



Comptroller General
of the United States

Washington, D.C. 20548

Released

B-236481

February 16, 1990

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The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This is in response to your letter dated June 12, 1989, in which you asked for our views on three legal issues concerning the Glines Canyon and Elwha River Dams:

- (1) Whether the Federal Energy Regulatory Commission (FERC) has jurisdiction to issue a new license for the Glines Canyon Dam;
- (2) Whether FERC may add conditions to its annual licenses on the Glines Canyon Dam for the restoration of fisheries; and
- (3) Whether any federal agency may order either dam removed.

First, we believe that FERC does not have jurisdiction to issue a new license for the Glines Canyon Dam.

Second, because FERC does not have jurisdiction to issue a new license for the Glines Canyon Dam, it does not have authority to issue annual licenses, much less condition their issuance.

Third, we have concluded that FERC has the authority to order either or both dams removed.

We hope our comments are helpful to you. We have enclosed our more detailed analysis of these issues. Under our usual

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agreement, this opinion will be available to the public 30 days from its date, unless you release it sooner. As agreed, we will provide you with our analysis of the nonlegal issues at a later date.

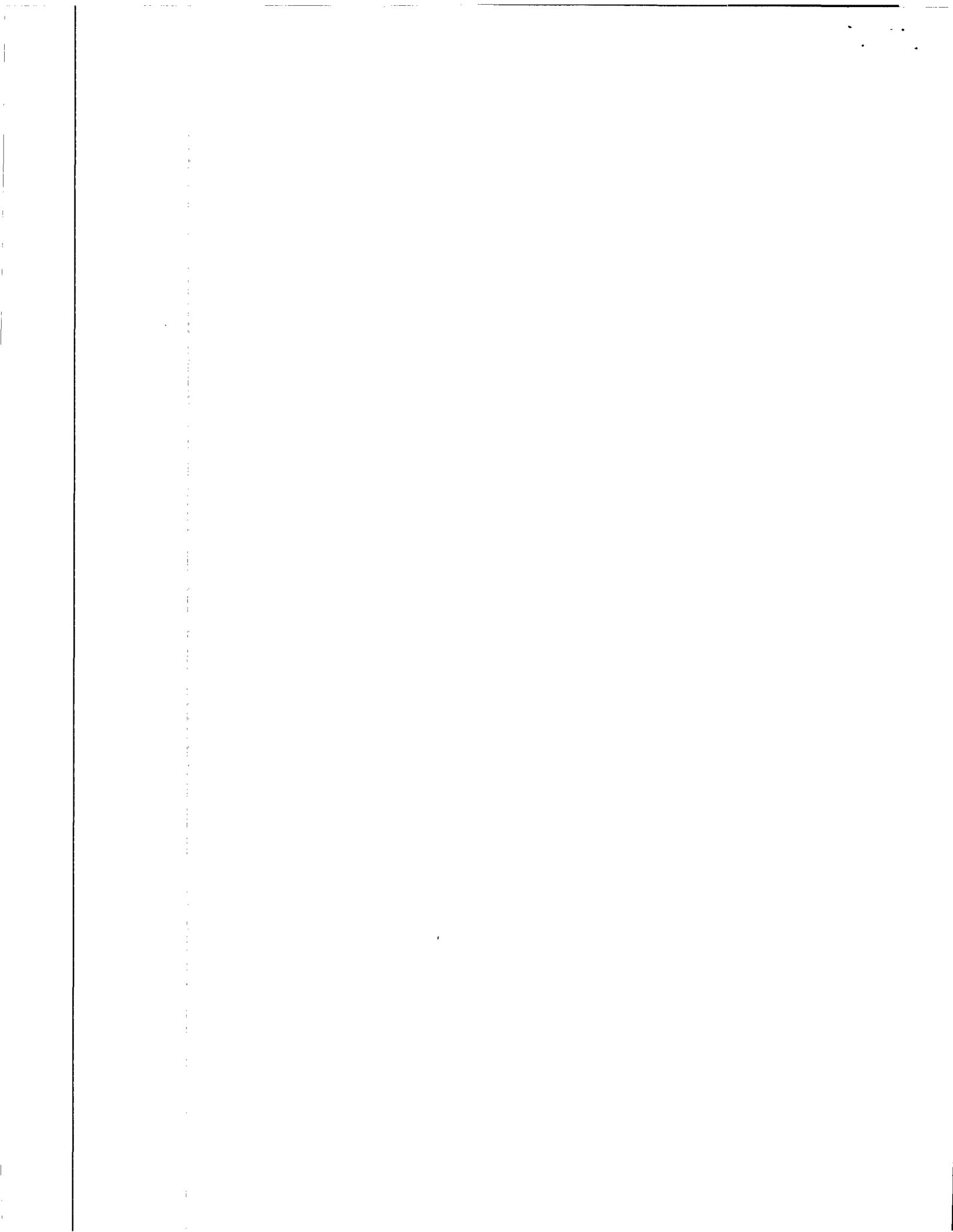
Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States

