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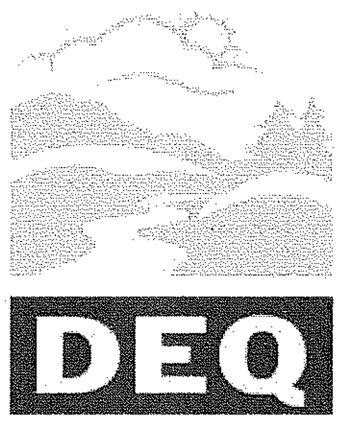
OREGON ENVIRONMENTAL QUALITY COMMISSION MEETING MATERIALS



State of Oregon
Department of Environmental Quality

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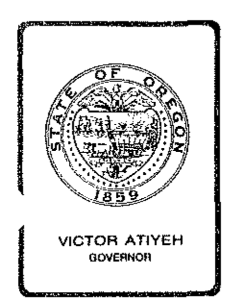

Environmental Quality Commission

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NOTICE OF SPECIAL MEETING OF THE OREGON ENVIRONMENTAL QUALITY COMMISSION

March 22, 1985
3:00 p.m.
Room 1400
522 S. W. Fifth Avenue
Portland, Oregon

The purpose of this special meeting is for the Commission to deliberate on the appeal of a 401 Certification denial for the Lava Diversion Project, Deschutes River, Oregon. The Commission will not be taking testimony on this matter.

TRANSCRIPT - MARCH 8, 1985 EQC MEETING - Agenda Item F

Petersen — Agenda Item F, which is appeal of DEQ denial of Clean Water Act, Section 401, Certification to the Lava Diversion Project, FERC No. 5205, Deschutes River, Oregon. I think we will ask counsel to both come up to the table. For the record, acknowledge receipt of the briefs--the Department's brief, the applicant's brief, and also receipt of the Deschutes County memorandum that was read by Commissioner Tuttle into the public record of this proceeding. The parties have, in an effort to expedite a decision, have stipulated as to the facts. This is the first time I've read two opposing briefs where the introductory factual statements are identical, so we can get down to the legal merits of the case and call on attorney Neil Bryant.

Bryant — Thank you Chairman Petersen. I'm Neil Bryant. I'm the attorney for Arnold Irrigation District which, as Commissioner Tuttle described, has entered into a joint venture agreement with GED to develop a small hydro project on the Deschutes called Lava Diversion. With me today, although he hasn't testified, is Don McCurdy. He is President of GED and lives in Medford, Oregon. It is my understanding, Mr. Chairman, that the record for this matter is the record that the DEQ has, as far as its file, the applications and the documents that have gone into that file. Is that correct?

Petersen — Correct. Plus the materials submitted here today.

Bryant

I would like to supplement that record here today with two things. The first is the minutes of the Board of Commissioners, which Mr. Tuttle referred to, stating that GED did make an application for a Certificate of Compatibility and was denied. Those are the minutes of October 10, 1984. And the second thing I'd like to add to the record would be the House and Senate and Conference Committee statements dealing with 401(d) in 1971. This is the Federal legislation. When the amendment was adopted that added language under for 401(d), the Pollution Control Act of 1972. I have copies for all the Commissioners and also for Mr. Huston.

I'd also like to thank the Commission's staff for expediting this hearing. You may or may not be aware of that, but because of our license application is presently pending before FERC, and that's just the acceptance of the application for a license, it doesn't mean they will grant the license. They have given us a time limitation that we must comply with and of course one of the things they are waiting to receive is the 401 Certificate from the state.

Congress has adopted a national energy policy in regards to hydroelectric. The Federal Power Act constitutes a complete and comprehensive plan for development, transmission, and utilization of electric power. It does this through the Commerce

Bryant (continued)

clause and it covers all navigable and in some cases nonnavigable streams. This, naturally, includes the Deschutes River. Both the cases cited in my brief and Mr. Huston's brief acknowledge this national plan. Today we do have agreement on the facts. The water quality issues have been resolved, and the question is whether or not we should be required to get a Certificate of Compatibility, and secondly, whether or not one should have been issued by Deschutes County. GED has not, or Arnold has not applied with Deschutes County for a Conditional Use Permit at this time. It's premature for us to do so. We think that we comply and should be entitled to the Compatibility Statement from Deschutes County because they have adopted an ordinance that under a conditional use allows for a small hydro development in Deschutes County. To be compatible does not mean we must obtain a Conditional Use Permit. Nothing in the legislation..... (TAPE ENDS)

(NEW TAPE BEGINS) ... compatibility means you must require a Conditional Use or some permit from the County. And that statute says that DEQ and the other state agencies must carry out their planning duties in a manner compatible with the Comprehensive Plan. If the Legislature wanted that to read that we had to comply and obtain a permit through the normal planning process before the 401 Certificate or before it wouldn't be considered compatible or coordinated, they could have certainly said so.

Bryant (continued)

And I think they left the door open too for when the DEQ or other agencies found that they had to act possibly inconsistent with the Statewide Plan. In ORS 197.640(2)(d), it states that an agency can go ahead and not follow the local jurisdiction's plan if in fact a state or federal statute doesn't allow it.

Turning to the real question though, we're talking about 401(d) and the language that's there. And the staff has interpreted this small section of the statute to allow the state to apply other requirements in hydro licensing. Those words are "and with any other appropriate requirement of state law." This phrase is just a small part of the entire legislation. If you take the plain meaning of this section, you have to read not only that little part that's taken out of context, but all of Section (d). And Section (d) refers only to water standards and water quality issues, effluent limitations, requirements necessary to assure compliance with any effluent limitations. And then it cites the other sections of the Act which all deal with water quality issues. Nothing mentioned but water quality issues. Then, if you just look at the word "appropriate" and how it modifies the word "requirement" in Section (d), you see that "requirements" refers only to water quality issues. There is a doctrine that is used by attorneys and courts in trying to interpret language in statutes, and unfortunately it's in Latin and Commissioner Denecke probably knows this pronunciation

Bryant (continued)

better than I, but I'll try it--ejusdem generis. The staff's interpretation of 401(d) would permit a state to consider almost any factor and issue a water quality certification, contrary to the doctrine of ejusdem generis. Our own 9th Circuit, this is the Federal court system, says, and I quote, "Under the rule of ejusdem generis, the general words which follow the specific words in the enumeration of prohibited acts must be construed to embrace only acts similar in nature to those acts enumerated by the proceeding specific words." Those proceeding specific words all deal with water quality standards and issues. That's from the case of Haili v. United States, 260 F2d 744 (1958). The second thing you look at in helping you determine what these words mean is the legislative history. I've introduced today the Senate, House, and Conference Committee reports from the United States Congress. In 1971 the House and Senate passed different bills and they went to a conference committee. This legislation talks about the purpose of the Act and the changes and says its to allow the Certification from the state in which the discharge occurs, that any such discharge will comply with Sections 301 and 302. Again Sections 301, 302--water quality. It goes on to say the Act was amended to assure consistency with the bill's changed emphasis. Water quality standards to effluent limitations based on elimination of any discharge or pollutants. Nothing about land use. They're concerned about water quality. The additional purpose, also, was to allow states to impose more

Bryant (continued)

stringent water quality standards than the federal act. William Ruckelshaus, and in that there is a letter from him, who was the EPA Administrator at that time, talks about the purpose and again emphasizes the water standards. But finally, when it went to the floor of the Senate, one of its chief sponsors, Senator Muskie from Maine, described the intent of the bill and the change, again this change came out of the conference committee that he was on. He states, "Secondly, the conferees agreed that a state may attach to any federal license or permit such conditions as may be necessary to assure compliance with water quality standards in the state." So when he explains that change that says "appropriate requirements of the state," he is saying to assure compliance with water quality standards, water quality requirements, not other requirements.

In summation on this point. If you allowed it to mean anything else you'd lose your federal energy policy and the power that the Federal Power Act gives to FERC to make the decision on issues that are not delegated specifically to the state. This is called the preemption and it has been recognized by the Supreme Court of the United States in the cases I've cited. The DEQ erroneously contends that Section 401 provides the agency with a veto power over FERC's hydro project licensing authority. I cite that from page 7 of the staff's brief. In fact, the Supreme Court has specifically held that no state shall have

<u>Bryant</u> (continued) veto power over federal hydro projects. This is a quote from the Iowa case, from the U.S. Supreme Court, to require the petitioner to secure the actual grant to it of a state permit as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Counsel of Iowa (who was trying to assert you had to get a state license too) a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the state the comprehensive planning that the Act provides and it shall depend on the judgment of the Federal Commission or other representatives of the Federal government to make the decision.

<u>Denecke</u> Excuse me Mr. Bryant. Doesn't the state have a veto power though in the area--you would argue that the state does have the right to withhold certification based on water quality standards. Isn't that really a form of veto as well, only you're saying it's a limited veto.

<u>Bryant</u> That's exactly right.

<u>Denecke</u> And not a broad form veto, but it isn't that the state doesn't have any veto at all.

Bryant — No. In the Federal plan, in the Federal Power Act, in the Pollution Control Act as passed in '72, Congress has said, out of the entire pie, let's consider it a pie for hydro development licensing, we will cut out a section where the state will make the determination, and that determination will be made in the area of water quality. They are very specific in just that area. And any attempt of states to attach other restrictions based upon the 401 Section has been denied by other federal courts and state courts. And in fact there is a suggestion in the brief from the staff that maybe the First Iowa case has been weakened. But as late as 1982 in New England Power Company v. New Hampshire, 455 U.S. 331, they have again said that the Federal Power Act gives the federal government that right to control the policy and the licensing.

Denecke — Mr. Bryant, is that case cited in the brief--this last one.

Bryant — No.

Denecke — Would you give me that again.

Bryant — Yes, I'd be happy to. New England Power Company v. New Hampshire, 455 U.S. 331 (1982).

Petersen — Did that case talk about Section 401?

Bryant — No. That case--it talked about--it involves the city in New Hampshire that was attempting to place some restrictions on the development of hydro and requiring them to get a license. And, in particular, they were in part trying to bootstrap an argument from the California case which is cited in the appellant's brief as stating that that is a weakening of the First Iowa case, and that maybe now the states did have more of a say in other areas. And the same Supreme Court that gave the U.S.-California case, said no, that is not the case.

Petersen — Has 401(d) been interpreted by any of the federal courts?

Bryant — No.

Petersen — So this issue is ...

Bryant — Only the New York Court of Appeals.

Denecke — Was the Campobelleo case, that's not the full name of it, did that interpret 401(d)?

Bryant — Yes. The Campobelleo case involved 401. In the Campobelleo case--but the question did not arise whether or not the state could impose additional nonwater quality issues. In that case it affirmed an Administrative Law Judge--said he lacked authority

<u>Bryant</u>
(continued)

to review the conditions imposed by the state in a 401 Certificate. That review could only be obtained in the state court. Again, as Commissioner Petersen has said, if the issue is 401 and the standards, and say we were denied our Certificate because we didn't meet the DEQ's requirement on water quality, FERC takes the position, and the court upheld it, that we could only appeal in the state court on the issue of whether or not we met that standard or whether or not that standard was fair. That's what the Campobelleo case stood for. That case does not hold that a state may impose nonquality concerns in 401. The issue is not addressed. There the state had already issued a Water Quality Certificate and someone didn't like the issuance of it so they challenged it in a nonstate proceeding, and the court said no, the proper way to challenge that is to go to the state court.

The other case that is cited by the staff in their report is <u>California v. U.S.</u> In fact, this did not modify the First Iowa case. In California we have a fight between two federal agencies. FERC who was licensing a small hydro project and the Department of the Interior, as it was on, in fact, an Indian reservation and the Department of the Interior controls the Indian reservations. Justice Renquist in writing the decision found that FERC had to listen to the other federal agencies as it pertained to the Indian reservation. But in that same case,

Bryant (continued) they did not allow the Indian reservation to impose restrictions and standards on the grant of the permit. Renquist went on to say, and this is his reasoning for why he found in this manner, "The history of the relationship between the federal government and the state and the reclamation of arid lands of the Western States is both long and involved. But through it runs a consistent thread of purposeful and continued deference to state water law by Congress." Thus the Court's opinion turns on the history of water rights in the arid western states in the Reclamation Act. That's the Act that they were interpreting and discussing in reaching that decision. You asked, Judge Denecke, about a case that might talk about California and First Iowa. There is only one case that I've been able to find that discusses the impact that the California decision might have on First Iowa, and that's the town of Springfield, Vermont v. McClaren. It's at 549 F2d 1134 (1982).

Denecke 549, what was the other number?

Bryant 1134. In this case, the Vermont public service board said, now that California's been decided, we have the right to pose some other standards on the licensing of a hydroelectric project. And they cited California as their basis for doing this--the California decision. The court said, "Notwithstanding some similarity in the wording of the state statute"--excuse me, let

<u>Bryant</u>
(continued)

me start again. "Notwithstanding some similarity in the wording of the statutes"--we're talking about the two federal statutes, the FERC statute and the Arid and Dry Land Reclamation Act statute--"They serve different objectives, relate to federal actions fundamentally dissimilar in nature." And the court found, and this is the federal court in Vermont, "that it does not overrule First Iowa."

The other case that is cited by the staff is the Escondido case. To me this has no impact on the federal preemption question. It involved--you know what--I apologize. When I discussed the California case I said it involved the Indian rights. That was not true. You were probably going to correct me. The Escondido case affected the Indian rights, where the Department and the Secretary of the Interior and the FERC commission were at odds as to who could set standards, whether or not the Secretary of the Interior could set standards on a hydro project on the Indian lands. And the decision was between the two federal agencies, where Congress had acted. Apparently there is a little inconsistent law that the Secretary of Interior could set some restrictions on the FERC license. Solely a question of division of authority between the two federal agencies.

The cases directly in point I've cited in my brief and they come out of New York, I believe they are both 1982 cases, it's very

Bryant
(continued)

analogous to what we're doing here today. The Commissioner of the environment in the State of New York tried to impose some additional restrictions other than water quality issues, and he based his decision on the same language, the same cases, that the staff have stated in their brief. And the New York court stated that they just couldn't do this--that the Federal Power Act has vested the Federal Power Commission with broad responsibility for development of the national policies in the area of electrical power. The Commission's jurisdiction with respect to such projects preempts all state licensing except where specifically allowed to address specific issues, i.e., water quality. The Federal Pollution Control Act, which is the one now that you have the legislative history on adopted in 1962, relinquishes only one element of the otherwise exclusive jurisdiction to the states. And that is that the project will violate applicable water standard quality of the state. I'm quoting, "Congress did not impower the state to consider or reconsider matters unrelated to their quality, water quality standards," like land use planning. "It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many issues which have been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it has conducted." The matter of de Rham case which is also cited gives the legislative history of 401. And they talk about the extensive and the exhaustive proceedings that

Bryant (continued) are conducted by FERC. Right now, we're dealing with 27 different state and federal agencies in the consultation requirements of FERC.

Finally, I think that the Oregon Attorney General's opinion, which I've cited in my brief, recognizes the preemption of FERC. And the DEQ in the past has recognized that you can only deal with water quality issues on the 401 Certificate because you haven't required Statements of Compatibility in the past from county or local government, simply because you weren't allowed to. You have to follow the federal scheme and the federal government. So I think, in conclusion, that when you review the plain meaning of the language, 401(d), review it by reading the other sections and the full paragraph. Don't take the words out of context. When you review the legislative history, and the ejusdem generis doctrine, you'll see that that language can only mean that the requirements you can add have to deal with water quality. The First Iowa case has not been watered down and weakened, and if you have an opportunity to review the cases that are in the briefs of both parties, and the ones that I have cited today, I think you'll see that you have no recourse but to grant the 401 Certificate if the water quality standards are met.

Thank you.

Petersen Questions?

Denecke Mr. Bryant, I'd like you to comment on Commissioner Tuttle's remarks. As I understand him, he is raising three points. GED has no standing as they can't use any water. That may be a pretty loose general statement. Secondly, that Deschutes County should be a party to this. And thirdly, that evidence was taken between the decision on this case by the Department and now that show that GED had satisfied--I think there were eight things where--on water quality which were absent at the time of the Department's decision, first decision. Would you comment on those.

Bryant Beginning with the last matter first. When the letter from Mr. Hansen, which I think was dated November 27, 1984, in addition to the compatibility question there were eight issues dealing with water quality and the responses to those eight issues were made in December. When the staff of the DEQ reviewed the answers they were satisfied. And so, as stipulated between the parties, the factual matters dealing with water quality have been answered. As far as whether or not that process was appropriate or not, I don't know. To me it seems like it would be. That's kind of the way that things were handled in the past, and if someone had some additional information that they wanted to submit to DEQ they certainly could have done so.

<u>Bryant</u>
(continued)

Concerning the standing of GED. The Attorney General's opinion that he has referred to, first of all, which said that the first two agreements between Arnold Irrigation and GED--by the way these agreements--it's a contract where we're cooperating with GED in allowing them to use our water rights to generate electricity and then we receive compensation for it that we will use to improve our water canals and conserve water, etc. The first two agreements were rejected by the Attorney General saying that according to what is called the Winchester Decision, it didn't give Arnold sufficient rights. This is delightful for Arnold because now we have rewritten the agreement that allows more rights to go to Arnold and more money. That has been submitted to Water Resources and to the Attorney General's office for review. It has not been rejected or accepted. We haven't gotten a decision on that.

Concerning the other matter about our municipal preference and the ability to do this project. Attorney General's opinion was issued approximately a month or so ago, which said that the Deschutes River, for purposes of that section of law allowing municipal preference was not part of our irrigation system. Now, this confused the Irrigation District because, I don't know if you're familiar with the Deschutes, but we have a reservoir up above at Crane Prairie and then we run the water down the river and take it out about 5-6 miles above Bend. If it wasn't

Bryant (continued)

for the River we couldn't get the water to our canals. So we feel the Deschutes is part of our system. The AG's opinion said it was a very close question. They based it upon the legislative history of the Act, and that's been submitted to Water Resources. Water Resources still has not acted on our joint application--the joint application between Arnold and GED. They have not turned us down. So formally they haven't rejected it, and I can assure you that if they do it's our intent to appeal that decision because we think it's in error and we would be entitled to the license from the State Water Resources. So that at the moment is up in the air.

Concerning the standing of the county. I don't really understand that. I guess my answer to that would go back to the point that it's not really an issue here because FERC and the Federal Power Act has given you a specific slice of the pie to make a decision on dealing with water standards. The Deschutes County in making that determination really isn't involved. DEQ does that analysis. Unless there is something that gives, under the Federal Law, and the 401 Certificate, gives Deschutes County the right to become a party, it wouldn't appear that they would be a party. But I have not had an opportunity to review what has been submitted by the County, and the first time I heard it was when Commissioner Tuttle testified today.

Petersen I know I've read this but I can't put my hands on it. The eight objections--water quality objections that have been overcome. Could you run through those really quickly for me?

Hansen Mr. Chairman, number 56 almost to the very back of that package. That identifies those issues that have not yet been addressed. Eight items.

Bryant Mr. Chairman, also there is an interoffice memo dated February 13, 1985 to Mr. Hansen from Glen Carter dealing specifically with those eight items. If you'd like to I could run through them very quickly.

Petersen Let me just take a minute and read them. I think I've got them here. The potential water quality impacts not adequately addressed.

Hansen Those are the problems, and then the memorandum is the answer to those problems.

Petersen To what extent did the Department get involved in minimum streamflow? Was that part of the--something the Department had to determine in connection with this also--this certification?

Huston I don't believe that was an issue in this case, Mr. Chairman.

Petersen — But was that something that the Department would have to pass on in addition to specific water quality.

Hansen — Minimum streamflow, Mr. Chairman, minimum streamflow refers to state law requiring 75 points to be identified for minimum streamflows. This minimum streamflow points being identified by Fish and Wildlife or by DEQ for our respective responsibilities. I don't believe that that relates at all to the particular situation here.

Bryant — Mr. Chairman, DEQ did testify at the minimum streamflow hearings in Bend concerning the proposed minimum streamflow and water quality issues. I attended those hearings, and this is just from recollection, but I think the testimony was that they didn't find serious water pollution problems or something like that on the Deschutes in regards to these proposed projects.

Petersen — Any more questions for Mr. Bryant at the present time? Mr. Huston.

Huston — Thank you Mr. Chairman.

Denecke — Excuse me Mr. Chairman just a moment. Do you have any comment to make on Mr. Smith's statement that 303 was not complied with.

Bryant — I couldn't hear him very well when he spoke, but from what I did grasp of it I believe it has been complied with and again the same arguments that are raised in my oral presentation and brief, it is very specific as to what states may do and what the DEQ can do, and those other uses, again, simply wouldn't apply in this forum--if I heard him correctly.

Denecke — I think, Mr. Bryant, that you stated that the requirements of 303, which the state has to find are complied with, where there was no evidence that they had been complied with--that's what I understand he was talking about.

Bryant — Oh. Okay. That's the first I've heard of that.

Denecke — ____????____ wasn't specific about the ____????____

Bryant — I know know of no deficiencies. It is my understanding they were all complied with.

Bishop — Wasn't he speaking about the uses of the water, so it would be the fish and the recreation use--the other uses of water and we should be considering those.

Denecke — I'm not sure what 303 refers to--do you recall?

Huston I think I can help just a little bit Mr. Chairman, members of the Commission. 303--I'm not sure of the specifics of 303 either. There is a general reference in there to the beneficial uses of the water. Mr. Smith's contention, basically, and it's one that you particularly have to grapple with in your rulemaking on 401, although we view this as a precedent-setting case toward that end, Mr. Smith's basic contention is regardless of what 401 specifically says about your ability to go beyond water quality standards, that the water quality standards themselves encompass beneficial use considerations.

Hansen Rather than the more narrow, limited water quality issues.

Bryant I guess then if that was his point, my response to that would be if it did get into that then you're defeating the purpose of the Federal Power Act decisions by the court saying that we can't allow any local or state vetos other than the specific areas that are described, otherwise you could have the counties or the cities put requirements there that couldn't be met or simply not allowing hydro to be developed, and that's not the purpose of the Act.

Petersen Mr. Huston, excuse me, I think the Commission probably would appreciate your remarks a lot more if we could take a brief, five minute recess.

-------------------------- BREAK --------------------------

Bryant: The cases that we have cited in our briefs and in our oral argument, and he has no objection if the Commission would like I'll give you just Xerox copies of those cases.

Petersen: I appreciate that. Since Commissioners Bishop, Buist, and Brill's legal library is rather limited. I don't know, do you have the U.S. Supreme Court reports in your house?

Buist: Oh indeed yes.

Petersen: This is just one set of all the cases?

Bryant: Right.

Bishop: That's sufficient.

Petersen: These aren't duplicate sets of all the cases?

Bryant: No. You'll find in most of them only 10% of the case applies to what we're talking about.

Petersen: Okay. Mr. Huston.

Huston Thank you Mr. Chairman, members of the Commission. I'm Michael Huston, Assistant Attorney General, representing the Department of Environmental Quality.

With respect to some of the procedural issues that have arisen. I understood the county to be in part requesting that they be granted party status in this case and have a formal involvement. The county, as you will see if you haven't already, has an obvious stake in the outcome of this decision. We would like to think that the Department's position is parallel enough to their concerns that we will indirectly represent their concerns today. And we would also like to think that the case can be easily resolved on a narrower issue than many of those that other people would like to have you deal with today. At the same time, the Department has no reluctance at all to suggest to you that if you prefer to have those additional parties involved, and prefer to have those additional issues briefed, we would support that. I think the proper vehicle for doing that would have to be referring the case back to your Hearings Officer to entertain those requests for party status and to establish a new briefing schedule for those additional parties and additional issues.

I would like to discuss all three of the legal issues that Mr. Bryant has raised in his brief. Dealing rather quickly with issue number 1--the land use compatibility issue--the county's

Huston (continued) interpretation. Also briefly with the third issue--the alleged inconsistency in the agency practices. And saving for last the most important issue, the breadth of 401.

The first issue, it is the appellant's position, Mr. Bryant's clients' position that the county's plan gives general recognition to the possibility of hydroelectric development in the county, and that is simply all that the land use laws require. The Department respectfully begs to differ. ORS 197.180 says that state agencies have to act compatibly with both local plans and ordinances. The and, the conjunctive and, is in that statute. The number of Oregon court decisions that have reversed state agency and local decisions for failure to comply with ordinances as opposed to plans, are virtually too numerous to cite. In this particular case, the county offered its interpretations to the Department in a pair of letters. What the county said, and those letters are attached as part of the appendices to our brief, what the county said was very simple. It said the county had adopted an ordinance that allowed hydro project development subject to a Conditional Use Permit process. Particularly pending completions of a longer-range study on the cumulative effects of projects being proposed for the Deschutes River. The very purpose of that review is to determine whether any project will indeed comply with the county's ordinances. Until that review is completed, any

Huston (continued)

determination of compatibility with the ordinance is simply impossible and I think there is no legal question that any project constructed with the absence--in the absence of a permit, would simply and boldly violate the county's land use ordinances. No such review has been completed. Indeed, the appellant has not even sought a conditional use permit from the county to date. That, in our judgment, both for the land use issue as well as a number of the other legal issues we'll be discussing today, simply makes the appellant's position premature. They have not even sought that necessary approval from the county.

Moving then to the appellant's third issue, the issue of consistency. The appellant, I think this is important although Mr. Bryant didn't spend much time on it today, I'm sure it's of some concern to the Commission. The appellant's position is, in effect, because DEQ has not assured compliance with the land use laws in past 401 decisions, it cannot do so in this case. Mr. Bryant bases that legal argument on a provision of the state Administrative Procedures Act which allows state agency decisions to be reversed by a court in some limited circumstances for acting inconsistently with prior agency practice. The Department's response is simple. I think clear. Fortunately, the state Administrative Procedures Act does not bar agencies from ever changing their practices. In particular it does not bar an agency from recognizing the error of their past ways and

Huston (continued)

improving on those errors. What the APA does say is that a court may remand an agency decision if the court finds that the agency decision to be quote, "inconsistent with an agency rule, an officially agency stated position, or a prior agency practice," and I emphasize "if the inconsistency is not explained by the agency." End of quote of the statutory provision from the APA. Thus, the law simply requires that an agency explain in a rational fashion its departure from its prior practice. That is precisely what the Department did so in this case. Precisely what the Department did in this case. In a letter, in the letter denying the 401 certification to the appellant, the Department included the following information. It rather candidly admitted that in the past it had overlooked the requirements of its own land use coordination agreement and of the state's land use laws, which specifically list 401 as a land use decision for which land use compatibility will be assured. It also said that the agency had consulted with its legal counsel, we expressed concerns about the failure to do so in the past, and it also noted several factual distinctions in this case. This is the first case in which the issue had ever arose. It's the first case in which a local government had specifically advised the Department that there was a conflict, or that there was even any potential for the conflict. Of course in this case it actually ended up going one step further with the county to taking a definitive position that its ordinances had not been

Huston (continued)

satisfied. Legally, we think this is very parallel to the court decision in Oregon, particularly the Roth v. LDCD case. That was a case in which LCDC decided to admit that it had been interpreting the statewide planning goals incorrectly and to change that interpretation. When challenged, the court disposed of the argument by saying, we do not remand a valid determination before us on review for inconsistency with the erroneous position previously taken by the agency. That administrative law principle was confirmed as recently as this week in a second LCDC case, 1000 Friends of Oregon v. LCDC and Benton County. In short, agencies may see the error of their ways and correct them. And even if prior procedures are not necessarily legally erroneous, agencies can decide to change those procedures and improve upon them providing they explain why they are doing so.

Thirdly, finally, deal with the admittedly more complicated issue in the case--the issue of the breadth of the state's authority under Section 401. This issue, in the Department's judgment merits more attention for at least two reasons. While the Department submits that the law--truly believes that the law favors its position, the law is admittedly less clear on this issue. Secondly, as a matter of policy, and as a representative of the Department's position on this case it is incumbent upon me to convey this, it is your Department's view that this case is of the utmost importance. It touches upon no less than the

<u>Huston</u>
(continued)

basic issues of the integrity of the state's land use laws and this Department's good track record in the past of trying to adhere to those, and perhaps more importantly, it touches upon the basic issue of the State of Oregon's view of its role in hydro development projects within our state borders.

401 presents the only clear, under the current law, state authority--authority for state involvement in hydroelectric development issues. Thus, you have the broad public interest that you've seen not only today during the comment--public comment period, but also in your initial hearing on the 401 rulemaking. Fortunately, you need not resolve all those broader policies in the context of this particular case. This case is much more narrowly attuned, in our judgment, to the minimal question of whether you can enforce requirements that this agency already has on the books, which the State Legislature has required that you have on the books. Those requirements simply being that when you make a water quality decision, that it is in effect in tandem a land use decision and that that decision has to be assured to be compatible with both state and local land use standards.

I think it is important on this last issue to distinguish between what the District is arguing and what they are not arguing. They are not arguing that the state land use laws do not have

Huston (continued)

clear application to this case. You have not heard Mr. Bryant make that argument. They do argue, however, that federal law preempts this agency's ability to apply the state land use laws as well as your own adopted rules and agreements on application of those laws. In short, appellant's argument amounts to a contention that federal law requires you to violate or at least ignore state law and your own law. The Department's response can be simply capsulized with three points. We think the appellant is wrong in the reading of the Clean Water Act, because they give no effect to the clear language that allows this body to determine other appropriate requirements of state law beyond water quality considerations. Secondly, and we will contend that to try to separate the land use considerations, both of concern to the county and encompassing state law, from water quality situations is virtually impossible. In this case you are not really confronted with the ultimate question of how far you can go, but rather you face a situation where the State Legislature simply said, in essence, land use is relevant to your water quality determinations. Much as in every water quality permit you issue you assure land use compliance, you should in a 401 Water Quality Certification. The second basic point the Department offers is that we believe the appellant's are wrong in in their statement of preemption law. You need not even get to the question of preemption law if you determine that 401 at least itself allows you room for operation. If

Huston (continued) that's the case, there is no preemption question at all. It's only if you read 401 and the other appropriate state requirement language out of 401 that you then have to confront the issue of whether the Federal Power Act prevents you from operating in this particular case.

Denecke Mr. Huston, could you reiterate that in perhaps different language because I'm not quite following you.

Huston I think Commissioner Denecke--I'll sure try. Section 401(d) says quite literally that in addition to water quality standard considerations required by the Clean Water Act, that you can apply and should apply other appropriate requirements of state law. If that language means what it appears to say, that is the end of the issue. It's only if that language is read out, then we confront the general preemption question of whether a federal law, most relevantly the Federal Power Act, prevents you from operating in this realm.

Petersen Mr. Huston, what state statute says that this body must consider the land use considerations.

Huston 197.180(1) says that all state agencies that make land use decisions have to make those decisions in compliance with statewide planning goals and with local comprehensive plans and ordinances.

---------------------- END OF TAPE ------------------------

Huston (continued) (NEW TAPE BEGINS) ... to make those compatible with local plans. You have adopted such an agreement required by law. You have submitted it to LCDC for their approval. They have approved it. It is attached in the appendices. What it says, is water quality decisions of this agency including 401 are land use decisions. They clearly impact the use of the land. Therefore, this agency concedes that it has a responsibility to assure land use compatibility. The means you've chosen to do that is that when an applicant submits a request for certification or request for a permit of virtually any form do you--your Department writes the local government or advises the applicant that the local government has to make a determination that its ordinances are complied with. That's precisely what happened in this case.

Petersen That's what I thought. The requirement is not in the statute, it's the statute sets out the general requirements and then the Agreement is what actually adopts the 401 connection with land use. That's what I thought.

Huston Exactly Mr. Chairman. I'm sorry I've misled. The general requirement for state agencies in taking land use decisions in compliance with ordinances is in the statute. Your determination

Huston (continued)
of what is and is not a land use decision and how you accomplish that is in your Agreement.

Petersen
That's ours. The Legislature has not said that water quality decisions are land use decisions.

Huston
The third basic point the Department would offer is in large part a policy argument and in lesser part also a legal argument. It is the Department's simple position that when confronted with a case of legal uncertainty that the agency should comply with the clear requirements of its state law and the own agency's rules, and simply opt for the broader view of its state authority. There is little question that federal law is increasingly pervasive in the environmental field. You will probably discover that there are few arenas in which you operate where there is not at least a reasonable contention that Congress has preempted the field. It is the Department's judgment that the proper way to respond to those contentions is to analyze them on a case-by-case basis. Not as a general principle, certainly, to react with timidity because of possible legal problem with preemption.

That sort of policy consideration also folds into the legal calculus, though, for at least two reasons. One, this agency's opinion carries legal weight on this sort of issue. You are

Huston (continued)

the agency charged by ORS Chapter 468 by the Legislature with implementation of the Federal Clean Water Act on the state level, as well as charged with meeting your responsibilities under the state land use laws. The Oregon courts have established strong principles of deference to agencies interpretation of the statutes that they are responsible for enforcing. The Court of Appeals has recently established the test that your interpretation is entitled to definitive deference unless it is plainly inconsistent with the purpose and language of the applicable law. There may be room for legal doubt in this case, and we're going to talk a little bit more about exactly how much doubt there may be, but it is the Department's position that certainly their case, or their position in this case is not plainly inconsistent with the applicable law.

Secondly, the Department's preference to opt for a broader rather than a narrower view of their authority is also relevant to the preemption issue. It is a basic tenet to the preemption issue. It is a basic tenet, the preemption doctrine, that state laws are presumed valid until the reverse is clearly shown. The burden, quite frankly, is on Mr. Bryant to establish that your authority is preempted. We submit that while there may be a possibility of preemption in the future, at a minimum that case has not been established yet. Mr. Bryant's client has not even applied for the conditional use permit that the county's

Huston (continued)

ordinances require. We have no--we don't know that Mr. Bryant wouldn't be successful in that effort or we certainly don't know what grounds the county might use to act upon that decision. In that case, any attempt to conclude preemption would appear to be significantly premature.

With respect to the tricky issue of the breadth of legal authority. It's an occupational hazard of attorneys that they like to talk about cases. Although often the inquiry is not very helpful. I'm going to engage in it out of occupational necessity, if for no other reason. What we have, and I'll try to be as candid as possible. We have two courts in the country that have opined on the meaning of 401 and cases that are very factually and legally different from one that we have in front of us. In short, they are not real helpful, but we'll talk about them. You have the 11th Circuit Court of Appeals, mid-level, second to the highest federal court, the 11th Circuit, the Northeast, that involved an oil refinery case. With all due respect to Mr. Bryant, I think he's got his facts reversed on the two cases. This is indeed a case where the State of Maine chose to take a broad view of its 401 authority. It quite boldly said, we're looking beyond water quality. We're going to condition our 401 approval of this 401 refinery on state siting law. A siting law very parallel in its considerations to Oregon land use law. What happened in that case is that it was EPA's

Huston (continued) jurisdiction to issue an NPDES permit. So that's how it got in federal court, because EPA refused to give credence to to the State of Maine's conditions under the siting laws, saying 401 doesn't allow you to go that far. What the federal court held is that it wasn't going to decide the issue. That it was not the federal court's business to tell the state how far it can go. It then proceeded to opine--to offer the unnecessary opinion that, in the court's judgment 401 would allow the state to do that by virtue of the specific language that we referred to--to determine what the other appropriate requirements of state law.

Denecke That's Campobello.

Huston That's the Roosevelt Campobello case. For the lawyers on the Commission, that's dictum, for the nonlawyers that means the court said more than they absolutely had to.

The other court that has addressed the issue is, indeed the New York Court of Appeals. Most recently in the Power Authority v. New York case. A case which I think the appellant relies upon wrongly as being definitive and on point. The facts refute that. Again, facts that I believe Mr. Bryant had wrong. The New York agency in that case did not choose to go beyond water quality considerations. It chose to take the narrow view of

Huston (continued)

its authority. It was challenged by the power company that wanted to build the dam. The power company contended that the state agency should have considered a broad range of other considerations, particularly energy considerations, and that your counterpart agency in New York should have decided that although water quality standards were violated, that the prevailing energy needs were such that they could verify 401 nonetheless. Thus, there are some very critical distinctions between that New York case and this case. It's a minimum case. All the court was faced there was with issue of whether at a minimum the agency has to meet water quality standards. And there is no serious question about that at all. In the Clean Water Act there is an entirely distinct provision, Section 1309 of the USC cite, that says states can't go below the minimum.

Secondly, energy considerations are, in our judgment, very different from land use considerations. If the Department in this case or in other cases were purporting to directly duplicate the energy considerations that FERC makes the preemption case or issue would become a lot harder. That's not what anyone is purporting to do here. Secondly, the case is, of course, completely different, or I guess exactly parallel in the sense, and the New York court was simply deferring to the judgment of its expert agency's narrow view of their 401 authority. That is in that sense the case precedent would support the principle

Huston
(continued)

that a court is likely to defer to to whatever position you take of your authority in this case. It is, indeed, somewhat ironic that the New York case is argued as one taking a restrictive, definitive restrictive view of the state's 401 authority. Because I am advised now that the State of New York itself, your counterpart agency, has joined a group of several states--Maine, State of Washington to the north, and others--in taking a broader view of 401. And they do not view that case as dispositive or prohibitive of that issue.

I think, for beginning to wrap up here, that the Commission faces the unfortunate situation where you're going to get a lawsuit regardless of what you decide. And perhaps it's a--be somewhat instructive to walk through exactly how that is going to work and what you will face in that situation. I'm sure if you rule in favor of the Department today that Mr. Bryant will be glad to fulfill my prophecy and give you a lawsuit. If you decide in Mr. Bryant's favor, I don't think the Department appeals Commission's decisions, but we know well that the county or other folks would. What would face, I think, is as follows. The Federal courts have said they won't decide it. They won't substitute their judgment for yours on the breadth of your authority under 401. FERC has held the same. They won't second-guess your authority under 401. So it's very likely that if you send your denial of 401 for this project to FERC that they

Huston
(continued)

will not second-guess that. Thus, the remedy if you rule in the Department's favor for Mr. Bryant will be exclusively on the critical substantive issues in state courts. In state courts, what we think you will face is a very strong state court recognition of our land use laws and a consistent literal enforcement of those land use laws. You will face a Court of Appeals which very recently had ruled in your favor on a very parallel land use case, Schreiner's Gardens v. DEQ, in which the Court of Appeals upheld your water quality permit, your air permit, and your solid waste permit for the garbage disposal north of Salem. That was a case where the Department behaved exactly like it's behaving in this case. It insisted that the applicant obtain a conditional use permit from the county. The applicant went to the county. Obtained it. The Department then in turn relied upon those land use findings. The court said, yup, you're right. Those were land use decisions. You had to do that and the way you did it was perfectly appropriate. Your reliance on the local government's determination was specifically acceptable. The inevitability of a lawsuit I don't think has swayed the Department's posture at all in the case. It has simply, I think, reinforced their judgment that if you are going to be involved in litigation, the proper role of the state is to be advocating in favor of its own authority rather than against it.

Huston (continued)

There are many ways that this case can get resolved. Mr. Bryant can have his client seek a conditional use permit and perhaps obtain it. No one knows whether that is impossible until he has tried. Congress can, with a stroke of a pen, rewrite the 401(d), the Clean Water Act, and eliminate all this doubt about whether it means what it says. Or they can in any other fashion make a clear preemptive ruling. They have not done so. Finally, a court, some other court or a court in direct ruling of your decision, can give us a definitive judgment that 401 does not allow us to comply with state land use laws. Until any of those things happen, it is simply the Department's belief that at a minimum, you should apply state land use laws and your own rules that are already on the books. And respectfully recommends that you endorse that position by affirming the Department's denial of the 401 certification in this case.

Thank you.

Petersen

Questions for Mr. Huston? Mr. Bryant, would you speak to--we're going to give you a chance to rebut--could you speak to the question of why your clients have not pursued the Conditional Use Permit.

Bryant

Several reasons, some factual and some you would consider political. The way the Conditional Use Permit is written, and

Bryant
(continued)

it's attached, in order to obtain it while the study period is proceeding--by the way the study period will probably conclude in approximately a year--the task force has the right to ask for a continuance for additional six months. And they plan on doing that, as I understand it, in August of this year. So it would be February before they issue their report, theoretically. During that interim you can apply for Conditional Use if you meet certain standards which are set out in Section 3 of the ordinance, which is attached. Those uses we feel are impossible to meet. For instance, maintain the streamflow. Any small hydro development will affect the streamflow. So that's impossible. And it talks about other restrictions are there. It says, rather than using words like "will not significantly impact," that give you some room to determine if it is a reasonable use, it is just a blanket statement that you shall maintain certain things. And of course, during construction--and what these projects are is you take water out of the river, run it through a pipe and back into the river after they go through a penstock and a power house. So, it does take water out of the river for awhile and then put it back in. For that reason we don't think it's possible to get a Conditional Use. Secondly, our time restrictions and what we're doing with the Federal Regulatory Commission would not allow us the time necessary to go through the process with Deschutes County to obtain the Conditional Use. Thirdly, to a large extent the FERC determines the scope and

Bryant (continued) the design and the implementation of the actual project from construction to how it is going to operate. And until they tell us exactly what they are going to require--you know we make proposals but until they tell us what they are going to require as a condition to granting our application, we wouldn't be able to tell Deschutes County precisely what is going to happen as far as the design and implementation. We can give them a real good idea of what we think it is going to be and what we're proposing, but we don't have the Federal Power Act stamp of approval. So it would be premature for us to go ahead and apply for that permit now, for those reasons.

Petersen So essentially you're arguing it's kind of a "Catch 22."

Bryant That's exactly right.

Petersen You can't learn how to land until you've had a few takeoffs under your belt type thing. Okay, I think I understand that issue.

Denecke Mr. Huston, see if I can phrase the question I have correctly. Suppose that instead of a land use matter, suppose that the Department refused to issue the certification because issuance would violate the state's policy on preservation and protection of wildlife and fish? Would your argument be the same that the laws on the protection and enjoyment of wildlife and fish is

Denecke (continued) an appropriate requirement of state law? Do you understand my question?

