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California v. FERC: Federal Supremacy in Hydroelectric Power Continues

Jill K. Osborne
University of Kentucky

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California v. FERC: Federal Supremacy in Hydroelectric Power Continues

INTRODUCTION

Since the 1970s, there has been a proliferation of new hydroelectric power projects along United States waterways. In addition, many long-established projects will require relicensing between now and the year 2000. This upsurge has produced growing tension between the states, which are concerned over the environmental impact of unfettered growth, and the Federal Energy Regulatory Commission (FERC), which oversees the licensing of hydropower plants. Widespread disenchantment with FERC’s procedures has led to a call for more state control over the country’s water resources. The courts, however, basing their decisions on the Supreme Court’s ruling in First Iowa Hydro-Electric Cooperative v. FPC, have consistently held that state agencies must defer to FERC’s authority. In First Iowa, the Court ruled that federal regulation of hydroelectric power under the Federal Power Act (FPA) preempts all state laws relating to water usage, except those

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3 See Small Hydro Program, supra note 1, at 22, 23 (statement of Hon. James M. Jeffords, Sept. 11, 1984).

4 See generally Small Hydro Program, supra note 1 (documenting discussions on the issue); Blum, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 HARV. ENVT'L. L. REV. 1 (1986) (advocating pluralism in authorization process).

5 328 U.S. 152 (1946).


governing the distribution or appropriation of water for irrigation or municipal purposes.  

After First Iowa, the states and various environmental groups supported amendments in Congress to change the FPA and lessen federal supremacy over hydroelectric power.  

When all attempts failed, these groups, encouraged by commentators who reported a change in the Court's position regarding preemption by federal regulatory acts, turned to the judiciary for relief.  

In 1987, the state of California directly challenged FERC's jurisdiction over licensing requirements for hydroelectric power plants. This argument reached the Supreme Court in California v. FERC. In a unanimous decision, delivered by Justice O'Connor, the Court upheld First Iowa and dealt a "death blow" to all but limited state control over hydroelectric power development.  

The reaction to California v. FERC was swift. The ruling was called a threat to a "century-old standard of state water control," and bills again were introduced in Congress to reverse the preemption of state law by federal regulation of hydroelectric power development.  

Part I of this Comment examines the FPA and the Supreme Court's decision in First Iowa. Part II reviews the decisions and legislation subsequent to First Iowa. Part III discusses the history and holding of California v. FERC. Part IV discusses the effects of the holding in California v. FERC, concluding that reliance on the Supreme Court for a change in public policy was unfounded, and that Congress is, and always has been, the proper forum for amending the FPA.

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8 First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152, 175-76 (1946). Preemption of state law occurs when either (1) Congress manifests the "intent to occupy a given field, [and] any state law falling within that field is pre-empted," or (2) Congress does not "entirely displace[] state regulation over the matter in question," but preemption of state law results when compliance with both state and federal authority is impossible. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).
9 See infra notes 67-84 and accompanying text.
10 See infra notes 50-66 and accompanying text.
11 Rock Creek Ltd. Partnership, 41 F.E.R.C. ¶ 61,198 (1987). For a discussion of this litigation, see infra notes 85-109 and accompanying text.
15 See infra notes 162-76 and accompanying text.
16 See infra notes 20-46 and accompanying text.
17 See infra notes 47-84 and accompanying text.
18 See infra notes 85-130 and accompanying text.
19 See infra notes 131-76 and accompanying text.
I. SUPERSEDURE OF STATE AUTHORITY UNDER THE FPA

A. The Federal Power Act

In 1920 Congress enacted the FPA to promote the comprehensive development of water power. The FPA created the Federal Power Commission (FPC), subsequently called the Federal Energy Regulatory Commission (FERC), to control the regulation of hydroelectric power on the nation’s navigable waters. The Supreme Court has given a broad interpretation to the concept of “navigable waters,” placing virtually all hydroelectric power projects under the authority of FERC.

The FPA gives FERC the power to issue licenses for the construction of “dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power . . . .” Before a license may be issued, however, FERC must consider whether the project is “best adapted to a comprehensive plan for improving or developing a waterway.” If necessary, the Commission may order the licensee to modify its plans to meet conditions imposed by FERC.

Before the passage of the FPA, there was much debate in Congress concerning the preemption of state water law. The states

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21 The FPC was terminated in 1977 and its functions regarding the development of water power were transferred to FERC. See 42 U.S.C. § 7172(a) (1982).
22 “Navigable waters” are “those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . . and . . . . are used or suitable for use for the transportation of persons or property . . . . .” 16 U.S.C. § 796(8) (1988).
25 Id. § 803(a).
26 Id.
27 Rep. LaFollette's (R. Wash.) statements are indicative:

[Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution.

promoted a comprehensive federal plan for the development of water resources,\textsuperscript{28} while attempting to retain control over their traditional spheres of water distribution and appropriation.\textsuperscript{29} Congress tried to mollify the states by inserting two provisions in the Act that deal directly with state water rights.\textsuperscript{30} Section 27 requires that a licensee produce evidence that he has complied with state laws in respect to the "appropriation, diversion, and use of water for power purposes."\textsuperscript{31} Section 9 states that the FPA should not be interpreted as "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 . . . .”\textsuperscript{32}

