ALASKA POWER AUTHORITY

FEDERAL POWER SITE CLASSIFICATION NO. 443 UPPER SUSITNA RIVER TALKEETNA MOUNTAINS CIRI LANDS 12(B) VILLAGE RECONVEYANCES SEC. 11(a) (1)-(3) PART II LAND STATUS

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HISTORICAL OVERVIEW
ALASKA LANDS
TALKEETNA MOUNTAINS
PCS #443

Treaty of Cession: 1867:

March 30, 1867; ratified by the United States May 28, 1867; exchanged June 20, 1867. (Russia ceded Alaska to the United States for $7.2 million dollars.)

ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; etc., the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country. (This set the pace for native lands and rights.)

The Organic Act of 1884:

The Organic Act of 1884, which established Alaska as a public land district acknowledged the existence of aboriginal claims but reserved any settlement of these claims for a future time.

...."the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire the title to such lands is reserved for future legislation by Congress." (This established Native Alaskan rights to their lands.)

Indian Allotment Act 1906:

Allowing Alaska Natives up to 160 acres each, not subject to taxation, with no mineral rights, this Act was eliminated by the Alaska Native Claims Settlement Act, from further entry after the date of passage of ANCSA.

Voting rights and citizenship awarded to Alaska Natives 1934.

Indian Lands Powersite Reserves 1910:

Act of June 25, 1910 (36 Stat. 855, 858, 850; Chap. 431; U.S.C. 331-336.)

Power Site Reserves on Indian Lands are made under Sections 13 and 14 of this Act.

Federal Power Act: June 10, 1920

Public Land Order PCS No. 443 established February 15, 1958. (16 U.S.C. 818) (41 Stat. 1075).

The Federal Power Act of 1920 is the mechanism established to withdraw lands for Federal Power Projects, Power Site Classifications, and Reservoirs as well as lands for support facilities.

The Federal Power Commission now identified as the Federal Energy Regulatory Commission (FERC) has the jurisdiction of this Act and has the final approval for opening lands under this Act that have been withdrawn and are subject to Sec. 24 of this Act unless superceded by the Congress of the United States.

Amendment to Sec. 24. FPA of June 10, 1920 dated August 26, 1935.

(see PCS 443)

P.C.S. 443 1958:

To be discussed in a separate section of this report (Talkeetna Mountains. Withdrawal Upper Susitna River Basin).

Alaska Statehood Act July 7, 1958:

Admitting Alaska to the Union of the United States as its 49th State.

Sec. 4 of this Act requires that the State and the people of Alaska disclaim any rights to any land, the right or title to which is held by the United States, except for those lands granted or confirmed by the statehood Act "Alaska also disclaims any rights to any lands or other property (including fishing rights) that are held by Alaska Natives or by the United States retains absolute jurisdiction over these native lands. These native lands are not subject to state taxation except as provided by Congress. Lands that are conveyed to an Alaskan Native without restraint or alienation under the Alaska Native Claims Act are not subject to this absolute federal jurisdiction and may be treated substantially the same as other private lands. (This identified Alaska Native rights to their lands, and confirmed taxable Native Properties.)

Alaska Native Claims Settlement Act of 1971 (ANCSA) December 18, 1971 P. L. 92-203 as amended P. L. 93-153 Nov. 16, 73, PIL. 94-456 Oct. 4, 76, P. L. 95-178 Nov. 15, 77, P. L. 95-600 Nov. 6, 78 P. L. 95-55 Aug. 14, 79, P.L. 96-487 Dec. 2, 80.

In 1966, United States Secretary of the Interior Stewart Udall imposed an informal land freeze on all Alaska Public Lands. The freeze was formalized by PLO 4582 pending congressional consideration of legislation on Alaska Native Claims.

These claims were extinguished by direct Congressional action in 1971 by ANCSA.

Alaska Natives received, in exchange, the right to select 44 million acres of public lands and a native fund of $962.5 million to be paid over a period of years. By amendment to the Act the Natives were given 20 years from date of conveyance of the land for that land which is not improved, free of any state or local taxation to the lands. Native selection rights were given priority over State selection rights. However, State selections that were Tentatively Patented (TP), Tentatively Approved (TA), or identified by the State prior to January 17, 1969 are recognized and protected by ANCSA.

Sec. 11(a)(1) village lands 25 townships surrounding any native village (does not include southeastern Alaska). The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriations under the public lands laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve No. 4. (Note: does not include Power Project or Power Site Classification or Water Power Withdrawals.)

Sec. (11)(a)(2) refers to Sec. (a)(1) lands selected or TA'd to the state withdrawn.

Sec. (11)(a)(3) deficiency lands character similar to those on which the village is located.

Sec. 3. (E) "Public Lands" determinations means all federal lands and interest therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary of Interior, enclosing land actually used in connection with the administration of any federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under Section 6(g) of the Alaska Statehood Act, as amended or identified for selection by the State prior to January 17, 1969.

Sec. 4 (A) all prior conveyances of public land and water areas in Alaska, or interest therein, pursuant to Section 6 (g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(B) All aboriginal titles extinguished etc.

(C) All claims against the United States, the State and all other persons etc. extinguished.

Sec. 17-D-2 Creation of the Alaska National Interest Conservation Act (ANILCA). P.L. 96-487 December 2, 1980 setting aside 80 million acres of land for the designation and conservation of certain public lands in the State of Alaska, including the designation of units of the National Parks, National Wildlife Refuge, National Forest, National Wild and Scenic Rivers, and National Wilderness Preservation Systems, and for other purposes. (Scenic Highway Study, Denali Highway, Parks Highway and Richardson Edgarton Highway.)

Sec. 12(a)(1) Native Land Selections Villages. See subsection 11(a)(1) (11)(a)(2) Core Townships 25 Sections 69, 120 acres from (11)(a)(2) withdrawals and the remainder are selected under 12(b) selections any remainder of lands to be allocated to the villages by the region on a village population basis. Sec 12(c) Regional Lands.

Sec. 13(a) Surveys. Secretary of Interior, Bureau of Land Management method of survey.

Sec. 14. Conveyance of Lands Villages. Sec 14(c)(3) Reconveyance to municipal govts. for community needs up to 1,280 (see PL 96-487 Sec. 1405 (43 U.S.C. 1613.)

Public Law 94-204 January 2, 1976

ANCSA Amendment:

Sec. 12(a)(3) - PSC 443 Sec. 24 reservations. (See PSC 443 for further detail.)

Public Law 94-579 October 21, 1976

An Act to establish Public Land Policy; to establish guidelines, for its administration; to provide for the management, protection, development, and enhancement of the Public Lands; (Sec. 701.(E) Protection to ANCSA (85 stat. 688, as amended; 43 U.S.C. 1601 et. seq.) excludes any rights to modify, revoke, or change any of the provisions of ANCSA by this Act).

This Act did protect all existing withdrawals, classifications, and designations under Sec. 701(c) until modified under the provision of this Act or other applicable Law.

Sec. 204(a). Gives the Secretary of Interior the power to modify, extend or revoke withdrawals, but only in accordance with the provisions and limitations of this section. Sec. 204(i) in the case of lands under the administration of any department or agency other than the Department of Interior, the Secretary shall make modify, and revoke withdrawals only with the consent of the head of the department or agency concerned, except when the provisions of Subsection (E) of this Section apply. (FERC-DOE authority should apply in Sec. 24 withdrawals.)

POWER SITE CLASSIFICATION
PSC NO. 443
SUBJECT TO SEC. 24 FEDERAL POWER ACT

Sixty-sixth Congress Sec. II, Ch. 25 Act the Federal Power Act established June 10, 1920, established the Authority to classify and withdraw lands for Federally Licensed Power Projects and to reserve Lands for future Power sites known as Power Site Classification.

Sec. 24. that any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby; shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determing that the value of any lands of the United States so applied for, heretofore or hereafter reserved or classified as Power Sites, will not be injured or destroyed for the purposes of Power development by location, entry, or selection under the Public-Land Laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the Judgment of the Commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the Purposes of this Act, upon payment of any damages to crops, buildings, or other improvement caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a Court of competent jurisdiction, said bond to be in the form prescribed by the Commission. Provided, that locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

(Note Sec. 3. "Public Lands" - means such lands and interest in lands owned by the United States as are subject to probate, appropriation, and disposal under Public-land Laws. It shall not include "reservations") (16 U.S.C. 818.) (16 U.S.C. 796)

16 U.S.C. 796 (1)(2) Definitions

(1) "Public Lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations" as hereinafter defined;

(2) "Reservations" means national forest, tribal lands embraced with Indian reservations, military reservation, and other lands and interest in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, also lands and interest in lands acquired and held for any public purposes; but shall not include National Monuments or National Parks; (June 10, 1920, Ch. 285, §3,41 Stat. 1063; Aug. 26, 1935, Ch.687 Title II §201,49 Stat. 838.)

16 U.S.C. 818 Public lands included in project; reservation of lands from entry.

Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filling of application therefore be reserved from entry, location, or other land disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filled in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as Power Sites, will not be injured or destroyed for the purposes of Power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgement of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and the benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission; Provided, that

locations, entries, selections, or filings heretofore made for lands reserved as water-Power sites, or in connection with water-Power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained; provided further, that before any lands applied for, heretofore or hereafter reserved, or classified as Power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any Statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application snall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

(Jun 10, 1920, Ch. 285 §24, 41 Stat. 1075; Aug. 26,1935, Ch. 687, title II, §211, 49 Stat. 846; May 28, 1948, Ch. 351, 62 Stat. 275.)

AMENDMENTS

1948 - Act May 28, 1948, added second proviso to the last sentence so that States may apply for reservations of portions of Power sites released for entry, location, or selection to the States for highway purposes.

1935 - Act Aug 26, 1935, added "for such purpose or purposes and under such restrictions as the Commission may determine", substituted "part" for "chapter" wherever appearing, and eliminated from the Proviso "prior to June 10, 1920" following "made".

The Sec. 24 reference to the Public Land Laws, referred intent, are classified generally to Title 43, Public Lands. Refer to 43CFR Part 2340 Subpart 2344 Sec. 2344.03 Authority.

2344.2 General determination under Sec. 24.

2344.3 Petitions for restorations.

Authority: R.S. 2478 43 U.S.C. 1201.

Source: 35 FR 9556, June 13, 1970, unless otherwise noted.

18 CFR Chapter I. for rights-of-way over Indian Lands; Power projects see Indians 25CFR161.27.

Sec. 21. License rights to Eminent Domain when property cannot be assigned by other legal means. (District Court).

Sec. 23. Affects on Valid existing rights protection etc. (not navigable where dams are proposed) must conform to State Law only.

Subpart E - Application for License for major unconstructed project. Federal Energy Regulatory Commission §4.41 12, 041 dated 12-1-81 Exhibit K. in Part 11,011.

Detail map covering entire project area. Scale shall be such as to show clearly, but without unnecessary multiplicity of sheets, the essential details of surveys and of notes as to ownership or right to occupancy of lands within the Project area. (Note: BLM Permit AK-017-0096 dated June 27, 1980, and CIRI Villages and Regional Corporation dated January 4, 1980.) In general a scale of approximately 400 feet to the inch is appropriate for features containing a relatively large amount of detail, and scales of 1,000 or 2,000 feet to the inch where there is little detail, etc.

(1) It shall show the project area and the project boundary.

(i) The project area for reservoirs may be shown by metes and bounds, or by contour, etc.

(ii) The project boundary for continuous structures, such as transmission lines, conduits, roads, etc., may be described by center or offset lines of survey specifying distances of the project boundary therefrom.

(iii) Except with respect to lands necessary or appropriate for recreation purposes, for which it is recognized that additional project area will generally be required, the project boundary shall be no more than 200 feet (horizontal measurement) from the exterior margin (in general, high-water level) of reservoirs, nor shall the width of the project area for canals, ditches, pipelines, transmission lines, roads, and other so-called continuous structures exceed 200 feet, unless satisfactory reasons are given to the contrary, etc.

(v) The project boundary, if described other than by a contour, shall be accurately plotted on the map with courses and distances fully and legibly shown either along the plotted boundary or in tabular form on the map. The project boundary, if described by a contour shall be accurately plotted on the map with such data as completely and accurately fixes its location and permits its recovery in the field. (Note here comments from FERC May 1982 Cultural Resources is a critical element and can stop a project. Dr. E. Slatter.)

(Paul Carrier indicated that the lands required for the project are those minimally necessary to construct and operate the project. The rights in those lands must be, at a minimum, those necessary to insure the operation of the project. FERC prefers fee simple ownership, but easements or leases are acceptable land rights. However, the agreements for those easements and leases must be for a minimum of fifty years in keeping with the period of the license. Generally FERC will be flexible on the project boundaries. The key in the reservoir area is to insure sufficient land has been identified to take care of maximum anticipated inundation. FERC indicated that the Power Authority is free to award control of any or all recreational development within the project boundaries to a private corporation. Paul indicated that the temporary facilities, such as construction camps, do not have to be within the project boundaries, although it does not adversely affect the license to include them within the boundary.)

(viii) There shall be shown the status as to ownership and the boundary lines and area of each parcel of land within, or partly within, the project area, designating separately lands owned by the applicant, lands to be acquired by the applicant, lands for which the applicant holds rights of use and occupancy for purposes of the project, reservations (indicating separately each reservation), and Public lands (indicating separately lands, full title to which remains in the United States, and lands in which the United States retains only an interest). (Native Lands and Power Site Classifications could be identified as retaining an interest in land by the United States before patent takes place.) Where the project works occupy lands not owned by the applicant, but as to which the applicant holds only an easement, franchise, lease, or other right of occupancy and use, the map shall show the nature of such right and shall give appropriate reference to Exhibit "F" for further details. (See BLM Permit and CIRI Native Agreement).

Power Site Classification:

PSC No. 443 is a United States Department of the Interior Geological Survey Powersite Classification withdrawn February 13, 1958, under WRC 1905 comprising currently 143,725 Acres primarily located on the Susitna River, Caribou Creek, and Teklanika River Basin No. 14. Talkeetna Mountains, Alaska.

(WRC-Water Resource Council Basin Code USGS.)

Federal Register:

Pursuant to authority vested to me by the act of March 3, 1879 (20 Stat. 394 43 USC 31) and by Departmental Order No. 2333 of June 10, 1947 (43 CFR 4623: 12 F.R. 4025), the following described lands are hereby classified as power sites insofar as title thereto remains in the United States and subject to valid existing rights; and the classification shall have full force and effect under the provisions of Sec. 24 of the Act of June 10, 1920, as amended by Sec. 211 of the Act of August 28, 1935 (16 U.S.C. 818). The lands classified are all in unsurveyed areas. The locations are referred to the U.S. Geological Survey topographic quadrangles and defined by limiting elevations. (Note: Title thereto remains in the United States.)

SUSITNA RIVER

OLSON PROJECT

Beginning at a point on the Susitna River Longitude 140'23'17' W., Latitude 62' 40' 50" N., approximately .02 miles downstream from the mouth of Portage Creek. All lands upstream from this point below the 930-foot contour. See Talkeetna Mountains D-5 Quadrange 175 acres.

DEVIL CANYON PROJECT

Beginning at a point on the Susitna River Longitude 140'20'40" W., Latitude 62'48'58' N., approximately 1.4 miles upstream from the mouth of Portage creek. All lands upstream from this point below the 1,500-Foot contour. See Talkeetna Mountains D-5, D-4, and D-3 Quadrangels. 9,450 Acres. (Not enough land for recreation, roads, transmission lines, campsites, etc.)

WATANA PROJECT

Beginning at a point on the Susitna River Longitude 148'34'10', W., Latitude 62'49'23" N. approximately 1.5 miles upstream from Tsusena Creek. All lands upstream from Tsusena Creek. All lands upstream from the point below the 1,910-foot contour. See Talkeetna Mountains D-4, D-2, and C-2 quadrangles 15,000 Acres. (Not enough lands for recreation, etc., see Devil Canyon).

VEE PROJECT

Beginning at a point on the Susitna River Longitude 148'34'10' W., Latitude 62'49'23' N., approximately 15 miles upstream from Tsusena Creek. All lands upstream from this point below the 2,000-foot contour. See Talkeetna Mountains C-2, c-1, and D-1 quadrangels. 12,3000 Acres.

DENALI PROJECT

Beginning at a point on the Susitna River Longitude 147'12'57" W., Latitude 62'57'38" N., approximately 7.5 miles upstream from the Clearwater River. All lands upstream from this point below the 2,600-foot contour. See Talkeetna Mountains D-1 and D-2; Gulkana D-6, Healy A-1, A-2, B-1, and B-2 quadrangles. 83,500 Acres.

Teklanika River 21,500 Acres and Caribou Creek 1,800 Acres (Revoked not subject to Sec. 24.) The area aggregates 143,725 Acres less 23,300 Acres for a remaining total of 120,4254 Acres. This action signed by Thomas B. Nolan, Director, dated February 13, 1958. April 18, 1958 notice stated (PSC No. 443)

Please note subject order in the Federal Register of February 19 at Page 1072 and have the manager post his records signed by W. H. Koegher copy to: AA, Area 4 June 1, 1961, DA-74 Sec 24. Determination.

See Document attached.

(Note Denali Planning Block Section 1008 of the Alaska National Interest Lands Conservation Act (ANILCA). Lands open to mineral entry and leasing includes the bulk of the lands reserved under Sec. 24 PSC 443 known as the Denali Project.) See map attached. Lands were open to entry on September 14, 1982. Public Land Order 2961 (Fairbanks 030474,) dated March 4, 1963 opening lands under Section 24 of Federal Power Act DA-74-Alaska notice to the Governor of the State was given.
(See attached PLO 2961.)

Public Law - 96-487 December 2, 1980, Section 1311(a) Scenic Highway Study Denali Highway reserving a corridor of one mile each side of the existing road.

(See attached).

Letter from State Director, Bureau of Land Management dated May 21, 1970-Revocation of PSC 443 (Revoking Caribou Creek and Teklanika River Projects).

(See attached.)

PLO 5174 dated 3-9-72. Reference No. 2480 Section 11(a)(3) withdrawals Cook Inlet Region Village Selections. Remaining lands to region under Sec. 12.

(See attached.)

PLO 5180 dated 3-9-72. Reference No. 2486 Section 17(D)(1) withdrawals public value lands reserved.

(See attached.)

PLO 5186 dated 3-15-72. Reference No. 2492 Section 17(D)(1) withdrawals State selections under the Statehood Act. Public value lands reserved.

(See attached.)

*PLO 5255 dated 9-12-72. Reference No. 2515 Amended PLO No. 5174, 5179, 5180, and 5186. Sections 11(a)(3), 17(D)(1), 17(D)(2)(A). Section 12 of the Act by the Village Corporations - (included the lands within PSC No. 443. No mention in this withdrawal to the classification other than saying subject to valid existing rights.)

(See attached.)

PLO 5321 dated 12-7-72. Reference No. 2520, 2520(A). Section 11(a)(3) and 17(d)(1) withdrawals amended PLO 5173.

(See attached.)

Title 43 - Public Lands Interior. Withdrawal for other Agencies. Subpart 2344-Federal Power Commission

(See attached.) (Sec.24 procedures of the Federal Power Act.)

Public Law - 92-203. Alaska Native Claims Settlement Act (ANCSA) dated December 18, 1971.

(See attached key sections of this Act.)

Draft Locate Easement Study - Federal State Land Use Policy Council (FSLUPC) dated September 6, 1974.

(See attached.)

*Public Law 94-204 dated January 2, 1976, Section 12(a) Cook Inlet Region, Inc., Land Exchange.

(See attached,) *Sec. 12(E) condition relating to Sec. 24 within the exterior Boundaries of PSC No. 443.) (16 U.S.C. 818.) (16 U.S.C. 791)

Solicitor's Opinions, Reviews, and Comments. Sec. 24 of the Federal Power Act. (Attached)

Ltr. dated May 3, 1976, State Director, BLM.
Ltr. dated May 14, 1976, Regional Solicitor, DOI, Anchorage.
Ltr. dated June 1, 1977, State Director, BLM.

Ltr. dated June 19, 1977, State Director, BLM.
Ltr. dated Oct. 27, 1977, Assoc. Solicitor, Div. of Energy and Resources, Wash., D.C.
Ltr. dated Jan. 13, 1978, State Director BLM.
Ltr. dated Feb. 1, 1978, Regional Solicitor, Anchorage.
Ltr. dated Feb. 1, 1978, Regional Solicitor, Anchorage, Reply II.

Decision to Convey lands within the exterior boundaries of Power Site Classification No. 443 dated Nov. 30, 1979, approved by Congress under PL 94-204, Sec. 12(E) (89 Stat. 1145, 1153.) Subject to Sec. 24 of the Federal Power Act (41 Stat. 1063, 1065; 16 U.S.C. 791, 818). This conveyance shall be considered and treated as a conveyance under ANCSA.

(See attached) October 4, 1976.

Interim Conveyance dated Feb. 11, 1980, pursuant to Secs. 14(a) and 22(j) of ANCSA (85 Stat. 688, 702, 715; 43 U.S.C. 1601, 1613(a), 1621(j), as amended by Sec. 4 of the Act of October 4, 1976, PL 94-204 (90 Stat. 1934, 1935; 43 U.S.C. 1611), of the surface and subsurface estates.

(See attached).

Interim Conveyance carries all rights of full patent pending a final survey. IC No. 285

(See Provisions No. 4. See PSC 443 Provisions same as in Decision to Convey.)

Legal Opinions on the Talkeetna Mountain lands for Cook Inlet Village Entitlements under Section 12(B) of ANCSA (961).

See AA 13358 attached.

Ltr's State Director, BLM dated Apr. 24, 1980, Attorney-Advisor Office of the Regional Solicitor Alaska Region dated July 21, 1980, attached.

Report identifying small federal withdrawals i.e.: Power Site Classifications to be small must be smaller than one township in size (23,040 acres or less) PSC No. 443 is at present 143,725 acres as complete withdrawal if within the classification, these separate projects were treated separately within the classification 443 then all but the Denali Project would qualify as small federal withdrawals. (Note Congressional intent Sec 11(a)(3) withdrawals of PL 92-203 dated December 18, 1971, which apparently was to permit native corporations to make otherwise valid selections from lands located anywhere within Section 11(a)(3) withdrawals, provided that such lands are no longer needed for a federal purpose and have not been claimed by the State pursuant to appropriate provisions of the Alaska Statehood Act.

(See attached.)

Report - Easements and declaration of taking Eminent Domain, Land Values dated April 5, 1975.

(See attached.)

Report - Cook Inlet Land Exchange Settlement. Refer: PL 94-204

(See attached) dated March 7, 1976.

Report - Background history of Native rights to land and establishment of an escrow account for proceeds of certain lands, etc., dated April 2, 1976.

BACKGROUND

Section 14(g) of the Settlement Act, which relates to the protection of valid existing rights on lands conveyed under the Act, provides that after conveyance Native Patentees will become entitled to all interests of the United States or the State of Alaska.

Upon issuance of the Patent, the Patentee shall succeed and become entitled to any and all interests of the State or the United States as Lessor, Contractor, Permitter, or Grantor, in any such leases, contracts, permits, rights-of-way, or easements conveying the estate patented, and a lease issued under Section 6(G) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State.

(See attached.)

Ltr. - Alaska Power Authority dated Oct. 25, 1978 to Cook Inlet Region, Inc., to gain access to Native selected lands in the Susitna River Hydroelectric Project Area.

(See attached.)

Agreement between the Alaska Power Authority and the individual Cook Inlet Native Village Corporations and the Cook Inlet Region, Inc., concerning the Susitna Hydropower Feasibility Analysis dated January 4, 1980.

(See attached.) (To be amended.)

U.S. Department of the Interior Permit AK-017-0096 dated June 27, 1980 for the Susitna Hydropower Feasibility Study.

(See attached.)

Legal basis for Archaeological and Historical Preservation laws, etc.

(See attached.)

Various documents relating to navigable bodies of water. Ltr. Dept. of Natural Resources Dec. 10, 1979, AA-13358 Patent of lands relating to PSC-443. See Dic 285. Ltr. dated Nov. 30, 1979, Decision to Convey Lands to Cook Inlet Region, Inc. Page 9.

(There are no inland water bodies considered to b e navigable within the described lands.) State of Alaska rights to all navigable bodies of water in the State. If a river or lake is navigable, the land under the water is owned by the State. If it is not navigable those acres of submerged lands within a Native Corporation go to the Native Corporation.

Ltr. definations "National Defense Purposes" as defined by the Alaska Native Claims Settlement Act. Solicitors Opinion Alaska Region Dec. 29, 1981. Federal Register dated Oct. 22, 1980, Part IV Dept. of the Interior, Bureau of Land Management. Federal installations; implementation of Section 3(E) of the Alaska Native Claims Settlement Act; Final Rule. 42 CFR, Part 2650. (Circular No. 2478) Vol. 45, No. 206. Rules and Regulations 11(a)(3) Lands not subject to a Sec. 3(E) ruling.

This ruling will be used to determine which lands held by Federal Department or Agencies were in actual use during the time prescribed in the Act, and which such lands were not in actual use and can be conveyed to Natives (ie: PSC #443 not in use at time of selection and no license application filed at time of conveyance.) Written responses were received from the State of Alaska.

"Lands subject to determination" apply to Federal installations located within areas withdrawn by Sections 11(a)(1), 16(a), or 16(b) or selected in accordance with Section 14(h)(8)(B). Regional Corp. Sections 12 or 16.

1. Nature and time of use-this criterion derives from §2655.0-5(a)(1) that the use must be for a purpose "directly and necessarily connected with a Federal Agency as of December 18, 1971.

   That the activity must be continuous depending on the type of use, throughout the appropriate selection period. The final rule making provides that use by the agency during the entire selection period is necessary in order for the lands to be exempt from native selection.

   (See attached.)

ANCSA terms defined Interim Conveyance-IC-The conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations, easements, rights-of-way or other interests in land, provided by the Act or imposed on the land by applicable law, subject only to confirmation by boundary descriptions after approval of the survey of the conveyed land.

(See attached.)

Ltr. Easements 17(6) ANCSA Regional Solicitor. (No Easements exist in IC #285 affecting PSC 443.)

(See attached.) dated Dec. 17, 1981.

Notice Section Line Easements.

(See attached.)

Alaska Land Use Council Federal Policy on Land Exchanges dated June 14, 1982.

(See attached.)

Chapter 50. §38.50.010-170 Alaska Statutes Public Lands - Exchange of State Lands.

(See attached.)

Chapter 09. §09.55.240-460, Article 4, Alaska Statutes Eminent Domain.

(See attached.)

Alaska Statehood Act-Sec. 16. Protection of Rights. Section 18. Private ways of necessity.

(Refers to just compensation for State use of private lands.)

(See attached.)

Condemnation of Alaska Native Lands, 9th Circuit Court of Appeals, Jan. 15, 1979.

(See attached.)

Winters vs. the United States Ninth Circuit Court of Appeals No. 158, agreed Oct. 24, 1907, decreed January 6, 1908. Constructing dams on Indian owned land.

(See attached.)

ANCSA Section 12(a) Conveyance Agreement.

(See attached.)

ANCSA 12(B) Selection Agreement.

(See attached.)

ANCSA Lake Clark Land Trade.

(See attached.)

ANCSA Cook Inlet Land Conveyance schedule for the Talkeetna Mountains.

(See attached.)

Ltr. United States Department of Interior Geological Survey dated February 23, 1978, listing USGS Power-site Classifications in Alaska includes PSC No. 443.

(See attached.)

The Acres American Report submitted to the Federal Energy Regulatory Committee makes reference to PSC No. 443 and the reservations to Sec. 24 of the Federal Power Act. It is highlighted out of context what Sec. 24 rights exist without reference to 16 USC 818 as amended. Acres does identify the problem that a controversy exists about the interpretation of the rights of the landowner and of the applicant under Sec. 24 of this Act.

On July 26, 1982, the Executive Director of the Alaska Power Authority did request from Wilson L. Condon, Attorney General for the State of Alaska, a legal opinion of Public Law 94-204 and PSC No. 443.

(See attached letter.)

On September 16, 1982 the Attorney General, by Robert E. Price, Assistant Attorney General, attempted to respond to the letter of July 26, 1982.

(See attached.)

Article Public Power Weekly attached April 13, 1981.

Ltr. Federal Energy Regulatory Commission, Washington, April 6, 1981, reference Page 2, Passing of Title in Fee, yet this has occurred on PSC No. 443 to the CIRI Villages subject to Sec. 24, and upon date of conveyance, no license existed, so title did pass to a major portion of

PSC 443 from Devil Canyon to and including the Watana Dam Site area. Refer to IC No. 285.

(See attached.)

Under Page 2 of this letter, reference is made to a debate in House on 5.1419, Comments of Rep. Ferris, Chairman, House Committee on Public Lands:

> First, no Legislation, Executive Order, or Departmental ruling should permit the patenting or the title in fee to pass out of the Federal Government under any conditions. The fee title should be reserved in perpetuity to the United States.

Public Law 92-203 did in fact do this as well as PL 94-204 and 96-487. This allowed the Alaska Native to select all Federal lands not used by that Federal Agency.

Village lands would not be subject to Sec. 24 of the Federal Power Act, but some Regional Selections would be, these Acts also froze any further patent of land to the State of Alaska and gave superior rights to Native Corporations.

Once patent has passed to the Natives, these lands are no longer Public lands (Note here except for Village Corporation lands under 11(a)(1) of the Act, Regional lands will not be conveyed, or patent issued if a valid application has been filed prior to obtaining patent.)

See Sec. 2 of this letter - under this provision of (Section 24) the United states will have the exclusive right in perpetuity to use or permit the use of Power Sites on the Public Lands for power purposes.

The controversy exists on the fact that once patent has passed they are no longer Public Lands in addition the natives receive all the rights and interest of the United States and the State of Alaska, reference conveyance procedures of ANCSA, these rights include leases, easements, mineral leases, etc., as if no change took place upon transfer of title.

In the original withdrawal of PSC No. 443 it clearly states (the following lands are hereby classified as Power Sites insofar as title thereto remains in the United States.

Based on this statement, it is clearly defined that once title is passed by the Bureau of Land Management PSC No. 443 for that portion, no longer is valid.

Village selections and conveyance of Power Projects under ANCSA.

(See Regional Solicitors Opinion, Oct. 27, 1977.)

Power site classification does not prevent Native selections within Sec. 11(a)(1) or Sec. 16 withdrawal areas, but would not allow selection in other areas, unless approved by Congress.

(See Sec. 12(E) of P.L. 94-204 authorizing selection of lands within the PSC No. 443 specifically for CIRI selections approved by the U.S.Congress.

The original selections of these lands within PSC No. 443 were withdrawn by the Secretary of Interior by virtue of the authority vested under Sections 11(a)(3), 17(d)(1), 17(d)2(A) of ANCSA, Dec. 18, 1971. 85 STAT. 688, 696, 708, and 709 and pursuant to Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831.) Reference: Public Land Order No. 5255 dated Sep. 16, 1972, amending PLO No. 5174, 5179, 5180, and 5186.

On May 3, 1976, the State Director, Bureau of Land Management, queried the Regional Solicitor, Anchorage, Alaska, for a determination of validity of Village selections within 11(a)(3) and Sec. 12 withdrawals of PL 92-203 and the authority of conveying lands within and without the exterior boundaries of PSC No. 443.

On May 14, 1976, the Regional Solicitor, Anchorage, John W. Burkee III, replied in summary that lands selected in PSC No. 443 are lawful selections and that Congressional Legislation was established by PL 94-204. Reference 16 U.S.C. 818, H.R. 94-729, 94th Congress., 1st Sess., 43 (1975).

The Solicitor further confirmed that the language of Section 12(E) of PL 94-204 does not make any distinctions limited only to Section 12(B) selections which could be made under Vol. A between 12(a) and 12(B) selections. Based upon the construction taken in Section 1 above, the authority to convey lands within PSC 443 is not limited to 12(B) selections. The only specific limitation, "not withstanding any other provision of Law to the contrary," is that any conveyance issued within PSC 443 be subject to the reservations of Section 24 of the Federal Power Act, 16 U.S.C. 818.

PLO 5255 established the basic purpose to the withdrawal of lands on the exterior boundaries of PSC 443. The purpose of this order is to supplement Public Land Order No. 5174, by reserving additional lands for selection by those Village Corporations that will be determined by the Secretary to be eligible to make such selections, and by the Regional Corp. for the approximate area covered by the Cook Inlet Assoc., as provided for by Section 12 of the Act ANSCA 37 F.R. 18915 (Sept. 16, 1972).

On April 19, 1976, the Director, Bureau of Land Management, issued a memorandum which addressed, among other things, the question of selection rights within those lands withdrawn by PLO 5255. The Director set out the Departments position: "None of the lands

described in Paragraph 1 of PLO 5255 were available for Village selection until specifically withdrawn for that purpose." The Director went on to analyze the Department's position, concluding: "therefore all section 12(a) Village selections made on lands not deleted from Para. 1 of PLO 5255, which are described below (Lands which encompass the exterior boundaries of PSC 443), must be rejected."

The Dept. present position is based upon an interpretation made contemporanously to the issuance of PLO 5255 in September 1972 (as indicated by the coloration of the Series E withdrawal map). Under the Doctrine of Contemporaneous Construction, as premised in Udall V. Tallman, 380 U.S. 1 (1965), the Director's interpretation, unless clearly erroneous, is to be given great difference "when faced with a problem of Statutory Construction."

Therefore, except as noted in Section 1 above, the Director's position on Section 12(a) selections is dispositive of this issue.

June 1, 1977, from the State Director, Bureau of Land Management questions relating to conveyances of land if a license has been issued by the Federal Power Commission or if a license had been issued, but has expired, no construction accomplished, if a project by a licensee is developed would this improved area be covered under Sec. 3(e) of ANSCA as a federal interest in the land to be retained, or would conveyance be issued "subject to" the Power Project?

We are of the opinion that Sec. 3(e) would be involved only if the Power Project is constructed by a Federal Agency. In most cases, the licensee for a project is a private individual or company.

July 19, 1977 from the State Director, Bureau of Land Management subject: Conveyance of Lands within PSC 443 to Cook Inlet Region, Inc.

(Complete letter attached.)

Jan. 13, 1978 from the State Director, Bureau of Land Management refers to the July 19, 1977, concerns.

(Complete letter attached.)

Feb. 1, 1978 from the Regional Solicitor, Anchorage two letters same date, same subject following statements:

This is in reply to your memo dated June 1, 1977, asking three questions regarding the above referenced subject. This was the subject of a recent opinion by the Associate Solicitor, Division of Energy and Resources, dated Oct. 27, 1977. He concluded that Power Site Classification did not prevent native selections within the Section 11(a)(1) or Section 16 withdrawal areas, but would prevent selections in other areas without specific legislative

authorization, as occurred with Power Site Classification 443. A license issued by the FPC would be treated as a valid existing right to which the conveyance would be subject.

A private project under federal license does not involve a Section 3(E)(1) determination under ANCSA signed John M. Allen same date: This responds to your memo dated July 17, 1977, and January 16, 1978, on the above referenced subject. We conclude that the authorization in P.L. 94-204 to convey lands in PSC 443 to Cook Inlet Native Corp. was not recinded by implication by P.L. 94-456. We agree that conveyance of such lands, however, cannot be made until the conditions of Section 12 of P.L. 94-204 have been satisfied. Signed John M. Allen.

Feb. 1, 1978 * Conveyance of lands within PSC 443 to Cook Inlet Region, Inc. Authority to convey land in PSC 443 is present once Sec. 12 of P.L. 94-204 is satisfied. (Note here, is the Alaska Power Authority a private project? If not then should a 3(E) determination be made on the remaining lands not yet conveyed?) (The Statutes for withdrawals relate to federally controlled lands not in use at the time of conveyance and lands used for federal purposes.

Alaska Power Authority--A quasi State agency.

Alaska Power Administration--A Federal Agency

Oct. 27, 1977 comment opinion Associate Solicitor, Division of Energy and Resources, Office of the Solicitor, Washington D.C. (Note: APA referred in this opinion is referring to the Alaska Power Administration, a Federal Agency.)

1. Power Site Classification lands included in conveyances.

2. Power Site Reserve lands included in conveyances.

3. Power Projects Lands included in conveyances.

   A. Subject to Section 24 FPA.

   B. Not subject to Section 24 FPA.

(See attached seven page comments.)

QUOTES:

The withdrawal in 1610(a)(1) therefore includes reserved and appropriated lands (under ANCSA) such as those in a Power Site Reserve, Power Site Classification, or a Power Project regardless of whether it was instituted by the Corps of Engineers (COE), the Alaska Power Administration (APA), or a private license before the Federal Power Commission (FPC). Since the withdrawal is made

subject to valid existing rights and the conveyance of the land will be made subject to 43 U.S.C. 1613(g) the selecting corporation will take the land subject to any outstanding leases, licenses, permits, or rights-of-way that have been granted to any licensee. The lands actually used in connection with any federal project are excluded from the selection by virtue of the terms of Section 3(E).

By virtue of the differences of the two processes it is concluded that Sec. 24 and the procedures established thereunder do not apply to lands within any Power Site Classification, Power Site Reservation, Power Project, or License Application. As we have indicated previously, any selection by the Natives will be conveyed subject to all the rights, privileges, and the obligations of any outstanding permit or license issued by the FPC. Any lands actually being used by the APA or COE will not be conveyed. Any lands needed for the future use of the APA or COE for easements may be reserved by the Secretary under the procedures of 43 U.S.C. 1616(B)

(See Sec. 2(E) ANCSA.)

United States Department of Interior Geological Survey Circular 400, dated Washington D.C., 1957.

History of Land Classification relating to Water-Power and Storage Sites.

Intent of the FPA Act of 1920 as amended by the FPA of 1935, provides a means whereby lands withdrawn because of their potential water power value, can be made available for other uses, with the power rights retained by the Government, until such time as they are required for waterpower development. Since passage of this Act, public domain land has, with few exceptions, been withdrawn for power purposes by orders of Power Site Classification under the Organic Act of the Geological Survey with full force and effect under Section 24 of the Federal Power Act. These orders are signed by the Director of the Geological Survey.

Section 24 of this Act provides for the disposal of land withdrawn for power purposes under this or other Acts with the Government retaining the power rights.

(See attached Circular 400)

(Note: When lands are transferred under ANCSA, all Rights of the Government are transferred with it. Does this relate to a Sec. 24 reservation when title is subject to Sec. 24 of the FPA?)

Proceedings of the American Society of Civil Engineers, November 1966. Reprint U.S. Department of the Interior Geological Survey--Water Resources Site Preservation on Federal Lands by Kenneth W. Sax, M. ASCE.

(See attached.)

Section 24 of the FPA specifies the procedures for acquisition or use of lands classified as valuable for powersites before or after passage of the Act. This gave the FPC control of the conditional disposition of all lands which might be classified as valuable for waterpower purposes. This authority made it possible for the Secretary of the Interior, through the USGS, to effectively protect powersite lands by merely classifying them as such under the authority provided by the Act of March 3, 1879. (Note here PSC No. 443 was classified under this Act.) Prior to passage of the Federal Power Act, lands could be classified as powersites by the USGS, but this had not protection, or effect unless they were also withdrawn by the President or by the Secretary of the Interior under one of the special Withdrawal Acts. Power Site Classifications are made by the Director of the USGS and, when approved by the Secretary of Interior, have full force and effect under the FPA. Such classifications are now issued as a Public Land Orders.

Neither classification as a Potential Powersite, nor Federal Power Project withdrawal, constitute "withdrawals" in the usual sense of the word, as the lands may continue to be used for other noninjurious purposes with the understanding that power development cannot be precluded by such entry. Conditional disposals of lands unrelated to mineral development, which affect USGS Power Classifications, as Power Site Reserves, Water Power Designations, and Power Site Classifications, come under the jurisdiction of the FPC (43 CFR 2022.1). Section 24 of the Federal Power Act provides that restoration to entry for various purposes under the Public Lands Laws or lands reserved or classified for power development may be made pursuant to a favorable determination by the FPC to the effect that such restoration will not injure power value.

Designated sites are released for water development either through Congressional approval of projects to occupy them or through operation of Public Land Laws (PLO); and their release involves only the usual procedures applicable to other Federal Land. Federal site use is first summarized, followed by non-Federal site use.

When non-federal organizations use federal land for water development projects, it has been a well-established national policy to retain title of lands essential to such development. Consent to use the federal lands may be given by Congress in a special enactment that does not require action by a Federal

Administrator, or Congress may empower a Federal Administrator to authorize the use of public land for the purpose needed.

Most authorizations for use of public lands are given by the Secretary of the Interior; however, certain authorizations may be allowed by other administrators, such as those in national forests. The Federal Power Act of 1920 overrides all previous acts relating to rights-of-way for water power, except those involving Indian allotments, and certain National Parks and National Monuments.

All of the above Acts follow a consistent course, in that a person is not entitled to an easement over any public land for a reservoir or right-of-way, or both, for related purposes used in connection with water rights,until he has first acquired a water right.

The FPC, now FERC, has authority, through its licensing power, to select for development those non-federal hydroelectric projects which in their judgement will be: "best adapted to a comprehensive plan for improving or developing a waterway or waterways for use or benefits of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes". Sec. 10(a), 41 Stat. 1063, 1068, as amended, 16 U.S.C. 803(a).

Problems:

Site preservation is a concept that deals with anticipated rather than immediate needs, and with general ideas and policies rather than with specific plans or designs.

Site preservation of federal lands involves the idea that the final use of the lands affected need not be decided now, as this is not an irrevocable action, but rather a declaration--a designation, a tagging--of one potentially prime land use to be carefully considered in any decisions as to the final best use of the lands. In the process of giving clearance to proposed site preservations actions, land management agencies may confuse the intention of holding sites for future use with withdrawal for immediate construction.

Sec. 24 of the FPA, has served well to protect powersites, yet provide a means for allowing noninjurious interim uses. A difficulty is that when sites in power withdrawals or classifications have passed to patent under provision of Section 24, there is no assigned right of recovery for reservoir use unassociated with production of power as there is for power sites.

Forestalling the encumbrance of attractive power or storage sites on federal lands is often made difficult because the lands

involved are also valuable as transportation or communication corridors as recreation areas, or as sites for urban or commercial development, or for agricultural activities. The profit" or value of water development often is one of socio economic benefit, measured by its indirect effects on the economy or society, and thus is extremely difficult to measure.

A symposium on withdrawal of public lands for water resources projects March 3, 1970, Power Planning Committee, Pacific Northwest River Basins Commission.

(See attached.)

Confirmation: Neither classification as a potential Powersite, nor Federal Power Project withdrawal, constitute "withdrawals" in the usual sense of the word, as the lands may continue to be used for other noninjurious purposes with the understanding that power development cannot be precluded by such entry.

The procedures for FPC Power withdrawals are as follows:

When an application for license for hydroelectric project is filed the land is automatically reserved from entry.

The map submitted by applicant (in application for license) is sent to the Bureau of Land Management, this is done as soon as possible after the filing.

The area designated in the map constitutes power withdrawals, however, either the map or wordage/or both, in application designates the lands withdrawn.

A review of lands withdrawn is then made by the FPC staff in the Washington Office.

A check is made to see that the area is on U.S. lands.

An estimate research is made of the withdrawn lands (some withdrawals overlap).

A tabulation is then made of lands withdrawn, this tabulation of lands withdrawn is sent to:

(A) Geological Survey.

(B) Bureau of Land Management.

(C) U.S. Forest Service.

(D) Published in the Federal Register.

(See mining claims in this document Rights of the Licensee protected (the Mining Claims Restoration Act.) August 11, 1955..

Memorandum of Understanding between the FPC and the Department of the Interior (July 20, 1966).

This memorandum, among other things, sets out procedures for other uses of the withdrawn lands.

"Powersite Stipulation" in accordance with the FPC letter of April 3, 1957.

This letter gives the conditions for use of lands.

Delegation of Authority.

By Executive Order 10355 of May 25, 1952 (43 U.S.C. 141, note). The President delegated all of his authority to act on withdrawal and reservation matters to the Secretary of the Interior under the conditions prescribed therein.

The conditions of particular interest to this discussion are in general as follows:

1. That the Secretary of the Interior shall not issue an Order of Withdrawal affecting land under the authority of any department or agency other than his own without concurrence of the head of such department or agency.

2. That any disagreement between two or more Executive Departments or Agencies shall be referred to the Director of the Bureau of Budget for consideration and adjustment. The Director may submit the matter to the President for determination.

3. That the Secretary of the Interior is authorized to issue rules and regulations and to prescribe procedures for the exercise of the authority delegated to him.

   The Secretary of the Interior has issued rules and regulations governing withdrawals procedures which are included in Part 2310 of Title 43 of the Code of Federal Regulations.

FERC News Release, April 29, 1981,--FERC says State-owned property at proposed hydropower sites must be federally licensed.

(See attached.)

Federal Power Commission--Order 415-C (issued December 18, 1972) statement of general policy to implement procedures for compliance with the National Environmental Policy Act of 1969 (NEPA).

(Gives procedures for intervenor status.)

Federal Power Commission Rules of Practice and Procedure 18 CFR 1.8 Intervention.

(See attached.)

Form L-2 (Revised October 1975) C-1.5 Federal Energy Regulatory Commission terms and conditions of license of unconstructed major projects affecting Lands of the United States.

(See attached.)

Article 5. The licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain possession of all project property covered by the license as issued or as later amended, including the project area. The project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, etc. Refer to Article 21, timber lands and Article 24, destruction to property.

Article 18. Free public access to project waters and adjacent project lands owned by the Licensee for navigation and recreational purposes; including hunting and fishing, etc.

Page 55938 Federal Register/Vol.48, No. 219/Friday, Nov. 13, 1981/Rules and Regulations, Exhibit E Requirements, Exhibit G (map).

(See attached.)

Power Site Classification No. 443 is probably one of the largest Power Sites that has gone to Patent from the Federal Public Lands. Documents, Acts, and legal opinions have been researched extensively to attempt to find answers and solutions and a better understanding of PSC 443.

The following summarizes these findings with documentation attached for possible legal review.

A. The lands in PSC 443 have gone to interim conveyance with all rights of the United States and the State of Alaska passed to the Natives.

B. PSC 443 of Feb. 13, 1958, clearly states the following described lands are hereby classified as powersites insofar as title thereto remains in the United States. (Title has passed to the Natives under IC#285 dated Feb. 11, 1980, with reservation for easements with the exception that it be subject to Sec. 24 of the FPA.)

C. Sec. 24 of the FPA relates to Lands of the United States not patented private land it also refers to filing of an application for license and to provide a description of the lands of the United States no mention of Private lands subject to Sec. 24 that has gone to patent, (no filing to date and no such filing is contemplated until Feb. 1983).

D. Upon issuance of patent, the Patentee under ANCSA shall succeed and become entitled to any and all interests of the State or the United States, etc.

(Does this include whatever provisions of Sec. 24 had, and the Natives now have and must comply with?)

E. That the Waters conveyed in IC 258 which are within PSC 443 are not navigable and that the land under the waters and its subsurface estate was conveyed at the same time to the Natives.

F. Alaska Statehood Act--Sec. 16, Protection of Rights, Sec. 18. Private ways of necessity. (Refers to Just Compensation for State use of Private Lands)

(Note here--the Alaska Power Authority, by Charter, has the right to Eminent Domain with just compensation.)

G. Debate in House on S. 1419, comments of Rep. Ferris, Chairman, House Committee on Public Lands, title should not leave the control of the Federal Government, Sept. 5, 1918. Creation of (Sec. 24, FPA).

H. The controversy exist on the fact that once patent has passed they are no longer Public Lands.

I. Washington D.C. and Anchorage, Alaska, Regional Solicitors Opinions Department of the Interior, solidifies Natives Rights to ownership of lands within Power Site Classifications subject to and not subject to Sec. 24 of the FPA.

J. Conclusions of the Washington D.C. Solicitor, Oct. 27, 1977 for PSC 443. By virtue of the differences

of the two processes it is concluded that Sec. 24 and the procedures established thereunder do not apply to lands within any Power Site Classification, Power Site reservation, Power Project or License Application. As we have indicated previously, any selection by the Natives will be conveyed subject to all the rights, privileges, and the obligations of any outstanding permit or license issued by the FPC. Any lands actually being used by the APA or COE will not be conveyed. Any lands needed for the future use of the APA or COE for easement may be reserved by the Secretary under the procedures of 43 USC 1616(B).

(See Sec. 3(E) ANCSA.)

K. PSC 443 classified under the Act of March 3, 1279, by the USGS on Feb. 13, 1958. According to the Society of Civil Engineers this type of withdrawal had no protective effect unless signed by the President or the Secretary of Interior. They go on to state, that when sites in power withdrawals or classifications have passed to patent under provisions of Sec. 24, there is no assigned right of recovery for reservoir use, unassociated with production of power as there is for power sites.

L. The Federal Energy Commission has recommended that the impoundment area be fee simple to the applicant and supporting facilities, though it does not have to include; Recreational lands, Roads, Campsites, Villages, Transmission Lines, Borrow Areas. These can be acquired by other means leases, easements, etc.

Based on items A though L, it appears that fee simple title to the recommended lands by FERC be acquired through whatever method the Alaska Power Authority and the CIRI Native Corporations agree to.

There is no question, that the project lands needed are beyond even the highest contour levels reserved in PSC No. 443 is not even adequate for impoundment only.

It will require acquiring a large area of land beyond the PSC-443 withdrawals, that have or will be conveyed to the Native Corporations. (Remaining lands to be conveyed in Feb. and July 1983.) To continue a position of attempting to gain any remaining lands not yet conveyed could have a negative effect under P.L. 94-204 and the Three Way Land Exchange Agreement between the Department of Interior, the State of Alaska, and the affected CIR Village Corporations.

As most of the lands needed by the Alaska Power Authority within PSC 443 have already been conveyed and the remainder is of such

small acreage, it would or could be a costly affair for all parties involved, not to seek solutions through other more ameniable methods of Land Acquisition.

SUMMARY:

The research involved is by no way complete or concise, nor is the information contained in this research to be construed as any official position of the United States, its Agencies; or the State of Alaska, its Agencies; or the Alaska Power Authority. The information can be a useful tool in providing direction for a better understanding of the Alaska Native Claims Settlement Act, Power Site Classification No. 443, and other land problems in the Susitna Hydroelectric Project study area, of the Talkeetna Mountains. The author of this research paper has to his credit approximately 27 years of Land Management experience mostly dealing with Federal and Native Lands. His experience in Native Lands date back to 1965, to current date, and his involvement with the Susitna Project dates back to September 1, 1980, to current date. His credentials and affiliations are untarnished with membership in such organizations listed below.

1. National Congress of American Indians.
2. Cook Inlet Native Assn., Anchorage, Alaska.
3. National Audubon Society.
4. National member the Smithsonian Associates.
5. American Museum of Natural History.
6. Alaska Sports Fishing Association.
7. National Trust for Historic Preservation.
8. National Geographic Society.
9. Land Use Planning Instructor, University of Alaska, Masters Degree Level.

He has also served as a principal witness in the U.S. Court of Claims, U.S. Department of Insular Affairs, U.S. Congressional Hearings, and other pertinent areas pertaining to energy and land management problems.

ATTACHMENTS:

Analysis of Laws Governing Access Across Federal Lands Options for Access in Alaska. OTA Congress of the United States, Washington D.C.

Analysis of Economic Development Rights on Alaska Native Lands. Bruce R. Bedard, March 27, 1982.

Analysis of Native Lands. Bruce R. Bedard. No date.

Devil Canyon Hydroelectric Project Proposed Requirements for Land. (Ref. PSC No. 443.)

Watana Hydroelectric Project Proposed Requirements for Land. (Ref. PSC No. 443.)

List of mining claims identified in the Susitna Project Area. (Subject to valid existing rights.) See (ANCSA-ANILCA) Lands open to entry for current claims, Denali Planning Block. (Map Valdez district.)

List of Existing cabins identified in the Susitna Project Area. (Subject to valid existing rights.) See ANCSA.

List of Cultural Resources located between June and July, 1980. (Talkeetna Mountains) (Some of these sites may qualify for the Historical Preservation for National Register recognition.

SOURCE REFERENCES
PSC-443

1. State Attorney General William Condon's Opinions.
2. Bureau of Land Management Position Papers.
3. Federal Energy Regulatory Commission Regulations, Policies and Procedures, Decisions.
4. U.S. Department of Interior Solicitors Opinions.
5. P.L. 94-204, January 2, 1976.
6. P.L. 94-456, October 4, 1976.
7. P.L.O. 2961 PSC-443, March 7, 1963.
8. P.L. 92-203, December 18, 1971.
9. P.L. 96-487, December 2, 1980.
10. PSC 443, February 13, 1958.
11. Sec. 24 FPA, June 10, 1920.
12. Ltr. PSC 443, April 19, 1958.
13. DOI BLM Sec. 3(E) ANCSA, October 22, 1980.
14. CIRI Land Trade Agreement, Oct 18, 1977.
15. CIRI Appendix "B" Conveyance Agreement, February 26, 1982.
16. Interior Conveyance #285, February 11, 1980.
17. 12(B) Selection Agreement, November 19, 1975
18. Ltr. Alaska Power Authority PSC-433, July 26, 1982.
19. USGS Report site Preservations, November 1966.
20. 43CFR .08, July 2, 1966
21. Navigability Issue, No date.
22. Federal Control Transfer with IC, No date.
23. PLO 5321 Amendment, July 17, 1973.

24. PLO 5321, December 7, 1972.

25. PLO 5180, March 9, 1972.

26. PLO 5186, March 15, 1972.

27. PLO 5255, September 12, 1972.

28. Ltr. Regional Solicitor, PSC-443, May 14, 1976.

29. Ltr. BLM State Director, PS 443, May 03, 1976.

30. Sec. 24 Determination, PSC-443, June 1, 1961.

31. Ltr. Associate Solicitor, DOE PSC-443, October 27, 1977.

32. 43 CFR 2340, Federal Power Commission, June 13, 1970.

33. 43 CFR 2350, Withdrawal Procedures, June 13, 1970.

34. 43 CFR 2850, Power Transmission Lines, June 13, 1970.

35. Book Withdrawals of Public Lands Power Projects, March 3, 1970.

36. USGS Powersites in Alaska, February 23, 1978.

37. BLM DIC List, November 17, 1982.

38. Ltr. Secretary of Interior, C.B. Morton, March 29, 1974.

39. Notice Ltr., Submerged Lands State, December 10, 1979.

40. DOI Ltr., Solicitor, 12(B) Lands, July 21, 1980.

41. Ltr., State Director, BLM, 12(B) Lands, April 24, 1980.

42. Native Agreement, Talkeetna Mountains, August 31, 1976.

43. Ltr., State Attorney General, PSC-443, September 21, 1982.

44. Ltr., State Director, BLM, PSC-443, May 21, 1979.

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46. Ltr., State Director, BLM, PSC-443, May 03, 1976.

47. Title 16, Chapter 12, Conservation, USC-818, June 10, 1920.

48. Ltr.,State Director, BLM, Power Sites 3(E), June 1, 1977.

49. Ltr.,State Director, BLM, PSC-443, January 13, 1978.

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53. Report, Joint Federal Land Use Committee, No date.

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57. Ltr.- Report, Federal Land Use Plan Comm., June 6, 2974.

58. Ltr.- Report, Federal Land Use Plan Comm., April 7, 1975.

59. Ltr.- Report, Federal Land Use Plan Comm., June 30, 1977.

60. Ltr.- Report, Federal Land Use Plan Comm., November 21, 1975.

61. Ltr.- Report, CIRI Land Exchange, March 7, 1976.

62. Ltr.- Report, State Lands Exchange, April 20, 1976.

63. Reports, FERC Meetings, Land Issues, May 1982.

64. Reports, FERC Meetings, Land Issues, August 5, 1982.

65. Report, Charles Isgar, Land, August 6, 1982.

66. Memo, Land Questions, FERC, No date.

67. Regulations, FERC Application, December 1, 1981.

68. Federal Register, FERC Regs., November 13, 1981.

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70. CIRI, Alaska Power Authority, Agreement, January 4, 1981.

71. Notice, BLM, Section Line Easements, No date.

72. Ltr., Alaska Power Authority to CIRI, October 25, 1978.

73. U.S. Senate and House Report, CIRI Land Trade, March 6, 1976.

74. Land Status Map CIRI, No date.

75. State Map, Existing Recreational use, 1980.

76. Ltr., Goldberg & Gottstein/AHTNA, March 26, 1981.

77. Memo, Alaska Land Use Council, Land Exchange, June 14, 1982.

78. Memo, Questions for CIRI, August 10, 1982.

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80. Draft Ltr. Memo, Susitna, September 28, 1982

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82. Study U of A, Cook Inlet Land Trade, No date.

83. Draft Regulation Change, Land Classification, State, July 15, 1982.

84. Land Status, Map, Silver Lake, PP 138, November 16, 1982.

85. Report, Bureau Land Management, Federal Lands, July 14, 1982.

86. Legal Cases, Native Lands Alaska, Condemnation, January 15, 1979.

87. Alaska Statutes, Article 4, Eminent Domain, no date.

88. Alaska Statutes, Exchange of State Lands, 1976.

89. Alaska Statutes, Protection of Rights, No date.

90. Alaska Statutes, Private Ways of Necessity, No date.

91. Treaty of Cession, May 28, 1867.

92. Statehood Act, Sec. 12, Disclaimer, No date.

93. List of Mining Claims (validity unknown), November 13, 1980.

94. Analysis of Native Lands (Bedard), No date.

95. Analysis of Economic Development Rights, March 27, 1982.

96. PL 94-579, not applicable to ANCSA, October 21, 1976.

97. State Land Selections, July 19, 1982.

98. ANCSA News, Navigability Issue, August-September 1980.

99. ANCSA News, ANCSA Terms Defines, August-September 1980.

100. ANCSA News, Lease Administration, October 1980.

101. Report, OTA Access Areas, Federal Lands, No date.

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Treaty of Cession

(15 Stat. 539)

Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America; Concluded March 30, 1867; Ratified by The United States May 28, 1867; Exchanged June 20, 1867; Proclaimed by the United States June 20, 1867.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

Whereas, a treaty between the United States of America and his Majesty the Emperor of all the Russias was concluded and signed by their respective plenipotentiaries at the city of Washington, on the thirtieth day of March, last, which treaty, being in the English and French languages, is, word for word, as follows:

The United States of America and his Majesty the Emperor of all the Russias, being desirous of strengthening, if possible, the good understanding which exists between them, have, for that purpose, appointed as their Plenipotentiaries: the President of the United States, William H. Seward, Secretary of State; and his Majesty the Emperor of all the Russias, the Privy Councillor Edward de Stoeckl his Envoy Extraordinary and Minister Plenipotentiary to the United States.

And the said Plenipotentiaries, having exchanged their full powers, which were found to be in due form, have agreed upon and signed the following articles:

ARTICLE I

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to-wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28-16, 1825, and described in Articles III and IV of said convention, in the following terms:

"Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude, and between the 131st and the 133d degree of west longitude (meridian of Greenwich), the said

line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian), and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen ocean.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood—

"1st. That the island called Prince of Wales Island shall belong wholly to Russia" (now, by this cession, to the United States).

"2nd. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of the coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."

The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Inaglook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian.

ARTICLE II

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.

It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. Any government archives, papers and documents relative to the territory and dominion aforesaid, which may be now existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian government, or to such Russian officers or subjects as they may apply for.

ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

ARTICLE IV

His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.

ARTICLE V

Immediately after the exchange of the ratifications of this convention, any fortifications or military posts which may be in the ceded territory shall be delivered to the agent of the United States, and any Russian troops which may be in the territory shall be withdrawn as soon as may be reasonably and conveniently practicable.

ARTICLE VI

In consideration of the cession aforesaid, the United States agree to pay at the treasury in Washington, within ten months

after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

ARTICLE VII

When this convention shall have been duly ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by his Majesty the Emperor of all the Russias, the ratifications shall be exchanged at Washington within three months from the date hereof, or sooner, if possible.

In faith whereof, the respective plenipotentiaries have signed this convention, and thereto affixed the seals of their arms.

Done at Washington, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL] WILLIAM H. SEWARD
[SEAL] EDOUARD DE STOECKL

And whereas the said Treaty has been duly ratified on both parts and the respective ratifications of the same were exchanged at Washington on this twentieth day of June, by William H. Seward, Secretary of State of the United States, and the Privy Counsellor Edward de Stoeckl, the Envoy Extraordinary of His Majesty the Emperor of all the Russias, on the part of their respective governments.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every clause and article thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twentieth day of June in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of the United States the ninety-first.

ANDREW JOHNSON

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

The initiative may be used only to enact laws. Starr v. Hagglund, Sup. Ct. Op. No. 98 (File No. 246), 374 P.2d 316 (1962).

And not for the purpose of constitutional amendment. — See Starr v. Hagglund, Sup. Ct. Op. No. 98 (File No. 246), 374 P.2d 316 (1962).

People are subject to same restrictions as legislature. — The implication in this section is that since the people have the same law-making powers as does the legislature, then the people are also subject to the same restrictions as the legislature, "unless clearly inapplicable." 1959 Op. Att'y Gen., No. 36.

Legislative power to enact method of determining whether act and initiative are substantially same. — This section and Alaska Const., art. V, § 3, and art. XI, § 4, when read in harmony, give the legislature the power to enact a method of determining whether an act and an initiative are "substantially the same," as used in Alaska Const., art. XI, § 4. Warren v. Boucher, Sup. Ct. Op. No. 1205 (File No. 2315), 543 P.2d 731 (1975).

Applied in Thomas v. State, Sup. Ct. Op. No. 1445 (File No. 2723), 566 P.2d 630 (1977); Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Stated in City of Douglas v. City & Borough of Juneau, Sup. Ct. Op. No. 672 (File No. 1379), 484 P.2d 1040 (1971).

Quoted in Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

Section 12. Disclaimer and Agreement. The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

Section 4 of the Alaska Statehood Act, 48 U.S.C. Prec. § 21, has been substantially incorporated into the Alaska Constitution as this section. Aquilar v. Kleppe, 424 F. Supp. 433 (D. Alas. 1976).

This section and § 4 of Statehood Act constitute compact between sovereigns. — Section 4 of the Alaska Statehood Act (72 Stat. 339, as amended, 48 USC preceding § 23) is a direct response by Congress to the provisions contained in the five sentences of this section. The two sections constitute a compact between sovereigns. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

A comparison of the offer, in the first sentence of this section, with the response in § 4 of the Alaska Statehood Act indicates definite agreement as to the future status of United States property. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

The offer in the third sentence of this section and the response in the Alaska Statehood Act indicate agreement as to property. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d

901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

The fourth and fifth sentences of this section and the response in § 4 of the Alaska Statehood Act appear to have sufficient definiteness to be offers and acceptances. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

A comparison between the offer in the second sentence of this section and the response in § 4 of the Alaska Statehood Act does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

Which became effective upon approval of Statehood Act by voters. — The compact or contract between Alaska and the United States became effective upon approval of the terms of the Alaska Statehood Act by the voters of Alaska. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

But Omnibus Act forms no part of it. — The amendment of the Alaska Statehood Act by the Alaska Omnibus Act, 73 Stat. 141, § 2a, forms no part of the compact between Alaska and the United States. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

And no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of this section and the responsive portion of § 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

No act of Congress had established any "right or title" in fishing rights which were "held" by or for natives at the time the compact was made. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

In the second sentence of this section the state offered to disclaim as to right or title "held" by or for the persons named. The response in the Alaska Statehood Act described the right or title as "held" by or for natives. There is no evidence of an intent on the part of either sovereign that any new or additional rights in fishing rights be established by the compact itself. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup. Ct. Op. No. 42 (File Nos. 21, 22, 23), 362 P.2d 901 (1961), vacated and remanded on other grounds in 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

Eleventh amendment bar not waived. — By adoption of this section, the state has not waived the bar of the 11th amendment of the federal constitution in disputes over land selected for allotment by Alaska natives. Aquilar v. Kleppe, 424 F. Supp. 433 (D. Alas. 1976).

Section 4 of the Alaska Statehood Act, 48 U.S.C. Prec. § 21, and this section do not expressly waive the 11th amendment bar, and while Alaska disclaimed any interest in property rights held by Alaska natives or the federal government, it is not overwhelmingly implied that the state consented to suits involving conflicting claims to land previously held by the federal government but later patented to the state. Aquilar v. Kleppe, 424 F. Supp. 433 (D. Alas. 1976).

Section 13. Consent to Act of Admission. All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

IN REPLY REFER TO:

3000 (010)

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Anchorage District Office
4700 East 72nd Avenue
Anchorage, Alaska 99507

July 14, 1982

The Secretary of Interior, in order to implement Section 1008 of the Alaska National Interest Lands Conservation Act (ANILCA), directed the Bureau of Land Management (BLM) Alaska to conduct an analysis of the public lands under its juridiction to determine which lands should be leased under the Mineral Leasing Act of 1920. In addition, the Secretary directed that this analysis consider which lands should be opened to location under the Mining Law of 1872 and to disposal under both the Federal Land Policy and Management Act of 1976 and the older settlement laws.

The Anchorage District, BLM, prepared a draft analysis of these actions for the Denali and Tiekel Planning Blocks which was sent to you for review in June, 1982. This analysis covered an area of approximately 4,250,000 acres in Southcentral Alaska: the Denali Block, lying north of the Glenn Highway and ~~east~~ west of the Richardson Highway; and the Tiekel Block, straddling the Richardson Highway just south of its junction with the Edgerton Highway. This draft analysis consisted of an environmental assessment of mineral leasing, mineral location, and land disposal as amendments to the Districts existing Southcentral Management Framework Plan (land use plan).

The public comments which were received on this draft analysis have been reviewed and final decisions have now been reached on these three issues as they affect the Denali and Tiekel Planning Blocks. These decisions are contained in the attached Decision Record. They will be implemented by attaching them to the Southcentral Management Framework Plan as amendments to the existing decisions. A Public Land Order will be published in the Federal Register during September, 1982, opening the lands in accordance with these decisions.

Any person who participated in the planning process and who has an interest which may be adversely affected by approval of the MFP amendments may file a protest on or before August 15, 1982. A protest may raise only those issues which were submitted for the record to the District Manager during the planning process. Any such protest must be in writing and must be filed with the State Director, Bureau of Land Management, Alaska State Office, 701 C Street, Box 13, Anchorage, Alaska 99513. The

protest shall contain the name, mailing address, telephone number and interest of the person filing it; a statement of the issue or issues being protested; a statement of the part of the amendment being protested; a copy of all documents addressing the issue or issues that were submitted by the protesting party or an indication of the date the issue or issues were discussed for the record; and a short, concise statement explaining how they affect the choice of decision.

Implemetation of these decisions will begin no sooner than August 15, 1982, or upon resolution of any protest received by the State Director.

Richard J. Vernimen

Richard J. Vernimen
Acting District Manager

DECISION RECORD
Denali/Tiekel Amendment to the Southcentral Management Framework Plan

Mineral Leasing

Finding of No Significant Impact

Since mitigating measures developed through the environmental analysis will be incorporated into the conditions of approval (permit stipulations) of permits to drill, the mineral leasing decision can be implemented without significant impact to the environment. In addition, the standard stipulations will be attached to all lease areas opened for noncompetitive oil and gas leasing. Therefore, the decision contained in the Decision Record does not warrant the preparation of an environmental impact statement.

Mineral Entry

Finding of No Significant Impact

Limiting mineral entry to areas which have known mineral values, and in some cases are already open to limited entry, mitigates the impact of the decision in this Decision Record, to the point where the surface protection regulations in 43 CFR 3809 can be expected to effectively reduce the significance of impacts to the environment. By protecting areas of high public resource values, this decision further reduces the potential for resource conflicts to the point where preparation of an evironmental impact statement is not warranted.

Disposal of Public Land

Finding of No Significant Impact

By limiting non-discretionary disposals to a small, isolated portion of the overall analysis area in which no significant public resource values such as recreation or wildlife have been identified, this decision produces no significant environmental impacts on the overall analysis area. Because of the relationship between this non-discretionary portion of the decision and the larger disposal action, which will receive ongoing environmental assessment, the decision does not warrant the preparation of an environmental impact statement.

Area Manager, Glennallen Resource Area — JUL 14 1982 — Date

District Manager, Anchorage District — JUL 14 1982 — Date

I Concur

State Director, Alaska — JUL 14 1982 — Date

SUMMARY OF ANALYSIS

The decision record amending the South Central Management Framework Plan (MFP) is arranged in three distinct sections. The three amendments cover mineral leasing, mineral entry, and settlement/disposal. Within each section, the narrative follows this format.

First, the current Management Framework Plan (MFP) decision is provided; second, the decision or amended wording is stated; third, the alternatives considered are discussed; fourth, a rationale is provided in support of the decision; and finally, a brief discussion is given of the environmental considerations made as a result of the environmental assessment. A map identifying the reclassification of lands is included.

MINERAL LEASING

Original Decision

The existing decision for mineral leasing in the Southcentral Management Framework Plan, as it affects the Denali and Tiekel Planning Blocks is to "Consider the Alphabet Hills in the southern portion of the Denali planning block for oil and gas leasing with stipulations to protect Trumpeter Swan nesting grounds." This decision will be removed from the Southcentral MFP and will be replaced with the following decision reached as a result of this analysis:

Decision

Lease all lands within the Denali and Tiekel blocks which are not encumbered by pending Native corporation selections, pending State of Alaska selections, or by the statutory segregations created by the Delta Wild and Scenic River, the Gulkana Wild and Scenic River and the corridor for the Denali Scenic Highway study. The corridor for the Denali Scenic Highway study will remain closed to mineral leasing until December 2, 1983 if a negative recommendation is reached on the study. If a positive recommendation is made, the study corridor will remain closed until Congress acts on the recommendation or until December 2, 1985, whichever comes first.

The utility corridor withdrawn in support of the Trans-Alaska Pipeline will be included in this decision to lease for minerals. Special stipulations governing surface occupany will be included in any lease issued within the granted right-of-way. Additional special stipulations may be attached to individual leases for protection of the environment in accordance with the mitigating measures developed in the environmental considerations protion of this decision record. The geographical extent of this decision is shown in the attached Illustration 25.

Alternatives Considered:

The alternatives considered in this analysis, from which this decision has been selected, ranged from the general opening of all public land to one of no action, as summarized in the following paragraphs:

Alternative 1: Open all lands in the Denali and Tiekel planning blocks to mineral leasing.

Alternative 2: Identify and open those lands in the Denali and Tiekel planning blocks that are suitable for and have potential for mineral leasing.

Alternative 3: Open only those lands south of the Alphabet Hills, in the Denali block, that have been identified by USGS

and industry for mineral leasing. (Existing MFP decision)

Alternative 4: Take no action.

The following decision has been selected based on three major factors:

1. As a discretionary action, leasing is subject to environmental controls through stipulations on both the leases themselves and on specific permits needed to develop leases.

2. Most of the potential oil and gas basin contemplated in the existing MFP decision is now State selected and no longer available for leasing.

3. In the absence of any concrete knowledge of the potential for leasable minerals in the rest of the analysis area, the current policy to allow exploration to develop this knowledge appears to be the only justifiable course. In this instance, exploration can occur only after a lease has been issued.

The decision as stated has been modified from the original alternative in order to consider a number of factors developed in the analysis, such as the statutory segregations attached to wild and scenic rivers, etc.

Rationale

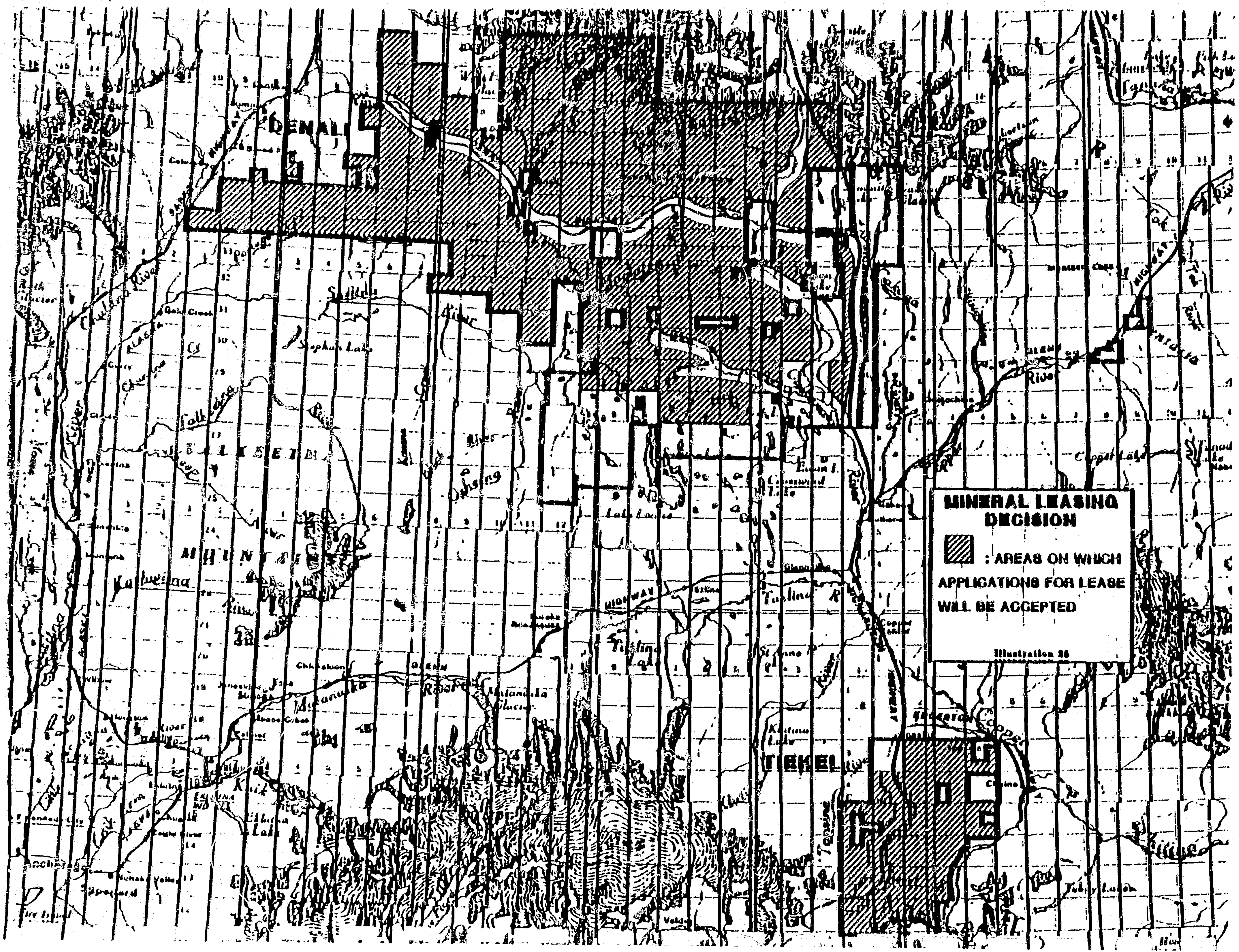
As a discretionary action by the Secretary of the Interior, mineral leases are subject to management by the Minerals Management Service and the affected surface-managing agency, in this case BLM. The requirement that surface-disturbing activity on a lease be subject to analysis and, where necessary, control through stipulation provides a procedure for mitigating impacts on the environment. This decision implements the Secretary's policy that lands should be open to leasing to the maximum extent possible to allow for the exploration necessary to determine just what values are present.

The existing decision addresses only a small portion of the public lands which are available for leasing. The opening of the entire area, while it may in fact produce a certain number of speculative lease interests, will allow the opportunity to participate in the Federal oil and gas non-competitive leasing program which is the intent behind the non-competitive leasing regulations. The presence or lack of significant deposits of leasable minerals, together with prevailing economic conditions will in the end operate to control the number of leases which are actually developed.

Environmental Considerations

The State of Alaska, in its comments on the Denali/Tiekel draft analysis, requested that BLM consider the body of environmental

issues and mitigating measures which the State had developed for its Lease Sale #37, just to the south of the Denali Block. The following discussion of issues reflects both those raised in the draft analysis and those found in Lease Sale #37. These mitigating measures will be considered on permits to drill. (See Appendix A for a discussion of the Issues and mitigating measures.) Prior to the actual opening of the affected lands, public notice will be provided which will identify stipulations the will be applied to leases.


MINERAL LEASING
DECISION
: AREAS ON WHICH
APPLICATIONS FOR LEASE
WILL BE ACCEPTED
DENALI
TIEKEL
HIGHWAY
Matanuska
Tazlina
Copper
Sheep Mountain
Illustration 25

MINERAL ENTRY

Original Decision

The existing decision for mineral entry in the Southcentral Management Framework Plan, as it affects the Denali and Tiekel Planning Blocks, is to "provide opportunities for the development of gold, silver, and copper in the Clearwater Mountain area of the Denali Planning Block." This decision will be removed from the Southcentral MFP and will be replaced with the following decision reached as a result of this analysis:

Decision

In the Tiekel Block, open to the full operation of the Mining Law of 1872, all public lands not segregated by pending Native corporation selections or by the corridor withdrawn in support of the Trans-Alaska Pipeline.

Open to the full operation of the Mining Law of 1972, those public lands in the Denali Block affected by Public Land Orders 4514, 5180, 5418, 5321, and 5184, not otherwise segregated by pending Native Corporation selection, pending State of Alaska selections, the Delta River Wild and Scenic River, the corridor for the Denali Scenic Highway study, or the corridor withdrawn in support of the Trans-Alaska Pipeline. The lands affected by this decision are portrayed in attached Illustration 26.

The corridor for the Denali Scenic Highway study will remain closed to mineral entry until December 2, 1983, should a negative recommendation be reached on the study. Should a positive recommendation be made, the study could will remain closed until Congress acts to make the segregation permanent or until December 2, 1985, whichever cames first.

Alternatives Considered:

The alternatives addressed in this analysis, from which this decision has been selected, ranged from a general opening to a no action alternative as follows:

Alternative 1: Open all lands in the Denali and Tiekel planning blocks to mineral location.

Alternative 2: Open for mineral location those lands in the Denali and Tiekel planning blocks that are suitable and have potential for mineral entry.

Alternative 3: Open only the following townships to mineral location in response to indications of interest (same geographical areas as shown in existing decision):

T. 32 N., R. 8 & 9 E., Seward Meridian
T. 33 N., R. 8 & 9 E.

T. 17 S., R. 4 & 5 E., Fairbanks Meridian
T. 18 S., R. 4-11 E.
T. 19 S., R. 2-11 E.
T. 20 S., R. 1-10 E.
T. 21 S., R. 1-10 E.
T. 22 S., R. 1 & 2 W., and R. 1 E

Alternative 4: Take no actions.

The decision has been selected based on three major factors:

1. The information which is available on the location of mineral values and the distribution of existing mining claims within the Denali and Tiekel planning blocks appears to concentrate both values and interest in the areas covered by this decision.

2. As a non-discretionary action, the filing of mining claims sets the stage for transfer of public land to private ownership. Where significant public resource values are present, the only way to protect those values is to keep the area closed to the filing of mining claims. The fact that an area is closed to the filing of claims does not, however, preclude exploration for mineral values. BLM is prepared to work with individuals and organizations to open additional areas in which mineral values can be shown to exist.

3. Large areas of the Denali planning block are presently open to limited entry under the mining laws. Since the impacts associated with mining activity are already present in these areas, the opening of the same areas to full operation of the mining laws can be done without significantly increasing those impacts.

Rationale

The draft analysis recommendation to keep the Tiekel block closed to mineral entry was based on ongoing negotiations between the State of Alaska, the Department of Interior and Chugach Natives Incorporated over the issue of identifying the site for selection of outstanding land rights by Chugach. This issue has been resolved. The State of Alaska can fulfill interests in the Tiekel block through the exercise of its right to select the area prior to any actual opening.

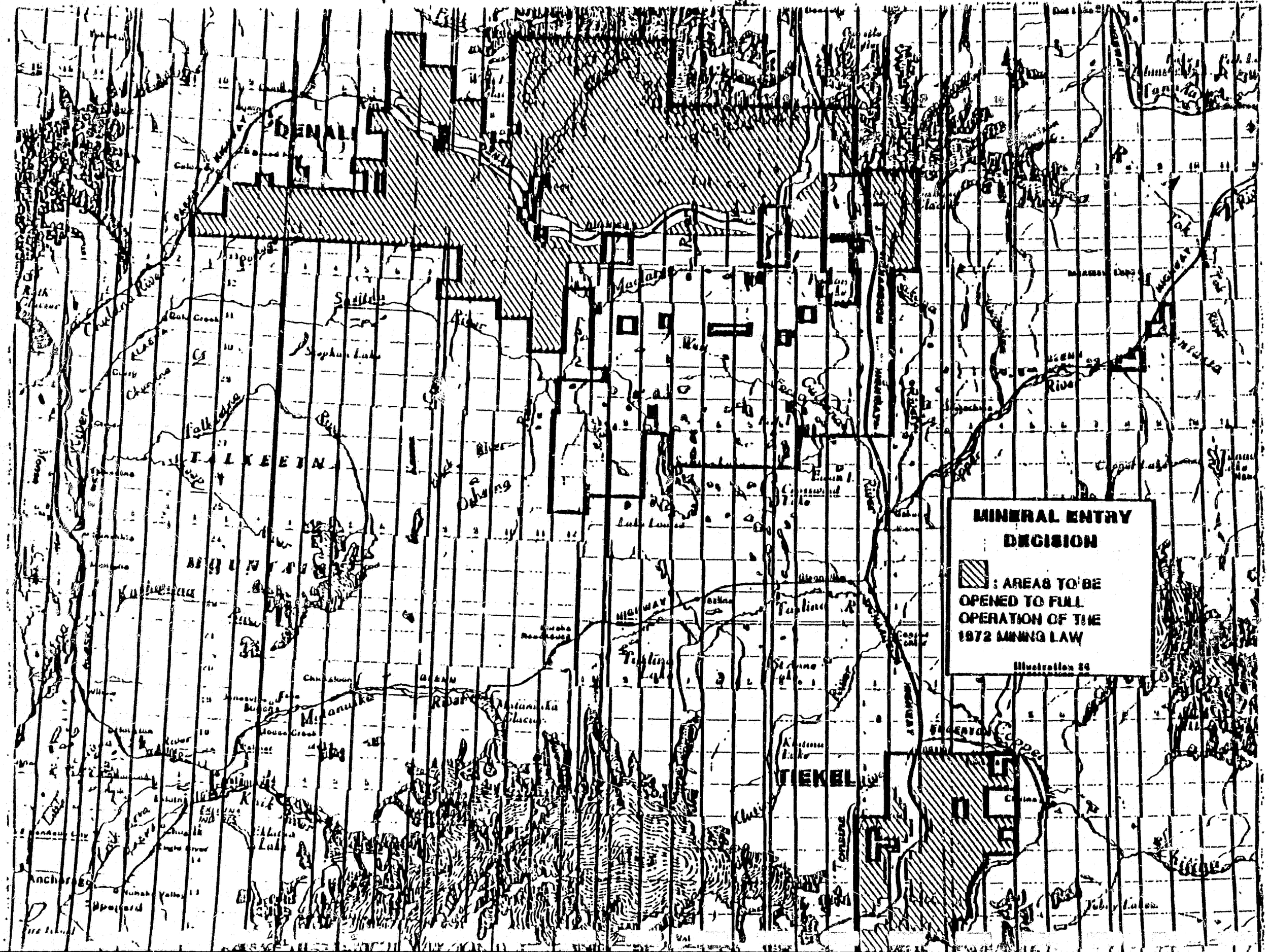
Comments received on the draft analysis pointed out that the discussion of PLO's was in error in several instances. One error of critical importance to the issue of mineral entry was the showing, on Illustration 2 in the draft, that the area covered by PLO 5321 was closed to mineral entry. A proper reading of PLO 5321 shows that these townships are in fact open to location for metalliferous minerals.

This decision, opening the Tiekel block and the northern portion of the Denali block is consistent with the known distribution of mineral values within these two areas. The lack of known mineral values together with the documented presence of significant resource values such as the concentration of bald eagle nesting sites, the extensive areas of Trumpeter Swan nesting sites and major migratory routes for the Nelchina Caribou herd provides justification for keeping that portion of the Denali Block south of the Denali Highway and east of the Susitna River closed to mineral entry.

Environmental Considerations

The majority of the environmental impacts identified in the draft analysis for mineral entry can be mitigated through the operation of the surface disturbance regulations in 43 CFR 3809. In those areas where mineral values predominate, these regulations operate to protect other resource values. These regulations do not, however, resolve the fact that the filing of mining claims sets the stage for transfer of title to lands from public ownership to private. Where significant public resource values exist, these regulations do not serve to protect the public interest from loss of those resources.

The continuing segregation of parts of the Denali Block does not prevent exploration for minerals in the affected areas. BLM is prepared to work with any interested party to open additional lands to mineral entry, given evidence that there is justification in the form of mineral values.


DENALI
TALKEETNA
TIEKEL
MINERAL ENTRY
DECISION
: AREAS TO BE
OPENED TO FULL
OPERATION OF THE
1972 MINING LAW
Illustration 56

SETTLEMENT/DISPOSAL

Original Decision

While an objective exists to "satisfy state and local government needs as well as public and/or private demonstrated needs for land" in the Southcentral Management Framework Plan, no specific action recommendation has yet been approved. The Southcentral MFP will be amended to act on the disposal of public lands through the inclusion of the following three part decision reached as part of this analysis.