Huston I'm afraid I do Commissioner. I wish I understood my answer. The problem is those are precisely the broader policy issues that you are going to be confronted with in your further rulemaking on 401. And you already know, I believe it was either Fish and Wildlife or an environmental group sharing their interest, that have already been in front of you and said they are likely to contend that precisely those considerations ought to be and can appropriately be made a part of 401. You also are going to face a contention raised by Mr. Smith's suggestions today about how far even the narrow view of 401 goes. And you had Mr. Bryant, I think, taking the position this morning that even considerations apparently expressly incorporated within the water quality standards may be arguably preempted by the federal power legislation. So, I guess an answer is lots of tough issues to come, more appropriately resolved by the Commission in its policy setting function of rulemaking. We think you've got a narrow question here of whether you enforce laws already on the books, both yours and the State Legislature's, and that the significance of the case simply is that if you take the narrow view here you really seem to have resolved the broader policy issues down the road.

Denecke I suppose what irritates me basically is that here Oregon has been a leader in environmental protection, and yet the Federal Government feels that because other states have not been a leader they've got to come in and effect take over and tell the states that they really don't have much to say about this. It appears in this case that, well, I don't think there is any question, it not only appears that federal legislation says the Feds are decide everything except the question of water quality.

Petersen Mr. Huston, is it your position that this Commission can decide what other appropriate requirements of state law are?

Huston Precisely.

Petersen By rulemaking? That's your position?

Huston By rulemaking in the future, Mr. Chairman, it is our contention that you have really already decided that, or the State Legislature has decided that for you with respect to at least land use. You get to decide some other tough ones down the road, but at least with respect to land use, our basic contention is the Legislature said that is an appropriate requirement with respect to water quality decisions really. Basic contention is that it may well be beyond your judgment. At least the Department--

Petersen Well, but really we talked about that. The State Legislature didn't say that. We said that by virtue of our agreement with LCDC. Isn't that true? The State Legislature didn't say that.

Huston The State Legislature didn't say that 401 Certification of the land use decision. What they said is, first of all they did create a general definition of what is a land use decision and the courts have as well. And basically that test is any time it has a significant impact on the present or future land uses. That principle is established by the Supreme Court in the Petersen case. Secondly, I don't think there is any question that that test is not met in this case. I don't believe Mr. Bryant has even attempted to argue that it wouldn't be. Secondly they have also directed each state agency to try to make their own rough cut of what is and is not a land use decision. I'm not sure that you've done that. You have said 401 is. I'm not sure that's binding, but probably is, and even if it isn't I think it meets the generic legal test for land use decision anyway.

Petersen Mr. Bryant, would you like to have some time for rebuttal?

Bryant I'll be very brief. First of all on Justice Denecke's comment and the question to Michael. You're exactly right. If you open the door here on other appropriate requirements to say it

Bryant (continued)

includes land use, then it can include a whole bunch of other things, not just for the State of Oregon but for every state in the Union. And so you try to have a National Energy Policy with that kind of an open door. I think when you review the cases, especially the Supreme Court cases, you will see that's not what they intended. When you review the legislative report and the testimony of Senator Muskie, a sponsor of the bill, you will see that is not intended. The people that want to tighten up water control and do it for the Country, they didn't intend to change our National Energy Policy or the Federal Power Act in doing it.

One thing that is hard for me to address here is, I've come and my client has come to ask for a different opinion than what your staff is recommending. I'm presuming that when you became Commissioners that you took an oath and that in it there is something about supporting the laws of the United States and the State of Oregon, and that you will not make a decision in this particular case because you have an obligation on behalf of the State of Oregon to stand up to the federal government. That is not the issue. The question is the interpretation of 401(d) and the preemption and whether or not preemption applies. And if you determine after your research in reviewing the file that it in fact does apply, whether or not you are on a state commission should not enter into your decision. To do so would

Bryant
(continued)

be denying us a fair hearing, if that is one of the things you weigh in making a decision. And I just can't believe that is intended. Otherwise, it doesn't really make sense to go through this process. So certainly--Michael used the word timidity--I don't want you to be timid on the other side of the coin either. And so the fact that if you find in our favor, and that makes it more difficult for the state on appeal, well so be it. That is our system, that is our process. That is the way it should work.

On the Schreiner Gardeners decision, I agree with that case. It doesn't have any application here. They weren't talking about 401 or federal preemption. So I would--and you have one other opportunity, which the Chairman has alluded to a couple of times. You can define compatibility. It has never been defined before. And if you define compatibility as stating that the plan allows for small hydro, which it does, then you have technically have met your coordination agreement. That part of your decision. And as I mentioned in my other argument, that section ORS 197.640(d)(2), does permit an out to a state agency when they can't follow the plan. Where it is inconsistent with a state or federal law. It is unfortunate that by what I think you need to do in following the federal legislation and the Constitution, you may be in fact violating a state law. But you do belong to the United States of America and it is a

Bryant (continued) National Energy Policy, and I think that is what you are obligated to do if you interpret the law the way I have asked you to. Thank you.

Petersen Thank you. Further questions.

Bryant I don't know, Michael, if 401 has actually been, a copy of it is in the record.

Denecke It is not.

Bryant I've got a copy of it here, and with permission I'd like to submit that to the record so you'll know what we've been talking about.

Petersen Also, it would be handy to have a copy of Section 303, I think since that has been--some inquiries from the Commission have come from that.

Hansen Would you like that now?

Petersen Well, maybe we ought to decide as a Commission how we are going to proceed, before we start making Xerox copies of things. I think it is clear to me that we have two or three very, very complex legal issues. I'm not sure this Commission is even

Petersen (continued)

capable of fully grappling with the technical legal arguments. And therein lies perhaps one of the problems. However, it is our responsibility, and I think we're going to do the best job we can. Not ever having before an opportunity to either be affirmed or reversed on appeal. I want my first shot--I don't want to get reversed. So I think that in view of that and in view of the new material that was submitted today, I think it would be appropriate for us to certainly take this under advisement. As a lawyer, when a judge tells me that, I always kind of cringe and wonder how long that is going to take. Sometimes that is used as an excuse for not being able to bite the bullet and make a decision. But I think that under the circumstances that would be appropriate so that we can do the best job possible for the parties. It is an important decision. It is going to have precedent-setting characteristics to it. It is going to be appealed no matter what we decide. So I think it would be appropriate, and I would entertain a motion to take it under advisement and then make a commitment to parties that we will do that as expeditiously as possible, and decide on the most appropriate way to do that. I suspect it will require some other meeting, work session, where we can talk amongst ourselves, and of course whenever we get together it is a public meeting unless it qualifies for Executive Session, which I don't think this would. So people would be able to be present in that process. As far as scheduling that is concerned, we haven't

Petersen (continued) talked about that and I don't know when people would be available, how long you would like to consider the record and digest some of these things. Maybe some of you wouldn't like to consider it at all. I don't know. I know Arno and I would. What are the thoughts of the Commission?

Denecke I'll move along the lines which you suggested Mr. Chairman.

Bishop Second.

Petersen Okay. Everybody agreeable with that? Our next meeting, Carol, is scheduled for when?

Hansen It's in Salem at--

Splettstaszer April 19.

Hansen April 19.

Petersen I'm thinking we probably ought to do it before then. Maybe in a couple of weeks from now. I will be out of town, or out of the state the last week in March. But perhaps the week before that we can set a time. It is the week of the 18th I believe. Are you going to be around?

Buist I'll be out of town Monday, Tuesday, Wednesday.

Petersen Why don't we do this. Why don't we just get our heads together right after our Commission meeting is adjourned and then we'll make that decision and obviously let everybody know where and when and what the procedures are going to be. Are there any other questions or comments on this particular agenda item before we move on to the next.

Bishop We need to take a vote on that.

Petersen It was kind of a consensus, I think. Everybody agreed--everybody nodded this way, which is--Chair took judicial notice of the up and down--thank you very much gentlemen for excellent presentations.

Petersen Are there any further items? Yes?

John Charles (OEC) Not having the Commission's rules in front of me regarding appeals of Departmental actions--on the 401 issue that you are taking under advisement--what does that mean in terms of the public record? Is the record closed, or is it open, or what. The issues raised today--some of the arguments I would be

<u>Charles</u> (continued) interested in commenting on. So I guess my question to you is, whether you are going to allow any other comment.

<u>Petersen</u> I'm inclined not to. I think that is consistent with prior Commission--we've got two parties and we're not going to--I understand how that bears on the other issue that you've addressed us on.

<u>Charles</u> That's what I mean--the rulemaking process that is coming up.

<u>Petersen</u> Right. Very appropriate at that point in time. But I think we have a more confined contested case situation here and I'd rather not open it up to public comment.

<u>Brill</u> Jim, does that mean at this time or at our future meeting?

<u>Petersen</u> Any--at this time and the future meeting. I'm not going to close the record because we may request additional information as a Commission to consider and help us make our decision. So I'm not going to close the record, but I'm not going to open it for nonparty participation, unless I'm overruled by the four people sitting up here with me.

Alright, then I will adjourn the meeting at this time.

TRANSCRIPT - PUBLIC FORUM - March 8, 1985 EQC Meeting

Subject: Lava Diversion Project

Wujack

Good morning. My name is John Wujack, I'm a resident of Bend. I'm a member of the Executive Committee of a group called the Coalition for the Deschutes. We're a natural resource planning group in the Bend area. We charge ourselves with monitoring hydroelectric development in the Deschutes river basin. There is a project which is going to be judged here later on this morning and that project will be judged on its own merits. What I'd like to talk to you about this morning is the need for sound planning from federal agencies, state agencies, city and county governments, so that very specific problems can be eliminated, sound planning can go into effect which will really benefit community interests. What's going to serve one community in the eastern agricultural sections may not be working in a community such as Bend where we have limited agricultural resources but we have a growing tourist industry. And we feel as though the compatibility between all government agencies working on this is the only way we're going to have sound planning in what is really becoming a burden on the state, and that is in the burgeoning hydroelectric industry. I just thank you for your time this morning.

<u>Petersen</u> Thank you. Questions for Mr. Wujack? Thank you. Larry Tuttle, Deschutes County Commissioner.

<u>Tuttle</u> Thank you very much Chairman Petersen. It appears that we see each other more in Portland than we do in Bend. My name is Larry Tuttle, I'm a Deschutes County Commissioner. For the record, my address is Courthouse, Bend, Oregon. The purpose for requesting this time on the public forum section today is to request that I be allowed to make comments in the public hearing at the time that you take up number F on the agenda.

<u>Petersen</u> Why don't you go ahead and make your comments now, Commissioner Tuttle. I think the time span between now and then is very brief. and the impact probably the same. I think we as a Commission decided that we want to limit that agenda item to just legal arguments and yet we do want people to feel free to talk with us on this subject.

<u>Tuttle</u> Would you be willing then, because the issue that I particularly want to address in my comments is the party status, may I submit a written memorandum into the record of the hearing?

<u>Petersen</u> Sure.

<u>Tuttle</u> I would like to go ahead and make the comments at this time.

Petersen Fine.

Tuttle I'll basically be reading from a prepared statement, so this statement will be the same as the one to be submitted into the record.

Petersen Okay.

Tuttle Today, of course, I'm speaking about Lava Diversion Project No. FERC 5205 on the Deschutes River. On November 28, 1983, General Energy Development Inc. (GED), through their consultant, Campbell-Craven Environmental Consultants, submitted a letter requesting Water Quality Standards Compliance Certification or waiver for the project I just previously described, pursuant to Section 401 of the Federal Clean Water Act. By letter dated September 7, 1984, the Department of Environmental Quality informed GED that it was circulating public notice of its application and that the application required statement of land use compatibility from Deschutes County, in accordance with the Agency's coordination program adopted pursuant to ORS 197.180.

Deschutes County received the public notice of GED's application from the Department on September 17, 1984. Deschutes County also received a letter from GED on October 2, 1984 requesting, and I quote, "a statement of compatibility with the Deschutes

Tuttle (continued)

County Comprehensive Plan." Deschutes County responded directly to the Department by letter dated October 10, 1984, saying in part that it was impossible for Deschutes County to find that the proposed hydroelectric project near the Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act, without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request. And further, that until such time as an application has been made by General Electric Development, Inc., and that application has been found in conformance with the comprehensive plan and implementing ordinances, Deschutes County opposes the issuance of 401 Federal Clean Water Act Certification. End of quote.

GED's application for Water Quality Standards Compliance Certification was denied by the Department by letter dated November 27, 1984. The Department identified eight activities associated with the project construction and operation whose potential for water quality impairment had not been adequately addressed in environmental report, and that GED had failed to obtain a Land Use Compatibility Statement from Deschutes County. Deschutes County learned that the November 27, 1984 denial of GED's application had been appealed to the Environmental Quality

<u>Tuttle</u> (continued)

Commission on February 27, 1985--that is, we learned it on that day.

Questions about the standing of GED. GED was the applicant for the Water Quality Standards Compliance Certification. GED, however, is unable to utilize the waters of the state because the waters of the upper Deschutes River have been withdrawn from appropriation. Therefore, GED is unable to build any project on the upper Deschutes River. Arnold Irrigation District has entered into a joint venture agreement where the District will supply GED the municipal preference for the project for a share in the revenue of the project. Two Attorney General opinions have analyzed the agreement between the District and GED. The opinions conclude that the agreement is insufficient to qualify GED's application before the Water Resources Department as municipal application because the District has retained sufficient beneficial interest and control to make it appear that the proposal is other than, I quote, "a subterfuge to allow a private developer to use the municipal application process." And that's a quote from the Attorney General's Department. This was an opinion of Larry D. Thompson, Assistant Attorney General, dated October 24, 1983. GED is precluded from appropriating water for the project and the District does not have an agreement which will allow GED to utilize your municipal powers. This District is not an applicant in this proceeding. Under these

Tuttle (continued) circumstances GED does not have standing to apply for the Water Quality Standards Compliance Certification.

Two. On the District's appeal. Deschutes County was not made a party to the proceeding today but was allowed to comment pursuant to the public notice, excuse me, Deschutes County was not made a party to the entire proceeding but was allowed to comment pursuant to the public notice as a member of the public and was a necessary party to the proceeding before the Department. To Deschutes County's knowledge, GED has not participated in this appeal of the Department's decision to the Commission. It appears that the District has received some special status and was allowed to stipulate to a briefing schedule and file a brief with the Commission raising legal arguments. Because of Deschutes County's role in determining compatibility with the Statewide Land Use Goals, the local Comprehensive Plan and implementing ordinances, Deschutes County should be given equal status with the District and be entitled to participate in the Commission's hearing in at least the same capacity as the District--and by the District I mean Arnold Irrigation District. The District was kind enough to supply Deschutes County with copies of the briefs on the afternoon of Tuesday, March 5, 1985--that's Tuesday of this week, about 5 o'clock. Given such a short period of time from the date of receipt of that information and the hearing before the Commission

Tuttle (continued)

today, March 8, there was insufficient time to respond to the legal issues raised on behalf of GED by the District. Deschutes County does, however, concur with the Department's position set forth in their brief as to the legal issues under consideration.

Three. Evidence outside the record. The Department and the District acknowledge in their briefs that the Department continued to work on eight deficient areas after November 27, 1984, after the November 27, 1984 decision. No additional notice was given to the public that additional information would be considered by the Department after the decision was made. It is of great concern to Deschutes County, who has attempted to participate in the entire process but has not been given party status or considered necessary to the proceedings, that factual issues could be determined after the public hearings process had been closed by the Department. We believe that if the eight issues are to be resolved by subsequent evidence submitted by GED, at a minimum a new notice should be issued with an opportunity for the public to review and participate in the application as amended relating to those eight items. The appeal from the decision to the Commission should not consider new evidence developed outside of the record.

Tuttle (continued)

Four. New hearing. Evidence was considered by Department outside the scope of the review process. We believe that, if the evidence is to be considered, it should not be considered as an appeal of the November 27, 1984 decision, but should be considered as a refiled or amended application. GED's application should be returned to the Department for new proceedings on the application as supplemented. It is our conclusion that the application of GED for Water Quality Standards Compliance Certification pursuant to Section 401 of the Federal Clean Water Act, should be denied. In the alternative, Deschutes County should be made a party with at least the same status as Arnold Irrigation District, and be entitled to participate in the rehearing of the supplemental application on remand before the Department.

Respectfully submitted, Richard L. Isham, Deschutes County Legal Counsel.

I have copies for each of the Commissioners and staff.

Petersen

Are there questions for Commissioner Tuttle?

Tuttle

So I'm clear. It is my understanding that this will be made a part of the public hearing record.

Petersen Yes.

Tuttle Thank you very much.

Petersen Thank you Commissioner Tuttle. I think it might be appropriate for legal counsel for the State and for the applicant to maybe comment on Commissioner Tuttle's remarks during your presentation, if you have one. Further public forum participation--Mr. J. D. Smith wants to talk to the Commission about Section 401.

Smith Thank you Mr. Chairman and members of the Commission. My name is J. D. Smith representing Oregon Shores Conservation Coalition and Northwest Environmental Defense Council, or Northwest Environmental Defense Center, pardon me.

I wanted to comment on the matter of the Lava Diversion Project.

Brill Get a little closer to the mike there.

Smith I and several others testified at the last month's meeting about the 401 certification process. Primarily to the extent that the certification of compliance with Section 303 of the Federal Clean Water Act seemed to us fairly clearly to require a consideration of the impact of projects to be certified under

Smith (continued)

Section 401, that they be consistent with not simply water quality criteria, but also the uses of the water. Amongst the issues to be argued during the formal hearing on this project, that particular consideration does not exist. I simply want to reiterate the same comments that we made last month that the Commission is missing a fairly key tool in making these kind of evaluations by not considering the impact of the Lava Diversion Project on the other uses of the water, primarily fish, recreation, etc.

Petersen

Isn't that the land use issue? I mean, isn't that the point that the state is making?

Smith

I think the point, Mr. Chairman, is not that it is or is not a land use issue, but what is clearly in the Federal law under Section 303 is the requirement of compliance or consistency with water uses. If that clearly appears under the land use law, that's probably fine, but it seems an unnecessarily circuitous route to make a determination under what is clearly in the Federal law.

Petersen

Therein lies one of the problems that we're dealing with is the Federal law versus the State law and how the two may or may not overlap or preempt one another. It's not as clear as it could be.

Smith — My point, Mr. Chairman, is that the Federal law, without arguing about whether local, state--without arguing about the relationship between local, state and federal law--the federal law itself allows this Commission, or perhaps better, requires this Commission to consider compatibility with water uses.

Denecke — Do I restate it correctly--your contention is that the evidence does not show compliance with 303 of the Federal law?

Smith — That is correct.

Petersen — Are there other people on the public forum? Then I'll close it at this time.

Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207
522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

TO: Environmental Quality Commission DATE: March 8, 1985

FROM: Linda K. Zucker, Hearings Officer

SUBJECT: Agenda Item F - Appeal of DEQ Denial of Clean Water Act, Section 401 Certification to Lava Diversion Project, FERC No. 5205, Deschutes River, Oregon.

General Energy Development, Inc. (GED) applied to the Department of Environmental Quality (DEQ) for water quality standards compliance certification for the Lava Diversion Project, a planned hydroelectric project on the Deschutes River. Compliance certification is required by Section 401 of the Clean Water Act.

DEQ denied certification for failure to adequately address certain potential water quality impacts and for failure to provide a statement of land use compatibility. The water quality information has been provided and is no longer an issue.

GED continues to dispute DEQ authority to condition certification on submission of a statement of compatibility with the Deschutes County Comprehensive Plan and land use ordinances. GED asks the Environmental Quality Commission to find it meets the requirements of law and is entitled to certification.

Because no factual issues exist, the parties have agreed to have this matter brought before the Commission without a prior hearing. Instead, the parties have submitted the attached memoranda outlining their legal arguments. A summary of the memoranda precedes them.

LKZ:d
HD1624
Attachments

IN RE: Lava Diversion Project FERC No. 5205

SUMMARY OF LEGAL MEMORANDA

FACTS

General Energy Development, Inc. (GED or Applicant) holds Permit No. 5205 issued by the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before FERC may issue a license to construct, the project must satisfy the requirements of Section 401 of the Clean Water Act. Section 401(a)(1) states that the licensed applicant shall provide the licensing agency (here FERC) "a certificate from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of section 301, 302, 303, 306 and 307 of this Act." These listed sections pertain to water quality effluent limitations, water quality standards, implementation plans, national performance standards and toxic and pretreatment effluent standards. None of the sections pertain to or mention compatibility with state, county, or local land use regulation. However, Section 401(d) also requires the state certifying agency to set out in the certification limitations or requirements to assure compliance with "any other appropriate requirement of State law. . ."

Relying on Section 401(d) and on state law requiring state agency decisions affecting land use to be made in accordance with local comprehensive plans and ordinances, the Oregon Department of Environmental Quality (DEQ) has denied certification to GED for its failure to supply DEQ with a statement that the project is compatible with the Deschutes County Comprehensive Plan and land use ordinances. This was the first time the DEQ has required a Section 401 applicant to obtain a "statement of compatibility."

In December, 1983 Deschutes County passed ordinances limiting hydroelectric development on the Deschutes River pending completion of a study assessing the cumulative impacts on the environment of numerous planned projects. Until the study is completed, any hydroelectric project must meet the special standards of the ordinances and must obtain a conditional use permit. GED has not obtained a conditional use permit from the County. Deschutes County has requested DEQ to withhold issuing any Section 401 certificates until after the study is over.

FIRST ISSUE

As a matter of law, was Deschutes County in error in failing to grant a statement of land use compatibility?

Applicant's Argument

Deschutes County land use law allows hydroelectric projects as conditional uses. Assuming compatibility with state land use law is a proper concern of DEQ when certifying projects under Section 401 of the Clean Water Act, DEQ should certify this project because it is authorized by state land use law. The test for DEQ to use in determining that the project should be certified is not whether a conditional use permit will ultimately be issued for this project, but simply whether hydroelectric projects are authorized by land use law.

Department's Argument

Oregon law requires DEQ decisions affecting land use to be compatible with local comprehensive plans and ordinances. While Deschutes County has passed an ordinance calling for a moratorium on proposed hydro development on the Deschutes River until July 1, 1985, the ordinance makes hydro projects eligible for conditional use permits prior to that date. GED could apply for such a permit but has not done so. Consequently, GED is not able to present a final determination that the project would be compatible with the standards of the ordinance. DEQ relies on local government's determination of land use compatibility and will not provide Section 401 certification without such a determination.

In any case, this issue should be resolved by GED and the county.

SECOND ISSUE

Can DEQ deny Section 401 certification under the Clean Water Act for reasons other than water quality?

Applicant's Argument

DEQ is going beyond its statutory power in requiring a statement of land use compatibility from Deschutes County. Land use compatibility is unrelated to Section 401 certification. Case law establishes that in the Federal Power Act Congress has preempted state licensing and permitting functions for hydroelectric power projects. Congress has delegated to the states only the limited duty to assure that project construction and operation will not violate applicable state water quality standards. Land use compatibility is unrelated to water quality standards. The county land use plan has nothing to do with water quality concerns. DEQ's previous failure to require compatibility statements recognizes this limitation.

The Clean Water Act, Section 401 does not allow the State of Oregon to delegate the question of water quality to Deschutes County. The power to decide whether a hydroelectric project will be built cannot be delegated to local government, as local veto would undermine the entire federal regulatory plan for hydroelectric licensing.

Department's Argument

The Clean Water Act establishes a joint system of state and federal control to preserve, protect and improve the nation's waters.
In Section 401 Congress granted the states veto power over federal hydro project licensing by requiring applicants for licenses to obtain state certification. Section 401 provides a state two means of conditioning or refusing to certify a hydro project. First, under Section 401(a), state certification may be withheld if the project would have an adverse effect on water quality. Second, Section 401(d) provides the project must comply with "any other appropriate requirement of State law. . ."

Under the provisions of Section 401(d), DEQ believes it may condition certification on a project's ability to obtain a statement of land use compatibility from local government.

When possible, statutes should be read to give effect to their plain meaning. Section 401 first says the state may require compliance with listed water quality criteria. It then says projects must meet any other appropriate requirement of state law. The plain meaning of the section is that both water quality criteria and other appropriate requirements of state law may be considered. This cumulative language demonstrates an intention to extend the scope of Section 401 beyond water quality standards.

Federal law does not preempt state law in this case. Developing case law supports an increasingly broad view of state authority to regulate power projects where the state action is not in direct conflict with federal law. In this case federal law provides that state law must be satisfied before a Section 401 permit is issued. State law provides that comprehensive plans and ordinances must be considered by DEQ before providing Section 401 certification. Oregon land use laws are not in conflict with either the Federal Power Act or the Clean Water Act. In denying certification DEQ satisfied both federal and state law.

Section 401(d) requires--or at least authorizes--consideration of state land use law in deciding whether to grant Section 401 certification. State land use law requires DEQ to consider comprehensive plans and land use ordinances when making decisions affecting land use. DEQ's coordination agreement with the state land use agency identifies Section 401 certification as a decision affecting land use. Moreover, because hydroelectric development on the Deschutes River clearly has a significant impact on present or future land uses, it is considered a land use decision. Consequently, DEQ must consider the Deschutes County land use plan, ordinances and determinations during the Section 401 certification process. Deschutes County has concluded and advised DEQ that the Lava Diversion Project is not consistent with the County's ordinances.

Case law supports DEQ's deference to local government determinations of land use compatibility.

As a matter of policy Oregon should be assertive in leading the nation in using Section 401 certification as a tool of effective comprehensive planned development of land and water resources. Certification is an important vehicle for influencing hydro power development decisions. DEQ's decision supports the Deschutes County planning effort and accords with the position and policies of the Oregon Department of Fish and Wildlife, Oregon Department of Energy, State Representative Tom Throop, and Save Benham Falls Committee.

THIRD ISSUE

Has DEQ violated the consistency standard of ORS 183.484 by failing to require previous Section 401 applicants to obtain a statement of compatibility?

Applicant's Argument

ORS 183.484(4)(b)(B) requires DEQ to be consistent in its application of standards and practices. DEQ contends that its coordination agreement with the state land use agency requires DEQ to condition Section 401 certification on an applicant's submission of a statement of land use compatibility. Several hydro developments have received Section 401 certification since January, 1983 without submitting a statement of compatibility. DEQ has not previously required a land use compatibility statement as a precondition to certification. Prior agency practice indicates that the statement is not necessary under Section 401.

DEQ's coordination agreement with the land use agency lists and summarizes DEQ programs, rules and decisions affecting land use. These lists deal with water quality and the programs deal with sewage works, industrial wastes, and similar concerns; they do not deal with hydroelectric licensing or Section 401 certification. This absence and DEQ's prior failure to require statements of compatibility indicate that the coordination agreement does not require it.

Department's Argument

Under Oregon law inconsistent agency action or departure from prior agency practice can be set aside if the inconsistency is not explained by the agency. While this project was the first project required to supply the DEQ with a local compatibility statement, this change in procedure was fully explained to the applicant. In a letter to the applicant, DEQ explained that it had been advised by legal counsel of the compatibility requirement in its coordination agreement with the land use agency, but

that DEQ had previously overlooked this provision. DEQ has since required at least 12 other hydroelectric projects to supply the statement and now requires local land use compatibility statements of all applicants for Section 401 certification.

Finally, even if this DEQ action were found to be inconsistent, the certification denial in this case is a proper change to correct prior erroneous agency procedure.

LKZ:d
HD1613

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In Re:)
LAVA DIVERSION PROJECT)
FERC NO. 5205)
DESCHUTES RIVER, OREGON)

MEMORANDUM OF DESCHUTES COUNTY

INTRODUCTION

On November 28, 1983, General Energy Development, Inc. (GED), through their consultant, Campbell-Craven, Environmental Consultants, submitted a letter requesting water quality standards compliance certification, or waiver, for the above referenced project pursuant to Section 401 of the Federal Clean Water Act. By letter dated September 7, 1984, (Exhibit "A"), the Department of Environmental Quality (Department) informed GED that it was circulating public notice of its application and that the application would require a statement of land use compatibility from Deschutes County in accordance with the Agency's coordination program adopted pursuant to ORS 197.180. Deschutes County received the public notice of GED's application from the Department on September 17, 1984 (Exhibit "B"). Deschutes County also received a letter from GED on October 2, 1984, (Exhibit "C") requesting "a statement of compatibility with the Deschutes County Comprehensive Plan".

DESCHUTES COUNTY LEGAL COUNSEL
DESCHUTES COUNTY COURTHOUSE ANNEX
BEND, OREGON 97701
TELEPHONE (503) 388-6623

Deschutes County responded directly to the Department by letter dated October 10, 1984, (Exhibit "D") saying, in part that:

> "It is impossible for Deschutes County to find that the proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request."
>
> and--
>
> ". . . until such time as an application has been made by General Energy Development, Inc., and that application has been found in conformance with the Comprehensive Plan and implementing ordinances, Deschutes County opposes the issuance of a Section 401 Federal Clean Water Act certification. . . ."

GED's application for water quality standards compliance certification was denied by the Department by letter dated November 27, 1984 (Exhibit "E"). The Department identified eight activities associated with the project construction and operation whose potential for water quality impairment had not been adequately addressed in the environmental report and that GED had failed to obtain a land use compatibility statement from Deschutes County.

Deschutes County learned that the November 27, 1984, denial of GED's application had been appealed to the Environmental Quality Commission (Commission) on February 27, 1985.

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DESCHUTES COUNTY COURTHOUSE ANNEX
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TELEPHONE (503) 388-6623

DISCUSSION

1. Standing of GED.

GED was the Applicant for the water quality standards compliance certification. GED, however, is unable to utilize the waters of the State because the waters of the upper Deschutes River have been withdrawn from appropriation. Therefore, GED is unable to build any project on the Deschutes River. Arnold Irrigation District (District) has entered into a joint venture agreement where the District will supply GED the municipal preference for the project for a share in the revenue of the project (Exhibit "F"). Two Attorney General Opinions (Exhibits "G" and "H") have analyzed the agreement between the District and GED. The Opinions conclude that the agreement is insufficient to qualify GED's application before the Water Resources Department as a municipal application because the District has not retained sufficient beneficial interest and control to make it appear that the proposal is other than a "subterfuge to allow a private developer to use the municipal application process". Opinion of Larry D. Thomson, Assistant Attorney General, dated October 24, 1983. GED is precluded from appropriating water for the project and the District does not have an agreement which will allow GED to utilize their municipal powers. The District is not an applicant to this proceeding. Under these circumstances, GED does not have standing to apply for the water quality

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1 standards compliance certification.

2 2. District's Appeal.

3 Deschutes County was not made a party to the above
4 proceedings, but was allowed to comment pursuant to the
5 public notice as a member of the public and was a necessary
6 party to the proceeding before the Department. To
7 Deschutes County's knowledge, GED has not participated in
8 the appeal of the Department's decision to the Commission.
9 It appears that the District has received some special
10 status, and was allowed to stipulate to a briefing schedule
11 and file a brief with the Commission raising legal argu-
12 ments. Because of Deschutes County's role in determining
13 compatibility with the Statewide Land Use Goals, the local
14 Comprehensive Plan, and implementing ordinances, Deschutes
15 County should be given equal status with the District and
16 be entitled to participate in the Commission's hearing in
17 at least the same capacity as the District.

18 The District was kind enough to supply Deschutes
19 County with copies of the briefs on the afternoon of
20 Tuesday, March 5, 1985. Given such a short period of time
21 from the date of receipt of that information and the
22 hearing before the Commission on Friday, March 8, 1985,
23 there was insufficient time to respond to the legal issues
24 raised on behalf of GED by the District. Deschutes County
25 does, however, concur with the Department's position set
26 forth in their brief as to the legal issues under consider-

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ation.

3. Evidence Outside the Record.

The Department and the District acknowledge in their briefs that the Department continued to work on the eight (8) deficient areas after the November 27, 1984, decision. No additional notice was given to the public that additional information would be considered by the Department after the decision. It is of great concern to Deschutes County, who has attempted to participate in this process, but has not been given party status or considered necessary to the proceedings, that factual issues could be determined after the public hearings process had been closed by the Department. This strikes the appearance of some private arrangement between the Developer and the Department.

We believe that if the eight (8) issues are to be resolved by subsequent evidence submitted by GED, at a minimum, a new notice should be issued with an opportunity to the public to review and participate in the application, as amended, relating to those eight (8) items. The appeal from the decision to the Commission should not consider new evidence developed outside that record.

4. New Hearing.

Evidence was considered by the Department outside the scope of the review process. We believe that, if that evidence is to be considered, it should not be considered as an appeal of the November 27, 1984, decision, but should

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1 be considered as a refiled or amended application. GED's
2 application should be returned to the Department for new
3 proceedings on the application, as supplemented.

4 CONCLUSION

5 The application of GED for a water quality standards
6 compliance certification pursuant to Section 401 of the
7 Federal Clean Water Act should be denied. In the alterna-
8 tive, Deschutes County should be made a party with at least
9 the same status as the Arnold Irrigation District, and be
10 entitled to participate in the rehearing of the supplement-
11 ed application on remand before the Department.

12 Respectfully submitted,

13 DESCHUTES COUNTY, OREGON

14

15 /S/ RICHARD L. ISHAM

16 RICHARD L. ISHAM, OSB #75-195
Deschutes County Legal Counsel
Attorney For DESCHUTES COUNTY

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DESCHUTES COUNTY LEGAL COUNSEL
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EXHIBIT A

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 7, 1984

CERTIFIED MAIL

Mr. Donald P. McCurdy, President
General Energy Development
216 E. Barnett St.
Medford, OR 97501

Re: FERC No. 5205
Lava Division Project
Deschutes River, Oregon

Dear Mr. McCurdy:

By letter of November 28, 1983, Campbell-Craven, Environmental Consultants, requested a water quality standards compliance certification, or waiver, for the above referenced project, as required by Section 401 of the Federal Clean Water Act. We replied on December 1, 1983, that we would not commence action on the certification request until having opportunity to review an Exhibit E Environmental Report for the project.

On August 20, 1984, we received from you the four-volume application to FERC for project licensing, that includes Exhibit E.

Please be advised that public notice of receipt of your Exhibit E and request for certification pursuant to Section 401 of the Federal Clean Water Act is being circulated to known interested persons and agencies and forwarded to the Secretary of State for publication in the Bulletin. Comments are being requested by October 15, 1984. A copy of this notice is attached for your information.

As you know, the Deschutes County Board of Commissioners has asked this Department by letter dated May 10, 1984, to hold your application with no action until completion of a study by them in 1985. Arnold Irrigation District (by letter dated June 5, 1984) and General Energy Development, Inc. (by letter dated June 12, 1984) have taken exception to the request of Deschutes County and urged us to proceed with evaluation of the project.

In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to the Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to Section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that "DEQ" will rely on a statement of compatibility from the appropriate planning agency.

EXHIBIT A

DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

This oversight makes it apparent that rules are needed to clearly establish procedures for 401 certification. The Department will seek authorization from the Environmental Quality Commission on September 14, 1984, to hold a hearing on proposed rules. We are enclosing a copy of the staff report for your information. Since your application for certification predates these proposed rules, action on your application will not be based on these draft rules but will be based on existing statutory authorities.

In order to address the land use compatibility determination required by Oregon law and our agreement with LCDC, we request that you obtain from Deschutes County and forward to us by October 15, 1984, a statement of compatibility with the acknowledged comprehensive plan or of consistency with statewide planning goals.

We interpret the letter from Campbell-Craven dated November 28, 1983, as the date of your first application for certification. Thus, we must act to issue or deny certification on your application by no later than November 28, 1984 to remain within the 1 year time frame established in Section 401 of the Clean Water Act. We apologize for the short time for response to the land use compatibility requirement.

We are aware that you may be unable to obtain the necessary statement of compatibility from Deschutes County. If you are unable to obtain such a statement, it is our opinion that we will have to propose denial of certification at this time pending resolution of land use issues.

Sincerely,

Fred Hansen

Fred Hansen
Director

HLS:t
WT264
Attachments

cc: Arnold Irrigation District
Federal Energy Regulatory Commission
Central Region, DEQ

EXHIBIT A

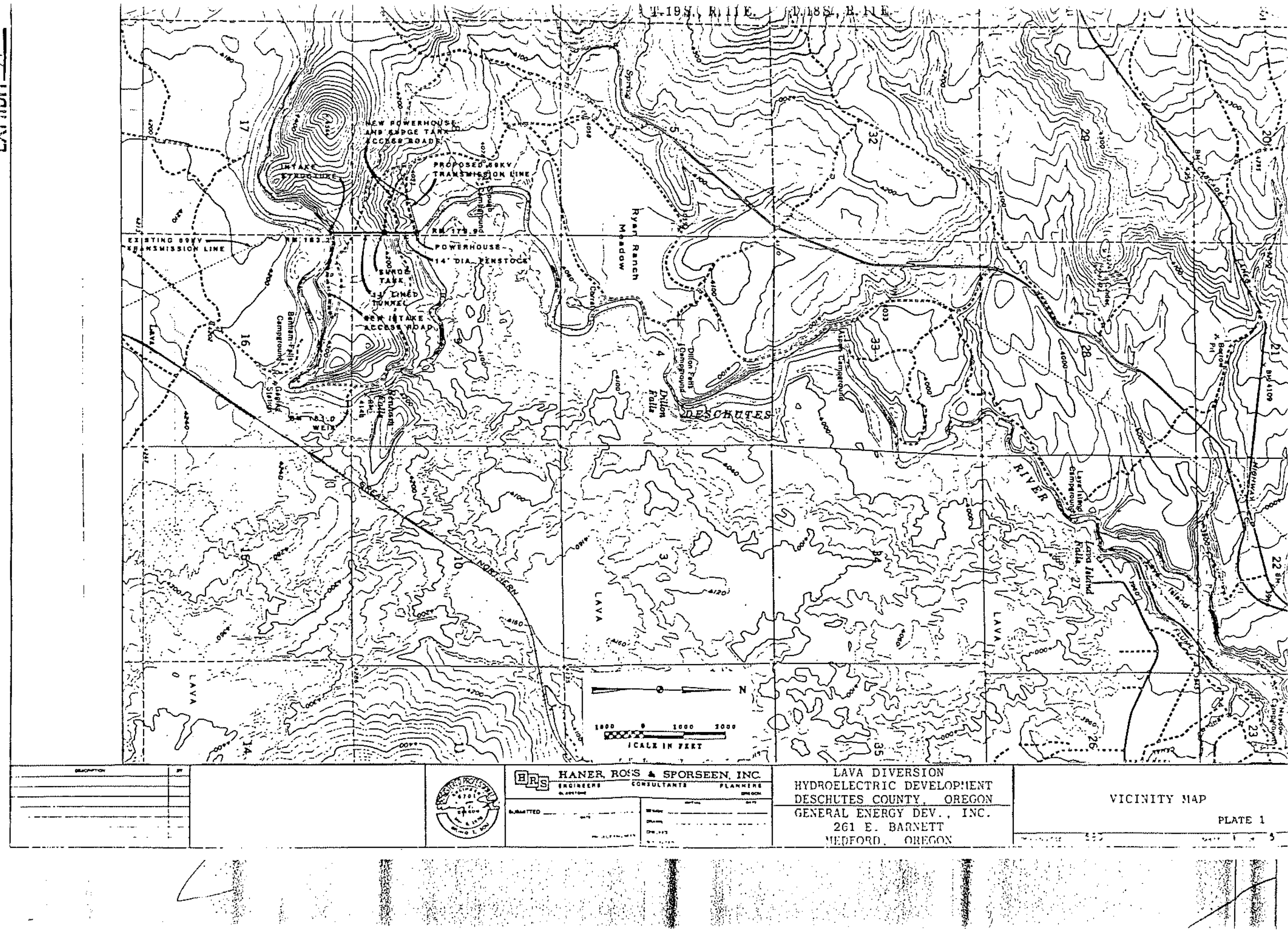


EXHIBIT B

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH WATER QUALITY STANDARDS AND REQUIRMENTS

RECEIVED

SEP 17 1984

BOARD OF COMMISSIONERS

BY

Date Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

WHO IS THE APPLICANT: General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501

WHAT IS REQUESTED: The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS: The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

HOW IS THE PUBLIC AFFECTED: The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to DEQ by October 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.

HT267

P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~, and ask for the Department of Environmental Quality. 1-800-452-4011

INCORPORATED

SPECIALISTS IN HYDRO — ELECTRIC DEVELOPMENT

October 2, 1984

RE[illegible]
OCT 4 1984

Mrs. Lois Prante
Mr. Larry Tuttle
Mr. Abe Young
Deschutes County Commissioner's Office
Courthouse Annex
Bend, OR 97701

Dear Deschutes County Commissioner's:

Enclosed please find a copy of a letter from the Oregon Department of Environmental Quality dated September 7, 1984. Pursuant to this letter, General Energy Development is requesting a statement of compatibility with the Deschutes County comprehensive plan.

The statement of compatibility is not an endorsement or approval of the project, but rather acknowledgement that the project is not in conflict with the comprehensive plan. The county planning department has a detailed description of the project, and a project plan is enclosed to ensure the location.

According to DEQ testimony for SB 225 hearings, there would not be a water quality problem in this reach of the river at the minimum stream flow of 660 cfs, which flow has been incorporated in the project design.

Should the Commissioner's reach the conclusion that this application be denied, I request that the specific reasons for such denial be forwarded to my attention. Please note the time frame in the DEQ letter.

Your attention to this matter is appreciated.

