OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1071

TITLE ALUMINUM COMPANY OF AMERICA, ET AL., Petitioners
v. CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

PLACE Washington, D. C.

DATE January 9, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

ALUMINUM COMPANY OF AMERICA, ET AL., Petitioners v. CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL. : No. 82-1071

Washington, D.C.

Monday, January 9, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

M. LAURENCE POPOFSKY, ESQ., San Francisco, Cal.; on behalf of the Petitioners.

JERROLD J. GANZFRIED, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of federal respondent in support of Petitioners.

JAMES T. WALDRON, ESQ., Portland, Ore.; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Popofsky.

ORAL ARGUMENT OF M. LAURENCE POPOFSKY, ESQ.,

ON BEHALF OF PETITIONERS

MR. POPOFSKY: Mr. Chief Justice, and may it please the Court:

We are here because we believe that the Ninth Circuit fundamentally misconceived the background, history and purposes of the statute enacted in 1980, and as a consequence also misconceived the congressional solution to the problem of the northwest region. I would like to dwell just a brief moment on the history because I think it is instructive of how the preference problem fits into the congressional solution.

Under the Bonneville Project Act of 1937 Bonneville was authorized to serve all classes of customers with power. Those classes of customers included not only those who were accorded statutory preference and priority but also utilities, which were privately owned and which had no such a priority, federal agencies and my clients, the DSI's, the Direct Service Industries, which are principally aluminum companies operating in the northwest.

Now the service to the aluminum companies, to the DSI's has certain characteristics which are

important as we move into the congressional considerations in 1980. Among those considerations are that the load is interruptable.

Unlike most industries or indeed most utilities it is possible without absolute and complete harm to operations to stop electricity, at least for short times, on an immediate basis in order to protect service to other customers. At the same time because of the character of the DSI load it is also possible to serve that load with what is called nonfirm energy, essentially energy, the production of which cannot be guaranteed based on historic water conditions.

As a consequence, over the years the DSI load was conceived by Bonneville has having unique values to the northwest in the form of providing reserves to protect firm power loads by others. There was only one problem with the system as it existed in the thirties, fourties and fifties, and that is that water was finite.

Dams were built on all acceptable locations, environmentally acceptable locations, and by the early 1970's all the best estimates were that the finite amount of power being generated by Bonneville would run out. That is where the preference clause of the 1937 statute was triggered.

First, went the private utilities. Their contracts expired in 1973. All service to them was terminated by Bonneville except for spot purchases thereafter.

In 1975 and 1976 the DSI's were advised that their contracts which had been in existence since the early sixties would when they expired most likely not be renewed, again because of the existence of the preference clause. The consequence was and the picture which emerged was that the only power that would be available would go to preference customers, preference utilities alone, and that that would be inadequate.

But the anomoly was that the Bonneville Project Act of 1937 was intended to serve consumers and farmers in the region and yet only a portion of the region was served by the preference utilities. The fact I believe you will see in the record that Oregon was generally not served by preference utilities whereas Washington was largely served by preference utilities and the disparity in rates that emerged in the seventies caused, needless to say, a considerable political problem in the northwest.

What happened in sum was that preference emerged as the problem, not an adequate solution to the problems of the northwest. The only solution that was

possible was congressional, and that is why the statute was enacted in 1980.

Now the statute ended what was called a regional civil war, and it ended it in a manner which we think is straightforward. It decreed as its first element of legislation that the power which was to be available would be legislatively allocated, not allocated administratively.

Priority and preference, the old preference clause after all, was a congressional direction to the administrator giving him instructions as to how he, the administrator, should allocate power. That is what the preference clause does. It governs administrative allocations.

The heart of a statute in 1980 was to take the allocation function away from the administrator and legislate it directly by statute.

QUESTION: Mr. Popofsky, do we find this heart of the statute in any one section or subsection?

MR. POPOFSKY: We do not find it in any one section of the 85 pages of legislation, but I believe you will find it mostly in section 5 where the sales to classes of customers are mandated, and that is the key, Justice Rehnquist. You will see in section 5 that the administrator is mandated directly by Congress to enter

into contracts, the terms of which are specified.

Now historically the preference clause has always honored the existence of contracts. Contracts could be performed in accordance with their terms without an invasion by a preference customer so long as they had been validly entered into in the first instance.

What Congress was doing in mandating contracts for all four classes of customers, for the preference customers, the privates, for the federals and directly for the DSI's, what Congress was doing was saying, we mandate directly by statute this amount of power -- we will come to that, of course -- this amount of power for these classes of customers. Now we know that we are mandating more power than Bonneville has. We know that.

The answer to that is we will also authorize Bonneville for the first time to acquire the resources necessary to serve these contracts, and then we will do one more remarkable thing so there can be no doubt and no dispute. In 5(g)(7) we will create a fiction. We will write a fiction right into the statute which says the administrator shall be deemed to have sufficient power to enter into these contracts.

