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The Preference Clause Revisited: Central Lincoln Peoples' Utility District v. Johnson and the Pacific Northwest Electric Power Planning and Conservation Act

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THE PREFERENCE CLAUSE REVISITED: *CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT V. JOHNSON* AND THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

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Historically, federal statutes gave public bodies and nonprofit cooperative organizations a preference over private entities in the sale of hydroelectric power from federally owned hydroelectric dams.[1] Congress enacted power-marketing and land reclamation statutes[2] authorizing federal agencies to sell hydroelectric power to public and private utilities and directly to certain large industries.[3] Congress allowed electric power sales to private interests, however, only after the agencies satisfied the needs of governmental bodies and publicly owned utilities.[4]

The original purpose of the preference for public entities was to dispose of surplus electric power, produced as a by-product of irrigation development, in a way that would encourage domestic use of electricity, espe-

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1. For a detailed historical description of the preference clause, see Comment, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Land Reclamation Statutes*, 9 ENVTL. L. 601 (1979). *See also* Redman, Preference and Other Clauses in Federal Power Marketing Acts (to be published in 13 ENVTL. L. (1983)) (suggesting that the preference concept has not been a consistent element of federal power marketing policy). Many federal statutes contain preference clauses favoring public agencies and nonprofit organizations. *See, e.g.*, Falcon Dam Act, ch. 310, 68 Stat. 255 (1954); Flood Control Act, ch. 665, §§ 1–8, 15, 58 Stat. 887, 887–91, 907 (1944) (codified in scattered sections of 16, 33, 43 U.S.C.); Reclamation Project Act, 43 U.S.C. §§ 387, 485h (1976); Fort Peck Act, 16 U.S.C. § 833c (1976); Bonneville Dam Act of 1937, 16 U.S.C. § 832c (1976); Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831i–831*l* (1976); Boulder Canyon Project Act of 1928, 43 U.S.C. § 617d (1976); Federal Water Power Act, 16 U.S.C. § 825g (1976); Reclamation Act of 1906, 43 U.S.C. § 522 (1976).

2. Power marketing statutes authorized particular federal agencies to sell electric power produced at federally owned hydroelectric facilities. *See, e.g.*, Bonneville Dam Act of 1937, 16 U.S.C. §§ 832–832a (1976) (Bonneville Power Administration); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 (1976) (Tennessee Valley Authority).

3. *E.g.*, Reclamation Project Act, 43 U.S.C. § 485h (1976); Bonneville Dam Act, 16 U.S.C. § 832a(a) (1976); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831i (1976).

4. *E.g.*, Reclamation Project Act, 43 U.S.C. § 485h(c) (1976); Bonneville Dam Act, 16 U.S.C. § 832c (1976); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831i (1976).

cially in rural areas of the nation.[5] During the early decades of the twentieth century, private utilities were not willing or able to serve rural areas at a reasonable price to consumers, apparently because of the great expense of constructing transmission facilities.[6] Additionally, preference clauses evolved as antimonopoly provisions intended to prevent private interests from gaining control of electric power development on public lands.[7] By the 1930's, members of Congress acknowledged a growing concern that the nation's electricity producing resources were falling under the control of "power trusts" of private interests.[8] The profit motives of the power trusts presented a sharp contrast to the government's goal of rural electrification.[9]

In addition to these antimonopoly and rural electrification goals, preference clauses manifest the belief that publicly owned resources belong to the nation's people and that federal agencies should distribute them directly to the citizenry whenever possible.[10] Theoretically, the fed-

5. Comment, *supra* note 1, at 621–23. Congressional comment on the purposes of early legislation indicated a clear intent to provide low-cost federal electric power to homes and farms. *Id.* at 623.

6. BONNEVILLE POWER ADMINISTRATION, COLUMBIA RIVER POWER FOR THE PEOPLE: A HISTORY OF POLICIES OF THE BONNEVILLE POWER ADMINISTRATION 138 (1981) [hereinafter cited as BPA HISTORY]. Generally, privately owned utilities set rural electric service rates higher than that charged in more densely populated areas. Private utilities often insisted on a cash contribution from rural customers, generally equal to the cost of extending transmission lines to serve them. *Id.*

7. *Id.* at 74 (quoting Oregon Senator McNary that a preference clause is really "an antimonopoly clause"). As early as 1908, President Theodore Roosevelt expressed his concern that monopolies would gain control over public resources: "We are now at the beginning of great development of water power . . . . Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power." Theodore Roosevelt, Rainy River Veto Message (Apr. 13, 1908), *quoted in* BPA HISTORY, *supra* note 6, at 21.

8. *See, e.g.*, 77 CONG. REC. 2280 (1933) (remarks of Rep. Weidman); 66 CONG REC 1074 (1925) (remarks of Sen. Norris).

9. Rural electrification became a symbol of economic recovery during the Great Depression because it provided jobs for the unemployed, and cheap abundant power for the farms and cities. N. CLARK, WASHINGTON: A BICENTENNIAL HISTORY 155 (1976). The goal of rural electrification was a major issue in the 1930 congressional elections and in the 1932 presidential campaign of Franklin Roosevelt. BPA HISTORY, *supra* note 6, at 98. In a radio address on April 7, 1931, Roosevelt said:

> From the very beginning I have held to a consistent course and a consistent objective. I have fought all along for development of this power by an agency of the state itself and not by any private corporation. Furthermore, I have fought from the very beginning for the use and distribution of this power for the great purposes of bringing more and more electricity into the homes of the state, into the small shops and industries, into the farms and into the flats.

PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 201 (1938), *quoted in* Comment, *supra* note 1, at 620 n.67.

10. From the earliest days of the republic, federal land disposal policies imposed limitations on any individual's right to acquire portions of the public domain or public property. Comment, *supra* note 1, at 618 n.63. President Thomas Jefferson urged that the government limit any individual's right to acquire public property so that as many citizens as possible be allowed a small portion of public land. THE WRITINGS OF THOMAS JEFFERSON 18 (memorial ed. 1904), *quoted in* Comment, *supra* note 1, at 618 n.63. *Cf.* 3 H. ICKES, THE SECRET DIARIES OF HAROLD ICKES 101 (1954) (noting

eral government holds in stewardship the nation's resources.[11] Thus, whenever the government makes natural resources available for use, it should provide every citizen with the opportunity to use that resource without paying a profit to other individuals.[12] If it is impractical to make the resource available directly to every citizen, the government should make the resource available to organizations whose purpose is to distribute the resource at the lowest possible cost to the individual.[13] Through preference clauses, Congress attempted to ensure that the benefits of federal water power projects flow directly to the public.[14]

Although preference clauses have been prevalent throughout the history of federal power legislation, the meaning of the preference concept and its application have not been static.[15] Congress has elaborated on the preference concept in a plethora of power marketing and land reclamation legislation.[16] The judiciary has contributed to the developing meaning of preference clauses by consistently interpreting the clauses to confer a priority status on public agencies and publicly owned utilities.[17]

This article analyzes the legislative development of the preference clause to its inclusion in the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). This analysis demonstrates the Northwest Power Act's reaffirmation of the supply preference traditionally included in federal power marketing legislation. The analysis also reveals a unique price discount for customers entitled to a supply preference under the Northwest Power Act. Additionally, the article considers recent Ninth Circuit decisions applying the preference clause to various forms of power allocation by federal agencies. The analysis identifies legislative and judicial adherence to the preference concept based on congressional confidence in the principles underlying the preference concept. The article concludes that Congress and the federal courts have strengthened the priority given to public utilities in the Pacific

President Franklin Roosevelt's desire that federal land disposal and irrigation policies benefit small farmers).

11. *See* Potamkin, *The Preference Clause is Fair—And Necessary*, 18 MONT. L. REV. 3, 6 (1957).

12. *See* G. PINCHOT, THE FIGHT FOR CONSERVATION 11–12 (1910). *See generally* Bates, *Fulfilling American Democracy: The Conservation Movement*, 44 MISS. VALLEY HIST. REV. 29 (1957), *reprinted in* THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 79 (R. Nash 2d ed. 1976) (discussing conservationists' concern with economic justice and democracy in allocating resources).

13. Potamkin, *supra* note 11, at 10.

14. *See id.*

15. *See generally* Comment, *supra* note 1 (survey of early reclamation laws, power production type reclamation laws, and labor irrigation type reclamation laws, and the evolution and application of preference laws); Redman, *supra* note 1 (same).

