Instream Flows and the Federal Power Act: Conflicts Between State and Federal Jurisdiction Over Water Allocation

by Jennifer Lucas

In the evolution of laws governing water rights, Congress has long recognized state sovereignty. Before many western states had entered the Union, Congress deferred to developing local customs. In an 1879 Supreme Court decision, the Court noted that local water appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect."[1] The western settlers realized early on that the eastern doctrine of riparian rights would not allow for the adequate allocation of scarce resources in an arid region. Thus a system of prior appropriation, or "first in time, first in right," rapidly emerged. While some states discarded the riparian doctrine entirely, states such as California have incorporated both riparian and prior appropriation schemes into their water law framework. State systems for allocation of water have developed over time to serve the particular needs of various localities, and Congress has traditionally respected the superior ability of a state to manage its resources.[2]

The federal government, however, has authority to exercise its powers in certain instances. The commerce clause gives Congress the power to regulate interstate commerce, which includes regulation of all navigable waters of the United States. In addition, Congress has jurisdiction over non-navigable waters adjoining navigable waters, insofar as the non-navigable waterway affects interstate commerce. Congress has extended this navigation power to include activities involving flood control, hydroelectric power generation, and irrigation. Congress retains the authority to preempt, or displace, state law in order to achieve goals served by these activities.

The federal government has played an important role in the development of water resources in the western states. Two major programs of development have been the irrigation systems authorized under the Reclamation Act of 1902[3] and the hydropower licensing program authorized by the Federal Water Power Act of 1920.[4] Now known as the Federal Power Act (FPA), the Federal Water Power Act was enacted for the purpose of providing a comprehensive framework for hydropower development. Conservationists lobbied strongly for the FPA, seeking to prevent a small number of corporations from controlling the entire hydropower industry. They desired a regulatory scheme which would balance the conflicting interests of navigation, irrigation, recreation, wildlife preservation, hydropower generation, and flood control.

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As a means of regulating the industry which gave rise to the Act, the FPA authorized the creation of an independent agency to oversee the licensing of private hydropower projects. This agency, the Federal Energy Regulatory Commission (FERC), formerly the Federal Power Commission, has jurisdiction over any privately owned and operated hydropower facility placed on or affecting navigable waters, public lands, or federal reservations. Facilities on non-navigable waters may also

be subject to federal licensing if FERC determines that interstate or foreign commerce would be affected. Federally owned and operated hydropower facilities are left to control by the Secretary of the Interior, as provided in the Reclamation Act.[5]

Although not usually considered to be a statute of great environmental significance,[6] the FPA has had a considerable effect on river systems. Hydropower projects require the diversion of water from its natural course, which causes marked deviations in the temperature and chemical composition of the water, and can dramatically affect fish and wildlife populations. Dams can also obstruct the migratory path of anadromous fish, such as salmon, which swim upstream from the sea in order to spawn.

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The role of the states in controlling the hydropower development of their rivers, thereby protecting fish and wildlife, is not clear. While the comprehensive nature of the FPA might appear to preempt state regulation of hydropower projects entirely, two provisions in the Act suggest otherwise. Section 9(b) of the FPA requires FERC license applicants to submit "satisfactory evidence" of compliance with state law regarding "the appropriation, diversion, and use of water for power purposes."[7] Section 27 mandates "[t]hat nothing herein contained [in the Act] 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 diversion of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[8] The author of section 27 took this language directly from a provision in the Reclamation Act which serves the same purpose of protecting state law.[9] That provision, section 8, requires the Secretary of the Interior to acquire water rights in accordance with state law and also to comply with state conditions unless they are inconsistent with the goals of the Act.[10]

The subject at issue in cases involving section 9(b) and section 27 of the FPA is not whether the federal government has the power to preempt state law in the name of navigation, for it clearly does. Rather, the question is to what extent Congress has chosen to use this power. The above provisions seem to indicate that the federal government did not intend to encroach upon state law for the purpose of hydropower development. Moreover, until 1946 the Federal Power Commission read the FPA as requiring licensees to comply with state laws.[11] The judicial history of section 27 since that time, however, has supplied quite a different interpretation.

