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The Federal Power Act and Western Water Law - Can States Maintain Their Own Water Use Priorities

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THE FEDERAL POWER ACT AND WESTERN WATER LAW—CAN STATES MAINTAIN THEIR OWN WATER USE PRIORITIES?

Under the Federal Power Act [FPA], the Federal Energy Regulatory Commission [FERC] licenses developers to construct hydropower projects throughout the United States. FERC must determine whether a project is "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, and for other beneficial public uses." Once FERC is satisfied that a project will meet one of these standards, it issues a license. Many policy makers in western states regard the FPA and FERC's licensing procedures as a problem. The essence of the problem is that FERC is not bound by state laws or policy in determining the number and location of hydropower projects to license within a state. FERC does not take into account the state prior appropriation system, nor does it consider the state comprehensive plan when such exists. Since First Iowa Hydro-Electric Cooperative v. Federal Power Commission, FERC's authority to regulate water for hydropower uses has preempted all state decision making on that issue. As a result of First Iowa, FERC also has been presumed to have authority to regulate and impose minimum stream flows without regard for state law and to operate without regard for state regional planning. In addition, recent circuit court decisions have suggested that FERC is not bound by the municipal preference language of the FPA in relicensing hearings or by other statutory designations. FERC's disregard of state policies has led to many federal-state conflicts. The

4. FERC licenses are issued for up to 50 years. They may be renewed annually thereafter until FERC reauthorizes them. The United States retains a right to take over projects. 16 U.S.C. §§ 799, 800(c) (1982).
5. 328 U.S. 152 (1946). The Supreme Court in First Iowa held that an Iowa prohibition on interriver transfers could not prohibit a hydropower developer from constructing a dam that would utilize water from two rivers within the state.
6. See Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 775 F.2d 359 (1985) (the court found the municipal preference inapplicable at a relicensing hearing due to economic considerations).
western states see FERC as a direct threat to the long-established water tradition of prior appropriation and to the future development of western water resources.

This comment discusses the effects of FERC's failure to recognize state policies in its licensing procedures. Through examination of several federal court decisions, this comment considers what means are currently available to states to override FERC's decisions regarding placement and operation of federal hydropower projects. The comment then considers who should resolve the underlying state-federal controversy with regard to hydropower development: whether the courts should resolve the issue or whether Congress should amend the FPA to require state approval for hydropower projects before licensees apply to FERC for a federal permit.

THE FEDERAL-STATE CONFLICT OVER HYDROPOWER LICENSING

The FPA was enacted in 1920 after a ten year debate in Congress over whether the federal government should control hydropower development in order to prevent the power industry from being concentrated in the hands of a few major power companies. The movement for federal control was strongly supported by conservationists who argued the prior practice of allowing utility corporations to occupy a dam site in perpetuity at no charge amounted to a giveaway of the nation's water resources. The issue before Congress over the legislation was whether it was constitutional for the federal government to charge a private developer for the privilege of generating power on a navigable stream unless the United States either owned the surrounding lands or had made expenditures at the development site. The resulting FPA was considered a victory for the conservationists because "[i]t established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for government recapture of the power at the end of the franchise." The FPA "recognized such hydroelectric developments to be essentially a public business that might be entrusted to private enterprise to the extent it served the predominant public interest in the development of the nation's water resources in an orderly, comprehensive manner." Scott, Is Federal Control of Water Power Development Incompatible With State Interests? (A Discussion of the New River Case), 9 GEO. WASH. L. REV. 631, 635 (1941).

In the early 1900's, when the FPA was enacted, almost one-third of the United States' energy needs were supplied by hydroelectric production. In the 1930's, cheap fossil fuels began to flood the energy market

10. Id. at 83-84.
11. Pinchot, supra note 9, at 19. The FPA "recognized such hydroelectric developments to be essentially a public business that might be entrusted to private enterprise to the extent it served the predominant public interest in the development of the nation's water resources in an orderly, comprehensive manner." Scott, Is Federal Control of Water Power Development Incompatible With State Interests? (A Discussion of the New River Case), 9 Geo. Wash. L. Rev. 631, 635 (1941).
and their use rapidly became more economical than building and operating hydroelectric plants. By the 1950's, most small hydroelectric facilities had been abandoned, and only large hydroelectric facilities were being constructed. By the 1970's, only 15 percent of the nation's energy was provided by hydroelectric power.\footnote{Winter 1987}

The United States' energy picture changed drastically in the 1970's, and energy economics favored small hydroelectric energy production. Many of the nation's leaders encouraged hydroelectric development as a means to decrease reliance on foreign oil.\footnote{\underline{14.} See H.R. Rep. No. 543, 95th Cong., 1st Sess. 5-10, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 7674-79.} Congress responded by enacting the Public Utility Regulatory Policies Act of 1978 (PURPA),\footnote{\underline{15.} Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. § 324a-3 (1982) and scattered sections of 16 U.S.C.).} which encouraged small scale energy development by requiring utility companies to purchase the electricity produced by small scale hydroelectric units.\footnote{\underline{16.} 16 U.S.C. §824a-3(a) (1982).} PURPA also offered tax incentives to developers.\footnote{\underline{17.} See 26 U.S.C. §§46a, 168 (1982).} As a result, the number of hydropower applications filed with FERC increased from 76 in 1979 to 1,859 in 1981.\footnote{\underline{18.} See also Western States Water Council, Position of the Western States Water Council Concerning Federal Energy Regulatory Commission Licensing and State Water Rights 2-3 (Apr. 22, 1983) [hereinafter cited as WSWC Position].} The dramatic increase has lead some experts to note that many of the claims are being filed solely to tie up hydro sites for speculation and profiteering purposes.\footnote{\underline{19.} WSWC Position, supra note 18, at 4.}

**FERC's Considerations in Licensing a Hydropower Project**

FERC is the licensing authority for hydropower projects.\footnote{\underline{20.} 16 U.S.C. § 817 (1982) states: It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a . . . license granted pursuant to this chapter. . . . [T]he Commission] shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter.} A developer must receive a FERC license for any proposed project on a stream that
is considered navigable and therefore within the federal domain under the commerce clause.  