16. *See supra* note 1 (partial list of federal statutes containing preference clauses).

17. *See infra* text accompanying notes 87–122.

Northwest to federally generated electric power despite attempts to circumvent or erode preference rights.

I. HISTORICAL DEVELOPMENT OF THE PREFERENCE CONCEPT

Throughout the twentieth century, Congress has included preference clauses in a number of power allocation and land reclamation statutes.[18] Congress established the fundamentals of federal power allocation policy in the Reclamation Act of 1906[19] (Reclamation Act) to provide for the irrigation of vast acreages of public lands in the West. Although hydroelectric power generation was not a primary purpose of the Reclamation Act, the Act nonetheless provided directly for the disposition of hydroelectric power.[20] The Reclamation Act required the Secretary of the Interior to give a preference to power sales for municipal purposes.[21]

In later legislation, Congress continued to grant preferences to publicly owned utilities in the sale of power from federal water projects. The Boulder Canyon Project Act[22] required the Secretary of the Interior to give preference to public entities when selling hydroelectric power from the Boulder Canyon Project on the Colorado River.[23] The Tennessee Valley Authority Act of 1933[24] (TVA Act) represented a further application of the preference concept. Specifically, the Act required the Tennessee Valley Authority (TVA) to give preference to states, counties, municipal-

18. *See supra* note 1. Previously, the federal reclamation statutes required the government to offer surplus water from irrigation projects for public use. L. WHITE, THE RIGHT TO FEDERALLY GENERATED POWER 9 (June 19, 1979) (published by the American Public Power Association). The first statute granting an actual preference in the distribution and use of public resources was the Desert Land Act of 1877, ch. 107, 19 Stat. 377, 43 U.S.C. § 321 (1976).

19. Reclamation Act of 1906, ch. 1631, 34 Stat. 116–17, 43 U.S.C. § 522 (1976). Although Congress included preference clauses in earlier statutes dealing with public resources, *see supra* note 18, the Reclamation Act of 1906 was the first to provide directly for the disposition of hydroelectric power from federal dams. Comment, *supra* note 1, at 610.

20. The Act provided the Secretary of the Interior with authority to dispose of surplus electric power from irrigation projects undertaken by the Interior Department. 43 U.S.C. § 522 (1976).

21. *Id.* The Act's preference clause required the Secretary of the Interior to guarantee a preference to power sold for municipal purposes. *Id.* In later legislation, Congress granted preferences to governmental bodies organized for the public benefit instead of limiting the ways purchasers could utilize power generated at public facilities. L. WHITE, *supra* note 18, at 11.

22. Boulder Canyon Project Act, 43 U.S.C. §§ 617–618p (1976).

23. 43 U.S.C. § 617d(c) (1976). Under the Boulder Canyon Project Act, the government constructed no power lines or generators. Instead, the Secretary of the Interior licensed customers to install their own generating equipment in the project's Boulder Dam facility. *See* Comment, *supra* note 1, at 615. The Act required the Secretary to wait a reasonable time before denying the application of a public body on the grounds that the applicant did not have the financial capability to construct generation and distribution facilities. 43 U.S.C. § 617d(c) (1976).

24. Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831–831dd (1976).

ities and nonprofit organizations of citizens or farmers, and to include five-year cancellation clauses in contracts with privately owned utilities.[25] Additionally, the Act authorized the TVA to construct its own transmission lines to serve farms and small villages not otherwise supplied with reasonably priced electricity and to acquire existing electric facilities to provide power directly to rural consumers.[26] Finally, the Act granted preference customers time to comply with local laws pertaining to their authorization as legal contracting agencies before allowing the TVA to contract with private utilities.[27]

The Bonneville Project Act[28] (Bonneville Act) represented another application of the preference concept. The Act created the Bonneville Power Administration (BPA) to act as marketing agent for the sale of hydroelectric power generated by the Bonneville Dam on the Columbia River.[29] Congress authorized the BPA[30] to construct and operate electric transmission lines in the Pacific Northwest and to market electricity produced at regional federal power projects.[31] Although the Bonneville Act allowed the agency to sell hydroelectric power to privately owned utilities and large industrial customers as well as to "public bodies and cooperatives,"[32] the Act's preference clause required that the BPA give preference to non-federal government agencies and publicly-owned utilities and cooperatives.[33] The preference clause of the Bonneville Act is almost identical to provisions in the TVA Act.[34] The Bonneville Act included

25. *Id.* § 831i (1976).

26. *Id.*

27. *Id.* § 831k.

28. Bonneville Project Act, 16 U.S.C. §§ 832–832*l* (1976).

29. *Id.* § 832a(a) (1976). *See infra* text accompanying note 31.

30. The Bonneville Act created the BPA to act as marketing agent for electric power produced at the Bonneville Dam on the Columbia River. Congress later expanded the agency's marketing authority to encompass power produced at all federally owned dams in the Pacific Northwest. *See generally* Foote, Larsen & Maddox, *Bonneville Power Administration: Northwest Power Broker*, 6 ENVTL. L. 831 (1976) (tracing the development of the BPA from an obscure federal agency to an agency actively involved in planning for the future of the Pacific Northwest) [hereinafter cited as Foote].

31. 16 U.S.C. § 832a(a)–(b) (1976). Construction of Bonneville Dam began in 1933 as Public Works Project No. 28. Comment, *supra* note 1, at 625 n.85. The Bonneville Dam was the first project over which the BPA had authority. President Franklin Roosevelt brought Grand Coulee Dam, also on the Columbia River, under the Bonneville Power Administrator's authority. *See* Exec. Order No. 8526, 5 Fed. Reg. 3390–91 (1940). Administration of the Grand Coulee Project was subject to the requirements of the Bonneville Act's preference clause. *Id.*

32. 16 U.S.C. § 832d(a) (1976).

33. *Id.* § 832c(a) (1976). *See infra* text accompanying notes 34–38.

34. Comment, *supra* note 1, at 626–27. The Bonneville Act contained two important clarifications of the public preference concept. The first is that Congress contemplated a wide geographic distribution of hydroelectric power produced at the Bonneville Dam and other federal facilities. *See* 16 U.S.C. § 832a(b) (1976). The Act encouraged the people of Washington, Oregon, Idaho, and Montana to create public or cooperative agencies so as to qualify for the public power preference. *See id.* at § 832c(d). Second, the Act prevented circumvention of the preference clause caused by prefer-

cooperatives as preference customers,[35] authorized construction of federal transmission lines,[36] and required that contracts with private utilities include five-year cancellation clauses.[37] Like the TVA Act, the Bonneville Act provided public entities with a reasonable opportunity to finance entry into the power business as preference customers.[38]

Over the next several years, Congress passed four additional preference power statutes. The Fort Peck Act,[39] the Reclamation Project Act,[40] and the Water Conservation and Utilization Act[41] each included clauses guaranteeing a preference to public bodies and cooperatives in power sales from federal multipurpose dams.[42] Likewise, the Flood Control Act[43] contained a preference clause.[44] After considerable debate,[45] Con-

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ence customers reselling electric power to private utilities, by forbidding resale, except by a private utility, of electric power to any agency engaged in the sale of electricity to the general public. *Id.* § 832d(a).

35. 16 U.S.C. § 832c(a) (1976). *See also* Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831i (1976) (also including cooperatives as preference customers).

36. 16 U.S.C. § 832a(b) (1976). Congress authorized the BPA to construct and operate transmission lines to encourage the widest possible use of electricity and to prevent monopolization of electric energy by limited groups. *Id. See also* Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831k (1976) (also authorizing construction of federal transmission lines).

37. 16 U.S.C. § 832d(a) (1976). *See also* Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831i (1976) (also requiring five-year cancellation clause in contracts with private utilities).

38. 16 U.S.C. § 832c(c) (1976). Congress intended the "reasonable time" requirement to encourage the formation of cooperatives and other nonprofit retail organizations. Comment, *supra* note 1, at 628 n.90. A similar requirement appears in the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617d(c) (1976), and in the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831k (1976).

39. Fort Peck Act, ch. 250, 52 Stat. 403, 16 U.S.C. §§ 833–833q (1976). Congress designed the Fort Peck Act to provide power to consumers in Eastern Montana and to improve navigation on the upper Missouri River. The Act's preference provisions were patterned after the preference provisions of the Bonneville Act. Comment, *supra* note 1, at 632 n.102.