Sincerely,

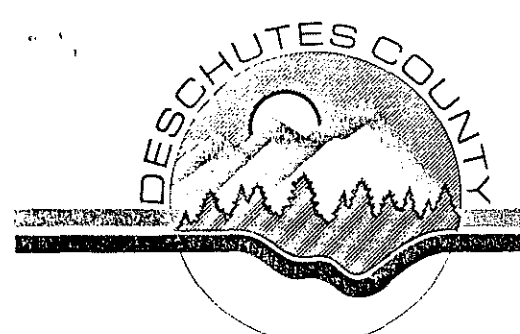
Donald P. McCurdy

Donald P. McCurdy

DPM:ds

261 East Barnett Street Medford, Oregon 97501 (503) 772-7416

EXHIBIT D



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

October 10, 1984

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, Oregon 97207

Re: General Energy Development, Inc.
Preliminary Permit No. 5205 FERC
Request For Certification of Compliance With Water Quality Standards and Requirements

Your notice dated September 5, 1984, indicates that the above applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend. It is our understanding that the certification requested is pursuant to Section 401 of the Federal Clean Water Act, and the applicant has filed a copy of his application with the Department.

Deschutes County is currently engaged in the study of the Upper Deschutes Basin in accordance with Deschutes County Ordinance No. 83-058. Included within the study is an assessment of cumulative and individual impacts of known and potential hydroelectric projects on land and resource uses within that portion of the Basin. There are concerns implicit in the County's ordinances that such projects may cause a degradation of the water quality. The ordinance identifies the proposed use as conditional and does not allow approval as being in compliance with the requirements and standards of the ordinance unless the applicant affirmatively shows that the use furthers the purposes of the ordinance and the applicant addresses the issue to be resolved during the study period provided for in the ordinance.

Even though certification pursuant to Section 401 of the Federal Clean Water Act may not directly be a land use action regulated by Deschutes County, it is clear that the Department of Environmental Quality must issue its permits in accordance with the

EXHIBIT D

local comprehensive plans and implementing ordinances. Deschutes County's Plan and implementing ordinances provide an opportunity for General Energy Development, Inc. to make application for a conditional use permit.

It is impossible for Deschutes County to find that the proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request.

Any review by Deschutes County would include not only direct influences during construction and operation due to increases in turbidity, settlement and erosion, but also the effect on minimum stream flows sufficient for pollution control, the effect on fish and wildlife, recreation, and other issues. Since the developer, General Energy Development, Inc., has not made application to the County, those issues cannot be addressed.

As a consequence, until such time as an application has been made by General Energy Development, Inc., and that application has been found to be in conformance with the Comprehensive Plan and implementing ordinances, Deschutes County opposes the issuance of a Section 401 Federal Clean Water Act certification. This position is consistent with our letter of May 10, 1984. A copy of the ordinance and May 10, 1984, letter are attached.

Sincerely,

BOARD OF COUNTY COMMISIONERS
OF DESCHUTES COUNTY, OREGON

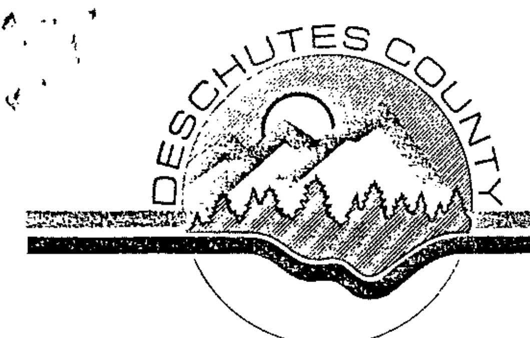
ALBERT A. YOUNG, Chairman

LOIS BRISTOW PRANTE, Commissioner

LAURENCE A. TUTTLE, Commissioner

BOCC/RLI/dw

EXHIBIT D



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

May 10, 1984

Mr. Fred Hansen, Director
Department of Environmental Quality
P. O. Box 1760
Portland, Oregon 97207

RE: Lava Diversion Hydroelectric Project; FERC No. 5205; Oregon HE 475,64551.

Dear Mr. Hansen:

Arnold Irrigation District and General Energy Development, Inc. (GED) have proposed a hydroelectric project at Benham Falls, one of the most environmentally sensitive areas on the Deschutes River, and one which is important economically and culturally to our community. To address this issue and several others, Deschutes County and the City of Bend are actively engaged in a study of the Deschutes River and its tributaries. This study is being coordinated with interested state and federal agencies, including your regional office in Bend. The results of this study and subsequent plan will have important impacts on the vital interests of the people of our county. With this letter we are asking your assistance.

It is our understanding that GED will soon be requesting your agencies waiver or approval of the required state certification of water quality for this project. Our proposal is that GED's request be held with no action taken by your staff until the completion of our study in 1985. This will allow a more complete evaluation and reasonable resolution of this important issue. Further, this delay by your department would be consistent with Oregon law, which requires intergovernmental coordination and cooperation on matters of mutual concern.

EXHIBIT D

Our staff has discussed this matter with Mr. Glen Carter, of your office, to assure coordination with your department's activities.

Very truly yours,

DESCHUTES COUNTY BOARD OF COMMISSIONERS

Albert A. Young, Chairman

Lois Bristow Prante, Commissioner

Laurence A. Tuttle, Commissioner

BOCC:ap

EXHIBIT D

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Zoning Ordinance of 1979, Ordinance No. PL-15, as Amended, by the Addition of the Deschutes River Combining Zone, Providing For a Study Period, Providing For Exceptions, Providing for Repeal; and Declaring an Emergency. *

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, is amended by the addition of Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone. DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone and other applicable combining zones. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, or other applicable combining zones, the provisions of this Section shall take precedence.

(1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.

(2) Application of Section. This Section shall apply to all land use actions in the area of the DR Zone defined as 200' from the mean high water mark, 200' measured at a right angle from the river meander, or the identified floodplain, whichever is greater on and along the Deschutes River, Little Deschutes River, Spring River, Fall River, Tumalo Creek, Paulina Creek, Squaw Creek, and the Crooked River, as identified on the Deschutes

EXHIBIT D

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

(3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.

(4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.

(A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.

(B) The use shall conserve and protect fish and wildlife habitat.

(C) The use shall maintain public access to any affected river or stream.

(D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.

(E) The use shall not impair recreational opportunities of the river or stream by the public.

(F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.

(G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.

(H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

EXHIBIT D

(I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.

(J) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.

(K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's intergovernmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.

(5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.

(A) There is hereby declared a study period for all land use activities within the area within the DR Zone.

(B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.

(C) The study period shall include, but not be limited to, the following:

1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.

2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.

4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.

5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.

6. Identification of current and potential river uses, and the economic value of such uses.

7. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

EXHIBIT D

(A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.

(B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.

(C) Construction or reconstruction of a single family residence.

(D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.

(E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.

(F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1985, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

EXHIBIT D

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

LOIS BRISTOW PRANTE, Commissioner

ATTEST:

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

EXHIBIT D

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character . . . ." Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are hereinafter referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.

3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.

4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.

5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electic Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).

6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

EXHIBIT D

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.

8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.

9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.

10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.

11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.

12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . . ", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.

13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.

14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent $100,000,000 in Deschutes County.

15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to $10,000,000.00 to the Deschutes County economy annually.

EXHIBIT D

16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.

17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.

18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Albert A. Young
ALBERT A. YOUNG, Chairman

Lois Bristow Prante
LOIS BRISTOW PRANTE, Commissioner

[signature]
LAURENCE A. TUTTLE, Commissioner

ATTEST:

Annette Pearson
Recording Secretary

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

   Within the prescribed area, new structures (excluding fences, existing structures or other structures less than $1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .

6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .

9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

EXHIBIT D

ECONOMY

"GOALS

2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.

2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT

"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

November 27, 1984

Richard E. Craven
Campbell-Craven
Environmental Consultants
9170 S.W. Elrose
Tigard, OR 97223

Re: Lava Diversion Project,
FERC No. 5205,
Deschutes River, Oregon

Dear Mr. Craven:

By a letter dated November 28, 1983, you requested water quality standards compliance certification for the above subject project, as is required by Section 401 of the Federal Clean Water Act. We responded on December 1, 1983, stating that we would not commence action on the certification process until having an opportunity to review an Exhibit E Environmental Report for the project.

We received the Environmental Report on August 20, 1984. As prescribed by law, we made public notice of your request on September 5, 1984, and received comments through October 15, 1984. During this same period, we evaluated the Environmental Report, plus the additional project information Exhibits A, B, C, D, F, and G which are part of your submittal for FERC licensing. Subsequently, we evaluated the comments which were received in response to our public notice of your project certification request.

Our findings, conclusions, and recommendation, pursuant to your request, are contained in the attached report "Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River, near Bend, Oregon (FERC No. 5205)," November 27, 1984.

Based on the findings and reasoning contained in that report, I hereby deny your request for water quality standards compliance certification for the Lava Diversion Project, FERC Number 5205. This denial is rendered without prejudice, and the request for certification may be made again if and when the current reasons for denial are removed.

Sincerely,

Fred Hansen
Director

GDC:t
WT462
Attachment

cc: Donald P. McCurdy
General Energy Development, Inc.

EXHIBIT E

Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)

by

Department of Environmental Quality

November 27, 1984

Introduction

General Energy Development, Inc. (GED) holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydroelectric Project on the Deschutes River at Benham Falls, south of Bend. Before construction licensing by FERC may proceed, federal law requires certification by the state Department of Environmental Quality (DEQ) of the project's compliance with water quality standards and related requirements. A state condition of certification is that the project must also be compatible with the county's comprehensive land use plan and/or Statewide Planning Goals. Thus, the DEQ's responsibility and authority in responding to the request for project certification are limited to making two determinations:

1. Is the project compatible with the county's comprehensive land use plan and/or statewide planning goals?

2. Is there reasonable assurance that the project will not violate applicable water quality standards and related requirements?

Hydropower development in Deschutes County is a conditional use under terms of the county's comprehensive land use plan.

In addition to the Lava Diversion Hydroelectric Project, there are eleven other hydropower sites in the Upper Deschutes River Basin on which applicants have filed for permits or licenses from the FERC. Deschutes County officials took note of this large hydropower interest and sensed the possibility that such river developments could possibly have cumulative adverse impacts on present environmental conditions and cultural uses of the area. As a consequence, the county passed Ordinance No. 83-058 which gives them from February 1, 1984, to July 31, 1985, to study the situation and determine whether such hydropower developments would truly fit well with key elements of their land use plan. Until the study is finished, Deschutes County officials will not issue a conditional use permit for any of the proposed hydroelectric sites in the Upper Deschutes River zone of contention.

GED's environmental consultants, Campbell-Craven, requested DEQ certification for the Lava Diversion Project by letter dated November 28, 1983 (received by DEQ on November 29, 1983). DEQ, in turn, requested further supporting information which was received on August 20, 1984.

The DEQ made public notice of the certification request on September 5, 1984, (Appendix A) and received public comment through October 15, 1984.

Project Description

This project description was taken from information Exhibit A, that the applicant submitted to the FERC for licensing purposes.

The project site is located in Sections 8, 9, 16, and 17 of Township 19 South, Range 11 East of the Willamette Meridian. It is situated entirely on federal lands in the Deschutes National Forest. A project plan is shown in Appendix B.

EXHIBIT E

The facility is designated for year-round operation as a run-of-river project with no storage of water. The controlled flows in the Deschutes River in the project area dictate the equipment required to maximize the power benefits of the project while allowing the bypass flows necessary to protect other recognized beneficial uses.

Current uses of the Deschutes River will not be altered by the project, except in the reach from the weir to the powerhouse. Relocations of private individuals or prior improvements will not be required to permit construction and operation of the project.

The project will have eight components: (1) a control weir, (2) an intake structure, (3) a tunnel to convey water from the intake to the powerhouse, (4) a surge tank, (5) a pipeline, (6) a powerhouse, (7) a tailrace and (8) access roads necessary for construction and operation of the project. These are briefly described as follows:

(1) A rectangular concrete control weir will be installed near the head of the Benham Falls. Benham Falls is 3,800 feet long and drops 103 feet. The weir will have a 140-foot crest, which will be totally submerged assuming flows in excess of 350 cfs.

The weir will measure bypassed flows and transmit these measurements to the powerhouse. A processor will compare the released flows to the project rule curve for releases and adjust the turbines to assure compliance with the required bypass flow. The weir is intended to maintain approximate existing upstream river levels during operation of the project. The applicant believes this will protect present recreation, wetland, and waterfowl uses of that river zone.

(2) The intake structure for the project will be constructed of reinforced concrete. It will be set on the left bank of the Deschutes River, with intake portals parallel to the flow of the river.

The structure will be fronted by a trash rack with two inch openings. The bar screen on the trash rack will be constructed to facilitate cleaning with a motorized rake.

The applicant expects that fish will be prevented from entering the conduit by screening with 0.25 inch openings.

(3) An 1,800-foot horseshoe shaped, concrete lined tunnel will be constructed to convey water from the intake structure to the powerhouse. The tunnel will have a 6.5-foot radius crown dropping from the radius point to a rectangular base and a grade of 0.0078 foot per foot. The upstream end of the tunnel will be set at an elevation of 4,120 feet (U.S.G.S. datum), and the outlet, which will be at the base of the surge tank, will be at an elevation of 4,106 feet. Two conduits will be installed in the tunnel cavity for controls and power for the intake structure.

EXHIBIT E

(4) A restricted orifice type surge tank 51 feet in diameter and 36-foot deep will be constructed at the transition point of the tunnel to penstock. The transition will be from the 13-foot diameter horseshoe type tunnel to a 14-foot diameter welded steel pipe. The tank will have a floor elevation of 4,129 feet and a top elevation of 4,165 feet.

(5) A 14-foot diameter pipe will extend from the tunnel outlet approximately 50 feet. It will then be split with a 40-foot bifurcation. The two resulting 9-foot, 6-inch diameter pipes will extend the remaining 410 feet to the powerhouse.

The pipeline will have a wall thickness of 1/2 inch and will be buried between the tank and the powerhouse.

(6) A low-level powerhouse will be constructed of reinforced concrete. The structure will be 62 feet by 71 feet 4 inches and will rise from a foundation elevation of 4,025 feet to a roof elevation of 4,071 feet. The powerhouse will be located on the left bank, 250 feet away from the Deschutes River. The powerhouse will be equipped with three generators having a combined rating of 11,825 kva, at a 95 percent power factor.

Additional mechanical equipment, such as air, oil, and cooling water systems, will be located in the powerhouse where appropriate. Electrical systems necessary for operation of the project will include station service, control boards, monitoring equipment, switchgear, and an auxiliary power supply. Further, a fire protection system will be provided for the powerhouse.

(7) A 250-foot tailrace will be excavated from the powerhouse to the Deschutes River. The discharge from the powerhouse will vary from 80 cfs to 1,800 cfs, and the tailwater will vary in height from an elevation of 4,036.9 feet to an elevation of 4,040.3 feet.

The discharge velocities at full capacity of the powerhouse will be 5.0 fps. These will dissipate to 1.5 fps at the river re-entry point.

The tailrace cross-section expands gradually as it proceeds to the Deschutes River. At its confluence with the river, the re-entry channel will be 135 ft. wide at the bottom and 165 ft. wide at the top.

(8) The Applicant will utilize existing roads and, where necessary, construct new roads to provide access to the project during construction and operation. All new roads will be built to USFS standards. The road system utilized for operation of the project will be part of the USFS's planned road system.

The old railroad grade, which currently provides access to the Benham Falls Viewpoint, will be utilized for both construction and operation of the project.

Road grades which are modified to permit movement of construction equipment will be restored to their prior condition following construction of the project.

In sum, access to the intake area will be provided by the following means:

Reconstructed roadway to top of hill	- 1,800 feet
Utilization of existing road	- 1,000 feet
New access road downhill to intake	- 1,370 feet

The total roadway to be constructed for the project is as follows:

General area access	- 1,400 feet
Surge tank	- 290 feet
Powerhouse	- 570 feet
Weir	- 1,250 feet
Intake	- 3,170 feet
Total roadway	6,680 feet

Power generated by the project will be sold to the Pacific Power & Light Company. The powerhouse for the project will be located 1,600 feet east of the Midstate transmission line. Power generated at the powerhouse will be transmitted underground at 69 kv to the Midstate line.

PERTINENT DATA FOR THE PROJECT

1. General

Stream	Deschutes River
Location	Deschutes National Forest Deschutes County Sections 8, 9, 16 and 17 T. 19S., R. 11E., W.M.
State	Oregon
Location on River	
Powerhouse	River Mile 179.9
Control Weir	River Mile 181.0
Intake	River Mile 182.4

2. Hydrology

Drainage Area	1,759 sq. mi.
Average Annual Discharge (27 years)	1,460 cfs
Minimum Daily Flow (27 years)	438 cfs (1970)
Maximum Daily Flow (27 years)	3,410 cfs (1964)

3. Control Weir

Type	Rectangular
Crest Length	140'
Throat Elevation	4,145.57

4. Intake

Type	Passive Screen
Opening	9 x 200
Approach Velocity	1 fps Maximum
Screen Size	Wedge Wire - 1/4" Spacing

5. Tunnel

Size	13' Horseshoe (150.9 S.F.)
Length	1,800 L.F.
Entrance Invert	Elev. 4,120
Exit Invert	Elev. 4,106

6. Surge Tank

Type	Differential type w/orifice
Size	51' dia. x 36' high
Material	Prestressed-post tensioned concrete
Location	
Top	Elev. 4,165
Bottom	Elev. 4,129

7. Pipeline

Length	500 L.F.
Type	Welded steel
Size	9.6' diameter

8. Powerhouse

Type	Reinforced concrete
Size	62' x 71'-4"
Foundation	Elev. 4,025
Roof	Elev. 4,071

9. Power Plant

Turbines	
Hydraulic Capacity	1 at 800 cfs 1 at 500 cfs 1 at 200 cfs
Rated Head	107 feet

EXHIBIT E

Generators	
Nameplate rating	1 at 6,350 KVA
(at 95 percent PF)	1 at 3,925 KVA
	1 at 1,575 KVA

10. Generation

Capacity	11,250 KW
Average Annual Energy	52,555,000 kWH
Average Annual Power	6,000 KW
Plant Factor	53 percent

Project Environmental Report

When applying for a project license from the Federal Energy Regulatory Commission, the applicant must present an "Exhibit E" Environmental Report which identifies the real and potential environmental impacts likely to be caused by the project's construction and operation. Additionally, the report must show how such impacts will be prevented or minimized to acceptable levels.

Campbell-Craven, Environmental Consultants, prepared the environmental report. Both "principals" in the firm have long professional histories in natural resources management and associated consulting services. The chapters of their environmental report cover: (1) Description of Locale, (2) Water Use and Quality, (3) Fish, Wildlife, and Botanical Resources, (4) Historic and Archeological Resources, (5) Socioeconomic Impacts, (6) Geographical and Soil Resources, (7) Recreational Resources, (8) Aesthetic Resources, (9) Land Use and Management, (10) Alternative Locations, Designs, and Energy Sources, and (11) List of Literature.

Chapters 2 and 9 address the two issues that the DEQ must consider when processing the project certification request. Thus, at this point, the DEQ evaluation is narrowed to those two elements of the Environmental Report.

Based on communications with agencies who reviewed the project proposal, the license applicant proposes to undertake the following mitigation measures with respect to water quality and stream flows:

1. The powerhouse/tailrace and intake structure will be constructed in the dry without placing a cofferdam in the River.

2. The intake structure will be sited in the location recommended by Oregon Department of Fish and Wildlife (ODFW).

3. The tailrace and intake areas near the shoreline will be riprapped to minimize erosion from wave action.

4. The discharge velocity in the tailrace will be about 1.5 feet/second. This will prevent erosion of the riprap area of the tailrace or of the river channel.

5. Sediment catchment basins will be located near all areas that may drain construction materials into the river.

6. Fueling stations for equipment will be located away from the river and the project area to minimize the possibility of spills into the river. Contingency plans will be developed in consultation with the agencies to effectively handle spills.

7. The existing willows and alders on the face of the dike will be preserved during weir construction and the dike will be plugged to prevent erosion.

8. The applicant will evaluate the effect of lowered velocities on sediment accumulation to identify the potential for sedimentation above the weir and determine if a study is required.

9. To minimize impacts of the cofferdam placement and removal at the weir location, construction will be scheduled for the late fall when river flow and visitor use are lower. Construction of each cofferdam will require approximately ten days. The upstream cofferdam will be constructed in late September/October and the downstream cofferdam will be constructed in late November. The weir will be completed and the cofferdams removed by mid-December of the same year. The applicant will coordinate with ODFW, U.S. Forest Service (USFS) and DEQ to minimize turbidity and sedimentation and subsequent impacts on fish resources, water quality and recreation.

10. A minimum flow of 660 cfs will be left in the bypass reach of the river and over Benham Falls.

The agencies which were consulted by the applicant have not recommended any operation mitigation measures with respect to stream flows and water quality.

The applicant proposes to periodically review project facilities and operations, particularly in the area near the intake, weir, powerhouse, and the access road to the intake, to determine if modifications of activities are necessary to decrease impacts relating to erosion. If necessary, the applicant proposes to modify operation of the project to reduce erosion.

The project license applicant fully recognizes the authority and applicability of the Deschutes County Comprehensive Land Use Plan and one goal therein to assist in the provision for adequate local energy supplies. Likewise, the applicant recognizes Deschutes County Ordinance No. 83-058 which places new restrictions on future developments along the Deschutes River and other rivers in Deschutes County, for the purposes of maintaining quality and quantity of streamflows and protecting the visual, environmental and aesthetic attributes of the rivers. Various standards for land uses within the Deschutes River Combining Zone (DR zone) are specified, including the requirement that an application for a hydroelectric project will show that the use will further the purpose of the ordinance. The ordinance also

specifies that a study shall be conducted for various purposes, including the identification of the individual and cumulative effects to all known and potential hydroelectric sites and sources on the Upper Deschutes River. The ordinance will be repealed February 1, 1986, or upon the completion and adoption of a recommended comprehensive plan and implementing ordinance amendments.

DEQ Evaluation

A. Applicable Water Quality Regulations and DEQ Evaluations

Oregon Administrative Rules (OAR) Chapter 340, Division 41, Rule 562, lists the beneficial uses for which water quality will be protected in the Deschutes River upstream from the Bend diversion dam. They are: Public Domestic Water Supply, Private Domestic Water Supply; Industrial Water Supply; Irrigation; Livestock Watering; Anadromous Fish Passage; Salmonid Fish Rearing; Salmonid Fish Spawning; Resident Fish & Aquatic Life; Wildlife and Hunting; Fishing; Boating; Water Contact Recreation; and Aesthetic Quality. Established water quality standards were designed to support and maintain these uses.

Under provisions of ORS 536.300(2), the Water Policy Review Board recognizes hydropower development as a beneficial water use throughout the Deschutes River Basin. However, this use has no corresponding DEQ water quality protection requirement because hydropower production is not likely to be water quality dependent.

OAR 340-41-026 lists the Policies and Guidelines Generally Applicable to All (river) Basins Statewide. These are mainly anti-degradation in nature, except where the DEQ Director or his designee may allow lower water quality on a short-term basis in order to respond to emergencies or to otherwise protect public health and welfare.

OAR 340-41-565 lists specific water quality standards for the Deschutes River Basin. For the purpose of relating water quality standards to potential water quality impacts of the proposed project, the pertinent standards are hereafter listed and DEQ staff evaluation follows each one:

340-41-565(2)(a) Dissolved Oxygen (DO) concentrations shall not be less than 90 percent of saturation at the seasonal low, or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes.

Water quality monitoring in the Upper Deschutes River shows that the dissolved oxygen standards are met at most seasons of the year. There have been infrequent cases of slight D.O. reductions due to natural causes. The proposed hydropower project will have no waste discharges or flow regulation needs that would be expected to adversely impact the river's present D.O. regime.

340-41-565(2)(b) No measurable (temperature) increases shall be allowed outside of the assigned mixing zone, as measured relative to a control point immediately upstream from a discharge when stream temperatures are 58°F. or greater; or more than 0.5°F. increase due to a single source discharge when receiving water temperatures are 57°F. or less; or more than 2°F. increase due to all sources combined when stream temperatures are 56°F. or less, except for specifically limited duration activities which may be authorized by DEQ under such conditions as DEQ and the Department of Fish and Wildlife may prescribe . . . .

Existing water temperature regimes in the Upper Deschutes River are suitable for all phases of salmonid fish life. The maximum water temperature recorded between water years 1968 and 1979 at the Benham Falls gage was 17°C, and the minimum 0°C. A probability analysis showed the water temperature to be below 16°C, 98% of the time--distributed mostly between 3° and 14°C.

Water temperatures and stream flows are directly related due to upstream reservoir releases and groundwater contributions. High temperatures correspond to high flows because of seasonal warming and the release of water from the reservoirs. Low temperatures correspond to low flows because of the seasonal cooling and greater contribution of cooler groundwater to the flow.

The project is not designed to cause any additional pooling or changes in the river level above the weir that would significantly increase the present degree of solar incidence. A minimum flow of 660 cfs is specified to remain in the bypass zone, over Benham Falls. While this lesser flow may slow the velocity slightly, it is not expected to result in an appreciable water temperature change from the range existing before the project's construction. The only minor changes in bankline vegetation will occur during weir construction, at the intake structure, and at the tailrace entry to the river. Here, also, the combination of these shoreline changes should not result in an appreciable change in pre-construction river temperatures.

The project is not expected to have a significant impact on the existing temperature regime in the river.

The very small amount of bearing cooling water that will emit from the plant is not expected to have a measureable impact on the river water temperature.

340-41-565(2)(c) No more than a 10 percent cumulative increase in natural stream turbidities (JTU) shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

EXHIBIT E

(1) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare.

(2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of Section 401 or 404 (Permit and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands) with limitations and conditions governing the activity set forth in the permit or certificate.

The placement and removal of coffer dams, plus final opening of the powerhouse "tailrace" channel, during project construction, will cause short-term turbidity increases in the river. The project applicant has proposed mitigation measures that will prevent and/or control these impacts in compliance with the applicable rule. Subsequent operation of the plant should have no impact on existing stream turbidity levels.

340-41-565(2)(d) pH values shall not fall outside the range of 6.5 and 8.5.

No discharge of materials that would affect the river's existing pH values are proposed by the applicant. Operation of facilities should not alter river pH values.

340-41-565(2)(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples): [shall not exceed] A log mean of 200 fecal coliform per 100 milliliters based on a minimum of 5 samples in a 30-day period with no more than 10 percent of the samples in a 30-day period exceeding 400 per 100 ml.

The applicant has not discussed methods of sewage disposal for either the construction or operation periods of the project.

No discharge of fecal coliform bearing wastes is proposed by the applicant.

340-41-565(2)(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health shall not be allowed.

No discharge of bacterial pollutants from the plant or plant site is proposed by the applicant.

340-41-565(2)(g) The liberation of dissolved gases, such as carbon dioxide, hydrogen sulfide, or other gases, in sufficient quantities to cause objectionable odors or to be deleterious to fish or other aquatic life, navigation, recreation, or other reasonable uses made of such waters shall not be allowed.

EXHIBIT E

No discharge of substances from the plant or plant site that will result in the liberation of noxious or toxic gases is proposed by the applicant.

340-41-565(2)(h) The development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or which are injurious to health, recreation, or industry shall not be allowed.

No discharge of substances from the plant or plant site that will result in the development of deleterious fungi or other harmful growths is proposed by the applicant.

340-41-565(2)(i) The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish shall not be allowed.

No discharges of substances that are likely to cause tastes, odors, or toxic conditions in the river are proposed by the applicant. The traces of oil and grease emitting with bearing cooling water at the powerhouse are so small that they should not contribute to taste, odor, or toxic problems in the river.

340-41-565(2)(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.

No discharge of materials from the plant or plant site that will cause bottom sludges or deleterious deposits in the river is proposed by the applicant.

Natural sediment in the Upper Deschutes River is largely composed of volcanic material, with little organic matter. Thus, it has almost no potential to chemically depreciate water quality.

A question has been raised whether the reduction of flow velocity in the approximate 1-1/2 miles of river channel between the intake structure and the control weir will result in detrimental deposits of sediment from passing water-- similar to what has happened in Mirror Pond at Bend. Since a minimum flow of 660 cfs will be maintained in the bypass channel and over the falls, sediment deposition upstream from the weir does not appear to be a serious factor. However, the applicant has not yet fully addressed the potential for this happening. Neither has the applicant fully addressed the potential need for sediment removal and disposal from certain areas of the project after plant operation begins.

EXHIBIT E

340-41-565(2)(k) Objectional discoloration, scum, oily sleek or floating solids, or coating of aquatic life with oil films shall not be allowed.

There may be a trace of oil and/or grease in the bearing cooling water that emits from the plant. However, past experience and monitoring of such plants have shown the volume to be only minutely detectable in the laboratory and unseen by the eye. It does not occur in a concentration that would be deleterious to aquatic life, or make the water unfit for human or other animal consumption.

340-41-565(2)(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed.

Some observers from the public sector believe the power project will destroy the present aesthetic quality of the river zone in and around Benham Falls. While this observation may have merit, the aesthetic changes will not be of a type regulated by water quality control rules. There is no project impact that is likely to change the present aesthetic quality of the river water during plant operation.

340-41-565(2)(m) Radioisotope concentrations shall not exceed maximum permissible concentrations (MPC's) in drinking water, edible fishes or shellfishes, wildlife, irrigated crops, livestock and other dairy products, or pose an external radiation hazard.

No discharges of radioisotopes are proposed by the applicant. Natural background levels of the radioisotopes in construction materials are expected.

340-41-565(2)(n) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and ten percent (110%) of saturation, except when stream flow exceeds the 10-year, 7-day average flood. However, for Hatchery receiving waters and waters of less than 2 feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and five percent (105%) of saturation.

Dissolved gas supersaturation usually results when large volumes of water are plunged over structures into deep pools, where the atmospheric gas entrainment due to the plunge cannot quickly equilibrate with the atmospheric pressure. Water carried in tunnels and penstocks is not usually subject to further gas entrainment. Water for the Lava Diversion Project will be carried in closed conduits and discharged into a relatively shallow stream where turbulence will rapidly equilibrate dissolved gas pressures with the atmospheric sources.

340-41-565(2)(o) Dissolved chemical substances: Guide concentrations listed below shall not be exceeded unless otherwise specifically authorized by DEQ upon such conditions as it may deem necessary to carry

out the general intent of this plan and to protect the beneficial uses set forth in rule 340-41-562: (mg/L)

(A)	Arsenic (As)	0.01
(B)	Barium (Ba)	1.0
(C)	Boron (Bo)	0.5
(D)	Cadmiun (Cd)	0.003
(E)	Chromium (Cr)	0.02
(F)	Copper (Cu)	0.005
(G)	Cyanide (Cn)	0.005
(H)	Fluoride (F)	1.0
(I)	Iron (Fe)	0.1
(J)	Lead (Pb)	0.05
(K)	Manganese (Mn)	0.05
(L)	Phenols (totals)	0.001
(M)	Total Dissolved Solids	500.0
(N)	Zinc (Zn)	0.01

No discharges of dissolved chemicals from the plant or plant site are proposed by the applicant. Any metals leached by water passing over metallic equipment would be only trace in concentration and with little or no potential for violating the water quality standards.

340-41-565(2)(p) Pesticides and other Organic Toxic Substances shall not exceed those criteria contained in the 1976 edition of the EPA publication "Quality Criteria for Water". These criteria shall apply unless supporting data show conclusively that beneficial uses will not be adversely affected by exceeding a criterion by a specific amount or that a more stringent criterion is warranted to protect beneficial uses.

It is not unusual that herbicides are used sparingly in grounds maintenance programs at power plants and electrical substations. However, no pesticides or other organic toxic substances are proposed to be used at the plant site by the applicant.

340-41-565(3) Where the natural quality parameters of waters of the Deschutes Basin are outside the numerical limits of the above assigned water quality standards, the natural water quality shall be the standard.

This standard is set to recognize the variations in water quality that occur naturally. For instance, natural turbidity levels in the Deschutes River may seasonally exceed the standard.

Outside of the controlled water quality impacts that may occur temporarily during construction, the project operation is not expected to cause any water quality changes that would be outside the range of naturally occurring conditions.

B. Land Use Compatibility

Hydroelectric power site development is a conditional use pursuant to requirements of the Deschutes County Comprehensive Land Use Plan. Since a number of sites in the Upper Deschutes River Basin have pending permits for hydropower development, Deschutes County officials have declared a moratorium, in the form of Ordinance No. 83-058, to delay the issuance of all conditional use permits until an overall hydropower site development impact study can be competed. Thus, the county will not consider the issuance of a conditional use permit for the proposed Lava Diversion Hydroelectric Project until terms of the Ordinance are met. On this basis, the county officials have opposed DEQ issuance of a water quality standards compliance certification for the project.

Potential Water Quality Impacts Not Adequately Addressed

The DEQ believes the following list of potential water quality impacts related to construction and operation of the project have not been adequately addressed by the applicant:

1. A trash collection rack is planned for the water intake. Where and how will the trash collections be disposed in compliance with solid waste and water pollution control regulations?

2. Fuel for emergency equipment, oil, and grease would be expected to be stored and used on site during normal plant operation. A plan is needed for their use and disposal of containers that will prevent spills or discharge to the water.

3. Transformer oils and hydraulic fluids for control systems are general products on site at hydroelectric power plants. A storage and use plan, plus a spill contingency plan, are needed to give maximum assurance that these products will not enter the water.

4. A plan and designated equipment are needed for the collection and proper disposal of toilet wastes and solid wastes both during plant construction and operational phases.

5. A considerable amount of concrete will be used in the project. If it is to be mixed on site, a plan is needed to show how wash waters, waste concrete, and yard drainage will be kept out of the river.

6. There is a potential for sediment deposition in the 1.4 miles of river channel between the intake structure and the flow regulation weir. If this occurs, what are the likely environmental impacts? The applicant proposes to address this issue at a later date.

7. It is not uncommon that maintenance dredging is needed at river-run hydroelectric projects to remove detrimental sediment deposits. The applicant should address this issue with a plan for both dredging and spoils disposal.

8. Herbicides are frequently used in grounds maintenance programs around power plants and substations. The applicant needs to also address this issue.

Summary of Public Comments

Twenty-two letters of public comment on the project were received by the DEQ, and are identified in Appendix C. A summary of each letter, by appended identification number, is as follows:

1) Opposes certification on basis that a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin may have undetermined adverse cumulative effects.

2) Opposes the project on the basis of the site's greater importance for recreation and fishery values. Requests that DEQ honor a county ordinance that calls for greater study of possible adverse cumulative impacts from a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin.

3) Opposes the project because it will likely have adverse impacts on aesthetic values and the local economy.

4) Opposes the project because of the site's great importance for recreation, fish production, big game habitat, and aesthetic values. Also, raises the question of whether the project complies with state planning goals.

5) Expresses concern that the project construction activities will cause untenable turbidity and sediment downstream. Eroded soils from access road construction could be a source of river turbidity and sediment. Concern that the project may violate the nitrogen gas supersaturation standard. Fluctuating discharges may increase downstream bank erosion. Suggests that the construction license be withheld until assurances can be given for proper resolution of the above listed concerns.

6) Opposes the project because it may adversely affect the tourist trade which is attracted by recreational offerings.

7) Requests the withholding of DEQ certification until Deschutes County completes its study of possible cumulative effects from the proposed development of multiple hydroelectric projects in the Upper Deschutes River Basin.

8) Believes the project would devastate existing river values and urges DEQ denial of project certification until Deschutes County completes its cumulative impacts study.

9) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

EXHIBIT E

10) Opposes the project on the basis of its destroying the beauty of public lands and adversely impacting fish production. Also, there would likely be other hydroelectric projects to follow that would result in cumulative adverse impacts.

11) Wants assurance that water quality standards will not be violated. Urges that the project not be permitted until Deschutes County completes its cumulative impacts study.

12) Confirms that hydropower development is a conditional use in the Deschutes County comprehensive land use plan. Says the project proponent has not applied to the county for a conditional land use permit. Before issuing a conditional land use permit, the county would have to know that the project would not have untenable, adverse impacts on the water quality, fish, wildlife, recreation, and "other issues". Deschutes County opposes the issuance of DEQ certification until the project has been found to be in conformance with the County comprehensive land use plan and implementing ordinances.

13) Opposes the DEQ issuance of water quality standards compliance certification until Deschutes County completes its cumulative impacts study.

14) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study.

15) Requests DEQ denial of project certification until Deschutes County completes its study of cumulative impacts.

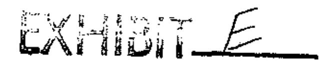
16) Opposes the project because of its potential for adverse impacts on water quality, fisheries, recreation, tourism, local irrigation, and economic base related to these river uses. Requests that the DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

17) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study. Stresses the need for county participation in the decision-making process.

18) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Also, requests that Deschutes County participate in the decision-making process.

19) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Declares that county participation is essential in the decision-making process.

20) The project design and siting have changed from the original proposal. The 2.2 miles of river in the diversion reach contain fine fishery habitat. There has already been significant loss of fishery habitat in the Upper Deschutes River due to its regulation for irrigation purposes.



The project could have a number of adverse impacts on fish as these factors play out through reduced flows, reduced water velocities, higher stabilized water levels, and potentially degraded water quality. Recommends that DEQ withhold project certification until the applicant can give assurances that the project impacts will be eliminated or reduced to acceptable levels.

21) The Upper Deschutes is listed in the State Parks System Plan as a potential study river for inclusion in the State Scenic Waterways System. Present, high levels of recreational use require that existing river and shore line conditions be maintained. Raises the question of whether the project is compatible with the local comprehensive land use plan.

22) Emphasizes that state law requires that DEQ action must be consistent with the local comprehensive land use plan or statewide land use planning goals.

The twenty-two responses to the DEQ public notice fall largely into five categories as follows:

1. Twenty oppose DEQ certification until county officials complete their cumulative impacts and land use compatibility study. Most of the opposition is prefaced with a concern that the project may be detrimental to existing aesthetic, recreation, fisheries, wildlife, and tourism attraction values.

2. Hydropower development is a conditional use in the county comprehensive land use plan. The applicant has not filed for a conditional use permit.

3. The applicant has not given adequate assurances of being able to protect water quality and other environmental values during project construction and operation. Certification should be withheld until adequate assurances are provided.

4. The project design and siting have changed from the original proposal. It has a number of characteristics that could cause damage to fishery production. Certification should be withheld until the applicant gives assurances that the project impacts can be eliminated or reduced to acceptable levels.

5. The Deschutes River zone in question is proposed for study as a possible addition to the Scenic Waterways System.

There were no comments in favor of the project.

DEQ Conclusions

1. The DEQ has identified eight activities associated with project construction and/or operation whose potential for water quality impairment have not been adequately addressed in the environmental report.

2. Except as noted in number one above, the project proponent's major programs to protect water quality during construction and operation appear adequate to comply with state water quality control regulations.

3. Except as noted in number one above, operation of the project is not likely to have any appreciable adverse impact on water quality, i.e. it is expected to comply with state water quality control regulations.

4. Hydropower site development in Deschutes County requires a conditional land use permit.

5. The project proponent has not yet applied for a conditional land use permit.

6. Deschutes County will not consider the issuance of a conditional land use permit until the study requirements mandated in County Ordinance No. 83-058 have been completed.

7. Deschutes County will not at this time issue a land use compatibility statement for the proposed Lava Diversion Hydroelectric Project.

8. The DEQ must have assurance that the project is compatible with the county's comprehensive plan and land use ordinances, or state planning goals, before issuing a water quality standards compliance certification statement.

DEQ Recommendation

Based on the information presented in this report, the DEQ recommends that water quality standards compliance certification for the project be denied until the following two requirements are met:

1. The project applicant adequately addresses the eight potential water quality impacts of the project identified by the DEQ.

2. The project applicant obtains a land use compatibility statement from Deschutes County officials.

GDC:1
WL3842

EXHIBIT E

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

WHO IS THE APPLICANT: General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501

WHAT IS REQUESTED: The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS: The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

HOW IS THE PUBLIC AFFECTED: The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to DEQ by October 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.