Enclosure

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Analysis

Background

The Elwha River flows for 44 miles from its source in the Olympic Mountains of Washington State through the Olympic National Park to the Strait of San Juan de Fuca. There are two dams along the river: the Glines Canyon Dam, located wholly within the Olympic National Park, and the Elwha Dam, located entirely outside the Olympic National Park. These dams provide electricity to the Daishowa America pulp and paper mill located in Port Angeles, Washington. The mill provides employment to 360 people. Daishowa plans to expand the facility and expects to employ another 150 mill workers.

During the 19th century, the river was home to eight different species of anadromous fish.^{1/} The damming of the river, early in this century, has kept the fish from spawning upstream.

The Glines Canyon Dam is located about 14 miles from the mouth of the Elwha River. It was licensed by the Federal Power Commission to produce electricity in 1926. When the dam was licensed, it was located largely within the Olympic National Forest. Twelve years later, Congress created from these Forest lands the Olympic National Park, and authorized the President to establish the Park's outer boundaries. In 1940, the President extended the Park boundaries to include the Glines Canyon Dam. The dam's license expired in 1976 and has been renewed on an annual basis since then pursuant to § 15(a) of the Federal Power Act (FPA) (16 U.S.C. § 808(a)).

The Elwha Dam is located about nine miles down river from Glines Canyon and five miles from river's mouth. This dam has produced electricity since its construction in 1913. At no time has the dam had a hydroelectric power license. At the time of its construction, no such license was required. However, under the Rivers and Harbors Act of 1899, dams across rivers like the Elwha had to be approved

^{1/} These included all five species of pacific salmon, as well as steelhead, cutthroat, and Dolly Varden trout.

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by, among others, the Army Corps of Engineers. We have found no evidence to suggest that such permission was ever obtained. In 1968, the dam owners applied for a license from the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission (FERC)). Ten years later, in 1978, FERC determined that it had jurisdiction over the Elwha Dam because the structure is located on a navigable waterway (FPA § 4(e); 16 U.S.C. § 797(e)). The license application for the dam is still pending before the Commission.

Issues

Chairman Dingell raised three issues.

