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FORTY YEARS AFTER *FIRST IOWA*: A CALL FOR GREATER STATE CONTROL OF RIVER RESOURCES

William L. Plouffe †

INTRODUCTION

The last two decades have seen an increased interest in rivers, both for the energy they produce when dammed and for the recreation they provide when free-flowing. The conflicts inherent in these interests have led to a heightened awareness of the importance of sound river resource planning. In response, states from all geographic regions have developed river programs.¹ Ultimately, however, state river programs are subservient to the decisions of one federal agency, the Federal Energy Regulatory Commission (FERC). The United States Supreme Court so held forty years ago in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,² when it found the Federal Power Act³ to be a pervasive scheme of federal regulation of hydropower licensing precluding shared decisionmaking with the states.

This Article argues that Congress should reexamine the federal government's preemptive power in light of the renewed public interest in rivers and the states' expressed desire to play a role in allocating river resources within their borders. Specifically, Congress should amend the Federal Power Act to provide that the FERC's licensing of hydropower projects must be consistent with state prepared and federally approved comprehensive river plans.

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¹ N.Y. DEP'T OF ENVTL. CONSERVATION, STATE WILD AND SCENIC RIVER PROGRAMS: 1983 (1984) (on file at *Cornell Law Review*). Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wisconsin all have legislatively authorized programs. Several other states have administratively authorized programs, and several states legislatively protect certain rivers or river segments.

² 328 U.S. 152 (1946).

³ 16 U.S.C. §§ 791a-828c (1982).

I

INCREASED COMPETITION FOR RIVER RESOURCES

The oil embargo of the early 1970s demonstrated the over-reliance of the United States on foreign energy supplies.⁴ Congress reacted by enacting the Public Utility Regulatory Policies Act of 1978 (PURPA),⁵ which it designed to spur development of indigenous energy resources by requiring public utilities to purchase power from independent producers. The FERC then issued implementing regulations requiring that public utilities buy power at "avoided-cost" rates.⁶ In conjunction with investment tax credit legislation,⁷ PURPA provided entrepreneurs with strong incentives to redevelop thousands of hydropower dam sites abandoned during the long era of cheap energy and to construct new dams for the production of electric power.⁸ Not surprisingly, this legislation resulted in a dramatic increase in the number of preliminary permit and license applications the FERC received and a concomitant pressure to allocate free-flowing rivers to the production of electricity.⁹

Developers' increased incentive to dam free-flowing rivers conflicted with an upsurge in public interest in using rivers for recreation. Rivers polluted for many years by municipal and industrial wastes were becoming clean again as a result of the treatment plants and industrial discharge controls required under the Federal Water Pollution Control Act.¹⁰ With the help of stocking programs, fishermen caught popular sport fish such as salmon and trout in these rivers for the first time in generations. White-water sports, including canoeing, kayaking, and rafting, became popular and, in some areas, developed into significant commercial activities. Sportsmen now sought the same conditions optimal for hydroelectric develop-

⁴ See President's Address to the Nation about Policies to Deal with the Energy Shortages, 1973 PUB. PAPERS 916 (Nov. 7, 1973); President's Special Message to Congress Proposing Emergency Energy Legislation, *id.* at 922 (Nov. 8, 1973).

⁵ Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of 16 U.S.C.).

⁶ 18 C.F.R. § 292.304 (1985). Under the "avoided cost" concept, the utility pays the developer the price it would pay if it had to generate that incremental unit of power. This provides an incentive for developers and obviates the need to construct new utility-owned central generating facilities, i.e., power plants.

⁷ See The Energy Tax Act of 1970, Pub. L. No. 95-618, 92 Stat. 3174 (codified as amended in scattered sections of 26 U.S.C.) (providing tax incentives for production and conservation of energy).

⁸ The Federal Power Act's provisions allow nonriparian owners to receive permits and licenses to construct power projects, thus placing no limit on where the new hydro-power developer can "stake a claim." 16 U.S.C. § 814 (1982).

⁹ For a well-documented description of this increase, see Arnold, *Emerging Possibilities for State Control of Hydroelectric Development*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,135 (1983).

¹⁰ 33 U.S.C. §§ 1251-1376 (1982).

ment—fast, falling water. In 1968, Congress responded to this interest in free-flowing rivers by passing the Wild and Scenic Rivers Act,¹¹ which prohibits dams and other forms of development on federally designated river stretches. That Act has been used sparingly since 1968, however, and virtually not at all in very recent years.¹²

II

FIRST IOWA AND ITS PROGENY

With *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,¹³ and the cases that flow from it,¹⁴ the federal courts have gradually denied the states any direct control over hydropower licensing decisions. The FERC or the courts have rebuffed every state attempt to circumvent the federal preemption articulated in *First Iowa*. Today, unless the Court overrules *First Iowa*, state laws purporting to allocate river resources to nonpower uses have no legal force in the face of the Federal Power Act.¹⁵ Because this Article argues for the abandonment of the principle underlying *First Iowa*, this section examines that case and its progeny.