FERC requires licensees to commence construction of the project within two years from the date fixed in the license. FERC can extend this time when not incompatible with "the public interest." A developer must submit evidence of compliance with state laws regulating appropriation, diversion, and use of water for power purposes. Generally, however, FERC does not require an applicant to show he has acquired state water rights prior to granting a license. In practice, FERC usually allows a licensee five years to obtain the necessary state property and water interests through negotiation or purchase. A five-year period gives a licensee adequate time to exercise the power of eminent domain under the FPA if it appears he will be unable to purchase the rights from state permittees.

PURPA and other statutes designed to promote alternative energy development provide exemptions to the regular licensing procedures of the FPA. Exemptions to the normal time consuming FERC licensing procedure provide incentives to entrepreneurs. However, this streamlining does not take into account the fact that most western surface streams are already overappropriated. Further, exempt FERC licensees acquire the same right of eminent domain as any FERC licensee.

By statute, FERC is supposed to "make investigations and to collect and record data concerning the utilization of the water resources of any

those parts of streams or other bodies of water over which Congress has jurisdiction
... and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.


23. Id.


25. L. Lebow, Special Assistant to the General Counsel of FERC, Remarks at the meeting of the Western States Water Council 8 (Jan. 10, 1985) [hereinafter cited as Lebow Remarks].


28. In California, estimates are that new hydropower projects will dewater over 11,000 miles of river. DWR REPORT, supra note 18, at 98.
region to be developed" prior to issuing a license. The FPA provides that FERC is authorized to cooperate with the executive branches of state government in such investigations. The statute does not require FERC to receive or seek state input prior to licensing. In practice, FERC is neutral with respect to state involvement in the licensing process. Many states have not developed plans for water resources. However, if a state has such a plan and provides it to FERC, the state's input will be considered along with that of other federal agencies and public interest groups.

The Western States' Prior Appropriation Doctrine

Before most western states achieved statehood, the doctrine of prior appropriation was the water law of the west. The doctrine is generally based on the concept of first in time, first in right. Irwin v. Phillips was the earliest recognition of prior appropriation. In that case, the water rights of a prior appropriator were upheld against a riparian owner of land who, under eastern custom, would have an absolute right to the water flowing through his land. The only limit on the right of a prior appropriator is that the water be put to beneficial use. In theory, prior appropriation means senior water appropriators have a better right to water during seasonal shortages than junior appropriators. When prior appropriation was adopted, shortage referred to a period of seasonal drought.

These days, shortage may mean governmental misappropriation. Most western states fully appropriated their water resources before the interconnectedness of surface and groundwater was understood. This meant that groundwater in tributary basins was thought to be a different source

29. 16 U.S.C. § 797(a) (1982). However, PURPA does not require FERC to consider need in granting an exemption for a small hydroelectric facility. 16 U.S.C. § 823a (1982). Recently the Ninth Circuit considered whether FERC had acted arbitrarily and capriciously in not making a finding of need for a hydroelectric project that qualified as a PURPA exemption. The court held that FERC's licensing discretion is limited by power needs, but its exemption discretion under PURPA is not so limited. The court found that a "need limitation would reduce the desired nonmarket incentive for qualifying facilities, and increase the effect of ordinary market forces." Idaho Power Co. v. F.E.-R.C., 766 F.2d 1348, 1351 (9th Cir. 1985).


31. W. Plouffe, Forty Years After First Iowa: A Call For Greater State Control of River Resources, 71 CORNELL LAW REVIEW 833, 844 (1986).


33. 5 Cal. 140 (1955).

34. State statutes may define what constitutes a beneficial use.


36. TRELEASE, supra note 32, at 21-22.

than surface flow and was regulated separately from surface flow. It is now generally recognized that the two sources of water are actually the same source in tributary basins; groundwater wells deplete surface flow. This realization has caused many states to take administrative notice of the fact that water is not an unlimited resource, and overappropriation will eventually result in administrative shortage.

Several, although not all, of the western states have established priorities in order to preserve certain beneficial uses above the simple date of priority in a prior appropriation system. Policies that establish state priorities are formalized in constitutions, statutes, or water resource plans. Most of the established state priority plans rank municipal use highest, then agricultural use, then industrial use. Legislative preference does not create the right for a municipal user to foreclose an industrial user, for example. A priority system merely codifies a preference of uses for periods of shortage. In addition, such a system provides guidance to the state's licensing agency upon reissuing a water use permit within the state. Eventually, water use within a state reflects the priority system as older permits are retired and reissued.

Most western states require a permit for a stream diversion or impoundment. Therefore, under state law, any developer must receive approval from the state licensing agency in the form of a water permit. FERC is not required to consider a state’s priority system when licensing hydropower projects within the state because a FERC determination takes priority over other uses at the project site. Nor must FERC worry about priority dates under state law for its projects because a FERC licensee may foreclose a use with an earlier priority date through the power of

38. See TRELASE, supra note 32, at 458 n. 3.
39. See IDAHO CONST. ART XV § 3, which states:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.


Municipalities, counties and public utilities supplying water to municipalities or counties shall be allowed a water planning period not to exceed forty years, . . . for reasonably projected additional needs within forty years.

