

Case Note -- *State of California v. Federal Energy Regulatory Commission*: Should State or Federal Law Control the Water Rights of Hydropower Plants?

by Donna Neville and Jeffery Swanson

INTRODUCTION

This term the United States Supreme Court will decide whether state agencies or the federal government should determine the amount of water diverted from a free-flowing stream to serve the needs of privately-owned hydropower plants. Since 1920, the federal government has had express authority to issue licenses for the construction and operation of hydropower plants. However, there is a question as to whether state or federal law governs the water rights of these federally-licensed operations. Because of this uncertainty, the federal government (acting through the Federal Energy Regulatory Commission (FERC)) and state agencies share an uneasy balance of power in granting water rights to hydropower plants.

The Supreme Court will remove this uncertainty when it hands down its decision in *State of California v. Federal Energy Regulatory Commission*, 877 F.2d 743 (9th Cir. 1989), *cert. granted*, No. 89-333. Regardless of how the Court rules, *California v. FERC* is likely to have dramatic environmental and economic consequences in the western states. Placing control of the disputed water rights in the hands of the federal government will result in inconsistent adjudication of water rights in the same river. If the Court rules that FERC has the authority to determine the water rights of hydropower plants, these plants will be exempt from state laws that apply to all other water users along the same stream. This inconsistency will severely undermine states abilities to monitor and control water quality, to maintain fishery habitats, or to provide recreational resources.

In addition, federal control over water rights will interfere with the states' autonomy in issuing water permits. Particularly in the western states, where water is scarce, state water boards issue per-

mits based on whether the intended use will benefit the public interest. Placing control in the hands of the federal government will impede the ability of states to allocate water rights in a way that protects their environmental and economic interests.

Those in favor of federal control over the disputed water rights urge that state control encumbers the process of building hydropower plants. If prospective operators of hydropower plants must first apply to FERC for a construction permit and then to the state water board for a water use permit, it will take longer to make a plant fully operational than if FERC had sole authority. In addition, proponents of federal control argue that the recently enacted Electricity Consumer Protection Act (1986) requires the federal government to consider the environmental impact of electricity development. Thus, they suggest that the state's own examination of environmental impacts would be cumulative and irrelevant. This change in the law is fairly recent, however, and it is difficult to predict how seriously an agency long-schooled in the tradition of power development will treat environmental issues.

CALIFORNIA V. FERC

A. The Facts Behind the Dispute

The present dispute arose when a small, private business, the Rock Creek Limited Partnership, submitted plans to FERC to construct a hydropower project on the South Fork of the American River. See *California v. FERC*, 877 F.2d 743 (9th Cir. 1989). The project involved building a diversion dam on Rock Creek, a small tributary of the South Fork of the American River, about a mile upstream from the creek's confluence with the American River. The dam diverts water through a tunnel into a powerhouse with the capacity to generate about 7,000

megawatt-hours of electricity per year. After passing through the powerhouse, the diverted water empties into the American River about a mile downstream. Water not diverted to the powerplant continues to flow in its natural course in Rock Creek. Pacific Gas & Electric Corporation planned to purchase the generated power.

Rock Creek Ltd. submitted its project proposal to FERC on June 1, 1982. FERC approved the project and issued a license for construction and operation on April 29, 1983. Article 37 of this license mandated that Rock Creek Ltd. maintain an initial minimum flow rate between the point of diversion and the creek's confluence with the South Fork of eleven cubic feet per second (cfs) from May to September, and fifteen cfs from October through April. These minimum flow rates would remain in effect until Rock Creek Ltd. satisfied Article 38 of the license, which required the partnership to conduct long-term minimum flow rate studies with the California Department of Fish and Game (DFG).

In February, 1984, the California State Water Resources Control Board (WRCB) issued two permits to Rock Creek Ltd. for water appropriation. These permits adopted the minimum flow rates previously established by FERC. Significantly, the WRCB expressly reserved jurisdiction to establish permanent minimum flow rates after Rock Creek Ltd. completed its studies in cooperation with the Department of Fish and Game. In reserving jurisdiction, WRCB noted that Rock Creek is as an important source of adult trout for the American River.

