Moving the West's Water to New Uses: Winners and Losers (Summer Conference, June 6-8) 1990

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THE ROLE OF THE FEDERAL ENERGY REGULATORY COMMISSION IN PROTECTING NON-CONSUMPTIVE WATER USES

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SUMMARY

There are today approximately 2000 hydroelectric projects operating under licenses from the Federal Energy Regulatory Commission (FERC). Because many of these licenses were issued for 50-year terms beginning in the 1920s and 1930s, they are or soon will be eligible for relicensing. As FERC confronts hundreds of relicensing proceedings between now and the end of the century, it must reevaluate the wisdom of each project based upon today's more sophisticated legal and environmental standards. This task is made difficult because the projects often were subjected to little or no environmental scrutiny in their initial licensing.

FERC has a statutory obligation to license only those hydroelectric projects that are best adapted to a comprehensive plan for resource development. To achieve this goal, FERC is directed to consult with other federal and state government agencies. FERC's ability to achieve the goal is complicated by the existence of state water laws which the Federal Power Act has directed FERC to respect.

The degree of respect which FERC must accord to state water laws has been a matter of dispute for almost fifty years. At one extreme are the states which insist that FERC cannot interfere with any state water laws, whether they be water rights laws or regulatory laws governing the use of those water rights. FERC, at the other extreme, insists that it need only adhere to those state water laws which are consistent with the regulatory scheme set forth in the Federal Power Act, and may ignore all others. The better view is that the Federal Power Act establishes a system of concurrent state and federal control in which FERC licensees must comply with state laws unless FERC affirmatively determines that to do so would conflict with the purposes of the Federal Power Act.

The interaction between federal and state regulation under the Federal Power Act was the principal issue in a opinion announced by the Supreme Court several weeks ago. The Court's resolution of the issue -- largely if not entirely in FERC's favor -- still leaves open a number of questions about FERC's authority to control over water allocation decisions.

OUTLINE

I. HISTORY

A. Congress has the authority to protect the navigable waters of the United States under the commerce clause of the Constitution (U.S. Const. Art. I, § 3, cl. 2).

1. Since Congress has the authority to exclude all structures from navigable waters of the United States, it can condition permission to build such structures upon grant of a license.

2. To a large extent, congressional authority to control navigable waters has been subsumed under it broader commerce clause powers (Oklahoma ex rel. Phillips v. Guy F. Atchison Co., 313 U.S. 508 (1941)).

B. Congress also has the authority under the supremacy clause to occupy the entire field of regulation of hydroelectric power and thereby supercede any conflicting state laws on the subject (U.S. Const. Art. IV, § 2).

C. Notwithstanding clear constitutional authority to do so, Congress and the Supreme Court both have been reluctant to assert congressional supreme authority to regulate all matters relating to navigable waters of the United States, including especially matters relating to proprietary water rights which form the backbone of the economy in the western United States

(See United States v. New Mexico, 438 U.S. 696, 702 n.5 (1978) (citing reference to 37 statutes which indicate congressional deference to state water laws); California v. United States, 438 U.S. 645 (1978) (holding that the federal government must comply with state water law in obtaining water for federal reclamation projects)).

1. The federal policy of deference to state water law originated in the equal footing doctrine which holds that the states have sovereign right, title, and interest to all navigable waters within their boundaries subject to the congressional power to regulate commerce and navigation (see Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); S. Rep. No. 755, 82d Cong., 1st Sess. (1951) (quoted in California v. United States, 438 U.S. 645 (1978)).
2. Section 8 of the Reclamation Act of 1902, for example, defers to state water rights law (43 U.S.C.§§ 372, 383.
3. The 1944 Flood Control Act contains the policy statement that it is declared to be the policy of the Congress "to recognize the interests and rights of the States ... in water utilization and control."
4. The Supreme Court has held that each state is

entitled to establish its own system of water rights subject to two limitations: federal reserved water rights, and the federal navigation servitude (California v. United States, 438 U.S. 645 (1978) (citing United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899))).

D. The Federal Power Act was enacted to promote the private development of hydroelectric power in the United States (Federal Water Power Act of 1920, ch. 825, 41 Stat. 1063; Federal Power Act, ch. 687, 49 Stat. 863, codified at 16 U.S.C. §§ 791-828).

E. The Federal Power Act was premised on the principle that the electric power potential of the nation's navigable waterways is a public resource which should be harnessed in a manner consistent with the public interest.

1. The Federal Power Act granted comprehensive authority to the Federal Power Commission (now the Federal Energy Regulatory Commission or FERC) to administer and regulate all hydroelectric development occurring on navigable waters in the United States (see California v. FERC, ___ U.S. __ 1990 LEXIS 2614 (May 21, 1990)).

2. The Federal Power Act requires that FERC consider all beneficial public uses of water in deciding whether and under what terms and conditions to

issue a hydroelectric project license (Federal Power Act § 10(a), 16 U.S.C.§ 803(a)).

3. The Federal Power Commission is made the "guardian of the public domain" with regard to water within navigable streams (Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952)).

4. FERC must impose conditions on every license for a hydroelectric project to require its adaption to a comprehensive plan for multiple use of federally regulated waterways (Federal Power Act § 10(a), 16 U.S.C. § 803(a)).

F. Since enactment of the Federal Power Act, there has been a great expansion in the federal commerce clause authority and a concomitant expansion in breadth of federal regulation under the Federal Power Act. (United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); see generally Note, Small Hydropower Projects and State Water Rights, 18 Pac. L. J. 1225 (1987)).

1. Federal power over navigable waters is plenary.

2. States and private parties retain authority to control or hold rights in such waters only subject to "the power of Congress to control the waters for the purpose of commerce." (United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (quoting United States v. Rio Grande Irrigation

Co., 174 U.S. 690 (1899))).

II. RECOGNITION OF ROLE OF STATE LAW IN REGULATION OF HYDROELECTRIC DEVELOPMENT UNDER THE FEDERAL POWER ACT

A. The Federal Power Act recognizes that federal regulation of hydroelectric power may conflict with state regulation of water rights, an area of traditional state authority in which the federal government has been reluctant to intrude.

1. Section 9 of the Federal Power Act, 16 U.S.C. § 802, requires an applicant for a license under the Federal Power Act to submit "satisfactory" evidence that it has complied with the requirements of state law of the state within which the project is to be located. The term "satisfactory evidence" is not defined in the statute.

2. Section 27 of the Federal Power Act, 16 U.S.C. § 821, is known as the savings or anti-preemption clause. The section provides that the Federal Power Act is not to be construed as "affecting or intending to affect or .. interfere" with state laws on control, appropriation, use, or distribution of water.

a. Identical or similar language preserving state water law appears in other federal regulatory and natural resources statutes,

including the Desert Land Act, 43 U.S.C. § 321, and the Reclamation Act, 43 U.S.C. §§ 372, 383.

b. Although the language of such clauses is relatively similar, the clauses cannot be read interchangeably; the reach of an anti-preemption clause is determined by the context of the particular statute (compare First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) (Federal Power Act) with California v. United States, 438 U.S. 645 (1978) (Reclamation Act) and California Oregon Power Co v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (Desert Land Act); see also California v. FERC, ___ U.S. _ _1990 LEXIS 2614 (May 21, 1990) (legislative history, not just the language of the statute is important for understanding the meaning of similar language in varied statutes)).

3. Section 9 prescribes the evidentiary burden which an applicant bears in a FERC licensing proceeding while section 27 addresses an applicant's obligation to comply with state law, independent of the federal licensing process.

