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# Licenses—Restricting Private Rights in Public Resources

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# Licenses—Restricting Private Rights in Public Resources*

An experiment of considerable significance is under way at the Federal Power Commission. The Commission is in the process of testing[1] whether it may require applicants for hydroelectric licenses to accept the following conditions in order to receive a license: (1) that any person, corporation or government agency may apply to the Commission for permission to make joint use of the licensee's facilities; (2) that the Commission may grant such right of use if it would be in the interest of proper utilization and comprehensive development of the waterway; and (3) that if such permission is granted the licensee shall receive reasonable compensation, amounting at least to reimbursement for any damages or expenses which the joint use causes it to incur.[2]

The potential importance of such a provision is that it invests the FPC with continuing authority to appraise the public importance of the uses being made by the licensee, and, if it deems it desirable, to force the resource involved to be shifted to another use at a cost which may be much lower than the market price. In effect the pro-

* Rumford Falls Power Co., No. 465-A (F.P.C., Sept. 9, 1966). This case is part of the continuing litigation in Rumford Falls Power Co., 34 F.P.C. 27 (1965), *remanded*, 355 F.2d 683 (1st Cir. 1966).

1. Rumford Falls Power Co., 34 F.P.C. 27 (1965), 355 F.2d 683 (1st Cir. 1966), on remand Rumford Falls Power Co., No. 465-A (F.P.C., Sept. 9, 1966).

2. Article 31 of the Rumford Falls license, as amended by the Commission on remand, provides:

> On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall, after notice and opportunity for hearing, permit such reasonable use of its reservoirs or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission in the interest of comprehensive development of the waterway or waterways involved and the conservation and utilization of water resources of the region, for water supply for the purpose of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation, at least full reimbursement for any damages or expenses which the joint use causes him to incur, for use of its reservoirs or other project properties or parts thereof for such purposes, any such compensation to be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot be concurrently submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

posed provision is a response to the view that the law—because of the strongly vested property rights it creates—has been responsible for retarding a needed reallocation of resources, and has thus helped to perpetuate wasteful uses. Because the FPC proposal is designed to promote reallocation, both by retaining for the agency the authority to force changes in use and in depressing the price the new user may have to pay, it provides an interesting opportunity to see how changes in the kinds of property rights which the law grants will affect the use made of resources.

Despite the popular notion that legal institutions have retarded a proper reallocation process, traditional legal theory has been anything but constraining. The theory of public resource disposition has customarily held that one gets only a right-of-use (rather than "ownership") which will be forfeited unless it is exercised in consonance with the public interest. While that has been the theory, in practice there has been no adequate machinery to enforce such limitations. Thus, for example, when a former commissioner of the Federal Communications Commission was asked "What happened to the old idea that you didn't have a property in radio or television, that you had nothing but a revocable license?", he replied that while this was still the rule in the law books, in fact "a guy who has a radio or TV license has just as much permanence as a fee simple deed to the Empire State Building."[3] An analogous situation exists in many other areas, of which water law is perhaps the best known example; the courts in water cases solemnly declare that one acquires only a right to make a beneficial and non-wasteful use, but in fact even quite profligate uses are hardly ever enjoined.[4]

The FPC proposal marks an attempt to find a practical way to implement the traditional, but largely inoperative, theory of resource reallocation. Whether it will succeed remains to be seen; if it does, a model will be provided for some sweeping changes in the disposition of public resources. It therefore seems appropriate to indicate why the FPC proposal may succeed where other attempts to limit private proprietorship in public resources have failed, and to suggest some reasons for thinking that it ought to be given a chance to succeed.

The trouble with traditional attempts to restrict private rights in

3. Center for the Study of Democratic Institutions, Broadcasting and Government Regulation in a Free Society 6 (1956).

4. D. Haber & S. Bergen, The Law of Water Allocation in the Eastern United States 95-139 (1958); J. Sax, Water Law: Cases and Commentary 129-30 (1965).

public resources was that they utilized a rhetoric of limitation so sweeping that it could not be taken very seriously. The rhetoric implied that the user of public resources was simply a trustee of the public interest whose right was limited to utilizing the resource in conformity with that interest.[5] In this high-sounding scheme the public interest was customarily left undefined. Since that term has no well understood common meaning, the user was presumably left in a situation where he undertook to use a public resource, frequently making a large investment with every expectation of permanence; despite this, in theory a determination could be made at any time that his use was no longer consistent with the public interest, and thereupon the use would be terminated and the entire investment possibly destroyed without any compensation.

It is easy to see why courts have been reluctant to enforce any such scheme. The uncompensated destruction of any substantial economic interest is always strongly resisted;[6] where that destruction is predicated upon a conception as vague as lack of conformity with "the public interest" the reluctance to interfere becomes understandably intense.

The proposed FPC license provision is intriguing precisely because it attempts to strike a middle position between the virtual absence of restrictions on the users of public resources which we have

5. The classic statement in the law of water rights is that "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372 (1964). The following excerpt from an opinion of the Utah Supreme Court is typical of the tone of judicial language used in dealing with this issue: "No water should run to waste. In this arid country it becomes increasingly necessary, as the demand for water use increases, to pay careful attention to the manner of use so as to insure the greatest duty possible for the quantity of water available. Wasteful methods must be discontinued." *In re* Water Rights, 10 Utah 2d 77, 81, 348 P.2d 679, 682 (1960).

The principal exception to this rule is found in the law relating to preferences in water law. While it is provided that a more beneficial use can displace a less beneficial use, full compensation—such as would be required in a condemnation proceeding —must be paid to the displaced party. *E.g.*, Idaho Const. art. 15, § 3; Wyo. Stat. Ann. § 41-3 (1957); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908).