A. *First Iowa* and the Exclusion of State Authority

First Iowa is without question the seminal case on the federal government's role in approving hydropower projects and their associated dams.¹⁶ The case arose when the First Iowa Hydroelectric Cooperative (the Cooperative) filed an application with the Federal Power Commission¹⁷ for a license to construct a one and a half mile wide dam across the Cedar River, near Moscow, Iowa. The proposed dam would impound virtually the entire flow of the river and

¹¹ Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287 (1982)).

¹² As of February 1985, the Wild and Scenic Rivers Act protected 65 rivers or river segments, totaling about 7,200 miles. The National Park Service, however, has identified more than 1,500 river segments, totaling 62,000 miles, that qualify for protection. See Letter from Sen. Dave Durenberger to Members of United States Senate (Feb. 6, 1985) (letter signed by additional 11 Senators) (on file at the *Cornell Law Review*).

¹³ 328 U.S. 152 (1946).

¹⁴ See *infra* notes 16-58 and accompanying text.

¹⁵ 16 U.S.C. §§ 791a-828c (1982).

¹⁶ Not all dams are part of a hydropower development. For example, dams associated with land reclamation projects are not subject to the Federal Power Act and are not licensed by the FERC. These dams, licensed under the Reclamation Act of 1902, 43 U.S.C. §§ 371-390zz-1 (1982), may be subject to state regulation. See *California v. United States*, 438 U.S. 645, 674-79 (1978).

¹⁷ The Federal Power Commission was the predecessor of the FERC. Congress transferred its authority to the FERC, effective October 1, 1977. See Department of Energy Organization Act, Pub. L. No. 95-91, § 402, 91 Stat. 565, 583 (codified at 42 U.S.C. § 7172(a) (1982)).

would cost approximately 14.6 million in 1940 dollars.¹⁸ Despite the proposed project's substantial environmental consequences,¹⁹ the Commission found that the proposal, with some modifications agreed to by the Cooperative, represented the practical and adequate development of the river's available power potential. The proposal thus met the Commission's licensing criteria.²⁰

The Commission, however, stopped short of approving the project. The state of Iowa intervened in the licensing process, contending that section 9(b) of the Federal Power Act²¹ required that the Cooperative submit evidence of compliance with Iowa law. Furthermore, the state maintained that Iowa law required the Commission to obtain approval for the project from the Iowa Executive Council and that because it had not so done, the Commission could not issue a license.²² The Commission decided to leave the question raised by the state of Iowa to the courts and dismissed the license application without prejudice.²³

The Supreme Court ruled against the state of Iowa's claims. Iowa's prohibition on inter-river transfers of water particularly troubled the Supreme Court. Federal studies had shown that inter-river transfers, such as the one from the Cedar to the Mississippi involved in this case, would maximize development of the river systems for power.²⁴ Iowa's prohibition on this transfer thus struck at the heart of the Federal Power Act and clearly presented the Court with the issue of which law would control.

¹⁸ 328 U.S. at 157.

¹⁹ The Commission found that dewatering the Cedar River would have a direct and substantial effect on the flow and stage of the Iowa River, into which the Cedar River flowed; that the impoundment would flood two islands in the Cedar River; and that operating cycles of the powerhouse would cause extreme fluctuations in the flow of the Mississippi River. *Id.* at 158-59.

²⁰ See *id.* at 160 n.5.

²¹ 16 U.S.C. § 802(b) (1982). Section 9(b) requires that each license applicant submit to the FERC

[s]atisfactory 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 chapter.

Id.

²² 328 U.S. at 161. Among other things, Iowa law required that the developer obtain a state license before constructing a dam on a navigable river, *id.* at 164, and that the Iowa Executive Council approve the dam's method of construction, operation, and maintenance, *id.* at 165. Iowa law also forbade inter-river transfers of water. *Id.* at 165-66.

²³ *Id.* at 162. The Cooperative appealed, and the United States Court of Appeals for the District of Columbia affirmed the dismissal.

²⁴ 328 U.S. at 166.