QUESTION: Mr. Popofsky, I have the same

question really I guess that Justice Rehnquist has already asked. Section 5 starts out by saying all power sales under this Act shall be subject at all times tc the preference and priority provision of the prior statute.

MR. POPOFSKY: That is correct.

QUESTION: What is it in section 5 that mandates the allocation that you describe?

MR. POPOFSKY: If you look further into section 5 in the (b) sections, Your Honor, you will find the terms of contracts that are mandated. For example, 5(g)(1) --

QUESTION: What page are you working from?

MR. POPOFSKY: I am working in the statute, Your Honor, (b)(38)(5)(g)(1).

QUESTION: (5)(g)(1) is on page 3 of the petition for certiorari.

MR. POPOFSKY: I was also referring to the appendix to the petition.

But in (5)(g)(1) there is a mandate that the administrator shall commence negotiations. In (5)(d)(1)(b), the crucial provision, after the effective date of this Act, the administrator shall offer -- it is mandatory language -- in accordance with subsection (g) of this section to each existing DSI contract, etc.

Indeed if you look at the legislative hearings, the committee reports they are described throughout as required, mandated contracts. I believe it is because of the character that they are mandated directly by Congress that section (5)(a) of the statute can be read to subsist with them in accordance with its terms.

(5)(a) applies to all power, all power which is not subject to a valid and lawful contract, and a valid, lawful initial contract are those specified as mandated by the statute.

QUESTION: But, Mr. Popofsky, (5)(a) does not say that. Perhaps it should maybe by implication, but it says all power sales under this Act. It does not make any exception.

MR. POPOFSKY: I agree, Your Honor. It absolutely says that, and the only question, therefore, before the Court is how does one reconcile a mandate by Congress, a congressional allocation, if you will, of power with the flat statement in (5)(a) that all sales are subject to preference. The answer to that, Your Honor, is plain.

Preference has never, has never required the invasion or invalidation of a lawful, valid contract. For example, in the 1970's the clients that I represent,

the DSI's, had lawful contracts which were going to expire in 1981 to 1991.

There was not adequate power by 1976, and yet nobody suggested that because if there was now an insufficiency of power that those contracts were in any way invadable. They were valid according to their terms notwithstanding the coexistence of a preference right.

Preference attaches only at the time of the offer of a new contract to competing applicants, and here Congress preempted the process. They said, we will take the applications ourselves. Through the legislative process all four classes will be served.

QUESTION: Would you go back a minute and spell out a little more what you mean by preference attaches only at the time the contract is offered?

MR. POPOFSKY: Yes. Under the preference clauses of various statutes as they have been interpreted throughout the federal courts, preference attaches as a directive to the administrator under a statute who is marketing federal power. It attaches at the time when the administrator has power for sale and announces that and there are competing applicants.

If among the competing applicants, for example, a preference utility on the one hand and a DSI on the other, both applied and there was not enough

power to serve both, at that point preference would govern and direct the administrator to serve the preference agency. If there was sufficient power for both, on the other hand, he would serve both.

If, on the other hand, he had actually entered into that contract, goes ahead and enters into that contract, and five years later on -- assume it is a 20 year contract -- five years later on a preference utility comes along and says, hey, I would like some of that power, and I have a statutory preference, no court has ever held he has a right to invade an existing contract, lawful under the preference clause when entered into. It is for that very reason you will find in the statute a requirement that in the contracts for the private utilities there is a five-year pull back clause to protect the preference notion that after five years if power has become insufficient for any reason those contracts can be interrupted by direction of Congress.

That is the historic functioning of the preference clause and why section (5)(a) can coexist in a cohesive and integrated legislative scheme with the mandated contracts of our clients.

CHIEF JUSTICE BURGER: Mr. Ganzfried.

ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.,

ON BEHALF OF FEDERAL RESPONDENT
IN SUPPORT OF PETITIONERS

MR. GANZFRIED: Mr. Chief Justice, and may it please the Court:

The government's argument boils down to two points I would like to stress this morning: first, that the Bonneville administrator's decision fully accords with expressed statutory directive and with congressional intent, and that alone should suffice to reverse the Ninth Circuit's decision. Our second point is that even if other interpretations of the Act are possible that the administrator's decision is a reasonable one and is, therefore, entitled to substantial deference.

I am not going to spend much time putting the Regional Act in perspective. I think Mr. Popofsky has done that.

I would like to emphasize only that at the time that the Act was under consideration the region faced three pressing concerns: an impending power shortage, uncertainty in planning for the future, and a great disparity in rates paid by consumers. What was needed and what was recognized as the solution to this was a legislative plan of allocation, and for this the region turned to Congress.

The Act that Congress passed was a careful balance of interdependent factors. In the end the competing interests that addressed Congress arrived at a compromise, and in this compromise all customers derived benefits and all were required to make concessions in order that the common good in planning for power could be served.