41. See STATE OF IDAHO DEPARTMENT OF WATER RESOURCES, IDAHO STATE WATER PLAN (January 1982) [hereinafter cited as IDAHO WATER PLAN], and STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA STATE WATER PLAN (1972).

42. See Phillips v. Gardner, 2 Or. App. 423, 469 P.2d 42 (1970); and TRELASE, supra note 32, at 229.
eminent domain. Receiving a preliminary FERC permit amounts to a federal priority date.

FERC does not immediately notify states that it has issued a federal license for a hydropower project. A FERC licensee receives the equivalent of a state water right once the federal license is issued. States issue regular use permits based on the amount of water they believe is available within their boundaries. A problem can arise when the state licenses one applicant and FERC licenses another. Further, FERC does not require the federal licensee to acquire only enough junior rights to mathematically equal the cubic foot per second [cfs] awarded in the federal project. If a state issues a hydropower permit in accordance with the amount of allocable water within the state, but FERC licenses the same project with a greater capacity, the amount of water available to the state is proportionately reduced. FERC simply creates another problem for the states that are experiencing administrative shortages.

Water rights are property rights under the jurisdiction of state law. The principle of navigation servitude that emerged in interpretations of the commerce clause gives the federal government discretionary power to subordinate state-granted water rights that "interfere" with federal access to navigable streams. The supremacy clause and the preemption doctrine allow the federal government to legislate water rights without regard for state policies or systems of prior appropriation. In essence, federal laws are applied to exempt federal water users from state law. Many of the western state's concerns have been communicated to FERC by the various states. However, they have found FERC unresponsive.

State Regional Planning

When competing applications are received by FERC, § 10 of the FPA requires FERC to license the project it considers best adapted to a comprehensive plan for improving or developing waterways for the use or benefit of interstate or foreign com-

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44. 16 U.S.C. § 798 (1982) states "[e]ach preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter ...."
45. This situation occurred in Idaho fairly recently. Two developers, American Falls Reservoir District No. 2 and Bigwood Canal Company, obtained from the state of Idaho a hydropower water right to develop a site with a priority date of September 15, 1980. FERC granted a preliminary permit for the same site to Idaho Renewable Resources, Inc. and the City of Ashton, Idaho on May 25, 1982. WSWC Position supra note 18, at 3.
46. See Union Bridge Co. v. United States, 204 U.S. 364 (1907).
48. WSWC Position, supra note 18, at 5-6.
merce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes... 49

On its face, this section implies that FERC should consider all relevant information, including available state water plans, in order to arrive at a comprehensive plan of hydropower development. However, FERC has generally operated on a case-by-case basis. 50 FERC does not typically consider the "potential for adverse environmental impacts presented by multiple pending applications in the same river basin." 51

The decision of where to locate a power plant on a river system is critical. 52 FERC's failure to arrive at a comprehensive plan has created an adverse environmental impact when multiple hydropower projects are clustered together in certain river basins in the West. 53 For example, FERC has licensed seventeen hydropower dams to Idaho Power Company in Idaho on the Snake River and a number of its tributaries, 54 most of which are downstream from irrigated agriculture in the Snake River Basin. Although hydropower is supposedly a nonconsumptive use, it is actually a 100% consumptive use as to upstream users, because the full flow is required in order to generate at capacity. Capacity generation effectively precludes all future upstream development above a hydropower project. For example, in western Montana, the Noxon Rapids Hydroelectric project has virtually appropriated the entire Clark Fork of the Columbia River above the dam. 55

Some states have enacted comprehensive hydroelectric licensing statutes to counteract FERC's authority. 56 These statutes, which require FERC to consider a wide range of public interests prior to licensing a hydropower project, are not binding on FERC. 57

POSSIBLE SOLUTIONS TO THE PROBLEM

Many commentators have offered suggestions to resolve the state-federal hydropower conflict. The suggestions range from the judicial deter-

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50. Lebow Remarks, supra note 25, at 8.
51. Id.
52. See Idaho Power Co. v. State, 661 P.2d 736 (Idaho 1983). The court discussed the creation of the Idaho Water Resource Board in 1965 in response to earlier diversions of the Snake River through Nevada for California and the Southwest. The court acknowledged that Idaho had been opposed to the diversion because "it was generally recognized that as long as Idaho had 'surplus' water it would continue to be viewed as a source for supplying other states' increasing needs." Id. at 737.
53. Id. at 7-8.
54. Idaho Power, No. 62237 at 17.
55. WSWC Position, supra note 18, at 5-6.
57. Lebow Remarks, supra note 25, at 7.
mination of the proper state-federal balance, to state negotiation with hydropower developers to alter the terms of FERC licenses, to an amendment of the FPA. Each of the suggestions is discussed in the following sections.

Judicial Determination—Overturning the Precedent of First Iowa

Under §9(b) of the FPA, FERC requires a potential licensee to provide 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.58

However, permit applicants need not actually obtain state permits to appropriate and use water. Nor are applicants required to submit evidence of having filed for state permits.59 FERC is considered to have such exclusive authority because of the broad construction given FPA §9 in First Iowa.60

Despite the seemingly restrictive language of the statute, the Court in First Iowa upheld federal supremacy in hydropower licensing for two principal reasons. First, the Court found that because Congress can prevent the construction of any obstruction in navigable waters,61 it can likewise grant the privilege.62 Second, the Court held that the language of the FPA places final authority for licensing hydropower projects "squarely upon federal officials."63 The Court concluded that requiring a state permit to be secured as a condition precedent to a federal licence would vest a state veto power over the federal project.64

