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So much water around the dam: State streamflow regulation of federally licensed hydroelectric facilities

by Robert H. Abrams

State of California
v.
Federal Energy Regulatory Commission
and Rock Creek Limited Partnership
(Docket No. 89-333)

Argument Date: March 20, 1990

Congress, in a series of laws dating back to 1920, established federal regulatory authority over the construction and operation of hydroelectric facilities, an authority that is today vested in the Federal Energy Regulatory Commission (FERC). In a long-standing ruling on federal regulatory power, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), the United States Supreme Court held that the predecessor agency to FERC enjoyed a power to regulate hydroelectric projects to the exclusion of the states, at least insofar as a state streamflow regulation conflicts with the terms of the federal license. In that decision the Court interpreted narrowly a section of the governing statute that preserved a degree of concurrent state authority.

In more recent years, the Court has shown a greater hesitancy to oust state regulatory authority in a variety of contexts, at least one of which is similar to state streamflow regulation of a federal hydropower licensee. In this case, California challenges the received wisdom of the *First Iowa* case and urges that a state in the valid exercise of its police power should be allowed to assure adequate in-stream flows to protect fish and wildlife by requiring that more water bypass the hydroelectric generation facility than the amount called for in the federal license.

ISSUE

Does section 27 of the Federal Power Act of 1935 (16 U.S.C. § 821 (1982 ed.)) preserve the power of the State of California to regulate the use of water within its borders when such regulation will affect the authorized actions of a federal hydropower licensee?

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FACTS

In 1982 a partnership sought a license from FERC to build a small hydroelectric generating facility on Rock Creek, a tributary of the South Fork of the American River near Placerville, Calif. As approved and licensed by FERC, the Rock Creek project diverts a portion of the stream through a tunnel and penstocks to its turbine generators and then returns the water to the American River about one mile below the original diversion point. The facility can generate up to 3,000 kilowatts and produces about 7,000 megawatt-hours of electricity annually. The project is located partially on private land owned by the Rock Creek Limited Partnership and partially on federally owned land administered by the federal Bureau of Land Management.

During the licensure proceedings, FERC, as required by the governing law, advised California of the proposal and considered materials on the environmental impacts of the proposed project submitted by both the applicant and the California Department of Fish and Game (CDFG). In 1983 FERC issued a license and required that the project maintain minimum instream flows (for protection of fish) of 11 cubic feet per second (cfs) from May through September, and 15 cfs at all other times. These flow levels were the ones contended for by the project applicant and were less than the flows sought by CDFG.

Even before initiating the FERC licensure proceeding, the project applicant sought to obtain the necessary state-law water rights from the California State Water Resources Control Board (SWRCB) under the state's prior appropriation system. The SWRCB in 1984 granted the water rights on an interim basis in reliance on the study of environmental impacts provided by the applicant. The SWRCB, however, expressly found that study to be "deficient" in several regards and required the applicant to prepare a new study in consultation with the CDFG. In 1987, after the mandated study was completed, the SWRCB found that the flow rates previously approved "would greatly reduce the fishery habitat in Rock Creek" and revised the water rights of the project to require instream flows of 60 cfs from March through June and 30 cfs the remainder of the year. These flows met with the approval of CDFG.

In 1986, while the state water-rights proceeding was still underway, the project applicant petitioned FERC for an order declaring that FERC's jurisdiction of the instream flow issue was exclusive and could not be reconsidered by the SWRCB. Just prior to the final SWRCB action, FERC issued

an order claiming exclusive authority, stating that “the establishment of minimum flows is beyond the reach of state regulation. . . [the SWRCB] has no authority to set minimum flows for the project that conflict with those contained in the license. . . .” California then tried to intervene in the FERC proceeding and obtain reconsideration of the newest FERC ruling. Intervention was allowed, but California’s legal position, that section 27 of the Federal Power Act preserves concurrent regulatory authority, was rejected. An appeal was taken to the Ninth Circuit Court of Appeals, which affirmed the FERC position. 877 F.2d 743 (1989). The Supreme Court granted California’s petition for a writ of certiorari.

BACKGROUND AND SIGNIFICANCE

This case is significant as a matter of law and policy. The precise legal issue it poses, whether FERC orders preempt state streamflow requirements, is rather narrow, turning on an interpretation of a single section of the Federal Power Act that is not of exceedingly broad application. The legal significance attaches because this case represents another datum in the array of decisions that address natural resource federalism. In the past two decades, the Supreme Court has often allowed the states more room to regulate federally controlled activities, but limits on state authority do still exist.