Now in this proceeding the Respondents are seeking to upset that balance, and they are trying to do that by preserving the enormous benefits they got in the Regional Act while rejecting the tradeoffs that they had to make. Obviously the statute and its subject matter are highly technical and complex, but the legal issues in the case are straightforward and relatively simple.

In our view they are easily believed under well established rules of statutory construction and administrative law. The key to the case is the expressed directive of section (5)(d)(1)(B) in the Regional Act that Bonneville shall offer to each existing DSI an initial long-term contract that provides for an amount of power equivalent to that which such customers are entitled under its 1975 contract.

QUESTION: May I interrupt right there with just one question?

MR. GANZFRIED: Surely.

QUESTION: Under your view of the issue in the case if your side wins will the DSI customers get the same or a greater amount of power than they would have gotten under the prior law?

MR. GANZFRIED: They would be entitled to the same amount of power?

QUESTION: Would they not get a little more because they have an additional protection?

MR. GANZFRIED: Well, they have an additional protection as to the first quartile. They have less protection as to the second quartile, and what I would have to do, and I am not in a position to do that, is to predict which set of circumstances, namely, those that trigger first quartile interruptions or those that trigger second quartile interruptions would be the more likely to occur.

In Congress' view it was likely that the amount of power actually received, the energy received by the DSI's, would go up, and I believe that the DSI's reply brief addresses that in reference to the comments in the Senate committee report indicating Congress' expectation that the energy received would go up to between 85 and 96 percent of the total contract load, which was somewhat more than they had actually received under the 1975 contracts.

QUESTION: So your answer is that Congress thought it would be higher, but you are not sure they were right.

MR. GANZFRIED: Congress thought it would be higher. Now, that was their determination --

QUESTION: Is it correct that if we take your opponent's interpretation of the law they would get the same amount of power?

MR. GANZFRIED: Well, not necessarily because what would happen under the Respondents' view of the case, as I understand it, is that the total entitlement to power would be -- I might add under what I understand is the Ninth Circuit's view of the case -- the total entitlement to power for the DSI's is not the full contract load, not what is specified in the '75 contracts as the amount of power, but rather three-quarters of that because as the Ninth Circuit believed it was only three-quarters of that that had been allocated.

QUESTION: It is a right to three-quarters and a possibility of more.

MR. GANZFRIED: Well, but that is not the way the '75 contracts work. The '75 contracts indicated in section 4 -- that is at page N-2 of the appendix to the petition -- that the amount of power that is sold is the

full amount, the full contract load. Those were the figures that were before Congress when it was considering the Regional Act.

Now I might also add that the questions as to interruption do not appear in section 4 of the 1975 contracts, but rather they are elsewhere. The amount of power is clearly the full amount and was clearly understood by everyone to be the full contract load.

On this question of the amount of power, in our view what we were required to do was to offer a contract that provided an amount of power equivalent to the amount they were entitled to in 1975, and as you can see from the chart on page 20 of the joint appendix we have done precisely that.

We offered new contracts for the same amount of power that the DSI's were entitled to before, and in our view there is really nothing else that need be addressed in this case. Since the 1981 contracts entitle the DSI's to no greater amount of power Bonneville clearly followed an express and specific statutory command.

Unfortunately the Ninth Circuit in its initial opinion did not even address this issue, amount of power. In footnote 9 of its original opinion, which is at page 65 of the joint appendix, it specifically

declined to decide whether the new contracts involved a greater amount of power than the old ones.

It was wrong for the court to do that. The issue had to be addressed, and eventually when the court did address it in its amended opinion it added footnote 4 that says, in effect, the '75 contracts never entitled the DSI's to the top quartile and, therefore, the new contracts can do no more.

The point is that that is wrong. As I indicated, section 4 of the '75 contracts specified an amount of power, and it was the full amount. Now because the top quartile was subject to interruption which is something that happens under a different section of those contracts, the court concluded that the DSI's are now entitled to -- are limited to the same terms of service as they were before.

What it did was it confused the notion of amount of power and terms of service, and I would like to point out why that is wrong. First of all, the Regional Act is to the contrary, and the House Commerce report makes clear at page D-123 of the appendix to the petition that section 5(d)(1) refers to the amount of power to which the DSI's were entitled and not to the amount that happened to be used at a particular time.

In addition, there were tables that were

listing what the DSI entitlement was and what Congress understood it to be, and those figures in the House and the Senate reports are references to the full contract load under the 1975 contracts. What the Ninth Circuit also ignored was the clear congressional directive that Bonneville take new steps to improve the quality of service to the top quartile and to serve that quartile as if it were firm.

Now that language "as if it were firm" is from the Senate committee report at page F-74 of the appendix to the petition. While the Ninth Circuit acknowledged that this was the congressional plan and said so in footnote 7 of its opinion it did not understand the significance of the plan.