The Court first observed that the Federal Power Act does not accord authority over all aspects of hydroelectric development to the federal government: "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act."²⁵ The Court termed this a "dual system of control"²⁶ but declined to say that two agencies, one state and one federal, equally share in the final decision on a given issue.²⁷ The Court noted that "[a] dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable"²⁸ and observed that requiring the Cooperative to comply with Iowa law would "vest in the Executive Council of Iowa a veto power over the federal project . . . [which] easily could destroy the effectiveness of the Federal Act."²⁹

The Court went on to find that the Federal Power Act placed licensing responsibility squarely with federal officials. The only role for the states on licensing issues was to supply any information the federal officials deemed material.³⁰ In other words, the Federal Power Commission could invite the submission of information and comments from the states, but it retained control over the ultimate licensing decision.³¹ Thus, although the Federal Power Commission had authority to require evidence of compliance with Iowa law, such compliance was not a condition precedent to granting the license.³²

On one level, *First Iowa* can be read as a commonplace opinion on the proper construction of a federal statute; the case defined the scope of section 9(b) of the Federal Power Act. On another level, *First Iowa* was a highly significant judicial pronouncement on the pervasive role that the federal government plays in licensing water power projects, a role apparently even broader than the role with which members of the Federal Power Commission felt comfortable.

²⁵ *Id.* at 167.

²⁶ *Id.*

²⁷ "Where the Federal government supersedes the state government there is no suggestion that the two agencies both shall have a final authority." *Id.* at 168.

²⁸ *Id.*

²⁹ *Id.* at 164.

³⁰ *Id.* at 168-69.

³¹ Recent changes in the FERC exemption regulations have given the states some control over small, i.e., not exceeding five megawatts, hydroelectric projects. *See* 18 C.F.R. § 4.60 (1985).

³² 328 U.S. at 170. Examining the Federal Power Act's legislative history, the Court found a clear congressional intent to establish federal control over the licensing process. *Id.* at 172-82. Among other things, the Court pointed out that Congress had rejected a proposed measure to require state consent for water power projects. *Id.* at 179.

Subsequent cases demonstrated to the states that *First Iowa* was in fact a significant judicial pronouncement.

B. The Progeny

1. *The State of Washington Cases*

Although the Supreme Court decided *City of Tacoma v. Taxpayers of Tacoma*³³ on the ground that the Federal Power Act precluded the Court from hearing the respondents' case,³⁴ its decision reaffirmed *First Iowa's* holding that the Federal Power Act had given the federal government preeminent authority over hydropower decisions. The litigation that led the Court to conclude that *res judicata* concepts barred the *City of Tacoma* lawsuit began with *Washington Department of Game v. Federal Power Commission*.³⁵ In that case the state of Washington fish and game agencies, and the Washington State Sportsmen's Council, Inc., appealed a Federal Power Commission decision issuing a license to the city of Tacoma to develop two sites on the Cowlitz River. The petitioners first contended that the city, by not meeting the conditions of Washington laws dealing with the protection of anadromous fish runs and with river diversions, had not complied with section 9(b) of the Federal Power Act. The petitioners also challenged the Commission's action on the grounds that the city of Tacoma, as a creature of the state, could not act in opposition to the state or in derogation of its laws.³⁶

The Ninth Circuit rejected both of the petitioners' arguments. Relying on *First Iowa*, the court ruled that section 9(b) did not require compliance with state law.³⁷ The court also rejected the petitioners' second argument, noting that the Supreme Court allowed the Cooperative in *First Iowa*, also a creature of the state, to act against state law.³⁸ The Ninth Circuit did hint at the role of state laws, however, when it said:

³³ 357 U.S. 320 (1958).

³⁴ *Id.* at 334-41.

³⁵ 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954). In *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955), the Supreme Court heard a case similar to *Washington Dep't of Game*. In that case the Court held that the Federal Power Commission had exclusive jurisdiction over whether to issue a license for a power project on non-navigable waters of the United States. The Court approvingly cited *Washington Dep't of Game*, *id.* at 446, but did not discuss preemption as thoroughly as had the Ninth Circuit in *Washington Dep't of Game*. See 207 F.2d at 396.

³⁶ 207 F.2d at 396.

³⁷ *Id.* at 395-96. The court also rejected the petitioners' argument that the Federal Power Commission had abused its discretion by not giving due consideration to the projects' alleged detrimental impact on the fishing industry. Eschewing what it termed a policy-making role, the court said, "If the dams will destroy the fish industry of the river, we are powerless to prevent it." *Id.* at 398.

³⁸ *Id.* at 396.

[W]e do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.³⁹

Thus, the court did not answer the question of where the penumbra of the Federal Power Act ended and state law began.