40. Reclamation Project Act, ch. 418, 53 Stat. 1193, 43 U.S.C. §§ 375a, 387–389, 485–485b (1976). The Act applies to all reclamation projects authorized under federal law and was intended by Congress to supplement all preceding reclamation legislation. *See* Comment, *supra* note 1, at 635–36. The Act requires the government, when selling surplus power from all its reclamation projects, to give preference to municipalities and other government agencies and to cooperatives and other nonprofit organizations. 43 U.S.C. § 485h(c).

41. Water Conservation and Utilization Act, ch. 861, 54 Stat. 1124, 16 U.S.C. §§ 590y–590z (1976).

42. *See, e.g.*, Fort Peck Act, 16 U.S.C. § 833 (1976); Reclamation Project Act, 43 U.S.C. § 485h(c) (1976); Water Conservation and Utilization Act, 16 U.S.C. § 590z(7) (1976).

43. Flood Control Act, ch. 665, §§ 1–8, 15, 58 Stat. 887 (1944) (codified in scattered sections of 16, 33, 43 U.S.C.).

44. 16 U.S.C. § 825s (1976).

45. *See* 90 CONG. REC. 8243 (1944). During Senate debate on the Flood Control Act, Sen. Bailey of North Carolina offered an amendment to the bill calling for sales of electricity directly from the generating facility with no preference. *Id.* at 8315. The Bailey amendment provided for the sale of electric power at the point of production, without special privilege or discrimination, to provide for the complete coordination of power development, both public and private, in the areas adjoining federal projects. *Id.* The Senate rejected the Bailey amendment. The final version of the bill simply

gress included a preference clause in the Flood Control Act that applied the Bonneville principles to all Corps of Engineers hydroelectric projects.[46]

II. THE PREFERENCE CONCEPT REVISITED: THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

Until recently, the Bonneville Act's preference clause was of little practical consequence. An abundance of hydroelectric power in the Pacific Northwest permitted the BPA to provide ample electricity to both private and public utilities.[47] Because of the vast amount of surplus power available, the federal government in the 1940's and 1950's encouraged electroprocessing companies to relocate in the region to stimulate economic development.[48] By the 1960's, however, the situation had changed. The BPA's commitments to preference customers under the Bonneville Act nearly exhausted the agency's hydroelectric power supply.[49] As the Bonneville Act's preference required, the BPA stopped selling power to the region's privately owned utilities.[50] The BPA proposed

read, "preference in the sale of such power and energy shall be given to public bodies and cooperatives." 16 U.S.C. § 825s.

46. 16 U.S.C. § 825s (1976). The U.S. Army Corps of Engineers presently operates twenty multipurpose dams in the Columbia River Basin. Hittle, Larson, Randall & Michie, *Pacific Northwest Power Generation, Multipurpose Use of the Columbia River and Regional Energy Legislation: An Overview*, 10 ENVTL. L. 235, 238 (1980) [hereinafter cited as Hittle]. The Flood Control Act entrusted the Secretary of the Interior with marketing responsibilities for surplus hydroelectric power produced at U.S. Army Corps of Engineers dams. 16 U.S.C. § 825s (1976). Congress later transferred the Secretary of the Interior's electric power marketing responsibilities to the Secretary of Energy. Department of Energy Organization Act, 42 U.S.C. § 7152 (Supp. IV 1980).

47. H.R. REP. No. 976, Part II, 96th Cong., 2d Sess. 27, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6023, 6025–26 [hereinafter cited as H.R. REP. No. 976, Part II].

48. Hittle, *supra* note 46, at 245. Electroprocessing industries in the Pacific Northwest primarily manufacture aluminum. During World War II the federal government sought to expand production of aluminum needed for the war effort. By 1942, the BPA's power sales commitments to electroprocessing industries totaled almost 900 megawatts, approximately 92% of the agency's commitments. BPA HISTORY, *supra* note 6, at 123.

49. *See* K. LEE, D. KLEMKA & M. MARTS. ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST 131–35 (1980).

50. *See* 16 U.S.C. § 832c(a) (1976). The BPA ceased sales of power to privately owned utilities when the private utilities' power sales contracts expired in 1973. H.R. REP. No. 976, Part II, *supra* note 47, at 6027. Consequently, private utilities were forced to construct their own generating facilities. By 1980, the generating capacity of private utilities in Washington, Oregon, Idaho and Montana totaled over 5200 megawatts of electric power. E. CARLSON, J. ELORRIAGA & G. WEYERHAEUSER, GOVERNORS' PANEL: A REPORT ON THE ECONOMIC IMPACTS OF THE ALTERNATIVES FACING THE REGION ON WASHINGTON PUBLIC POWER SUPPLY SYSTEM UNITS 4 AND 5 II-0 (1981) [hereinafter cited as GOVERNORS' PANEL REPORT]. Together, the region's private utilities generated over 46 million megawatt-hours of electric energy in 1980. BONNEVILLE POWER ADMINISTRATION, 1980 ANNUAL REPORT 54 (1981) [hereinafter cited as 1980 BPA ANNUAL REPORT].

to allocate "firm power" resources[51] among preference customers.[52] The agency continued to honor existing contracts by selling "interruptible" or "nonfirm" power,[53] directly to large industrial customers,[54] but announced that it would be unable to renew those contracts when they expired.

Partly to resolve the competing claims to the increasingly valuable hydroelectric power resource, Congress enacted the Northwest Power Act.[55] The Act is the most recent pronouncement of congressional policy

51. Firm power resources are those electric power resources that are available at all times, even under adverse conditions. The BPA determines the quantity of firm power available by calculating the Columbia River's lowest 42-month streamflow period of historic record. The agency characterizes the amount of power that would be available during a recurrence of the critical water period as firm power. Michie, *Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Acquisition Priority Scheme*, 4 U. PUGET SOUND L. REV. 299, 307 n.29 (1981). *See also* GOVERNORS' PANEL REPORT, *supra* note 50, at III-3 (another discussion of "critical water").

52. *See* H.R. REP NO. 976, Part II, *supra* note 47, at 5989–90. The BPA published notice of its proposed allocation policy on October 5, 1979. 44 Fed. Reg. 57,824 (1979). The agency planned to limit preference customers to a pro rata share of the BPA's firm power supply after 1991. H.R. REP NO. 976, Part II, *supra* note 47, at 6029.

53. Interruptible or nonfirm power is the amount of power in excess of firm power produced when the Columbia River exceeds critical water levels. Interruptible power is delivered to customers who are permitted to use it as long as it is not needed for the firm power loads of any BPA customers. If a shortage develops, the BPA interrupts the supply of interruptible nonfirm power made available to nonpreference customers. Hittle, *supra* note 47, at 249 n.75.

54. *See* H.R. REP. NO. 976, Part I, 96th Cong., 2d Sess. 28–29, *reprinted in* 1980 U.S. CODE CONG. & AD NEWS 5994–95 [hereinafter cited as H.R. REP NO. 976, Part I]. Prior to enactment of the Northwest Power Act, *infra* note 55, the BPA sold power directly to fifteen large industries, referred to as "DSIs." *Id.* at 5994. The following chart presents a list of the BPA's DSI customers, their locations, their contract expiration dates and contract demand amounts as of March 1, 1979:

Customer	Contract Expiration	Demand (in megawatts)
Aluminum Companies:		
Alcoa	June 15, 1987	520
Anaconda Co.	Sept. 8, 1987	379
Intalco	Oct. 22, 1984	438
Kaiser Aluminum & Chemical Corp.	Oct. 10, 1986	674
Martin-Marrieta Aluminum Corp.	Feb. 13, 1988	380
Reynolds Metals Co.	Dec. 28, 1986	690
Other Companies:		
The Carborundum Co.	Dec. 31, 1985	30
Crown Zellerbach Corp.	Aug. 30, 1983	14
Georgia Pacific Corp.	July 6, 1984	27
Hanna Nickel Smelting Co.	June 26, 1990	115
Oregon Metallurgical Corp.	May 7, 1988	9
Pacific Carbide & Alloys Co.	Sept. 9, 1991	8
Pennwalt Corp.	Dec. 31, 1985	45
Stauffer Chemical Works	Apr. 22, 1988	80
Union Carbide Corp.	May 11, 1981	12

H.R. REP. NO. 976, Part I, *supra*, at 5994–95.

55. Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94

regarding the preference concept and the sale of federally produced electric power. It follows decades of legislative silence on the subject.[56] The Act requires the BPA to offer long term power sale contracts to: (1) publicly owned utilities,[57] (2) federal agencies,[58] (3) privately owned utilities,[59] and (4) industrial customers directly served by the agency.[60] It expressly preserves the public-preference provisions of earlier federal legislation, including the Bonneville Act.[61]

The Northwest Power Act is designed to combine and operate generating and transmitting facilities in the region as though a single utility owned them.[62] The Act provides for creation of a regional power plan-

Stat. 2698 (1980) (codified at 16 U.S.C. §§ 839–839h (Supp. V 1981)) [hereinafter cited as Northwest Power Act].

56. During the period from 1944 to 1954, Congress did nothing to alter the scope or substance of the Bonneville Act's preference clause. In 1954, Congress passed legislation requiring the BPA to purchase power generated by the Grant County, Washington, Public Utility District at Priest Rapids Dam on the Columbia River. Priest Rapids Dam Act of 1954, Pub. L. No. 83-544, 68 Stat. 573 (1954). Congress required the BPA to resell power from the Priest Rapids Dam according to the marketing provisions of the Bonneville Act. *Id.* § 6, 68 Stat. at 574.

In 1978, Senator Jackson of Washington introduced a bill to eliminate the Bonneville Act's preference provisions. S. 3418, 95th Cong., 2d Sess. (1978). The unsuccessful Jackson bill would have restructured the BPA's authority to allow distribution of federal power in the context of a single, nondiscriminatory allocation framework. *Id.*

57. Northwest Power Act, *supra* note 55, § 5(b), 16 U.S.C. § 839c(b) (Supp. V 1981). The Northwest Power Act requires the BPA to offer to sell public bodies and cooperatives the power needed to meet their firm power needs to the extent their own resources are insufficient. *Id.* The Act specifies that, in the event of an energy shortage, the BPA may not sell to preference customers an amount of power less than its firm energy capability. *Id.* § 5(b)(6), 16 U.S.C. § 839c(b)(6) (Supp. V 1981). *See* H.R. REP. No. 976, Part II, *supra* note 47, at 6045.

58. Northwest Power Act, *supra* note 55, § 5(b), 16 U.S.C. § 839c(b) (Supp. V 1981). The Northwest Power Act authorizes the BPA to sell electric power to federal agencies as though they were preference customers. H.R. REP. No. 976, Part II, *supra* note 47, at 6045.

59. Northwest Power Act, *supra* note 55, § 5(b), 16 U.S.C. § 839c(b) (Supp. V 1981). The Northwest Power Act requires that the BPA offer to sell privately owned utilities the power needed to meet their firm power needs to the extent their own resources are insufficient. *Id.* § 5(b)(6), 16 U.S.C. § 839c(b)(6). The Act continues the Bonneville Dam Act's mandate that the BPA be able to reduce its obligations to private utilities on five years' notice. *Id.* § 5(b)(2), 16 U.S.C. § 839c(b)(2). *See* H.R. REP. No. 976, Part II, *supra* note 47, at 46–47. *See also supra* text accompanying note 37 (contracts with private utilities include 5-year cancellation clause).

60. Northwest Power Act, *supra* note 55, § 5(d)(1)(A), 16 U.S.C. § 839c(d)(1)(A) (Supp. V 1981). Under the Northwest Power Act, the direct-service industrial customers of the BPA are entitled only to the equivalent amount of power available to them under their contracts with the BPA dated January or April 1975 unless set criteria are met. *Id.* § 5(d)(1)(B), 16 U.S.C. § 839c(d)(1)(B).

61. *Id.* §§ 5(a), 10(c), 16 U.S.C. §§ 839c(a), 839g(c). The Northwest Power Act expressly subjects all power sales by the BPA to the Bonneville Dam Act's preference clause. *Id.* § 5(a), 16 U.S.C. § 839c(a). Furthermore, the Act states that its provisions do not alter the preference requirements of other federal legislation to which the BPA is subject. *Id.* § 10(c), 16 U.S.C. § 839g(c). According to Hittle, *supra* note 46, at 240–41, other federal legislation to which the BPA is subject to include the Flood Control Act, 16 U.S.C. § 825s (1976), the Rivers and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945), and the Reclamation Project Act, 43 U.S.C. § 485h(c) (1976). *See infra* text accompanying notes 68–71.

62. *See* 126 CONG. REC. S14,693 (daily ed. Nov. 19, 1980) (remarks of Sen. Hatfield). The

ning council to develop a regional acquisition plan.[63] The Act authorizes the BPA to purchase electric power resources to meet the region's energy needs.[64] Assuming the availability of sufficient resources,[65] the Act requires the BPA to offer long term power sale contracts to privately owned utilities and direct-service industrial customers (DSIs) as well as to preference customers.[66] Finally, the Act establishes rate directives that

"one-utility" concept, which represents an attempt to coordinate regional resource planning, marketing and generation activities, is the Act's major theme. Michie, *supra* note 51, at 305. To achieve the one-utility objective, the Act provides for the development of a comprehensive regional energy plan. Northwest Power Act, *supra* note 55, § 4(a)(1), 16 U.S.C. § 839b(a)(1) (Supp. V 1981). *See infra* note 63. The Act authorizes the BPA to provide sufficient electric power to direct-service industries and privately owned utilities as well as to preference customers. Northwest Power Act, *supra* note 55, § 5(d)(1)(A), 16 U.S.C. § 839c(d)(1)(A) (Supp. V 1981). *See supra* notes 59 & 60. The Act authorizes the BPA to acquire the resources necessary to meet its customers' requirements. Northwest Power Act, *supra* note 55, § 5(c), 16 U.S.C. § 839c(c) (Supp. V 1981). *See infra* note 64. The Act's rate directives, § 7, and residential power exchange provisions, § 5(c), attempt to preclude any rate disparity between preference customers and residential and small farm customers of participating private utilities. *See* 126 CONG. REC. S14,694 (daily ed. Nov. 19, 1980) (remarks of Sen. Hatfield).

63. Northwest Power Act, *supra* note 55, § 4, 16 U.S.C. § 839b (Supp. V 1981). The Northwest Power Act establishes an eight-member Pacific Northwest Electric Power Planning Council, two members of which are appointed by the respective governor of each of the states of Idaho, Montana, Oregon and Washington. *Id.* § 4(a)(1)–(3), 16 U.S.C. § 839b(a)(1)–(3). The Act directs the Council to prepare and adopt a regional conservation and electric power plan. *Id.* § 4(d), 16 U.S.C. § 839b(d). The Act requires that the plan include an energy conservation program, including model conservation standards, a twenty-year demand and resource availability forecast, an analysis of cost-effective methods of providing resources and a program for the protection and enhancement of fish and wildlife on the Columbia River and its tributaries. *Id.* §§ 4(e)(3), 4(h)(1)(A), 16 U.S.C. §§ 839b(e)(3), 839b(h)(1)(A). The Act requires the BPA Administrator to act consistently with the Council's plan. *Id.* § 4(d)(2), 16 U.S.C. § 839b(d)(2).

64. *Id.* § 6(b), 16 U.S.C. § 839d(b). The Act authorizes the BPA to acquire from any available source sufficient resources to meet contractual obligations to its customers. H.R. REP. NO. 976, Part II, *supra* note 47, at 6033. Specifically, it requires the BPA to first acquire all conservation and renewable resources installed by residential and small commercial consumers and implement all conservation measures, including loans and grants for insulation and weatherization, that are consistent with the Power Planning Council's conservation program. Northwest Power Act, *supra* note 55, § 6(a), 16 U.S.C. § 839d(a) (Supp. V 1981). The Act requires the BPA, after taking into account savings from conservation and renewable resource measures, to acquire nonrenewable resources from the region's utilities and from sources outside the region. *Id.* § 6(b), 16 U.S.C. § 839d(b) (Supp. V 1981). Congress intended the BPA's resource acquisition authority to obviate the need for the agency to allocate a limited amount of federal resources among existing and potential claimants to the resources. H.R. REP. NO. 976, Part II, *supra* note 47, at 6033. *See generally* Michie, *supra* note 51 (discussing the resource acquisition priority scheme and the resource selection process).