Instead it dismissed the committee reports as ambiguous and meaningless, but the Court of Appeals really made no effort to understand what those reports were about, and in particular the court made no reference to section 5(f) of the Act, another provision dealing with the question of when the preference customers are entitled to assert that preference.

Now even if the question of the quality of service is reached it is our position that the Respondents are wrong. Unlike the situation that existed before when the DSI's top quartile could be

interrupted for any reason, the Regional Act specifies that the DSI load shall provide a portion of the administrator's reserves. That is, it may be interrupted only for firm power loads within the region. That is in section 5(d)(1)(A) of the Act, and it is language that is consistent with section 5(b)(1) of the Act.

Now the import of that language is made crystal clear in the Senate report. That is at page F-47 and F-48 of the appendix to the petition. That report states that it is not intended that the administrator's reserves will be used to protect other than firm loads.

So it was Congress that changed the status of the DSI reserve and the terms of interruption. It was not an arbitrary or capricious act of the administrator.

Let there be no mistake about it, Congress was absolutely well aware of what it was doing. While this complex legislation was pending, Representative Kazen the Chairman of the House Interior Subcommittee on Water and Power inquired of Bonneville just how the DSI load would be served.

The administrator responded and told Representative Kazen that he would do precisely what he

eventually did, namely, that 25 percent would be subject to restriction to serve firm loads of other customers. This statement was adopted verbatim in the House report and approved by the Senate.

The Act was passed with this understanding. Bonneville went out and did it.

QUESTION: Mr. Ganzfried, I take it your position is that this is the only way the statute could be construed, or is the statute reasonably construable in another way?

MR. GANZFRIED: Well, our first point is that this is the only way the statute could be construed. We had to offer contracts to the DSI's. It had to be for the amount of power equivalent to what they got before, and it had to provide --

QUESTION: So that if Bonneville had taken the course as suggested by your opposition, would it have violated the statute?

MR. GANZFRIED: If it had offered less than the amount of power entitlement of the 1975 contract it probably would have been a violation of the statute, and that is one of the reasons why it --

QUESTION: You have to say it would have.

MR. GANZFRIED: It would have, but we did not --

QUESTION: Your position just is not that the statute is construable one way or another and that Bonneville chose one of the reasonable courses and that we should defer. That is not your point.

MR. GANZFRIED: Our first argument is that there was only one way it could be done, and it was done that way and it was the way that Congress was told it would be done. If I am wrong about that and there is another intrepretation and Bonneville was not required to do what it did, it was certainly a reasonable reading of the statute for the administrator to do what he did.

QUESTION: What was the Ninth Circuit's answer to -- Was the Ninth Circuit of the view that the statute had to be read the other way?

MR. GANZFRIED: The Ninth Circuit was of the view presumably that it had to be read another way.

QUESTION: It just preferred to read it another way.

MR. GANZFRIED: Well, it preferred to read it the other way even though as it said that Bonneville's interpretation was supported by the legislative history. It also said that Bonneville's policy may serve the purpose of the preference clause.

QUESTION: They seem to think the statute was

readable either way, but that it just preferred another reading.

MR. GANZFRIED: What it did was it focused on the preference clause. Its original opinion spoke only of the preference clause and did not address the amount of power issue.

There was really no way for this case to be decided without the amount of power issue being decided for reasons I think you suggest in your question. If we did what we were expressly told to do, we complied with the statute and other provisions would have to be put into harmony with the specific directive we followed.

If we violated the specific directive of 5(d)(1)(B) then the provisions of this contract would be invalid, not because of a preference claim but because we violated the specific provision telling us what we were to offer to the DSI's.

I would just like to add one other comment to what the Ninth Circuit had to say that supports our view in the case is that the Ninth Circuit had to say at page 13 of its opinion in the appendix to the petition under Bonneville's construction all of its customers would benefit. That was the point that Congress was trying to achieve when it passed the Regional Act.

It was trying to benefit all of the

customers. For the reasons outlined in the briefs, because of the interdependency and the need to sell to the DSI's the benefits of that reserve in subsidizing the exchange program, the lower rates for the customers of privately owned utilities, all of this pattern that mixes together, if we start tugging at one point of this ball of yarn it is going to begin to unravel.

Congress put this together very carefully. We think it should remain in place as the administrator concluded.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Waldron.

ORAL ARGUMENT OF JAMES T. WALDRON, ESQ.,

ON BEHALF OF RESPONDENTS

MR. WALDRON: Mr. Chief Justice, and may it please the Court:

For over forty years, Congress through three specific statutes required BPA to sell this nonfirm energy to my clients first. We built our systems in reliance upon this essential and longstanding priority. I agree with the Solicitor General is what you have here is a straightforward question of statutory application.

Did Congress in the Regional Act change this essential and longstanding priority? The simple answer

to that is no.

Let me look at the problem that Congress faced, too much demand in the northwest, not enough supply. The solution was not, as Petitioners would suggest, take something from my clients and give it to them.