While *Washington Department of Game* was pending before the Ninth Circuit, the city of Tacoma went to state court seeking a declaratory judgment holding valid its sale of bonds to finance construction.⁴⁰ By the time the case reached the Supreme Court of Washington, the major issue under review was whether the city of Tacoma had the authority to construct the project. The Washington Supreme Court ruled that the state legislature had not granted municipalities the right to condemn state-owned land previously dedicated to public use and that the city's proposed project would inundate a state-owned fish hatchery previously dedicated to public use. Accordingly, the court enjoined further construction of the project.⁴¹

The United States Supreme Court granted certiorari to hear the case, denominated as *City of Tacoma v. Taxpayers of Tacoma*.⁴² The city argued that the Ninth Circuit had considered the issue of Tacoma's power to inundate the fish hatchery in *Washington Department of Game* and that the Ninth Circuit's decision became final with the Supreme Court's denial of certiorari in that case.⁴³ The state, on the other hand, argued that the court of appeals had explicitly declared that it was not "touch[ing] the question as to the legal capacity of the city of Tacoma to initiate and act under the license once it [was] granted."⁴⁴ The Supreme Court reversed the Washington Supreme Court, agreeing with the city that "the very issue upon which respondents stand here was raised and litigated in the Court of Appeals . . . [or] could and should have been."⁴⁵ The Court went on to explicitly reject the state's interpretation of the language from *Washington Department of Game*. The Court noted that the court of appeals had reserved judgment on "'indebtedness limitations' in

³⁹ *Id.* at 396-97.

⁴⁰ See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 329 (1958).

⁴¹ *City of Tacoma v. Taxpayers of Tacoma*, 49 Wash. 2d 781, 307 P.2d 567 (1957) (en banc), *rev'd*, 357 U.S. 320 (1958).

⁴² 357 U.S. 320 (1958).

⁴³ *Id.* at 334. The city argued that the Federal Power Act made final any decision of a United States court of appeals that the Supreme Court did not review. *Id.*

⁴⁴ *Id.* at 340 (quoting *Washington Dep't of Game*, 207 F.2d at 396).

⁴⁵ *Id.* at 339.

the City's Charter and 'questions of this nature,' " not on the right of the city to receive and perform the federal rights determined by the Federal Power Commission and delegated to the city as a licensee.⁴⁶ The Supreme Court intimated that any broader interpretation of the court of appeals's language would render that decision contrary to *First Iowa*. Thus, the Supreme Court in *City of Tacoma* held that all challenges to a federal hydropower license must be joined in one action before the federal appeals courts. The Court also seemed to clarify its position that only state laws having no relationship to the issues involved in a license application under the Federal Power Act will apply to a licensee once the license is issued.

2. *The Vermont Cases*

As in the Washington cases some thirty years earlier, two separate cases in the federal courts addressed one hydropower project. The first case, *Town of Springfield v. Vermont Environmental Board*,⁴⁷ arose when the town of Springfield, Vermont, and the Vermont Public Power Supply Authority applied to the FERC to construct and operate a hydroelectric project near Springfield, on the Black River. While their license application was pending before the FERC, the Vermont Environmental Board issued an order barring the developers from constructing a road and recreational facilities as part of the project. The Board, acting under a state land use statute, asserted that these construction activities required a state permit.⁴⁸

The developers sued in federal court, seeking declaratory and injunctive relief. They argued that the Vermont Environmental Board had no authority to require state permits because the Federal Power Act vested exclusive jurisdiction over hydropower projects in the FERC. The Environmental Board countered that federal preemption under the Federal Power Act applied only to those aspects of a project directly related to the construction and operation of the hydroelectric generating facility. The Board argued that state law controlled on project aspects, such as road relocations and recreational improvements, that were not directly related to generating power. In addition, the Board distinguished *First Iowa* on the ground that the present case did not involve a claim that a developer must comply with state law as a prerequisite to obtaining a license

⁴⁶ *Id.* at 340 (quoting *Washington Dep't of Game*, 207 F.2d at 396). See also *Public Util. Dist. No. 1 v. Federal Power Comm'n*, 308 F.2d 318 (D.C. Cir. 1962) (technical violations of federal conflict of interest statutes did not invalidate city's license to construct hydroelectric project).

⁴⁷ 521 F. Supp. 243 (D. Vt. 1981).