65. The Act premises the requirement that the BPA offer new long term power sale contracts to private utilities and direct-service industrial customers on a "deemed" availability of sufficient resources to meet the needs of preference customers. Northwest Power Act, *supra* note 55, § 5(g)(7), 16 U.S.C. § 839c(g)(7) (Supp. V 1981). The Northwest Power Act does not affect the BPA's authority under the Federal Columbia River Transmission System Act, 16 U.S.C. § 838i(b)(6) (1976), to purchase power on a short term basis to meet temporary shortages. H.R. REP. NO. 976, Part I, *supra* note 54, at 6003.

66. *See supra* notes 57–60 and accompanying text.

the BPA must follow when fixing rates for the power sold to preference, private utility and DSI customers.[67]

The Northwest Power Act preserves the traditional supply preference by expressly incorporating the preference provisions of other federal legislation, including the Bonneville Act.[68] As a preamble to the power sales provisions,[69] the Northwest Power Act declares that all power sales thereunder are subject to the preference and priority provisions of the Bonneville Act.[70] The Northwest Power Act's savings provisions also refer to the preference concept, stating that nothing in the statute is intended to affect the public preference provisions of other federal laws.[71]

The rate directives of the Northwest Power Act are the source of the Act's greatest impact on the historical preference concept. Previously, the BPA did not differentiate among its customers regarding the sale price of firm power.[72] In the Northwest Power Act, however, Congress set out rate directives that give price discounts to preference customers and to residential and small farm customers of private utilities.[73] Furthermore, Congress established rate ceilings ensuring that preference customers pay the lowest firm power rate.[74] The rate ceilings mandate that preference customers' rates will be no higher than if the Act had not required the BPA to participate in power sales or purchase transactions with nonpreference customers.[75] In other words, preference customers' rates should approximate the rates they would receive if the BPA were uninvolved with nonpreference sales. Never before has a federal statute cre-

67. *See infra* notes 72–78 and accompanying text.

68. Northwest Power Act, *supra* note 55, §§ 5(a), 10(c), 16 U.S.C. §§ 839c(a), 839g(c) (Supp. V 1981). *See* H.R. REP. No. 976, Part I, *supra* note 54, at 5999–6000.

69. Northwest Power Act, *supra* note 55, § 5(a), 16 U.S.C. § 839c(a) (Supp. V 1981).

70. *Id. See* Bonneville Dam Act, 16 U.S.C. §§ 831–832*l*, discussed *supra* in notes 28–38 and accompanying text.

71. Northwest Power Act, *supra* note 55, § 10(c), 16 U.S.C. § 839g(c) (Supp. V 1981). *See supra* note 61.

72. Prior to enactment of the Northwest Power Act, the Bonneville Act's rate directives required only that the BPA fix rates to encourage the widest possible use of electric energy from the Bonneville Project. 16 U.S.C. § 832e (1976). Congress allowed the BPA to set uniform rates to encourage equitable distribution of electric energy throughout the region. *Id.*

73. Northwest Power Act, *supra* note 55, § 7(b)(1), 16 U.S.C. § 839e(b)(1) (Supp. V 1981). Subject to the general requirement that the BPA set rates so that total revenues recover total costs, the Northwest Power Act requires the agency to establish a three-tiered rate structure. H.R. REP. No. 976, Part II, *supra* note 47, at 6034, 6050. The rate directives reserve the lowest rates for preference customers' firm power requirements and for power sold to private utilities to serve their residential and small farm loads. Northwest Power Act, *supra* note 55, § 7(b)(1), 16 U.S.C. § 839e(b)(1) (Supp. V 1981). A higher rate applies to private utilities' "load growth needs" and to power preference customers' need to meet any "new large single loads" they may have. *Id.* § 7(f), 16 U.S.C. § 839e(f). DSIs have a special rate. *Id.* § 7(c), 16 U.S.C. § 839e(c).

74. Northwest Power Act, *supra* note 55, § 7(b)(2), 16 U.S.C. § 839e(b)(2) (Supp. V 1981). *See* H.R. REP. No. 976, Part II, *supra* note 47, at 6050.

75. H.R. REP. No. 976, Part II, *supra* note 47, at 6034.

ated more than a priority in the right to purchase the power generated at federally owned installations.[76] Under the Northwest Power Act, Congress expanded the historical preference concept to encompass the price of power as well as its availability.[77] Thus, the Act creates an entirely new form of preference.[78]

III. THE NINTH CIRCUIT AND THE PREFERENCE CLAUSE

A. *The* Arizona Power Pooling *and* Santa Clara *Decisions*

The 1982 case of *Central Lincoln Peoples' Utility District v. Johnson*[79] was the Ninth Circuit's first opportunity to examine the Bonneville Act's preference clause.[80] The Ninth Circuit, however, had previously interpreted similar preference clauses in the Reclamation Project Act[81] and the Flood Control Act.[82] In *Arizona Power Pooling Association v. Morton*,[83] the court applied the Reclamation Project Act's preference clause to governmental sales of thermally generated electric power. The Colorado River Basin Project Act[84] (Colorado River Act) authorized the purchase of nonfederal thermal power for the Bureau of Reclamation's Central Arizona irrigation project. The Colorado River Act authorized the Bureau, subject to the preference provisions of the Reclamation Project Act, to dispose of power purchased, but not yet needed, for the Central Arizona Project.[85] The Bureau refused to sell surplus power to preference customers under the Reclamation Project Act, arguing that the Colorado River Act allowed the agency to sell the power back to the private utility owners of the thermal plant projects.[86] The *Arizona Power Pooling* court dis-

76. Potamkim, *supra* note 11, at 3, 5, *cited with approval in* BPA HISTORY, *supra* note 6, at 75.

77. *Compare* Bonneville Dam Act, 16 U.S.C. § 832e (1976) (allowing rate schedules for the "widest possible diversified use") *with* Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831n–834(f) (1976) (providing only for lowest possible rates).

78. *See supra* note 76.

79. 673 F.2d 1076 (9th Cir. 1982), discussed *infra* in notes 96–115 and accompanying text.

80. On November 15, 1977, the City of Portland, Oregon filed suit against the BPA claiming that the agency had unlawfully denied the city's application for power as a preference customer. City of Portland v. Munro, No. 77-928 (D. Or., filed Nov. 14, 1977). The case appeared to be a major test of the preference concept because the city's complaint alleged violations of the Bonneville Project Act's preference provisions. On December 27, 1978, however, the court ruled that the case was not ripe for adjudication because the city was not yet ready to receive power from the BPA even if the agency were to grant the city's application. *See* Comment, *supra* note 1, at 607 n.26.

81. Reclamation Project Act, 43 U.S.C. § 485h(c) (1976).

82. Flood Control Act, 16 U.S.C. § 825a (1976).

83. 527 F.2d 721 (9th Cir. 1975).

84. Colorado River Basin Project Act, 43 U.S.C. §§ 1501–1556 (1976).

85. *Id.* §§ 1521–1528. Congress designed the Central Arizona Project to furnish irrigation and municipal water to water-deficient areas of Arizona and New Mexico. 527 F.2d at 723.

86. 527 F.2d at 725.

agreed, ruling that the Reclamation Project Act's preference clause constitutes a specific directive prohibiting the sale of federal power to a private customer when a preference customer is willing to purchase the power.[87]

The Ninth Circuit reaffirmed the *Arizona Power Pooling* decision in *City of Santa Clara v. Andrus*.[88] The Bureau of Reclamation refused to supply Santa Clara's municipal utility system with firm power on the grounds that all firm power was already committed to meet the growth needs of other preference customers.[89] While denying the city's application, the Bureau sold firm power to Pacific Gas and Electric (PG&E), a private utility.[90] The Bureau made the sale with the understanding that it could repurchase power from PG&E to meet the existing preference customers' future load growth needs, an arrangement referred to as "banking" energy.[91] The *Santa Clara* court examined the form of the questionable allocations in order to uncover their substance.[92] The court ruled that, regardless of characterization, the "banking" arrangement constituted a sale of power, subject to the preference provisions of the Reclamation Project Act.[93] The Ninth Circuit held that a private utility could not receive federally marketed power, even on a provisional basis, while the Bureau denied power to a preference customer.[94]

87. *Id.* at 727. The Ninth Circuit rejected the Bureau's argument that Congressional appropriations in connection with the Central Arizona Project effectively "approved" of the disposition of interim power to nonpreference customers and thus sanctioned any possible violation of the Colorado River Basin Project Act's preference clause. *Id.* at 726. In *Central Lincoln*, the Ninth Circuit rejected a similar argument made by the BPA and its direct-service industrial customers. 673 F.2d 1076, 1080 n.4 (9th Cir. 1982). The *Central Lincoln* defendants argued that the BPA informed Congress of the agency's proposed interpretation of the Northwest Power Act while the Act was still pending and that, in passing the legislation, Congress accepted the BPA's interpretation. *Id.*

88. 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

89. *See* 572 F.2d at 664. The Reclamation Project Act authorizes the Bureau of Reclamation to sell surplus electric power generated at multipurpose federal reclamation projects. 43 U.S.C. § 485h (1976). The Bureau's Central Valley Project, located in the Central Valley of California and its surrounding mountains, generated the electric power involved in *Santa Clara*. 572 F.2d at 664.