The solution as Senator Henry Jackson, the sponsor of the bill, said was simply to bake a bigger pie and for the first time give Bonneville the authority to acquire resources. In fact, I believe the statement is, the Act will give Bonneville the authority to buy power to serve nonpreference customers without offending the principles of preference.

That is what is unique about this statute. That is why it passed after four years of discussion with the regional consensus.

Now the answer to the question posed, did Congress change this, is the simple and straightfoward language of the Act, two provisions, one of which Justice Stevens has already referred to. Congress said in straight language all power sales shall be subject to this priority, and later at section 10(c), nothing shall abridge, diminish, affect, or change in any way whatsoever this priority.

What Congress did is bake a bigger pie, as

Senator Jackson used that analogy in introducing the bill, drew a line down the middle of it and said, this side is the priority customers -- that is why they are supporting this -- and this side over here, we are now going to give Bonneville the authority to buy resources, and that will serve the needs of the nonpreference customers and provide rate relief.

QUESTION: Mr. Waldron.

MR. WALDRON: Yes, sir.

QUESTION: You do not argue that section 10 means that the Act that we are construing here did not change the Bonneville Act, do you?

MR. WALDRON: Justice Rehnquist, Bonneville sells power under two statutes, the Bonneville Project Act and the Flood Control Act. It has some dams that were built by the Corps of Engineers and the Bureau of Reclamation Act. Those statutes also provide the preference and pricrity, and that is what section 10(c) refers to.

QUESTION: But are you arguing that the Act that we are here considering did not really make any changes in the Bonneville Act, that it presumably succeeded?

MR. WALDRON: Well, it did not make changes in the Bonneville Act. What it did was add to the

Bonneville Act.

It retained the priority of the Bonneville Act. It refers in numerous sections to the federal base system. There were federal resources in the Bonneville Project Act in place at the date of the passage of the Act.

Those are the rescurces, for example, that generate nonfirm energy. What the Regional Act did was add to that and for the first time give Bonneville the authority to buy power. Then when it gave Bonneville that authority to buy power in specific sections it basically told Bonneville how much through sections 5(b), (c), and (d).

QUESTION: To take 5(d)(1)(B), which your opponents rely on, which says the administrator shall offer in accordance with subsection (g) an initial long-term contract that provides an amount of power equivalent to that which such customers are entitled. I am sure you know the provision.

MR. WALDRON: Yes, sir.

QUESTION: What is your interpretation of the sort of contract that the administrator was required to offer under that section?

MR. WALDRON: Congress would be required to offer a contract that provided the same rights to power

that they had under -- excuse me, Bonneville would be required to offer a contract that gave them the same rights to power that they had under their 1975 contract.

QUESTION: But 5(d)(1)(B) talks about an amount of power.

MR. WALDRON: It talks about an amount of power equivalent to that to which they were entitled. That is what Bonneville did not do. Under their 1975 contracts they were not entitled to this priority to nonfirm. That is undisputed.

We had that priority to nonfirm. That is the change in question that the Bonneville administrator did in this case, and it is the essence of what prompted this law suit to come before the courts. He changed the amount of power that they would receive.

Mr. Ganzfried was looking for a citation for Justice Stevens. The Petitioners' brief states that their minimum entitlement under their old contracts was approximately 85 percent, that their minimum entitlements under their new contract will be 96 percent. That is an increase in the amount of power they are entitled to, an increase that Congress specifically prohibited.

The clear language of section 5(a) about all

power sales -- If I may take a minute I think it is instructive to this Court if we take a look at the origin of that language. The original bill that Senator Jackson sponsored merely paid lip service to preference.

My clients did not support it and because it was a northwest bill and it did not have regional consensus it died. Then Senator Jackson introduced a second bill.

QUESTION: You are talking about the present Act, now, right?

MR. WALDRON: Yes. I am sorry.

The second bill which led to become the present Act did not have section 5(a) in it. Senator Jackson had hearings. Representatives of my clients and other people in the northwest and across the nation said someone may make the exact argument that Mr. Ganzfried and the Petitioners have made that preference now only applies to surplus or uncommitted power.

This Court should know that by definition as described in the brief, surplus or uncommitted power is power that is not needed in the northwest. My clients would have a preference to air that power is power that is beyond the needs of the northwest.

That was explained to Senator Jackson. This

is traced very well in the amicus brief by the APPA, the American Public Power Council, at page 24.

Senator Jackson then in the next session because time ran out introduced the present bill, and he said, I have listened to the Public Power Council. I was concerned that there might be some inroad on this priority and so, therefore, I have inserted sections 5(a) and 10(c) to be sure that that line was drawn so that after Congress had acted someone could not subsequently come in and cross that line and take a piece of power that had been committed to the priority customers because prior to the Regional Act we had both a statutory mandate to that priority to nonfirm and it was a part of our contracts.