⁴⁸ *Id.* at 246. The Environmental Board claimed that VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1985), popularly known as "Act 250," required the permit.

from the FERC.⁴⁹

The district court rejected the Board's contentions and granted the developers' summary judgment motion. The court responded to the Board's first argument by pointing to language in the Federal Power Act that "reflect[s] a clear Congressional intent to bring all aspects of the hydroelectric project within the purview of the federal regulatory scheme."⁵⁰ The court thus found unwarranted "[t]he Board's attempt to carve out . . . a sphere for the exercise of its state land use authority."⁵¹ The court also disagreed with the Board's attempt to distinguish *First Iowa*:

The distinction between *First Iowa* and the present case implicit in this argument . . . is inconsequential. The result is the same whether the state permit is required as a condition precedent to obtaining a federal license or as an independent exercise of the state regulatory power. In either event, the power to withhold a state permit is the power to thwart a federal project. This is prohibited.⁵²

Thus, like the Supreme Court in *City of Tacoma*,⁵³ the district court refused to allow state interference with the developers' ability to exercise federal rights granted by the FERC.

The federal courts examined the same hydroelectric project again in *Town of Springfield v. McCarren*.⁵⁴ In that case the Vermont Public Service Board had ruled that it had jurisdiction to require a certificate of public good for the project. The Public Service Board, although recognizing that prior case decisions opposed its action, claimed that the Supreme Court's opinion in *California v. United States*⁵⁵ had implicitly overruled *First Iowa* and its progeny.⁵⁶

The developers sought and won a declaratory judgment voiding the Public Service Board's action. The district court found that *California v. United States* had not overruled *First Iowa*, pointing out that *California v. United States* dealt with the federal Reclamation Act of 1902,⁵⁷ not with the Federal Power Act. The court noted that the Federal Power Act contained language similar to the language of the

⁴⁹ 521 F. Supp. at 248-49.

⁵⁰ *Id.* at 249.

⁵¹ *Id.* at 249-50.

⁵² *Id.* at 249.

⁵³ 357 U.S. 320 (1958). See *supra* notes 40-46 and accompanying text.

⁵⁴ 549 F. Supp. 1134 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983). See also *Board of Elec. Light Comm'rs v. McCarren*, 563 F. Supp. 374 (D. Vt. 1982) (seeking injunctive relief in addition to declaratory relief), *aff'd*, 725 F.2d 176 (2d Cir. 1983).

⁵⁵ 438 U.S. 645, 674 (1978) (states can impose conditions on federal reclamation project if not inconsistent with congressional provisions authorizing project).

⁵⁶ 549 F. Supp. at 1137, 1154.

⁵⁷ Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

Reclamation Act construed in *California v. United States* but concluded that each statute had a distinct purpose and history and the interpretation of one did not necessarily apply to the other. Finally, the court stated that a unanimous Supreme Court had cited *First Iowa* with approval four years after *California v. United States*.⁵⁸

McCarren is important for two reasons. First, the decision rejected any notion that *California v. United States* had overruled *First Iowa*. Second, the case illustrated the plight of states seeking to have some voice in how their rivers are used. The Public Service Board's justification for its order showed that *First Iowa* and its progeny left states no room to maneuver. The Board was forced to claim baldly that *First Iowa* was no longer good law, and the Board proved to be wrong.

III

A PROPOSAL FOR GIVING THE STATES GREATER CONTROL OVER THEIR RIVER RESOURCES

Some commentators have suggested that the Burger Court will overrule *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*⁵⁹ and return to the states greater control over development of rivers within their borders.⁶⁰ No one, however, can accurately predict whether the Supreme Court will ever again squarely face the question of federal preemption in hydropower licensing or whether it will overrule *First Iowa*, even if it has the opportunity.⁶¹ In any event, public policymakers should not wait for the courts to address the issue of state control over river resources. The *First Iowa* decision turned on the Court's interpretation of the legislative intent embodied in the Federal Power Act, thus the most appropriate way to deal with the issue of state control is for Congress to amend that law.

⁵⁸ 549 F. Supp. at 1154. The court referred to the Supreme Court's favorable citation to *First Iowa* in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 n.6 (1982).

⁵⁹ 328 U.S. 152 (1946). See *supra* notes 16-32 and accompanying text.

⁶⁰ See Arnold, *supra* note 9, at 10,143; 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).

⁶¹ Several factors militate against the conclusion that the Supreme Court is likely to overrule *First Iowa*. First, the Supreme Court cited *First Iowa* with approval in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 n.6 (1982). Furthermore, in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), the Court had an opportunity to comment unfavorably on *First Iowa*. Instead, the Court distinguished *First Iowa* from the case at hand, which involved the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284 (1982). 461 U.S. at 223 n.34. Finally, *First Iowa* and subsequent cases attached great significance to the Federal Power Act's comprehensive scheme for uniform hydropower development. Congress has not amended this aspect of the Act since *First Iowa*.