THE PRECEDENT OF *FIRST IOWA*

In 1946, the U.S. Supreme Court decided a case which would become extremely influential in the area of hydropower development under the FPA. The case of *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*[12] involved a proposal for a large hydropower project on the Cedar River in Iowa. The project plan called for the diversion of nearly the entire flow of the river from its natural destination, the Iowa River, to a generator on the Mississippi River eight miles away. The Federal Power Commission (FPC) dismissed the application for the project's licensing because First Iowa had not fulfilled section 9(b) of the FPA, which requires a licensee to submit "satisfactory evidence" of compliance with state laws relating to the project.[13] First Iowa claimed that to try to obtain the necessary permit under Iowa State law would be futile because of a restriction providing that water diverted from a stream

in connection with a project be "returned thereto at the nearest practicable place."[14]

The Court of Appeals for the District of Columbia upheld the Commission's decision, reasoning that the FPA provided for the joint participation of federal and state agencies in the development and regulation of hydropower projects.[15] The Court flatly rejected the argument that section 9(b) did not explicitly require a licensee to show proof of compliance with state law.[16] The Supreme Court then granted certiorari to review the decision of the Court of Appeals, and reversed on the basis that such an interpretation of section 9(b) would vest the State with veto power over federal projects. The Court feared that states could use this veto power to undermine the comprehensive planning role which Congress had intended for the FPC. The Court ignored the fact that the FPC had required its licensees to comply with state law since the enactment of the FPA, and declared that a dual system of control in which federal and state agencies shared in the determination of the same issue would be "difficult," if not "impossible."[17]

Relying on this policy conclusion,[18] the Court held that Congress could not have meant section 9(b) to require compliance with state law.[19] Instead, the "satisfactory evidence" requirement of section 9(b) serves as an informational requirement only, enabling the FPC to secure facts which it deems relevant to its licensing decision.[20]

Although the meaning of section 9(b) of the Act was the primary issue in this case, the Court also examined section 27 to support its holding of section 9(b). The Court, in defining section 27 as a "'saving' clause"[21] for states' rights, actually narrowed its meaning considerably. Without providing any basis for its conclusion, the Court opined that section 27 protects only those state rights which are proprietary in nature.[22] The Court further limited the scope of section 27 when it maintained that the section's broad language, "...irrigation or for municipal or other uses...,"[23] was "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."[24]

While the First Iowa case narrowed the scope of section 27, it did not clearly establish its meaning. The Court did not define whether section 27 "saves" certain state laws from federal preemption completely, or only insofar as they do not conflict with federal objectives. The Court's ruling offers little guidance to other cases because of a lack of substantive rationale. Yet, ironically, the *First Iowa* case has become the definitive source for matters regarding the meaning of section 27.[25]

A DIFFERENT VIEW OF FEDERAL PREEMPTIVE POWERS

The ambiguity of the *First Iowa* Court's rationale has led other cases to cite *First Iowa* as their precedent, while coming to rather different conclusions as to the meaning of section 27. An example of such a case is *Federal Power Commission v. Niagara Mohawk Power Corp.*,[26] a 1954 Supreme Court decision which determined whether certain riparian rights valid under New York State law were preempted by the FPA. The Supreme Court affirmed a District of Columbia Court of Appeals decision which held that the state rights at issue had not been preempted by the FPA.

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The Supreme Court expanded section 27 to provide protection for riparian rights to the use of water for power purposes. The Court stated that its ruling was consistent with First Iowa because the language used in that case regarding the protection of proprietary rights "is applicable to proprietary water rights for power purposes

as well as those for other proprietary uses."[27] Thus, the *Niagara* Court deviated from the *First Iowa* Court's definition of "other uses," and expanded it to include power uses as well. In relaxing the *First Iowa* Court's standard, the *Niagara* Court's decision implies that section 27 is applicable to all proprietary rights, not merely those rights which serve uses "of the same nature" as irrigation or municipal uses. Thus, while the Supreme Court in *F.P.C. v. Niagara Mohawk* claimed to uphold its decision in *First Iowa*, it actually provided an expanded reading of section 27.

CALIFORNIA V. UNITED STATES: AN IMPLICIT OVERRULING OF *FIRST IOWA*?