Subsequent to the Regional Act they are given in their contracts a priority to that nonfirm energy.

QUESTION: Mr. Waldron.

MR. WALDRON: Yes, sir.

QUESTION: Supposing under the Bonneville Act which is superseded by the present Act a DSI had a 20-year contract for a certain amount of power as such a contract would have been issued under the Bonneville Act, now could a preference customer come in during the pendency of that 20-year contract and say, look, we have got a lot of new people that want electricity; we want

you to cut in on the DSI's contract?

MR. WALDRON: No, we would not have done that because the DSI's contracts provided for certain interruption rights to cover that process in case we grew and Bonneville did not have the resources. The present Regional Act expressly --

QUESTION: No, I am interested in the past.

MR. WALDRON: Yes, sir.

QUESTION: So you really agree with your opponents then that preference could not be used to cut into the rights of an existing DSI contract under the Bonneville Act?

MR. WALDRON: That is correct if there was an amount of power available when the administrator entered into that contract that we reasonably could not foresee. That is all mandated directly in the Bonneville Project Act. That is the section that immediately follows our express priority to all sales.

QUESTION: Then are you contending that you have greater rights to interrupt your existing DSI contracts than you had under the prior law?

MR. WALDRON: No, sir.

QUESTION: I do not understand the two answers. It seems to me you told Justice Rehnquist that if you had the situation we are talking about you could

not have gotten the power but that you can get it today.

MR. WALDRON: Perhaps I was not clear. Under our prior contracts we had the priority to nonfirm energy. They did not. They did not have an entitlement to that amount of power. That was ours. So we would not have to interrupt them.

Under the present contracts the BPA administrator has reversed that priority and given that priority to the aluminum companies and taken it away from the priority and preference customers.

QUESTION: You say that he has made an illegal contract?

MR. WALDRON: Yes. That is correct.

QUESTION: So you are not cutting into anything. You just want what you were entitled to that he contracted away?

MR. WALDRON: Yes, sir. As the Ninth Circuit pointed out, what they did was they remanded it to the Bonneville administrator to write a proper contract, which would maintain our priority as Congress expressly stated.

I think, and we have argued in our briefs, that 5(a) and 10(c) are clear and that they are introduced by Senator Jackson precisely to enter their

arguments. He said that in the legislative history.

QUESTION: May I ask another question? I may reveal my stupidity, but I have some difficulty really understanding this first quartile concept. Is that something that has got a statutory foundation?

MR. WALDRON: No. That is something that was devised by a person called Mr. Goldhammer, a Bonneville employee, to take advantage of some of the interruptability of the aluminum companies. It applies to four quartiles.

The top quartile is interruptable at any time.

QUESTION: Tell me how do you know whether a particular day's production is in the top or the bottom quartile.

MR. WALDRON: One-fourth of their loads is assigned to be in the top quartile.

QUESTION: Is that one-fourth every day or the first three months of the year, or how does it work?

MR. WALDRON: Every day.

QUESTION: Every day.

MR. WALDRON: Yes, sir.

When we receive the nonfirm it is sold -- Perhaps this might make it even more clear. Nonfirm is sold on an hour-by-hour basis. Firm power is sold over

20 years or perhaps through yearly contracts. That is what makes it firm.

On the nonfirm each hour the BPA scheduler -- if I could actually put you at Bonneville -- looks at how much water is behind the dam. He looks at the preference customer's need, which on a magnitude over a year are 30 to 1,000 because we use it to keep our reservoirs full because we are in a different climate -- we are on the other side of the mountains from their reservoirs -- or when we are maintaining our own generation or our generation has gone down.

He looks at that small amount and says, preference customers, do they need any at five of the hour? If they do, then he goes on down the priority. Prior to the present situation the remainder was split equally between the privately-owned utilities and the aluminum companies. Bonneville has leapfrogged the aluminum companies all the way to the top now.

QUESTION: Of course, Bonneville says it is Congress that is done what they say they are just carrying out the instructions.

MR. WALDRON: Justice Rehnquist, I think the legislative history we have cited at page 29 indicates 20 people in Congress, every person that sponsored the bill from the northwest, every single one of them said

one thing, we have completely protected the previous priority of my clients. Most of them also said, and now we are going to take care of the nonpreference customers by giving Bonneville for the first time the right to buy power.

There is not a single place in that legislative history that Petitioners or the government can point to where anyone in Congress said, we are going to change this priority to nonfirm energy. Section 5(a), for example, in the statute does not say we have priority to all power sales except this one exception we are going to make for the aluminum companies. Section 10(c) does not say either.

I think it is instructive also if we could go back to this four-year process where, for example, the lobbyist for the aluminum companies when they testified to Congress their statement is the only benefit the aluminum companies ought to receive from this legislative process is long-term contracts. That was their benefit.

They use 30 percent of the power in the northwest, and it was important and we recognized --

QUESTION: Didn't they have long-term contracts under the Bonneville Project Act?