6. It is probably accurate to say that the only widespread exception is the uncompensated recapture of utility easements in the public right of way. *E.g.*, New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453 (1905); City of Macon v. Southern Bell Tel. & Tel. Co., 89 Ga. App. 252, 79 S.E.2d 265 (1953). But there are so many cases which grant compensation that neither result can be said clearly to prevail. *E.g.*, City of Los Angeles v. Los Angeles Gas & Elec. Co., 251 U.S. 32 (1919); City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913); City of Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649 (1912). For a discussion of the navigation servitude problem see Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 Natural Resources J. 1 (1963).

in practice, and the exceedingly broad restrictions which we have in theory. The Commission apparently seeks to be somewhat more restrained in attaching strings to public resource users, and thereby to accomplish more actual control over such uses. There are two basic ways this can be done. One is to set out in a license certain specific limitations, such as a requirement that a certain minimum stream flow be maintained to preserve fish life, or that certain rights of way must be relinquished to the Government on request. The propriety of this sort of restriction has already been rather widely litigated, and the FPC has regularly prevailed.[7]

The second device, now at issue in *Rumford Falls Power Co. v. FPC*,[8] is considerably more ambitious. Rather than attempting to set out in advance those specific future needs which the public interest might be thought to require of the licensee, it accepts the fact that the public interest of the future may bring a number of demands which cannot now be precisely identified. Moreover, it implicitly recognizes that even if one were to try to identify all the potential demands of the future, to demand the licensee's uncompensated subordination to them as a condition of obtaining his license would be to restrict him so severely that a court probably would be unwilling to implement the restrictions, viewing them as indistinguishable from the traditional ineffective restrictions in favor of "the public interest." Thus in *Rumford Falls* the Commission makes room for future demand, but provides that whenever such future demand injures the licensee he is entitled to substantial compensation. Undoubtedly this is calculated to soften the double blow of harsh economic loss and surprise. Under the proposed license provision, a licensee whose uses are adversely affected is at least given the consolation that making way for the future will not require him to bear an out-of-pocket loss.

While this may seem an obvious and even rather simplistic sort of compromise, its significance should not be underestimated. It is one of the very first acts formally recognizing that our traditional restrictions have been largely useless. Thus it is a conscious step away from the widespread practice of disposing of the public re-

7. FPC v. Idaho Power Co., 344 U.S. 17 (1952); Idaho Power Co. v. FPC, 346 F.2d 956 (9th Cir. 1965), *cert. denied*, 382 U.S. 957 (1965); California v. FPC, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965); *cf.* Portland Gen. Elec. Co. v. FPC, 328 F.2d 165 (9th Cir. 1964).

8. 355 F.2d 683 (1st Cir. 1966), on remand Rumford Falls Power Co., No. 465-A (F.P.C., Sept. 9, 1966).

source reserve by granting the effective equivalent of fee simple interests.

How much less than a fee simple the FPC would give its licensees is not certain. Clearly it will not permit the current user to be displaced without payment of some compensation. The precise measure of that compensation remains to be determined, but it seems that the Commission contemplates payment of something less than would be required as just compensation if the user had the equivalent of a full fee simple interest. As a minimum, it requires only "that the licensee at least be made whole for any damages or expenses which the joint use causes him to incur."[9] The FPC's notion seems to be that upon reallocation a present user should be entitled as of right to no more than a return of his actual expenditure, as opposed to what he—as a fee owner—might have been able to extract from a buyer in the marketplace.

If this is what the FPC has in mind, it is a most interesting compromise. It says to one who undertakes to use a public resource that he will have at least this protection for his proposed investment: while he is using the public resource he will be enabled to produce a reasonable return of current income on his investment; if the Government decides to displace him, he will be assured a full return of his actual dollar outlay. On the other hand, it seems clearly intended that he will not be *entitled* to receive the full market value of the public resource.[10]

If such a scheme works, it will permit the public to secure for itself the benefit of enhanced opportunities to have the resource reallocated to uses thought to be more desirable at a forced reduction in

9. Rumford Falls Power Co., No. 465-A at 4 (F.P.C., Sept. 9, 1966). It is contemplated that something more than this minimum would in some circumstances be appropriate. The example the Commission gives is "when an electric utility proposes to use another utility's project reservoir for cooling water for a steam-electric plant. Such use could result in considerable savings to the joint user. It seems doubtful to us that the joint user should be the exclusive beneficiary of the savings. We believe that he might properly be required to make a payment in addition to the licensee's damages and expenses." *Id.* at 5. But there is clearly no notion that in every case damages equivalent to those required in eminent domain law would be paid the licensee.

10. In speaking of compensation, there may appear to be confusion as to whether the licensee is to be reimbursed for the value of his structures and project works, or for the market value of the water resource. The license provision speaks in terms of the works and structures, but it should be understood that as a practical matter the market value of these interests commonly reflects their proximity to, or right to the use of, the public resource involved. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 Mich. L. Rev. 13 (1965).

reallocation cost. Clearly the lower the cost of change, the greater the number of potential users who will be in a position realistically to apply for joint use; surely enlarging the available alternatives in this way produces a desirable public benefit. At the same time the public encourages private users to utilize resources by giving them the opportunity to produce current income from the use of the resource and guaranteeing them against loss of their investment. The net result, hopefully, is adequate incentive to promote use without undue constraint of changes in use as public needs change.

To the extent that the preceding is an accurate appraisal of the FPC plan, it seems an ingenious and useful attempt to mediate practicably between the traditional giveaway of the public domain and visionary attempts to promote private investment with the promise of nothing more than some vague sort of license revocable at the will of the state. It is an experiment well worth watching.

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