Decision

Applications for lease or sale of lands under Section 302 of the Federal Land Policy and Management Act of 1976 will be accepted on those public lands in the Tiekel Block not otherwise segregated by pending Native corporation selections.

Entries under the public land laws for homesites, trade and manufacturing sites, and headquarters sites will be allowed on the following described public lands lying east of the Denali Block, along the Tok Cutoff at its junction with the Nebesna Road:

Copper River Meridian

T. 11 N., R. 8 E., Secs., 24 to 28, and 33 to 36 inclusive
T. 12 N., R. 9 E., Secs., 12, 24 to 27, and 34 to 36 inclusive

Any decision on disposal of public lands in the Denali Block proper will be deferred pending BLM's integration into the preparation of the regional plan being prepared by the State of Alaska, Department of Natural Resources in conjunction with the Matanuska-Susitna Borough. BLM will seek to operate as a full partner within this regional planning effort. BLM will forward all elements of this present analysis for the Denali Block with its input into the regional plan.

The first two parts of this decision are shown on the attached Illustration 27.

Alternatives Considered

The alternatives addressed in this analysis, from which this decision was selected, ranged from one of unrestricted entry to one of no action, as follows:

Alternative 1: Open all lands in the Denali and Tiekel planning blocks to unrestricted entry for settlement.

Alternative 2: Identify and open those lands in the Denali and Tiekel planning blocks that are suitable for and have potential for settlement under the public land laws.

Alternative 3: In the Denali and Tiekel planning blocks, open for entry under the Homesite and Trade and Manufacturing site laws only those lands that support significant site-specific mineral development.

Alternative 4: Open all lands in the Denali and Tiekel planning blocks to entry through a petition-application system in which BLM considers specific individual r ests on a case-by-case basis.

Alternative 5: Open lands in the Denali and Tiekel planning blocks on a site-specific basis to sales and leases under Section 302 of FLPMA.

Alternative 6: Take no action.

The decision is stated in several parts and reflects a mixing and matching of the options presented by the alternatives based on the findings of the analysis. two major factors were considered in making the decision.

1. Congress, in the Federal Land Policy and Management Act of 1976 has established specific criteria for determining suitability of land for disposal.

2. Congress, again in FLPMA, has established certain criteria for coordination with State and local governments on land use planning for disposal.

Rationale

The Federal Land Policy and Management Act of 1976 (90 Stat. 2743) establishes the policy that:

> "The public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this act, it is determined that disposal of a particular parcel will serve the national interest...." (43 USC 1701, Section 102)

FLPMA further establishes three criteria under which public lands may be considered for disposal:

1. Such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public land, and is not suitable for management by another Federal department or agency; or

2. Such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or

3. Disposal of such tract will serve important public objectives, including but not limited to expansion of communities and economic

development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.

FLPMA, even though it established a general policy for retention of the public lands in federal ownership, also extended the older public land laws on settlement until 1986 in Alaska. It failed, however, to give criteria for disposal under these settlement laws beyond the initial policy statement on retention. BLM, lacking any other standard, has applied the criteria for sales to settlement as well. Using thses criteria, it has been possible to identify the two small parcels of public land discussed in the decision for disposal based on their isolation from other tracts of public land, on the difficulty and ecomonics of management, and on the unsuitability for their management by another Federal agency short of legislation to amend the Alaska National Interest Lands Conservation Act of 1980. The identification of these parcels for disposal through the public land laws meets a persistent demand by which people, who wish to, may gain title to the public land through the traditional settlement laws.

The draft recommendation to defer any disposal decision on the Tiekel Block was based on the ongoing negotiations between the State of Alaska, the Department to the Interior, and Chugach Natives Inc., to determine the location of lands on which Chugach could exercise its outstanding selection rights. This issue has now been resolved with the identification of T. 3 S., R. 1 E., Copper River Meridian, as the site for this selection. BLM believes that in this instance, and in this specific area, it can best respond to interests in acquiring public land through the formal FLPMA lease and sale procedures.

Within the context of this effort, BLM has not been able to specifically identify all those tracts of land within the Tiekel Block which might meet the disposal criteria established by FLPMA. This level of analysis can be obtained through a program which allows the public to identify specific sites within the block to which they wish to gain title. By exercising its discretionary authority on FLPMA sale and lease applications. BLM can effectively narrow this general opening of the Tiekel Block to those sites which meet FLPMA requirements. Through this lease and sale program, BLM can also meet the identified needs for land disposal within the Tiekel Block while still considering the legitimate concerns of those private land owners in the area whose land values are dependent on the continuation of a fair market value climate.

In both of these instances, FLPMA leases and sales in the Tiekel Block, and settlement entry in the isolated parcel along the Tok Road, the State of Alaska is the primary provider of community services such as police and fire protection. Its concerns in the area will be addressed by including the State in any analysis associated with lease or sale applications in the lands, both leases and sales, as discretionary actions by the Secretary can be tailored to meet the

State's concerns. The state can also exercise its preference right to select the area prior to any opening.

While both of these concerns also impact the allowance of entries on the parcels along the Tok Cutoff, the conflict with the State's selection rights assumes a larger role since once opened the allowance of entry applications becomes a nondiscretionary action and could significantly reduce the State's options for selection. Here again, the State can resolve the issue by exercising its preference selection rights prior to any opening.

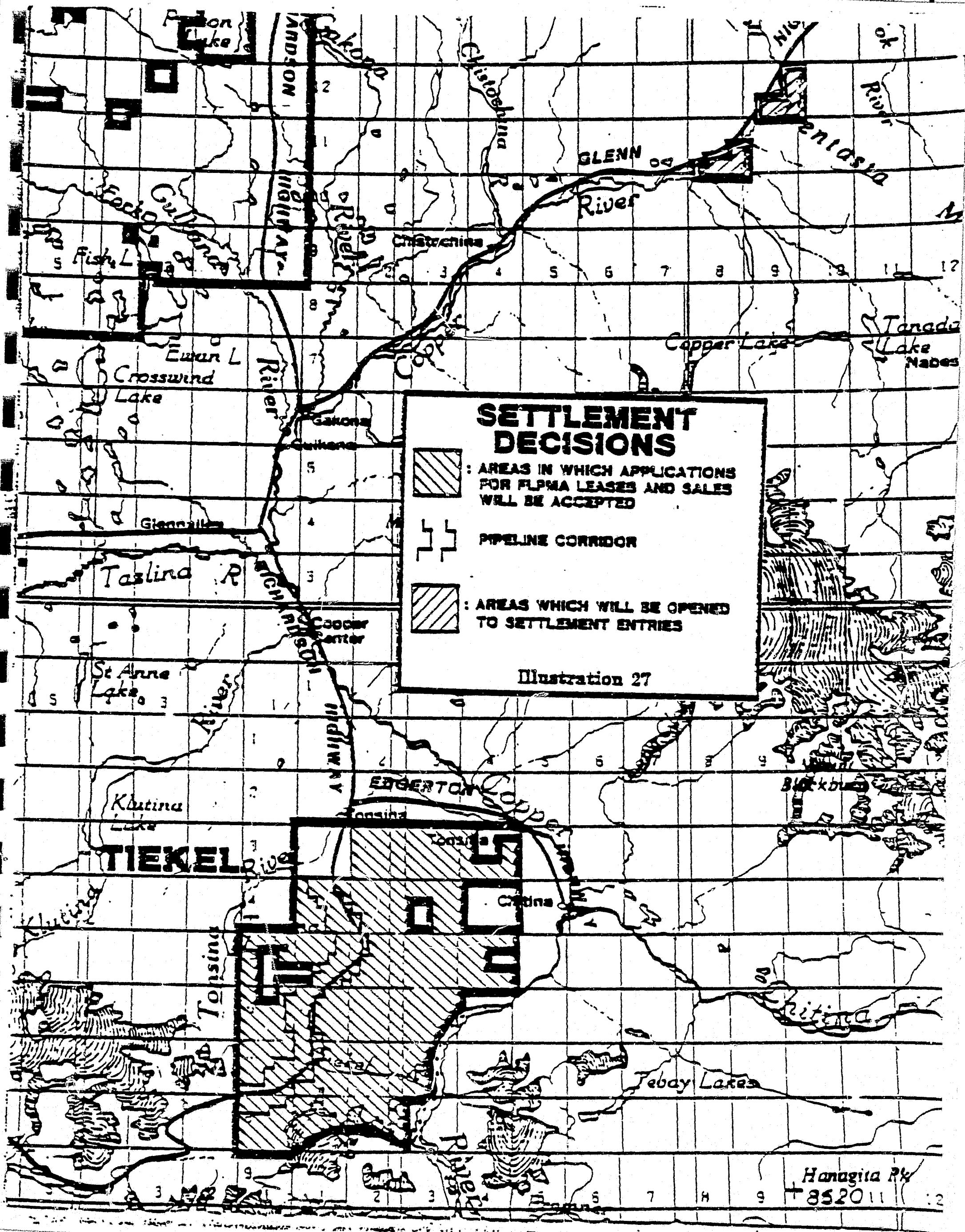
In the Denali Block, where both the State of Alaska and the Matanuska-Susitna Borough have requested coordination of land use planning for disposal, BLM believes it only proper to acceed to these requests. As the primary provider of public services and as the major land use zoning authority for most of the Denali Block, the Matanuska-Susitna Borough's interests should be taken into consideration in any action to dispose of lands in those areas under its jurisdiction. In the balance of the block, the State of Alaska, as the only other major owner of lands and resources surrounding the block, has a valid interest in seeing that policies for land use between BLM and the State do not conflict. The state also has a significant interest in land use planning on public lands in its role as a manager of wildlife resources and in its role as provider of public services, etc., in unincorporated areas.

Environmental Considerations

The deferral of any disposal decision on the Denali Block has the effect of producing no environmental effects at all at this time. Should the regional plan for the area call for some level of disposal action, an assessment of impacts may have to be done at that time.

The opening of the Tiekel Block to FLPMA leases and sales, as a strictly discretionary action, allows BLM to mitigate potential impacts on a site-specific basis. Each application for lease or sale will in fact require a site-specific environmental assessment prior to the publication of any Notice of Realty Action approving it. Any significant impacts associated with a given application which cannot be mitigated through modification or through reservations in the grant should cause the application to be rejected.

The opening to entry of the two parcels on the Tok Cutoff while it does produce the potential for localized impacts, does not create a significant impact to the public lands within the context of overall size and management. No specific resource values of high public value have been identified in the areas to be opened.


SETTLEMENT DECISIONS
: AREAS IN WHICH APPLICATIONS FOR FLPMA LEASES AND SALES WILL BE ACCEPTED
PIPELINE CORRIDOR
: AREAS WHICH WILL BE OPENED TO SETTLEMENT ENTRIES
Illustration 27
TIEKEL
EDGERTON
GLENN
Copper River
Chistochina
Gakona
Glennallen
Taslina R
Crosswind Lake
Ewan L
Fish L
Tebay Lakes
Tanada Lake
Copper Lake
St Anne Lake
Klutina Lake
Hanagita Pk

APPENDIX
A
MANAGEMENT CONSIDERATIONS

MANAGEMENT CONSIDERATIONS FOR IMPLEMENTING AN OIL AND GAS LEASING PROGRAM

This section is provided in support to the Decision Record for Mineral Leasing. The specific reference is made through the Environmental Considerations portion of the text. Comments received from both public and internal review identified a series of environmental issues which required management consideration. The following text identifies the issues and the mitigating measures proposed to ameliorate potential adverse environmental impacts.

1. Issue: Development activities could result in a decline in recreational use of public lands through modification of existing trail systems and detracting from the wilderness qualities of currently undeveloped areas.

   Mitigating Measures: Facilities should not be sited along, or immediately adjacent to, existing trail systems unless it can be demonstrated to the satisfaction of the District Manager, BLM, that there are no feasible alternatives. Facilities should be designed and sited to blend in with the surrounding environment to the maximum extent possible.

2. Issue: Sportsmen, commercial fishermen, subsistence users, and recreationists all utilize lands within and near the proposed lease area, and should be guaranteed continued access to lands and resources within the proposed lease boundaries.

   Mitigating Measures: Avoid restriction of public access to, or use of, the proposed lease area as a consequence of oil and gas activities except for small, limited areas in the immediate vicinity of drill sites and other related structures.

3. Issue: Surface disturbance and related activities can damage and/or destroy Historic and Prehistoric sites and artifacts.

   Mitigating Measures: Apply the Bureauwide standard archeolgoical protection stipulation to all leases issued.

4. Issue: Removal of snow cover and winter appropriations from fish-bearing water can dewater fish overwintering areas and lead to reductions in local populations.

   Mitigating Measures: Removal of freshwater snow cover from fish-bearing rivers and streams should be prohibited during the winter (freeze-up to break-up). Winter water removal from natural lakes should be subject to prior approval from the Area Manager, BLM.

5. Issue: Operation of equipment in streams during the winter can cause stream flow modifications and interruptions of under-ice flow. These changes may restrict or eliminate fish overwintering areas. In addition, clean up of oil spills would be difficult.

Mitigating Measures: The operation of equipment in open water areas of fish-bearing streams and in fish streams where under-ice water may be present would be prohibited during the winter (between freeze-up and break-up).

6. Issue: Drilling muds, etc., can be toxic and vary tremendously in chemical makeup.

   Mitigating Measures: Because in the Denali/Tiekel area evaporation is often exceeded by precipitation, mud pits are unlikely to dry out. Drilling muds and other produced waters should not be dumped on land or in water bodies. The operations are conducted under permit from the Alaska Department of Environmental Conservation. The Minerals Management Service assures compliance to permit requirements.

7. Issue: Vehicular traffic across unfrozen wetlands often causes severe damage to soils and vegetation, can lead to permafrost degradation, and may result in disturbance or destruction of wildlife populations including fisheries.

   Mitigating Measures: Exploration activities and surface entry into wetlands should be restricted to periods of the year when sufficient ground frost and snow cover are present to prevent damage to vegetation and soils (generally November 20 to April 15), and should be supported only by ice roads, winter trails, existing road systems, and air service. Surface travel may be allowed outside of this time period if it can be demonstrated to the satisfaction of the Area Manager, BLM, that travel can be accomplished without damaging the soils and vegetation, and without disturbing sensitive wildlife populations. In wetlands, Corps of Engineers (404) permits are required.

8. Issue: Refuse disposal sites can disturb important wildlife habitat, pollute groundwater and adjacent waterbodies, and attract and trap and/or kill wildlife.

   Mitigating Measures: All garbage and refuse should be contained and stored in a manner that would not attract or trap wildlife and should be disposed of at a site approved by both the BLM and permitted by the Alaska Department of Environmental Conservation. Drilling muds, etc., pose a potential problem which requires extra effort to avoid.

9. Issue: Would exploration, development, and eventual production significantly affect fish and wildlife populations or their habitat? Will these effects be short-term or long-term in nature?

   Mitigating Measures: Although certain environmental impacts are unavoidable when exploring for oil and gas, many impacts can be avoided or minimized through the use of mitigating measures. In order to ensure that the environmental impacts of the proposed project are minimized to the extent possible, the following protective measures should be incorporated into all lease agreements. Although the probability of

industry discovering commercial quantities of oil and gas reserves in the lease area is low, recommendations made would also address oil and gas development, production and spill avoidance. It is essential that protective measures directed toward these two phases of proposed projects be included in lease agreement in the event that producible reserves are found.

10. Issue: Construction activities and the siting of facilities in close proximity to rivers and lakes can lead to shoreline erosion and sedimentation of waterbodies, degradation of fisheries habitat, loss or alteration or riparian habiat important to birds and mammals, and loss of public access to waters and shorelines.

Mitigating Measures: With the exception of watercourse crossings, facilities should not be located along the banks of rivers or shorelines of lakes. The siting, design, and construction of watercourse crossings should be strictly controlled to avoid crucial habitats identified by BLM.

With the exception of road and pipeline crossings aligned perpendicular to watercourses and approved by the BLM, facilities should be prohibited within 500 feet (152 m) of all rivers and streams and fish-bearing lakes. Wild and Scenic Rivers have more stringent protections.

Alteration of the banks of watercourses would be prohibited except in a manner approved by BLM.

Bridges would be used as watercourse crossings of fish habitat wherever feasible and practical. Culverts should be used in fish habitat only when absolutely necessary and where it can be demonstrated they would not block fish passage. The siting, design, and construction of both bridges and culverts should be approved by the BLM prior to the placement of either of these structures. Specific permits will be issued by BLM for all rights-of-way including water crossings. Each right-of-way would require an environmental assessment and site specific stipulations.

11. Issue: Loss or alteration of habitat is frequently the most significant factor contributing to displacement and/or declines in fish and wildlife populations. Maintaining the integrity of critical habitats, such as fish spawning areas, moose calving grounds, and moose and caribou wintering ranges, is espcially important to the continued survival of wildlife populations.

Mitigating Measures: Long-term and permanent alterations of habitats should be avoided to the maximum extent possible, particularly during the exploratory phase when it is not known whether economically producible reserves of hydrocarbons will be discovered. If it is necessary to site facilities in particularly sensitive fish and wildlife habitats, or along migration routes to and from these areas, development activities should be strictly controlled to minimize the environmental impacts of the project. Surface use should not conflict significantly with subsistence use of resources.

A. Exploration facilities, with the exception of drill pads, should be temporary and should not be constructed of gravel.

B. Plans of Operations and unit agreements would be reviewed to ensure that facilities and surface disturbance required to safely and efficiently explore and develop the proposed lease area are kept to a minimum.

C. The Area Manager, BLM, would require that lease facilities be sited to avoid critical fish and wildlife habitats.

D. All lease activities would be conducted, and structures designed, to maintain normal water flow and drainage patterns, and to allow free movement and safe passage to fish, caribou, and moose, Dall sheep, and other wildlife species.

E. Whenever possible, joint use of facilities with other lessees is desirable.

F. Upon abandonment of drill sites, roads, buildings, or other facilities, such facilities would be removed and the site rehabilitated, unless it is shown to the satisfaction of the Area Manager, BLM, that such removal and restoration is not in the best interest of sustained multiple use land management.

12. Issue: The use of upland gravel sources generally results in fewer impacts on fish and wildlife populations than gravel removal from rivers and streams. Upland gravel removal can result in habitat loss, however, through surface disturbance and interference with natural drainage patterns. Gravel extraction from critical wildlife habitat can be particularly damaging to local populations.

Mitigating Measures: In meeting gravel needs, uses of gravel from existing BLM approved material sites would be the first sources utilized. Exceptions may be permitted if it can be demonstrated to the satisfaction of the Area Manager, BLM, that use of these sources is not feasible or prudent.

Gravel mining sites would not be located within the annual floodplains (from vegetation line to vegetation line) of watercourses, unless it is demonstrated to the Area Manager, BLM, that a floodplain source is the preferred environmental alternative. If gravel mining within floodplain is deemed necessary, a permit for the site shall be granted by the Corps of Engineers prior to any gravel removal. Mining site development within floodplains should follow the procedures outlined in Gravel Removal Guidelines for Arctic and Subarctic Floodplains, 1980, U. S. Fish and Wildlife Service, Woodward Clyde Consultants.

13. Issue: Above-ground pipelines can interfere with seasonal movements of moose and caribou migrations and lead to displacement of caribou from preferred habitats. This could prevent the Nelchina caribou herd from utilizing traditional calving or winter ranges and cause a decline in population.

Mitigating Measures: In the event of production, pipelines should be consolidated and buried in all areas where thaw stable soils exist in sufficient depths to allow burial. Any required above ground sections will be constructed to ensure a minimum ground clearance of ten feet (3.0 m) at the pile bents, with the following exceptions: (1) in areas where it can be demonstrated to the satisfaction of the Area Manager, BLM, that lower heights will be adequate to ensure safe and unrestricted passage of moose and caribou, and (2) in areas identified as important caribou movement zones, greater clearances may be required. In addition, refrigerated sections of buried pipelines may be required to prevent thawing unstable areas that are highly used traditional caribou migration routes.

14. Issue: Water intakes commonly entrain and kill large numbers of fish and other aquatic organisms.

Mitigating Measures: Water intakes used during the summer to remove water from fish-bearing waterbodies would be surrounded by a screened enclosure to prevent fish entrainment and impingement. Pipes and screening should be designed and constructed so that the maximum water velocity at the surface of the screen enclosure is no greater than 0.1 foot per second. Screen mesh size should not exceed 0.04 inch.

15. Issue: Use of eskers as gravel sources will result in loss of denning habitat for brown bears, wolves, and several other denning species, and could displace these animals from habitat crucial to their survival and well-being.

Mitigating Measures: Gravel removal from eskers during exploration and development would be prohibited unless it can be demonstrated to the satisfaction of the Area Manager, BLM, that important habitat would not be lost and there are no other feasible gravel sources.

16. Issue: An increase in public access to crucial moose wintering habitat in the Alphabet Hills region could result in the displacement of moose from this area and lead to a decline in the local moose population due to the unavailability of other wintering habitat.

Mitigating Measures: The construction of permanent roads would be prohibited within the following areas:

Township 10 North, Ranges 2, 3, 4, 5, 6, 7, 8, and 9 West, CRM
Township 11 North, Ranges 2, 3, 4, 5, 6, 7, 8, and 9 West, CRM
Township 12 North, Ranges 2, 3, 4, 5, 6, 7, 8, and 9 West, CRM

17. Issue: Bald eagles, protected under federal law, nest throughout the Copper River Basin. Destruction of nest sites and disturbance to nesting pairs is forbidden by law and could displace eagles from preferred habitat, cause a decrease in reproductive success, and lead to a decline in present population levels. Some bald eagle pairs have alternate nests and rotate their use among their nests.

Mitigating Measures: The following stipulations should be incorporated into all permits to ensure that activities are in compliance with Federal regulations:

A. Permanent facilities would be prohibited within 500 feet (152 m) of all bald eagle nest sites. Most eagle nests are located within 1/4 mile of waterbodies.

B. Surface entry within 500 feet (152 m) of bald eagle nests would be prohibited between April 1 and August 31. Temporary activities, which do not alter the habitat, may be allowed outside of this time period.

18. Issue: Peregrine falcons (Falco peregrine anatum and Falco peregrine tundrius) are currently on both the State and Federal endangered species lists. Destruction of nesting habitat and disturbance of nesting pairs could interefere with the reproductive efforts of falcons and prevent peregrine populations from increasing and eventually attaining healthy stable population levels.

Mitigating Measures: Apply Peregrine Falcon standard stipulation to remedy any potential problems.

19. Issue: The Delta River and Gulkana River, including the main stem, Middle Fork, and both branches of the West Fork have been included in the Wild and Scenic River System. Their wild and scenic values must be protected.

Mitigating Measures: Seismic lines, trails, roads, and other permanent facilities would be prohibited within two miles (3.2 km) of the Gulkana River and Delta River. Provisions would be made to allow crossing of the river at a location(s) approved and accepted by the BLM.

20. Issue: Many people associated with oil and gas exploration will not be aware of the environmental and social considerations essential to proper development of the area.

Mitigating Measures: An environmental training program may be required as a condition of approval of Plans of Operations. The program should be designed to inform each person working on the project of specific types of environmental, social, and cultural concerns that relate to the proposed lease or project area and ensure that personnel understand the use of techniques necessary to preserve biological, geological, archeological, and cultural resources.

21. Issue: Trumpeter swans, protected under International Treaty, are particularly sensitive to disturbance and may be displaced from traditional breeding habitat if facilities and human activities occur in close proximity to nest sites or rearing lakes. The area south of the Alphabet Hills is a major swan concentration area.

Mitigating Measures: In order to maintain trumpeter swan nesting populations at their present levels, the following measures will be implemented:

Roads, pipelines, above-ground wires, and all other permanent facilities would be prohibited within a minimum of one-quarter mile (0.4 km) of documented trumpeter swan nest sites and rearing areas, and possibly within one mile (1.6 km) of nests and rearing areas, depending on the site and the proposed facility.

Surface entry and aircraft overflights at altitudes of less than 1,500 feet (456 m), would be prohibited within one-quarter mile (0.4 km) of documented trumpeter swan nest sites and rearing areas between May 1 and September 1.

22. Issue: The detonation of high explosives near fish habitat has been shown to have detrimental effects on fish.

Mitigating Measures: To protect fish and other aquatic fauna, high explosives would be prohibited within, beneath, and in close proximity to fish-bearing waters unless prior drilling indicates that the waterbody, including its substrate, is solidly frozen. The minimum acceptable offset from fish-bearing waters for various high explosive charges is contained in the appropriate permit.

23. Issue: Threatened or endangered (T&E) species may be discovered after a lease is issued.

Mitigating Measures: The Endangered Species Act would still apply and the lease would have to be modified.

24. Issue: Waterfowl are attracted to waste water areas, such as mud pits, causing their death or injury.

Mitigating Measures: All waste water areas, such as mud pits, would be equipped with flagging, scarecrows, noise-making devices, or other means to prevent waterfowl from landing in these areas.

25. Issue: Dall sheep rely on certain mineral licks.

Mitigating Measures: No activities would be permitted within 1/2 mile of identified sheep licks.

26. Issue: Furbearers may be heavily hunted and trapped in areas of lease activity. People working on the lease would have an unfair advantage over the general public in trapping and hunting in the area.

Mitigating Measures: Leaseholders, their agents, employees, subcontractors, subcontractors' employees, etc., should be prohibited from hunting and trapping within 5 miles of their lease area. Alaska Fish and Game is the enforcement agency.

27. Issue: Exploration and/or development activities may impact subsistence use of resources.

Mitigating Measure: Apply the standard subsistence protection stipulation to ameliorate potential adverse impacts.

APPENDIX
B
GENERAL STIPULATIONS

Department of the Interior
Bureau of Land Management
Anchorage, Alaska

ALASKA UPLAND NONCOMPETITIVE OIL AND GAS LEASING STIPULATIONS ON BUREAU OF LAND MANAGEMENT ADMINISTERED PUBLIC LANDS

The Bureau of Land Management (BLM) operating in accordance with the Federal Land Policy and Management Act of 1976 (FLPMA) and 30 CFR 3100 has the authority to impose conditions or limitations, in addition to those imposed by law.

The stipulations have been developed considering South Central Management Framework Plan Corridor (MFP), and amended, interagency review, public comment, and previous mitigation measures imposed on other Federally or State managed lands within the State of Alaska. Lease stipulations will be enforced throughout the lease term. Included here are general stipulations. Special conditions exist for which a geographically restricted stipulation will be prepared. For example, special stipulations governing surface occupancy will be included in any lease issued within any granted right-of-way.

The following are <u>general</u> stipulations and are to be applied to a lease.

1. Lessee shall not conduct geological, geophysical, and other assessment activities on the leasehold without an Exploration Plan and Permit approved from the District Manager, Bureau of Land Management (BLM, as required by the Alaska National Interest Lands Conservation Act (ANILCA), Section 1008 (b)(1)(B) and (f).

2. Lessee shall not conduct exploratory (excluding geological, geophysical, and other assessment activities which will be permitted under Item 1 above), development or production activity on the leasehold without an Exploration, Development and Production Plan approved by the Deputy Manager, Minerals Management Service (MMS) which is consistent with the requirements of ANILCA, Section 1008 (b)(1)(B), (f), and (g).

3. Prior to undertaking any surface-disturbing activities on the lands covered by this lease, the Lessee, unless notified to the contrary by the District Manager, shall:

   a. Engage the services of a qualified archaeologist acceptable to BLM to conduct an intensive inventory for evidence of cultural resource values;

   b. Submit a report of the inventory acceptable to the District Manager;

c. Implement such mitigation measures as required by the District Manager to preserve or avoid destruction of inventoried cultural resource values. Mitigation may include relocation of proposed facilities, monitoring of surface disturbance, testing, and data recovery or other protective measures. All costs of the inventory and mitigation will be the responsibility of the Lessee or operator, and all data and materials removed will remain under the jurisdiction of the U.S. Government;

d. Cease surface disturbance upon discovery of paleontological or archaeological values or other objects of scientific interest until further work is approved by the District Manager.

4. In any Application for Permit to Drill (APD) submitted under 30 CFR 221, the Lessee shall include a proposed environmental training program for all personnel involved in exploration or development activities (including personnel of the Lessee's contractors and subcontractors). The program shall be reviewed and if adequate, approved by the MMS, after consultation with the BLM.

5. In any application involving geological, geophysical, and other assessment activities, the BLM will determine if the activity would conflict with subsistence use of resources and if these conflicts require special attention, based on information provided by the Lessee. The MMS will make similar determinations for exploration plans and for development and production plans.

a. If conflicts are identified, the Lessee agrees to employ a certified subsistence specialist. Certification will be by the BLM in consultation with the Alaska Department of Fish and Game (ADF&G) Regional Subsistence Council. The Lessee also will provide transportation and accommodations for the specialist to visit the site of potential conflice, inspect the lands and resources involved, and interview subsistence users.

b. The subsistence specialist is required to develop comments and recommendations or alternatives for protection of subsistence resources and to guarantee access to them, consistent with the intent and language of ANILCA, Title VIII. These will be used by the Lessee, as determined appropriate by the BLM in consultaion with the MMS.

6. Permits for geophysical operations, exploration plans, (Drilling Plan as defined in 30 CFR 221.12) and development and production plans will be limited, as follows, in order to protect endangered peregrine falcons (Falco peregrinus anatum, Falco peregrinus tundrius), unless expectations are approved by the MMS following

endorsement by the BLM. Under Section 7 of the Endangered Species Act, consultation would not be required prior to approval of permits for activities consistent with the following:

a. All construction and ground level activity will be prohibited within one mile of peregrine falcon nesting sites from April 15 through August 31.

b. Aircraft shall maintain 1500 feet in height above nest sites when within one mile horizontal distance from nest sites between April 15 and August 31.

c. Drill pads, airstrips, camps roads, pipelines, and similar facilities will not be permitted within one mile of nesting sites.

d. Blasting or other significant construction noise within two miles of nest sites will be prohibited between Apirl 15 and August 31.

e. Alteration of ponds, lakes, wetlands, riparian areas, and other limited, high-quality habitat is not permitted with 15 miles of nest sites.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

SURFACE DISTURBANCE STIPULATIONS

Area Oil and Gas Supervisor or
District Engineer *(Address, include zip code)*

MINERALS MANAGEMENT SERVICE
ONSHORE FIELD OPERATIONS
800 A STREET, SUITE 201
ANCHORAGE, ALASKA 99501

Management Agency *(name)*	Address *(include zip code)*
Bureau of Land Management	ALASKA STATE OFFICE 701 C STREET, BOX 13 ANCHORAGE, AK 99513

1. Notwithstanding any provision of this lease to the contrary, any drilling, construction, or other operation on the leased lands that will disturb the surface thereof or otherwise affect the environment, hereinafter called "surface disturbing operation," conducted by lessee shall be subject, as set forth in this stipulation, to prior approval of such operation by the Area Oil and Gas Supervisor in consultation with appropriate surface management agency and to such reasonable conditions, not inconsistent with the purposes for which this lease is issued, as the Supervisor may require to protect the surface of the leased lands and the environment.

2. Prior to entry upon the land or the disturbance of the surface thereof for drilling or other purposes, lessee shall submit for approval two (2) copies of a map and explanation of the nature of the anticipated activity and surface disturbance to the District Engineer or Area Oil and Gas Supervisor, as appropriate, and will also furnish the appropriate surface management agency named above, with a copy of such map and explanation.

An environmental analysis will be made by the Geological Survey in consultation with the appropriate surface management agency for the purpose of assuring proper protection of the surface, the natural resources, the environment, existing improvements, and for assuring timely reclamation of disturbed lands.

3. Upon completion of said environmental analysis, the District Engineer or Area Oil and Gas Supervisor, as appropriate, shall notify lessee of the conditions, if any, to which the proposed surface disturbing operations will be subject.

Said conditions may relate to any of the following:

(a) Location of drilling or other exploratory or developmental operations or the manner in which they are to be conducted;

(b) Types of vehicles that may be used and areas in which they may be used; and

(c) Manner or location in which improvements such as roads, buildings, pipelines, or other improvements are to be constructed.

SCENIC HIGHWAY STUDY

SEC. 1311. (a) WITHDRAWAL.—Subject to valid existing rights, all public lands within an area, the centerline of which is the centerline of the Parks Highway from the entrance to Denali National Park to the Talkeetna junction which is one hundred and thirty-six miles south of Cantwell, the Denali Highway between Cantwell and Paxson, the Richardson Highway and Edgerton Highway between Paxson and Chitina, and the existing road between Chitina and McCarthy (as those highways and road are depicted on the official maps of the department of transportation of the State of Alaska) and the boundaries of which are parallel to the centerline and one mile distant therefrom on either side, are hereby withdrawn from all forms of entry or appropriation under the mining laws and from operation of the mineral leasing laws of the United States. Nothing in this section shall be construed to preclude minor road realignment, minor road improvement, or the extraction of gravel for such purposes from lands withdrawn or affected by the study mandated herein. 16 USC 3200.

(b) STUDY.—During the three-year period beginning on the date of enactment of this Act, the Secretary shall study the desirability of establishing a Denali Scenic Highway to consist of all or part of the lands described in subsection (a) of this section. In conducting the studies, the Secretary, through a study team which includes representatives of the Secretary of Transportation, the National Park Service, the Bureau of Land Management, the State, and of each Regional Corporation within whose area of operation the lands described in subsection (a) are located, shall consider the scenic and recreational values of the lands withdrawn under this section, the importance of providing protection to those values, the desirability of providing a symbolic and actual physical connection between the national parks in south central Alaska, and the desirability of enhancing the experience of persons traveling between those parks by motor vehicles. Members of the study team who are not Federal employees shall receive from the Secretary per diem (in lieu of expenses) and travel allowances at the rates provided for employees of the Bureau of Indian Affairs in Alaska in grade GS-15.

(c) COOPERATION NOTICE; HEARINGS.—In conducting the studies required by this section, the Secretary shall cooperate with the State and shall consult with each Village Corporation within whose area of operation lands described in this section are located and to the maximum extent practicable with the owner of any lands adjoining the lands described in subsection (a) concerning the desirability of establishing a Denali Scenic Highway. The Secretary, through the National Park Service, shall also give such public notice of the study as he deems appropriate, including at least publication in a newspaper or newspapers having general circulation in the area or areas of the lands described in subsection (a), and shall hold a public hearing or hearings at one or more locations convenient to the areas affected.

(d) REPORT.—Within three years after the date of enactment of this Act, the Secretary shall report to the President the results of the studies carried out pursuant to this section together with his recommendation as to whether the scenic highway studied should be established and, if his recommendation is to establish the scenic highway, the lands described in subsection (a) which should be included therein. Such report shall include the views and recommendations of all members of the study team. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations and those of the Governor of Alaska with respect to creation of the scenic highways, together with maps thereof, a definition of boundaries thereof, an estimate of costs, recommendations on administration, and proposed legislation to create such a scenic highway, if creation of one is recommended.

Presidential recommendations to Congress.

(e) PERIOD OF WITHDRAWAL.—The lands withdrawn under subsection (a) of this section shall remain withdrawn until such time as the Congress acts on the President's recommendation, but not to exceed two years after the recommendation is transmitted to the Congress.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS

323 E. 4TH AVENUE
ANCHORAGE, ALASKA 99501

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 10, 1979

Cook Inlet Region, Inc.
P.O. Drawer 4-N
Anchorage, AK 99509

NOTICE OF STATE OF ALASKA'S
OWNERSHIP OF SUBMERGED LANDS

Pursuant to section 6(m) of the Alaska Statehood Act, 72 Stat. 339, the Submerged Lands Act of 1953, 43 U.S.C. 1301 et seq., and the "equal footing" doctrine, Pollard v. Hagen, 44 U.S. 212 (1845), the State of Alaska holds title to the land under navigable and tidal waters located within the State of Alaska. Such title vested in the State of Alaska upon Alaska's admission as a State to the United States on January 3, 1959; and since that time the United States has had no title, ownership right or interest in submerged lands. In particular, such submerged lands are not "public lands" as that term is defined in section 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(e).

By decision of November 30, 1979, file No. AA-13358, the Chief Adjudicator for the Alaska Office of the Bureau of Land Management has stated his approval for interim conveyance or patent of certain lands pursuant to Section 4(a) of P.L. 94-456. It appears from the adjudicator's decision that the BLM will attempt to convey to you certain lands which may underlie waters which the State of Alaska believes to be navigable. The heavy black lines as outlined on the attached Water Delineation Map indicate those water bodies within the selection area which the State of Alaska believes are navigable; the Water Delineation Maps are identified as Exhibit A, Sheets 1-3.

BE ADVISED that the Bureau of Land Management is without power to convey title to lands under navigable waters. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935). The State of Alaska has the right and the duty to protect its title by all means authorized by law.

This notice is provided to you so that you may be aware of the State's position regarding lands under navigable waters, and protect

your own interests as you deem appropriate. The State's identification by name of certain water bodies as navigable is intended to assist you in protecting your own interests. You are CAUTIONED that the above list of navigable waters may be incomplete. Only a federal court may determine as a final matter whether a particular body of water is navigable or non-navigable. The State's identification of navigable waters in many instances is based on limited data. If additional information should indicate that a water body was navigable at the time Alaska became a state, then the State holds title to the land under that body and has the duty to protect such title. The State's failure to list such water body in this notice is not intended as a waiver or relinquishment of the State's title.

AMOS C. MATHEWS
Director

cc: Curtis V. McVee, State Director
Bureau of Land Management

Ninilchik Natives Association, Inc.
P.O. Box 173
Ninilchik, Alaska 99639

Salamatoff Native Association, Inc.
P.O. Box 2682
Kenai, Alaska 99611

Seldovia Native Association, Inc.
P.O. Box 185
Seldovia, Alaska 99663

Tyonek Native Corporation
445 E. 5th Avenue, Suite 9
Anchorage, AK 99501

Knikatnu, Inc.
P.O. Box 2130
Wasilla, Alaska 99687

Alexander Creek, Inc.
8126 Tri-Lake Road
Anchorage, AK 99502

Chickaloon Moose Creek Native Association, Inc.
2600 Fairbanks Street
Anchorage, AK 99501

6. SLA 1980 Chapter 76: Leasing of State Land to Utility Cooperatives

The commissioner of natural resources is required to lease state land at less than market value to non-profit cooperative associations for telephone or electric transmission and distribution lines. Theoretically, this should lower the retail price to some telephone and electric services by lowering the cost of providing these services.

Effective date: June 13, 1980

WHAT ABOUT NAVIGABILITY?

The Question

In 1959, ownership of the beds of navigable waters and submerged lands was passed to the new State of Alaska. These underwater lands **cannot** be conveyed to Native corporations. The problem is that the ownership was conveyed by declaration, not by identifying **which** specific rivers or lakes were navigable. Now, 20 years later, the question is: **Which** underwater lands does the State own?

The Answer And Why It Matters

If a river or lake is navigable, the land under the water is owned by the State. If it is not navigable those acres of submerged lands within a Native corporation go to the corporation.

Whether such acreage is considered a benefit or a loss by corporations may vary from one to another. In any event, the submerged lands acreage of non-navigable waters are charged as part of the corporation's entitlement.

Definitions

BLM is required to determine which rivers and lakes are navigable within Native selections. It makes its determination on the basis of court decisions defining navigability and all of the information it has about the particular water bodies.

Definitions employed by BLM are drawn from a 1976 memorandum from the Office of the Solicitor. They include (in shortened form):

Navigable Waters: Bodies of water used, or susceptible to being used, in their ordinary condition as highways of commerce.

Highways of Commerce: Usable by commercial vessels that float upon the water; aircraft use does not make the water navigable.

Commercial Vessels: Ferries, barges, or other boats carrying commercial quantities of items. This does not include small flat-bottomed or sport fishing boats.

Susceptibility: Could be used for commerce, even if it hasn't been so used.

Seasonal variations neither fix nor deny navigability determinations. However, physical accessability is necessary to be considered navigable.

Information About the Water Bodies

In determining navigability, BLM initially relied on available information about rivers and lakes and then supplemented that information with field reports on navigability.

To obtain more information about water bodies and whether they might be navigable, the BLM contracted with the Arctic Environmental Information and Data Center to conduct systematic research of written records. This research supplied information about more than 3,000 water bodies. On some water bodies the information is very thin and research and organization of this information continues.

Determination

In its draft decision on easements, BLM determines that bodies of water are navigable or non-navigable on the basis of all the foregoing. Before a final determination is made, BLM takes into account any contrary evidence presented by village or regional corporations or other interested parties.

SOLICITOR ISSUES NAVIGABILITY OPINION

Department of the Interior Regional Solicitor Jack Allen has prepared navigability guidelines for BLM staff as a result of the Alaska Native Claims Appeal Board ruling on the Kandik and Nation Rivers. The ANCAB decision, in Appeal of Doyon, Ltd., ruled the two rivers navigable, reversing BLM's determination of non-navigability.

Allen summarized that, for the most part, the ruling reiterated existing Departmental guidelines on navigability. Where the Board and BLM diverged was on interpretation of the law as it applies to the types of uses that must be considered in navigability determinations.

The Board's decision indicates that BLM needs to consider use by smaller craft, such as outboard river boats and pole boats, if they represent the customary mode of trade or travel on a river. The Board emphasized the importance of local conditions in establishing commercial use and also stated that the Kandik and Nation "may . . . constitute the outside limit of navigation for useful commerce."

Allen also interpreted the ANCAB ruling as meaning BLM must place a stronger emphasis on the *possibility* that a river could be used for commercial travel, as well as on documented historic commercial use. For example, the use of boats for "private" non-commercial purposes such as hunting, recreation and subsistence does not necessarily establish navigability. However, such use may contribute to a finding that the waterbody could be used as a highway for commerce.

Taken in its entirety, Allen advised BLM that the ruling emphasized all factors and considerations must be viewed together to determine whether a given water body is navigable or not. The Kandik and Nation ruling indicates that each navigability case is a factual one, based on use or potential use, not on volume. BLM must evaluate each waterbody within its geographic and factual setting.

Copies of the Solicitor's opinion may be obtained by writing: Bob Arnold, BLM, 701 C Street, Anchorage, AK 99513.

Navigability may determine land ownership

According to the federal Submerged Lands Act of 1953, title to all lands beneath navigable bodies of water belongs to the states. For Alaska, that may involve as many as 16 million acres of land above and beyond the state's upland entitlement to 104.5 million acres under the Statehood Act.

"Not only could this mean additional land for the State of Alaska," explained Ron Swanson, Department of Natural Resources navigability project manager, "but it also means the state may be entitled to submerged lands under waterways which are surrounded by federal lands or those lands under private ownership by Native corporation and others."

In terms of the oil and gas potential, and saleable materials such as river basin gravel, such ownership could be very valuable to the state. It would also mean the state could provide access to most of Alaska's waterways for sportspersons and recreationists.

In order to substantiate its claim to these submerged lands, the state has embarked on a project to document the navigability of the waterways.

"According to the Supreme Court, navigability of a waterway is defined as supporting 'trade, travel or commerce, or susceptibility to those uses, while in its ordinary state, " explained Swanson.

To accomplish this documentation, the Department of Natural Resources' Division of Research and Development has a staff of historians working to gather data which could be used to substantiate navigability of Alaska's waterways.

According to one of the state's historians, Richard O. Stern, there are several ways of gathering the data. "After the geographic area of concern has been determined, we do a published literature search," he said, "looking for both primary and secondary references to uses agreement with the Bureau of Land Management (BLM).

"Working with BLM on a regional basis is helpful in that we can divide up the state for research and avoid duplications," explained Stern. "We don't bother to research in great detail those bodies we (the state and BLM) agree are navigable—like the Yukon River—but, instead, concentrate on those, such as the Gulkana River, where title navigation is in dispute."

BLM's historians go one step further than the state's in their analysis and interpretation of the historical information they gather; they make recommendations to BLM's land conveyance personnel as to the navigability of waterways.

"When BLM conveys the land to the state or a Native corporation, they make the navigability determinations," explained Stern. "But if the state has data which indicate use of a waterway for navigation, and the BLM maps do not show such a determination, DNR recommends to the Attorney General's Office that an appeal be filed on the contested waterway."

This is what has happened in the Gulkana River area where land has been conveyed to Native corporations of the Copper River area.

"Within a month we will be going to court to contest BLM's determination that the Gulkana River is non-navigable," said Swanson. "At the same time, we will be documenting the navigability of the Upper Susitna River; historical uses follow the same pattern in that area as in the Gulkana area."

In the case of the Susitna River, submerged lands in the middle part are now claimed by Cook Inlet Region, Inc., while the state has an uncontested claim on the lower part of the river. "If the plan to put together several types of navigability court actions," he explained, "which cover several types of waterways uses. Then when we go to court, we will be not only settling a particular case, but also setting precedents in terms of court cases for certain types of situations."

"The historical evidence we have to use for substantiation is different in different cases," remarked Stein. "We have few Alaska cases to go by in terms of preparing our case: Due to Alaska's unusual physical characteristics and historical legacy, there are no cases in the Lower 48 to which we can make analogies in preparing our legal and historical cases on navigability."

The pressures for obtaining ju rulings on waterbody navigability w even greater if Alaska lands legisl passes. If it does, the state will ha initiate court actions, on cases invo navigability of waterways on N lands, within five years of the of the transfer of land.

"This will require a much intensive state effort," said Swa "but the background research al scheduled, together with several pl court actions to clarify naviga criteria, will provide a good base fo state's future legal efforts."

ANCSA Profile:

BLM's Navigability Program

The vast majority of land selections made by the state's Natives include some type of water body. Whether it be lake or river, slough, bog pond or marsh, these water bodies must be designated either navigable or non-navigable by the BLM during the land conveyance process. During fiscal year 1981 navigability determinations will need to be made on roughly 7 million acres of Native selected land; state selections will require the agency to review the waters on an additional 34 million acres.

The legal requirement for this work stems, in part, from the 1953 Submerged Lands Act which granted states title to submerged beds of navigable waters. The Alaska Statehood Act entitled Alaska to 103.5 million acres of unreserved federal land, in addition to beds of all unreserved navigable waters, but did not specify which lakes and rivers were navigable. Additionally, the 1971 Alaska Native Claims Settlement Act entitled eligible Native corporations to select 44 million acres of federal land, including the lands under non-navigable water bodies. The BLM, as the federal agency charged with conveyance of available land to the state and the Natives, must make the navigability determinations not spelled out at the time of statehood.

BLM staff, guided by existing law and precedent, research the past and present use and conditions of the water body and arrive at an administrative recommendation of navigability. BLM solicits recorded and verbal testimony from various state agencies, Native corporations and private parties during the case investigation. ANCSA Division staffers gather additional information for the record at village meetings. Before any water body is

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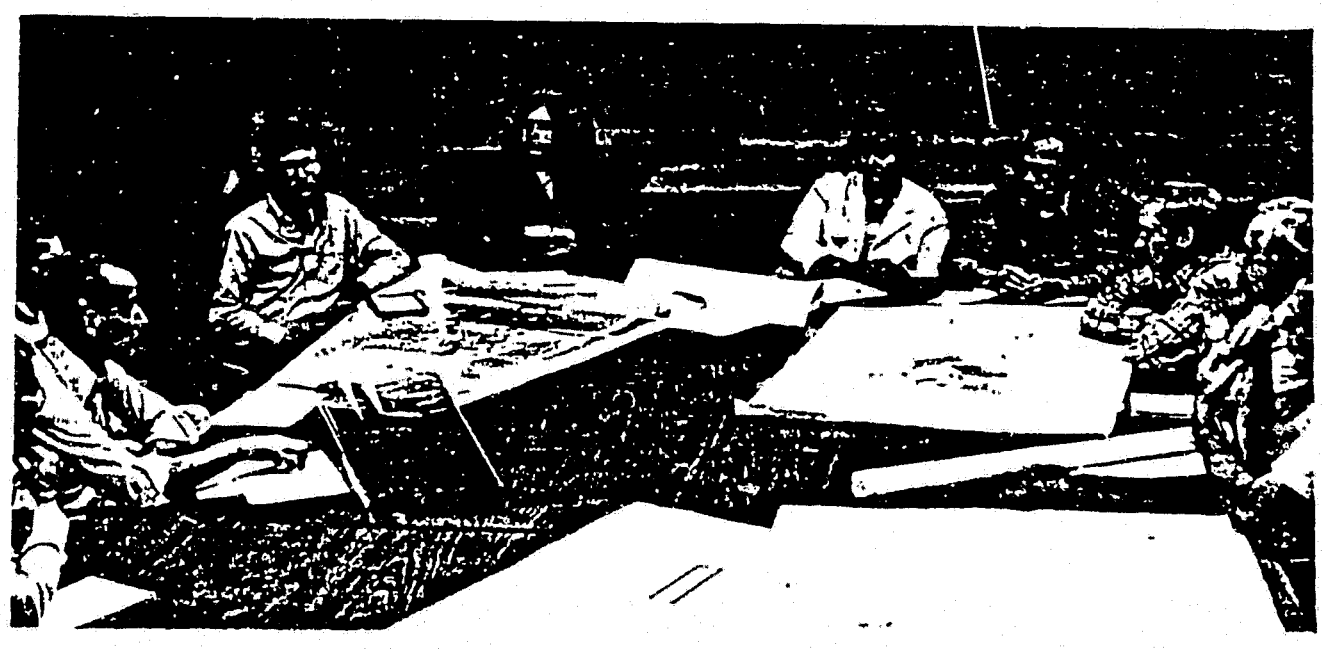
BLM's navigability team in the Division of Resources received commendation from Secretary of the Interior Cecil D. Andrus for their work during the past two years. BLM State Director Curt McVee reads the Secretarial Citation to lead navigability specialist Sherm Berg in the August ceremonies. Also commended were, from left to right, Jo Antonsen-Mohr, Historian; Jules Tileston, Chief, Division of Resources; Liz Jacobsen, Clerk-Typist; Cathy Bolds, Clerk-Typist; and Tammy Beck, Clerk-Typist. To McVee and Berg's right are Alvena Klinefelter, Legal Clerk; Neil Bassett, Natural Resources Supervisor; and, Mike Brown, Historian. During fiscal year 1979 BLM evaluated navigability selections for 131 Native villages, 3 regional corporations and over 4 million acres of state selections. Thus far during 1980, 73 village selections have been reviewed, 13 regional selections and over 11 million acres of state selections.



BLM staff from the Anchorage and Fairbanks District Offices, the ANCSA Division and the Resources Division meet to discuss navigability priorities for the 1981 work schedule. From left to right are Mike Brown, Sherm Berg, Willa Mae Shore, Dave Rupert, Jo Antonsen-Mohr, Carol Shobe, Marty Karsetter, Terry Hassett, Rick Elliott and Jules Tileston. Also attending the meeting but not pictured were Pat Beckley and Art Hosterman.

Navigability

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conveyed to a Native corporation a legal notice is published in the classified section of the state's newspapers and allows 30 days for appeals to the determinations to be filed.

The BLM considers navigability on a case by case and a township by township basis — as land selections require — but has also recently begun a massive reorganization of the task to evaluate entire drainages. In an effort to reach early consensus on navigability determinations, BLM and the Alaska Department of Natural Resources are cooperatively preparing regional navigability reports. Representatives from the two agencies decide upon an area of study then proceed to compile a complete historical record of use for the region that is mutually agreeable. Regions currently under study are the Tanana Basin, the Yukon River and the Kuskokwim Basin. After review by interested parties, including Native corporations, the regional report will become a factual record agreed to by the state and federal governments, Native corporations and interested parties and will become a factual basis for BLM in determining the status of water bodies on Native selections in those areas.

Navigability recommendations are made by the BLM State Office Resources staff as well as navigability specialists in the Fairbanks and Anchorage District Offices. The administrative determination is made by the BLM's State Director, when he signs the Decision to Issue Conveyance. Three staff members in the Anchorage District Office review the case files for the southern half of the state. During 1981 they will be assisted by personnel from the Glennallen, McGrath and Peninsula Resource Areas. The Fairbanks District has a staff of six assigned to navigability work, including a representative each from the northern Resource Areas of Arctic, Kobuk, Yukon and Fortymile. The State Office presently has a staff of three navigability specialists and is recruiting for two more.

Solicitor Advises BLM on Chargeability of Land Beneath Nonnavigable Waters

The Regional Solicitor has determined that Native corporations selecting land which is more than one-half nonnavigable water must be charged for both the dry and wet acreage in that section.

In response to a BLM request for clarification of the regulations, Regional Solicitor Jack Allen qualified this decision by explaining that if a section is more than one-half covered by nonnavigable water, the Native corporations *are not required* to select the section — even though such an omission might violate the requirements of compactness and contiguity. The only situation in which corporations would be required to select sections containing more than one-half nonnavigable water is if the corporation selects all the riparian land surrounding the water body.

If the corporations *choose* to select land that is over one-half nonnavigable water, then they should expect that the wet acreage will be charged against their entitlement. The choice is left to the corporation.

Allen cites the Code of Federal Regulations, Title 43, Section 2650.5-1 which refers to the nonnavigable chargeability and then compares it with Section 2651.4(b) which refers to compactness and contiguity. Allen also refers to a 1978 Federal District Court case, Doyon v. Andrus, where the court rejected an attempt to select less than whole sections.

Allen advised BLM that he does not believe the exemption from compactness and contiguity in a section that is over one-half nonnavigable water applies to the core township. Here, he says, all submerged lands under nonnavigable waters must be selected, conveyed and charged, otherwise Section 12(a)(1) of ANCSA will be violated.

CONDEMNATION

OF

PRIVATE LANDS

GUIDE

CAUTION: This document is not to be used as a legal opinion of the State or its agencies

Prepared by: Bruce R. Bedard
Alaska Power Authority
January 1981

CONDEMNATION OF PRIVATE LANDS

(N) or shall private property be taken for public use without just compensation.[1]

The above quotation from the taking clause of the fifth amendment to the United States Constitution poses, by far, the most significant restraint upon the government's acquisition of property and regulation of land use. The extent to which government (both federal and state) may regulate the use of private property without violating the Constitutional protections afforded the landowner has become increasingly important.

Condemnation is the taking of private property by a governmental body for a public use without owners consent.[2] When the government exercises its power of eminent domain[3] to condemn property, the Constitution requires that the landowner receive just compensation for the property taken. The government through the acquiring agency usually estimates the just compensation owned to the landowner and offers this amount as recompense for the property condemned. If the landowner agrees with the government's estimate of value and accepts the compensation offered, the matter is closed and litigation is averted.

The landowner, however, often refuses to accede to the government's unilateral declaration of value and attempts to seek additional compensation commensurate with the landowner's estimate of fair market value. When the government and the landowner are unable to agree on a value, they resort to the judicial process, and litigation ensues.

The goal of all condemnation litigation is to arrive at a fair and just determination of compensation for the landowner deprived of property as a result of governmental actions. Cost of condemnation are usually comprised of employment of experts, inventory of resources (timber, coal, gas, oil, gold etc.) and valuation of condemned property, estimation of severance damages, pre-trial discovery, trial, and appeal.

The description of state condemnation practice and procedure contained herein is not meant to be exhaustive. Instead, the presentation is directed at the non-lawyer seeking to gain a practical work knowledge of condemnation proceedings.

Each condemnation is unique and has distinct legal and practical problems. The landowner confronting impending condemnation is well-advised to consult an appraiser immediately. Should condemnation occur or even appear probable, the landowner should seek legal counsel to insure adequate representation in obtaining just compensation for the property taken or to be taken.

I.

A OVERVIEW OF

CONDEMNATION OF PRIVATE LAND

A. The Constitution and the Power of Condemnation

The fifth amendment to the Constitution states: "(N) or shall private property be taken for public use, without just compensation." Under the Constitution the United States may not condemn property unless:

1) the condemnation is for a "public use," and
2) the United States pays the landowner "just compensation".

1. Public Use

The term "public use" esentially means "public advantage." Any taking which tends to enlarge the resources, increase the industrial energies, and promote the productive power of the inhabitants of the United States, and which contributes to the general welfare and prosperity of the whole community, is a taking for public use.[4] Although a public benefit must be shown, the entire community or even a considerable portion thereof need not directly benefit for the taking to constitute public use.[5] Public use also has been defined as a use "conducive to community prosperity."[6] Examples of public use to which forestland is devoted when condemned include national parks, national forests, national wildlife refuges, and military reserves. The benefit derived in each instance, of course, may vary.

The definition of "public use" is given a very broad construction by the courts, in order to allow the widest discretion to the federal government. If any possible public benefit can be anticipated, the court will sustain the government's action, even if the landowner alleges that the taking is designed to promote other private interests at the expense of the landowner.[7]

2. Just Compensation

Just compensation has been interpreted to mean the "full and perfect equivalent for the property taken."[8] The landowner must be placed in as good a pecuniary position as if the property had not been condemned.[9] Under the Constitution, an award of just compensation is comprised of three elements. First, the landowner is entitled to the fair market value of the property taken.[10] Second, the landowner should receive compensation for any depreciation in the market value of remaining property not taken,[11] commonly called severance

damages.[12] Third, when the date of taking precedes the date of payment, the landowner should receive such additional amount as will produce the full equivalent of the value of the property, had full payment been made contemporaneously with the taking.[13] This additional amount is known as damages for delay in payment. A brief overview of each element of just compensation follows.

B. Fair Market Value of Property Condemned

1. Definition of Fair Market Value

When a parcel of land is taken for public use by the exercise of the power of eminent domain, the fair market value of the taken property must be determined.[14] It must be borne in mind, however, that "market value" is not an end in itself, but merely a means to an end, the ultimate object being the ascertainment of "just compensation."[15] Federal courts have used the term "market value" interchangeably with the term "fair market value", and there is no reason to suspect any difference in application.[16]

Definitions of what constitutes fair market value have been articulated by a number of appraisal authorities, treatise writers, and federal courts. As defined by the American Institute of Real Estate Appraisers, fair market value consists of:

> (1) . . . the highest price estimated in terms of money which a property will bring if exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.
>
> (2) . . . the price at which a willing seller would sell and a willing buyer would buy, neither being under abnormal pressure.
>
> (3) . . . the price expectable if a reasonable time is allowed to find a purchaser and if both seller and prospective buyer are fully informed.[17]

George Schmutz, author of the Condemnation Appraisal Handbook, defines market value as:

> The highest price estimated in terms of money which the property will bring is exposed for sale in the open market by a seller who is willing but not obliged to buy, both parties having full knowledge of all uses to which it is adapted and for which it is capable of being used.[18]

In defining fair market value in the classic sense, the federal courts have generally ascribed to the basic elements of fair market value described above. The Supreme Court in Brooks-scanlon Corp. v. United States, 265 U.S. 106, 124 (1924), for example, defined fair market value as: "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." The Supreme Court refined this definition in Olson v. United States, 292 U.S. 246, 257 (1934), stating that market value is:

> the sum which, considering all the circumstances, could have been obtained for (the property); that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate, there should be taken into account all consideration that fairly might be brought forward and reasonably be given substantial weight in such bargaining.[19]

In synthesizing the above definitions, it should be remembered that fair market value essentially is based on reasonable assumptions supported by actual market behavior. For example, when valuing a large tract of timberland it is perfectly valid to assume that the property could be offered for sale on the date of valuation in several parcels or units and sold to one or more buyers.[20] A party, however, need not identify a particular potential buyer or buyers or show that the property owner is in fact willing to sell.[21] Fair market value is nothing more than a benchmark used by the courts to award just compensation for condemned property.[22]

2. Highest and Best Use

Fundamental to the concept of fair market value is the theory of highest and best use, also called highest, best and most profitable use. According to one commentator:

> "All fair market value estimates proceed from the vital question of the highest and best use of the property . . . . Whatever the case may be, no determination of fair market value can be made without a finding of the highest and best use since the two concepts are inseparable.[23]"

The Appraisal Terminology and Handbook published by the American Institute of Real Estate Appraisers defines highest and best use as:

> "the most profitable likely use to which a property can be put . . . . (S)uch use may be based on the highest and more profitable continuous use to which the property is adapted and needed, or likely to be in demand in the reasonably near future.[24]"

This definition is essentially reiterated in a subsequent publication by the Institute:

> that (use) which at the time of appraisal is the most profitable likely use of a property . . . . (T)hat available use and program of future utilization which produces the highest present land value.[25]

Federal cases giving precise definitions of highest and best use have not been abundant. In Olson v. United States, 292 U.S. 246, 255 (1943), the Supreme Court commented:

> "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

Another federal court has reiterated this definition, stating that highest and best use must contemplate:

> a present existing use or one reasonably likely to take place in the near future, whereby availability of this future use would have affected the market price.[26]

3. Appraisal Methodologies

There are several generally recognized methods for estimating fair market value: prior sales approach, comparable sales approach, income approach, and cost approach.

a. Prior Sales Approach

Prior sales of the same property, reasonably recent and not forced, can sometimes be the best evidence of market value. The primary problem with using the prior sales method, however, is the normal lack of proximity in time between the prior sale date and the date of valuation. The Supreme Court has held that original cost to the condemnee is a "false standard of the past" when current market value in no way reflects that cost.[27] Generally, the question of remoteness between the time of the prior sale and the date of valuation goes to weight, rather than admissibility of the valuation evidence.[28] Courts generally hesitate to rely upon prior sales as the exclusive basis of their determinations of current market value.

b. Comparable Sales Approach

The most commonly used method of appraisal is the comparison of sales of similar property with the property being condemned, commonly known as the comparable sales or the market

data approach. Courts favor this appraisal methodology -- "(O)rdinarily, if there are sales of comparable property at or near the time the condemned property is taken, evidence in regard to such sales would be more appropriate than any other method in determining the market value of the property taken."[29] Opinions of value based on comparable sales and on the general familiarity of the expert witness with property values in a given area are the most reliable bases of market value.[30]

c. Income Approach

The income approach estimates the present worth of future benefits to be derived from a property, as measured by the net income which a fully informed person is warranted in assuming the property will produce.[31] This methodology has its greatest usefulness in the valuation of income-producing property, since such property usually is purchased in expectation of a reasonable return.[32]

Values estimated by the income approach, however, normally are disfavored where adequate comparable sales evidence exists.[33] But where no evidence of comparable sales is available, the income approach may be accepted as the next best valuation method.[34]

d. Cost Approach

The cost approach, technically speaking, determines a property's overall value by adding to the value of the bare land the depreciated reproduction or replacement costs of improvements currently on that land. The cost approach method of valuation is usually allowed only when the property involved is so unique as to take it outside the general appraisal rules.[35]

By reason of its very nature, land cannot be appraised by strict application of all of the above-described methods. Moreover, to fit the needs of the subject matter, variations on the above general valuation approaches have been developed. For example, the merchantable resource component on a condemned tract may be valued by a conversion return analysis. The specific applicability of these standard valuation methods to the appraisal of resources, as well as modifications and variations thereof, are discussed later in this written material.

C. Severance Damages

There exists an additional element of just compensation when only a portion of the landowner's property is acquired (hereinafter referred to as a "partial taking") and the taking results in a diminution of the fair market value of the remainder property. In such instances,

the owner is entitled to payment for any diminution in fair market value of the remainder property; this compensation is termed severance damages.[36] Severance damages are measured as of the date of the partial taking, considering any information or data upon which a prospective purchaser and seller of the remainder property would have relied at that date.[37]

Several fundamental prerequisites must be satisfied before a court will award severance damages in a partial taking case. These prerequisites include the following:

1. The landowner must demonstrate that a definite relationship exists between the property taken and the remainder. That is to say, the landowner must show that the whole property constituted an optimum economic unit before the taking. Although some courts have been unwilling to assess damages for property which is not physically contiguous with the part condemned, more recent decisions have held that integrated use, not physical contiguity, is the standard by which a court will determine whether land condemned is part of a single, integrated tract warranting consideration of severance damages.[38]

2. The landowner must show that there has been a reduction in value to the remainder property and that the reduction is a direct result of the partial taking and/or the proposed use of the part acquired.[39]

3. The remainder property for which damages may be recovered must usually be real property. For example, the courts have consistently held that special damage due to loss of business is not a compensable element of severance damages.[40]

At least three methods have been used to estimate severance damages: (1) the "before and after" valuation; (2) the "modified before and after" valuation; and (3) the modified modified" valuation. These three appraisal methods will be discussed in more detail later.

D. Damages for Delay in Payment

As stated previously, just compensation has been defined as "the full and perfect equivalent for the property taken"[41] and represents an attempt to place the landowner in as good a position as the landowner would have been had the property not been taken.[42] When the date of taking precedes the date of payment, the owner is entitled to receive an additional amount that will produce the full equivalent of the value of the property, had payment been made contemporaneously with the taking.[43] Awards for this element of just compensation have been referred to as "interest." Such characterization, however, is a mistake, since this additional amount is awarded to the landowner to compensate for damages due to delay in payment and is not interest as such.[44]

As an element of just compensation, damages for delay in payment can be extremely important to the landowner, especially in instances where the judicial award for the value of the taken property (plus severance damages) is significantly greater than the government's initial deposit and when the delay period from the date of taking to the date of award is long. Given the current unsettled state of the law relating to the measure of such damages, however, the landowner is less likely to become as involved in this area of the litigation as compared to the determination of fair market value of the taken property and the appraisal of severance damages. Therefore, the various legal issues concerning damages for delay in payment will be treated in fairly summary fashion herein.

The first issue generally confronted relates to the government's usual attempt to have the court adopt, without any consideration of existing realities, the rate of "interest" found in the pertinent legislation passed by Congress authorizing the condemnation. For example, the Declaration of Taking Act, 40 U.S.C. * 258a (1976), as well as the original Redwood National Park Act, cited previously in this written presentation, employs a six percent figure. Recognizing that the determination of just compensation (and therefore, damages for delay in payment) is a judicial function and not a legislative one, federal courts have found that the six percent rate of interest appropriate for computing damages for delay in payment of just compensation.[45] Rather, it serves as a floor.[46] Indeed, one court stated that, "we strongly suspect that in this case the use of 6 percent is barred by the Fifth Amendment."[47] Faced with continuing judicial opposition to its repeated efforts to understate damages for delay in payment by use of statutory rates, one would expect (albeit optimistically) that the government would stop using this argument. The landowner, however, should expect the government to argue this erroneous theory in every case, even though it has been discredited as lacking in legal (and common) sense.

Once the initial hurdle discussed above has been overcome, the question of how damages for delay in payment are to be measured remains. Again, the government in recent years has made the unrealistic argument that rates for a government obligation covering the period of delay should be the sole determinant of the measure of damages. This argument also has been found to be without merit, although one court has required the trier of fact to "consider" government obligations along with other indicators of the financial climate.[48] Courts have reviewed performance of various debt instruments, including certain certificates of deposit and bond rates, plus levels of the prime rate in arriving at interest rates substantially above those espoused by the government.[49] The United States Court of Claims has taken the additional step of indicating its desire to adopt standard rates for given periods of time for use in determining damages for delay in payment in just compensation cases, this rate to be used regardless of the evidence presented by the landowner.[50]

As mentioned previously, the rates adopted by the various courts are not "interest" as such. Notwithstanding this fact, courts generally have used the adopted rates in a simple rather than a compound manner, based on the premise that compound interest cannot be allowed against the government. This, in itself, precludes the landowner from being placed in the same position as if full payment had been made on the date of taking.

To summarize, a landowner-condemnee is legally entitled to just compensation which includes the fair market value of the condemned property, severance damages to the remainder property, and damages for delay in payment. The remainder of this presentation traces the stages in a condemnation lawsuit from the formal condemnation to the final award of just compensation to the landowner. The discussion focuses on factual and legal issues that might arise and the role of the landowner in condemnation proceedings.

II.

THE CONDEMNATION

The United States may take property pursuant to its power of eminent domain in three ways. First, Congress may pass a statute legislatively taking property (called a "legislative taking"). Second, Congress by law may authorize an agency to condemn property. The administrative agency then may proceed under specific statutes allowing for immediate acquisition of title and possession prior to ascertainment of just compensation, usually the Declaration of Taking Act, 40 U.S.C. * 258a. Under this procedure, the agency must file with the court a declaration of taking and a deposit of the estimated just compensation. On the other hand, the agency may file with the court a complaint in condemnation whereby the property remains with the landowner until the court determines and the United States pays just compensation to the landowner. Third, the United States can acquire physical possession of property without authority of a court order,[51] or engage in an action or activities which deprive the landowner of the full and beneficial use of the property.[52] In this last type of taking, known as "inverse condemnation," no condemnation proceedings are instituted by the government, and the landowner must take the initiative and sue the government for just compensation.

A. Legislative Taking

Congress may, if it so chooses, enact a statute condemning property on a specific date. Upon enactment, the property is taken and the date of valuation is set. A legislative taking of this nature might identify the particular court where the landowner must litigate the question of just compensation. For example, by the Redwood

National Park Act, the United State acquired all right, title and interest in, and the right to immediate possession of, thousands of acres of redwood forestland as of October 2, 1968.[53] In that instance, Congress required the landowner to bring an action for just compensation in the United States Court of Claims. This Act was amended on March 27, 1978, when the United States acquired additional redwood forestland by legislative taking.[54] On this occasion, the landowner was directed to bring suit in the United States District Court for the district where the property was located. In addition, the government was given the alternative of initiating suit.

B. Statutory Authorization to Condemn

Rather than taking the property itself, Congress may authorize a federal agency to take the property. In carrying out the congressional direction to condemn, the agency has available to it several means.

1. Declaration of Taking

The filing of a declaration of taking is a common method by which the federal government condemns land. Under the Declaration of Taking Act (40 U.S.C. * 258a), the United States may file a formal declaration of taking signed by the authority empowered by law to acquire the subject lands. The declaration must contain:

a) a statement of the authority under which the lands are taken and the public use intended,

b) a description or identification of the lands,

c) a statement of the estate or interest taken in the lands,

d) a plan showing the condemned lands, and

e) a statement of the estimated just compensation for the property taken.

Upon filing the declaration of taking with the court, the agency must also deposit in the court's registry the estimated compensation recited in the declaration. When this is done, the United States may obtain immediate title to and possession of the property. Besides granting title and possession to the government, the Declaration of Taking Act relieves the government of the burden of paying damages for delay in payment on the amount deposited. The Declaration of Taking Act also gives "the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property."[55]

Naturally, the deposit by the government does not always compensate the landowner fully for the property; if the final judgment exceeds the amount deposited, the land owner is entitled to the excess with damages for delay in payment. An example of the discrepancy that might exist between the amount deposited and the true value of the condemned property appears in the case of United States v. United States National Bank of Oregon and Klamath Tribe, Civ. No. 74-894 (D. Ore., filed November 15, 1974). In that case, the United States filed a declaration of taking on November 15, 1974, to gain title and possession to approximately 135,000 acres of timberland in Oregon. The government deposited only $49,000,000 for nearly a billion board feet of ponderosa pine, lodgepole pine, sugar pine and white fir. The final judgment in this case totalled $130,540,000. Of this amount, $103,000,000 was attributable to the fair market value of the condemned property, with the remaining $27,540,000 constituting damages for delay in payment.

The courts are divided as to whether a landowner may contest the adequacy of the deposit of just compensation and thus the validity of the declaration of taking. One court has held that the amount of deposit is a matter of administrative discretion and not subject to judicial review unless the landowner asserts that the condemning authority acted in an "arbitrary or wanton" manner.[56] In United States v. 45.33 Acres of Land, 266 F.2d 741 (4th Cir. 1959), the government deposited $1.00 in the registry of the court. The landowner submitted evidence that he had been offered $180,000 by a prospective buyer. Although the court gave the United States adequate opportunity to present evidence to the effect that the $1.00 deposit was made in good faith, the government failed to offer such testimony and gave no assurance to the court that the matter could ever be heard and decided. The court thereupon dismissed the condemnation case and ordered the government to surrender possession of the property to the landowner. On appeal, the United States Court of Appeals for the Fourth Circuit stressed that,

> We do not find it necessary to review the authorities nor to consider whether the District Court possessed the power to inquire into the sufficiency of the deposit nor to determine the issue of good faith.[57]

Nevertheless the Court of Appeals affirmed the district court's dismissal of the condemnation case "for failure to properly prosecute and in the interest of the orderly conduct of court procedure."[58] The net result was that the government's apparent bad faith in its deposit of $1.00 resulted in a dismissal of the condemnation.[59]

Pursuant to Section 301 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1984 (1971), Congress has established a uniform policy regarding the federal acquisition of real property. The statute states that the acquiring agency proceeding under a declaration of taking should deposit with the court "an amount not less than the agency's approved appraisal of the fair market value" of the condemned property. Although the Act creates "no rights or liabilities" for the landowner,[60] the acquiring agency is "required to furnish the owner with a written statement of the basis for the amount established as a just compensation and a summary of that basis."[61] Despite these statutory requirements, the government often has no "approved appraisal" at the time the declaration of taking is filed and rarely will it provide the landowner with the basis for the estimated deposit.

Once the United States files a declaration of taking and deposits its estimated just compensation, the government is "irrevocably bound" to pay the final award of just compensation, whether or not Congress has authorized appropriation of monies sufficient to cover actual cost of the condemned property.[62] Title in the property having vested upon the filing of a declaration of taking, the government cannot abandon the condemnation without paying the landowner the final award of just compensation.[63]

Rather than resorting to the general provisions of the Declaration of Taking Act, the government can condemn property and obtain immediate possession prior to a determination of just compensation by proceeding under specific statutes expressly authorizing such possession. Statutes of this sort, however, are infrequently used and are not of general applicability. Among the more commonly encountered are Section 5 of the Rivers & Harbors Act of 1918, 40 Stat. 911, codified at 33 U.S.C. * 594 (1976) (available only to the Secretary of the Army for certain civil works projects) and Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177 (available to the Secretaries of War and Navy for military purposes in times of war and national emergency). In 1971 Congress went on record favoring grants of possession prior to judicial determination of just compensation only when the Declaration of Taking Act is followed:

> No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.[64]

2. Complaint in Condemnation

An agency can also initiate proceedings to acquire property by filing a complaint in condemnation. In the complaint, the condemning authority identifies the tract in question and requests the court to determine just compensation owing to the landowner. Unlike a declaration of taking, the filing of a complaint in condemnation requires no deposit and the United States therefore cannot obtain title and possession to the property until the court has determined and awarded just compensation. For purposes of determining fair market value, the property is valued as of the date of trial or as close thereto as possible.[65] Since title and right to possession does not vest in the United States upon mere filing of a complaint in condemnation, the government does not become irrevocably bound to take the property and pay the just compensation awarded by the court.[66] The government may withdraw its complaint at any time without being required to take the property.[67] The government normally obtains title and the right to possession of the property at issue only when it pays the landowner the final judgment awarded by the court.

Controversy exists regarding the question of whether the United States may acquire the right to immediate possession merely by filing a complaint without depositing in the court's registry an estimate of just compensation for the condemned tract. On the one hand, more recent cases indicate that possession may be granted to the United States prior to determination and payment of just compensation only when the Declaration of Taking Act is followed or when Congress expressly has authorized immediate possession.[68] Yet, older decisions indicate that immediate possession may be granted the government without the necessity of a deposit of estimated just compensation.[69]

If the United States were allowed to condemn land by filing a complaint in condemnation and a motion to obtain immediate possession, without depositing in the court's registry the estimated just compensation, the government would be able to acquire the use and benefit of resources without paying for them. Needless to say, the effect on the landowner would be devastating.

C. Inverse Condemnation

The United States may also take property without the authority of a court order. Such a taking is known as "inverse condemnation." In an inverse condemnation, the landowner initiates the court proceeding by filing a complaint alleging that the United States or agents of the government in their official capacity through various actions have acquired the property by depriving the owner of the full and beneficial use of the land.

A lawsuit in inverse condemnation has several practical implications for the landowner in the litigation of the case. For example, if the landowner seeks compensation in excess of $10,000, the action can be brought only in the United States Court of Claims. If the compensation sought is $10,000 or less, the landowner may choose to file a claim either in the federal district court where the land is found or in the Court of Claims. Other practical implications of inverse condemnation actions will be discussed in greater detail below.

The first major issue in an inverse condemnation action is whether there has been a "taking" that is compensable under the fifth amendment of the Constitution. An inverse taking can occur with or without actual physical intrusion on the landowner's property by the government.

1. Inverse Condemnation by Physical Intrusion

By entering into physical possession without authority of a court order, the United States is liable for inverse condemnation.[70] A physical invasion of property includes not only appropriation and confiscation, but also physical interference with the owner's use and enjoyment of the -- property. The government might physically intrude on property, yet never assert that it intended to appropriate the land. Where physical invasion is present, no showing of an intent to acquire on the part of the government is necessary provided the consequences of the actions which resulted in the taking are reasonably foreseeable.[71]

2. Inverse Condemnation without Physical Intrusion

An inverse taking need not include a physical intrusion. Various governmental actions, short of occupying the property, can constitute an inverse condemnation, although such takings are much harder to prove than physical takings. Courts have held that a landowner alleging inverse condemnation without physical intrusion must prove two elements in order to recover:

a) that the government had the specific intent to acquire the land, and

b) that the land has substantially diminished in value as a result of the government's actions.

a. Intent to Acquire

As a general rule, the mere threat of a taking is insufficient to establish inverse condemnation. The government's actions must go beyond preliminary statements and investigations and clearly evidence an intent to acquire the property in question.[72]

Federal acquisition of the property must have been expressly authorized or directed by Congress or the taking must at least be the natural consequence of congressionally approved measures.[73] For example, an intent to acquire may be manifested by formal condemnation legislation, depending upon the language of the statute.[74]

b. Substantial Diminution in Value

Besides proving intent to acquire, the landowner must show that the property at issue has significantly diminished in value as a result of the government's actions.[75] This is most readily established when use of the property and/or its marketability is substantially impaired. A good example is the case of Drakes Bay Land Co. v. United States, 191 Ct. Cl. 389, 424 F.2d 574 (1970). The property involved in Drakes Bay lay within the area designated by Congress for inclusion in the Point Reyes National Seashore in California. The aggrieved landowner had the specific intention of subdividing the property for residential purposes. The landowner was precluded from proceeding with subdivision by the government's acquisition of adjacent land which was necessary for a county standard access road. Upon thwarting the landowner's subdivision plans through blockage of access, the United States delayed further dealings with the landowner, as the property's status was frozen. The Court of Claims characterized the landowner's predicament as follows:

> Thus plaintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation of Seashore realty. The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure.[76]

III.

FAIR MARKET VALUE APPRAISAL

OF CONDEMNED PROPERTY

A. The Cruise

Clearly one of the most important steps in valuing property is to determine the volume of resources involved. Field (and office) work associated with this task may, in the case of large land

tracts, require several years to complete. Because of the many technical complexities involved, perhaps in no other area is proper coordination of attorney and expert more essential.

This discussion is not meant to provide a listing of every potential controversy related to cruising. Suffice it to say that any step in the process, from selection and training of cruisers to discussions found within the formal inventory report, may be called into question by the opposition. The trier of fact, most likely because of a lack of technical expertise, often finds it extremely difficult to determine which party's inventory is more acceptable. As one judge recently stated:

> The record establishes that crusing lands is not an exact science. Two different cruises of the same land often produce different results. Yet, each cruise result may in and of itself be acceptable for a given purpose.[77]

It is therefore imperative that the inventory process be conducted with a view towards litigation. This is not to mean that the answers should be skewed in favor of the party employing the expert to cruise the property. Rather, special steps must be taken to insure that the trier of fact understands the procedures followed and finds the work to be entirely reasonable.

Initial cruise specifications must be formulated with existing market standards in mind, so that the trier of fact will find the results an indicator of how the market would view the condemned property at the date of taking. Sampling techniques should be chosen (and checked) so that final volumes cannot be questioned on the basis of inadequate data. Training programs must be instituted (and fully documented), if necessary, to demonstrate to the trier of fact that field measurements are taken by qualified personnel and are not biased. The choice and use of volume tables must be shown to be reasonable. Finally, certain check cruising work, otherwise unnecessary, may have to be accomplished merely because the work is being conducted for litigation.

There are two general ideas to convey concerning inventory work conducted for use in condemnation litigation. First, the expert cruiser should recognize that the biggest hurdle is one of education--education first of the attorney representing the expert's client and, second, of the judicial trier of fact. This is not to say that technical correctness should be sacrificed but merely to point out that the "most valid" cruise possible, from a technical standpoint, is of little use in the courtroom if explained in such a manner that the trier of fact cannot fully understand what procedures were used. The expert must be prepared to patiently explain the methods adopted in layman's terms on a ste-by-step basis. No prior knowledge on the part of the trier of fact should be assumed.

Second, the importance of extremely accurate and full recordkeeping cannot be overemphasized. Since the trier of fact may not desire to become entangled in technical arguments concerning numerous cruising techniques and procedures, the ultimate decision with respect to volume may well turn on "appearances." Again, technical expertise cannot be ignored, but instead must be augmented by a cruise conducted with the knowledge that a non-expert must determine its validity at trial. Therefore, neat, accurate, and full record-keeping on all aspects of the inventory work is essential. Nothing so harms the credibility of an expert at trial than for the opposition to demonstrate a continuing appearance of sloppiness, erroneous mathematics or judgment, even if such negative "appearances" occur in areas of little consequence to the final answer.

Because of the complexities involved, many time parties are not certain how a trier of fact will review the inventory work performed on their behalf. Added to this feeling of uncertainty is the dearth of judicial precedent in this area to guide the trier of fact. These two factors combine to create, in certain situations, a climate where a fair settlement can be accomplished prior to trial. If such a situation arises, the cruiser/expert will undoubtedly be asked to perform certain studies, e.g., a demonstration of the effects on volume determinations of various methods or procedures adopted by other cruises to determine the underlying reasons for final volume discrepancies between the parties.

B. The Appraisal

Estimation of the fair market value of a property can represent an extremely complex and multifaceted undertaking, especially if the property is large. Numerous investigations and studies must be performed by the appraiser. Regardless of the particular method of appraisal or approach to value utilized, certain general guidelines should be kept in mind during the course of collecting appraisal data, the first and perhaps most essential stage of the appraisal process.

As part of the necessary field work, the appraiser should view the condemned tract and the surrounding market area in order to gain a personal understanding of the various factors affecting fair market value of the particular tract of land being appraised.

> (T)he essential elements of the real estate expert's competency include his knowledge of the property and of the real estate market in which it is situated, as well as his evaluating skill and experience as an appraiser.[78]

The trier of fact is less likely to adopt an expert's valuation opinion if the appraiser has not personally inspected the property at issue and its relevant market area. Indeed, "(f)or a witness to give his opinion on market value of land, it must appear that he has actual personal knowledge of the facts affecting the land at the time of taking."[79]

As stressed earlier in this presentation, it is important that there be proper documentation of all work performed and data collected. In appraising the taken property, the appraiser must assemble valuation data from personal field work, formal and informal interviews, published and unpublished records of buyers and sellers of resources and land, and other miscellaneous sources. Information collected should be retained for later reference and use, and should be properly identified and dated. Since certain types of data or information can be difficult to obtain, when information of this nature is collected, it should be checked or verified to the greatest extent possible to insure reliability. In instances where basic data is obtained through an intermediary, that basic data should be verified or corroborated with the original source wherever possible.

In addition to general procedural guidelines such as those set forth above, the appraiser should be aware of a vast array of potential legal pitfalls. Whether a certain legal structure applies in a particular case often depends upon the approach to value utilized by the appraiser. Earlier in this presentation, a brief summary of appraisal methodologies was set out. In the following discussion, these methods or approaches to value will be discussed in greater detail within the context of the appraisal of land.

1. Prior Sales Approach

   Seldom, if ever, will prior sales of the same property (that is, the property being appraised) be a relevant consideration. Large land transactions are infrequent at best; a prior sale of a large condemned property at a reasonably proximate date is rare. If there does happen to be a prior sale of the property being appraised, it is of use to the appraiser only if that sale transaction can fairly be characterized as recent. With the ever increasing appreciation in the value of resources and of land, the appraiser should exercise extreme caution before placing reliance upon a prior sale of the property at issue. Moreover, if there is a recent prior sale, the appraiser should be satisfied that the property as of the date of valuation is in substantially the same condition as at the time of the prior sale.

2. Comparable Sales Approach

   As with appraisals of most types of property, the comparable sales approach to value is frequently used to estimate the fair market value of lands in condemnation lawsuits. However, as noted above, actual fee sales of large tracts of land do not abound. Therefore, sales that are directly comparable in a given instance may be non-existent. To adjust for this dearth of data, the comparable sales approach is modified so as to make use of the information that does exist.

One of the more common modifications consists of appraising the resources on the property separate from the land itself (including premerchantable stocking). Thus, in appraising the merchantable resource component, the appraiser relies upon one set of sales and in appraising the land he utilities a separate set of sales of fee.

In following this modified approach, the appraiser must be careful not to transgress the so-called "unit rule" to the extent that doctrine may still be applicable in the jurisdiction involved. The unit rule basically is two-pronged. First, it disallows evidence of total property value arrived at by addition of separate values for merchantable resources and for land. Second, it disallows evidence of resource value arrived at by applying a praticular price per unit to a given quantity of resources.[80] Fortunately, the unit rule is of lesser importance with each passing year. If an evidentiary foundation is laid establishing the existence of a market, the going price on the market, and the foreseeability of the future of that market. Obviously, in the case of almost all resources in the United States, these facts can be readily established.[81]

The selection of comparable sales by the appraiser requires thoughtful analysis and often considerable field work. To guard against charges that the expert was biased in choosing comparable sales or failed to consider particular sales, the appraiser should evolve guidelines for selecting sales used in appraising the property at issue These guidelines should be soundly based, both factually and legally. The guidelines for selection might include: time interval between sale date and date of valuation, geographic market area, species composition, resource quality, extraction conditions, and volume merchantable resources involved. Sales having certain identifiable characteristics should be rejected where at all possible -- for example, forced sales, sales involving a buyer who has the power of condemnation, and sales occurring well after the date of valuation.[82] Sales might also be rejected because of competitive restrictions which result in less than full market exposure.