The 1978 case of *California v. United States* (New Melones)[28] examined the meaning of section 8 of the Reclamation Act. Since the two savings provisions in the Federal Power Act and in the Reclamation Act are very similar in language and purpose, states' rights advocates hoped that the Court's recognition of state law in California v. United States implied a change in the Court's position on section 27, as well.[29]

In this case, the Court considered the issue of whether the U.S. Bureau of Reclamation (the Bureau) held power to preempt state laws relating to the appropriation of water for a reclamation project. The Bureau originally applied for permits from the California State Water Resources Control Board (SWRCB) to appropriate water that would be impounded by the New Melones Dam on the Stanislaus River. SWRCB approved the application, but attached a number of conditions. Some of these conditions required minimum and maximum releases of water from the Dam and other measures to protect fish and wildlife.[30] The United States then brought suit in the U.S. District Court on grounds that the federal government held the power to impound whatever unappropriated water was necessary for a federal project without deferring to state law. The District Court held that, while the federal government must apply to SWRCB as a matter of comity, SWRCB was obligated to issue the permit unconditionally if sufficient unappropriated water were available.[31]

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's decision, but made one distinction. The Appeals Court upheld the lower court's judgment that SWRCB could not condition the permit, but stated that section 8 of the Reclamation Act, rather than comity, required the U.S. Bureau to apply for state permits.[32] The Supreme Court reversed and remanded the case after finding that under section 8, a state could impose a condition on a permit if the condition was not inconsistent with congressional directives relating to the project.

In framing its decision, the Supreme Court considered at length the relationship between federal and state water regulation. It noted that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."[33] After examining both the language of section 8 and congressional intent relating to its enactment, the Court determined that section 8 reserves state control over two important aspects. First, the Secretary must comply with state law when appropriating, purchasing, or condemning necessary water rights for a project. Second, once the water is released from the dam, state law controls its distribution. The Court maintained that to conclude otherwise would "trivialize the broad language and purpose of section 8."[34]

Several previous decisions, in which the Court had given narrow readings of

section 8, confronted the Court in *California v. United States.* Yet the Court dismissed these readings as dicta since they had not been essential to the determination of the issue in those cases.[35] The Court instead upheld the State's argument that under section 8, the State could impose any condition which was not "inconsistent with clear congressional directives respecting the project."[36]

CALIFORNIA V. FERC

In 1990, a unanimous Supreme Court decision destroyed any hope that the Court would overrule *First Iowa* in light of its holding in *California v. United States.* The importance of this decision's outcome to not only California, but other states as well, is shown by the action of 43 states to support California's position in an *amicus curiae* brief.[37] The Court disappointed the states, however, and denied them the power under section 27 to condition a federal permit.

The case which upheld *First Iowa, California v. Federal Energy Regulatory Commission (Rock Creek),* concerned a hydroelectric project located near the confluence of the South Fork of the American River and one of its tributaries, Rock Creek. The Rock Creek project diverts water from the creek to run its generators, and then releases it nearly one mile downstream. In 1983, FERC issued a license for the operation of the project. Obligated to consider both economic feasibility and the environmental impacts of the project, FERC required the licensee to maintain interim flow rates of 11 cubic feet per second (cfs) during the summer months and 15 cfs for the remainder of the year for the bypassed section of the river.[38] FERC also required the licensee to consult with federal and state fish and wildlife protection agencies, and then to recommend permanent flow rates.

The licensee had also applied for state water permits, and in 1984 SWRCB issued a permit which incorporated FERC's interim rates but which reserved the right to set different permanent rates. SWRCB commissioned a study showing that the FERC rates would significantly harm the fish habitat in Rock Creek, and that higher rates (60 and 30 cfs, respectively) would better protect the adult, juvenile, and spawning trout. After SWRCB considered a draft order requiring the flows recommended in the study, FERC issued an order declaring its sole jurisdiction over the determination of the project's flow requirements. Administrative hearings resulted in the adoption of a minimum flow requirement of 20 cfs year-round. After exhausting its administrative remedies, SWRCB appealed to the Ninth Circuit Court, which affirmed FERC's order. The Supreme Court granted certiorari to review the case, and then affirmed, based on the meaning of section 27 given in *First Iowa.*