B. First Iowa Hydro-Electric Cooperative v. FPC

The two sections that were intended to save state water rights were first interpreted by the Supreme Court in First Iowa Hydro-Electric Cooperative v. FPC.\textsuperscript{33} The cooperative applied for a license to construct a hydroelectric power plant on the Cedar River in Iowa.\textsuperscript{34} The FPC granted Iowa permission to intervene; the state opposed the granting of the license.\textsuperscript{35} Iowa claimed that First Iowa Hydro-Electric had not complied with the terms of the Iowa State Code.\textsuperscript{36} Confronted with Iowa's claim that the cooperative must meet both the requirements of the FPA and Iowa state law, the Commission dismissed the license application, without prejudice, for judicial determination.\textsuperscript{37}

\textsuperscript{28} First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152, 180 (1946).
\textsuperscript{30} See generally First Iowa, 328 U.S. at 174-75 (explaining Congressional intent in sections 27 and 9).
\textsuperscript{32} Id. § 821.
\textsuperscript{33} 328 U.S. 152.
\textsuperscript{34} Id. at 157.
\textsuperscript{35} Id. at 159.
\textsuperscript{36} Id. at 161. The Iowa Code provided:
No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same.
\textsuperscript{37} Id. at 164 (quoting IOWA CODE § 7767 (1939)).
\textsuperscript{37} Id. at 162. The Commission felt that a court was the appropriate forum in which to decide the necessity of compliance with state law as a prerequisite for granting a license. Id. at 161-62.
The Supreme Court examined the legislative history of the FPA, including Congress’ rejection of a proposal that would have required a state’s consent before the Commission granted a permit, and determined that Congress intended a dual system of jurisdiction over water power, with the federal government having superiority over any state agency. The Court stated that securing a permit from the state of Iowa should not be a condition precedent to obtaining a federal license. Holding that section 9(b) of the FPA did not require compliance with state laws, the Court interpreted this section as suggesting considerations as to which the Commission may wish some proof submitted to it of the applicant’s progress. Requiring the cooperative to comply with state laws before being granted a federal license would, the Supreme Court reasoned, give Iowa veto power over the project and “destroy the effectiveness of the federal act.”

The Court distinguished section 27 from 9(b) as a “saving” clause as to state property laws governing water use. But the Court limited the effect of section 27 “to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature.” The Court empha-

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38 First Iowa, 328 U.S. at 179. The Court noted that the Shields Bill (introduced by John Shields (D. Tenn.)), S. 1419, 65th Cong., 2d Sess. (1917), contained the following language which was not enacted: “[T]he permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of the water power is proposed to be constructed.”

39 First Iowa, 328 U.S. at 167-68.
40 Id. at 170. The Court said, in part:
It is a procedure required by the state of Iowa in dealing with its local streams and also with the waters of the United States within the State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.

Id.
41 Id. at 177-78.
42 Id. at 164.
43 Id. at 175.
44 Id. at 175-76. In addition, the Court said the following, about section 27:
It therefore has primary, if not exclusive reference to such proprietary rights. The phrase “any vested right acquired therein” further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words “other uses.” Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

Id. at 176.
sized the national purpose of the act, based on the federal government's broad powers to regulate commerce\textsuperscript{45} and the preemption of Iowa state law by the FPA.\textsuperscript{46}

II. PREEMPTION DOCTRINE AFTER \textit{First Iowa}

The 1980s brought a call from commentators, congressmen, and environmentalists to allow more state control of the licensing of hydroelectric power plants.\textsuperscript{47} \textit{First Iowa Hydro-Electric Cooperative v. FPC} and federal supremacy over hydropower regulation were attacked on two fronts. First, cases decided subsequent to 1946 were heralded as an indication that \textit{First Iowa} eventually would be overruled.\textsuperscript{48} Second, legislation was introduced in Congress to amend the FPA directly.\textsuperscript{49}

A. Judicial Developments Subsequent to \textit{First Iowa}

Proponents of states' water rights detected a softening of the Supreme Court's position regarding preemption in two cases decided several years after \textit{First Iowa}.\textsuperscript{50} \textit{California v. United States}\textsuperscript{51} dealt with the Reclamation Act of 1902\textsuperscript{52} and \textit{Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission}\textsuperscript{53} concerned regulation under the Atomic Energy Act of 1954.\textsuperscript{54}

In \textit{California v. United States}, the United States Bureau of Reclamation applied for a permit from the California State Water Resources Control Board to appropriate water, which would later be used for reclamation, for the New Melones Dam.\textsuperscript{55} The State

\textsuperscript{45} The United States Constitution grants Congress the right to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{46} \textit{First Iowa}, 328 U.S. at 182.
\textsuperscript{47} See generally Small Hydro Program, supra note 1 (documenting discussions on the issue); Blum, supra note 4 (advocating pluralism in authorization process).
\textsuperscript{48} See infra notes 50-66 and accompanying text.
\textsuperscript{49} See infra notes 67-84 and accompanying text.
\textsuperscript{51} 438 U.S. 645 (1978).
\textsuperscript{53} 461 U.S. 190 (1983).
\textsuperscript{54} 68 Stat. 919 (codified throughout 42 U.S.C.).
Board approved the application, but attached twenty-five conditions to the permit. The most important condition prohibited full impoundment until the Bureau indicated how it would use the water, as required by California law. The United States then obtained a declaratory judgment in federal district court stating that it could impound unappropriated water that was necessary for a federal reclamation project without complying with state law.