In addition, the Court found that "a duplicate system of state permits and federal licenses . . . for each project, would be unworkable."65 The Court so found, despite §27 of the Act, which provides,

nothing contained herein 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

59. However, permitees must comply with the Clean Water Act before receiving state approval to operate under the act. Additionally, permitees must consult state fish and wildlife agencies before filing. Lebow Remarks, supra note 50, at 3.
60. 328 U.S. 152 (1946).
63. Id. at 168.
64. Id. at 164.
65. Id. at 168.
water used in irrigation or for municipal or other uses, or any vested right acquired therein.\textsuperscript{66}

The Court would not read the language of § 27 into § 9(b).\textsuperscript{67} Rather, the Court interpreted § 27 as a saving clause\textsuperscript{68} which preserved state water legislation in a subordinate position to federal regulation so that the Act would not preempt state regulation altogether.\textsuperscript{69} Therefore, the Court ruled that Iowa’s water use statutes were not unconstitutional, but could not be used to require federal licensees to comply with state law prior to placing their applications with FERC.\textsuperscript{70}

The \textit{First Iowa} Court based its findings on a principle of national uniformity underlying the FPA. The Court found the FPA was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.\textsuperscript{71}

In fact, the Court went so far as to state “[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.”\textsuperscript{72}

Courts have upheld \textit{First Iowa} by maintaining that federal hydropower licensees do not first have to obtain state permission for projects.\textsuperscript{73} However, recent decisions have suggested FERC may not have absolute authority under the FPA with regard to location of hydropower projects.\textsuperscript{74}

\textbf{State Negotiated Subordination Clauses}

In the early 1950’s, the agricultural interests on FERC’s predecessor, the Federal Power Commission [FPC], were just becoming “aware of the possibility of the effect on future irrigation developments if down-

\textsuperscript{67} 328 U.S. at 177.
\textsuperscript{68} \textit{Id.} at 175. The court defined a saving clause as one that prevents the federal legislation from preempting state regulation of an area altogether.
\textsuperscript{69} \textit{Id.} at 176-177.
\textsuperscript{70} \textit{Id.} at 177.
\textsuperscript{71} \textit{Id.} at 180.
\textsuperscript{72} \textit{Id.} at 181.
\textsuperscript{74} See Uncompahgre Valley Water Users Ass’n v. F.E.R.C., 785 F.2d 269 (10th Cir. 1986). The court found FERC does not have jurisdiction to consider an application for hydropower development on a reclamation project because the Secretary of the Interior has specific authority under the Act of June 22, 1938, 52 Stat. 941, which restricts the broad grant of authority to FERC under the FPA.
stream power rights were to be given priority.” 75 For example, in Idaho, a majority of the state’s economy derives from irrigated agriculture in the Snake River plain, which covers over three-fourths of all the irrigable land in the state. 76 Much of the hydropower development occurs downstream from irrigation. This has been a problem in Idaho, where over-appropriation of the Snake River is already causing shortages. 77

Idaho Power, Idaho’s major hydropower developer, operates seventeen hydropower projects in Idaho and western Washington. Idaho Power possesses rights to the Swan Falls Project 78 on the Snake River in Idaho, downstream from most agricultural projects on the river.

In 1950, Idaho Power formally applied to the FPC for a permit to develop the Oxbow site, far downstream from the Swan Falls Dam, and the C. J. Strike Project, upstream from a proposed irrigation project. 79 Due to much controversy in the state about the location of the projects in relation to irrigated agriculture, compromise language was inserted in the C. J. Strike license. 80 Idaho Power also proposed subordination lan-

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75. Idaho Power v. State of Idaho, Department of Water Resources and the Idaho Water Resource Board, No. 62237 at 4 (4th District, Idaho 1979). Prior to application for the C. J. Strike license, the president of Idaho Power asserted to the Oregon Legislature in 1947 that Idaho Power had subordinated its hydropower projects to future upstream diversions. However, counsel for Idaho Power attempted to avoid subordination language in the C. J. Strike FPC license. The FPC conveyed the Department of Interior’s concerns to Idaho Power, and Idaho Power agreed to the subordination provision. Id.

76. IDAHO WATER PLAN, supra note 41, at 5.

77. The Snake River is the principal source of irrigation water for 4.5 million acres in the Snake River basin. Irrigation use depletes the river flow by nearly 7 million acre-feet per year. IDAHO WATER PLAN, supra note 41, at 9. Twenty-five percent of the depletion is due to groundwater wells. Id. The 1976 Idaho State Water Plan established a minimum flow of 3,300 cfs at the Murphy gauging station. Since 1950, the amount of water that reaches the Murphy gage has been steadily declining. According to the Idaho Water Resource Board, the decline is due to: 1) large pumped diversions in the western Snake River plain above the Murphy gage, 2) increased use of groundwater on the Snake River plain which diminish Thousand Springs discharge to the River, and 3) drier than normal conditions in two tributaries, the Wood River and Bruneau River. Id.

78. Swan Falls is the oldest dam on the Snake River and was the first power plant put into operation on that river. Idaho Power obtained its license for the Swan Falls Project as the successor to Trade Dollar Consolidated Mining Company, which put the dam into operation in 1901. The plant has been in continuous operation since 1901. Idaho Power, No. 62237 at 4-10; Idaho Power, 661 P.2d at 744.

79. Idaho Power, No. 62237 at 20. At the same time, the Department of Interior was considering construction of the Hells Canyon Project, slightly farther downstream than the proposed Oxbow Dam. Idaho irrigation developers were pressing the federal government to develop the Mountain Home Division irrigation project just upstream from the Swan Falls Dam. Id.