B. Section 27 was not intended to be a general provision applicable to protect all state laws from federal

supremacy; it was not supposed to override more specific provisions of the Federal Power Act. Instead of an absolute protection for state-granted rights, arguably, section 27 only allows for compensation when the grant of a federal license results in taking of such rights (Portland General Electric Co. v. Federal Power Comm'n, 328 F.2d 165 (9th Cir. 1964); see Grand River Dam Auth. v. Grand-Hydro, 335 U.S. 359 (1948)).

1. Section 27 must be seen as a protection against a taking; a recognition that holders of vested state water rights have proprietary interests worthy of protection as property rights under the Constitution.
2. Section 27 merely complements the provision of the Federal Power Act which permits federal licensees to exercise powers of eminent domain (Federal Power Act § 21, 16 U.S.C.§ 814).
3. The purpose of section 27 in part was to clarify that the mere passage of the Federal Power Act did not act to abrogate state usufructuary rights (Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954)).
4. Section 27 continued the well-established congressional deference to state water law under the equal footing doctrine.

C. Section 9 was intended to guide FERC discretionary

authority where a state expressed a regulatory or policy interest in a potential license.

1. Compliance with state regulatory laws is not a condition precedent to issuance of a FERC license.
2. FERC, in its discretion, may require total or partial compliance with state regulatory requirements; nevertheless, FERC's obligation always is to ensure that the purposes of the Federal Power Act are achieved.
3. The purpose of section 9 is largely informational: FERC licensing decisions should be based upon knowledge of state regulatory requirements so that a decision to disregard or comply with state law will be an informed one.
4. FERC may disregard state law, if in its discretion, such action is consistent with its statutory mandate (see State of Oregon v. Idaho Power Co., 312 P.2d 583 (Or. 1957) (state licensing superfluous for a federal licensee); Public Util. Dist. No. 1 v. Federal Power Comm'n, 308 F.2d 318 (D.C. Cir. 1962), cert. denied, 372 U.S. 908 (1963); accord Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971) (FERC has discretion to determine whether federal license will interfere with state law), cert. denied, 407 U.S. 926 (1972)).

5. FERC may not impose conditions on a hydropower project license which would have the effect of displacing state tort law; Congress did not intend to authorize FERC to preempt such laws (South Carolina Public Service Auth. v. FERC, 850 F.2d 788 (D.C. Cir. 1988)).

D. Read together, sections 9 and 27 of the Federal Power Act demonstrate plenary federal control over regulation of hydropower, with few caveats (see generally, Comment, "Hydroelectric Power, the Federal Power Act and State Water Laws: Is Federal Preemption Water Over the Dam?" 17 U.C.D. L. Rev. 1179 (1984); Wolfe, "Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts," 29 Rocky Mtn. Min. L. Inst. 851 (1983)).

1. State proprietary rights survived passage of the Federal Power Act and cannot be extinguished by FERC order (Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); Georgia Power Co. v. Baker, 830 F.2d 163 (11th Cir. 1987)).

2. If state proprietary rights are taken, adequate compensation must be provided (Portland General Elec. Co. v. Federal Power Comm'n, 328 F.2d 165 (9th Cir. 1964); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930).

E. Although not explicitly outlined in the statute, the

Federal Power Act clearly contemplates a system of dual, or concurrent government control, in which the federal and state governments share control over hydroelectric projects (First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1945); California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

1. Concurrent federal and state control is not unusual in federal environmental and natural resources regulatory statutes.

   a. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403 provides for joint jurisdiction by the states and the Army Corps of Engineers.

   b. Clean Water Act, 33 U.S.C. §§ 1341, 1344(a) provides that a condition precedent for issuance of a permit by the Army Corps of Engineers is the obtaining of a state water quality certification.

2. Dual or concurrent authority is necessary to resolve the apparent conflict between FERC's obligations under section 10(a) to engage in comprehensive planning and its obligation under section 27 to respect state water laws.

F. Congress recognized that, because of the subject and scope of its jurisdiction, FERC frequently either would

cooperate or conflict with state regulatory agencies. Congress chose to require cooperation wherever possible (see, e.g., Federal Power Act § 7 (preference to states and municipalities in issuance of licenses); § 10(j) (consultation with states on fish and wildlife protection); § 19 (provision of electricity subject to state regulation)).

G. Where cooperation was not desirable or practical, specific provisions of the Federal Power Act explicitly designate whether state or federal law will apply (see, e.g., Federal Power Act § 27 (states control appropriation and use of water), § 10(a) (federal control over comprehensive planning for hydroelectric development)).

III. HISTORICAL EFFORTS TO AVOID OR RESOLVE CONFLICTS BETWEEN STATE AND FEDERAL LAW ON HYDROPOWER DEVELOPMENT

A. First Iowa is the seminal case in the field. In that case, the Supreme Court held that concurrent jurisdiction over hydropower resources by state and federal government was unworkable. (First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152 (1946)).

1. First Iowa established the law that, except where proprietary rights are at issue, compliance with state laws is required only when, and to the extent that, the Federal Power Commission deems compliance to be necessary.

2. Section 27 preserves only state proprietary rights laws and not state regulatory laws.

3. First Iowa limited the reach of section 27 of the Federal Power Act to the protection of state-granted proprietary rights, most important among which is state water rights.

4. First Iowa did not define the limits, if any, on state authority over water rights and the extent to which a state could use its property law to regulate a hydropower project.

   a. For example, the Court did not decide whether a state can regulate a hydroelectric project under the guise of protecting water rights; such an exercise of state authority would be consistent with the First Iowa protection of state proprietary rights but would conflict with the prohibition on state regulation of federally-licensed hydroelectric projects.

   b. The Court did not draw a bright line between state proprietary water rights and state regulatory water rights, a distinction which the Court has done nothing to clarify (see California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

5. Unlike section 27 of the Federal Power Act, which provides substantive protection to proprietary

rights, section 9 provides merely discretionary authority to FERC; compliance with state laws under section 9 is not a condition precedent to a FERC license.

6. Although the proceeding at issue in First Iowa primarily concerned section 9, the Court has rejected the argument that its discussion of section 27 -- including the limitation of that section to proprietary rights -- is mere dicta (see generally Petitioner's Opening Brief, California v. FERC, (U.S. Supreme Ct. No. 89-333) (Jan. 11, 1990); California v. FERC, ___ U.S. __ 1990 LEXIS 2614 (May 21, 1990)).

B. Since First Iowa, courts have consistently applied the reasoning in that case to hold that states have had limited -- or no -- role in regulating hydroelectric development or operation of hydroelectric projects. (See, e.g., City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1972), cert. denied, 407 U.S. 926 (1972); Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954); Town of Springfield v.

McCarren, 549 F. Supp. 1134 (D. Vt. 1982), cert. denied, 464 U.S. 942 (1983); Town of Springfield v. Vermont Envtl. Bd., 521 F. Supp. 243 (D. Vt. 1981)).

C. It generally is accepted that the federal government has occupied the entire field of hydroelectric power regulation because of the pervasiveness of the federal scheme (see Town of Springfield v. Vermont Envtl. Bd., 521 F. Supp. 243 (D. Vt. 1981); City of Tacoma v. Taxpayers of Tacoma, 262 P.2d 214 (Wash. 1953)).

D. Although interpreting the Reclamation Act rather than the Federal Power Act, California v. United States has been widely cited for the proposition that states retain the power not only to grant but also to regulate water rights notwithstanding federal regulatory controls (California v. United States, 438 U.S. 645 (1978)).

1. At issue was section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383, a provision whose language is virtually identical to section 27 of the Federal Power Act.

2. The Court held that section 8 was designed to protect more than only proprietary rights and was broad enough to preclude preemption of any state law governing water use or allocation.