The Supreme Court held that section 8 of the 1902 Act required the Secretary of the Interior to comply with state law in the "control, appropriation, use, or distribution of water." The Court relied on legislative history to conclude that "Congress intended to defer to the substance, as well as the form, of state water law."

In *Pacific Gas*, the Supreme Court again faced the question of federal preemption of state law. California had passed a statute conditioning the construction of nuclear power plants on the State Energy Resources Conservation and Development Commission's determination that adequate storage and disposal facilities for nuclear waste were available. Two utility companies filed an action in district court to declare the provision preempted by the Atomic Energy Act. The Supreme Court, accepting California's argument that its statute was motivated by economic rather than safety

56 Id. Some of the conditions were the prohibition of the collection of water during certain periods of the year, provisions to protect fish and wildlife, and the filing of additional reports. Id. at n.8.

57 Id. at 652-53.

58 Id. at 647. As a matter of comity, the district court did require the United States to comply with the state's application process. Id.

59 Id. at 675. Section 8 states:

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.


60 California v. United States, 438 U.S. at 675. The Court said that the Secretary "should follow state law in all respects not directly inconsistent with [congressional] directives." Id. at 678. The case was remanded to the court of appeals to ascertain whether the conditions imposed were consistent with congressional directives as to the New Melones Dam. Id. at 679.

61 CAL. PUB. RES. CODE § 25524.2 (West 1977).

considerations, held that Congress had intended a dual system of nuclear energy regulation. The federal government was to oversee the radiological safety aspects involved in the licensing of a nuclear plant, while the states reserved the right to determine questions of cost, need, reliability and other related concerns. The decisions in Pacific Gas and California v. United States were viewed by those concerned with state jurisdiction under federal regulatory schemes as an indication that the Court might look with greater favor on concurrent powers for state and federal government.

B. Legislative Assaults on First Iowa

Several bills introduced in Congress in the 1980's sought to amend section 27 directly or to change other sections of the FPA to allow states more control over license issuance. Representative Jeffords from Vermont introduced a 1985 bill that would have added a new section to allow state authorities to review and approve all license applications for hydroelectric projects with a 15,000 or less kilowatt power producing capacity.

In 1983, the Western States Water Council, representing 12 western states, suggested amendments to sections 9(b) and 27 to prevent preemption of state law by the FPA. The phrase, "and to the appropriation, diversion, and use of water for power purposes," was to be struck from section 9(b) of the Act. A new subsection would have contained the statements: "[T]he commission is prohibited from issuing an original or new license . . . 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,

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63 Id. at 216.
64 Id. at 205.
65 Id.
67 H.R. 1314, 99th Cong., 1st Sess. (1985) (introduced Feb. 27, 1985). This proposed law also would have authorized state governors to designate a state authority to cooperate with the Commission regarding state approval and review of license applications. The bill was never enacted.
divert, and use water for power purposes.\textsuperscript{70} Two of the new subsections added to section 27 would have read:

\begin{quote}
(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.\textsuperscript{71}
\end{quote}

In addition to these attempts at amendment, when Congress passed the first significant revision of the FPA licensing procedures, the Electric Consumer Protection Act of 1986 (ECPA),\textsuperscript{72} several efforts were made to add provisions that would have given states more control over hydropower development. One such bill, the State Comprehensive River Planning Act,\textsuperscript{73} would have allowed states to develop comprehensive plans to control hydroelectric power, which, if approved by FERC, would govern the licensing of power projects.

During the Senate ECPA debate, Senator Max Baucus of Montana deferred introducing "controversial" amendments to the bill, and agreed instead to a hearing on the issue of preemption of state water rights.\textsuperscript{74} Before the Senate adopted a resolution, including the proposed Western States Water Council amendments, he stated in the Congressional Record:

I believe that section 27 of the original Federal Power Act articulated Congress' intent not to preempt State water law. Instead, under the Supreme Court's current interpretation of the law, FERC is only required to consider State resource plans and the recommendations of appropriate State agencies when evaluating license applications.\textsuperscript{75}

\textsuperscript{70} 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., 2d Sess. 27 (1986) [hereinafter Hydroelectric Project].

\textsuperscript{71} Id.

\textsuperscript{72} Pub. L. No. 99-495, 100 Stat. 1243; see 16 U.S.C. §§ 797(e), 803(a), 803(j) (1988) (partially codifying this act).


\textsuperscript{74} Id.

\textsuperscript{75} Id.
Additional testimony before the Senate Committee on Energy and Natural Resources suggested that *First Iowa* was incorrectly decided. The Director of the Montana Department of Natural Resources and Conservation testified that Congress should “examine and resolve the many problems caused by the Supreme Court’s misinterpretation of the Federal Power Act in *First Iowa.*” The past chairman of the Interstate Conference on Water Policy declared, “The Federal Power Act was originally crafted in full recognition of state authority with regard to control, appropriation, and distribution of water . . . . Judicial and administrative actions have narrowly interpreted the provisions of the Federal Power Act, jeopardizing the states’ ability to exercise their sovereignty over state waters.”