T267

P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~, and ask for the Department of Environmental Quality. 1-800-452-4011

EXHIBIT E

APPENDIX B

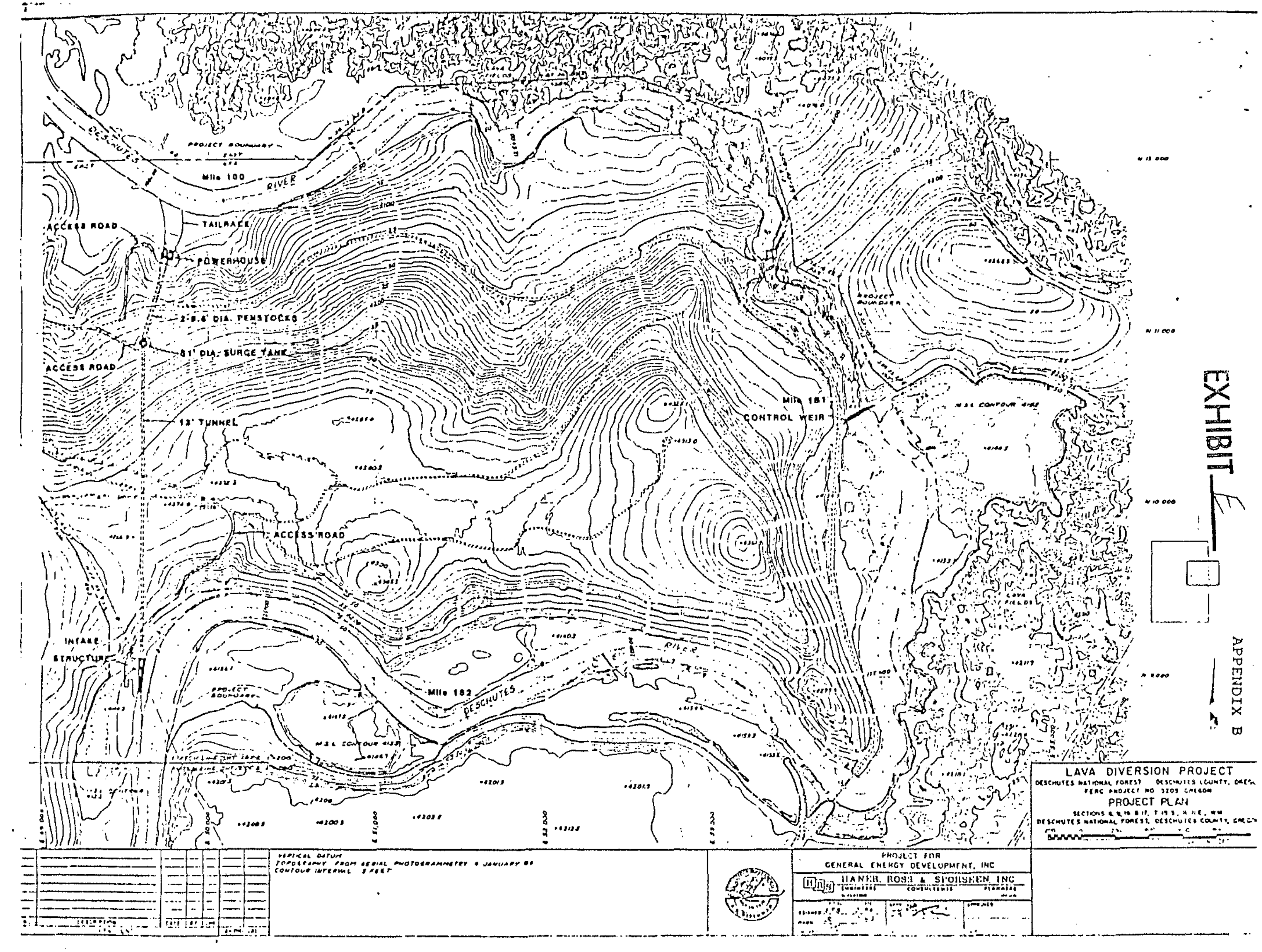


EXHIBIT E

APPENDIX C

Letter No.	Date of Letter	Signature(s)	Representing
1)	9/30/84	Laurie LeFors	Self
2)	10/1/84	Marti Gerdes	Self
3)	10/1/84	Jean & Joseph Berger	Self
4)	10/3/84	Mike Johns	Self
5)	10/5/84	David Mohla, Supervisor	Deschutes National Forest
6)	10/5/84	Mr. & Mrs. Keith Corwin	Self
7)	10/7/84	P. W. Chase	Self
8)	10/8/84	Eric Schulz	Central Oregon Flyfishers
9)	10/8/84	Brian Meece	Citizens Realty Group
10)	10/9/84	Kenneth Corwin	Self
11)	10/9/84	Fred Ehlen	Sunriver Anglers
12)	10/10/84	Deschutes County Commissioners(3)	Deschutes County
13)	10/11/84	Robert Robinson	Coalition for the Deschutes
14)	10/11/84	Jane Poor	Self
15)	10/11/84	Richard & Carolyn Miller	Contemporary Homes
16)	10/12/84	John Wujack	Save Benham Falls Committee
17)	10/12/84	Tom Throop	State Representative, District 54
18)	10/12/84	Lawson La Gate	Self
19)	10/15/84	Stephen Toomey	Frank Ruegg Real Estate
20)	10/15/84	Michael Weland	Oregon Fish & Wildlife Dept.
21)	10/16/84	Alan Cook	Oregon Parks & Recreation Division
22)	10/22/84	Tim Knight JRK (initials only)	Dept. of Land Conservation & Development

GDC:1
WL3843
11/5/84

EXHIBIT E

AGREEMENT WITH RESPECT TO WATER RIGHTS

THIS AGREEMENT is made and entered into as of this ___ day of June, 1984, by and between GENERAL ENERGY DEVELOPMENT, INC., a Nevada corporation (hereinafter referred to as "GED") and ARNOLD IRRIGATION DISTRICT, a municipal corporation of the State of Oregon (hereinafter referred to as "ARNOLD").

RECITALS

A. GED is the holder of a preliminary permit issued February 12, 1982 by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC") under the Federal Power Act (as amended) for the proposed Upper Deschutes Water Power Project No. 5205 (hereinafter referred to as "the Project").

B. In order to construct and operate the Project, GED will be required to obtain a permit to appropriate, for nonconsumptive purposes, surface waters of the State of Oregon pursuant to the laws of the State of Oregon and applicable regulations of the Oregon Water Resources Department (hereinafter referred to as "OWRD").

C. OWRD has taken the position that the waters of the Upper Deschutes Riveer and its tributaries have been heretofore withdrawn from appropriation for the benefit of certain irrigation and power projects, and that only irrigation districts such as ARNOLD may apply for and acquire the right to appropriate the waters necessary for operation of the Project.

D. GED and ARNOLD desire to establish an arrangment by which GED may acquire the water rights it needs to construct and operate the Project, and by which ARNOLD may secure a long-term revenue stream enabling it to improve and maintain its existing irrigation facilties.

OPERATIVE PROVISIONS

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereby agree as follows:

1. Application for Water Rights. Unless otherwise provided herein, promptly after the parties' execution of this Agreement, GED will prepare, and ARNOLD will execute and submit to OWRD, an application for a permit to appropriate for nonconsumptive purposes such amount of the surface waters of the Upper Deschutes River and its tributaries as may be required for the construction and operation of the Project. In the event that the scope of the Project is changed as a result of studies that may be conducted during the preliminary permit period, ARNOLD will, upon request of GED or OWRD, execute and submit to OWRD any necessary or desirable amendments to the previously-described application to OWRD or will execute and submit to OWRD any necessary or desirable applications for amendment of any permit issued by OWRD in connection with the Project. GED will bear all

EXHIBIT E

application fees, and all legal, engineering, administrative and other costs involved in obtaining from OWRD the requisite water appropriation permit and any amendments thereto. ARNOLD will cooperate fully with GED in obtaining the requisite permit and any amendments thereto, provided that GED will reimburse ARNOLD, upon receipt of proper invoices, for all reasonable and documented out-of-pocket expenditures, including reasonable attorneys' fees, incurred by ARNOLD in connection with the provision of such cooperation. It is understood by GED that Neil R. Bryant, Esquire, of Gray, Fancher, Holmes & Hurley, Bend, Oregon, is the attorney for ARNOLD, even though GED is paying ARNOLD's reasonable attorneys' fees.

2. Lease of Water Rights. ARNOLD hereby agrees that, promptly upon issuance of the water appropriation permit described in Section 1 hereof, ARNOLD will lease the permit, as may be amended (and all rights to appropriate and utilize water thereunder), to GED upon the following terms and subject to the following conditions:

(a) Term of Lease, Transfer of Ownership, and Post-Transfer Royalty Arrangement. The nonrenewable term of ARNOLD's lease of water rights to GED for the purposes of Project operation shall be 25 years, and such lease term shall commence upon the day that the Project first demonstrates the capacity for continuous generation of electrical power for sale. After the

expiration of the term of the lease, ownership of the Project shall be irrevocably vested in ARNOLD, and ARNOLD shall thereupon take possession of the Project property and shall thereafter be responsible for the operation and maintenance of the Project. After such time as the Project becomes the property of ARNOLD, ARNOLD shall pay GED annual royalty payments for the lesser of 25 years, or until such time as ARNOLD, in its sole discretion, abandons the Project. The annual royalty payments paid to GED by ARNOLD pursuant to this provision shall be in an amount equal to the greater of ten percent (10%) of the annual gross revenues or thirty percent (30%) of the annual net revenues of the Project. Annual gross revenues of the Project shall be defined as the sum of all revenues received from the sale of power generated by the Project in any calendar year. Annual net revenues of the Project shall be defined as the sum of all revenues received from the sale of power generated by the Project in any calendar year, less all costs of operation of the Project for such year. Royalty payments payable to GED pursuant to this provision shall be paid to GED quarterly, as of each March 31st, June 30th, September 30th, and December 31st. Such royalty payments shall be paid to GED within 30 days after the end of each quarter in respect of which the relevant gross or net revenues were received. Nothing in this Agreement shall prevent ARNOLD and GED from renegotiating the terms of the royalty arrangement described herein, in the

EXHIBIT E

event that the annual gross or net revenues of the Project, following the transfer of ownership of the Project to ARNOLD, are materially different from the parties' present expectations regarding the levels of such revenues at such point in time.

(b) Rental. As annual rental for the lease of the water appropriation permit and all rights to appropriate and utilize water thereunder, GED shall pay to ARNOLD, on or before the 45th day after the end of each of GED's fiscal years during the term of the lease, commencing with the fiscal year of GED in which the Project first demonstrates the capacity for continuous generation of electrical power and actually generates electrical power and delivers same to a utility for resale to the utility's customers or to private individuals, a sum calculated as follows:

(i) One percent (1%) of the Project's annual gross revenues received during each of GED's fiscal years comprising the first 24 months after the generation and delivery of electrical power from the Project first commences;

(ii) Two percent (2%) of the Project's annual gross revenues received during each of GED's fiscal years comprising the next succeeding 96 months; and

(iii) Three percent (3%) of the Project's annual gross revenues received during each of GED's fiscal years for the remainder of the lease term.

EXHIBIT E

(c) Commencement and Completion of Construction. The lease shall provide that GED shall commence construction of the Project as soon as practicable after all requisite governmental permits and authorizations for construction have been received and a contract for the sale of all electrical power generated by the Project has been entered into; and such construction shall be completed within three years thereafter unless such construction is hindered or delayed for reasons beyond the control of GED.

(d) Operation of the Project. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED warrants that it shall operate and maintain the Project in accordance with such practices and standards as are commonly observed in the hydroelectric power generating industry. GED further represents that it will consult with ARNOLD regarding all material decisions relating to Project operation or maintenance, during the term of ARNOLD's lease of water rights hereunder to GED.

(e) Termination. The lease may be terminated by GED only in the event that ARNOLD fails to perform its obligations thereunder (and failed to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default), or in the event of material physical damage to or destruction of the Project (in which

EXHIBIT F

latter event GED may terminate the lease effective upon the date of loss or destruction if GED determines within 180 days thereafter that it is not feasible to rebuild the Project). The lease may be terminated by either GED or ARNOLD upon (i) acquisition of the Project by the State of Oregon or by any municipality thereof, pursuant to the provisions of ORS § 537.290 or of ORS § 543.610, (ii) condemnation, or (iii) sale of the Project under threat of condemnation (in any of which events either GED or ARNOLD may terminate the lease effective as of the date of transfer to the acquirer or condemnor). Upon termination of the lease for any reason other than loss or destruction of the Project, GED agrees to restore that portion of ARNOLD's irrigation system adversely affected by construction or operation of the Project to its pre-Project condition. Upon termination of the lease for any reason other than loss or destruction of the Project, GED also agrees to restore the Project property adversely affected by GED to its pre-Project condition. The lease may be terminated by ARNOLD only in the event that GED fails to perform its obligations thereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default), or in the event that construction and operation of the Project interferes with ARNOLD's irrigation projects and its ability to furnish water to its irrigation customers, or in the event that construction and operation

of the Project unreasonably interferes with the licensing, construction, or operation of any hydroelectric project on the Deschutes River for which ARNOLD has heretofore commenced the planning and licensing process.

(e) Inspection of Books and Records. During the term of ARNOLD's lease of water rights to GED hereunder for Project operation, ARNOLD shall have the right to inspect and audit GED's books and records, insofar as they directly apply to the Project, upon request, at reasonable times and places. During the period of time after ownership of the Project is vested in ARNOLD, and while GED is still receiving royalty payments pursuant to paragraph 2(a) of this agreement, GED shall have the right to inspect and audit ARNOLD's books and records, insofar as they directly apply to the Project, upon request, at reasonable times and places.

3. Development of the Project. GED will be solely responsible for the development, financing, licensing, construction, operation, and maintenance of the Project. Until ARNOLD owns the Project, ARNOLD's sole responsibility hereunder shall be to apply for the OWRD water appropriation permit, to lease water rights available under such permit to GED as provided herein, and promptly to furnish GED with all notices and information received by ARNOLD with respect to such permit in order that GED will have a reasonable opportunity to protect its interests thereunder.

This agreement shall not be deemed to create a partnership or joint venture between GED and ARNOLD, and GED has no authority to bind ARNOLD to any contract or to sign any document on ARNOLD's behalf. The indemnities exchanged by ARNOLD and GED herein shall survive the termination of the lease or of this agreement.

4. Indemnification. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED hereby agrees that it shall, at its sole cost and expense, indemnify and hold ARNOLD harmless from any and all demands, claims, causes of action, or liabilities that may arise out of Project development, construction, or operation, or that may arise out of GED's or ARNOLD's activities pursuant to this Agreeent. GED shall not be obliged to indemnify ARNOLD, however, with respect to such Project-related acts of ARNOLD as constitute gross negligence or willful misconduct. ARNOLD hereby agrees that, following the transfer of ownership of the Project to ARNOLD, ARNOLD shall, at its sole cost and expense, indemnify GED and hold GED harmless from any and all demands, claims, causes of action, or liabilities that may arise out of Project operation, provided that no such demand, claim, cause of action, or liability relates to a Project-related fact, event, occurrence, or omission that arose or took place before the date of transfer of ownership of the Project to ARNOLD.

5. Insurance. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED agrees to procure and maintain in full force and effect, for the benefit of GED and ARNOLD, insurance underwritten by responsible parties and providing full coverage against:

(a) any liability under the worker's compensation law of the State of Oregon;

(b) any form of employer's liability;

(c) liability for bodily injury or property damage attributable to Project operation;

(d) physical loss or destruction of the Project or of any material component thereof; and

(e) any other liability or potential loss deemed by GED and ARNOLD to represent a reasonably insurable risk. GED shall see to it that ARNOLD is named as co-insured on all policies of insurance secured and maintained pursuant to this provision, and GED shall provide ARNOLD with copies of all such policies of insurance.

6. Termination of the Agreement.

(a) This agreement shall immediately terminate and be of no further force or effect in the event that OWRD declines to issue the water appropriation permit, or in the event that OWRD or any other governmental agency having jurisdiction over the Project declines to issue any permit or authorization

EXHIBIT E

necessary for construction or operation of the Project (and all periods for judicial review of such agency decision or decisions have expired).

(b) GED may terminate this agreement and all further rights and obligations hereunder if, prior to the grant of the lease contemplated in paragraph 2 hereof, GED determines that it will not go forward with construction of the Project or has no need for the lease. GED may also terminate this agreement in the event that ARNOLD fails to perform any of its obligations hereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default).

(c) ARNOLD may terminate this agreement in the event that GED fails to perform any of its obligations hereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default).

(d) This agreement shall become void and of no further force and effect upon execution and delivery of the lease contemplated in paragraph 2 hereof; provided, however, that all terms and conditions hereof which by their nature are to survive such termination shall be incorporated into the lease agreement.

(e) Upon any termination pursuant to subparagraphs (b) or (c) of this paragraph 4, ARNOLD shall, upon request,

EXHIBIT E

assign to GED any and all pending applications for the OWRD water appropriation permit described in paragraph 1 hereof.

7. Assignments. This agreement and the rights and obligations of the parties hereto shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto; provided, however, that GED shall not assign its rights hereunder to a third party without the prior written consent of ARNOLD, which consent shall not be unreasonably withheld; and provided further that no such consent shall be required for a partial assignment of this agreement to a third party who enters into a joint venture or partnership with GED for the development of the Project or for a mortgage or pledge of this agreement as security for financing of the Project or any portion thereof.

8. Representations of GED. GED represents and warrants to ARNOLD that:

(a) GED is a corporation duly organized, validly existing, and in good standing under the laws of the State of Nevada and is authorized to conduct business in the State of Oregon; and

(b) GED will provide ARNOLD with a copy of a duly adopted resolution of the Board of Directors of GED approving this agreement and authorizing its execution on GED's behalf by an authorized officer of GED.

9. Attorneys' Fees; Applicable Law. In the event that any suit or action is instituted to enforce or interpret any of the terms or conditions of this agreement, or otherwise arises hereunder, the losing party shall pay to the prevailing party, in addition to the costs and disbursements allowed by statute, such sum or sums as the court or courts hearing such matter may adjudge reasonable as attorneys' fees in such suit or action, upon appeal thereof, or in connection with any petition for review thereof. This agreement shall be construed under the laws of the State of Oregon and venue for any dispute hereunder shall lie in Deschutes County, Oregon.

10. Notices. Any notices which may be necessary or desirable hereunder shall be deemed to be delivered upon delivery in person or upon the expiration of 24 hours after such notice has been mailed, certified or registered mail, postage prepaid, to the appropriate party at the following stated address or at such address as to which a party may give notice as set forth in this Section:

If to GED: 261 East Barnett Street
Medford, Oregon 97501

If to ARNOLD: 37 NW Irving Avenue
Bend, Oregon 97701

11. Force Majeure. Obligations of the parties hereunder may be suspended upon the request of either party during any period in which such party's performance is prevented or

substantially impeded by any occurrence, circumstance or event beyond the reasonable control of such party.

12. Compliance with Law. Except as otherwise provided in paragraph 1 hereof, this agreement shall become effective upon its approval by the OWRD as required by law; and ARNOLD agrees that it will promptly upon execution hereof diligently pursue such approval; provided, however, that GED will prepare (for review and approval by ARNOLD's attorney), all documents required for such approval, and will reimburse ARNOLD for all reasonable and documented out-of-pocket expenses incurred by ARNOLD in connection therewith.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate by their duly authorized representatives as of the date and year first above written.

ARNOLD IRRIGATION DISTRICT	GENERAL ENERGY DEVELOPMENT, INC.
By: ____________________	By: ____________________
	Donald P. McCurdy, President

DAVE FROHNMAYER
ATTORNEY GENERAL

EXHIBIT G

William F. Gary
DEPUTY ATTORNEY GENERAL

RECEIVED
OCT 25 1983
WATER RESOURCES DEPT.
SALEM, OREGON

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4620

October 24, 1983

Chris L. Wheeler
Deputy Director
Water Resources Department
555 13th Street NE
Salem, OR 97310

Re: Arnold Irrigation District/General Energy Development, Inc.

Dear Chris:

This confirms our telephone conversation of October 18, 1983. It is my opinion that the agreement between Arnold Irrigation District and General Energy Development, Inc. dated May 26, 1983, involving the proposed hydroelectric project on the Upper Deschutes River does not comply with the standards set forth in our department's March 30, 1983 letter to the Water Resources Department Director for a private developer by contract to qualify as a municipality under ORS chapters 537 and 543.

Under the proposed contract, the Water District has not retained sufficient beneficial interest and control to make it appear that the proposal is other than a subterfuge to allow the private developer to use the municipal application process.

This also confirms that you do not wish any further opinions from us at this time in connection with this application. We will close our file on this unless we hear further from you.

Sincerely,

Larry D. Thomson
Assistant Attorney General

LDT:tla

DAVE FROHNMAYER
ATTORNEY GENERAL

EXHIBIT 4

William F. Gary
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4620

RECEIVED
MAY 10 1984
WATER RESOURCES DEPT
SALEM, OREGON

May 9, 1984

Larry Jebousek
Administrator
Water Rights Division
Water Resources Department
555 - 13th Street NE
Salem, OR 97310

Dear Mr. Jebousek:

I have reviewed the proposed agreement between GED and Arnold Irrigation District as transmitted to me by Neil Bryant's April 24, 1984 letter. I believe you have seen that agreement. I have also discussed it with Don Buell. I share Mr. Buell's conclusion that the agreement as proposed vests insufficient control in Arnold Irrigation District to consider the application under this contractual arrangement as a municipal application. As you will recall in our March 30, 1983 letter discussing the Winchester Water Control District arrangement, we concluded that it was a close call on the facts of that case as to whether the application was truly a municipal application. The proposed GED agreement seems to fall substantially short of even the Winchester arrangement in several respects.

There is no clear ending of the lease term so that the project comes solely within the control of Arnold Irrigation District. At the end of 25 years, GED reserves the right to indefinitely continue the possession and use of the project until abandoned by GED even though nominal title passes to Arnold Irrigation District. The indefinite extension also includes a formula royalty payment beyond the control of Arnold Irrigation District to modify.

It does not appear that Arnold Irrigation District has attempted to maintain control of the project as a municipal project. For example, Arnold Irrigation District can only terminate the arrangement for breach of the contract or by exercising its right of emminent domain under the statutes. On the other hand, GED may terminate for any reason upon 180 days' written notice. Further, the proposed agreement includes almost

EXHIBIT H

no apparent benefit to the irrigation district beyond the generation of a long term revenue stream. That revenue stream is not adjustable based upon any change of circumstances or renegotiation should it appear that GED is reaping a windfall through the project.

I also recommend that any contractual arrangement incorporate by reference the provisions of ORS 537.290 to avoid any question that the municipality reserves the right to take over the dams, plants and other structures under the terms set forth in that statute or any successor provision. I believe that intent is clear in the proposed agreement by incorporation of ORS 543.610, but I do not believe ORS ch 543 applies on these facts. We are treating this as a municipal application under ORS ch 537.

Very truly yours,

Larry D. Thomson
Assistant Chief Counsel
General Counsel Division

LDT:tla31
Enclosures
DOJ File 690-001-G0008-83

1 STATE OF OREGON)
) ss. CERTIFICATE OF SERVICE
2 County of Deschutes)

3 I hereby certify that I served a true copy of the fore-
4 going Memorandum of Deschutes County, certified by me as
5 such, on the following party(s) at the address indicated
6 below by mail:

7 Neil R. Bryant
Gray, Fancher, Holmes
8 & Hurley
P. O. Box 1151
9 Bend, Oregon 97709

Michael Huston
Department of Environmental
Quality
Box 1760
Portland, Oregon 97207

10 DATED this 7th day of March, 1985.

11 /S/ RICHARD L. ISHAM
12 RICHARD L. ISHAM, OSB #75-195
Deschutes County Legal Counsel
13

14 STATE OF OREGON)
) ss.
15 County of Deschutes)

16 I hereby certify that the foregoing copy of Memorandum
17 of Deschutes County is a true and correct copy of the
18 original thereof.
19 Dated this March 7, 1985.

20
21
22 RICHARD L. ISHAM, OSB #75-195
Deschutes County Legal Counsel
23
24
25
26

DESCHUTES COUNTY LEGAL COUNSEL
DESCHUTES COUNTY COURTHOUSE ANNEX
BEND, OREGON 97701
TELEPHONE (503) 388-6623

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

In Re:)
LAVA DIVERSION PROJECT)
FERC NO. 5205)
DESCHUTES RIVER, OREGON)

EQC
Hearing Section
1985

FACTS

General Energy Development, Inc. (GED) holds Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before licensing by FERC, Section 401 of the Clean Water Act, 33 USC §1341 states that the licensed applicant shall provide the licensing agency (FERC) a "certification from the state in which the discharge originates or will originate . . . that the discharge will comply with the applicable provisions of §1311, 1312, 1313, 1316, and 1317 of [USC., Title 33]." These sections pertain to water quality affluent limitations, water quality standards, and implementation plans, national performance standards and toxic and pre-treatment affluent standards. None of the water quality sections pertain or mention compatibility with state, county, or local land use plans.

The staff of the Department of Environmental Quality (DEQ) has determined that the project, in addition to complying with water quality standards, must also obtain a "statement of compatibility" from Deschutes County. The "statement of compatibility" would state that the proposed use is allowed by

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ATTORNEYS AT LAW
40 N.W. GREENWOOD P.O. BOX 1151
BEND, OREGON 97709-1151
TELEPHONE 382-4331

1 Deschutes County's comprehensive plan. This is the first time
2 the Department of Environmental Quality has required a 401 appli-
3 cant to obtain a "statement of compatibility".
4 On November 27, 1984, the DEQ issued its evaluation and
5 denied the requested certification on two grounds: First, eight
6 areas of potential water quality impacts were not adequately
7 addressed by GED. Secondly, GED was unable to obtain the cer-
8 tificate of compatibility from Deschutes County.
9 The questions regarding water quality impacts have now
10 been addressed by the applicant and are no longer at issue. The
11 only questions remaining concern the statement of compatibility
12 from Deschutes County.
13 In December of 1983, Deschutes County passed Ordinances
14 No. 83-058 and 83-066, copies of these ordinances are attached.
15 These ordinances allow hydro development on the Deschutes River
16 as a conditional use. They also impose a study period. During
17 the study period, small hydro development is permitted only if
18 the requirements of the ordinances are met. Deschutes County has
19 requested the DEQ withhold issuing any 401 certificates until
20 after the study period has been completed. During the interim,
21 the Deschutes County has refused to issue a statement of
22 compliance to GED.
23 Neil R. Bryant represents Arnold Irrigation District.
24 Arnold Irrigation District is involved in the development of the
25 project.
26

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ISSUES

1. Whether or not as a matter of law, Deschutes County was in error in failing to grant the statement of compatibility.

2. Whether or not the DEQ can deny 401 certification under the Clean Water Act for reasons other than water quality.

3. Whether or not the DEQ has violated the consistancy standard of APA 183.484 by not requiring previous 401 applicants to obtain a statement of compatibility.

ARGUMENT

1. Deschutes County has adopted ordinances allowing for small hydro development under a conditional use process. Although the ordinances establish a study period, a conditional use permit can still be granted during the interim according to the terms of the ordinance. Consequently, the project is compatible with the plan. The issue is not whether or not a conditional use will ultimately be issued, but simply that the plan allows for such a use. The DEQ is not asking that Deschutes County make a decision as to whether or not the project will be granted a conditional use permit, but simply to acknowledge that such a use is allowed under the ordinances.

By judicial notice of the Deschutes County ordinances, the DEQ can acknowledge the compatibility.

2. The FERC regulations require that a water certificate be filed with the application for hydroelectric licensing. The certificate states that the project comply with

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1 the Clean Water Act, §401. The §401 certificate pertains to
2 water quality standards and implementation plans. None of these
3 pertinent sections pertain to or mention compatibility with
4 state, county, or local land use plans.

5 The DEQ is going beyond its statutory authorization when
6 it requires a statement of land use compatibility from Deschutes
7 County. Land use compatibility is unrelated to §401 certificates.

8 As the New York Court of Appeals has explained:

9 > "Section 21 (SUBD. [b]) of the Federal Water
10 > Pollution Control Act [predecessor of present §401] relinquishes only one element of the
11 > otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It
12 > authorizes States to determine and certify only the narrow question whether there is
13 > 'reasonable assurance' that the construction and operation of a proposed project 'will not
14 > violate applicable water quality standards' of the State. That is all that Section 21 (SUBD.
15 > [b]) did and all that it was designed to do. Congress did not empower the States to recon-
16 > sider matters, unrelated to their water quality standards, which the Power Commission has
17 > within its exclusive jurisdiction under the Federal Power Act." In the Matter of de Rham
18 > vs. Diamond, 343 N.Y.S.2d 84, 295 NW2d 763, 768 (N.Y. 1973) (emphasis added).

19 The United States Supreme Court has clearly stated that
20 Congress has preempted state licensing and permit functions for
21 hydroelectric power through the Federal Power Act, 16 USC §92
22 et. seq. First Iowa Hydro-electric Cooperative vs. FPC, 383 US
23 152 (1946). However, Congress has delegated to the states cer-
24 tain limited functions. One of these limited functions is the
25 authority to protect the quality of the state's water through
26

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1 Section 401 of the Clean Water Act. This limited delegation of
2 authority to the state does not allow the DEQ the right to regu-
3 late hydroelectric development with respect to matters other than
4 water quality. The DEQ has exceeded its delegated authority by
5 requiring a certificate of compatibility.

6 In Port Authority of New York vs. Williams, 469 N.Y.S.2d
7 620, 457 NE2d 726 (N.Y. 1983), the New York Court of Appeals
8 held:

9 "In acting on the application for State Section 401 certification of a hydroelectric
10 project as a prerequisite to the issuance of a Federal license therefor, the [New York] Com-
11 missioner of Environmental Conservation is limited to determining whether, applicable
12 water quality standards will be met and is not empowered to base his decision on a balancing
13 of need for the project against adverse environmental impact." 457 NE2d at 727
14

15 In Power Authority of New York, supra, the Commissioner
16 of Environmental Conservation was responsible for issuing the 401
17 certificate for the State of New York. The commissioner did not
18 limit his determination to water quality standards, but included
19 the requirement of a balancing of the needs of a project against
20 adverse environmental impact. The court responded:

21 "Congress, by the Federal Power Act (U.S. Code, tit. 16, §792 et seq), has vested the
22 Federal Power Commission with broad respon-
23 sibility for the development of national poli- cies in the area of electric power, granting
24 it sweeping powers and a specific planning responsibility with respect to the regulation
25 and licensing of hydroelectric facilities affecting the navigable waters of the United
26 States. The Commission's jurisdiction with

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respect to such projects preempts all State licensing and permit functions. [Footnotes and authorities omitted.]

Section 21 (subd. [b]) of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' of the State. That is all that section 21 (subd. [b] did, and all that it was designed to do. <u>Congress did not empower the States to reconsider matters, unrelated to their water quality standards</u>, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

With this in mind, it is clear that the State Commissioner was required only to consider water quality standards which may be affected by discharges from Con Ed's project into the Hudson River -- in other words, to ascertain whether the project would offend against the applicable regulations (6 NYCRR 701.3) governing 'Class B' waters, the classification of the River at Cornwall (6 NYCRR 858.4). It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many other issues -- which had been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it had conducted". <u>Matter of de Rham</u>, supra, 457 NE2d at 730, at 763. [Emphasis added]

The Oregon Attorney General's Opinion dated December 13, 1983 (OP-5506) concludes that state statutes are pre-empted by Federal statutes when state authority ". . . stands as an obstacle to the accomplishment and execution of the full process and objectives of Congress". <u>Petty vs. Campbell</u>, 402 US 637, 649

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(1971), quoting Hines vs. Badidowitz, 312 US 52, 67 (1941).

Clearly, compliance with Deschutes County's land use plan has nothing to do with water quality concerns. The DEQ has recognized this in the past by not requiring a compatibility statement. It is the DEQ's responsibility to determine water quality issues. The counties do not have the personnel qualified to make water quality decisions for small hydroelectric projects. The DEQ is mandated to provide this service.

The Clean Water Act §401 does not allow the State of Oregon to delegate the question of water quality to Deschutes County. If this were the case, every county, every municipality, in Oregon would have the power to decide whether or not a hydroelectric project would be built. Local vetoes over hydroelectric projects would undermine the entire Federal regulatory plan for the licensing of hydroelectric.

3. APA 183.484 (4)(b)(B) requires that the DEQ be consistent in its applications of standards and practices. This consistency would also apply to the 401 certifications. To the best of our knowledge, this is the first time the DEQ has required a statement of land use compatibility under a 401 certification. The DEQ maintains that this is required pursuant to an "Agreement for Coordination with Land Conservation and Development Commission" dated January, 1983. Several other hydro developments have received 401 certifications since January of 1983 without the requirement of a statement of compatibility.

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1 Prior agency practice indicates such a statement is not
2 necessary.
3 It is not reasonable to require a statement of com-
4 patibility for the reasons stated above and the fact that the
5 Agreement for Coordination is not intended to cover this
6 situation. Attached to the Agreement for Coordination is a list
7 and summary of DEQ programs, rules, and decisions affecting land
8 use. These lists deal with water quality and includes nothing
9 that pertains to hydroelectric licensing or 401 certification.
10 Most of the programs deal with sewerage works, industrial waste,
11 and similar concerns. It is logical to assume DEQ has not
12 required a statement of compatibility in the past, because the
13 Agreement for Coordination did not require it under existing
14 programs.
15
16 **CONCLUSION**
17 The 401 certificate should be issued because the appli-
18 cant has met the water quality standards of the State of Oregon.
19 DEQ is without authority to base its decision upon other grounds
20 than their water quality.
21 GRAY, FANCHER, HOLMES & HURLEY
22
23 NEIL R. BRYANT 73041
24 Of Attorneys for Arnold Irrigation District
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26

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BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Zoning Ordinance of 1979, Ordinance No. PL-15, as Amended, by the Addition of the Deschutes River Combining Zone, Providing For a Study Period, Providing For Exceptions, Providing for Repeal; and Declaring an Emergency.

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, is amended by the addition of Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone. DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone and other applicable combining zones. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, or other applicable combining zones, the provisions of this Section shall take precedence.

(1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.

(2) Application of Section. This Section shall apply to all land use actions in the area of the DR Zone defined as 200' from the mean high water mark, 200' measured at a right angle from the river meander, or the identified floodplain, whichever is greater on and along the Deschutes River, Little Deschutes River, Spring River, Fall River, Tumalo Creek, Paulina Creek, Squaw Creek, and the Crooked River, as identified on the Deschutes

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

(3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.

(4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.

(A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.

(B) The use shall conserve and protect fish and wildlife habitat.

(C) The use shall maintain public access to any affected river or stream.

(D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.

(E) The use shall not impair recreational opportunities of the river or stream by the public.

(F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.

(G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.

(H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

(I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.

(J) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.

(K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's intergovernmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.

(5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.

(A) There is hereby declared a study period for all land use activities within the area within the DR Zone.

(B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.

(C) The study period shall include, but not be limited to, the following:

1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.

2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.

4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.

5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.

6. The study of river and stream diversion canals to the extent funding is identified for such purposes.

7. Identification of current and potential river uses, and the economic value of such uses.

8. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

(A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.

(B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.

(C) Construction or reconstruction of a single family residence.

(D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.

(E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.

(F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1986, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this _____ day of _________________, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

____
ALBERT A. YOUNG, Chairman

____
LOIS BRISTOW PRANTE, Commissioner

ATTEST:

____
Recording Secretary

____
LAURENCE A. TUTTLE, Commissioner

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character . . . ." Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are hereinafter referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.

3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.

4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.

5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electic Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).

6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.

8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.

9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.

10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.

11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.

12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . . ", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.

13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.

14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent $100,000,000 in Deschutes County.

15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to $10,000,000.00 to the Deschutes County economy annually.

16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.

17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.

18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this _____ day of _________________, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

ATTEST:

LOIS BRISTOW PRANTE, Commissioner

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

APPENDIX "A"

The following are excerpts from pertinent portions of Deschutes River Goals and Policies contained in the Deschutes County Year 2000 Comprehensive Plan, adopted November 1, 1979:

WATER RESOURCES

"GOAL

1. To maintain existing water supplies at present quality and quantity. . . ."

"POLICIES

3. The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. . . ." (pg. 170)

FISH AND WILDLIFE

"GOALS

1. To conserve and protect existing fish and wildlife areas. . . .

3. To develop and manage the lands and waters of this County in a manner that will enhance, where possible, the production and public enjoyment of wildlife.

4. To develop and maintain public access to lands and waters and the wildlife resources thereon. . . ."

"POLICIES

4. Because public access to fish and wildlife areas is so important to the economic and livability aspects of Deschutes County, walking easements and periodic boat access points shall be provided in areas where public river access is limited, as determined appropriate by the County and State Department of Fish and Wildlife.

5. Consistent with Policy 4 and in order to protect the sensitive riparian areas, as well as to protect people and property from flood damage, the Zoning Ordinance shall prohibit development (except floating docks) within 100 ft. of the mean high water mark of a perennial or intermittent stream or lake. . . . Variances shall also be possible where

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

   Within the prescribed area, new structures (excluding fences, existing structures or other structures less than $1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .

6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .

9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

ECONOMY

"GOALS

2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.

2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT

"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Ordinance No. PL-11, Bend Urban Growth Boundary Zoning Ordinance, as Amended, by the Addition of the Deschutes River Combining Zone, Providing For a Study Period, Providing For Repeal, and Declaring an Emergency. *

ORDINANCE NO. 83-066

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. Deschutes County Ordinance No. PL-11, Bend Urban Growth Boundary Zoning Ordinance, as amended, is amended by the addition of Section 23A, Deschutes River Combining Zone, as set out below:

"Section 23A. Deschutes River Combining Zone. DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, the provisions of this Section shall take precedence.

(1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.

(2) Application of Section. This Section shall apply to land use actions in the area of the DR Zone defined as the areas of special interest or 100' from the mean high water mark, whichever is greater on and along the Deschutes River and Tumalo Creek, as identified on the Deschutes River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

(3) Uses Permitted Conditionally. In a zone with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria set forth in Section 29, and the requirements and standards for the underlying zone.

(4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.

(A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.

(B) The use shall conserve and protect fish and wildlife habitat.

(C) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream, and shall not diminish the economic benefits of tourism to the local economy.

(D) The use shall not impair recreational opportunities of the river or stream by the public.

(E) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.

(F) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.

(G) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

(H) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.

(I) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.

(J) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's inter-governmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.

(5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.

(A) There is hereby declared a study period for all land use activities within the area within the DR Zone.

(B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.

(C) The study period shall include, but not be limited to, the following:

1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas, including areas of special interest, to allow precise review of the boundaries of the overlay zone.

2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the requirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power

Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.

4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.

5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.

6. The study of river and stream diversion canals to the extent funding is identified for such purposes.

7. Identification of current and potential river uses, and the economic value of such uses.

8. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, areas of special interest, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

(A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.

(B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.

(C) Construction or reconstruction of a single family residence.

(D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.

(E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Destination Resort approval, Planned Unit Development approval, master plan approval, or site plan approval dated prior to January 1, 1984.

Section 2. This Ordinance is repealed February 1, 1986, or upon the completion of the study provided for in Section 23A of Ordinance No. PL-11, Bend Urban Growth Boundary Zoning Ordinance, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this _____ day of ________________, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

____
ALBERT A. YOUNG, Chairman

ATTEST:

____
LOIS BRISTOW PRANTE, Commissioner

____
Recording Secretary

____
LAURENCE A. TUTTLE, Commissioner

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-066.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character . . . ." Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

2. The Bend Area General Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are hereinafter referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.

3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.

4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.

5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electic Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).

6. A number of applications for hydroelectric generating facilities and diversions have been filed for in the Deschutes River Basin.

7. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydro-

electric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.

8. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.

9. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.

10. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.

11. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . . ", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.

12. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.

13. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent $100,000,000 in Deschutes County.

14. The Department of Fish and Wildlife has estimated fishing and hunting generate up to $10,000,000.00 to the Deschutes County economy annually.

15. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities in and around the City of Bend.

16. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.

17. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this _____ day of __________________, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

____
ALBERT A. YOUNG, Chairman

ATTEST:

____
LOIS BRISTOW PRANTE, Commissioner

____
Recording Secretary

____
LAURENCE A. TUTTLE, Commissioner

APPENDIX A
Bend Area General Plan
Pertinent Deschutes River Goals and Policies

Open Lands -

The open land section of the plan deals with three basic types, forests, urban area reserve, and areas of special interest - private and public open space.

Areas of Special Interest - Private and Public Open Space

1. The banks and canyon of the Deschutes River shall be retained as public or private open space throughout its entire length within the planning area except in the intensively developed central part of the community.

2. Major rock outcrops, stands of trees or other prominent natural features shall be preserved as a means of retaining the visual character and quality of the community.

Outside the Urban Growth Boundary the policies and requirements of the Deschutes County Year 2000 Comprehensive Plan shall apply. Decisions along the boundary that may impact natural resource lands outside the boundary will be coordinated with the County, and preference will be given to the protection of such adjacent resources through the development review process. Areas of special interest identify lands along the banks of the Deschutes River. These areas are also basic habitat. The following policies and goals shall also apply.

Fish and Game

The primary goals for the protection of the fish and wildlife habitat within the urban area are:

1. To conserve the existing riparian zone along the Deschutes River.
2. To provide for public access to this scenic and attractive resource.
3. To provide more park and trails along the river.
4. To allow the community flexibility in reviewing development proposals within the areas of special interest that would award superior design; that grant public access and dedication of land to the public; that grant scenic or development easements to a public body or recognized conservation organization; and still maintains the scenic resources and protects or enhances the wildlife habitat or that can be judged to be a reasonable trade-off in values for the public.

Strategies and Policies:

1. The city and county shall preserve areas of the banks and canyons of the Deschutes River in public or private open space throughout its entire length within the Urban Growth Boundary, except in the intensively developed central part of the city. Areas so preserved will allow residential densities to be higher in the developable portion of the parcel affected.

2. The city and county shall review development proposals that include land in areas designated as areas of special interest for the public benefits that can be gained under preservation or development. The city and county may allow those developments that are not subject to natural hazards; that would not inflict irreversible harm to the riparian zone; that would enhance public open space, parks, and access; that have excellence of design, provide via easement or fee title access for the public to the river, either as park or trails; and carry out the intent of the plan to enhance the variety and livability of the Bend Urban Area.

3. Any development within 100 feet of the water's edge shall be subject to a conditional use and design review procedure, taking into account the goals for the areas of special interest and the protection of fish and wildlife habitat.

4. The county and city shall apply the requirements of the deer winter range overlay zone to any development in the urban reserve area adjacent to or within one mile of the WA designation on the county plan or zoning maps.

The Deschutes River represents a significant sensitive area within the Urban Growth Boundary, and the upmost care shall be taken in any development that occurs so that the public is benefitted by any changes that may occur in the existing character of the river or riparian zone.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

EQC Hearing Section

FEB 26 1985

In Re:)
)
LAVA DIVERSION PROJECT) BRIEF OF RESPONDENT DEPARTMENT
FERC No. 5205) OF ENVIRONMENTAL QUALITY
Deschutes County, Oregon)

STATEMENT OF THE CASE

Summary of Facts

General Energy Development, Inc., (GED) holds Permit No. 5205 issued by the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before FERC may issue a license to construct, § 401 of the Clean Water Act states that the license applicant shall provide the licensing agency (here FERC) a "certification from the state in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of this act . . . and with any other appropriate requirements of state law set forth in such certification . . . ." 33 U.S.C. § 1341.