80. Idaho Power requested a provision that the United States would provide replacement power if the rights were subordinated. Id. at 21. However, the C. J. Strike license provided the United States an additional option to take over the project beyond the existing FPA provision. Id. The FPA allows:

That upon not less than two years’ notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects . . . or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee . . . upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the
guage in its FPC application for the Hells Canyon Project.\(^{81}\)

Idaho Power’s license for the Swan Falls Dam expired in 1970. Upon application for relicensing, competing interests questioned the validity of Idaho Power’s water rights at Swan Falls and sought to impose subordination language into the subsequent license. Idaho Power sued for a determination of the validity of its water rights at Swan Falls.\(^{82}\) Idaho Power asserted that it had 9450 cfs at Swan Falls with priority dates from 1901 to 1919 due to an earlier federal court decree.\(^{83}\) However, it was undisputed that the hydroelectric capacity of the Swan Falls Dam is 8400 cfs.\(^{84}\) Because Idaho Power had agreed to insert a subordination clause in its Hells Canyon license, irrigators argued that the Swan Falls water right should also be subordinated to upstream use, or in the alternative, that 1050 cfs had been abandoned at Swan Falls.

The Idaho Supreme Court did not read the subordination language of the Hells Canyon license into the the Swan Falls license.\(^{85}\) The court found no mention in the Hells Canyon license of the Swan Falls license or other intent to subordinate the Swan Falls right, and therefore FERC had no power to alter Idaho Power’s vested state water rights at Swan Falls.\(^{86}\) The court found that the additional 1050 cfs of the Swan Falls license had been taken by Idaho’s State Water Plan. Thus, as a result, Idaho Power was entitled to compensation for the amount of cfs taken by the state plan.\(^{87}\) The court further stated,

\[\text{property taken, plus reasonable damages, if any, to property of the licensee . . .} \]


81. There is plenty of evidence that Idaho Power was against subordination, however: one must remember that Idaho Power Company officials felt that the Company’s survival was the construction of the C. J. Strike project and the Hells Canyon project. A then dominant force in Idaho politics were the irrigators. In order to obtain the support of that segment of Idahoans and to eventually acquire the right to construct power facilities (which have since served it well) it was necessary that the threat of downstream non-consumptive power rights preempting upstream future development be eliminated. The Company’s reluctant agreement to subordinate resulted in not only support from the State of Idaho and its irrigation water users, but others in the northwest and the country.

Idaho Power, No. 62237 at 21.

82. Idaho Power, 661 P.2d at 744.

83. See Trade Dollar Consolidated Mining Co. v. Fraser & Cruzen, 148 F. 585 (9th Cir. 1906). The cfs awarded in that decree consolidated all the rights Trade Dollar had acquired from previous appropriators with priority dates from 1900 to 1919. The FPC licensed the Swan Falls project in 1928 without any subordination language.

84. Idaho Power, 661 P.2d at 744.

85. Id. at 752.

86. Id.

87. Id. at 756. The court found that an Idaho statute regulating transfers of property “used in the generation or transmission of electricity” to be approved by the Public Utilities Commission could not be applied to transfers of water rights, or to abandonment of water rights. Id. at 755.
we deem it questionable whether the FPC would have the authority to subordinate then-existing water rights, even assuming such had been the intent in the Hells Canyon licenses. Section 27 of the Federal Power Act, known as the “Savings Clause” provides that the Act does not intend to interfere with any vested right acquired under state water law.88

The effect of the court’s decision in *Idaho Power* is that perfected water rights under state law cannot be denied by FERC.

**State Determined Instream Flows**

A further consideration in the Swan Falls controversy was the determination of instream flows. The Idaho Water Resource Board had determined 3300 cfs as a proper minimum flow to be delivered at the Murphy gage, below the Swan Falls Dam.89 Idaho Power argued that upholding the state determination of 3300 cfs at the Murphy gage would allow the river to be depleted to that amount, thereby derogating its water right of 8400 cfs at Swan Falls.90 The Idaho Supreme Court upheld the determination of 3300 cfs as the appropriate minimum flow under the State Water Plan.91 It found that such a determination by a state agency is an acceptable public welfare purpose. The court stated

> there is no requirement contained therein that the Snake River be depleted to 3300 cfs at Swan Falls, but rather the plan only prohibits a reduction below 3300 cfs. To that extent, if anything, it protects the Swan Falls rights to the extent of 3300 cfs . . . Since we have held that Idaho Power’s water rights at Swan Falls are vested, the State Water Plan is not to be construed as affecting those water rights.92

Therefore, the court rejected Idaho Power’s assertion that the State Water Plan constituted a compensable taking of a portion of the 8400 cfs awarded at Swan Falls.93

**State Environmental Concerns**

Another area of state concern is environmental preservation. The courts have held that FERC should consider beneficial uses of surface streams other than economic concerns. However, the difficulty occurs when “the comprehensive judgment of the state does not coincide with the Com-

89. *Id.* at 756.
90. *Id.*
92. *Id.*
93. *Id.*
mission’s judgment of what the public interest requires.” In *Scenic Hudson Preservation Conference v. Federal Power Commission*, a challenge was made to FERC’s licensing a hydropower project without consideration for a scenic portion of the Hudson River in New York that had received worldwide acclaim for its beauty. An environmental group successfully challenged FERC licensing a hydropower project that would destroy this historic stretch of river. The court held that FERC must represent the public interest and, as such, must fully consider all relevant information including possible alternatives for location of a hydropower project.