In order to mitigate damage to fish and scenic waterways, environmental groups also petitioned Congress to change the FPA to allow for more state control of licensing hydroelectric power plants. In a hearing before the House Subcommittee on Energy Conservation and Power, a representative of ten conservation groups called for greater deference to state law in hydropower licensing where state policy “has established instream flow requirements to protect recognized natural and cultural values.” At the same hearing, counsel for the National Wildlife Federation in Oregon asked for a “repeal of the *First Iowa* holding,” stating, “Federal government should not jam hydro projects down the throats of unwilling states.” He characterized FERC’s approach to hydroelectric licensing as “power first/fish last.”

When Congress finally passed the ECPA, it included several provisions aimed at minimizing damage to fish and wildlife. The ECPA requires FERC to consider the “adequate protection, mitigation, and enhancement of fish and wildlife,” along with other factors such as irrigation, flood control, and water supply, before

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76 Id. at 86.
77 Id. at 44.
79 Id. at 500-501 (Testimony of Terence L. Thatcher, counsel for the National Wildlife Federation at its Pacific Northwest Resource Center in Portland, Or.).
80 Id. at 473.
issuing a license for a hydropower project. While FERC must consult with state and federal fish and wildlife agencies, it may disallow their recommendations upon publishing a finding that they are inconsistent with the Act or with other law and that the Commission has adequately complied with conditions of section 10(j). Congress amended the FPA to require FERC to consider various environmental factors, but it did not modify the language of section 27 in respect to state water law, nor did it require FERC to defer to comprehensive plans before granting a license.

III. California v. FERC

A. Procedural History

In 1983, FERC issued a license for a hydroelectric project to be built on Rock Creek, a small tributary of the South Fork American River, in El Dorado County, California. In order to protect trout in the stream, the license required that the project maintain interim minimum flow rates of eleven cubic feet per second (cfs) from May through September and fifteen cfs from October through April. The licensee also was required to conduct studies, after consultation with the California Department of Fish

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81 16 U.S.C. § 803(a). This section states, in part:

[T]he project adopted . . . will be 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, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . . .


82 16 U.S.C. § 803(j) (codifying § 10(j)).


84 FERC can consider comprehensive plans, but it "must maintain its role as an independent regulatory agency with a national, and not just a regional or river basin perspective." Small Hydro Program, supra note 1, at 80 (letter from Raymond J. O'Connor, Chairman, FERC, in answer to question F.2.a).


86 Joseph M. Keating, 23 F.E.R.C. ¶ 62,137, at 63,204. Inadequate instream flows harm existing fish and wildlife habitats and the natural qualities of the affected rivers. See generally Small Hydro Program, supra note 1, at 728.
and Game (CDFG), to enable FERC to set permanent flow rates. In 1985, the Rock Creek Limited Partnership recommended that FERC permanently adopt the interim flow rates. The CDFG recommended much higher flow rates to the Commission.

In 1984, the partnership also applied for a state water permit from the State Water Resources Control Board (WRCB). The WRCB approved, on an interim basis, the minimum flow rates established by FERC, but reserved jurisdiction to set different permanent rates. While the WRCB was conducting a hearing to establish permanent flow rates, the Rock Creek Limited Partnership petitioned FERC for an order declaring that the Commission had exclusive jurisdiction to set minimum flow rates. The partnership claimed that the higher flow rates set by the WRCB would be an economic hardship on the project.

In March 1987, FERC issued a declaratory order requiring the partnership to comply with FERC's flow rates and stating that California "ha[d] no authority to set minimum flows for the project that conflict with those contained in the license." FERC claimed that allowing states to determine minimum flow rates would, in essence, give them veto power over projects, thus contravening the Supreme Court's decision in First Iowa Hydro-Electric Cooperative v. FPC.

In its March 1987 order, FERC also scheduled hearings to set the permanent minimum flow rates for the project. After hearing

87 Joseph M. Keating, 23 F.E.R.C. ¶ 62,137, at 63,204.
89 Brief for the Federal Energy Regulatory Commission in Opposition at 3a, California v. FERC, U.S., 110 S. Ct. 2024 (1990) (No. 89-333) [hereinafter Brief for FERC in Opposition]. Specifically, the CDFG recommended minimum flow rates of 30 cfs from October through February, and 60 cfs from March through September. Id.
90 California v. FERC, ___ U.S. at ___, 110 S. Ct. at 2027.
91 Petitioner's Opening Brief, supra note 66, at 2-3. The State Board found that Keating's instream study had failed to "consider most habitat types and stream areas affected by the project," and required him to prepare a new study before commencing construction. Id. at 2.
92 Id. at 3. At the conclusion of the hearing the WRCB adopted permanent flow rates of 60 cfs from March through June and 30 cfs from July through February. See Rock Creek Ltd. Partnership, 38 F.E.R.C. ¶ 61,240, at 61,772.
93 Id.
94 Id. at 61,773. The Commission said, "The imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process," under FPA and, "the establishment of minimum flows is a matter beyond the reach of state regulation." Id.
95 Id.
96 Id. at 61,774.
testimony from the interested parties, the administrative law judge set the minimum flow rate at 20 cfs for the entire year.\textsuperscript{97} The WRCB then issued an order requiring the licensee to comply with the minimum flow rates\textsuperscript{98} and requested intervention and a hearing.\textsuperscript{99} The Commission granted the intervention motion, but denied a new hearing.\textsuperscript{100} FERC concluded that by imposing different minimum flow rate requirements, the state would defeat the Commission's purposes of comprehensive planning under the FPA.\textsuperscript{101}