The Oregon Department of Environmental Quality (DEQ) denied issuance of certification on two bases. First, eight areas of potential water quality impacts were not adequately addressed by GED. These areas have now been addressed to the satisfaction of the DEQ and are no longer at issue here. Second, GED did not supply DEQ a statement of compatibility with the Deschutes County

comprehesive plan and land use ordinances. Oregon law requires that any state agency decision which affects land use be made in accordance with local comprehensive plans and ordinances. DEQ's land use procedures provide the statement of compatibility shall be issued by the appropriate local government. Deschutes County has not issued this statement.

In December of 1983 Deschutes County passed ordinances Nos. 83-058 and 83-066. (The first of the two similar ordinances is included in the appendices at App 11.) These ordinances limit hydroelectric development on the Deschutes River pending the completion of a study assessing the cumulative impacts upon the environment of the numerous planned projects. Until the study is completed, any project must meet the special standards of the ordinance and obtain a conditional use permit. No such study has yet been completed, and GED has not yet applied for a conditional use permit.

Since no factual issues exist, the parties have agreed to have this matter brought before the commission without a prior hearing. The only issues presented for the commission are legal and policy issues.

Summary of Argument

GED raises three issues in its appeal of DEQ's denial of § 401 certification. The three issues and DEQ's position thereon may be summarized as follows:

1) As a matter of law, did Deschutes County err in failing to grant a statement of land use compatibility?

Deschutes County was not in err for failing to grant a statement of compatibility. Deschutes County's current zoning ordinances allow hydroelectric development on the Deschutes River only upon receipt of a conditional use permit. Deschutes County has never received a conditional use permit request from GED. Therefore, as the county property advised DEQ, there has not yet been a determination that the GED project is consistent with the Deschutes County plan and ordinances.

2) Can DEQ deny § 401 certification for reasons other than water quality?

Yes, DEQ can, and probably must, deny § 401 certification for a project that has not complied with state land use laws. § 401 of the Clean Water Act allows the state to consider appropriate requirements of state law other than water quality requirements in granting § 401 certification. The statute's plain language and most relevant case law support a broad interpretation of the state's authority. In Oregon, state land use law requires state agencies to act in compliance with local comprehensive plans and ordinances. DEQ, following its regular land use procedures, requested that Deschutes County determine whether the project complied with the Deschutes County plan and ordinances. Since Deschutes County did not issue a statement of compatibility, DEQ property withheld § 401 certification.

3) Did DEQ violate the consistency standard of ORS 183.484 by not requiring previous § 401 applicants to obtain a statement of compatibility?

DEQ did not violate the consistency standard of ORS 183.484 by not requiring previous applicants to obtain a statement of compatibility. The reason GED was the first company required to supply a county compatibility statement was explained to GED by letter. Therefore, the consistency standard was met. Furthermore, DEQ was changing from erroneous to correct procedure. Case law provides that correct agency procedure should not be reversed for inconsistency with prior erroneous procedure.

DEQ's argument on each of these issues is set forth in full below.

ANSWER TO FIRST ISSUE

As a matter of law, Deschutes County was not in error for failing to grant the statement of compatibility.

ARGUMENT

State agency decisions affecting land use must be compatible with local comprehensive plans and ordinances. Oregon's land use laws provide in pertinent part:

> . . . state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use . . . in a manner compatible with . . . [c]omprehensive plans and land use regulations . . . ORS 197.180(1(b)(A) (Emphasis added).

Deschutes County Zoning Ordinance No. 83-058 was passed in response to the potential adverse cumulative effects of the numerous proposed hydroelectric projects on the Deschutes River and its tributaries, diversions, adjacent areas, and stream

flows. The ordinance limits hydroelectric development until July 31, 1985 to allow for completion of a cumulative effects study. The study is intended to allow compliance with Statewide Planning Goal 5 which requires the users of land within the state "[t]o conserve open space and protect natural and scenic resources by developing [p]rograms that will: (1) insure open spaces, (2) protect scenic and historical areas and natural resources of future generations, and (3) promote healthy and visually attractive environments in harmony wilth the natural landscape character . . ." OAR 660-15-000. No programs have been developed to implement Goal 5. Development of proposed hydroelectric projects on the Deschutes River could severely impact the county's ability to implement programs designed to meet Goal 5. Inability to meet Goal 5 could result in diminution in the tens of millions of tourist dollars spent annually in Deschutes County by tourists drawn to the area for its recreational opportunities. See Deschutes County Ordinance No. 83-058.
(App. 11.)

Until the cumulative effects study is completed, the ordinance allows hydroelectric projects only as a conditional use. However, Deschutes County has never received an application for a conditional use permit from GED. (App. 23-24, October 10, 1984 letter from Deschutes County Commission to DEQ.) As a result, Deschutes County has not issued GED a statement of compatibility with the county's comprehensive plan and land use ordinances. Until the permit process is complete, there is no final deter-

mination that a project will be compatible with the standards of the ordinance. Therefore, Deschutes County was correct in not issuing GED a statement of compatibility.

DEQ's practice of relying upon a local government's interpretation of its own land use ordinances makes good sense as a matter of practical administration and policy. As a matter of law, this practice has also been specifically upheld by the Oregon courts. Schreiner's Gardens v. DEQ, 71 Or App 381, _____ P2d _____ (1984) (upholding DEQ's reliance on Marion County's land use findings with respect to the waste burning facility).

Even if DEQ could overrule a local government's interpretation of its own ordinances, there is no reason to do so in this case. It is beyond debate that Deschute County's current ordinances require that hydroelectric projects obtain a conditional use permit and that no such permit has been issued in this case. If GED is dissatisfied with the result in this case, its remedy is with the county, not DEQ.

ANSWER TO SECOND ISSUE

DEQ can deny § 401 certification for reasons other than water quality.

ARGUMENT

A. Introduction

The Clean Water Act establishes a joint system of state and federal control designed to preserve, protect and improve the nation's waters. The Environmental Protection Agency

(EPA) serves as the overseer of the programs implemented under the Clean Water Act. However, the Act grants the states broad regulatory powers. This is apparent in the purposes and policy of the Act set out in 33 U.S.C. § 1251 as follows:

> . . . it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of <u>land and water</u> resources . . . (Emphasis added.)

Mindful of this purpose, Congress granted the states regulatory veto power of FERC's hydroelectric project licensing authority by requiring FERC applicants for licenses to obtain state certification. Without state certification, or a waiver from the state, FERC may not grant a license to construct or operate a hydroelectric power facility. § 401 provides in pertinent part:

> Any applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate . . . that any such discharge will comply wilth the applicable provisions of §§ 301, 302, 303, 306 and 307 of this act. . . and with any other appropriate requirements of state law set forth in such certification. 33 U.S.C. § 1341.

Thus, § 401 provides a state two means of conditioning or refusing to certify a hydro project. First, under § 401(a), state certification may be withheld if the project would impact water quality. Second, § 401(d) provides the project must comply with

"any other appropriate requirements of state law." The scope of § 401(d) is at issue in this case.

B. Plain Meaning

Whenever possible, statutes are to be construed to give effect to their plain meaning. The plain meaning of § 401 is clear. By requiring compliance with particular sections listing water quality criteria and then providing that projects must meet "other appropriate requirements of state law", it is clear Congress did not intend to limit the scope of § 401(d) to state laws pertaining to water quality. § 401(d), in addition to the "other appropriate requirement" language, also lists the water quality criteria sections. By explicitly requiring compliance with "other appropriate requirements of state law", Congress intended the states flexibility in considering § 401 certification. A plain meaning reading of § 401 supports DEQ's action of denying certification to GED for failing to comply with Oregon's land use laws.

C. Case Precedent

The case law interpreting the scope of § 401 also supports the action taken by DEQ.

In Roosevelt Campobello Int'l Park Comm'n v. Environmental Protection Agency, 684 F2d 1041 (1st Circuit 1982), the State of Maine imposed conditions on a proposed oil refinery under the State Siting Law. EPA declined to incorporate these conditions into the NPDES permit granted to the project applicant. The circuit court addressed two issues: 1) were the state conditions

water quality related, and (2) was EPA required to include the conditions in its NPDES permit? The Administrative Law Judge (ALJ) held that the state may not impose permit restrictions unrelated to water quality standards, effluent limitations or schedules of compliance. The court disagreed stating:

> Petitioners argue, with some force, that the conditions listed above are related to water quality . . . We believe that the ALJ made a more fundamental error by seeking to determine which requirements of state law were appropriately affixed to the state's certification. Section 401 of the CWA empowers the state to certify that a proposed discharge will comply with the Act and 'with any other appropriate requirement of state law.' Id. at 1036.

The court in essense rendered the first issue moot by its holding on the second issue. It was unnecessary to determine whether the conditions were water quality related because states may impose conditions not related to water quality on § 401 certification as long as the conditions are supported in state law.

Following this reasoning, DEQ was correct in denying certification to GED. By failing to obtain a statement of compatibility with the Deschutes County plan and ordinances, GED was not in compliance with Oregon state law. State law requires this statement of compatibility before agencies may act. Therefore, DEQ has the discretion, if not a mandate, to assure compliance with the Oregon land use law when taking action under § 401.

The New York courts have also considered the scope of § 401. In de Rham v. Diamond and Consolidated Edison Co., 32 NY2d 34, 295 NE2d 763 (1973), environmental groups sought to overturn the

State Commission of Environmental Conservation's granting of certification. The issues were: 1) whether the commissioner acted arbitrarily and capriciously, and 2) would the project damage water quality leading to impact upon the fishery resource?

The court stated:

> Congress did not empower the states to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act . . . [T]he Commissioner has neither the authority nor the duty to delve into the many other issues which had been investigated and decided by the Federal Power Commission . . . Id. at 768 (Emphasis added).

The court was indicating the state agency may not reconsider matters under the jurisdiction of the Power Commission that had already been investigated. The Power Commission had already conducted a study assessing the probable damage to fishery resources. Therefore, the CEC could not reconsider this matter. However, many matters of state law affecting hydropower projects are not under the jurisdiction of FERC. Therefore, FERC would not have considered them. Under § 401(d), states may consider state laws during § 401 certification proceedings.

FERC has not considered whether the GED project would meet the Deschutes County comprehensive plan and land use ordinances. When DEQ requested a certificate of compliance with the plan and ordinances, it was not reconsidering anything FERC had already investigated. This assessment was purely a state law requirement. Therefore, DEQ properly considered the Deschutes County plan and ordinances, which it must consider under state law, in denying GED's application for certification.

Furthermore, in de Rham, the court did not directly address language resembling current § 401(d). The issues were restricted to the petitioner's concerns regarding whether the state commission had adequately addressed water quality concerns. The petitioner was not claiming the commission failed to consider "other appropriate requirements of state law". Rather, the petitioner claimed that licensing of the facility would lead to water quality degradation. The difference in breadth of the inquiry in de Rham as compared with the case at hand diminishes the value of any dictum in de Rham discussing the scope of § 401(d).

The New York courts also addressed § 401 in Power Authority of State of New York v. Williams, 60 NY2d 315, 457 NE2d 726 (1983). In this case, the State Department of Environmental Conservation denied the power authority's application for a § 401 certification. This denial was predicated solely on water quality standards. The issue on appeal was whether the state department could consider granting a § 401 certification because the project offerred the sole means to meet the energy needs described in the State Energy Master Plan even when the project would violate applicable water quality standards. The court held that the state department could not balance the need for the project with the water quality impacts the project would produce, as mandated in the State Energy Law, because this balancing test was within FERC's jurisdiction.

Williams is clearly distinguishable from the case at hand. In Williams, the state department could not comply with both

federal and state law. "[W]hen compliance with federal and state regulations is a physically impossibility", state law may be preempted. Florida Lime and Avacodo Growers, Inc. v. Paul, 373 US 132, 142-43 (1963). However, as discussed above, DEQ acted within the bounds of both state and federal law. In this case, DEQ was not acting in violation of the Clean Water Act. To the contrary, DEQ was considering "other appropriate requirements of state law" when it required compliance with the Deschutes County plan and ordinances. Therefore, DEQ's action was proper.

D. FERC Preemption

Opposing counsel contends the Federal Power Act preempts state licensing and permit functions for hydropower except for water quality concerns preserved by § 401 and cites First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 US 152 (1946). The precedential value of First Iowa has been weakened by recent court opinions.

In California v. United States, 438 US 645 (1978), the court interpreted § 8 of the Reclamation Act, 43 U.S.C. § 383, as applied to conditions placed by the State of California on water permits issued for the construction of the New Melones Dam. § 8 provides:

> . . . nothing in this Act shall be construed as affecting or intended to affect or to in an way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation . . . . 43 U.S.C. § 383.

This language is very similar to that in § 27 of the Federal Power Act. Despite the plain language meaning of § 27, the Supreme

Court in First Iowa determined § 27 merely preserved proprietary rights, i.e., that the section's only function was preservation of a state's right to compensation for injury to vested water rights. The court looked to interpretations of § 8 of the Reclamation Act for guidance. First Iowa, supra at 176. In California v. United States, the court held that the conditions imposed by California were valid, if the condition actually imposed was not inconsistent with the congressional directives as to the New Melones Dam. See California v. United States. This language should also be read to limit § 27 of the Federal Power Act since the court has discussed § 27 of the Federal Power Act and § 8 of the Reclamation Act interchangeably. Thus, a state law not in direct conflict with a federal law, i.e., when compliance with both federal and state law is not physically impossible, is valid.

In this case, there is no direct conflict. Federal law provides that state law must be satisfied before issuance of a § 401 permit. State law provides that comprehensive plans and ordinances must be considered by DEQ before providing § 401 certification. Both federal and state law were concurrently satisfied by DEQ's action. Therefore, state law is not preempted and DEQ's action was proper and valid.

In another recent Supreme Court case, the "superagency" powers FERC has assumed regarding hydropower licensing have been further limited. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians. ______ US _____, 104 S Ct 2105, 80 L Ed 2d 753

(1984) involved the meaning of § 4(e) of the Federal Power Act. 16 U.S.C. § 797(e). This section gives the agency having jurisdiction over federal reservations the power to impose conditions on FERC power projects passing over these lands. FERC rejected or modified conditions imposed by the Secretary of the Interior upon a project passing through several Indian reservations. The court held that the conditions were binding upon FERC.

In reaching this decision, the Supreme Court has recognized that FERC licensing involves shared powers and that FERC does not have exclusive jurisdiction over hydropower licensing.

E. State Land Use Laws

Any DEQ decision which affects land use must be made pursuant to local comprehensive plans and land use ordinances. ORS chapter 197 provides in pertinent part:

> . . . state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use . . . in a manner compatible with . . . comprehensive plans and land use regulations . . . ORS 197.180(1)(b)(A).

The land use laws also require that each state agency prepare and submit to the Land Conservation and Development Commission (LCDC) a coordination agreement. ORS 197.180(2)-(6). Among other requirements, the agreement must list the agency's rules and programs affecting land use. See OAR Chapter 660, Division 330 (LCDC's administrative rule on state agency coordination agreements).

DEQ has adopted such an agreement, and it has been reviewed and approved by LCDC. (Pertinent portions are attached at

App 1-10.) The agreement specifically identifies § 401 certification as a decision affecting land use. (App 10.)

DEQ's coordination agreement is consistent with Oregon case law, which has broadly construed what actions constitute land use decisions. In Peterson v. Klamath Falls, 299 Or 249, _____ P2d _____ (1977), a decision by the City of Klamath Falls to annex land outside its borders was held to be a land use decision. Peterson also established the general test of what is a land use decision: will the decision have "a significant impact on present or future land uses . . ."? Id. at 254.

There is little doubt that a decision involving a hydroelectric project on the Deschutes River will have such a "significant impact". Water is the blood of arid Deschutes County. Water related recreation results in the annual influx of tens of millions of tourist dollars into Deschutes County. The availability of water has a direct effect upon the county's ability to accommodate growth.

The Final Deschutes County Year 2000 Comprehensive Plan, adopted in November of 1979, recognizes the vital importance of water resources to the county:

> Water in adequate quality and quantity is important to all communities, but in a semi-arid region such as where Deschutes County is located it is of particular importance . . . . Unfortunately, inadequate information exists on water supplies and on water quality. The County Health Division, Oregon Health Division, DEQ, and U.S. Geological Survey are all presently involved with studies or ongoing programs to provide a greater understanding of the area's water resources. Given the unexpected continued growth of the area and the existence of water quality and quantity problems already, the

> results of these studies will prove useful in updating this plan and safely accommodating the new growth while protecting existing industries and residents. Deschutes County Comprehensive Plan at 138-39. . . . The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. Deschutes County Comprehensive Plan at 140.

Other decisions regarding utilization of water resources have been held to be land use decisions by the Oregon courts. For example, the Department of Fish and Wildlife's determination of whether or not to issue a salmon hatchery permit was held to be a land use decision. Federation of Independent Seafood Harvesters v. Fish and Wildlife Commission, 291 Or 452, 632 P2d 777 (1981). Similarly, a state permit authorizing the spraying of the pesticide Sevin in the Tillamook Bay was held to be a land use decision. Audubon Soc'y v. Department of Fish and Wildlife, 67 Or App 776, 681 P2d 135 (1984).

DEQ has regularly relied upon a local government's interpretation of its own ordinances. This approach has been specifically upheld by the Oregon courts. Most notably, the Court of Appeals recently held that DEQ properly relied on the decisions of Marion County regarding whether the operation of a waste burning facility met the Marion County plan and ordinances. Schreiner's Gardens v. DEQ, 71 Or App 381, _____ P2d _____ (1984). Schreiner's Gardens is directly parallel to this case in that the county's ordinances required a conditional use permit, and DEQ issued its permit subsequent to and in reliance upon the local permit.

Contrary to petitioners assertion, DEQ has not delegated to Deschutes County veto power over proposed hydroelectric facilities. Rather, DEQ is simply deferring interpretation of Deschutes County's ordinances to the body best able to perform this function, the body which promulgated these ordinances.

F. Summary Discussion of the Law as Applied to this Case

As the above discussion should demonstrate, DEQ is allowed to, if not required to, consider state land use law in deciding whether to grant § 401 certification.

§ 401 plainly states that "a discharge will comply with any other appropriate requirements of state law". State land use law requires DEQ to consider comprehensive plans and land use ordinances when making decisions affecting land use. DEQ's coordination agreement with LCDC lists § 401 certification as a decision affecting land use. Furthermore, a major decision affecting the use of waters in Deschutes County clearly has a "significant impact on present or future land uses", thereby satisfying the Petersen test as a land use decision.

Therefore, at least under current statutes and rules, DEQ must consider the Deschutes County plan and ordinances during § 401 certification. Deschutes County has concluded and advised DEQ that the Lava Diversion Project is not consistent with the county's ordinances. As a result, DEQ properly denied § 401 certification to GED.

DEQ has traditionally deferred to local government's interpretation of its own ordinances. This approach has been

upheld by the Oregon courts. Schreiner's Garden v. DEQ, 71 Or App 381, _____ P2d _____ (1984). DEQ was therefore correct to do so in this case.

The pervasive preemptive powers assumed by FERC under the Federal Power Act have diminished since First Iowa. The Supreme Court in California v. U.S. provided that state law not in direct conflict with federal law is valid and therefore not preempted. In this case, Oregon's land use laws are not in conflict with either the Federal Power Act or the Clean Water Act. The land use laws were promulgated to serve purposes different from either federal act. In fact, § 401 mandates that DEQ certify pursuant to "other appropriate requirements of state law". DEQ has obeyed both state and federal law in denying certification to GED.

Although the courts have been divided on the exact breadth of § 401, the most relevant case law supports DEQ's action in this case. In Roosevelt Campobello, the First Circuit chastised EPA for omitting from an NPDES permit conditions imposed by the State of Maine on a proposed oil refinery under the State Siting Law. The court held that § 401(d) allows imposition of conditions unrelated to water quality. In the case at hand, DEQ conditioned § 401 certification with the requirement that GED obtain a land use compatibility statement from Deschutes County. Following the reasoning of the First Circuit, this action was valid.

The important policy considerations underlying DEQ's decision in this case should also not be overlooked. Oregon leads the nation in comprehensive planned development of land and water

resources. Efficient use and development of the state's rich water resources is an integral part of the state's land use planning goals. § 401 certification is an important, if not the only, vehicle through which Oregon may influence hydropower development decisions on waters within the state. Until the courts or Congress clearly narrow the scope of § 401, Oregon should join the states that have taken an assertive view of their authority.

Deschutes County Ordinance No. 83-058 called for a hydro power development study to assess cumulative impacts upon the Deschutes River basin. The Oregon Department of Fish and Wildlife, Oregon Department of Energy, State Representative Tom Throop, and Save Benham Falls Committee all support the county's efforts. (App 27-39.) Thus, DEQ's decision in this case was not only within its apparent legal authority, but also was compelled by important policy considerations.

ANSWER TO THIRD ISSUE

DEQ has not violated the consistency standard of ORS 183.484 by failing to require previous § 401 applicants to obtain a statement of compatibility.

ARGUMENT

Petitioner claims that DEQ acted inconsistently with its prior practice by requiring a statement of compatibility in this case. The Administrative Procedures Act provides in pertinent part:

> The court shall remand the order to the agency if it finds the agency's exercise of discretion to be: . . . [i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice, <u>if the inconsistency is not explained by the agency</u> . . . ORS 183.484(4)(b)(B) (Emphasis added).

This project was the first project required to supply the DEQ with a local compatibility statement. However, this change in procedure was explained to GED in a letter dated September 7, 1984. (App 40, 41.) The letter stated:

> In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that DEQ will rely on a statement of compatibility from the appropriate planning agency.
>
> DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

In this manner, the change in procedure was fully explained by the DEQ and, therefore, was not in violation of the consistency standard of ORS 183.484.

Since becoming aware of the land use compatibility statement requirement, DEQ has required at least twelve proposed hydroelectric projects to supply these statements. (App 64-81.)

Indeed, DEQ now requires local land use compatibility statements of all applicants for § 401 certification.

Furthermore, even if the DEQ action in this case were found to be inconsistent, the action would not be remanded by the courts. The Oregon courts have clearly held that changing procedure to correct prior erroneous procedure does not merit remand of proper procedures. See, e.g. Roth v. LCDC, 57 Or App 611, 646 P2d 85 (1982).

In conclusion, DEQ was correct in requiring a statement of compatibility in this case. GED was informed that DEQ was changing procedure to correct past inadequacies. The new procedures are correct, and the Administrative Procedures Act does not require agencies to continue prior erroneous or undesirable procedures. Subsequent applicants for § 401 certification have been required to supply DEQ with statements of compatibility with local comprehensive plans and ordinances.

CONCLUSION

DEQ acted within its legal power in denying § 401 certification to GED. For the legal and policy reasons discussed above, this denial should be upheld.

Respectfully submitted,*

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Attorney General

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Of Attorneys for Respondent DEQ

*This brief was primarily researched and written by Christopher Rycewicz, a second-year law school student on externship with the Oregon Department of Justice.

APPENDICES

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

AGREEMENT FOR COORDINATION

WITH

LAND CONSERVATION AND DEVELOPMENT COMMISSION

JANUARY 1983

deq

Intergovernmental Coordination Section
[illegible]522 S.W. Fifth Avenue
P.O. Box 1760
[illegible]land, Oregon 97[illegible]

DEPARTMENT OF ENVIRONMENTAL QUALITY AGREEMENT FOR COORDINATION WITH LAND CONSERVATION AND DEVELOPMENT COMMISSION

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3. State and Federal Agencies with which DEQ Coordinates:

Air Quality — 3-1
Noise Control — 3-2
Solid Waste — 3-2
Water Quality — 3-3

MK1109

DEPARTMENT OF ENVIRONMENTAL QUALITY
AGREEMENT FOR COORDINATION WITH
LAND CONSERVATION AND DEVELOPMENT COMMISSION

I. Introduction

The Department of Environmental Quality (DEQ) agreement for coordination with the Land Conservation and Development Commission (LCDC) has been prepared to meet the requirements of ORS 197.180(2), and the LCDC Administrative Rule on state agency coordination agreements (OAR 660-30-000, amended July 9, 1982)

These requirements, termed Key Elements pursuant to the rule are:

1. List of agency rules and programs affecting land use.

2. Program for cooperation with and technical assistance to local governments in the development of comprehensive plans.

3. Program for assuring compliance with the Statewide Planning Goals and compatibility with local comprehensive plans.

4. Program for coordination with other governmental agencies and bodies.

The Department's agreement presented here includes a DEQ Land Use Coordination Handbook and DEQ Procedures Manual.

The DEQ Land Use Handbook (hereafter referred to as Handbook) is to guide both writers and reviewers of local comprehensive land use plans in how to incorporate the Department's pollution control programs into the local plan. The handbook includes an introduction and sections for air quality, water quality, solid waste management, and noise control and identifies those agencies with whom DEQ coordinates its activities.

The DEQ Procedures Manual describes how land use compatibility statements will be incorporated into all DEQ Programs and Decisions affecting local government.

II. The Key Elements of DEQ's Coordination Agreement

A. List of Agency Rules and Programs Affecting Land Use.

A summary of DEQ statutes, rules, programs and decisions and an identification of those affecting land use is included in Attachments 1 and 2.

B. Program for Cooperation with and Technical Assistance to Local Governments.

1. Participation in Comprehensive Plan Development, Acknowledgment Review, Periodic Review and Plan Amendment Review:

   a. The DEQ Intergovernmental Coordinator will review plan materials to determine how completely they address DEQ programs affecting land use. Assistance of the DEQ region or branch office and headquarters programs and the local planner and DLCD field representative will be solicited. This is to aid in identifying local environmental problems, appropriate environmental policies and in finding the appropriate references in the plans.

   b. All Comments and Objections will be compiled and adjusted for consistency by the Intergovernmental Coordinator, who then gains DEQ Director approval on any objections and routes the official DEQ response to the local jurisdiction and DLCD.

2. Provision of Technical Assistance to Local Governments.

   a. Information from DEQ:

      (1) The Handbook lists information which is available upon request. The Department can provide other information on request about specific items not contained in the publications referred to in the Handbook.

      (2) Informational reports and other items such as those listed in the Handbook will routinely be mailed as soon as they are available to those on DEQ mailing lists including each DLCD field representative, the DLCD Director, the DLCD State Agency Coordinator, and each local planning coordinator. The Department expects the local coordinator to advise the cities and counties of material for review. Additional copies may be requested from DEQ headquarters or regions, but budget constraints preclude us from routinely sending a copy to each city and county in Oregon.

      (3) The DEQ staff listed in the Handbook are designated as land use liaisons to assist in development and review of local comprehensive plans.

(4) As necessary and financially feasible, DEQ will conduct workshops to acquaint local planners with DEQ programs affecting land use.

(5) As part of the plan update and periodic review process, DEQ will advise local jurisdictions of what new DEQ programmatic changes should be included in the plan. The DEQ will also formally notify the jurisdictions of any special subjects of environmental concern the jurisdiction should focus on in the plan update.

b. DEQ assistance:

(1) Requests for technical assistance should be made to the DEQ Intergovernmental Coordinator.

(2) DEQ program, region, and public affairs staff are available on a limited basis to brief or hold discussions with local planners and citizen groups. Where appropriate, local officials will be invited to accompany DEQ staff on field investigations to promote mutual understanding.

C. Program for Assuring Conformance with the Goals and Compatibility with Comprehensive Plans.

The DEQ programs and decisions are related primarily to LCDC Goals 6 (Air, Water and Land Resources Quality) and 11 (Public Facilities and Services). DEQ implementation of environmental quality programs may also relate to other LCDC Goals. DEQ understands that all 19 LCDC Goals must be considered by local governments and overall Goal conformance and comprehensive plan compatibility assessment developed by the appropriate local government in considering any proposed project or program. It is beyond DEQ's authority and expertise to make such conclusory assessment.

The following will be used by DEQ to assure that its programs, rules and decisions affecting land use conform with the Statewide Planning Goals and are compatible with local comprehensive plans.

1. Programs and Rules Affecting Land Use

a. DEQ initially reviewed its programs and rules affecting land use in 1978, noting that revisions to rules would begin if DEQ found a program or rule not in conformance.

b. To assure that new DEQ programs and rules affecting land use conform with LCDC Goals and are compatible with the local comprehensive plan, DEQ will send a public notice of new or amended programs and rules, and other appropriate items affecting local comprehensive plans to affected local governments, state and federal agencies as much in advance of DEQ's final decision as possible, but with at least the minimum notice required by law. This public hearing notice will state DEQ's determination of Goal compliance and plan compatibility. (See the DEQ Procedures Manual for details about the notice.)

c. The DLCD may request a public hearing to review any concerns with the rule or program. If no request is received by the DEQ within 15 days, it will be assumed that the DLCD agrees with the DEQ findings regarding Goal compliance and plan compatibility.

2. Decisions Affecting Land Use

a. Non site-specific decisions affecting land use, such as plans, grants and other items affecting local plans, will follow public notice procedures outlined in Section C. 1. above.

b. The DEQ administrative procedures for all site-specific decisions on new or expansion projects affecting land use require a "statement of compatibility" with the acknowledged local comprehensive plan and zoning requirements or the LCDC Goals from the appropriate jurisdiction(s). The site-specific decisions affecting land use include: DEQ permits, facility plans, construction grants and loans, and notices of construction. (See Attachment 2 for list.) General procedures for submission of this "statement of compatibility" are outlined below.

(1) When an applicant applies, it must supply with the application to DEQ a "statement of compatibility," or evidence that the applicant has applied for such a statement before DEQ can accept the application as complete for processing. The local statement must indicate the compatibility of the proposed project under ORS, Chapter 197 with the Statewide Planning Goals or LCDC acknowledged local comprehensive plan and ordinances.

(2) If DEQ receives an affirmative local statement of compatibility, DEQ will rely on it as evidence that there has been a determination of compatibility with the Statewide Planning Goals or LCDC acknowledged local comprehensive plan and ordinances.

(3) If DEQ does not receive a local statement with the permit application one of the following circumstances will apply:

(a) If the applicant has applied for but not yet received a local statement of compatibility, the DEQ may proceed with review of the application and inform the applicant that DEQ's decision (e.g. issuance of a permit) is not a finding of compatibility with the Statewide Planning Goals or the acknowledged comprehensive plan and that the DEQ's action is conditioned upon the applicant receiving a land use approval from the affected local government. If the applicant, however, is the local jurisdiction, the application will not be processed until the statement of compatibility is received.

(b) If a negative statement of compatibility is received stating that the project is incompatible with the acknowledged plan and ordinances or the Goals, DEQ will notify the applicant that a decision cannot be made on the application. If the decision has already been made conditionally, it cannot become effective.

(4) Where more than one local jurisdiction has planning authority over a specific site, we will expect statements of compatibility from each of these jurisdictions (e.g., city and county in urbanizing area). See Procedures Manual for details.

(5) The Department may petition LCDC for a compatibility determination and statement where:

(a) A city or county negative compatibility determination and statement or no statement at all has been issued on a proposal needed to meet DEQ program requirements (e.g., sewage treatment plant modifications) or

where a negative determination by a local jurisdiction is in a Goal area under DEQ jurisdiction by statute; or

(b) A proposal appears to have major impact requiring a State determination of compatibility in addition to the local statement.

D. Program for Coordination with Other Governmental Agencies and Bodies.

The Department's program for coordination of DEQ actions with affected state and federal agencies and special districts includes the following. (See Attachment 3 for list of agencies.)

1. Provision of information and call for comment on DEQ plans, programs, and decisions affecting land use as described above in Section II C (above).

2. DEQ reaction to information and calls for comment from other agencies, including notices from the Executive Department, Intergovernmental Relations Division's "A-95" state clearinghouse and "One-Stop Permit" coordination center.

DEQ/DLCD COORDINATION AGREEMENT
Attachment 1

List and Summary of DEQ Programs, Rules and Decisions Affecting Land Use

A. SOLID WASTE

Program/Decision	Summary	Citations: State & Federal Laws and Rules
1. Resource Conservation and Recovery Act	Provides for protection of health and the environment and conservation of material and energy resources; prohibits open dumps and provides funding.	Public Law 94-580 (Federal)
a. Planning & Implementation	Establishes agencies responsible for planning and implementation within solid waste areas.	(C) 255.20 (Federal)
b. Open Dump Inventory	State to provide to EPA for publication a list of open dumps to be upgraded or closed.	State Plan, OAR 340-61-017 (effective 1-30-80)
2. State Solid Waste Plan	Compilation of regional plans and state policy toward solid waste (published in 1978).	ORS 459.015 - OAR 340-61-015
3. Completion of Local Solid Waste Plan		
a. Counties with Plans not completed (2)	Finish development of a local solid waste plan - approved by DEQ.	ORS 459.015 - OAR 340-61-015
b. Update Existing Plans	Update plans to reflect current volumes, practices and direction.	ORS 459.015 - OAR 340-61-015
4. Grants for Secondary Planning	Provide money for expanded solid waste studies leading to implementation only on a hardship basis.	ORS 468.220(E)
5. Loans for Implementation	Provide assistance for construction of specific systems or facilities. Must be detailed in or compatible with comprehensive plan.	ORS 468.220(F)
6. Plan Review	Review and approve plans for specific facility operation and construction. Must be compatible with comprehensive plan.	ORS 459.235 - OAR 340-61-005 (amended September 1981)

Program/Decision	Summary	Citations: State & Federal Laws and Rules
7. Award of State Grant and Loan financial assistance for sewerage works construction	DEQ may purchase bonds for local share of eligible sewerage works construction. DEQ may, if specifically approved by the legislature or legislative emergency legislative emergency board, grant funds in hardship cases for sewerage works construction. Funds come from State Pollution Control Bond Fund.	ORS 468.195 et seq OAR 340-81-005 et seq
8. Adoption of standards and plans for sewage and industrial waste disposal of water quality	EQC adopts and DEQ implements such rules and standards are deemed necessary to control waste water disposal so as to prevent water pollution, health hazards and nuisance conditions. EQC also adopts and DEQ implements such standards and rules as are necessary to ensure that beneficial uses of public waters are not impaired inadequate water quality. Rules presently exist for on-site sewage disposal. These will be amended from time to time based on new information and experience. Initial elements of statewide Water Quality Management Plan have been established by rule. These include beneficial uses to be protected, water quality standards, minimum design criteria for point source controls and general policies. The state plan is updated as necessary.	ORS 454.605 et seq ORS 468.020, 035, 705 through 735, OAR 340-71 through -73, PL 92-500 Sections 303 and 208
9. Certification of Water Quality standards compliance prior to federal permit issuance	DEQ must issue a certification that water quality standards will not be violated before any federally issued permit or license can be granted to a non-federal permittee for actions in or adjacent to a waterway which may result in a discharge of pollutants to the waterway.	Section 401 PL 92-500

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Zoning Ordinance of 1979, Ordinance No. PL-15, as Amended, by the Addition of the Deschutes River Combining Zone, Providing For a Study Period, Providing For Exceptions, Providing for Repeal; and Declaring an Emergency.

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, is amended by the addition of Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone. DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone and other applicable combining zones. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, or other applicable combining zones, the provisions of this Section shall take precedence.

(1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.

(2) Application of Section. This Section shall apply to all land use actions in the area of the DR Zone defined as 200' from the mean high water mark, 200' measured at a right angle from the river meander, or the identified floodplain, whichever is greater on and along the Deschutes River, Little Deschutes River, Spring River, Fall River, Tumalo Creek, Paulina Creek, Squaw Creek, and the Crooked River, as identified on the Deschutes

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

(3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.

(4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.

(A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.

(B) The use shall conserve and protect fish and wildlife habitat.

(C) The use shall maintain public access to any affected river or stream.

(D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.

(E) The use shall not impair recreational opportunities of the river or stream by the public.

(F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.

(G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.

(H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

(I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.

(J) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.

(K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's inter-governmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.

(5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.

(A) There is hereby declared a study period for all land use activities within the area within the DR Zone.

(B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.

(C) The study period shall include, but not be limited to, the following:

1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.

2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.

4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.

5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.

6. Identification of current and potential river uses, and the economic value of such uses.

7. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

(A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.

(B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.

(C) Construction or reconstruction of a single family residence.

(D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.

(E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.

(F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1985, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

LOIS BRISTOW PRANTE, Commissioner

ATTEST:

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character . . . ." Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are hereinafter referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.

3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.

4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.

5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electic Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).

6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.

8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.

9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.

10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.

11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.

12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . . ", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.

13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.

14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent $100,000,000 in Deschutes County.

15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to $10,000,000.00 to the Deschutes County economy annually.

16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.

17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.

18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

LOIS BRISTOW PRANTE, Commissioner

LAURENCE A. TUTTLE, Commissioner

ATTEST:

Recording Secretary

APPENDIX "A"

The following are excerpts from pertinent portions of Deschutes River Goals and Policies contained in the Deschutes County Year 2000 Comprehensive Plan, adopted November 1, 1979:

WATER RESOURCES

"GOAL

1. To maintain existing water supplies at present quality and quantity. . . ."

"POLICIES

3. The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. . . ." (pg. 170)

FISH AND WILDLIFE

"GOALS

1. To conserve and protect existing fish and wildlife areas. . . .

3. To develop and manage the lands and waters of this County in a manner that will enhance, where possible, the production and public enjoyment of wildlife.

4. To develop and maintain public access to lands and waters and the wildlife resources thereon. . . ."

"POLICIES

4. Because public access to fish and wildlife areas is so important to the economic and livability aspects of Deschutes County, walking easements and periodic boat access points shall be provided in areas where public river access is limited, as determined appropriate by the County and State Department of Fish and Wildlife.

5. Consistent with Policy 4 and in order to protect the sensitive riparian areas, as well as to protect people and property from flood damage, the Zoning Ordinance shall prohibit development (except floating docks) within 100 ft. of the mean high water mark of a perennial or intermittent stream or lake. . . . Variances shall also be possible where

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

   Within the prescribed area, new structures (excluding fences, existing structures or other structures less than $1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .

6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .

9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

ECONOMY

"GOALS

2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

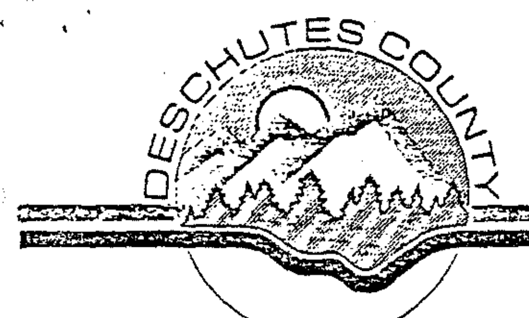
1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.

2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT

"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)



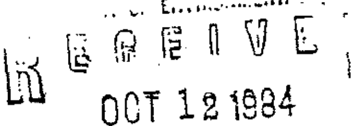
Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

October 10, 1984

CERTIFIED MAIL - RETURN RECEIPT REQUESTED



Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, Oregon 97207

Re: General Energy Development, Inc.
Preliminary Permit No. 5205 FERC
Request For Certification of Compliance With Water Quality Standards and Requirements

Your notice dated September 5, 1984, indicates that the above applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend. It is our understanding that the certification requested is pursuant to Section 401 of the Federal Clean Water Act, and the applicant has filed a copy of his application with the Department.

Deschutes County is currently engaged in the study of the Upper Deschutes Basin in accordance with Deschutes County Ordinance No. 83-058. Included within the study is an assessment of cumulative and individual impacts of known and potential hydroelectric projects on land and resource uses within that portion of the Basin. There are concerns implicit in the County's ordinances that such projects may cause a degradation of the water quality. The ordinance identifies the proposed use as conditional and does not allow approval as being in compliance with the requirements and standards of the ordinance unless the applicant affirmatively shows that the use furthers the purposes of the ordinance and the applicant addresses the issue to be resolved during the study period provided for in the ordinance.

Even though certification pursuant to Section 401 of the Federal Clean Water Act may not directly be a land use action regulated by Deschutes County, it is clear that the Department of Environmental Quality must issue its permits in accordance with the

local comprehensive plans and implementing ordinances. Deschutes County's Plan and implementing ordinances provide an opportunity for General Energy Development, Inc. to make application for a conditional use permit.

It is impossible for Deschutes County to find that the proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request.

Any review by Deschutes County would include not only direct influences during construction and operation due to increases in turbidity, settlement and erosion, but also the effect on minimum stream flows sufficient for pollution control, the effect on fish and wildlife, recreation, and other issues. Since the developer, General Energy Development, Inc., has not made application to the County, those issues cannot be addressed.

As a consequence, until such time as an application has been made by General Energy Development, Inc., and that application has been found to be in conformance with the Comprehensive Plan and implementing ordinances, Deschutes County opposes the issuance of a Section 401 Federal Clean Water Act certification. This position is consistent with our letter of May 10, 1984. A copy of the ordinance and May 10, 1984, letter are attached.

Sincerely,

BOARD OF COUNTY COMMISIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

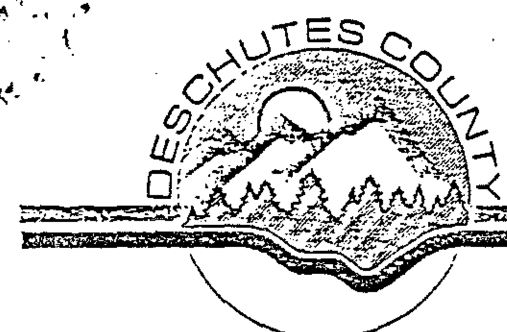
LOIS BRISTOW PRANTE, Commissioner

LAURENCE A. TUTTLE, Commissioner

BOCC/RLI/dw

84-201

APP 25



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

May 10, 1984

Mr. Fred Hansen, Director
Department of Environmental Quality
P. O. Box 1760
Portland, Oregon 97207

RE: Lava Diversion Hydroelectric Project; FERC No. 5205; Oregon HE 475,64551.