MR. WALDRON: They were expired. The first

one would have expired in 1981. The Act was passed December 5, 1980.

What would have happened to them, Justice Rehnquist, is they would have had to become for 85 percent of them customers of my clients. They would have then gotten the same service as Boeing or Warehouser or Longview Fiber, the large industries in the northwest, the other 2,000 industries.

They wanted this Regional Act so that they could have this relationship with Bonneville where they got this assured supply because as they record is replete with they are enormous users of electricity. We did not dispute that.

What we dispute is where they cross the line. This was a regional consensus. We all agree. There is no place in the legislative history where they asked to cross this line, and there is no place in the Regional Act that authorizes the crossing of this line. That is in essence the dispute we had.

QUESTION: What about the provision of the statute -- I do not have it in mind -- that says the power shall be deemed to be firm power for the purpose of their contract?

MR. WALDRON: That was as they described it a legal fiction that said that there could not be a law

suit initially if Bonneville had not been able to buy enough resources to serve them. There was no problem with that because Bonneville also had short-term purchase authority.

This was a provision that the aluminum companies authored that some outsider could not come in and say, Bonneville, you cannot enter into 20-year contracts because you have not acquired the resources yet. What are you selling?

They had short-term authority to sell them over the first few years, and then they needed to acquire the resources. So it was a legal fiction to prevent that challenge.

When we are talking also about the legislative history, and again I refer to the Act as being clear, I think the most instructive piece of legislative history is when the BPA administrator testified before Congress, before Senator Jackson on the final hearing of the bill that become this Act. We have quoted it at length, and I am not going to repeat it, but the emphasis there is the BPA administrator informed Congres that this priority was expressly to be protected and that we were to have first call on the federal base system, which is what produces the nonfirm, and there was to be no change in this priority.

What the Act was to do was to give Mr. Monroe, the administrator, the authority to buy resources and, therefore, he could meet the needs of the nonpreference customers.

QUESTION: Well, then your suggestion is that he did not follow his own testimony. Is that it?

MR. WALDRON: He may have. He was replaced shortly thereafter, and when the election --

QUESTION: Anyway his successor then did not act in --

MR. WALDRON: No, his successor adopted a different view, and as we described in our brief also declared that there was some negotiation of contracts. He declared that. That was nonnegotiable. We could negotiate anything else, but that change that he said that he had to do he said could not be discussed in the contract negotiations. That is pointed out in the private utilities' brief. They have amplified that.

One other important point, I think, is that the Solicitor discussed the reserves provided. The reserves that are provided in the Regional Act are a codification of BPA's administrative practice prior to the Regional Act.

That was told to Congress, and that is what Congress did. It codified it. Prior to the Regional

Act, and this is quoted in our brief, Mr. Goldhammer who authorized these reserve provisions described them as providing reserves to the administrator for his firm loads.

The court in the Ninth Circuit in Port of Astoria v. Hodel, the only court to construe these reserves, said they provide reserves for the firm loads of the administrator. Then the Role FIS, which Bonneville published simultaneously with the Act describing this alternative as how it would sell power, is almost verbatim. It will provide reserves for the firm loads of the administrator.

The argument on the other side is that the Regional Act changed these reserves. They are almost word for word the administrative practice and everyone in the region's understanding including Congress.

When they were translated into the contracts for the aluminum companies they say provide reserves for the administrator. Then they get to the heart of the issue, and they say, however, power will be sold first to the aluminum companies before anyone else.

That is the change that they did not follow from Congress. That is the change in priority that is embodied in section 8(a) of the new contract and is the heart, again, of this dispute.

I would also like to emphasize a point I made earlier regarding its importance to us. This power -- again the ratio is perhaps 30 to 100, but this nonfirm power we use first of all when our reservoirs are depleted, when we are not sure we can serve our firm loads because it has not rained on our side of the mountains; secondly, when we have scheduled maintenance; -- we schedule our maintenance of our plant when we can have available BPA nonfirm service. That will be dramatically changed under this situation -- thirdly, when we have a forced outage. When a plant goes down our needs are small enough that if you do not put that 1,000 unit load ahead of us we can almost rely upon their being small amounts, even in a drought year, of BPA nonfirm that can protect our firm load when we need it.

In conclusion, and I would like to summarize it really based on the framework that this Court has used in reviewing statutory construction. The Act itself is clear under our point of view. We have priority to all power sales and nothing shall diminish that priority.

Their reading is inconsistent with the plain language. They say we have priority to all sales except this nonfirm and that nothing has been diminished except

this nonfirm in the northwest.

As far as the legislative history, the legislative history is clear equally. It says that priority will be protected. There will be a line drawn down this bigger pie, and we retain our priority to federal base system resources, which produce this nonfirm.

The new resources acquired by BPA or bought by BPA will go to the nonpreference customers. That is clear. Their argument is that that legislative history is not clear and that Senator Jackson did not mean what he said or did not know what he was saying when he inserted section 5(a) into the Regional Act.