FERC typically does not consider scenic beauty when awarding hydropower licenses. For example, several stretches of river in Northern California were declared wild and scenic rivers. On May 8, 1985, the Ninth Circuit affirmed FERC’s preliminary permit to the Modesto and Turlock Irrigation Districts and the City and County of San Francisco for the Clavey-Wards Ferry hydroelectric project on the Tuolumne River. The Sierra Club petitioned that an EIS was required prior to the issuance of a preliminary permit because feasibility testing would disturb the environment. The court dismissed this claim, stating the FERC order required applicants to obtain a memorandum of agreement with the Forest Service and BLM prior to doing any feasibility testing, and therefore those agencies would “be responsible for evaluating the environmental impact of activities authorized by their special use permits.” The court cited an earlier case that showed an EIS is not required when the

94. Lebow Remarks, supra note 25, at 7.
96. In *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965), the court found that the FPA required FERC to conduct a reasonable fact-finding hearing at which all the relevant information would be considered, including input of concerned environmental groups. Information about the state’s water plan might be introduced, but was not required. The court in *Scenic Hudson* did not compel FERC to find in a particular way after considering all the available information. However, the court admonished FERC that the statute required a careful consideration of all the factors prior to issuing a license for a hydropower site.
97. Id. at 620. Recently, FERC has considered a departure from its traditional case-by-case basis for making hydropower licensing decisions. In two recent applications, FERC has considered environmental impact assessments in the application for the Owens, Snohomish and Salmon River Basins and the Snake River licensing application. Lebow Remarks, supra note 25, at 9.
98. See *State of N.C. v. Federal Power Comm’n*, 533 F.2d 702 (4th Cir. 1976), vacated 429 U.S. 891 (1978), where the court determined that a wild and scenic river is only one designated in the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1278 (1982). The court held that construction of a hydropower project is not restricted while the Secretary of the Interior considers whether to add a river to the federally protected system at a state’s request.
100. Sierra Club v. F.E.R.C., 754 F.2d 1506 (9th Cir. 1985).
101. Feasibility testing for a hydropower project involves geological tests to determine soil stratification and underlying geologic formations. The process typically involves heavy equipment and soil removal for core samples.
102. Id. at 1509.
proposed federal action will effect no change in the status quo. The court also dismissed petitioner's claim that FERC was required to hold an evidentiary hearing. The court found FERC's regulations require a hearing only "whenever appropriate." Because the preliminary permit served only to insure applicant priority and there was no "substantial environmental controversy," the court found there was no need for a hearing.

The Court of Appeals of Oregon recently required that a hydroelectric project comply with regulations promulgated by state agencies under the Clean Water Act [CWA], even if the regulations are more strict than EPA regulations under the CWA. However, the court held a state agency is not authorized to deny an effluent permit merely because hydroelectric generation is not a designated beneficial use under state law. In issuing its order denying a permit, the state agency stated its reason was "failure to show compliance with state and county land use requirements." The court remanded the case to the agency for consideration of the correct legal requirements, including effluent guidelines promulgated by the agency. The court acknowledged that the agency can require a FERC permittee to comply with the water-related portions of a county's land use regulations.

The regulations promulgated under PURPA require an exempt FERC licensee to consult with state fish and wildlife agencies prior to FERC approval. However, the regulations do not require applicants to have the approval of the state fish and wildlife agency or to have obtained water rights from the state at the time the applicant applies for the federal license. However, PURPA does not completely exempt licensees from compliance with environmental statutes.

104. 754 F.2d at 1510.
105. 40 C.F.R. § 1506.6(c) (1986).
106. Id. at 1510.
108. Arnold Irrigation Dist. v. DEQ, 717 P.2d 1274 (Or. App. 1986). Through the CWA, Congress intended to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of the EPA] in the exercise of his authority under this [Act].
33 U.S.C. § 1251(b).
109. 717 P.2d at 1280.
110. Id. at 1278.
111. Id. at 1278, 1280.
112. Id. at 1279.
116. In Steamboaters v. F.E.R.C., 777 F.2d 1384 (9th Cir. 1985), the court remanded an exempt project to FERC for reconsideration of whether an EA and subsequent EIS should have been prepared subsequent to an earlier decision, Steamboaters v. F.E.R.C., 759 F.2d 1382 (1985).
Municipal Use Preference

The FPA contains a licensing preference for municipal users. This preference indicates that a municipal user will be favored when it is "equally well adapted to conserve and utilize in the public interest the water resources of the region." The municipal preference also applies to relicensing applications. A successor to a hydropower project under the municipal preference provision must compensate the predecessor for its net investment plus severance damages.

Recently in Washington state, an original licensee, Pacific Power, reapplied to FERC for an operating permit for the Merwin Hydroelectric Project on the Lewis River. Two public utility districts created the Clark-Cowlitz municipal corporation in order to obtain under the municipal preference provision of the FPA the Merwin project license when it was due to be reissued. Based on economic considerations, FERC denied the municipality’s application because the original licensee (Pacific Power) served a broad national policy by selling power to six states. The Clark-Cowlitz decision contradicted an earlier decision by FERC that had been upheld by the Eleventh Circuit.

The court in Clark-Cowlitz found that FERC’s denial of the municipal application was an attempt to incorporate broad-ranging national policy considerations, such as user benefits and economic losses, into the phrase “public interest.” The court acknowledged that FERC is authorized to exercise “technical” judgment about the soundness and feasibility of plans and can consider “economic impacts” that relate to economic feasibility. However, the court admonished FERC’s attempt to impose wide-ranging policy considerations as to the best allocation of regional profits and losses onto the decision to deny municipal preference in favor of relicensing the original licensee. The court stated “[i]t is self-evident that any change of license will involve at least temporary economic disruption and some shifting of benefits from the former licensee to its successor.”