California petitioned for review, asking the court of appeals to consider FERC's declaratory order and denial of rehearing.\textsuperscript{102} The Ninth Circuit held that the Supreme Court's interpretation of FPA section 27 in \textit{First Iowa} evidenced the intent of Congress to give FERC vast regulatory control over hydroelectric projects.\textsuperscript{103} Thus, when the WRCB's powers to set minimum flow rates under state law conflicted with congressional objectives, the WRCB was pre-empted by the FPA.\textsuperscript{104} California then petitioned for certiorari, which was granted on December 4, 1989.\textsuperscript{105}

\textbf{B. The Decision}

In \textit{California v. FERC}\textsuperscript{106} the Supreme Court affirmed the ruling of the Ninth Circuit. The Court declined to overrule \textit{First Iowa}, upholding the forty-four year old interpretation of FPA section 27.\textsuperscript{107} In addition, the Court labeled its ruling in \textit{California v. United States} as premised upon the Reclamation Act of 1902, and hence not a disavowal of \textit{First Iowa}.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{97} Rock Creek Ltd. Partnership, 41 F.E.R.C. \textsection 63,019 (1987). Experts for the Rock Creek Limited Partnership recommended a constant minimum flow rate of 15 cfs. CDFG recommended the higher rates of 30 cfs in the winter months and 60 cfs in the summer months. CDFG maintained that low flow levels would raise water temperatures. \textit{Id.} at 65, 121.
\item \textsuperscript{98} California v. FERC, U.S. at, 110 S. Ct. at 2028.
\item \textsuperscript{99} Brief for FERC in Opposition, \textit{supra} note 89, at 7.
\item \textsuperscript{100} Rock Creek Ltd. Partnership, 41 F.E.R.C. \textsection 61,198 (1987).
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} Congress provided for review of FERC decisions in the federal courts of appeals. \textit{See} 16 U.S.C. \textsection 825l(b) (1988).
\item \textsuperscript{103} California v. FERC, 877 F.2d 743, 750 (9th Cir. 1989), \textit{aff'd}, U.S., 110 S. Ct. 2024 (1990).
\item \textsuperscript{104} \textit{Id.} at 750.
\item \textsuperscript{105} California v. FERC, U.S., 110 S. Ct. 536 (1989).
\item \textsuperscript{106} U.S., 110 S. Ct. 2024.
\item \textsuperscript{107} \textit{Id.} at 2029.
\item \textsuperscript{108} \textit{Id.} at 2032.
\end{itemize}
1. First Iowa and Stare Decisis

California argued that section 27 of the FPA specifically barred FERC from total control over minimum flow requirements. The section states:

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.

California argued that “other uses” should require the Rock Creek project to comply with the state’s minimum rates independent of its obligation to follow FERC’s requirements.

The Supreme Court conceded that if the issue had been a question of first impression, California’s interpretation of the statute could be a “close question,” stating that a state’s minimum flow requirements might be thought of as “other uses” relating to the “generation of power or the protection of fish.” In addition, the Court said this reading would coincide with the Court’s presumption, absent clear congressional intent, against finding pre-emption of state law.

However, the Court refused to disturb its interpretation of section 27 as set forth in First Iowa. The Court found “no sufficient intervening change in the law, or indication that First Iowa has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent.”

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109 See Petitioner's Opening Brief, supra note 66, at 8-12.
111 Petitioner's Opening Brief, supra note 66, at 10.
112 California v. FERC, U.S. at __, 110 S. Ct. at 2028-29.
113 Id. at ___, 110 S. Ct. at 2029.
114 Id. at ___, 110 S. Ct. at 2029. The Court stated: [California] misconceives the deference this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and “[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”
115 Id. at ___, 110 S. Ct. at 2029-30.
2. **The Interpretation of Section 27 in First Iowa is Not Dictum**

The Supreme Court rejected California's argument that the Court's discussion of section 27 in *First Iowa* was merely dictum.116 The Court acknowledged that *First Iowa* was primarily concerned with the interpretation of section 9(b), but found that only a "narrow reading" of section 27 could have led to the conclusion that licensees were not required to obtain state permits or comply with state laws that were preempted by federal regulation.117 Accepting FERC's argument, the Court reasoned:

Had § 27 been given the broader meaning that Iowa sought, it would have "saved" the state requirements at issue, made the state permit one that could be issued, and supported the interpretation of § 9(b) as requiring evidence of compliance with those state requirements, rather than compliance only with those requirements consistent with the federal license.118

The Court stated that *First Iowa*'s narrow construction of section 27 was necessary to the general holding in the case.119 To the Court, by rejecting concurrent jurisdiction and mandated compliance with state permit requirements, *First Iowa* upheld only limited state participation in hydroelectric project licensing,120 and by interpreting section 27 as dealing only with state proprietary rights, the *First Iowa* Court found this restriction of the states' role in regulation consistent with congressional intent.121

116 Id. at ___, 110 S. Ct. at 2030-31. In its brief, California stated:

The *First Iowa* Court distinguished section 9(b) from section 27, stating that the latter provision, unlike the former, requires substantive compliance with state water law . . . . The Court then commented on section 27 itself, stating that the reference to "irrigation," "municipal" and "other uses" implies that provision is limited to "proprietary rights" and thus does not authorize state "regulation" of hydropower uses . . . . Since the Court held only that section 9(b) does not require a state permit as a "condition precedent" to a FERC license, the Court's comments concerning section 27 were dictum.

