

VIII. The “Big Betrayal”: Perversion of Public Law 96-375

In a bizarre move, the Bureau of Reclamation on May 19, 2008 demanded that four major Lake Berryessa resorts essentially shut down immediately! The impact of this move would have serious negative impacts on visitors, resort employees, and the local business community.

Reclamation Letter: “Based upon evaluation of the successful proposal and subsequent confirmation with the successful offeror, the Pensus Group LLC, Reclamation has determined that all permanent facilities in your Resort concession area must be removed by the end of the concession contract.” See the full letter below.

This essentially ended the summer season at the lake before it even began because all the contracts were set to expire in 2009: Rancho Monticello Resort, June 15; Spanish Flat Resort, July 13; Berryessa Marina Resort, August 13; Putah Creek Resort, August 13.

The apparent reason for this action, after several weeks of negotiation with the Pensus Group, was money - many millions of dollars worth of it. The entry cost for a new company taking over the present resorts seemed to be too high to make a profit if the present facilities had any value. But the present facilities clearly had value since even Reclamation’s own appraisers documented a value of more than \$11 million for Rancho Monticello, for example.

Paying for the present facilities would have required an incoming company (Pensus Group, in this case) to pay \$11 million to the outgoing company (Rancho Monticello, in this case). Add in the Bureau of Reclamation’s own appraised value of the four other resorts in the Pensus package and you’re talking really big money (\$40M) - even before a new company invests in any new facilities. Concurrently, the present resort owners had an appeal before a federal judge asking that their own separate appraisals (significantly higher, by about \$40 million, than the Reclamation appraisals) be recognized as valid.

So what’s the easy way to solve this financial dilemma? Declare that the present facilities have no value and require the present owners to remove them at their own cost. And base your authority on Public Law 96-375. It seems that problems with the contract negotiations caused Reclamation to try this hardball approach, although there was no hint of it in Reclamation’s glowing announcement of the selection of the new concession companies.

Released On: April 02, 2008 - Reclamation Announces the Selection of Three Proposals for New Concession Contracts at Lake Berryessa: Mr. Finnegan added, "Reclamation intends for recreation at Lake Berryessa to continue essentially uninterrupted, other than occasional temporary closures in various locations for developmental activities." Reclamation anticipates that the new contracts will be signed within the next few months."

Public Law 96-375

These excerpts are the parts of PUBLIC LAW 96-375 that pertain to Lake Berryessa and the concession operations.

SEC.5 (a) Notwithstanding any other provision of law, the Secretary of the Interior is authorized to enter into new negotiated concession agreements with the present concessionaires at Lake Berryessa, California. Such agreements shall be for a term ending not later than May 26, 1989,

and may be renewed at the request of the concessionaire with the consent of the Secretary of the Interior for no more than two consecutive terms of 10 years each. Concession agreements may be renegotiated preceding renewal. Such agreements must comply with the 1959 National Park Service Public Use Plan for Lake Berryessa, as amended, and with the Water and Power Resources Service Reservoir Area Management Plan: *Provided*, That the authority to enter into contracts or agreements to incur obligations or to make payments under this section shall be effective only to the extent and in such amounts as are provided in advance in appropriate Acts.

(b) Notwithstanding any other laws to the contrary, all permanent facilities placed by the concessionaires in the seven resorts at Lake Berryessa shall be considered the property of the respective current concessionaires. Further, any permanent additions or modifications to these facilities shall remain the property of said concessionaires: *Provided*, That at the option of the Secretary of the Interior, the United States may require that the permanent facilities mentioned herein not be removed from the concession areas, and instead, pay fair value for the permanent facilities or, if a new concessionaire assumes operation of the concession, require that new concessionaire to pay fair value for the permanent facilities to the existing concessionaire.

This conflict over PL 96-375 legal interpretations began several years ago. From the original Draft Environmental Impact Statement released by Reclamation in 2003: "Also of critical importance to existing concessionaires is PL 96-375, which establishes the requirements and stipulations for compensation due outgoing concessionaires for their property located at Lake Berryessa. The law states that concessionaires will be paid only for those facilities that Reclamation requires for use into the next contract term. Those that are not so identified would be demolished or removed at the owners' expense."

PL 96-375 was passed to protect both the concessionaires and the government by allowing the concessionaire to receive fair market value for their property and improvements and alternately preventing a concessionaire from arbitrarily removing facilities of importance to the recreational services provided. Simply stated, if the facilities have a value the concessionaire will be compensated. If the facility has no value, the concessionaire will receive no compensation. The law does not explicitly say that the concessionaire must remove all unwanted facilities and improvements, including roads, launch ramps, sewers, motels and restaurants simply deemed to have no value by the decree of Reclamation. This is Reclamation's interpretation supported by an Attorney General legal opinion.