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The Court admitted that "[w]ere this a case of first impression, [the State's] argument based on the statute's language could be said to present a close question."[39] The Court further conceded that California's minimum flow requirements could be thought to relate to "the control, appropriation, use, or distribution of water used...for...other uses."[40] Yet the Court declined to judge the case on its merits, concluding that the matter had already been decided in *First Iowa.* [41] The Court justified its actions by explaining that it must defer to "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes"[42] and also by reasoning that "the legislative power is implicated, and Congress remains free to alter what we have done."[43] In light of this determination, section 27 could not

protect SWRCB's minimum flow requirements because they were neither "proprietary rights" nor "rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."[44]

Although the Court acknowledged "some tension"[45] between the holdings in *California v. United States* and *First Iowa,* it dismissed this concern by differentiating between section 8 of the Reclamation Act and section 27 of the Federal Power Act. It relied on small differences in the language of the two provisions and on the argument that the FPA provided for a "broader and more active federal oversight role,"[46] and therefore more control, than did the Reclamation Act. The Court also minimized the importance of legislative history, because of its "tangential relation" to the issue at hand.[47]

In the *Rock Creek* case, the Court faced many of the same questions as in the *New Melones* case, but emerged with a completely different ruling. While the *New Melones* Court disavowed previous decisions as dicta, the *Rock Creek* Court adhered to precedent. The *New Melones* Court dealt thoroughly with legislative history, whereas both the *First Iowa* Court and the *Rock Creek* Court gave the subject little attention. Lastly, the *New Melones* Court considered its decision's affect on state water allocation and management, and the *Rock Creek* Court did not. The *Rock Creek* Court having made clear its unwillingness to disturb *First Iowa*, the states would have to look to Congress for any further resolution.

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AMENDMENTS TO THE FEDERAL POWER ACT

Both before and after the *Rock Creek* decision, environmentalists, state water agencies, and legislators have repeatedly attempted to amend the FPA. In 1983, the Western States Water Council, composed of 12 states, proposed an alteration of the language in section in section 9(b) and section 27 which would have explicitly prohibited the preemption of state water law.[48] A new subsection of section 27 would require licensees to follow "State statutory law, decisional law, and regulations governing the appropriation, diversion, and use of water."[49]

In response to this and other such proposals which indicated wide discontentment with FERC's broad authority, the Senate Committee on Energy and Natural Resources agreed to hold a hearing on the subject.[50] A Montana state official urged the Congress to "examine and resolve the many problems caused by the Supreme Court's misinterpretation of the Federal Power Act in *First Iowa* ."[51] At a separate hearing before the House Subcommittee on Energy Conservation and Power, environmental groups called for greater deference to state law in cases where the states have "established instream flow requirements to protect recognized natural and cultural values."[52]

The outcome of these proceedings was the passage of the Electric Consumer Protection Act of 1986 (ECPA).[53] The ECPA amended the Federal Power Act by adding several provisions for the protection of fish and wildlife. The ECPA requires FERC to consider the "adequate protection, mitigation, and enhancement of fish and wildlife," along with other relevant factors, before issuing a license.[54] Section 10(j) requires FERC to consult with state and federal fish and wildlife agencies in the licensing process.[55] FERC retains the authority to ignore the recommendations of these agencies, but only after publishing a

finding that (i) the recommendations conflict with the purposes of the Act or other law, and (ii) FERC has complied with the conditions of section 10(j) insofar as they do not conflict.[56]

While these provisions increase the demands placed on FERC to consider fish and wildlife protection, the agency still retains its autonomy in making such determinations. Rather than vesting state agencies with more authority outright, the provisions increase FERC's accountability by widening opportunities to contest its discretionary judgment regarding adequate consideration of fish and wildlife. Thus while it seems clear that Congress is concerned about the effects of FERC licensing decisions on the States, it is currently unwilling to go so far as to explicitly prohibit federal preemption of state water law. The outlook for the States appears bleak in this regard, for both the Supreme Court and Congress have declined to take action which would, in the minds of many, firmly put the matter to rest.