Petitioner's Opening Brief, *supra* note 66, at 37.

117 Id. v. FERC, U.S. at ___, 110 S. Ct. at 2030-31.

118 Id. at ___, 110 S. Ct. at 2030-31. FERC advanced this argument in its brief: "If Section 27 preserved the Iowa statute requiring that any water taken from the stream be returned at 'the nearest practicable place,' then the Court could not have held that Iowa was without authority to insist on compliance with that provision." Brief for the Federal Energy Regulatory Commission at 13, California v. FERC, U.S., 110 S. Ct. 2024 (1990) (No. 89-833) [hereinafter Brief for FERC].

119 California v. FERC, U.S. at ___, 110 S. Ct. at 2031.

120 Id. at ___, 110 S. Ct. at 2031.

121 Id. at ___, 110 S. Ct. at 2031-32.
3. *California v. United States—Not an Abandonment of First Iowa*

The Supreme Court also dismissed California's argument that *California v. United States* was a rejection of *First Iowa*.¹²³ Noting that *California v. United States* interpreted the Reclamation Act of 1902, and was not an assessment of the FPA, the Court reasoned that both the *California v. United States* Court and the *First Iowa* Court had studied the legislative histories and purposes of the respective Acts and had discerned that "the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act."¹²⁴

Furthermore, the Court stated that the crucial language of FPA section 27, "other uses," was missing from section 8 of the Reclamation Act.¹²⁵ Since minimum flow rate requirements do not reflect a recognized proprietary right,¹²⁶ the language in section 8 referring only to "water used in irrigation" would defeat a critical element of California's argument.¹²⁷ Observing that legislative history had been studied previously in *First Iowa*, the Court declined to reexamine section 27 in view of the considerations favoring its support.¹²⁸

4. *State and Federal Instream Flow Requirements Cannot Coexist*

The Supreme Court agreed with FERC's contention that allowing a state to impose minimum flow requirements would defeat Congress' intent to give the Commission broad powers to set

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¹²³ For a discussion of that case, see *supra* notes 50-60 and accompanying text.
¹²⁴ *Id.* at , 110 S. Ct. at 2032.
¹²⁵ *Id.* at , 110 S. Ct. at 2032.
¹²⁶ *Id.* at , 110 S. Ct. at 2033.
¹²⁷ *Id.* at , 110 S. Ct. at 2029.
¹²⁸ *Id.* at , 110 S. Ct. at 2029. The words "other uses" were a crucial aspect of California’s argument. California’s water law is based predominantly on prior appropriation. See Comment, *State's 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, 547 (1984). Prior appropriation is based on the premise that "the first user to put water to beneficial use has a water right that is superior to all those who come after him." L. McGUIGAN, LEGAL ISSUES AFFECTING THE DEVELOPMENT OF LOW-HEAD HYDROELECTRIC POWER 17 (1980). California courts have not recognized instream flow requirements as a beneficial use that gives rise to proprietary rights. See Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518 (Cal. Ct. App. 1979).
¹²⁹ California v. FERC, U.S. at , 110 S.Ct. at 2029.
licensing conditions and conduct comprehensive planning. Rejecting California's assertion that its own instream flow rates would merely "supplement" FERC's requirements, the Court held that state rates were preempted by federal law to the extent that they conflicted with and obstructed congressional directives.

IV. IMPACT OF CALIFORNIA v. FERC ON STATE RIGHTS UNDER THE FPA

The decision in California v. FERC gives the states notice that the judiciary is an inappropriate forum for seeking relief from the FPA's preemption of state water law. However, this should not have surprised California. No intervening court decisions since First Iowa Hydro-Electric Cooperative v. FPC suggested that the Supreme Court would change its position in its interpretation of the FPA, and efforts to modify First Iowa legislatively were also unsuccessful.

A. The Attempts to Restrict Implications of First Iowa Were Unjustified

In supporting its position, California, along with amici curiae for 49 additional states and nine environmental groups, suggested that the Supreme Court's discussion of section 27 in First Iowa was dictum and inconsistent with legislative intent. This belief, supported by the decision in California v. United States, was based on the supposition that the question of state water rights had not been before the Court.