Among these limits, *First Iowa* for over 40 years has been a high-water mark of federal dominance, granting exclusive power to the federal government to regulate the waters used by hydroelectric generating facilities. Its reversal or evisceration would be a signal victory for the states in their effort to wrest control over natural resource policy from the federal government. The downfall of *First Iowa* would mean that in almost all natural-resource regulation cases, the Supreme Court will presume the intent of Congress is for concurrent state regulation.

As a practical matter, this case will have an effect on all hydropower facilities. Although states may prove unwilling to seek changes in established operating procedures at federally licensed facilities because to do so would upset established patterns of use, many new small hydropower facilities are being proposed nationwide. The new interest in hydropower stems from the Public Utilities Regulatory Policies Act of 1978 (PURPA), which offers substantial economic incentives for developers of small hydroelectric generating facilities. FERC, for example, received only 47 hydropower applications in 1977, but in 1981, a post-PURPA year, FERC received 1,752 such applications.

The environmental consequences of so many dam projects could be significant. The affected states feel themselves far better able to fly-speck the environmental consequences of these hydropower proposals than the FERC staff. FERC, of course, lacks the degree of localized expertise that the states enjoy in regard to state water resources and fish management programs. Additionally, FERC’s en-

vironmental review is burdened by the large numbers of hydropower applications, and FERC’s staff resources must also be expended in reviewing a host of other aspects of each hydroelectric project and non-hydropower project alike.

ARGUMENTS

For the State of California (Counsel of Record, Roderick E. Walston, Deputy Attorney General, 350 McAllister Street, Suite 6000, San Francisco, CA 94102; telephone (415) 557-3920):

1. Section 27 of the Federal Power Act provides that state water laws apply to hydropower projects.
2. *California v. United States*, 438 U.S. 645 (1978), compels a reinterpretation of section 27.
3. Congress has traditionally deferred to state water laws.
4. The legislative history of the Federal Power Act indicates that Congress intended to defer to state water law.
5. *First Iowa* is distinguishable from this case.
6. FERC preemption would impair the state’s ability to allocate the limited water supply.
7. There is no conflict between state and federal regulation in this case.

For Federal Energy Regulatory Commission (Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):

1. Section 27 does not reserve authority to the states to veto the exercise of the Commission’s authority to determine whether and on what terms a hydropower project would represent an appropriate use of water resources.
2. The California minimum-flow requirements do not constitute a proprietary right under California law and are inconsistent with FERC’s licensing authority.

For Rock Creek Limited Partnership (Counsel of Record, Louis Touton, Jones, Day, Reavis & Pogue, 255 S. Grand Avenue, Suite 3000, Los Angeles, CA 90071; telephone (213) 625-3939):

1. Supreme Court precedents establish that FERC has exclusive authority to license and regulate hydroelectric projects within its jurisdiction.
2. The legislative history of the relevant statutes discloses a congressional intent to have federal regulation be exclusive.
3. *First Iowa* is not inconsistent with *California v. United States*.
4. This case does not involve the kind of “water rights” that remain subject to state control under section 27 of the Federal Power Act.

AMICUS BRIEFS

This case sparked a good deal of support for both sides. In support of California, Idaho filed a brief representing

its view as well as that of the remaining 48 states. Other briefs on that side were filed representing local governmental units and environmental groups. Respondents received support from numerous power-generating utilities and a small number of other FERC license holders.

In Support of the State of California

1. The portion of *First Iowa* addressing the proper interpretation of section 27 is dicta and misstates the intent of Congress.
2. FERC's efforts to expand the scope of its regulatory authority are inconsistent with the scope of action intended for it by Congress.
3. In enacting the Federal Power Act, Congress recognized that the public interest would best be served by state regulation of water resources.
4. FERC cannot fairly and efficiently regulate streamflow requirements on a national basis.
5. The jurisdiction of FERC and the states over by-pass flows is concurrent.

In Support of FERC and the Rock Creek Limited Partnership

1. *First Iowa* has served the interests of regulation of the power industry predictably and well for 45 years and should not now be abandoned.
2. The comprehensive regulatory scheme of the Federal Power Act evinces an intent on the part of Congress that FERC's license be the exclusive control of hydropower facilities governed by the Act.
3. The 1986 Electric Consumers Protection Act confirms that FERC has exclusive authority to establish minimum flows.
4. Section 27 of the Federal Power Act is unlike section 8 of the Reclamation Act of 1902 that was interpreted in *California v. United States*.
5. The state regulation here involved directly conflicts with the FERC order and is therefore not a valid exercise of any concurrent regulatory authority that California may enjoy.
6. The holding below can be affirmed on the basis that the land involved in this case is federally reserved land as to which federal authority is exclusive.



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