In July, 1986, Rock Creek Ltd. petitioned FERC for a declaratory order stating that FERC had exclusive jurisdiction to establish permanent minimum flow rates. Not surprisingly, FERC found that FERC should have the final say in determining minimum flow rates. In issuing the declaratory order, FERC relied on section 10(a) of the Federal Power Act,¹ which states that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's planning and licensing process." 38 FERC ¶ 61,240 (1987) In addition, FERC relied on the Supreme Court's holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n.*, 328 U.S. 152 (1946), to support its position. FERC relied on *First Iowa* for the proposition that the Federal Power Commission's² licensure of a dam on a navigable river preempted objections to the project based on state

law (see discussion below).

Just a few days after FERC issued the declaratory order, the WRCB amended its permits based on the DFG's completion of the fishery studies. Based on the DFG's findings, WRCB increased the minimum flow rates to permanent levels of sixty cfs from March through June and thirty cfs from July through February. In issuing the order amending the permits, WRCB stated that *First Iowa* was not controlling, and that WRCB had "jurisdiction . . . to regulate the Rock Creek Project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by FERC." WRCB Order WR 87-2 (1987). The State of California, acting on behalf of WRCB, asked FERC to rehear its declaratory order, but FERC denied the rehearing.

B. The 9th Circuit's Review

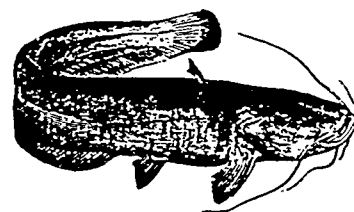
Having exhausted all available administrative remedies, the State of California filed a petition with the 9th Circuit. *State of California ex rel. State Water Resources Board v. FERC*, 877 F.2d 743 (1989). California sought review of FERC's declaratory order and the order denying a rehearing. California contended that neither the Federal Power Act nor subsequent case law interpreting that Act gave the federal government authority to preempt state laws concerning water rights or the conditions that can be imposed on the exercise of those rights.

California relied on two central arguments to support this contention. First, California urged that section 27 of the Federal Power Act serves as an anti-preemption provision, requiring projects licensed under the Act to comply with state water rights and usage laws. Section 27 reads in relevant part:

Nothing contained in this chapter 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 water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Federal Power Act § 27, 16 U.S.C.A. § 821.

In addressing the preemption issue posed by



section 27, the court looked first at the statute as a whole. The court stated,

[a]lthough not dispositive of the preemption issue, the statute read in its entirety strongly suggests that Congress intended the Federal Power Act to vest final authority for the regulation of hydroelectric power projects in federal hands. [Many] sections illustrate Congress' intent to preempt the hydro-power field to the exclusion of state controls.

California v. FERC, 877 F.2d at 746-747.

Looking at section 27 in isolation, however, was more problematic for the court. The court stated that section 27's language forestalled the conclusion that the Federal Power Act "manifests a clear congressional intent to preempt state regulations in every aspect of the hydropower domain." *Id.* at 747.

The court noted that section 27's language supports two conflicting readings. One reading limits state authority to water rights involving irrigation, municipal use, and related activities. Under the second reading, the "other uses" language in section 27 suggests that the states have final authority over the control and use of water by a project licensed under the Federal Power Act. This broader interpretation would support California's belief that states, not the federal government, have the final say in establishing minimum flow rates. Unable to resolve what they saw as an inherent ambiguity in the statute, the court turned to case law to resolve their dilemma.