This belief was misplaced. Cases decided after First Iowa consistently supported the proposition that the FPA supersedes state law, except for instances involving certain proprietary rights re-

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129 Id. at , 110 S. Ct. at 2033-34.
130 Id. at , 110 S. Ct. at 2034. California had contended that there was no conflict between the requirements of WRCB and FERC. By complying with the State Board's flow rates, the Rock Creek project would necessarily comply with FERC's less stringent rates and thus meet both state and federal obligations. Petitioner's Opening Brief, supra note 66, at 48-49.
131 Brief for Amici Curiae States at 4-6, Brief of Amici Curiae American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited and Save Our Streams at 20, California v. FERC, U.S. , 110 S. Ct. 2024 (1990) (No. 89-333); see also supra note 116 and accompanying text.
132 See Comment, supra note 66, at 1185; Comment, supra note 50, at 1235.
served to the states. For example, the Supreme Court concluded, in *FPC v. Niagara Mohawk Power Corp.*, that the FPA left intact preexisting water rights, such as riparian rights, that are traditionally determined by state law. This express limitation on the FPA had been considered previously in *First Iowa*. In its discussion of the meaning of the FPA, the *First Iowa* Court relied on statements made during congressional debate, saying, "[P]roperty rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks...." The Court in *Niagara Mohawk* did not expand the *First Iowa* interpretation of section 27 of the FPA to confer any more than proprietary rights upon the states.

One year later, in 1955, the Court’s decision in *FPC v. Oregon* again emphasized that the FPC had exclusive jurisdiction to license hydroelectric plants in holding that Oregon could not exercise a veto "by requiring the State’s additional permission." The Court summarily dismissed any question as to the FPC's right to dictate the terms on which a license for a hydropower project would be granted. Both *FPC v. Oregon* and *Niagara Mohawk* gave the states notice that the Court’s interpretation of the FPA, as espoused in *First Iowa*, had remained unchanged.

Contrary to some commentators’ belief, in light of *California v. United States*, that the Supreme Court would overrule *First Iowa* if given the opportunity, the Court actually cited *First Iowa* with favor following the decision. In *Pacific Gas & Electric Co.*

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137 Id. at 174.
138 Niagara Mohawk, 347 U.S. at 256.
140 FPC v. Oregon, 349 U.S. 435, 445 (1955). Oregon had challenged the authority of FPC to grant a license on reserved lands and the adequacy of the project’s protection for breeding fish. Id. at 437.
141 Id. at 444-46.
142 For a discussion of that case, see supra notes 50-60 and accompanying text.
143 Id. at 174.
v. State Energy Resources Conservation & Development Commission, the Court distinguished First Iowa, noting that Congress did not intend to give the same comprehensive planning role to the Nuclear Regulatory Commission that it gave to FERC. In California v. United States, the Court cited neither section 27 nor First Iowa, and section 8 of the Reclamation Act, the statute in question, can be distinguished on its face from section 27. Section 8 provides, "[T]he Secretary of the Interior, in carrying out the provisions of [the Reclamation Act], shall proceed in conformity with [state] laws." The Court in California v. United States substantially relied on that language. There is, however, no comparable directive in the FPA. The First Iowa Court made clear that section 9(b) of the Act, which contains the closest counterpart to the "in conformity" language, "does not require compliance with any state laws."

Before California challenged FERC over the Rock Creek license, one federal court had squarely considered whether California v. United States had overruled First Iowa, rejecting that argument. The court noted the differences in the histories and purposes of the Reclamation Act and the FPA and concluded that California v. United States and First Iowa were "consistent." To the court, both cases recognized the need to avoid duplicating regulation, holding that states have proprietary rights over water, a necessary local regulation, and that the federal government has exclusive jurisdiction over hydroelectric project licensing.

B. The Failure to Obtain Legislative Help: Evidence of Congressional Intent

Before turning to the judiciary, environmentalists and advocates of state water rights had petitioned Congress to change the preemption policy of the FPA. All attempts failed. California argued that the First Iowa Court misinterpreted the legislative

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148 First Iowa, 328 U.S. at 177.
149 McCarran, 549 F. Supp. 1134.
150 Id. at 1157.
151 Id. at 1156-57.
152 See supra notes 67-84 and accompanying text.
intent behind the FPA. However, for over forty years Congress refrained from legislatively overturning *First Iowa*.

Although commentators and legislators asked Congress to amend the FPA to allow state and regional comprehensive plans to be binding on FERC, Congress rejected this option. In fact, the passage of the ECPA reaffirmed Congress' intent that FERC possess broad power to regulate the issuance of hydroelectric power plant licenses. The amendments to the FPA require FERC to "consider" comprehensive plans prepared by federal or state agencies, but "this provision is not intended to modify any existing requirement of State or Federal law."

Additionally, section 10(j), while requiring FERC to either include or publish findings regarding the failure to follow applicable state fish and wildlife agency recommendations, did not reduce the agency's plenary power to control licensing of hydropower projects. The House Conference report stated: "[Section 10(j)] does not give [state] agencies a veto, nor does it give them mandatory authority, such as is provided in section 30(c) of the Federal Power Act . . . . FERC is empowered to decide license terms and conditions."