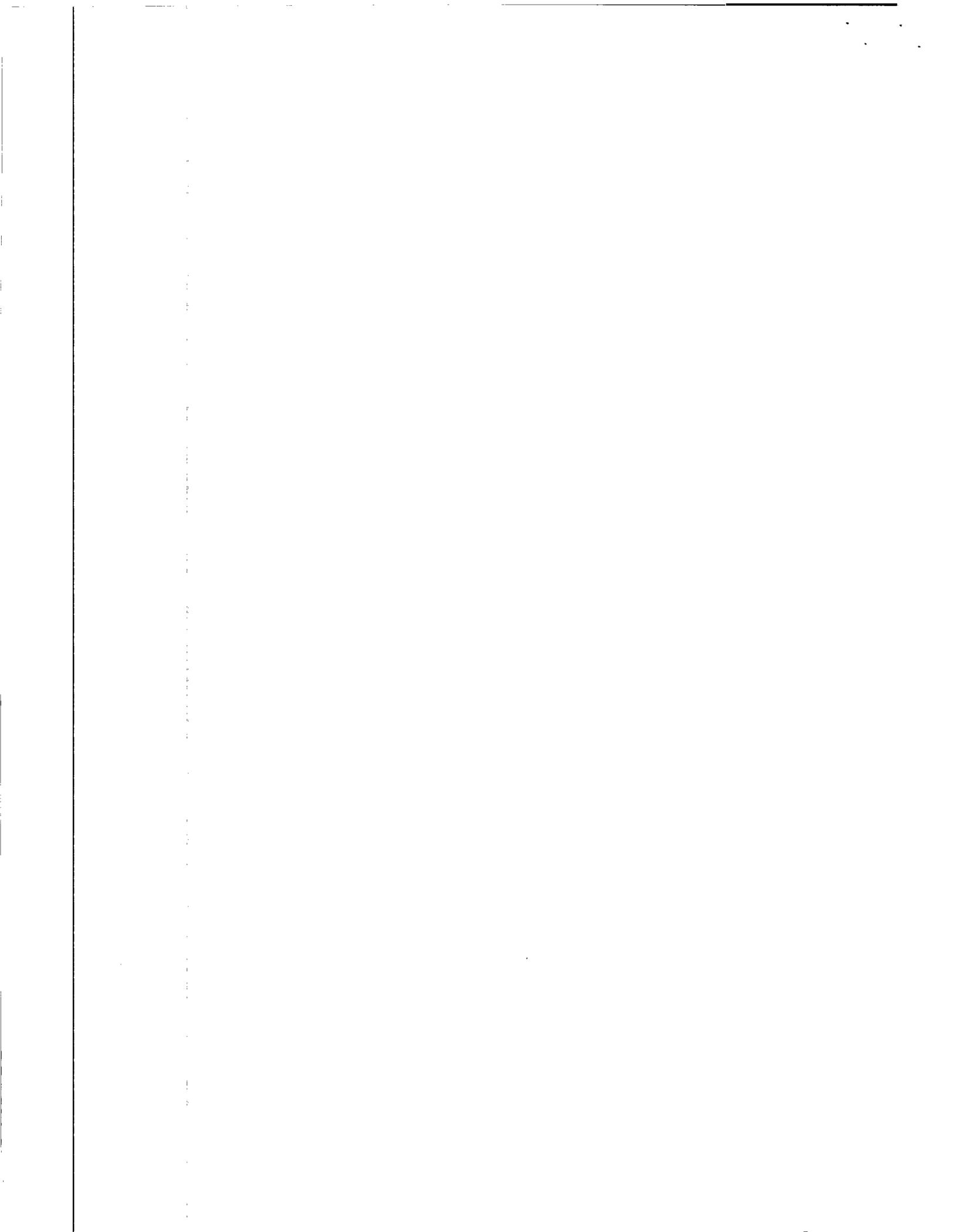
- First, whether FERC has jurisdiction to issue a new license for the Glines Canyon Dam.
- Second, whether FERC, if it may license the Glines Canyon Dam, has authority to add conditions to the annual license for the restoration of fisheries.
- Third, whether any federal agency may order either dam removed.

As requested by Chairman Dingell, we obtained the views of the Department of Interior's Park Service (Park Service) and FERC. The Department of Interior takes the position that only Congress can relicense the Glines Canyon Dam. FERC staff have concluded that their own research and analysis do not provide a definitive answer to the question of the Commission's authority to relicense Glines Canyon. However, they observe that there may be two grounds for FERC jurisdiction.

Discussion

1. Whether FERC has jurisdiction to issue a new license for the Glines Canyon Dam.

The FPA provides FERC with authority to license hydropower projects on bodies of water that are subject to Congress's



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constitutional power under the commerce clause^{2/} or are on public lands and reservations. Section 4(e), 16 U.S.C. § 797(e) provides:

"The Commission is authorized and empowered--

"(e) To issue licenses . . . 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" (Emphasis added.)

§ 4(e) of the FPA (16 U.S.C. § 797(e)).

In 1935, Congress amended the Federal Water Power Act (renaming it the Federal Power Act) to exclude national parks from the definition of the term "reservations."^{3/} The Conference Report accompanying these amendments stated unequivocally that the purpose of changing this definition

^{2/} The commerce clause, in relevant part, reads as follows:

"The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" Article I, section 8.

^{3/} The term "public lands" is defined by statute as excluding lands that may not be acquired and disposed of by private parties under the public land laws. This excludes land in national parks. Section 3(1) of the FPA, 16 U.S.C. § 796(1).