3. The Court held that a state may impose conditions on a federal reclamation project so long as those

conditions are not inconsistent with federal directives.

a. The Court found that federal directives for management of reclamation lands were not inconsistent with deference to state water laws.

b. To preclude application of that holding to its proceedings, FERC has taken the position that the Court's requirement for consistency with the federal scheme exempts it from virtually all state water laws because of the pervasive federal regulation of hydroelectric facilities articulated in section 10 of the Federal Power Act.

4. The holding specifically applied to a state's ability to regulate water rights. The Court held that the legislative history made it "abundantly clear" that Congress intended "to defer to the substance, as well as the form" of state water law (California v. United States, 438 U.S. at 675).

5. The only limitation on the Secretary of Interior's obligation to comply with state law is that such laws cannot be applied if to do so would conflict with "clear congressional directives." (California v. United States, 438 U.S. at 672)

6. The Supreme Court has rejected the assertion that

the case called into question, or even overruled, sub silentio, the application of First Iowa to section 27 of the Federal Power Act (California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

a. If the same interpretation were applied to section 27 of the Federal Power Act as that used by the Court in discussing section 8 of the Reclamation Act, the reach of section 27 would be broadened substantially.

b. The congressional directive favoring comprehensive federal regulation and the displacing of state laws is clearer in the Federal Power Act.

c. Application of the anti-preemption provisions of the Reclamation Act would not frustrate the very purpose of that statute since it is not, at its heart, a regulatory statute. The contrary is true for the Federal Power Act.

E. The courts have never adequately defined what state rights fall within the protection of section 27; while courts have been virtually unanimous in making the distinction between property rights and governmental, police, or regulatory powers, they rarely have been called upon to make finer distinctions.

1. The Ninth Circuit in California ex rel. State Water Resources Bd. v. FERC somewhat incompletely

quoted the First Iowa decision as defining proprietary rights as applying only to "municipal and irrigation proprietary rights."

2. State interest in protection of non-game wildlife is probably not a proprietary interest, especially in light of the strong federal interest (see Missouri v. Holland, 252 U.S. 416 (1920)).

3. Even protection of fisheries, which has a strong proprietary component because of the importance of fisheries to many states' economies, may not fall within the protection of section 27 (California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989)).

4. Although states have an interest in protection of inchoate proprietary rights, courts have consistently referred to the section 27 savings clause as designed to protect only vested rights (see Portland Gen. Elec. Co. v. Federal Power Comm'n, 328 F.2d 165 (9th Cir. 1964); there is no indication that the section 27 protections are designed to protect rights for which no compensation would be available under the takings clause of the United States Constitution (see State of Oregon v. Idaho Power Co., 312 P.2d 583 (Or. 1957)).

IV. FEDERAL POWER COMMISSION AND FERC ATTEMPTS TO RESOLVE PROBLEMS OF DUAL STATE-FEDERAL CONTROL

A. The FERC, and before it the Federal Power Commission, traditionally has viewed itself as being the final arbiter of matters affecting the nation's hydroelectric power resources.

B. Consistent with that position, FERC has only reluctantly complied with conflicting or competing statutory and regulatory regimes, whether they concern federal environmental statutes or state water rights laws.

1. For example, FERC did not promulgate regulations implementing its environmental review procedures pursuant to the National Environmental Policy Act until 1987, almost 20 years after the statute was enacted (see 18 C.F.R. Part 380).

2. Congress' enactment of the Electric Consumers Protection Act was in large part brought about by FERC's reluctance to give due consideration to fish and wildlife and other non-power resources, in the hydroelectric licensing process (see H.R. Rep. No. 507, 99th Cong., 2d Sess. (1986)).

3. FERC has found that as a condition of its issuing a hydroelectric license, it may limit a licensee's ability to use its state-adjudicated water rights (see, e.g., Conway Ranch, 46 FERC ¶ 62,332 (1989);

Howard & Mildred Carter, 40 FERC ¶ 61,280 (1987)).

C. Relying on First Iowa, FERC consistently has rejected assertions by state agencies, individual water users, and project licensees that it should defer to state water rights law in determining how a project should be operated. (see Henwood Assocs., Inc., 50 FERC ¶ 61,183 (1990); Twin Falls Canal Co., 45 FERC ¶ 61,423 (1988)).

D. In analysis which belies the clouded line between section 9 and 27, FERC frequently has overruled state attempts to exercise authority over water releases from hydroelectric projects by holding that the Federal Power Act creates an exclusively federal regulatory scheme (see Guadaloupe-Blanco River Auth., 42 FERC ¶ 61,079 (1988); Rock Creek Limited Partnership, 38 FERC ¶ 61,240, reh'g denied, 41 FERC 61,198 (1987); Roseburg Resources, 41 FERC ¶ 61,142 (1987)).

E. More recently, FERC appears to be resolving conflicts with state water law by characterizing its decisions as being the best comprehensive use of the waterway, thereby cloaking its decisions with the protection of section 9's requirement that state law can apply to the extent that it is not inconsistent with the purpose of the Federal Power Act (see Brazos River Auth., 48 FERC ¶ 62,190 (1989); Twin Falls Canal Co., 45 FERC ¶ 61,423 (1988); accord California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

1. The use of the terminology "best comprehensive use" is derived from section 10(a) of the Federal Power Act which always has required FERC to balance competing uses of navigable waters.

2. The Electric Consumers Protection Act strengthened the importance of section 10(a) by requiring that FERC give "equal consideration" to power and non-power uses, thereby allowing FERC further discretionary authority to find state laws not to be consistent with the "best comprehensive use" of a waterway.

3. As a result of the revision to section 10(a) in the Electric Consumers Protection Act, FERC's authority was strengthened even more since it now is required to take a more activist role; it can no longer rely on state recommendations but must itself determine the appropriate resource mix for hydroelectric development (see, e.g., Central Nebraska Pub. Power & Irrigation Dist., 50 FERC ¶ 61,180 (1990); Northern Lights, Inc., 39 FERC ¶ 61,352 (1987)).

F. FERC perceives its authority to prescribe water release regimes to be limited only by actions of other federal agencies (see, e.g., Henwood Assocs., Inc., 50 FERC ¶ 61,183 (1990) (conflict with Bureau of Land Management); Eugene Water and Elec. Bd., 49 FERC

¶ 61,211 (1989) (conflict with Army Corps of Engineers).

V. RECENT DEVELOPMENTS AFFECTING FERC AUTHORITY TO REGULATE WATER RIGHTS

A. Recent developments have focused attention anew on the long unresolved debate over the proper respective roles of the states and federal governments in controlling the hydroelectric power resource.

1. Enactment of the Public Utility Regulatory Policies Act and related statutes produced an explosion in applications for new hydroelectric project permits (see generally M.C. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 Harv. Envtl. L.R. 135 (1986)).

2. The expiration of the licenses on hundreds of projects licensed for fifty-year terms in the early days of the Federal Power Act has provided an unusual opportunity to reexamine the environmental desirability of these projects (see 52 Fed. Reg. 4648 (Feb. 13, 1987) (list of hydropower licenses expiring from 1987 through 2000)); FERC is facing license applications in numbers not seen for fifty years. Both the hydroelectric industry and environmental organizations are viewing this historical

phenomenon as an opportunity.

B. Enactment of Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1243 (1986).

1. The Electric Consumers Protection Act of 1986 was the first significant revision to the hydroelectric project licensing provisions of the Federal Power Act since the 1920s (see generally J.D. Echeverria, "The Electric Consumers Protection Act of 1986," 8 Energy L.J. 61 (1987); J.H. Bornong, "The Electric Consumer Protection Act of 1986: Changes in Hydro Licensing?," 23 Gonzaga L.R. 135 (1987)).