3. Income Approach

The income approach, or as sometimes now called, the cash flow approach, to the appraisal of land is a particularly difficult method to implement. In order to arrive at an estimate of fair market value, a number of significant assumptions must be made by the appraiser. Sould any of these assumptions prove unreasonable or not be soundly based, the estimated value will be of little, if any, use.

By this method, the appraiser projects the gross revenue which he assumes will be generated from the subject land each year over a presumed time period or liquidation period. Thus, at the outset, a unit resource value is necessary. As a result, if the income approach is used, it must be used in conjunction with a comparable sales approach for resources or with a conversion return analysis. Moreover, assumptions must then be made to determine the amount of appreciation, if any, in resource values over the presumed time period or liquidation period. Next, the appraiser must deduct for each year of the income analysis, estimated costs to be incurred in generating the income. Last, the resulting net income, or resulting net cash flow during the liquidation period, must be discounted or capitalized to the date of valuation. Needless to say, choice of a discount or a capitalization rate is extremely important and has a profound effect upon the estimate of value arrived at by this approach.

Recognizing the numerous assumptions and variables which comprise an income or cash flow appraisal approach, it is not surprising that this appraisal methodology has sometimes received harsh treatment at the hands of the courts. One court, concerned with the valuation of coal deposits, noted with regard to a discounted cash flow analysis that it "takes on the spectre of a syllogism, if the premises fail the entire agrument fails.[83] Another court commented as follows:

> The estimates of future values and costs (which resulted in an estimate of present value) were based upon certain premises, assumptions, and contingencies and upon possible variables and alternatives of each, with respect to the viability of which expert witnesses are prone to disagree. All that the evidence related to development cost analysis indicated was that a particular purchaser might be willing to pay a price equal to the "mean" if he relied upon a particular interfusion of assumptions and future projections. But fair market value is not the theoretical price a particular purchaser might be willing to pay. Rather, fair market value "is" the present actual value of the land with all its adaptations to general and special uses, and not its prospective, speculative or possible value based on future expenditures and improvements, that is to be considered.[84]

The income approach, in essence, seeks to predict the reasoning of a prospective purchaser. To be valid, it must predict the reasoning of the most likely prospective purchaser, as well as the seller, in arriving at the purchase price that will be paid. Thus, it is necessary for the appraiser to take account of the full spectrum of factors influencing the most likely prospective purchaser and the seller.[85] Many of these considerations or factors are extremely subjective and are of

greater or lesser importance depending upon the particular property being appraised and the entity identified as the most likely prospective purchaser. These factors are incapable of refinement for purposes of inclusion in a mathematical appraisal process. If they are to be expresses at all in an income or cash flow approach appraisal, they must be reflected in the discount or capitalization rate, which in turn then must be based upon such rates as indicated by actual market transactions, not assumptions. The common failure of this appraisal approach to consider these subjective factors was brough to light in United States v. 103.38 Acres of Land:

> (I)t simply is not accurate to assert that mineral tracts have no value except upon actual severance or mining. Coal properties historically have been bought and sold in (the market area) for future reserves for valuable consideration where there was no intent to engage in immediate mining operations.[86]

Similarly, private forestland, particularly a large tract, represents an assured supply of timber to a potential purchaser and may thus command a special value or premium.

In view of the above-described difficulties and inherent shortcomings, use of the income approach in appraising lands is disfavored when adequate comparable sales evidence exists.

4. Cost Approach

Precisely defined, the cost approach is not applicable to the appraisal of resource land. Nevertheless, the cost approach by reason of its summation nature is sometimes used to describe an appraisal process whereby the resource component is appraised separately from the land itself. In such an instance, the resource component can be valued by looking to comparable sales of resources or by conversion return analysis.

5. Conversion Return

In those instances where the appraiser approaches the appraisal problem by separating the resource component from the land itself, resource value may be appraised by use of a conversion return analysis. Such an approach traditionally estimates the gross revenue from converting merchantable resources into various end products. From this amount there is then deducted the amount of operation and manufacturing costs and certain other expenses to arrive at what is called the conversion return. This amount represents an indicated worth to the purchaser of the resource being appraised as well as a recognition of profit and risk to the operator. When the allowance for profit and risk is subtracted, the remainder represents the value of the resource. This "work back" method requires complete and reliable data.

There is very little case law dealing with use of the conversion return approach. What little there is suggests that the conversion return approach must be carefully employed in that wherever possible it should be based on a wide array of data.[87] However, since the most likely prospective purchaser would be the entity which can afford to pay and is willing to pay the highest price for the property, a strong argument can be made that the data used for a conversion return analysis should be drawn where at all possible from the most efficient operators in the market area.

Whenever the value of the merchantable resource component of a large tract of land is appraised by use of the conversion return analysis or by reliance upon transactions of substantially smaller resource volume than existent on the property being appraised, the question of discount arises. Discount in this instance refers to a reduction in value due to the quantity of merchantable resources being appraised or stated another way, it refers to time in the sense that the volume of merchantable resources being appraised cannot be liquidated within a period of one year or less.[88] The applicability of discount should be considered by the appraiser on a case-by-case basis. That is, the appraiser should not blindly follow a set pattern, but should take account of the facts and circumstances present in the marketplace on the particular date of valuation. Generally speaking, with the scarcity of resources and the expectation of heavily increased demand and of rising prices in the future, discount is evidenced in the marketplace in actual transactions less frequently than ever before. In fact, certain transactions that have occurred in the 1970's would indicate that the appraiser should consider the flip side of discount -- payment of premium above retail levels for large tracts of land.

IV.

SEVERANCE DAMAGES ANALYSIS

In addition to the appraisal of the fair market value of the condemned property, the appraiser may be asked to estimate severance damages resulting from the condemnation of a portion of the landowner's property. As an element of just compensation, the concept of severance damages derives much of its meaning from the standards of fair market value used in measuring the value of taken property. Therefore, the discussion found in the previous section regarding methods of valuing the property taken are also applicable to severance damages.

As mentioned previously, the reduction in fair market value to the property remaining after a condemnation must result directly from the partial taking and/or the proposed use of the part taken.[89] Three appraisal methodologies have been used to value severance damages: "before and after" valuation, "modified before and after" valuation, and "modified modified" valuation.

The traditional appraisal methodology for determining severance damages is the "before and after" method, which estimates the fair market value of the entire tract before the taking and the fair market value of the remaining tract (called the "remainder") after the taking, assessing the difference as the owner's proper measure of just compensation owed on the date of taking. This may be represented by the following formula:

> (value of entire parcel before taking) - (value of remainder after taking) = just compensation owing at date of taking.

Thus, the value of the taken tract and the diminution of fair market value of the remainder tract (or severance damages) are lumped together in one award.[90]

Although the traditional "before and after" appraisal methodology is recognized by some authorities as the preferred valuation method, the "modified before and after" valuation approach is also widely used. This valuation methodology computes the value of the property taken and separately estimates the damage to the remainder. Damage to the remainder is measured by the difference between its value before the taking and its value after the taking. The "modified before and after" approach may be represented by the following formula:

> (value of property taken) + (value of remainder area before taking - value of remainder area after taking) = just compensation owing at date of taking.

A third formula, referred to herein as the "modified modified" rule, estimates severance damages by considering the specific items which reduce the fair market value of the remainder. This method has been used when the practicalities of a given case (lack of suitable comparable sales or existence of an extremely large remainder in comparison to the property taken) preclude resort to the earlier-described methods. The "modified modified" appraoch may be represented by the following formula:

> (value of property taken) + ((Item A Reduction in Fair Market Value of Remainder Property) + (Item B Reduction in Fair Market Value of Remainder Property) + (Item C Reduction in Fair Market Value of Remainder Property) . . . .) = just compensation owing at date of taking.

It is impossible to state under the case law presently established which appraisal methodology will find favor with a particular court in any given situation. For example, in the United States Court of Appeals for the Ninth Circuit, both the "before and after" method and the "modified before and after" method have been accepted as the appropriate appraisal methodology adopted in certain cases.[91] The "modified modified" method has been used in the United States Court of Claims on several occasions. The facts surrounding the particular case in suit will determine which appraisal methodology is preferred.

While the concept and compensability of severance damages have been recognized since the turn of the century, judicial application of this concept to concrete factual situations has led to much confusion and to contradictory results. However, it is well established that severance damages are justly regarded as possible elements of a landowner's full just compensation in partial taking cases, and the appraiser should be acutely aware of the concept and its varying applications. Throughout the appraiser's analysis, it should be remembered that damages resulting from the government's use of the taken tract or damages reasonably anticipated from the use of the taken property is relevant in determining severance damages to the remainder.[92] For example, in West Virginia Pulp and Paper Co. v. United States, 200 F.2d 100 (4th Cir. 1952), the portion of the property condemned was to be used for the storage of gasoline. The court held that the landowner was entitled to show that the hazards incident to the use of the property taken for storage of gasoline reduced the value of the remainder land.[93]

Severance damages resulting from interference with the present use or the future development of the remainder property would include all increased costs resulting directly from the partial taking. Such anticipated increased costs could include increased extraction expenses,[94] costs of altering existing methods of operation,[95] increased costs of supplying reasonable access,[96] increased management expenses in using or developing the remainder property in conformity with the use made of the government-owned taken tract,[97] and increased costs for relocation of roads.

The market value of the remainder property may be diminished substantially if convenient access to it is cut off, or if access from the remainder to the nearest highway is rendered difficult. If access is thereby obstructed as a result of the partial taking, the remainder property is diminished in fair market value, and the landowner should be entitled to severance damages.[98]

Examples of management or other restrictions which give rise to severance damages include anticipated restriction on crop dusting operations due to the proximity of a proposed housing project,[99] anticipated restrictions imposed on the use of the remainder property due to the possibility of contamination of a water course on the remainder,[100] and restrictions imposed on the use of the remainder property to insure that the remainder is maintained visually attractive to people on or in the vicinity of the

taken area.[101] An owner of resource lands, part of which have been condemned by the government, should likewise be compensated for diminution in the fair market value of his remainder property occasioned by actual or anticipated restrictions on the free management of the remainder property (such as prohibition on the use of herbicides or fertilizers) resulting directly from the condemnation or the proposed use of the part taken.

Severance damages should be awarded where the landowner can show that the manufacturing plants and mills on the remainder property have diminished in value as a direct result of the partial taking. One instance in which this may occur is when the property taken contains irreplaceable quantities of natural resources which, prior to the taking, were to be processed through the resource products facilities on the remainder property.[102] It should be noted that in determining whether severance damages have occurred to the manfacturing mills and plants on the remainder property, the questions of physical contiguity and unity of use between the part taken and the landowner's industrial facilities often arise

Other elements of possible severance damage to the remainder property, depending upon the particular facts involved, may include loss of privacy,[103] increased animal damage to the remainder by virtue of the use to be made of the property taken,[104] among others. Thus, it is necessary to investigate carefully every possible or potential diminution in fair market value of the remainder property which may occur as a result of the taking or of the use or proposed use of the property taken in order to determine the landowner's full measure of just compensation, including severance damages.[105]

V.

SETTLEMENT

No discussion of litigation concerning the condemnation of private lands would be complete without at least brief treatment accorded to settlement between the parties on all or at least some of the issues in dispute. The possibility of settlement exists in any litigation, with the chances somewhat greater as the issues to be tried become more complex, since the parties are less able to gauge how the trier of fact will view the mammoth amount of technical evidence presented at trial. This feeling of uncertainty is heightened in litigation where presentation of factual data of a technical nature and the perceived reliability of expert witnesses is normally more determinative of the final decision than legal precedents. Settlement can occur at any stage of the proceedings, but the likelihood is greater for negotiations tc commence after the discovery process has been concluded, since then each party can better ascertain the strengths and weaknesses of its opposition.

It is somewhat difficult to generalize about the role of the expert in settlement negotiations that might occur in condemnation controversies, since each case has its unique characteristics affecting this role. Much depends on the relationship that exists between the attorney and expert. Of course, the expert must complete the appraisal or other work product in an independent manner with no view to settlement. After completion of this work, the expert may be asked to review similar work conducted on behalf of the opposing party, to educate counsel regarding the areas of difference between the parties and what those differences mean in terms of the final answer. Final negotiation strategies and goals must be determined by the attorney and client, although the expert may be called upon to offer suggestions and to analyze the effect of proposed agreements.

VI.

CONCLUSION

The end result of federal condemnation of any property, resource land or otherwise, should be full just compensation to the landowner. The United States Constitution guarantees no less. A landowner faced with impending condemnation should not hesitate to consult a qualified appraiser to obtain preliminary knowledge of the current fair market value of the property.

The actual condemnation of private land can trigger a complex judicial process requiring the active involvement of experts. The foregoing presentation has sought to provide a broad overview of land condemnation litigation by reviewing substantive issues and legal procedures in condemnation actions and emphasizing the prominent role of the professional resource manager.

In view of the dramatic increased in land values in recent years, determination of fair market value by competent appraisers has become extremely important. Where the resource involved is of significant value and the valuation differences between the government and the landowner are substantial, litigation may be the only recourse in the search for "just compensation".

FOOTNOTES

[1] U. S. Constitution, Amendment V.

[2] "The purpose of the (condemnation proceeding is not to determine the right of the Plaintiff to take the property, but only to determine the amount which the plaintiff shall be required to pay the defendant as Just Compensation for the property taken." United States v. City of Jacksonville, 257 F.2d 330,333 (8th Civ. 1958).

[3] "It is commonplace to recall that the power of eminent domain is an attribute of sovereignty. The taking of private property for public use upon Just Compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state." Green St. Ass'n v. Daley, 373 F.2d 1,6 (7th Civ 1967), citing Georgia v. City of Chattanooga, 264 U. S. 472, 480 (1924).

[4] See Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 (1896).

[5] Rindge Co. v. County of Los Angeles, 262 U. S. 700, 707 (1923).

[6] Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316, 234 (1st Cir. 1946).

[7] See United States v. 416.81 Acres of Land, 514 F.2d 627, 632 (7th Cir. 1975).

[8] Monongahela Navigation Co. v. United States, 148 U. S. 312, 326 (1893).

[9] United States v. Miller, 317 U. S. 369, 373 (1943).

[10] Id. at 374.

[11] United States v. Grizzard, 219 U. S. 180, 184-85 (1911); Sharp v. United States, 191 U. S. 341, 354 (1903).

[12] United States v. Miller, 317 U. S. at 376.

[13] Seaboard Air Line Ry. v. United States, 261 U. S. 299, 306 (1923).

[14] See Almota Farmers Elevator & Whse Co. v. United States, 409 U. S. 470, 473-74 (1973); United States v. Miller, 317 U. S. at 374-75.

[15] 4 NICHOLS' THE LAW OF EMINENT DOMAIN * 12.2 (rev. 3d ed. 1978).

[16] See United States v. Commodities Trading Corp., 339 U. S. 121 (1950).

[17] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 23 (7th ed. 1978). See also AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOD 131 (5th ed. 1967).

[18] G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 3 (1963).

[19] See also Almota Farmers Elevator & Whse Co. v. United States, 409 U. S. 470, 473-74 (1973); United States v. Reynolds, 397 U. S. 14, 16 (1970); United States v. Virginia Elec. Co., 365 U. S. 624, 633 (1961).

[20] See Buena Park School Dist. v. Metrim Corp., 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959), where the court observed:

> Actually the fair market value contemplated by the law means the price for which the property could be sold and is without regard to whether it be bought by one individual or by several purchasers or by a syndicate formed for the purchase. (176 Cal. App. 2d at 264)

This concept of multiple purchasers is discussed in greater detail later herein.

[21] To sell property at fair market value usually requires extensive negotiations with various potential purchasers over a period of time. The determination of fair market value, therefore, assumes a reasonable time to find a purchaser or purchasers who would be willing to pay the highest price for the property. See United States v. Silver Queen Mining Co., 385 F.2d 506, 508 n.2 (10th Cir. 1960). Cf. United States v. Certain Parcels of Land, 45 F. Supp. 899, 900 (E.D. Wash. 1942) (potential subdivision of property could not have been accomplished in one day).

[22] United States v. Miller, 317 U. S. 369, 374-75 (1943).

[23] G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 9 (1963).

[24] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOD 99 (5th ed. 1963).

[25] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 43 (6th ed. 1973).

[26] United States v. 46,672.96 Acres of Land, 521 F.2d 13, 15 (10th Cir. 1975) (citations omitted).

[27] United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U. S. 396, 403 (1949).

[28] Dickinson v. United States, 154 F.2d 642, 643 (4th Cir. 1946).

[16] See United States v. Commodities Trading Corp., 339 U. S. 121 (1950).

[17] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 23 (7th ed. 1978). See also AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOD 131 (5th ed. 1967).

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[22] United States v. Miller, 317 U. S. 369, 374-75 (1943).

[23] G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 9 (1963).

[24] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOD 99 (5th ed. 19[illegible]).

[25] AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 43 (6th ed. 1973).

[26] United States v. 46,672.96 Acres of Land, 521 F.2d 13, 15 (10th Cir. 1975) (citations omitted).

[27] United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U. S. 396, 403 (1949).

[28] Dickinson [illegible]ited States, 154 F.2d 642, 643 (4th Cir. 1946).

[29] United States v. 100 Acres of Land, 468 F.2d 1261, 1265 (9th Cir. 1972), cert. denied, 414 U. S. 822, 864 (1973). See United States v. New River Collieries Co., 262 U. S. 341, 344 (1923); United States v. Eden Memorial Park Ass'n, 350 F.2d 933, 935 (9th Cir. 1965); Simmonds v. United States, 199 F.2d 305, 307 (9th Cir. 1952).

[30] United States v. 55.22 Acres of Land, 411 F.2d 432, 435 (9th Cir. 1969).

[31] See Welch v. Tennessee Valley Auth. 108 F.2d 95, 99 (6th Cir. 1939).

[32] See United States v. Carroll, 304 F.2d 300 (4th Cir. 1962).

[33] See United States v. 103.38 Acres of Land, No. 76-124 (E.D. Ky., Nov. 3, 1976); Brooklyn E. Dist. Terminal v. City of New York, 139 F.2d 1007, 1013 (2d Cir.), cert. denied, 322 U. S. 747 (1944).

[34] 4 NICHOLS' THE LAW OF EMINENT DOMAIN * 12.312 (rev. 3d ed. 1978).

[35] United States v. Certain Interests in Property, 271 F.2d 379, 382 (7th Cir. 1959).

[36] E.g., United States v. Grizzard, 219 U. S. 180 (1911); United States v. Welch, 217 U. S. 333 (1910); Sharp v. United States, 191 U. S. 341 (1903).

[37] United States v. Miller, 317 U. S. 369 (1943); King v. United States, 205 Ct. Cl. 512, 504 F.2d 1138 (1974).

[38] See United States v. Evans, 380 F.2d 761 (10th Cir. 1967); United States v. Waymire, 202 F.2d 550 (10th Cir. 1953); Baetjer v. United States, 143 F.2d 391 (1st Cir.), cert. denied, 323 U. S. 722 (1944).

[39] See United States v. Dickinson, 331 U. S. 745, 750-51 (1947); United States v. Grizzard, 219 U. S. 180, 183 (1911).

[40] Mitchell v. United States, 267 U. S. 341, 345 (1925).

[41] Monongahela Navigation Co. v. United States, 148 U. S. 312, 326 (1893).

[42] Almota Farmers Elevator & Whse. Co. v. United States, 409 U. S. 470, 473-74 (1973).

[43] Seaboard Air Line Ry. v. United States, 261 U. S. 299, 305 (1923).

[44] United States v. Klamath & Modoc Tribes, 304 U. S. 119, 123 (1938). While a rate of interest has been found in some cases to be a convenient measure for determining just compensation, Jacobs v. United States, 290 U. S. 13, 17 (1933), courts have also approved the use

of other standards appropriate under the circumstances. Shoshone Tribe v. United States, 299 U. S. 476, 496 (1937); United States v. Rogers, 255 U. S. 163, 169 (1921). In the words of one court, "Interest is allowed, not as interest, but as the equivalent of the use of the property or its money substitute." United States v. Northern Pacific Ry. Co., 51 F. Supp. 749, 750 (E.D. Wash. 1943).

45 See United States v. Blankinship, 543 F.2d 1272, 1276 (9th Cir. 1976); United States v. 62.57 Acres of Land, No. 6269 (D. Ariz. February 14, 1979). See also Miller v. United States, No. 296-74 (Ct. Cl. Apr. 16, 1980).

46 United States v. Blankinship, 543 F.2d at 1276.

47 Id.

48 Id.

49 See id.; United States v. 62.57 Acres of Land, No. 6269 (D. Ariz. Feb. 14, 1979).

50 See Miller v. United States, No. 296-74 (Ct. Cl. Apr. 15, 1980). See also Tektronix, Inc. v. United States, 213 Ct. Cl. 257, 552 F.2d 343 (1977); Pitcairn v. United States, 212 Ct. Cl. 168, 547 F.2d 1106 (1976), cert. denied, 434 U. S. 1051 (1978).

51 United States v. Dow, 357 U. S. 17, 21 (1958).

52 E.g., Drakes Bay Land Co. v. United States, 191 Ct. Cl. 389, 424 F.2d 574 (1970); Eyherabide v. United States, 170 Ct. Cl. 598, 345 F.2d 565 (1965).

53 Act of October 2, 1968, Pub. L. No. 90-545, 82 Stat. 931.

54 Act of March 27, 1978, Pub. L. No. 95-250, 92 Stat. 163.

55 United States v. Miller, 317 U. S. 369, 381 (1943).

56 Lee v. United States, 58 F.2d 879, 880 (D.C. Cir. 1932).

57 266 F.2d at 743-44.

58 Id. at 744.

59 See also United States v. 44.00 Acres of Land, 234 F.2d 410, 415-16 (2nd Cir.), cert. denied, 352 U. S. 916 (1956). For cases contrary to the proposition that bad faith or the arbitrary or wanton exercise of discretion in deciding the amount of deposit in a declaration of taking is grounds for dismissing a condemnation action, see, e.g. In re United States, 257 F.2d 844, 848-49 (5th Cir.), cert. denied, 358 U. S. 908 (1958); United States v. Certain Lands, 247 F. Supp. 741, 742-43 (E.D.N.Y. 1965).

[60] 42 U.S.C. * 4602 (1976).

[61] Wise v. United States, 369 F. Supp. 30, 32 (W.D. Ky. 1973).

[62] Hessel v. A. Smith & Co., 15 F. Supp. 953, 956 (E.D. Ill. 1936); see Catlin v. United States, 324 U. S. 229, 242 (1945).

[63] See Richland Irr. Dist. v. United States, 222 F.2d 112, 114 (9th Cir. 1955), cert. denied, 350 U. S. 967 (1956).

[64] 42 U.S.C. * 4651 (4) (1976).

[65] See United States v. 3.66 Acres of Land, 426 F. Supp. 533, 537 (N.D. Cal. 1977).

[66] Danforth v. United States, 308 U. S. 271, 284 (1939).

[67] If the federal government abandons the condemnation action, the federal court having jurisdiction will reimburse the landowner "for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceeding . . . ." 42 U.S.C. 4654(a) (1976). See United States v. 431.60 Acres of Land, 355 F. Supp. 1093 (S.D. Ga. 1973).

[68] United States v. Dow, 357 U. S. 17 (1958); United States v. Parcel of Land, 90 F. Supp. 498, 501, 504 (D.D.C. 1951).

[69] Commercial Station Post Office v. United States, 48 F.2d 183, 184-85 (8th Cir. 1931).

[70] See United States v. Dow, 357 U. S. 17, 21 (1958).

[71] Federal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied. (citations omitted) The interference with use or possession may be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive powers.

Eyherabide v. United States, 170 Ct. Cl. 598, 601, 345 F.2d 565, 567 (1965).

[72] See Elliott v. United States, 184 Ct. Cl. 298 (1968).

[73] NBH Land Co. v. United States, 217 Ct. Cl. 41, 576 F.2d 317, 319 (1978).

[74] Drakes Bay Land Co. v. United States, 191 Ct. Cl. 389, 404-06, 424 F.2d 574, 582-83 (1970).

[75] United States v. General Motors Corp., 323 U. S. 373, 378-79 (1945).

[76] 191 Ct. Cl. at 411, 424 F.2d at 586.

[77] Miller v. United States, No. 296-74, slip op. at 16 (ct. Cl. May 30, 1979) (Recommended Opinion of Trial Judge Lydon).

[78] United States v. 60.14 Acres of Land, 362 F.2d 660, 668 (3d Cir. 1966).

[79] United States v. 13,255.53 Acres of Land, 158 F.2d 874, 876 (3d Cir. 1946).

[80] Morton Butler Timber Co. v. United States, 91 F.2d 884, 887-88 (6th Cir. 1937); see United States v. Carroll, 304 F.2d 300, 306 (4th Cir. 1962); United States v. 158.76 Acres of Land, 298 F.2d 559, 561 (2d Cir. 1962); United States v. Cunningham, 246 F.2d 330, 333 (4th Cir. 1957).

[81] United States v. Wateree Power Co., 220 F.2d 226, 231 (4th Cir. 1955); United States v. 5,139.5 Acres of Land, 200 F.2d 659, 661 (4th Cir. 1952); United States v. Devore, 133 F.2d 694, 695 (8th Cir. 1943); United States v. Certain Parcels of Land 327 F. Supp. 181 (W.D.N.Y. 1970); see Cade v. United States, 213 F.2d 138, 141 (4th Cir. 1954); United States v. 237,500 Acres of Land, 236 F. Supp. 44, 54 (S.D. Cal. 1964). See also State v. Hobart, 5 Wash. App. 469, 487 P.2d 635 (1971); State v. Hart, 249 So. 2d 310 (La. 1971).

[82] Admissibility of post-date of valuation sales evidence remains an open question. Some courts reject such sales. See Jayson v. United States, 294 F.2d 808, 810 (5th Cir. 1961). Other courts allow the sales into evidence as long as they are reasonable close to the dale of valuation. See United States v. 63.04 Acres of Land, 245 F.2d 140, 144 (2d Cir. 1957). The judicial trend seems to be to allow post-date of valuation sales into evidence so long as they are sufficiently close in time to the date of valuation to be representative of market behavior on the date of valuation.

[83] United States v. 103.38 Acres of Land, No. 76-124, slip op. at 12 (E.D. Ky. Nov. 3, 1978).

[84] Fruit Growers Express Co. v. City of Alexandria, 221 S.E. 2d 157, 161-62 (Va. 1976). See also Welch v. Tennessee Valley Auth., 108 F.2d 95 (6th Cir. 1939).

[85] See United States v. Sowards, 370 F.2d 87, 90 (10th Cir. 1966); United States v. Michoud Indus. Facilities, 322 F.2d 698, 722 (5th Cir. 1963), cert. denied, 377 U. S. 916 (1964); United States v. 237,500 Acres of Land, 236 F. Supp. 44, 52 (S.D. Cal. 1964), aff'd, sub nom. United States v. American Pumice Co., 404 F.2d 336 (9th Cir. 1968).

[86] No. 76-124, slip op. at 12 (E.D. Ky. Nov. 3, 1978).

[87] See United States v. Cornish, 348 F.2d 175 (9th Cir. 1965).

[88] It should be remembered that if a property is reasonably subject to division into parcels or units for purposes of offering and sale, then discount may be affected assuming a sizeable number of prospective purchasers. In a recent opinion, one judge held:

> If however, it is the Government's contention that there can be one and only one buyer of the timber on October 2, 1968, then it is in error. Such a restriction would in a number of cases deprive the owner of the full monetary equivalent of the property taken, in derogation of a number of Supreme Court opinions . . . (P)laintiff should be permitted to sell to a number of purchasers on October 2, 1968 (the date of valuation), or a reasonable time thereafter, and not be limited to one and only one buyer. Timber is generally sold to a number of purchasers. The record fully supports a conclusion that there would be a number of mill owners interested in purchasing plaintiff's redwood timber if it were offered for sale at this time.

Arcata National Corp. v. United States, No. 777-71, slip op. at 113-14 (Ct. Cl. July 25, 1974) (Recommended opinion of Trial Judge Lydon).

[89] See United States v. Dickinson, 331 U. S. 745, 750-51 (1947).

[90] See 4A NICHOLS' THE LAW OF EMINENT DOMAIN * 14.232 (rev. 3d ed. 1976); 1 L. ORGEL, THE LAW OF EMINENT DOMAIN * 51 (2d ed. 1953).

[91] Compare United States v. Honolulu Plantation Co., 182 F.2d 172, 195-76 (9th Cir.), cert. denied, 340 U. S. 820 (1950) with Puget Sound Power & Light Co. v. Public Util. Dist. No. 1, 123 F.2d 286, 290-91 (9th Cir. 1941), cert. denied, 315 U. S. 814 (1942).

[92] Sharp v. United States, 191 U. S. 341, 353-54 (1903); 2,953.15 Acres of Land v. United States, 350 F.2d 356, 360 (5th Cir. 1965); United States v. Baker, 279 F.2d 603 (9th Cir. 1960). In Sharp the Court stated the rule applicable to such cases:

> If the remaining land had been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the government, would be a proper subject of award in these condemnation proceedings. (191 U. S. at 354)

[93] 200 F.2d at 102-03.

[94] Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp., 166 F.2d 997, 1001-02 (9th Cir. 1947), cert. denied, 334 U. S. 837 (1948).

95 Mid-States Fats & Oils Corp. v. United States, 159 Ct. Cl. 301, 310-11 (1962); Potts v. United States, 130 Ct. Cl. 88, 92-93, 126 F. Supp. 170, 172 (1954).

96 State v. Bruening, 326 S.W. 2nd 305 (Mo. 1959).

97 United States v. Benning, 330 F.2d 527, 533-34 (9th Cir. 1964).

98 United States v. Grizzard, 219 U. S. 180, 183-84 (1911); United States v. Welch, 217 U. S. 333, 339 (1910).

99 United States v. Baker, 279 F.2d 603, 606 (9th Cir. 1960).

100 Wheatley v. City of Fairfield, 240 N.W. 628, 631 (Iowa 1932).

101 United States v. Coughlin, 405 F. Supp. 13, 16-17 (D. Ore. 1975).

102 See Baetjer v. United States, 143 F.2d 391, 396 (1st Cir.), cert. denied, 323 U. S. 772 (1944); United States v. 339.77 Acres of Land, 240 F. Supp. 545, 549-50 (W.D. Ark. 1965).

103 See United States v. 287.89 Acres of Land, 241 F. Supp. 464, 468 (W.D. Pa. 1965).

104 See Lockhart Power Co. v. Askew, 96 S.E. 685 (S.C. 1918); Idaho & Western Ry. Co. v. Coey, 131 P. 810 (Wash. 1913).

105 It should be noted that damages which are categorized as remote, speculative, contingent, or trivial, will not be considered severance damages by the courts. Damage may be considered speculative and, hence, noncompensable due to the uncertainty as to whether the damage will really occur, the particular difficulty in measuring the monetary significance of the damage, Wetzel v. United States, 25 Ct. Cl. 277 (1890), or the conjectural, trivial, or fanciful nature of the damage, Rose Island Co. v. United States, 46 F.2d 802 (W.D. Ky. 1930).

remanded, 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1961); Isakson v. Rickey, Sup. Ct. Op. No. 1267 (File No. 2550), 550 P.2d 359 (1976); Commercial Fisheries Entry Comm'n v. Apokedak, Sup. Ct. Op. No. 2011 (File No. 4464), 606 P.2d 1255 (1980).

Section 16. Protection of Rights. No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

Legislative intent. — The provisions in this article were intended to permit the broadest possible access to and use of state waters by the general public. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

This section affords protection against the involuntary divestment of private property rights for a superior beneficial use, such as the construction of a by-pass, by specifying that it shall be "only with just compensation and by operation of law." Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

Property owner has private right of littoral access. — See Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

There is little difference between land-access and water-access situations, at least where the facts establish actual use of water access. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), **rehearing denied,** 519 P.2d 801 (1974).

The supreme court questioned the validity of a restricted definition of the private right of access in water cases, especially in view of the more realistic right of access recognized in land-access cases. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

Section 17. Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Cross reference. — See note to Alaska Const., art. VIII, § 10.

Cited in State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Section 18. Private Ways of Necessity. Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.

Legislative intent. — The provisions in this article were intended to permit the broadest possible access to and use of state waters by the general public. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 516 P.2d 1191 (1973), rehearing denied, 519 P.2d 801 (1974).

Article IX

Finance and Taxation

Section 1. Taxing Power. The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Section 2. Nondiscrimination. The lands and other property belonging to citizens of the United States residing without the State shall never be taxed at a higher rate than the lands and other property belonging to the residents of the State.

Section 3. Assessment Standards. Standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law.

Quoted in Hoblit v. Greater Anchorage Area Borough, Sup. Ct. Op. No. 636 (File No. 1214), 473 P.2d 630 (1970).

Section 4. Exemptions. The real and personal property of the State or its political subdivisions shall be exempt from taxation under conditions and exceptions which may be provided by law. All, or any portion of, property used exclusively for non-profit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained until otherwise provided by law.

Strict construction. — Provisions exempting property from ad valorem taxation must be strictly construed against the property holder and in favor of the taxing authority. McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

The power of deciding what types of education are to be publicly supported, either under the School Foundation Act or by tax exemption, is vested with the legislature. McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

This section directs the legislature to define the educational exemption and encourage the exercise of that responsibility. McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

The word "like" refers to the named exemptions in the preceding sentence. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962).

And "different" was intended to clearly indicate that the legislature was not to be bound by the rule of ejusdem generis and was free to grant other exemptions, even though they might not be of the same kind or character as those named. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962).

Purpose of second sentence of section. — The second sentence of this section only serves to emphasize the alternative wording of the following sentence wherein it is provided that other exemptions of like or different kind may be granted by general law. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962).

Intent of constitutional convention. — The constitutional convention intended that only so much of the property used for religious purposes as was being used to produce income should be taxable, that such other parts should be exempt, and that a proration between taxable and

non-taxable parts should be made. 1962 Op. Att'y Gen., No. 15.

Commentary of Committee on Finance and Taxation. — The constitutional Committee on Finance and Taxation has adequately clarified the ambiguity regarding the intended meaning of the state exemption provision of this section. The committee commentary with reference to this section states: "All property owned by the State and its subdivisions is exempt from taxation unless the legislature provides otherwise. An exception to tax immunity might be appropriate if a government engaged in what is normally a private business such as operating a ski resort, a moving picture theatre, or a swimming pool." 1962 Op. Att'y Gen., No. 16.

Former AS 29.10.336 was enacted pursuant to this section. Harmon v. North Pac. Union Conference Ass'n, Sup. Ct. Op. No. 591 (File No. 1060), 462 P.2d 432 (1969). See now AS 29.53.020.

The phrase "educational purposes" as used in this section includes systematic instruction in any and all branches of learning from which a substantial public benefit is derived. McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

The term "educational purposes" is in no way delimited, and there is no justification for the supreme court to give to that term anything other than its ordinary meaning. That restrictive definition is a legislative concern seems especially apparent at a time when there is increasing desire for specialized practical education, a proliferation of new kinds of educational institutions, and rapidly changing concepts of mass education. McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

The minutes of the constitutional convention reveal no indication of what was intended to constitute an "educational" purpose, the drafters stating merely that they intended to adopt a "standard" state exemption. Nor has the legislature defined the term as it has done with regard to "religious purposes." McKee v. Evans, Sup. Ct. Op. No. 740 (File No. 1382), 490 P.2d 1226 (1971).

"Charity" or "charitable purposes". — Neither in Alaska's constitution nor in its general laws are the terms "charity" or "charitable purposes" defined. In such circumstances, resort to the common-law definition of these terms is appropriate. Matanuska-Susitna Borough v. King's Lake Camp, Sup. Ct. Op. No. 472 (File No. 857), 439 P.2d 441 (1968).

It is quite clear that what is done out of good will and a desire to add to the improvement of the moral, mental, and physical welfare of the public generally comes within this meaning of the word "charity." Matanuska-Susitna Borough v. King's Lake Camp, Sup. Ct. Op. No. 472 (File No. 857), 439 P.2d 441 (1968).

The test of charitable exemption looks to the use of the property, not to the use of the income derived from that property. City of Nome v. Block No. H, Lots 5, 6 & 7, Sup. Ct. Op. No. 839 (File No. 1652), 502 P.2d 124 (1972).

A benevolent or charitable undertaking is not shorn of tax-exempt status because it charges fees and thereby realizes rent or income from its property. Matanuska-Susitna Borough v. King's Lake Camp, Sup. Ct. Op. No. 472 (File No. 857), 439 P.2d 441 (1968).

The providing of recreational facilities, such as accommodations for campers, is a charitable use of the property. Matanuska-Susitna Borough v. King's Lake Camp, Sup. Ct. Op. No. 472 (File No. 857), 439 P.2d 441 (1968).

Actual use rather than owner's use should be analyzed in determining eligibility for an exemption. Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, Sup. Ct. Op. No. 1299 (File No. 2445), 553 P.2d 467 (1976).

Taxpayer must show exclusive use for nonprofit religious, etc., purposes. — In order to qualify for an exemption, the taxpayer must show not benefits, but exclusive use for nonprofit religious, charitable, cemetery, hospital or educational purposes. Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, Sup. Ct. Op. No. 1299 (File No. 2445), 553 P.2d 467 (1976).

Or there can be no exemption. — When the property in question is used even in part by nonexempt parties for their private business purposes, there can be no exemption. Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, Sup. Ct. Op. No. 1299 (File No. 2445), 553 P.2d 467 (1976).

Office space rented to doctors engaged in private practice. — Office space in a building partially used exclusively for nonprofit hospital purposes, rented to doctors engaged in the private practice of medicine by a nonprofit charitable and religious corporation, was

not exempt from taxation. Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, Sup. Ct. Op. No. 1299 (File No. 2445), 553 P.2d 467 (1976).

While the use of office space by doctor-tenants in conducting their private practices does provide incidental benefits to the adjacent hospital, the office space is not used exclusively for hospital purposes. Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, Sup. Ct. Op. No. 1299 (File No. 2445), 553 P.2d 467 (1976).

All religious property in the state not used for business, rent, or profit is exempt from taxation. 1962 Op. Att'y Gen., No. 15.

However, property of a religious organization used for the production of income is taxable. 1962 Op. Att'y Gen., No. 15.

But even in this situation a proration must be made with regard to the property involved, between those portions being used for business, rent or profit, and those with no such use. 1962 Op. Att'y Gen., No. 15.

As the fact that a segment of religious property is used for business, rent, or profit will not result in the taxation of the whole. 1962 Op. Att'y Gen., No. 15.

Parsonage of assistant or lay pastor is exempt from ad valorem taxation under the broadened tax exemption provisions of this section and former AS 29.10.336. Evangelical Covenant Church of America v. City of Nome, Sup. Ct. Op. No. 243 (File No. 457), 394 P.2d 882 (1964). See now AS 29.53.020.

But property and facilities of a church-owned radio station are subject to ad valorem taxation if they are not used exclusively for religious purposes. Evangelical Covenant Church of America v. City of Nome, Sup. Ct. Op. No. 243 (File No. 457), 394 P.2d 882 (1964).

State immune from taxation. — As an attribute of its sovereignty, the State of Alaska is immune from taxation of any kind. 1962 Op. Att'y Gen., No. 16.

Likewise municipal corporations. — Municipal corporations are immune in the same manner and to the same degree as is the state itself. 1962 Op. Att'y Gen., No. 16.

Immunity of state may be waived only by express constitutional or statutory declaration providing that the state shall be subject to particular tax provisions or to its tax statutes generally. 1962 Op. Att'y Gen., No. 16.

The inherent sovereign immunity of the state from its own tax statutes has been reaffirmed by the state constitution, subject to the power of the legislature to waive that immunity. 1962 Op. Att'y Gen., No. 16.

The state constitution contains no express waiver of immunity, rather it contemplates that the state shall be immune from taxation save when immunity is expressly waived by statute. 1962 Op. Att'y Gen., No. 16.

The state constitution provides for immunity of the state from its own taxing provisions, save when the legislature provides for exceptions to immunity. 1962 Op. Att'y Gen., No. 16.

The immunity of the state from taxation does not exempt third parties dealing with the state from payment of state taxes when the burden of taxation in a particular transaction falls upon that party and not upon the state. 1962 Op. Att'y Gen., No. 16.

However, when the incidence of taxation falls clearly upon the state, there is no obligation on the part of the party dealing with the state to collect and pay over the tax to the state. 1962 Op. Att'y Gen., No. 16.

The presumption that state tax laws are intended to apply to private activity only is equally applicable to instrumentalities and political subdivisions of the state. 1962 Op. Att'y Gen., No. 16.

State property is not subject to special assessments levied by local subdivisions of the state for improvements which benefit such property. 1966 Op. Att'y Gen., No. 10.

But such exemption is not conferred by this section. — Any exemption for state property from special assessment will have to be found separate and apart from this section. 1966 Op. Att'y Gen., No. 10.

But rather by AS 18.55.250. — The obvious implication of AS 18.55.250 is that it is the policy of the legislature that public property used for essential public and government purposes is exempt from local special assessments. 1966 Op. Att'y Gen., No. 10.

As this section exempts from ordinary taxes only. — A constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes, for the general purposes of

government, state, county, or municipal, and does not relieve those in whose favor such exemption exists from the obligation to pay special assessments for local improvements which are charged upon property on the theory that such property is specially benefited thereby. 1966 Op. Att'y Gen., No. 10.

Special assessments are usually distinguished from general taxation. Special assessments are levied for improvements which benefit particular individuals or property and are levied with reference to, and in proportion to, the special benefit conferred. General taxes, on the other hand, are imposed for the purpose of raising monies to be expended for governmental purposes without regard to special benefits conferred on a particular group or class of persons or property. 1966 Op. Att'y Gen., No. 10.

Third sentence of section authorizes exemptions similar to exemptions granted to state. — The third sentence of this section authorizes the legislature to grant exemptions similar to the exemptions granted to the state by the first sentence of this section. Such exemptions may thus be for both real and personal property. City of Nome v. Block No. H, Lots 5, 6 & 7, Sup. Ct. Op. No. 839 (File No. 1652), 502 P.2d 124 (1972).

Thus, AS 44.59.300 is constitutional. — AS 44.59.300, according an exemption to the Alaska State Development Corporation, has been upheld as constitutional under the third sentence of this section. City of Nome v. Block No. H, Lots 5, 6 & 7, Sup. Ct. Op. No. 839 (File No. 1652), 502 P.2d 124 (1972).

When the legislature chose to exempt the Alaska State Development Corporation from "all taxes and assessments," it meant to draw upon its full powers under the third sentence of this section, and thereby to grant ASDC an exemption for both its real and personal property. City of Nome v. Block No. H, Lots 5, 6 & 7, Sup. Ct. Op. No. 839 (File No. 1652), 502 P.2d 124 (1972).

Alaska State Development Corporation held exempt. — Where actions of the Alaska State Development Corporation to keep a foreclosed property saleable by continuing operation of its hotel-restuarant-bar complex were in consonance with the ASDC's powers and in furtherance of the valid public purpose of the ASDC and therefore constituted use of the property for a public purpose, the ASDC did not lose its tax exemption. City of Nome v. Block No. H, Lots 5, 6 & 7, Sup. Ct. Op. No. 839 (File No. 1652), 502 P.2d 124 (1972).

Section 5. Interests in Government Property. Private leaseholds, contracts, or interests in land or property owned or held by the United States, the State, or its political subdivisions, shall be taxable to the extent of the interests.

Taxation of leaseholds by cities. — This section does not say in so many words that leaseholds shall be taxable by cities. But neither has that power been specifically denied to cities. City of Anchorage v. Baker, Sup. Ct. Op. No. 113 (File No. 210), 376 P.2d 482 (1962).

Section 6. Public Purpose. No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

This section is a general measure and expresses a very definite policy. Matthews v. Quinton, Sup. Ct. Op. No. 31 (File No. 48), 362 P.2d 932 (1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

Its proscription is against the appropriation of "any public money." Matthews v. Quinton, Sup. Ct. Op. No. 31 (File No. 48), 362 P.2d 932 (1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

The phrase "public purpose" represents a concept which is not capable of precise definition. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962); Walker v. Alaska State Mtg. Ass'n, Sup. Ct. Op. No. 353 (File No. 669), 416 P.2d 245 (1966).

It would be a disservice to future generations for the supreme court to attempt to define "public purpose." Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

It is a concept which will change as changing conditions create changing public needs. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962); Walker v. Alaska State Mtg. Ass'n, Sup. Ct. Op. No. 353 (File No. 669), 416 P.2d 245 (1966); Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

Determination of public purpose. — Whether a public purpose is being served must be decided as each case arises and in the light of the particular facts and circumstances of each case. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962); Walker v. Alaska State Mtg. Ass'n, Sup. Ct. Op. No. 353 (File No. 669), 416 P.2d 245 (1966); Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

The technique used by most courts is that of looking to the entire factual and governmental context to determine whether a particular plan of action serves a public purpose. Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

Depends upon character of use. — The test of whether a public purpose is being served does not depend on the religious or nonreligious nature of the agency that will operate property leased from city, but upon the character of the use to which the property will be put. Lien v. City of Ketchikan, Sup. Ct. Op. No. 146 (File No.275), 383 P.2d 721 (1963).

It is not essential that the entire community or any particular number of persons should benefit from remedial legislation in order that a public purpose be served. Suber v. Alaska State Bond Comm., Sup. Ct. Op. No. 344 (File No. 651), 414 P.2d 546 (1966).

Court will not set aside finding of legislature. — Where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, the court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962); Walker v. Alaska State Mtg. Ass'n, Sup. Ct. Op. No. 353 (File No. 669), 416 P.2d 245 (1966).

The courts will not interfere with the exercise of legislative discretion unless it is clearly shown that the legislative determination that a public purpose will be served by the means chosen is arbitrary and without any reasonable basis in fact. Suber v. Alaska State Bond Comm., Sup. Ct. Op. No. 344 (File No. 651), 414 P.2d 546 (1966).

Industrial development. — It is recognized that the location of an industry in a particular community may have widespread economic benefits and that these do fulfill the public purpose and the general welfare of the community, broadly conceived. Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

The test which the supreme court must apply is whether a plan for the development of industry within a municipality is so unreasonable as to transgress the limitations of the Alaska Constitution. Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

A general obligation bond issue for the purpose of encouraging industrial development within a municipality was held valid in Wright v. City of Palmer, Sup. Ct. Op. No. 605 (File No. 1192), 468 P.2d 326 (1970).

Relief and support of the poor has long been recognized as an obligation of government and a public purpose. Suber v. Alaska State Bond Comm., Sup. Ct. Op. No. 344 (File No. 651), 414 P.2d 546 (1966).

Relieving economic distress. — It is a public purpose to expend public moneys to relieve economic distress by aiding those persons in the state who have suffered a substantial financial burden as a result of a natural disaster. Suber v. Alaska State Bond Comm., Sup. Ct. Op. No. 344 (File No. 651), 414 P.2d 546 (1966).

The issuance of the debenture certificates by Alaska State Development Corporation does not constitute a transfer of public funds and the use of public credit for other than a public purpose. DeArmond v. Alaska State Dev. Corp., Sup. Ct. Op. No. 116 (File No. 285), 376 P.2d 717 (1962).

The expenditure of state money in the construction of a hospital operated by a religious nonprofit group under the terms and conditions imposed by the federal government under the Hill-Burton

phases of it—are ably dealt with in the opinion of the Court of Claims, and it would be unnecessary repetition to go over the argument or to review the cases.

Judgment affirmed.

WINTERS *v.* THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 158. Argued October 24, 1907.—Decided January 6, 1908.

The rule that all the parties must join in an appeal or writ of error unless properly detached from the right so to do applies only to joint judgments and decrees. This court has jurisdiction of an appeal taken or writ of error sued out by one of several defendants if his interest is separate from that of the other defendants.

In a suit against several defendants as trespassers in which some of them defaulted and others answered, *held*, that each defendant was a separate trespasser and that while those who defaulted were precluded from questioning the correctness of the decree entered against them, the answering defendants had nothing in common with the others and could maintain an appeal without them.

In a conflict of implications, the instruments must be construed according to the implication having the greater force; and, in the interpretation of agreements and treaties with Indians, ambiguities should be resolved from the standpoint of the Indians.

In view of all the circumstances of the transaction this court holds that there was an implied reservation in the agreement of May 1, 1888, 25 Stat. 121, with the Gros Ventre and other Indians establishing the Fort Belknap Reservation of a sufficient amount of water from the Milk River for irrigation purposes, which was not affected by the subsequent act of February 22, 1889, 25 Stat. 676, admitting Montana to the Union, and that the water of that river cannot be diverted, so as to prejudice this right of the Indians, by settlers on the public lands or those claiming riparian rights on that river.

The Government of the United States has the power to reserve waters of a river flowing through a Territory and exempt them from appropriation under the laws of the State which that Territory afterwards becomes.

148 Fed. Rep. 684, affirmed.

THIS suit was brought by the United States to restrain appellants and others from constructing or maintaining dams or reservoirs on the Milk River in the State of Montana, or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation.

An interlocutory order was granted, enjoining the defendants in the suit from interfering in any manner with the use by the reservation of 5,000 inches of the water of the river. The order was affirmed by the Circuit Court of Appeals. 143 Fed. Rep. 740. Upon the return of the case to the Circuit Court, an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer, upon which and the bill a decree was entered making the preliminary injunction permanent. The decree was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 684.

The allegations of the bill, so far as necessary to state them, are as follows: On the first day of May, 1888, a tract of land, the property of the United States, was reserved and set apart "as an Indian reservation as and for a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation." The tract has ever since been used as an Indian reservation and as the home and abiding place of the Indians. Its boundaries were fixed and defined as follows (25 Stat. 124):

"Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of People's Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning."

Milk River, designated as the northern boundary of the

reservation, is a non-navigable stream. Large portions of the lands embraced within the reservation are well fitted and adapted for pasturage and the feeding and grazing of stock, and since the establishment of the reservation the United States and the Indians have had and have large herds of cattle and large numbers of horses grazing upon the land within the reservation, "being and situate along and bordering upon said Milk River." Other portions of the reservation are "adapted for and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of grass, grain and vegetables," but such portions are of dry and arid character, and in order to make them productive require large quantities of water for the purpose of irrigating them. In 1889 the United States constructed houses and buildings upon the reservation for the occupancy and residence of the officers in charge of it, and such officers depend entirely for their domestic, culinary and irrigation purposes upon the water of the river. In the year 1889, and long prior to the acts of the defendants complained of, the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miners' inches, and conducted it to the buildings and premises, used the same for domestic purposes and also for the irrigation of land adjacent to the buildings and premises, and by the use thereof raised crops of grain, grass and vegetables. Afterwards, but long prior to the acts of the defendants complained of, to wit, on the fifth of July, 1898, the Indians residing on the reservation diverted from the river for the purpose of irrigation a flow of 10,000 miners' inches of water to and upon divers and extensive tracts of land, aggregating in amount about 20,000 acres, and raised upon said land crops of grain, grass and vegetables. And ever since 1889 and July, 1898, the United States and the Indians have diverted and used the waters of the river in the manner and for the purposes mentioned, and the United States "has been enabled by means thereof to train, encourage and accustom large numbers of Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement." It is alleged with detail that all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created, and that in furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them, it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

It is alleged that "notwithstanding the riparian and other rights" of the United States and the Indians to the uninterrupted flow of the waters of the river the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and by means of canals and ditches and waterways have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof. And this diversion of the water, it is alleged, has continued until the present time, to the irreparable injury of the United States, for which there is no adequate remedy at law.

The allegations of the answer, so far as material to the present controversy, are as follows: That the lands of the Fort Belknap Reservation were a part of a much larger area in the State of Montana, which by an act of Congress, approved April 15, 1874, c. 96, 18 Stat. 28, was set apart and reserved for the occupation of the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indians, but that the right of the Indians therein "was the bare right of the use and occupation thereof at the will and sufferance of the Government of the United States." That the United States, for the purpose of opening for settlement a large portion of such area, entered into an agreement with the Indians composing said tribes, by which the Indians "ceded, sold, transferred and conveyed" to the United States all of the lands embraced in said area, except Fort Belknap Indian Reservation,

described in the bill. This agreement was ratified by an act of Congress of May 1, 1888, c. 213, 25 Stat. 113, and thereby the lands to which the Indians' title was thus extinguished became a part of the public domain of the United States and subject to disposal under the various land laws, "and it was the purpose and intention of the Government that the said land should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed and cultivated and communities of civilized persons be established thereon."

That the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company were qualified to become settlers upon the public land and to acquire title thereto under the homestead and desert land laws of the United States. And that said corporations were organized and exist under the laws of Montana for the purpose of supplying to their said stockholders the water of Milk River and its tributaries, to be used by them in the irrigation of their lands.

That the defendant, the Empire Cattle Company, is a corporation under the laws of Montana, was legally entitled to purchase, and did purchase, from those who were qualified to acquire them under the desert and homestead land laws of the United States, lands on the Milk River and its tributaries, and is now the owner and holder thereof.

That the defendants, prior to the fifth day of July, 1898, and before any appropriation, diversion or use of the waters of the river or its tributaries was made by the United States or the Indians on the Fort Belknap Reservation, except a pumping plant of the capacity of about 250 miners' inches, without having notice of any claim made by the United States or the Indians that there was any reservation made of the waters of the river or its tributaries for use on said reservation, and believing that all the waters on the lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rulings and customs

of the State of Montana, in like manner as water on other portions of the public domain, entered upon the public lands in the vicinity of the river, made entry thereof at the United States land office, and thereafter settled upon, improved, reclaimed and cultivated the same and performed all things required to acquire a title under the homestead and desert land laws, made due proof thereof, and received patents conveying to them respectively, the lands in fee simple.

That all of said lands are situated within the watershed of the river, are riparian upon the river and its tributaries, but are arid and must be irrigated by artificial means to make them inhabitable and capable of growing crops.

That for the purpose of reclaiming the lands, and acting under the laws of the United States and the laws of Montana, the defendants, respectively, posted upon the river and its tributaries, at the points of intended diversion, notices of appropriation, stating the means of diversion and place of use, and thereafter filed in the office of the clerk and recorder of the county wherein the lands were situated a copy of the notices duly verified, and within forty days thereafter commenced the construction of ditches and other instrumentalities, and completed them with diligence and diverted, appropriated and applied to a beneficial use more than 5,000 miners' inches of the waters of the river and its tributaries, or 120 cubic feet per second, irrigating their lands and producing hay, grain and other crops thereon. The defendants and the stockholders of the defendant corporations have expended many thousand of dollars in constructing dams, ditches and reservoirs, and in improving said lands, building houses, and other structures establishing schools and erecting thereon homes and other improvements, usually had and enjoyed in a civilized community and that the only supply of water to irrigate the lands is from Milk River. If defendants are deprived of the waters the lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained thereon.

That there are other lands within the watershed of the

Milk River and its tributaries and dependent upon its waters for irrigation upon which large numbers of persons have settled under the land laws of the United States and are irrigating and cultivating the same by means of said waters, and have assisted the defendants "in establishing a civilized community in said country and in building and maintaining churches, schools, villages and other elements and accompaniments of civilization; that said communities consist of thousands of people, and if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up and the purpose and object of the Government in opening said lands for settlement will be wholly defeated."

It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained for stock and irrigation purposes, and particularly these: People's Creek, flowing about 1,000 inches of water; Big Horn Creek, flowing about 1,000 inches; Lodge Pole Creek, flowing about 600 inches of water; Clear Creek, flowing about 300 inches. That all of the waters of these streams can be made available for use upon the reservation, and that it was not the intention of the Government to reserve any of the waters of Milk River or its tributaries. That the respective claims of the defendants to the waters of the river and its tributaries are prior and paramount to the claims of the United States and the Indians, except as to 250 inches used in and around the agency buildings, and at all times there has been sufficient water flowing down the river to more than supply these 250 inches.

And it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than $100,000 to them, and that if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but will greatly exceed $100,000," and that they will

be wholly without remedy if the claim of the United States and the Indians be sustained.

Mr. Edward C. Day and *Mr. James A. Walsh* for appellants:

The decree is, in fact, separate and severable.

It is not charged that the defendants acted jointly. Neither one is responsible for the acts of the other. In so far as the record shows, the defaulting defendants are not the owners of any lands and are not interested in this suit. *Hancock* v. *Patrick*, 119 U. S. 156; *Forgay* v. *Conrad*, 6 How. 201; *Gilfillan* v. *McKee*, 159 U. S. 303; *City Bank* v. *Hunter*, 129 U. S. 578; *Milner* v. *Meek*, 95 U. S. 252; *Todd* v. *Daniel*, 16 Pet. 521; *Railroad Co.* v. *Johnson*, 15 Wall. 8; *Germain* v. *Mason*, 12 Wall. 261. See also *Hill* v. *Chicago and Evanston Ry. Co.*, 140 U. S. 52; *Baskel* v. *Haskell*, 107 U. S. 602; *Louisville & N. A. C.* v. *Pope*, 74 Fed. Rep. 5; *Farmers' Loan & Trust Co.* v. *McClure*, 49 U. S. App. 146; *Mercantile Trust Co.* v. *Adams Express Co.*, 16 U. S. App. 37.

In the agreement with the Indians and the act of Congress, ratifying that agreement, there was no reservation of the waters of Milk River or its tributaries for use on the Fort Belknap Indian Reservation. Nor can it be held that the Indians understood that there was any reservation of the waters of Milk River for use upon the Belknap Reservation, or that they ceded and relinquished to the Government anything less than the absolute title to the lands and all waters thereon to that portion of the former reservation to which they relinquished their claims.

The rule that the treaty must be construed most favorably to the Indians does not apply to this case. Here the controversy is between the United States, as guardian of the Indians, and the appellants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case, the appellants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their

entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams upon or adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensation.

There is nothing before the court for construction or interpretation, but the plain, unambiguous language of the agreement, and that is so clear that it does not require any construction or interpretation.

The appellants made valid appropriations of the waters of Milk River and its tributaries under the laws, customs and decisions of Montana, and the laws of Congress, and their rights as grantees of the Government are superior to any rights which the Indians may have by reason of the agreement entered into between them and the Government.

The doctrine of riparian rights is not recognized, does not prevail and never was in force in Montana, and the rights of the parties to the use of the waters of Milk River and its tributaries must be construed according to the laws of this State.

Even if the doctrine of riparian rights did prevail, the appellants would be entitled to a reasonable use of the water for the purpose of irrigating their lands, having in view the equitable rights of others.

The right to appropriate water is recognized by the laws of the United States, the laws and decisions of the courts and the customs prevailing in Montana, which are now and were in force in Montana at the time the agreement was made with the Indians, and these appellants have shown that they acquired title to their lands under the grant from the Government and made valid and prior appropriations of the waters to reclaim such lands.

Mr. Assistant Attorney General Sanford and *Mr. Assistant Attorney General Van Orsdel*, with whom *The Solicitor General* and *Mr. A. C. Campbell*, Special Attorney, were on the brief, for appellee:

The decree below adjudging the complainants' right to the flow of the waters of Milk River as against all of the defendants before the court, is a joint decree within the meaning of the rule that all parties against whom a joint judgment or decree is rendered must join in prosecuting a writ of error or appeal, and that if prosecuted by less than the whole number of such parties, without a summons and severance or other equivalent proceeding, the appellate court acquires no jurisdiction of the case and the writ of error or appeal will be dismissed. *Owings* v. *Kincannon*, 7 Pet. 399; *Masterson* v. *Herndon*, 10 Wall. 416; *Hampton* v. *Rouse*, 13 Wall. 187; *Wilson's Heirs* v. *Insurance Co.*, 12 Pet. 140.

The defect of lack of jurisdiction for want of necessary parties to the appeal was not waived by the final decree entered by the Circuit Court of Appeals upon the merits without objection on that ground. *Union & Planters Bank* v. *Memphis*, 189 U. S. 71, 73.

Under the just and reasonable construction of this agreement with the Indians, considered in the light of all the circumstances and of its express purpose, the Indians did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk River necessary to their use for agricultural and other purposes upon the reservation, but retained this right, as an appurtenance to the land which they retained, to the full extent in which it had been vested in them under former treaties, and the right thus retained and vested in them under the agreement of 1888, at a time when Montana was still a Territory of the United States, could not be divested under any subsequent legislation either of the Territory or of the State.

While the United States may itself abrogate rights granted to the Indians under a treaty with them, it alone has this power, and unless such rights are abrogated by the United States itself by subsequent legislation it is well settled that all

rights acquired by the Indians under the treaty are to be fully protected against invasion by other parties. *The Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Cook*, 19 Wall. 591.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

A question of jurisdiction is presented by the United States. Five of the defendants named in the bill failed to answer and a decree *pro confesso* was taken against them. The other defendants, appellants here, after the affirmance by the Circuit Court of Appeals of the interlocutory injunction, filed a joint and several answer. On this answer and the bill the case was heard and a decree entered against all of the defendants. From that decree the appellants here appealed to the Circuit Court of Appeals without joining therein the other five defendants. The contention is that the Circuit Court of Appeals had no jurisdiction and that this court has none, because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal, or proceedings should have been taken against them in the nature of summons and severance or its equivalent.

The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established.[1] But the rule only applies to joint judgments or decrees.[2] In other words, when the interest of a de-

[1] *Williams* v. *Bank of United States*, 11 Wheat. 414; *Owings* v. *Kincannon*, 7 Pet. 399; *Heirs of Wilson* v. *Insurance Company*, 12 Pet. 140; *Mussina* v. *Cazenos*, 6 Wall. 356; *Masterson* v. *Herndon*, 10 Wall. 416; *Hampton* v. *Rouse*, 13 Wall. 187; *Simpson* v. *Greeley*, 20 Wall. 152; *Feibelman* v. *Packard*, 108 U. S. 14; *Estis* v. *Trabue*, 128 U. S. 225, 230; *Mason* v. *United States*, 136 U. S. 581; *Dolan* v. *Jennings*, 139 U. S. 385; *Hardee* v. *Wilson*, 146 U. S. 179; *Inglehart* v. *Stansbury*, 151 U. S. 68; *Davis* v. *Mercantile Trust Company*, 152 U. S. 590; *Beardsley* v. *Railway*, 158 U. S. 123, 127; *Wilson* v. *Kiesel*, 164 U. S. 248.

[2] *Todd* v. *Daniel*, 16 Pet. 521, 523; *Germain* v. *Mason*, 12 Wall. 259; *Forgay* v. *Conrad*, 6 How. 201; *Brewster* v. *Wakefield*, 22 How. 118, 129; *Milner* v. *Meek*, 95 U. S. 252; *Baskel* v. *Hassell*, 107 U. S. 602, 608; *Hanrick* v. *Patrick*, 119 U. S. 156; *City Bank* v. *Hunter*, 120 U. S. 557; *Gilfillan* v. *McKee*, 159 U. S. 303.

fendant is separate from that of other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was between them, in the diversion of the waters of Milk River, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests and action on the part of the defendants. In other words, whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all, they were separate trespassers. Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree *pro confesso* was entered against them, and thereafter, according to Equity Rule 19, the cause was required to proceed *ex parte* and the matter of the bill decreed by the court. *Thomson* v. *Wooster*, 114 U. S. 104. The decree was in due course made absolute, and granting that it might have been appealed from by the defaulting defendants, they would have been, as said in *Thomson* v. *Wooster*, absolutely barred and precluded from questioning its correctness, unless on the face of the bill it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied and we proceed to the merits.

The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to

be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,000 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule

should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject of appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States* v. *Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union and the power over the waters of Milk River which the State thereby acquired

to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the Government.

Decree affirmed.

MR. JUSTICE BREWER dissents.

Condenation of native lands

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to information which it had in its possession which would have disclosed the existence of said kiting scheme." I agree that this is an inartful way to allege active conduct on the part of Mid-Cal. Nevertheless, "the Federal Rules of Civil Procedure were designed, and should be interpreted and applied, to do away with this kind of technicality," *Dunn v. TWA*, 589 F.2d 408 (9th Cir. 1978), and we should remember that a "complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the claim." *United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963), *quoting Dotschay v. National Mutual Insurance Co.*, 246 F.2d 221, 223 (5th Cir. 1957). We should be particularly careful to follow this rule where the Supreme Court of the state whose law is applicable to the proceeding has rendered a controlling decision after the complaint was drafted.

Admittedly, the existence or not of the nonfeasance doctrine in California and the presence or absence of a special relationship between Mid-Cal and Stockton appear to have received more attention at the trial court level than whether the counterclaim alleged misfeasance and if so whether it stated a claim upon which relief could be granted. On the other hand, the district court and Mid-Cal were aware that Stockton was proceeding on the theory of misfeasance, at least in the alternative. I do not think the counterclaim as drafted should prevent Stockton from arguing that Mid-Cal's conduct was misfeasance of the kind held actionable in *Sun 'n Sand*, and from seeking leave to amend to state that theory with specificity. *Cf.* Fed.R.Civ.P. 15(b).

The question before us is somewhat ob- [illegible]

such conduct. It appears to be Stockton's theory that Mid-Cal continued to accept the checks after a subordinate notified a Mid-Cal branch officer of irregularities in the subject accounts disclosed by a computer analysis, irregularities that justified further investigation. It should be open to the appellant by way of further pleadings and discovery, to develop a theory upon which it could at least argue that Mid-Cal's conduct in this case was below the minimum standard of care which controls the conduct owed by one bank to another. Therefore, although the views of the majority are well stated, I respectfully dissent from the judgment.

25 USC § 357

KEY NUMBER SYSTEM

condemnation of Indian lands

UNITED STATES of America, Appellant,

v.

Glen M. CLARKE et al., Appellees.

Nos. 77-2571, 77-3469.

United States Court of Appeals, Ninth Circuit.

Jan. 15, 1979.

Rehearing Denied in No. 77-2571 Feb. 26, 1979.

The United States filed trespass suit as owner in fee title of property held in trust after its patent to an Indian by allotment. [illegible]

against use of road, which was built on property of Indian owner by private party, whose interest therein was later transferred to political subdivision of State of Alaska, until eminent domain proceedings were commenced. The United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, granted partial summary judgment and denied injunction, and the United States appealed from latter ruling. The Court of Appeals, Kennedy, Circuit Judge, held that: (1) federal statute permitting state to take Indian land by condemnation permits state to take such land by paying compensation in an inverse condemnation action, and (2) accordingly, plaintiff was not entitled to injunctive relief.

Order denying injunction affirmed and case remanded for further proceedings.

1. Federal Courts ⇐667

Assuming that district court's order denying motion for partial summary judgment was an appealable one, propriety of that order would nevertheless not be addressed on appeal, where no timely notice of appeal was filed.

2. Eminent Domain ⇐309

Federal statute permitting state to take Indian lands by condemnation permits a state to take such lands by paying compensation in an inverse condemnation action. 25 U.S.C.A. § 357.

3. Injunction ⇐136(2)

The United States, which filed trespass suit as owner in fee title of property held in trust after its patent to an Indian by allotment, was not entitled to injunction against use of road, which was built on property of Indian owner by private party whose interest therein was later transferred to a political subdivision of state, until eminent domain proceedings were commenced, on asserted basis that state or a political subdivision could not acquire an interest in Indian [illegible] main, land having been subject of an inverse taking. 25 U.S.C.A. § 357.

Carl Strass (argued), of Dept. of Justice, Washington, D. C., for appellant.

Richard A. Weinig (argued), of Anchorage, Alaska, for appellees.

Appeal from the United States District Court for the District of Alaska.

Before WRIGHT, KENNEDY and TANG, Circuit Judges.

KENNEDY, Circuit Judge:

The United States filed this trespass suit as the owner in fee title of property held in trust after its patent to an Indian by allotment. *See* 25 U.S.C. §§ 331–332. A complete background of the case is set forth in our earlier opinion, *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976). The dispute concerns a road that was built on property of the Indian owner by a private party. The private owner's interest in the road later was transferred to a political subdivision of the State of Alaska.

[1] In this phase of the proceedings, the United States sought an injunction against use of the road, claiming that the State of Alaska or a political subdivision may not acquire an interest in Indian lands held in trust except by eminent domain and that an injunction should be granted until eminent domain proceedings are commenced.[1] The trial court denied the injunction, reasoning that the land had been the subject of an inverse taking and that the public has the right to use the road after its acquisition by this means, the property owner being limited to an action for compensation resulting from inverse condemnation. The court granted partial summary judgment and denied injunctive relief, and the latter ruling is the subject of this appeal.

1. The appellees seek review of the district court's denial of an earlier motion for partial summary judgment. Assuming the order was an appealable one, a timely notice of appeal was not filed. Therefore, the propriety of this order will not be addressed.

[2] A state is allowed by federal statute to take Indian land by condemnation, 25 U.S.C. § 357. The sole issue on appeal is whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power. We agree with the district court that the statute permits a state to take the Indian land by paying compensation in an inverse condemnation action.

The statute in question provides: "Lands allotted in severalty to Indians may 'be condemned' for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." The argument of the Government that the statute does not include inverse takings is based principally on *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939). There the Supreme Court held that the United States is an indispensable party in state actions to condemn any trust property and that such actions must be brought exclusively in the federal courts. We think that case is simply inapposite to the issue before us. There was no occasion there for the Court to consider the propriety of inverse condemnation suits, since the eminent domain action was instituted by the state. The reason for requiring the condemnation suit to be heard in a federal court is irrelevant to whether the United States may, on behalf of the Indian owner, maintain an inverse condemnation action. The Court noted that Indian land under trust allotment is a subject within the exclusive control of the federal government, and that "the judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts." *Id.* at 389, 59 S.Ct. at 296 (footnote omitted). Whether the proceeding is for inverse condemnation or for eminent domain, the federal court may maintain control over the action to comply with the policies of *Minnesota*.

We think once the taking has been accomplished by the state it serves little pur- [illegible] maintained on the grounds that the state should have filed an eminent domain action prior to the taking. As the Alaska Supreme Court noted in an analogous situation:

> The property has already been taken. It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

Department of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

The Government argues that the statute permitting condemnation should be limited to direct condemnation to avoid clouding title to trust lands, thus increasing protection for Indian allottees. It suggests that such clouding will occur any time the state or a political subdivision trespasses upon the property as, such as in this case, by building a road across it. We do not think this is a persuasive reason for accepting such limited interpretation of the statute. To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing inverse condemnation suits will encourage states and political subdivisions to act with more circumspection, not less, when governmental activities conflict with ownership rights of Indian trust lands. [illegible] the United States and the allottee from

seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass of a private or public entity.

The United States further contends that our holding will require it to make frequent and expensive inspections of these lands for possible acts of inverse condemnation. We think, however, that if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government.

Congress has declared that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found. We see no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit.

[3] There appear to be unresolved questions in this case, including, among others, the date and extent of the taking and the operation of the applicable statute of limitations. These matters remain before the lower court. We hold only that section 357 of 25 U.S.C. does not preclude actions against states or their political subdivisions, according to the law of the state, for inverse condemnation. Accordingly, it does not appear that the plaintiff will prevail in its prayer for injunctive relief and the district court was correct to deny the injunction pending the suit.

The order denying the injunction is affirmed and the case is remanded for further proceedings.

Charles F. KIMBALL, Stephen L. Lang, Allan Lang, Leonard O. Norris, Jr., James Kirk, and the Klamath Indian Game Commission, an agency of the Klamath Indian Tribe, Plaintiffs-Appellees,

v.

John D. CALLAHAN, Allan L. Kelly, Pat J. Metke, Frank A. Morre, and James W. Whittaker, each Individually, and as a member of the State Game Commission of the State of Oregon, John McKean, Individually, and as director of the Oregon Game Commission; and Holly Holcomb, Individually, and as director of the Oregon State Patrol and Oregon Game Enforcement Division, Defendants-Appellants.

No. 77-2628.

United States Court of Appeals,
Ninth Circuit.

Jan. 26, 1979.

Oregon State officials appealed from a judgment of the United States District Court for the District of Oregon, Gus J. Solomon, J., declaring that certain Klamath Indians and the Klamath Indian Game Commission and members of the Klamath Indian Tribe were entitled to hunt, trap and fish within their ancestral reservation as it existed at termination of Klamath Treaty, free from regulation by State. The Court of Appeals, Jameson, District Judge, sitting by designation, held that: (1) previous Court of Appeals decision was the law of the case in its holding that members of the Klamath Tribe who withdrew pursuant to Klamath Termination Act retained their treaty rights to hunt, fish, and trap on former reservation; (2) treaty hunting, fishing, and trapping rights survived the Klamath Termination Act for all members on final tribal roll and their descendants; (3) State of Oregon had authority, under appropriate standards to regulate treaty fishing, hunting and trapping rights on former reservation for conservation purposes,

STATE OF ALASKA

DEPARTMENT OF LAW

JAY S. HAMMOND, Governor

OFFICE OF THE ATTORNEY GENERAL
TRANSPORTATION SECTION

420 'L' STREET, SUITE 100
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

January 25, 1982

Eric Yould
Executive Director
Alaska Power Authority
333 W. 4th Street
Anchorage, Alaska 99501

RE: Our File No. A66-271-82
Declaration of Taking Power for Alaska Power Authority

Dear Mr. Yould:

Pursuant to the request of Warren L. Krotke of Land Field Services, Inc. on behalf of the Alaska Power Authority, enclosed is legislation giving the Alaska Power Authority the ability to use the declaration of taking procedure in eminent domain actions. Additions to the statutes are underlined and deletions are bracketed and capitalized.

You should note that the deletions from AS 9.55.420 also include "telephone cooperatives". This was included to broaden the power of eminent domain for all users. Using the slow take procedure creates difficulties both for the condemnor and the condemnee, who must wait until final judgment to receive any compensation for the taking of the property. In practice this often works a hardship on the condemnee because he must defend a condemnation action without having been paid for the property which is to be taken.

Finally, my understanding is that the Alaska Power Authority will be pursuing this legislation on its own. If we can be of further assistance, please call us.

Very truly yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: Martha T. Mills
Martha T. Mills
Assistant Attorney General

Enclosures

_____BILL NO. _____

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the eminent domain powers of the Alaska Power Authority."

*Section 1. Sec. 09.55.420. (a) is amended to read:

(a) Where a proceeding is instituted under §§ 240-460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. Where a proceeding is instituted under §§ 240-460 of this chapter by a municipality in the exercise of eminent domain for street or highway, off-street automobile parking facilities, school, sewer, water, telephone, electric, other utility, and slum clearance purposes or use granted to cities of the first class, the governing body of the municipality may exercise the power through the filing of a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. The declaration of taking procedure may not be used [WITH RELATION TO THE PROPERTY OF RURAL ELECTRIFICATION OR TELEPHONE COOPERATIVES OR NONPROFIT ASSOCIATIONS RECEIVING FINANCIAL ASSISTANCE FROM THE FEDERAL GOVERNMENT UNDER THE RURAL ELECTRIFICATION ACT; PROVIDED THAT NO DECLARATION OF TAKING] for off-street parking purposes [MAY BE USED] unless there has been public notice by publica-

tion in a newspaper of general circulation in the area for not less than once a week for four consecutive weeks followed by a full and complete public hearing held before the govening body of the first class city or municipality.

*Section 2. Sec. 44.83.080. (15) is amended to read:

(15) to exercise the power of eminent domain in accordance with AS 09.55.250 - 09.55.460[410];

if she stipulates that she will not attempt to obtain custody of the child in any other state, since the stipulation would not be binding on the courts of another state and those courts would not be required to give full faith and credit to the original custody decree. Goodfellow v Goodfellow, 2 Alas. L.J. No. 6, p. 86 (June-July, 1964).

Death of wife given custody warrants revising decree.—Where the wife was given custody of the children of the marriage in a divorce action and the wife subsequently died, the status of the parties was so changed that the court was warranted in revising the original decree. In re Brown's Children, 7 Alaska 411 (1926).

Cited in Johansen v. State, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

ALR references.—Power of court to modify decree for support, alimony, or the like, based on agreement of parties, 58 ALR 639; 109 ALR 1068; 166 ALR 675.

Power to reopen decree of divorce which is silent as to, or has expressly provided against, alimony, so as to permit modification in that regard, 83 ALR 1248.

Power of court to modify provisions of divorce decree as to alimony, as respects past due installments, 94 ALR 331.

Power of court as to terminating permanently husband's duty to pay alimony awarded by decree, 100 ALR 1262.

Concealment or misrepresentation of financial condition by husband or wife as ground of relief from decree of divorce as regards property settlement, 152 ALR 190.

Husband's default, contempt or other misconduct as affecting modification of decree for support, 6 ALR2d 835.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support, 6 ALR2d 1277.

Changing financial conditions or needs of husband or wife as grounds for modification of decree for alimony or maintenance, 18 ALR2d 10.

Sec. 09.55.230. Effect of divorce. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. (§ 12.16 ch 101 SLA 1962)

Article 4. Eminent Domain.

Sec. 09.55.240. Uses for which authorized; rights-of-way. (a) The right of eminent domain may be exercised for the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;

(3) public buildings and grounds for the use of an organized or unorganized borough, city, town, village, school district, or other municipal division, whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of an organized or unorganized borough, city, town, or other municipal division, whether incorporated or unincorporated; raising the banks of streams, removing obstructions from them and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of an organized or unorganized borough, city, town, or other municipal division whether incorporated or unincorporated, or its inhabitants, which may be authorized by the legislature;

(4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water;

(5) roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water;

(6) private roads leading from highways to residences, mines, or farms;

(7) telephone lines;

(8) telegraph lines;

(9) sewerage of an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, or a subdivision of it, or of a settlement consisting of not less than 10 families, or of public buildings belonging to the state or to a college or university;

(10) tramway lines;

(11) electric power lines;

(12) subject to the requirements of the Alaska Right-of-Way Leasing Act of 1972 (AS 38.35), for th . location of pipelines for gathering, transmitting, transporting, storing, or delivering natural or artificial gas or oil or any liquid or gaseous hydrocarbons, including, but not limited to, pumping stations, terminals, storage tanks, or reservoirs, and related installa ions.

(b) The use of water for mining, power, and municipal purposes and the use of pole and power lines for telephone and telegraph wires, for aerial trams, and for the transmission of electric light and electric power, by whomever utilized, are each declared to be beneficial to the public and to be a public use within the provisions of this article. Rights-of-way across private property when they are necessary for the operation of the mine or other project in connection with which it is intended to be used may be condemned in the manner as for any other condemnation. The right-of-way may extend only to a right-of-way along, upon, and across the surface of the lands to be condemned and to a strip of the land of sufficient width to permit the construction on the land of a ditch, flume, pipeline, canal, or other means of conveying water as is adequate for the purposes intended, for the setting of poles or the construction of towers upon which to string wires for telephone and telegraph lines and lines for the transmission of electric light or power for the operation of aerial trams, and to permit maintaining the lines and keeping them in repair.

(c) Until July 1, 1975, home rule cities of over 50,000 population may exercise eminent domain authority within their boundaries to acquire land for the use of the United States, the State of Alaska or any other political subdivision for governmental office buildings and ancillary improvements, including but not limited to the improvement and landscaping of adjacent grounds, under an agreement entered into under art. X, § 13, Constitution of the State of Alaska. (§ 13.01 ch 101 SLA 1962; am § 2 ch 72 SLA 1972; am § 1 ch 62 SLA 1973)

Cross reference. — See Civ. R. 72(c).

Effect of amendments.—The 1972 amendment added "subject to the requirements of the Alaska Right-of-Way Leasing Act of 1972 (AS 38.-35)" at the beginning of subsection (a)(12).

The 1973 amendment added subsection (c).

Editor's note — All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

Eminent domain statutes are universally construed strictly, particularly where a different construction would render the act of doubtful validity. Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 F.2d 5 (9th Cir. 1927).

Condemnation proceedings are statutory, and a strict compliance with the requirements of the statute is necessary. City of Helena v. Rogan, 68 P. 798 (Mont. 1902).

The subject matter of eminent domain proceedings is one of public rather than of private interest. Alaska

Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

The power of eminent domain is inherent in the government and does not depend upon the constitution. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

The right of eminent domain does not depend for its existence on a specific grant in the constitution It is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution State v. Aitchison, 30 P.2d 805 (Mont. 1934).

Which only acts as limitation on the power.—See Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Authority to condemn must be clearly expressed in the law — Authority to condemn property for a public use must clearly be expressed in the law before such right will be allowed. State ex rel. McLeod v. District Court of Sixth Judicial Dist., 215 P. 240 (Mont. 1923).

Or implied clearly and satisfactorily.—Power to take the property of private citizens or other corporations for public use must be exercised and can be exercised only so far as the authority extends either in terms expressed by the law itself or by implication clear and satisfactory. Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

The statute is coercive: that is, upon the necessity of the appropriation being shown the landowner may be compelled to give up his lands for the superior use, whether he consents or not. Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

"Public use" extends to use for public welfare. — The term "public use" has received enlarged scope and meaning, and the test is no longer confined to use by the public, but use for the public welfare. The power of a state to work out from the conditions existing in a mining region the largest welfare of its inhabitants has often been recognized. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Questions to be considered by court. —Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. Town of Seward v. Margules, 9 Alaska 354 (D. Alas. 1938).

Question of whether use is public is for courts.—The question whether the use is in fact public or not, so as to justify the taking without the consent of the owner, is, ultimately, one which the courts alone may determine. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Legislature determines public use in first instance.—It is for the legislature to determine, in the first instance, the question whether the use for which it is proposed to make the condemnation is a public use. State v. Aitchison, 30 P.2d 805 (Mont. 1934).

But question is ultimately for the judiciary - Whether a particular use is public or not is ultimately a question for the judiciary State v Aitchison, 30 P.2d 805 (Mont. 1934).

Also, the question as to the character of a road is one for judicial determination. Komposh v. Powers, 244 P. 298 (Mont. 1926).

And it is of little importance that subsection (6) designates the roads to be established as "private roads." Komposh v. Powers, 244 P. 298 (Mont. 1926).

"Private roads" in subsection (6) are in fact public roads.—The legislature has limited the application of subsection (6) to "private roads leading from highways to farms," and have therefore authorized the taking by the exercise of the right of eminent domain of land for those roads only which are in fact not "private roads," but public roads which lead from a public highway, and must therefore be open to any member of the public who may care to travel it, although few may have occasion to do so. Komposh v. Powers, 244 P. 298 (Mont. 1926).

The circumstance that the plaintiff

road was built by a private corporation, and that its branches run within convenient contiguity of private mines or ore houses, does not materially affect the road and give a private character to its use or to the use of its spurs. Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

A right of way of necessity established under condemnation statutes becomes an open public way which may be traveled by any person who desires to use it. Tomten v. Thomas, 232 P.2d 723 (Mont. 1951).

Therefore subsection (6) is not unconstitutional.—The provisions of subsection (6) do not violate the Fourteenth Amendment to the Constitution of the United States. Komposh v. Powers, 244 P. 298 (Mont. 1926).

Where statutes authorize the opening of a road from a public highway through the lands of one or more private owners to the lands of another for general road purposes, and which road the public generally has the right to travel although others than the applicant may have slight occasion to do so, they are by the great weight of authority held not to contravene the Fourteenth Amendment but to be valid enactments Komposh v. Powers, 244 P. 298 (Mont. 1926).

Character of a way is determined by extent of right to use it. — The character of a way, whether it is public or private, is determined by the extent of the right to use it. Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895); Komposh v. Powers, 244 P. 298 (Mont. 1926).

And not by the extent to which that right is exercised.—See Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895); Komposh v. Powers, 244 P. 298 (Mont. 1926).

If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

If, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

While the road may not be so situated or of such extent that its services may be in great demand, or demanded at all by the public, yet the character of a way, whether it is public or private, is determined by extent of the right to use it, and not by the extent to which that right is exercised If all the people have the right to use it, it is a public way although the number who have occasion to exercise the right is very small. Kipp v. Davis-Daly Copper Co., 110 P. 237 (Mont. 1910).

Private profit may result from use.—It is erroneous to assume that, because the use may bring about private profit, for that reason it cannot be a public use Spratt v Helena Power Transmission Co., 94 P. 631 (Mont. 1908).

The mining of gold has been held to be a public use on account of its relation to the public currency. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

As are roads, streets and alleys.—The words "roads, streets and alleys" in subsection (3) of this section are used independently as within the public uses defined by the statute, and relate to properties clearly made the subjects of condemnation. Ashby v. City of Juneau, 174 F. 737 (9th Cir. 1910).

Only municipality may condemn property for street.—The power to locate and construct a street can only be exercised by a municipality, and can only be made effective by invoking the power of eminent domain. Ashby v. City of Juneau, 174 F. 737 (9th Cir. 1910).

This section and AS 29.10.117 give municipalities power of condemnation.—The right of a municipality to proceed in eminent domain is conferred, when this section is considered in connection with the express grant of power to municipalities by AS 29.10.117 to provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves. Ashby v. City of Juneau, 174 F. 737 (9th Cir. 1910).

Right of eminent domain must be conferred upon municipality by statute.—Municipal corporations can exercise the right of eminent domain only to the extent to which the power has been conferred upon them by

statute. State ex rel. McLeod v. District Court of Sixth Judicial Dist., 215 P. 240 (Mont. 1923).