90. 572 F.2d at 669–70.

91. *Id.* at 669. The Bureau of Reclamation and Pacific Gas & Electric (PG&E) had participated in the banking arrangement since 1965. *See id.* at 670. The Bureau claimed that the arrangement enabled it to meet existing preference customers' future load growth by repurchasing banked power from PG&E when needed and distributing it to those users at that time. *Id.* at 669.

92. *See id.* at 670–71.

93. *Id.*

94. *Id.* The city argued further that the Bureau of Reclamation violated the Reclamation Project Act's preference clause by providing other public entities with firm power while refusing to allocate firm power to Santa Clara. *Id.* at 667. The Ninth Circuit rejected the city's argument. *Id.* at 668. The *Santa Clara* court ruled that the Act's preference clause provides no law to apply in reviewing the Bureau's allocation of federal electric power among preference customers. *Id.* The court concluded that the preference clause does not prevent the Bureau from discriminating against some preference entities to benefit others. *Id.*

B. *Back to the Courts:* Central Lincoln Peoples' Utility District v. Johnson

As previously stated, the Northwest Power Act authorizes the BPA to sell electric power to existing direct-service industrial customers.[95] The Act directs that portions of the direct-service sales be interruptible to provide reserves for all the BPA's firm power needs and for preference customers' nonfirm power needs.[96] The BPA interpreted the power sales provisions of the Act to require the establishment of a reserve by giving DSIs priority in purchasing nonfirm power.[97] The agency reasoned that interruptible sales of nonfirm power to DSIs are necessary to provide peaking reserves[98] for preference customers' firm power needs.[99] According to the BPA, however, Congress did not intend for DSI sales to provide reserves for preference customers' nonfirm power needs.[100] In other words, the BPA thought that it could interrupt DSI sales to provide for the preference customers' firm power needs but not for their nonfirm power needs.[101]

On August 28, 1981, relying on its interpretation of the Northwest Power Act's power sales provisions, the BPA offered power sales contracts to its DSI customers that obligated the agency to provide nonfirm power to the DSIs before making it available to preference customers.[102] The DSI contracts called for a single class of "industrial firm" power[103]

95. Northwest Power Act, *supra* note 55, § 5(d), 16 U.S.C. § 839c(d) (Supp. V 1981). *See supra* note 60 and accompanying text.

96. *See* Northwest Power Act, *supra* note 55, § 5(d)(1)(A), 16 U.S.C. § 839c(d)(1)(A) (Supp. V 1981); Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076 (9th Cir.), *amended*, 686 F.2d 708 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3699 (U.S. Mar. 25, 1983) (No. 82–1071).

97. *See* 46 Fed. Reg. 44,340, 44,348 (1981).

98. Peaking reserves means having uncommitted power available to meet the highest demand experienced during a given period of time. *See* Hittle, *supra* note 46, at 247 n.64. Peaking periods vary in duration from minutes to hours. *Id.*

99. *See* 46 Fed. Reg. 44,340, 44,348 (1981).

100. *Id.* The BPA cited the Senate Energy Committee's report on the Act as authority for the decision to deny preference customers access to nonfirm power. *Id.* The Senate Committee report cryptically directs the agency to serve the first 25% of a direct-service industrial customer's operating demand with nonfirm power resources operated by the agency as if they were firm. S. REP No 272, 96th Cong., 1st Sess. 59 (1979) [hereinafter cited as S. REP. No 272].

101. *See infra* text accompanying notes 105–06.

102. 46 Fed. Reg. 44,340 (1981).

103. *Id.* at 44,348. The Northwest Power Act requires the BPA to provide the DSIs with amount of power available under the 1975 "industrial firm" contracts. Northwest Power Act, *supra* note 55, § 5(d)(1)(B), 16 U.S.C. § 839c(d)(1)(B) (Supp. V 1981). Industrial firm power under those contracts was power made continuously available to direct-service customers, subject to curtailment in the event of delayed completion, unexpectedly poor performance of generating facilities or conservation measures, or unanticipated growth of preference customers' firm power loads. *See* S. REP No 272, *supra* note 100, at 28. Industrial firm power is also subject to partial curtailment to provide forced outage and peaking power reserves and to complete curtailment whenever frequency problems arise on the regional transmission grid. H.R. REP. No. 976, Part II, *supra* note 47, at 48.

and divided service into four approximately equal "quartiles."[104] The contracts authorized the BPA to restrict deliveries of power, in amounts up to twenty-five percent of DSI demand, at any time and for any reason in order to meet the agency's firm power obligations.[105] The contracts explicitly stated, however, that the BPA could not restrict the first quartile of power to sell nonfirm power to the BPA's preference customers.[106]

In *Central Lincoln Peoples' Utility District v. Johnson,*[107] a number of public utilities sought a declaratory judgment that the August 1981 DSI contracts violated the preference clause of the Northwest Power Act.[108] The utilities argued that the Northwest Power Act reaffirmed the preference concept and applied it to all forms of power sales by the BPA.[109] The Ninth Circuit agreed with the utilities, holding that the preference

104. Under the 1975 and August 1981 contracts, each "quartile" represented 25% of a direct-service customer's operating demand. 46 Fed. Reg. 44,340, 44,390 (1981).

105. *Id.* at 44,381. Under section 7(d) of the August 1981 contracts, the BPA could restrict deliveries of an additional 25% of the direct-service customers' power demand, but only if the agency was unable to meet its firm power obligations to preference customers due to delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by the agency. *Id.* at 44,382. The contracts did not allow the BPA to restrict delivery of the second quartile of industrial firm power to meet the unanticipated growth of preference customers' firm power loads. *Cf. id.* at 44,381–82 (first quartile restriction rights under the August 1981 contracts).

106. *Id.* at 44,382. Section 8(a)(2) of the August 1981 contracts prohibited the BPA from selling nonfirm energy to preference customers if the energy could be used to serve the first quartile of the direct-service customers' operating demand. *Id.* at 44,385. Section 8(c)(9) of the contracts provided that the BPA would attempt to acquire additional energy before requiring the direct-service customers to repay energy advanced to the first quartile. *Id.* at 44,387.

107. 673 F.2d 1076 (9th Cir.), *amended,* 686 F.2d 708 (9th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3699 (U.S. Mar. 25, 1983) (No. 82–1071).

108. *Id.* at 1077–78. Section 9(e)(5) of the Act provides the Ninth Circuit Court of Appeals with original jurisdiction to hear challenges to actions by the BPA and the Pacific Northwest Electric Power Planning Council. Northwest Power Act, *supra* note 55, § 9(e)(5), 16 U.S.C. § 839f(e)(5) (Supp. V 1981). In *Central Lincoln,* the public utilities named as plaintiffs were the Central Lincoln County Peoples' Utility District; City of Eugene, Oregon, Water & Electric Board; City of Seattle, Washington, City Light Department; City of Tacoma, Washington, Department of Public Utilities; Clatskanie County Peoples' Utility District; Northern Wasco County Peoples' Utility District; Public Utility District No. 1 of Chelan County; Public Utility District No. 1 of Cowlitz County; Public Utility District No. 1 of Douglas County; Public Utility District No. 1 of Snohomish County; Public Utility District No. 2 of Grant County; and Tillamook County Peoples' Utility District. Second Amended Complaint at 1, Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076 (9th Cir.), *amended,* 686 F.2d 708 (9th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3699 (U.S. Mar. 25, 1983) (No. 82–1071).