2. The importance of the new statute comes not only from its provisions but from the time at which it was enacted. The environmental impacts of the expiring licenses generally never had been examined. The renewal of licenses offered the first opportunity to scrutinize the environmental impacts of hydropower projects and to impose new conditions to protect watershed ecology (see generally J.H. Bornong, "The Electric Consumer Protection Act of 1986: Changes in Hydro Licensing?," 23 Gonzaga L.R. 135 (1987); J.D. Echeverria et al., Rivers At Risk (1989)).

3. One of the major goals of the Electric Consumers Protection Act was to ensure that FERC pays more

attention to environmental concerns in deciding whether to issue hydroelectric project licenses (See generally J.D. Echeverria, "The Electric Consumers Protection Act of 1986," 8 Energy L.J. 61 (1987)).

4. The statute adds both substantive and procedural provisions elevating the importance of environmental issues.

   a. New substantive provisions were added to section 4(e) of the Federal Power Act requiring FERC to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, ... the protection of recreational opportunities, and the preservation of other aspects of environmental quality." (Electric Consumers Protection Act § 3(a), 16 U.S.C. § 797(e); see also Electric Consumers Protection Act § 3(b), 16 U.S.C. § 803(a)(1) (adding environmental protection issues to the factors that FERC must consider in issuing licenses)). The purpose of these provisions was to change FERC's public interest review standards (see Udall v. Federal Power Comm'n, 387 U.S. 428 (1966)) to improve consideration

of environmental factors (H.R. Rep. No. 934, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Ad. News 2496 (1986) (conference committee report on the statute)).

b. New procedural requirements now require FERC to solicit and consider the views of other federal and state agencies on environmental issues (Electric Consumers Protection Act § 3(b), 16 U.S.C. § 803(a)(2)(B)). The statute also establishes a complicated consultation procedure requiring close consultation between FERC and state and federal fish and wildlife agencies (Electric Consumers Protection Act § 10(j), 16 U.S.C. § 803(j)). Notwithstanding the consultation requirement, FERC has the discretion to reject recommendations under certain circumstances.

c. FERC must adopt license conditions based upon recommendations it receives from state and federal fish and wildlife agencies. If it appears to FERC that the recommendations "may be inconsistent with the purposes" of the Federal Power Act or any other "applicable law," FERC must resolve the inconsistency by giving "due weight" to the recommendations

and the "expertise, and statutory responsibilities" of the recommending agencies (Electric Consumers Protection Act § 10(j), 16 U.S.C. § 803(j)).

d. FERC's authority under the Electric Consumers Protection Act to reject environmental protection recommendations as being contrary to law is consistent with FERC's authority under section 9 of the Federal Power Act to accept or reject state law requirements.

e. The statute disclaims any congressional intent to "alter or establish the respective rights of states, the United States ... or any person with respect to any water or water-related right." (Electric Consumers Protection Act § 17, 100 Stat. 1259, 16 U.S.C. § 797 note)

5. The statute directs FERC to apply new, and greater, scrutiny to relicense applications to ensure that each project meets today's more sophisticated standards for whether resource development is in the public interest (see H.R. Rep. No. 507, 99th Cong. 2d Sess., reprinted in 1986 U.S. Code Cong. & Ad. News 2496 (1986)).

6. The new statute does not refer explicitly to, or give guidance on how to resolve, disputes which

might arise between FERC's new environmental protection responsibilities and state proprietary rights. The legislative history of the Electric Consumers Protection Act, on the contrary, focuses only on recommendations which are "inconsistent with the purposes and requirements" of the Federal Power Act. The conference report explains that FERC's discretionary authority is intended to ensure that environmental protection recommendations do not give commenting agencies a veto over FERC license decisions (H.R. Rep. No. 934, 99th Cong., 2d Sess. (1986)).

7. The Electric Consumers Protection Act has no provision for FERC to receive or consider comments from state agencies responsible for protecting proprietary rights. The statute did not change or clarify the interplay between sections 9 and 27 of the Federal Power Act. Instead, the statute reaffirms -- and strengthens -- FERC's ultimate authority to reconcile public interests affected by hydroelectric development, including fish and wildlife protection and recreation (see California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

8. Because the new statute was the first major revision of the Federal Power Act since the

Supreme Court's decision in First Iowa, Congress had an opportunity -- which it declined -- to explain or change how the dual authority of federal and state laws is intended to operate.

a. Congress' failure to address First Iowa and the virtually unbroken line of cases striking down most mandatory state regulations affecting hydroelectric projects suggests congressional satisfaction with the current division of authority.

b. Notwithstanding established law that FERC has occupied the field of hydroelectric power regulation, the Electric Consumers Protection Act also makes FERC the regulator of environmental and wildlife protection laws. There is no indication in the plain language of the statute that Congress intended for FERC to occupy this field as well.

c. The role of states as advisors in the FERC licensing process is consistent with First Iowa and its progeny which contemplate a system of dual state and federal jurisdiction in which FERC is the ultimate arbiter of conflicts.

C. The Electric Consumers Protection Act must be viewed in the context of other congressional environmental

protection and energy enactments of the 1970s and 1980s, all of which preserved federal control over these issues.

1. The Public Utility Regulatory Policies Act of 1978 encouraged the development of small hydroelectric projects through financial and regulatory incentives, but retained FERC control over the licensing and regulation of these projects (Public Utility Regulatory Policies Act, Pub. L. 95-617, 92 Stat. 3117 (1978)).

2. The federal environmental protection laws, including the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361, the Endangered Species Act, 16 U.S.C. §§ 1531-1543, and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, enforce procedural and substantive environmental protections in which the states have only an advisory role.

D. The Ninth Circuit's decision in California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989) offered the Supreme Court the opportunity to clarify the interplay of sections 9 and 27 in cases where there is no bright line between state water and regulatory laws.

1. The Ninth Circuit held that the California Water Resources Control Board did not have the authority

to set minimum water flow rates downstream which were more stringent than FERC had set for the same project as conditions of the FERC license because the FERC license preempted state law.

2. The Ninth Circuit explicitly rejected California v. United States, 438 U.S. 645, and its progeny, construing language in the Reclamation Act of 1902 which is substantially similar to section 27, and held that all aspects of state hydroelectric regulation are preempted by federal law, except for state proprietary rights. The court distinguished both the purpose and the nature of the federal regulatory interest expressed in the two statutes in holding that Reclamation Act jurisprudence is not directly applicable to the Federal Power Act.

3. There is some dispute whether the California law at issue was actually a proprietary rights law; California does not recognize a proprietary right in instream flows (see Brief of Respondent Rock Creek Ltd. Ptshp., California v. FERC, (U.S. Supreme Ct. No. 89-333) (Feb. 12, 1990)).

E. The Supreme Court unanimously affirmed the Ninth Circuit in an opinion by Justice O'Connor (California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)).

1. The Court relied almost exclusively on the 1946

decision in First Iowa

a. Although the case would have presented a "close question" if it were one of first impression, the Court believed itself constrained by First Iowa.

b. Relying on the strength of stare decisis, the Court adopted the principle that it is better to be consistent than to be right in statutory construction (see Patterson v. McLean Credit Union, 491 U.S. ___ (1989) (slip. op. at 4)).

2. Congress' passage of the Electric Consumers Protection Act confirmed FERC's "broad and paramount ... regulatory role" and affirmed Congress' concurrence with the balance struck in First Iowa and its progeny.