117. 16 U.S.C. §§ 7(a), 800(a) (1982).
118. Id.
119. 16 U.S.C. §§ 807(a), 808(a) (1982).
121. Id.
122. Id. at 369. In ruling on the Clark-Cowlitz matter, FERC had no difficulty in overturning Bountiful, stating the municipal preference language of the FPA was "a conception of that era" when the FPA was enacted. Id. at 370.
123. Id. at 382.
124. Id. at 380.
125. Id.
The court relied on the legislative history of the FPA to show that economic loss cannot be used to create an "insurmountable preference" in relicensing the incumbent. The legislative history demonstrates that private investment was encouraged through lengthy lease terms of up to 50 years and assurances that all property taken over would be sufficiently compensated. The court found the single most important goal of the FPA's drafters was "preventing private corporations from acquiring a permanent hold on water power resources." The court found that FERC is bound by the statutory preference system established by Congress, and retains no discretion to apply relicensing standards in a contrary manner. However, in a later hearing en banc, the full court vacated the earlier decision. Clark-Cowlitz leaves an unresolved issue as to whether the municipal preference of the FPA can or will be upheld.

Increased State Participation in Licensing and Developing Comprehensive Plans

In response to expressed state concerns, FERC is now attempting to persuade states to participate in the licensing procedures for small hydropower projects under PURPA. In addition, FERC is encouraging the western states to become parties to all proceedings where a license applicant has not obtained a state water rights permit and if the state has already granted a mutually exclusive water right permit to another entity or has determined that it would not be in the public interest to grant a permit to the applicant. FERC asserts that if states brought forth this information, the Commission might "well find that the granting of licenses to such applicants would not be consistent with the 'best adapted' standard of the Federal Power Act." The problem with FERC's position is that neither the courts nor FERC
itself have defined what a "comprehensive plan" should contain. Many of the western states themselves have not developed a clear definition of public welfare in their jurisdiction, nor have all of the states adopted water resource plans. Given the lack of unity among the western states over the meaning of the term public welfare, state participation in FERC's licensing proceedings actually might cause FERC proceedings to function less productively.

First Iowa was an early case that recognized state input might not be efficient in FPA licensing proceedings. In First Iowa, the court acknowledged that under § 9, the Commission has the power to solicit any additional information "in so far as it deems it material, such parts or all of the information that the respective States may have prescribed in state statutes as a basis for state action." However, in his dissent, Justice Frankfurter noted that many state statutes may not have received a construction by "the only authoritative source for the interpretation of State laws, namely, the highest court of the State." Justice Frankfurter recommended the Supreme Court stay a review of a FERC licensing until the state law was authoritatively determined by a State court. He attributed the necessity of this procedure to an acknowledgement that "construction of State legislation relating to the matters dealt with in the Federal Power Act is subtle business and a subtlety peculiarly within the duty, skill, and understanding of State judges." In response to the inevitable argument that such a delay would be unfair to all interests concerned, Justice Frankfurter stated:

[i]f it be said that the procedure for which the Federal Power Commission contends may take time, there is no assurance that a contested case like this will not take just as much time hereafter. The Commission must pass independently on an unconstrued State statute; its construction may then come before the Court of Appeals for the District and eventually before this Court. Even then the possibility remains that this Court's decision will be followed by one in the State court ruling, as has not been unknown, that this Court's interpretation was in error. In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.

Courts have yet to adopt the reasoning of Justice Frankfurter although the amount of litigation under the FPA is voluminous.

134. Plouffe, supra note 31, at 845. See Municipal Elec. Ass'n v. Federal Power Comm'n, 414 F.2d 1206 (9th Cir. 1969) (the meaning of comprehensive plan does not require a project to be integrated with a regional power plan).
135. First Iowa, 328 U.S. at 169 (emphasis added).
136. Id. at 185.
137. Id. at 186-87. Justice Frankfurter noted that federal litigation is frequently stayed until a state court construes a statute.
138. Id. at 187.
139. Id. at 187-88 (emphasis added).
While FERC may solicit state input to assist licensing decisions, if the state's position is not simple and direct, its input might actually confuse licensing proceedings. The Court was faced with this dilemma in *First Iowa*. Iowa did not want either a state or federal permit granted because "the state statute, as interpreted by the state officials, expresses[d] a policy opposed to the diversion of water from one stream to another." Nothing in the FPA will prevent the conflict that arises when a state does not want to reallocate its water resources and a hydropower developer presents a viable project. In light of all the potential problems, FERC's offer to the states may be unworkable.

Amendment of the FPA

The Western States Water Council [WSWC] is an organization that represents the interests of 12 western states in developing their water resources. WSWC proposed amending §§9(b) and 27 of the FPA. WSWC's proposal is based on the assumption that the courts may not overturn *First Iowa*. The proposed amendments would force FERC to defer to state decisions regarding location and licensing of hydropower projects.

Other commentators have suggested the proposed FPA amendments

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140. *Id.* at 171.
142. *See* Comment, *supra* note 13, at 1197 n. 90 & 91 (for a discussion of precedent under *First Iowa*). Although the holding in *First Iowa* has been applied to all state water laws, the issue involved riparian rights, and therefore the preemption of state water appropriation laws has not been considered. *Id.*
143. The proposal for § 9(b) is to strike the language "and to the appropriation, diversion, and use of water for power purposes," and add:

(d) Notwithstanding any other provisions of law, the commission is prohibited from issuing an original or new license, amendment to license, or exemption from licensing under this Part, unless the applicant proves acquisition, in accordance with applicable substantive and procedural provisions of state law, of the necessary rights established pursuant to state law to appropriate, divert, and use water for power purposes.

The proposal for § 27, is to designate the existing sentence as subsection (a) and add the following subsections:

(b) Nothing in this Part shall be construed as conferring upon the United States, its agents, permittees, or licensees any right to acquire rights to appropriate, divert, or use water.

(c) Appropriation of water for power purposes subject to this Part shall be pursuant to substantive and procedural provisions of State statutory law, decisional law, and regulations governing appropriation, diversion and use of water.