A city has no power to condemn land for a public highway outside of its corporate limits, without express or necessarily implied legislative authorization State v District Court of Sixth Judicial Dist., etc., 215 P. 240 (Mont. 1923).

Provisions respecting railroad appropriation for public service are liberal.—The provisions of this section are exceedingly liberal in bestowing upon railroad corporations the power to appropriate the property of citizens to carry forward the public service. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

But they must be interpreted in the light of AS 09.55.270. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

Railroad may condemn land to change course of a stream.—A railroad company may condemn land adjoining its right of way by invoking the power of eminent domain, for the purpose of changing the course of a river which the right of way crosses several times. State ex rel. Bloomington Land & Live Stock Co. v. District Court of Tenth Judicial Dist., 88 P. 14 (Mont. 1906).

Or for right of way for lateral lines extending to mines and smelters.—A railroad company may acquire by the exercise of the right of eminent domain right of way for its lateral lines extending to mines and smelters, though owned by private persons as well as the right of crossing with them the main or lateral lines of other roads Kipp v Davis Daly Copper Co., 110 P. 237 (Mont. 1910).

Improvement of water power is public use.—Where the general public advantage is greatly promoted by the improvement of water power to the streams and waters of a country private property taken for that purpose is taken for a public use within the meaning of that term Butte A. & Pac. Ry. v. Montana U. Ry. 41 P. 232 (Mont. 1895).

This section applies to mining tunnels as well as irrigation ditches Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

Lode and placer claims are included within "mines." — The word "mines," as used in this section, e.g., "supplying mines * * * with water," and "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines," is sufficiently broad to include, and was intended to include, placer mining ground, and both lode and placer claims are so included, irrespective of whether they are already opened up or not. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Land may be condemned for ditch to carry water to mining claims.—A corporation authorized to own and operate mines and mining claims, to own and appropriate water and water rights for private and public use, and to build canals, ditches, flumes, and aqueducts, and to lay pipes for supplying its mines with water, and for the general use of the public has the right to condemn land for a ditch to carry water to work mining claims owned by it, by others, and by the public generally for mining purposes. Miocene Ditch Co. v. Jacobsen, 146 F. 680 (9th Cir. 1906).

The right of way for a "tramway line" or "aerial tram" is intended also for power to operate them. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 455, rev'd on other grounds, 20 F.2d 5 (9th Cir. 1927).

But property may not be taken for site for equipment to operate mine.—Where the main purpose of the taking was to obtain a site for plant and equipment to operate a mine which could not be maintained on the mining claim itself because of the periodical inflow of sea water, this section did not authorize such a taking. Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 F.2d 5 (9th Cir. 1927).

Improvements to right of way reserved in patent.— While the original reservation of a right-of-way and election provided for in former § 41 1-4 ACLA 1949 was without limitation as to initial choice on the part of either the federal government or Alaska once the right-of-way has been selected and defined, later improvements necessitating the utilization of land upon which the road is not already located can only be ac

complished pursuant to the condemnation and compensation provisions of this article. Hillstrand v. Alaska, 181 F. Supp. 219 (D. Alas.), petition for interlocutory review denied, 352 P.2d 633 (1960).

Right of foreign or domesticated corporations to condemn lands.

See Helena Power Transmission Co. v. Spratt, 88 P. 773 (Mont. 1907).

Right of foreign or domesticated corporations to condemn lands.—See Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905) and Helena Power Transmission Co. v. Spratt, 88 P. 773 (Mont. 1907).

Appropriation deemed exercise of power of eminent domain.—Neither the failure of the state to institute a condemnation action nor the owners' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating the owners' property from one of the exercise of the power of eminent domain. State v. Crosby, Sup. Ct. Op. No. 322 (File No. 584), 410 P.2d 724 (1966).

Am. Jur., ALR and C.J.S. references.—18 Am. Jur., Eminent Domain, §§ 19 to 33, 49, 53 to 79, 307 to 379.

State power of eminent domain over property of United States, 4 ALR 548.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damages, 61 ALR 1292.

Power as to exercise of eminent domain by federal government exclusively under state authority, 143 ALR 1040.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing or the like to protect public water supply, 56 ALR2d 790.

29 C.J.S. Eminent Domain §§ 18 to 28.

Sec. 09.55.250. Classification of estates and lands subject to be taken. The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) a fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned by them, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or when, in the judgment of the Department of Natural Resources, Department of Public Works, or the Department of Highways, a fee simple is necessary for any of the purposes for which the department, on behalf of the state, is authorized by law to acquire real property by condemnation;

(2) an easement when taken for any other use;

(3) the right of entry upon an occupation of lands, and the right to take from the land earth, gravel, stones, trees, and timber as may be necessary for a public use. (§ 13.02 ch 101 SLA 1962; am § 10 ch 49 SLA 1963; am § 8 ch 130 SLA 1971)

Cross reference.—See Rule 72(c).

Legislative committee report.—For report on ch. 130, SLA 1971 (HCSSB 119 am H), see 1971 House Journal, p. 579.

Court grants only such relief as plaintiff establishes right to.—This section merely classifies the estates and rights "subject to be taken," not that must be taken. The court, on a final hearing, will grant only such relief as plaintiffs shall show themselves entitled to, which relief will be within the limits set by the prayer of the complaint and the statutes. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Title in fee to state common school lands, granted by the enabling act,

complished pursuant to the condemnation and compensation provisions of this article. Hillstrand v. Alaska, 181 F. Supp. 219 (D. Alas.), petition for interlocutory review denied, 352 P.2d 633 (1960).

Right of foreign or domesticated corporations to condemn lands.

See Helena Power Transmission Co. v. Spratt, 88 P. 773 (Mont. 1907).

Right of foreign or domesticated corporations to condemn lands.—See Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905) and Helena Power Transmission Co. v. Spratt, 88 P. 773 (Mont. 1907).

Appropriation deemed exercise of power of eminent domain.—Neither the failure of the state to institute a condemnation action nor the owners' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating the owners' property from one of the exercise of the power of eminent domain. State v. Crosby, Sup. Ct. Op. No. 322 (File No. 584), 410 P.2d 724 (1966).

Am. Jur., ALR and C.J.S. references.—18 Am. Jur., Eminent Domain, §§ 19 to 33, 49, 53 to 79, 307 to 379.

State power of eminent domain over property of United States, 4 ALR 548.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damages, 61 ALR 1292.

Power as to exercise of eminent domain by federal government exclusively under state authority, 143 ALR 1040.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Necessity of condemnation where private rights are affected by regulation of bathing, swimming, boating, fishing or the like to protect public water supply, 56 ALR2d 790.

29 C.J.S. Eminent Domain §§ 18 to 28.

Sec. 09.55.250. Classification of estates and lands subject to be taken. The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) a fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned by them, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or when, in the judgment of the Department of Natural Resources, Department of Public Works, or the Department of Highways, a fee simple is necessary for any of the purposes for which the department, on behalf of the state, is authorized by law to acquire real property by condemnation;

(2) an easement when taken for any other use;

(3) the right of entry upon an occupation of lands, and the right to take from the land earth, gravel, stones, trees, and timber as may be necessary for a public use. (§ 13.02 ch 101 SLA 1962; am § 10 ch 49 SLA 1963; am § 8 ch 130 SLA 1971)

Cross reference.—See Rule 72(c).

Legislative committee report.—For report on ch. 130, SLA 1971 (HCSSB 119 am H), see 1971 House Journal, p. 579.

Court grants only such relief as plaintiff establishes right to.—This section merely classifies the estates and rights "subject to be taken," not that must be taken. The court, on a final hearing, will grant only such relief as plaintiffs shall show themselves entitled to, which relief will be within the limits set by the prayer of the complaint and the statutes. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (1926).

Title in fee to state common school lands, granted by the enabling act,

cannot be acquired in condemnation proceedings. State ex rel. Galen v. District Court, 112 P. 706 (Mont. 1910), construing the Montana statute.

Sec. 09.55.260. Private property subject to be taken. The private property which may be taken under §§ 240—460 of this chapter includes

(1) all real property belonging to any person;

(2) lands belonging to the state or to an organized or unorganized borough, city, town, village, or other municipal division, whether incorporated or unincorporated, not appropriated to a public use;

(3) property appropriated to public use, but the property shall not be taken unless for a more necessary purpose than that to which it has already been appropriated;

(4) franchises for a public utility, but those franchises shall not be taken unless for a more necessary public use;

(5) all rights-of-way for any of the purposes mentioned in § 240 of this chapter, and the structures and improvements on the rights-of-way, and the lands held and used in connection with them shall be subject to be connected with, crossed, or intersected by another right-of-way or improvements or structures on them; they shall also be subject to a limited use, in common with the owner, when necessary; but the uses, crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and least private injury;

(6) all classes of private property not enumerated may be taken for public use when the taking is authorized by law. (§ 13.03 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72(c).

Editor's note.— All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

Lands belonging to the state may be taken by the exercise of the power of eminent domain. State ex rel. Galen v. District Court, 112 P. 706 (Mont. 1910).

And the state may properly be made a party to the action. State ex rel. Galen v. District Court, 112 P. 706 (Mont. 1910).

As the state has expressly consented to be sued under such circumstances. State ex rel. Galen v. District Court, 112 P. 706 (Mont. 1910).

Applicability of subsection (3) — Subsection (3) can only apply where there is a taking of the property dedicated to a public use and appropriating it to another public use Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

The right to take depends largely upon the superior necessity. City of Helena v. Rogan, 68 P. 798 (Mont. 1902).

Subsection (3) does not mean a different public use in all cases If the legislature had intended that construction to be put upon the statute instead of carefully restricting the right to a more necessary public use they could easily have said a different public use. Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

Test is destruction of prior public use.— Under subsection (3) the real question is, Will the taking of this private property, already dedicated to one public use, destroy the prior public use? Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

The legislature had in mind in enacting subsection (3), when it speaks of a more necessary public use than that to which the property is already dedicated, that the latter use is such as will destroy the prior use Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

Complaint must show more necessary public use.—It must appear in the complaint that property already appropriated to public use is to be applied to a more necessary public use. City of Helena v. Rogan, 68 P. 798 (Mont. 1902).

A complete description of the property to be taken is necessary to the end that the court may see that a proposed use is superior in point of necessity to the present public use City of Helena v. Rogan, 68 P. 798 (Mont. 1902).

And the mere statement that a use is superior in necessity would not be sufficient without the facts as to the present use coupled with those appertaining to the intended use. City of Helena v. Rogan, 68 P. 798 (Mont. 1902).

Lands of a public corporation not in actual use may be taken by another public corporation.—One public corporation cannot take the lands or franchises of another public corporation in actual use by it unless expressly authorized to do so by the legislature, but the lands of such a corporation not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, subject to the qualification that there is a necessity therefor. Butte, A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

This section applies to mining tunnels. Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

As well as irrigation ditches.—See Cocanougher v. Zeigler, 112 P.2d 1058 (Mont. 1941).

Prerequisites to chattel becoming fixture.—The rule is that for a chattel to become a fixture and be considered as real estate, three prerequisites must unite: There must be an annexation to the realty of something appurtenant thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated; and there must be an intention of the party to make the chattel a permanent accession to the freehold. Intention, the third of the three factors said to comprise the general test for determining whether an object has become a fixture, refers to to the intent of the parties that the object being introduced onto the realty become a permanent accession thereto. Stroh v. Alaska State Housing Authority, Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

Compensation for personal property taken or damaged.—Reading Alaska Const., art. I, § 18, and Alaska Const., art. I, § 1, in paria materia, and the generally recognized principle that the constitution and legislative enactments in implementation thereof are to be liberally construed, the supreme court found no clear legislative intent to have been manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. Alaska State Housing Authority, Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

Carpeting constituted personalty at the time of the taking, and party was entitled to recover the actual market value thereof at the time of the taking. Stroh v. Alaska State Housing Authority, Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

Sec. 09.55.270. Prerequisites. Before property can be taken, it shall appear that

(1) the use to which it is to be applied is a use authorized by law;

(2) the taking is necessary to the use;

(3) if already appropriated to a public use, the public use to

which it is to be applied is a more necessary public use. (§ 13.04 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72(c).

Editor's note.—All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

Pleading must plainly show authority and necessity for taking.—The right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use. Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905).

An inference is not sufficient in eminent domain proceedings. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized by law, and supported by a statement of facts from which the court can see that the property is intended to be used for that purpose. Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905).

The complaint should allege both that the use to which the property is to be applied is a use authorized by law and that the taking is necessary to such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

Which must be found by court before condemnation.—This section has been construed as requiring the court to find the use is authorized by law and the taking is necessary "before condemnation." Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1960).

It is upon findings made in accordance with this section that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be taken can be condemned at all. Van Dyke v. Midnight Sun Mining & Ditch Co., 177 F. 85 (9th Cir. 1910).

Questions to be considered by court.—Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. Town of Seward v. Margules, 9 Alaska 354 (1938).

Taking for use authorized by law is not conclusive that taking is necessary.—By providing that the right to take property for public use is founded upon a use authorized by law and that the use for such purpose is necessary, the law itself recognizes the fact that a mere taking for a use authorized by law is not conclusive that the taking is necessary for such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

The rule of necessity must be determinative of the right to take in each instance. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

But absolute necessity is not required.—An absolute necessity is not a prerequisite to the exercise of the law of eminent domain Butte A & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

Question of necessity is one of fact.—In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined as other questions of fact, in view of all the evidence in the case State ex rel. Livingston v. District Court of Fourth Judicial Dist., 300 P. 916 (Mont. 1931).

It involves both public and private considerations.—The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizen whose property may be injured. State ex rel. Livingston v. District Court of Fourth Judicial Dist., 300 P. 916 (Mont. 1931).

And the evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. State ex rel. Livingston v. District Court of Fourth

Judicial Dist., 300 P. 916 (Mont. 1931).

Proof of unnecessary injury should be clear and convincing – When an attempt is made to show that the location proposed is unnecessarily injurious, the proof should be clear and convincing; otherwise no location could ever be made. State ex rel. Livingston v. District Court of Fourth Judicial Dist., 300 P. 916 (Mont. 1931).

Sufficient showing of necessity.— Where a complaint used the words "imperatively required" for a public use and alleged facts supporting the same, this was sufficient to show necessity under this section. Town of Seward v. Margules, 9 Alaska 354 (1938).

Appeal from interlocutory order finding use authorized and taking necessary. — See Van Dyke v. Midnight Sun Mining & Ditch Co., 177 F. 85 (9th Cir. 1910); Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 F.2d 5 (9th Cir. 1927).

Convenience and enhanced profits are insufficient to permit appropriation.—That the appropriation of a particular piece of property would promote convenience of operation and enhance the profits of the business of a railroad company is not alone a sufficient reason for permitting it Northern Pac. Ry. v. McAdow 121 P. 473 (Mont. 1912).

Sec. 09.55.280. Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice. (§ 13.05 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.
Am. Jur. reference.—18 Am. Jur., Eminent Domain, §§ 133, 142, 143, 272, 274, 370, 374.

Sec. 09.55.290. Jurisdiction. Eminent domain proceedings may be commenced in the superior court. (§ 13.06 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.
Am. Jur. reference.—18 Am. Jur., Eminent Domain, §§ 313, 314.

Sec. 09.55.300. Powers of court. (a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by law;

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.

(b) If the court determines that the property is to be taken for a public use, and if all parties to the action do not object, the court shall appoint a master to determine the amount to be paid by the plaintiffs to each owner or other person interested in the

property as compensation and damages by reason of the appropriation of the property. If all parties to the action object to the appointment of a master the court shall proceed with a jury trial, unless the jury is waived by all parties to the action. (§ 13.07 ch 101 SLA 1962; am § 1 ch 138 SLA 1968)

Cross reference.—See Civ. R. 72.

Legislative committee report.—For report on ch. 138, SLA 1968 (HCSSB 215 am), see 1968 House Journal, p. 628.

No finding necessary to issuance of order appointing master.— No "finding" seems to be necessary to the issuance of the order appointing commissioners (now master) to appraise damages. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

And such order is not appealable.— The order appointing commissioners (now master) cannot be regarded as appealable Alaska Gold Recovery Co v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

Except for abuse of discretion.— An order appointing commissioners (now master) can only be reviewed for an abuse of discretion, if at all Alaska Gold Recovery Co. v Northern Mining & Trading Co., 7 Alaska 655 (1927).

"Owner" includes purchaser under contract.—An instruction "that the term 'owner' to whom compensation must be paid, may include a purchaser under contract who has an interest in the land sought to be taken or damaged," is entirely proper "State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935), construing the Montana statute.

Sec. 09.55.310. Hearing. (a) The jury or master shall hear the allegations and evidence of persons interested and shall ascertain and assess the followin.

(1) the value of the property sought to be condemned, and all improvements on it pertaining to the realty, and of each separate estate or interest in it; if it consists of different parcels, the value of each parcel and each estate or interest in each parcel shall be separately assessed;

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff;

(3) separately, how much the portion not sought to be condemned and each estate or interest in it will be benefited, if at all, by the construction of the improvements proposed by the plaintiff; and, if the benefit is equal to the damages assessed under (2) of this section, the owner of the parcel shall be allowed no damages except the value of the portion taken; but if the benefits are less than the damages so assessed, the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value;

(4) if the property sought to be condemned is for a railroad, the cost of good and sufficient fences along the line of the rail-

road, and the cost of cattle guards where fences may cross the line of the railroad.

(b) As far as practicable, compensation shall be assessed for each source of damages separately. (§ 13.08 ch 101 SLA 1962; am § 2 ch 138 SLA 1968)

Cross reference.—See Civ. R. 72(e)(4); 72(h).

Editor's note.—All notes from Montana decisions appearing under this section are constructions of the Montana statute from which the section derives.

Legislative committee report.—For report on ch. 138, SLA 1968 (HCSSB 215 am), see 1968 House Journal, p. 628.

Fair market value is an appropriate measure of the just compensation guaranteed by Alaska Const., art. I, § 18. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

One criterion for determining value is what the property is worth on the market—its fair market value, and this is to be determined by a just consideration of all the uses for which a property is suitable. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The essential difference between market price and market value lies in the premises of intelligence, knowledge and willingness, all of which are contemplated in market value but not in market price. Stated differently, at any given moment of time, market value connotes what a property is actually worth and market price what it may be sold for. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Rule as to special benefits. — The rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

"Best use" evidence.—See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

In determining just compensation, usually measured by the "market value" of the property, the highest and most profitable use for which the land is adaptable may be considered to the extent that the prospective demand for such use affects the property's present market value. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

A truly speculative or imagined use should not be considered. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Evidence of use as subdivision.—Many courts, including Alaska's, have allowed evidence of a reasonably probable subdivision to be admitted to prove the adaptability of the land for subdivision use. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The majority of courts allow evidence of a potential subdivision only for the limited purpose of showing the adaptability of the land for subdivision purposes. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The courts are much more liberal in admitting evidence of a potential subdivision when some preliminary steps have been taken to develop the land. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Where there is testimony that the highest and best use of the property is as an industrial subdivision, and evidence that other property in the immediate area was subdivided for industrial purposes, the proposed subdivision is not purely conjectural or speculative. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

If the land were adaptable for subdivision purposes, it would seem that the potential income to be derived from sales of the subdivided lots would be highly relevant to a determination of the "market value," especially to the extent that sophisticated investors who make decisions on the basis of income capitalization take part in market transactions.

Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Capitalization of income, in contexts other than proposed subdivisions, has been recognized as an accepted method of valuation by a number of jurisdictions. Although capitalization of anticipated proceeds from a proposed subdivision necessarily has a speculative element, it still has a direct impact on the property's market value since it will influence investment decisions and thereby affect supply and demand. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

To the extent that the "just compensation" guarantee in Alaska Const., art. I, § 18, comprises a notion of fair market value rather than merely the price the property will bring in an imperfect market, income capitalization must be considered particularly apposite. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Even in a market place where a parcel's price is unaffected by its income potential, income capitalization must be considered to have a bearing on "market value." The danger that market price will not closely reflect market value is enhanced when the property is not currently generating income. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Income capitalization in general and the anticipated use or development method in particular are standard appraisal practices. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

An expert's testimony which capitalized the anticipated rentals from a proposed recreational subdivision to arrive at an estimate of fair market value was properly admitted. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

As to admission of expert testimony on market value based on the development costs and income capitalization of a potential subdivision, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Role of expert witness in eminent domain proceedings.—See Dash v. State, Sup. Ct. Op. No. 756, (File No. 1405), 491 P.2d 1069 (1971).

Sale fifteen months after date of taking. — As to admission into evidence of a sale taking place fifteen months after the date of the taking by the state, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Duty of master.—It is the commissioners (master's) duty to examine the lands sought to be condemned, hear the allegations and evidence of all parties interested, and ascertain and assess the damages done to the persons whose lands are sought to be appropriated Spratt v Helena Power Transmission Co., 94 P. 631 (Mont. 1908).

Assessment of damages refers to "portion sought to be condemned."—The assessment of damages the award of the commissioners (master) provided for in this section, is made with reference to property sought to be appropriated or "portion sought to be condemned," not to property already condemned at the time of the appointment Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

The award of damages is a substantial fact which fixes the just compensation to which relator is entitled, until revised on appeal. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

Recoverable damages must be the natural and proximate consequence of the action taken; they must be direct and certain; actual and reasonable, they must be readily ascertainable, and not remote speculative or contingent. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928); State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935).

Questions relative to revenue produced from the property taken is admissible for the purpose of arriving at the market value of the property State v. Peterson, 328 P.2d 617 (Mont. 1958).

Loss of business by relocation of a highway is not compensable.—It is clear that compensation cannot be had for loss of business by relocation of a highway and diversion of traffic State v. Peterson, 328 P.2d 617 (Mont. 1958).

The owner of land abutting on a highway established by the public has

no property or other vested right in the continuance of it as a highway at public expense, and, at least in the absence of deprivation of ingress and egress, cannot claim damages for its mere discontinuance, although such discontinuance diverts traffic from his door and diminishes his trade and thus depreciates the value of his land State v. Hoblitt, 288 P. 181 (Mont. 1930).

Opinions of witnesses.—The opinions of witnesses must be resorted to to determine (1) the value of the land taken; (2) the detriment, if any to the portion not taken, or, in other words the value of that not taken; and (3) the benefits if any, to the portion not taken. Yellowstone Park R. Co. v. Bridger Coal Co., 87 P. 963 (Mont. 1906).

The right mode of proving value is to take the sworn opinions of those who are shown to be competent to give opinions on the subject, and let them be cross-examined as to the foundation of their opinions, their means of knowledge and the motives prompting them Yellowstone Park R. Co. v. Bridger Coal Co., 87 P. 963 (Mont. 1906).

The question of how the taking of a right of way affects the premises in the market should logically be determined by testimony of qualified witnesses as to the cash market value of the premises today and what that value would be today considering the highway as constructed across them and permitting the witnesses, on cross-examination, to state the manner in which they arrived at their conclusion on the subject. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Competency of witnesses. — One who knows the real property in question and is familiar with the uses to which it may be put, may testify as to its market value. State v. Peterson, 328 P.2d 617 (Mont. 1958).

It must appear that the witness has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond what is presumed to be possessed by men generally State v Peterson, 328 P.2d 617 (Mont. 1958).

Value of real estate may be proved by witnesses other than experts State v. Peterson, 328 P.2d 617 (Mont. 1958).

The witness need not know of any sales and he need not be a technical expert. State v. Peterson, 328 P.2d 617 (Mont. 1958).

A witness as to value of property need not to have been engaged in buying or selling the same. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Who are competent to give opinions on value of property is generally in the discretion of the trial judge. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Weight of testimony is jury question.—The question of what weight to give witness' testimony is one for the jury to decide upon the evidence produced at the trial and under the court's instructions on the law Alaska State Housing Authority v. Vincent, Sup. Ct. Op. No. 261 (File No. 458), 396 P.2d 531 (1964)

Value of improvements is material only if market value is enhanced. — If improvements on the property enhance the market value then the value of those improvements is material; if improvements do not enhance the market value, they are not material. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Testimony as to value of improvements.—The true rule seems to be for the witness to testify as to the nature of the improvements, their use, and then, probably, state that the improvements enhance the market value of the land. He may then testify as to the consideration of the improvements and their condition and value at the time of the condemnation. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Testimony as to amounts invested in the lands and improvements would be incompetent, for it is the value of all such at the time summons is served that counts. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Depreciation of adjacent tract should be considered.—In arriving at a conclusion as to the damages to be awarded, the triers of facts should consider all of the circumstances which immediately and directly depreciate the present market value of the portions of the whole tract adjacent to the strip sought to be taken as a right of way. Lewis & Clark

County v. Nett, 263 P. 418 (Mont. 1928).

But not every possible element of depreciation is compensable.—It is not every possible element of depreciation in value for which compensation must be awarded in an eminent domain proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

And attempt to enumerate elements of depreciation is futile.—Any attempt to enumerate the various circumstances which may enter into depreciation of the market value of a tract of land would be futile. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Highway destroying the close and requiring additional fencing is direct depreciation - One of the circumstances which directly depreciates the market value of land is that the opening of a highway through a fenced tract of land destroys the close and necessitates additional fencing in order to re-establish it. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

An item of damages which would enter into the depreciation of the value of a tract is the cost of constructing a fence along the highway to maintain an inclosure State v Hoblitt, 288 P. 181 (Mont. 1930).

Because the damage suffered and the amount of depreciation is readily ascertainable by testimony as to the reasonable cost of construction of such fences and the consideration of such an item has generally been upheld. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

But in the absence of statutory justification therefor no allowance can be made for a fence as a fence. — See Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Necessity of fencing and cost goes only to show depreciation by reason of taking.—Proof of the necessity of such fencing and its cost, is proper only as a means of showing the depreciation in market value of the land by reason of the taking and use of a part of the land. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

And on examination, a witness could readily testify concerning the depreciation by reason of the requirement of fencing. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

But maintenance of fences is too remote. — Maintenance of fences would be a known future burden upon the lands but the claim should be disregarded as too remote, and as incapable of definite ascertainment or determination at the time the depreciation in value must be determined, i.e., as of the time of the commencement of the proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

General enhancement of land values is not a proper element of benefit.—The general enhancement of values in land in the vicinity because of the construction of a road is not a proper element of benefit to be allowed Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

It may be stated as a general rule that general and neighborhood benefits resulting to the owner in common with others may not be set off against the damages to the owner Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

The benefits which may be deducted must be special or local, or such as result directly and peculiarly to the particular tract of which a part is taken Gallatin Valley Elec. Ry. v Neible, 186 P. 689 (Mont. 1919).

The measure of damages in a proceeding for the condemnation of land for public highway is the fair market value of the land sought to be condemned with the depreciation of such value of the land from which the strip is to be taken, less allowable deductions for benefits proven which values are to be determined as of the date of the commencement of the proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Independent parcels.—When parts of the same establishment are separated by intervening private lands they are generally considered as independent parcels State v Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935).

Am. Jur. reference.—18 Am. Jur., Eminent Domain, § 331 et seq.

Sec. 09.55.320. Right to jury trial as to damages and value of property. An interested party may appeal to the master's award of damages and his valuation of the property, in which case there shall be a trial by jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal. (§ 13.09 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

The proceedings after the master's report are an appeal in name only. Inglima v. Alaska State Housing Authority, Sup. Ct. Op. No. 594 (File No. 1050), 462 P.2d 1002 (1970).

And the right to a jury trial vests by operation of law in all parties to the appeal. Inglima v. Alaska State Housing Authority, Sup. Ct. Op. No. 594 (File No. 1050), 462 P.2d 1002 (1970).

The Alaska statute grants a jury trial to any party and without the necessity of any action or demand by the passive party to the proceeding once the appeal has been taken by any party. Inglima v. Alaska State Housing Authority, Sup. Ct. Op. No. 594 (File No. 1050), 462 P.2d 1002 (1970).

Hence, the owner against whom appeal is taken is entitled to look forward to a jury trial as a matter of right, even though he may be the passive party. Inglima v. Alaska State Housing Authority, Sup. Ct. Op. No. 594 (File No. 1050), 462 P.2d 1002 (1970).

And he must prepare for that type of trial. — Once an appeal is taken from a master's report the opponent is placed in the position of any other party to a contested civil action. He may be called upon to make discovery, engage in motion practice, and prepare for trial. He must plan for the presentation of evidence. In whatever manner the burden of proof may be distributed in a condemnation case, the owner bears at least some burden if he is to hope for success. For what type of trial should he be expected to prepare? According to the statute, it is a trial by jury. Inglima v. Alaska State Housing Authority, Sup. Ct. Op. No. (File No. 1050), 462 P.2d 1002 (1970).

In eminent domain proceedings the right to appeal is purely statutory and may be granted to or withheld from, either party or both at the discretion of the legislature, if no constitutional provision is thereby infringed. Great N. Ry. v. Fiske, 169 P. 44 (Mont. 1917), construing the Montana statute.

Nature of proceeding depends upon statutory provisions.—When the assessment of damages is submitted to a jury after a prior assessment by commissioners, the nature of the proceedings depends upon statutory provisions. State v. Anderson, 13 P.2d 288 (Mont. 1932), construing the Montana statute.

Case is tried de novo as to all elements of damages.—This section implies that not only is the case to be tried de novo before the jury, but it is tried de novo as to all the elements which go to make up the damages to which the owner may be entitled by reason of the appropriation of his property. Great N. Ry. v. Fiske, 169 P. 44 (Mont. 1917), construing the Montana statute.

Property owner, although named as defendant, has the burden of proof to establish the value of his property. State v. Atkins, 1 Alas. L.J. No. 5, p. 6 (May, 1963).

And therefore he has the right to open and close the argument to the jury. State v. Atkins, 1 Alas. L.J. No. 5, p. 6 (May, 1963).

If no appeal taken original award remains as just compensation.—Although there be a right of appeal, to resubmit the question of damage, that appeal may never be prosecuted to effect, in which event the original award would remain as the just compensation ascertained and deposited in such case. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894), construing the Montana statute.

Review of jury findings.—In eminent domain proceedings, the jury findings will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation. State v.

Peterson, 328 P.2d 617 (Mont. 1958), construing the Montana statute.

Quoted in State v. 7.536 Acres, Sup. Ct. Op. No. 434 (File No. 796), 431 P.2d 897 (1967); 6,656 Sq. Ft., more or less, Collart v. State, Sup. Ct. Op. No. 565 (File No. 981), 456 P.2d 480 (1969).

Cited in Tallman v. State, Sup. Ct. Op. No. 862 (File No. 1612), 506 P.2d 679 (1973).

Am. Jur. reference.—18 Am. Jur., Eminent Domain, §§ 337, 338.

Sec. 09.55.330. Compensation and damages. For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the basis of damages to property not actually taken but injuriously affected in the cases where the damages are allowed. If an order is made letting the plaintiff into possession, as provided in § 380 of this chapter, the compensation and damages awarded shall draw lawful interest from the date of the order. No improvements put upon the property after the date of the service of summons shall be included in the assessment of compensation or damages. (§ 13.10 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Editor's note.—All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section was derived

The "actual value" is the market value, the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy State v. Hoblitt, 288 P. 181 (Mont. 1930); State v. Lee, 63 P.2d 135 (Mont. 1936).

Determination of market value. — To arrive at the market value it is always proper to introduce evidence as to the uses to which the land may be put, as well as the uses to which it has been put, for a witness to detail its adaptability for a particular use, and then to state its market value. State v. Peterson, 328 P.2d 617 (Mont. 1958).

To arrive at the market value, evidence may be introduced as to the various uses to which the property is adapted, even though it has never been put to such use in fact In this connection the location of the land the character of the neighborhood and all things surrounding the property may be shown as all are matters which a purchaser would consider in attempting to ascertain the market value. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Burden of proof.—The burden of proof as to value is upon the owners of the property Alaska State Housing Authority v Vincent, Sup. Ct. Op No 261 (File No. 458), 396 P.2d 531 (1964)

Use should be considered in arriving at market value.—The use should be considered in arriving at the ultimate inquiry, the market value itself. State v. Peterson, 328 P.2d 617 (Mont. 1958).

But the use is not the market value. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Owner is entitled to market value based on availability for most valuable use.—The owner has the right to obtain the market value of the land, based upon its availability for the most valuable purpose for which it can be used, whether so used or not State v. Hoblitt, 288 P. 181 (Mont. 1930).

But to be available for a purpose means capable of being used for that purpose. State v. Hoblitt, 288 P. 181 (Mont. 1930).

And it must be marketable for that purpose at the date of summons. — As the market value at the date of the summons controls, the land must be shown to have been marketable at

that time for the purpose stated. State v. Hoblitt, 288 P. 181 (Mont. 1930).

Plaintiff may not use value of premises at time of trial when action not tried as eminent domain proceeding.—In an action for injury to gold mining claims by discharging debris thereon, where the cost of restoration would exceed the value of the property, the measure of damages was the value of the claims at the time of the injury, and plaintiff was not entitled to treat the suit as a quasi eminent domain proceeding and recover the value of the claims as of the time of the trial, thus giving himself the advantage of an increase in the price of gold, where the suit was tried and determined on the theory that it was an action in trespass, not one involving the power of eminent domain, the pleadings framed no issue of appropriation for a public use and the judgment did not purport to vest in the defendant any title or right of possession. Erceg v. Fairbanks Exploration Co., 9 Alaska 264, 95 F.2d 850 (9th Cir. 1938), cert. denied, 9 Alaska 399, 305 U.S. 615, 59 S. Ct. 74, 83 L. Ed. 392 (1938).

Use must be such as would probably affect a purchaser.—The showing must be that the use is one to which the land may reasonably be applied such as would probably affect a purchaser. State v. Hoblitt, 288 P. 181 (Mont. 1930).

Speculative uses, remote and conjectural possibilities, are not to be taken into consideration, as the land must, at the date of the summons, have been "available" for the more valuable use shown. State v. Hoblitt, 288 P. 181 (Mont. 1930).

Showing of most valuable use is merely to fix actual highest market value.—While the owner is entitled to show the most valuable use for which the land is available, this is merely for the purpose of fixing the actual highest market value at the time specified. State v. Hoblitt, 288 P. 181 (Mont. 1930).

And discussion of uses to which the land is not then put is but sales talk, persuasive only in so far as it would convince a prospective purchaser that the price asked is reasonable under all of the circumstances shown. State v. Hoblitt, 288 P. 181 (Mont. 1930).

With the jury standing in the position of the purchaser. State v. Hoblitt, 288 P. 181 (Mont. 1930).

This section is definite and certain as to the time when compensation and damages accrue. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

And as to the right to damages to portion not sought to be condemned—This section is certain in its terms as to the right of the owner to recover damages which will accrue to that portion of the larger tract not sought to be condemned, by reason of the severance. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

But elements to be considered are not enumerated — Aside from the value of the land actually taken, the statute does not enumerate just what elements may be taken into account in fixing damages to the remaining portion of the tract, nor what the rule shall be governing the admissibility of evidence. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

Owner entitled to actual value of part taken and for injury to remaining portion.—The owner is entitled in all cases to have as one item of damages the actual value of the part taken, and where the contemplated improvements, properly constructed, cared for, and operated, injure the remaining portion of the tract, he is entitled to recover for that unless the benefits derived equal or exceed the injury. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

Ordinarily damages may be awarded only for injury done to the particular lot or tract of land from which the right of way strip is taken, and the above rule is applied in ascertaining the award to be made by a determination of the value of the acreage taken and the depreciation in value of the remainder of the particular tract, regardless of what other lands the owner may possess, but even where two tracts are separated by a highway or water course, or by a railway if they are used jointly by the owner in a single enterprise and the whole plant is depreciated in value by the proposed improvement, the direct damages suffered may be compensated. State v. Hoblitt, 288 P. 181 (Mont. 1930).

Appraisal of damages prior to con-

struction of improvements should assume proper construction. — When damages are appraised prior to the construction of the improvements for which the land is condemned, the estimate should be made on the assumption that the improvements will be properly constructed: and, if they are constructed pending the condemnation proceedings, the rule under this section should be the same Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

Effect of properly constructed improvements should control appraisal —The actual effect of the properly constructed improvements in the manner proposed by plaintiff as to the larger parcel should control the appraisal. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

And no additional damage is allowed for improperly constructed improvements — If the improvements are improperly or negligently constructed no additional damage should be given for this reason. Montana R.R. v. Freeser, 74 P. 407 (Mont. 1903).

Interest is allowed by this section as compensation for the use and occupation of the premises under the order allowing the plaintiff to take possession Helena Power Transmission Co. v. Spratt, 106 P. 5 (Mont. 1910).

And allowance of interest is not a jury matter.—Interest is allowed by this section and with such allowance the jury could not properly have anything whatever to do Helena Power Transmission Co. v. Spratt, 106 P. 5 (Mont. 1910).

It is merely a matter for the court Helena Power Transmission Co. v. Spratt, 106 P. 5 (Mont. 1910).

"Improvements" upon property are a part thereof for this section excludes improvements put upon the property subsequent to the date of service of the summons State v Peterson, 328 P.2d 617 (Mont. 1958).

Testimony as to the amounts invested in lands and improvements would be incompetent, for it is value of all such at the time summons is served that counts State v Peterson 328 P.2d 617 (Mont. 1958).

Am. Jur. reference.—18 Am. Jur., Eminent Domain, § 128 et seq.

Sec. 09.55.340. Defective title. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as provided in §§ 240—460 of this chapter. (§ 13.11 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Sec. 09.55.350. Time for paying compensation or damages and bond to build railroad fences and cattle guards. The plaintiff shall, within 30 days after final judgment, pay the sum of money assessed. If the use is for railroad purposes, the plaintiff may, at the time of or before the payment, elect to build the fences and cattle guards. If he so elects, he shall execute to the defendant a bond, with one or more sureties to be approved by the court, in double the assessed cost of the same to build such fences and cattle guards within eight months from the time the railroad is built on the land taken. If the bond is given, the plaintiff need not pay the cost of the fences and cattle guards. In an action on the bond, the plaintiff may recover reasonable attorney fees. (§ 13.12 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Sec. 09.55.360. Payment or deposit and execution. Payment may be made to the defendants entitled to payment, or the money may be deposited in court for the defendants and be distributed to

those entitled to it. If the money is not so paid or deposited, the defendants may have execution as in civil cases. If the money cannot be obtained on execution, the court, upon a showing to that effect, shall set aside and annul the entire proceedings and restore possession of the property to the defendants if possession has been taken by the plaintiff. (§ 13.13 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

The holder of legal title to land taken is prima facie entitled to compensation under this section Forbis v. Cannon, 90 P. 161 (Mont. 1907), construing the Montana statute.

Am. Jur. reference.—18 Am. Jur., Eminent Domain, §§ 304 to 306.

Sec. 09.55.370. Final order of condemnation. When payments have been made and the bond given, if the plaintiff elects to give one as required by § 350 of this chapter, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation. A copy of the order shall be filed in the office of the recording district where the land is located, at which time the property described in the order vests in the plaintiff for the purposes specified in the order. (§ 13.14 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Final order of condemnation may not constitutionally precede payment of award.—The final order of condemnation follows the payment of the award and could not be entered in advance without infringing the constitutional mandate that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner Great N. Ry. v. Benjamin, 149 P. 968 (Mont. 1915), construing the Montana statute.

Am. Jur. reference.—18 Am. Jur., Eminent Domain, § 364 et seq.

Sec. 09.55.380. Order authorizing plaintiff to continue in or take possession. Upon application of the plaintiff at any time after the jury's verdict has been returned or the master's report has been filed in the court, the court may make an order that, upon payment into court of the amount of damages assessed in the report or by the jury, the plaintiff, if already in possession of the property sought to be condemned, may continue in possession and, if not in possession, the court may authorize the plaintiff to take possession of the property and use and possess it until the final conclusion of the proceedings, and that all actions and proceedings against the plaintiff on that account be stayed until that time. However, where an appeal is taken by the defendant, the court may also require the plaintiff to give a bond or undertaking with sufficient sureties before continuing or taking possession. The bond or undertaking shall be approved by the court and shall be in the sum the court may direct, and conditioned to pay defendant any additional damages and costs given by the judgment over and above the amount assessed, and the damages which defendant sustains if the property is not taken for public uses. For the purposes of this section the amount assessed as damages in the report or by

the jury is considered as just compensation for the property appropriated until reassessed or changed in further proceedings. However, the plaintiff, by payment into court of the amount assessed or by giving security as above provided, is not precluded from an appeal, but may appeal in the manner and with the effect as if no money had been deposited or security given. If the plaintiff deposits the amount of the assessment and continues in possession or takes possession of the property and there is no dispute as to the ownership of the property, the defendant may at any time demand and receive from the court the money deposited, and the demand or receipt does not bar or preclude him from his right of appeal. However, if the amount of the assessment is reduced on appeal by either party, the defendant who has received the amount of the assessment deposited is liable to the plaintiff for the difference between the amount received by him and the amount finally assessed with legal interest from the time the defendant received the money deposited, and it may be recovered by action. (§ 13.15 ch 101 SLA 1962; am § 3 ch 138 SLA 1968)

Cross reference.—See Civ. R. 72.

Editor's note.—All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section was derived.

Legislative committee report.—For report on ch. 138, SLA 1968 (HCSSB 215 am), see 1968 House Journal, p. 628.

Constitutionality.—See State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894); State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935).

The order for possession is not final It is temporary, and the whole subject-matter, together with the thing sought to be condemned, is within the jurisdiction of the court, and therefore the taking of the property, or the ultimate divestiture of the owner thereof has not been consummated, but only temporary possession given. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

If no appeal is taken original award remains as just compensation ascertained and deposited.— Although there be a right of appeal to resubmit the question of damage, that appeal may never be prosecuted to effect, in which event the original award would remain as the just compensation ascertained and deposited in such case State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

Deposit of damages in court authorizes order for possession.— Where the amount awarded as damages was on deposit in the court, and still subject to be drawn down by defendant, this, in itself, entitled plaintiffs to an order for possession or continued possession "until the final conclusion of the proceedings." Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927), rev'd on other grounds, 25 F.2d 106 (9th Cir. 1928).

Award of master is sufficient deposit to answer for temporary possession.— An award, considered in the judgment of the commissioners (master) to be just compensation in lieu of complete deprivation or of continued use of property condemned, must be sufficient deposit to answer for the temporary possession granted by the court on deposit of the first award. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

Procedure upon increase of award through trial on appeal — If the award should be increased through the trial on appeal, there will be no final judgment confirming to the condemnor the right of way proposed to be condemned until deposit or payment of the additional amount; and in default of such additional payment,

the court having jurisdiction of the subject-matter and the parties would oust the party seeking to condemn the property from the temporary possession which the court had given, and mete out to the owner adequate damage for temporary use and injury applying the deposited sum thereto. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

It does not necessarily follow that because one is a trespasser he may not invoke the power of eminent domain. Spratt v Helena Power Transmission Co., 94 P. 631 (Mont. 1908).

And he is not deprived of his right to condemn because he has committed a trespass or is wrongfully in possession of the land sought to be condemned Spratt v Helena Power Transmission Co., 94 P. 631 (Mont. 1908).

Sec. 09.55.390. Acquisition of easements and additional powers of the court to require surrender of possession to plaintiff. The right to take possession under this section is in addition to any other right to take possession provided in §§ 240—460 of this chapter. In proceedings for the acquisition of easements for the transmission and distribution of electric energy, communications, water, steam, and gas, the court may, upon motion and after a hearing, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the plaintiff. If the court finds that urgent public necessity requires, it may grant the plaintiff possession at any time after the action has been commenced. Notice of the hearing shall be as provided in the Rules of Civil Procedure, except that, where service by publication is required, notice may be given at any time following the date of the last publication by registered mail addressed to the defendant and to parties in possession at their last-known addresses as shown on the latest tax roll of the political subdivision in which the premises are located or as indicated by other evidence which shall be satisfactory to the court. (§ 13.16 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Sec. 09.55.400. Deposit into court of estimated compensation and damages. The order given under § 390 of this chapter requiring the parties in possession to surrender possession to the plaintiff shall require that the plaintiff deposit with the clerk of the court an amount of money determined by the court fairly to represent the estimated compensation and the estimated damages to the defendant and for the speedy occupation, including reasonable relocation costs if required. In addition the court shall include in its order a further requirement that the plaintiff execute and file with the clerk of the court a bond, approved as to form and as to sufficiency of the sureties by the court, in an amount equal to the amount of money required to be deposited, conditioned upon payment to the defendant of additional damages and costs found to be due to the defendant in the action. No costs or attorney fees shall

be assessed against the defendant in an action brought under § 390 of this chapter. (§ 13.17 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.
Am. Jur. reference.—18 Am. Jur., Eminent Domain, § 305.

Sec. 09.55.410. Withdrawal of funds by party in interest. The money deposited in the court or a part of it may be withdrawn by a party in interest in the manner provided in § 440 of this chapter, and the court shall have the power to direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation and to make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable. (§ 13.18 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72.

Sec. 09.55.420. Declaration of taking by state or municipality. (a) Where a proceeding is instituted under §§ 240—460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. Where a proceeding is instituted under §§ 240—460 of this chapter by a municipality in the exercise of eminent domain for street or highway, off-street automobile parking facilities, school, sewer, water, telephone, electric, other utility, and slum clearance purposes or use granted to cities of the first class, the governing body of the municipality may exercise the power through the filing of a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. The declaration of taking procedure may not be used with relation to the property of rural electrification or telephone cooperatives or nonprofit associations receiving financial assistance from the federal government under the Rural Electrification Act; provided that no declaration of taking for off-street parking purposes may be used unless there has been public notice by publication in a newspaper of general circulation in the area for not less than once a week for four consecutive weeks followed by a full and complete public hearing held before the governing body of the first class city or municipality.

(b) Notwithstanding the provisions of (a) of this section, until July 1, 1975, a home rule city of over 50,000 population may exercise the power of declaration of taking under § 240(c) of this chapter. When the home rule city exercises this power for the United States government, the just compensation paid for the property shall include all relocation and other costs to the extent required by the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (P.L. 91-646; 84 Stat. 1894). (§ 13.19 ch 101 SLA 1962; am § 2 ch 122 SLA 1966; am § 2 ch 62 SLA 1973)

Cross reference.—See Civ. R. 72(c)(3).

Effect of amendment. — The 1973 amendment added subsection (b).

Legislative committee report.—For report on ch. 122, SLA 1966 (HB 418 am 5), see 1966 House Journal, p. 432.

AS 09.55.420—09.55.440 were taken almost word for word from 40 USC 258a, except for substitutions of "state, public utility district, or school district" for "United States." 1960 Op. Att'y Gen., No. 15.

The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected. Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959).

Power is strictly construed. — A grant of power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner. Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959).

It is confined within definite limits. — The legislature was particular in selecting those upon whom the power to exercise a declaration of taking would be conferred and particular also in confining this authority within definite limits. Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959).

And the Alaska Housing Authority may not use a declaration of taking. Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959); Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 8 (File No. 46), 352 P.2d 1118 (1960).

A declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Bridges v. Alaska Housing Authority, Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1959).

The condemnor may take immediate possession of the property upon the filing of a declaration of taking with the complaint. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Determination of state agency to condemn will not be overturned by courts.—The general law is that a determination on the part of a state agency to condemn will not be overturned by the courts in the absence of fraud, bad faith, abuse of discretion, or lack of statutory authority. 1960 Op. Att'y Gen., No. 15.

In absence of lack of necessity, fraud or abuse of discretion.—A determination to condemn by an agency acting under power to condemn delegated to it by the legislature would not become a problem requiring judicial action unless a lack of necessity for a public use could be shown, and if there is no fraud, bad faith, or abuse of discretion. 1960 Op. Att'y Gen., No. 15.

The question of the necessity of taking land for public use is primarily a "legislative" question rather than a "judicial" question. 1960 Op. Att'y Gen., No. 15.

Sec. 09.55.430. Contents of declaration of taking. The declaration of taking shall contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plain-

tiff to be just compensation for the property or the interest in it. (§ 13.20 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72-(e)(3).

Where the state has adequate knowledge of separate interests, amounts should be specified for each. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Sec. 09.55.440. Vesting of title and compensation. (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment shall include interest at the rate of six per cent per year on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

(b) Upon motion of a party in interest and notice to all parties, the court may order that the money deposited or a part of it be paid immediately to the person or persons entitled to it for or on account of the just compensation to be awarded in the proceedings. If the compensation finally awarded exceeds the amount of money deposited, the deposit shall be offset against the award. If the compensation finally awarded is less than the amount of money deposited, the court shall enter judgment in favor of the plaintiff and against the proper parties for the amount of the excess. (§ 13.21 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72-(e)(3).

Condemnor takes estate sought in declaration of taking. — The Alaska declaration of taking statutes are as effective as the federal statutes in effecting the vesting of title in the condemnor of whatever interest in the land it seeks to condemn. If the state undertakes to obtain title to real property in fee simple absolute by the filing of a declaration of taking that is the title which it obtains. 1960 Op. Att'y Gen., No. 15.

Alaska Const., art. I, § 18, necessitates that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. If an award were paid immediately upon the taking of the land by the state no damages to the property owner would ensure. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Therefore, it is well established that the owner of property is entitled to interest from the date of taking to the date of payment. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

This section provides for interest on the amount awarded which exceeds the amount paid into court under the declaration of taking. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Au-

thority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Interest can be avoided only where the amount paid into court is available for immediate withdrawal by the owner or owners of the separate interests in the land. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

No interest where failure to withdraw funds is attributable to delay of owner.—In situations where the failure to withdraw funds on deposit in the registry of the court is attributable to the delay of the property owner, no interest should be allowed on the portion of the award so deposited. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

A blanket estimate and deposit covering several parcels and not attended by allocation among them is not an effective tender of any sum for any parcel. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Multiple party interest in property for which lump sum is deposited without segregation.—When more than one party has an interest in property and a lump sum is deposited without segregation as to the amount estimated to be just compensation for the various interests, it is generally impossible to receive a speedy withdrawal of the funds. Under those circumstances the property owners necessarily will suffer a delay in receiving compensation for the value of their interest in the property taken. Where the amount to be deposited for the property may readily be segregated to reflect such interests, the government is obligated to allocate the deposit among the parcels taken in order to stop the running of interest. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Depositing separate amounts for structure, furnishings, and fixtures.—Where the appraisal allocated separate values for the fee interest in the land contained in two parcels as well as for a hotel structure and its furnishings and fixtures, it would have been a simple matter to deposit a separate amount for the hotel structure, its furnishings and fixtures. Since this was not done, the property owner should not be deprived of interest from the time of taking of the property until such time as he receives payment. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Applied in State v. Severance, Superior Court, 4th Jud. Dist., C.A. No. 70-327 (1972).

Cited in Tallman v. State, Sup. Ct. Op. No. 862 (File No. 1612), 506 P.2d 679 (1973).

Am. Jur. reference. — 18 Am. Jur., Eminent Domain, §§ 113, 305.

Sec. 09.55.450. Right of entry and possession. (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. Where the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

(b) The court may direct the payment of delinquent taxes and special assessments out of the amount determined to be just com-

tin to be just compensation for the property or the interest in it. (§ 13.20 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72-(e)(3).

Where the state has adequate knowledge of separate interests, amounts should be specified for each. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Sec. 09.55.440. Vesting of title and compensation. (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment shall include interest at the rate of six per cent per year on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

(b) Upon motion of a party in interest and notice to all parties, the court may order that the money deposited or a part of it be paid immediately to the person or persons entitled to it for or on account of the just compensation to be awarded in the proceedings. If the compensation finally awarded exceeds the amount of money deposited, the deposit shall be offset against the award. If the compensation finally awarded is less than the amount of money deposited, the court shall enter judgment in favor of the plaintiff and against the proper parties for the amount of the excess. (§ 13.21 ch 101 SLA 1962)

Cross reference.—See Civ. R. 72-(e)(3).

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Alaska Const., art. I, § 18, necessitates that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. If an award were paid immediately upon the taking of the land by the state no damages to the property owner would ensure. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Therefore, it is well established that the owner of property is entitled to interest from the date of taking to the date of payment. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

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Applied in State v. Severance, Superior Court, 4th Jud. Dist., C.A. No. 70-327 (1972).

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Sec. 09.55.450. Right of entry and possession. (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. Where the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

(b) The court may direct the payment of delinquent taxes and special assessments out of the amount determined to be just com-

pensation, and make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable.

(c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240—460 of this chapter. (§ 13.22 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72-(e)(3).

Section defers possession until after time for objection. — Possession is deferred pursuant to this section for at least that period of time which is granted to the defendant to file a challenge to the declaration of taking and for a greater period if the court should so direct. 1960 Op. Att'y Gen., No. 15.

The court may enter an order placing the plaintiff in possession of the property upon the filing of the declaration of taking and the deposit of the estimated compensation. Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Am. Jur. reference.—18 Am. Jur., Eminent Domain, § 112 et seq.

Sec. 09.55.460. Effect of appeal. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, and (2) recover for the plaintiff any award paid to any person. (§ 13.23 ch 101 SLA 1962)

Cross reference. — See Civ. R. 72-(e)(3).

Article 5. Official Bonds, Fines, and Forfeitures.

Sec. 09.55.470. Suits on undertakings. (a) The official undertaking or other security of a public officer to the state, a borough, city, town, or other municipal or public corporation of like character therein is considered a security to the state or to the borough, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally for the official delinquency against which it is intended to provide.

(b) When a public officer, by official misconduct or neglect of duty, forfeits his official undertaking or other security or renders his sureties liable upon the undertaking or other security, a person injured by the misconduct or neglect or who is by law entitled to the benefit of the security may maintain an action thereon in

his own name against the officer and his sureties to recover the amount to which he may be entitled. (§ 16.01 ch 101 SLA 1962)

Am. Jur. reference.—50 Am. Jur., Suretyship, §§ 27, 28.

Sec. 09.55.480. Subsequent actions on same undertaking. A judgment in favor of a party for one delinquency does not preclude the same or another party from maintaining another action on the same undertaking or other security for another delinquency. (§ 16.02 ch 101 SLA 1962)

Sec. 09.55.490. Amount of judgment. In an action upon an official undertaking or other security, if judgment has already been recovered against the surety therein other than by confession equal in the aggregate to the penalty or a part of the penalty of the undertaking or other security and if the recovery be established on the trial, judgment shall not be given against the surety for an amount exceeding the penalty or such portion of the penalty as is not already recovered against him. (§ 16.03 ch 101 SLA 1962)

Sec. 09.55.500. Actions for fines or forfeitures. Fines and forfeitures may be recovered by an action in the name of the state or the officer or person to whom they were given by law, or in the name of the state, officer, or person who is authorized to prosecute for them. (§ 16.04 ch 101 SLA 1962)

Sec. 09.55.510. Amount which may be claimed and recovered. When an action is commenced for a penalty which by law is not to exceed a certain amount, the action may be commenced for that amount, and, if the judgment is given for the plaintiff, it may be for that amount or less, in the discretion of the court, in proportion to the offense. (§ 16.05 ch 101 SLA 1962)

Sec. 09.55.520. Collusive judgment not a bar to another action. Recovery of a judgment for a penalty or forfeiture obtained by collusion between the plaintiff and defendant with intent to save the defendant wholly or partially from the consequence contemplated by law in cases where penalty or forfeiture is given wholly or partly to the person who prosecutes, does not bar the recovery of a penalty or forfeiture by another person in a separate action. (§ 16.06 ch 101 SLA 1962)

Article 6. Malpractice Actions.

Section
530. Declaration of purpose
540. Burden of proof
550. Jury instructions

Sec. 09.55.530. Declaration of purpose. The legislature considers that there is a need in Alaska to codify the law with regard

ANCSA Terms Defined

Every issue of ANCSA News contains certain words and phrases that are of particular significance to implementation of the Alaska Native Claims Settlement Act. We thought it might be helpful to list the legal definitions for the most common terms. The definitions are taken from the Code of Federal Regulations, Title 43, page 237-238. Emphasis provided.

CONVEYANCE — The transfer of title pursuant to the provisions of the act whether by interim conveyance or patent, whichever occurs first.

INTERIM CONVEYANCE — The conveyance granting to the recipient legal title to *unsurveyed lands*, and containing all the reservations, easements, rights-of-way, or other itnerests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation by boundary descriptions after approval of the survey of the conveyed land.

PATENT — The original conveyance granting legal title to the recipient to *surveyed* lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law; or the document issued by the Bureau of Land Management, to confirm the boundary description of the unsurveyed conveyed land.

> "I'm tired of Being-a-Native. I just want to be a citizen of this town again."

Subsistence

Many myths exist about the nature of societies with subsistence economies. One, for example, is that the land is viewed by subsistence societies as common, group property. Hanrahan and Gruenstein assert:

> "Natives treat land used to sustain their subsistence way of life as community property" (1977:120).

In fact, traditional village concepts of property rights were complex and varied from village to village and from one ethnic group to another. As suggested by the quotation at the beginning of this essay, some Natives traditionally held a concept of the people belonging to the land.

Another misconception which seems to pervade the non-Native thinking about Native subsistence activities is that it is not productive but recreational: This implies that hunting and fishing are not work, that these are not economic behaviors.

Subsistence activities are permeated with economic behaviors: the expenditure of effort, the allocation of labor, the distribution of time, the sharing of the fruits of labor. Just because these activities happen to be hauling water, chopping wood, berry picking, hunting and butchering, fishing, preserving and giving, does not make them any the less economically related. Western society has a narrow definition of work; it is cash-producing behavior. The statement that "Natives do not want to work" is limited to this definition. Many Natives work very hard at subsistence activities.

What is essential for subsistence economies is the availability of resources. Restrictions in access to fish and game can undermine the entire society. Thus it comes as some surprise that limitations may be imposed on Native Alaskans. The Federal Field Committee stated:

> "There is no dispute that the right of Alaska Natives to go upon Federal lands for the purpose of taking fish and game should continue." (1968:540).

At least in those days there was no dispute.

Management

With the disappearance of the frontier and the loss of the "wide open spaces," came the need to manage things. Among the many issues confronting Alaska is the increasing complexity of managing the land, rivers, oceans, animals, fish and people. We already may need an agency to manage the agencies.

Inherent in the management of lands and resources regardless of which philosophy of management is being put forth, is the management of people.

determining whether an applicant has the subjective intent which is a necessary element of bona fide residence. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

The state may constitutionally give a preference to residents. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

And it is constitutionally entitled to use reasonable administrative means to determine who is a bona fide resident and who is not. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

"Maintaining a place of residence" defined. — Maintaining a place of residence simply means being ordinarily physically present in Alaska, having a place within Alaska where one ordinarily stays, and having no such place anywhere else. A construction camp may meet this requirement. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Residency for voting purposes means durational residency for 30 days. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

In order to determine bona fide residency vel non, the 30-day requirement is permissible. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Functions of 30-day period. — As under the election laws, the 30-day period both serves administrative convenience and acts as an indicator of bona fide residence and intent to remain in Alaska. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

The requirement of paragraph (1)(D) is a reasonable requirement for determining bona fide residency. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Criterion of paragraph (1)(D) defined. — The criterion of paragraph (1)(D) that the worker may not claim residency anywhere else during the durational period means no claim of residency anywhere else at the time of application or thereafter. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

A person receiving any benefit from any other state on the basis of his residence in that state — e.g., voting, unemployment compensation, public assistance, "resident" tuition rate for unemancipated children, etc. — would not qualify as a resident. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Once a person becomes an Alaska resident for the purpose of this chapter, he becomes an Alaska resident for all purposes. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

The criteria of paragraphs (1)(D) and (1)(E) are part of the definition of domicile. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Which is meaning of bona fide residency for purposes of chapter. — See Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

"Permanent" does not require a promise to stay in Alaska forever. This indicium is no more subjective or vague than the concept of domicile itself. Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977).

Chapter 50. Exchange of State Land.

Section
10. Authorization
20. Value of properties exchanged
30. Parties
40. Land subject to exchange
50. Conveyance of mineral rights
60. Reservations and covenants
70. Valid existing rights
80. Prohibition against future considerations and alienation of selection rights
90. Coordination with other state agencies
100. Finding requirement as to alterantives
110. Notice of proposed exchange
120. Public hearings
130. Report on proposed exchange
140. Legislative review
150. Execution of exchange
160. Regulations
170. Definitions

Cross reference. — As to reservations to which contracts for sale, lease or grant of state land and deeds to state land, properties or interest in state land are subject, see AS 38.05.125.

Statute authorizing exchange of land between state, United States government and regional corporation held not invalid. — See State v. Lewis, Sup. Ct. Op. No. 1364 (File No. 3039), 559 P.2d 630 (1977), decided under former AS 38.95.060.

Sec. 38.50.010. Authorization. Subject to the requirements of this chapter, the director, with the concurrence of the commissioner, is authorized to dispose of state land or interest in land by exchanging it for land, interest in land, or other consideration. Exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes. (§ 1 ch 240 SLA 1976)

Legislative committee report. — For report on ch. 240, SLA 1976 (FCCS HCS CSSB 726), see 1976 House Journal, p. 1432.

Sec. 38.50.020. Value of properties exchanged. (a) The land, interest in land, and other consideration which the state receives in an exchange made under this chapter shall be equal to or exceed the appraised fair market value of the land, interest in land or property exchanged by the state; however, the director may accept cash from, or pay cash to, any other party to an exchange in order to equalize the value of the property or other consideration conveyed and received by the state. If the director determines that the property to be exchanged is not equal in appraised fair market value or if the value cannot be ascertained with reasonable certainty, the director may enter into an exchange if he finds that the appraised fair market value of the property to be received, together with the value of other public benefits, equals or exceeds the value of the property which the state will relinquish. An exchange for other than equal appraised fair market value is subject to legislative review as provided in § 140 of this chapter.

(b) An appraisal required by this section is presumed accurate and valid for a period of six months from the time the appraisal is completed. After that time, or if the director has reason to believe that the value of the appraised property has changed significantly during the original six-month period, a reappraisal of the property is required. (§ 1 ch 240 SLA 1976)

Sec. 38.50.030. Parties. (a) The director may exchange land an interest in land with a government agency, organization, corporation,

individual, or other person. At the beginning of discussions concerning a proposed exchange, the director shall require proof that each party to the negotiations is the owner of, or is legally entitled to, the property which the party desires to exchange and proof that a person acting as an agent for the party has the authority to negotiate an exchange in behalf of his principal.

(b) The director may negotiate an exchange involving more than one party; however, in order to ascertain whether the equal value requirements of this chapter have been met, the director shall consider only the land and other consideration which the state would convey and receive if the exchange were executed. (§ 1 ch 240 SLA 1976)

Sec. 38.50.040. Land subject to exchange. Except as otherwise provided in this chapter, the director is authorized to convey for purposes of exchange any state land or interest in land regardless of the authority under which the land or interest was obtained by the state. The conveyance of university land and school land shall be approved in the manner prescribed in AS 38.05.030, and the conveyance of mental health land shall be approved by a board composed of the director of the division of mental health, the chairman of the Mental Health Advisory Council, and the commissioner of revenue. (§ 1 ch 240 SLA 1976)

Sec. 38.50.050. Conveyance of mineral rights. Subject to the requirements of this chapter, the director is authorized to exchange mineral rights in state land to the extent that the conveyance is authorized by the state constitution and applicable federal law. The director may not exchange or receive the surface estate of land or the mineral rights in it, one without the other, unless the separation of estate is necessitated by a prior separation of ownership or by restrictions in applicable law, or the director otherwise finds that the conveyance or receipt of the surface or mineral estates, one without the other, is necessary to achieve a significant public purpose. (§ 1 ch 240 SLA 1976)

Sec. 38.50.060. Reservations and covenants. The director may include in any patent or other instrument issued under this chapter any reservations and covenants relating to the land which he considers necessary to protect or promote the public interest. Reservations and covenants may include, but are not limited to, those relating to access, environmental protection, and use or development rights. The director may receive land which is subject to reservations and covenants if he finds that the reservations and covenants are consistent with the public interest. (§ 1 ch 240 SLA 1976)

Sec. 38.50.070. Valid existing rights. Conveyances made by the state under this chapter are subject to valid existing rights, including, but not limited to, contracts, permits, leases, rights-of-way, and easements. Unless jurisdiction is waived, the appropriate state agency shall continue

to administer valid existing rights as long as any revenues derived from the rights are distributed as provided in the exchange agreement. (§ 1 ch 240 SLA 1976)

Sec. 38.50.080. Prohibition against future considerations and alienation of selection rights. (a) The director may not negotiate or enter into a land exchange agreement which requires the identification of land, interest in land, or other consideration, except for the performance of necessary survey work, at any time after the agreement is initially executed.

(b) The director, in implementing the provisions of this chapter, may not alienate or agree not to exercise selection rights granted to the state in the Alaska Statehood Act or other applicable law authorizing the state to select land or interest in land. (§ 1 ch 240 SLA 1976)

Sec. 38.50.090. Coordination with other state agencies. (a) During the negotiation of a land exchange, the director shall consult with other departments and other divisions of the Department of Natural Resources relative to matters which are within their jurisdiction. If land under the jurisdiction of a state agency other than the Department of Natural Resources may be involved in a proposed exchange, the director shall afford the head of that agency an opportunity to participate in the discussions respecting the land.

(b) The director shall be afforded an opportunity to review and comment on any land exchange proposed by a state agency other than the Department of Natural Resources. (§ 1 ch 240 SLA 1976)

Sec. 38.50.100. Finding requirement as to alternatives. Before circulating notice under § 110 of this chapter, the director shall consider other alternatives to achieve the objectives of the proposed exchange in an effort to determine whether the proposed exchange will best serve the public interest. In making this determination, the director shall consider, among other things, the advantages and disadvantages of acquiring the land or interest in land for the state by means of purchase, lease, or selection under the Alaska Statehood Act, or condemnation. In addition, he shall consider alternatives to the disposal through exchange of the state land or interest in land, including, but not limited to, lease or sale. (§ 1 ch 240 SLA 1976)

Sec. 38.50.110. Notice of proposed exchange. (a) Not more than 60 days nor less than 30 days before a public hearing is scheduled under § 120 of this chapter the director shall circulate a notice containing the information specified in (b) of this section. The director shall

(1) publish or post the notice as provided in AS 38.05.345, except as otherwise specified in this section. The director shall publish the notice in a newspaper of general circulation in the vicinity of the land which the state will receive and in the three most populated cities of the state;

(2) mail the notice to any person who has filed a request for notice of proposed exchanges;

(3) mail the notice to each member of the legislature;

(4) mail the notice to each municipality the boundaries of which encompass or are located within six linear miles of land involved in the proposed exchange:

(5) circulate the notice to the Office of the Governor and to all state departments;

(6) mail the notice to the appropriate board or other entity or person with approval authority as indicated in § 40 of this chapter and AS 38.05.030, when university land, school land, or mental health land is involved in the proposed exchange;

(7) mail the notice to any corporation organized under the Alaska Native Claims Settlement Act, which corporation owns or has selected land located within a radius of 15 linear miles from land or property involved in the proposed exchange; and

(8) mail the notice to any other party, including an organization of land users, that he considers appropriate.

(b) The notice of proposed exchange shall include the following information:

(1) a statement of the proposed action and a legal or other appropriate description of the tracts and potential uses of land involved in the proposed exchange;

(2) a map of sufficient scale to allow identification of each tract in relationship to reference points which are easily identified by laymen;

(3) the name and post office address of each party to the proposed exchange;

(4) a statement that any person asserting a claim to the property involved or desiring to comment or to obtain further information concerning the exchange should contact the office designated in the notice;

(5) the date, time, and place of a public hearing which has been scheduled in connection with the proposed exchange. (§ 1 ch 240 SLA 1976)

Sec. 38.50.120. Public hearings. (a) The director may hold as many public hearings as is considered appropriate. There shall be at least one public hearing.

(b) A person who desires to testify at a hearing shall be provided an opportunity to do so, subject to reasonable time limits. In addition, the director shall hold the hearing record open for at least two weeks following the conclusion of a hearing in order to receive supplemental or additional statements. (§ 1 ch 240 SLA 1976)

Sec. 38.50.130. Report on proposed exchange. (a) In conjunction with the public notice required by § 110 of this chapter, the director shall prepare and distribute the report required by this section to the parties

listed in § 120(a)(2) — (8) of this chapter and to any other party who requests it. The report shall contain, among other things, a copy of the notice required by § 110 of this chapter and a discussion in a concise format designed to facilitate public understanding of the issues of

(1) the physical characteristics of the land involved, including the surface and mineral resources associated with the land;

(2) the appraised fair market value of each tract involved in the exchange or, if the exchange is for other than equal appraised fair market value, the nonmonetary values which are involved;

(3) the benefits and detriments which can be expected to accrue, including possible social, economic, and environmental impacts; and

(4) alternatives to the proposed exchange.

(b) Upon termination of the period provided for agency and public comment, the report and the proposed land exchange may be revised, if appropriate, to reflect comments or other information which has come to the director's attention. A brief summary of all comments and information received shall be appended to the report. (§ 1 ch 240 SLA 1976)

Editor's note. — The reference to § 120(a)(2) — (8) of this chapter in the introductory paragraph of subsection (a) is incorrect. The reference should be to § 110(a)(2) — (8) of this chapter.

Sec. 38.50.140. Legislative review. Within 10 days of the convening of a regular legislative session, the governor shall transmit to the president of the senate and the speaker of the house of representatives any proposal for a land exchange for other than equal appraised fair market value which is scheduled to occur before the next legislative session. If, in his view, exigent circumstances seriously affecting state interests so require, the governor may submit the proposed exchange to the legislature at some other time. A finding of exigent circumstances shall be carefully documented in the letter of transmittal. The director is authorized to conclude a proposed exchange agreement unless either house of the legislature by simple resolution disapproves of the exchange within 60 legislative days of transmittal by the governor. A decision by the legislature to disapprove a proposed exchange shall be accompanied by a recommendation to the governor with respect to future actions which the director should take concerning the exchange. (§ 1 ch 240 SLA 1976)

Sec. 38.50.150. Execution of exchange. If a deed, contract of exchange, or other instrument of conveyance which the director receives to effectuate an exchange is properly executed, acknowledged, and authorized by the appropriate party, the director shall accept conveyance of title to the land and other property which the state is to receive as consideration, and he shall issue a patent, contract of exchange or other instrument of conveyance to the appropriate party

for the property which he is then obligated to convey. Before acceptance by the director of a deed, contract of exchange or other instrument, no action taken by him or by any other state official creates a right against the state with respect to state land. (§ 1 ch 240 SLA 1976)

Sec. 38.50.160. Regulations. The commissioner may adopt regulations under the Administrative Procedure Act (AS 44.62) necessary to carry out the purposes of this chapter. (§ 1 ch 240 SLA 1976)

Sec. 38.50.170. Definitions. In this chapter, unless otherwise specified,

(1) "commissioner" means the commissioner of natural resources;

(2) "director" means the director of the division of lands;

(3) "state land" means all lands including shore, tide and submerged land or unsevered resources belonging to or acquired by the state excluding interests in land severed or constructively severed from the land. (§ 1 ch 240 SLA 1976)

Chapter 95. Miscellaneous Provisions.

Article

Article 1. Manner of Conveying State's Interest in Land under Its Jurisdiction.

Section

Sec. 38.95.010. State's interest may not be obtained by adverse possession or prescription. No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state. (§ 47-2-1 ACLA 1949; am § 1 ch 77 SLA 1955)

Revisor's note (1962). — Section 47-2-1 ACLA 1949 dealt with prescription against title of the United States to territorial lands and has been omitted as obsolete since statehood. The 1955 amendment added the above wording to § 47-2-1 ACLA 19

Revisor's note (1973). — Before 1973, this section was designated AS 38.15.010.

Article 2. Management Contracts and Land Exchanges: P.L. 92-203 Corporations.

Sec. 38.95.050. Contracts between department of natural resources and P.L. 92-203 corporations. A corporation organized under Alaska law pursuant to the federal Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688; 43 U.S.C. 1601 et seq.) may contract with the state Department of Natural Resources for the management of land; however, no sale, lease, exchange or other disposal of this land may be made without the approval of the corporation owning it. The contract is terminable upon reasonable notice by either party to it; it may cover all or a portion of the land of the corporation, and shall provide for the terms of management by reference to law or regulation or otherwise. The Department of Natural Resources is authorized to receive and expend, subject to appropriation, funds necessary to carry out its functions under this section. (§ 4 ch 70 SLA 1972)

Editor's note. — Prior to the 1973 relocation of this chapter, this section appeared as AS 38.15.050.

Section 1, ch. 70, SLA 1972, provides: "Purpose. It is the purpose of this Act to implement the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688, 43 U.S.C. 1601 et seq.) by amending state law to resolve those ambiguities, conflicts and problems directly or impliedly created by the enactment by Congress of the Alaska Native Claims Settlement Act. It is also the purpose of this Act to complement through state policy, in a reasonable and fair manner, the federal policy expressed in that Act."

Legislative committee report. — For report on ch. 70 SLA 1972 (CSHB 731), see 1972 House Journal, p. 837.

Sec. 38.95.060. Exchange of land.
Repealed by § 4 ch 240 SLA 1976.

Cross reference. — As to exchange of state land, see AS 38.50.010 et seq.

Editor's note. — The repealed section derived from § 4, ch. 70, SLA 1972.

Legislative committee report. — For report on ch. 70, SLA 1972 (CSHB 731), see 1972 House Journal, p. 837.

Sec. 38.95.080. Trapping cabin construction permits. (a) The director of the division of lands shall issue a nontransferable permit for the construction of a trapping cabin on state land to a person who meets the following qualifications:

(1) the person must have an established trapline with proof of regular use;

(2) the person must have a trapline of sufficient length to justify the need for cabin construction.

(b) Nothing in (a) of this section prevents the director from issuing a permit to more than one qualified person for the construction and use of the same trapping cabin.

(c) The director shall establish, by regulation, conditions attaching to the permit issued under (a) and (b) of this section. These conditions shall include, but not be limited to, the following:

(1) permits shall be issued for a period of not more than five years, with succeeding five-year renewal options, if continued use and occupancy is established, and the qualifications of (a) of this section continue to be met;

(2) a cabin shall be constructed and maintained according to reasonable specifications established by the director; however, in no case may a line cabin exceed 192 square feet;

(3) a permit shall specify the number of cabins allowed to be constructed and indicate their specific geographical location; the director may establish a maximum number of cabins per person or otherwise limit their number because of the probability of adverse consequences;

(4) adequate provision must be made at each cabin for waste and garbage disposal, as determined by the director;

(5) the payment of a trapping cabin permit fee of $10.

(d) A permit issued under (a) and (b) of this section entitles its holder to use timber in the immediate vicinity of the cabin for personal noncommercial purposes only. No ownership rights to the land are conveyed by the issuance of a trapping cabin permit under this section.

(e) A person who makes a false statement as to any material fact relating to a permit issued under this section is guilty of a misdemeanor. A person who violates this subsection or any of the terms and conditions of a permit issued under this section may have his permit immediately revoked and is subject to payment of all costs required in dismantling his cabin structure. (§ 1 ch 115 SLA 1976)

Article 3. Steering Council for Alaska Lands.

Effective date of article. — Section 6, ch. 47, SLA 1977, makes this article effective May 21, 197[illegible] ccordance with AS 01.10.070(c)

April 20, 1976

Honorable Kay Poland
Chairman
Senate Resources Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Poland:

As promised in earlier correspondence to the Committee, we are writing to communicate the Commission's views respecting the principal elements which should be included in any new legislation enacted by the Legislature to govern land exchanges involving the State.

The concepts discussed in this letter were considered by the Commission at a meeting held on April 20, 1976. The Commission elected not to put its recommendations into legislative form.

1. Valuation of Properties.

The Commission believes that any new State legislation should emphasize the consummation of land exchanges based on the equal fair market value of the properties to be exchanged. However, we also recommend that in situations where the properties involved are not equal in appraised fair market value or where such value cannot be ascertained with reasonable certainty, the director be authorized to enter into an exchange if he finds that the appraised fair market value of the properties to be received by the State, together with the nonmonetary value of other public benefits, equals or exceeds the value of the properties which the State will relinquish.

The criterion of equal fair market value has traditionally been included in Federal and State exchange statutes, and this standard works well

where land values can be readily determined through appraisal. The equal monetary value standard breaks down in the Alaska context, however, because the paucity of comparable land sales in many rural areas, the vast acreages involved, and other factors often vitiate the accuracy of the appraisal method. In recognition of this fact, Congress recently authorized Federal involvement in exchanges which are premised on other than appraised value. We believe that a similar approach, with proper procedural and other safeguards, should be incorporated into State legislation. Such safeguards should include, among other things, public notice and hearings, legislative review, and a carefully documented statement of the nonmonetary values involved. In our opinion, passage of legislation of this sort would help consolidate State land holdings and lead to more effective administration of the State public domain. At the same time, appropriate procedural safeguards and the emphasis on the consummation of equal appraised value trades, where possible, should insure adequate protection of the public interest.

2. Exchanges Involving Mineral Rights.

The Commissic recommends that any new exchange legislation authorize the Director of the Division of Lands or other appropriate official to convey mineral rights in State lands to the extent that such a conveyance is permitted by the Alaska Constitution and applicable Federal law. The Commission further recommends that except where special circumstances dictate, the Director be precluded from conveying or receiving either the surface estate or the mineral rights therein, one without the other.

Previous experience in other parts of the country demonstrates the adverse economic, environmental, and social consequences which can result from separating ownership of the surface estate and the mineral rights located therein. While Section 6(i) of th Alaska Statehood Act does preclude the State from disposing of mineral rights generally, a recent amendment to the Settlement Act explicitly waives this constraint with respect to exchanges involving the Federal government. (This waiver is presently being challenged in the courts.) Other Federal statutes pursuant to which the State has previously selected mental health, university, and school lands do not contain a prohibition against the disposal of mineral rights. In view of this and the improved land mangement and use which usually results from a conveyance of full fee title, the Commission believes that new exchange legislation should authorize the State to convey mineral rights to the extent authorized by applicable law, and that the appropriate official be required to convey or receive full fee title except where special circumstances pertain.

3. Legislative Review.

The Commission recommends that subsequent legislation provide an opportunity for legislative review of proposed exchanges based on other than equal appraised fair market value. However, the Commission believes

that affirmative approval should not be required. Rather, the Legislature should be afforded an opportunity to review a proposed exchange within a reasonable period, and if the Legislature does not act to disapprove the exchange within that period, the appropriate State official would be empowered to execute it in behalf of the State.

Historically, the requirement of equal fair market value has been included in exchange statutes as legislative protection against arbitrary action and other abuse by those empowered to execute an exchange. This standard has worked well in protecting the public interest with respect to exchanges involving equal appraised value, and we see no reason to impose the additional requirement of legislative approval, which possesses certain infirmities of its own. The situation is different with respect to proposed exchanges premised on other than equal appraised value. Here, there is no objective standard against which to test a proposed exchange. In view of this, we believe that exchanges for other than equal appraised value should be viewed as resource allocation decisions concerning which the people's elected representative should have an opportunity to express their views. We do not think, however, that the means of expression should be affirmative legislative approval. Experience on the Federal level indicates that the review approach which the Commission is suggesting provides ample opportunity for legislative bodies to participate meaningfully in the decisionmaking process. At the same time, this means of review helps to avoid political logrolling and other undesirable activity.

In making the recommendations discussed in this section, we are aware that some persons believe that the separation of powers doctrine and other constitutional constraints preclude any sort of legislative review of proposed land exchanges. The research which has been conducted by our legal staff indicates that there is currently no definitive judicial decision or other opinion on this point. There are cases, constitutional provisions, and other considerations which can be used by either side of the issue to support its contention. Our staff does believe, however, that the better reasoned opinion would support legislative review in the form which we are suggesting here. (Because the criterion of equal appraised value does provide an objective standard against which to test proposed exchanges based on this standard, legislative review of such exchanges would appear less supportable.) Since there is no definitive answer at the present time, we suggest that the Legislature adopt that review procedure which it deems best from a policy point of view, and then if necessary, that decision can be tested in the courts.

4. Prohibition Against Exchanges Requiring Subsequent Identification of the Consideration Involved.

The Commission recommends that any legislation should specifically prohibit the Director of the Division of Lands or other appropriate State official from negotiating or entering into any land exchange which

requires the identification of lands or interests in land at some time after the exchange is initially executed. The Commission further recommends that such officials be precluded from alienating or agreeing not to exercise selection rights granted in the Alaska Statehood Act.

We believe that the best way to insure proper analysis of a proposed exchange is to require that all lands and other consideration which will be involved therein be clearly identified at the time when public notice is circulated. If such properties are not so identified, the public and others desiring to analyze a proposed exchange will be compelled to speculate on how the selection procedures contained in the proposed agreement will be implemented. In such instances, executory selection and exchange procedures often could be implemented in a number of ways, with varying consequences resulting from each scenario. To avoid uncertainty in a matter so important as the disposition of the State public domain, and to provide meaning to the public and other review processes provided in proposed legislation, we believe that the prohibition recommended here is necessary. For the same reasons, and in recognition of certain constraints contained in Section 6(g) of the Statehood Act, we also recommend that appropriate State officials be precluded from alienating or agreeing not to exercise State selection rights as part of the consideration for an exchange.

5. Statement of Basis for an Exchange.

We recommend that the Director or other appropriate State official be required to prepare and distribute a report which objectively analyzes a proposed exchange in a clear and concise format which is designed to facilitate public understanding of the issues involved. Among other things, the report should include a discussion of the monetary and non-monetary values of the properties involved, including surface and mineral resources, the benefits and detriments which can be expected to accrue, and possible alternatives. Preparation and circulation of a report of this type should promote informed public dialogue and lead to a better ultimate decision concerning the proposed exchange.

6. Other Elements.

We have dealt in this correspondence with the principal elements which, in the opinion of the Commission, should be included in any new legislation governing land exchanges. In so doing, we do not mean to minimize the importance of other necessary elements, such as provisions concerning authorization, parties to an exchange, reservations and covenants, agency coordination, public notice and hearings, protection of valid existing rights, and so forth. We believe, however, that there is general agreement about how to handle these matters, and so we have not considered them here.

. . . .

In closing, we want to express the Commission's strong support for needed revisions, such as those which we have discussed here, in State land exchange authority. The land ownership pattern in Alaska is growing ever more complex as a consequence of the implementation of the selection provisions of the Alaska Statehood Act and the Alaska Native Claims Settlement Act. Lands owned by the Federal government, the State, Native corporations, and others lie adjacent to each other in tracts which do not necessarily follow rational boundary lines. This intermixture of land ownership often jeopardizes prudent management and use. To rectify this situation, certain refinements in existing authority and new innovations appear necessary. In our opinion, the enactment into law of the elements referred to above would facilitate the types of land adjustments needed to establish more rational patterns of land ownership in Alaska.

Thank you for your consideration of this correspondence. If we can be of any further assistance in the Committee's consideration of the matters discussed here, please let us know.

Sincerely,

Burton W. Silcock
Federal Co-Chairman

Sincerely,

Walter B. Parker
State Co-Chairman

JWK:go

cc: Senator H.D. Meland, Senate Resources Committee
Senator John Huber, Senate Resources Committee
Senator John L. Rader, Senate Resources Committee
Senator Patrick Rodney, Senate Resources Committee
Senator John Butrovich, Senate Resources Committee
Senator Joseph L. Orsini, Senate Resources Committee
Senator Chancy Croft, President, Alaska State Senate
Commissioner Guy Martin, Department of Natural Resources
Director Mike Smith, Division of Lands
Attorney General Avrum Gross

bcc: Roy Hundorf, President, Cook Inlet Region, Inc.
E.U. Curtis Bohlen, Deputy Assistant Secretary, Fish and Wildlife and Parks, USDI
Ken Brown, Legislative Counsel and Director, Office of Legislation, USDI
Harold H. Galliett, Jr., Registered Civil Engineer
Lonnie Heinner, Resource Associates of Alaska
David S. Jackman, Attorney

NOTE: An exact duplicate of this letter was addressed to:

Honorable Nels A. Anderson, Jr.
Chairman
House Resources Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

cc: Representative Theodore G. Smith, House Resources Committee
Representative Fred E. Brown, House Resources Committee
Representative Richard I. Eliason, House Resources Committee
Representative H.M. Hershberger, House Resources Committee
Representative James H. Huntington, House Resources Committee
Representative Alvin Osterback, House Resources Committee
Representative Leo Rhode, House Resources Committee
Representative Leslie E. Swanson, House Resources Committee

Rec'd 6/16/82
cc: 1) All Division Directors
2) All Regional Supervisors
3) F&G CSU Contacts

Alaska Land Use Council

1689 "C" Street, Suite 100
P.O. Box 120
Anchorage, Alaska 99510-0120
(907) 272-3422 & 271-5485 (FTS)

DEC

MEMORANDUM

Date: June 14, 1982

To: State Staff Committee

From: Lisa Parker
State Staff Coordinator

Subject: ALUC Policy Statements

Enclosed please find a copy of the Council's policy statements on land exchanges and regulation review.

There have been some inquiries and questions regarding whether the policy statements are being circulated around the State and Federal agencies and departments.

Please make sure that those offices/agencies within your department who should be aware of these policy statements receive a copy of them. If anyone has any questions please feel free to have them call me.

Thank you for your help.

Send F&G comments to Stan Moberly or Tina Cunning

Alaska Land Use Council

1689 "C" Street, Suite 100
P.O. Box 120
Anchorage, Alaska 99510-0120
(907) 272-3422 & 271-5485 (FTS)

M E M O R A N D U M

DATE: April 30, 1982

TO: Alaska Land Use Council

FROM: Ron McCoy
Federal Staff Coordinator

SUBJECT: Council Land Exchange Policy Statement and Procedures

At the February 9, 1982 meeting the Council adopted a memorandum (C.M. #007/82 attached) outlining a policy regarding the review of land exchanges. The Project Group was directed, "to prepare a policy statement embodying the concepts contained (in the memo) and outlining a procedure for submission of proposed exchanges to the Council and for accomplishing Council review".