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was to assure that no hydroelectric projects would be licensed in national parks.^{4/}

A literal reading of the language of section 4(e) of the FPA (49 U.S.C. § 797(e)), however, suggests that FERC does have authority to issue a new license for the Glines Canyon Dam despite its location within a national park. Section 4(e) provides FERC with authority to license power projects

"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" (Emphasis added.)

Because the two clauses giving FERC jurisdiction are disjoined by "or," one may insist that they represent independent alternative grounds for licensing authority. Thus, although the definitional change of "reservations," contained in the 1935 legislation, unquestionably eliminated one of those jurisdictional grounds, the other was not addressed. Use of the conjunction "or" arguably leaves FERC with unrestricted authority to license power projects on bodies of water over which Congress has commerce clause power, regardless of whether they are located within

4/ The Conference Report stated:

"The definition of the former term [reservations] has been amended to exclude national parks and national monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in the national parks or national monuments. The purpose of this change in the definition of 'reservations' is to remove from the act all suggestion of authority for the granting of such licenses." H.R. Rep. No. 1318, 74th Cong. 1st Sess. 22 (1935). (The language of the 1921 Act does not, in our view, purport to establish that the Commission lacks authority to issue licenses in all National Parks.)

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national parks.^{5/} According to the Supreme Court, Congress has commerce clause authority over all navigable waterways. U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940); U.S. v. Rio Grande Irrigation Co., 174 U.S. 690 (1898). Thus, assuming the Glines Canyon Dam is located on a navigable waterway, it could be argued that FERC retains licensing authority on this basis.

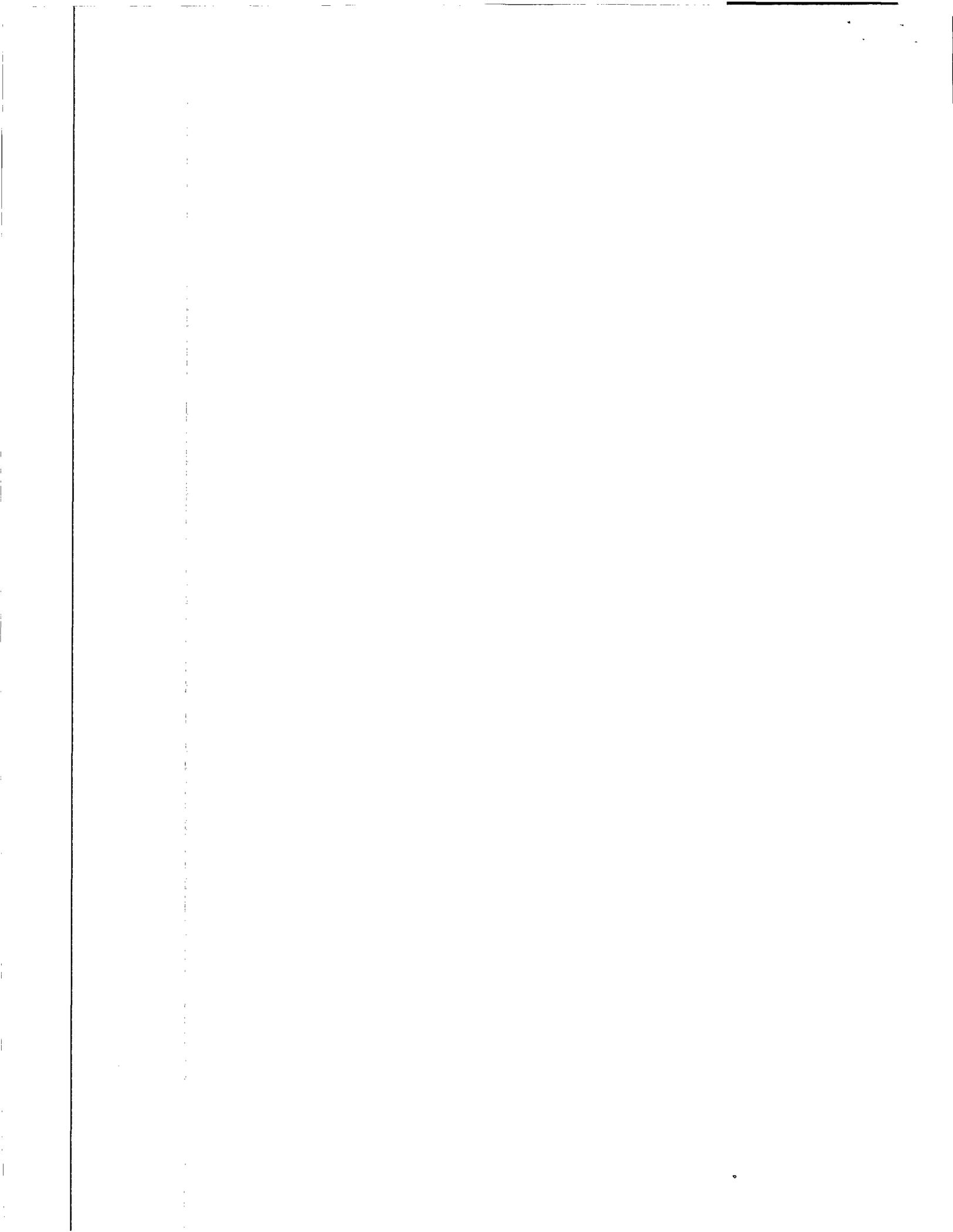
Nevertheless, we are disinclined to place such overriding importance on the statute's use of the conjunction "or." To do so requires us to accept the notion that, when Congress authorized two separate grants of licensing authority in section 4(e), it intended the first to override any restrictions in the second, and thereby to effectively annul those restrictions. This contradicts the explicit expression of congressional purpose in the Conference Report.