Congressional Intent for Public Law 96-375 - Below is a discussion in Congress about PL 96-375 in 1980. Although it is clear that the intent of the law was to protect the concessionaires' property as well as to allow the government to keep facilities it wanted, there is a single comment that implied that the Secretary of the Interior could specify facilities it wanted to be removed. However, there is no such statement in the law nor is there is any discussion of criteria for requiring the removal of facilities.

In a July, 2007 legal protest letter to Reclamation, the resort owners complained about Reclamation's interpretation of the law:

"Reclamation's requirement that the current concessionaires remove improvements "not required to remain," and to remove all tenant (private) personal property prior to the end of the current contract, also is unduly prejudicial to the Resort Owners. As an initial matter, it should be noted that neither the statute nor the current concession contracts require the removal of permanent improvements prior to the end of the contract term. Moreover, the current concession contracts

do not contain any clauses which require the early termination of business. Finally, we note that, although PL 96-375 specifically provides the Secretary with the power to require that selected permanent improvements not be removed, it makes no such grant of power regarding the removal of permanent improvements. Reclamation, therefore, does not have the authority to require the Resort Owners to remove the property or to do so at their own cost.

Reclamation's failure to properly interpret PL 96-375 presents other problems as well. The agency reads the statute to allow a successful bidder to choose which of the Resort Owners' permanent improvements the bidder is willing to purchase. It is nonetheless clear that, in order to comply with the provisions and intent of PL 96-375, any succeeding concessionaire must be required to purchase all of the permanent improvements, regardless if the new concessionaire plans to use the improvements in the future. To interpret the statute otherwise would place Reclamation's actions in this case, i.e., forcing the Resort Owners to surrender the improvements that congress clearly has designated as their personal property, squarely at odds with the Fifth Amendment's Just Compensation Clause."

Per the Bureau of Reclamation: The Federal Court of Claims addressed this issue in the case *Frazier v. United States*, 79 Fed. Cl. 148 (2007), and the United States prevailed. Regarding Public Law 96-375, the court noted that "it is illogical to presume that Congress would insist that the Bureau retain all permanent facilities at a concession, preventing unwanted or dilapidated facilities from being removed by the concessionaire." *Id.* at 162. The court also held that it was "unassailable from a textual analysis of the statute" that "(1) permanent facilities, if removable, can be transported off federal lands and retained by plaintiffs, if the Bureau has not commanded that they remain and (2) plaintiffs may abandon their property rights in permanent facilities which the Bureau has not selected to remain at the concession, if these are not removable or not worth removing." *Id.* at 161. Finally, the court agreed that Reclamation was "also correct in stating that payment under Public Law 96-375 is only required when the Bureau exercises its option to require permanent facilities to remain at a concession site." *Id.* The Court of Appeals for the Federal Circuit later considered an appeal from the unsuccessful plaintiffs' and affirmed the prior decision without any changes.

For fairness, the core documents are copied below.

Dear RESORT OWNER NAME:

The purpose of this letter is to notify you of the determination by the Bureau of Reclamation regarding disposition of permanent facilities owned by RESORT OWNER COMPANY NAME located at RESORT NAME, Lake Berryessa, Napa County, California. The determination is authorized by P.L. 96.375 Section 5(b).

Part 3, Section L, of the Lake Berryesa Prospectus issued on June 7, 2007 required all offerors to identify which existing permanent facilities would be required to not be removed and instead pay fair value for those facilities to the existing concession contractor with the approval of Reclamation. Based upon evaluation of the successful proposal and subsequent confirmation with the successful offeror, The Pensus Group LLC, Reclamation has determined that all permanent facilities in the Resort concession area belonging to RESORT OWNER COMPANY NAME must be removed by the end of the concession contract.

Reclamation recognizes that there may not be adequate time to remove all of your permanent facilities prior to the end of your contract; therefore we require that you submit a detailed plan for orderly removal of all permanent facilities. Your plan should include details such as: method of removal, permits required, timeline for completion, and any other relevant information assuring full removal of all facilities. Please submit your plan by June 15.

“Sincerely”,
Michael R. Finnegan, Area Manager

Congressional History

PL96-375: WATER RESOURCE DEVELOPMENTS, feasibility investigations. Congressional Record – House - February 5, 1980: Authorizing Investigation of Certain Water Power Resource Developments

...

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to engage in feasibility studies of the following proposals:
(Page 1866)

MR. CLAUSEN. ...The legislation also authorizes the Secretary of the Interior to enter into new negotiated concession agreements with present concessionaires at Lake Berryessa, notwithstanding any other provision of law. Lake Berryessa is a water supply and recreation facility, as a result of water development that is located in my congressional district. The provision was added to the legislation by way of an amendment that I offered in the full Interior Committee, and it had the concurrence not only of the committee as a whole but also the chairman and the ranking member of the Water and Power Resources Subcommittee. New statutory authority is necessary due to the unique history of the project and the unusual circumstances which have developed there.