The State of California argued that *California v. United States*, 438 U.S. 645 (1978), was determinative of the preemption issue. In *California v. United States*, the federal government sought to impound water

from the Stanislaus River as part of the Central Valley Project. The WRCB ruled that the water could not be allocated to the government unless it complied with various conditions imposed on the water's use. The federal government sought a declaratory judgment in the District Court, in effect allowing the government to impound whatever unappropriated water necessary for the federal reclamation project. The District Court denied the declaratory judgment and ordered the federal government to comply with the state's requirements as a matter of comity. The court also held that the state must issue the permit without imposing any conditions on its use if unappropriated water is available.

On appeal, the 9th Circuit affirmed *California v. United States*, but on different grounds. The 9th Circuit held that Section 8 of the Reclamation Act of 1902 required the federal government to apply for use permits. Section 8 of the Reclamation Act of 1902 reads in relevant part:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to use of water ac-



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quired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C. § 371.

The Supreme Court granted certiorari to review the 9th Circuit's decision in *California v. United States* with respect to that part of the court's holding that California could not impose use conditions on the water it allocated to federal reclamation projects. In making its determination, the Supreme Court paid exacting attention to the legislative history of the Reclamation Act and to a series of cases interpreting Section 8.

In an important footnote to the case, the Supreme Court stated that,

[i]n previous cases interpreting § 8 of the Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary. . . . We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. Whatever the intent of Congress with respect to state control over the distribution of water, however, Congress in the 1902 Act intended to follow state law as to the appropriation of water and condemnation of water rights.

California v. United States, 438 U.S. at 668-669, n.21.

The Supreme Court in *California v. United States* held that, absent clear Congressional intent to the contrary, state law controls in determining water rights. The Court's motive was to force Congress to be more explicit in wording the 1902 Act. In addition, the *California v. United States* decision, written by then Justice Rehnquist, was an attempt to give the states greater local control and to weaken the power of federal administrative agencies.

FERC argued to the 9th Circuit that *California v. United States* was irrelevant to its declaratory order because the case dealt with an interpretation of the Reclamation Act rather than the Federal Power Act. Instead, FERC relied on *First Iowa*, 328 U.S. 152 (1946), as the definitive case interpreting the Federal Power Act.

In *First Iowa*, a hydropower project applied for, and received, a license to build a dam and a diversion

canal on the Cedar River, a tributary of the Iowa River. The Federal Power Commission, under authority of the Federal Power Act, granted the construction license even though the project would divert all but 25 cfs of the river's flow. The state of Iowa objected to the project on the ground that it did not comply with state permitting requirements. Iowa sought to require that the diverted water be returned to the Cedar River at the nearest practicable place. The U.S. Supreme Court held that requiring the hydropower project to meet state permit requirements, in effect, would give the state veto power over a federal project not in compliance with state law. The Court stated that this would frustrate the Federal Power Act's purpose of comprehensive nationwide planning.

In deciding the case, the Supreme Court interpreted section 9(b) of the Federal Power Act,³ which is not at issue in the present case. In interpreting that section, however, the Court analyzed the Federal Power Act as a whole to determine Congress' intent on the question of preemption. The Court reasoned that the express provisions of the Act demonstrate Congress' intent to concentrate comprehensive planning authority in the hands of the Federal Power Commission. The Court consequently disapproved the argument that the proposed project must conform to a state statute dealing with permit terms and conditions. Instead, the Court ruled that there is a separation of authority between the federal government and the states over various aspects of hydropower regulation. When the federal government takes jurisdiction over "waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. at 170. The Court concluded that "[t]he detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181.

FERC argued that *First Iowa* controlled interpretation of section 27. The Court in *First Iowa* stated that section 27 served only to delineate the state's specific sphere of authority. Thus, FERC believed that the Federal Power Act authorized it to impose minimum flow requirements and ignore California's minimum requirements, since it believed that the determination of flow requirements was outside of California's authority and conflicted with the federal plan for the project.

California argued that the decision in *California v. United States*, which dealt with section 8 of the Reclamation Act of 1902, controlled interpretation of section 27 of the Federal Power Act. The state argued that since section 8 predates section 27, and since section 8 was a drafting model for section 27, any decision interpreting the former would apply equally to the latter. In addition, California asserted that *California v. United States* overruled the decision in *First Iowa*, thus giving the state the authority to establish minimum flow requirements on the Rock Creek project.