3. Allowing state regulatory control over minimum instream flows would require the Court "fundamentally to restructure" a "highly complex and long-enduring regulatory regime."

4. The Court rejected the argument that the discussion of section 27 in First Iowa was mere dicta.

5. California v. United States does not control the case and is not in tension with First Iowa, the Court held.

a. The language of the Reclamation Act and Federal Power Act is similar but not identical.

b. The legislative history of the two statutes is more important than the words used; the histories are vastly different.

c. The purpose of the Federal Power Act is to provide an "active federal oversight role" while the Reclamation Act contemplates that the federal government will act like any ordinary holder of a state water right.

6. The California instream flow requirement is preempted because it "would disturb" and "actually conflicts" with, the "balance embodied" in the FERC instream flow requirements.

7. Although the Court's decision has reaffirmed the validity of First Iowa, it did not resolve that case's ambiguities.

a. When is a right a proprietary right?

b. When does a state regulatory scheme "actually conflict with" or "disturb" FERC's obligation to balance conflicting water needs?

c. If a licensee can comply with both FERC and state requirements (i.e. where the state imposes different or more stringent requirements than FERC), how does FERC

determine whether a conflict or disturbance exists?

F. FERC Decisions After the Ninth Circuit Decision in California ex rel. State Water Resources Bd. v. FERC

1. Since the Ninth Circuit's decision in California ex rel. State Water Resources Bd. v. FERC, FERC twice has cited that decision as providing further support for its authority to control and impact state water rights.

   a. The FERC has found that it possesses authority to impair significantly the private use of state water rights (see, e.g., Brazos River Auth., 48 FERC ¶ 62,190 (1989)).

   b. The FERC also has held that it may overrule state agency attempts to control the use of such water rights (see, e.g., Henwood Assocs., Inc., 50 FERC ¶ 61,183 (1990)).

2. The FERC does not view the Ninth Circuit's decision as providing new authority for its actions, but only as providing additional support for its long-standing view that First Iowa's interpretation of section 27 of the Federal Power Act enables the FERC in essence to preempt state water law (see Henwood Assocs., Inc., 50 FERC ¶ 61,183 (1990); Brazos River Auth., 48 FERC ¶ 62,190 (1989)).

VI. CONCLUSIONS

A. Although the Supreme Court in California v. FERC reaffirmed the validity of First Iowa after the Electric Consumers Protection Act and California v. United States, the Court did nothing to clarify the interplay between sections 9 and 27.

B. There appear to be three principal views on the role which FERC plays in regulating water rights.

1. One view is that FERC maintains regulatory authority to disregard any state law except those relating narrowly to the appropriation and use of water (proprietary rights only).

a. FERC can disregard state regulatory water rights.

b. Section 27 protects only vested water rights recognized by state law.

c. The Supreme Court appears to have adopted this approach.

d. Notwithstanding its doctrinal simplicity, this view may be difficult to apply because of the clouded line between proprietary rights and regulatory laws which are attached thereto.

2. An alternative view is that section 27 protects from preemption any state law which relates to control or appropriation of water usage.

a. States retain right to regulate water rights.

b. State regulatory water laws effectively can veto a FERC license or can impose additional conditions on the exercise of license rights even if those conditions are inconsistent with FERC license conditions.

c. This broad reading of section 27 -- although consistent with its plain language -- effectively has been killed by California v. FERC.

3. The best view appears to be that the states and FERC exercise concurrent authority over all hydroelectric regulatory matters, with disputes between FERC and the states settled based upon certain conflict resolution priorities.

a. The Supreme Court says that it has adopted this approach but is decisions suggest a dissatisfaction with concurrent authority

b. The Court is uneasy with any approach which requires resolution of conflicts between state and federal law.

C. States retain preeminent authority in limited areas.

1. State law is preeminent where vested rights are at issue or an unconstitutional taking would occur.

2. FERC must consult with the states over environmental, wildlife, and fishery protection

issues under the Electric Consumers Protection Act.

3. If state law allows for instream flow water rights and such rights would be implicated by FERC action, state law should be applied to determine whether a taking would occur.

4. States may impose additional regulatory burdens on FERC licensees if to do so would not frustrate either the purpose of the Federal Power Act or the licensee's ability to operate its project.

   a. FERC has broad authority to define the purpose of a project so as to preclude state regulation.

   b. FERC's comprehensive planning obligation leaves little room for state regulatory requirements which might conceivably affect a basin-wide development plan.

D. FERC has comprehensive planning authority subject to the states' limited authority.

1. The Electric Consumers Protection Act clarifies FERC's long-standing regulatory supremacy.

2. FERC statutorily is charged with regulating hydroelectric power in a coordinated, basin-wide manner.

3. FERC may not disregard any state regulatory laws under section 9 unless compliance with both

federal and state law would be a physical impossibility or would impose a practical conflict violative of the purpose of the Federal Power Act.

E. FERC licensees must comply with the more stringent of the requirements imposed by either the state or FERC unless there is a practical conflict between those requirements, in which case FERC becomes the final arbiter of the dispute under section 9 of the Federal Power Act.

PRINCIPAL STATUTORY AND CASE REFERENCES

A. FEDERAL POWER ACT PROVISIONS GRANTING FEDERAL CONTROL OVER WATER RESOURCES IN CONTEXT OF HYDROPOWER DEVELOPMENT

1. Section 4(e), 16 U.S.C. § 797(e)

The Commission is authorized and empowered

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development

purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

2. Section 6, 16 U.S.C. § 799

Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended (U.S.C., title 41, sec. 20).

3. Section 7(a), 16 U.S.C. § 800(a)

(a) In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

4. Section 9(a), 16 U.S.C. § 802(a)

(a) Each applicant for a license under this chapter shall submit to the commission --

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the Commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the Commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

5. Section 10(a), 16 U.S.C. § 803(a)(1)

All licenses issued under this Part shall be on the following conditions:

(a)(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood water, water supply, and recreational and other purposes referred to in section 4(e) if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specification of the project works before approval.

6. Section 10(j), 16 U.S.C. § 803(j)

All licenses issued under this Part shall be on the following conditions:

(j)(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and

statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Part or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) shall not apply to the conditions required under this subsection.

7. Section 21, 16 U.S.C. § 814

When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceedings for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

8. Section 27, 16 U.S.C. § 821

Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

B. PRINCIPAL AND RECENT COURT CASES

1. California v. FERC, ___ U.S. ___1990 LEXIS 2614 (May 21, 1990)

[See discussion of Ninth Circuit opinion below]

The Supreme Court unanimously affirmed the Ninth Circuit opinion, holding that the principle of stare decisis demanded adherence to First Iowa Hydro-Electric Power Coop. v. Federal Power Comm'n, although were the issue one of first impression, it would present a "close question." While the decision was based almost entirely on First Iowa, the Court did hold that Congress' enactment of the Electgric Consumers Protection Act reaffirmed FERC's broad and paramount control over hydroelectric power resources. The Court also rejected the parallel between language in section 27 of the Federal Power Act and substantially similar language in section 8 of the Reclamation Act.

2. First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152, 66 S.Ct. 906 (1946).

The petitioner applied to the Federal Power Commission for a license to operate a hydroelectric project without attempting to comply with an Iowa law which forbids dam construction without a state permit. The Commission granted the license nonetheless, citing its authority under section 9 of the Federal Power Act. Because the state law purported to impose a permit requirement which supplemented the federal permit requirement, the Court held that the applicant was not required to comply with Iowa law as a condition precedent to a federal license. The Court distinguished between sections 9 and 27 of the Federal Power Act. Section 27, which protects state law from supersedure by the Federal Power Act, is limited to those laws which relate to the protection of property rights in water. Section 9 has broader reach, and applies in all circumstances in which property rights are not at issue. Section 9 does not require compliance with state law but only empowers the Federal Power Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the purposes of the federal license on the navigable waters of the United States."