Dear Mr. Hansen:

Arnold Irrigation District and General Energy Development, Inc. (GED) have proposed a hydroelectric project at Benham Falls, one of the most environmentally sensitive areas on the Deschutes River, and one which is important economically and culturally to our community. To address this issue and several others, Deschutes County and the City of Bend are actively engaged in a study of the Deschutes River and its tributaries. This study is being coordinated with interested state and federal agencies, including your regional office in Bend. The results of this study and subsequent plan will have important impacts on the vital interests of the people of our county. With this letter we are asking your assistance.

It is our understanding that GED will soon be requesting your agencies waiver or approval of the required state certification of water quality for this project. Our proposal is that GED's request be held with no action taken by your staff until the completion of our study in 1985. This will allow a more complete evaluation and reasonable resolution of this important issue. Further, this delay by your department would be consistent with Oregon law, which requires intergovernmental coordination and cooperation on matters of mutual concern.

Our staff has discussed this matter with Mr. Glen Carter, of your office, to assure coordination with your department's activities.

Very truly yours,

DESCHUTES COUNTY BOARD OF COMMISSIONERS

Albert A. Young, Chairman

Lois Bristow Prante, Commissioner

Laurence A. Tuttle, Commissioner

BOCC:ap

TOM THROOP
DESCHUTES AND KLAMATH COUNTIES
DISTRICT 54

REPLY TO ADDRESS INDICATED:
☐ House of Representatives
Salem, Oregon 97310

P.O. Box 643
Bend, Oregon 97709

(17)

APP 27

COMMITTEES
Chairman:
Revenue
Member:
Environment and Energy

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

October 12, 1984

Department of Environmental Quality
Water Quality Division
Post Office Box 1760
Portland, Oregon 97207

Dear Sirs,

The certification from the Department that water quality standards and requirements will not be violated by the construction and operation of the Benham Falls project clearly should not be issued until the Deschutes River study here in Deschutes County has been completed. The area in question contains the most sensitive fish and wildlife habitat on the entire upper Deschutes River system. At this time, adequate information does not exist to determine that water quality standards and requirements will not be violated by this construction and operation.

It is also essential that the County participate in the decision to certify or not certify. Your state agency is required to coordinate with local comprehensive land-use plans and joint participation in this decision-making process is the appropriate vehicle to meet this coordination requirement. The County is extremely familiar with the area and its issues and is in an excellent position to determine with the Department whether or not the certification is appropriate or inappropriate.

Sincerely,

Tom

Representative Tom Throop
Deschutes and Klamath Counties

RECEIVED
OCT 16 198
WATER QUALITY CONTROL

STATEMENT

of the
OREGON DEPARTMENT OF FISH AND WILDLIFE

to the
FEDERAL ENERGY REGULATORY COMMISSION

regarding
THE NEED FOR CUMULATIVE ENVIRONMENTAL ASSESSMENT

of proposed
HYDROPOWER DEVELOPMENT IN THE DESCHUTES RIVER BASIN

The Oregon Department of Fish and Wildlife (Department, ODFW) supports and recommends cumulative environmental assessment of all proposed hydropower projects in the Deschutes River Basin, particularly the Upper Deschutes Basin. The Upper Deschutes Basin is defined as the Deschutes River and its tributaries above the confluence of the Deschutes with Lake Billy Chinook (formed by Round Butte Dam).

There are numerous potential hydroelectric sites in the Deschutes River Basin. As of this date 11 applications for permits and licenses for development of hydroprojects in the Upper Deschutes River Basin are pending before FERC. This represents a total of 15 separate hydroelectric sites. The Department believes that there are common factual and legal issues in these proposed developments, and that the most efficient and meaningful review of the projects will occur through the development of comprehensive data on the projects in the Basin. Therefore, the Department requests that the review of these projects be conducted by FERC in a coordinated manner. Specifically, ODFW requests that these applications be assigned to an administrative law judge and be consolidated for review.

Statutory Authority

The Department of Fish and Wildlife is the state agency designated by the Oregon legislature to manage Oregon's fish and wildlife resources (ORS Chapter 496). The Department has an interest in any activities which have the potential to impact fish and wildlife resources in the state. The proposed development of hydroelectric projects in the Upper Deschutes Basin has the potential to have a significant adverse impact on these resources.

In addition, the Department is the state agency vested with jurisdiction over the management of fish and wildlife resources pursuant to the Fish and Wildlife Coordination Act, 16 USC § 662.

The Department previously has sought intervention in three of the proposed Deschutes River projects and has submitted comments on one other. In the Petitions for Intervention and Comments, the Department has detailed specific concerns about the impacts on fish and wildlife resources of each project.

However, the Department is also concerned about the need to identify the potential for interrelated and cumulative impacts of the proposed projects on the fish and wildlife populations of the area, as well as social, aesthetic, economic and energy impacts. ODFW believes that the development and consideration of information concerning these cumulative and interrelated impacts are essential to meaningful consideration of the permit and license applications for these projects.

Historical Perspective

The current proposals for hydroelectric development in the Upper Deschutes River from Wickiup to Lake Billy Chinook have caused the Department to examine the river both historically and with future projections to determine the potential fate of fish and wildlife resources. The focal point of both proponents and adversaries has been fish and wildlife populations and the associated recreation and economic benefits. The Deschutes is a highly regulated stream and has undergone great change and suffered much damage.

Irrigation in the Deschutes Basin began in 1871 when water was diverted from Squaw Creek. Individual developments were consolidated and expanded in 1895. The first recorded diversion from the Deschutes River was made in 1899 by the construction of the Swalley Ditch. Early irrigation was carried out primarily for purposes of supplementing feed for range livestock and for the production of farm commodities for local consumption. Power was first produced in 1914 with completion of the Deschutes Power and Light Company plant at North Canal Dam in Bend. Irrigation development of Upper Deschutes area continued through the early 1900's and culminated in the completion of Wickiup Dam in 1947. Six irrigation districts--Swalley, Central Oregon, Crook County Improvement, Arnold, Tumalo, and North Unit--now divert water from the river in the vicinity of Bend and have storage in Crane Prairie and Wickiup Reservoirs and in Crescent Lake.

Habitat

The Upper Deschutes is primarily a low gradient, slow moving, meandering stream with a sand-silt substrate. There are small, isolated pockets of spawning gravel within these areas. There are four major falls within the upper basin including Pringle, Benham, Dillon and Lava Island. The areas immediately below these falls are moderate gradients with moderate velocities. These areas contain pools and riffles with braided channels. The substrate contains gravels suitable for salmon spawning. The riparian habitat is diverse, well established, and provides good edge or pocket water which provides fish cover. Because of the relative quality and quantity of gravel and suitable velocities, these are the few areas in the main upper Deschutes where spawning occurs. It also provides excellent rearing habitat. These areas provide the finest fishery habitat within the Upper Deschutes Basin. We depend upon these limited spawning areas for seeding areas downstream. There are several proposed projects at these various falls. If these projects were built it is possible that they could impact fish populations not only within their respective diversion reaches, but also downstream outside the project area. This greatly concerns the Department and is one of the main reasons why we support cumulative environmental assessment.

Fish

The Deschutes River contains six species of game fish including brown trout, rainbow trout, brook trout, kokanee, coho and whitefish as well as tui chub, a nongame, detrimental species. Since completion of Wickiup Dam in 1947, there has been slow but continual loss of fisheries habitat and corresponding loss of game fish populations from Wickiup to Benham Falls. For example, brown trout redd counts in the river reach from Wickiup Dam to Pringle Falls have declined from ninety two in 1954 to one in 1970. Widely fluctuating river flows caused by irrigation releases have eliminated through erosion most of the riparian areas in this area. For example, prior to completion of Wickiup Dam, the extreme record low flow was 341 cfs. After completion, the winter flow has dropped as low as 5 cfs. Summer regulated flows are also higher than unregulated flows (up to 2,280 cfs). Extensive bank erosion caused by these

widely fluctuating flows has resulted in sedimentation of this entire reach of river. This "cementing" of river gravels has virtually eliminated natural trout spawning in this area. The regulated flow plus the natural flat gradient does not allow the river to cleanse the gravels as normally happens in a natural flowing stream. A large percentage of natural reproduction in the river above Benham Falls occurs in tributaries such as Spring River and Fall River. Attempts to improve riparian and in-stream habitat over many years have been only marginally successful. Costs to substantially improve this section of river are prohibitive.

Attempts to augment the natural populations of brown and rainbow trout have not been successful. Fingerling and catchable size brown trout were experimentally released in the upper river from 1965 to 1968. Returns of marked and tagged fish indicated poor survival and there was no indication these fish contributed to the wild spawning population.

Rainbow populations have suffered the same fate as brown trout in terms of loss of spawning and rearing habitat. Their reintroduction by stocking has not been successful due to the presence of Ceratomyxa shasta, a disease specific to rainbow. The ODFW currently stocks 30,000 catchable size rainbow annually from Wickiup to Sunriver to provide a recreation fishery. Carry-over of these fish to the next year is precluded by Ceratomyxa which causes fish mortality once the water temperature reaches 50°F or more.

With help from local sportsmen's clubs, 115 cubic yards of spawning gravel were placed in Spring River to augment natural spawning habitat and increase production of wild brown trout. The gravel is heavily used by brown trout and we believe that natural seeding of fry and fingerling is occurring downstream from Spring River to below Benham Falls.

The ODFW has recently used Deschutes River brood stock to develop a strain of Ceratomyxa resistant hatchery rainbow for use in waters containing this disease. In 1984, in conjunction with the Sunriver Anglers, a local angling club, a hatchbox was installed in Spring River and Fall River. Each box was stocked with 13,000 eyed Deschutes rainbow eggs. If this experiment is successful, there may be additional plants in the future.

In 1978, ODFW determined the reach of river between Benham Falls and Bend was suited for both wild rainbow trout and brown trout production. Recognizing

that spawning area in this stretch of river is available but limited, ODFW eliminated all legal trout stocking to reduce competition with wild fish. The Department is now managing this section of river as a wild trout stream. Angling success indicates a slow but steady increase in the brown trout population. Many small wild rainbow are also being taken. Although angling pressure dropped after the stocking program was eliminated, it is now increasing annually, based on random creel census and observation.

Wildlife

The wildlife habitat within the Upper Deschutes River Basin contains yellow and lodgepole pine, bitter and buck brush, diverse riparian vegetation adjacent to the river, sloughs and numerous wetlands connected to or near the river, and the river itself. This diverse habitat contains many wildlife species which include eight species of game mammals, 18 species of game birds and waterfowl, eight species of furbearers, 17 species of raptors and owls and many nongame birds and animals, shorebirds, reptiles and amphibians.

Roosevelt elk are a year-round game animal in the area around Benham Falls. This important herd has been growing for the past 10-15 years and now number approximately 60. Previously, their winter range was from Sunriver to Dillon Falls in the meadows and trees along the river that provided both forage and thermal cover. The expanded development of Sunriver properties eliminated meadows used by the elk and the herd now winters almost exclusively in the Ryan Ranch area just downstream from Benham Falls. Mule deer utilize the river reach and adjacent cover for fawning and summer range.

Waterfowl are common on the river and wetlands in the basin. Sloughs are used extensively by nesting waterfowl. The more common species include mallards, cinnamon and blue wing teal, and Canadian geese.

Furbearers such as beaver, mink, and river otter use the river, marsh and riparian areas. Bobcats, coyotes and marten use areas further from the river.

Miscellaneous small mammals such as squirrels, chipmunks, mice, and rabbits are numerous throughout the area.

Raptors utilizing the river area and vicinity include osprey, redtailed hawks, kestrels, great horned owls, goshawks, and golden and bald eagles. There are two documented peregrine falcon sitings within the Upper Deschutes Basin.

Project Impacts

The Deschutes River Basin is an important recreational fishing area. Tourism related to the recreational opportunities of the area is a vital component of the local economy. Thus, any impacts on recreational fishing sites and resident fishing populations must be based on an understanding of cumulative impacts of proposed projects.

The proposed projects have the potential to detrimentally affect these fish populations by impacting streamflows required for spawning, incubation, rearing and instream movement. Wildlife also may be adversely impacted by the proposed projects. The projects may significantly alter wildlife's use of project sites through destruction or alteration of existing wildlife habitat.

In addition to common impacts on the resources, the proposed projects have numerous locational, design and operational features in common. Thus, in addition to the benefits of coordinated review of the projects for purposes of determining the impact on fish and wildlife resources, coordinated review will allow efficient and meaningful evaluation of project operations to insure efficiently planned development of power production.

As mentioned above, the projects have the potential to detrimentally affect fish and wildlife populations through regulation and diversion of stream flow, which influences not only aquatic habitat for fish, but riparian and wetland habitat utilized by wildlife. In 1978, the Department filed a Fish and Wildlife Resource Protection Plan ("Plan") with Deschutes County as guidance for developing a county land use plan consistent with statewide land use planning goals for protection and maintenance of fish and wildlife habitat. The Plan identified "sensitive" habitats for fish and wildlife. These sensitive habitats for fisheries and associated water quality requirements include "streams and rivers", "lake and reservoirs", and "head-water areas." (See page 5 of Plan).

For wildlife habitat, specific sensitive areas were identified for big game (see page 9 of Plan). Both short and long term construction and operation activity could cause relocation or reduction of numbers to big game herds. Riparian vegetation was regarded generally as a sensitive habitat for upland game. Specific areas, including the main stems of the Deschutes and Little Deschutes River, were identified as sensitive for waterfowl production (see page 15 of Plan). All of the above habitats were regarded as generally valuable for production of furbearers and non-game wildlife. It was recommended in the Plan that land use activities within these sensitive habitats should be limited to those which were non-destructive and non-disruptive of the fish and wildlife habitat values. All of the proposed projects in the Upper Deschutes Basin are located within, or would affect sensitive fish and wildlife habitats identified by the Department for Deschutes County.

Deschutes County Ordinance

On December 21, 1983, the Deschutes County Commissioners adopted, under its land-use planning authority, a Deschutes River Combining Zone encompassing areas physically affected by the proposed projects in the Upper Deschutes Basin. The court ordinance provides for an 18-month study "of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows." The study period has been set for the period February 1, 1984 through July 31, 1985. The Department supported this ordinance as consistent with the statutory fish and wildlife policy of the State of Oregon and as a necessary amendment to the Deschutes County Comprehensive Land Use Plan to assure consistency with the statutory fish and wildlife policy. The Department is a participant in the Study Team formed under the ordinance and will provide recommendations on the requirements of the study to identify potential hydroelectric impacts on fish and wildlife measures.

Upon completion of the Study described above, the Department will be better able to specify appropriate fish and wildlife measures for any hydroelectric

projects which may be subsequently constructed within the Deschutes River Combining Zone. Also, the Department will be better able to specify consistent measures for conservation and development of fish and wildlife populations or habitats affected by more than one project, thus avoiding cumulative impacts.

Power Planning Act

An additional reason supporting consolidated review is that the Upper Deschutes Basin is included in the planning area of the Northwest Power Planning and Conservation Act. The Power Planning Council (NWPPC) is presently organizing site ranking, cumulative impacts and critical reach criteria for new hydroelectric projects as required by the NWPPC Fish and Wildlife Program. The Department is participating in this effort. It is presently too early to assess how these studies would affect the proposed projects. One purpose of the Deschutes County ordinance is to assist in the completion of the NWPPC Study.

The Department believes that a consolidated review of the applications for development of hydroelectric projects in the Deschutes River Basin is the most reasonable and efficient method to achieve the purposes of the Federal Power Act which as stated by the United States Supreme Court is to:

> " * * * promote the comprehensive development of water resources of the nation * * * instead of the piecemeal, restrictive, negative approach of the River and Harbor Act under the federal law previously enacted." First Iowa Hydro-Electric Cooperative v. F.P.C., 328 US 152, 180 (1946).

The Pacific Northwest Electric Power Planning and Conservation Act also contemplates coordinated review of hydroelectric projects in a single river drainage. 16 USC §§ 839, et seq. Section 1204(a) of the Fish and Wildlife program provides that:

> "The Federal Project operators and regulators shall review all applications or proposals for hydroelectric development in a single river drainage simultaneously through consolidated hearings, environmental impact statements of assessments, or other appropriate methods. This review shall assess cumulative environmental effects of existing and proposed hydroelectric development on fish and wildlife." Sec. 1204(b)(1).

Thus, the above provisions of the Power Act recognize the value of the coordinated approach requested by the Department in this matter.

Fish and Wildlife Coordination Act

Further, the coordinated review process is consistent with the provisions of the Fish and Wildlife Coordination Act. The pertinent provisions of the Act provide that whenever the waters of any stream or body of water are to be impounded, diverted, controlled or modified pursuant to a federal permit or license, the federal agency must consult with the state agency with authority over the wildlife resources in the affected area:

> " * * * with a view to the conservation of wildlife resources by preventing loss of or damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development." 16 USC § 662(a).

The federal agency is required to give "full consideration" to the recommendations of the state agency and the project plan should include:

> " * * * such justifiable means and measures for wildlife purposes as the reporting agency (the state agency) finds should be adopted to obtain maximum overall project benefits." 16 USC § 662(b).

The Department believes that in the case of the Deschutes River Basin, the projects' impacts and appropriate measures for fish and wildlife protection may best be determined through a coordinated review process.

Conclusion

Therefore, for the above reasons, the Department requests that all of the proposed Deschutes River Basin projects be assigned to an administrative law judge who shall coordinate the review process and specifically shall conduct consolidated hearings as determined to be appropriate pursuant to the provisions of the Administrative Procedures Act, 5 USC § 385.502. The specific actions the Department requests FERC to take are as follows:

1. The Commission will consolidate the Deschutes River Basin projects into a single proceedings, with procedures to be used and hearings to be held as determined by an administrative law judge to be necessary to achieve meaningful consideration of common issues and cumulative impacts.

2. The Commission will require project developers to submit additional information to allow evaluation of individual and cumulative project impacts, including, but not limited to:

   (a) Studies of site specific and cumulative impacts of the proposed projects on fish and wildlife resources consistent with the findings of the Deschutes County hydroelectric impacts study.

   (b) Studies of available enhancement and protection measures to reduce project impacts.

   (c) Preparation of an Exhibit E consistent with implementation requirements of Deschutes County Ordinance 83-058.

   (d) Projects impact, including impacts on recreation, angling, hunting and access (including boating).

3. The Commission shall notify all present and future applicants for hydroelectric projects in the Deschutes River Basin of the requirements of the consolidated proceeding.

4. In taking any action regarding projects subject to this consolidated proceedings, the Commission shall make written findings regarding the consistency of the action with the Northwest Power Act, specifically with pertinent portions of the Fish and Wildlife program.

5. The Department shall be made a party to all proceedings concerning projects subject to this consolidated proceedings.

6. A condition shall be included in all exemption orders on projects in the Upper Deschutes Basin which enables the Department to subsequently modify terms and conditions of the order to address matters identifed in cumulative impact studies.

Summary

The Deschutes River has suffered substantial losses in fish habitat and fish numbers due to impoundment construction and operation, and disease. Attempts to increase habitat and fish populations through artificial means have only been partially successful. Many of the proposed projects in the Deschutes Basin, as they are presently proposed, could have significant short and long term adverse impacts to fish and wildlife populations and their habitats. The Department feels that any further significant degradation of the environment, whether short or long term, is not acceptable. The Department recommends that cumulative environmental assessment is necessary to completely evaluate the impacts of a proposed hydropower project within the Deschutes River Basin.

APP 36

Department of Energy

LABOR & INDUSTRIES BUILDING, ROOM 102, SALEM, OREGON 97310 PHONE 378-4040
TOLL FREE 1-800-221-8035

May 8, 1984

Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street NE
Washington, DC 20426

Dear Secretary Plumb:

The Oregon Department of Energy urges you to develop a methodology to measure the cumulative impacts of multiple hydroelectric projects operating and planned in a particular river basin. The Northwest Power Planning Council and Bonneville Power Administration are working to develop such a methodology. We recommend that the Federal Energy Regulatory Commission work in concert with those efforts and with the state jurisdictions which have the responsibility for managing our resources, of which water is the lifeblood.

Many of the small-scale hydroelectric projects which have been proposed may not cause significant environmental impacts by themselves. However, the development of multiple projects on a single stream may result in disproportionate cumulative impacts. The Federal Energy Regulatory Commission and the many other agencies involved in regulation of hydroelectric projects need a better method for identifying all of the adverse impacts of each project. This should include impacts which become significant only because of their interaction with impacts of other development activities which come before the agencies for licensing or exemption. Such a method must permit an assessment of environmental impacts caused by projects which are operating, under construction, and in the exemption or licensing phase. That method must provide or have the ability to assess other economic and environmental demands on a river, including but not limited to, industry, migration, fisheries and recreation.

Hydroelectric projects have been proposed at several sites in the Upper Deschutes basin in Central Oregon. Some of these could adversely affect tourism and recreation which constitute a major part of Deschutes County's economic base and is one of Oregon's top three industries.

Given the interest in project development in the basin, we urge the Federal Energy Regulatory Commission to give priority to acquisition of the information needed to assess the cumulative impacts of projects proposed in the basin.

Sincerely,

Lynn Frank
Director

LF:dmp
58451(D4,F2)

APP 38

Save Benham Falls Committee

P.O. Box 6013 • Bend, Oregon 97708

Steering Committee
John Wujack - Chairman
Harry Barker
Davenport Brown Jr.
John Fishburn
Richard Foster
Jeff Frank
Beardsley Graham
Matt Holmes
Ken Mathisen
Brian Meece
Bill Meyer
Lee Meyer
Carolyn [illegible]
Jan [illegible] - Treas.
Caryl Robinson
L. Foster Rucker
Phillip Rummell
Kirk Sandberg
Eric Schulz
Josh Thompson
Rep. Tom Throop
Barbara Young
Clyde Young

October 12, 1984

Gentlemen:

The Benham Falls Committee, a citizens group of wildlife biologists, engineers, recreationalists, and natural resource managers from the Bend/Sunriver communities urges you to deny a #401 water quality permit to General Energy Development of Medford for their proposed Lava Diversion Project at Benham Falls on the Deschutes River.

The Deschutes River serves as the drinking water source for hundreds of Central Oregon residents and currently falls below the safe standards as set by your department. Any further reduction in water quality may cause harm to the health of these users.

An increase in turbidity during construction will have catastrophic effects on the Wild Trout Fishery below Benham Falls. This opinion may be affirmed by contacting the Central Office of the Oregon Department of Fish and Wildlife in Bend.

Increased turbidity may also pose a threat to the mechanically delivered irrigation systems that make up our second largest industry with an estimated direct benefit of over 200 million dollars to our agricultural interest.

Our largest industry, tourism,(calculated to be a 215 million dollar industry) would be directly threatened by:

1. lost aesthetic appeal
2. lost resort revenue (the Inn of the 7th Mountain has established a successful white water program in the area with over 1,000 guests being escorted through Benham Falls yearly.
3. particulate suspension will cause a heating to the Deschutes River which will effect the Fishery (this area is currently the only remaining portion of the main stem Deschutes that allows angling from a boat or other device, a most cherished recreation for many handicapped Central Oregonians and vacationers.

As you may know, the City of Bend and Deschutes County adopted ordinances last December calling for a study of the Deschutes River

Save Benham Falls Committee

P.O. Box 6013 • Bend, Oregon 97708

Steering Committee
ohn Wujack - Chairman
Harry Barker
Davenport Brown Jr.
ohn Fishburn
Richard Foster
eff Frank
eardsley Graham
Matt Holmes
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rian Meece
ill Meyer
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aryl Robinson
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rk Sandberg
ic Schulz
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ep. Tom Throop
arbara Young
yde Young

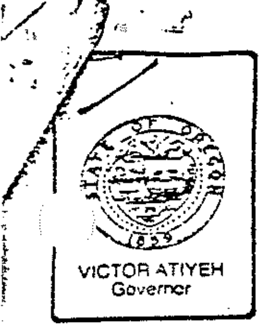
Combining Zone. This study has been overwhelmingly supported by Oregon's Congressional Delegation, the Northwest Power Planning Council, and thousands of Oregon residents. An issuance of a 401 permit before this study is finished would be a slap in the face to the thousands that have expressed concern for the natural resources of this area.

If The Benham Falls Committee may be of further assistance to you in this matter, please feel welcome to contact us.

Sincerely,

John L. Wujack

John L. Wujack



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

CLE. APP 10
TO
Sawyer
Huston
Sawyer
Huston MA

September 7, 1984

CERTIFIED MAIL

Mr. Donald P. McCurdy, President
General Energy Development
216 E. Barnett St.
Medford, OR 97501

Copy also sent via regular mail 9-10-8

Re: FERC No. 5205
Lava Division Project
Deschutes River, Oregon

Dear Mr. McCurdy:

By letter of November 28, 1983, Campbell-Craven, Environmental Consultants, requested a water quality standards compliance certification, or waiver, for the above referenced project, as required by Section 401 of the Federal Clean Water Act. We replied on December 1, 1983, that we would not commence action on the certification request until having opportunity to review an Exhibit E Environmental Report for the project.

On August 20, 1984, we received from you the four-volume application to FERC for project licensing, that includes Exhibit E.

Please be advised that public notice of receipt of your Exhibit E and request for certification pursuant to Section 401 of the Federal Clean Water Act is being circulated to known interested persons and agencies and forwarded to the Secretary of State for publication in the Bulletin. Comments are being requested by October 15, 1984. A copy of this notice is attached for your information.

As you know, the Deschutes County Board of Commissioners has asked this Department by letter dated May 10, 1984, to hold your application with no action until completion of a study by them in 1985. Arnold Irrigation District (by letter dated June 5, 1984) and General Energy Development, Inc. (by letter dated June 12, 1984) have taken exception to the request of Deschutes County and urged us to proceed with evaluation of the project.

In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to the Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to Section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that "DEQ" will rely on a statement of compatibility from the appropriate planning agency.

DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

This oversight makes it apparent that rules are needed to clearly establish procedures for 401 certification. The Department will seek authorization from the Environmental Quality Commission on September 14, 1984, to hold a hearing on proposed rules. We are enclosing a copy of the staff report for your information. Since your application for certification predates these proposed rules, action on your application will not be based on these draft rules but will be based on existing statutory authorities.

In order to address the land use compatibility determination required by Oregon law and our agreement with LCDC, we request that you obtain from Deschutes County and forward to us by October 15, 1984, a statement of compatibility with the acknowledged comprehensive plan or of consistency with statewide planning goals.

We interpret the letter from Campbell-Craven dated November 28, 1983, as the date of your first application for certification. Thus, we must act to issue or deny certification on your application by no later than November 28, 1984 to remain within the 1 year time frame established in Section 401 of the Clean Water Act. We apologize for the short time for response to the land use compatibility requirement.

We are aware that you may be unable to obtain the necessary statement of compatibility from Deschutes County. If you are unable to obtain such a statement, it is our opinion that we will have to propose denial of certification at this time pending resolution of land use issues.

Sincerely,

Original Signed By
Fred Hansen

SEP 10 1984

Fred Hansen
Director

HLS:t
WT264
Attachments

cc: Arnold Irrigation District
Federal Energy Regulatory Commission
Central Region, DEQ

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

November 27, 1984

Richard E. Craven
Campbell-Craven
Environmental Consultants
9170 S.W. Elrose
Tigard, OR 97223

Re: Lava Diversion Project,
FERC No. 5205,
Deschutes River, Oregon

Dear Mr. Craven:

By a letter dated November 28, 1983, you requested water quality standards compliance certification for the above subject project, as is required by Section 401 of the Federal Clean Water Act. We responded on December 1, 1983, stating that we would not commence action on the certification process until having an opportunity to review an Exhibit E Environmental Report for the project.

We received the Environmental Report on August 20, 1984. As prescribed by law, we made public notice of your request on September 5, 1984, and received comments through October 15, 1984. During this same period, we evaluated the Environmental Report, plus the additional project information Exhibits A, B, C, D, F, and G which are part of your submittal for FERC licensing. Subsequently, we evaluated the comments which were received in response to our public notice of your project certification request.

Our findings, conclusions, and recommendation, pursuant to your request, are contained in the attached report "Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River, near Bend, Oregon (FERC No. 5205)," November 27, 1984.

Based on the findings and reasoning contained in that report, I hereby deny your request for water quality standards compliance certification for the Lava Diversion Project, FERC Number 5205. This denial is rendered without prejudice, and the request for certification may be made again if and when the current reasons for denial are removed.

Sincerely,

Fred Hansen
Director

GDC:t
WT462
Attachment

cc: Donald P. McCurdy
General Energy Development, Inc.

Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)

by

Department of Environmental Quality

November 27, 1984

Introduction

General Energy Development, Inc. (GED) holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydroelectric Project on the Deschutes River at Benham Falls, south of Bend. Before construction licensing by FERC may proceed, federal law requires certification by the state Department of Environmental Quality (DEQ) of the project's compliance with water quality standards and related requirements. A state condition of certification is that the project must also be compatible with the county's comprehensive land use plan and/or Statewide Planning Goals. Thus, the DEQ's responsibility and authority in responding to the request for project certification are limited to making two determinations:

1. Is the project compatible with the county's comprehensive land use plan and/or statewide planning goals?

2. Is there reasonable assurance that the project will not violate applicable water quality standards and related requirements?

Hydropower development in Deschutes County is a conditional use under terms of the county's comprehensive land use plan.

In addition to the Lava Diversion Hydroelectric Project, there are eleven other hydropower sites in the Upper Deschutes River Basin on which applicants have filed for permits or licenses from the FERC. Deschutes County officials took note of this large hydropower interest and sensed the possibility that such river developments could possibly have cumulative adverse impacts on present environmental conditions and cultural uses of the area. As a consequence, the county passed Ordinance No. 83-058 which gives them from February 1, 1984, to July 31, 1985, to study the situation and determine whether such hydropower developments would truly fit well with key elements of their land use plan. Until the study is finished, Deschutes County officials will not issue a conditional use permit for any of the proposed hydroelectric sites in the Upper Deschutes River zone of contention.

GED's environmental consultants, Campbell-Craven, requested DEQ certification for the Lava Diversion Project by letter dated November 28, 1983 (received by DEQ on November 29, 1983). DEQ, in turn, requested further supporting information which was received on August 20, 1984.

The DEQ made public notice of the certification request on September 5, 1984, (Appendix A) and received public comment through October 15, 1984.

Project Description

This project description was taken from information Exhibit A, that the applicant submitted to the FERC for licensing purposes.

The project site is located in Sections 8, 9, 16, and 17 of Township 19 South, Range 11 East of the Willamette Meridian. It is situated entirely on federal lands in the Deschutes National Forest. A project plan is shown in Appendix B.

The facility is designated for year-round operation as a run-of-river project with no storage of water. The controlled flows in the Deschutes River in the project area dictate the equipment required to maximize the power benefits of the project while allowing the bypass flows necessary to protect other recognized beneficial uses.

Current uses of the Deschutes River will not be altered by the project, except in the reach from the weir to the powerhouse. Relocations of private individuals or prior improvements will not be required to permit construction and operation of the project.

The project will have eight components: (1) a control weir, (2) an intake structure, (3) a tunnel to convey water from the intake to the powerhouse, (4) a surge tank, (5) a pipeline, (6) a powerhouse, (7) a tailrace and (8) access roads necessary for construction and operation of the project. These are briefly described as follows:

(1) A rectangular concrete control weir will be installed near the head of the Benham Falls. Benham Falls is 3,800 feet long and drops 103 feet. The weir will have a 140-foot crest, which will be totally submerged assuming flows in excess of 350 cfs.

The weir will measure bypassed flows and transmit these measurements to the powerhouse. A processor will compare the released flows to the project rule curve for releases and adjust the turbines to assure compliance with the required bypass flow. The weir is intended to maintain approximate existing upstream river levels during operation of the project. The applicant believes this will protect present recreation, wetland, and waterfowl uses of that river zone.

(2) The intake structure for the project will be constructed of reinforced concrete. It will be set on the left bank of the Deschutes River, with intake portals parallel to the flow of the river.

The structure will be fronted by a trash rack with two inch openings. The bar screen on the trash rack will be constructed to facilitate cleaning with a motorized rake.

The applicant expects that fish will be prevented from entering the conduit by screening with 0.25 inch openings.

(3) An 1,800-foot horseshoe shaped, concrete lined tunnel will be constructed to convey water from the intake structure to the powerhouse. The tunnel will have a 6.5-foot radius crown dropping from the radius point to a rectangular base and a grade of 0.0078 foot per foot. The upstream end of the tunnel will be set at an elevation of 4,120 feet (U.S.G.S. datum), and the outlet, which will be at the base of the surge tank, will be at an elevation of 4,106 feet. Two conduits will be installed in the tunnel cavity for controls and power for the intake structure.

(4) A restricted orifice type surge tank 51 feet in diameter and 36-foot deep will be constructed at the transition point of the tunnel to penstock. The transition will be from the 13-foot diameter horseshoe type tunnel to a 14-foot diameter welded steel pipe. The tank will have a floor elevation of 4,129 feet and a top elevation of 4,165 feet.

(5) A 14-foot diameter pipe will extend from the tunnel outlet approximately 50 feet. It will then be split with a 40-foot bifurcation. The two resulting 9-foot, 6-inch diameter pipes will extend the remaining 410 feet to the powerhouse.

The pipeline will have a wall thickness of 1/2 inch and will be buried between the tank and the powerhouse.

(6) A low-level powerhouse will be constructed of reinforced concrete. The structure will be 62 feet by 71 feet 4 inches and will rise from a foundation elevation of 4,025 feet to a roof elevation of 4,071 feet. The powerhouse will be located on the left bank, 250 feet away from the Deschutes River. The powerhouse will be equipped with three generators having a combined rating of 11,825 kva, at a 95 percent power factor.

Additional mechanical equipment, such as air, oil, and cooling water systems, will be located in the powerhouse where appropriate. Electrical systems necessary for operation of the project will include station service, control boards, monitoring equipment, switchgear, and an auxiliary power supply. Further, a fire protection system will be provided for the powerhouse.

(7) A 250-foot tailrace will be excavated from the powerhouse to the Deschutes River. The discharge from the powerhouse will vary from 80 cfs to 1,800 cfs, and the tailwater will vary in height from an elevation of 4,036.9 feet to an elevation of 4,040.3 feet.

The discharge velocities at full capacity of the powerhouse will be 5.0 fps. These will dissipate to 1.5 fps at the river re-entry point.

The tailrace cross-section expands gradually as it proceeds to the Deschutes River. At its confluence with the river, the re-entry channel will be 135 ft. wide at the bottom and 165 ft. wide at the top.

(8) The Applicant will utilize existing roads and, where necessary, construct new roads to provide access to the project during construction and operation. All new roads will be built to USFS standards. The road system utilized for operation of the project will be part of the USFS's planned road system.

The old railroad grade, which currently provides access to the Benham Falls Viewpoint, will be utilized for both construction and operation of the project.

Road grades which are modified to permit movement of construction equipment will be restored to their prior condition following construction of the project.

In sum, access to the intake area will be provided by the following means:

Reconstructed roadway to top of hill	- 1,800 feet
Utilization of existing road	- 1,000 feet
New access road downhill to intake	- 1,370 feet

The total roadway to be constructed for the project is as follows:

General area access	- 1,400 feet
Surge tank	- 290 feet
Powerhouse	- 570 feet
Weir	- 1,250 feet
Intake	- 3,170 feet
Total roadway	6,680 feet

Power generated by the project will be sold to the Pacific Power & Light Company. The powerhouse for the project will be located 1,600 feet east of the Midstate transmission line. Power generated at the powerhouse will be transmitted underground at 69 kv to the Midstate line.

PERTINENT DATA FOR THE PROJECT

1. General

Stream	Deschutes River
Location	Deschutes National Forest Deschutes County Sections 8, 9, 16 and 17 T. 19S., R. 11E., W.M.
State	Oregon
Location on River	
Powerhouse	River Mile 179.9
Control Weir	River Mile 181.0
Intake	River Mile 182.4

2. Hydrology

Drainage Area	1,759 sq. mi.
Average Annual Discharge (27 years)	1,460 cfs
Minimum Daily Flow (27 years)	438 cfs (1970)
Maximum Daily Flow (27 years)	3,410 cfs (1964)

3. Control Weir

Type	Rectangular
Crest Length	140'
Throat Elevation	4,145.57

4. Intake

Type	Passive Screen
Opening	9 x 200
Approach Velocity	1 fps Maximum
Screen Size	Wedge Wire - 1/4" Spacing

5. Tunnel

Size	13' Horseshoe (150.9 S.F.)
Length	1,800 L.F.
Entrance Invert	Elev. 4,120
Exit Invert	Elev. 4,106

6. Surge Tank

Type	Differential type w/orifice
Size	51' dia. x 36' high
Material	Prestressed-post tensioned concrete
Location	
Top	Elev. 4,165
Bottom	Elev. 4,129

7. Pipeline

Length	500 L.F.
Type	Welded steel
Size	9.6' diameter

8. Powerhouse

Type	Reinforced concrete
Size	62' x 71'-4"
Foundation	Elev. 4,025
Roof	Elev. 4,071

9. Power Plant

Turbines	
Hydraulic Capacity	1 at 800 cfs 1 at 500 cfs 1 at 200 cfs
Rated Head	107 feet

Generators	
Nameplate rating (at 95 percent PF)	1 at 6,350 KVA 1 at 3,925 KVA 1 at 1,575 KVA

10. <u>Generation</u>

Capacity	11,250 KW
Average Annual Energy	52,555,000 kWH
Average Annual Power	6,000 KW
Plant Factor	53 percent

<u>Project Environmental Report</u>

When applying for a project license from the Federal Energy Regulatory Commission, the applicant must present an "Exhibit E" Environmental Report which identifies the real and potential environmental impacts likely to be caused by the project's construction and operation. Additionally, the report must show how such impacts will be prevented or minimized to acceptable levels.

Campbell-Craven, Environmental Consultants, prepared the environmental report. Both "principals" in the firm have long professional histories in natural resources management and associated consulting services. The chapters of their environmental report cover: (1) Description of Locale, (2) Water Use and Quality, (3) Fish, Wildlife, and Botanical Resources, (4) Historic and Archeological Resources, (5) Socioeconomic Impacts, (6) Geographical and Soil Resources, (7) Recreational Resources, (8) Aesthetic Resources, (9) Land Use and Management, (10) Alternative Locations, Designs, and Energy Sources, and (11) List of Literature.

Chapters 2 and 9 address the two issues that the DEQ <u>must</u> consider when processing the project certification request. Thus, at this point, the DEQ evaluation is narrowed to those two elements of the Environmental Report.

Based on communications with agencies who reviewed the project proposal, the license applicant proposes to undertake the following mitigation measures with respect to water quality and stream flows:

1. The powerhouse/tailrace and intake structure will be constructed in the dry without placing a cofferdam in the River.

2. The intake structure will be sited in the location recommended by Oregon Department of Fish and Wildlife (ODFW).

3. The tailrace and intake areas near the shoreline will be riprapped to minimize erosion from wave action.

4. The discharge velocity in the tailrace will be about 1.5 feet/second. This will prevent erosion of the riprap area of the tailrace or of the river channel.

5. Sediment catchment basins will be located near all areas that may drain construction materials into the river.

6. Fueling stations for equipment will be located away from the river and the project area to minimize the possibility of spills into the river. Contingency plans will be developed in consultation with the agencies to effectively handle spills.

7. The existing willows and alders on the face of the dike will be preserved during weir construction and the dike will be plugged to prevent erosion.

8. The applicant will evaluate the effect of lowered velocities on sediment accumulation to identify the potential for sedimentation above the weir and determine if a study is required.

9. To minimize impacts of the cofferdam placement and removal at the weir location, construction will be scheduled for the late fall when river flow and visitor use are lower. Construction of each cofferdam will require approximately ten days. The upstream cofferdam will be constructed in late September/October and the downstream cofferdam will be constructed in late November. The weir will be completed and the cofferdams removed by mid-December of the same year. The applicant will coordinate with ODFW, U.S. Forest Service (USFS) and DEQ to minimize turbidity and sedimentation and subsequent impacts on fish resources, water quality and recreation.

10. A minimum flow of 660 cfs will be left in the bypass reach of the river and over Benham Falls.

The agencies which were consulted by the applicant have not recommended any operation mitigation measures with respect to stream flows and water quality.

The applicant proposes to periodically review project facilities and operations, particularly in the area near the intake, weir, powerhouse, and the access road to the intake, to determine if modifications of activities are necessary to decrease impacts relating to erosion. If necessary, the applicant proposes to modify operation of the project to reduce erosion.

The project license applicant fully recognizes the authority and applicability of the Deschutes County Comprehensive Land Use Plan and one goal therein to assist in the provision for adequate local energy supplies. Likewise, the applicant recognizes Deschutes County Ordinance No. 83-058 which places new restrictions on future developments along the Deschutes River and other rivers in Deschutes County, for the purposes of maintaining quality and quantity of streamflows and protecting the visual, environmental and aesthetic attributes of the rivers. Various standards for land uses within the Deschutes River Combining Zone (DR zone) are specified, including the requirement that an application for a hydroelectric project will show that the use will further the purpose of the ordinance. The ordinance also

specifies that a study shall be conducted for various purposes, including the identification of the individual and cumulative effects to all known and potential hydroelectric sites and sources on the Upper Deschutes River. The ordinance will be repealed February 1, 1986, or upon the completion and adoption of a recommended comprehensive plan and implementing ordinance amendments.

DEQ Evaluation

A. Applicable Water Quality Regulations and DEQ Evaluations

Oregon Administrative Rules (OAR) Chapter 340, Division 41, Rule 562, lists the beneficial uses for which water quality will be protected in the Deschutes River upstream from the Bend diversion dam. They are: Public Domestic Water Supply, Private Domestic Water Supply; Industrial Water Supply; Irrigation; Livestock Watering; Anadromous Fish Passage; Salmonid Fish Rearing; Salmonid Fish Spawning; Resident Fish & Aquatic Life; Wildlife and Hunting; Fishing; Boating; Water Contact Recreation; and Aesthetic Quality. Established water quality standards were designed to support and maintain these uses.