The 9th Circuit Court of Appeal rejected California's argument that *California v. United States* required state control of water resources, and found *First Iowa* dispositive. The 9th Circuit further rejected California's argument that the Supreme Court's interpretation of the Reclamation Act of 1902 in *California v. United States* effectively overruled the interpretation of section 27 of the Federal Power Act in *First Iowa*. In its conclusion, the 9th Circuit stated that *First Iowa* convinced them that "Congress intended to vest regulatory control in FERC over most aspects of hydropower plants." *California v. FERC*, 877 F.2d at 750.

Based on this conclusion, the court found that only control of certain limited proprietary rights remained under state control. Further, the court

found that the WRCB's laws at issue were in direct conflict with congressional directives expressed in the Federal Power Act. Under *First Iowa*, this would make the state's regulations invalid. Consequently, the 9th Circuit determined that the WRCB must yield to FERC and affirmed the Commission's decision to deny a rehearing.

C. The Case Before the Supreme Court

The Supreme Court granted *certiorari* to hear *State of California v. Federal Energy Regulatory Comm'n.* in December, 1989. *State of California v. Federal Energy Regulatory Commission*, 877 F.2d 743 (9th Cir. 1989), *cert. granted*, No. 89-333. The question before the Court is whether the Federal Power Act preempts state regulatory water rights laws otherwise applicable to hydropower projects licensed by FERC, or whether the savings clause of section 27 of the Act precludes such preemption.

California presents six primary points in its brief filed with the Court. First, California asserts that section 27 of the Federal Power Act provides that California law must apply to hydropower plants. California bases this assertion on a facial construction of the statute. The state argues that section 27, in effect, authorizes states to exercise concurrent jurisdiction over federally licensed hydropower projects by requiring that



the projects acquire water rights under state law.

California further argues that the conclusion in *California v. United States* is applicable to the present situation.

If Congress intends that state water laws apply to federal reclamation projects authorized and funded by Congress that serve important national purposes, *a fortiori*, Congress intends that state water laws apply to private hydropower projects operated for profit that serve essentially local purposes.

California v. FERC, Petitioner's Opening Brief at 5.

California next contends that Congress' traditional deference to state water law supports the conclusion that Congress intended to defer to state laws when it enacted section 27. In making this assertion, California relies first on the "equal footing" doctrine. The equal footing doctrine holds that states whose domain is largely federally owned acquire the same interests in water that were retained by the original states. Based on this doctrine, California argues that states have the right to regulate water use and allocation within their borders. The state points out that one of a state's sovereign interests in navigable waters is the right to conserve fish resources for the public's benefit.

California also argues that the "severance" principle supports the contention that Congress intended to defer to state law concerning water rights. In the nineteenth century, Congress enacted several public land statutes that effectively "severed" water from the land, vesting control of the water in the states. California argues that based on this principle, water rights are controlled by state law. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). In addition, California supports its assertion that Congress has traditionally deferred to state law by pointing out that the legislative history surrounding section 27 indicates an intent to defer to state laws.

California's third argument is that the legislative history of the Federal Power Act indicates Congress' intent to require federally-licensed hydropower projects to comply with state water law. The state cites strong language from the Senate and Congressional Records to support its contention. For example, Senator Myers of Montana, Chairman of the Senate Committee on Public Lands, stated:

[The bill] is not intended to interfere with the

ownership and control by the State of [water flowing through public lands]....The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained.