The Court explained that the Federal Power Act establishes a dual system of control between the state and federal government in which there is a "division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where

the Federal Government supercedes the state government there is no suggestion that the two agencies both shall have final authority." States retain regulatory control only over allocation of proprietary rights. Regulatory matters are within the exclusive purview of the federal government, the Court concluded; within the regulatory arena, an applicant need not comply with any state laws if such laws could conceivably conflict with the federal scheme.

The Court reviewed the legislative history of the Federal Power Act in noting that state authority was severely limited. Even as to control of water rights, the states retained authority only because of the explicit provision to such effect in the Federal Power Act. Citing United States v. Appalachian Power Co., 311 U.S. 377 (1940), the Court noted that state control over waters within their borders is "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters and rivers."

3. Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S.Ct. 487 (1954).

A challenge was brought to an order of the Federal Power Commission which disallowed, as amortization reserve, the expenses which Niagara Falls Power Company had to pay for the use of private water rights needed as part of its power project. The Commission had disallowed the expenses because it considered those rights no longer to exist. The Court of Appeals' reversal of that decision was affirmed by the Supreme Court. At issue was whether the Federal Power Act abolished water rights which interfered with the operation of federally-licensed projects. The Court explained that, although water rights are usufructuary rights, the Federal Power Act treats those rights no differently from other property rights. While the Act allows for federal purchase or condemnation of such rights, the Act does not have the effect of seizing, abolishing, or eliminating water rights without compensation, the Court held. Preexisting water rights are to survive unless purchased.

4. Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954).

The state petitioned for review of a Federal Power Commission order granting a license to a municipality to operate a dam. The state had opposed the license on the grounds that the municipality had not sought or received permits from the Department of Fisheries and Game for the dam construction. Under First Iowa, the court held that the Commission was acting within its discretionary authority when it failed to require the municipality to demonstrate its compliance with the laws of Washington state. Notwithstanding the state's claim that the federal dam would have disastrous impacts on the state fisheries,

the court noted that if the project "will destroy the fish industry of the river, we are powerless to prevent it."

5. California v. Federal Power Comm'n, 345 F.2d 917 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965).

Both the state and the licensees challenged a Federal Power Commission order which imposed conditions on operation of a hydroelectric project for the protection of downstream fisheries. The Federal Power Commission order mandated specified instream flows to maintain salmon runs in the river. The licensee claimed, and the Federal Power Commission did not dispute, that the conditions impaired their ability to deliver irrigation water pursuant to state water rights. The court held that the Federal Power Commission had the authority under section 27 of the Federal Power Act to impose a license condition "which would operate to impair the districts' full use of their irrigation water rights in some future year." The holding was based, in part, upon the court's conclusion that the licensee was protected by a reopener clause in the license which provided for application to the Commission for changes in the license conditions for emergency situations. The court explicitly concluded that the Federal Power Commission "has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise."

6. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).

The City of New York intervened in a long-disputed Federal Power Commission proceeding over a pumped-storage hydroelectric project on the Hudson River in New York. Numerous challenges were raised to the Federal Power Commission order granting the license. The City of New York argued that the license violated section 27 of the Federal Power Act because the project posed a potential danger to, and therefore interfered with, a New York-owned aqueduct. The court held that, pursuant to section 9, the Federal Power Commission had adequately considered the interference issue before granting the license. New York should not be permitted to exercise a veto over the license merely because it disagreed with the Federal Power Commission conclusion, the court held, quoting from First Iowa.

7. Pennsylvania Dep't of Envtl. Resources v. FERC, 868 F.2d 592 (3d Cir. 1989).

The state brought suit challenging FERC's refusal to reopen a licensing proceeding to consider the state's input into the environmental review process. The state argued that the FERC license interfered with state property and Pennsylvania law regulating lands and water. The court rejected the state's

argument and held that, under First Iowa, a state retains only very limited authority. Quoting First Iowa, the court explained that the Federal Power Act does not "permit interference with certain state laws relating 'to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature.'" States do not retain control over matters such as pollution, flood control, aesthetics, recreation, and natural resources conservation, the court held.

8. State of California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989), cert. granted, 110 S.Ct. 537 (1989), aff'd, ___ U.S. ___, 1990 LEXIS 2614 (May 21, 1990)

California sought review of a FERC order which set water flow rates for a FERC-licensed hydroelectric project. California alleged that the State Water Resources Control Board had the authority to set terms and conditions on water flow pursuant to state law, notwithstanding a FERC order which set a minimum flow rate. California argued that the licensee had to comply not with the FERC-imposed instream flow conditions but also with the more stringent minimum flow conditions which it had set. So long as the licensee complied with state law, it claimed, the licensee automatically would comply with FERC-imposed conditions.

The Ninth Circuit held that the Federal Power Act preempted state law and that FERC, therefore, had exclusive jurisdiction to determine the instream flow that the project operator had to preserve in Rock Creek. At issue was whether the FERC's imposition of minimum flow releases for fishery protection and other purposes was an integral part of FERC's comprehensive planning and licensing authority under section 10(a) of the Federal Power Act. The court contrasted section 27 of the Federal Power Act, which provides that the Act is not intended "to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water..." with section 4(e), section 10(a), and section 7(a). The Ninth Circuit held that the "weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity."

The Court rejected California v. United States, 438 U.S. 645 (1978) in favor of First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946). The court held that the Federal Power Act, read as a whole, teaches that "Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified" in section 27.

9. Town of Springfield v. Vermont Envtl. Bd., 521 F. Supp. 243 (D. Vt. 1981).

Town brought action challenging a state order which prohibited the town from proceeding with a hydroelectric project until it obtained a state land use permit. The district court held that the state order was void because the state's withholding of a state permit had the effect of thwarting a project the permit for which was regulated by FERC. The Court rejected the state's argument that it was entitled at least to regulate "corollary improvements" relating to highways and recreational areas which were not used in connection with the generation of hydroelectric power. The Court held that the reservation of authority to the states in section 27 of the Federal Power Act was limited to those specific areas enumerated in the statute and, as to other matters, exclusive regulatory jurisdiction lay with FERC. The Federal Power Act prohibits a state from requiring a permit for any matter related to a FERC-licensed project if such a permit is a condition precedent to obtaining a federal license. In explaining the pervasiveness of FERC regulation of hydro projects, the court stated that there is a "clear Congressional intent to bring all aspects of [a] hydroelectric project within the purview of the federal regulatory scheme."

10. Mega Renewables v. County of Shasta, 644 F. Supp. 491 (E.D. Cal. 1986).

Plaintiffs alleged that a local ordinance and section 1603 of the California Fish and Game Code both were preempted by the Federal Power Act to the extent that the state law affected federal hydropower projects. On motion for summary judgment, the court held that the state law was not preempted but the local ordinance was. The state law was valid, the court concluded, because it required only the submission of information to the state and did not purport to impose a permit requirement which could have the effect of vetoing a federal project. The court explained that First Iowa prohibited only those state laws which otherwise would allow a state veto of a federal project. Noting that courts are reluctant to infer preemption of an entire field, the court explicitly rejected the argument that the Federal Power Act preempts the entire field of water power projects. Unlike the state law, the local ordinance imposed a permit requirement on all hydro projects. Reading First Iowa to prohibit any non-federal permitting requirement, the court struck down the local permit ordinance.