The following is the final of the March 3 Policy Statement and Procedures pursuant to comments by the Staff Committee.

Ronald B. McCoy
Federal Staff Coordinator

Attachments

Policy Statement and Procedures for Council Review of Proposed Land Exchanges

ANCSA and ANILCA both contained provisions which clearly anticipated the future need and opportunities for the consolidation of land ownership patterns and enhancement of land management and uses through the exchange of lands between and among federal, state, Native corporation and other private owners. Such exchanges could further the goals of conservation system units, promote sound resource development, and/or protect traditional uses of the lands depending on the land use objectives of the concerned owner or manager.

Although the discretion and authority to negotiate and finalize land exchanges rests with the individual agency or corporation, Section 1201(i)(2)(H) of ANILCA directs the Council to make recommendations for land exchanges between and among federal, state and Native corporation landowners. Because such exchanges could often have impact on the uses and management of adjacent lands, there is considerable benefit, if not need, to afford other Council agencies and Native corporations an opportunity to review and comment upon proposed exchanges prior to finalization. It shall be the policy of the Council to ensure such an opportunity for comment and possible recommendations pursuant to the procedures outlined below.

Furthermore, there may arise cases where trades of possible mutual benefit to landowners are identified in studies or planning processes conducted under the auspices of the Council. In such cases the Council shall inform all concerned parties of the potential for a trade and make recommendations as to future actions needed.

Finally, pursuant to Section 1302(c) of ANILCA, the Council shall provide comments, when appropriate, to the Secretary regarding the identification of public lands for exchange of lands owned by certain private owners located within conservation system units.

It is not the intent of the Council to assume a negotiator or mediator role in proposed land exchanges, to solicit or provide a forum for public input on exchanges, or to usurp the decision-making authority of the particular agency, Secretary or Native corporation by a recommendation of the Council. While most exchanges would be anticipated to come to the Council for review, it is not the Council's intent to review all exchanges of land within the State of Alaska, to discuss or debate the merits of every submitted exchange at a meeting of the Council, or to require a specific approval or disapproval of each exchange submitted.

PROCEDURES

Land exchanges to be submitted

Any exchange of lands between the following parties shall be submitted to the Council for review:

1) a Federal ALUC member and another federal agency;
2) a Federal ALUC member and the State;
3) a Federal ALUC member and a private landowner;
4) the State and a Native corporation represented by members of the Council.

Agency responsible for submittal

As all exchanges to be reviewed by the Council would, by definition, involve either a federal or state agency or both, at lease one of the federal or state agencies involved in the exchange shall notify the Council of the intended exchange.

When and where proposed exchange submitted

Notice of the proposed exchange shall be submitted to the Co-Chairmen and to each Council member after the exchange has been agreed to in principle by all parties and after lands to be exchanged have been generally identified, but prior to final signing of the exchange agreement by the agencies or corporation involved.

The submittal should include at least the following:

1) A notification of the intent or preliminary agreement to exchange lands;

2) a description and map of the lands proposed for exchange;

3) a general listing of the ownership of lands (and/or interests) to be exchanged, the ownership of any other significant lands encompassed by the boundaries of the lands to be exchanged, and the ownership of major adjacent lands to those being exchanged;

4) a brief description of the resources and values of the lands to be exchanged;

5) an identification of the management objective(s) to be achieved as a result of the exchcange; and

6) an outline of any terms, not involving lands, which are expected to be included in the exchange agreement.

Council review

The agency submitting the proposed exchange shall afford Council members at least 30 days from the time of submittal to review and comment on the exchange. Such review shall be accomplished to the maximum extent possible concurrent with the normal review procedures of individual agencies. Any comments from Council members shall be submitted directly to the agency or agencies submitting the exchange with copies to the Co-Chairmen.

Pursuant to Council procedures, the Co-Chairmen or Council members may request that the exchange be placed on the agenda for discussion and possible recommendation at the next Council meeting. The Co-Chairmen may also call a special meeting of the Council, or of concerned Council members, to discuss the exchange. The Co-Chairmen or the Council may also issue a paper or report on the exchange based on the consolidated comments of member agencies or corporations.

In the case of exchanges proposed under Section 1302(c), the Co-Chairmen or the Council may appoint a Staff Committee Study Group or Project Group to assist in or comment on the identification of exchange lands.

Council review

The agency submitting the proposed exchange shall afford Council members at least 30 days from the time of submittal to review and comment on the exchange. Such review shall be accomplished to the maximum extent possible concurrent with the normal review procedures of individual agencies. Any comments from Council members shall be submitted directly to the agency or agencies submitting the exchange with copies to the Co-Chairmen.

Pursuant to Council procedures, the Co-Chairmen or Council members may request that the exchange be placed on the agenda for discussion and possible recommendation at the next Council meeting. The Co-Chairmen may also call a special meeting of the Council, or of concerned Council members, to discuss the exchange. The Co-Chairmen or the Council may also issue a paper or report on the exchange based on the consolidated comments of member agencies or corporations.

In the case of exchanges proposed under Section 1302(c), the Co-Chairmen or the Council may appoint a Staff Committee Study Group or Project Group to assist in or comment on the identification of exchange lands.

C.M. #007/82

ALASKA LAND USE COUNCIL

P.O. Box 120
Anchorage, Alaska 99510

(907) 272-3422

State Co-Chairman
Jay S. Hammond
Governor

Federal Co-Chairman
Vernon R. Wiggins

DATE: January 15, 1982

TO: Alaska Land Use Council

FROM: Vernon R. Wiggins
Federal Cochairman

SUBJECT: Recommended Policy Statement Setting Forth the Role of the Council in Land Exchanges

The role of the Alaska Land Use Council in land exchanges is defined in several sections of the Alaska National Interests Lands Conservation Act (ANILCA).

Section 1201(i)(2)(H) states:

> (2) It shall be the function of the Council,...
>
> (H) to make recommendations to appropriate officials of the governments of the United States, the State of Alaska, and Native Corporations for land exchanges between or among them.

Section 1302(c) states:

> (c) EXCHANGES...Lands located within the boundaries of a conservation system unit (other than National Forest Wilderness) which are owned by persons or entities other than those described in subsection (b) of this section shall not be acquired by the Secretary without consent of the owner unless prior to final judgement on the value of the acquired land, the owner, after being offered appropriate land of similar characteristics and like value (if such land is available from public lands located outside boundaries of any conservation system unit) chooses not to accept the exchange. In identifying public lands for exchange pursuant to this subsection, the Secretary shall consult with the Alaska Land Use Council.

In light of the above consideration it is necessary, in the opinion of the Federal Cochairman, for the Council to adopt a policy setting forth the Council's involvement in land exchanges and establishing a process for the Council's review and consideration of proposed land exchanges. It is the purpose of this memorandum to present to the Council a concept for that policy.

It is recommended that the Council adopt the following conceptual policies with respect to Council involvement in the land exchange policy

- The Council may bring parties together to initiate potential land exchanges which have been identified through studies or planning processes which have occurred under the Council's auspices.

- Proposed land exchanges between or among Council members will be submitted to the Council for review and comment after involved parties have reached agreement in principal on a proposed exchange, but prior to final agreement (signature) of pending exchanges. In reviewing any proposed land exchange presented, the Council may recommend approval, disapproval or modification to the involved parties and/or to the office(s) vested with final approval of any proposed land exchange.

The Council's approval of this memorandum, either with or without amendment, will serve as an expression of the Council's direction on this matter and is requested. If approved, the Staff Committee will be directed to prepare a policy statement embodying the concepts contained herein and outlining a procedure for submission of proposed exchanges to the Council and for accomplishing Council review. Unitl that formal statement and procedure is finalized all parties should be advised to adhere to this expression of the Council's intent. This memorandum and the Council's formal policy statement should not be construed in any way as infringing upon an individual agency's perogative to adopt rules and procedures for handling land exhanges internally or between entities.

Thank you.

Vernon R. Wiggins
Federal Cochairman

Attachment: Appendix

ALASKA LAND USE COUNCIL

P.O. Box 120
Anchorage, Alaska 99510

(907) 272-3422

State Co-Chairman
Jay S. Hammond
Governor

Federal Co-Chairman
Vernon R. Wiggins

Appendix to Council Memorandum #007/82

"The Role of the Alaska Land Use Council in Land Exchanges"

Submitted by Vernon R. Wiggins, Federal Cochairman

Consideration of a policy setting forth the Alaska Land Use Council's role and involvement in land exchanges brings to the forefront several key issues which need to be dealt with.

Should the Council assume a mediator or participant role in land exchanges? In the opinion of the Federal Cochairman, clearly the answer is "No".

The Council does not have the capability, expertise or facilities to function as a mediator among parties engaged in negotiating an exchange of public lands. In the opinion of the Federal Cochairman the Congress did not contemplate such a role for the Council. The parties to the prospective exchange should negotiate independent of the Council's influence until such time as an agreement in principal is reached. Participants who are public agencies, be they federal or state government, are required to operate under existing, strict laws and (in most cases) regulations in negotiating an exchange of lands. Those statutes and regulations should provide sufficient guidance for the participants to reach an agreement. If not, it is difficult to understand how the Council could mediate among the participants. Reaching such an impasse is probable indication that the proposed exchange of lands is not in the public interest. An exchange of lands should not be an adversary exercise; it should occur on a voluntary basis and result in both parties acquiring something of equal value (as they each perceive it) in return for the thing(s) traded to the other party. There seems to be no need for a mediator if that is the case; since the Council does not have any responsibilty with respect to management of land resources, certainly the Council has no role to play as a participant in the negotiating processes.

Should the Council serve as a sounding board to determine public sentiment with regards to a proposed land exchange? In the opinion of the Federal Cochairman the answer is "Probably Not".

Except to the extent that the Council's Land Use Advisor's Committee may have a function in this regards, the Council itself should not be the body determining public approval or disapproval of a prospective land exchange. As stated, public agencies engaged in a negotiation to exchange public lands with another owner are governed by strict laws and regulations, all of which provide for public notice, review and comment on the merits of a proposed land exchange. In the instance of an exchange of lands where the State of Alaska is a party, the State Legislature seems to be the ultimate

determinate of whether the interest of the people of the State of Alaska is served. Knowledge, on the part of the Legislature that the Alaska Land Use Council has favorably considered a proposed exchange of lands involving lands owned by the State of Alaska would seem to be of value to the Legislature, considering the composition of the Council. But the Council should not subrogate the Legislature infullment of its role of determinate of the interest of the Alaska people.

There seems to be a need to duplicate those processes. Rather, a Council recommendation favoring or objecting to a proposed exchange of lands involving public resources would probably serve the public well in its efforts to review and comment upon a pending land exchange.

Similarly, the Secretary of Agriculture or Interior, in most cases being the ultimate determinate of the public interest in a proposed exchange of lands involving federal public lands, would possibly benefit from knowledge that the Alaska Land Use Council has looked with favor (or disfavor) upon a proposed exchange of lands. Indeed, the Secretary in most cases would be required to consult with the Council before he makes his final decision.

A grant of authority to exchange lands is assigned to the Secretary (Interior or Agriculture) in Section 1302(h) and Section 1302(i). The role of the Land Use Council is not mentioned in these sections.

Section 1302(h) and Section 1302(i) state:

> (h) EXCHANGE AUTHORITY...Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups, Village Corporations, Regional Corporations, and the Urban Corporations, and other municipalities and corporations or individuals, the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act), or any Federal agency. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged, except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other equal value.
>
> (i)(1) The Secretary is authorized to acquire by donation or exchange lands (A) which are contiguous to any conservation system unit established or expanded by this Act, and (B) which are owned or validly selected by the State of Alaska.
>
> (2) Any such lands so acquired shall become a part of such conservation system unit.

Despite silence in Sections 1302(h) and (i) with respect to the role of the Council in land exchanges, a comprehensive reading of the Act indicates that the Congress intended for the Council to have some role in the land exchange process.

Of relevance to this issue is the fact that the State of Alaska has a comprehensive statute within AS. 38.50 governing the procedures and terms under which land exchanges involving State-owned lands may occur. As that statute predated the passage of ANILCA and creation of the Land Use Council it likewise is silent on Council involvement in land exchanges involving the State of Alaska.

Thank you.

Vernon R. Wiggins
Federal Cochairman

Alaska Land Use Council

1689 "C" Street, Suite 100
P.O. Box 120
Anchorage, Alaska 99510-0120
(907) 272-3422 & 271-5485 (FTS)

M E M O R A N D U M

DATE: April 30, 1982

TO: Alaska Land Use Council

FROM: Ron McCoy
Federal Staff Coordinator

SUBJECT: Policy Statement for Regulations Review Policy Statement

Attached please find the final draft of the subject policy statement. This statement will be finalized at the May 6 Staff Committee meeting.

Ronald B. McCoy
Federal Staff Coordinator

Attachment

DRAFT POLICY STATEMENT AND PROCEDURES REGARDING ALUC REGULATION REVIEW PROCESS

Authority

The Alaska Lands Act at Section 1201(i)(2)(A)(i) and (iii) states:

> (i) It shall be the function of the Council—
> (A) to make recommendations to appropriate officials of the United States and the State of Alaska with respect to—
> (i) proposed regulations promulgated by the United States to carry out its responsibilities under this Act; (and)
>
> (ii) proposed regulations promulgated by the State of Alaska to carry out its responsibilities under this Act and other State and Federal laws;

Policy

It shall be the policy of the Council to facilitate early involvement by member agencies in the promulgation of significant regulations affecting land management or use in Alaska. Further, it is the policy of the Council, that upon a request from the Co-Chairmen, or a member agency, the Council shall review and may make recommendations on a proposed regulation.

Procedure

1. Each federal agency shall notify the Co-Chairmen and all Council members of plans for promulgating regulations which may be of interest or significance to member agencies, including ANCSA and ANILCA implementation actions. Such notification shall be concurrent with issuance of notice of a formal intent to make a rule. Each state agency shall notify the Co-Chairmen and Council members of plans for promulgating regulations which may be of interest or significance to member agencies. If possible, informal advisement of a department's intent to draft regulations should be relayed to the council before drafting occurs.

2. With federal regulations, upon formal issuance of a proposed rule, a copy will be provided to the Co-Chairmen and each Council member for their review and comment. With state regulations, notification to the Co-Chairmen and Council members shall be concurrent with the issuance of a notice of proposed changes in the department's regulations per Alaska Statute 46.62.

3. Agency review comments and recommendations shall be submitted to the responsible agency with a copy to the Co-Chairmen.

4. Pursuant to Council procedures, the Co-Chairmen or a Council member may request that the proposed rule be placed on the agenda for discussion and possible recommendation at the next Council meeting.

The Co-Chairmen may also call a special meeting of the Council, or of concerned Council members, to discuss the proposed rule. The Council or the Co-Chairmen may also appoint a Staff Committee Project Group to review the proposed rule and/or to prepare a paper or report to the Council on problems or comments involved.

5. Agencies who are not members of the ALUC will be encouraged to utilize these same procedures when promulgating regulations which may be of interest or significance to the Council or its member agencies.

6. The Council will maintain a list of regulations in progress, the initiating agency, and the name of a contact within said agency who can provide additional information regarding the proposed regulation.

This policy and procedure has been approved _____ and shall be adhered to by all Council members.

United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION
510 L Street, Suite 100
Anchorage, Alaska 99501

IN REPLY REFER TO:

December 17, 1981

Memorandum

To: SD, BLM

From: Regional Solicitor, Alaska

Subject: Section 17(b) ANCSA Easements

You have asked whether 17(b) easements across Native lands must be continuous or whether they may be interrupted by a Native allotment, settlement claim or other private inholding.

As you know, there are many existing trails on lands to be conveyed to Native corporations under ANCSA; many of them have been there for decades. A large number of the inholdings are located on, and some are bisected by, these existing trails. In many cases, the public continues to use the existing trails even after the inholding has been patented. Where the public use predated the private entry, it is arguably protected under R.S. 2477.

Section 17(b) requires the Secretary to reserve easements "reasonably necessary . . . to guarantee a full right of public . . . access" across Native lands. This does not, in my mind, prohibit reserving an easement across an existing trail which crosses an inholding. The easement regulations reflect a clear instruction that easements shall "follow existing routes of travel unless a variance is otherwise justified," 43 CFR 2650.4-7(b)(iv).

Where several alternative routes exist, the preferred choice would be the one entirely on Native selected land. However, where skirting an inholding is unreasonable, for reasons of topography for example, then the easement may be reserved up to the inholding and again on the other side.

You have asked if the inholding must be reflected on the easement map so that the break in the easement reservation can be shown. Not to show the inholdings could suggest to the public that the entire trail is on Native selected land and that the public has a legal right to use the entire trail. The latter may or may not be correct. However, to show inholdings may present practical problems. In addition,

the described location of some inholdings, i.e., Native allotments, is frequently unreliable until actual survey. The best solution may be to show the entire trail but to add a legend to the map such as the following:

> This map is intended to show the location of public easements reserved by conveyance _____. Some of the land which the map shows an easement as crossing may not be included as part of the conveyance. If so, the map should not be cnstrued as creating public access rights across those lands or as implying that such rights exist.

John M. Allen

cc: Beau McClure
Paul Kirton

BRB

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

NOTICE CONCERNING SECTION LINE EASEMENTS AND/OR DEDICATIONS

The Bureau of Land Management title and land status records provide information concerning the basic disposition of land from the United States under federal law such as the date of an application, survey and patent. Jurisdiction passes from the United States upon issuance of patent. Transfers of title and subsequent section line easement and/or dedication data are not recorded in this office. Additional information may be obtained from the State of Alaska, Department of Law, Office of the Attorney General, 420 L Street, Suite 100; The State of Alaska, Department of Transportation, 4111 Aviation Avenue and from the State of Alaska, Department of Natural Resources, Division of Land and Water Management, 941 Dowling Road, Anchorage, Alaska.

BRB

Lease Administration to be Transferred on Conveyances

BLM State Director Curt McVee has instructed Division Directors and District Managers to immediately implement procedures for transferring administrative responsibility for leases, contracts, permits, rights-of-way or easements on lands conveyed to Native corporations.

In a memorandum dated October 2, McVee directed "it is imperative that a decision on waiver of administration be made promptly after conveyance and that transfer of administration to the appropriate Native corporation be made immediately," as the land is no longer under Federal jurisdiction. McVee went on to request that these procedures be applied to past conveyances, if not yet done, as well as to all future conveyances.

The Settlement Act specifies that all Native land conveyances are subject to any lease, contract, right-of-way or easement issued prior to the conveyance. The act also provides that administration of these prior rights will continue under Federal jurisdiction unless the agency responsible for administration transfers this responsibility.

BLM, as the managing agency for Native land conveyances, is guided by Department of the Interior regulation 43 CFR 2650.4-3 which states that the agency must forgo its administrative responsibilities when the conveyance covers all land embraced within a lease, contract, permit, right-of-way or easement unless there is a finding by the Secretary that the interest of the United States requires continued Federal administration.

For example, if leases issued under the authority of the Mining Leasing Act of 1920 are entirely within the Native conveyance, administration by the BLM will be terminated. The Division of ANCSA must transfer administration of these cases to the appropriate Native corporation and notify the leaseholder of the change. If only a portion of the lease is included in a conveyance, BLM will not transfer administation.

Copies of the memorandum are available from the ANCSA Division, BLM, 701 C Street, P.O. Box 13, Anchorage, AK 99513.

BRB

D R A F T

September 6, 1974
FSLUPC

LOCAL EASEMENT STUDY

Size and Use Standards *

The following standards are suggested as general guides that would be varied where warranted by specific conditions.

Linear Easements:

Category 1 - Foot trails.

Ten-foot width. Where soil conditions, slope, or other conditions dictate, additional width should be added for construction and maintenance. (This width applies to any linear shoreline easements.)

Uses.

Permitted uses: Foot travel, snow machines, dogsleds, cross-country skiing, two-wheeled vehicles, and uses of a similar character.

Prohibited uses: Four-wheeled vehicles, caterpillar tractors and bulldozers, and uses of a similar character.

Category 2 - Roads through developed areas.

Sixty feet except where existing development prohibits this width. A road of this type would provide access in and around developed areas. Such width would accommodate a simple gravel road of the type built under the State's Local Service Roads and Trails program.

Uses.

All customary road traffic.

Category 3 - Roads through undeveloped areas.

One hundred-foot total easement. Roads of this type would provide basic land connections through undeveloped areas within a region. The State Department of Highways considers 100 feet to be minimal for important connector roads in rural areas.

---

* The easement holder should be responsible for marking boundaries of the easement, maintenance, and enforcing laws, regulations, and use restrictions which are applicable to the site.

D R A F T

Site Easements:

Campsites.

Fifty feet deep by 200 feet, as measured from the mean high water line.

Uses.

Permitted uses: Temporary camping through use of undeveloped site, boat and floatplane pullout areas, and sanitation facilities.

Prohibited uses: Permanent or commercial site development, hunting, timber cutting, use of motorized vehicles, littering, and other uses which would tend to degrade the environment.

August/September

* Native Lands Exempted From Gasline Right-of-Way

The Department of the Interior has recommended approval for a Grant of Right-of-Way for the Alaska portion of the Northwest gasline, specifically excluding "all lands validly selected by Native corporations" from any of the terms of the grant. Assistant Secretary for Land and Water Resources Guy Martin submitted the grant for Congressional review in late August, requesting the 60-day review period be waived to enable issuance of the grant by mid-October, 1980.

In cover letters to Northwest Board Chairman John McMillian and Senate Energy Committee Chairman Henry Jackson, Martin clarified that, although title to Native selections currently rests with the United States, ownership will eventually belong to the Native corporations therefore the grant will not apply to these lands.

Martin added that the Native lands are excluded "with the full knowledge and consent of each corporation", and with the "full expectation that Northwest will immediately and vigorously enter into negotiations with each corporation." The progress and terms of these negotiations will be thoroughly reviewed by the Department prior to issuance of the final grant.

Estimated Land Allocations:
Sections 12 & 14 of ANCSA

Native regional and village corporations are entitled to select acreage under the specific land terms of the Alaska Native Claims Settlement Act, chiefly sections 12 and 14. The broad acreage totals fixed by the Act are predictable but final figures will not be available until certain issues such as village eligibility and enrollment are resolved.

Since the land selections are based on a reallocation of acreage after major selections have been completed, estimates of the remaining acreage entitlement for each category must be shown as minimum and maximum figures. The BLM-ANCSA staff has computed these figures by region based upon the terms of the Act and subsequent amendments.

A brief description of the entitlements found in sections 12 and 14 follow. It should be noted that Section 12 entitlements apply only to 11 of the 13 regional corporations since the Thirteenth Corporation is not entitled to any lands and Sealaska village corporations are entitled to land under Section 16.

Section 12(a) Entitlement. This is the village corporations' entitlement from lands withdrawn under section 11(a). Since entitlement is based upon enrollment and the eligibility of several villages is still in question, the total acreage entitlement under section 12(a) cannot be finally determined until the remaining eligibility cases are resolved.

Section 12(b) Entitlement. The difference between 22 million acres and the total entitlement of village corporations under section 12(a) is to be divided among the 11 applicable regional corporations on the basis of Natives enrolled in each region. The number of villages found eligible will affect the 12(b) entitlement also; therefore, 12(b) entitlement cannot be finalized until the 12(a) entitlement is finalized. Although this is a village entitlement, each regional corporation will decide how much 12(b) acreage each Native village within the region will receive.

Section 12(c) Entitlement. This is a regional entitlement of approximately 16 million acres. The entitlement is based on a complex formula involving land area within the regions and selections filed under other sections of ANCSA. The regional corporations with small enrollments but which cover large areas within their boundaries receive the largest entitlement in this category.

Section 14(h) of the Claims Act authorizes 2 million acres to be conveyed or charged under the following categories:

- (h)(1) Cemetery sites and historical places
- (h)(2) Native groups (not more than 23,040 for each group)
- (h)(3) Conveyances to Natives residing in Sitka, Kenai, Juneau and Kodiak
- (h)(5) Native primary place of residence

continued, page 5

SECTION 12 ESTIMATED ENTITLEMENTS

	12(a)		12(b)		12(c)	
Region	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Ahtna	691,200	691,200	34,993	47,928	979,641	999,953
Aleut	1,221,120	1,221,120	107,900	147,786	0	0
Arctic Slope	852,480	852,480	125,357	171,970	3,980,492	4,036,448
Bering Straits	1,820,160	1,820,160	222,125	304,235	0	0
Bristol Bay	2,718,720	2,718,720	177,372	242,940	0	0
Calista	5,644,800	5,644,800	431,601	591,147	0	0
Chugach	460,800	460,800	67,610	92,603	333,558	354,988
Cook Inlet	576,000	806,400	201,514	276,006	1,207,572*	1,431,882*
Doyon	3,248,640	3,248,640	296,766	406,468	8,281,526	8,415,339
Koniag	921,600	1,405,440	108,959	149,237	0	0
NANA	1,198,080	1,198,080	157,757	216,073	734,055	783,741

*The lands and interests conveyed to Cook Inlet region pursuant to the provisions of Public Law 94-204 constitute the region's full entitlement under section 12(c).

Land Allocations

continued from page 2

(h)(6) Native allotment applications approved during the period 1971-1975

(h)(8) Any portion of the 2 million acres not conveyed by other subsections will be allocated and conveyed to the regional corporations on the basis of enrollment.

Pursuant to Departmental regulations, 43 CFR 2653.1, of the total 14(h) allocation, a maximum of 500,000 acres are to be used to satisfy applications filed pursuant to section 14(h)(1), (2) and (5) of the Act; 92,160 acres are set aside for conveyance to corporations formed in Sitka, Kenai, Juneau and Kodiak; and 195,000 acres are used to satisfy Native allotment applications approved before December 18, 1975. The remaining acres will be reallocated among the 12 regional corporations on the basis of enrollment.

	TOTAL ACRES ALLOWED FOR 14(h) (1) (2) and (5)	TOTAL ACRES ALLOWED FOR 14(h) (8)
Ahtna	27,830	17,166
Aleut	33,728	52,932
Arctic Slope	35,160	61,594
Bering Straits	42,968	108,966
Bristol Bay	39,348	87,012
Calista	59,914	211,728
Chugach	30,469	33,167
Cook Inlet	41,301	98,855*
Doyon	49,007	146,583
Koniag	33,814	53,451
NANA	37,761	77,390
Sealaska	68,697	264,991

*3.58 townships of coal, oil and gas rights in the Kenai National Moose Range constitute the full surface and subsurface entitlement of Cook Inlet Region under section 14(h) (8) pursuant to Sec. 12(c) of Public Law 94-204.

Based on these allocations, the maximum total acres allowed for (1), (2) and (5) entitlements for each region are shown above. The total acres allowed for 14(h)(8) is also shown; however, final entitlement in this category could be greater than the amount shown if regions are conveyed less then their entitlements under other provisions of 14(h).

United States Department of the Interior

GEOLOGICAL SURVEY

9277 West Alameda Avenue
Lakewood, Colorado 80226

EPY

February 23, 1978

Darlene Layne, Energy Planner
Division of Energy and Power Development
State of Alaska
Department of Commerce and
Economic Development
338 Denali Street
Anchorage, Alaska 99501

Dear Ms Layne:

As promised during my recent telephone conversation with Mr. Shipp of the FERC Washington office, I am enclosing a list of all Geological Survey powersite reserves and classifications in Alaska. The list is dated March 1976 but there have been no changes since that date.

Most of the headings are self-explanatory but I have attempted to clarify them on the extra sheet enclosed. The list shows, chronologically, all actions pertaining to each withdrawal, total acreage in powersite classifications, total acreage in powersite reserves, and total area withdrawn in the state. Many of the acreages are estimates because of the generalized descriptions of the withdrawn areas (i.e., all lands within ¼ mile of the stream) in the unsurveyed portions of the state.

Mr. Jesse Colbert, our Area Hydraulic Engineer in Portland, Oregon, who I believe you have met, is responsible for our waterpower work in Alaska.

Sincerely,

Vernon C. Indermuhle

Vernon C. Indermuhle
Staff Engineer

Enclosure

cc: J.L. Colbert, Area Hydraulic Engineer,
Portland, Or.

WRC CODE	OFC	MDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
1906	2	PSC	009			08	20	21	CASCADE CREEK	13	DB	AK	1110
1906	2	PSC	009	INT	174	08	20	31	CASCADE CREEK	13	DB	AK	1790
			009										2900
1906	2	PSC	022			01	20	22	FISH CREEK	13	DD	AK	73
1906	2	PSC	022	CAN	330	06	05	75	FISH CREEK	13	DD	AK	-73
			022										0
1906	2	PSC	053			02	23	23	ANNEX CREEK	13	AE	AK	2295
1906	2	PSC	053			02	23	23	TRANSMISSION LINE	13	AE	AK	0
1906	2	PSC	053	CAN	036	07	01	30	ANNEX CREEK	13	AE	AK	-2130
			053										165
1905	2	PSC	107			06	12	25	KNIK AND TURNAGAIN ARMS	14	D*	AK	39527
1905	2	PSC	107	CAN	050	08	21	31	KNIK AND TURNAGAIN ARMS	14	D*	AK	-775
1905	2	PSC	107	INT	269	08	09	38	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	MOD	416	12	17	40	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INT	377	09	17	51	KNIK AND TURNAGAIN ARMS	14	D*	AK	550
1905	2	PSC	107	INT	379	09	19	51	KNIK AND TURNAGAIN ARMS	14	D*	AK	147
1905	2	PSC	107	INT	389	03	18	52	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INT	394	08	19	52	KNIK AND TURNAGAIN ARMS	14	D*	AK	-30
1905	2	PSC	107	INT	400	02	12	53	KNIK AND TURNAGAIN ARMS	14	D*	AK	50
1905	2	PSC	107	INT	404	10	17	55	KNIK AND TURNAGAIN ARMS	14	D*	AK	680
1905	2	PSC	107	INT	406	10	25	55	KNIK AND TURNAGAIN ARMS	14	D*	AK	156
1905	2	PSC	107	INT	407	02	10	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	240
1905	2	PSC	107	INT	409	05	15	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INT	410	05	17	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	AUD		05	28	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	-307
1905	2	PSC	107	AUD		05	28	59	KNIK AND TURNAGAIN ARMS	14	D*	AK	617
1905	2	PSC	107	CAN	159	01	17	64	KNIK AND TURNAGAIN ARMS	14	D*	AK	-30544
1905	2	PSC	107	INT	458	07	16	71	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
			107										10321
1906	2	PSC	187			09	10	27	BARANOF ISLAND	13	BC	AK	500
1906	2	PSC	187	INT	157	10	27	30	BARANOF ISLAND	13	BC	AK	0
			187										500
1906	2	PSC	188			09	13	27	WARM SPRING BAY	13	BC	AK	320
1906	2	PSC	188	CAN	144	03	04	60	WARM SPRING BAY	13	BC	AK	-6
			188										314

			187											500
1906	2	PSC	188			09	13	27	WARM SPRING BAY		13	BC	AK	320
1906	2	PSC	188	CAN	144	03	04	60	WARM SPRING BAY		13	BC	AK	-6
			188											314

USGS POWER SITE RESERVES AND CLASSIFICATIONS
DETAIL BY STATE,PSC,DATE PAGE NO. 6.
MAR 03, 1976 05:45:51

WRC CODE	ORG	RVL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME		BASIN NO.		ST	AREA ACRES
R301	2	PSC	192			11	14	27	ANAN CREEK		13	**	AK	0
R301	2	PSC	192			11	14	27	ANAN LAKE		13	**	AK	0
R301	2	PSC	192			11	14	27	CASCADE CREEK		13	**	AK	0
R301	2	PSC	192			11	14	27	CLAUDE CREEK		13	YY	AK	0
R301	2	PSC	192			11	14	27	CLAUDE CREEK (EAST FORK)	(REV)	13	**	AK	0
R301	2	PSC	192			11	14	27	CLAUDE LAKE	(REV)	13	**	AK	0
R301	2	PSC	192			11	14	27	HARDING RIVER		13	**	AK	0
R301	2	PSC	192			11	14	27	HIDDEN INLET LAKE AND OUT.	(REV)	13	**	AK	0
R301	2	PSC	192			11	14	27	HUMPBACK LAKE AND OUTLET STREAM		13	**	AK	0
R301	2	PSC	192			11	14	27	KARTA RIVER	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	LAKE JOSEPHINE	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	LAKE MELLEN	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	LAKE REFLECTION		13	**	AK	0
R301	2	PSC	192			11	14	27	LAKE TRIBUTARY TO ANAN LAKE		13	**	AK	0
R301	2	PSC	192			11	14	27	LITTLE SALMON LAKE		13	**	AK	0
R301	2	PSC	192			11	14	27	MANZANITA CREEK	(REV)	13	**	AK	0
R301	2	PSC	192			11	14	27	MCHENRY LAKE AND OUTLET	(ETO)	13	**	AK	0
R301	2	PSC	192			11	14	27	ONE-THIRD MILE LAKE	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	PUNCHBOWL LAKE AND OUTLET STREAM		13	**	AK	0
R301	2	PSC	192			11	14	27	REYNOLDS CREEK	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	SALMON LAKE	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	SHELDRUM LAKE AND OUTLET STREAM		13	**	AK	0
R301	2	PSC	192			11	14	27	SHORT CREEK		13	**	AK	0
R301	2	PSC	192			11	14	27	SHORT CREEK (EAST FORK)		13	XX	AK	0
R301	2	PSC	192			11	14	27	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	27000
R301	2	PSC	192			11	14	27	SUMMIT LAKE AND OUTLET	(POW)	13	**	AK	0
R301	2	PSC	192			11	14	27	SWAN LAKE		13	**	AK	0
R301	2	PSC	192			11	14	27	TOM CREEK		13	**	AK	0
R301	2	PSC	192			11	14	27	WHITE RIVER		13	**	AK	0
R301	2	PSC	192	CAN	039	10	13	30	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	-3200
R301	2	PSC	192	INT	171	04	07	31	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	0
R301	2	PSC	192	INT	174	08	20	31	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	0
R301	2	PSC	192	CAN	067	08	16	33	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	-2100
R301	2	PSC	192	MOD	421	09	29	47	STREAMS & LAKES OF S.E. ALASKA		13	**	AK	-5
			192											21695
1906	2	PSC	203			10	18	28	SHEEP CREEK NEAR JUNEAU		13	AE	AK	500
1906	2	PSC	203	MOD	420	06	26	47	SHEEP CREEK NEAR JUNEAU		13	AE	AK	-8
			203											492
R301	2	PSC	221			05	14	29	MISCELLANEOUS STREAMS		13	**	AK	34100
R301	2	PSC	221	INT	143	04	28	30	MISCELLANEOUS STREAMS		13	**	AK	0
R301	2	PSC	221	INT	157	10	27	30	MISCELLANEOUS STREAMS		13	**	AK	-900
R301	2	PSC	221	INT	158	11	07	30	MISCELLANEOUS STREAMS		13	**	AK	0
R301	2	PSC	221	INT	172	08	20	31	MISCELLANEOUS STREAMS		13	**	AK	0

WRC CODE	OFC	WDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
8301	2	PSC	221	INT	247	01	20	36	MISCELLANEOUS STREAMS	13	**	AK	300
8301	2	PSC	221	CAN	144	03	04	60	MISCELLANEOUS STREAMS	13	**	AK	0
1906	2	PSC	221	CAN	283	12	02	70	MISCELLANEOUS STREAMS (GREEN LK)	13	BC	AK	-845
1906	2	PSC	221	AUD		04	24	75	MISCELLANEOUS STREAMS (GREEN LK)	13	BC	AK	-355
													32300
			221										
1906	2	PSC	238			08	22	29	TAKU INLET BASIN	13	DA	AK	7000
1906	2	PSC	238	INT	164	01	08	31	TAKU INLET BASIN	13	DA	AK	2800
													9800
			238										
1906	2	PSC	244			12	02	29	SCENERY LAKE	13	DB	AK	0
1906	2	PSC	244			12	02	29	UNNAMED LAKE	13	DB	AK	2000
													2000
			244										
1906	2	PSC	257			08	20	30	WARD COVE CREEK	13	DE	AK	1600
1906	2	PSC	257	INT	162	12	01	30	WARD COVE CREEK	13	DE	AK	0
1906	2	PSC	257	CAN	284	09	20	71	WARD COVE CREEK	13	DE	AK	-1600
													0
			257										
1906	2	PSC	258			02	09	31	SALMON CREEK	13	AE	AK	360
1906	2	PSC	258	CAN	054	03	08	32	SALMON CREEK	13	AE	AK	-4
													356
			258										
1906	2	PSC	262			11	27	31	GOULDING HARBOR	13	BA	AK	3000
													3000
			262										
1906	2	PSC	264			02	23	32	LAKES ON BARANOF ISLAND	13	BC	AK	4000
													4000
			264										
1905	2	PSC	395			04	22	48	CHAKACHAMNA LAKE	14	D*	AK	13000
1905	2	PSC	395			04	22	48	CHAKACHATNA RIVER	14	D*	AK	0
													13000
			395										
1906	2	PSC	396			04	23	48	TAIYA RIVER	13	AD	AK	5000
													5000
			396										
1906	2	PSC	398			08	30	48	LAKE PERSEVERANCE	13	DE	AK	252
1906	2	PSC	398			08	30	48	WARD LAKE	13	DE	AK	0

WRC CODE	OFC	WDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
1906	2	PSC	398	CAN	284	09	20	71	LAKE PERSEVERANCE	13	DE	AK	-252
			398										0
1904	2	PSC	399			03	29	50	EAGLE RIVER	14	J*	AK	7520
1904	2	PSC	399	INT	389	03	18	52	EAGLE RIVER	14	J*	AK	-40
1904	2	PSC	399	INT	400	02	12	53	EAGLE RIVER	14	J*	AK	0
1904	2	PSC	399	INT	405	10	24	55	EAGLE RIVER	14	J*	AK	-720
1904	2	PSC	399	CAN	159	01	17	64	EAGLE RIVER	14	JG	AK	-880
1904	2	PSC	399	INT	458	07	16	71	EAGLE RIVER	14	JG	AK	-3807
			399										2073
8401	2	PSC	403			03	29	50	COPPER RIVER	14	**	AK	320
8401	2	PSC	403			03	29	50	COPPER RIVER NO. 2	14	YY	AK	320
8401	2	PSC	403			03	29	50	NENANA RIVER	14	**	AK	320
8401	2	PSC	403			03	29	50	RESURRECTION RIVER	14	**	AK	5040
8401	2	PSC	403			03	29	50	SALMON LAKE	14	**	AK	10870
8401	2	PSC	403			03	29	50	TURSUR CHANNEL	14	**	AK	320
8401	2	PSC	403			03	29	50	YUKON RIVER (RAMPART)	14	**	AK	1280
8401	2	PSC	403	CAN	161	06	06	62	SALMON LAKE	14	**	AK	-4196
			403										14274
1905	0	PSC	406			00	00	00	SUSITNA RIVER	14	E*	AK	0
			406										0
1905	2	PSC	409			06	29	50	KENAI RIVER	14	C*	AK	1760
			409										1760
1904	2	PSC	412			11	09	50	LITTLE SUSITNA RIVER AND VIC.	14	JG	AK	2086
1904	2	PSC	412	CAN	171	01	29	63	LITTLE SUSITNA RIVER AND VIC.	14	JG	AK	-37
1904	2	PSC	412	CAN	245	02	27	67	LITTLE SUSITNA RIVER AND VIC.	14	JG	AK	-2046
1904	2	PSC	412	AUD		02	27	67	LITTLE SUSITNA RIVER AND VIC.	14	JG	AK	-3
			412										0
1906	2	PSC	415			09	06	51	SHEEP CREEK	13	AE	AK	460
			415										460
1906	2	PSC	419			11	02	51	WARD COVE CREEK	13	DE	AK	2500
1906	2	PSC	419	CAN	284	09	20	71	WARD COVE CREEK	13	DE	AK	-2500
			419										0

WRC CODE	OFC	WDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
1906	2	PSC	427			09	12	52	BLUF LAKE	13	BC	AK	1000
1906	2	PSC	427			09	12	52	HERRING LAKE	13	BC	AK	0
			427										1000
1905	2	PSC	436			08	29	55	BRADLEY LAKE	14	C*	AK	10000
			436										10000
1906	2	PSC	439			07	10	5?	CHILKOOT LAKE AND RIVER	13	AK	AK	4300
			439										4300
1905	2	PSC	443			02	13	58	CARIBOU CREEK	14	E*	AK	0
1905	2	PSC	443			02	13	58	SUSITNA RIVER	14	E*	AK	143725
1905	2	PSC	443			02	13	58	TEKLANIKA RIVER	14	E*	AK	0
			443										143725
1903	2	PSC	445	COR		01	05	65	YUKON RIVER	14	MV	AK	3200
1903	2	PSC	445			01	05	65	YUKON RIVER	14	MV	AK	8955520
1903	2	PSC	445	MOD	447	10	15	69	YUKON RIVER	14	MV	AK	0
1903	2	PSC	445	MOD	448	10	30	72	YUKON RIVER	14	MV	AK	0
1903	2	PSC	445	MOD	451	01	07	74	YUKON RIVER	14	MV	AK	0
			445										8958720
1903	2	PSC	450			10	07	64	NENANA RIVER	14	L*	AK	21085
			450										21085
1905	0	PSC	452			00	00	00	COOPER RIVER	14	B*	AK	0
			452										0
1905	2	PSC	456			06	10	65	NELLIE JUAN RIVER & LAKE	14	CE	AK	12320
			456										12320
8301	2	PSC	459			12	02	70	VOUOPAU RIVER AND GREEN LAKE	13	**	AK	1095
			459										1095
1904	2	PSC	463			10	22	71	TAZIMINA RIVER & LAKES	14	GC	AK	18000
			463										18000

WRC CODE	OFC	WDL TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
		PSC											9294655
1906	2	PSR	460	INT	145	00	00	00	SALMON CREEK	13	AE	AK	0
1906	2	PSR	460			10	08	14	SALMON CREEK	13	AE	AK	3200
1906	2	PSR	460	MOD	241	11	22	17	SALMON CREEK	13	AE	AK	0
1906	2	PSR	460	RST	442	06	24	30	SALMON CREEK	13	AE	AK	-2846
			460										354
1904	2	PSR	485			04	01	15	ILIAMNA REGION	14	GB	AK	65000
			485										65000
1902	2	PSR	491	MOD	195	07	31	15	SOLOMON GULCH	14	KC	AK	0
1902	2	PSR	491			07	31	15	SOLOMON GULCH	14	KC	AK	626
1902	2	PSR	491			07	31	15	UNO GULCH	14	KC	AK	474
1902	2	PSR	491	RST	451	10	14	30	SOLOMON GULCH	14	KC	AK	-420
1902	2	PSR	491	RST	451	10	14	30	UNO GULCH	14	KC	AK	-474
1902	2	PSR	491	RST	733	01	07	74	SOLOMON GULCH	14	KC	AK	-206
			491										0
1905	2	PSR	674			01	23	18	BIG RABBIT CREEK	14	E*	AK	350
1905	2	PSR	674			01	23	18	CAMPBELL CREEK	14	E*	AK	1280
1905	2	PSR	674			01	23	18	PETERS CREEK	14	E*	AK	725
1905	2	PSR	674			01	23	18	SHIP CREEK	14	E*	AK	1280
1905	2	PSR	674	MOD	259	05	29	18	CAMPBELL CREEK	14	E*	AK	-520
1905	2	PSR	674	MOD	274	10	22	18	PETERS CREEK	14	E*	AK	0
1905	2	PSR	674	MOD	272	10	25	18	CAMPBELL CREEK	14	E*	AK	0
1905	2	PSR	674	INT	377	09	17	51	BIG RABBIT CREEK	14	E*	AK	-110
1905	2	PSR	674	INT	379	09	19	51	PETERS CREEK	14	E*	AK	124
1905	2	PSR	674	INT	393	06	07	52	PETERS CREEK	14	E*	AK	120
1905	2	PSR	674	INT	402	11	08	54	BIG RABBIT CREEK	14	E*	AK	13
1905	2	PSR	674	RST	572	01	17	64	BIG RABBIT CREEK	14	E*	AK	-253
1905	2	PSR	674	RST	572	01	17	64	CAMPBELL CREEK	14	E*	AK	-760
1905	2	PSR	674	RST	572	01	17	64	PETERS CREEK	14	E*	AK	-728
1905	2	PSR	674	RST	572	01	17	64	SHIP CREEK	14	E*	AK	-1280
1905	2	PSR	674	AUD		03	31	64	PETERS CREEK	14	E*	AK	-241
			674										0
1905	2	PSR	684	MOD	258	04	27	18	LAKINA RIVER	14	B*	AK	0
1905	2	PSR	684			04	27	18	LAKINA RIVER	14	B*	AK	8600
1905	2	PSR	684	INT	029	08	17	22	LAKINA RIVER	14	B*	AK	0
1905	2	PSR	684	RST	613	04	07	64	LAKINA RIVER	14	B*	AK	-5200

WRC CODE	OFC	WDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
			684										3400
8404	2	PSR	726			12	06	19	KRUZGAMEPA RIVER AND TRIBS.	14	K*	AK	10000
1905	2	PSR	726			12	06	19	PASS CREEK	14	B*	AK	0
8404	2	PSR	726	MOD	317	05	14	20	KRUZGAMEPA RIVER AND TRIBS.	14	K*	AK	0
			726										10000
1906	2	PSR	753			12	09	20	REVILLAGIGEDO ISLAND	13	CE	AK	2400
1906	2	PSR	753	RST	684	03	06	75	REVILLAGIGEDO ISLAND	13	CE	AK	-2400
			753										0
8401	0	PSR	768			00	00	00	YUKON RIVER	14	**	AK	0
			768										0
		PSR											78754
												AK	9373409

Water Resource Council Basin code

GS office - Portland

Withdrawal Type

Power Site Class. or Power Site (PSR) Reserve (PSC)

Subsequent revision

WRC CODE	OFC	WDL. TYPE	NO.	REV. CAT.	NO.	MONTH	DAY	YEAR	STREAM NAME	BASIN NO.		ST	AREA ACRES
1906	2	PSC	009			08	20	21	CASCADE CREEK	13	DB	AK	1110
1906	2	PSC	009	INI	174	08	20	31	CASCADE CREEK	13	DB	AK	1790
			009										2900
1906	2	PSC	022			01	20	22	FISH CREEK	13	DD	AK	73
1906	2	PSC	022	CAN	330	06	05	75	FISH CREEK	13	DD	AK	-73
			022										0
1906	2	PSC	053			02	23	23	ANNEX CREEK	13	AE	AK	2295
1906	2	PSC	053			02	23	23	TRANSMISSION LINE	13	AE	AK	0
1906	2	PSC	053	CAN	036	07	01	30	ANNEX CREEK	13	AE	AK	-2130
			053										165
1905	2	PSC	107			06	12	25	KNIK AND TURNAGAIN ARMS	14	D*	AK	39527
1905	2	PSC	107	CAN	050	08	21	31	KNIK AND TURNAGAIN ARMS	14	D*	AK	-775
1905	2	PSC	107	INI	269	08	09	38	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	MOD	316	12	17	40	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INI	377	09	17	51	KNIK AND TURNAGAIN ARMS	14	D*	AK	550
1905	2	PSC	107	INI	379	09	19	51	KNIK AND TURNAGAIN ARMS	14	D*	AK	147
1905	2	PSC	107	INI	389	03	18	52	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INI	394	08	19	52	KNIK AND TURNAGAIN ARMS	14	D*	AK	-30
1905	2	PSC	107	INI	400	02	12	53	KNIK AND TURNAGAIN ARMS	14	D*	AK	60
1905	2	PSC	107	INI	404	10	17	55	KNIK AND TURNAGAIN ARMS	14	D*	AK	680
1905	2	PSC	107	INI	406	10	25	55	KNIK AND TURNAGAIN ARMS	14	D*	AK	156
1905	2	PSC	107	INI	407	02	10	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	240
1905	2	PSC	107	INI	409	05	15	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	INI	410	05	17	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
1905	2	PSC	107	ADD		05	28	56	KNIK AND TURNAGAIN ARMS	14	D*	AK	-307
1905	2	PSC	107	ADD		05	28	59	KNIK AND TURNAGAIN ARMS	14	D*	AK	617
1905	2	PSC	107	CAN	159	01	17	64	KNIK AND TURNAGAIN ARMS	14	D*	AK	-30544
1905	2	PSC	107	INI	458	07	16	71	KNIK AND TURNAGAIN ARMS	14	D*	AK	0
			107										10321
1906	2	PSC	187			09	10	27	BARANOF ISLAND	13	BC	AK	500
1906	2	PSC	187	INI	157	10	27	30	BARANOF ISLAND	13	BC	AK	0
			187										500
1906	2	PSC	194			09	13	27	WARM SPRING BAY	13	BC	AK	320
1906	2	PSC	194	CAN	144	03	04	60	WARM SPRING BAY	13	BC	AK	-6
			188										314

Old GS Basin index code

State

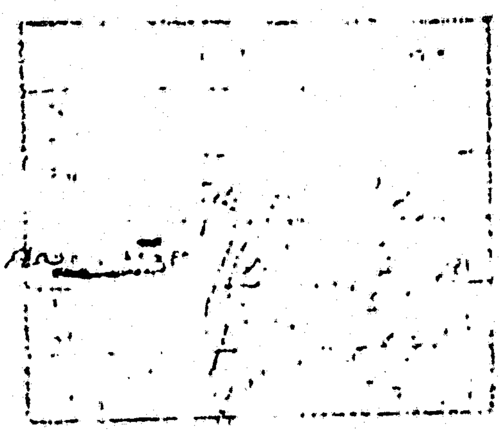
Interpretation

Cancellation

Modification

Office addition of area

BRB



Geological Survey

[Power Site Classification [illegible]]

ALASKA

SUSITNA RIVER, TEKLANIKA RIVER AND CARIBOU CREEK

Pursuant to authority vested in me by the act of March 3, 1879 (20 Stat. 394; 43 U. S. C. 31) and by Departmental Order No. 2333 of June 10, 1947 (43 C. F. R. 4.623; 12 F. R. 4025), the following described lands are hereby classified as power sites insofar as title thereto remains in the United States and subject to valid existing rights; and this classification shall have full force and effect under the provisions of sec. 24 of the act of June 10, 1920, as amended by sec. 211 of the act of August 26, 1935 (16 U. S. C. 818).

The lands classified are all in unsurveyed areas. The locations are referred to the U. S. Geological Survey topographic quadrangles and defined by limiting elevations.

SUSITNA RIVER

OLSON PROJECT

Beginning at a point on the Susitna River longitude 149°33'14" W., latitude 62°40'53" N., approximately 0.2 mile downstream from the mouth of Portage Creek. All lands upstream from this point below the 930-foot contour. See Talkeetna Mountains D-5 quadrangle.

175 acres.

DEVIL CANYON PROJECT

Beginning at a point on the Susitna River longitude 149°29'40" W., latitude 62°48'58" N., approximately 1.4 miles upstream from the mouth of Portage Creek. All lands upstream from this point below the 1,500-foot contour. See Talkeetna Mountains D-5, D-4, and D-3 quadrangles.

9,450 acres.

WATANA PROJECT

Beginning at a point on the Susitna River longitude 148°34'10" W., latitude 62°49'23" N., approximately 1.5 miles upstream from Tsusena Creek. All lands upstream from this point below the 1,910-foot contour. See Talkeetna Mountains D-4, D-2, and C-2 quadrangles.

15,000 acres.

VEE PROJECT

Beginning at a point on the Susitna River longitude 147°32'37" W., latitude 62°42'01" N., approximately 9.8 miles downstream from the Oshetna River. All lands upstream from this point below the 2,340-foot contour. See Talkeetna Mountains C-2, C-1, and D-1 quadrangles.

12,300 acres.

DENALI PROJECT

Beginning at a point on the Susitna River longitude 147°12'57" W., latitude 62°57'38" N., approximately 7.5 miles upstream from the Clearwater River. All lands upstream from this point below the 2,600-foot contour. See Talkeetna Mountains D-1 and D-2; Gulkana D-6; Healy A-1, A-2, B-1 and B-2 quadrangles.

82,500 acres.

Total for Susitna River, 120,425 acres.

TEKLANIKA RIVER

TEKLANIKA RIVER PROJECT

Beginning at a point on the Teklanika River longitude 149°31'[illegible] W., latitude 6[illegible]°[illegible]'08" N. All lands upstream from this point below the [illegible] contour. See Healy quadrangle [illegible].

[illegible] acres.

CARIBOU CREEK

CARIBOU CREEK PROJECT

Beginning at a point on Caribou Creek approximately [illegible] miles upstream from highway bridge on Glenn Highway, longitude 147°[illegible]'03" W., latitude 61°50'[illegible]" N. All lands upstream from this point below the 2,500 contour. See Anchorage D-[illegible] quadrangle.

1,[illegible] acres.

The area aggregates 143,7[illegible] acres.

Dated, February 13, 1958.

THOMAS B. NOLAN,
Director.

[F. R. Doc. [illegible]; Filed, [illegible], 1958; [illegible]]

Noted on AS 955 / 953, 954 / 952 / Noted on AS 951 / Noted on AS 956 / Noted on AS 885 / Noted on AS / Noted on AS

143725
23,300
120,425

BLM

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

IN REPLY REFER TO:

5.04e:G
75904
75905

APR 19 1958

RECEIVED

Memorandum

To: Operations Supervisor, Anchorage

From: Director

Subject: Power Site Classification No. 443

Please note subject order in the Federal Register of February 19 at Page 1072 and have the Manager post his records.

We shall try to obtain another copy of the order for your files.

For the Director:

W. J. Keegan

Copy to: AA, Area 4

BRB

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck and Arthur Kline.

Lands Withdrawn in Power Site Classification No. 443	)	Docket No. DA-74-Alaska
	)	Bureau of Land Management, United States Department of the Interior

DETERMINATION UNDER SECTION 24 OF THE FEDERAL POWER ACT

(Issued June 1, 1961)

An application (FLM 1091) was filed by the Bureau of Land Management, United States Department of the Interior, for revocation of the power withdrawal with respect to the following-described lands:

Alaska - Third Judicial Division

Denali Project: Beginning at a point on the Susitna River, longitude 147°12'57" west, latitude 62°57'38" north, approximately 7.5 miles upstream from the Clearwater River. All lands upstream from this point below the 2600-foot contour. (See Talkeetna Mountains D-1 and D-2; Gulkana D-6; and Healy A-1, A-2, B-1 and B-2 quadrangles.) Containing 83,500 acres.

Applicant desires to open the lands to entry to meet public demands for recreational and commercial uses.

The above-described lands are withdrawn in Power Site Classification No. 443, dated February 13, 1958.

The lands are located in south central Alaska in a wide valley near the headwaters of the Susitna River and its tributary, West Fork, just below the leading edge of the glaciers feeding these streams. Portions of the lands are also included in a short reach near the mouth of the East Fork Susitna River.

The suggested development of the Denali site, for which the lands were withdrawn, as the secondary unit for the over-all Devil Canyon Project, would inundate practically all of the lands. However, it appears that the unit studies is by no means the final selection or design and that development is remote.

17

BKB

The Commission finds:

(1) Inasmuch as the lands are valuable for power purposes, the power withdrawal with respect thereto should not be revoked.

(2) Inasmuch as development does not appear imminent and use of the lands in the meantime for other purposes will not injure materially their power value, a determination as hereinafter provided is justified.

The Commission determines:

The value of the above-described lands will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, subject to the provisions of Section 24 of the Federal Power Act, as amended, and subject to the condition that in the event said lands are required for power purposes, any improvements or structures placed thereon which shall be found to interfere with such development shall be removed or relocated as may be necessary to eliminate interference with power development at no cost to the United States, its permittees or licensees.

By the Commission.

J. H. Gutride

Joseph H. Gutride,
Secretary.

2321 (921)

Your referenc
(721)

State Office
555 Cordova Street
Anchorage, Alaska 99501

May 21, 1970

Memorandum

To: Administrator, Alaska Power Administration
Juneau, Alaska

From: State Director, Bureau of Land Management

Subject: Revocation of PSC 443

Your April 8 memo on this subject asks for our review of the Caribou and Teklanika projects in accordance with Manual Supplement 2022 (Power).

Based on our review (enclosed) we request your recommendations as to power values. If no such values exist, we recommend complete revocation of these withdrawals, not merely a Section 24 restoration to entry.

Our records are in keeping with the February 21, 1958 publication of PSC 443. The Gold Project does not appear on them.

/s/ T. G. Bingham

Acting

Enclosure 1
Encl. 1 - Review

PSC 443
(Caribou and Teklanika Projects)

Date: February 21, 1958

Identity: 1. Caribou Project: on Caribou Creek in Tps. 20 and 21 N., R. 10 E., T. 21 N., R. 11 E., SM
2. Teklanika Project: on Teklanika River west of Healy, Alaska, beginning at longitude 149° 31'48" W., latitude 63° 58'08" N.

Existing Developments or Uses: portions of these projects are within the BLM Copper River multiple use classification and are in townships selected by the State of Alaska. There are also individual isolated claims and selections in the general area. No known BLM programs except for the Copper River classification.

Potential Development or Uses: possible enlargement of or additional State selections. Multiple use management by BLM within the Copper River classification.

Conflicts with BLM Programs: multiple use management within the BLM classified areas, State selections.

Recommendations: should be canceled.

T. 17 S., R. 67 E.,
Secs. 1 S½;
Secs. 19, 20, 21, 22, and 23;
Sec. 24, N½;
Sec. 27, N½.
T. 2[illegible] E.
Sec. 30, [illegible]
T. 2[illegible]
Sec. 6, N½.

Most of the land has been patented to the State of Nevada under the provisions of the Act of June 8, 1926 (44 Stat. 708), with a reservation of the minerals to the United States. The remaining public lands are in part included in withdrawals for other purposes.

2. The following-described lands are the public lands, and patented lands reconveyed to the United States, which are not otherwise withdrawn for other purposes:

MOUNT DIABLO MERIDIAN

T. 23 S., R. 61 E.,
Secs. 1, 2, 3, 6, and 7.
T. 1[illegible] 66 E.,
Sec. [illegible] N½.
Sec. 1.
Sec. 2 SW¼;
Sec. 3 NE¼;
Sec. [illegible] W½W½.
Sec. 26 NW¼NW¼;
Sec. 27 NE¼, W½, and SE¼.
T. 17 S., R. 67 E.
Sec. 19, E½E½ and NW¼NE¼;
Sec. 20, W½W½, E½NW¼, and N½NE¼;
Sec. 21, NE¼ and E½SE¼;
Sec. 22, W½SW¼, and SE¼SW¼.

The lands in T. 17 S., R. 66 E., described above, have been independently resurveyed and are now described as:

MOUNT DIABLO MERIDIAN

T. 17 S., R. 66 E.,
Sec. 12, E½ Lot 5, lots 6, 7, E½ Lot 8;
Sec. 13 [illegible]ot 2, E½ Lot 3, E½ Lot 8, lots 9, 10, E½ lot 11, E½ Lot 16, Lot 17;
Sec. 24, Lot 1, E½ Lot 2;
Sec. 25, Lots 2-16, incl.;
Sec. 26, Lots 12 and 13;
Sec. 27, SE¼SE¼, S½NE¼SE¼, SE¼NW¼SE¼, E½SW¼SE¼;
Sec. 34, E½E½, E½W½E½;
Sec. 35, Lots 1-9, incl., W½ Lot 11, W½SW¼SE¼, SW¼, S½NW¼;
Sec. 36, Lots 1 and 2.
T. 17 S., R. 66½ E.,
Sec. 7, Lots 5, 6, incl.;
Sec. 18, Lots 1-6, incl., S½NW¼, SW¼
Sec. 19, Lots 1, 2 and 3
T. 18 S., R. 66 E.,
80 acres in unsubdivided township which will probably, when subdivided, be described as:
Sec. 2, NW¼NW¼NE¼, N½NE¼NW¼, N½NW¼NW¼;
Sec. 3, N½NE¼NE¼, NE¼NW¼NE¼.

The areas described aggregate approximately 2,931.36 acres.

3. Effective at 10:00 a.m. on April 9, 1963, the lands described in paragraph 2 hereof are hereby restored to the operation of the public land laws, subject to any valid existing rights and equitable claims, the provisions of existing withdrawals, and the requirements of applicable law, rules and regulations. The lands have been open to applications and offers under the mineral leasing laws, and to location for metalliferous minerals. They will be open to location for non-metalliferous minerals beginning at 10:00 a.m. on April 9, 1963.

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Reno, Nevada.

JOHN A. CARVER, JR.
Assistant Secretary of the Interior.

MARCH 4, 1963.

[F.R. Doc. 63 2467; Filed. Mar. 7, 1963; 8:49 a.m.]

[Public Land Order 2961]

[Fairbanks 030474]

ALASKA

Opening of Lands Under Section 24 of Federal Power Act

1. In DA-74—Alaska, the Federal Power Commission determined that the value of the following-described lands in Alaska, withdrawn in Power Site Classification No. 443 of February 13, 1958, will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, subject to the provisions of section 24 of the Federal Power Act, as amended, and subject to the condition that in the event said lands are required for power purposes, any improvements or structures placed thereon which shall be found to interfere with such development shall be removed or relocated as may be necessary to eliminate interference with power development at no cost to the United States, its permittees or licensees:

DENALI PROJECT

Beginning at a point on the Susitna River, longitude 147°12'57" W., latitude 62°57'38" N., approximately 7.5 miles upstream from the Clearwater River. All lands upstream from this point below the 2600-foot contour. (See Talkeetna Mountains D-1 and D-2; Gulkana D-6 and Healy A-1, A-2, B-1, and B-2 quadrangles.)

The area described contains approximately 83,500 acres. Some of the lands are withdrawn for other purposes, and about 30 acres are embraced in an application for patent filed by the State of Alaska.

2. The lands are located in south central Alaska in a wide valley near the headwaters of the Susitna River and its tributary, West Fork, just below the leading edge of the glaciers feeding these streams. Some are also included in a short reach near the mouth of the East Fork Susitna River. Terrain is hilly and treeless, except along the banks of streams. Vegetative cover consists mostly of tundra-type mosses, forbs, and berry bushes.

3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on June 3, 1963, the State of Alaska shall have (1) a preferred right to select the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339) and the regulations in 43 CFR Part [illegible] and (2) a preferred right to apply for the reservation to the State or to any of its political subdivisions under any statute or regulation applicable thereto of any of the lands required for a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways in accordance with the provisions of section 24 of the Federal Power Act of June 10, 1920 (41 Stat. 1075; 16 U.S.C. 818), as amended.

b. All other valid applications and selections under the nonmineral public land laws presented at or prior to 10:00 a.m. on June 3, 1963 will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.

c. The lands have been open to applications and offers under the mineral leasing laws, and to location under the United States mining laws subject to the provisions of the Act of August 11, 1955 (69 Stat. 682; 30 U.S.C. 621). They will be open to settlement under the homestead and Alaska homesite laws at 10:00 a.m. on June 3, 1963.

4. Any disposals of the lands shall be subject to the provisions of section 24 of the Federal Power Act, supra, and to the condition specified by the Federal Power Commission in its determination.

A small portion of the lands falls within the Anchorage Land District. Most of the lands are in the Fairbanks Land District. Inquiries should be addressed to the Manager, Land Office, Bureau of Land Management, Fairbanks, Alaska.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

MARCH 4, 1963.

[F.R. Doc. 63-2468; Filed, Mar. 7, 1963; 8:49 a.m.]

Title 47—TELECOMMUNICATION

Chapter I—Federal Communications Commission

[Docket No. 14661; RM227]

PART 3—RADIO BROADCAST SERVICES

Use of Automatic Logging Devices

The Commission's report and order (FCC 63-184) in the above-entitled matter, adopted February 20, 1963, and published in the FEDERAL REGISTER February 28, 1963 (28 F.R. 1872), is corrected as follows:

1. Footnote 1 of the report and order lists as a party filing comments the National Association of Broadcasting. This organization title is corrected to read National Association of Broadcasters.

2. The headnote of new § 3.115 is corrected to read:

§ 3.115 Retention of logs.

3. Section 3.283(b)(8) is corrected by the addition of a sentence, to read as follows:

3 IRB

IN REPLY REFER TO:
2650.17 (941)

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
State Office
555 Cordova Street
Anchorage, Alaska 99501

MAY 03 1976

Memorandum

To: Regional Solicitor, Office of the Solicitor
Anchorage, Alaska

From: State Director, Bureau of Land Management

Subject: Determination of Validity of Village Selection Applications Within the Cook Inlet Region

Enclosed is a copy of a draft decision to be used in rejecting the improper selections made by various villages in the Cook Inlet Region, under section 12 of the Alaska Native Claims Settlement Act (P.L. 92-203). The rejection of the selections is based on noncompliance with the mandatory selection requirements for compactness and contiguity and on the unavailability of lands for village selection.

As documented in a memorandum of April 10, 1976, from the Director's Office (copy enclosed), those lands withdrawn by PLO 5255, as amended by PLO 5411, are not available for village selection under ANCSA. Certain applications are therefore being rejected for this reason. Portions of the lands within the exterior boundaries of PLO 5255 are withdrawn by Power Site Classification 443, dated February 13, 1958.

Section 12(e) of the Omnibus Act (P.L. 94-204) states:

> The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered or treated as a conveyance under the Settlement Act.

In a letter dated March 31, 1976, Cook Inlet Region, Inc. contends that the purpose of this provision was to expressly validate the village selections made for the lands in Power Site Classification 443, in light of BLM's determination that power site classifications are segregated from deficiency withdrawals under section 11(a)(3) of ANCSA. (Copy of CIRI's letter and attachments are enclosed.) This provision, giving the Secretary discretionary authority to convey lands <u>within the exterior boundaries</u> of PSC 443, was apparently worded as such, the authors assuming that the lands surrounding the classification and under PLO 5255 were available for village selection.

BRB

Does section 12(e) of P.L. 94-204 validate the village selection applications for lands within PSC 443, made under section 12 of ANCSA? Or is the authority to convey lands within PSC 443 to the Native corporations limited only to section 12(b) selections which could be made under V11.A of the "Terms and Conditions for Land Consolidation and Management in Cook Inlet Area," as ratified by P.L. 94-204? If this were true, is the Secretary also authorized to make conveyances without the exterior boundaries of PSC 443?

Also, as stated in the draft decision, because of the unresolved eligibility status of Alexander Creek and Salamatof, which are currently in litigation, the applications were filed in up to four methods to cover all alternatives. The methods are explained in the decision. Actions taken in the decision would be inevitable under any determination of eligibility. Please determine whether or not issuance of the decision would have any effect on the outcome of the cases in litigation.

Please expedite your review and opinion.

/S/ CURTIS V. McVEE

Enclosures:
Draft Decision
Cy Director's Memo dtd 4/10/76
Cy CIRI's Ltr dtd 3/31/76
(w/attachments)

cc:
Powersite Classification 443 file

BLB

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
1016 W. 6th Ave., Suite 201
Anchorage, Alaska 99501

IN REPLY REFER TO:

May 14, 1976

Memorandum

To: State Director, Bureau of Land Management

From: Regional Solicitor, Anchorage

Subject: Determination of Validity of Village Selection Applications Within Cook Inlet Region

The following memorandum opinion is forwarded in response to the following issues raised in your memorandum request of May 3, 1976.

1. Does section 12(e) of P.L. 94-204 validate the village selection applications for lands within PSC 443, made under section 12 of ANCSA?

Section 12(e) of P.L. 94-204 states:

> The Secretary may, not withstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

This provision is the result of Section V of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, December 10, 1975, which stated that:

> The Secretary, CIRI, and the State shall seek legislation authorizing the Secretary to convey title to those selections by Native Corporations within the exterior of Power Site Classification 443, February 13, 1958, provided however, that the patents conveying the above described lands shall contain the reservations required by Section 24 of the Federal Power Act, 16 U.S.C. 818. H.R. 94-729, 94th Cong., 1st Sess., 43 (1975).

BRB

Since section 12(e) referred to lands "selected by Native corporations" and Section V of Terms and Conditions for Land Consolidation and Management of the Cook Inlet Area referred to "those selections by Native corporations," section 12(e) is construed to resolve previous selections and is remedial in nature rather than prospective in nature like section 12(h) which permits new selections for section 12(b) purposes. Section 12(e), therefore, is a validation of previous selection applications made under section 12 of ANCSA. However, it must be noted that section 12(e) of P.L. 94-204 does not take effect until the three conditions of section 12(a) of P.L. 94-204 have been satisfied.

2. Is the authority to convey lands within PSC 443 to the Native corporations limited only to section 12(b) selections which could be made under VII.A of the Terms and Conditions for Land Consolidation and Management in Cook Inlet Area, as ratified by P.L. 94-204?

The language of section 12(e) of P.L. 94-204 does not make any distinctions between 12(a) and 12(b) selections. Based upon the construction taken in section 1 above, the authority to convey lands within PSC 443 is not limited to 12(b) selections. The only specific limitation, "not withstanding any other provision of law to the contrary," is that any conveyance issued within PSC 443 be subject to the reservations of section 24 of the Federal Power Act, 16 U.S.C. 818.

3. If this were true (referring to the issue in section 2 above), is the Secretary also authorized to make conveyance without the exterior boundaries of PSC 443?

PLO 5255 established the basic purpose for the withdrawal of lands on the exterior boundaries of PSC 443.

> The purpose of this order is to supplement Public Land Order No. 5174, by reserving additional lands for selection by those village corporations that will be determined by the Secretary to be eligible to make such selections, and by the Regional Corporation for the approximate area covered by the Cook Inlet Association, as provided for by section 12 of the Act. 37 F.R. 18915 (Sept. 16, 1972).

On April 19, 1976, the Director, Bureau of Land Management, issued a memorandum which addressed, among other things, the question

BRB

of selection rights within those lands withdrawn by PLO 5255. The Director set out the Department's position: "None of the lands described in paragraph 1 of PLO 5255 were available for village selection until specifically withdrawn for that purpose." The Director went on to analyze the Department's position, concluding: "Therefore, all section 12(a) village selections made on lands not deleted from paragraph 1 of PLO 5255, which are described below (lands which encompass the exterior boundaries of PSC 443), must be rejected."

The Department's present position is based upon an interpretation made contemporaneously to the issuance of PLO 5255 in September 1972 (as indicated by the coloration of the Series E withdrawal map). Under the doctrine of contemporaneous construction as premised in Udall v. Tallman, 380 U.S. 1 (1965), the Director's interpretation, unless clearly erroneous, is to be given great deference "when faced with a problem of statutory construction."

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" (Citations omitted.) When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. At 16.

Therefore, except as noted in section 1 above, the Director's position on section 12(a) selections is dispositive of this issue.

4. Please determine whether or not issuance of the decision would have any effect on the outcome of the cases in litigation.

As long as no conveyances are issued, a decision to reject would not affect the outcome of any of the cases in litigation. This position reflects the stipulations reached in Koniag, Inc., et al v. Morton, Civ. No. 74-1061, D.D.C. which permit BLM to continue processing selection applications of the villages which are involved in this litigation.

John W. Burke III

John W. Burke III
For the Regional Solicitor
Anchorage Region

Enclosure:
Memo of Director, BLM,
dated April 19, 1976

BKB

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

State Office
555 Cordova Street
Anchorage, Alaska 99501

2651 (941)

JUN 1 1977

RECEIVED
REGIONAL SOLICITOR, US
JUN 2 1977
ANCHORAGE, ALASKA

Memorandum

To: Regional Solicitor, Office of the Solicitor
Anchorage, Alaska

From: State Director, Bureau of Land Management

Subject: Selection and Conveyance of Power Projects Under the Alaska Native Claims Settlement Act

Problems have arisen in three regions, with possibility of recurrence, concerning the conveyance of power projects to Native villages.

Our foremost questions are as follows:

1. Can we convey to a Native village corporation land in a power project which is located in a core or concentric ring township if a license has been issued by the Federal Power Commission, but no work has been instituted toward construction of a power project, yet the license is still in effect?

2. Can we make such a conveyance if a license had been issued at one time, expired at a later date, no construction accomplished, but the power project has not been vacated by a determination of the Federal Power Commission?

3. If there is in actuality a project, developed by a licensee, would this improved area be covered under Sec. 3(e) of ANCSA as a Federal interest in the land to be retained, or would conveyance be issued "subject to" the power project?

We are of the opinion that Sec. 3(e) would be involved only if the power project is constructed by a Federal agency.

In most cases, the licensee for a project is a private individual or company.

BRB.

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

2650.17 (941

State Office
555 Cordova Street
Anchorage, Alaska 99501

JUL 19 1977

Memorandum

To: Regional Solicitor, Office of the Solicitor
Anchorage, Alaska

From: State Director, Bureau of Land Management

Subject Conveyance of Lands Within Power Site Classification 443 to Cook Inlet Region, Inc.

Section 12(e) of Public Law 94-204 (85 Stat. 1153) authorizes conveyance of title to lands and interests, selected by Cook Inlet Native corporations, in lands located within the boundaries of Power Site Classification 443 of February 13, 1958. The conveyances would be subject to the reservations required by section 24 of the Federal Power Act (16 U.S.C. 818).

This provision was specifically included in the act as the lands in PSC 443 were not withdrawn for selection by the Native corporations. The adjoining lands were withdrawn pursuant to section 11(a)(3) of the Alaska Native Claims Settelment Act, but since that section provided for withdrawal of unreserved, vacant and unappropriated public lands, the lands in PSC 443 were not withdrawn.

No action has been, or can be, taken to convey lands thus authorized, because the provisions of section 12 of P.L. 94-204 are not yet in effect (see section 12(a)).

Conveyance of these classified lands, subject to section 24 of the FPA is next mentioned in Part I of the agreement of August 31, 1976 between the Secretary of the Interior and CIRI. Also, in Appendix A of the agreement, the description of the lands which shall be conveyed is in whole sections and does not exclude the classified lands. This implies approval of such conveyance; however, the agreement itself does not amend the provisions of section 11(a)(3) of ANCSA.

You will note that section 4 of P.L. 94-456 (90 Stat. 1935) authorizes conveyance of lands under application for selection by the village corporations to CIRI, for reconveyance by CIRI to such village corporations. The lands under application do include those lands within PSC 443. However, this does not appear to amend section 11(a)(3) of ANCSA which would allow conveyance of reserved lands, as does the specific wording given in section 12(e) of P.L. 94-204; nor does section 4 of P.L. 94-456 specifically ratifies or refers to the agreement of August 31, 1976.

Based on the above information, we have determined that conveyances of land made to CIRI cannot legally include the lands in PSC 443, unless and until section 12 of P.L. 94-204 can be implemented.

Your concurrence and/or comments on this determination are requested.

BRB

Mc Conkey.

Dale Grayson
343-4036
OA

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

OCT 27 1977

Memorandum

To: Assistant Secretary, Land and Water Resources

From: Associate Solicitor, Division of Energy and Resources

Subj: Susceptibility of power sites to selection by Alaskan Native corporations and the applicability of section 24 of the Federal Power Act to the conveyance of any such selections

You have asked "How are conveyances to corporations affected by power site classifications and reserves and projects?"

1. Power site classification lands included in conveyances.
   a. Subject to section 24 FPA
   b. Not subject to section 24
2. Power site reserve lands included in conveyances.
   a. Subject to section 24 FPA
   b. Not subject to section 24
3. Power project lands included in conveyances.
   a. Subject to section 24 FPA
   b. Not subject to section 24

On December 18, 1971, the Alaska Native Claims Settlement Act (ANCSA) became law (43 U.S.C. 1601). Two sections of that Act made withdrawals for regional and village selections, i.e., 43 U.S.C. 1610(a)(1) and 1615(a). One section, 43 U.S.C. 1610(a)(3), authorized the Secretary to make withdrawals for regional and village selections whenever the lands withdrawn under section 1610(a)(1) were insufficient. The language in each section describing the lands withdrawn or which may be withdrawn is different and it is believed that those differences are relevant to the questions you have asked.

Atch 3-2

BRB

43 U.S.C. 1602(e) contains the definition of public lands as that term is used in ANCSA. It provides:

> "(e) 'public lands' means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;"

43 U.S.C. 1610(a)(1) provides:

> "(a)(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:
>
> (A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;
>
> (B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and
>
> (C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.
>
> The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4."

From the language of section 1610(a)(1) it is clear that all public lands as that term is defined in section 1602(e) are withdrawn except: (a) national defense lands; (b) National Park Systems lands; (c) the smallest practicable tract of land enclosing those lands actually used in connection with any Federal installation.

Atch 3-3

BRB

The withdrawal in 1610(a)(1) therefore includes reserved and appropriated lands such as those in a power site reserve, power site classification or a power project regardless of whether it was instituted by the Corps of Engineers (COE), the Alaska Power Administration (APA), or a private licensee before the Federal Power Commission (FPC). Since the withdrawal is made subject to valid existing rights and the conveyance of the land will be made subject to 43 U.S.C. 1613(g) the selecting corporation will take the land subject to any outstanding leases, licenses, permits, or rights-of-way that have been granted to any licensee. The lands actually used in connection with any Federal project are excluded from the selection by virtue of the terms of section 3(e).

On the other hand, 43 U.S.C. 1610(a)(3)(A) provides:

> "If the Secretary determines that the lands withdrawn by subsections (a) (1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: Provided, That if the Secretary, pursuant to section 1616, and 1621(e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge."

As can be seen, this section excludes from the lands that may be withdrawn by the Secretary lands which are reserved, occupied, or appropriated. Section 24 of the Federal Power Act, 16 U.S.C. 818, and the definition of reservations in 16 U.S.C. 796 each make it clear that power site classifications, power site reservation and power projects all constitute both reservations and appropriations. The taking of public

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lands by flooding, or by the construction of transmission lines without the formal withdrawal of those lines by classification or reservation nevertheless constitute appropriations. See Wilcox v. Jackson, 38 U.S. 496 (1839); Grisar v. McDowell, 73 U.S. 363, 380 (1867); and 44 LD 513. Since only unreserved, vacant and unappropriated lands could be withdrawn by the Secretary under 43 U.S.C. 1610(a)(3) and since the Natives could only select from lands withdrawn under 43 U.S.C 1610(a) or 43 U.S.C 1615(a) (See 43 U.S.C. 1611(a) and (c), and 43 U.S.C. 1615(b)), any reservation, occupation, or appropriation is automatically excluded from a withdrawal under 43 U.S.C. 1610(a)(3) as being unauthorized. Consequently, no power site classification, power site reserve, power project or land reserved by virtue of the filing of a license with the FPC pursuant to 16 U.S.C. 818 can be included within any deficiency withdrawal.

In those areas withdrawn by 43 U.S.C. 1610(a)(1) or 43 U.S.C. 1615(a) the Congress itself withdrew the lands and made them available for Native selection. Note that section 24 of the Federal Power Act, 16 U.S.C. 818, provides for the FPC to determine which lands will be open for settlement entry or selection and for that agency to determine the terms and conditions that will be included in any patent. That section provides:

> "Any lands of the United States included in any proposed project under the provisions of sections 792, 793, 795-818, and 820-823 of this title shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws,

Rtch- 3-5

BRB

the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of sections 792, 793, 795-818, and 820-823 of this title, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of sections 792, 793, 795-818, and 820-823 of this title, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: Provided, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: Provided further, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for

Atch 3-6

BRB

the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application."

By virtue of the differences of the two processes it is concluded that section 24 and the procedures established thereunder do not apply to lands within any power site classification, power site reservation, power project or license application. As we have indicated previously, any selection by the Natives will be conveyed subject to all the rights, privileges, and the obligations of any outstanding permit or license issued by the FPC. Any lands actually being used by the APA or COE will not be conveyed. Any lands needed for the future use of the APA or COE for easements may be reserved by the Secretary under the procedures of 43 U.S.C. 1616(b). (3c)

Atch 3-7

BRB

2650.17 (941)

State Office
555 Cordova Street
Anchorage, Alaska 99501

JAN 16 1978

Memorandum

To: Regional Solicitor, Office of the Solicitor
Anchorage, Alaska

From: State Director, Bureau of Land Management

Subject: Conveyance of Lands Within Power Site
Classification 443 to Cook Inlet Region, Inc.

On December 23, 1977, there was a meeting between the Corps of Engineers, Department of Army and Bureau of Land Management representatives, at which you were present. The meeting concerned the Susitna Dam Project and more particularly the prospective land ownership pattern. Currently, the Department of Army needs right of entry to begin feasibility studies for the project. It was determined that letters of nonobjection must be obtained from Cook Inlet Region, Inc. and all village corporations having selection applications filed within the areas involved.

This memorandum is to recall our request for a legal opinion regarding the land availability of those lands classified under P.S.C. 443 for conveyance to Cook Inlet Region, Inc. Enclosed is a copy of our memorandum dated July 19, 1977, and other correspondence which will explain our problem.

Please review and comment on our determination as soon as possible. As there could be more public involvement in the near future and to avoid unnecessary controversy, we will need your opinion. Your assistance is sincerely appreciated.

Enclosures:
Cy memo dtd 7/19/77
Cy memo dtd 5/14/76
Cy memo dtd 5/3/76
Cy memo dtd 4/10/76
Cy CIRI's Ltr dtd 3/31/76

JRB.

cc:

Solicitor, ~~Washington, D.C.~~.
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C. 20240
(w/enclosures)

Director (320)
Attn: Beau McClure
(w/enclosures)

DM-A (017)
(w/enclosures)

Division of Resources (930)
Attn: Mr. Bassett
(w/enclosures)

AJohnson:hd 1/9/78

BRB

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO:

February 1, 1978

Memorandum

To: State Director, Bureau of Land Management, Alaska

From: Regional Solicitor, Anchorage

Subject: Selection and Conveyance of Power Projects Under the Alaska Native Claims Settlement Act

This is in reply to your memo dated June 1, 1977 asking three questions regarding the above-referenced subject. This was the subject of a recent opinion by the Associate Solicitor, Division of Energy and Resources, dated October 27, 1977. He concluded that power site classification did not prevent Native selections within the Section 11(a)(1) or Section 16 withdrawal areas but would prevent selections in other areas without specific legislative authorization, as occurred with Power Site Classification 443. A license issued by the FPC would be treated as a valid existing right to which the conveyance would be subject. A private project under federal license does not involve a Section 3(e)(1) determination.

John M. Allen

John M. Allen

BRB

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER T

February 1, 1978

Memorandum

To: State Director, Bureau of Land Management, Alaska

From: Regional Solicitor, Anchorage

Subject: Conveyance of Lands Within Power Site Classification 443 to Cook Inlet Region, Inc.

This responds to your memorandums dated July 17, 1977 and January 16, 1978 on the above-referenced subject. We conclude that the authorization in P.L. 94-204 to convey lands in PSC 443 to Cook Inlet Native Corporation was not rescinded by implication by P.L. 94-456. We agree that conveyance of such lands, however, cannot be made until the conditions of section 12 of P.L. 94-204 have been satisfied.

John M. Allen

John M. Allen

6 Oct 75	*Validity of selection of F-14943-B by Tanacross, Inc. Failure of government to properly withdraw land which is contiguous or corners on the core township invalidates the selection.
23 Oct 75	*Village selection of lands selected by the State of Alaska under the Alaska Mental Health Enabling Act. (See 14 Aug 74 opinion.) Washington challenges the legal soundness of the earlier opinion. Position is that State gave up an equitable title on lands for benefits of ANCSA.
15 Jan 76	*Effect on Proclamations of June 15, 1908 and May 3, 1912 on Land Management under ANCSA. A 60-foot neutral strip along the U.S.-Canadian border is available for selection under ANCSA.
11 May 76	*Proceeds on lands selected under ANCSA and National Wildlife Refuge Reserve System. Discussion of escrow procedures is made.
14 May 76	*Determination of validity of village selections applications within Cook Inlet Region (memo). Questions on CIRI applications for Power Site Classification 443 are answered.
1 Feb 78	*Conveyance of lands within Power Site Classification 443 to Cook Inlet Region, Inc. Authority to convey land in PSC 443 is present once Sec. 12 of P.L. 94-204 is satisfied.
1 Feb 78	*Selection and conveyance of Power Projects under ANCSA. (See 27 Oct 77 opinion.) Power site classification does not prevent Native selections within Sec. 11(a)(1) or Sec. 16 withdrawal areas, but would not allow selections in other areas.
18 May 78	*Conveyance of Campbell Tract to the State of Alaska Pursuant to P.L. 94-204. BLM does not need concurrence of other agencies before conveying land because of the mandatory direction of the act.

July 26, 1982

Wilson L. Condon
Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811

Dear Mr. Condon:

I would like to request your assistance in determining the effect of the Federal Statute that relates to land within the Susitna Hydroelectric Project. Public Law 94-204 Section 12 (e) seems to allow lands selected by Native Corporations within Federal Power Site Classification 443 (Susitna Project) to be treated as conveyances under the Settlement Act, subject only to the reservations required by Section 24 of the Federal Power Act.

According to the B.L.M., much, if not all, of the land within Power Site Classification 443 has been selected by Native Corporations. Our concern is to understand the proper land ownership, which involves the following questions:

1. What is the effect of selection by and conveyance to Native Corporations under Public Law 94-204 of land withdrawn under Federal Power Site Classification 443?