The third point is the underlying policies of the Act, and that is where they are especially inconsistent. If I might call it the beauty of this Act is you had a serious dispute. You had what they described as a civil war.

What happened is Congress said, okay, we obtained the consensus of the priority customers by protecting their priority, but BPA has not been able to acquire any new power for a long time because no dams have been built so we will give them this new authority to buy power; and, therefore, BPA can go out and acquire resources and be sure that the aluminum companies may

receive their 20-year long-term supply and be sure that there can be some rate relief for the privately owned utilities in the region.

That in the Ninth Circuit's opinion harmonizes the Act well. I think to me it is inconceivable that a change of this magnitude was not asked for before Congress by the aluminum companies. Congress in no place ever discussed it, described it. It is not mentioned any place in the legislative history that there is going to be a change in priority.

QUESTION: Mr. Waldron, do you think the Ninth Circuit's opinion then was quite a sensible disposition of the various issues of the case including the treatment of the question in footnote 4 in a footnote? Do you think the Ninth Circuit opinion was a good opinion, in other words?

MR. WALDRON: Yes. The reason I do, Justice Rehnquist, is if you look at the Ninth Circuit opinion it begins by saying the priority is clear. Congress in 5(a) and 10(c) has kept that priority, and that is as far as we need to go.

Then it followed many of your and Justice White's opinions and said, however, to be sure we will give deference to BPA, and the Act examined it from a technical point of view and concluded that it was

undisputed that we first received that priority and they had no priority under their 1975 contracts.

QUESTION: And that the material treated in the footnote 4 should not have been in the text at all. It was just a footnote type of item?

MR. WALDRON: I am not obviously going to comment on how they write an opinion, but, yes, it should have been in a footnote because the opinion says that the priority is clear and that, therefore, we do not have to go beyond the priority to the equivalent amount of power. Then when they raised it -- the first time they ever emphasized it was in the petition for rehearing and rehearing en banc -- when they raised that at that time then the Ninth Circuit added that footnote which basically summarizes it and says they are tied to their entitlement under their 1975 contracts, and under those contracts they had no entitlement to this nonfirm energy.

QUESTION: The material in footnote 4 you say was not raised until petition for rehearing?

MR. WALDRON: Was not emphasized just as, I might add, if we are looking at consistency of administrative construction, for example, the surplus argument, the argument that we only have a right to the surplus and that 5(a) is basically written out of the

Act as they would like, that was mentioned for the first time in the petition for rehearing and really briefed for the first time before this Court. It was not in the administrator's record of decision. It is not what he relied upon.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Popofsky.

CHIEF JUSTICE BURGER: You have three minutes remaining.

ORAL ARGUMENT OF M. LAURENCE POPOFSKY, ESQ.,
ON BEHALF OF PETITIONERS -- REBUTTAL

MR. POPOFSKY: Let me start with the observation that the statute nowhere uses the concept of firm power and nowhere uses the concept nonfirm power. The assumption that somehow everything Congress was doing took those separate concepts into mind as a statutory matter, preference for one but not for the other, is, I think, a figment of the other side's imagination.

What Congress mandated was contracts for an amount of power, 5(b)(1)(B), for our clients, that is, a concept of load capacity, not load usage, but load capacity, and it was the same amount of load capacity as existed in the then extent DSI contracts. Now, Congress

intended as BPA told them it would that it would use nonfirm power in the load subject to interruption or protection of firm resources only in load in order to serve the purposes Congress intended by guaranteeing this mandated contract.

Those purposes were, one, to provide rate relief principally for people in Oregon who were being served by the private utilites, rate relief which the DSI's would have to pay for, and that is why that power getting to the DSI's was important, and also provide through the raising of rates from wholesale to retail essentially more profit downstream for Bonneville. Now this was all integrated into the comprehensive legislative scheme.

Congress intended specifically that a higher level of actual service be received by the DSI's through the combination of (1) a direction to Bonneville of a demand capacity; and (2) a limitation in 5(d)(1)(A) on the circumstances under which that power could be interrupted.

You can find nowhere in the legislative history, if I may return the compliment, any discussion, any discussion whatsoever that by reaffirmation of preference somehow nonfirm power has been kept outside of the DSI load where Bonneville wanted to put it in

order to obtain the operational efficiencies and the monetary goals of the statute. You cannot find that anywhere in the legislative history.

All you can find is a treaty in which all customers are going to be served by mandate of Congress free and clear, at least for the original mandated contracts, of the old preference problems and a reaffirmation of preference for the future, preference in its traditional meaning, preference which honors lawful contracts, but preference which governs everything including my client's rights to any future contracts. That makes sense of the statute, and that is precisely what Bonneville did in the contracts under challenge.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1071 - ALUMINUM COMPANY OF AMERICA, ET AL., Petitioners v. CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

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