It is not surprising that the Supreme Court rejected the plea of California and the *amicus curiae* to overturn *First Iowa*. The Court has demanded a "special justification" before it departs from the doctrine of *stare decisis*. The Court, in *First Iowa*, referred to the FPA as a "major change of national policy," and suggested, after a lengthy discussion of the Act's legislative history, that federal supremacy over the regulation of hydroelectric power had broad public support. With no change in public policy forthcoming in Congress, California's appeal to the Supreme Court was predicated on overturning an interpretation of a law that had given rise to a complex regulatory scheme. However, the Court is "especially reluctant" to overturn precedents based on statutory construction. As the Court implied in its decision, if California wants

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153 California v. FERC, U.S. at , 110 S. Ct. at 2033.
158 *First Iowa*, 328 U.S. at 180.
159 *Id.* at 180-81.
a change in federal preemption of regulation of hydroelectric projects, it must again turn to Congress for relief.161

C. A Return to Legislative Assaults After California v. Federal Energy Regulatory Commission

Several bills were introduced in Congress to amend the FPA after the Supreme Court's decision in California v. FERC. One bill, introduced in the Senate the following month, seeks to change sections 9 and 27 directly.162 Section 9 would be amended by adding a new paragraph that states: "No license may be granted for any project subject to the provisions of this Act unless the applicant complies with all procedural and substantive requirements of the laws of the State ... in which the project is located ..."163 Section 27 would be amended to deny preemption of state law specifically.164 Although the press release that followed the introduction of the legislation declared that it was "based upon [correcting] an incorrect interpretation of the Federal Power Act," the bill's provisions are similar to ones previously considered by Congress.165 Unless there is a basic congressional policy change, the amendments are unlikely to receive much attention.

A second bill introduced in the Senate166 takes a different approach to preemption under the FPA. By amending the Federal Water Pollution Control Act (FWPCA),167 it intends to grant the states a greater say in the licensing of hydropower plants. Section 401 of the FWPCA currently states:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State ... that any such discharge will

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161 See California v. FERC, U.S. at , 110 S. Ct. at 2030.
163 Id.
164 This amendment states: "Nothing in this Act nor in any other Act may be construed to constitute a preemption or intent to preempt the procedural and substantive requirements of state law ...." Id.
165 See supra notes 67-71 and accompanying text.
comply with the applicable provisions [of other sections] of this title.\textsuperscript{168}

Suggested as an "untapped source" for state control over regulation of hydro plants,\textsuperscript{169} the central question of section 401 and its application to hydroelectric projects is the meaning of "any discharge." One section of the FWPCA defines a discharge as the "discharge of a pollutant."\textsuperscript{170} However, it has been argued that section 401 contains a broader definition of "discharge," and that state laws dealing with water quality standards could be applied to deny a license to a hydroelectric plant.\textsuperscript{171}

A recent court decision has held that FERC has the authority under the FPA to review and approve state water quality standards enacted pursuant to the FWPCA.\textsuperscript{172} Citing First Iowa, the Third Circuit ruled that federal regulations relating to pollution do not fall within the permissible confines of state control as mandated by section 27 of the FPA.\textsuperscript{173} It appears that minimum flow rate requirements, which California sought to impose on the Rock Creek project, would fail under any interpretation of the FWPCA.\textsuperscript{174}

The proposed amendment to section 401 of the FWPCA seeks to add language that would encompass the state control denied in California v. FERC. As amended, FWPCA would call for state certification when there is "any water quality degradation or impairment of designated uses recognized under State law."\textsuperscript{175} Additionally, an applicant for a federal license would have to certify to the licensing agency that the activity will "achieve, maintain, and protect such water quality and the designated uses identified in the State's water quality standards."\textsuperscript{176} While this constitutes a new approach to undoing First Iowa and California v. FERC legislatively, it remains to be seen whether the additional support needed in Congress will be forthcoming.

\textsuperscript{168} Id.

\textsuperscript{169} Bodi & Erdheim, Swimming Upstream: FERC's Failure to Protect Anadromous Fish, 13 ECOLOGY L.Q. 7, 44 (1986); see Arnold, supra note 143, at 10,141.


\textsuperscript{171} See Hydroelectric Project, supra note 70, at 176.

\textsuperscript{172} Pennsylvania Dep't of Envrl. Resources v. FERC, 868 F.2d 592, 598 (3d Cir. 1989).

\textsuperscript{173} Id.


\textsuperscript{175} See S. 3186, supra note 166.

\textsuperscript{176} Id.
CONCLUSION

Today there are over 2,000 hydroelectric power plants licensed by FERC, with many scheduled for renewal over the next ten years.\footnote{See supra note 2.} Under the regulatory scheme of the FPA, as interpreted by the Supreme Court in First Iowa Hydro-Electric Cooperative v. FPC, the states have little input in determining the conditions under which hydropower projects receive federal licenses.\footnote{See Hydroelectric Project, supra note 70, at 7-9 (statement of Sen. Max Baucus, Sept. 12, 1986).}

Although many expressed outrage over the Court’s decision in California v. FERC, its affirmation of First Iowa was not unexpected. The Supreme Court is reluctant to overturn established precedent, especially concerning statutory construction.\footnote{See supra notes 157-60 and accompanying text.} Further, congressional intent as to the purpose of the FPA could be inferred from the consistent failure of advocates for a policy change. Also, the Court actually had relied on First Iowa in subsequent decisions, instead of disavowing it, as had been theorized.\footnote{See supra note 144.}

In the 1990s, the courts will offer the states no relief in their conflict with FERC. The states and environmentalists must turn, once again, to the halls of Congress for support. Given the new legislation introduced subsequent to California v. FERC, it appears that the states are prepared to pursue this avenue vigorously. However, since all previous legislative efforts have been unsuccessful, there must be a fundamental policy shift in Congress before any change can be expected.

Jill K. Osborne

\footnote{See supra note 2.}