A. Federal and State Interests

The Commerce Clause accords the federal government authority to act in furtherance of its substantial interest in river resources,⁶² and developing indigenous supplies of renewable-resource-based electrical power clearly is in the national interest. To grant the states autonomous control over the development of hydropower resources within their borders could easily frustrate this national goal by generating an inhibiting patchwork of regulations. Absolute state control could also lead to a situation in which states refuse to allow appropriate levels of power development on their rivers, thereby forcing other states to develop more than their "fair share" of national hydroelectric power needs.

The federal government also has an important interest in preserving some rivers in their free-flowing state. For example, the federal government has a legitimate role in determining whether the recreational opportunities and natural features of some river stretches are simply too valuable to allow dam construction.⁶³ A state's decision to promote and license development on all of its rivers, without regard to nonpower values, should not foreclose the federal government from protecting, at least temporarily, a river stretch with recreational and natural features of national significance. As in matters of air and water quality, the federal government should continue to play the predominant role in hydropower licensing.

The states, however, also have a strong interest in the rivers within their borders and should have a role in decisions concerning their development. State-level decisionmakers are more familiar with their river resources and therefore better able to discern their value for both power and recreation. Furthermore, state citizens arguably have the most at stake in river decisions. State electricity ratepayers want sufficient and reliable power sources available at reasonable rates, and hydropower development can mean lower long term rates and the displacement of foreign oil and its volatile prices.

Federal inaction also demonstrates the need for states to have a role in decisions about rivers. A lack of federal resources, or an uninterested administration, may have prevented some river stretches with recreational value of national or regional significance from being protected under the Wild and Scenic Rivers Act. Nevertheless,

⁶² See *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-93 (1824).

⁶³ See *Wild and Scenic Rivers Act*, 16 U.S.C. §§ 1271-1287 (1982) (preserving selected rivers in free-flowing condition).

state-level policymakers may have wanted to protect that river stretch from hydropower development.

Local residents tend to be the greatest beneficiaries of the recreational and natural values of free-flowing rivers within their state borders; commercial guides and fishermen typically live near the rivers they use, and recreational boaters and anglers tend to know and use local rivers.

The history of the FERC and its predecessor, the Federal Power Commission, demonstrates that the states differ with the federal government on river resource allocation decisions.⁶⁴ In only one case, however, *Namekagon Hydro Co. v. Federal Power Commission*,⁶⁵ has a state successfully prevailed upon the FERC to deny a license on environmental and recreational grounds.⁶⁶

Almost invariably the FERC grants the license request because the Federal Power Act, as interpreted by *First Iowa* and later cases, limits the states' role in hydropower licensing decisions to commenting to the FERC. States' comments are thus considered along with those of various federal agencies⁶⁷ and other intervenors, such as sportsmen's and environmental groups.

Although according the states parity with the federal govern-

⁶⁴ States often oppose federal licensing because of recreational or environmental considerations. See *Washington Dep't of Game v. Federal Power Comm'n*, 207 F.2d 391 (9th Cir. 1953) (state sought denial of license because of adverse effect on salmon populations), *cert. denied*, 347 U.S. 936 (1954).

⁶⁵ 216 F.2d 509 (7th Cir. 1954) (upholding as not arbitrary Federal Power Commission's decision that recreational uses of river outweighed benefits of hydropower development).

⁶⁶ *Cf. Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (remanding Commission's decision to grant license for failure to consider adequately impact on anadromous fish resources). The FERC did not deny any license applications on recreational or environmental grounds between 1978 and 1984. See *Small Hydro Program: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 264 (1984) (written response of Raymond J. O'Connor, Chairman, FERC) [hereinafter cited as *Small Hydro Program*].

⁶⁷ The overlapping roles of federal agencies raise the issue of "horizontal preemption," i.e., whether, when licensing a hydropower project, the FERC may ignore the jurisdiction of other federal agencies acting under a conflicting federal law. See Arnold, *supra* note 9, at 10,136 n.9; see also *Escondido Mut. Water Co. v. LaJolla*, 466 U.S. 765 (1984) (Federal Power Commission's authority to license hydropower projects on reservations and public lands subject to conditions required by Secretary of Interior). To the extent that a state administers a federal statute under a delegation from the federal government, it may be able to exert more influence over hydropower development decisions than it could under state law. See, e.g., *Roosevelt Campobello Int'l Park v. Environmental Protection Agency*, 684 F.2d 1041, 1055-57 (1982) (discussing applicability of state water quality standards allowed by Clean Water Act to federal licensing scheme); *Pacific Northwest Electric Power Planning and Conservation Act*, 16 U.S.C. §§ 839-839h (1982) (granting nonfederal regional agency authority over fishery resources in certain rivers); *Federal Water Pollution Control Act* § 401, 33 U.S.C. § 1341(a)(1) (1982) (development license may be denied if state or regional authority refuses to certify that development meets federal clean water provisions).

ment may be neither possible nor desirable, the states deserve a greater degree of authority in decisionmaking than they now have. Relegating the states to the same status as private intervening organizations does not strike the right balance of federal and state authority. The states have substantial knowledge and expertise in river planning, and Congress should recognize their rightful role in determining the future of their rivers. The challenge is to construct a statutory mechanism that accords the states their appropriate roles but continues to recognize the federal government's preeminent position in river resource allocation.