2. What title and interests will Native Corporations receive to land in the Federal Power Site Classification 443 and what is the effect of Section 24 of the Federal Power Act?

3. Under Section 24 of the Federal Power Act it appears that the Secretary of the Interior must give notice to the Governor of his intention to transfer land and that the Governor may within 90 days of such notice declare a preference to that land. Has this procedure been followed, if it hasn't, would the Governor still have an opportunity to declare a preference? If the Governor has or still can make a timely declaration, what effect would this have upon these lands?

We would appreciate your assistance in determining these issues, and if there is any further information I can provide please let me know.

Sincerely,

Eric P. Yould
Executive Director

CI/EY:js

MEMORANDUM

State of Alaska

TO: Eric P. Yould
Executive Director
Alaska Power Authority

DATE: September 16, 1982
RECEIVED
SEP 20 1982
ALASKA POWER AUTHORITY

FILE NO: 366-068-83

TELEPHONE NO: 465-3600

SUBJECT: Effect of ANCSA selections on Susitna Hydro project

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By:
Robert E. Price
Assistant Attorney General

This is in response to your letter of July 26 which requested the opinion of this office on several questions relating to selections by Native corporations within Power Site Classification 443 (Susitna project) pursuant to section 12(e) of the Act of January 2, 1976, 89 Stat. 1153. That section provides as follows:

> The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

In response to your first and second questions, a conveyance to a Native Corporation within Power Site Classification 443 vests title to the land described in the conveyance in the Native corporation subject to the provisions of section 24 of the Federal Power Act, 16 U.S.C. 818, which provides in pertinent part as follows:

> . . . subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for

> said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission . . .

The section 24 reservation provides in effect that the State, if a licensee, must compensate a Native corporation for any damages to crops, buildings, or other improvements. The damages, however, are limited to that amount.

Your third question inquires about a 90 day preference right of the State provided for in section 24 of the Federal Power Act. First, it is necessary to distinguish the 90 day preference provided for in section 24 of the Federal Power Act from the 90 day selection preference provided for in section 6(g) of the Statehood Act, the Act of July 7, 1958, 72 Stat. 339. The section 24 State preference relates only to rights-of-way and material sites for highways, whereas the Statehood Act preference provides that upon the revocation of any order of withdrawal in Alaska that the order of revocation shall provide for a 90 day period during which the State shall have a preferred right of selection. THe Statehood Act preference is also set out in 43 C.F.R. 2627.4(a). Accordingly, in the case of a restoration of lands to selection by the State under section 24 of the Federal Power Act, the State has a preference right under section 6(g) of the Statehood Act. See 43 C.F.R. 2320.3. Your question is whether the State is entitled to the section 6(g) selection preference on lands within Power Site Classification 443 selected by Native corporations pursuant to section 12(e) of the Act of January 2, 1976. As a matter of law, it is difficult for the State to argue against the clear language of section 12(e), which grants a selection right to Native corporations "notwithstanding any other provision of law to the contrary. . . ." It would be necessary for the State to establish that the 90 day preference was part of the compact between the State and the United States, and that as such it was necessary to obtain State consent to that legislation. See State of Alaska v. Lewis, 559 P.2d 630 (Alaska

1977). However, it would be possible to explore that argument in greater detail if you determine that the section 24 reservation to the State is not adequate for the Susitna project. In that case, it would also be necessary for someone on your staff or Department of Natural Resources to furnish me with the Native selection case files in the Bureau of Land Management to determine whether the State was given the 90 day notices provided for in the Federal Power Act and the Alaska Statehood Act.

If you wish something further on this subject, please advise me. I believe that it would be better to discuss this matter in person before any commitment to major research.

REP/jb

CHAP. 273.—Joint Resolution Authorizing the payment of the compensation of session employees of the Senate and House of Representatives for the month of June, 1920, on the 5th day of said month.

June 5, 1920.
[H. J. Res. 380.]
[Pub. Res. No. 52.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Senate and Clerk of the House of Representatives are hereby authorized and directed to pay to the session employees of the Senate and House of Representatives borne on the session roll their respective salaries for the month of June, 1920, on the fifth day of said month.

Congressional session employees to be paid June 5, 1920, salaries for month of June.

Approved, June 5, 1920.

CHAP. 285.—An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

June 10, 1920.
[H. R. 3184.]
[Public, No. 280.]
Post, p. 1639.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission.

Federal Water Power Act.
Federal Power Commission.
Creation and composition of.

SEC. 2. That the commission shall appoint an executive secretary, who shall receive a salary of $5,000 a year, and prescribe his duties, and the commission may request the President of the United States to detail an officer from the United States Engineer Corps to serve the commission as engineer officer, his duties to be prescribed by the commission.

Executive secretary.
Detail of Army engineer officer.

The work of the commission shall be performed by and through the Departments of War, Interior, and Agriculture and their engineering, technical, clerical, and other personnel except as may be otherwise provided by law.

Execution of work by Departments of War, etc.

All the expenses of the commission, including rent in the District of Columbia, all necessary expenses for transportation and subsistence, including, in the discretion of the commission, a per diem of not exceeding $4 in lieu of subsistence incurred by its employees under its orders in making any investigation, or conducting field work, or upon official business outside of the District of Columbia and away from their designated points of duty, shall be allowed and paid on the presentation of itemized vouchers therefor approved by a member or officer of the commission duly authorized for that purpose; and in order to defray the expenses made necessary by the provisions of this Act there is hereby authorized to be appropriated such sums as Congress may hereafter determine, and the sum of $100,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to be paid out upon warrants drawn on the Secretary of the Treasury upon order of the commission.

Expenses authorized.
Appropriation.

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

Meaning of terms as used.

"Public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include "reservations," as hereinafter defined.

"Public lands."

"Reservations" means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the

"Reservations."

thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall in so far as applicable be published and promulgated as a part of the rules and regulations of the commission.

Powers of Commission.

SEC. 4. That the commission is hereby authorized and empowered—

To investigate, etc., water resources, power industry, etc.

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this Act.

Use of Government dams, etc.

Detailed statements of cost of construction, etc., to be furnished by licensees.

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands. The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

Free access to project, records, etc.

Cooperate with Federal or State agencies in investigations.

(b) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

Publish information, etc.

(c) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use.

Reports to Congress.

The commission, on or before the first Monday in December of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Act, and in each case the parties thereto, the terms prescribed, and the moneys received, if any, on account thereof.

Issue licenses for improving navigation, developing water power, etc.

(d) 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 navigable waters of the United 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: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be

Post, p. 1253.

Provisos.
Restriction on use in reservations.

inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate of foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *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 the passage of this Act: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (e) of this section, notice shall be given and published as required by the proviso of said subsection.

Approval of dams, etc., on navigable waters.

Use of Government dams for public purposes.

Notice of application without preliminary permit.

(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

Issue preliminary permits to applicants.
Post, p. 1068.
Proviso.
Notice thereof to State, etc.

(f) To prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof by licensees hereunder; to examine all books and accounts of such licensees at any time; to require them to submit at such time or times as the commission may require statements and reports, including full information as to assets and liabilities, capitalization, net investment and reduction thereof, gross receipts, interest due and paid, depreciation and other reserves, cost of project, cost of maintenance and operation of the project, cost of renewals and replacements of the project works, and as to depreciation of the project works and as to production, transmission, use and sale of power; also to require any licensee to make adequate provision for currently determining said costs and other facts. All such statements and reports shall be made upon oath, unless otherwise specified, and in such form and on such blanks as the commission may require. Any person who, for the purpose of deceiving, makes or causes to be made any false entry in the books or the accounts of such licensee, and any person who, for the purpose of deceiving, makes or causes to be made any false statement or report in response to a request or order or direction from the commission for the statements and report herein referred to shall, upon conviction, be fined not more than $2,000 or imprisoned not more than five years, or both.

Prescribe rules for accounting, operating, etc.

Verification.

Punishment for false statements, etc.

(g) To hold hearings and to order testimony to be taken by deposition at any designated place in connection with the application for any permit or license, or the regulation of rates, service, or securities, or the making of any investigation, as provided in this Act;

Conduct hearings, order depositions, etc.

and to require by subpœna, signed by any member of the commission, the attendance and testimony of witnesses and the production of documentary evidence from any place in the United States, and in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any member, expert, or examiner of the commission may, when duly designated by the commission for such purposes, administer oaths and affirmations, examine witnesses and receive evidence. Depositions may be taken before any person designated by the commission or by its executive secretary and empowered to administer oaths, shall be reduced to writing by such person or under his direction, and subscribed by the deponent. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Aid of Federal courts.

Administer oaths, etc.

Witness fees, etc.

(h) To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act.

Other necessary powers.

SEC. 5. That each preliminary permit issued under this Act shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. Such permits shall not be transferable, and may be canceled by order of the commission upon failure of permittees to comply with the conditions thereof.

Preliminary permits. Issue of, to obtain priority for licenses.

Conditions.

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

Licenses. Period of, and conditions controlling.

Revocation, etc.

SEC. 7. That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Preferences to State, etc., applications.

Post, p. 1072.

Between other applicants.

That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but

Action if Commission deem Government should undertake project.

shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States.

Great Falls of the Potomac River.
Investigation of cost, etc., of power plant, etc., at.

The commission is hereby authorized and directed to investigate and, on or before the 1st day of January, 1921, report to Congress the cost and, in detail, the economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, in view of existing conditions, utilizing such study as may heretofore have been made by any department of the Government; also in connection with such project to submit plans and estimates of cost necessary to secure an increased and adequate water supply for the District of Columbia. For this purpose the sum of $25,000, or so much thereof as may be necessary, is hereby appropriated.

Increase of water supply, D. C.
Appropriation.

Transfers of licenses, etc., restricted.

SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

Proviso.
Mortgages, etc., excepted.

Application requirements.

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

Submission of plans, etc.

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

Changes restricted.

Compliance with State laws.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Additional information.

(c) Such additional information as the commission may require.

Conditions of licenses.

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

Project adapted to utilize navigation, water power, etc.

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Restriction on alterations.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the

commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the commission may direct.

Project works to be maintained in effective operation, etc.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

Liability for damages to property of others.

Amortization reserves to be established.
Disposition of.

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

Rate to be specified in license.

Annual charges.
Basis of.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *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 fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

Price to consumers.

Provisos.
Use of Government structures, or Indian tribal lands.

No charge to States, etc., if power furnished public without profit, etc.

Small projects.

Exceptions.

No free use of Government dam.

Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

Report to Congress, etc.

SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

Time limit for construction and operation.

Extensions.

Termination of license on failure.

Proceedings if partly completed.

Post, p. 1076.

SEC. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided*, That such net investment shall

Right of Government to take over, operate, etc., on expiration of license.

Ante, p. 1064.

Payment to be made.

Determination of amount.

Provisos.
Values excluded.

mission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

Payment for damages to crops, etc.

Proviso.
Former locations, etc., not impaired.

Penalty for violations by licensees, etc.

SEC. 25. That any licensee, or any person, who shall willfully fail or who shall refuse to comply with any of the provisions of this Act, or with any of the conditions made a part of any license issued hereunder, or with any subpœna of the commission, or with any regulation or lawful order of the commission, or of the Secretary of War, or of the Secretary of Commerce as to fishways, issued or made in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall, in the discretion of the court, be punished by a fine of not exceeding $1,000, in addition to other penalties herein prescribed or provided by law; and every month any such licensee or any such person shall remain in default after written notice from the commission, or from the Secretary of War, or from the Secretary of Commerce, shall be deemed a new and separate offense punishable as aforesaid.

Continuing offenses.

Equity proceedings for revoking licenses, etc.

SEC. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

Correcting violations.

Jurisdiction of district courts.

Sale, etc., on revocation of license.

Rights, etc., to vendee.

Payment if United States the purchaser.

Ante, p. 1071.

.01 Act of June 10, 1920 as amended by the Act of August 26, 1935.

[¶ 5224]

[Public Lands Included in Project—Reservation of Lands from Entry]

Sec. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in

the form prescribed by the Commission: *Provided,* That locations, entries, selection, or filings heretofore made for lands reserved as water power sites, or in connection with water power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section continued: *Provided further,* That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

.01 Act of June 10, 1920 as amended by the Act of August 26, 1935 and the Act of May 28, 1948.

[¶ 5225]

Sec. 25. [Repealed by the Act of August 26, 1935.]

[¶ 5226]

[Proceedings in Equity for Revocation of License or to Prevent Violations of License]

Sec. 26. That the Attorney General may, on request of the Commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission, or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the Commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee

(Aug. 15, 1914, ch. 253, § 5, 38 Stat. 692; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1431; Aug. 4, 1949, ch. 393, §§ 1, 20, 63 Stat. 495, 561; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

AMENDMENTS

1949—Act Aug. 4, 1949, reestablished the Coast Guard and repealed act Jan. 28, 1915, ch. 20, § 1, 58 Stat. 800.

EFFECTIVE DATE OF 1949 AMENDMENT

Amendment by act Aug. 4, 1949, effective the first day of the third month after the month of approval, August 1949, see Effective Date note set out preceding chapter 1 of Title 14, Coast Guard.

TRANSFER OF FUNCTIONS

"Secretary of Commerce" and "Department of Commerce" were substituted for "Secretary of the Interior" and "Department of the Interior" in view of: the creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in the Appendix to Title 5, Government Organization and Employees.

For transfer of functions of other officers, employees, and agencies of the Department of the Interior, with certain exceptions, to the Secretary of Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to title 5.

The Coast Guard was transferred to the Department of Transportation and all functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of other offices and officers of the Department of the Treasury were transferred to the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655 of Title 49, Transportation.

All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of such Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of such officers, agencies, and employees, by Reorg. Plan No. 26 of 1950, §§ 1, 2, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 1281, set out in the Appendix to Title 5. The Customs Service, referred to in this section, is a service under the Treasury Department, and the Coast Guard, also referred to in this section, was generally a service under such Department, but such Plan excepted, from the transfer, functions of the Coast Guard, and of the Commandant thereof, when the Coast Guard was operating as a part of the Navy under sections 1 and 3 of Title 14, Coast Guard.

Reorg. Plan No. III of 1940, § 3, eff. June 30, 1940, 5 F.R. 2108, 54 Stat. 1232, set out in the Appendix to Title 5, Government Organization and Employees, consolidated the Bureau of Fisheries and the Bureau of Biological Survey with their respective functions into one agency in the Department of the Interior to be known as the Fish and Wildlife Service, and provided that the functions of the consolidated agency shall be administered under the direction and supervision of the Secretary of the Interior.

Reorg. Plan No. II of 1930, set out in the Appendix to Title 5, transferred the Bureau of Fisheries in the Department of Commerce and its functions to the Department of the Interior, to be administered under the direction and supervision of the Secretary of the Interior.

CHAPTER 12—FEDERAL REGULATION AND DEVELOPMENT OF POWER

SUBCHAPTER I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

Sec.

(Aug. 15, 1914, ch. 253, § 5, 38 Stat. 692; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1431; Aug. 4, 1949, ch. 393, §§ 1, 20, 63 Stat. 495, 561; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

AMENDMENTS

1949—Act Aug. 4, 1949, reestablished the Coast Guard and repealed act Jan. 28, 1915, ch. 20, § 1, 58 Stat. 800.

EFFECTIVE DATE OF 1949 AMENDMENT

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TRANSFER OF FUNCTIONS

"Secretary of Commerce" and "Department of Commerce" were substituted for "Secretary of the Interior" and "Department of the Interior" in view of: the creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in the Appendix to Title 5, Government Organization and Employees.

For transfer of functions of other officers, employees, and agencies of the Department of the Interior, with certain exceptions, to the Secretary of Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to title 5.

The Coast Guard was transferred to the Department of Transportation and all functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of other offices and officers of the Department of the Treasury were transferred to the Secretary of Transportation by Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655 of Title 49, Transportation.

All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of such Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of such officers, agencies, and employees, by Reorg. Plan No. 26 of 1950, §§ 1, 2, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 1281, set out in the Appendix to Title 5. The Customs Service, referred to in this section, is a service under the Treasury Department, and the Coast Guard, also referred to in this section, was generally a service under such Department, but such Plan excepted, from the transfer, functions of the Coast Guard, and of the Commandant thereof, when the Coast Guard was operating as a part of the Navy under sections 1 and 3 of Title 14, Coast Guard.

Reorg. Plan No. III of 1940, § 3, eff. June 30, 1940, 5 F.R. 2108, 54 Stat. 1232, set out in the Appendix to Title 5, Government Organization and Employees, consolidated the Bureau of Fisheries and the Bureau of Biological Survey with their respective functions into one agency in the Department of the Interior to be known as the Fish and Wildlife Service, and provided that the functions of the consolidated agency shall be administered under the direction and supervision of the Secretary of the Interior.

Reorg. Plan No. II of 1930, set out in the Appendix to Title 5, transferred the Bureau of Fisheries in the Department of Commerce and its functions to the Department of the Interior, to be administered under the direction and supervision of the Secretary of the Interior.

CHAPTER 12—FEDERAL REGULATION AND DEVELOPMENT OF POWER

SUBCHAPTER I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

Sec.

APPLICATION TO NATIONAL PARKS

Acadia National Park, see section 342b of this title.
Big Bend National Park, see section 158 of this title.
Bryce Canyon National Park, see section 402e of this title.
Carlsbad Caverns National Park, see section 407b of this title.
Everglades National Park, see section 410b of this title.
Grand Canyon National Park, see section 221b of this title.
Great Smoky Mountains National Park, see section 403b of this title.
Isle Royale National Park, see section 408b of this title.
Lands reserved for park purposes in Coos County, Oregon, see section 405 of this title.
Lassen Volcanic National Park, see sections 201b, 204l, 205a, and 207a of this title.
Mammoth Cave National Park, see section 404b of this title.
Mount Rainier National Park, see section 108 of this title.
Rocky Mountain National Park, see section 197 of this title.
Shenandoah National Park, see section 403b of this title.
Yellowstone National Park, see section 21b of this title.
Yosemite National Park, see section 47f of this title.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 21b, 47b, 47f, 90d–4, 108, 158, 197, 201b, 204l, 205a, 207a, 221b, 342b, 391, 391b–1, 402e, 403b, 404b, 405, 407b, 408b, 410b, 435, 459a–1, 460m–11, 460ee, 460gg–2, 577b, 832h, 833g, 836, 1278 of this title; title 25 section 326; title 30 section 621; title 33 section 467a.

SUBCHAPTER I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

Section 212 of act of Aug. 26, 1935, ch. 687, 49 Stat. 847, provided that sections 1 to 29 of the Federal Water Power Act, as amended (sections 792, 793, 794 [eliminated], 795 to 797, 798 to 818, 819 [repealed], and 820 to 823 of this title) shall constitute Subchapter I of the act, as set out above. Said section 212 also repealed sections 25 and 30 of the act (sections 819, 791 of this title). It also contained a proviso as follows: "That nothing in that Act, as amended, shall be construed to repeal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1921 (41 Stat. 1353 [section 797a of this title]), or the provisions of any other Act relating to national parks and national monuments."

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 825o of this title.

§ 791. Repealed. Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847

Section, act June 10, 1920, ch. 285, § 30, 41 Stat. 1077, designated the act as The Federal Water Power Act.

§ 791a. Short title

This chapter may be cited as the "Federal Power Act."

(June 10, 1920, ch. 285, § 320, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 863.)

§ 792. Federal Power Commission; creation; number; appointment; term; qualifications; vacancies; quorum; chairman; salary; place of holding sessions

A commission is created and established to be known as the Federal Power Commission (hereinafter referred to as the "commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

The commissioners first appointed under this section, as amended, shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination. Their successors shall be appointed each for a term of five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his prede-

cessor was appointed shall be appointed only for the unexpired term. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioners. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. Three members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal of which judicial notice shall be taken. The commission shall annually elect a vice chairman to act in case of the absence or disability of the chairman or in case of a vacancy in the office of chairman.

Each commissioner shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, within the limitation prescribed by law, while away from the seat of government upon official business.

The principal office of the commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States.

(June 10, 1920, ch. 285, § 1, 41 Stat. 1063; June 23, 1930, ch. 572, § 1, 46 Stat. 797; 1950 Reorg. Plan No. 9, § 3, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265; July 12, 1960, Pub. L. 86-619, § 1, 74 Stat. 407.)

CODIFICATION

Provisions covering the compensation of commissioners have been omitted as obsolete. Compensation of the Chairman and members of the Commission are now covered by sections 5314 and 5315 of Title 5, Government Organization and Employees.

AMENDMENTS

1960—Pub. L. 86-619 provided for continuation in office of a commissioner upon termination of his term until a successor is appointed and has qualified, not beyond expiration of next session of Congress subsequent to the expiration of said fixed term of office.

1930—Prior to the amendment by act June 23, 1930, this section read as follows: "A commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission."

REPEALS

Act Oct. 15, 1949, ch. 695, § 5(a), 63 Stat. 880, formerly set out in the credit to this section, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 655.

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, set out below.

REORGANIZATION PLAN NO. 9 OF 1950

Eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949.

FEDERAL POWER COMMISSION

§ 1. TRANSFER OF FUNCTIONS TO THE CHAIRMAN

(a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the Federal Power Commission, hereinafter referred to as the Commission, to the Chairman of the Commission, hereinafter referred to as the Chairman, the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds.

(b)(1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(3) Personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman shall not be affected by the provisions of this reorganization plan.

(4) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

§ 2. PERFORMANCE OF TRANSFERRED FUNCTIONS

The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any functions transferred to the Chairman by the provisions of this reorganization plan.

§ 3. DESIGNATION OF CHAIRMAN

The functions of the Commission with respect to choosing a chairman from among the commissioners composing the Commission are hereby transferred to the President.

§ 793. Appointment of officers and employees of Federal Power Commission; duties, and salaries; detail of officers and employees from other departments; expenditures authorized

The commission shall have authority to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant; and may, subject to the civil service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5. The commission may request the President to detail an officer or officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officer or

District of Columbia and away from their designated points of duty, shall be allowed and paid on the presentation of itemized vouchers therefor, approved by a member or officer of the commission duly authorized for that purpose.

(June 10, 1920, ch. 285, § 2, 41 Stat. 1063; June 9, 1949, ch. 185, § 9, 63 Stat. 167.)

CODIFICATION

This section consists of the third paragraph of section 2 of act June 10, 1920. The first and second paragraphs of said section 2 were classified to section 793 and section 794 of this title.

An additional provision of the third paragraph of section 2 of act June 10, 1920, which authorized appropriations for expenses made necessary by this chapter in such sums as Congress might thereafter determine, and appropriated $100,000 therefor, was omitted as temporary.

AMENDMENTS

1949—Act June 9, 1949, increased the per diem allowance from $4 to $9.

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

CROSS REFERENCES

Expenditures by commission authorized, see section 793 of this title.

Subsistence allowances generally, see chapter 57 of Title 5, Government Organization and Employees.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of 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, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or

similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter.

(June 10, 1920, ch. 285, § 3, 41 Stat. 1063; Aug. 26, 1935, ch. 687, title II, § 201, 49 Stat. 838.)

REFERENCES IN TEXT

Public land laws, referred to in pars. (1), (2), are classified generally to Title 43, Public Lands.

AMENDMENTS

1935—Act Aug. 26, 1935, amended definitions of "reservations" and "corporations", and added definitions of "person", "licensee", "commission", "commissioner", "state commission" and "security".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 807 of this title.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licenses in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands or interest in lands. The licensee shall grant to the Commission or to its duly authorized agents or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

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: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under

whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *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: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or 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 by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, § 4, 41 Stat. 1065; June 23, 1930, ch. 572, § 2, 46 Stat. 798; Aug. 26, 1935, ch. 687, title II, § 202, 49 Stat. 839.)

AMENDMENTS

1935—Subsec. (a). Act Aug. 26, 1935 eliminated last paragraph of subsec. (a), which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsec. (b). Act Aug. 26, 1935 added subsec. (b). Former subsec. (b) relettered (c).

Subsec. (c). Act Aug. 26, 1935 relettered former subsec. (b) as (c). Former subsec. (c) relettered (d).

Subsec. (d). Act Aug. 26, 1935 relettered former subsec. (c) as (d) and substituted "3d day of January" for "first Monday in December" in second sentence. Former subsec. (d) relettered (e).

Subsec. (e). Act Aug. 26, 1935 relettered former subsec. (d) and (e) and substituted "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" for "navigable waters of the United States" and "subsection (f)" for "subsection (e)". Former subsec. (e) relettered (f).

Subsec. (f). Act Aug. 26, 1935 relettered former subsec. (e) as (f) and substituted "once each week for four weeks" for "for eight weeks". Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was eliminated by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935 added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was eliminated by act Aug. 26, 1935.

Subsec. (h). Act Aug. 26, 1935 eliminated former subsec. (h), which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, added sentence respecting contents of report.

CHANGE OF NAME

The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3011 to 3013 continued the military Department of the Army under the administrative supervision of a Secretary of the Army.

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to the Federal Power Commission, see Parts 1, 19, and 30 of Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, set out as a note under section 2292 of Title 50, Appendix, War and National Defense.

FEDERAL RULES OF CIVIL PROCEDURE

Subpoena, see rule 45, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 796, 828b of this title.

§ 797a. Congressional authorization for permits, licenses, leases, or authorizations for dams, conduits, reservoirs, etc., within national parks or monuments

On and after March 3, 1921, no permit, license, lease, or authorization for dams, con-

duits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as constituted, March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

(Mar. 3, 1921, ch. 129, 41 Stat. 1353.)

CODIFICATION

Provisions repealing so much of this chapter "as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission" have been omitted from the Code.

Section was not enacted as part of the Federal Power Act which comprises this chapter.

Section 212 of act Aug. 26, 1935, ch. 687, title II, 49 Stat. 847, provided that nothing in this chapter, as amended should be construed to repeal or amend the provisions of the act approved Mar. 3, 1921 (41 Stat. 1353) [16 U.S.C. 797a] or the provisions of any other Act relating to national parks and national monuments.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, § 5, 41 Stat. 1067; Aug. 26, 1935, ch. 687, title II, § 203, 49 Stat. 841.)

AMENDMENTS

1935—Act Aug. 26, 1935, eliminated "and a license issued" which appeared at the end of the second sentence and added "or for other good cause shown after notice and opportunity for hearing" onto the last sentence.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.

(June 10, 1920, ch. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, ch. 687, title II, § 204, 49 Stat. 841.)

AMENDMENTS

1935—Act Aug. 26, 1935, substituted "thirty days" for "ninety days" in the third sentence and added the last sentence to the section.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

(June 10, 1920, ch. 285, § 7, 41 Stat. 1067; Aug. 26, 1935, ch. 687, title II, § 205, 49 Stat. 842; Aug. 3, 1968, Pub. L. 90-451, § 1, 82 Stat. 616.)

CODIFICATION

Additional provisions in the section as enacted by act June 10, 1920, directing the commission to investigate the cost and economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, and also in connection with such project to submit plans and estimates of cost necessary to secure an increased water supply for the District of Columbia, have been omitted as temporary and executed.

AMENDMENTS

1968—Subsec. (c). Pub. L. 90-451 added subsec. (c).

1935—Act Aug. 26, 1935, eliminated "navigation and" preceding "water resources" wherever appearing, and lettered the paragraphs (a) and (b).

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 807 of this title.

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, § 8, 41 Stat. 1068.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

§ 802. Information to accompany application for license

Each applicant for a license under this chapter shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(c) Such additional information as the commission may require.

(June 10, 1920, ch. 285, § 9, 41 Stat. 1068.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans, etc., to secure adaptability of project

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment.

or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

(June 10, 1920, ch. 285, § 15, 41 Stat. 1072; Aug. 3, 1968, Pub. L. 90-451, § 3, 82 Stat. 617.)

AMENDMENTS

1968—Pub. L. 90-451 designated existing provisions as subsec. (a) and added subsec. (b).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 800, 803, 807 of this title.

§ 809. Temporary use by Government of project works for national safety; compensation for use

When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license under this chapter, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

(June 10, 1920, ch. 285, § 16, 41 Stat. 1072.)

TERMINATION OF WAR AND EMERGENCIES

Joint Res. July 25, 1947, ch. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

§ 810. Disposition of charges arising from licenses

(a) All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this subchapter, shall be paid into the Treasury of the United States, subject to the following distribution: 12½ per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to "Miscellaneous receipts"; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter shall be paid into the Treasury of the United States and credited to miscellaneous receipts.

(b) In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law.

(June 10, 1920, ch. 285, § 17, 41 Stat. 1072; Aug. 26, 1935, ch. 687, title II, § 208, 49 Stat. 845.)

REFERENCES IN TEXT

The Act of Congress known as the Reclamation Act, approved June 17, 1902, referred to in subsec. (a), is act June 17, 1902, ch. 1093, 32 Stat. 388. For classification of this Act to the Code, see Short Title note set out under section 391 of Title 43, Public Lands, and Tables volume.

AMENDMENTS

1935—Act Aug. 26, 1935, designated existing provisions as subsec. (a) and added "except charges fixed by

each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

(June 10, 1920, ch. 285, § 19, 41 Stat. 1073.)

§ 813. Power entering into interstate commerce; regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce approved February 4, 1887, as amended, and the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter.

(June 10, 1920, ch. 285, § 20, 41 Stat. 1073.)

REFERENCES IN TEXT

The Act to regulate commerce approved February 4, 1887, as amended, referred to in text, is the Interstate Commerce Act (act Feb. 4, 1887, ch. 104, 24 Stat. 379, as amended), which is classified generally to chapters 1 (§ 1 et seq.), 8 (§ 301 et seq.), 12 (§ 901 et seq.), 13 (§ 1001 et seq.), and 19 (§ 1231 et seq.) of Title 49, Transportation. For complete classification of this Act to the Code, see note captioned Interstate Commerce Act set out under section 27 of Title 49 and Tables volume.

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 10, 1920, ch. 285, § 21, 41 Stat. 1074.)

CROSS REFERENCES

Jurisdiction of Federal courts, amount to exceed $10,000, see sections 1331 and 1332 of Title 28, Judiciary and Judicial Procedure.

FEDERAL RULES OF CIVIL PROCEDURE

Procedure in condemnation proceedings, see rule 71A, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 815. Contract to furnish power extending beyond period of license; obligations of new licensee

Whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

(June 10, 1920, ch. 285, § 22, 41 Stat. 1074.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in note under section 792 of this title.

§ 816. Preservation of rights vested prior to June 10, 1920

The provisions of this subchapter shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this subchapter and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this subchapter and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(June 10, 1920, ch. 285, § 23(a), 41 Stat. 1075; Aug. 26, 1935, ch. 687, title II, § 210, 49 Stat. 846.)

CODIFICATION

Section consists of subsec. (a) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (b) of section 23 of act June 10, 1920, is set out as section 817 of this title.

AMENDMENTS

1935—Act Aug. 26, 1935, amended section by substituting the word "part" for "chapter" wherever it appeared, by substituting the word "heretofore" for "then" and by substituting the last sentence for "Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they cannot agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value."

§ 817. Projects not affecting navigable waters; necessity for Federal license

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 chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

(June 10, 1920, ch. 285, § 23(b), 41 Stat. 1075; Aug. 26, 1935, ch. 687, title II, § 210, 49 Stat. 846.)

CODIFICATION

Section consists of subsec. (b) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (a) of section 23 of act June 10, 1920, is set out as section 816 of this title.

AMENDMENTS

1935—Act Aug. 26, 1935, added first sentence to section, and substituted "with foreign nations" for "between foreign nations", "shall before such construction" for "may in their discretion" and "shall not construct, maintain, or operate such dam or other project works" for "shall not proceed with such construction".

§ 818. Public lands included in project; reservation of lands from entry

Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, sub-

ject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further*, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

(June 10, 1920, ch. 285, § 24, 41 Stat. 1075; Aug. 26, 1935, ch. 687, title II, § 211, 49 Stat. 846; May 28, 1948, ch. 351, 62 Stat. 275.)

REFERENCES IN TEXT

The public-land laws, referred to in text, are classified generally to Title 43, Public Lands.

AMENDMENTS

1948—Act May 28, 1948, added second proviso to the last sentence so that States may apply for reservations of portions of power sites released for entry, location, or selection to the States for highway purposes.

1935—Act Aug. 26, 1935, added "for such purpose or purposes and under such restrictions as the commission may determine", substituted "part" for "chapter" wherever appearing, and eliminated from the proviso "prior to June 10, 1920" following "made".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 30 section 1014.

§ 819. Repealed. Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847

Section, act June 10, 1920, ch. 285, § 25, 41 Stat. 1076, related to offenses and punishment and is now covered by section 825m et seq. of this title.

§ 820. Proceedings for revocation of license or to prevent violations of license

The Attorney General may, on request of the commission or of the Secretary of the Army, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this chapter or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of the Army, and to compel the performance of any condition imposed under the provisions of this chapter. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 807 of this title at the termination of the license.

(June 10, 1920, ch. 285, § 26, 41 Stat. 1076.)

REFERENCES IN TEXT

Proceedings in equity, referred to in the text, were abolished by the adoption of Rule 2 of the Federal Rules of Civil Procedure, Title 28, Appendix, Judiciary and Judicial Procedure, which provided that "there shall be one form of action to be known as 'civil action' ".

CHANGE OF NAME

The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3011 to 3013 continued the military Department of the Army under the administrative supervision of a Secretary of the Army.

subject to the provisions, limitations, charges, terms, and conditions of the reclamation law, and all application to make selections, locations, or entries of any other kind on such lands should be rejected, except that where settlement rights were acquired prior to the withdrawal and have been diligently prosecuted and the homestead law complied with, the settler will be entitled to make and complete his entry subject to all the charges, terms, conditions, limitations, and provisions of the reclamatiom law. (See Sarah E. Allen, 44 L.D. 331.) No person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after withdrawal of the land from settlement and entry.

§ 2322.1-3 Claims initiated prior to withdrawals; reservation for ditches or canals.

Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to rights-of-way for ditches or canals constructed by authority of the United States (act of Aug. 30, 1890, 26 Stat. 391; 43 U.S.C. 945).

§ 2322.1-4 Effect of filing of farm-unit plats.

Where an authorized officer by the approval of farm-unit plats has determined or may determine, that the lands designated thereon are irrigable, the filing of such plats in the Bureau of Land Management and in the proper offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form if such withdrawal and all orders then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the reclamation law or as subject to the filing of water-right applications, and to all farm units to which an authorized officer has announced that water is ready to be delivered.

§ 2322.2 Payment for lands acquired.

If any lands embraced in any unapproved or uncertified selection are needed in the construction and maintenance of any irrigation works (other than for right-of-way for ditches or canals reserved under act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945) under the reclamation law, payment therefor will be made upon agreement of the owner with the representative of the Government as to the value of the land and the improvements thereon. Where the owner of the land and the representative of the Government fail to agree as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process, as provided by section 7 of the Reclamation Act of June 17, 1901 (32 Stat. 389; 43 U.S.C. 421).

§ 2322.3 Effective dates of withdrawals and restorations.

(a) All withdrawals become effective on the date upon which they are ordered and all orders for restorations on the date they are received in the proper office unless otherwise specified in the order. (George B. Pratt et al., 38 L.D. 146.)

(b) Upon the cancellation of an entry covering lands embraced within a withdrawal under the Reclamation Act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. MacNamara, 33 L.D. 520.) Such lands under first-form withdrawal cannot therefore, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person.

BRB

Subpart 2325—Indians

§ 2325.1 Designation of Indian reservations in Alaska.

(a) The inherent power conferred upon the Secretary of the Interior by section 441, Revised Statutes (5 U.S.C. 485), to supervise the public business relating to the Indians includes the supervision over reservations in the State of Alaska created in the interest of the natives and the authority to lease lands therein for their benefit. Opinion of the solicitor, May 18, 1923 (49 L.D. 592).

(b) The act of May 1, 1936 (49 Stat. 1250; 25 U.S.C. 496, 473a) extends certain provisions of the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), known as the Wheeler-Howard Act, to Alaska, and provides for the designation of Indian reservations in the State.

(c) The act of May 31, 1938 (52 Stat. 593; 25 U.S.C. 497), authorizes the Secretary of the Interior in his discretion to withdraw, subject to any valid existing rights, and permanently reserve, small tracts of not to exceed 640 acres each of the public domain in Alaska, for schools, hospitals, and such other purposes as may be necessary in administering the affairs of the Indians, Eskimos, and Aleuts of Alaska.

(R.S. 2478, 34 Stat. 197; 43 U.S.C. 1201, 48 U.S.C. 357)

[35 FR 9556, June 13, 1970]

PART 2340—WITHDRAWAL FOR OTHER AGENCIES

Subpart 2344—Federal Power Commission

Sec.
2344.0-3 Authority.
2344.1 Lands conside ed withdrawn or classified for power purposes.
2344.2 General determination under section 24.
2344.3 Petitions for restoration.

AUTHORITY: R.S. 2478; 43 U.S.C. 1201.

SOURCE: 35 FR 9556, June 13, 1970, unless otherwise noted.

CROSS REFERENCES: For rights-of-way for power projects and for power transmission [illegible] the Federal Power Commission) see 18 CFR Chapter I. For rights-of-way over Indian lands; power projects; see Indians 25 CFR 161.27.

§ 2344.0-3 Authority.

(a) Section 24 of the Federal Power Act of June 10, 1920 (41 Stat. 1075; 16 U.S.C. 818), as amended. The Act provides that any lands of the United States included in an application for power development, under said Act, shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States, until otherwise directed by the Federal Power Commission or by Congress. It also provides that whenever the Commission shall determine that the value of any lands withdrawn or classified for power purposes will not be injured or destroyed for such purposes by location, entry or selection under the public land laws, the Secretary of the Interior shall declare such lands open to location, entry or selection under such restrictions as the Commission may determine, and subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy and use any or all of such lands for power purposes. Before the lands are declared open to location, entry or selection, the Secretary of the Interior must give notice of his intention to make such declaration, to the Governor of the State within which such lands are located, and the State shall have a preference for a period of 90 days from the date of such notice to file under any applicable law or regulation, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways.

(b) The act of August 11, 1955 (69 Stat. 681; 30 U.S.C. 621). The Act opened lands then, theretofore or thereafter withdrawn or classified for power purposes, with certain specified exceptions, to mineral location and development under certain conditions.

BRB

§ 2344.1 Lands considered withdrawn or classified for power purposes.

The following classes of lands are considered as withdrawn or classified for power purposes for the purposes of section 24 of the Federal Power Act: Lands withdrawn for powersite reserves under the act of June 25, 1910 (36 Stat. 847) as amended by the act of August 24, 1912 (37 Stat. 497, 43 U.S.C. 141–143); lands included in an application for power development under the Federal Power Act; lands classified for powersite purposes under the act of March 3, 1879 (20 Stat. 394; 43 U.S.C. 31); lands designated as valuable for power purposes under the acts of June 20, 1910 (36 Stat. 557, 564, 575), June 9, 1916 (39 Stat. 218, 219), and February 26, 1919 (40 Stat. 1178, 1180); lands within final hydroelectric power permits under the act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959); and lands within transmission-line permits or approved right-of-way under said act of 1901 or the act of March 4, 1911 (36 Stat. 1253; 16 U.S.C. 5, 420, 523; 43 U.S.C. 961).

§ 2344.2 General determination under section 24.

(a) On April 17 1922, the Federal Power Commission made a general determination "that where lands of the United States have heretofore been, or hereafter may be, reserved or classified as powersites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the commission determines that the value of such lands so reserved or classified or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act."

(b) The regulations governing mining locations on lands withdrawn or classified for power purposes, including lands restored under section 24 of the Federal Power Act, are contained in Group 3800 of this chapter.

§ 2344.3 Petitions for restoration.

(a) Petitions for restoration of lands withdrawn or classified for power purposes, under the provisions of section 24 of the Federal Power Act, must be filed, in duplicate, in the proper office (see § 1821.2-1 of this chapter). No particular form of petition is required, but it must be typewritten or in legible handwriting. Each petition must be accompanied by a service charge of $10 which is not returnable.

(b) Favorable action upon a petition for restoration will not give the petitioner any preference right or right to preferential treatment if or when the lands are finally restored.

[29 FR 4341, Mar. 31, 1964, as amended by Circ. 2220, 31 FR 16784, Dec. 31, 1966]

PART 2350—WITHDRAWAL PROCEDURES

Subpart 2350—Withdrawal Procedure General

Sec.
2350.0-1 Purpose.

Subpart 2351—Applications

2351.1 Who may apply.
2351.2 Filing of applications
2351.2-1 Applications for more than 5,000 acres.
2351.3 Segregative effect of applications.
2351.4 Approval of application; publicity; hearing; investigations; and negotiations.
2351.5 Findings, reviews.
2351.6 Payment for improvements.

Subpart 2353—Public Land Order

2353.1 Public land order preparation, approval, and publication.

Subpart 2357—Transfer of Jurisdiction

2357.1 Withdrawals or reservations for the use or benefit of non-Federal agencies.

AUTHORITY: R.S. 2478, as amended; 43 U.S.C. 1201, unless otherwise noted.

Subpart 2350—Withdrawal Procedures, General

SOURCE: 35 FR 9557, June 13, 1970, unless otherwise noted.

§ 2350.0-1 Purpose.

The regulations in this part 2350 apply to all proposals for withdrawal, reservation or restriction, under the authority of Executive Order 10355, May 26, 1952 (17 FR 4831), or under the statutory authority of the Secretary of the Interior, or under the Act of February 28, 1958 (72 Stat. 27), of lands or water areas owned or controlled by the United States. However, only the following apply to proposals by the Department of Defense which are governed by the provisions of sections 1, 2, and 3 of the Act of 1958, supra: §§ 2091.2-5, 2300.0-5, 2351.1, 2351.2, 2351.3, and 2351.4.

Subpart 2351—Applications

SOURCE: 35 FR 9557, June 13, 1970, unless otherwise noted.

§ 2351.1 Who may apply.

The heads of Federal agencies and instrumentalities or any subordinate officer designated by them may apply for the withdrawal, reservation or restriction of lands or water areas owned or controlled by the United States for the use or benefit of the agency or instrumentality they represent or where such agency has a direct interest in a State, Territorial, or local program, for the use or benefit of a State, Territory, or political subdivision thereof in connection with such program.

§ 2351.2 Filing of applications.

(a) Except where the application is classified by the applicant for national security reasons, all applications for withdrawal or reservation must be filed in duplicate in accordance with the provisions of § 1821.1 of this chapter. Where the application is classified by the applicant agency for national security reasons, it must be submitted to the Office of the Secretary, Department of the Interior, Washington 25 D.C.

(b) No specific form of application is prescribed but it must contain the following information:

(1) The name and address of the applicant agency and intended using agency;

(2) Legal description of the lands desired, in terms of the public land surveys, where applicable;

(3) When sections 1, 2, and 3 of the Act of February 28, 1958 (72 Stat. 27), are applicable, location of the area involved, to include a detailed description of the exterior boundaries of the lands to be included within, and those to be excepted from, the proposed withdrawal or reservation.

(4) Gross acreage within the exterior boundaries of the requested withdrawal or reservation, and net public land, water, or public land and water acreage covered by the application;

(5) The purpose or purposes for which the area is proposed to be withdrawn, reserved, or restricted, or if the purpose or purposes are classified for national security reasons, a statement to that effect;

(6) Whether the proposed use will result in contamination of any or all of the requested withdrawal or reservation area, and if so, whether such contamination will be permanent or temporary;

(7) The estimated period during which the proposed withdrawal or reservation will continue in effect;

(8) Whether, and if so to what extent, the proposed use will affect continuing full operation of the public land laws and Federal regulations relating to conservation, utilization, and development of mineral resources, timber and other material resources, grazing resources, fish and wildlife resources, water resources, and scenic, wilderness, and recreation and other values;

(9) If effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether, subject to existing rights under law, the intended using agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, and distribution of water;

(10) A justification for the proposed withdrawal or reservation, including statements showing the need for all the area requested and for the limitation, if any, of concurrent uses;

(11) Citation of the statutory or other authority for the type of withdrawal or reservation requested.

§ 2351.2-1 Applications for more than 5,000 acres.

If the application is for the withdrawal of more than 5,000 acres for any one project or facility, the application must be accompanied by a map or maps, in duplicate, of adequate scale, showing clearly the location of the land by legal subdivisions; the proposed utilization of the property, including the location of the major improvements to be erected or installed; areas to be inundated, if any; and any cultural or other features of the lands requested and of the surrounding area deemed by the applicant to be significant and to illustrate the need for and effect of the proposed withdrawal. Standard base maps, where suitable, may be used for the purposes of this paragraph.

§ 2351.3 Segregative effect of applications.

(a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed or in the tract books maintained by the Washington Office of the Bureau of Land Management if there is no Land Office for the State in which the lands are located shall temporarily segregate such lands as provided in § 2091.2-5.

§ 2351.4 Approval of application; publicity; hearing; investigations; and negotiations.

(a) The authorized officer of the Bureau of Land Management will have published in the FEDERAL REGISTER a notice of the filing of the application and of the opportunity of the public to object to, or comment on, the proposed withdrawal or reservation. In cooperation with the applicant agency, he will also provide for publicity sufficient to inform the interested public of the proposed withdrawal or reservation.

(b) If, as a result of such notice and publicity, sufficient protest is filed against the proposal, or if, in his discretion, it is otherwise desirable in the [illegible] the authorized officer of the Bureau of Land Management will, subject to the approval of the Secretary of the Interior if the applicant agency objects, hold a public hearing at a time and in a place convenient to the interested public and to the agencies involved. Costs of such hearings incurred by the Bureau of Land Management, except for the salaries of its personnel, will be borne by the applicant agency.

(c) The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the lands and their resources. He will also undertake negotiations with the applicant agency with the view of adjusting the application to reduce the area to the minimum essential to meet the applicant's needs, to provide for the maximum concurrent utilization of the lands for purposes other than the applicant's, to eliminate lands needed for purposes more essential than the applicant's, and to reach agreement on the concurrent management of the lands and their resources.

§ 2351.5 Findings, reviews.

(a) The authorized officer of the Bureau of Land Management will report to the applicant agency his findings of fact, and where he has authority to effect the withdrawal or reservation, his conclusions in respect to the application. If the applicant agency does not concur with such findings or conclusions, it may request the Director, Bureau of Land Management, to review the case, and if it feels aggrieved by the findings or conclusions of the Director, may request the Secretary for further review. When the proposed withdrawal or reservation involves authority delegated to the Secretary by Executive Order 10355, May 26, 1952 (17 FR 4831) and if the applicant is a Federal agency or instrumentality outside of the Department of the Interior and it does not concur in the findings of the Secretary, the applicant may request the Secretary to refer the case to the Office of Management and Budget.

(b) The Secretary of the Interior, or his authorized agent, will approve or deny the application in whole or in part, provided that no withdrawal or reservation affecting land under the administrative jurisdiction of an Executive department or agency of the Government other than the Department of the Interior will be effected without the prior approval or concurrence of the head of the department or agency concerned, or his delegate.

§ 2351.6 Payment for improvements.

The allowance of an application for withdrawal under the regulations of this part will be conditional upon the payment by the applicant agency or upon agreement of the applicant agency to pay to the owner or owners of range or other improvements placed upon the lands pursuant to an agreement with the United States such amount and at such times as the authorized official of the Bureau of Land Management deems fair and reasonable under the circumstances and the terms of such agreement to compensate for the loss of the improvements, providing that the applicant agency is authorized by law to make such compensation. In addition, a holder of a grazing license or permit for lands within a grazing district will be compensated for the loss resulting from the use of the lands embraced in the license or permit for war or national defense purposes in an amount to be determined fair and reasonably by, and to be paid by, the head of the Department or Agency of the Federal Government making such use.

Subpart 2353—Public Land Order

§ 2353.1 Public land order preparation, approval, and publication.

(a) When an application is finally denied in whole or in part by the authorized officer, he will have published in the FEDERAL REGISTER a Notice of Determination which will specify the date and hour that the affected lands will be relieved of the segregative effect of the agency's application.

(b) When an application is finally approved in whole or in part by the authorized officer, he will have published in the FEDERAL REGISTER an appropriate order of withdrawal or reservation.

[35 FR 9558, June 13, 1970]

Subpart 2357—Transfer of Jurisdiction

§ 2357.1 Withdrawals or reservations for the use or benefit of non-Federal agencies.

Lands withdrawn or reserved under Group 2300 for the use or benefit of a non-Federal agency will remain or will be placed under the jurisdiction of the appropriate Federal agency.

(R.S. 2478; 43 U.S.C. 1201)

[35 FR 9558, June 13, 1970]

PART 2360—NATIONAL PETROLEUM RESERVE IN ALASKA

Subpart 2361—Management and Protection of the National Petroleum Reserve in Alaska

Sec.
2361.0-1 Purpose.
2361.0-2 Objectives.
2361.0-3 Authority.
2361.0-4 Responsibility.
2361.0-5 Definitions.
2361.0-6 [Reserved]
2361.0-7 Effect of Law.
2361.1 Protection of the Environment.
2361.2 Use Authorizations.
2361.3 Unauthorized Use and occupancy.

Subpart 2361—Management and Protection of the National Petroleum Reserve in Alaska

SOURCE: 42 FR 28721, June 3, 1977, unless otherwise noted.

§ 2361.0-1 Purpose.

The purpose of the regulations in this subpart is to provide procedures for the protection and control of environmental, fish and wildlife, and historical or scenic values in the National Petroleum Reserve in Alaska pursuant to the provisions of the Naval Petroleum Reserves Production Act of 1976. (90 Stat. 303; 42 U.S.C. 6501 et seq.).

§ 2361.0-2 Objectives.

The objective of this subpart is to provide for the protection of the environmental, fish and wildlife, and historical or scenic values of the Reserve so that activities which are or might be detrimental to such values will be

unpatented land is affected by the proposed right of way. The maps and field notes will be approved by the authorizing officer in duplicate. Any valid right existing at the date of the filing of the right-of-way application will not be affected by the filing or approval thereof. If no unpatented land is involved in the application the authorizing officer will reject it, allowing the usual right of appeal.

§ 2842.2-2 Evidence of construction.

When the railroad is constructed, a statement of the engineer and certificate of the president (Forms 5 and 6, Appendix A) must be filed in the proper office, in duplicate. No new map will be required, except in case of deviations from the right-of-way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them and the location must be described in the terms as the amended survey and the amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the authorizing officer.

PART 2850—POWER TRANSMISSION LINES

Subpart 2850 Power Transmission Lines, General

Sec.
2850.0-3 Statutory authority.
2850.0-5 Definitions.
2850.0-8 Lands subject to grant.

Subpart 2851 Principals and Procedures, Power Transmission Lines

2851.1 Nature of interest.
2851.1-1 Terms and conditions.
2851.2 Procedures.
2851.2-1 Applications.

Subpart 2850—Power Transmission Lines, General

SOURCE: 35 FR 9650, June 13, 1970, unless otherwise noted.

§ 2850.0-3 Statutory authority.

(a) The act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959), authorizes the Secretary under such regulations as he may fix, to permit the use of rights-of-way through public lands and certain reservations of the United States, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for pipe lines, canals, ditches, water plants, and other purposes to the extent of the ground occupied by such canals, ditches, water plants, or other works permitted thereunder and not to exceed 50 feet on each side of the marginal limits thereof, or not to exceed 50 feet on each side of the center line of such pipe lines, telephone and telegraph lines, and transmission lines, by any citizen, association,. or corporation of the United States, where it is intended by such to exercise the use permitted under the act.

(b) The act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961), as amended, authorizes the head of the department having jurisdiction over the lands, under general regulations fixed by him, to grant an easement for rights-of-way for a period not exceeding 50 years, over and across public lands and reservations of the United States, for poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes and for radio, television and other forms of communication transmitting, relay and receiving structures and facilities to the extent of 200 feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for superstructures and facilities to any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under the act.

(c) The applicability of the acts of February 15, 1901, and March 4, 1911, over public lands, was superseded by the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended by sections 201 to 213 inclusive, of the act of August 26, 1935 (49 Stat. 838; 16 U.S.C. 791-825r), as to power projects for the generation and transmission of hydroelectric power, defined in section 3(11) of the act, excepting distribution lines. Applications for hydroelectric power plant sites or rights-of-way for main or primary hydroelectric power transmission lines must be made to the Federal Power Commission, Washington, D.C., under the act of June 10, 1920, as amended. Rights-of-way for transmission lines which are not primary lines must be secured under the act of February 15, 1901, or the act of March 4, 1911. See 18 CFR 2.2.

§ 2850.0-5 Definitions.

(a) The opinion of the Solicitor of the Department of the Interior of November 1, 1940 (M. 30846), held that lands acquired by the United States, by purchase or otherwise, were reservation lands within the meaning of the acts of February 15, 1901, and March 4, 1911.

§ 2850.0-8 Lands subject to grant.

Permission may be given under the act of February 15, 1901, and the act of March 4, 1911, for a right-of-way over unsurveyed lands as well as surveyed lands.

Subpart 2851—Principals and Procedures, Power Transmission Lines

SOURCE: 35 FR 9651, June 13, 1970, unless otherwise noted.

§ 2851.1 Nature of interest.

§ 2851.1-1 Terms and conditions.

(a) By accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case, in addition to those specified in § 2801.1-5.

(1) To protect in a workmanlike manner, at crossings and at places in proximity to his transmission lines on the right-of-way authorized in accordance with the rules prescribed in the National Electric Safety Code, all Government and other telephone, telegraph, and power transmission lines from contact and all highways and railroads from obstruction, and to maintain his transmission lines in such manner as not to menace life or property.

(2) Neither the privilege nor the right to occupy or use the lands for the purpose authorized shall relieve him of any legal liability for causing inductive or conductive interference between any project transmission line or other project works constructed, operated, or maintained by him on the servient lands, and any radio installation, telephone line, or other communication facilities now or hereafter constructed and operated by the United States or any agency thereof.

(3) Each application for authority to survey, locate, commence construction work and maintain a facility for the generation of electric power and energy or for the transmission or distribution of electric power and energy of 33 kilovolts or higher under this subpart shall be referred by the authorized officer to the Secretary of the Interior to determine the relationship of the proposed facility to the power-marketing program of the United States. Where the proposed facility will not conflict with the program of the United States the authorized officer, upon notification to that effect, will proceed to act upon the application. In the case of necessary changes respecting the proposed location, construction, or utilization of the facility in order to eliminate conflicts with the power-marketing program of the United States, the authorized officer shall obtain from the applicant written consent to or compliance with such requirements before taking further action on the application: *Provided, however,* That if increased costs to the applicant will result from changes to eliminate conflicts with the power-marketing program of the United States, and it is determined that a right-of-way should be granted, such changes will be required upon equitable contract arrangements covering costs and other appropriate fac-

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(4) The applicant shall make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision for avoiding inductive or conductive interference between any transmission facility or other works constructed, operated, or maintained by it on the right-of-way authorized under the grant and any radio installation, telephone line, or other communication facilities existing when the right-of-way is authorized or any such installation, line or facility thereafter constructed or operated by the United States or any agency thereof. This provision shall not relieve the applicant from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive or conductive interference.

(5) An applicant for a right-of-way for a transmission facility having a voltage of 66 kilovolts or more must, in addition to the requirements of Subpart 2802, execute and file with its application a stipulation agreeing to accept the right-of-way grant subject to the following conditions:

(i) In the event the United States, pursuant to law, acquires the applicant's transmission or other facilities constructed on or across such right-of-way, the price to be paid by the United States shall not include or be affected by any value of the right-of-way granted to the applicant under authority of the regulations of this part.

(ii) The Department of the Interior shall be allowed to utilize for the transmission of electric power and energy any surplus capacity of the transmission facility in excess of the capacity needed by the holder of the grant (subsequently referred to in this paragraph as "holder") for the transmission of electric power and energy in connection with the holder's operations, or to increase the capacity of the transmission facility at the Department's expense and to utilize the increased capacity for the transmission of electric power and energy utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(a) When the Department desires to utilize surplus capacity thought to exist in the transmission facility, notification will be given to the holder and the holder shall furnish to the Department within 30 days a certificate stating whether the transmission facility has any surplus capacity not needed by the holder for the transmission of electric power and energy in connection with the holder's operations and, if so, the amount of such surplus capacity.

(b) Where the certificate indicates that there is no surplus capacity or that the surplus capacity is less than that required by the Department the authorized officer may call upon the holder to furnish additional information upon which its certification is based. Upon receipt of such additional information the authorized officer shall determine, as a matter of fact, if surplus capacity is available and, if so, the amount of such surplus capacity.

(c) In order to utilize any surplus capacity determined to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the holder's transmission facility in a manner conforming to approved standards of practice for the interconnection of transmission circuits.

(d) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate protective equipment to insure the normal and efficient operation of the holder's transmission facilities.

(e) After any interconnection is completed, the holder shall operate and maintain its transmission facilities in good condition, and, except in emergencies, shall maintain in a closed position all connections under the holder's control necessary to the transmission of the Department's power and energy over the holder's transmission facilities. The parties may by mutual consent open any switch where necessary or desirable for maintenance, repair or construction.

(f) The transmission of electric power and energy by the Department over the holder's transmission facilities will be effected in such manner, as will not interfere unreasonably with the holder's use of the transmission facilities in accordance with the holder's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the transmission facility which has been provided at the Department's expense.

(g) The holder will not be obligated to allow the transmission of electric power and energy by the Department to any person receiving service from the holder on the date of the filing of the application for a grant, other than statutory preference customers including agencies of the Federal Government.

(h) The Department will pay to the holder an equitable share of the total monthly cost of that part of the holder's transmission facilities utilized by the Department for the transmission of electric power and energy, the payment to be an amount in dollars representing the same proportion of the total monthly cost of such part of the transmission facilities as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's transmission facilities bears to the total capacity in kilowatts of that portion of the transmission facilities. The total monthly cost will be determined in accordance with the system of accounts prescribed by the Federal Power Commission, exclusive of any investment by the Department in the part of the transmission facilities utilized by the Department.

(i) If, at any time subsequent to a certification by the holder or determination by the authorized officer that surplus capacity is available for utilization by the Department, the holder needs for the transmission of electric power and energy in connection with its operations the whole or any part of the capacity of the transmission facility theretofore certified or determined as being surplus to its needs, the holder may request the authorized officer to modify or revoke the previous certification or determination by making application to the authorized officer not later than 36 months in advance of the holder's needs. Any modification or revocation of the certification or determination shall not affect the right of the Department to utilize

available under a contract entered into by reason of the equitable contract arrangements provided for in this section.

(j) If the Department and the holder disagree as to the existence or amount of surplus capacity in carrying out the terms and conditions of this paragraph, the disagreement shall be decided by a board of three persons composed as follows: The holder and the authorized officer shall each appoint a member of the board and the two members shall appoint a third member. If the members appointed by the holder and the authorized officer are unable to agree on the designation of the third member, he shall be designated by the Chief Judge of the United States Court of Appeals of the circuit in which the major share of the facilities involved is located. The board shall determine the issue and its determination, by majority vote, shall be binding on the Department and the holder.

(k) As used in this section, the term "transmission facility" includes (1) all types of facilities for the transmission of electric power and energy and facilities for the interconnection of such facilities, and (2) the entire transmission line and associated facilities, from substation or interconnection point to substation or interconnection point, of which the segment crossing the lands of the United States forms a part.

(l) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the holder and the Secretary of the Interior or his designee.

(b) Unless otherwise specified in a right-of-way granted under the act of March 4, 1911, and unless sooner canceled, the right-of-way shall expire 50 years from the date thereof. If, however, within the period of 1 year prior to the expiration date, the grantee shall file, in accordance with § 2802.1, a written application to renew the right-of-way, and shall agree to comply with all the laws and regulations existing at such expiration date governing the occupancy and use of the lands of the United States for the purpose desired, the right-of-way may be renewed for a

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application is filed, the existing ght-of-way will be extended subject then existing and future rules and gulations, pending consideration of e application.

1 Stat. 790, 36 Stat. 1253; 43 U.S.C. 959, 1)

5 FR 9651, June 13, 1970, as amended at FR 44985, Sept. 8, 1977]

2851.2 Procedures.

2851.2-1 Applications.

(a) *Applications filed.* Application nder the act of February 15, 1901, or he act of March 4, 1911, for permisn to use the desired right-of-way hrough the public lands and reservaons must be filed and approved efore any rights can be claimed hereunder.

(b) *Applications for lands in national forests and other reservations.* (1) pplications under the act of Februry 15, 1901, for rights-of-way across ational forests should be prepared in ccordance with the regulations issued y the Department of Agriculture and ubmitted to the proper officer there-. In case a right-of-way is desired pon public lands partly within and artly without a national forest, sepate applications must be prepared, nd the one affecting lands within the ational forest filed with the forest ofcer, and the other filed in accordance ith § 2802.1. (See section 1 of the act f February 1, 1905 (33 Stat. 628; 16 .S.C. 472).)

(2) Applications for a right-of-way nder the act of March 4, 1911, involvg lands under the control of a deartment or agency other than the epartment of the Interior should be repared in accordance with the regutions issued by such department or gency and submitted to the proper fficer thereof. (See 29 Op. Atty. Gen. 03.)

(c) *Required showings.* (1) A descripon of the plant or connecting generting plants which generate or will enerate the power to be transmitted ver such line, such description to be sufficient detail to show, to the satfaction of the authorized officer, the haracter, capacity, and location of uch plants.

(2) A description of the transmission line of which the line for which a right-of-way is requested forms a part, giving in reasonable detail the points between which it will extend, its characteristics and purpose. There must also be included a statement as to the voltage for which the line is designed and at which it is to be operated initially, and a statement as to whether it is to serve a single customer, or a number of customers, or is intended to transmit power solely for the applicant's use. If the line is to serve a single customer or is for the applicant's own use, the nature of such use must be given (such as airway beacon, coal mine, and irrigation pumps).

(3) The application and maps shall specify the width of the right-of-way desired. Rights-of-way for power lines will be limited to 50 feet on each side of the centerline unless sufficient justification is furnished for a greater width and it is otherwise authorized by law.

(4) If the line is to have a nomina voltage of 66 kilovolts or more, the application should include a one-line diagram of the proposed line and the immediate interconnecting facilities including power plants and substations, a power flow diagram for proposed line and connecting major lines showing conditions under normal use, and typical structure drawings of proposed line showing construction dimensions and list of materials.

(5) Any application under the act of March 4, 1911 for a line right-of-way in excess of 100 feet in width or for a structure or facility right-of-way of over 10,000 square feet must state the reasons why the larger right-of-way is required. Rights-of-way will not be issued in excess of such sizes in the absence of a satisfactory showing of the need therefor.

(6) (i) A detailed description of the environmental impact of the project shall be included with the application. It shall provide, among other things, information about the impact of the project on airspace, air and water quality, scenic and esthetic features, historical and archeological features, and wildlife, fish, and marine life.

(ii) The proposed site, design, and construction of the project shall be

consistent with the "Environmental Criteria for Electric Transmission Lines," prescribed jointly by the Secretary of the Interior and the Secretary of Agriculture, as well as such other environmental critera and guidelines as the Department shall from time to time prescribe. "Environmental Criteria for Electri ransmission Systems" is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(iii) If all other requirements are met, the application may be approved if it is determined that the beneficial purposes and effects of the project will not be outweighed by an adverse environmental impac If the authorized officer determines that the application cannot be approved as proposed, he will, whenever possible, suggest alternative routes or methods of construction, or other modifications which if adopted by the applicant would make the application acceptable.

[35 FR 9651, June 13, 1970, as amended at 36 FR 6828, Apr. 9, 1971; 42 FR 44986, Sept. 8, 1977]

§ 2851.3 Boulder Canyon Project.

Section 5(d) of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057; 43 U.S.C. 617d), authorizes the use by any agency receiving a contract for the purchase of electrical energy from Boulder Canyon Project of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

PART 2860—COMMUNICATIONS

Subpart 2861—Radio and Television Sites

Subpart 2862—Telephone and Telegraph Lines

Subpart 2861—Radio and Television Sites

§ 2861.0-3 Authority.

The act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961), as amended, authorizes the head of the department having jurisdiction over the lands, under general regulations fixed by him, to grant an easement for rights-of-way for a period not exceeding 50 years, over and across public lands and reservations of the United States, for poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes and for radio, television and other forms of communication transmitting, relay and receiving structures and facilities to the extent of 200 feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for superstructures and facilities to any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under the act.

[35 FR 9653, June 13, 1970]

§ 2861.0-5 Definitions.

The opinion of the Solicitor of the Department of the Interior of November 1, 1940 (M. 30846), held that lands acquired by the United States, by purchase or otherwise, were reservation lands within the meaning of the acts of February 15, 1901, and March 4, 1911.

[35 FR 9653, June 13, 1970]

§ 2861.1 Procedures.

(a) Applications for a right-of-way under the act of March 4, 1911, involving lands under the control of a department or agency other than the Department of the Interior should be prepared in accordance with the regulations issued by such department or agency and submitted to the proper officer thereof. (See 29 Op. Atty. Gen. 303.)

(b) Any application under the act of March 4, 1911, for a line right-of-way in excess of 100 feet in width or for a structure or facility right-of-way of over 10,000 square feet must state the

ROUTING AND TRANSMITTAL SLIP

Date 12-6-82

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. Mr. Marchegiani		
2.		
3.		
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REMARKS

The attached letter will help you understand Section 24 of the FPA. Line 17 on page 3 should read "unsequential entries and redundancies".

Fred Fischer

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

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FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON 20426

DA-2-South Carolina
U.S. Forest Service

Chief, Forest Service
Department of Agriculture
P.O. Box 2417
Washington, D.C. 20013

APR 6 1981

Dear Sir:

In regard to a proposed land exchange with the South Carolina Public Service Authority (Authority), the Forest Service has requested restoration to selection, subject to Section 24 of the Federal Power Act, of Francis Marion National Forest lands withdrawn for Project No. 199 (the Authority's Santee-Cooper Hydroelectric Project).

The Authority subsequently requested vacation of the project withdrawal upon conveyance of the project lands. As an alternative, the Authority stated that it "will consider accepting a Commission order restoring the lands in question to entry, location or selection subject to section 24 but on the condition that the Commission waives whatever authority it may have to assess annual charges for the use of those lands or assesses a purely nominal charge." The Authority contends that the Commission has no authority to assess annual charges for lands patented subject to the provisions of Section 24.

The Authority cites two prior Commission actions to support its request for vacation of the project withdrawal. In DA-222-Washington, issued July 5, 1978, the Commission ordered the vacation of the withdrawal for Project No. 2149 as to 6.1 acres included in that project as licensed, upon conveyance of the lands to the licensee. The Director, Office of Electric Power Regulation, acting under delegated authority, took similar action with respect to Project No. 1894 in DA-1-South Carolina, dated January 31, 1979. Our earlier interpretation of the phrase "until otherwise directed by the Commission," in the first sentence of Section 24, appeared to provide adequate authority for these vacations since the Commission's licensing authority was not jeopardized. Subsequent research indicates that Section 24 does not contemplate vacations of withdrawals covering lands with significant power value. Therefore, the Commission denies the Authority's request for vacation of the withdrawal.

Congressional reports and debates in the legislative history of Section 24 indicate that Congress created a power reservation intended to remain in the people in perpetuity. See, for example:

1. Debate in House on S. 1419, Comments of Rep. Ferris, Chairman, House Committee on Public Lands:

> The salient features of a correct and adequate water-power policy . . . are as follows:
>
> First. No legislation, Executive order, or departmental ruling should permit the patenting or [illegible] title in fee to pass out of the Federal Government under any conditions. The fee title should be reserved in perpetuity to the United States . . . It has been [the private water-power interests'] determined effort to secure from the Government the Nation's valuable water-power resources in perpetuity as distinguished from a term of years . . . . Four times in previous Congresses this contention has been denied them, and it has been denied them in this bill. 1/

2. Memorandum on S. 1419, a synopsis entered into the Record by Rep. Sinnott and prepared by Mr. O.C. Merrill, Chief Engineer, Department of the Agriculture, Forest Service:

> Under this provision of [Section 24] the United States will have the exclusive right in perpetuity to use or permit the use of power sites on the public lands for power purposes. 2/

3. See also,
   a) Hearings on H.R. 14893 Before the House Committee on Public Lands, 63rd Cong., 2d Sess. 413 (1914) (statement of Mr. O.C. Merrill, Chief Engineer, Department of Agriculture, Forest Service).
   b) H.R. Rep. No. 842, 63rd Cong., 2d Sess. 1, 10 (1914). Report recommended passage of H.R. 16673 (a bill substantially similar to H.R. 14893).
   c) S. Rep. No. 66, 64th Cong., 1st Sess. 13 (1916) (quoting the views of Sec. of Interior Franklin K. Lane "on the

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1/ 56 Cong. Rec. 9301-03 (1918).

2/ Memorandum on the water-power bill (S. 1419), passed by the House of Representatives September 5, 1918, Appendix to Congressional Record, p. 613, September 13, 1918.

subject of water-power legislation. . . in a letter addressed by him to the chairman of the Senate Committee on Public Lands during the . . . Sixty-third Congress. . . ." (pp. 13-15)).

d) 59 Cong. Rec. 1034-35 (1920) (remarks of Rep. Raker).
e) 59 Cong. Rec. 6527 (1920) (remarks of Rep. Lee).

As to the annual charges issue raised by the Authority, the status of lands patented subject to the provisions of Section 24 was explained by the Acting Secretary of the Interior in a July 13, 1920, decision:

> The evident purpose of Section 24 is to permit of the agricultural or other use of lands withdrawn or classified as water-power sites in so far as same may not be thereafter needed and utilized by the United States, its permittees, or licensees for power purposes, as authorized and defined in the act. The reservation is analagous to that contained in agricultural entries and selecting patented under the acts of Congress of March 3, 1909, June 22, 1910, July 17, 1914, and February 25, 1920, wherein certain minerals and the right to enter upon lands for the purpose of prospecting for, mining, and removing same is reserved to the United States, its grantees, permittees, or lessees. All these reservations, as well as the reservation contained in the act of June 10, 1920, supra, are, in the opinion of the Department, exclusive and reserve and retain in the United States the right to utilize and develop the resource so withheld . . . .
>
> It is manifest from the language of section 24 of the act of June 10, 1920, read in connection with the remainder of the act, that water-power development upon any lands which may be patented by the United States, with the reservation provided for in section 24, can only lawfully be made by the United States, its permittees, or licensees, and that the person securing the limited patent has no right whatever by virtue of the patent or his possession of the land thereunder to utilize or develop the water power resources, unless and until he shall have secured a permit or license from the United States, as provided by the act. The Federal Water Power Act, 47 Pub. Lands Dec. 556.

Charges assessed for the Section 24 interest are identical to charges assessed for lands in which the United States owns the full title because rights granted by the Commission are identical. In both cases the licensee is granted the right to use the land for project purposes and must pay for damages to improvements not covered by special power site stipulations.

The Authority's request for reduction or waiver of these charges is denied. Such a reduction or waiver of annual charges as consideration for a licensee's conveyance of lands to the Forest Service would be inconsistent with the requirements of Sections 10(e) and 17 of the Federal Power Act.

The Authority has indicated that it may not accept the lands subject to Section 24. Nevertheless, a determination enabling such conveyance was requested by the Forest Service and could foster further exchange negotiations. Conveyance of the National Forest lands to the Authority, subject to the provisions of Section 24, would have no effect on project operations.

Under the circumstances, the Commission:

(1) Determines that the power value of the Francis Marion National Forest lands withdrawn for Project No. 199 will not be injured or destroyed by their conveyance to the Authority, subject to the provisions of Section 24 of the Federal Power Act.

(2) Denies the Authority's request for vacation of the land withdrawal for Project No. 199.

(3) Finds that the established practice of assessing the same annual charge for lands patented subject to the provisions of Section 24 of the Federal Power Act as for lands in which the United States owns the full title is appropriate.

By the Commission.

Kenneth F. Plumb

Secretary

GEOLOGICAL SURVEY CIRCULAR 100

HISTORY OF LAND CLASSIFICATION RELATING TO WATERPOWER AND STORAGE SITES

UNITED STATES DEPARTMENT OF THE INTERIOR
Fred A. Seaton, *Secretary*

GEOLOGICAL SURVEY
Thomas B. Nolan, *Director*

GEOLOGICAL SURVEY CIRCULAR 400

HISTORY OF LAND CLASSIFICATION RELATING TO WATERPOWER AND STORAGE SITES

By F. F. Lawrence, C. E. Nordeen, and H. L. Pumphrey

Washington, D. C., 1957

Free on application to the Geological Survey, Washington 25, D. C.

HISTORY OF LAND CLASSIFICATION RELATING TO WATERPOWER AND STORAGE SITES

By F. F. Lawrence, C. E. Nordeen, and H. L. Pumphrey

CONTENTS

ABSTRACT

Segregation of lands having value for development of water resources was first undertaken following the act of October 2, 1888 which provided for the withdrawal of reservoir sites and lands adjacent, or near, which would be susceptible of irrigation. This activity was curtailed by the act of August 30, 1890 which repealed the act of October 2, 1888 to the extent that only actual sites of reservoirs were retained in a withdrawn status. The act of March 3, 1891 was designed to reduce lands in withdrawal to the minimum required for storage purposes, and insofar as practicable to exclude lands occupied by settlers on the date of the withdrawal of the reservoir site.

Segregation of lands into reserves as a means of protecting their water resources values was again undertaken in 1909 with the reservation of nearly 1½ million acres in temporary power site withdrawals. These withdrawals were confirmed under the authority of an act of June 25, 1910 and were made permanent power site reserves by executive orders of July 2, 1910. Lands valuable for waterpower were withdrawn as power site reserves under this act until 1920. Another act of June 25, 1910 provides the authority for reservation of Indian lands.

Valuable power site lands in Arizona and New Mexico, the revested lands of the Oregon and California Railroad Company, and the Coos Bay Wagon Road in Oregon, were withdrawn in Water Power Designations by the acts of June 20, 1910, June 9, 1916, and February 26, 1919, respectively.

The Federal Water Power Act of 1920, as amended by the Federal Power Act of 1935, provides a means whereby lands withdrawn because of their potential waterpower value can be made available for other uses, with the power rights retained by the Government, until such time as they are required for waterpower development. Since passage of this act, public domain land has, with few exceptions, been withdrawn for power purposes by orders of Power Site Classification under the Organic Act of the Geological Survey with full force and effect under Section 24 of the Federal Power Act. These orders are signed by the Director of the Geological Survey.

Lands which are within a reservoir site which is potentially valuable for power development may be classified and withdrawn in a Power Site Classification. Where potential power value is clearly subordinate to flood control, irrigation, or other values and development would not be justified for power alone, the lands may be withdrawn in a Reservoir Site Reserve on the basis of their value for storage regulation for these other purposes.

Power Site Reserves affecting public lands, Power Site Reserves affecting Indian lands, and Water Power Designations are revoked by the Secretary of the Interior, the first by a Public Land Order and the latter two by departmental orders. Power Site Classifications are cancelled by the Director of the Geological Survey.

INTRODUCTION

The authorities providing the basis for withdrawal of the public domain of the United States for waterpower and storage sites were designed to meet the requirements of a particular stage in the growth of the electric power industry and the expanding concepts of irrigation. As a result of this narrow approach to the problem of protecting this portion of our natural resources, various acts were passed by Congress which were designed to accomplish the withdrawal of such lands, each of which was a product of the specific need at the time in which they were enacted.

The following paper is a summary of the laws and directives which have been used in the past and are now being used to effect the withdrawal of public lands for water-power and storage purposes. In this paper an attempt has been made to present the methods of withdrawal in such a manner that the history of land classification for water resources values will be clear to those who have a responsibility for administration of the public lands.

DISCUSSION

The act of March 3, 1879 which created the Geological Survey also charged the Director with the task of classifying the public lands. However, few, if any, classifications of lands for water resources values were made until passage of the act of October 2, 1888 which reads in part as follows:

"Storage reservoirs in arid regions. Investigation.

"For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, * * *. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law."

A number of withdrawals were made under this act shortly after its passage, but considerable resistance soon arose because large areas adjacent to the reservoir sites were withdrawn for project purposes and were therefore not available for settlement. These were often the best farmlands and there was no legal method of permitting their use for farming or other purposes pending construction of the prospecting project. As a result of dissatisfaction with these withdrawals, Congress in the Sundry Civil Appropriation Act of August 30, 1890 made the following provision in the Section on Topographic Surveys:

"Topographic Surveys.

"For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement, as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof."

The withdrawals under the act of October 2, 1888 were further limited by an act approved March 3, 1891 entitled "An act to repeal the timber culture laws and for other purposes." One section of this act reads in part as follows:

"Limit on reservoir sites.

"Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs,

excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs."

Lands withdrawn under the act of October 2, 1888 which remained in withdrawal after the adjustments resulting from the acts of August 30, 1890 and March 3, 1891 and subsequent executive orders are still withdrawn. Presumably it is still possible to withdraw reservoir sites for reclamation purposes under the act of October 2, 1888 as modified by the acts of August 30, 1890 and March 3, 1891. However, the record is not clear as to the current status of these lands and present day withdrawals are made as Power Site Classifications under the Organic Act of the Geological Survey and the Federal Power Act or as Power Site or Reservoir Site Reserves under one of the acts of June 25, 1910.

By 1909 it became apparent that many of the best hydroelectric power sites were being transferred from the public domain to private individuals and corporations through the use of land script, homesteads, and by other means. In a letter dated April 23, 1909, the Secretary of the Interior instructed the Director of the Geological Survey to investigate waterpower sites on the public domain and to recommend their temporary withdrawal pending legislative action by the Congress. This letter is quoted as follows:

"You will please immediately detail such employee or employees of your service as are available to make an investigation of water-power sites on the public domain, outside of national forests, which are not included within withdrawals for reclamation purposes, with the view of securing at the next session of Congress legislation to control and regulate their disposition.

"You will please have your report with regard to such lands available as early as possible in order that any necessary withdrawals may be made to protect such power sites pending the securing of such proposed legislation as may be recommended by the President.

"All withdrawals made for the purpose herein mentioned will be of a temporary nature to allow the securing of such legislation as will permit of the disposition of the lands in question.

"The Reclamation Service will cooperate with you in order to secure the necessary data."

By July 1, 1910, nearly 1.5 million acres had been included in Temporary Power Site Withdrawals and on July 2, 1910, these withdrawals were confirmed and continued as Power Site Reserves by Executive Orders under an act of June 25, 1910. Actually there are two acts of June 25, 1910, which are pertinent to power site segregations. One provides:

"That the President may at any time, in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of the lands or other purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."

The other provides:

"Sec. 13. That the Secretary of the Interior be, and he is hereby, authorized in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress."

Such orders signed by the Secretary are known as departmental orders.

Section 2 of the first act provided that the withdrawn lands should "be open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas, and phosphates." This provision permitted inferior locations, such as building-stone quarries of little value, on valuable power site lands. The act of August 24, 1912, changed this provision to permit exploration and purchase under the mining laws for metalliferous minerals only.

The act of June 20, 1910, which enabled the people of New Mexico and Arizona to prepare constitutions for admission to the Union, provided for the withdrawal, in those Territories, of all public land which was considered valuable for waterpower purposes. Such withdrawals were termed Water Power Designations.

The acts of June 9, 1916, February 26, 1919, and August 28, 1937, provided for the

classification of the revested lands of the Oregon and California Railroad Company and the reconveyed lands of the Coos Bay Wagon Road grant in Oregon and the withdrawal of any of the lands valuable for waterpower purposes. These withdrawals were also known as Water Power Designations. The lands now included in Water Power Designations were withdrawn by the Secretary of the Interior under authority given him by these special acts of Congress. Lands included in Water Power Designations are regarded as having the same status as lands in Power Site Reserves.

On April 24, 1942, the President, by Executive Order No. 9146, delegated to the Secretary of the Interior authority to make or revoke Power Site Reserves other than those on Indian lands which the Secretary had already been given authority to withdraw for waterpower purposes by an act of Congress of June 25, 1910. Executive Order No. 9146 was superseded by Executive Order No. 9337 dated April 24, 1943, which authorized the Secretary of the Interior to withdraw or reserve lands of the public domain or other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President and also to modify or revoke withdrawals or reservations of such lands, provided that the Secretary should have prior approval of the Director of the Bureau of the Budget and the Attorney General and the head of any department or agency outside of the Department of the Interior having jurisdiction over the lands. Executive Order No. 9337, in turn, was superseded by Executive Order No. 10355 dated May 26, 1952, which deleted the required approval of the Director of the Bureau of the Budget and Attorney General, and which provided for the reference of disputes to the Director of the Bureau of the Budget and, if necessary, to the President.

The Federal Power Act was originally enacted as the Federal Water Power Act and approved June 10, 1920. On March 3, 1921, it was amended to exclude any authority to license water power projects in national parks or national monuments. The Federal Power Commission, originally composed of the Secretaries of Interior, War (Army), and Agriculture, was reorganized as an independent Commission under the act approved June 23, 1930. The original Federal Water Power Act was made Part I of the Federal Power Act by Title II of the Public Utility Act of 1935 approved August 26, 1935.

Section 24 of the Federal Power Act provided protection against acquisition for other uses of lands classified, before or after passage of the act, as valuable for power sites. This had the effect of a blanket withdrawal of all lands which might at any time be classified as valuable for water power purposes. This blanket authority made it possible for the Geological Survey to effectively withdraw power site lands by merely classifying them as such under the authority provided by the act of March 3, 1879 to which reference has already been made. Prior to passage of the Federal Power Act, lands could be classified as power sites by the Geological Survey, but this had no protective effect unless they were also withdrawn by the President or by the Secretary of Interior under one of the special withdrawal acts such as that of October 2, 1888, or of June 25, 1910.

Power Site Classifications, as these withdrawals are known, were originally made by the Director of the Geological Survey and, when approved by the Secretary of the Interior, had full force and effect under the Federal Power Act. Departmental Order No. 2333 of June 10, 1947, authorized the Director of the Geological Survey "without prior secretarial approval, to classify public domain lands as power sites and to modify or revoke such classifications." Since that date, Power Site Classifications have required only the signature of the Director, Geological Survey, to give them full force and effect under Section 24 of the Federal Power Act.

Section 24 of the Federal Power Act provides for another type of withdrawal closely related to and frequently covering the same areas as the withdrawals by the Geological Survey. This provides that:

"Any lands of the United States included in any proposed project under the provisions of this Part (Part I) shall from the date of filing an application for permit or license therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress."

The lands withdrawn as a result of the filing of an application for permit or license remain withdrawn, even though the permit or license is revoked or allowed to lapse, until such time as the withdrawal is officially vacated.

Section 24 of the Federal Power Act made all Power Site Reserves, Water Power Designations, and subsequent Power Site Classifications secure against alienation under any law. The act of August 11, 1955 modified the laws governing power site

withdrawals to permit acquisition for mining purposes of lands in such withdrawals subject to the provision that:

"The United States, its Permittees and Licensees shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any mining claim, mill site, facility installed or erected, income, or other property or investments resulting from the actual use of such lands or portions thereof for power development at any time where such power development is made by or under the Authority of the United States, except where such damage, destruction, or loss results from the negligence of the United States, its Permittees and Licensees."

The act of June 25, 1910 which provided for the establishment of Power Site Reserves is still in effect; however, since passage of the Federal Water Power Act in 1920, power site withdrawals by the Geological Survey have, with few exceptions, been made through the medium of Power Site Classifications. This procedure is simpler than withdrawals in Power Site Reserves because Power Site Classifications become effective when signed by the Director of the Geological Survey while Power Site Reserves require approval by the Secretary of the Interior as explained earlier.

Lands within Indian Reservations classified as valuable for power by the Geological Survey, if approved by the Commissioner of Indian Affairs, are reserved by the Secretary of the Interior under the pertinent act of June 25, 1910, described earlier. If Indian land and other public domain land lie in the same power site area two separate orders of withdrawal are necessary.

Prior to April 24, 1942, Power Site Reserves were revoked by Executive Order. On that date, the President delegated this authority to the Secretary of the Interior in Executive Order No. 9146. Subsequent revisions of this delegated authority have been made as described earlier, but the basic delegation of the President's authority to the Secretary is still in force. Water Power Designations and Power Site Reserves on Indian lands are revoked by Departmental Order. Revocations of Power Site Reserves or Water Power Designations usually result from recommendations by the Geological Survey with concurrence by the Federal Power Commission.

Prior to July 10, 1947, land in a Power Site Classification which was found to have no power value was eliminated by a Power Site Cancellation signed by the Secretary of the Interior. Departmental Order No. 2333 of that date, as noted earlier, delegated authority to modify or revoke Power Site Classifications to the Director of the Geological Survey and, at present, orders of Power Site Cancellation are signed by him.

The order revoking a Power Site Reserve or a Water Power Designation usually provides for the restoration of the lands to disposition under the public land laws. The Geological Survey has no authority to restore lands; therefore, upon cancellation of a Power Site Classification, the Bureau of Land Management issues a Restoration Order under authority delegated to it by Departmental Order No. 2582 of August 16, 1950, as amended, which restores the lands to entry and prepares the way for their disposition under public land laws. Such orders are published in the Federal Register.

Nearly 2.6 million acres of land had been segregated into Power Site Reserves by June 1920. Much of this land was valuable for other purposes, such as agriculture, but there was no legal way for the Government to dispose of the land and still retain the power rights. Power Site Reserves could be modified but such modification, while satisfactory for a right-of-way, did not answer the demand for use of all the land until such time as it would be required for power development. The Federal Water Power Act of June 10, 1920, remedied this to a great extent through the provisions of Section 24. This section, as amended in 1935, provides in part:

"Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no

claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission."