(d) Establishment of, and compliance with, pursuant to State law, terms or conditions, including licenses, or other entitlements for appropriation, diversion or use of water for power purposes, shall not be deemed to constitute a burden on interstate commerce.

(e) Nothing in this Part shall alter in any way any provision of State statutory law, decisional law, or regulation, or of any interstate compact, governing the appropriation, diversion, or use of water.

*Id.* See also notes 58-74 and accompanying text.
include a provision for FERC to solicit state comprehensive plans. This would encourage many states which "have an apparent willingness and ability to take on this task" to prepare detailed work that FERC cannot accomplish, given the current economic climate of the federal government. The comprehensive plan could contain elemental provisions, including the identification of rivers deserving special protection, a state hydropower plan, a fisheries management plan, and a provision limiting hydropower construction within a state that is intended for multistate use and restricting redevelopment of sites to not diminish recreational and natural values. Some commentators have suggested the federal government should provide grants to states that present suitable comprehensive plans.

WHO SHOULD RESOLVE THE CONFLICT?

Much of the controversy between state and federal authorities over water resources centers around the recent acknowledgment that water resources are finite. However, most overappropriation in western states has been due to the states' miscalculation of water resources or the states' inability to curb the power of dominant economic forces which have misallocated water. The federal government did not create the overappropriation problem.

The cases construing the FPA imply that federal control of hydropower is a superior method of curbing the private greed that more easily influences local officials and state legislatures than remote federal commissions and courts. This may be true, especially considering that the interests frequently opposing hydropower projects are large-scale agricultural projects with their own interest in federal programs. However, "[t]he Federal Power Commission which devised this procedure has not been an unzealous guardian of the national interests." FERC has been accused of favoring large economic interests. It is certain that economic interests powerful enough to control a state may be powerful enough to control a Commission or the federal legislature as well. However, the more important point, and one that is frequently lost in this debate, is the issue of what ultimate interest these laws were drafted to serve.

144. Plouffe, supra note 31, at 846-47.
145. Id. at 846.
146. Id.
147. Id. at 847.
149. See Idaho Power, No. 62237 at 20 (the interests opposed to Idaho hydropower development were mostly irrigators who had benefitted from federal reclamation assistance in another decade).
150. First Iowa, 328 U.S. at 187, Justice Frankfurter dissenting.
151. See Plouffe, supra note 31, at 845.
A number of environmentally oriented groups have become participants in the hydropower arena. These groups focus on the issues of creating consistency, curbing private greed, and conserving natural resources. These groups are attempting to involve all interested parties in mediated negotiations with the goal of arriving at a cohesive result. Some groups have met with success. Whether this process will expand depends on a number of factors, including the cost to the participants and the government of sponsoring such negotiations in contrast to the cost of regular hearings.

If the solution cannot come from the courts, Congress, or state innovation, the final solution available is for states and FERC to resolve their differences through a process of cooperation. As suggested by FERC, if it simply could consider clear positions by the states at licensing proceedings, it would likely see things in a different light than it does when focusing only on federal concerns. Of course, state cooperation with FERC would mean limiting the idea that states should have an absolute veto over who can profit within their borders. And, FERC would have to occasionally acquiesce on dam constructions that may have good geological foundations and economic potential, but fall on waterways with tremendous aesthetic acclaim. In addition, FERC would have to acknowledge that many western states rigidly resist the use of their natural resources for the benefit of those living in urban areas out of the state.

The root of the state-federal conflict may be based on the fear that water resources are overappropriated and, thus, continued appropriation will cause a future disaster. Seasonal cycles are an unavoidable phenomenon. Modern technology has helped overcome short periods of shortage. The United States has not been faced with a long period of shortage since the depression of the 1930's. However, if extended droughts in fact occur in cycles of approximately fifty to sixty years, the nation may be faced with difficult times ahead. Neither the federal system nor the state system takes into account long-term shortage through making provisions to insure that major aquifers are not depleted or that drinking water remains potable. If periodic long-term water shortages are inevitable, simply having a uniform system of hydropower is not helpful. Most hydropower facilities cannot generate at less than capacity. Therefore, a long-term water shortage can undermine even the best of FERC's plans. Neither federal programs nor state policies can create water in times of shortage. In essence, what difference will it make whether a federal agency or a state agency issued the last permit if everyone is suffering water shortages?

153. E.g., Western Network in Santa Fe, New Mexico.
154. E.g., El Paso Electric Negotiation, Feb. 10-13, 1986 at Las Cruces, New Mexico (where community groups were able to participate in rate setting hearings with the public utility).
155. Id.
CONCLUSION

Since its passage, advocates of the FPA have asserted that it is a better drafted bill than the similar Rivers and Harbors Acts that takes too much state geography into account. The FPA appears uniform and unequivocally grants power to the FERC to uniformly determine which hydropower applicants will be licensed.

However desireable uniformity may be from an administrative point of view, absolute uniformity is impossible even under the existing Act. The geography of the continent is varied, the hydropower needs of different regions are varied, and the nature of states themselves and the history of their citizens are varied. "[T]he public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects . . . are to be located."

If the ultimate goal is administrative efficiency, having a streamlined federal process may be expeditious. But, as Justice Frankfurter pointed out in his dissent in First Iowa, by the time FERC decisions are appealed all the way to the Supreme Court, no meaningful time has been saved for anyone. Judging from the thousands of FERC cases that have been appealed to all levels of the federal courts, it appears that the expeditious FERC licensing process fails to save anyone time. Rather, that process is actually costing everyone time.

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156. See First Iowa, 328 U.S. at 180.
157. Id. at 183-84, Justice Frankfurter dissenting.