When Lake Berryessa was first built in the late 1950's the Bureau of Reclamation, now called the Water and Power Resources Service, did not believe there was any recreation potential at the lake, and refrained from development of recreational facilities. Despite the position of the Bureau, thousands of people began using the lake for recreational purposes. As use increased, the county of Napa assumed responsibility for recreational management of the lake under the cognizance of the bureau.

In order to develop facilities, the county leased concessions to individuals over 20- and 30- year periods with renewal provisions in the leases. The concessionaires developed launching ramps, picnic grounds, and limited day-use facilities. In order to realize any return on their investments in these facilities, they began charging fees, and opened a number of resorts, which included mobile-home trailers. The lake proceeded to develop along this pattern under agreement with Napa County, and under the acquiescence of the Bureau.

In 1972, concern was raised that the facilities were in disrepair and that the public was not being allowed proper access. Over the next several years a great deal of public debate took place over who should manage the lake, the types of facilities that should be allowed, and what steps could be taken to enhance public access and enjoyment of the lake.

During this same period, I appointed a Lake Berryessa task force whose purpose was to study the situation and come up with suggestions on what types of improvements needed to be made at the lake. The task force made its recommendations which resulted in the Reclamation Development Act of 1974, which gave the Bureau authority to resume recreational management, and authorized expenditure of funds to develop new public day-use facilities.

In 1974, the county of Napa reversed its policy and informed the Bureau of Reclamation that it no longer would manage the recreational facility. With enactment of the 1974 act, it became incumbent upon the Bureau to address the question of the rights of the present concessionaires. For a number of reasons, this period was stormy, with the future of the concessions left somewhat unclear. It is in the public interest that we resolve this uncertainty, and allow orderly development and improvements to go forward at Lake Berryessa.

As the author of the Lake Berryessa provision, I would like to clarify the terms under which the new concession agreements will be negotiated. In the bill, H.R. 5278, we have provided that -

Such agreements shall be for a term ending not later than May 26, 1989, and may be renewed at the option of the concessionaires for no more than two consecutive terms of ten years each. Such agreements must comply with the 1959 National Park Service Public Use Plan for Lake Berryessa, as amended, and with the Water and Power Resources Service Reservoir Area Management Plan: Provided, That the authority to enter into contracts or agreements to incur obligations or to make payments under this section shall be effective only to the extent and in such amounts as are provided in advance in appropriation Acts.

If the Secretary of the Interior finds that the operations of the concessionaires are not in accordance with the use and management plans mentioned, it is our intent that the Secretary shall declare those concessionaires agreements terminated and those concessionaires will have no further right to extension of the concession agreements.

Further, it is our intent that all permanent facilities placed by the concessionaires in the seven resorts at Lake Berryessa shall be considered the property of the respective current concessionaires. Further, any permanent additions or modifications to these facilities by the concessionaires shall remain the property of said concessionaires; however, at the option of the Secretary of the Interior, the United States may require that the permanent facilities not be removed from the concession areas, and instead pay fair value for the permanent facilities or , if the new concessionaire assumes operation of the concession, require that new concessionaire to pay fair value for the permanent facilities.

MR. LUJAN. I thank the gentleman for yielding. I want to make certain that the language which we have provided in this bill would fully protect those people who have made sizable investments at this lake. They have been whipsawed among three agencies over the years, each of whom has had different regulations, and I commend the gentleman for his concern and for his timely action to provide congressional direction as to how the situation should be handled. Let me ask the gentleman this question: What will happen if the Secretary finds that the operations of the concessionaires are not in strict accordance with the use and management plans mentioned in the bill?

MR. CLAUSEN. In the event, the Secretary may declare the agreements terminated, and those concessionaires would have no further right to extension of the agreements.

MR. LUJAN. If the gentleman will yield further, yes, but it is my understanding that concessionaires have made sizable investments in permanent facilities at the lake. What happens to those facilities? Does the Government just make a windfall profit in the form of confiscated property simply by declaring the agreements terminated? Would these people just have to walk away and leave their investments?

MR. CLAUSEN. The answer to that is no. As we have discussed previously in the committee, the eventuality has been foreseen, and we have no intent of such a thing happening. It is our intent that all permanent facilities placed by the concessionaires in these seven resorts at Lake Berryessa be considered the property of the respective current concessionaires, along with any permanent additions or modification to those facilities. That is only right and fair, and the committee has no intention of stripping them of those rights. However, the committee is saying that the Secretary has the right to require those facilities to stay where they are and not to be removed from the premises if and when the concessionaire leaves.

The Secretary has the option to require the facilities to be removed or to require that they remain. We simply intend that if the United States wants the facilities to stay when the concessionaire leaves, the Secretary will pay the concessionaire fair value for the permanent facilities; or, if the Secretary permits a new concessionaire to assume operation of the concession, he will require the new concessionaire to pay fair value for the permanent facilities.