Restorations under Section 24 of the Federal Power Act are made by an order of the Bureau of Land Management under delegated authority following a "no injury" determination and recommendation by the Federal Power Commission acting upon the advice and recommendation of the Geological Survey and other interested agencies through the familiar "DA" (determination application) reports.

The need for the Federal Power Commission to make determinations concerning applications for entry, location, and patent for mining purposes was eliminated by the passage of the act of August 11, 1955.

Sites which are primarily valuable as reservoir sites are withdrawn in Power Site Classifications if they involve power in any way either at the sites or through regulation affecting downstream power sites, developed or undeveloped. There are two reasons for this. First, the site is protected against alienation under any law if it is withdrawn under the Federal Power Act as a Power Site Classification except as such alienation is allowed by the act of August 11, 1955. Second, the mechanics for making the withdrawal as a Power Site Classification signed by the Director of the Geological Survey are simpler than those for a Reservoir Site Reserve. However, if no power is involved, lands in reservoir sites can be withdrawn under the broad authority given the President by the act of June 25, 1910, which provides the basis for Power Site Reserves as well as Reservoir Site Reserves. As with Power Site Reserves, the authority to make and revoke Reservoir Site Reserves was delegated to the Secretary of the Interior by Executive Order No. 9146 and subsequent delegation orders. Lands in Reservoir Site Reserves are subject to entry under the mining laws as they apply to metalliferous minerals but are not subject to disposal under Section 24 of the Federal Power Act.

The area withdrawn for waterpower purposes, as of June 30, 1955, totaled 9,258,000 acres of which 2,154,000 have been restored to entry. The net withdrawn area, at 5-year intervals, is as follows:

Year ending June 30	Net area withdrawn for waterpower (thousands of acres)
1910	1,454
1915	2,228
1920	2,588
1925	5,247
1930	6,588
1935	6,465
1940	6,685
1945	6,774
1950	6,848
1955	7,104

The pronounced increase in the withdrawn area between 1920 and 1925 was due to the withdrawals made as a result of filing of applications with the Federal Power Commission for permits or licenses for power projects, in addition to the withdrawals initiated by the Geological Survey.

ANNOTATED CHRONOLOGICAL LIST OF WATERPOWER AND RESERVOIR CLASSIFICATION LAWS, EXECUTIVE ORDERS, AND DEPARTMENTAL ORDERS

Act of March 3, 1879 (20 Stat. 394; 43 USC 31)

Act creating the Geological Survey and the one under which Power Site Classifications are made.

Act of October 2, 1888 (25 Stat. 527)

Provided for the withdrawal, by the Geological Survey, of irrigable lands and the sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows.

Act of August 30, 1890 (26 Stat. 391)

Repealed the act of October 2, 1888, except the withdrawals for reservoir sites which remained in effect and left the 1888 act still applicable as to reservoir sites.

Act of March 3, 1891 (26 Stat. 1101; 43 USC 663)

All but actually necessary lands to be excluded from reservoir site reserves.

Act of June 20, 1910
(36 Stat. 557, 564) (for New Mexico)
(36 Stat. 557, 575) (for Arizona)

This is the New Mexico and Arizona Enabling Act under which Waterpower Designations were made withdrawing all public land having power value in New Mexico and Arizona.

Act of June 25, 1910 (36 Stat. 847, Chap. 421; 43 USC 141-143)
Amended by the Act of August 24, 1912 (37 Stat. 497) and by the Act of June 10, 1920, as amended (41 Stat. 1075; 49 Stat. 846; 16 USC 818)

Provides for temporary withdrawals of waterpower sites and other public purposes. Power Site Reserves and Reservoir Site Reserves can be made under this act.

Act of June 25, 1910 (36 Stat. 855, 858, 859; Chap. 431; 25 USC 331-336

Power Site Reserves on Indian lands are made under Sections 13 and 14 of this act.

Act of August 24, 1912 (37 Stat. 497; 43 USC 142)

Amends act of June 25, 1910 to permit exploration, discovery, occupation and purchase under mining laws. Oil and gas rights and homestead entries in force at time of withdrawal remain in effect.

Act of June 9, 1916 (39 Stat. 218)

Provides for withdrawal of revested Oregon and California Railroad Company lands in Oregon valuable for waterpower purposes.

Act of February 26, 1919 (40 Stat. 1179)

Provides for withdrawal of reconveyed Coos Bay Wagon Road grant lands in Oregon valuable for waterpower purposes in manner provided by the act of June 9, 1916.

Act of June 10, 1920 (41 Stat. 1063, 16 USC 791-823; March 3, 1921, 41 Stat. 1353; June 23, 1930, 46 Stat. 797; August 26, 1935, 49 Stat. 838, 16 USC 791a-825r as amended)

The Federal Water Power Act changed to the Federal Power Act by amendment of August 26, 1935.

Under this act, lands included in proposed projects are withdrawn from all forms of entry effective as of the date of the filing of the application for the project, and lands reserved or classified as valuable for waterpower purposes are also withdrawn from all forms of entry. Cancellations or revocations of Federal Power Commission permits or licenses do not cancel the withdrawal. If the Federal Power Commission finds that land withdrawn by a filing for a Federal Power Project does not have power value, it will issue an order vacating the withdrawal. This vacating order does not affect Reserves or Classifications made by the Geological Survey. Separate action, restoration or cancellation, depending on the type of withdrawal, is required.

Section 24 of this act provides for the disposal of land withdrawn for power purposes under this or other acts with the Government retaining the power rights.

Act of August 28, 1937 (50 Stat. 874)

Provides for the disposition of revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands in Oregon under the acts of June 9, 1916 (39 Stat. 218) and February 26, 1919 (40 Stat. 1179), respectively. About 60,000 acres of land in Oregon have been designated as valuable for power as Waterpower Designations.

Executive Order No. 9146, April 24, 1942
7 F.R. 3067)

Delegated authority to withdraw land to the Secretary of the Interior. Superseded by Executive Order No. 9337.

Departmental Order No. 1694, May 15, 1942

Revoked by Departmental Order No. 2511.

Executive Order No. 9337, April 24, 1943
(8 F.R. 5516)

Delegated authority to withdraw or reserve lands and to modify or revoke withdrawals to the Secretary of the Interior with the approval of the Director of the Bureau of the Budget and the Attorney General and the head of any department or agency under whose jurisdiction the land was held. Superseded by Executive Order No. 10355 (17 F.R. 4831).

Departmental Order No. 2331, June 5, 1947

Required that Land Orders signed by the Secretary must be cleared by all interested Bureaus by letter to the Secretary, through the Director, Bureau of Land Management.

Departmental Order No. 2333, June 10, 1947
12 F.R. 4025)

Authorized the Director of the Geological Survey to classify public domain lands as power sites and to modify or revoke such classifications.

Departmental Order No. 2511, March 3, 1949

Departmental Order No. 2583, August 16, 1950
(15 F.R. 5643)

Departmental Order No. 2708, November 7, 1952

These three Departmental Orders prescribe the mechanics of preparing Public Land Orders in the Bureau of Land Management.

Executive Order No. 10355, May 26, 1952
(17 F.R. 4831)

Delegated authority to withdraw or restore lands of the public domain to the Secretary of the Interior. Does not require approval of the Director of the Bureau of the Budget or the Attorney General, but does require approval of the head of any department or agency under whose administrative jurisdiction the affected lands might lie. Provides for referring disputes to the Director of the Bureau of the Budget.

Act of August 11, 1955 (69 Stat. 681)

Mining Claims Rights Restoration Act of 1955. Eliminates need for Federal Power Commission to make a determination concerning applications for entry, location, and patent for mining purposes.

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Water Resources Site Preservation on Federal Lands

by Kenneth W. Sax, M. ASCE

4976 WATER RESOURCES SITE PRESERVATION ON FEDERAL LANDS

KEY WORDS: hydraulics; hydroelectric power sites; land use; legislation; planning; reservoir sites; site acquisition; water resources

ABSTRACT: The Bureau of Reclamation, Federal Power Commission, and Geological Survey preserve water resources sites. Through cooperative procedures of these agencies and the land management agencies, Federal lands designated as being valuable for water power or reservoir sites are managed to forestall undesirable encumbrances, yet allow many interim uses without destroying site values. These designated sites are acquired for water development either through Congressional approval of projects to occupy them or through operation of public land laws. Site preservation procedures serve to protect a limited resource and to retain control of advantages derived; and such operations are beneficial to all organizations developing water resources, whether Federal or not.

REFERENCE: Sax, Kenneth W., "Water Resources Site Preservation on Federal Lands," Journal of the Hydraulics Division, ASCE, Vol. 92, No. HY6, Proc. Paper 4976, November, 1966, pp. 81-94.

needed in behalf of all people.

2. Congressional action affecting the disposition of Federal lands.

Note.—Discussion open until April 1, 1967. To extend the closing date one month, a written request must be filed with the Executive Secretary, ASCE. This paper is part of the copyrighted Journal of the Hydraulics Division, Proceedings of the American Society of Civil Engineers, Vol. 92, No. HY6, November, 1966. Manuscript was submitted for review for possible publication on June 7, 1966.

[1] Hydraulic Engr., Conservation Div., U. S. Geol. Survey, Dept. of the Interior, Sacramento, Calif.

[2] Kerr, R. S., Report No. 29, Select Comm. on National Water Resources, 87th Congress, 1st Session, 1961, p. 19.

[3] Kennedy, John F., Message from the President of the United States Relative to our Natural Resources, House Document 94, 87th Congress, 1st Session, 1961, p. 3.

[4] Ackerman, E. A., and Lof, G. O. G., "Technology in American Water Development," John Hopkins Press, Baltimore, Md., 1959, pp. 471-481.

[5] Olson, G. T., Monograph No. 1, "Preservation of Reservoir Sites," Univ. of North Carolina, Center of Urban and Regional Studies, Raleigh, N. C., 1963.

[6] Goddard, J. E., "Considerations in Preserving Reservoir Sites," Journal of the Hydraulics Division, ASCE, Vol. 91, No. HY1, Proc. Paper 4188, January, 1965, pp. 1-8.

Journal of the
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WATER RESOURCES SITE PRESERVATION ON FEDERAL LANDS

By Kenneth W. Sax,[1] M. ASCE

INTRODUCTION

In recent years, strong emphasis has been placed by the Senate Select Committee on National Water Resources,[2] the President's conservation message in 1961,[3] a book by Ackerman and Lof,[4] and articles by Olson[5] and Goddard,[6] on the value of preserving major reservoir sites. Thus, it seems appropriate to review Federal activities related to preservation of water development sites on Federal land in the western states.

Congress as proprietor and the President as administrator of Federal lands have long recognized that protecting hydroelectric power and reservoir sites for anticipated use is a proper function of government. Federal activities in the area have evolved from implementation of certain basic philosophies, policies, and objectives of water-resources development, including the following:

1. Protection of resources to assure availability for the best use when needed in behalf of all people.
2. Congressional action affecting the disposition of Federal lands.

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3. Congress may require that Federal land be developed in a manner to avoid monopoly and bring about a wide-spread distribution of benefits.

4. Water and related land resources development and management are essential to national economic growth.

5. Surface storage in reservoirs is essential to the optimum use of water supply. Reservoirs control periodic and seasonal fluctuations of streamflow, and the regulated flows can be used for domestic and industrial water supply, irrigation, generation of electric power, flood control, recreation, and water quality control.

6. Saving the limited number of favorable water power and reservoir sites is fundamental to planning for efficient land use.

7. Site preservation is not an end itself, but serves to enhance the attainment of other objectives of water-resource development.

8. The primary purpose in preserving water development sites on Federal land is to protect a limited resource and to retain control of benefits derived. This conservation of sites is beneficial to all developers, whether individuals, private companies, public bodies, or the Federal government itself.

Water resources development is a subject that is receiving considerable attention by government at all levels. More skillful management of water resources is necessary to meet the needs of expanding population and economy. The Senate Select Committee on National Water Resources (87th Congress) has furnished an excellent survey of the problems to be solved. Whatever methods are used to develop more water to meet increasing demands, it is obvious that more surface reservoirs for storing water will be required. Estimates[7] indicate the need for almost doubling the amount of storage now available by 1980 to meet demands for water use.

With the rapidly growing pressures in society for the total benefits from the provisions of water resources development, greater regulation of nearly all of America's streams can be anticipated. Multiple-purpose water development will be emphasized to provide for as many uses as possible from each water storage project.

It is evident that with increasing development of water resources by construction of storage facilities, there will be abundant chances for hydroelectric power development. Advantage should be taken of opportunities for such power production so that economies inherent in large-scale installations can be passed on to electric power users and the drain on our nonrenewable energy resources can be minimized.

As the prime unit in integrated multiple-purpose development is the storage reservoir, protection of favorable sites from encumbrances by land uses that forestall future efficient river basin development must be carefully evaluated. The number of sites is physically limited, thus taking one for a limited water use or for a nonwater use rules out essential benefits. These sites should be developed for maximum serviceability. Steps to protect potential sites which would occupy nonFederal lands nationwide and particularly in the East involve difficult problems relating to purchase or zoning, and only isolated attempts have been made to conserve them. No doubt this subject will receive considerable attention in the future. Action with respect to favorable

[7] Wollman, Nathaniel, "Water Supply and Demand," Committee Print 32, Senate Select Committee on Natl. Water Resources, 1960, Tables 1 and 2.

sites located on Federal land in the West is, as indicated, a continuing activity by the government, and much has been accomplished.

Federal authority and procedures in site preservation are outlined below, followed by brief descriptions of site acquisition, problems in protecting water power and reservoir sites on Federal lands, and a summary of accomplishments.

FEDERAL AUTHORITY

Basic.—A great body of laws governing Federal responsibilities in water-resource development and management has evolved, not always consistently, but to meet the needs of the times. The concepts and activities in preservation of water development sites on Federal land have been derived from certain aspects of these laws. In the late 1700's, there was little need for Federal activity. As water supply needs and problems increased, they began to exceed the capabilities of private interests and state and local governments to deal with them, and the Federal government exercised its responsibilities, first in the field of navigation, and subsequently in reclamation of arid lands, flood control, hydroelectric power, recreation, fish and wildlife conservation, and municipal and industrial water supplies.

Two main lines of authority in the operation of the Federal government make provision for the preservation of water development sites on public domain land. These are (1) the inherent power of the President (Executive) to withdraw public lands in aid of conservation and development of natural resources[8] and (2) the unlimited power of Congress over the use of the public lands entrusted to it by the Property clause of the Constitution.[9]

From reference 8,

> "The Supreme Court has recognized inherent power in the President to withdraw public lands for public purposes and the act of June 25, 1910, merely recognizes and does not circumscribe that power."[8]

With one exception, the two lines of authority are merged in Federal land administration and vested by statute and Executive Order with the Secretary of the Interior, who has the responsibility for public-purpose withdrawal of public domain and other lands owned or controlled by the United States and for restoring these lands to unreserved status when the need for withdrawal has passed. The exception lies in the statutory authority granted to the Federal Power Commission (FPC) by the Federal Power Act which will be described subsequently below. Direct preservation of water development sites is accomplished by means of public land orders signed by the Secretary of the Interior, or by issuance of notices of land withdrawal by the FPC.

Chronological Summary of Statutes.—The act of March 3, 1879, which created the Geological Survey (USGS), charged the Director with the task of classifying the public lands. The first classifications of lands for water resources values were made after passage of the act of October 2, 1888, which provided for the withdrawal of reservoir sites and lands adjacent, or near,

[8] 37 Op. Atty. Gen. 433, (236 U.S. 459; 266 U.S. 545).

[9] Foster, B. A., Jr., et. al., "Water Resources Law," Report of the President's Water Resources Policy Comm., 1950, pp. 29-30.

which would be susceptible to irrigation. This activity was curtailed by the act of August 30, 1890, which repealed the act of October 2, 1888, to the extent that only actual sites of reservoirs were retained in a withdrawn status. The act of March 3, 1891, was designed to reduce lands in withdrawal to the minimum required for storage purposes, and insofar as practical to exclude lands occupied by settlers on the date of segregation of the reservoir site. Lands that were withdrawn under the act of October 2, 1888, and remained segregated after the adjustments resulting from the acts of August 30, 1890, and March 3, 1891, and subsequent executive orders, are still withdrawn if of value for that purpose.

The Reclamation Act of June 17, 1902, which created the Reclamation Service [later the Bureau of Reclamation (USBR)] provides in Section 3 a means whereby irrigation project lands are withdrawn. In certain cases, reservoir site preservation is accomplished in conjunction with irrigation project study many years before actual site use.

By 1909 it became apparent that many of the best hydroelectric powersites were being transferred from the public domain to private individuals and corporations through the use of land script, homesteads, and other means. In a letter dated April 23, 1909, the Secretary of the Interior instructed the Director of the USGS to investigate waterpower sites on the public domain and to recommend their temporary withdrawal pending legislative action by the Congress. The desired legislative action was achieved on June 25, 1910, when the President signed two bills providing for segregation of lands for water resources development. By this time, nearly 1,500,000 acres had been included in Temporary Power Site Withdrawals and on July 2, 1910 these withdrawals were confirmed and continued as Power Site Reserves by Executive Orders under the acts of June 25, 1910. One of the two acts of June 25, 1910, which are pertinent to powersite segregations provides:

> 1. "That the President may at any time, in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of the lands or other purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."
> 2. "Sec. 13. That the Secretary of the Interior be, and he is hereby, authorized in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress."

Section 2 of the first act provided that the withdrawn lands should "be open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas, and phosphates." This provision permitted inferior locations, such as building stone quarries of little value, on valuable powersite lands. The act of August 24, 1912, changed this provision to permit exploration and purchase under the mining laws for metalliferous minerals only.

The act of June 20, 1910, which enabled the people of Arizona and New Mexico to prepare constitutions for admission to the Union, provided that lands valuable for waterpower should be designated by the Secretary of the Interior within 5 yr after approval of the act. The Secretary, acting on the advice of the USGS, designated considerable areas along the streams of those states as being valuable for powersites. These classifications were termed "Water Power Designations."

The acts of June 9, 1916, February 26, 1919, and August 28, 1937, provided for the classification of the revested lands of the Oregon and California Railroad Company, the reconveyed lands of the Coos Bay Wagon Road grant in Oregon, and the designation of any of the lands which were valuable for waterpower purposes. These withdrawals were also known as "Water Power Designations." Lands included in Water Power Designations are regarded as having the same status as lands in Power Site Reserves.

The Federal Power Act was originally enacted as the Federal Water Power Act and approved June 10, 1920. This Act and its history reflect a purpose to encourage non-Federal hydroelectric power development while safeguarding the public interest. The FPC's licensing authority extends to waters under the jurisdiction of Congress and generally to public lands. On March 3, 1921, it was amended to exclude any authority to license waterpower projects in national parks or national monuments. The FPC, originally composed of the Secretaries of the Interior, War (Army), and Agriculture, was reorganized as an independent Commission under the act approved June 23, 1930. The original Federal Water Power Act was made Part I of the Federal Power Act by Title II of the Public Utility Act of 1935 approved August 26, 1935. Section 24 of the Federal Power Act provides for another type of waterpower withdrawal. This provides that:

> "Any lands of the United States included in any proposed project under the provisions of this Part (Part I) shall from the date of filing an application for permit or license therefore be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress."

The lands withdrawn as a result of the filing of an application for permit or license remain withdrawn, although the permit or license is revoked or allowed to lapse, until such time as the withdrawal is officially vacated by the FPC. These "Power Project Withdrawals" have also conserved many valuable sites on Federal lands. Such withdrawals constitute the one exception, previously noted, to the vested authority of the Secretary of the Interior to withdraw public land for water development.

Section 24 of the Federal Power Act specifies the procedures for acquisition or use of lands classified as valuable for powersites before or after passage of the act. This gave the FPC control of the conditional disposition of all lands which might be classified as valuable for waterpower purposes. This authority made it possible for the Secretary of the Interior, through the USGS, to effectively protect powersite lands by merely classifying them as such under the authority provided by the act of March 3, 1879. Prior to passage of the Federal Power Act, lands could be classified as powersites by the USGS, but this had no protective effect unless they were also withdrawn by the President or by the Secretary of the Interior under one of the special withdrawal

acts such as that of October 2, 1888, or June 25, 1910. Power Site Classifications are made by the Director of the USGS and, when approved by the Secretary of the Interior, have full force and effect under the Federal Power Act. Such classifications are now issued as public land orders.

SITE PRESERVATION PROCEDURE

Certain land management agencies, such as the U. S. Forest Service and Bureau of Land Management, indirectly preserve valuable water development sites by the nature of their control of Federal lands. However, direct water resources site preservation functions related o Federal lands are performed by two Interior agencies; the USBR, and the USGR, and by one independent agency, the FPC. Procedure by each is outlined below.

Bureau of Reclamation.—Reclamation Withdrawals, commonly known as "First Form" withdrawals because of the language of the enabling act, are made pursuant to authority contained in Section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 416). Authority to withdraw is restricted to the Secretary of the Interior under Section 2 (*n*) of Departmental Order No. 2765, Amendment 5, dated December 22, 1958. Instructions state that "The Regional Director or the Alaska District Manager shall prepare a list of the unentered public land that will be required in connection with project construction and development. This list shall generally be based on feasibility studies; however, in special cases where reconnaissance studies or other information indicate a definite need for the project and the area has a potential for development other than water resources, recommendation for withdrawal may be made on the basis of reconnaissance or other information."[10]

Under these instructions, the USBR has retained reservoir sites for later use in addition to acquisition of lands for construction of authorized projects. Generally, Reclamation Withdrawals relate only to contemplated development by the USBR; however, in a number of cases such withdrawals have saved sites which later were used for project construction by another Federal agency, a non-Federal agency, or a private organization.

Reclamation Withdrawals are reviewed every two years, and retained if (1) the lands are required for construction or irrigation purposes within existing or contemplated projects; (2) the continuance of the withdrawal is required for the operation, maintenance, and protection of an existing project; or (3) the lands are required for potential dam or reservoir sites or for the protection of the watershed of potential or existing USBR projects. Otherwise, such withdrawals are revoked.

Orders under the 1902 act usually specify the lands "are hereby withdrawn from all forms of appropriation under the public land laws, including the mining laws." The affected lands are available for leasing under mineral leasing regulations of 43 CFR 3103.2. Upon application, lands may, in certain cases, be restored to entry under the mining laws for locatable minerals as provided in 43 CFR 3400.4. Rights-of-way through Reclamation Withdrawals are granted by the Bureau of Land Management under applicable laws and regulations if the USBR believes site values can be protected.

[10] Reclamation Instructions, Part 214.1.2, U. S. Bur. of Reclamation, Dept. of the Interior, Washington, D. C., 1963.

Federal Power Commission.—The site preservation accomplished by the FPC is of great value in western public land states. Preservation, in this instance, depends on the filing of applications by non-Federal organizations for preliminary permits or licenses for waterpower developments. Upon filing, the FPC issues a notice of land withdrawal under Section 24 of the Federal Power Act (16 U.S.C. 818; 43 CFR 2022.0-3) for the Federal lands involved. The notices state "under said Section 24 these lands are from the date of filing of said application, reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by this Commission or by Congress." Filing for a project gives no long-term priority to the applicant. Many schemes of development were filed but never constructed, particularly in early years of the FPC's operation; thus, a substantial number of potential power and reservoir sites remain withdrawn. As a conservation practice, the FPC vacates previous withdrawals not actually used for development only when other land uses are indicated to have a higher value or studies indicate that there is negligible power value.

Permits, grants, and sometimes patents, may be obtained through the Bureau of Land Management for other uses of lands in Federal Power Project Withdrawal. Congress, the FPC and the USDI, have established regulations for interim use of lands in power withdrawal. Generally, such uses are permitted if they will not seriously interfere with or encumber the site. Regulations for mineral leasing are given in 43 CFR 3103.2, and regulations for entries related to available minerals are contained in 43 CFR 3530. Entries unrelated to mineral development are processed under provisions of Section 24 of the Federal Power Act stated in 43 CFR 2022. Provision has been made for the Bureau of Land Management to permit a wide variety of short-term uses on power withdrawals without referral of cases to the FPC.

Geological Survey.—The USGS classifies Federal lands as being valuable, or eminently suitable, for power or reservoir sites. These classifications, made under the authority of the Secretary of the Interior, neither commit the Federal government to construction nor prohibit private use for water resource development; however, they do serve to identify, protect, and forestall the encumbrance of potential sites. The USGS administers lands included in Reservoir Sites under the act of October 2, 1888; Power and Reservoir Site Reserves under the act of June 25, 1910; Water Power Designations under the acts of June 20, 1910, June 9, 1916, and February 26, 1919; and Power Site Classifications under the act of March 3, 1879. Such actions have conserved for later use a great many sites in the western public land states.

Practice in the USGS consists of initiating Power Site Classification for reservoir sites if they have value for development of waterpower either at the sites or through regulation affecting downstream powersites, developed or undeveloped. However, if power development is not feasible in conjunction with storage, lands within reservoir sites are withdrawn as Reservoir Site Reserves under the broad authority given the President by the act of June 25, 1910. Power Site Classifications are not initiated over lands already in Reclamation or Federal Power Project Withdrawal; however, Project Withdrawals often include land subject to earlier USBR or USGS actions, or even earlier project filings. FPC Withdrawals, in a sense, confirm the validity of classification actions. The USGS endeavors only to designate an important potential land use to assure proper consideration of that value in any decisions as to utilization of the subject lands. Its classifications are based on all

available information in the field of water resources planning and are frequently initiated at the request of Federal and State agencies.

USGS classification actions are kept to a minimum consistent with the concepts of site conservation, are continually reviewed for harmony with changing trends in water development and competitive land uses, and are revoked when no longer needed, or when conflicting land uses are indicated to have a higher value in the public interest.

Neither classification as a potential powersite, nor Federal Power Project Withdrawal, constitute "withdrawals" in the usual sense of the word, as the lands may continue to be used for other noninjurious purposes with the understanding that power development cannot be precluded by such entry. Conditional disposals of lands unrelated to mineral development, which affect USGS power classifications, as Power Site Reserves, Water Power Designations, and Power Site Classifications, come under the jurisdiction of the FPC (43 CFR 2022.1). Section 24 of the Federal Power Act provides that restoration to entry for various purposes under the public land laws of lands reserved or classified for power development may be made pursuant to a favorable determination by the FPC to the effect that such a restoration will not injure power value. Regulations for locatable minerals on powersite lands conform with Public Law 359 of August 11, 1955 and are found in 43 CFR 3530. Mineral leasing is permitted under regulations of 43 CFR 3103.2.

Classifications of potential reservoir sites, as Reservoir Sites (Act of 1888), or Reservoir Site Reserves (Act of 1910), do not come under provisions of the Federal Power Act; thus, lands in such classifications are subject to alienation under the mining laws for metalliferous minerals. Mineral leasing entries are permitted under 43 CFR 3103.2 with conditions to protect site values. Entries unrelated to mineral development are allowed in cases where the site value can be protected.

All applications filed with the Bureau of Land Management affecting waterpower or reservoir sites, except for short-term uses, are processed through the USGS and the FPC so that entries in the public interest may be allowed, yet sites may be kept free of encumbrances that might impair subsequent development. Uses of National Forest lands in power or reservoir sites, if of a temporary nature, or involving structures which can be readily removed and do not impair the value of the lands for these sites, may be permitted by the Forest Service with stipulations that the use is subject to prior reservation. Other uses are referred to FPC and the USGS for recommendations, and some require Secretary of the Interior approval.

SITE USE

Designated sites are released for water development either through Congressional approval of projects to occupy them or through operation of public land laws; and their release involves only the usual procedures applicable to other Federal land. Federal site use is first summarized, followed by non-Federal site use.

Federal development of water resources is authorized by Congress, usually on a project basis. Consent to use Federal lands involved is inherent in such authorization. However, the USDI, FPC, and USDA have opportunities to comment and make recommendations on water resource developments using

lands under their jurisdiction, including those lands covered by waterpower or reservoir site classifications or withdrawals. The two main Federal construction agencies utilizing such sites are the USBR and the Army Corps of Engineers. Each seeks project authorization from Congress for water resource developments that are normally planned as integrated multiple-purpose projects incorporating several related uses with widely-spread benefits.

Congress, in a long series of acts, has encouraged state and local programs of water development by providing funds and Federal assistance. Examples of such legislation include the Soil Conservation and Domestic Allotment Act of 1935, the Water Facilities Act of 1937, the Water Utilization Act of 1939, the Watershed Protection and Flood Prevention Act of 1954, and the Small Reclamation Projects Act of 1956. Heads of the designated Federal agencies having a direct interest in a state or local program may apply for use of Federal lands for the use or benefit of the State or political subdivision concerned.

When non-Federal organizations use Federal land for water development projects, it has been a well-established national policy to retain title of lands essential to such development. Consent to use the Federal lands may be given by Congress in a special enactment that does not require action by a Federal administrator, or Congress may empower a Federal administrator to authorize the use of public land for the purpose needed.

In the past, Congress has authorized certain individual water development projects of non-Federal organizations to permit use of Federal lands. Grants given by Congress have not followed a set pattern, although some have involved power production and others have not. Examples of these actions include the City of San Francisco's Hetch-Hetchy Project on the Tuolumne River, the East Bay Municipal Utility District's Project on the Mokelumne River, and the City of Los Angeles Owens River-Mono Basin Project, all in California; and the Salt Lake City municipal water supply project on tributaries to Great Salt Lake in Utah.

Congress has authorized the FPC to license non-Federal hydroelectric projects located on streams over which Congress has jurisdiction or which affect public lands and reservations of the United States. Permission to use United States lands for non-Federal water resources projects that do not include development of waterpower may be given by Federal administrators under authority granted by Congress in a long series of legislative actions. Most authorizations for use of public lands are given by the Secretary of the Interior; however, certain authorizations may be allowed by other administrators, such as for those in National Forests.

The earliest act of Congress dealing with Federal lands for use of water is the act of July 26, 1866. This act provided for recognition of water rights vesting and accruing before and after that time under local customs, laws, and decisions of the courts; and acknowledged a right-of-way for ditches and canals. The act of March 3, 1891 grants a limited fee for rights-of-way, conditioned to use for that purpose, to canal ditch companies or to districts formed for irrigation or drainage purposes. This act was amended by the act of March 11, 1898 to include rights-of-way for purposes subsidiary to main purposes of irrigation. The Carey Act of August 18, 1894 makes desert lands available free of charge to States for reclamation, such grants being conditioned upon actual reclamation. The act of February 15, 1901 provides for revocable permits for rights-of-way to 50 ft on either side of the marginal

TABLE 1.—PROJECTS WITH HYDROELECTRIC POWER FACILITIES[a]

State	Name	River	Installed capacity, in kilowatts	Total storage, in acre-feet
		(a) Constructed		
Alaska	Eklutna	Eklutna	30,000	160,000
Alaska	Salmon Creek	Salmon (Cr.)	5,600	19,000
Arizona	Parker	Colorado	120,000	716,000
Ariz.-Calif.	Davis	Colorado	225,000	1,818,300
Ariz.-Nev.	Hoover	Colorado	1,249,800	29,827,000
Arizona	Glen Canyon	Colorado	900,000	28,040,000
California	Iron Gate	Klamath	18,000	58,000
California	Shasta	Sacramento	379,000	4,396,000
California	Oroville-Wynndotte	Feather	90,900	163,800
California	Folsom	American	162,000	1,000,000
California	Tri-dam	Stanislaus	81,100	295,900
California	Mammoth	San Joaquin	129,400	120,000
California	Kings River	Kings	276,300	312,000
Colorado	Green Mountain	Blue	21,600	154,600
Colorado	Gross	So. Boulder (Cr.)	8,000	42,000
Idaho	American Falls	Snake	27,500	1,700,000
Idaho	Bliss	Snake	75,000	1,200
Idaho	C. J. Strike	Snake	82,800	250,000
Idaho	Anderson Ranch	Boise	27,000	493,000
Idaho	Brownlee	Snake	360,400	1,470,000
Idaho	Oxbow	Snake	220,000	52,500
Idaho	Cabinet Gorge	Clark Fork	200,000	42,800
Idaho	Albeni Falls	Pend Oreille	42,600	1,155,000
Montana	Canyon Ferry	Missouri	50,000	2,051,000
Montana	Hungry Horse	Flathead	285,000	3,468,000
Montana	Kerr	Flathead	169,000	1,791,000
Montana	Noxon Rapids	Clark Fork	282,880	495,600
Oregon	McNary	Columbia	986,000	1,350,000
Oregon	Round Butte	Deschutes	247,000	535,000
Oregon	Pelton	Deschutes	108,000	4,100
Oregon	The Dalles	Columbia	1,125,000	330,000
Oregon	Hills Creek	Willamette	30,000	249,000
Oregon	Lookout Point	Willamette	120,000	456,000
Oregon	Carmen	Smith	80,000	12,000
Oregon	Trail Bridge	McKenzie	10,000	–
Oregon	Cougar	McKenzie	25,000	165,000
Oregon	Detroit	Santiam	100,000	455,000
Oregon	North Fork	Clackmas	38,400	6,000
Oregon	Lemolo	Umpqua	29,000	16,900
Oregon	Green Springs	Emigrant (Cr.)	16,000	76,500
Oregon	John C. Boyle	Klamath	80,000	–
Utah	Hyrum	Blacksmith Fork	2,000	–
Utah	Flaming Gorge	Green	108,000	3,789,000
Washington	Box Canyon	Pend Oreille	60,000	–
Washington	Grand Coulee	Columbia	1,974,000	9,562,000
Washington	Chief Joseph	Columbia	1,028,800	516,200
Washington	Rocky Reach	Columbia	711,550	36,000
Washington	Wanapum	Columbia	748,100	161,000
Washington	Priest Rapids	Columbia	788,500	44,430
Washington	Swift #1	Lewis	204,000	755,580
Washington	Baker	Baker	198,400	363,000
Wyoming	Boysen	Wind	15,000	819,800
Wyoming	Seminole	No. Platte	32,400	1,012,000
Wyoming	Kortes	No. Platte	36,000	4,700
Totals:	54		14,419,030	100,811,910
		(b) Under Construction		
California	Oroville	Feather	644,000	3,523,000
California	Trinity	Trinity	100,000	2,508,000
California	McCloud-Pit	McCloud & Pit	330,000	109,400
California	Upper American	American	540,800	503,000
California	Middle Fork	American	210,300	330,000
Colorado	Blue Mesa	Gunnison	60,000	940,800
Colorado	Morrow Point	Gunnison	60,000	82,000
Idaho	Hells Canyon	Snake	493,000	1,200,000
Idaho	Dworshak	Clearwater	300,000	3,453,000
Montana	Yellowtail	Big Horn	200,000	1,375,000
Ore.-Wash.	John Day	Columbia	1,350,000	2,500,000
Oregon	Green Peter	Santiam	80,000	433,000
Washington	Boundary	Pend Oreille	826,500	–
Washington	Wells	Columbia	774,000	–
Washington	Mossyrock	Cowlitz	300,000	1,237,000
Totals:	15		6,268,600	18,254,200

[a] Those projects constructed within the past 30 yr using Federal lands previously classified for such purposes.

TABLE 2.—PROJECTS WITHOUT HYDROELECTRIC POWER FACILITIES[a]

State	Name	River	Total storage, in acre-feet
		(a) Constructed	
Arizona	Painted Rock	Gila	2,491,700
California	Friant	San Joaquin	520,500
California	Pine Flat	Kings	1,000,000
California	Isabella	Kern	550,000
California	Monticello	Putah (Cr.)	1,600,000
Colorado	Taylor Park	Gunnison	106,200
Idaho	Arrowrock	Boise	286,600
Idaho	Lucky Peak	Boise	307,000
Montana	Tiber	Marias	1,337,000
Montana	Tongue River	Tongue	69,400
New Mexico	Navajo	San Juan	1,709,000
New Mexico	Jemez	Jemez	114,000
Oregon	Owyhee	Owyhee	1,120,000
Oregon	Warm Springs	Malheur	192,400
Oregon	Buelah	Malheur	60,000
Utah	Woodruff Narrows	Bear	28,000
Utah	East Canyon	East Canyon (Cr.)	28,730
Wyoming	Fontenelle	Green	403,000
Wyoming	Keyhole	Belle Fourche	200,000
Totals	19		12,123,530
		(b) Under Construction	
California	Rollins	Bear	60,000
Colorado	Ruedi	Fryingpan	101,000
Washington	Sultan #1	Sultan	97,700
Totals	3		258,700

[a] Those projects constructed within the past 30 yr using Federal lands previously classified for such purposes.

limits for all purposes except irrigation and purposes subsidiary thereto. The act of February 1, 1905 permits rights-of-way through National Forests for dams, reservoirs, ditches, flumes, pipelines, tunnels, and canals for municipal or mining purposes. The act of March 4, 1911 grants rights-of-way to 200 ft on each side of the center line for electrical distribution lines, communication lines, and other forms of communication transmitting, relay, and receiving facilities. The Federal Power Act of 1920 overrides all previous acts relating to rights-of-way for waterpower, except those involving Indian allotments, and certain national parks and national monuments. These exceptions are still governed by the acts of 1901 and 1911.

Subsequent Congressional action relevant to water development by non-Federal organizations includes the Recreation and Public Purposes Act of June 14, 1926. This act grants Federal lands under certain conditions to states, counties, municipalities, other political subdivisions, or to nonprofit organizations, for purposes not otherwise provided for by public land laws. Lands in withdrawn status may not be granted under this act unless the withdrawal is first revoked.

All the above acts follow a consistent course, in that a person is not entitled to an easement over any public land for a reservoir or right-of-way, or both, for related purposes used in connection with water rights, until he has first acquired a water right.

The three agencies active in preserving water resources sites on Federal land have varying responsibilities regarding project construction on these sites. The two Interior agencies, the USBR and the USGS, make recommendations to the Secretary of the Interior regarding project suitability and use of previously designated site lands; and the Bureau of Reclamation exercises control if it has been authorized to construct the project. The FPC has authority, through its licensing power, to select for development those non-Federal hydroelectric projects which in their judgment will be:

> "best adapted to a comprehensive plan for improving or developing a waterway or waterways for use or benefits of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."[11]

PROBLEMS IN SITE PRESERVATION

The problems encountered in the preservation of desirable waterpower and reservoir sites on Federal land are varied and numerous. They evolve from the following facts:

Site preservation is a concept that deals with anticipated rather than immediate needs, and with general ideas and policies rather than with specific plans or designs.

Site preservation of Federal lands involves the idea that the final use of the lands affected need not be decided now as this is not an irrevocable action, but rather a declaration—a designation, a tagging—of one potentially prime land use to be carefully considered in any decisions as to the final best use of the lands. In the process of giving clearance to proposed site preservation actions, land management agencies may confuse the intention of holding sites for future use with withdrawal for immediate construction.

[11] Sec. 10(a), 41 Stat. 1063, 1068, as amended, 16 U.S.C. 803(a).

Section 24 of the Federal Power Act has served well to protect powersites, yet provide a means for allowing noninjurious interim uses. A difficulty is that when sites in power withdrawal or classification have passed to patent under provisions of Section 24, there is no assigned right of recovery for reservoir use unassociated with production of power as there is for powersites. A parallel method for protecting such reservoirs should be provided.

Forestalling the encumbrance of attractive power or storage sites on Federal lands is often made difficult because the lands involved are also valuable as transportation or communication corridors, as recreation areas, or as sites for urban or commercial development, or for agricultural activities. The "profit" or value of water development often is one of socioeconomic benefit measured by its indirect effects on the economy or society, and thus is extremely difficult to evaluate.

Although a great many major reservoir sites on Federal land have been recognized and protected, the study of secondary sites is not as well advanced. Justifying site preservation for smaller sites may not be an easy task.

ACCOMPLISHMENTS

Despite the many problems involved in Federal site preservation activities, the fact remains that many favorable waterpower and reservoir sites have been identified and successfully protected from encumbrances for subsequent use. Since 1910, cases where the United States has lost control of desirable sites are scarce. Only a meager number of large water projects affecting Federal lands has been constructed which did not use lands included in prior site classifications or withdrawals.

Table 1 lists a number of water development projects having hydroelectric power facilities constructed in the past 30 yr, or under construction, which use Federal lands previously classified for these purposes. Table 2 lists a number of water development projects without power facilities constructed in the same period, or under construction, which use Federal lands previously classified for such purposes.

CONCLUSIONS

In the fall of 1965, there were about 16,000,000 acres of Federal land in powersite withdrawals or classifications, of which 2,200,000 are in Power Site Reserves, 500,000 are in Water Power Designations, 11,800,000 in Power Site Classifications (of which 9,000,000 acres cover one Alaskan site), and 1,500,000 acres in Federal Power Projects. An estimated additional 1,300,000 acres in Project Withdrawal duplicate earlier USGS actions. About 130,000 acres of other Federal lands are within Reservoir Site Reserves. The number of individual sites protected is difficult to state with any degree of accuracy as this would entail a determination of exact plan of development in the western basins affected.

Federal activities relating to water development site preservation are modest in scope and size. The total personnel involved full time is less than

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50 employees. Examples can be cited showing that many years expenditures have been matched by the savings at one reservoir site on the basis of costs of private land acquired for project purposes. However, the avoidance of the necessity of purchasing lands is incidental to the true purpose of site preservation, which is to protect a limited resource and to retain control of benefits derived from the government in the public interest.

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March 3, 1970

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A SYMPOSIUM ON

WITHDRAWAL OF PUBLIC LANDS

FOR

WATER RESOURCE PROJECTS

POWER PLANNING COMMITTEE

PACIFIC NORTHWEST RIVER BASINS COMMISSION

MARCH 3, 1970

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WITHDRAWAL OF PUBLIC LANDS FOR WATER RESOURCE PROJECTS

FOREWORD

By Arvid C. Ellson, Panel Moderator, Forest Service

On the afternoon of March 3, 1970, the Power Planning Committee, Pacific Northwest River Basins Commission, and interested guests heard a panel discussion on handling, processing, and effects of various public land withdrawals for water project purposes. Several members of the committee and of the panel itself expressed considerable interest in assembling the speakers' notes and papers for future reference. Since this was the first such inter-agency discussion of public land withdrawal in the Pacific Northwest River Basins Commission, all the participants agreed to submit their papers for this booklet.

Members of the panel were:

Jesse L. Colbert	Geological Survey	Portland
Norman H. Moore	Bureau of Reclamation	Boise
Joseph O. Sondeno	Federal Power Commission	San Francisco
John H. Minger	Corps of Engineers	Portland
Virgil O. Seiser	Bureau of Land Management	Portland
John H. Brillhart	Forest Service	Portland
Arvid C. Ellson	Forest Service	Portland

In addition, Kenneth W. Sax, U.S. Geological Survey, Sacramento, agreed to summarize his remarks, made during the discussion, to be included in this packet.

In reviewing this symposium, please keep in mind that this was an informal panel discussion and the papers do not necessarily reflect the policies of the panel members' respective agencies. At the same time, the impressive amount of experience of the members in the public land withdrawals makes the papers very useful in understanding the subject.

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WATER RESOURCES SITE PRESERVATION

Remarks by Jesse L. Colbert,
Acting Regional Hydraulic Engineer,
Geological Survey

INTRODUCTION

From 1879-1934, the Geological Survey was the principal land classifier. Our role then as now was to provide for future needs. Along the way certain action agencies were established which at first used personnel who had been doing related work in the Geological Survey: the Bureau of Reclamation and Forest Service in 1905; the Park Service in 1916; the Federal Power Commission in 1920; and the Grazing Service in 1934.

After the General Land Office and Grazing Service were merged, there remained to the Geological Survey only the classification of mineral lands and water resource sites. Under the Taylor Grazing Act the withdrawal of public lands from entry until classified finally accomplished effectively what Powell had tried to do unsuccessfully in the Act of 1888.

Congress as proprietor and the President as administrator of Federal land have long recognized that protecting hydroelectric power and reservoir sites for anticipated use is a proper function of government. Federal activities in the area have evolved from the use of certain basic philosophies, policies, and objectives of water resource development, among which are:

1. Protection of resources to assure availability for the best use when needed in behalf of all people.

2. Congressional actions affecting the disposition of Federal Lands.

3. Congressional requirements that Federal land be developed in a manner to avoid monopoly and bring about a wide-spread distribution of benefits.

4. Water and related land resources development and management are essential to national economic growth.

5. Surface storage in reservoirs is essential to the optimum use of available water. Reservoirs control fluctuations of streamflow, and the regulated flows can be used for domestic and industrial water supply, irrigation, generation of electric power, flood control, recreation, and water quality control.

6. Saving the limited number of favorable water power and reservoir sites is fundamental to planning for efficient land use.

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7. The primary purpose in preserving water development sites on Federal land is to protect a limited resource and to retain control of benefits derived. This conservation of sites is beneficial to all developers, whether individuals, private companies, public bodies, or the Federal government itself.

Water resource development is a subject that is receiving considerable attention by government and others at all levels. More skillful management of water resources is necessary to meet the needs of expanding population and economy. The Water Resources Council has furnished an excellent survey of the problems to be solved in its 1968 report, "The Nation's Water Resources." Whatever methods are used to develop more water to meet increasing demands, it is obvious that more surface reservoirs for storing water will be required. Estimates indicate the need for more than double the amount of storage now available by 1980 to meet demands for water.

With the rapidly growing pressures in society to realize the total benefits of water resources development, greater regulation of nearly all of America's streams can be anticipated. Multiple-purpose water development will be emphasized to provide for as many uses as possible from each water storage project.

It is evident that with increasing development of water resources by construction of storage facilities, there will be abundant chances for hydroelectric power development. Advantage should be taken of opportunities for such power production so that economies inherent in large-scale installations can be passed on to electric power users and the drain on our nonrenewable energy resources can be minimized.

As the prime unit in integrated multiple-purpose development is the storage reservoir, protection of favorable sites from encumbrances by land uses that forestall future efficient river basin development must be carefully evaluated. The number of sites is physically limited, thus taking one for a limited water use or for a nonwater use rules out essential benefits. These sites should be developed for maximum serviceability. Steps to protect potential sites which would occupy non-Federal lands nation-wide and particularly in the East involve difficult problems relating to purchase or zoning, and only isolated attempts have been made to conserve them. No doubt this subject will receive considerable attention in the future. Action with respect to favorable sites located on Federal land in the West is, as indicated, a continuing activity by the government, and much has been accomplished.

FEDERAL AUTHORITY

There are two main lines of authority in the operation of the Federal government which provide for the preservation of water development sites on public domain land. These are the inherent powers of the

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President to withdraw public lands and the unlimited power of Congress under the Property clause of the Constitution. With one exception the two lines of authority are merged and vested by Statute and Executive Order with the Secretary of the Interior who has the responsibility for public purpose withdrawal of public domain and other lands owned or controlled by the United States, and for restoring these lands to unreserved status when the need for withdrawal has passed. The exception lies in the statutory authority granted to the Federal Power Commission by the Federal Power Act. Direct preservation of water development sites is accomplished by means of public land orders signed by the Secretary of the Interior or by issuance of notices of land withdrawal by the Federal Power Commission.

SITE PRESERVATION PROCEDURE

Certain land management agencies, such as the U.S. Forest Service and Bureau of Land Management, indirectly preserve valuable water development sites by the nature of their control of Federal lands. However, direct water resources site preservation functions related to Federal lands are performed by two Interior agencies (the Bureau of Reclamation and the Geological Survey) and by one independent agency (the Federal Power Commission).

As used in the Branch of Waterpower Classification, Geological Survey classifications for water storage and waterpower purposes designate Federal lands as being valuable or eminently suitable for power or reservoir sites. These classifications neither commit the government to construction nor prohibit private use for water resource development; however, they do serve to identify, protect, and forestall the encumbrance of potential sites. Geological Survey classifications include reservoir sites under the Act of 1888; powersite reserves and reservoir site reserves under the Act of 1910; waterpower designations under the Acts of 1910, 1916, and 1919; and powersite classifications under the Organic Act of 1879 which created the Geological Survey.

Practice in the Geological Survey consists of initiating Powersite Classification for reservoir sites if they have value for development of waterpower either at the sites or through regulation affecting downstream powersites, developed or undeveloped. It need not be proven at this point in time that use for water storage or hydroelectric power development is the best use. However, if power development is not feasible in conjunction with storage, lands within reservoir sites are withdrawn as Reservoir Site Reserves under the broad authority given the President by the Act of June 25, 1910. Powersite Classifications are not initiated over lands already in Reclamation or Federal Power Project Withdrawal; however, Project Withdrawals often include land subject to earlier Bureau of Reclamation or Geological Survey actions, or even earlier project filings. Federal Power Commission withdrawals, in a sense, confirm the validity of classification actions. The Geological Survey endeavors only to designate

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an important potential land use to assure proper consideration of that value in any decisions as to utilization of the subject lands. Its classifications are based on all available information in the field of water resources planning and are frequently initiated at the request of Federal and State agencies. For the purposes of discussion in this group powersites mean lands in reservoir sites.

Geological Survey classification actions are kept to a minimum consistent with the concepts of site conservation, are continually reviewed for harmony with changing trends in water development and competitive land uses, and are revoked when no longer needed, or when conflicting land uses are indicated to have a higher value in the public interest.

Neither classification as a potential powersite, nor Federal Power Project Withdrawal, constitute "withdrawals" in the usual sense of the word, as the lands may continue to be used for other noninjurious purposes with the understanding that power development cannot be precluded by such entry. Conditional disposals of lands unrelated to mineral development, which affect Geological Survey power classifications, as Powersite Reserves, Waterpower Designations, and Powersite Classifications, come under the jurisdiction of the Federal Power Commission (43 CFR 2022.1). Section 24 of the Federal Power Act provides that restoration to entry for various purposes under the public land laws of lands reserved or classified for power development may be made pursuant to a favorable determination by the Federal Power Commission to the effect that such a restoration will not injure power value. Regulations for locatable minerals on powersite lands conform with Public Law 359 of August 11, 1955, and are found in the Code of Federal Regulations (43 CFR 3530). Mineral leasing is permitted under other regulations (43 CFR 3103.2).

Classifications of potential reservoir sites, as Reservoir Sites (Act of 1888), or Reservoir Site Reserves (Act of 1910), do not come under provisions of the Federal Power Act; thus, lands in such classifications are subject to alienation under the mining laws for metalliferous minerals. Mineral leasing entries are permitted under 43 CFR 3103.2 with conditions to protect site values. Entries unrelated to mineral development are allowed in cases where the site value can be protected.

All applications filed with the Bureau of Land Management affecting waterpower or reservoir sites, except for short-term uses, are processed through the Geological Survey and the Federal Power Commission so that entries in the public interest may be allowed, yet sites may be kept free of encumbrances that might impair subsequent development. Uses of National Forest lands in power or reservoir sites, if of a temporary nature, or involving structures which can be readily removed and do not impair the value of the lands for these sites, may be permitted

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by the Forest Service with stipulations that the use is subject to prior reservation. Other uses are referred to the Federal Power Commission and the Geological Survey for recommendations, and some require Secretary of the Interior approval.

Examples can be cited showing that many years' expenditures for the classification program have been matched by savings at just one reservoir site when the costs of acquiring private lands for project purposes are considered. However, the cost factor is incidental to the true purpose of site preservation which is to protect a limited resource and benefit the public interest.

SITE USE

Designated sites are released for water development either through Congressional approval of projects to occupy them or through operation of public land laws; and their release involves only the usual procedures applicable to other Federal land.

ACREAGE CLASSIFIED OR WITHDRAWN

In December, 1969, there were about 15,800,000 acres of Federal land in powersite withdrawals or classifications, of which 2,100,000 are in Powersite Reserves, 500,000 are in Waterpower Designations, 11,700,000 in Powersite Classifications (of which 9,000,000 acres cover one Alaskan site), and 1,400,000 acres in Federal Power Projects. An estimated additional 1,300,000 acres in Project Withdrawal duplicate earlier Geological Survey actions. About 128,000 acres of other Federal lands are within Reservoir Site Reserves.

ACCOMPLISHMENTS

Many favorable waterpower and reservoir sites have been identified and successfully protected from encumbrances for subsequent use. Since 1910, cases where the United States has lost control of desirable sites are scarce. Only a meager number of large water projects affecting Federal lands has been constructed which did not use lands included in prior site classifications or withdrawals. The number of individual sites protected is difficult to state with accuracy due to the necessary choice between alternative sites and overlapping.

Hydroelectric sites which use Federal lands previously classified for such purposes include such well-known sites as Hoover, Glen Canyon, Shasta, American Falls, Brownlee, Hungry Horse, Round Butte, Pelton, The Dalles, Lookout Point, and Cougar. Other sites which do not have power facilities include Arrowrock, Lucky Peak, Owyhee, and Warm Springs.

In Alaska over a 20-year period the Branch of Waterpower Classification has studied 274 potential waterpower sites, mapped 61, and obtained geologic reports on 47 of them. Geological Survey withdrawals have been made for 80 sites and 27 are under Federal Power Project

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Withdrawals. Two of the mapped sites have been developed, two are under construction, and at least four more are under active consideration by the Corps of Engineers and Bureau of Reclamation.

Two facts stand out in relation to preservation of water development sites: (1) such sites are finite in number, fixed in position, increasingly scarce, and irreplaceable; and (2) in a rapidly changing society, in which the specific needs of the future are impossible to forecast and where technology provides many alternatives, a primary tenet of planning should be to maintain flexibility for the future--site classification is one step toward this goal.

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RECLAMATION WITHDRAWALS
Remarks by Norman H. Moore - Assistant Regional Director,
Bureau of Reclamation
Before the Power Planning Committee - Portland, Oregon
March 3, 1970

To establish the scope of Reclamation's withdrawals in the Pacific Northwest and thus its general interest in the overall subject, the following statistics are presented. There are approximately 753,200 acres of public land presently under Reclamation withdrawal within the boundaries of Region 1 which is, in general, the Columbia River drainage. The areas withdrawn in the various states within the Region are as follows:

Idaho	= 445,700 acres
Oregon	= 103,300 acres
Washington	= 124,500 acres
Montana	= 54,700 acres
Wyoming	= 25,000 acres

Approximately 200,000 acres of the above are located within or immediately adjacent to existing reservoirs.

Withdrawals on unentered public land for reclamation purposes are made under the authority contained in Section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388).

Reclamation's request for withdrawal of public lands originates from its projects' requirements, that is, for project construction, operation, and maintenance, protection of constructed works, settlement purposes, and material sites such as borrow pits. In addition, land can be withdrawn for recreation and fish and wildlife purposes.

Recommendation for withdrawal is usually based on feasibility studies. The level of these studies is of such a degree that the planning report prepared in accordance with them is ultimately presented to the Congress for its consideration for authorization of the project. However, there are some cases where reconnaissance level studies are utilized for withdrawal purposes. In this latter case, generally the reconnaissance information indicates there is little doubt of the justification of the project, there is a definite need for the project, and the area has a potential for development other than water resources. Also there are times when Reclamation withdraws additionally required land on already authorized or constructed projects.

When withdrawing public lands for settlement purposes, all available public lands within the exterior boundaries of the area to be developed are withdrawn. By settlement purposes we mean here that the

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public land will be homesteaded as part of our reclamation development. Thus, the land is then available for the establishment of farm units, right-of-way for irrigation facilities, and other purposes such as borrow areas, operation and maintenance, etc.

When making withdrawals for reservoir sites lands are withdrawn to provide a minimum of 300-foot horizontal distance from the high water line of the proposed reservoir. The land is withdrawn by legal subdivisions and thus the withdrawn area will, in most cases, extend back a bit more than the 300-foot minimum. At times, additional lands are also withdrawn to block out areas to eliminate administrative problems.

While lands can be withdrawn to provide rights-of-way for canals, pipelines, transmission lines, etc., this generally requires the acquisition of considerably more area than is actually utilized by these facilities. The Bureau of Reclamation therefore would prefer not to withdraw land for this type of right-of-way but to reserve easements across the public lands. These easements can generally be reserved to the United States under the Act of December 5, 1924 (43 Stat. 672).

In general, Reclamation's request for withdrawal originates at one of its regional planning offices. We have three of these offices in the Pacific Northwest. The first is the Lower Columbia Development Office, located at Salem, Oregon, the second is the Upper Columbia Development Office, located at Spokane, Washington, and the third, the Snake River Development Office, located at Boise, Idaho. After one of these planning offices has provided the list of needed lands and reasons for withdrawal, the Regional Director of the Bureau of Reclamation requests approval from the Commissioner of the Bureau of Reclamation and the Assistant Secretary for Water and Power to file an application for withdrawal of such lands for the reasons stated. Upon receipt of such approval, the application for withdrawal is filed with the appropriate State office of the Bureau of Land Management (BLM). This application, although not a specified form, must contain certain information, such as name and address of applicant, legal descriptions of the lands desired, purpose of the withdrawal, what effect the withdrawal will have on present operation of the public lands in question, estimated period of withdrawal, any water rights that may be involved, and total acres to be included in the withdrawal. If the area to be withdrawn is more than 5,000 acres, an adequate map must also be furnished with the application.

Subsequent to the filing with BLM, the Bureau of Reclamation receives a copy of the notice of proposed withdrawal, prepared for publication by BLM. Such notice is published in the Federal Register. If an objection is filed to the Bureau of Reclamation proposed withdrawal, Reclamation is advised of the nature of the objection and generally negotiates with the objector, to determine whether or not any

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adjustments would be appropriate. BLM is then advised of the results of the negotiation and of any changes to be made in the withdrawal application by the Bureau of Reclamation. If no further action or correspondence is required, BLM prepares an appropriate withdrawal order. The land becomes withdrawn when the withdrawal order is published in the Federal Register.

It is the policy of the Bureau of Reclamation to continually review all lands withdrawn to determine if the withdrawal is still needed within the context of the overall Reclamation program. If such lands are not needed the BLM is requested to take the necessary action to release them from Reclamation withdrawal. It is also the general policy of Reclamation to turn over to other land operating agencies, lands which are not directly required for the operation of the project. For instance; withdrawn National forest lands that are not required for actual operating needs are turned over to the Forest Service to administer for recreation and general forest purposes. When Public Domain lands are involved they are turned over to the Bureau of Land Management for grazing administration in accordance with existing agreements with that agency.

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A check is made to see that area is on U. S. lands.

An extensive research is made of the withdrawn lands -- (some withdrawals overlap).

A tabulation is then made of lands withdrawn. This tabulation of lands withdrawn is sent to:

(a) Geological Survey.
(b) Bureau of Land Management.
(c) Forest Service.
(d) Published in the Federal Register.

The need for the FPC to make determinations concerning applications for entry, location, and patent for mining purposes was eliminated by the passage of the Act of August 11, 1955 (the Mining Claims Restoration Act).

This law is subject to the provisions that "the United States, its Permittees and Licensees, shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any mining claim, mill site, facility installed or erected from use of such lands for power development."

This was further clarified by the "Memorandum of Understanding" between the FPC and the Department of Interior (July 20, 1966). This memorandum, among other things, sets out procedures for other uses of the withdrawn lands.

Grazing privileges may be allowed by the BLM without reference to FPC on lands within powersites which are not within a power project, in accordance with the Commission's determination of February 16, 1937, which established grazing districts, grazing permits, etc.

The BLM may issue, without reference to FPC, other nonmineral leases, licenses, or permits covering powersites which are not included within a power project, in accordance with the Commission's letter of September 29, 1950. (Special permits for use of small tracts, with provision that U. S. and licensee are exempt).

Any grazing privileges or any other lease, license, or permit must include the applicant's agreement.

The BLM shall refer all mineral leases, licenses or permits to the FPC for its concurrence and recommendations for special stipulations, if any. All leases, licenses or permits shall contain the "powersite stipulation" in accordance with the FPC letter of April 3, 1957. This letter gives the conditions for use of lands.

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Memorandums also give the BLM authority to sell or make other disposal of any timber, other forest vegetation, minerals or other materials from powersite lands so long as the lands involved are not within a power project.

In reference to Rights-of-Way, the memorandum states that BLM may restore lands classified as Transmission Line Powersite Reserves, subject to Section 24 without reference to the FPC for determination. The memorandum goes on to discuss the Rights-of-Way.

Section 25 of Regulations under the Federal Power Act gives the procedures for the vacation of FPC power withdrawals made under Section 24 of the Federal Power Act.

An application for a determination permitting restoration to entry of the power withdrawal may be filed directly with the Commission at its offices in Washington, D.C., or its regional offices, or at an office of the Bureau of Land Management.

In processing applications for vacation of withdrawal, the Commission reviews the power potential of the powersite and if it finds that the site no longer serves a useful purpose for power, an order vacating the power withdrawal is issued and published in the Federal Register.

Section 25 of the Regulations also provides for hearings in the determination of vacation of FPC power withdrawals. However, as far as can be determined, no hearings have been held in recent years.

It is probable that a hearing would be held if an appeal was made to the Commission's determination of power withdrawal vacation.

Additional procedure for restoration or vacation of power withdrawals is given in the Memorandum of Understanding.

All petitions for restoration or vacation of power withdrawals under Section 24 of the FPC Act shall be directed to the BLM. BLM will make a determination as to whether land disposals including exchanges and other transfers sought in petitions are consistent with proper land use. Where it is not consistent, the BLM will reject the petition without referral to other agencies. All other petitions, together with the BLM findings, will be referred to the FPC, through the GS, for a determination pursuant to Section 24; the GS shall make such recommendations or comment as it deems appropriate.

A recent example of a restoration of a FPC power withdrawal was the request by Boise Cascade for the use of certain lands in the Tuolumne River Basin (California) between the New Don Pedro Reservoir and Yosemite National Park. This withdrawal was the result of plan devised in the 1920's by the Turlock Irrigation District. In 1931, the FPC issued a Preliminary Permit to the Turlock Irrigation District for the proposed hydroelectric power project.

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After further determination, the irrigation district decided that the project would not be economical and withdrew its application for license in 1934. However, the lands of the proposed project remained withdrawn. Boise Cascade proposed that they develop a recreation reservoir in this site and requested that the withdrawal be vacated. After reviewing the area for possible power development, the FPC in February of this year issued an order vacating the power withdrawal made under Section 24 of the Federal Power Act.

I have other examples of FPC action regarding FPC power withdrawals if anyone cares to see them after our discussion.

A. Recreation
B. Mining entry
C. Other uses (no FPC objection)
D. Publication of lands withdrawn in Federal Register
E. Restoration of lands

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WITHDRAWAL OF PUBLIC LANDS FOR WATER RESOURCE PROJECTS
Remarks by J. H. Minger, Corps of Engineers, Real Estate Division
at the Meeting of the Power Planning Committee,
PNWRBC, in Portland, Oregon
March 3, 1970

In this presentation, I will outline some of the purposes for withdrawal of public land for Department of the Army, Corps of Engineers projects; discuss some of the effects of these withdrawals on other land management agencies; and touch briefly on the handling and processing of withdrawal requests as suggested in the communication announcing this panel discussion.

Regarding the purposes, i.e., the reasons and uses for which public land is withdrawn for Corps projects, I will confine my comments to dam and reservoir projects. The purposes for which public lands might be withdrawn for other Corps civil works projects would be quite similar.

Public land is withdrawn in connection with a Corps project to reserve this land from entry and use by others that would be adverse to the project and to establish the public land as necessary or appropriate for construction and for future operation, maintenance and management relating to the project. Basically, the Corps withdraws public land for a project for the same purposes and reasons that it acquires non-Federal land from private ownership.

The criteria for determining the public land to be withdrawn for a project are essentially the same as the criteria used for determining the non-Federal land to be acquired. These criteria are set forth in "Joint Policies of the Departments of the Interior and Army Relative to Reservoir Project Land" as published in Title 43, Subtitle A, Part 8, Code of Federal Regulations. These policies were developed jointly by the Department of the Interior, Bureau of Reclamation, and the Department of the Army, Corps of Engineers, early in the 1960's and have been in effect for a number of years.

The uses that are made by the Corps of withdrawn public land are dependent upon the location and extent of the public land at the projects. In this regard, withdrawn public land at a project may be used for [illegible] or in combination with land acquired from non-Federal ownership such purposes as: (1) dam site and construction area; (2) perm[illegible] buildings, overlooks or visitor facilities; (3) to accommodate the reservoir pool with reasonable freeboard and to provide a minimum 300' horizontal strip above the maximum pool for public access as required by the Flood Control Act; (4) to provide for additional public access where needed; (5) various operational purposes, such as debris collection areas; (6) relocation of highways, railroads and public utilities; (7) for fish and wildlife purposes where approved under the F&W Coordination Act; and (8) for public recreation under the Federal Water Project Recreation Act.

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In establishing the boundary or the extent of public land to be withdrawn for a project, the published Joint Army-Interior policies heretofore mentioned are followed and the Corps adheres to the principle of "blocking out" on tangents to a "guide taking" line for the project established from engineering data, as provided for in the referenced Joint Policies.

Regarding the effects of Corps withdrawals of public land on land management agencies, it is appropriate to point out that the Corps of Engineers is, in fact, a land management agency in a degree to the same extent as other agencies such as the Bureau of Land Management and the Forest Service. The Corps is not just a construction agency as is sometimes suggested. The Corps has responsibility not only for the construction of its authorized and funded projects but generally for their future operation, maintenance and management, including the management of perimeter lands within the project boundaries. The Department of the Army and the Corps have authority not only to acquire land for Corps projects, but authority for a wide range of management and disposal actions under various general and special laws.

Since public lands of the U. S. are already in a management status under a Federal agency, such as the BLM or Forest Service, the imposition of a withdrawal of public land for a project of the Department of the Army, Corps of Engineers, which also has land management responsibility and authority, produces a "gray" area with respect to the land management policies and procedures to be followed. Insofar as the public land withdrawn for the project is concerned, two (or perhaps more) Federal agencies having land management authority and responsibility are involved. The impracticability of two agencies trying to manage the same segment or parcel of land and the public confusion resulting in such case has been recognized for some time.

To resolve the problems attendant to the above situation, the Department of Agriculture and the Department of the Army in 1964 entered into a basic agreement with respect to Corps projects within or partially within the boundaries of National Forests. This agreement provides basic guidelines for determinations regarding planning for and the management and administration of such projects. It further provides for the development thereunder of supplemental, individual project Memoranda of Understanding between the Corps and Forest Service for each such project. These individual project memos basically cover the coordination of planning for the project, the management and administrative practices and procedures to be followed, which agency will be responsible for what areas and functions, and the interchange by transfer between the two departments of land jurisdiction consistent with the provisions of the memos. Several of these project memos have been consummated for projects in National Forests in the Pacific

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Northwest and one land interchange with the Forest Service for a portion of the Libby Dam Project in Montana has been completed.

Another basic departmental agreement between the Department of the Interior and the Department of the Army with respect to Corps projects involving public land under the Bureau of Land Management, currently is in process of completion on the Washington, D. C. level. It is understood this agreement has been signed by the Secretary of the Army and signature by Secretary Hickel is now pending.

This Interior-Army agreement is along the same lines as the 1964 Agriculture-Army agreement heretofore discussed. Similar to that document, this Interior-Army agreement provides that whenever public land under BLM jurisdiction is involved in a Corps project, the Corps will coordinate with BLM during the initial survey and investigation stages and the planning stage. It also provides for individual project supplemental agreements between the Corps and BLM covering the management and administrative practices and procedures to be followed and which agency will be responsible for what areas and management functions at the project. Also provision is made for development of individual project agreements on existing Corps projects involving withdrawn BLM land where there may be problems relating to management responsibility.

After t[illegible] basic Interior-Army agreement is consummated, it is expected that Public Land Orders withdrawing BLM land for a Corps project will be issued after the individual project supplemental agreement has been completed and that the PLO will make reference thereto and state that the withdrawn land will be administered by the Corps and BLM in accordance therewith. If, because of exigencies of construction, for convenience, or other reasons, a PLO withdrawing BLM land for a Corps project is issued before the project supplemental agreement has been completed, it is expected that the PLO will state that administration of the land will be subject to a project agreement to be entered into later between the Corps and BLM.

Further agreements, along the lines of the [illegible]riculture-Army and the Interior-Army agreements, with other agencies holding prior withdrawals of public land involved in Corps projects may be appropriate if problems of land management arise.

Since the handling and processing of public land withdrawal applications is a BLM function, comment on this aspect will be limited. Briefly, the Corps, upon authorization to proceed with land acquisition for a project, submits its requests for withdrawal of public land to the appropriate State Land Office of BLM in accordance with Subpart 2311, Code of Federal Regulations. Under the new Interior-Army agreement

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for BLM lands there should have been prior coordination between the Corps and the BLM Land Office and a project agreement either completed or in process. This should make understanding and review by BLM of the Corps' application much easier than heretofore. It is believed that some Corps applications in the past have not always been entirely clear as to the necessity for the withdrawal and the particular uses intended to be made of the land.

It may be appropriate to point out that the Corps in certain instances also has requested and obtained reservation of public land prior to project authorization to enable planning and prevent adverse entry; e.g., for the proposed Rampart Dam in Alaska.

It is hoped that this presentation, which has only touched briefly on the purposes, effects and procedures relating to Corps withdrawals of public land, has been informative and helpful. Thank you.

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HANDLING AND PROCESSING OF WITHDRAWALS OF PUBLIC LANDS FOR WATER RESOURCE PROJECT

Remarks by Virgil O. Saiser, BLM

INTRODUCTION

This discussion covers current practices and procedures followed in the processing of withdrawals of public lands. It is limited to those withdrawals for which the Secretary of the Interior has responsibility under statutory or executive authorities. Therefore, withdrawals under other statutory authority such as that granted the Federal Power Commission by the Federal Power Act are not included.

Withdrawals of public lands are accomplished by Public Land Orders issued by the Secretary of the Interior. Some background on the nature of public land withdrawals is essential to an understanding of withdrawal procedures and of some of their implications.

PURPOSE AND MEANING OF WITHDRAWALS

The Federal Government holds a vast acreage of public lands. Down through the years, the Congress has passed an estimated 5000 laws governing these lands. Some laws provide for their disposal to non-Federal interests while others prescribe Federally managed programs. To a degree, disposal laws are incompatible with laws providing for Federal programs. The purpose of withdrawals is, therefore, to except specific public lands, to a greater or lesser degree, from the operations of the disposal laws and to assign them to a particular management program. This double nature of withdrawals is reflected in the terms applied to them, i.e., "withdrawals" or "reservations". The term "withdrawal" suggests "removing lands from the operations of the disposal laws" while "reservation" implies "segregation of lands for specific public purposes." The two terms are generally used interchangeably.

EFFECT OF WITHDRAWALS

In various degrees, laws authorizing Federally managed programs also provide for the granting of use-privileges to non-Federal interests. In these circumstances, private use is restricted to the extent that it would be inconsistent with the purpose of the withdrawals. The effect of a withdrawal, then, is not to prevent private use in favor of a Federal program but rather to harmonize private use as much as possible with simultaneous Federal use. Withdrawals, effectively managed, should provide the highest type of multiple use.

Another aspect of withdrawal orders is that they may affect a transfer between agencies of jurisdictoral and administrative responsibility for the lands involved and the resources thereon.

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LEGISLATIVE AUTHORITY

The basic legislative authority for the President to withdraw or reserve public lands in the United States and Alaska for public purposes is contained (1) specifically in the Act of June 25, 1910 (36 Stat. 847, 43 U.S.C. 141); (2) by implication, in other acts relating to executive powers over public lands; and (3) special acts relating to specific types of reservations.

Some of the special Acts have been cited in the discussion given by the U.S. Geological Survey. The Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 416) is another significant Act. The latter Act authorized the Secretary of the Interior to withdraw lands required for irrigation works and other purposes.

DELEGATION OF AUTHORITY

By Executive Order 10355 of May 25, 1952 (43 U.S.C. 141, Note) the President delegated all of his authority to act on withdrawal and reservation matters to the Secretary of the Interior under the conditions prescribed therein.

The conditions of particular interest to this discussion are in general as follows:

1. That the Secretary of the Interior shall not issue an order of withdrawal affecting land under the authority of any department or agency other than his own without concurrence of the head of such department or agency.

2. That any disagreement between two or more executive departments or agencies shall be referred to the Directer of the Bureau of the Budget for consideration and adjustment. The Director may submit the matter to the President for determination.

3. That the Secretary of the Interior is authorized to issue rules and regulations and to prescribe procedures for the exercise of the authority delegated to him.

SUMMARY OF PROCEDURES

The Secretary of the Interior has issued rules and regulations governing withdrawal procedures which are included in Part 2310 of Title 43 of the Code of Federal Regulations.

Applications for withdrawals are filed in the appropriate Land Office of the Bureau of Land Management. The regulations list in detail the contents of an application. Some of the key items are:

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1. Legal description of the land involved.

2. Purpose of the withdrawal.

3. Whether the proposed use will contaminate any of the land, and whether such contamination will be permanent or temporary.

4. How long the withdrawal will continue in effect.

5. Whether, and if so to what extent, the proposed use will affect continuing full operation of the public land laws and Federal regulations relating to conservation, utilization, and development of mineral resources, timber and other material resources, grazing resources, fish and wildlife resources, water resources, and scenic, wilderness, and recreation and other values.

6. A justification for the proposed withdrawal or reservation, including statements showing the need for all the area requested and for the limitation, if any, of concurrent uses.

7. Citation of the statutory or other authority for the type of withdrawal or reservation requested.

If the lands of another agency or department will be affected, the applicant will be requested to obtain the concurrence of such other agency or department.

Upon receipt, the withdrawal application is noted on the Land Office records. The noting of the records will temporarily segregate the land from use or disposal under the public land laws to the extent applied for in the application for withdrawal. The temporary segregation does not affect the administrative jurisdiction of the lands.

The Bureau of Land Management publishes a notice of the proposed withdrawal in the Federal Register. The Bureau of Land Management, in cooperation with the applicant agency provides news releases and other publicity to inform the interested public.

If, as a result of public response, sufficient protests are filed, a hearing may be ordered.

The Bureau of Land Management will investigate and evaluate the existing and potential demand for the lands and their resources. The Bureau of Land Management may negotiate with the applicant agency with a view toward adjusting the application to reduce the area to the minimum essential to the applicant's needs and to provide for the maximum concurrent utilization of the land for purposes other than the applicant's.

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In practice most withdrawal applications do not require hearings and only a minimum of adjustments. The Bureau of Land Management reports its findings and recommendations to the Secretary of the Interior who will approve or deny the application in whole or part. Approval of an application is finalized by publication of a Public Land Order in the Federal Register. Cancellation of an application and lifting of the temporary segregation on the land is accomplished by a Termination Order also published in the Federal Register.

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WITHDRAWAL OF NATIONAL FOREST LANDS FOR WATER RESOURCE PROJECTS
Remarks by John Brillhart, Division of Lands, R-6 Forest Service

In discussing Water Resource Project withdrawals and effects of the same on Federal lands which in this case are National Forest lands, the derivation of National Forest lands in Oregon and Washington need to be explained.

For all intent and purposes the vast majority of National Forest lands in Oregon and Washington were reserved from public domain lands under an Act of Congress approved March 3, 1891. By this Act the President was given power to establish forest reserves from the public domain (22 Stat. 1103). In other words, most of the National Forest lands in Oregon and Washington came from public domain lands.

Withdrawal of National Forest lands from appropriation and entry for water resource projects can be accomplished under the provisions of several Acts of Congress and under Executive Order 10355 of May 26, 1952. In each case the order states the purpose of the withdrawal as well as types of appropriation and the uses that are prohibited.

Authority to withdraw National Forest lands reserved from the public domain has been given to the Secretary of Interior for:

1. First form reclamation withdrawals under the Act of 6/17/02.

2. Powersite classification withdrawals under the Act of 3/3/1879. These are based on recommendation to the Secretary of Interior by the Director of the U.S. Geological Survey for withdrawal of National Forest lands for future power developments. In like manner the Director can recommend modification and revocation of such withdrawals.

   In these two (1 and 2) the consent of the Secretary of Agriculture is not required. However, by interdepartmental agreement the recommendations of the Forest Service are requested by the Secretary of Interior before such withdrawals are made.

3. Another form of withdrawal under the Secretary of Interior authority is for use by and at the request of other agencies of the Federal Government and require the consent of the Secretary of Agriculture.

All withdrawals of National Forest lands are, therefore, under the Secretary of Interior's authority with one exception. This exception lies in the statutory authority granted the Federal Power Commission by the Federal Power Act of June 10, 1920. By the authority of this Act, National Forest lands included in proposed Federal power projects are withdrawn from all form of entry upon filing of an application for preliminary permit or license.

What are the effects of withdrawals upon National Forest land?

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In the case of Bureau of Reclamation withdrawals, until project surveys and determinations have been made the land is managed as any other National Forest lands with the proviso that any uses authorized will not be incompatible with the use of the lands for reclamation purposes.

In addition, a Memorandum of Understanding between the Bureau of Reclamation and the Forest Service (signed January 1948) defines Forest Service responsibility which includes impact planning as well as working out with the Bureau of Reclamation supplemental Memorandums of Understanding which stipulate that all contracts will provide for safeguarding lands and resources under the administration of the Forest Service.

Lands withdrawn for power purposes under various types of withdrawals such as powersite and reservoir site reserves, water power designations, powersite classifications, all by the Secretary of Interior and FPC withdrawals; all have power values which are protected to the greatest extent possible consistent with other multiple use requirements of the Forest Service. This means uses of temporary nature or involving structures which can be readily removed and do not impair the value of the land for power purposes, may be permitted by the Forest Service on such reserved National Forest lands with the stipulations that such use is subject to prior reservation of lands for power purposes.

National Forest lands withdrawn by the Secretary of Interior (with Secretary of Agriculture's approval) for the Department of Army flood control projects are managed under an agreement between the Secretaries of War and Agriculture. This agreement provides for resolving differences that might arise as to the Army requesting a withdrawal for flood control purposes. Supplemental agreements drawn up between the two agencies include items relating to safeguarding land and resource values to be included in project contracts.

In conclusion you may ask, "What about acreages of National Forest lands withdrawn for water resource projects, is it sizable or not?" A review of our records indicates the following acreages have been withdrawn:

	Total N.F. in U.S.	Region 6 - USFS
Reclamation withdrawals	1,367,501	84,103 acres
Power withdrawals	3,096,754	615,751 acres
Flood Control	60,169	10,684 acres
Total -	4,524,241	710,538 acres

On these total 4½ million acres of withdrawn lands, all the forest officers must exercise judgment in protecting the water resource values of withdrawn lands, particularly when the protection of such values may be in direct conflict with other Forest Service interest.

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WITHDRAWALS OF PUBLIC LANDS FOR WATER RESOURCES PROJECTS

Summary of remarks by K.W. Sax, U.S. Geological Survey
March 3, 1970

The orientation by panelists Ellson, Colbert, Sondeno, Minger, Seiser, and Brillhart covers the subject very well, but it may be helpful to point out they were discussing two general types of withdrawals: (1) those made as the result of an intention to proceed with development of water resources projects, and (2) those made to protect water resource sites for anticipated future development. The first type of withdrawals usually results from actions initiated by the Corps of Engineers or Bureau of Reclamation, or are made automatically by virtue of the filing by a private or public organization for a Federal Power Commission License. The second type of withdrawals results from actions initiated by the Geological Survey, or have resulted from the fact that many schemes of development were filed as Federal Power Projects but never constructed, particularly in early years of Federal Power Commission's operation. The second type of withdrawals saves water resource sites for future use--a conservation of sites as there is an attempt to deliberately shift the use of land from the present to the future because water resource sites are finite in number, fixed in position, increasingly scarce, and irreplaceable.

Both the Forest Service and Bureau of Land Management have problems with power withdrawals for anticipated future use as their presence limits the freedom of land management agencies to use, exchange, or dispose of such lands; however, procedures are available for the re-examination of any case where power withdrawals appear to be an improper obstacle of higher value land uses. Conflicts arise since the withdrawals for anticipated future use are single purpose in nature and must compete with a wide range of potential land uses. The Geological Survey has a continuing program of reviewing existing power withdrawals to keep them current with both new plans and the changing concepts of water resource development. Processing such studies involves a considerable amount of effort in land management agencies since revocations of withdrawals are examined with reference to all existing rights, whereas new classifications are examined only with reference to conflicting rights.

Both Messrs. Colbert and Sondeno noted that through cooperative procedures with the land management agencies, Federal land designated as being valuable for water resources sites are managed to forestall undesirable encumbrances, yet allow many interim uses without destroying site value. The worth of saving these sites for future use is not always evident, and even if stated in simple terms, many intricate relationships must be ignored. However, in California we have become aware of several outstanding examples, including the following:

Subpart E—Application for License for Major Unconstructed Project and Major Modified Project

[¶12,040]

§ 4.40 Applicability and definitions.

(a) *Applicability.* The provisions of this subpart apply to any application for an initial license for a major unconstructed project that would have a total installed capacity of more than 5 megawatts, and any application for an initial or new license for a major modified project with a total installed capacity more than 5 megawatts. An applicant for license for any major unconstructed or major modified water power project that would have a total installed generating capacity of 5 megawatts or less must submit application under Subpart G (§ § 4.60 and 4.61).

(b) *Definitions.* For the purposes of this subpart:

(1) "Initial license" means any license for a water power project that is issued under the Federal Water Power Act of 1920 or the Federal Power Act.

(2) "Major unconstructed project" means any unlicensed water power project that is proposed to:

(i) Have a total installed generating capacity of more than 1.5 MW; and

(ii) Use the water power potential of a dam and impoundment which, at the time application is filed, has not been constructed.

(3) "Major modified project" means any major project—existing dam, as defined in § 4.50(b)(5) of this chapter, that is proposed to include:

(i) Any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or the normal maximum surface elevation of an existing impoundment; or

(ii) Any change in existing project works or operations that would result in a significant environmental impact.

(4) "New license" means any license, except an annual license issued under section 15 of the Federal Power Act, for a water power project that is issued under the Federal Power Act after the initial license for that project.

(c) *Guidance from Commission staff.* A prospective applicant for a license for a major unconstructed project or major modified project may seek advice from the Commission's Division of Hydropower Licensing regarding the applicability of this subpart to its project [*see* § 4.31(g)], including the determinations whether any proposed repair, modification or reconstruction of an existing dam would result in a significant change in the normal maximum surface elevation of an existing impoundment, or whether any proposed change in existing project works or operation would result in a significant environmental impact.

(d) *Consultation.* As provided under § 4.41(f) of this chapter, the appropriate Federal, state and local resource agencies must be given the opportunity to comment on the proposed project prior to filing of the application for license for a major unconstructed or major modified project.

Information from the consultation must be included in the Exhibit E, as appropriate.

.01 46 F.R. 55926 (November 13, 1981).

.05 *Historical record.*—Section 4.40 read as follows until it was amended in 46 F.R. 55926 (11/13/81), effective 12/14/81:

§ 4.40 Contents.

Each application for license for a complete project of more than 2,000 horsepower installed capacity to be constructed, or for a minor part of such project, shall be verified, shall conform to § 131.2 of this chapter, shall be filed in accordance with § 4.31, and shall set forth in appropriate detail the following information in the order indicated.

(a) The exact name and address of the applicant. (If the applicant desires that correspondence concerning the application be directed to any person other than the one who signs the application, the Commission should be notified of that fact and of the name and address of such other person by a statement indicating that such other person is authorized to act as agent, and that service upon him will be deemed to be service upon the applicant.)

(b) If the applicant is a corporation, the State or Territory under the laws of which the applicant was organized and if authorized to operate in more than one State, all pertinent facts should be stated.

(c) The measure of control or ownership, if any, exercised by applicant in any other organization or over applicant by any other organization.

(d) The name of each State in which the applicant operates or proposes to operate electric power plants or facilities.

(e) A concise general description of the project and the principal project works, including dams, reservoirs, water conduits, power houses, substations, switch yards, and transmission lines, in such detail as may be applicable.

(f) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(g) The lands and reservations of the United States which will be affected by the proposed project.

(h) A description of the proposed initial and ultimate schemes of development including installed capacities contemplated in each scheme.

(i) The proposed use or market for the power to be developed, indicating whether applicant is a public utility or will become a public utility, and if so whether it is or will be subject to regulation by any State agency. In case the applicant can give no positive assurance that there is or will be a demand for the power upon completion of construction of the project, and that it will be used or distributed by the applicant or sold to others for use or distribution, a full and complete statement and explanation shall be made of the applicant's expectations in this regard and of the basis therefor.

(j) The location and capacity of all power plants or other electric facilities owned or operated by the applicant, the market supplied thereby, and the relation thereof to the project applied for and a brief description of such other plants.

(k) A description of any historical or archeological properties listed in the National Register established under the provisions of Public Law 89-665 (80 Stat. 915) or under consideration or eligible for listing in the National Register which are or may be affected by the project. The National Register is contained in the FEDERAL REGISTER of February 25, 1969, Part 2 of this chapter (34 F.R. 2580), and is updated on the first Tuesday of each month thereafter. Inquiries with respect to properties under consideration or eligible for listing may be directed to the State Liaison Officer, a list of which is included in the FEDERAL REGISTER of February 25, 1969.

(l) Those applications within the purview of § 2.81(a) of this chapter must be accompanied by a detailed statement of the environmental factors enumerated in § 2.80 of this chapter.

(m) Other data which the Applicant may consider pertinent.

[¶ 12,041]

§ 4.41 Contents of application.