B. The Value of Comprehensive Plans

Section 10(a) of the Federal Power Act contains the germ of a solution to the problem of how to involve the states in hydropower decisionmaking. That section requires the FERC to ensure that any hydropower project it licenses "will be best adapted to a *comprehensive plan* for improving or developing a waterway . . . and for other beneficial public uses, including recreational purposes."⁶⁸ Neither the Federal Power Act nor the FERC's regulations, however, define or prescribe the contents of a "comprehensive plan." Moreover, no court decision has adequately interpreted the meaning of the term.⁶⁹

The comprehensive plan requirement appears to be an expression of Congress's intent that the FERC balance claims on river resources. These claims often conflict in hydropower licensing decisions, and a comprehensive plan requirement prevents the FERC from simply licensing any project that will maximize the river's megawatt potential without considering the river's nonpower resources as well. If plans to mitigate environmental damage cannot protect especially significant nonpower resources, section 10(a) seems to contemplate denial of the license.⁷⁰

Unfortunately, the FERC has not prepared plans that seek to balance the full range of values for America's rivers. The FERC has generally made licensing decisions on an ad hoc, case-by-case basis, rather than pursuant to a comprehensive plan. This manner of licensing has led to a perception that the FERC favors power resource values over nonpower values and that it accords insufficient weight to the cumulative impact of permitting development on river

⁶⁸ 16 U.S.C. § 803(a) (1982) (emphasis added).

⁶⁹ The courts have refused to define "comprehensive plan" any more broadly than is minimally sufficient to decide the case at hand. See, e.g., *Municipal Elec. Ass'n v. Federal Power Comm'n*, 414 F.2d 1206, 1208 (9th Cir. 1969) ("comprehensive plan" does not require project's integration into regional power plan).

⁷⁰ See *Udall*, 387 U.S. at 436-38. In actuality, however, the FERC seldom denies a license for environmental reasons. See *supra* note 66 and accompanying text.

systems.⁷¹

C. A Proposal for FERC Hydropower Licensing Using State-Prepared Comprehensive Plans

The Federal Power Act should be amended to grant the states greater control over the future of their rivers. Given the 1986 financial climate of the federal government, it seems unlikely that the FERC will be able to undertake preparation of comprehensive plans for a significant number of America's rivers, even if it recognizes a need to do so. On the other hand, many states have an apparent willingness and ability to take on this task. Ultimate authority over hydropower licensing, however, must continue to reside with the federal government if legitimate federal interests in navigation, commerce, energy, recreation, and water quality are to be protected.

Congress should therefore encourage states to develop comprehensive plans for the future of their rivers and to submit these plans to the FERC for review and approval. Once the FERC approves a state plan, it should only license hydropower projects that comport with the approved plan.⁷² Because the state comprehensive plan would be without effect unless approved by the FERC, that agency could continue to protect the national interest by rejecting a plan that, for example, placed too much of a state's developable hydropower resources "off limits."

As amended, the Federal Power Act would not require a state to prepare and submit a comprehensive plan. Nevertheless, the federal government should provide incentives for river planning through a grant program for states that present suitable applications.⁷³ States choosing not to submit a plan, however, or those with plans the

⁷¹ See *Small Hydro Program*, *supra* note 66, at 296-97 (letter of Oct. 9, 1984, from Congressmen Richard L. Ottinger, Al Swift, and Ron Wyden to Chairman O'Connor of the FERC) ("The absence of any comprehensive planning by the Commission and its refusal to depend on comprehensive plans developed by the states or regions . . . has caused many to conclude that the Commission's implementation of its small hydro responsibilities is unbalanced and may be in violation of the law."). The FERC has recently put in place, through Commission order (EL 85-19), a "cluster impact assessment procedure" aimed at determining the cumulative impact of hydro development on three river basins in the Pacific Northwest. See 50 Fed. Reg. 3385 (1985).