109. 673 F.2d at 1077–78. The utilities and the BPA asserted that, prior to passage of the Northwest Power Act, the Bonneville Act entitled preference customers to purchase nonfirm energy before the BPA could offer the energy to direct-service customers. Preference Customer Reply Memorandum at 12, *Central Lincoln Peoples' Utility Dist.* [hereinafter cited as Reply Memorandum]. The utilities argued that giving direct-service customers priority in buying nonfirm power would enable those customers to receive a greater amount of power than they received under their previous contracts in violation of section 5(d)(1)(B) of the Northwest Power Act. *Id.* at 8. *See* Northwest Power Act, *supra* note 55, § 5(d)(1)(B), 16 U.S.C. 839c(d)(1)(B) (Supp. V 1981).

provisions of the Northwest Power Act apply to firm and nonfirm power alike.[110]

Significantly, the Ninth Circuit in *Central Lincoln* ruled that the BPA must provide nonfirm power to its preference customers prior to serving the DSIs' first quartile.[111] The court reasoned that application of the preference clause to nonfirm power would interrupt first quartile service, but argued that the interruption would result from insufficient power to make the initial allocation of nonfirm power to the DSIs rather than from the use of power already allocated to the reserve.[112] The *Central Lincoln* court explicitly ruled that the initial allocation of nonfirm power is subject to the preference concept.[113] It squarely rejected the BPA's contention that interruption of nonfirm power to the DSIs violated the Act by making the DSIs' nonfirm power allocation into a reserve for the preference customers' nonfirm power needs.[114]

IV. CONCLUSION—THE PREFERENCE CONCEPT IN THE EIGHTIES: PRICE AS WELL AS AVAILABILITY

The Northwest Power Act is the most recent pronouncement of congressional policy regarding the sale of federally produced and federally acquired electric power. The Act explicitly preserves the public preference concept by incorporating the preference and priority provisions of the Bonneville Act and other federal power marketing legislation.[115]

110. 673 F.2d at 1080–81.

111. *Id.* According to the BPA, the Northwest Power Act requires the agency to treat the direct-service customers' first quartile of operating demand as if it were a firm obligation. *See id.* at 1081. As previously noted, the BPA cited the Senate Energy Committee's report as authority for its interpretation of the 1980 Act. *See supra* note 100. The *Central Lincoln* court acknowledged the Senate Committee report as providing some support for the BPA's interpretation. 673 F.2d at 1081. The court ruled, however, that the Senate Committee's direction to the BPA to treat the direct-service load "as if it were firm" was too ambiguous to support an exception to the preference provisions of the Act. *Id.* at 1081 n.6.

112. *Id.* at 1080.

113. *Id.*

114. *See id.*

115. *See supra* notes 68–71 and accompanying text. In *Central Lincoln*, the Ninth Circuit ruled that the Northwest Power Act's savings provisions explicitly reaffirm the preference to public bodies established by the Bonneville Act. 673 F.2d at 1079. The *Central Lincoln* court found support for its ruling in the reports of both House committees that considered the Northwest Power Act. *Id.* at 1081 n.5. The House Interior and Insular Affairs Committee stated that, when passing the Act, Congress did not intend "to interfere in any way with, or modify the statutory rights of preference customers either within or without the region." H.R. REP. NO. 976, Part II, *supra* note 47, at 6024, *quoted in Central Lincoln*, 673 F.2d at 1081 n.5. The House Interstate and Foreign Commerce Committee declared that it did not want to "undo nearly 80 years of history or establish any precedent" which "might be construed to change the meaning or application" of the preference clause. H.R. REP NO 976, Part I, *supra* note 54, at 6000, *cited in* 673 F.2d at 1081 n.5.

While the Northwest Power Act requires the BPA to offer power sales contracts to private utilities and direct-service industrial customers,[116] the assumption is that enough power will be available to first serve all the power needs of the preference customers.[117]

The Act's rate directives significantly expand the scope of the preference concept. For the first time, Congress applied the preference concept to the price of electric power as well as to its availability. The Act's rate directives require the BPA to charge lower rates to preference customers than to nonpreference customers.[118] The rate directives enable preference customers to receive cost benefits from their preference rights for firm power purchases.[119] Furthermore, the Act includes residential and small farm customers of privately owned utilities (noted as public bodies and cooperatives) as beneficiaries of many preference-customer rights.[120] Congress expanded the category of preference customers to preclude the rate disparity that would otherwise result from the rate directive scheme.[121]

The Ninth Circuit's decision in *Central Lincoln* is the most recent judicial interpretation of the public-preference concept. The *Central Lincoln* decision is consistent with earlier Ninth Circuit decisions that give priority to preference customers in the sale of electric power, regardless of the way that the sale is characterized by the agency.[122] According to the *Central Lincoln* court, the preference concept continues to prohibit the sale of electric power to nonpreference customers when the needs of preference customers are unsatisfied.[123]

By restoring preference customers access to nonfirm power, *Central Lincoln* allows publicly owned utilities to reduce greatly the cost of power to their customers. Many of the region's public utilities maintain and operate their own power generating facilities.[124] Access to nonfirm power

116. *See supra* notes 59–60 & 66 and accompanying text.

117. *See supra* notes 69–71 and accompanying text.

118. *See supra* notes 73–74 and accompanying text.

119. H.R. REP. No. 976, Part II, *supra* note 47, at 6046.

120. Northwest Power Act, *supra* note 55, § 7(b)(1), 16 U.S.C. § 839e(b)(1) (Supp. V 1981). The Senate Energy Committee declared that a major purpose of the Northwest Power Act was to extend the benefits of the Federal Columbia River Power System to the residential and farming consumers of privately owned utilities. S. REP. No. 272, *supra* note 100, at 14.

121. *See* 126 CONG. REC. S14,694 (daily ed. Nov. 19, 1980) (remarks of Sen. Hatfield).

122. *E.g.*, City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978), discussed *supra* in notes 88–94 and accompanying text; Ariz. Power Pooling Ass'n v. Morton, 572 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), discussed *supra* in notes 83–87 and accompanying text.

123. 673 F.2d at 1080. *See supra* notes 108–09 and accompanying text.

124. 673 F.2d at 1080. The following public utilities in the Pacific Northwest own and operate their own generating facilities: City of Eugene, Oregon, Water and Electric Board (96,800 kilowatts hydro, 51,200 kilowatts cogeneration, 500 kilowatts wind); City of Centralia, Washington, Electric

provides the generating utilities with backup resources for their own facilities.[125] When adverse water conditions or generating unit outages occur, generating utilities will be able to purchase nonfirm power from the BPA and thus guarantee their customers a continuous supply of electricity.[126] Access to nonfirm power also enables generating utilities to replace power produced at their own facilities with generally cheaper, nonfirm power, produced as surplus at federal facilities.[127] Whenever nonfirm power is available from the BPA, generating utilities may either discontinue their own generating or continue generation and sell their own power to other purchasers.

Nongenerating public utilities may also derive benefits from the *Central Lincoln* decision. Any preference customer may forego its initial priority to the BPA's firm power and purchase generally cheaper nonfirm power instead.[128] Given the consistent seasonal availability of quantities

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Light Department (10,000 kilowatts hydro); Chelan County Public Utility District (1,879,700 kilowatts hydro); Cowlitz County Public Utility District (70,000 kilowatts hydro); Douglas County Public Utility District (774,300 kilowatts hydro); Grant County Public Utility District (1,619,800 kilowatts hydro); Pend Oreille County Public Utility District (60,600 kilowatts hydro); City of Seattle, Washington, City Light Department (1,276,800 kilowatts hydro, 750 kilowatts combustion turbine, 30,000 kilowatts steam); City of Tacoma, Washington, Department of Public Utilities (659,700 kilowatts hydro); City of Bonners Ferry, Idaho (2400 kilowatts hydro, 2400 kilowatts diesel turbine); City of Idaho Falls, Idaho (3000 kilowatts hydro). PACIFIC NORTHWEST UTILITIES CONFERENCE COMMITTEE, NORTHWEST REGIONAL FORECAST OF POWER LOADS AND RESOURCES JULY 1982–JULY 1993, at VII-1 to -4 (1982). In addition, the following public utilities own portions of the 1,400,000 kilowatt Centralia Steam Electric Project: Snohomish County Public Utility District (112,000 kilowatts); Grays Harbor County Public Utility District (56,000 kilowatts); City of Seattle, Washington, City Light Department (112,000 kilowatts); City of Tacoma, Washington, Department of Public Utilities (112,000 kilowatts). OFFICE OF APPLIED ENERGY STUDIES, WASHINGTON STATE UNIVERSITY, WASHINGTON STATE ENERGY USE PROFILE, 1960–1981, at 30–31 (1981).