^{5/} This argument, which relies heavily on the overriding significance of Congress's having used the conjunction "or," has some judicial support. In Garcia v. U.S., 469 U.S. 70 (1984), the U.S. Supreme Court was faced with an analogous question concerning the significance of the conjunction "or." In that case, the defendant contended that a criminal statute, 18 U.S.C. § 2114, was intended to apply only to crimes involving Postal Service employees. As proof of Congress's intent, the defense pointed to a floor statement by the bill's manager. The language of the statute prohibited assault, with intent to rob, of "any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States." (Emphasis added.) The Supreme Court rejected the defendant's contention, stating:

"The three classes of property protected by § 2114 are each separated by the conjunction 'or.' Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."

Id. at 73.

However, the Court also observed that the legislative history "would perhaps be controlling if there were substantial ambiguity in the language Congress had enacted."
Id. at 78.



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We believe the better view is that the second clause of section 4(e), with its restricted definition of "reservations," necessarily qualifies the first clause. Read in this manner, the 1935 legislation, by eliminating FERC's authority to license power projects in national parks, limits the Commission's authority to license such projects on bodies of water over which Congress has commerce clause power. That is, FERC indeed retains licensing authority regarding such bodies of water, but not if they are located in national parks. Even if this reading of section 4(e) is not free from doubt, it finds strong support in the clear statement of congressional purpose regarding the 1935 amendments, contained in the Conference Report accompanying those amendments ("The purpose . . . is to remove from the act all suggestion of authority for the granting of such licenses [in national parks]").^{6/}

Second, the literal interpretation of section 4(e), discussed above, would result in less protection for dams constructed in national parks than for identical projects constructed on other government lands. For example, in all instances where FERC is authorized to license dams on reservations, such as in the case of national forests, section 4(e) requires FERC to allow the agency with responsibility for that reservation (e.g., the Forest Service) the opportunity to impose conditions on the license. If, however, pursuant to the literal interpretation, FERC is authorized to license dams on navigable waters in national parks, those licenses would not be subject to those conditions, because, by virtue of the 1935 definitional change, national parks are not reservations.

This would create an anomalous situation whereby dams licensed by FERC on all government lands, with the single exception of national parks, would be subject to protective conditions imposed by other federal agencies. Dams in national parks would be immune from such conditions. Thus, under this literal interpretation, Congress, in eliminating Commission authority to license dams in national parks, left FERC with fewer restrictions on its authority to license such dams on navigable waters than if the 1935 legislation

^{6/} This contrasts with the Garcia case where the Supreme Court rejected the expression of congressional intent on grounds that there was no ambiguity in the language of the statute.

