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Fitzgerald v. Harris, No. 07-16-B-W, 2007 U.S. Dist. LEXIS 61806 (D. Me. August 20, 2007)

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apart from those adjudicating proprietary water rights. Moreover, the Supreme Court in *California v. FERC* upheld the supremacy of the FPA over state law. Consequently, PacifiCorp argued that state law has no role in the regulation of hydropower except in proprietary water rights.

McConnell sought a permanent injunction directing PacifiCorp to cease operation of the dams and reservoirs in a manner that caused the aforementioned environmental hazards. The court held that the injunctive relief impermissibly intruded on the comprehensive regulatory scheme for a hydropower project. Three key decisions influenced the court in its determination. First, the Supreme Court in *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n* established federal preemption in regards to hydropower. Second, *California* reaffirmed *First Iowa's* holding that the FPA established a comprehensive federal regime, subject to a limited reservation of state authority. Finally, the Ninth Circuit applied *California* in *Sales Hydro Assoc. v. Maughan* and held that the FPA preempted the field of hydropower regulation. The court held that the KHP is subject to the FPA, which gave FERC broad powers and exclusive licensing authority of the development and operation of non-federal hydroelectric projects on navigable waters.

Although the FPA prevents injunctive relief, Congress preserved state-law damage remedies under 16 U.S.C. § 803. The FPA provides a right to recover from a licensee for damages caused by the construction, maintenance, or operation of the projects. McConnell's nuisance claim fell under state-law; therefore, the FPA did not bar their claim. The court found that PacifiCorp's license did not have the specificity required by the California Civil Code Section 3482 to gain exemption from the nuisance claim. Furthermore, the California Supreme Court explained in *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, that "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." McConnell alleged that the manner that PacifiCorp operated the dams was a nuisance. As a result, the court did not bar the nuisance claim.

The court held that the FPA preempted McConnell's claim for injunctive relief. Consequently, the court granted PacifiCorp's motion for judgment on McConnell's request for injunctive relief. However, the court denied the motion to dismiss or for judgment on the pleadings because the FPA allows for recovery based on damages caused by the construction, operation, or maintenance of the hydroelectric plant.

Tamara Qureshi

Fitzgerald v. Harris, No. 07-16-B-W, 2007 U.S. Dist. LEXIS 61806 (D. Me. August 20, 2007) (holding that the Wild and Scenic Rivers Act did not preempt state control of state owned lands along a river protected as "wild river area" and, as such, the state could permit motor

vehicle access points and permanent bridges on the waterway even if the state action jeopardized the river's protected status).

The U.S. Secretary of the Interior designated the Allagash Wilderness Waterway as a "wild river area" of the National Wild and Scenic Rivers System under the Wild and Scenic Rivers Act ("WSRA"). Pursuant to the WSRA, a "wild river area" is generally only accessible by trail, the shorelines and watersheds are essentially primitive, and the water is unpolluted. Further, the WSRA provided that the designated rivers "shall be preserved in free-flowing condition" and not subject to new federal water resources projects.

Two avid wilderness canoeists, Charles Fitzgerald and Kenneth Cline ("the canoeists"), filed an action in the U.S. District Court for the District of Maine, against the Director of the Maine Bureau of Parks and Lands ("MBPL Director"). The canoeists sought a declaration that the WSRA preempted certain provisions of Maine state law ("AWW") pertaining to motor vehicle access and permanency of bridges. The canoeists further requested that the court enjoin the MBPL Director from implementing the disputed provisions.

Under the theory of conflict preemption, the canoeists argued that the disputed provisions of the AWW were invalid because there was an irreconcilable conflict between the WSRA and those provisions. Specifically, the canoeists argued that the state law did not comply with the intent of the WSRA to preserve the primitive qualities of the river and it conflicted with the WSRA's standard for a "wild river area" of "inaccessible except by trail" because the disputed provisions provided for six permanent bridges over the Allagash River and eleven motor vehicle access points.

The court looked to both the WSRA and the agency guidelines and publications relating to the Act to determine whether conflict preemption existed. The court found that the WSRA did not compel the state or local government to implement a particular plan with regard to the designated river nor were there any binding provisions on the state and local governments to protect the river. Instead, the WSRA merely encouraged the state and local governments to employ land use planning to protect "river values."

While the administrative guidelines did not warrant full *Chevron* deference per the court, the court held they "do carry weight." According to the court, state and local governments retained full regulatory power over non-federal areas of a WSRA protected river and limited the federal role to cooperation and assistance per the agency guidelines. The court further found the WSRA's aim of permanently preserving the designated rivers did not override the regulatory power that remained with the state.

The court held that this did not preclude the state from permitting the eleven motor vehicle access points and six permanent watercourse

crossings for a WSRA protected river because the federal statute did not preempt the state's control of state owned land along the Allagash River. As such, the court recommended that the district court grant the MBPL Director's motion to dismiss.

Julie Anderson

United States v. Nevada, No. 2:00-CV-0268-RLH-LRL, 2007 U.S. Dist. LEXIS 69177 (D. Nev. Aug. 31, 2007) (holding that a sudden, self-imposed need for water could not overcome the Nevada State Engineer's denial of the DOE's water permit application and cease and desist order).

The Department of Energy ("DOE") attempted to obtain Nevada water permits in association with a proposal to create a nuclear waste depository at Yucca Mountain, Nevada. The Nevada State Engineer authorized temporary permits to the DOE, which expired April 9, 2002. The State Engineer denied the DOE's request to extend the permits. The State Engineer also denied the DOE's 1997 application for permanent appropriation of 430 acre-feet of groundwater in connection with the planned construction of the repository.

Meanwhile, the State Engineer and the DOE worked out an arrangement for DOE's interim use of water. Originally, the agreement allowed for the use of potable water and water for emergency and fire use. In 2003, the parties came to a "tentative agreement," which allowed an increase in DOE's water use to 1.36 million gallons per year. The DOE had mentioned the need for an additional 300,000 gallons of water for bore hole drilling for seismic investigation. However, the State Engineer did not stipulate to that use. In 2004, the DOE announced that it would drill 35 bore holes, requiring an additional 2 million gallons of water. The State Engineer never approved the use of the water. In 2007, the DOE announced that it would need 4 million gallons of water and was planning on boring 48 holes. The State Engineer never agreed to the use of water for any of the proposed 48 holes.

The DOE began to use the water for the holes. The State Engineer issued a cease and desist order to the DOE over the use of water for the bore hole drilling. The DOE complained that the order was causing delay and unnecessary expense, that the bore holes were necessary and authorized by Congress, and that the Congressional mandate preempted state water law. The State Engineer lifted the order on the condition that the parties could reach an agreement. Eventually, the State Engineer agreed to water use with certain conditions, namely that the DOE could not use water for the purpose of additional phases or expanded phases of the bore hole drilling. DOE did not accept the limitation and the State Engineer reinstated the cease and desist order.

On July 20, 2007, the DOE filed an emergency injunction and resumed drilling operations. The DOE also refused entry on the site to