Under provisions of ORS 536.300(2), the Water Policy Review Board recognizes hydropower development as a beneficial water use throughout the Deschutes River Basin. However, this use has no corresponding DEQ water quality protection requirement because hydropower production is not likely to be water quality dependent.

OAR 340-41-026 lists the Policies and Guidelines Generally Applicable to All (river) Basins Statewide. These are mainly anti-degradation in nature, except where the DEQ Director or his designee may allow lower water quality on a short-term basis in order to respond to emergencies or to otherwise protect public health and welfare.

OAR 340-41-565 lists specific water quality standards for the Deschutes River Basin. For the purpose of relating water quality standards to potential water quality impacts of the proposed project, the pertinent standards are hereafter listed and DEQ staff evaluation follows each one:

340-41-565(2)(a) Dissolved Oxygen (DO) concentrations shall not be less than 90 percent of saturation at the seasonal low, or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes.

Water quality monitoring in the Upper Deschutes River shows that the dissolved oxygen standards are met at most seasons of the year. There have been infrequent cases of slight D.O. reductions due to natural causes. The proposed hydropower project will have no waste discharges or flow regulation needs that would be expected to adversely impact the river's present D.O. regime.

340-41-565(2)(b) No measurable (temperature) increases shall be allowed outside of the assigned mixing zone, as measured relative to a control point immediately upstream from a discharge when stream temperatures are 58°F. or greater; or more than 0.5°F. increase due to a single source discharge when receiving water temperatures are 57°F. or less; or more than 2°F. increase due to all sources combined when stream temperatures are 56°F. or less, except for specifically limited duration activities which may be authorized by DEQ under such conditions as DEQ and the Department of Fish and Wildlife may prescribe . . . . . .

Existing water temperature regimes in the Upper Deschutes River are suitable for all phases of salmonid fish life. The maximum water temperature recorded between water years 1968 and 1979 at the Benham Falls gage was 17°C, and the minimum 0°C. A probability analysis showed the water temperature to be below 16°C, 98% of the time--distributed mostly between 3° and 14°C.

Water temperatures and stream flows are directly related due to upstream reservoir releases and groundwater contributions. High temperatures correspond to high flows because of seasonal warming and the release of water from the reservoirs. Low temperatures correspond to low flows because of the seasonal cooling and greater contribution of cooler groundwater to the flow.

The project is not designed to cause any additional pooling or changes in the river level above the weir that would significantly increase the present degree of solar incidence. A minimum flow of 660 cfs is specified to remain in the bypass zone, over Benham Falls. While this lesser flow may slow the velocity slightly, it is not expected to result in an appreciable water temperature change from the range existing before the project's construction. The only minor changes in bankline vegetation will occur during weir construction, at the intake structure, and at the tailrace entry to the river. Here, also, the combination of these shoreline changes should not result in an appreciable change in pre-construction river temperatures.

The project is not expected to have a significant impact on the existing temperature regime in the river.

The very small amount of bearing cooling water that will emit from the plant is not expected to have a measureable impact on the river water temperature.

340-41-565(2)(c) No more than a 10 percent cumulative increase in natural stream turbidities (JTU) shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

(1) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare.

(2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of Section 401 or 404 (Permit and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands) with limitations and conditions governing the activity set forth in the permit or certificate.

The placement and removal of coffer dams, plus final opening of the powerhouse "tailrace" channel, during project construction, will cause short-term turbidity increases in the river. The project applicant has proposed mitigation measures that will prevent and/or control these impacts in compliance with the applicable rule. Subsequent operation of the plant should have no impact on existing stream turbidity levels.

340-41-565(2)(d) pH values shall not fall outside the range of 6.5 and 8.5.

No discharge of materials that would affect the river's existing pH values are proposed by the applicant. Operation of facilities should not alter river pH values.

340-41-565(2)(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples): [shall not exceed] A log mean of 200 fecal coliform per 100 milliliters based on a minimum of 5 samples in a 30-day period with no more than 10 percent of the samples in a 30-day period exceeding 400 per 100 ml.

The applicant has not discussed methods of sewage disposal for either the construction or operation periods of the project.

No discharge of fecal coliform bearing wastes is proposed by the applicant.

340-41-565(2)(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health shall not be allowed.

No discharge of bacterial pollutants from the plant or plant site is proposed by the applicant.

340-41-565(2)(g) The liberation of dissolved gases, such as carbon dioxide, hydrogen sulfide, or other gases, in sufficient quantities to cause objectionable odors or to be deleterious to fish or other aquatic life, navigation, recreation, or other reasonable uses made of such waters shall not be allowed.

No discharge of substances from the plant or plant site that will result in the liberation of noxious or toxic gases is proposed by the applicant.

340-41-565(2)(h) The development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or which are injurious to health, recreation, or industry shall not be allowed.

No discharge of substances from the plant or plant site that will result in the development of deleterious fungi or other harmful growths is proposed by the applicant.

340-41-565(2)(i) The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish shall not be allowed.

No discharges of substances that are likely to cause tastes, odors, or toxic conditions in the river are proposed by the applicant. The traces of oil and grease emitting with bearing cooling water at the powerhouse are so small that they should not contribute to taste, odor, or toxic problems in the river.

340-41-565(2)(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.

No discharge of materials from the plant or plant site that will cause bottom sludges or deleterious deposits in the river is proposed by the applicant.

Natural sediment in the Upper Deschutes River is largely composed of volcanic material, with little organic matter. Thus, it has almost no potential to chemically depreciate water quality.

A question has been raised whether the reduction of flow velocity in the approximate 1-1/2 miles of river channel between the intake structure and the control weir will result in detrimental deposits of sediment from passing water-- similar to what has happened in Mirror Pond at Bend. Since a minimum flow of 660 cfs will be maintained in the bypass channel and over the falls, sediment deposition upstream from the weir does not appear to be a serious factor. However, the applicant has not yet fully addressed the potential for this happening. Neither has the applicant fully addressed the potential need for sediment removal and disposal from certain areas of the project after plant operation begins.

340-41-565(2)(k) Objectional discoloration, scum, oily sleek or floating solids, or coating of aquatic life with oil films shall not be allowed.

There may be a trace of oil and/or grease in the bearing cooling water that emits from the plant. However, past experience and monitoring of such plants have shown the volume to be only minutely detectable in the laboratory and unseen by the eye. It does not occur in a concentration that would be deleterious to aquatic life, or make the water unfit for human or other animal consumption.

340-41-565(2)(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed.

Some observers from the public sector believe the power project will destroy the present aesthetic quality of the river zone in and around Benham Falls. While this observation may have merit, the aesthetic changes will not be of a type regulated by water quality control rules. There is no project impact that is likely to change the present aesthetic quality of the river water during plant operation.

340-41-565(2)(m) Radioisotope concentrations shall not exceed maximum permissible concentrations (MPC's) in drinking water, edible fishes or shellfishes, wildlife, irrigated crops, livestock and other dairy products, or pose an external radiation hazard.

No discharges of radioisotopes are proposed by the applicant. Natural background levels of the radioisotopes in construction materials are expected.

340-41-565(2)(n) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and ten percent (110%) of saturation, except when stream flow exceeds the 10-year, 7-day average flood. However, for Hatchery receiving waters and waters of less than 2 feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and five percent (105%) of saturation.

Dissolved gas supersaturation usually results when large volumes of water are plunged over structures into deep pools, where the atmospheric gas entrainment due to the plunge cannot quickly equilibrate with the atmospheric pressure. Water carried in tunnels and penstocks is not usually subject to further gas entrainment. Water for the Lava Diversion Project will be carried in closed conduits and discharged into a relatively shallow stream where turbulence will rapidly equilibrate dissolved gas pressures with the atmospheric sources.

340-41-565(2)(o) Dissolved chemical substances: Guide concentrations listed below shall not be exceeded unless otherwise specifically authorized by DEQ upon such conditions as it may deem necessary to carry

out the general intent of this plan and to protect the beneficial uses set forth in rule 340-41-562: (mg/L)

(A)	Arsenic (As)	0.01
(B)	Barium (Ba)	1.0
(C)	Boron (Bo)	0.5
(D)	Cadmiun (Cd)	0.003
(E)	Chromium (Cr)	0.02
(F)	Copper (Cu)	0.005
(G)	Cyanide (Cn)	0.005
(H)	Fluoride (F)	1.0
(I)	Iron (Fe)	0.1
(J)	Lead (Pb)	0.05
(K)	Manganese (Mn)	0.05
(L)	Phenols (totals)	0.001
(M)	Total Dissolved Solids	500.0
(N)	Zinc (Zn)	0.01

No discharges of dissolved chemicals from the plant or plant site are proposed by the applicant. Any metals leached by water passing over metallic equipment would be only trace in concentration and with little or no potential for violating the water quality standards.

340-41-565(2)(p) Pesticides and other Organic Toxic Substances shall not exceed those criteria contained in the 1976 edition of the EPA publication "Quality Criteria for Water". These criteria shall apply unless supporting data show conclusively that beneficial uses will not be adversely affected by exceeding a criterion by a specific amount or that a more stringent criterion is warranted to protect beneficial uses.

It is not unusual that herbicides are used sparingly in grounds maintenance programs at power plants and electrical substations. However, no pesticides or other organic toxic substances are proposed to be used at the plant site by the applicant.

340-41-565(3) Where the natural quality parameters of waters of the Deschutes Basin are outside the numerical limits of the above assigned water quality standards, the natural water quality shall be the standard.

This standard is set to recognize the variations in water quality that occur naturally. For instance, natural turbidity levels in the Deschutes River may seasonally exceed the standard.

Outside of the controlled water quality impacts that may occur temporarily during construction, the project operation is not expected to cause any water quality changes that would be outside the range of naturally occurring conditions.

B. Land Use Compatibility

Hydroelectric power site development is a conditional use pursuant to requirements of the Deschutes County Comprehensive Land Use Plan. Since a number of sites in the Upper Deschutes River Basin have pending permits for hydropower development, Deschutes County officials have declared a moratorium, in the form of Ordinance No. 83-058, to delay the issuance of all conditional use permits until an overall hydropower site development impact study can be competed. Thus, the county will not consider the issuance of a conditional use permit for the proposed Lava Diversion Hydroelectric Project until terms of the Ordinance are met. On this basis, the county officials have opposed DEQ issuance of a water quality standards compliance certification for the project.

Potential Water Quality Impacts Not Adequately Addressed

The DEQ believes the following list of potential water quality impacts related to construction and operation of the project have not been adequately addressed by the applicant:

1. A trash collection rack is planned for the water intake. Where and how will the trash collections be disposed in compliance with solid waste and water pollution control regulations?

2. Fuel for emergency equipment, oil, and grease would be expected to be stored and used on site during normal plant operation. A plan is needed for their use and disposal of containers that will prevent spills or discharge to the water.

3. Transformer oils and hydraulic fluids for control systems are general products on site at hydroelectric power plants. A storage and use plan, plus a spill contingency plan, are needed to give maximum assurance that these products will not enter the water.

4. A plan and designated equipment are needed for the collection and proper disposal of toilet wastes and solid wastes both during plant construction and operational phases.

5. A considerable amount of concrete will be used in the project. If it is to be mixed on site, a plan is needed to show how wash waters, waste concrete, and yard drainage will be kept out of the river.

6. There is a potential for sediment deposition in the 1.4 miles of river channel between the intake structure and the flow regulation weir. If this occurs, what are the likely environmental impacts? The applicant proposes to address this issue at a later date.

7. It is not uncommon that maintenance dredging is needed at river-run hydroelectric projects to remove detrimental sediment deposits. The applicant should address this issue with a plan for both dredging and spoils disposal.

8. Herbicides are frequently used in grounds maintenance programs around power plants and substations. The applicant needs to also address this issue.

Summary of Public Comments

Twenty-two letters of public comment on the project were received by the DEQ, and are identified in Appendix C. A summary of each letter, by appended identification number, is as follows:

1) Opposes certification on basis that a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin may have undetermined adverse cumulative effects.

2) Opposes the project on the basis of the site's greater importance for recreation and fishery values. Requests that DEQ honor a county ordinance that calls for greater study of possible adverse cumulative impacts from a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin.

3) Opposes the project because it will likely have adverse impacts on aesthetic values and the local economy.

4) Opposes the project because of the site's great importance for recreation, fish production, big game habitat, and aesthetic values. Also, raises the question of whether the project complies with state planning goals.

5) Expresses concern that the project construction activities will cause untenable turbidity and sediment downstream. Eroded soils from access road construction could be a source of river turbidity and sediment. Concern that the project may violate the nitrogen gas supersaturation standard. Fluctuating discharges may increase downstream bank erosion. Suggests that the construction license be withheld until assurances can be given for proper resolution of the above listed concerns.

6) Opposes the project because it may adversely affect the tourist trade which is attracted by recreational offerings.

7) Requests the withholding of DEQ certification until Deschutes County completes its study of possible cumulative effects from the proposed development of multiple hydroelectric projects in the Upper Deschutes River Basin.

8) Believes the project would devastate existing river values and urges DEQ denial of project certification until Deschutes County completes its cumulative impacts study.

9) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

10) Opposes the project on the basis of its destroying the beauty of public lands and adversely impacting fish production. Also, there would likely be other hydroelectric projects to follow that would result in cumulative adverse impacts.

11) Wants assurance that water quality standards will not be violated. Urges that the project not be permitted until Deschutes County completes its cumulative impacts study.

12) Confirms that hydropower development is a conditional use in the Deschutes County comprehensive land use plan. Says the project proponent has not applied to the county for a conditional land use permit. Before issuing a conditional land use permit, the county would have to know that the project would not have untenable, adverse impacts on the water quality, fish, wildlife, recreation, and "other issues". Deschutes County opposes the issuance of DEQ certification until the project has been found to be in conformance with the County comprehensive land use plan and implementing ordinances.

13) Opposes the DEQ issuance of water quality standards compliance certification until Deschutes County completes its cumulative impacts study.

14) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study.

15) Requests DEQ denial of project certification until Deschutes County completes its study of cumulative impacts.

16) Opposes the project because of its potential for adverse impacts on water quality, fisheries, recreation, tourism, local irrigation, and economic base related to these river uses. Requests that the DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

17) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study. Stresses the need for county participation in the decision-making process.

18) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Also, requests that Deschutes County participate in the decision-making process.

19) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Declares that county participation is essential in the decision-making process.

20) The project design and siting have changed from the original proposal. The 2.2 miles of river in the diversion reach contain fine fishery habitat. There has already been significant loss of fishery habitat in the Upper Deschutes River due to its regulation for irrigation purposes.

The project could have a number of adverse impacts on fish as these factors play out through reduced flows, reduced water velocities, higher stabilized water levels, and potentially degraded water quality. Recommends that DEQ withhold project certification until the applicant can give assurances that the project impacts will be eliminated or reduced to acceptable levels.

21) The Upper Deschutes is listed in the State Parks System Plan as a potential study river for inclusion in the State Scenic Waterways System. Present, high levels of recreational use require that existing river and shore line conditions be maintained. Raises the question of whether the project is compatible with the local comprehensive land use plan.

22) Emphasizes that state law requires that DEQ action must be consistent with the local comprehensive land use plan or statewide land use planning goals.

The twenty-two responses to the DEQ public notice fall largely into five categories as follows:

1. Twenty oppose DEQ certification until county officials complete their cumulative impacts and land use compatibility study. Most of the opposition is prefaced with a concern that the project may be detrimental to existing aesthetic, recreation, fisheries, wildlife, and tourism attraction values.

2. Hydropower development is a conditional use in the county comprehensive land use plan. The applicant has not filed for a conditional use permit.

3. The applicant has not given adequate assurances of being able to protect water quality and other environmental values during project construction and operation. Certification should be withheld until adequate assurances are provided.

4. The project design and siting have changed from the original proposal. It has a number of characteristics that could cause damage to fishery production. Certification should be withheld until the applicant gives assurances that the project impacts can be eliminated or reduced to acceptable levels.

5. The Deschutes River zone in question is proposed for study as a possible addition to the Scenic Waterways System.

There were no comments in favor of the project.

DEQ Conclusions

1. The DEQ has identified eight activities associated with project construction and/or operation whose potential for water quality impairment have not been adequately addressed in the environmental report.

2. Except as noted in number one above, the project proponent's major programs to protect water quality during construction and operation appear adequate to comply with state water quality control regulations.

3. Except as noted in number one above, operation of the project is not likely to have any appreciable adverse impact on water quality, i.e. it is expected to comply with state water quality control regulations.

4. Hydropower site development in Deschutes County requires a conditional land use permit.

5. The project proponent has not yet applied for a conditional land use permit.

6. Deschutes County will not consider the issuance of a conditional land use permit until the study requirements mandated in County Ordinance No. 83-058 have been completed.

7. Deschutes County will not at this time issue a land use compatibility statement for the proposed Lava Diversion Hydroelectric Project.

8. The DEQ must have assurance that the project is compatible with the county's comprehensive plan and land use ordinances, or state planning goals, before issuing a water quality standards compliance certification statement.

DEQ Recommendation

Based on the information presented in this report, the DEQ recommends that water quality standards compliance certification for the project be denied until the following two requirements are met:

1. The project applicant adequately addresses the eight potential water quality impacts of the project identified by the DEQ.

2. The project applicant obtains a land use compatibility statement from Deschutes County officials.

GDC:1
WL3842

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIRMENTS

Date Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

WHO IS THE APPLICANT: General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501

WHAT IS REQUESTED: The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS: The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

HOW IS THE PUBLIC AFFECTED: The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to DEQ by October 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.

T267

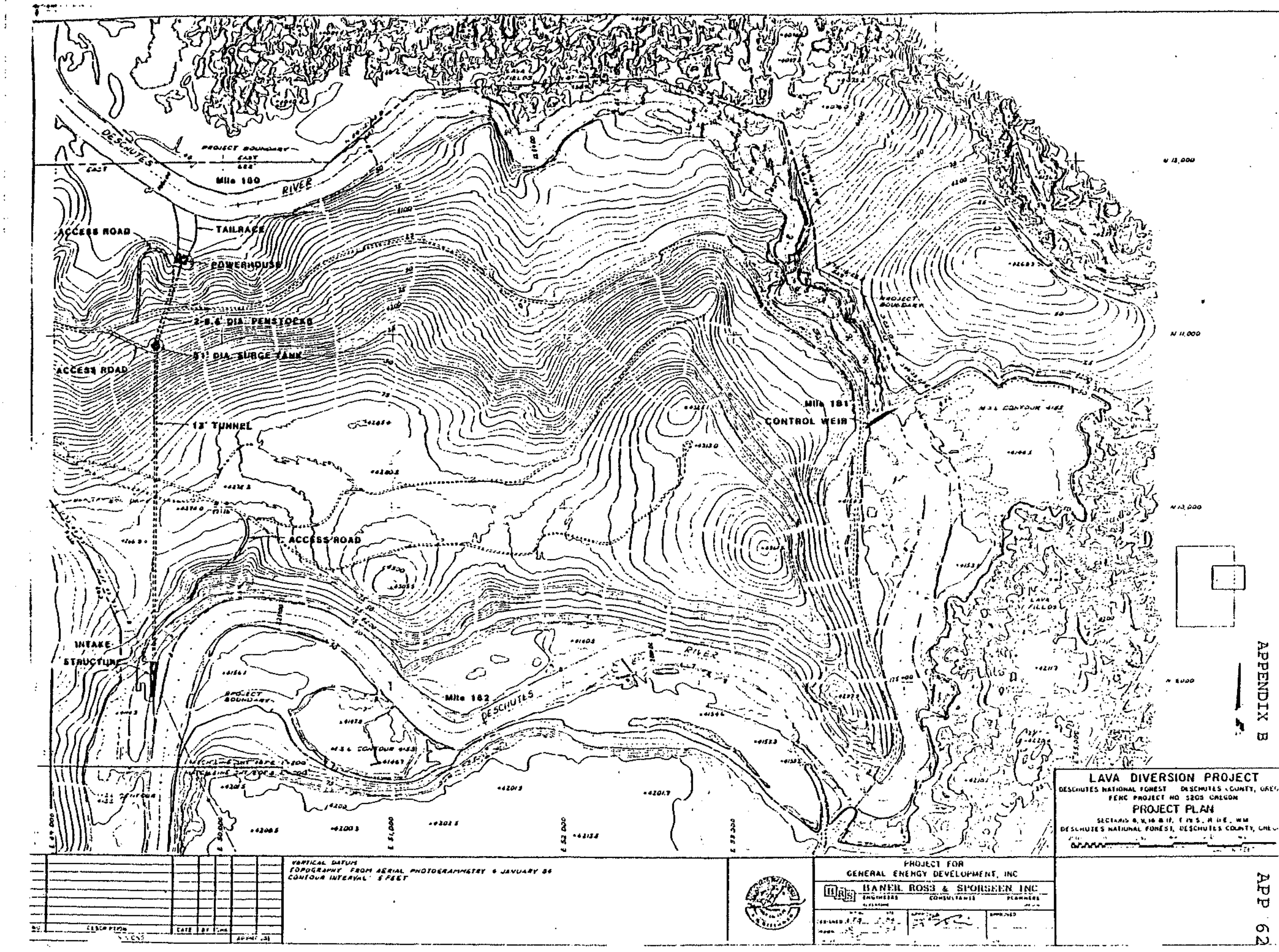
P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~, and ask for the Department of Environmental Quality. 1-800-452-4011

APPENDIX B



APPENDIX C

Letter No.	Date of Letter	Signature(s)	Representing
1)	9/30/84	Laurie LeFors	Self
2)	10/1/84	Marti Gerdes	Self
3)	10/1/84	Jean & Joseph Berger	Self
4)	10/3/84	Mike Johns	Self
5)	10/5/84	David Mohla, Supervisor	Deschutes National Forest
6)	10/5/84	Mr. & Mrs. Keith Corwin	Self
7)	10/7/84	P. W. Chase	Self
8)	10/8/84	Eric Schulz	Central Oregon Flyfishers
9)	10/8/84	Brian Meece	Citizens Realty Group
10)	10/9/84	Kenneth Corwin	Self
11)	10/9/84	Fred Ehlen	Sunriver Anglers
12)	10/10/84	Deschutes County Commissioners(3)	Deschutes County
13)	10/11/84	Robert Robinson	Coalition for the Deschutes
14)	10/11/84	Jane Poor	Self
15)	10/11/84	Richard & Carolyn Miller	Contemporary Homes
16)	10/12/84	John Wujack	Save Benham Falls Committee
17)	10/12/84	Tom Throop	State Representative, District 54
18)	10/12/84	Lawson La Gate	Self
19)	10/15/84	Stephen Toomey	Frank Ruegg Real Estate
20)	10/15/84	Michael Weland	Oregon Fish & Wildlife Dept.
21)	10/16/84	Alan Cook	Oregon Parks & Recreation Division
22)	10/22/84	JRK (initials only)	Dept. of Land Conservation & Development

GDC:1
WL3843
11/5/84

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 10, 1984

Al Peters
Energy Planning Associates
3182 Timberlake Dr.
Hillsboro, OR 97123

Re: FERC No. 7903
Squaw Creek Project
Deschutes County, Oregon

Dear Mr. Peters:

This is to acknowledge receiving your letter and attachments dated September 3, 1984, in which you announce the beginning of feasibility studies for the above referenced project.

At some point in the federal licensing process, FERC will likely require that you submit a water quality standards compliance certification for the project from our Department. An application to DEQ for such certification must contain, at minimum, the following information:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.

(e) Name of involved waterway.

(f) Copies of the environmental background information required by the federal permitting or licensing agency.

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

We may have some useful water quality data from Squaw Creek in our files. Andy Schaedel at our laboratory, 229-5983, can tell you more about it.

Sincerely,

Glen D. Carter
Water Quality Division

GDC:1
WL3662

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 21, 1984

Kenneth H. Plumb, Secretary
Federal Energy Regulatory Commission
Washington DC 20426

Re: FERC No. 3459-001
Mason Dam Hydroelectric Project;
Power River, Baker County, Oregon,
Cascade Water Power Development Corp.

Dear Secretary Plumb:

I had a telephone discussion on September 17, 1984, with your environmental staff person Robert Krska, regarding water quality standards compliance certification need for the above referenced project. Considering the local concern caused by competing applications for the project site, I am writing to clarify and verify the major items of our discussion.

By FERC public notice of February 28, 1983, we learned of the above application for license. We assumed this would be a license "to construct" since there was no mention of a preliminary permit process.

The applicant hired CH_2M-Hill consultants to develop the information exhibits required for FERC licensing. On January 10, 1983, CH_2M-Hill requested from our agency a water quality standards compliance certification letter for the project, as is required by Section 401 of the Federal Clean Water Act. On February 18, 1983, we advised CH_2M-Hill that we would not take action on their certification request until having an opportunity to review the upcoming Exhibit E Report.

In developing the Exhibit E information, CH_2M-Hill and the applicant discovered there were substandard dissolved oxygen concentrations in the water supply that would need further assessment. By letter of August 3, 1983, CH_2M-Hill outlined for our agency a plan to gather further dissolved oxygen data from the project site. We approved their plan on August 9, 1983. Since that date, we have received no further word from either CH_2M-Hill or the license applicant. Consequently, we have taken no further action on their request for project certification.

There is also another piece of state-required information missing from the applicant's request for project certification. State law requires the applicant for "401 certification" to provide our Department with a statement from the local land use planning agency (Baker County Planning Department) that the project is compatible with the acknowledged local comprehensive plan before we can act to issue such certification. We have not yet received that statement.

It would normally be included in the package of supporting information we receive from the applicant or his consultant. In discussing this matter with the Baker County Planning Department Director, I learned that a land use compatibility statement has not been issued for the project.

Thus, without the dissolved oxygen problem assessment and the land use compatibility statement, we do not yet have a completed application for project certification. I wish to advise you that our Department does not consider the one-year time period for state response, as allowed by Section 401 of the Federal Clean Water Act, to begin until we have in hand all of the required and requested information necessary to evaluate a project for certification. For your use, I am enclosing a list of the minimum information items that a completed application for project certification must contain in Oregon.

For your knowledge, we are fully aware of the competing major license application for this project site by the Baker County Court. It is under FERC No. 7732, published October 18. 1983. We have not yet received either the Exhibit E Environmental Report or request for water quality standards compliance certification from the license applicant.

If you wish to discuss this matter further, please call me at (503) 229-5358.

Sincerely,

Glen D. Carter

Glen D. Carter
Water Quality Division

GDC:1
WL3697

Enclosure

cc: Larry Smith, Judge, Baker County Court
Diane Stone, Director, Baker County Planning Department
George Smith, Cascade Water Power Development Corp.
John Lincoln, CH_2M-Hill, Boise, Idaho
Duane West, Oregon Fish and Wildlife Department
William Young, Director, Oregon Water Resources Department
Steve Gardels, Eastern Region, DEQ

blind cc: Bob Krska - FERC

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.

(e) Name of involved waterway, lake, or other water body.

(f) Copies of the environmental background information required by the federal permitting or licensing agency.

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698

FILED
OCT 2 1984
NORMA PAULUS
SECRETARY OF STATE

Oregon Department of Environmental Quality

APP 68

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 10/24/84
Notice Issued: 11/15/84
Comments Due: 12/15/84

Competing Applications for Federal License

WHO ARE THE APPLICANTS:
(1) Cascade Water Power Development Corp.
P.O. Box 1016
Idaho Fallls, ID 83402

(2) Baker County Court
Courthouse
Baker, OR 97814

WHAT IS REQUESTED: The applicants have requested certification from DEQ that water quality standards and requirements will not be violated by construction and/or operation of a proposed major hydroelectric project at the existing Mason Dam outlet on the Powder River in Baker County, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicants have filed with DEQ background information on their respective project proposals to support their certification requests.

WHAT ARE THE HIGHLIGHTS: The applicants hold license application numbers 3459 and 7732, respectively, from the Federal Energy Regulatory Commission (FERC) to plan and design their projects. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals. Baker County has advised DEQ by letter that their comprehensive plan contains the following statement of policy: "Potential energy producing sites shall be protected from irreversible loss and encouraged to be developed."

HOW IS THE PUBLIC AFFECTED: The project site involves public lands and waters of the State that also serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to Glen Carter of the DEQ by December 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.

WL3817

P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~ and ask for the Department of Environmental Quality

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 27, 1984

Mr. Frederick D. Ehlers
P.O. Box 7148
Klamath Falls, OR 97602

Re: FERC No. 6552
Sprague River
Hydroelectric Project
Klamath County, Oregon

Dear Mr. Ehlers:

This is a reply to your letter of June 25, 1984, in which you request water quality standards compliance certification, or waiver, for the above referenced project. As supporting information, you also sent Exhibit E, the environmental report that is part of the project license application to FERC.

We have recently been advised that the abbreviated method we were using to process hydroelectric project water quality certification requests was not in full compliance with federal and state public disclosure laws. Consequently, I must ask you for further background information that is vital to our meeting those legal requirements.

Attached hereto is a list of the minimum required informational items that constitute a completed application for project certification. In your case, I believe you can best satisfy items (a) through (g) by sending us a full set of the information exhibits you sent to FERC in your license application. Item (h), the land use consistency statement, you will have to get from the County Planning Department and submit to us.

We must issue or deny certification within one year of the date of receiving the request, which was July 2, 1984. Consequently, we must ask that you return the requested information to us by March 1, 1985, so we will have time to make the required public notice of your request within the one year time limit.

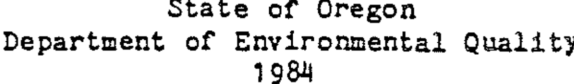
If you fail to submit the requested information by March 1, 1985, we will deny your request, without prejudice, and you may then re-apply for certification at a time of your convenience.

I apologize for putting you to this extra effort. Please call me at 1-800-452-4011 if you need further information on this matter.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WT311
Attachment



State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.

(e) Name of involved waterway, lake, or other water body.

(f) Copies of the environmental background information required by the federal permitting or licensing agency.

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698

ATTACHMENT A

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIRMENTS

Date Prepared: 10/18/84
Notice Issued: 11/15/84
Comments Due: 12/15/84

WHO IS THE APPLICANT: Frederick D. Ehlers
P.O. Box 7148
Klamath Falls, OR 97602

WHAT IS REQUESTED: The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project on the North Fork Sprague River near Bly, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS: The applicant holds Preliminary Permit No. 6552 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements.

HOW IS THE PUBLIC AFFECTED: The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to DEQ by December 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and made a final determination to grant or deny certification.

WL3798

P.O. Box 1760
Portland, OR 97207

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-7813 [illegible]

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 28, 1984

Al Peters
Energy Planning Associates
Biez Timberlake Dr.
Hillsboro, OR 97123

FERC 6145

Re: Proposed Grave Creek
Hydroelectric Project
Josephine County, Oregon

Dear Mr. Peters:

This is a reply to your letter of August 3, 1984, in which you request a water quality standards compliance certification, or waiver, for the above referenced project. In support of your request, you also sent a draft copy of Application for License Before the Federal Energy Regulatory Commission, Grave Creek Hydroelectric project, September 1984.

In addition to the supporting documents contained in the above license application, we must receive the following information before we will commence processing your certification request:

1. A technical assessment of whether the long penstock, with approximately 500 feet drop, will entrain dissolved nitrogen gas at levels harmful to downstream fish life. If so, explain the engineering technique to be used to prevent nitrogen gas supersaturation.

2. A detailed listing of what there real and potential adverse water quality impacts might be during project construction, their duration, and how they will be minimized or prevented.

3. A copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

4. A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

Since you do a considerable amount of consulting work on small hydroelectric project license applications, I am enclosing a general list of the information items that we require to support requests for water quality standards compliance certification.

Please call me at 229-5358 if you wish to discuss any of this subject in greater detail.

Sincerely,

Glen D. Carter
Water Quality Division

GDC:1
WL3708
Enclosure

cc: Oregon Fish & Wildlife Dept. [illegible]

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.

(e) Name of involved waterway, lake, or other water body.

(f) Copies of the environmental background information required by the federal permitting or licensing agency.

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

October 15, 1984

Gail Marshall
Wildcat Hydro, Inc.
12825 S.W. 20th Court
Beaverton, OR 97005

Re: FERC No. 4574
Three Lynx Creek
Hydro Project

Dear Gail Marshall:

This is to acknowledge your letter of October 9, 1984, in which you announce that the above referenced project no longer qualifies for exemption from FERC licensing, and that you will now apply for a minor hydroelectric project license.

If the FERC should require that you obtain a water quality standards compliance certification from our agency to submit to them as part of your application for the "minor" license, there are certain pieces of information we need from you to commence that process and meet public disclosure requirements. Enclosed is a sheet that lists the items of information that constitute a completed application for water quality certification.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WT371
Enclosure

cc: Northwest Region, DEQ

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.

(e) Name of involved waterway, lake, or other water body.

(f) Copies of the environmental background information required by the federal permitting or licensing agency.

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 12-6-84
Notice Issued: 1-2-85
Comments Due: 2-1-85

WHO IS THE APPLICANT: Gail Marshall
Wildcat Hydro, Inc.
12825 S.W. 20th Court
Beaverton OR 97005

WHAT IS REQUESTED: The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed minor hydroelectric project on Three Lynx Creek near Ripplebrook, Clackamas County, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS: The applicant holds Permit No. 4574 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

HOW IS THE PUBLIC AFFECTED: The project involves waters of the State that also serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to Glen Carter of the DEQ by January 15, 1985, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.

WL3917

P.O. Box 1760
Portland, OR 97207

8.10.82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~ and ask for the Department of Environmental Quality.

APP 77

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

November 13, 1984

Michael H. Giddings
Liaison Officer, City of Halfway
P.O. Box 154
La Grande, OR 97850

Re: FERC No. 8094
Pine Creek Project
Halfway, Oregon

Dear Mr. Giddings:

In response to your letter of October 29, 1984, I am your DEQ contact person for matters relative to the above referenced project.

At some point in your dealings with the FERC for a project license, they may require a water quality standards compliance certification statement from our agency. Enclosed is a listing of the informational items that a completed application for certification must contain.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:1
WL3862

Enclosure

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

December 11, 1984

Mr. Al Peters
Energy Planning Associates
3182 S.E. Timberlake Drive
Hillsboro, OR 97123

Re: Freemont Power Project,
FERC No. 6628,
Lake and Lost Creeks,
Grant County, Oregon

Dear Mr. Peters:

This is to acknowledge your letter of November 7, 1984 (received in this office November 26, 1984), in which you request water quality standards compliance certification for the above referenced hydroelectric project. With your request, you have also sent a copy of the information exhibits that went to the FERC in support of the project license application. In addition to these materials, we need one more document to make a completed application for project certification. That is a land use compatibility statement from the Grant County Planning Department--or their statement of compatibility with statewide planning goals if the County does not have an approved comprehensive plan.

We are withholding any further action on your request until the land use compatibility statement arrives.

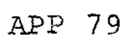
Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WL3937

cc: Northeast Region, DEQ

Department of Environmental Quality



522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

February 21, 1985

Dale Hatch
Pioneer Hydropower, Inc.
P.O. Box 1071
Twin Falls, ID 83303

Re: FERC Project Nos. 6650, 6651, 6652, 6655

Dear Mr. Hatch:

This is a reply to your letter and attachments of January 14, 1985, in which you propose to conduct further feasibility studies of the above referenced project sites in Oregon's Hood and Clackamas River Basins.

If you proceed to apply for FERC licensing of the individual projects, federal law requires that you obtain four separate water quality standards compliance certification letters from our Department. Attached to this letter is a list of information items that a request for certification must contain.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WT599

Attachment

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

February 7, 1985

William G. Miller
Project Director
Resource Management International, Inc.
1010 Hurley Way, Suite 500
Sacramento, CA 95825

Dear Mr. Miller:

Your letter of January 25, 1985 regarding the Salt Caves Hydroelectric Project (FERC 3313) has been received. This letter notifies the Department that the City of Klamath Falls requests certification of the project pursuant to Section 401 of the Federal Clean Water Act.

Please be advised that your letter as received is not a complete and sufficient application for 401 certification. A request for certification must be supported by the following:

(a) Legal name and address of the project owner.

(b) Legal name and address of owner's designated official representative, if any.

(c) Legal description of the project location.

(d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials. (This description should describe the project in terms understandable by the public. It should be supported by more detailed technical material as appropriate.)

(e) Name of involved waterway, lake, or other water body.

(f) Copies of the environmental background information required by the federal permitting or licensing agency. (This information is expected to describe project impacts on water quality and beneficial uses of water in the project area, both during construction and during operation after construction.)

(g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.

(h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts.

Upon receipt of a complete and sufficient application, the Department will issue a public notice inviting comments by interested individuals and agencies within 30 days. A hearing may be held if there is significant public interest.

The Department would expect to complete its evaluation of your application and public comments received thereon and take final action to issue or deny certification within 90 days of receipt of your completed application and issuance of a public notice, assuming no hearing is held and subsequent submittal of additional information is not required.

The Department will cooperate with the Department of Water Resources and the Energy Facility Siting Council in their review of your project. However, please be advised that the 401 certification process is a distinctly separate and independent process administered by the Department of Environmental Quality.

We will anticipate receiving your completed application in the near future.

Sincerely,

Fred Hanson
Director

FH:d
WD1514

92d Congress 2d Session } SENATE { Report No. 92-1236

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

September 28, 1972.—Ordered to be printed

Mr. Muskie, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 2770]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2270) to amend the Federal Water Pollution Control Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

With respect to the amendment of the House, the Senate recedes from its disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below except for minor technical and clarifying changes made necessary by reason of the conference agreement.

SHORT TITLE

Senate bill

Provides that the Act may be cited as the "Federal Water Pollution Control Act Amendments of 1971".

House amendment

Provides that the Act may be cited as the "Federal Water Pollution Control Act Amendments of 1972".

Conference substitute

The conference substitute is the same as the House amendment.

Both the Senate bill and the House amendment provide for complete revisions of the Federal Water Pollution Control Act. The revision would consist of five titles and hereafter the references in this statement are to the sections and titles of the proposed revision of the Federal Water Pollution Control Act.

TITLE I—RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

Senate bill

Section 101 establishes a policy to eliminate the discharge of pollutants by 1985, restore the natural chemical, physical, and biological integrity of United States waters, and reach an interim goal of water quality for swimming and fish propagation by 1981.

…ting, controlling, and abating pollution specifically, including financing of programs after fiscal 1976.

Conference substitute

Section 317 is the same as the House amendment.

TITLE IV—PERMITS AND LICENSES

CERTIFICATION

Senate bill

Section 401 requires any applicant for a Federal license or permit to provide the licensing agency with a State certification. The State would be required to certify that the discharge complies with sections 301 and 302.

House amendment

Section 401 requires any applicant for a Federal license or permit which may result in any discharge into navigable waters to provide a certification from the originating State that the discharge complies with sections 301, 302, 306, 307, and 316 of the Act.

Conference substitute

This section is the same as the House amendment, except as follows:

(1) Subsection (a)(7) of this section, which provides that where actual construction of a facility began before January 3, 1970, that a license or permit to operate such facility shall not be subject to the certification requirements until April 3, 1973, has been modified to exempt permits issued under section 402 of this Act.

(2) Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, has been expanded to also require compliance with any other appropriate requirement of State law which is set forth in the certification.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Senate bill

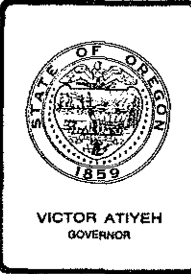
Section 402 transfers the 1899 Refuse Act permit program from the Corps of Engineers to the Administrator.

The section authorizes the Administrator to issue a permit for the discharge of pollutants into the navigable waters, the waters of the contiguous zone, or the oceans.

Before a permit can be issued, an applicant must meet the requirements of sections 209, 301, 302, 306, 307, 308, and 403. Any permit issued under section 13 of the Refuse Act prior to June 30, 1972, would be considered a permit pursuant to section 402 of this Act.

Under section 402, the Administrator can delegate permit authority to a State if the State program is adequate. Any State receiving such authority is required to send the Administrator a copy of all permit applications. The State cannot issue a permit until the Administrator determines the application meets all requirements of the Act.

The Administrator is authorized to waive the review authority over specific classes or sizes of plants and over individual plants if he does so within 30 days of receipt of the permit application.



MAR 18 1985

Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207
522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

March 15, 1985

Neil R. Bryant
Attorney at Law
40 N. W. Greenwood
Bend, OR 97709-1151

Richard L. Isham
Deschutes County Legal Counsel
Deschutes County Court House Annex
Bend, OR 97701

Michael Huston
Assistant Attorney General
500 Pacific Building
520 S. W. Yamhill St.
Portland, OR 97204

Re: Lava Diversion Project
FERC No. 5205
Deschutes River, Oregon

The Environmental Quality Commission will meet on March 22, 1985 at 3:00 p.m. in Room 1400, 522 S. W. 5th, Portland, Oregon, to continue its deliberations in this case.

No additional testimony or argument will be presented, but you are invited to attend to respond to questions from the Commission.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:y
HY286
cc:All Members, Environmental Quality Commission
Larry Tuttle, Deschutes County Commissioner

Alvin J. Gray
Bradley D. Fancher
William M. Holmes
James V. Hurley
Neil R. Bryant
Robert S. Lovlien
Lynn F. Jarvis
Gregory P. Lynch
Brian J. MacRitchie
Daniel C. Re
of Counsel:
Bruce Bischof

GRAY, FANCHER, HOLMES & HURLEY

LAW OFFICES
40 N.W. GREENWOOD • P.O. BOX 1151 • BEND, OREGON 97709-1151 • (503) 382-4331

SUNRIVER VILLAGE MALL • SUNRIVER, OREGON 97707-3215 • (503) 593-1292

MAR 18 1985

March 15, 1985

JAMES E PETERSEN
ATTORNEY AT LAW
835 NW BOND STREET
BEND OR 97701

Re: Arnold Irrigation - GED/DEQ Hearing

At the March 8th meeting, I gave you photocopies of the cases dealing with pre-emption. I neglected to include the Escondido copies. Consequently, I am enclosing them with this letter.