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had not been enacted. We believe it is unlikely that Congress intended this anomalous result when it determined to prevent further licensing of dams in national parks.^{7/}

Finally, FERC staff, in memoranda dated August 24 and October 31, 1989, have concluded that their own research and analysis do not provide a definitive answer to the question of the Commission's authority to relicense Glines Canyon. However, the memoranda observe that there may be two grounds for FERC jurisdiction.

First, the August 24 memorandum notes that the jurisdictional issue involves the relicensing of the Glines Canyon Dam, not the issuance of a new license. The staff memorandum suggests that, because the Commission had clear jurisdiction to issue the initial license, FERC may now be able to relicense Glines Canyon even if the Commission would lack the authority to issue a new license.

Second, the staff memoranda observe that two special facts may provide FERC with jurisdiction over Glines Canyon. (1) The Elwha Dam and the Glines Canyon Dam effectively function as one project; and (2) a small portion of the transmission line running from the Glines Canyon Dam crosses national forest land, outside the national park. The memoranda suggest that, because FERC licenses projects, not just dams, the Commission's authority over the Elwha Dam might give FERC jurisdiction to relicense the Glines Canyon Dam as well. Similarly, the memoranda suggest that, because a small portion of the transmission line crosses national forest land, outside the national park, it may be licensed and that this transmission line, as a part of the entire project, might provide FERC with jurisdiction to license the Glines Canyon Dam.

^{7/} Also, as the Park Service points out, the 1935 Legislation may be susceptible to a construction that precludes FERC from licensing power projects for bodies of water in national parks, even if the term "or" is read disjunctively. That is, even if section 4(e) provides FERC with authority to license projects on all bodies of water over which Congress has commerce clause power, including those located in national parks, it would be difficult to construct some projects in such parks without constructing some part of them on the park land. In the case of the Glines Canyon Dam, the reservoir is located on park land.

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The FERC staff memoranda do not take the position that FERC has jurisdiction to relicense the Glines Canyon Dam. (Indeed, as the staff noted, the research and analysis reflected in the memoranda do not provide a definitive answer on this issue.) Rather, the points discussed in the memoranda are offered only as suggestions regarding possible bases for FERC jurisdiction.^{8/}

We do not believe that the suggestions advanced in the staff memoranda provide FERC with a sufficient legal basis for establishing jurisdiction over the Glines Canyon Dam. For example, the first proposition, that once FERC has licensing jurisdiction it continues to have relicensing jurisdiction, does not take into account section 15(a) of the FPA (16 U.S.C. § 808(a)). This provision allows FERC to relicense a project subject to existing laws.^{9/} Thus, in the case of Glines Canyon, if existing law prohibits FERC from licensing a dam in a national park--as we believe it may--it is unlikely that FERC would have authority to relicense it.

In our view, the staff memoranda's second suggested basis for jurisdiction is also inapposite because the Glines Canyon Dam is located wholly within a national park. Although Glines Canyon and Elwha may effectively function as one project, and a small portion of the transmission line crosses a national forest, outside the national park, it is doubtful that this would be sufficient to override the 1935 legislation which, through its definitional change, barred licensing of hydroelectric projects in national parks.

Accordingly, we believe the better view to be that the Commission lacks authority to issue a new license.

^{8/} The August 24 staff memorandum also suggests that FERC may have authority to establish jurisdiction over the Glines Canyon Dam based on its authority over navigable waterways. However, the staff memorandum did not pursue this basis for relicensing authority.

^{9/} Section 15(a) of the FPA authorizes FERC to,

" . . . issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee"

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2. Whether FERC, if it may license the Glines Canyon Dam, has authority to add conditions to the annual license for the restoration of fisheries.

If, as we concluded above, FERC does not have jurisdiction to issue a new license for the Glines Canyon Dam, then the agency does not have authority to issue annual licenses, much less condition their issuance.

3. Whether any federal agency may order either dam removed.

Glines Canyon

If, as we concluded above, it is likely that the Glines Canyon Dam no longer has a valid federal license, the project can still be taken over by the United States and operated, altered, or removed. The Federal Power Act, as amended, offers two alternatives for taking over a dam that has been licensed by FERC.

