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# Insufficient EIS Halts Hydro-Electric Power Project

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# INSUFFICIENT EIS HALTS HYDRO-ELECTRIC POWER PROJECT

ENVIRONMENTAL LAW—ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT: Placement of hydro-electric power plant in completed dam halted due to insufficient EIS and lack of Congressional authorization. *National Wildlife Federation v. Andrus*, 10 E.R.C. 1353 (D.D.C. 1977).

Navajo Dam and Reservoir, on the San Juan River in New Mexico, was authorized by Congress in the Colorado River Storage Project Act of April 11, 1956.[1] In 1973 the Bureau of Reclamation began construction on a 23 megawatt powerplant in the dam. Between 1974 and 1976 $3.6 million worth of generated equipment was purchased by the Department of the Interior for use in the powerplant. As originally authorized the powerplant was to have produced 15 megawatts of electricity for use in a gravity-flow irrigation system. The 23 megawatt powerplant being constructed was designed to be used for an all-sprinkler irrigation system.

The construction of the dam between 1958 and 1963 created a cold-water fishery which the New Mexico Department of Game and Fishery stocked with trout. The trout fishery is "now recognized as one of the finest resources of its kind in the southwestern United States."[2] The river is also home to aquatic mammals and a wide variety of waterfowl.

On December 10, 1976, the National Wildlife Federation and the New Mexico Wildlife Federation[3] brought an action for declaratory and injunctive relief in the District of Columbia District Court against the Department of the Interior *et al*, to halt construction of the powerplant. The parties agree that "both the fish and the other wildlife might be adversely affected should there occur [the] rapid daily fluctuations in water volume and rate of flow"[4] that would result were a powerplant to be constructed.

Plaintiffs' amended complaint of February 9, 1977, alleged that:

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1. 43 U.S.C. § 620 (1970).
2. National Wildlife Fed'n v. Andrus, 10 E.R.C. 1353, 1354 (D.D.C. 1977).
3. Two intervenors joined the original plaintiffs on March 1, 1977. They are both conservation groups; Trout Unlimited and the New Mexico Council of Trout Unlimited.
4. *Supra* note 2.

(a) Defendants had exceeded their statutory authority in constructing a 23 megawatt powerplant at the dam, since express authority was given only for a 15 megawatt powerplant to be located on a tributary to the San Juan not at the dam itself;
(b) that defendants had violated the National Environmental Policy Act of 1969 [NEPA][5] by their failure to fully evaluate the effect on fish and wildlife; and
(c) that defendants failed to comply with the Fish and Wildlife Coordination Act [FWCA].[6]

In a decision on cross-motions for summary judgment the court found:

(a) that there had been no statutory authorization for the powerplant;
(b) that defendants had failed to comply with NEPA's central procedural requirement, that of preparing a detailed environmental impact statement; and,
(c) that defendants violated the FWCA since the Secretary of the Interior failed to submit a report to Congress concerning the stream modification, and since NEPA was not complied with.

The original authorization of the Navajo Dam and Reservoir was found to be "specifically limited by Congress to 'dam and reservoir only.' "[7] The 1962 Navajo Indian Irrigation Project [NIIP] legislation provided for a powerplant to be located on Chaco Wash, a tributary of the San Juan. As proposed, the plant was to have a maximum capacity of 15 megawatts, and to be used only to provide the energy necessary for irrigation pumps.[8]

In the Reevaluation Report of July 1966, the Bureau of Reclamation and the Bureau of Indian Affairs found that certain of the designated lands were not suitable for sustained irrigation.[9] The Department needed Congressional authorization in order to substitute lands for those found to be unsuitable. Since substitution of lands would make the Chaco Wash powerplant unfeasible, the possibility of substituting a powerplant at the dam was discussed in the Report. However, the report did not specifically recommend the 23 megawatt powerplant.[10]

5. 42 U.S.C. § § 4331 *et seq.* (1970).
6. 16 U.S.C. § § 661 *et seq.* (1970).
7. *Supra* note 2, at 1353. The statute reads: "the Secretary of the Interior is authorized (1) to construct, operate, and maintain in the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon. . . ." *Supra* note 1.
8. *Supra* note 2, at 1354.
9. *Id.*
10. *Id.*

Plaintiffs contended that Congress never authorized the powerplant, while defendants contended that the 1970 legislation contained implicit authorization. Defendants relied on the report of the Senate Committee on Interior and Insular Affairs which specifically states that the project "includes a powerplant at Navajo Dam,"[11] and on the Reevaluation Report, which was made part of the files of the House.[12]

Defendants also contended that the construction of the powerplant was not inconsistent with the original 1956 authorization, since the dam was designed to allow later installation of a powerplant. Defendants' final contention was that Congress knew about the powerplant since it was mentioned in proposals for work pursuant to NIIP, and Congress appropriated funds for the plant between 1974 and 1977, thus implicitly authorizing it through appropriations.