Any application under this subpart must contain the following information in the form prescribed:

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION; APPLICATION FOR LICENSE FOR MAJOR UNCONSTRUCTED PROJECT OR MAJOR MODIFIED PROJECT

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for a [license or new license, as appropriate] for the [name of project] water power project, as described in the attached exhibits [Specify any previous FERC project number designation.]

(2) The location of the proposed project is:

State or territory: _____

County: _____

Township or nearby town: _____

Stream or other body of water: _____

(3) The exact name, business address, and telephone number of the applicant are:

_____

_____

(4) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate. See 16 U.S.C. 796].

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power].

(ii) The steps which the applicant has taken, or plans to take, to comply with each of the laws cited above are: [provide brief description for each requirement].

(b) *Exhibit A* is a description of the project. If the project includes more than one dam with associated facilities, each dam and the associated component parts must be described together as a discrete development. The description for each development must contain:

(1) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, powerhouses, tailraces or other structures proposed to be included as part of the project;

(2) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments to be included as part of the project;

(3) The number, type and rated capacity of any proposed turbines or generators to be included as part of the project;

(4) The number, length, voltage and interconnections of any primary transmission lines proposed to be included a part of the project [*See* 16 U.S.C. 796(11)];

(5) The description of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(6) All lands of the United States, including lands patented subject to the provisions of section 24 of the Act, 16 U.S.C. 818, that are enclosed within the project boundary described under paragraph (h) of this section (Exhibit G), identified and tabulated by legal subdivisions of a public land survey, by the best available legal description. The tabulation must show the total acreage of the lands of the United States within the project boundary.

(c) *Exhibit B* is a statement of project operation and resource utilization. If the project includes more than one dam with associated facilities, the information must be provided separately for each discrete development. The exhibit must contain:

(1) A description of each alternative site considered in selecting of the proposed site;

(2) A description of any alternative facility designs, processes, and operations that were considered.

(3) A statement as to whether operation of the power plant will be manual or automatic, an estimate of the annual plant factor, and a statement of how the project will be operated during adverse, mean, and high water years;

(4) an estimate of the dependable capacity and average annual energy production in kilowatt-hours (or mechanical equivalent), supported by the following data:

(i) The minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, with a specification of any adjustment made for evaporation, leakage minimum flow releases (including duration of releases) or other reductions in available flow; a flow duration curve indicating the period of record and the gauging stations used in deriving the curve; and a specification of the critical streamflow used to determine the dependable capacity;

(ii) An area-capacity curve showing the gross storage capacity and usable storage capacity of the impoundment, with a rule curve showing the proposed

operation of the impoundment and how the usable storage capacity is to be utilized;

(iii) The estimated hydraulic capacity of the powerplant in terms of flow and efficiency (cubic feet per second at one-half, full and best gate), and the corresponding generator output in kilowatts;

(iv) A tailwater rating curve; and

(v) A curve showing powerplant capability versus head and specifying maximum, normal, and minimum heads;

(5) A statement of system and regional power needs and the manner in which the power generated at the project is to be utilized, including the amount of power to be used on-site, if any, supported by the following data:

(i) Load curves and tabular data, if appropriate;

(ii) Details of conservation and rate design programs and their historic and projected impacts on system loads; and

(iii) The amount of power to be sold and the identity of proposed purchaser(s); and

(6) A statement of the applicant's plans for future development of the project or of any other existing or proposed water power project on the affected stream or other body of water, indicating the approximate location and estimated installed capacity of the proposed developments.

(d) *Exhibit C* is a proposed construction schedule for the project. The information required may be supplemented with a bar chart. The construction schedule must contain:

(1) The proposed commencement and completion dates of any new construction, modification, or repair of major project works;

(2) The proposed commencement date of first commercial operation of each new major facility and generating unit; and

(3) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a chronology of original completion dates of those structures or facilities specifying dates (approximate dates must be identified as such) of:

(i) Commencement and completion of construction or installation;

(ii) Commencement of first commercial operation; and

(iii) Any additions or modifications other than routine maintenance.

(e) *Exhibit D* is a statement of project costs and financing. The exhibit must contain:

(1) A statement of estimated costs of any new construction, modification, or repair, including:

(i) The cost of any land or water rights necessary to the development;

(ii) The total cost of all major project works;

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(iii) Indirect construction costs such as costs of construction equipment, camps, and commissaries;

(iv) Interest during construction; and

(v) Overhead, construction, legal expenses, and contingencies;

(2) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a statement of the original cost of those structures or facilities specifying for each, to the extent possible, the actual or approximate total costs (approximate costs must be identified as such) of:

(i) Any land or water rights necessary to the existing project works;

(ii) All major project works; and

(iii) Any additions or modifications other than routine maintenance;

(3) If the applicant is a licensee applying for a new license, and is not a municipality or a state, an estimate of the amount which would be payable if the project were to be taken over pursuant to section 14 of the Federal Power Act, 16 U.S.C. 807, upon expiration of the license in effect including:

(i) Fair value;

(ii) Net investment; and

(iii) Severance damages;

(4) A statement of the estimated average annual cost of the total project as proposed, specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

(i) Cost of capital (equity and debt);

(ii) Local, state, and Federal taxes;

(iii) Depreciation or amortization, and

(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies;

(5) A statement of the estimated annual value of project power based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source of power, specifying any projected changes in the costs (life-cycle costs) of power from that source over the estimated financing or licensing period if the applicant takes such changes into account;

(6) A statement describing other electric energy alternatives, such as gas, oil, coal and nuclear-fueled powerplants and other conventional and pumped storage hydroelectric plants;

(7) A statement and evaluation of the consequences of denial of the license application and a brief perspective of what future use would be made of the proposed site if the proposed project were not constructed; and

(8) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e)(1) and (4) of this section.

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. If information required is not applicable, the applicant must briefly explain why it is not applicable. For application for license for a major unconstructed or major modified project (more than 5 MW) submitted under this subpart or for applications for such projects (5 MW or less) submitted under §§ 4.60 and 4.61 of this part, Exhibit E must be prepared in accordance with the following consultation provisions, after consultation with appropriate Federal, state, and local resource agencies, as indicated in this paragraph. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of consultation. If any agency that an applicant is required to consult fails to consult or fails to provide documentation of the consultation process within a reasonable time after the applicant informs the agency of the proposed project and requests to consult, the applicant may submit a summary of the consultation or attempts to consult, including any recommendations of the agency. An applicant must allow at least 60 days for consultation and documentation, unless the agency indicates that it has no comment. A list of agencies to be consulted can be obtained from the Director of the Commission's Division of Hydropower Licensing. The Environmental Report must contain the following information, *commensurate with the scope of the project:*

(1) *General Description of the Locale.* The applicant must provide a general description of the environment of the proposed project area and its immediate vicinity. The description must include location and general information helpful to an understanding of the environmental setting.

(2) *Report on Water Use and Quality.* The report must discuss water quality and flows and contain baseline data sufficient to determine the normal and seasonal variability, the impacts expected during construction and operation, and any mitigative, enhancement, and protective measures proposed by the applicant. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality and quantity in the affected stream or other body of water. The report must include:

(i) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes;

(ii) A description of the seasonal variation of existing water quality for any stream, lake, or reservoir that would be affected by the proposed project, including (as appropriate) measurements of: significant ions, chlorophyll *a*, nutrients, specific conductance, pH, total dissolved solids, total alkalinity,

total hardness; dissolved oxygen; bacteria; temperature, suspended sediments, turbidity and vertical illumination;

(iii) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(iv) A quantification of the anticipated impacts of the proposed construction and operation of project facilities on water quality and downstream flows, such as temperature, turbidity and nutrients;

(v) A description of measures recommended by Federal and state agencies and the applicant for the purpose of protecting or improving water quality and stream flows during project construction and operation; an explanation of why the applicant has rejected any measures recommended by an agency; and a description of the applicant's alternative measures to protect or improve water quality stream flow;

(vi) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams; a description of anticipated impacts on groundwater and measures proposed by the applicant and others for the mitigation of impacts on groundwater; and

(vii) As an appendix, either:

(A) A copy of the water quality certificate (or agency statement that such certification is waived) as described in Section 401 of the Federal Water Pollution Control Act (Clean Water Act) [*see* 33 U.S.C. 134]; or

(B) A copy of a dated letter from the applicant to the appropriate agency requesting such certification;

(3) *Report on Fish, Wildlife, and Botanical Resources.* The applicant must provide a report that describes the fish, wildlife, and botanical resources in the vicinity of the proposed project; expected impacts of the project on these resources; and mitigation, enhancement, or protection measures proposed by the applicant. The report must be prepared in consultation with the state agency or agencies with responsibility for these resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the proposed project may affect anadromous, estuarine, or marine fish resources), and any state or Federal agency with managerial authority over any part of the proposed project lands. The report must contain:

(i) A description of existing fish, wildlife, and plant communities of the proposed project area and its vicinity, including any downstream areas that may be affected by the proposed project and the area within the transmission line corridor or right-of-way. A map of vegetation types should be included in the description. For species considered important because of their commercial

or recreational value, the information provided should include temporal and spatial distributions and densities of such species. Any fish, wildlife, or plant species proposed or listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service [*see* 50 CFR 17.11 and 17.12] must be identified;

(ii) A description of the anticipated impacts on fish, wildlife and botanical resources of the proposed construction and operation of project facilities, including possible changes in size, distribution, and reproduction of essential population of these resources and any impacts on human utilization of these resources;

(iii) A description of any measures or facilities recommended by state or Federal agencies for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or enhancement of these resources, the impact on threatened or endangered species, and an explanation of why the applicant has determined any measures or facilities recommended by an agency are inappropriate as well as a description of alternative measures proposed by applicant to protect fish, wildlife and botanical resources; and

(iv) The following materials and information regarding any mitigation measures or facilities, identified under clause (iii), proposed for implementation or construction:

(A) Functional design drawings;

(B) A description of proposed operation and maintenance procedures for any proposed measures or facilities;

(C) An implementation, construction and operation schedule for any proposed measures or facilities;

(D) An estimate of the costs of constuction, operation, and maintenance of any proposed facilities or implementation of any measures;

(E) A statement of the sources and amount of financing for mitigation measures or facilities; and

(F) A map or drawing showing, by the use of shading, crosshatching or other symbols, the identity and location of any proposed measures or facilities.

(4) *Report on Historic and Archeological Resources.* The applicant must provide a report that discusses any historical and archeological resources in the proposed project area, the impact of the proposed project on those resources and the avoidance, mitigation, and protection measures proposed by the applicant. The report must be prepared in consultation with the State Historic Preservation Officer (SHPO) and the National Park Service of the U.S. Department of Interior. The report must contain:

(i) A description of any discovery measures, such as surveys, inventories, and limited subsurface testing work, recommended by the specified state and Federal agencies for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that would be affected by construction and operation of the proposed project, together with a statement of the applicant's position regarding the acceptability of the recommendations;

(ii) The results of surveys, inventories, and subsurface testing work recommended by the state and Federal agencies listed above, together with an explanation by the applicant of any variations from the survey, inventory, or testing procedures recommended;

(iii) An identification (without providing specific site or property locations) of any historic or archaeological site in the proposed project area, with particular emphasis on sites or properties either listed in, or recommended by the SHPO for inclusion in, the National Register of Historic Places that would be affected by the construction of the proposed project;

(iv) A description of the likely direct and indirect impacts of proposed project construction or operation on sites or properties either listed in, or recommended as eligible for, the National Register of Historic Places;

(v) A management plan for the avoidance of, or mitigation of, impacts on historic or archaeological sites and resources based upon the recommendations of the state and Federal agencies listed above and containing the applicant's explanation of variations from those recommendations; and

(vi) The following materials and information regarding the mitigation measures described under paragraph (f)(4)(v) of this section:

(A) A schedule for implementing the mitigation proposals;

(B) An estimate of the cost of the measures; and

(C) A statement of the sources and extent of financing.

(vii) The applicant must provide five copies (rather than the fourteen copies required under § 4.31(b) of the Commission's regulations) of any survey, inventory, or subsurface testing reports containing specific site and property information, and including maps and photographs showing the location and any required alteration of historic and archaeological resources in relation to proposed project facilities.

(5) *Report on Socio-Economic Impacts.* The applicant must provide a report which identifies and quantifies the impacts of constructing and operating the proposed project on employment, population, housing, personal income, local governmental services, local tax revenues and other factors within the towns and counties in the vicinity of the proposed project. The report must include:

(i) A description of the socioeconomic impact area;

(ii) A description of employment, population and personal income trends in the impact area;

(iii) An evaluation of the impact of any substantial in-migration of people on the impact area's governmental facilities and services, such as police, fire, health and educational facilities and programs;

(iv) On-site manpower requirements and payroll during and after project construction, including a projection of total on-site employment and construction payroll provided by month;

(v) Numbers of project construction personnel who:

(A) Currently reside within the impact area;

(B) Would commute daily to the construction site from places situated outside the impact area; and

(C) Would relocate on a temporary basis within the impact area;

(vi) A determination of whether the existing supply of available housing within the impact area is sufficient to meet the needs of the additional population;

(vii) Numbers and types of residences and business establishments that would be displaced by the proposed project; procedures to be utilized to acquire these properties, and types and amounts of relocation assistance payments that would be paid to the affected property owners and businesses; and

(viii) A fiscal impact analysis evaluating the incremental local government expenditures in relation to the incremental local government revenues that would result from the construction of the proposed project. Incremental expenditures may include, but are not limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(6) *Reports on Geological and Soil Resources.* The applicant must provide a report on the geological and soil resources in the proposed project area and other lands that would be directly or indirectly affected by the proposed action and the impacts of the proposed project on those resources. The information required may be supplemented with maps showing the location and description of conditions. The report must contain:

(i) A detailed description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources;

(ii) A detailed description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(iii) A description showing the location of existing and potential geological and soil hazards and problems, including earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, and mass soil movement, and an identification of any large landslides or potentially unstable soil masses which could be aggravated by reservoir fluctuation;

(iv) A description of the anticipated erosion, mass soil movement and other impacts on the geological and soil resources due to construction and operation of the proposed project; and

(v) A description of any proposed measures of facilities for the mitigation of impacts on soils.

(7) *Report on Recreational Resources.* The applicant must prepare a report containing a proposed recreation plan describing utilization, design and development of project recreational facilities, and public access to the project

area. Development of the plan should include consideration of the needs of the physically handicapped. Public and private recreational facilities provided by others that would abut the project should be noted in the report. The report must be prepared in consultation with appropriate local, regional, state and Federal recreation agencies and planning commissions, the National Park Service of the U.S. Department of the Interior, and any other state or Federal agency with managerial responsibility for any part of the project lands. The report must contain:

(i) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in:

(A) The National Wild and Scenic Rivers Systems (*see* 16 U.S.C. § 1271);

(B) The National Trails System (*see* 16 U.S.C. § 1241); or

(C) A wilderness area designated under the Wilderness Act (*see* 16 U.S.C. § 1132);

(ii) A detailed description of existing recreational facilities within the project vicinity, and the public recreational facilities which are to be provided by the applicant at its sole cost or in cooperation with others no later than 3 years from the date of first commercial operation of the proposed project and those recreation facilities planned for future development based on anticipated demand. When public recreation facilities are to be provided by other entities, the applicant and those entities should enter into an agreement on the type of facilities to be provided and the method of operation. Copies of agreements with cooperating entities are to be appended to the plan;

(iii) A provision for a shoreline buffer zone that must be within the project boundary, above the normal maximum surface elevation of the project reservoir, and of sufficient width to allow public access to project lands and waters and to protect the scenic, public recreational, cultural, and other environmental values of the reservoir shoreline;

(iv) Estimates of existing and future recreational use at the project, in daytime and overnight visitation (recreation days), with a description of the methodology used in developing these data;

(v) A development schedule and cost estimates of the construction, operation, and maintenance of existing, initial, and future public recreational facilities, including a statement of the source and extent of financing for such facilities;

(vi) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the proposed project, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency; and

(vii) A drawing or drawings, one of which describes the entire project area, clearly showing:

(A) The location of project lands, and the types and number of existing recreational facilities and those proposed for initial development, including access roads and trails, and facilities for camping, picnicking, swimming, boat docking and launching, fishing and hunting, as well as provisions for sanitation and waste disposal;

(B) The location of project lands, and the type and number of recreational facilities planned for future development;

(C) The location of all project lands reserved for recreational uses other than those included in paragraphs (f)(7)(vii)(A) and (B) of this section; and

(D) The project boundary (excluding surveying details) of all areas designated for recreational development, sufficiently referenced to the appropriate Exhibit G drawings to show that all lands reserved for existing and future public recreational development and the shoreline buffer zone are included within the project boundary. Recreational cottages, mobile homes and year-round residences for private use are not to be considered as public recreational facilities, and the lands on which these private facilities are to be developed are not to be included within the proposed project boundary.

(8) *Report on Aesthetic Resources.* The applicant must provide a report that describes the aesthetic resources of the proposed project area, the expected impacts of the project on these resources, and the mitigation, enhancement or protection measures proposed. The report must be prepared following consultation with Federal, state, and local agencies having managerial responsibility for any part of the proposed project lands or lands abutting those lands. The report must contain:

(i) A description of the aesthetic character of lands and waters directly and indirectly affected by the proposed project facilities;

(ii) A description of the anticipated impacts on aesthetic resources from construction activity and related equipment and material, and the subsequent presence of proposed project facilities in the landscape;

(iii) A description of mitigative measures proposed by the applicant, including architectural design, landscaping, and other reasonable treatment to be given project works to preserve and enhance aesthetic and related resources during construction and operation of proposed project facilities; and

(iv) Maps, drawings and photographs sufficient to provide an understanding of the information required under this subparagraph. Maps or drawings may be consolidated with other maps or drawings required in this exhibit and must conform to the specifications of § 4.32.

(9) *Report on Land Use.* The applicant must provide a report that describes the existing uses of the proposed project lands and adjacent property, and those land uses which would occur if the project is constructed. The report may reference the discussions of land uses in other sections of this exhibit. The report must be prepared following consultation with local and state zoning or land management authorities, and any Federal or state agency with managerial responsibility for the proposed project or abutting lands. The report must include:

(i) A description of existing land use in the proposed project area, including identification of wetlands, floodlands, prime or unique farmland as designated by the Soil Conservation Service of the U.S. Department of Agriculture, the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or subject to control by government agencies;

(ii) A description of the proposed land uses within and abutting the project boundary that would occur as a result of development and operation of the project; and

(iii) Aerial photographs, maps, drawings or other graphics sufficient to show the location, extent and nature of the land uses referred to in this section.

(10) *Alternative Locations, Designs, and Energy Sources.* The applicant must provide an environment assessment of the following:

(i) Alternative sites considered in arriving at the selection of the proposed project site;

(ii) Alternative facility designs, processes, and operations that were considered and the reasons for their rejection;

(iii) Alternative electrical energy sources, such as gas, oil, coal, and nuclear-fueled power plants; purchased power or diversity exchange, and other conventional and pumped-storage hydroelectric plants; and

(iv) The overall consequences if the license application is denied.

(11) *List of Literature.* Exhibit E must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) *Exhibit F* consists of general design drawings of the principal project works described under paragraph (b) of this section (Exhibit A) and supporting information used as the basis of design. If the Exhibit F submitted with the application is preliminary in nature, applicant must so state in the application. The drawings must conform to the specifications of § 4.32.

(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project, including:

(i) Plans (overhead view);

(ii) Elevations (front view);

(iii) Profiles (side view); and

(iv) Sections.

(2) The applicant may submit preliminary design drawings with the application. The final Exhibit F may be submitted during or after the licensing process and must show the precise plans and specifications for proposed structures. If the project is licensed on the basis of preliminary designs, the applicant must submit a final Exhibit F for Commission approval prior to commencement of any construction of the project.

(3) *Supporting Design Report.* The applicant must furnish, at a minimum, the following supporting information to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions and must submit such information in a separate report at the time the application is filed. The report must include:

(i) An assessment of the suitability of the site and the reservoir rim stability based on geological and subsurface investigations, including investigations of soils and rock borings and tests for the evaluation of all foundations and construction materials sufficient to determine the location and type of dam structure suitable for the site;

(ii) Copies of boring logs, geology reports and laboratory test reports;

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material;

(iv) Stability and stress analyses for all major structures and critical abutment slopes under all probable loading conditions, including seismic and hydrostatic forces induced by water loads up to the Probable Maximum Flood as appropriate; and

(v) The bases for determination of seismic loading and the Spillway Design Flood in detail sufficient detail to independent staff evaluation.

(4) The applicant must submit five copies (not fourteen copies as required under § 4.31(b) of this part) of the supporting design report described in paragraph (g)(3) of this section at the time preliminary and final design drawings are submitted to the Commission for review. If the report contains preliminary drawings, it must be designated a "Preliminary Supporting Design Report."

(h) *Exhibit G* is a map of the project that must conform to the specifications of § 4.32. If more than one sheet is used, the sheets must be numbered consecutively, and each sheet must bear a small insert sketch showing the entire project and indicating that portion of the project depicted on that sheet. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within a reasonable period following the completion of project construction, a final Exhibit G showing the extent of such changes. The map must show:

(1) *Location of the project and principal features.* The map must show the location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects, such as roads, transmission lines or other structures, that can be noted on the map and recognized in the field. The map must also show the relative locations and physical interrelationships of the principal project works and other features described under paragraph (b) of this section (Exhibit A).

(2) *Project boundary.* The map must show a project boundary enclosing all of the principal project works and other features described under paragraph (b) of this section (Exhibit A). If accurate survey information is not available at the time the license application is filed, the applicant must so

state and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as flowage, public recreation, shoreline control, or protection of environmental resources. If the boundary is on land covered by a public land survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

(i) *Impoundments.* The boundary around a project impoundment must be no more than 200 feet (horizontal measurement) from the exterior margin of the reservoir, defined by the normal maximum surface elevation, except where deviations may be necessary in describing the boundary according to the method used, or where additional lands are necessary for project purposes, such as public recreation. The boundary may be described by any one or a combination of the following methods:

(A) Contour lines, including the contour elevation [preferred method]; or

(B) Specified courses and distances (metes and bounds); or

(C) If the project lands are covered by a public land survey, lines parallel to the lines of the survey.

(ii) *Continuous features.* The boundary around linear project features such as access roads, transmission lines and conduits may be described by specified distances from center lines or offset lines of the survey. The width of such corridors must not exceed 200 feet, unless good cause is shown for a greater width. Several sections of a continuous feature may be shown on a single sheet, with information showing the sequence of continuous sections.

(iii) *Noncontinuous features.* The boundary around noncontinuous project works such as dams, spillways and powerhouses must enclose only those lands that are necessary for safe and efficient operation and maintenance of the project, or for other specified project purposes, such as public recreation or protection of environmental resources. The boundary may be described by any one or a combination of the following methods:

(A) Contour lines; or

(B) Specified courses and distances; or

(C) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey.

(3) *Federal lands.* Any public lands and reservations of the United States ("Federal lands") [see 16 U.S.C. 796(1) and (2)] that are within the project boundary, such as lands administered by the U.S. Forest Service, Bureau of Land Management, or National Park Service, or Indian tribal lands, and the boundaries of those Federal land[illegible]st be identified as such on the map by:

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(i) Legal subdivisions of a public land survey of the affected area (a protraction of identified township and section lines is sufficient for this purpose); and

(ii) The Federal agency, identified by symbol or legend, that maintains or manages each identified subdivision of the public land survey within the project boundary; or.

(iii) In the absence of a public land survey, the location of the Federal lands according to the distances and directions from fixed monuments or physical features. When a Federal survey monument or a Federal bench mark will be destroyed or rendered unusable by the construction of project works, as least two permanent, marked witness monuments or bench marks must be established at accessible points. The maps show the location (and elevation, for bench marks) of the survey monument or bench mark which will be destroyed or rendered unusable, as well as of the witness monuments or bench marks. Connecting courses and distances from the witness monuments or bench marks to the original must also be shown.

(4) *Non-Federal Lands.* For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:

(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired to be required by easement or lease.

CIRI, villages inholders

DNR

.01 46 F.R. 55926 (November 13, 1981).

.05 ***Historical record.***—Section 4.41 read as follows until it was amended in 46 F.R. 55926 (11/13/81), effective 12/13/81:

§ 4.41 Required exhibits.

The following exhibits must be filed as part of the application for a license. Any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter. Exhibit A may be incorporated in an application by reference where an applicant files applications for several projects one of which already contains an Exhibit A or, in any case, where an applicant has filed an Exhibit A within 10 years preceding the filing of the application.

Exhibit A. If applicant is a corporation: One copy of charter or certificate and articles of incorporation, with all the amendments thereto, duly certified by the secretary of state of the State where organized, or other proper authority, and the required number of additional uncertified copies; one certified and the required number of additional uncertified copies of the by-laws; and six copies of the certificate of organization with one additional copy for each interested State commission in conformity with § 131.3 of this chapter. If the project is located in another State than that in which the corporation is organized, a certificate and the required additional copies shall be submitted from the secretary of state or other proper authority of the State in which the project is located, showing compliance with the laws relating to foreign corporations.

If the applicant is a State: Copies of the laws under authority of which the application is made, or reference thereto.

If the applicant is a municipality as defined in the Federal Power Act: One copy of its charter or other organization papers, duly certified by the secretary of state of the State in which it is located, or other proper authority, and the required number of additional uncertified copies. Copies of, or

reference to the State laws authorizing the operations contemplated by the application.

If the applicant is a natural person: An affidavit by applicant that he is a citizen of the United States, and the required number of additional copies thereof.

If the applicant is an association: One verified copy and the required number of additional copies of its articles of association. If there are no articles of association, that fact shall be stated over the signature of each member of the association and the required additional copies of the statement submitted. A complete list of members and a statement of the citizenship of each must be given in an affidavit by one of them, and an original and the required number of additional copies submitted.

Exhibit B. Copy of all minutes, resolutions of stockholders or directors, or others representatives of the applicant, properly attested, and the required additional copies, authorizing the filing of application.

Exhibit C. If special hydroelectric, waterpower, or irrigation laws of the State or States involved pertain to the construction of the applicant's project, submit copies of such laws or reference thereto. (General State incorporation acts are not desired.)

Exhibit D. Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.

Exhibit E. The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use the water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and the required additional uncertified copies shall be submitted.

Exhibit F. Full details as to lands owned by applicant, and as to applicant's plans for acquiring title to or the right to occupy and use lands other than those owned by the applicant or by the United States, necessary or essential for carrying out the project covered by the application. If the applicant, at the time of filing application, has by easement, lease, franchise, or otherwise acquired the right to occupy and use lands owned by others, the statement should show with respect to each separate right of occupancy and use—

(1) From whom acquired.

(2) The date acquired.

(3) Nature and extent of the right acquired.

(4) Whether perpetual or limited term.

(5) If of limited term, when such term expires.

(6) For each parcel acquired, the area inside of the project boundary and the area outside of the project boundary, and a reference to Exhibit K.

Exhibit G. Statement showing the financial ability of the applicant to carry out the project applied for, together with a statement or explanation of the proposed method of financing the construction thereof.

Exhibit H. A statement of the proposed operation of the project worked during times of low, normal, and flood flows on the stream, including a statement of reservoir elevations and the minimum flow proposed to be released, during the recreation season and periods of low water, and, to the extent possible, full exposition of any proposed use of the project for the conservation and utilization in the public interest of the available water resources for the purposes of power, navigation, irrigation, reclamation, flood control, recreation, fish, wildlife, and municipal water supply. A statement of the effect, if any, the project would have on water quality, in the reservoir or downstream, plans for maintaining or improving water quality and a statement on the extent of consultation and cooperation with Federal, State, and local agencies having responsibilities for water quality control. A statement as to whether in relation to existing

and proposed future projects in the same or related watersheds, the fullest practicable utilization of the water, storage possibilities and head available will be made possible. Furnish operating rule for reservoirs with draw-down and usable storage; State criteria for determining spillway capacity. To the extent that aspects of water quality, referred to herein, related to fish and wildlife and recreation are covered in Exhibit S or in Exhibit R, respectively, a specific reference to Exhibit S or Exhibit R will suffice.

Exhibit I. Estimate of the dependable capacity and average annual energy output to be generated by the project (dependable capacity for purposes of this section is equal to the amount of capacity from an alternative additional source which would be required to meet the load during the critical flow period for the system if the proposed hydro-project were not constructed). Specify the period of critical stream flow used in determining the dependable capacity and describe the load into which the power generated by the project will be utilized. Furnish the following engineering data: A flow duration curve indicating the period of record and gaging stations used in deriving this curve, a tail-water rating curve, a curve showing etimated plant capability v. as head, and an outline of plan for future proposed hydro-projects on the stream involved and their approximate location and ultimate installed capacity. When pertinent, state assumptions used for evaporation, leakage, and head losses.

Exhibit J. General map covering the entire project area, showing on a single sheet and to an appropriate scale the location of the following:

(1) Principal structures and other important features of the project, including such roads, railways, tramways, and bridges as it is proposed shall become part of the project works and be placed under the license.

(2) All transmission lines, substations, switchyards, and telephone lines, which it is proposed shall become a part of the project works and be placed under license, as well as general layout of the transmission system, if any, with which the project may be connected, indicating prominently by appropriate symbol the portion or portions of the transmission lines or system covered by application for license.

(3) State and county lines, reservations of the United States, towns, streams, stream gauging stations, railroads, power plants, irrigation systems and other features in the vicinity of the proposed development, information concerning which will aid in arriving at a general comprehension of the project.

(4) Reference to the detail map (Exhibit K) indicating by outline the portion shown on each sheet.

(5) If all features cannot be shown with sufficient distinctness on one sheet, two general maps may be furnished, one for the power plant and appurtenant works, and one for the transmission system. (See specifications for drawings § 4.32.)

Exhibit K. Detail map covering entire project area. Scale shall be such as to show clearly, but without unnecessary multiplicity of sheets, the essential details of surveys and of notes as to ownership or right of occupancy of lands within the project area. In general, a scale of approximately 400 feet to the inch is appropriate for features containing a relatively large amount of detail, and scales of 1,000 or 2,000 feet to the inch where there is little detail, as is frequently the case with respect to transmission and telephone lines, roads, and railways. Elevations shall be tied to Government bench marks whenever available, and shall be referred to mean sea level except that in the case of projects in navigable waters having a datum accepted for local use by the Office of the Chief of Engineers, Department of the Army, such local datum shall be used. If more than one sheet is used the sheets shall be numbered consecutively, and each shall bear a small diagram showing the entire map and indicating the portions shown on each sheet. Several sections of a conduit, transmission line, telephone line, road, railway, etc., may be shown upon a single sheet, each so placed or limited as to avoid crowding or confusion. Except to the extent and in such particulars as the requirements may be expressly waived or modified by the Commission the detail map to be filed as this exhibit shall conform to the specifications for drawings, § 4.32, and the following requirements:

(1) It shall show the project area and the project boundary.

(i) The project boundary for reservoirs may be shown by metes and bounds, or by a contour, or if the project lands are covered by the public land survey by lines along or parallel to lines of the public land survey. Where a flowage easement or right of use involving other than a conveyance in fee for a reservoir applies to a whole tract of land and is not otherwise defined, the project boundary may enclose the entire tract.

(ii) The project boundary for continuous structures, such as transmission lines,

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telephone and control lines, conduits, roads, etc., may be described by center or offset lines of survey specifying distances of the project boundary therefrom.

(iii) Except with respect to lands necessary or appropriate for recreation purposes, for which it is recognized that additional project area will generally be required, the project boundary shall be no more than 200 feet (horizontal measurement) from the exterior margin (in general, high-water level) of reservoirs, nor shall the width of the project area for canals, ditches, pipelines, transmission lines, roads, and other so-called continuous structures exceed 200 feet, unless satisfactory reasons are given to the contrary. The project boundary shall be shown on the map in such manner that it can be readily identified on the ground. There shall be shown the location and description of monuments and other marks with reference lines therefrom to permanent objects in accordance with good practice in land surveying.

(iv) If the project boundary is located on lands covered by the public land survey there shall be shown a reference line from the initial point of the project boundary survey by distances and bearings to an established corner if one can be identified within a distance of 2 miles. At each intersection of the project boundary with an identified line of the public land survey, there shall be shown the station number on the boundary survey, and the bearing and distance to the nearest identified corner in each direction on the public land survey line crossed, if such distance does not exceed one mile. The station number of the boundary survey shall be shown at points of entering and leaving lands of the United States or lands in which the United States has an interest.

(v) The project boundary, if described other than by a contour, shall be accurately plotted on the map with courses and distances fully and legibly shown either along the plotted boundary or in tabular form on the map. The project boundary if described by a contour shall be accurately plotted on the map with such data as completely and accurately fixes its location and permits its recovery in the field.

(vi) If a contour project boundary is located on lands covered by the public land survey, a permanent monument shall be established at each intersection of the boundary with an identified line of the public land survey. The map shall have the location of all such monuments with the bearing distance from each monument to nearest identified corner in each direction if such distance does not exceed one mile.

(vii) Wherever a Federal survey monument will be destroyed or rendered unusable by the proposed development, at least two permanent, marked witness monuments shall be established at accessible points. The map shall show a description of the monument destroyed or rendered unusable and location of the witness monuments with the connecting courses and distances to the original monument. Similarly where Federal bench marks are destroyed or rendered unusable, witness bench marks shall be established at accessible points. The map shall show the location and elevation of the original and witness bench marks with connecting courses and distances.

(viii) There shall be shown the status as to ownership, and the boundary lines and area of each parcel of land within, or partly within, the project area, designating separately lands owned by the applicant, lands to be acquired by the applicant, lands for which the applicant holds rights of use and occupancy for purposes of the project, reservations (indicating separately each reservation), and public lands (indicating separately lands, full title to which remains in the United States, and lands in which the United States retains only an interest). Where the project works occupy lands not owned by the applicant, but as to which the applicant holds only an easement, franchise, lease, or other right of occupancy and use, the map shall show the nature of such right and shall give appropriate reference to Exhibit F for further details.

(ix) Each map shall have thereon a statement by the person who makes or supervises the survey that the survey was accurately made and is correctly shown on the map. Each map shall have thereon a statement that the person who makes or supervises the survey has been employed by the applicant to make the survey.

(2) The location shall be accurately shown of all project works, such as—

(i) Dams.

(ii) Reservoirs. Show the flow lines for maximum and minimum water levels and for elevation of spillway crest, and give tables or diagrams of areas and capacities for maximum and minimum water levels and for each contour line.

(iii) Water conduits. Show center line, grade, and elevation of bottom at each change of grade, and designate lengths of each type of conduit, i.e., flume, ditch tunnel, pipe, etc.

(iv) Powerhouses, substations, and switchyards.

(v) Transmission lines and appurtenances, telephone lines, roads, railways, trails, tramways and bridges.

(vi) Navigation structures.

(vii) Channel approaches to navigation structures. Indicate elevation of bottom for distance of not less than 1,000 feet above and below the structures.

(3) Show contour lines with contour intervals of not more than 10 feet for the entire project area, except such portions as will be occupied only by such project works as are enumerated in (2)(v), or as will be included in reservoirs below the minimum elevation to which the water may be drawn down. Profiles of tunnel lines may be substituted for contours along such lines. (See specifications for drawings in § 4.42.)

Exhibit L. General design drawings showing plans, elevation, and sections of all principal structures and apppurtenant works, or other features of the project. These drawings shall be in sufficient detail and shall be accompanied by sufficient information relating to controlling factors (such as character of foundations and explorations thereof, materials and types of construction, important elevations, gradation of filter and riprap material, design and ultimate strengths for concrete and steel, stress and/or stability analysis for important structures, water levels; spillway rating curves. etc.) to enable the Commission to have a full understanding of the project and to check safety, adequacy, and desirability in the development of the resources involved.

Scales are not specified, but it is desired that they be no larger than necessary to show clearly the information required. Drawings should be simple. Details are desired only as necessary to show features of importance in determining safety, adequacy and suitability of design. Working drawings are not desired as part of application, but should be prepared for purposes of construction and retained as a record of the work when completed. In this exhibit shall be included—

(1) Dams and appurtenances, such as spillways fishways, outlet works, etc.

(2) Navigation structures and approaches thereto, including locks, lock gates, operating machinery, etc.

(3) Conduits including forebays, intake works, surge tanks, and other pressure relief devices, etc.

(4) Powerhouses and substations (see) specifications as in § 4.42)

Exhibit M. General descriptions of mechanical, electrical, and transmission equipment and their appurtenances in sufficient detail to enable the Commission to have a full understanding of the project, to determine the installed capacity in horsepower and kilowatts, and to determine the safety of the project works and their adequacy and suitability for the development and utilization of the resources involved, also proposed name plate ratings for generators and turbines, and when required by the Commission or the Secretary performance data for generators and turbines and general specifications of mechanical, electrical, and transmission equipment.

Exhibit N. Estimate of the cost of developing the project including the following items:

Land and land rights;

Power plant structures and inmprovements;

Reservoirs, dams and waterways;

Water wheels, turbines and generators;

Accessory electric equipment;

Miscellaneous power plant equipment;

Roads, railroads, and bridges (permanent facilities); and

Transmission facilities.

When required by the Commission or the Secretary, under each item show quantities, unit costs and total costs; indirect construction costs such as construction equipment, camp and commissary, etc. if the work is not to be done under contract; or if under contract include the indirect costs among the various cost items above; overhead construction costs such as engineering, supervision of construction, legal expense, taxes allowance for funds used during construction, administrative and general expense, and a contingent item, if necessary.

When required by the Commission or the Secretary, furnish an estimate of the annual cost including the following:

Rate of return or interest;

Local, State and Federal taxes;

Depreciation;

Insurance; and

Operation, maintenance and general or administrative expense.

When required by the Commission or the Secretary, furnish information as to the method used in evaluating the power output from the project or the cost of obtaining an

equivalent amount of power from an alternate source expressed in terms of dollars per kilowatt, year of capacity and mills per kilowatt hour of average annual energy.

Exhibit O. Detailed statement of the time desired for beginning and completing construction of the projects works. If the ultimate development is to be completed and put into operation in two or more parts, the time desired for beginning and completing the construction of each part shall be given.

Exhibit P. (Not required under this section.)

Exhibit Q. (Not required under this section.)

Exhibit R. A proposed plan for full public utilization of project waters and adjacent lands for recreational purposes consistent with proper operation of the project for the development of water power and other public purposes. The exhibit shall include maps and drawings as follows:

(1) A map or maps of suitable and appropriate scale, one of which shows the entire project area, clearly delineating by use of symbols, shading, crosshatching, etc.:

(a) The location of project lands and waters (i) already developed, (ii) designated for initial development, and (iii) those ultimately planned for recreational use.

(b) The location, type, and number of the various recreational facilities in existence and those planned for immediate development, i.e., access roads and trails, and facilities for camping, picknicking, bathing, boating and boat launching, fishing, hunting, and similar recreational activities, as well as provisions for sanitation and waste disposal.

(c) The location, type, and number of the various recreational facilities planned for future development according to anticipated demand. (These plans may be revised during the license period subject to approval by the Commission.)

(d) The project boundary (excluding surveying details) at all areas designated for recreational use and development, referenced sufficiently to the appropriate Exhibit K maps, to show that all lands reserved for existing and proposed recreational development are included within the project boundary.

(2) On the map, or on separate sheets to be filed as part of the exhibit, the following information:

(a) Which of the facilities shown are to be provided by the applicant or licensee at its sole cost, or in cooperation with others, consistent with the economics of the project and the potential recreational opportunities.

(b) Estimated present or initial recreational use and projected ultimate recreational use, in daytime or overnight visits.

(c) A schedule of initial and future recreational development and cost estimates of any existing, and of initial and projected future, development.

(d) The nature and extent of consultation and cooperation with the Bureau of Outdoor Recreation of the Department of the Interior, with Federal agencies having supervision over lands of the United States affected by the project, and with appropriate State and local agencies. Copies of cooperative agreements entered into with such agencies shall be included as part of the Exhibit R.

(3) Except to the extent and in such particulars as the requirements may be expressly waived or modified by the Commission. Exhibit R maps are to be filed in conformity with the specifications for drawings contained in § 4.32.

Exhibit S. A report on the effect, if any, of the project upon the fish and wildlife resources in the project area or in other areas affected by the project and proposals for measures considered necessary to conserve and, if practicable, to enhance fish and wildlife resources affected by the project. The exhibit shall include functional design drawings of any fish ladders proposed to be constructed in compliance with section 18 of the Federal Power Act, such other facilities or developments as may be necessary for the protection, conservation, improvement and mitigation of losses of fish and wildlife resources in accordance with section 10(a) of the Act, and cost estimates for such facilities and developments. The Applicant shall prepare this exhibit on the basis of studies made after consultation and in cooperation with the U.S. Fish and Wildlife Service, Department of the Interior, and appropriate state fish and wildlife agencies and in the case of public lands, advise Federal Agencies having jurisdictional responsibilities therefor of its proposed plans. The exhibit shall include a statement on the nature and extent of applicant's consulation and cooperation with the above agencies. To the extent those aspects of fish and wildlife related to recreation are covered in Exhibit R, a specific reference to Exhibit R will suffice.

Exhibit T. A statement setting forth why the development and operation of the project by applicant rather than the Federal Government would be best adapted to a

comprehensive plan for improving or developing the waterway or waterways within the meaning of section 10(a) of the Act and why the development of the water resources by the Federal Government is not necessary to achieve these public purposes. (This exhibit is not required in applications for relicensing of State or municipal projects.)

Exhibit U. This exhibit shall (unless specially requested during the course of processing of an application) be applicable to applications for projects both on initial licensing and relicensing, having or proposing to have 25,000 kilowatts or more of capacity. It shall consist of a detailed statement showing: the manner in which any power or energy developed or to be developed by the project; or, in the case of an application for relicensing of an existing project, any additional power or energy proposed to be developed, will be utilized, and the manner in which any additional power or energy that could be economically developed might be utilized: (a) As a part of applicant's electric system; (b) as a part of the electric systems of others with which applicant electrically interconnects and coordinates; and (c) as a part of the electric systems of others with which applicant could electrically interconnect and coordinate upon an economic basis.

Among the details to be so provided, the exhibit shall identify by FPC rate schedule designation (or furnish as part of the exhibit, if not on file with the Commission, including any agreements) all of the undertakings of the applicant to interconnect and coordinate its generation and transmission facilities with those of others for purposes of sales, purchases, or exchanges of various types of capacity, energy, transmission, or other servicing including, but not necessarily limited to, all requirements service, partial requirements service, hydrostorage and hydrothermal pumped back operations, economy energy transactions, equipment maintenance scheduling, reserve sharing, frequency control and point to point or displacement deliveries of electric power and energy.

The exhibit shall inter alia state the following: (1) Nature and extent of the applicant's consultation with other electric systems, power pools, or power planning groups in formulating its plan for development and utilization of the optimum output of the project, including the disposition of excess power and energy from the project to others than the applicant and the terms of any such disposition; (2) the nature and extent of applicant's activities in correlating the generating and transmission capability of the project with the needs and resources of its system and of other interconnected systems. Such statements shall set forth full details of the load, generation, and time periods employed. With respect to information on dependable capacity required in Exhibit I, applicants shall furnish a summer and winter load curve either on a weekly or monthly basis, showing the contribution that the project would make to the dependable capacity on the applicant's system as well as the regional system load on which it would or could be used and indicating any change in dependable capacity of the project with load growth at appropriate intervals from and after the date of the application or initial operation.

Exhibit V. A map, together with text, photographs or drawings as may be needed to describe the location of, and architectural design, landscaping, and othe reasonable treatment to be given to project works, including compliance with the Commission's "Guidelines for the Protection of Natural, Historic, Scenic, and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities", in the interest of protecting and enhancing the natural, historic, and scenic values and resources of the project area. The exhibit shall include measures to be taken during construction and operation of the project works including temporary facilities such as roads, borrow and fill areas, and clearing of the reservoir area to prevent or minimize damage to the environment and to preserve and enhance the project's scenic values, together with estimated costs of such treatments, location, and design. Applicant shall prepare this exhibit, on the basis of studies made after consultation with, or consideration of comments submitted by, Federal, State, and local agencies or organizations and individuals having an interest in the natural, historic, and scenic values of the project area, and shall set forth therein the nature and extent of this consultation or consideration. The exhibit shall include the location of existing rights-of-way belonging either to the applicant or others which could practically by used in routing the projects transmission lines. The applicant shall submit a statement indicating which of such rights-of-way it intends to use and explaining why the other rights-of-way shown are not to be used. Where any project works will or may be located sufficiently near to have a significant effect upon any of the national historic places listed in the National Register of Historic Places maintained by the Secretary

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of the Interior, or any park, scenic, natural, or recreational area officially designated by duly constituted public authorities, applicant shall state the reason for such location and efforts being taken to minimize the adverse effects of that location. Whenever such historic places are affected by the project, applicant shall locate the project by latitude and longitude. To the extent that these requirements have been fulfilled in other exhibits, a specific reference to the applicable parts of those exhibits will suffice.

Exhibit W. Applications covered by 18 CFR 2.81(a) shall be accompanied by an applicant's environmental report. Such report shall comply with the detailed requirements set down in 18 CFR 2.80—2.81, and shall include a one-page summary of the report. Furthermore, such report with its supporting papers shall be self-contained.

[¶ 12,042]

§ 4.42 Specifications for drawings. [Revoked.]

.01 44 F.R. 61328 (October 25, 1979).

.05 *Historical record.*—Section 4.42 originated in Order 175, 19 F.R. 5216 (8/18/54); and was amended in Order 501, 39 F.R. 2266 (1/18/79); and was revoked in Order 54, 44 F.R. 61328 (10/25/79), effective 11/26/79.

[The next page is 11,013.]

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FEDERAL POWER COMMISSION-ORDER 415-C
(Issued December 18, 1972)
STATEMENT OF GENERAL POLICY TO IMPLEMENT PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

§ 2.80 Detailed Environmental Statement.

(a) It shall be the general policy of the Federal Power Commission to adopt and to adhere to the objectives and aims of the National Environmental Policy Act of 1969 (Act) in its regulation under the Federal Power Act and the Natural Gas Act. The National Environmental Policy Act of 1969 requires, among other things, all Federal agencies to include a detailed environmental statement in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

(b) Therefore, in compliance with the National Environmental Policy Act of 1969 the Commission staff shall make a detailed environmental statement when the regulatory action taken by us under the Federal Power Act and Natural Gas Act will have a significant environmental impact. A "detailed statement" prepared in compliance with the requirements of §§ 2.81 through 2.82 of this Part shall fully develop the five factors listed hereinafter in the context of such considerations as the proposed activity's direct and indirect effect on the air and water environment of the project or natural gas pipeline facility; on the land, air, and water biota; on established park and recreational areas; and on sites of natural, historic, and scenic values and resources of the area. The statement shall discuss the extent of the conformity of the proposed activity with all applicable environmental standards. The statement shall also fully deal with alternative courses of action to the proposal and, to the maximum extent practicable, the environmental effects of each alternative. Further, it shall specifically discuss plans for future development related to the application under consideration.

The above factors are listed to merely illustrate the kinds of values that must be considered in the statement. In no respect is this listing to be construed as covering all relevant factors.

The five factors which must be specifically discussed in the detailed statement are:

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(c) (1) To the maximum extent practicable no final administrative action is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment or thirty days after the final text of an environmental statement has been made available to the Council on Environmental Quality and the public.

(c) (ii) Upon a finding that it is necessary and appropriate in the public interest, the Commission may dispense with any time period specified in §§ 2.80-2.82.

§ 2.81 Compliance with the National Environmental Policy Act of 1969 under Part I of the Federal Power Act

(a) All applications for major projects (those in excess of 2,000 horsepower) or for reservoirs only providing regulatory flows to downstream (major) hydroelectric projects under Part I of the Federal Power Act for license or relicense, shall be accompanied by Exhibit W, the applicant's detailed report of the environmental factors specified in § 2.80 and 4.41. All applications for surrender or amendment of a license proposing construction, or operating change of a project shall be accompanied by the applicant's detailed report of the environmental factors specified in § 2.80. Notice of all such applications shall continue to be made as prescribed by law.

(b) The staff shall make an initial review of the applicant's report and, if necessary, require applicant to correct deficiencies in the report. If the proposed action is determined to be a major Federal action significantly affecting the quality of the human environment, the staff shall conduct a detailed independent analysis of the action and prepare a draft environmental impact statement which shall be made available to the Council on Environmental Quality, the Environmental Protection Agency, other appropriate governmental bodies, and to the public, for comment. The statement shall also be served on all parties to the proceeding. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of the availability of the staff's draft environmental statement. Written comments shall be made within 45 days of the date the notice of availability appears in the Federal Register. If any governmental entity, Federal, state, or local, or any member of the public, fails to comment within the time provided, it shall be assumed, absent a request for a specific extension of time, that such entity or person has no comment to make. Extensions of time shall be granted only for good cause shown. All entities filing comments with the Commission will submit ten copies of such comments to the Council on Environmental Quality. Upon expiration of the time for comment the staff shall consider all comments received and revise as necessary and finalize its environmental impact statement which, together with the comments received, shall accompany the proposal through the agency review and decision-making process and shall be made available to the parties to the proceeding, the Council on Environmental Quality, and the public. In the event the proposal is the subject of a hearing the staff's environmental statement will be placed in evidence at that hearing.

(c) Any person may file a petition to intervene on the basis of the staff draft environmental statement. All intervenors taking a position on environmental matters shall file timely comments, in accordance with paragraph (b) of this section, on the draft statement with the Commission including, but not limited to, an analysis of their environmental position in the context of the factors enumerated in § 2.80, and specifying any differences with staff's position upon which intervenor wishes to be heard. Nothing herein shall preclude an intervenor from filing a detailed environmental impact statement.

(d) In the case of each contested application, the applicant, staff, and all intervenors taking a position on environmental matters shall offer evidence for the record in support of their environmental position. The applicant and all such intervenors shall specify any differences with the staff's position, and shall include, among other relevant factors, a discussion of their position in the context of the factors enumerated in § 2.80.

(e) In the case of each contested application, the initial and reply briefs filed by the applicant, the staff and all intervenors taking a position on environmental matters must specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80. Furthermore, the Initial Decision of the Presiding Administrative Law Judge in each case, and the final order of the Commission dealing with the application on the merits in all cases, shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section.

§ 2.82 Compliance with the National Environmental Policy Act of 1969 Under the Natural Gas Act.

(a) All certificate applications filed under Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)) for the construction of pipeline facilities, except abbreviated applications filed pursuant to Sections 157.7(b), (c) and (d) of Commission Regulations and producer applications for the sale of gas filed pursuant to Sections 157.23-29 of Commission Regulations, shall be accompanied by the applicant's detailed report of the environmental factors specified in § 2.80. Notice of all such applications shall continue to be made as prescribed by law.

(b) The staff shall make an initial review of the applicant's report and, if necessary, require applicant to correct deficiencies in the report. If the proposed action is determined to be a major Federal action significantly affecting

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the quality of the human environment, the staff shall conduct a detailed independent analysis of the action and prepare a draft environmental impact statement which shall be made available to the Council on Environmental Quality, the Environmental Protection Agency, other appropriate governmental bodies, and to the public, for comment. The statement shall also be served on all parties to the proceeding. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of the availability of the staff's draft environmental statement. Written comments shall be made within 45 days of the date the notice of availability appears in the Federal Register. If any governmental entity, Federal, state, or local, or any member of the public, fails to comment within the time provided, it shall be assumed, absent a request for a specific extension of time, that such entity or person has no comment to make. Extensions of time shall be granted only for good cause shown. All entities filing comments with the Commission shall submit ten copies of such comments to the Council on Environmental Quality. Upon expiration of the time for comment the staff shall consider all comments received and revise as necessary and finalize its environmental impact statement which, together with the comments received, shall accompany the proposal through the agency review and decision-making process and shall be made available to the parties to the proceeding, the Council on Environmental Quality, and the public. In the event the proposal is the subject of a hearing, the staff's environmental statement will be placed in evidence at that hearing.

(c) Any person may file a petition to intervene on the basis of the staff draft environmental statement. All intervenors taking a position on environmental matters shall file timely comments, in accordance with paragraph (b) of this section, on the draft statement with the Commission including, but not limited to, an analysis of their environmental position in the context of the factors enumerated in § 2.80, and specifying any differences with staff's position upon which intervenor wishes to be heard. Nothing herein shall preclude an intervenor from filing a detailed environmental impact statement.

(d) In the case of such contested applications, the applicant, staff, and all intervenors taking a position on environmental matters shall offer evidence for the record in support of their environmental position. The applicant and all such intervenors shall specify any differences with the staff's position, and shall include, among other relevant factors, a discussion of their position in the context of the factors enumerated in §2.80.

(e) In the case of such contested applications, the initial and reply briefs filed by the applicant, the staff, and all intervenors taking a position on environmental matters must specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80. Furthermore, the Initial Decision of the Presiding Administrative Law Judge in such cases, and the final order of the Commission dealing with the application on the merits in all cases, shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section.

FEDERAL POWER COMMISSION
RULES OF PRACTICE AND PROCEDURE
18 CFR 1.8 Intervention

"(a) Initiation of intervention. Participation in a proceeding as an intervenor may be initiated as follows:

(1) By the filing of a notice of intervention by a State Commission, including any regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy, or natural gas, as the case may be, to consumers within the intervening State or municipality.

(2) By order of the Commission upon petition to intervene.

(b) Who may petition. A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

(1) A right conferred by [illegible] of the United States;

(2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding (the following may have such an interest; consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent; and competitors of the applicant, defendant, or respondent).

(3) Any other interest of such nature that petitioner's participation may be in the public interest.

(c) Form and contents of petitions. Petitions to intervene shall set out clearly and concisely the facts from which the nature of the petitioner's alleged right or interest can be determined, the grounds of the proposed intervention, and the position of the petitioner in the proceeding, as to fully and completely to advise the parties and the Commission as to the specific issues of fact or law to be raised or controverted, by admitting, denying or otherwise answering specifically and in detail, each material allegation of fact or law asserted in the proceeding, and stating by appropriate reference the statutory provisions or other authority relied on: Provided, that where the purpose of the proposed intervention is to obtain an allocation of natural gas for sale and distribution by a person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, the petition shall comply with the requirements of Part 154 of this chapter (i.e., Regulations Under the Natural Gas Act). Such petitions shall in other respects comply with the requirements of §§ 1.15 to 1.17, inclusive.

(d) Filing and service of petitions. Petitions to intervene and notices of intervention may be filed at any time following the filing of a notice of rate or tariff change, or of an application, petition, complaint, or other document seeking Commission action, but in no event later than the date fixed for the filing of petitions to intervene in any order or notice with respect to the proceedings issued by the Commission or its Secretary, unless, in extraordinary circumstances for good cause shown, the Commission authorizes a late filing. Service shall be made as provided in §1.17. Where a person has been permitted to intervene notwithstanding his failure to file his petition within the time prescribed in this paragraph, the Commission or officer designated to preside may where the circumstances warrant, permit the waiver of the requirements of §1.36(a)(5) with respect to copies of exhibits for such intervenor.

(e) Answers to petitions. Any party to the proceeding or staff counsel may file an answer to a petition to intervene, and in default thereof, may be deemed to have waived any objection to the granting of such petition. If made, answers shall be filed within 10 days after the date of service of the petition, but not later than 5 days prior to the date set for the commencement of the hearing, if any, unless for cause the Commission with or without motion shall prescribe a different time. They shall in all other respects conform to the requirements of §§1.15 to 1.17, inclusive.

(f) Notice and action on petitions.

(1) Notice and service. Petitions to intervene, when tendered to the Commission for filing, shall show service thereof upon all participants to the proceeding in conformity with §1.17(b).

(2) Action on petitions. As soon as practicable after the expiration of the time for filing answers to such petitions or default thereof, as provided in paragraph (e) of this section, the Commission will grant or deny such petition in whole or in part or may, if found to be appropriate, authorize limited participation. No petitions to intervene may be filed or will be acted upon during a hearing unless permitted by the Commission after opportunity for all parties to object thereto. Only to avoid detriment to the public interest will any presiding officer tentatively permit participation in a hearing in advance of, and then only subject to, the granting by the Commission of a petition to intervene.

(g) Limitation in hearings. Where there are two or more intervenors having substantially like interests and positions, the Commission or presiding officer may, in order to expedite the hearing, arrange appropriate limitations on the number of attorneys who will be permitted to cross-examine and make and argue motions and objections on behalf of such intervenors."

*U S GOVERNMENT PRINTING OFFICE: 1981 340-948/18

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Form L-2
(Revised October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED MAJOR PROJECT
AFFECTING LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any feature or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license,

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retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement whcih may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: Provided, That the Licensee may reserve from public access such portions of the project waters, adjacent

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lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: Provided, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 22. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 23. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 24. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 25. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 26. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United

States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 27. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 28. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 29. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. Sec. 601, et seq.), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: Provided, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: Provided further, That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Article 30. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 31. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 32. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

(ii) Local, state, and Federal taxes;
(iii) Depreciation or amortization, and
(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies;

(5) A statement of the estimated annual value of project power based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source of power, specifying any projected changes in the costs (life-cycle costs) of power from that source over the estimated financing or licensing period if the applicant takes such changes into account;

(6) A statement describing other electric energy alternatives, such as gas, oil, coal and nuclear-fueled powerplants and other conventional and pumped storage hydroelectric plants;

(7) A statement and evaluation of the consequences of denial of the license application and a brief perspective of what future use would be made of the proposed site if the proposed project were not constructed; and

(8) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e) (1) and (4) of this section.

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. If information required is not applicable, the applicant must briefly explain why it is not applicable. For application for license for a major unconstructed or major modified project (more than 5 MW) submitted under this subpart or for applications for such projects (5 MW or less) submitted under §§ 4.60 and 4.61 of this part, Exhibit E must be prepared in accordance with the following consultation provisions, after consultation with appropriate Federal, state, and local resource agencies, as indicated in this paragraph. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of consultation. If any agency that an applicant is required to consult fails to consult or fails to provide documentation of the consultation process within a reasonable time after the applicant informs the agency of the proposed project and requests to consult, the applicant may submit a summary of the consultation or attempts to consult, including any recommendations of the agency. An applicant must allow at least 60 days for consultation and documentation, unless the agency indicates that it has no comment. A list of agencies to be consulted can be obtained from the Director of the Commission's Division of Hydropower Licensing. The Environmental Report must contain the following information, *commensurate with the scope of the project:*

(1) *General Description of the Locale.* The applicant must provide a general description of the environment of the proposed project area and its immediate vicinity. The description must include location and general information helpful to an understanding of the environmental setting.

(2) *Report on Water Use and Quality.* The report must discuss water quality and flows and contain baseline data sufficient to determine the normal and seasonal variability, the impacts expected during construction and operation, and any mitigative, enhancement, and protective measures proposed by the applicant. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality and quantity in the affected stream or other body of water. The report must include:

(i) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes;

(ii) A description of the seasonal variation of existing water quality for any stream, lake, or reservoir that would be affected by the proposed project, including (as appropriate) measurements of: significant ions, chlorophyll *a*, nutrients, specific conductance, pH; total dissolved solids, total alkalinity, total hardness, dissolved oxygen, bacteria, temperature, suspended sediments, turbidity and vertical illumination;

(iii) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(iv) A quantification of the anticipated impacts of the proposed construction and operation of project facilities on water quality and downstream flows, such as temperature, turbidity and nutrients;

(v) A description of measures recommended by Federal and state agencies and the applicant for the purpose of protecting or improving water quality and stream flows during project construction and operation; an explanation of why the applicant has rejected any measures recommended by an agency; and a description of the applicant's alternative measures to protect or improve water quality stream flow;

(vi) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams; a description of anticipated impacts on groundwater and measures proposed by the applicant and others for the mitigation of impacts on groundwater; and

(vii) As an appendix, either:

(A) A copy of the water quality certificate (or agency statement that such certification is waived) as described in Section 401 of the Federal Water Pollution Control Act (Clean Water Act) [*see* 33 U.S.C. 134]; or

(B) A copy of a dated letter from the applicant to the appropriate agency requesting such certification.

(3) *Report on Fish, Wildlife, and Botanical Resources.* The applicant must provide a report that describes the fish, wildlife, and botanical resources in the vicinity of the proposed project; expected impacts of the project on these resources; and mitigation, enhancement or protection measures proposed by the applicant. The report must be prepared in consultation with the state agency or agencies with responsibility for these resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the proposed project may affect anadromous, estuarine, or marine fish resources), and any state or Federal agency with managerial authority over any part of the proposed project lands. The report must contain:

(i) A description of existing fish, wildlife, and plant communities of the proposed project area and its vicinity, including any downstream areas that may be affected by the proposed project and the area within the transmission line corridor or right-of-way. A map of vegetation types should be included in the description. For species considered important because of their commercial or recreational value, the information provided should include temporal and spatial distributions and densities of

such species. Any fish, wildlife, or plant species proposed or listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service [*see* 50 CFR 17.11 and 17.12] must be identified;

(ii) A description of the anticipated impacts on fish, wildlife and botanical resources of the proposed construction and operation of project facilities, including possible changes in size, distribution, and reproduction of essential population of these resources and any impacts on human utilization of these resources;

(iii) A description of any measures or facilities recommended by state or Federal agencies for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or enhancement of these resources, the impact on threatened or endangered species, and an explanation of why the applicant has determined any measures or facilities recommended by an agency are inappropriate as well as a description of alternative measures proposed by applicant to protect fish, wildlife and botanical resources; and

(iv) The following materials and information regarding any mitigation measures or facilities, identified under clause (iii), proposed for implementation or construction:

(A) Functional design drawings;

(B) A description of proposed operation and maintenance procedures for any proposed measures or facilities;

(C) An implementation, construction and operation schedule for any proposed measures or facilities;

(D) An estimate of the costs of construction, operation, and maintenance of any proposed facilities or implementation of any measures;

(E) A statement of the sources and amount of financing for mitigation measures or facilities; and

(F) A map or drawing showing, by the use of shading, crosshatching or other symbols, the identity and location of any proposed measures or facilities.

(4) *Report on Historic and Archaeological Resources.* The applicant must provide a report that discusses any historical and archaeological resources in the proposed project area, the impact of the proposed project on those resources and the avoidance, mitigation, and protection measures proposed by the applicant. The report must be prepared in consultation with the State Historic Preservation Officer (SHPO) and the National Park Service of the U.S. Department of Interior. The report must contain:

(i) A description of any discovery measures, such as surveys, inventories, and limited subsurface testing work, recommended by the specified state and Federal agencies for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that would be affected by construction and operation of the proposed project, together with a statement of the applicant's position regarding the acceptability of the recommendations;

(ii) The results of surveys, inventories, and subsurface testing work recommended by the state and Federal agencies listed above, together with an explanation by the applicant of any variations from the survey, inventory, or testing procedures recommended;

(iii) An identification (without providing specific site or property locations) of any historic or archaeological site in the proposed project area, with particular emphasis on sites or properties either listed in, or recommended by the SHPO for inclusion in, the National Register of Historic Places that would be affected by the construction of the proposed project;

(iv) A description of the likely direct and indirect impacts of proposed project construction or operation on sites or properties either listed in, or recommended as eligible for, the National Register of Historic Places;

(v) A management plan for the avoidance of, or mitigation of, impacts on historic or archaeological sites and resources based upon the recommendations of the state and Federal agencies listed above and containing the applicant's explanation of variations from those recommendations; and

(vi) The following materials and information regarding the mitigation measures described under paragraph (f)(4)(v) of this section:

(A) A schedule for implementing the mitigation proposals;

(B) An estimate of the cost of the measures; and

(C) A statement of the sources and extent of financing.

(vii) The applicant must provide five copies (rather than the fourteen copies required under § 4.31(b) of the Commission's regulations) of any survey, inventory, or subsurface testing reports containing specific site and property information, and including maps and photographs showing the location and any required alteration of historic and archaeological resources in relation to proposed project facilities.

(5) *Report on Socio-Economic Impacts.* The applicant must provide a report which identifies and quantifies the impacts of constructing and operating the proposed project on employment, population, housing, personal income, local governmental services, local tax revenues and other factors within the towns and counties in the vicinity of the proposed project. The report must include:

(i) A description of the socio-economic impact area;

(ii) A description of employment, population and personal income trends in the impact area;

(iii) An evaluation of the impact of any substantial in-migration of people on the impact area's governmental facilities and services, such as police, fire, health and educational facilities and programs;

(iv) On-site manpower requirements and payroll during and after project construction, including a projection of total on-site employment and construction payroll provided by month;

(v) Numbers of project construction personnel who:

(A) Currently reside within the impact area;

(B) Would commute daily to the construction site from places situated outside the impact area; and

(C) Would relocate on a temporary basis within the impact area;

(vi) A determination of whether the existing supply of available housing within the impact area is sufficient to meet the needs of the additional population;

(vii) Numbers and types of residences and business establishments that would be displaced by the proposed project, procedures to be utilized to acquire these properties, and types and amounts of relocation assistance payments that would be paid to the affected property owners and businesses; and

(viii) A fiscal impact analysis evaluating the incremental local government expenditures in relation to the incremental local government revenues that would result from the construction of the proposed project. Incremental expenditures may include, but are not be limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(6) *Report on Geological and Soil Resources.* The applicant must provide a report on the geological and soil resources in the proposed project area and other lands that would be directly or indirectly affected by the proposed action and the impacts of the proposed project on those resources. The information required may be supplemented with maps showing the location and description of conditions. The report must contain:

(i) A detailed description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources;

(ii) A detailed description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(iii) A description showing the location of existing and potential geological and soil hazards and problems, including earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, and mass soil movement, and an identificaiton of any large landslides or potentially unstable soil masses which could be aggravated by reservior fluctuation;

(iv) A description of the anticipated erosion, mass soil movement and other impacts on the geological and soil resources due to construction and operation of the proposed project; and

(v) A description of any proposed measures of facilities for the mitigtion of impacts on soils.

(7) *Report on Recreational Resources.* The applicant must prepare a report containing a proposed recreation plan describing utilization, design and development of project recreational facilities, and public access to the project area. Development of the plan should include consideration of the needs of the physically handicapped. Public and private recreational facilities provided by others that would abut the project should be noted in the report. The report must be prepared in consultation with appropriate local, regional, state and Federal recreation agencies and planning commissions, the National Park Service of the U.S. Department of the Interior, and any other state or Federal agency with managerial responsibility for any part of the project lands. The report must contain:

(i) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in:

(A) The National Wild and Scenic Rivers Systems (*see* 16 U.S.C. § 1271);

(B) The National Trails System (*see* 16 U.S.C. 1241); or

(C) A wilderness area designated under the Wilderness Act (*see* 16 U.S.C. 1132);

(ii) A detailed description of existing recreational facilities within the project vicinity, and the public recreational facilities which are to be provided by the applicant at its sole cost or in cooperation with others no later than 3 years from the date of first commercial opertion of the proposed project and those recreation facilities planned for future development based on anticipated demand. When public recreation facilities are to be provided by other entities, the applicant and those entities should enter into an agreement on the type of facilities to be provided and the method of operation. Copies of agreements with cooperating entities are to be appended to the plan;

(iii) A provision for a shoreline buffer zone that must be within the project boundary, above the normal maximum surface elevation of the project reservoir, and of sufficient width to allow public access to project lands and waters and to protect the scenic, public recreational, cultural, and other environmental values of the reseroir shoreline;

(iv) Estimates of existing and future recreational use at the project, in daytime and overnight visitation (recreation days), with a description of the methodology used in developing these data;

(v) A development schedule and cost estimates of the construction, operation and maintenance of existing, initial, and future public recreational facilities, including a statement of the source and extent of financing for such facilities;

(vi) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the proposed project, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency; and

(vii) A drawing or drawings, one of which describes the entire project area; clearly showing:

(A) The location of project lands, and the types and number of existing recreational facilities and those proposed for initial development, including access roads and trails, and facilities for camping, picnicking, swimming, boat docking and launching, fishing and hunting, as well as provisions for sanitation and waste disposal;

(B) The location of project lands, and the type and number of recreational facilities planned for future development;

(C) The location of all project lands reserved for recreational uses other than those included in paragraphs (f)(7)(vii) (A) and (B) of this section; and

(D) The project boundary (excluding surveying details) of all areas designated for recreational development, sufficiently referenced to the appropriate Exhibit G drawings to show that all lands reserved for existing and future public recreational development and the shoreline buffer zone are included within the project boundary. Recreational cottages, mobile homes and year-round residences for private use are not to be considered as public recreational facilities, and the lands on which these private facilities are to be developed are not to be included within the proposed project boundary.

(8) *Report on Aesthetic Resources.* The applicant must provide a report that describes the aesthetic resources of the proposed project area, the expected impacts of the project on these resources, and the mitigation, enhancement or protection measures proposed. The report must be prepared following consultation with Federal, state, and local agencies having managerial responsibility for any part of the proposed project lands or lands abutting those lands. The report must contain:

(i) A description of the aesthetic character of lands and waters directly and indirectly affected by the proposed project facilities;

(ii) A description of the anticipated impacts on aesthetic resources from construction activity and related equipment and material, and the subsequent presence of proposed project facilities in the landscape;

(iii) A description of mitigative measures proposed by the applicant, including architectural design, landscaping, and other reasonable treatment to be given project works to preserve and enhance aesthetic and related resources during construction and operation of proposed project facilities; and

(iv) Maps, drawings and photographs sufficient to provide an understanding of the information required under this subparagraph. Maps or drawings may be consolidated with other maps or drawings required in this exhibit and must conform to the specifications of § 4.32.

9. *Report on Land Use.* The applicant must provide a report that describes the existing uses of the proposed project lands and adjacent property, and those land uses which would occur if the project is constructed. The report may reference the discussions of land uses in other sections of this exhibit. The report must be prepared following consultation with local and state zoning or land management authorities, and any Federal or state agency with managerial responsibility for the proposed project

or abutting lands. The report must include:

(i) A description of existing land use in the proposed project area, including identification of wetlands, floodlands, prime or unique farmland as designated by the Soil Conservation Service of the U.S. Department of Agriculture, the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or subject to control by government agencies;

(ii) A description of the proposed land uses within and abutting the project boundary that would occur as a result of development and operation of the project; and

(iii) Aerial photographs, maps, drawings or other graphics sufficient to show the location, extent and nature of the land uses referred to in this section.

(10) *Alternative Locations, Designs, and Energy Sources.* The applicant must provide an environment assessment of the following:

(i) Alternative sites considered in arriving at the selection of the proposed project site;

(ii) Alternative facility designs, processes, and operations that were considered and the reasons for their rejection;

(iii) Alternative electrical energy sources, such as gas, oil, coal, and nuclear-fueled power plants, purchased power or diversity exchange, and other conventional and pumped-storage hydroelectric plants; and

(iv) The overall consequences if the license application is denied.

(11) *List of Literature.* Exhibit E must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) *Exhibit F* consists of general design drawings of the principal project works described under paragraph (b) of this section (Exhibit A) and supporting information used as the basis of design. If the Exhibit F submitted with the application is preliminary in nature, applicant must so state in the application. The drawings must conform to the specifications of § 4.32.

(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project, including:

(i) Plans (overhead view);

(ii) Elevations (front view);

(iii) Profiles (side view); and

(iv) Sections.

(2) The applicant may submit preliminary design drawings with the application. The final Exhibit F may be submitted during or after the licensing process and must show the precise plans and specifications for proposed structures. If the project is licensed on the basis of preliminary designs, the applicant must submit a final Exhibit F for Commission approval prior to commencement of any construction of the project.

(3) *Supporting Design Report.* The applicant must furnish, at a minimum, the following supporting information to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions and must submit such information in a separate report at the time the application is filed. The report must include:

(i) An assessment of the suitability of the site and the reservoir rim stability based on geological and subsurface investigations, including investigations of soils and rock borings and tests for the evaluation of all foundations and construction materials sufficient to determine the location and type of dam structure suitable for the site;

(ii) Copies of boring logs, geology reports and laboratory test reports;

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material;

(iv) Stability and stress analyses for all major structures and critical abutment slopes under all probable loading conditions, including seismic and hydrostatic forces induced by water loads up to the Probable Maximum Flood as appropriate; and

(v) The bases for determination of seismic loading and the Spillway Design Flood in detail sufficient detail to independent staff evaluation.

(4) The applicant must submit five copies (not fourteen copies as required under § 4.31(b) of this part) of the supporting design report described in paragraph (g)(3) of this section at the time preliminary and final design drawings are submitted to the Commission for review. If the report contains preliminary drawings, it must be designated a "Preliminary Supporting Design Report."

(h) *Exhibit G* is a map of the project that must conform to the specifications of § 4.32. If more than one sheet is used, the sheets must be numbered consecutively, and each sheet must bear a small insert sketch showing the entire project and indicating that portion of the project depicted on that sheet. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within a reasonable period following the completion of project construction, a final Exhibit G showing the extent of such changes. The map must show:

(1) *Location of the project and principal features.* The map must show the location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects, such as roads, transmission lines or other structures, that can be noted on the map and recognized in the field. The map must also show the relative locations and physical interrelationships of the principal project works and other features described under paragraph (b) of this section (Exhibit A).

(2) *Project boundary.* The map must show a project boundary enclosing all of the principal project works and other features described under paragraph (b) of this section (Exhibit A). If accurate survey information is not available at the time the license application is filed, the applicant must so state and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as flowage, public recreation, shoreline control, or protection of environmental resources. If the boundary is on land covered by a public land survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

(i) *Impoundments.* The boundary around a project impoundment must be no more than 200 feet (horizontal measurement) from the exterior margin of the reservoir, defined by the normal maximum surface elevation, except where deviations may be necessary in describing the boundary according to the method used, or where additional lands are necessary for project purposes, such as public recreation. The boundary may be described by any one or a combination of the following methods:

(A) Contour lines, including the contour elevation [preferred method]; or

(B) Specified courses and distances (metes and bounds); or

(C) If the project lands are covered by a public land survey, lines parallel to the lines of the survey.

(ii) *Continuous features.* The boundary around linear project features such as access roads, transmission lines and conduits may be described by

specified distances from center lines or offset lines of the survey. The width of such corridors must not exceed 200 feet, unless good cause is shown for a greater width. Several sections of a continuous feature may be shown on a single sheet, with information showing the sequence of continuous sections.

(iii) *Noncontinuous features.* The boundary around noncontinuous project works such as dams, spillways and powerhouses must enclose only those lands that are necessary for safe and efficient operation and maintenance of the project, or for other specified project purposes, such as public recreation or protection of environmental resources. The boundary may be described by any one or a combination of the following methods:

(A) Contour lines; or

(B) Specified courses and distances; or

(C) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey.

(3) *Federal Lands.* Any public lands and reservations of the United States ("Federal lands") [*see* 16 U.S.C. 796 (1) and (2)] that are within the project boundary, such as lands administered by the U.S. Forest Service, Bureau of Land Management, or National Park Service, or Indian tribal lands, and the boundaries of those Federal lands, must be identified as such on the map by:

(i) Legal subdivisions of a public land survey of the affected area (a protraction of identified township and section lines is sufficient for this purpose); and

(ii) The Federal agency, identified by symbol or legend, that maintains or manages each identified subdivision of the public land survey within the project boundary; or

(iii) In the absence of a public land survey, the location of the Federal lands according to the distances and directions from fixed monuments or physical features. When a Federal survey monument or a Federal bench mark will be destroyed or rendered unusable by the construction of project works, at least two permanent, marked witness monuments or bench marks must be established at accessible points. The maps show the location (and elevation, for bench marks) of the survey monument or bench mark which will be destroyed or rendered unusable, as well as of the witness monuments or bench marks. Connecting courses and distances from the witness monuments or bench marks to the original must also be shown.

(4) *Non-Federal Lands.* For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:

(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired to be required by easement or lease.

4. Section 4.31 is amended by revising paragraph (a)(2)(iii) to read as follows:

§ 4.31 Acceptance for filing or rejection.

(a) * * *

(2) * * *

(iii) License for a major unconstructed project and a major modified project: §§ 4.40 and 4.41;

5. Section 4.50 is amended by revising paragraph (a) to read as follows:

§ 4.50 Applicability and definitions.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, the provisions of this subpart apply to any application for either an initial license or new license for a major project—existing dam that is proposed to have a total installed capacity of more than 5 megawatts.

(2) This subpart does not apply to any major project—existing dam (*see* § 4.40) that is proposed to entail or include:

(i) Any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or normal maximum surface elevation of an existing impoundment; or

(ii) Any new development or change in project operation that would result in a significant environmental impact.

(3) An applicant for license for any major project—existing dam that would have a total installed capacity of 5 megawatts or less must submit an application under Subpart G (§§ 4.60 and 4.61).

* * * * *

§ 4.50 [Amended]

6. Section 4.50 is amended in paragraph (b)(5) by adding the word "and" at the end of clause (i), by deleting the semicolon at the end of clause (ii), and inserting a period in lieu thereof, and by removing clauses (iii) and (iv).

7. Section 4.51 is amended by revising the introductory statement and paragraph (f) to read as follows:

§ 4.51 Contents of application.

An application for license under this subpart must contain the following information in the form specified. As provided in paragraph (f) of this section, the appropriate Federal, state, and local resource agencies must be given the opportunity to comment on the proposed project, prior to filing of the application for license for major project—existing dam. Information from the consultation process must be included in this Exhibit E, as appropriate.

* * * * *

(f) *Exhibit E* is an environmental report. Information provided in the report must be organized and referenced according to the provisions of this paragraph. If a request for information is not applicable, the applicant must briefly explain why it does not apply. The Environmental Report is prepared after consultation with appropriate Federal, state and local resource agencies. If any agency that an applicant is required to consult fails to consult or fails to provide documentation of the consultation process within a reasonable time after the applicant informs the agency of the proposed project and requests to consult, the applicant may submit a summary of the consultation or attempt to consult, including any recommendations of the agency. An applicant must allow at least 60 days for this consultation and documentation, unless the agency indicates within that period that it has no comment. A list of agencies to be consulted can be obtained from the Director of the Commission's Division of Hydropower Licensing. The Environmental Report must contain the following information, *commensurate with the scope of the proposed project:*

* * * * *

8. Subpart H (§§ 4.70 and 4.71) is revised to read as follows:

* * * * *

Subpart H—Application for License for Transmission Line only

Sec.

4.70 Applicability.

4.71 Contents of application.

* * * * *

Subpart H—Application for License for Transmission Line only

§ 4.70 Applicability.

This subpart applies to any application for license issued solely for a transmission line that transmits power from a licensed water power project or other hydroelectric project authorized by Congress to the point of junction with the distribution system or with the interconnected primary transmission system.

pg 10-15

-B3

Council on Environmental Quality
Executive Office of the President

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REGULATIONS

For Implementing The Procedural Provisions Of The

NATIONAL ENVIRONMENTAL POLICY ACT

Reprint
43 FR 55978–56007
November 29, 1978
40 CFR Parts 1500–1508

CONTENTS

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An Index to CEQ Regulations
Alphabetical Order

Index to CEQ
(Numerical Order)

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PART 1500—PURPOSE, POLICY, AND MANDATE

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970 as amended by Executive Order 11991, May 24, 1977).

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement Section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run con-

currently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500–1508 of this Title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to Sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24 1977).

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1508.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review

(§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analyzed rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact

statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report

On proposals (§ 1508.23)
For legislation and (§ 1508.17)
Other major Federal actions (§ 1508.18)
Significantly (§ 1508.27)
Affecting (§§ 1508.3, 1508.8)
The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately

after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in

the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.
(b) Summary.
(c) Table of Contents.
(d) Purpose of and Need for Action.
(e) Alternatives Including Proposed Action (secs. 102(2)(C)(iii) and 102(2)(E) of the Act).
(f) Affected Environment.
(g) Environmental Consequences (especially sections 102(2)(C) (i), (ii), (iv), and (v) of the Act).
(h) List of Preparers.
(i) List of Agencies, Organizations, and Persons to Whom Copies of the Statement Are Sent.
(j) Index.
(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11-1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.
(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.
(c) The name, address, and telephone number of the person at the agency who can supply further information.
(d) A designation of the statement as a draft, final, or draft or final supplement.
(e) A one paragraph abstract of the statement.
(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
(b) Devote substantial treatment to each alternative considered in detail including the proposed action

so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C) (i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Sec. 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information

in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with sec. 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. Sec. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. Sec. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdic-

tion by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do

not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.
1504.1 Purpose.
1504.2 Criteria for Referral.
1504.3 Procedure for Referrals and Response.

AUTHORITY. NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.
(b) Severity.
(c) Geographical scope.
(d) Duration.
(e) Importance as precedents.
(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) below.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of

agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f) (2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how

those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of

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minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1505.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of

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minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of

information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this subparagraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appro-

priate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C.

1271 et seq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10 below.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy

reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under sec. 102(2)(D) of the Act or under sec. 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reason of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency Capability to Comply.
1507.3 Agency Procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of Sec. 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by Sec. 102(2)(B) to

insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to Sec. 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of Sec. 102(2)(E) extends to all such proposals, not just the more limited scope of Sec. 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of Sec. 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified por-

tions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating Agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental Impact Statement" means a detailed written statement as required by Sec. 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human Environment.

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction By Law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead Agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in Section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of Section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of Intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when

viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative. (2) Other reasonable courses of actions. (3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct. (2) Indirect. (3) Cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on

the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, AS AMENDED*

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

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*Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, and Pub. L. 94-83, August 9, 1975.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(d) Any detailed statement required under subparagraph (c) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(i) Assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

SEC. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and freshwater, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

SEC. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to

the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SEC. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

SEC. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

SEC. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) Consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) Utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

SEC. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

SEC. 207. The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

SEC. 208. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the sup-

port of international exchange programs in the United States and in foreign countries.

SEC. 209. There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970*

TITLE II—ENVIRONMENTAL QUALITY (OF THE WATER QUALITY IMPROVEMENT ACT OF 1974)

SHORT TITLE

SEC. 201. This title may be cited as the "Environmental Quality Improvement Act of 1970."

FINDINGS, DECLARATIONS, AND PURPOSES

SEC. 202. (a) The Congress finds—

(1) That man has caused changes in the environment;

(2) That many of these changes may affect the relationship between man and his environment; and

(3) That population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title are—

(1) To assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) To authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190.

OFFICE OF ENVIRONMENTAL QUALITY

SEC. 203. (a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this title referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Bureau of the Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions under this title and Public Law 91-190, except that he may employ no more than 10 specialists and other experts without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or

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*Pub. L. 91-224, 42 U.S.C. 4371-4374, April 3, 1970.

expert shall be paid at a rate in excess of the maximum rate for GS–18 of the General Schedule under section 5330 of title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by—

(1) Providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91–190;

(2) Assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

(3) Reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

(4) Promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

(5) Assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

(6) Assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;

(7) Collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to sections 3618 and 3709 of the Revised Statutes (31 U.S.C. 529; 41 U.S.C. 5) in carrying out his functions.

REPORT

SEC. 204. Each Environmental Quality Report required by Public Law 91–190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

AUTHORIZATION

SEC. 205. There are hereby authorized to be appropriated not to exceed $500,000 for the fiscal year ending June 30, 1970, not to exceed $750,000 for the fiscal year ending June 30, 1971, not to exceed $1,250,000 for the fiscal year ending June 30, 1972, and not to exceed $1,500,000 for the fiscal year ending June 30, 1973. These authorizations are in addition to those contained in Public Law 91–190.

Approved April 3, 1970.

THE CLEAN AIR ACT § 309*

§ 7609. Policy review

(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

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*July 14, 1955, c. 360, § 309, as added Dec. 31, 1970, Pub. L. 91-604 § 12(a), 42 U.S.C. § 7609 (1970).

Executive Order 11514. March 5, 1970

PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

As amended by Executive Order 11991. (Secs. 2(g) and (3(h)). May 24, 1977*

By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970), it is ordered as follows:

Section 1. *Policy.* The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. *Responsibilities of Federal agencies.* Consonant with Title I of the National Environmental Policy Act of 1969, hereafter referred to as the "Act", the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, States, counties, municipalities, institutions, and other entities, as appropriate.

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*The Preamble to Executive Order 11991 is as follows:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 *et seq.*), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows:

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act.

(g) In carrying out their responsibilites under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.

Sec. 3. *Responsibilities of Council on Environmental Quality.* The Council on Environmental Quality shall:

(a) Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b) Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for enhancement of the environment.

(c) Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d) Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f) Coordinate Federal programs related to environmental quality.

(g) Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and

Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.

(i) Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act.

(j) Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act.

(k) Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

Sec. 4. *Amendments of E.O. 11472.* Executive Order No. 11472 of May 29, 1969, including the heading thereof, is hereby amended:

(1) By substituting for the term "the Environmental Quality Council", wherever it occurs, the following: "the Cabinet Committee on the Environment".

(2) By substituting for the term "the Council", wherever it occurs, the following: "the Cabinet Committee".

(3) By inserting in subsection (f) of section 101, after "Budget,", the following: "the Director of the Office of Science and Technology,".

(4) By substituting for subsection (g) of section 101 the following:

"(g) The Chairman of the Council on Environmental Quality (established by Public Law 91-190) shall assist the President in directing the affairs of the Cabinet Committee."

(5) by deleting subsection (c) of section 102.

(6) By substituting for "the Office of Science and Technology", in section 104, the following: "the Council on Environmental Quality (established by Public Law 91-190)".

(7) By substituting for "(hereinafter referred to as the 'Committee')", in section 201, the following: "(hereinafter referred to as the 'Citizens' Committee')".

(8) By substituting for the term "the Committee", wherever it occurs, the following: "the Citizens' Committee".

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