First, § 7(c) of the FPA (16 U.S.C. § 800(c)) covers those situations where the original license has expired and FERC has determined that the United States should exercise its right to take over a dam for public purposes. Under these circumstances, FERC may not issue a new license, and must submit its recommendations to Congress. Congress would then decide whether to permit continued private operation or a federal take over of the dam.

Second, § 14(a) of the FPA (16 U.S.C. § 807(a)) expressly authorizes the United States, upon 2 years notice from the Commission, to take over and thereafter maintain and operate a hydroelectric project.^{10/} The government would pay the licensee for his or her net investment in the project and for certain damages, as well as assuming responsibility for any existing contracts approved by FERC. As owner of the hydroelectric project the government would be able to operate, remove, or alter the dam.

^{10/} FERC's licensing authority does not extend to the federal government. Thus, the statutory provision that prevents FERC from issuing a license for a dam on park land does not apply to the federal government.

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Elwha Dam

Incident to an administrative hearing, FERC determined that the Elwha Dam was on a navigable river and therefore that the Commission had jurisdiction to license the dam. This decision, made in 1978, has not been challenged, and we are not aware of any grounds upon which it reasonably could be challenged.

As noted above, the dam was apparently built without receiving requisite approval from the Army Corps of Engineers. Accordingly it has been operating without legal authority.^{11/} In order to maintain and operate the Elwha Dam, the owners must now obtain a license from FERC. Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.2d 155 (D.C. Cir. 1941).^{12/}

The Supreme Court has ruled that, as part of FERC's general licensing authority, the Commission has the power to order dams removed when a license has not been issued. In U.S. v. Appalachian Electric Power, 311 U.S. 377 (1940), the dam owner refused to accept a hydropower license tendered by the Commission, claiming the Commission had no jurisdiction and that, even if the Commission did have jurisdiction, it could not place conditions unrelated to navigation in the license. The Commission sued to enjoin construction of the project and to force the dam owner to remove it if the license was not accepted.

The U.S. Supreme Court determined that the Commission had licensing jurisdiction over the project because it was located on a navigable waterway. The Supreme Court then ruled that the federal government had plenary power to

^{11/} At the time the Elwha Dam was constructed, the FPA had not been enacted. The owners were required by the Rivers and Harbors Act of 1899 to obtain approval of their plans from the Army Corps of Engineers. Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.2d 155, 163 (D.C. Cir. 1941).

^{12/} See, section 23(b)(1) (16 U.S.C. § 817 (1)) of the FPA. Although the owners of the dam currently operate the dam without a license, they have submitted an application, which is pending before FERC. According to FERC officials, in the past, the pendency of an application has been sufficient to permit the hydroelectric facility to continue operating until FERC decides whether to grant a license.



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exclude structures from navigable waters and had dominion over water flow and its product, energy. Further, the United States, in exercise of its power, could make the erection or maintenance of a structure in a navigable water dependent upon a license. Finally, Congress had given this licensing authority to the Commission.

On these grounds, the Supreme Court granted the Commission an injunction requiring licensing or removal of the dam project. Thus, as an incident to its licensing authority, it appears that FERC has the authority to order dam removal.13/

13/ Further, it is likely that the operators of the Elwha Dam could be required to pay for its removal. In cases where the government has removed an obstruction on a navigable waterway, the courts have held private parties liable to the government for the cost of removing the obstruction. For example, in U.S. v. Perma Paving, 332 F.2d 754 (2d Cir. 1964), the court of appeals ruled that the defendants were liable for the costs incurred by the United States in removing an obstruction on the Bronx River. Although section 12 of the Rivers and Harbors Act of 1899 does not specifically provide for reimbursement of government removal expenses, the court of appeals held that Congress contemplated reimbursement because the court could have ordered defendants to remove the obstruction.

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1. It is doubtful that the Federal Energy Regulatory Commission (FERC) has jurisdiction to issue a new license for a dam located in a national park, even though that dam is located on a navigable waterway.
2. Because FERC does not have jurisdiction to issue a new license for a dam in a national park, it does not have authority to issue annual licenses, much less condition their issuance.
3. FERC has authority to order the removal of dams it has licensed, as well as unlicensed dams within its licensing jurisdiction.

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