11. City of Tacoma v. Taxpayers of Tacoma, 262 P.2d 214, 43 Wash. 2d 468 (1953).

The City of Tacoma brought a declaratory judgment action seeking determination of whether it had to comply with Washington

state fishery protection laws in order to operate a federally licensed dam within the state. The court noted that compliance with Washington fishery laws would force abandonment of the project and that by enforcing those laws, therefore, the state effectively could veto the federal hydropower license. Because the supremacy clause of the United States Constitution prohibited a state veto over a federal action, the court held that where state and federal statutes cannot be reconciled, "the action of a state even under its police power must give way." The court further held that the Federal Power Act had preempted the entire field of regulation of dams on navigable waters.

12. Oregon v. Idaho Power Co., 312 P.2d 583, 211 Or. 284 (1957).

Idaho Power Company was indicted for constructing a hydroelectric project without a license from the Oregon Hydroelectric Commission. Although conceding that the project was constructed over navigable waters, Oregon claimed that the "use and appropriation of water rights ... is within the control and authority vested in the state of Oregon and not within the authority of the licensing power of the Federal Power Commission." Quoting from First Iowa, the court disagreed, holding that the section 27 savings clause of the Federal Power Act only protects state proprietary rights, not state regulatory powers. Under section 27, the state is entitled only to compensation under the takings clause of the United States Constitution.

C. PRINCIPAL RECENT FERC CASES

1. Henwood Assocs., Inc. 50 FERC ¶ 61,183 (Feb. 15, 1990).

In an original license proceeding, the FERC determined that recommendations of the California Department of Fish and Game regarding minimum flows would render the project uneconomic if implemented. FERC therefore rejected the agency's proposed minimum flows and implemented those recommended by its staff.

The FERC also found that minimum flows required by the California Water Resources Control Board as a condition of a Clean Water Act section 401 water quality certificate were not enforceable against the proposed project because the FERC found the Water Resources Board to have waived the section 401 certification requirement for the project. In discussing the Water Resources Board's actions, the FERC cited California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989) in rejecting the Board's assertion that it had authority under state law to establish minimum flows. The FERC noted, however, that State of California did not "address the issue of whether the Water Resources Board is authorized under the Clean Water Act to establish minimum flows by adoption of minimum flow conditions in a state water rights permit." (This issue needs to

be addressed, although the FERC is unlikely to be the one to decide the point, because the FERC has consistently held that "review of the appropriateness of a section 401(a)(1) certification condition is a matter for the state courts, not a federal agency or court.")

In Henwood, the FERC also found that the Bureau of Land Management has authority under the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq. (FLPMA), to require project licensees to obtain FLPMA right-of-way permits. In this proceeding, the BLM had issued a permit containing a condition that the project release certain minimum flows -- flows identical to those recommended by California Fish & Game and rejected by the FERC as rendering the project uneconomic. The FERC noted its belief that a FLPMA right-of-way permit is not necessarily a prerequisite to issuance of a license nor is it a condition of such license, unless the permit is issued to protect a federal "reservation," in which case the FERC must include the permit's conditions in a project's license pursuant to section 4(e) of the Federal Power Act. The FERC indicated its discomfort with its finding that hydro projects must obtain FLPMA permits by stating "[i]t appears to us that the denial or conditioning of a right-of-way under FLPMA should not be allowed to be a de facto veto of the Commission's license. Indeed, it may well be that BLM has exceeded its authority under FLPMA in imposing such conditions in the grant of the right-of-way. However, we recognize that this is a matter for the courts to decide."

2. Central Nebraska Pub. Power and Irrigation Dist., 50 FERC ¶ 61,180 (Feb. 14, 1990).

In this order, the FERC responded to the D.C. Circuit Court of Appeals' decision in Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989), in which the court had reversed the FERC's prior refusal to impose interim measures to protect whooping crane habitat (and that of several other endangered or threatened species) pending the completion of relicensing proceedings for two Nebraska hydro projects. The Commission found that the potential for significant, irreversible injury to the whooping crane's habitat in central Nebraska justified the imposition of interim measures requiring, among other things, maintenance of certain instream flows downstream of the two projects.

The FERC found, however, that it possessed authority to impose interim conditions only on one of the projects, the downstream project of the two. Due to the small amount of storage in the downstream project's facilities, however, the FERC had to tie the magnitude of the required flows to the volume of water stored in the upstream project's reservoir. (Although it lacked authority to impose unilateral conditions on the upstream project's license, the FERC implored the upstream project

operator to assist in facilitating the required flows). When the volume of storage in the upstream reservoir equalled 1.3 million acre-feet or more, minimum instream flows (in an approximately 118 mile stretch of the Platte River) would be required which would vary depending on the endangered resources' seasonal requirements. When the volume of storage was between 900,000 acre-feet and 1.3 million acre-feet, a constant minimum flow of 400 cubic feet per second would be required. No minimum flows would be imposed when storage was less than 900,000 acre-feet.

3. Eugene Water and Elec. Bd., 49 FERC ¶ 61,211 (Nov. 16, 1989).

FERC in this case found that it possessed no authority to impose minimum flows on a new project located at an existing U.S. Army Corps of Engineers dam, because the Corps had sole control over the dam's release schedule. The Corps would release water from the dam as necessary to satisfy the authorized purposes of the dam (flood control, recreation and conservation); power would be generated only when such releases so allowed.

4. Brazos River Auth., 48 FERC ¶ 62,190 (Sept. 14, 1989).

In this case, the FERC's Director of Hydropower Licensing addressed a conflict among water supply obligations of a licensee, recreational use of a dam's reservoir and minimum releases from the dam necessary to protect downstream fishery resources. The case involved the new license application of a project operator whose 50-year federal license for the Morris Sheppard Dam was expiring. At its maximum storage level, the dam impounded approximately 570,200 acre-feet of water contained in a reservoir with a surface area of 17,600 acres. The dam was operated in a "peaking" mode, with water released from the dam only when power generation was needed to meet electric system power demands or when releases were required to meet downstream water supply requirements.

As a preliminary matter, the Director of Hydropower Licensing found that the FERC had exclusive authority to control flow regimes at the dam, citing to California ex rel. State Water Resources Bd. v. FERC. "[S]tates must yield to the Commission when a state's and the Commission's respective authorities over state waters are in conflict." Given the FERC's preeminent authority, the Director went on to discuss how the FERC staff resolved conflicts among the various uses of the Morris Sheppard Dam and its reservoir.

The Director found that consistent with sections 4(e) and 10(a) of the Federal Power Act, the FERC was required "to consider and balance, in the public interest, all uses of the waterway on which a project is proposed to be located." The FERC staff therefore developed a minimum flow regime that included a

drought contingency plan that would reduce the required minimum flows in times of drought in order to mitigate the impact on the licensee's water supply obligations and on recreational use of the reservoir. Nevertheless, the staff did not go as far as the licensee desired, instead deciding that minimum flows had to be maintained, at least in part, in times of drought in order to protect downstream aquatic resources. The Director's order in this case therefore represents an attempt to strike a balance between the competing needs of aquatic resources on the one hand, and water supply and reservoir recreation on the other.

5. Mega Renewables 47 FERC ¶ 61,194 (May 4, 1989).

In Mega Renewables, certain landowners contested the FERC's issuance of an exemption from licensing for a small hydro project. The landowners alleged that operation of the project would adversely affect existing water rights holders by changing the prevailing regime of water releases, diversion and uses. The FERC rejected these allegations by referring to an agreement between the hydro developer and the water users' association (of which the contesting landowners were members) wherein the developer agreed that its rights to water for power generation purposes were subordinate to the water users'. The FERC found that this agreement assured that the proposed hydro project would not interfere with the landowners' water rights.