56 Cong. Rec. 10494 (1918).

In its fourth argument, California distinguishes *First Iowa* from the Rock Creek dispute. California argues that the decision in *California v. United States* invalidates the *dictum* in *First Iowa* regarding section 27 and federal preemption over states' rights. The *dictum* in *First Iowa* limited state control over hydropower projects to "proprietary rights." The state points out that this *dictum* was based on the belief that section 8 of the 1902 Reclamation Act, which was the basis for section 27, similarly limited state authority with regard to federal reclamation projects. However, the Supreme Court expressly held in *California v. United States* that section 8 required the federal reclamation projects to fully comply with state law in the "control, appropriation, use, or distribution of water." *California v. United States*, 438 U.S. at 675. California also states that the holding in *First Iowa* is inconsistent with the legislative history behind the Federal Power Act.

California's fifth contention is that there are strong policy justifications for allowing state law to govern the water rights of hydropower plants. California contends that federal preemption would result in inconsistent water rights along the same waterway, which would impair the needs of all users and limit the states' ability to allocate supplies efficiently in times of shortage. Preemption would also interfere with the states' attempts to monitor and maintain acceptable water quality.

Finally, California argues that there is no conflict between state and federal regulation in this case. Section 27 provides that a hydropower project must comply with state laws, unless the laws conflict with clear congressional directives. Cf. *California v. United States*, 438 U.S. at 672, & n. 25. California states that its laws do not conflict with either a congressional directive or the FERC license itself. California granted a permit for the Rock Creek project; thus the project can divert water for its uses and comply with both the state permit and the federal license. This is distinguishable from *First Iowa*, where the state denied the permit altogether.

In response to California's arguments, the Federal Energy Regulatory Commission makes four main arguments. First, FERC states that the question of its authority to license and regulate hydropower projects has been repeatedly decided by the Supreme Court. Relying on *First Iowa*, FERC states that it has the final authority to consider all factors of a federally licensed hydropower project. FERC argues that the "effects of section 27 are to protect vested water rights and to preserve state primacy in the regulation of irrigation, municipal, and other water uses outside FERC's jurisdiction." *California v. FERC*, Brief of Respondent at 5.

FERC's second argument is that the legislative history of the Federal Power Act supports its claim of exclusive jurisdiction to regulate federally licensed hydropower projects. It states that the legislative history relied on by the state was from floor debates over bills never enacted. FERC, instead, points to language extolling the need for a constructive national program under the exclusive authority of the federal agency, free from the conflicting restraints of state laws.

FERC's third argument is that the decision in *California v. United States* does not undercut the decision in *First Iowa*. FERC states that the Reclamation Act does not have the same comprehensive scheme of regulation or broad federal purpose as the Federal Power Act. It argues that the Court's interpretation of the Reclamation Act is inapposite to the current construction of the Federal Power Act.

The final argument put forth by FERC is that the water rights at issue in this case are not within the "savings" language of section 27. Section 27 states that state law will apply to uses of water not relevant to the terms of the Federal Power Act. The laws saved pertain to control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses. FERC points out that California is attempting to regulate the water flows of the hydro-power project to protect fisheries in the stream. It asserts that the need to preserve fisheries is not among the areas of state law protected from preemption by section 27.

CONCLUSION

In deciding *California v. F.E.R.C.*, the Court must interpret federal legislation enacted almost 90 years ago, before water conservation and water quality became crucial issues. In construing the Federal Power

Act, the Court must strike an important balance between states' rights and the need for a comprehensive federal power-production program. Hopefully, the Court will also consider the states' interests in the environment and balance these into its decision.

NOTES

1. 16 U.S.C.A. § 791 et seq. The Federal Power Act was originally entitled the Federal Water Power Act of 1920. It was amended and renamed in 1935. The Act was the first comprehensive federal legislation designed to insure comprehensive nationwide water planning. One of its objectives was to reconcile conflicts between different uses of water, such as hydropower, wildlife preservation, flood control, irrigation, and navigation.

2. The Federal Power Commission, created by Congress in the Federal Water Power Act of 1920, was FERC's predecessor.

3. § 9(b) of the Federal Power Act requires that each license applicant submit to the commission [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license....

16 U.S.C.A. § 802(b).

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