125. Reply Memorandum, *supra* note 109, at 1.

126. *See id.* The BPA's direct-service customers contract with the agency to purchase available nonfirm power. 673 F.2d at 1079 n.3. If a power plant outage occurs or energy peaks so that the BPA cannot meet its firm obligations, the agency must interrupt delivery of power to direct-service customers. *Id.*

127. For a discussion of this displacement option, see Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 WASH. L. REV. 279, 287–89 (1983). Since nonfirm power is interruptible, it is often sold by the BPA for less than firm power. *Compare* BONNEVILLE POWER ADMINISTRATION, WHOLESALE RATE SCHEDULES & GENERAL RATE SCHEDULE PROVISIONS A-1 (Aug. 1982) (Schedule PF-2, Primary Firm Power Rate) *with id.* at A-32 (Schedule NF-2, Nonfirm Energy Rate). In 1983, the BPA will offer its preference customers continuous firm energy during peak hours at an average rate of 18.2 mills per kilowatthour during the billing months of April and May, 14.4 mills per kilowatthour during the billing months June through August and 15.02 mills per kilowatthour during the billing months September through November. *Id.* at A-1. While the availability of nonfirm energy depends on whether the Columbia River exceeds critical water levels, the price of nonfirm energy depends on whether the river exceeds or is expected to exceed spill levels. When spill conditions exist or are expected to exist, the BPA offers nonfirm energy at 9.0 mills per kilowatthour. *Id.* at A-32. When the river exceeds critical water levels but spill conditions do not exist nor are they expected to exist, the BPA offers nonfirm energy at 18.2 mills per kilowatthour. *Id.*

128. Utilities with nonfirm power sale contracts may not purchase nonfirm power to displace firm

of nonfirm power,[129] and the supply of surplus power available outside the region,[130] purchases of nonfirm power by nongenerating utilities

power the BPA is contractually obligated to supply. *Id.* at A-32. The Northwest Power Act required the BPA to offer long term power sales contracts to existing public body and cooperative customers, privately owned utility customers and direct-service industrial customers within nine months of the effective date of the Act. Northwest Power Act, *supra* note 55, § 5(g)(1), 16 U.S.C. § 839c(g)(1) (Supp. V 1981). Accordingly, on August 28, 1981, the BPA offered 20-year power sales contracts to its customers. *See* 46 Fed. Reg. 44,340, 44,341–42, 44,349 (1981). The Northwest Power Act allowed the BPA's customers one year from the date of offering to accept the BPA's proposed power sales contracts. Northwest Power Act, *supra* note 55, § 5(g)(2), 16 U.S.C. § 839c(g)(2) (Supp. V 1981). The following public utilities refused to sign power sales contracts with the BPA: Public Utility District of Mason County; Public Utility District of Pacific County; Pend Oreille County Public Utility District; City of Canby, Oregon; City of Cascade Locks, Oregon; and City of Centralia, Washington. Northwest Power Planning Council, *Finally—the region signs on,* 1 NORTHWEST ENERGY NEWS No. 5, Sept.-Oct. 1982, at 3–4.

129. Nonfirm power is available only when the Columbia River exceeds critical water levels. *See supra* note 53. *See also Central Lincoln,* 673 F.2d at 1078 n.1 (when water level is greater than critical level, the power generated from the excess water is nonfirm energy). Planning experts expect critical water conditions to recur only once every 160 years. Boly, *Why the BPA Doesn't Want it to Rain,* Willamette Week, August 25–31, 1981, at 1 col. 5. *Accord,* GOVERNORS' PANEL REPORT, *supra* note 50, at III-3.

130. *See* BONNEVILLE POWER ADMINISTRATION, INTERREGIONAL RESOURCE POTENTIALS: A SURVEY OF POTENTIALS FOR THE PACIFIC NORTHWEST ACQUIRING RENEWABLE RESOURCES FROM ADJOINING REGIONS AND FOR MUTUALLY BENEFICIAL INTERREGIONAL POWER EXCHANGES (June 1981) [hereinafter cited as INTERREGIONAL RESOURCE POTENTIALS]. The Northwest Power Act requires the BPA to investigate opportunities for entering into arrangements for acquisition of resources from adjoining regions. Northwest Power Act, *supra* note 55, § 6(1)(1), 16 U.S.C. § 839d(l)(1) (Supp. V 1981). As of this writing, the BPA has refused to estimate the amount of additional resources available outside the region, or the reduction in intraregional nonrenewable generation requirements that could result from interregional power exchanges. INTERREGIONAL RESOURCE POTENTIALS, *supra,* at iii. In 1981, however, the British Columbia Hydro authority (BC Hydro) reported a surplus of 6.6 million megawatt hours of energy and 3325 megawatts of peaking capacity. BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, ANNUAL REPORT, 1980–81 (1981), *quoted in* Arlon R. Tussing and Associates, Inc., Potential Markets in the Pacific Northwest and California for Surplus Electricity from British Columbia 6, 8 (November 3, 1981) (unpublished memorandum) (copy on file with the *Washington Law Review*).

Presently, power transmission interties owned by the federal government connect the Pacific Northwest Region with the transmission systems of the Montana Power Company (MPC), the Idaho Power Company (IPC), the Pacific Southwest Region, BC Hydro and the West Kootenay, British Columbia, Power and Light Co. *See generally* INTERREGIONAL RESOURCE POTENTIALS, *supra* (survey of existing and potential interties). The Federal Columbia River Transmission System Act of 1974 authorizes public utilities to utilize federal transmission facilities, including the interregional intertie system. 16 U.S.C. § 838d (1976). The Act requires the BPA to make excess capacity in the federal transmission system available to all utilities on a fair and nondiscriminatory basis. *Id.* "Potential transactions" across interregional interties "include exchanges of capacity for firm offpeak energy, seasonal exchanges of capacity or firm power to take advantage of diversity in loads, short-term power purchases and sales, sharing of power systems' reserve generating capacity, coordination of hydraulic operations to maximize use of storage reservoirs and provisional energy sales." INTERREGIONAL RESOURCE POTENTIALS, *supra,* at 20. The Act requires the BPA to charge rates for use of the federal transmission system that equitably allocate the system's costs between federal and nonfederal users of the system. 16 U.S.C. § 838h.

would be consistent with the utilities' statutory duty to provide a continuous supply of power to their customers.[131]

Read together, the Northwest Power Act and the *Central Lincoln* decision strongly reaffirm the preference concept. The Act represents Congress' determination to preserve the Bonneville Act's preference clause;[132] *Central Lincoln* demonstrates the Ninth Circuit's unwillingness to tolerate administrative erosion of the preference concept.[133] Furthermore, the Act's rate directives expand the preference concept to cover the price of power as well as its availability.[134] Thus, Congress and the federal courts have strengthened the priority of public utilities and cooperatives to power sold by the BPA. After threatened extinction by legislative amendment and administrative retraction, the preference concept continues to greatly help its beneficiaries.

131. State statutes require utilities to exercise "public utility responsibility" toward their customers. *E.g.*, IDAHO CODE §§ 61-301 to -303 (1976); MONT CODE ANN § 69-3-201 to -209 (1981); OR. REV STAT. § 757.020 (1981); WASH REV. CODE § 80.28.010 (1981). Public utility responsibilities generally include the duty to serve upon reasonable demand all customers of the type and in the territory the utility proposes to serve, the duty to render adequate service, the duty to serve customers at reasonable rates and the duty to serve customers on a nondiscriminatory basis. *See, e.g.*, WASH REV. CODE § 80.28.010 (1981).

132. *See supra* notes 68–71, 115 and accompanying text.

133. *See supra* notes 108–10 and accompanying text.

134. *See supra* notes 76–78 and accompanying text.