CONFLICTS ON THE HORIZON

While some criticize the Supreme Court for its misinterpretation of section 27 in *First Iowa,* and blame both the Court and Congress for letting the decision stand, others question the necessity of providing states with more control over hydropower licensing.[57] They point out that in addition to several provisions of the FPA, which require FERC to consider environmental impacts,[58] there are also several major environmental statutes with which FERC must comply. FERC is obligated to satisfy the environmental impact statement requirement of the National Environmental Policy Act.[59] When applicable, the Endangered Species Act,[60] the Wild and Scenic Rivers Act,[61] and the Fish and Wildlife Coordination Act[62] place additional restraints on FERC's licensing decisions.

Nevertheless, the current interpretation of section 27 provides several obstacles to the effective management of water resources. Although the purpose of the Federal Power Act was to provide a comprehensive planning scheme for hydropower development, in reality it considers applications on a case by case basis.[63] Many states, on the other hand, have realized the importance of watershed planning and have developed allocative systems which take into consideration the cumulative effects of many different appropriators. Thus, with little protection for states' rights under section 27, the FPA has considerable power to interfere with state regulatory systems for water allocation.[64]

Two trends are likely to aggravate this conflict. The activity of the federal government in the licensing of private hydropower facilities has increased dramatically in the last decade. From 1920 to 1980, FERC approved approximately 2,000 license applications.[65] During the period from 1980 to 1990, FERC granted the same number of licenses as it had during the previous sixty years combined, with a total of 7,000 applications submitted.[66]

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At the same time, state environmental regulation has evolved in a way unforeseen by the authors of the FPA. Currently, 16 of the 19 western states have established instream flow requirements.[67] As states continue to give greater consideration to fish and wildlife values, FERC's "power first/fish last"[68] policies will provide increasing resistance.

In addition, the discrepancy between section 8 of the Reclamation Act and section 27 of the Federal Power Act will pose

logistical problems to state water allocation schemes. Roderick Walston, counsel for the state in both *California v. United States* and *California v. FERC,* provides an example of a situation likely to arise in the future.[69] He hypothesizes three appropriators on the same stretch of river: a municipal appropriator which diverts water to a nearby urban area; the U.S. Bureau of Reclamation, which diverts water for irrigation purposes; and, downstream, a private owner which diverts water to generate hydroelectric power. If the state decides to increase instream flow to protect a fish habitat, it will require the municipal appropriator to divert less water. In light of *California v. United States,* the state will be able to require compliance by the U.S. Bureau of Reclamation, as well. However, given the holding in *California v. FERC,* the state will not be able to impose the same conditions on the hydropower project operator. Rather, the downstream appropriator could conceivably divert the additional water which the state intended for instream use, defeating the purpose of the state's restrictions on the two upstream appropriators. The state can only hope that FERC shares in its desire to protect the resource, and that FERC will condition the licensee's permit in order to achieve that goal.

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A recent development in reclamation law will add to the frustration of SWRCB's efforts to coordinate different water uses. The Central Valley Improvement Act (Title 34)[70] reforms the Central Valley Project, requiring the CVP to comply with all state laws and SWRCB regulations. The Act elevates fish and wildlife concerns to the same priority level as agricultural interests, and stipulates that an annual amount of 800,000 acre feet of project water will serve the "primary purpose" of achieving environmental goals.[71] Although title 34 represents a victory for state environmental interests, but it also compounds the problem of the state's inability to coordinate planning between users.

CONCLUSIONS

It might seem clear from the judicial history of cases involving section 27 of the Federal Power Act that the Court is very clear on its position regarding the role of the states in hydropower licensing. It has repeatedly acknowledged and upheld the holding in *First Iowa* that section 27 protects only proprietary rights. Yet in the *First Iowa* decision, the Court seems to have molded section 27 to satisfy its policy goals rather than relying on an examination of the section's language and purpose to determine its holding. The lack of rationale supporting the *First Iowa* Court's decision provides a vague picture at best of the Court's stance on section 27, an issue which was not of primary concern in the case. And although the *Niagara Mohawk* Court claimed to be invoking *First Iowa* in support of its rationale, the Court's interpretation of section 27 differed greatly from the meaning given in *First Iowa.*

In 1990, the Supreme Court declined to disturb its earlier holding, denying the opportunity to address subsequent decisions involving section 27 and to clarify the provision's full meaning and scope. Congress has also avoided amending the language of the provision to supply an explicit preservation of state water law.