The court rejected all three of defendants' arguments, finding that the powerplant was not actually proposed until 1973 when defendants prepared an administrative report proposing it,[13] and so could not have been considered in 1970. The court found that the Reevaluation Report "contained nothing specific or detailed enough to be considered a distinct recommendation."[14]

The court summarily rejected the second contention, that the powerplant was not inconsistent with the original act, finding that there was no specific authorization for the design and construction used. Although the court conceded that the Bureau of Reclamation had discretion to modify aspects of the dam, they found that they had exceeded their discretion in using the design they did since Congress had been "specific in its . . . lack"[15] of authorization for construction of a powerplant. The court concluded that since there were no references to the powerplant in discussions at appropriation hearings or in the appropriation bills themselves, awareness could not be presumed from the fact that the plant was mentioned in proposals for work.

Having found the record insufficient for the contention that Congress knew of the powerplant, the court dismissed the contention that authorization could be found implicitly in the appropriations, citing the principle from *Atchison Topeka and Santa Fe R. Co. v. Callaway*[16] that "Congress cannot and does not legislate through the

11. S. Rep. No. 363, 91st Cong., 1st Sess. 2 (1969).
12. Hearings of H.R. 13001 Before the Subcommittee on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 91st Cong., 2d Sess. 41 (1970).
13. *Supra* note 2, at 1355.
14. *Id.*
15. *Id.* at 1356.
16. 382 F. Supp. 610, 620 (D.D.C. 1974).

appropriations process."[17] The court summed up its position with a quote from *D.C. Federation of Civic Ass'ns v. Airis,*[18] stating that "[w]here as here 'the only relevant pre-existing statutory language was directly contrary to the disputed administrative action,' the Court of Appeals for the District of Columbia Circuit has held that ratification by appropriation is particularly unlikely."[19] Having rejected all of the Department of the Interior's arguments, the court granted a permanent injunction halting construction on the powerplant.

It is difficult to see how the court can justify a statement that the powerplant could not have been considered in 1970 when the committee report clearly shows that it was. The idea of the powerplant was introduced in the Reevaluation Report, however informally, and so was made a part of the legislative record. That the Congress chose not to specifically refer to it in subsequent legislation is subject to more than one interpretation. A conclusion contrary to that drawn by the court is supported by the fact that the Congress chose not to specifically disallow the powerplant, as the initial legislation had done. Although there is no discussion of the plant in the statutes, the legislative history does indicate that it was considered. It seems, then, that the contention that the powerplant was implicitly allowed was too lightly dismissed.

Reasons for the court's decision can be found outside the language of the opinion. District of Columbia court decisions have, in recent years, shown a tendency towards limiting the discretion of the Bureau of Reclamation, one of the real parties in interest in this suit. In *National Land for People, Inc. v. The Bureau of Reclamation, et al.*[20] the Bureau was sued for failing to promulgate standards for the allocation of water. And in *United States v. Imperial Irrigation Dist.*[21] the Department of the Interior (real party in interest: Bureau of Reclamation) chose not to appeal a district court decision against the enforcement of the 160 acre irrigation limitation in the Imperial Valley. The court of appeals allowed small farmers in the area to intervene and prosecute the appeal. As a result the Bureau was made to enforce the regulation, which had not been enforced in the 75 years of its existence, and which the Bureau, by its decision not to appeal, had chosen not to begin enforcing.

Another possible reason for the court's decision is recent ques-

17. *Supra* note 2, at 1356.
18. 391 F.2d 478, 482 (D.C. Cir. 1968).
19. *Supra* note 2.
20. 417 F. Supp. 449 (D.C.D.C. 1976).
21. 559 F.2d 509 (9th Cir. 1977).

tioning of the viability of the project. The feasibility and practicability of single-family farming that was to be promoted by the Navajo Project is discussed in a paper by Price and Weatherford,[22] who claim that "The Navajo Tribe has come to see the economic future of the reservation more in terms of industrial development than agriculture."[23] However, it is likely that if the 23 megawatt powerplant system irrigated efficiently, there would be more water available for technological demand. Thus the changes encompassed by alternative irrigation methods may have influenced the decision in one of two ways: either causing the court to feel that the project was not worthwhile, or that the Bureau was improperly diverging from its primary purpose, that of promoting agriculture. Yet the power that would have been created by a non-polluting, renewable source will now have to be replaced by a technology utilizing scarce fossil fuels.

Whether there will now be a push for Congressional authorization of the powerplant depends on the strength of the Bureau's dedication to the ultimate party in interest, the Navajos, and Congressional attitudes towards an industrial future for the reservation.

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22. Price & Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROB. 97 (1976).

23. *Id.* at 125.