6. Conway Ranch, 46 FERC ¶ 62,332 (March 31, 1989)

The FERC's Director of Hydropower Licensing rejected in Conway Ranch a license applicant's argument that state adjudicated water rights cannot be abrogated by FERC. The FERC required as a condition of its issuance of a license for the applicant's proposed hydro project that the project release minimum flows varying from 1.5 to 4.0 cubic feet per second, depending upon the amount of inflow to the project's facilities. The FERC also imposed a condition on the license requiring the project to release flushing flows in June of each year. The FERC justified its action by reasoning that "the fact that the applicant is free to use [its adjudicated allotment of] 6 cfs for irrigation purposes does not mean that it is similarly free to use the water for hydroelectric generation without restriction. It is well established that the Commission may include a condition in a license which would impair the licensee's full use of its water rights." (Citing California v. Federal Power Comm'n, 345 F.2d 917 (9th Cir. 1965).

More than a year later, the applicant refused the FERC license for the project in order to protect its 128-year irrigation water right. See Hydro-Wire vol. 11, no. 10 at 5 (May 21, 1990).

7. Pacific Gas & Elec. Co., 46 FERC ¶ 61,249 (Feb. 27, 1989).

In Pacific Gas & Elec. Co., a hydro license article reserving to the FERC authority to require modification of project operations for the protection and development of fish and wildlife resources was read to include authority to require changes in minimum flows in the future. The licensee had argued that the FERC authority to require changes in project operation was limited to instances "where some major, unexpected change in circumstances arose."

In response, the Commission rebutted the licensee's arguments with references to the Ninth Circuit's decision in California v. Federal Power Comm'n, 345 F.2d 917 (9th Cir. 1965) ("When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6 [of the FPA], to include in the license a condition reserving the problem, including the licensee's rights to test the validity of any future action taken."), South Carolina Elec. & Gas Co., 30 FPC 1338 (1963) ("The Commission in recent months had undertaken a review of hydroelectric licenses in the interest of making the most effective use of its authority to impose conditions upon licensee[s] in the public interest.... This review has increased our awareness of the potential contribution of the license conditions to comprehensive resource development."), and Trinity River Auth. of Texas, 41 FERC ¶ 61,300 (1987). The FERC summarized its views by stating that its "obligation under Section 10(a) [of the FPA] is a continuing one throughout the term of the license. When information becomes available to us, through our staff, another agency, the licensee, or the public in general, that a project may no longer conform to the comprehensive development standard, we may investigate that situation and then require changes to project operation or facilities as our authority permits."

8. Twin Falls Canal Co., 45 FERC ¶ 62,534 (Dec. 15, 1988)

In this proceeding, the FERC required, as part of mitigating the cumulative impacts on fish and wildlife of the project under consideration and three other Snake River Basin projects, that the project licensee participate in a "comprehensive water block," which would provide for varying water releases from each project, depending upon resource needs. The Commission also required that the licensee purchase and/or lease water from the State of Idaho's "Water Bank" if necessary to satisfy the required minimum flow releases.

FERC reviewed the proposed conditions to the project license under its duty to ensure that the project is consistent with the best comprehensive use of the waterway. In developing the required minimum flow regime, FERC therefore rejected an agency's proposed flow regime as having too great an impact on irrigation and power generation. The flow regime rejected by the Commission would have required releases of 300 cfs in the irrigation season and 1260 cfs in the non-irrigation season. Instead, the Commission adopted a minimum flow regime requiring year-round releases of 200 cfs for fish and wildlife purposes. The FERC also approved special 10,000 cfs releases on eight days in May and June of each year when such flows would be available for whitewater boaters.

The Commission authorized the licensee to release flows less than the required minimums when sufficient water was unavailable from the state "Water Bank" or from water surplus to irrigation needs. The Commission expressly rejected, however, the State of Idaho's request that the FERC include in the project license a condition subordinating the use of water for hydropower generation to use of water for upstream depletions, including irrigation. "[T]he subordination clause ... could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license. Consequently, inclusion of the open-ended water subordination clause in the license as requested by [the state] would interfere with the exercise of our comprehensive planning responsibilities under Section 10(a)(1) of the FPA and thus would be inconsistent with the scheme of regulation established by the FPA, which vests in the Commission the exclusive authority to determine whether, and under what conditions, a license should issue." (Citing to First Iowa). The Commission acknowledged that the State of Idaho was not precluded from petitioning the FERC in the future for a determination that hydropower generation at the project should be reduced to accommodate upstream water uses.

9. Guadaloupe-Blanco River Auth., 42 FERC ¶ 61,079 (Jan. 28, 1988).

FERC's decision in this case was significant in that it was the first proceeding involving post-ECPA environmental review in which the Commission asserted its authority to impose minimum flows for fishery protection in opposition to a state's assertions of exclusive jurisdiction over water rights. (The Rock Creek Ltd. Partnership cases, and the Ninth Circuit's affirmance of the FERC's decisions in those cases -- California ex rel. State Water Resources Bd., involved pre-ECPA environmental review by the FERC).

The Commission found that "to the extent Texas water right laws would require a release regime for the project that

conflicts with the minimum flow requirements contained in the license, those laws are inconsistent with the scheme of the FPA and are superseded by it. ... [W]hile Section 27 protects "proprietary" rights in water acquired from a state, it does not abrogate the Commission's authority to require a licensee to release water from its licensed project for fishery protection and other purposes. ... [Section 27] only establishes a right of compensation for vested water rights taken by a Commission licensee."

10. Rock Creek Ltd. Partnership, 38 FERC ¶ 61,240 (March 11, 1987), reh'g denied, 41 FERC ¶ 61,198 (Nov. 20, 1987), affirmed in California ex rel. State Water Resources Bd. v. FERC, 877 F.2d 743 (9th Cir. 1989), cert. granted, 110 S.Ct. 537 (1989), aff'd, ___ U.S. ___, 1990 LEXIS 2614 (May 21, 1990).

In its two orders, the Commission found the Supreme Court's decision in First Iowa to be controlling precedent concerning the authority of states to impose minimum flow releases from FERC-licensed hydro projects. The FERC therefore found that the California Water Resources Control Board was preempted from imposing minimum flow requirements. "[T]he authority to impose minimum flow releases resides exclusively with [the Commission], since it is an integral part of our responsibilities under Section 10(a)."

11. Roseburg Resources, 41 FERC ¶ 61,142 (Nov. 6, 1987).

In this case the FERC cited both First Iowa and the first Rock Creek order as support for rejecting the minimum flows recommended by a California state agency to be released from a new project. "[T]he establishment of minimum flows is a matter beyond the reach of state regulation."

12. Howard & Mildred Carter, 40 FERC ¶ 61,280 (Sept. 18, 1987).

In Carter, the FERC rejected the license applicants' claim that they had the right to dewater the stream on which the proposed hydro project would be located. The Commission stated that "[a] licensee must accept the reasonable restrictions and obligations that the Commission attaches to" a hydropower license. "The Commission has clear authority to require a 4 cfs minimum flow release at the project, even if such requirement impairs the licensee's irrigation water rights."

13. City of Santa Clara, 20 FERC ¶ 61,257 (Aug. 31, 1982), reh'g denied, 22 FERC ¶ 61,121 (Feb. 4, 1983).

In these two orders, the FERC considered complaints by a water users association that operation of the proposed project would require utilization of water rights not possessed by the

project licensee. The Commission found that if the licensee was unsuccessful in obtaining the requisite water rights under state law, then the licensee could obtain these property interests under Section 21 of the FPA.