As FERC project licenses come up for renewal, they will be treated as new applications for licensing.[72] Therefore, the Court's position on section 27, which will apply to the new permit, is of considerable importance to the states. If the current interpretation holds, states will not possess

the authority to condition FERC licenses to require compliance with state environmental regulations. A change in section 27's ability to protect the integrity of state water law and management practices would allow the states to better protect fish and wildlife resources affected by FERC licensed projects. The current administration and Congress should work towards a more balanced approach to regulation of water allocation in the future.

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ENDNOTES

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2. *California v. United States*, 438 U.S. 647, 667 (1978).
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4. Federal Water Power Act, 16 U.S.C. §§791(a)-793, 795-818, 820-825(r)(1982).
5. 43 U.S.C. §§371, 383.
6. Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows after* California v. Federal Energy Regulatory Commission, 21 Envtl. L. 113 (1991).
7. Federal Power Act §9(b), 16 U.S.C. §802(b).
8. Federal Power Act §27, 16 U.S.C. §821.
9. Blumm, *supra* note 6, at 117.
10. *Id.*
11. *Id.* at 118.
12. 328 U.S. 152 (1946).
13. Federal Power Act §9(b), 16 U.S.C. §802(b).
14. 363 Iowa State Code §7771.
15. 151 F.2d. 20 (1945).
16. *Id.* at 30.
17. 328 U.S. 168.
18. Frederic A. Randall, Jr., Note, *States' Rights in Hydroelectric Development: The Interrelation Between California Water Law and Section 27 of the Federal Power Act*, 18 U. S. F. L. REV. 535, 550 (1984).
19. 328 U.S. 179.
20. *Id.* at 169.
21. *Id.* at 175.
22. *Id.*
23. Federal Power Act §27, 16 U.S.C. §821.
24. 328 U.S. 176.
25. Randall, *supra* note 18, at 537.
26. 347 U.S. 239 (1954).
27. *Id.* at 256.
28. 438 U.S. 645 (1978).
29. Blumm, *supra* note 6, at 121.
30. *Id.* at 652.
31. 403 F. Supp. 874.
32. 558 F.2d. 1347.
33. 438 U.S. 653.
34. *Id.* at 675.
35. *Id.* at 673.
36. *Id.* at 672.
37. Thomas J.P. McHenry and John D. Echeverria, California v. FERC: *State Regulation of Federal Hydropower*, 4 Nat. Res. and Envt. 26 (1989-1990).
38. 495 U.S. 494.
39. *Id.* at 497.
40. *Id.*
41. *Id.*
42. *Id.* at 499.
43. *Id.* at 498.
44. *Id.*
45. *Id.* at 504.
46. *Id.*
47. *Id.* at 506.

48. Jill K. Osborne, California v. FERC: *Federal Supremacy in Hydroelectric Power Continues,* 80 KY. L. J. 353, 360 (1990-1991).
49. *Hydroelectric Project Licensing/State Water Law: Hearing Before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources,* 99th Cong., 2nd. Sess. 27-28 (1986).
50. Osborne, *supra* note 47, at 361.
51. *Id.* at 362.
52. *Id.*
53. *Id.* at 361.
54. 16 U.S.C. §803(a).
55. Federal Power Act §10(j), 16 U.S.C. §803(j).
56. Osborne, *supra* note 47, at 363.
57. Blumm, *supra,* note 6, at 128.
58. *Id.*
59. National Environmental Policy Act, 42 U.S.C. §§4331-44.
60. Endangered Species Act, 16 U.S.C. §§1531-43 (1982).
61. Wild and Scenic Rivers Act, 16 U.S.C. §§1271-87.
62. Fish and Wildlife Coordination Act, 16 U.S.C. §§661-666c.
63. Randall, *supra* note 18, at 535.
64. McHenry and Echeverria, *supra* note 37, at 26.
65. *Id.* at 27.
66. *Id.*
67. *Id.*
68. Osborne, *supra* note 47, at 362.
69. Roderick E. Walston, California v. Federal Energy Regulatory Commission: *New Roadblock to State Water Rights Administration,* 21 Envtl. L. 89, 105 (1991).
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