⁷² The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982), uses a similar "consistency" process. Under that Act, a state may submit to the Secretary of Commerce a plan for managing its coastal zone. Upon the Secretary's approval of the plan, all federal agencies and parties seeking federal licenses for coastal zone activities must, "to the maximum extent practicable," comply with the state plan. *Id.* §§ 1455-1456.

⁷³ Senator David Durenberger of Minnesota has introduced legislation to provide these incentive grants to the states. See S. 317, 99th Cong., 1st Sess., 131 CONG. REC. S800-01 (daily ed. Jan. 29, 1985).

FERC rejects, would continue to have projects within their borders licensed by the FERC in its present manner.

To gain the FERC's approval, a state's comprehensive plan should meet certain minimum criteria. Congress should require that the plan contain certain essential provisions:

- (a) the identification of rivers and river segments deserving special protection based upon an analysis of such river's recreational and natural values in at least two categories:
 - (i) rivers and river segments which are of greater than statewide significance because their values are outstanding or rare when considered in a regional or national context; and
 - (ii) rivers and river segments which are of statewide significance because their values are outstanding or rare when considered in a statewide context;
- (b) a state hydropower plan which includes electrical energy demand projections for 10 and 20 years, and an analysis of how suppliers will use hydropower to meet the demand, making reference to existing and future hydropower sites;
- (c) a fisheries management plan; and
- (d) the provision that no new dam may be constructed in a river or river segment of greater than statewide significance, and that redevelopment of existing sites on those rivers and river segments must be carried out so as not to diminish recreational and natural values.

In addition, the amended Federal Power Act should require that federal and state agencies, and the general public, have an opportunity to comment upon the plan before the state submits it to the FERC.⁷⁴

As amended, the statute should require that developers of projects within states with FERC-approved plans certify to the FERC that the project is in accord with the state comprehensive plan and send a copy of the certification to the state. The state would then have a period of time to inform the FERC of whether the project actually complies with the plan. Thus, if a new project is on a river that the state plan protects from new hydropower development, the FERC would dismiss the application. If a proposed redevelopment is on a protected river stretch, then the FERC, in consultation with the state, would determine whether it diminishes existing resource values. If a project is on an unprotected river, then the FERC would proceed in much the same manner as it now

⁷⁴ The state of Maine has prepared a "comprehensive plan" containing these elements and has submitted it to the FERC. The FERC has not acted on the plan. See *Small Hydro Program*, *supra* note 66, at 25-29 (letter of Sept. 7, 1984, from Maine Governor Joseph Brennan).

does, but with the knowledge that the state has determined that hydropower development is appropriate for the site. The FERC would remain responsible for ensuring suitable mitigation of the project's adverse consequences and would continue to issue appropriate licenses.⁷⁵

Amending the Federal Power Act would also aid the FERC. First, the suggested amendment would assist the FERC by having states do the comprehensive planning that the FERC needs to manage properly the nation's river resources. Second, the amendment would tend to reduce the time and resources the FERC expends in licensing decisions because the state comprehensive plan would reflect state and federal agency comments.

Hydropower developers and members of the public would also benefit under this proposal. Hydropower developers would have increased notice of which hydropower sites the state and federal governments consider unsuitable for hydropower projects. The process of sorting out conflicts over river values would therefore occur during preparation of the plan, rather than in a FERC proceeding. Developers could thus avoid some of the costly and time consuming battles which sometimes now occur over controversial project proposals. Sportsmen and environmentalists, on the other hand, would profit by gaining some assurance that the outstanding rivers in their states are truly protected from potentially detrimental development. Thus, the legislative initiative outlined above would be of great value to the federal and state governments, and to developers and preservationists. The proposed amendment is an overdue response to *First Iowa* and the growing public interest in river resources.

CONCLUSION

The public attitude toward river resources has changed dramatically since Congress enacted the Federal Power Act in 1920. That change is reflected by many states' adoption of river plans. Congress should give states with the interest and ability to initiate river resource planning a meaningful role in federal decisions that determine the use of rivers within their borders. As long as *First Iowa* remains the law of the land, however, the states will never have their deserved role in river resource management.

Congress should remedy this situation by encouraging the states to prepare comprehensive plans for their rivers. To meet this

⁷⁵ Congress is presently considering legislation introduced by Senator George Mitchell of Maine to amend the Federal Power Act in much the same way as outlined above. See S. 870, 99th Cong., 1st Sess., 131 CONG. REC. S4021-22 (daily ed. Apr. 3, 1985).

goal, Congress should help fund state river planning, and should amend the Federal Power Act to accord state plans bench mark status in the federal hydropower licensing process. The proposal suggested above would meet this goal, while still allowing the FERC to act in the national interest.