Neil

Neil R. Bryant

da

Enclosure

cc: Michael Huston

DESCHUTES COUNTY BOARD OF COMMISSIONERS
OCTOBER 10, 1984 MEETING MINUTES

Acting Chairman Tuttle called the meeting to order at 10:05 A.M. Commissioners Prante and Young were also present.

Amendments to the Agenda

Chairman Tuttle read aloud the amendments to the agenda. There were no additions or changes. He also indicated that item number 4 on the agenda would be heard at 11:30 A.M.

Appeal Hearing on V-84-10, Brooks Resources and Carl & Gwen Newport, Applicants

Chairman Tuttle stated that this was an appeal of a Hearings Officer decision not to allow a variance to the road standards for a subdivision. This property had also been included in a zone change application. Chairman Tuttle gave further background information as contained in the Staff Report. The Hearings Officer approved the zone change request from F-4 to F-2 but denied the variance to the road standards.

Chairman Tuttle outlined the hearing procedure and asked for any challenges or declarations of conflict of or by any member of the Board to hear this appeal. There were none. Chairman Tuttle opened the hearing.

Lin Bernhardt, Planner, gave the staff report. She explained that the variance request was for a 20' graded road surface rather than a paved surface. This is a four-lot subdivision located just outside the Sisters urban growth boundary to the west. The subdivision ordinance requires that all parcels in the subdivision have paved road access. The variance was developed for extreme and unique hardship cases. The staff and the Hearings Officer feel that two of the four variance criteria have not been met. Those two requirements are: (1) there does not appear to be any uniqueness about the subject property; and (2) it appears that the applicant did create the condition. Had the applicant not applied for a subdivision this would not have been necessary. In this case, a subdivision plat would have been necessary even if only one lot were created, since this property was subdivided within the last five years. There were no further questions of staff at this time.

Chairman Tuttle called for comments from the applicant. Bob Lovlien, attorney representing Brooks Resources and the Newports, came forward. He noted that Jim Crowell and Carl Newport were also present. Mr. Lovlien explained that this

subdivision was part of a subdivision filed earlier by Brooks called "Section 5". Access is through Heavenly Acres Subdivision. Mr. Newport intends to purchase the three parcels to the North, which are parcels 2, 3, and 4 on the subdivision plat in question. The property is bound on three sides by Forest Service land. Immediately to the North is Tollgate subdivision, which has its own access. He noted that they asked for a 5" cindered road base, not just a graded road base, instead of the required paved base. He stated that Brooks has done a number of things in Section 5, one being the Heavenly Acres subdivision, and that they had been notified by the Planning Department that any further land divisions would require a subdivision plat to be filed, so the Newports had no other choice. They then filed a four-lot subdivision, with the one 60-acre parcel intended for the proposed high school. The other lots are intended to be sold to the Newports. If this had not been a subdivision, then only a gravelled road would have been required. This road will not go anywhere because adjoining land doesn't require further access. The other three lots will not be divided further because they are now the smallest allowed in the zone. When the High School goes in, paving will be required then, and then it can be paved. With regard to the variance criteria, he felt that the condition was not created by the applicant, but rather by the County, because it is the County's ordinance that requires it. Brooks Resources is in the business of selling land so no matter how they want to sell this property they would be in the same position on the subdivision requirement so he feel that this is a condition created by the Planning staff. He also felt that this situation was unique to the lot itself. He noted that little case law exists with regard to this criteria. He did not feel that this criteria applied in the F3 zone because it is not a general condition in the F3 zone throughout the county. Sometimes this condition applies to an irregularly shaped lot. There is nothing inherent in the land itself, but it is the circumstances. He felt that this offered a basis for granting a variance. There are circumstances inherent in the land that would justify the variance. It doesn't seem necessary and reasonable to require a 3" paved surface to serve three woodlots. They are zoned for forest use. They feel that people may use this road thinking that it is a through road and creating an increased risk of fire, vandalism, etc. They feel that a 5" cindered base should be required. There were no questions of Mr. Lovlien at this time.

Chairman Tuttle then called for rebuttal comments. Ms. Bernhardt noted that the applicant's representative stated that the proposal is one step below paving. That is true, but there is a substantial difference between a cindered and a paved road. The partition versus subdivision argument is really not an issue in this case because this would be a subdivision regardless of any prior land divisions, because it does create four lots. This subdivision requirement was written into the ordinances to prevent people from circumventing the ordinance requirement by partitioning the same property each year into more and more lots. Ms. Bernhardt also noted that the construction of the proposed high school on one lot is not a valid argument because it may not be developed for ten years, if at all, and there is no guarantee that it will be put there at all. The Road Department has indicated that even if the school was built they would not have to tear up the old pavement. This road could be built upon for the school road. She also noted that there are two court cases that speak to the physical characteristics of a site. Those both required that there be a physical characteristic about the site causing the condition. Parcel size can be considered a physical characteristic. She did not feel there was anything physically unique on this property that merits variance.

Commissioner Prante commented that based on common sense there are only three places, that the road goes nowhere and all the subdivisions that were developed with graded roads, that it seemed like they shouldn't require this for this subdivision.

Mr. Lovlien came forward for his rebuttal comments. He felt that the partition versus subdivision question is an issue. He also felt that the high school question is a valid argument because that is a donation that has been offered by not yet accespted by the Sisters School District. They are not trying to circumvent the subdivision ordinance because they did apply for a subdivision but they only want a variance from the road standards because people can't built the paved roads for woodlots like this.

Chairman Tuttle then called for any further questions. Hearing none, he closed the hearing.

MOTION: YOUNG moved to sustain the decision of the Hearings Officer and adopt the findings of the Hearings Officer supporting that decision.

TUTTLE: Second.

Commissioner Young stated that when these variances are allowed, although they are told no one will build, someone will come along and build and then they come to the County and want decent roads. The County has had many problems with subdivisions that were allowed to put in only gravel roads. He mentioned that the development of a school is no guarantee that they will put in a road. He noted that when the Bend school district built Mountain View High School, one condition of approval to build was that the district would improve the road. This never happened, and the county had to improve the road for the safety of the children. He did not feel that they could grow enough trees on this land to make it pay so eventually that property will probably be developed.

VOTE: APPROVAL; PRANTE DISSENTING.

Public Hearing on Proposed Incorporation of LaPine

Chairman Tuttle outlined the hearing format. Mr. Isham gave background information on the progress of the incorporation procedure to date as well as information on the related land use issues. He stated that there are two statutes governing incorporation, which will be consolidated for the purpose of this hearing. The hearing is to determine whether to vote on incorporation, and to establish boundaries of incorporation. Chairman Tuttle then opened the public hearing, calling first for comments from Planning staff.

Denyse McGriff, Senior Planner, came forward. She explained that the hearing was to discuss incorporation and amendment of the Comprehensive Plan and exceptions to the goals in the plan. She showed the proposed boundaries as outlined on the wall map. She and the LCDC local representative, Brent Lake, had done a parcel by parcel land use inventory for use in determining these boundaries. She also noted that the map reprented a revised boundary, which is smaller than that indicated in the notice because they had omitted a subdivided area used for grazing within the flood plain zone.

Kenneth Jones (998 Ferry Lane, Eugene), attorney representing the LaPine Business Association, spoke in favor of the incorporation. He stated that the area in LaPine has been the subject of a lot of paperwork and discussion in the Comp Plan. He stated that it is a Rural Development Center that should be incorporated according to the Plan. He submitted for the record an economic feasibility

study for Lapine, and two attached exhibits. He then outlined information contained in his letter to the Board dated October 10, 1984 (contained in the record). He commented that the entire area has been considered a community for many years. In order for it to control all of its growth and to be an orderly growth, they would like to control that in LaPine. He stated that the only way to do that is to incorporate.

Ken Travis (16221 North Drive, LaPine), President of the LaPine Business Assocation, came forward. He stated they are the primary group behind the effort to incorporate. They have been told that for their sewer project, there is more money available for a city than for a district. They are trying to get a town with very few frills-- just what is necessary create a town and to begin development at a very minimum cost. He stated that the present budget of the sewer and the proposed budget for the town is only 9c difference. For that 9c difference, they could have their own town. At the present time, they cannot enlarge any motels or restaurants or build any additional facilities which would provide more tourism-based income. Incorporation would also provide the local residents with the decision making power relating to future development. They feel that they should get the money from the state available for this sort of thing.

Brent Lake (2150 NE Studio Rd., Bend), LCDC Field Representative, came forward. He stated that they have been working with the citizens in LaPine to form incorporation boundaries. He supports the reduced boundaries being presented. He discussed Administrative Rule 660.14 dealing with incorporation. That rule identifies three general types of cities which seek incorporation: (1) incorporation that is totally included within existing growth boundaries; (2) a city that has an urban density and some level of urban services; and (3) and area on rural land with no development. He feels LaPine falls into the second category. The rule also requires that the decision be based on findings of fact supported by: size, relation of residences; urban levels of facilities or residential services, and parcel size and ownership patterns. It is the department's position that the findings provided by the LaPine Incorporation Committee address these.

Representative Tom Throop, Bend, came forward. He stated that he is very interested in obtaining sewer services for the LaPine area. He stated that

the businesses are supportive but residents are not. He stated that it is very important the measure appears on the ballot and the get the opportunity to make that decision. They must solve the problem caused by the lack of sewage facilities. He felt that the problems that need to be solved could be solved by sewage facilities.

Mary Gordon, 16480 Foss Road, LaPine, came forward. She is both a property owner and a business owner and a resident. She stated her support for the incorporation.

Kay Nelson, Westviwe Motel, Hwy. 97, LaPine, came forward. She is a Board member of the LaPine Sewer District. She stated support of the incorporation because she feels that the sewer will cost them less if they have access to some of the funding that is not available to them now.

Chairman Tuttle then called for comments in opposition. Bob House, 32070 Oak Plain Drive, Halsey, OR, came forward. He also owns property on Foss Road. He stated that the area is approximately 80 acres and only 16.6 acres is taxable land, the rest is BLM. He noted that the County land to the north also was not on the tax rolls. He stated that to the east and south are about 160 acres included in the proposed industrial area. He stated that the watershed is quite fragile. The railroad dug a well to supply trains with water. The industrial park which pumps water and their cement plant caused the water table to drop. He stated that because of the property not on the tax rolls, the 80 acres has very little tax base. He stated that he wished for his property to be excluded from the boundaries (tax map 22-10-14AC, taxlot 500).

Chairman Young instructed him to file his request for exclusion in writing as well. He also cautioned that this does not constitute a promise to be excluded.

Mr. O.H. Lunda, Foss Road, LaPine, came forward. He stated that he opposes incorporation. He did not feel that they should have to pay for a sewer for the businesses. They are retired and cannot afford this.

Maxine Wardrip, Findley Butte Road, LaPine, came forward. She explained that they lease the property and are the only ones who live there year-round. There are three other homes in the area

and they rarely have people staying there. She stated that they wish to be excluded from the incorporation boundaries. Chairman Young again requested a written request.

Mr. Wes Mitts, Moro, OR, came forward. He explained that he lives in LaPine in the summer. He did not wish to be included in the boundaries. He felt the boundaries extended too far. He noted that the industrial park was near his property, and he stated he doesn't want any noisy activities like a sawmill right next to him. He also stated that the names of the streets are always named after the first ones that lived on them. Since he was the first on his road he requested that it be named Mitts Way. He indicated that he would send his letter requested to be excluded.

Dick Maudlin, County Commission candidate, came forward. He believes that this should be a decision made by the citizens of LaPine in cooperation with Deschutes County. They have received testimony from 1000 Friends of Oregon. He stated that 1000 Friends of Oregon can no longer justify their organization on their attack on the LaPine incorporation while there is a Rajneeshpuram.

Chairman Tuttle then called for rebuttal comments from those in favor.

Kenneth Jones stated that one of the parties talked about income and that party already lives within the boundaries of the LaPine Sewer District. He stated that the land next to Mr. Mitts is already industrial, so incorporation won't affect his concerns about noise.

Ken Travis stated that in regard to the industrial sit they are working with the County to set up guidelines on what is permitted. He stated that it is very close to becoming available for industrial purposes. He stated that they do not want a lot of noise or smoke pollution.

Chairman Tuttle then called for rebuttal comments from those opposed.

Bob House stated that most of the people objecting to this are in the one area and they are nearly half of that area.

Mr. Mitts stated that he may have mentioned the railroad tracks as being a dividing line between

the residential and industrial area. He wanted to clarify that there are two lots of 2-1/2 acres between his land and the railroad tracks.

Chairman Tuttle then called for questions from the Board.

Chairman Tuttle asked Mr. Lake if their department comments would have been the same regarding the water and sewer district requirements if Ballot Measure 2 were successful. Mr. Lake responded that they are looking at the factors the county must address before the County can put this out to a vote of the people. Whether it was before or after November 7 would not make any difference. Chairman Tuttle then asked about financial matters relating to the distribution of income. The figure of $10,000 was listing as revenue for the LaPine share Forest Receipts. The total road length within the city for city maintenance is only .81 mile. The County has cooperative agreements with the cities for these funds which are based on roads. The $10,000 figure does not agree with that distribution formula. There was some discussion on the proper way to request the response to this question, so as to allow for other parties to respond. It was determined that a written response could be allowed as long as it was made available for others to respond to it.

MOTION: YOUNG moved to continue this matter to the 7th of November.
PRANTE: Second.
VOTE: UNANIMOUS APPROVAL.

At this time the Board took a five-minute break.

Resolution 84-047, Declaring the Necessity to Acquire Property

Mr. Isham explained that this is required in accordance with Chapter 35 Eminent Domain for the LaPine Rec Road. This will provide a through access to the residential area to be served by that road. The property will be acquired through eminent domain, and an offer made to the owner. If the owner does not find the offer acceptable, he can arrange to meet with the Assessor to determine value. If an agreement is not then reached, then the process of acquiring through eminent domain will be utilized.

Chairman Tuttle read aloud the resolution.

MOTION: YOUNG moved to adopt.
PRANTE: Second.
VOTE: UNANIMOUS APPROVAL.

Orders 84-267 & 84-268, In the Matter of Refund of Taxes	MOTION: YOUNG moved the orders be accepted. PRANTE: Second. VOTE: UNANIMOUS APPROVAL
Requests for Refunds	Before the Board were requests for refunds for High Country Wood Stoves, $18.20; Wayne Coker, $14.56; and Spring River Electric, $20.80. The requests were approved.
Other Staff/ Public Concerns	Before the Board was a 401 Water Quality permit for GED Corporation for consideration. Chairman Tuttle explained that on May 10, 1984, the Board sent a letter to DEQ indicating that we understood there were some applications for Section 401 certificates for hydro projects on the Deschutes River. In that letter, it was asked that DEQ not act on them, but continue to cooperate with the County. After that time, GED applied to FERC for a license. Chairman Tuttle then read aloud a letter from GED relating to this. Since the deadline for response is October 15, Chairman Tuttle asked Legal Counsel to draft a letter in response to DEQ. This letter says County want DEQ to continue to coordinate with the hydro ordinance adopted 12/21/84 by Deschutes County. This requires that GED make application in accordance with the Comp Plan and the ordinance and procedures the County is proposing. In consideration of the intergovernmental agreement DEQ was exempted from the application and land use goals. DEQ has indirectly delegated the land use questions to the local level. MOTION: YOUNG moved that they sign and send the letter to DEQ. PRANTE: Second. VOTE: UNANIMOUS APPROVAL.
Closing on the Sheldon Arnett Deed	Mr. Isham explained that this is for the Pilot Butte Nursing Home property on Highway 20. This used to be the County poor farm. The deed was not ready for signature at this meeting because this is not a simple transaction. It was purchased in 1979 under a land sales contract. There have been two sales releases from the contract. The closing is not scheduled to occur until next Monday. A pay-off figure was given for closing on Monday's date. MOTION: PRANTE moved to sign that deed subject to the payoff of the land sales contract and back taxes which are due and owing on the property. YOUNG: Second. VOTE: UNANIMOUS APPROVAL.

Acceptance of Deed for Knott Road	Dave Hoerning, County Engineer, explained that this is a correction deed to create the proper intersection. MOTION: YOUNG moved to accept the deed subject to Legal Counsel's review. PRANTE: Second. VOTE: UNANIMOUS APPROVAL.
Signature of Contracts for Pickups and Sedans	It was noted that this bid was awarded at the last meeting in the amount of $68,500. MOTION: YOUNG moved to sign the contracts for the purchase of sedans and pickups, the purchase was approved last week. PRANTE: Second. VOTE: UNANIMOUS APPROVAL.
Ordinance 84-032, Removing CH Zoning from Certain Property	It was noted that this was the subject of a zone change application. The property was under a conventional housing overlay zone. They want to allow a mobile home on this property. They received approval from the Hearings Officer and no appeal was filed. The ordinance contains an emergency clause. MOTION: YOUNG moved the first and second reading be by title only. PRANTE: Second. VOTE: UNANIMOUS APPROVAL. Chairman Tuttle so read. MOTION: PRANTE moved to adopt Ordinance 84-032. YOUNG: Second. VOTE: UNANIMOUS APPROVAL. It was noted that there was no public hearing because the hearing was conducted by the Hearings Officer.
Presentation of Building Remodeling plans for Greenwood Bldg.	Michael Maier, Director of Administrative Services, and Marshal Ricker, Architect, were present for this. Mr. Ricker explained that the plan before them represents all the departmental meetings and is an updated version resulting from many drafts. He went through the plan, noting that the entrance would be changed to the east side of the building facing the parking lot. It appears that construction will begin about December 1. An extended cost of $200,000 also reflects the roof system cost. MOTION: YOUNG moved to approve the plan as presented and to direct Mike Maier, Rick Isham and Marshal Ricker to begin preparing contract documents. PRANTE: Second. VOTE: UNANIMOUS APPROVAL.

Being no further business, the meeting was adjourned.

DESCHUTES COUNTY BOARD OF COMMISSIONERS

Albert A. Young, Chairman

Laurence A. Tuttle, Acting Chairman

Lois Bristow Prante, Commissioner

/ss

*[357 US 320]

***CITY OF TACOMA, Petitioner,**

v

TAXPAYERS OF TACOMA and Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and the State of Washington

357 US 320, 2 L ed 2d 1345, 78 S Ct 1209

[No. 509]

Argued April 30, 1958. Decided June 23, 1958.

SUMMARY

The State of Washington, in proceedings which the City of Tacoma nstituted in the Superior Court, Pierce County, Washington, for the purpose of validating an issue of bonds to finance the city's construction of a water power project pursuant to a license issued by the Federal Power Commission, successfully contended that the city was acting illegally, since the proposed project would interfere with public navigation contrary to Washington statutory provisions. On appeal, the Supreme Court of Washington affirmed the judgment enjoining the city from proceeding to construct the project, not on the ground stated by the trial court, but on the ground that construction of the project involved condemnation by the city of a state-owned fish hatchery, and the city lacked capacity to effect the condemnation (49 Wash2d 781, 307 P2d 567). It appeared that the state, in proceedings before the Federal Power Commission which preceded the issuance of the license to the city, had raised, or had had an opportunity to raise, its contention as to the city's lack of capacity, and had argued, or had had an opportunity to argue, the same issue before the Court of Appeals for the Ninth Circuit, which had affirmed the Commission's order granting the license, and whose affirmance the United States Supreme Court refused to review on certiorari.

On certiorari, the United States Supreme Court reversed the judgment of the state court below. WHITTAKER, J., speaking for eight members of the Court, held that the provision of the Federal Power Act vesting in the Courts of Appeals exclusive jurisdiction to review Commission orders barred the state from asserting in the city's bond validation proceeding the issue of municipal capacity which was litigated, or capable of being litigated, in the proceedings resulting in issuance of the license to the city and affirmance of the Commission's action in this regard.

HARLAN, J., concurring, emphasized that he did not understand the majority opinion to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide controlling issues of state law if such law were deemed controlling, or that, had the Court of Appeals undertaken to do so, such a determination would have foreclosed the examination of such a decision in other proceedings.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Appeal and Error § 1216 — dismissal — moot case — water power project — inability to complete.

1. The United States Supreme Court, having granted certiorari to review a state court judgment holding that a city within the state lacks power to construct a water power project in accordance with a license issued by the Federal Power Commission, will not dismiss the writ, on the ground that the case is moot since it is evident, at the time of Supreme Court review, that the project cannot be completed prior to the completion date stated in the license, where, under § 13 of the Federal Power Act (16 USC § 806), the Federal Power Commission is authorized to extend the period for completion of construction when not incompatible with the public interest, and an application by the city is pending before the Commission for an extension of completion time based upon delays entailed by state opposition to the project.

Waters §§ 12, 20 — navigable waters — federal power.

2. The federal government, under the commerce clause of the Constitution, has dominion, to the exclusion of the states, over navigable waters of the United States, and Congress has elected to exercise this power, under the detailed and comprehensive plan for the development of the nation's water sources which is prescribed in the Federal Power Act, to be administered by the Federal Power Commission.

Administrative Law § 203; Courts §§ 530, 537.5 — power of Congress.

3. Congress, acting within its constitutional limits, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had.

Administrative Law § 299; Public Service Commissions § 33 — Federal Power Commission — review.

4. Congress, in enacting § 313(b) of the Federal Power Act, prescribed a specific, complete, and exclusive mode for judicial review of orders of the Federal Power Commission, and thereby necessarily excluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.

Public Service Commissions §§ 34, 36 — Federal Power Commission — review.

5. Under the provisions of § 313(b) of the Federal Power Act, upon judicial review of an order of the Federal Power Commission, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, may be made only to the Court of Appeals, which has exclusive jurisdiction to affirm, modify, or set aside the Commission's order in whole or in part.

Judgment § 121 — conclusiveness — power project — opposition by state.

6. A state which opposes the grant by the Federal Power Commission of a license to construct a power project may not, following affirmance by a Federal Court of Appeals of a Commission order granting the license, assert that an issue relating to the propriety of the grant was not decided by the judgment of the Court of Appeals, where the state has not raised the issue in that court.

Judgment § 121 — conclusiveness — power project — opposition by state — affirmance of Commission's order.

7. Under the provisions of § 313(b) of the Federal Power Act, by which exclusive jurisdiction to review orders of the Federal Power Commission is vested in the Federal Courts of Appeals, a state, its Directors of Fisheries and of Game, and its citizens, are barred from asserting, in a suit instituted in the state courts by a city of the state, seeking validation of a bond issue to finance the city's con-

struction of a water power project pursuant to a license issued by the Federal Power Commission, that the city lacked capacity to act under the license because to do so would require it to condemn a state-owned hatchery, where the Federal Power Commission issued the license to the city, and a Federal Court of Appeals affirmed the Commission's order, following proceedings in which the state made, or could have made, the same assertion regarding the city's lack of capacity, and the United States Supreme Court refused to grant certiorari to review the Court of Appeals' affirmance; the statement of the Court of Appeals, in affirming the Commission order, that it did not reach the question of the legal capacity of the city to initiate an act under the license, since there might be limitations in the city charter, "for instance, as to indebtedness limitations," and questions of this nature might be inquired into by the Commission as relevant to the practicability of the plan, but the Commission had no power to adjudicate them, furnishes no indication that the Court of Appeals did not decide the question of legal capacity of the city to act under the license, where it appears clearly that the language of the Court of Appeals had no reference to the right of the city to receive and perform, as licensee of the federal government, under the Federal Power Act, the federal rights determined by the Commission and delegated to the city as specified in the license.

APPEARANCES OF COUNSEL

Northcutt Ely, of Washington, D. C., argued the cause for petitioner.

Oscar H. Davis, of Washington, D. C., argued the cause for the United States and Federal Power Commission, as amicus curiae, by leave of Court.

John S. Lynch, Jr., and **E. P. Donnelly**, both of Olympia, Washington, argued the cause for respondents.

Briefs of Counsel, p. 2128, infra.

OPINION OF THE COURT

Mr. Justice **Whittaker** delivered the opinion of the Court.

This is the latest episode in litigation beginning in 1948 which has been waged in five tribunals and has produced more than 125 printed pages of administrative and judicial opinions. It concerns the plan of the City of Tacoma, a municipal corporation in the State of Washington, to construct a power project on the Cowlitz River, a navigable water of the United States, in accordance

*[357 US 323]

with a *license issued by the Federal Power Commission under the Federal Power Act.[1] The question presented for decision here is whether under the facts of this case the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly § 21 thereof.[2] The project cannot be built without taking the hatchery because it necessarily must be inundated by a reservoir that will be created by one of the project's dams.

The question has arisen under the following circumstances and proceedings. Having earlier filed its declaration of intention to construct the project,[3] the City of Tacoma, a

1. 41 Stat 1063 et seq., 16 USC §§ 791a et seq.

2. 41 Stat 1074, 16 USC § 814.

3. On August 6, 1948, the City filed with the Commission its declaration of intention to build this power project. On March 18, 1949, the Commission ruled that the Cowlitz River was navigable below the pro-

"municipality"[4] in the State of Washington, on December 28, 1948, *[357 US 324] filed with the Commission, under *§ 4 (e) of the Federal Power Act,[5] an application[6] for a federal license to construct a power project, including two dams (known as Mossyrock and Mayfield) and appurtenant facilities, on the Cowlitz River.[7]

The Mossyrock development was proposed to be located at Mile 65 and to consist of a concrete dam across the Cowlitz rising 510 feet above bedrock (creating a reservoir covering about 10,000 acres extending 21 miles upstream) and an integral powerhouse containing, initially, three generators each of 75,000-kilowatt capacity and provisions for a fourth generator of like capacity.

*[357 US 325]

*The Mayfield development was proposed to be located at Mile 52 and to consist of a concrete dam across the Cowlitz rising 240 feet above bedrock (creating a reservoir covering about 2,200 acres extending 13.5 miles upstream to the tailwaters of the Mossyrock Dam, which would inundate the State's fish hatchery) and an integral powerhouse containing, initially, three generators each of 40,000-kilowatt capacity and provisions for a fourth generator of like capacity. The project—estimated to cost $146,000,000, including $9.465,-000 for devices to enable anadromous fish to pass to spawning grounds upstream and their young to pass to the sea, and for new fish hatcheries—would thus have initial capacity

posed project and that its construction would affect navigation and interstate commerce and, hence, could not be built without a license from the Commission, because of the provisions of § 23 of the Federal Power Act. 41 Stat 1075, 16 USC § 816.

4. "'Municipality' [as used in the Federal Power Act] means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." § 3 (7), 41 Stat 1063, 16 USC § 796(7).

By a Washington statute all cities and towns of that State are made legally competent to "construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes . . . ." RCW 80.40.050. Tacoma has exercised such powers since 1893.

5. 41 Stat 1065, 16 USC § 797(e). That subsection, so far as presently pertinent, provides:

"The Commission is authorized and empowered—

. . . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, 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 across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States . . . ."

6. The application was accompanied by the maps, plans, specifications and estimates of cost covering the proposed project, as required by § 9(a) of the Act. 41 Stat 1068, 16 USC § 802(a). Those maps, plans and specifications made clear that the State's hatchery would be inundated by the proposed Mayfield Reservoir.

7. The Cowlitz River is a tributary of the Columbia in southwestern Washington. It drains an area of 2,490 square miles of the western slope of the Cascade Range, and flows westerly for about 100 miles and thence southerly for 30 miles to its confluence with the Columbia at Longview which is about 65 miles above the mouth of the Columbia. It is conceded to be navigable at all points below the projected Mayfield Dam and, at the point of confluence with the Columbia, is a tidal river with an average flow of about 10,000 cubic feet per second.

produce 345,000 kilowatts or 4,000 horsepower, and eventually 0,000 kilowatts or 632,000 horsepower, of electrical energy.

The Commission ordered a public aring to determine whether the ense should issue, and gave notice the hearing to the Governor of e State of Washington. In reonse, the Attorney General of the ate filed an intervening petition, the names of the State's Directors Fisheries and of Game, alleging ubstance that the State's Departnts of Fisheries and of Game are divisions of the sovereign State, that the respective Directors charged with the duty of enring its laws concerning the convation of fish and game; that the s and fish-handling facilities posed by the City would destroy ry resources of the State; that struction of proposed dams ld violate RCW 90.28.060, rering the State's permission to struct any dam for the storage 0 acre-feet or more of water, and W 75.20.010, prohibiting the conction of any dam higher than eet across any river tributary to Columbia, downstream from the McNary Dam, within the migratory range of anadromous fish; and "[t]hat the reservoirs which would

*[357 US 326]

be created by the proposed *dams would inundate a valuable and irreplaceable fish hatchery owned by the State of Washington, as well as . . . productive spawning areas." The City's answer admitted that the State's fish hatchery would be inundated by the Mayfield Reservoir. The State's Attorney General also appointed a Special Assistant Attorney General to represent all persons of the State whose views were in conflict with the State's official position.

Upon the issues thus framed a hearing, consuming 24 days, was conducted by a Commission examiner, throughout which the Attorney General of the State, by his designated assistant, actively participated in opposition to the application, and the Special Assistant Attorney General, appointed for the purpose stated, also participated in the proceedings before the Commission. Thereafter the Commission, on November 28, 1951, rendered its opinion,[8] findings,[9] and order grant-

The Commission's opinion discussed at th the State's basic contention that the should be left in its natural state for nobstructed use and propagation of romous fish and, upon that contention, uded:

he question posed does not appear to be between all power and no fish but r between large power benefits ed particularly for defense purposes, tant flood control benefits and navi n benefits, with incidental recreation ntangible benefits, balanced against fish losses, or a retention of the a in its present natural condition unh time in the fairly near future when mic pressures will force its full utin. With proper testing and experition by the city of Tacoma, in cotion with interested state and Fedgencies, a fishery protective program e evolved which will prevent undue f fishery values in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order." 92 PUR NS 79, 85.

9. In its order granting the license the Commission made 66 findings in which, among other things, it found that the Cowlitz is a navigable water of the United States below the site of the proposed project and that the dams and reservoirs will affect the interests of interstate or foreign commerce (see §§ 4(e) and 23 of the Act, 41 Stat 1065, 16 USC § 797(e) and 41 Stat 1075, 16 USC § 816); that a critical shortage of electric power exists on the west side of the Cascade Range; that the project "will be an exceptionally valuable addition to the Northwest Region power supply"; that "none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project"; that the project has

*[357 US 327]
ing the license.[10] Matter of *Tacoma, Washington, 92 PUR (NS) 79. The State petitioned for a rehearing which was denied.

Pursuant to § 313 of the Act, 16 USC § 825l, the State, in its proper name and also on behalf of its Direc-
*[357 US 328]
tors *of Fisheries and of Game, petitioned for review of the Commission's order by the Court of Appeals for the Ninth Circuit. The City intervened. The State there challenged the Commission's authority to issue the license principally upon the grounds that the City had not complied with applicable state laws nor obtained state permits and approvals required by state statutes;[11] that "Tacoma, as a creature of the State of Washington, *cannot act* in opposition to the policy of the State or in derogation of its laws" (emphasis added); and that the evidence was not sufficient to sustain the Commission's findings and order. The Court of Appeals, holding that "state laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States" and that there was ample evidence to sustain the Commission's findings and its order, affirmed. State of Washington Dept. of Game v Federal Power Com. (CA9) 207 F2d 391, 396. (Emphasis added.) The State then petitioned this Court for a writ of certiorari which was denied. 347 US 936, 98 L ed 1087, 74 S Ct 626.

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been approved by the Chief of Engineers and the Secretary of the Army (see § 4(e), 41 Stat 1065, 16 USC § 797(e)); that the project is financially and economically feasible; that "*the applicant . . . has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for the project* [see § 9(b), 41 Stat 1068, 16 USC § 802(b)] and is a municipality within the meaning of § 3(7) of the Act"; and that "[u]nder present circumstances and conditions and upon the terms and conditions hereinafter included in the license, *the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.*" See § 10(a), 41 Stat 1068, 16 USC § 803(a). (Emphasis added.)

10. The license was issued on November 28, 1951, for a period of 50 years from January 1, 1952—the first day of the month in which the City filed with the Commission its ordinance, No. 14386, enacted on January 9, 1952, formally accepting the license and all its requirements and conditions. See § 6, 41 Stat 1067, 16 USC § 799. The license, among other things, incorporated the City's maps, plans, specifications, and estimates of cost for the construction of the project (see § 9(a), 41 Stat 1068, 16 USC § 802(a)); incorporated by reference all provisions of the Federal Power Act (see § 6, 41 Stat 1067, 16 USC § 799); required construction of the project to be commenced within two years from the effective date of the license and to be completed within 36 months (see § 13, 41 Stat 1071, 16 USC § 806); required the City to construct, maintain and operate such fish-handling facilities and fish hatcheries as may be prescribed by the Commission, but, before doing so, to make further studies, tests and experiments in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington to determine the effectiveness of such facilities, and to submit the plans therefor to the Commission and obtain its approval.

11. The Washington statutes relied upon were RCW 75.20.050, proscribing the diversion or use of water without a state permit; RCW 75.20.100, requiring the State's approval of plans for the protection of fish in connection with the construction of dams; and RCW 75.20.010, proscribing the construction of any dam higher than 25 feet across any stream tributary to the Columbia, downstream from the McNary Dam, within the migration range of anadromous fish.

*[357 US 329]

*While the petition for review was pending in the Ninth Circuit, the City, on February 3, 1952, commenced an action in the Superior Court of Pierce County, Washington, against the taxpayers of Tacoma and the State's Directors of Fisheries and of Game, seeking a judgment declaring valid a large issue of revenue bonds, authorized by the City's ordinance (No. 14386) of January 9, 1952, to be issued and sold by Tacoma to finance the construction of the Cowlitz project—a proceeding specifically authorized by RCW 7.25.010 through 7.25.040. As required by those statutes the court named representative taxpayers of Tacoma as class defendants and also appointed their counsel who demurred to the City's complaint. The State's Directors of Fisheries and of Game, acting through an Assistant Attorney General of the State, filed an answer and also a cross-complaint (reasserting substantially the same objections that they and the State had made before the Commission, and that had been made in, and rejected by, the Court of Appeals on their petition for review) to which the City demurred. The judge of the Superior Court sustained the Taxpayers' demurrer and dismissed the suit.[12] Tacoma appealed to the Supreme Court of Washington. That court, three justices dissenting, reversed the judgment and remanded the cause with instructions to overrule the Taxpayers' demurrer and to proceed further consistently with the court's opinion. Tacoma v Taxpayers of Tacoma, 43 Wash2d 468, 262 P2d 214.[13]

*[357 US 330]

*Following that opinion the City, on June 21, 1955, accepted bids for a block of its revenue bonds totaling $15,000,000, and on the next day it awarded contracts for construction of the Mayfield Dam aggregating $16,120,870. Two days later, June 24, 1955, the Directors "acting for and on behalf of the State" moved in the Superior Court for, and obtained, ex parte, an order enjoining the City, pending determination of the suit, from proceeding to construct the Cowlitz project or to sell any of its revenue bonds. That order was modified on June 30, 1955, to permit such construction work as would not in any manner interfere with the bed or waters of the Cowlitz River. Promptly thereafter the City began construction of the project, within the limits of the injunction, and had expended about $7,000,000 thereon to the time the work was

12. This order was entered by the Superior Court of Thurston County to which the cause had been transferred.

13. The court, in answering the contentions of the Taxpayers and the State's Directors of Fisheries and of Game that the State's statutes proscribing the diversion of water and the construction of dams (see note 11) "are a valid exercise of the [State's] police power" (id. 43 Wash2d at 483) and "must be complied with before [the City] can proceed with the construction of its project" (id. 43 Wash2d at 477), said: "[T]he State laws are in direct conflict with the Federal power act, they are invalid under the supremacy clause contained in Article VI of the United States Constitution, [and] [w]here, as here, the State and Federal acts cannot be reconciled, or consistently stand together, the action of a State even under its police power must give way." Id. 43 Wash2d at 483. And in answering the further contention that the City, "being a municipal corporation created by the State, may not defy the laws of its creator" (id. 43 Wash 2d at 491), the court said: "The Federal power act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. *Appellant has complied with the State law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act.*" Id 43 Wash2d at 492. (Emphasis added.)

completely enjoined as later stated.

On July 27, 1955, Tacoma amended its complaint merely to assert the intervening facts that the Commis-

*[357 US 331]

sion, *upon application of the City which was opposed by the State, had, on the basis of delays entailed by this litigation, entered an order on February 24, 1954, amending Articles 28 and 33 of the City's license by extending the time for commencing and for completing the project to December 31, 1955, and December 31, 1958, respectively, and that the City had amended its pertinent ordinance (No. 14386) accordingly and in other minor respects. On August 8, 1955, on motion made by the State's Attorney General (in the names of the Directors of Fisheries and of Game), the State, "in its sovereign capacity," was formally made a defendant in the action. The State and those Directors answered, and also filed a cross-complaint again reviving the objections previously made by the Directors in their earlier cross-complaint and alleging further that the project would interfere with navigation of the Cowlitz River in violation of RCW 80.40.010. Upon pretrial conference the Superior Court found that the navigation issue was the only one open and ordered that the evidence at the trial be limited to that issue. On January 11, 1956, the case was tried and the testimony taken was limited solely to the navigation issue. On March 6, 1956, the court, holding that the State's statutes proscribing the construction of dams (note 11) are "inapplicable," but that the City "is acting illegally and in excess of its authority in the construction of the . . . project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of RCW 80.40.010 et seq.," entered judgment in favor of the Taxpayers and the State, and enjoined the City from proceeding to construct the project.

Tacoma appealed, and the Taxpayers, the State and its Directors cross-appealed, to the Supreme

*[357 US 332]

Court of Washington. *On February 7, 1957, that court,[14] three justices dissenting, affirmed. Tacoma v Taxpayers of Tacoma, 49 Wash2d 781, 307 P2d 567. It agreed that the Washington statutes proscribing the construction of dams (note 11) were "inapplicable . . . insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of [the City's] license for said project, or insofar as they would enable State officials to exercise a veto power over said project" (id. 49 Wash2d at 801), but it disapproved the action of the trial court in sustaining the State's objection that the project would interfere with navigation in violation of RCW 80.40.010. However, upon the declared premise that though the trial court's judgment was based upon an erroneous ground it would sustain it if correct on any ground within the pleadings and established by proof, it held that, though the State Legislature has given the City the right to construct and operate facilities for the production and distribution of electric power and a general power of condemnation for those purposes, "the Legislature has [not] expressly authorized a municipal corporation to condemn State-owned lands previously dedicated to a public use [and] that the City of

14. The Supreme Court of Washington was then somewhat differently constituted than when it rendered its decision on October 14, 1953, reversing the Superior Court's judgment sustaining the Taxpayers' demurrer to the City's complaint. Tacoma v Taxpayers of Tacoma, 43 Wash2d 468, 262 P2d 214.

Tacoma has not been endowed with [State] statutory capacity to condemn [the State's fish hatchery]"; that "the City of Tacoma [may not] receive the power and capacity to condemn [the State's fish hatchery] previously dedicated to a public use, from the license issued to it by the Federal Power Commission in the absence of such power and capacity *under State statutes*" (emphasis *[357 US 333] *added); and that the City's "*inability so to act can be remedied only by State legislation that expands its capacity.*" (Emphasis in original.) Id., at 798, 799. This, it said, "is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this State *to act under such license* when its exercise requires the condemnation of State-owned property dedicated to a public use." Id. 49 Wash2d at 798. (Emphasis added.) We granted certiorari. 355 US 888, 2 L ed 2d 188, 78 S Ct 262.

At the outset respondents ask dismissal of our writ on the ground that the case is moot. They argue that it is evident the Cowlitz project cannot be completed by December 31, 1958, which is the date now stated in the license for its completion. There is no merit in this contention because § 13 of the Federal Power Act, 41 Stat 1071, 16 USC § 806, expressly provides that "the period for the completion of construction carried on in good faith with reasonable diligence may be extended by the Commission when not incompatible with the public interests," and an application by the City is now pending before the Commission for an extension of completion time based upon delays entailed by these proceedings.

Headnote 1

We come now to the core of the controversy between the parties, namely, whether the license issued by the Commission under the Federal Power Act to the City of Tacoma gave it capacity to act under that federal license in constructing the project and delegated to it federal eminent domain power to take, upon the payment of just compensation, the State's fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority.

*[357 US 334]

*At the threshold of this controversy petitioner, the City, asserts that, under the express terms of § 313(b) of the Act, 16 USC § 825l (b), this question has been finally determined by the decision of the Court of Appeals (207 F2d 391) and this Court's denial of certiorari (347 US 936, 98 L ed 1087, 74 S Ct 626); and that respondents' cross-complaints, and proceedings thereon, in the subsequent bond validation suit in the Washington courts have been only impermissible collateral attacks upon the final judgment of the Court of Appeals. If this assertion is correct, the judgment of the Supreme Court of Washington now before us would necessarily have to be reversed, for obviously that court, like this one, may not, in such a case, re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties. We must turn then to an examination of petitioner's contention.

It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution (Art 1, § 8, cl 3) has dominion, to the exclusion of the States, over navigable waters of the United

Headnote 2

States. Gibbons v Ogden (US) 9 Wheat 1, 196, 6 L ed 23, 70; New Jersey v Sargent, 269 US 328, 337, 70 L ed 289, 293, 46 S Ct 122; United States v Appalachian Electric Power Co. 311 US 377, 424, 85 L ed 243, 261, 61 S Ct 291; First Iowa Hydro-Electric Co-op. v Federal Power Com. 328 US 152, 173, 90 L ed 1143, 1154, 66 S Ct 906; United States v Twin City Power Co. 350 US 222, 224, 225, 100 L ed 240, 245, 76 S Ct 259. Congress has elected to exercise this power under the detailed and comprehensive plan[15] for development of the Nation's water resources, which it prescribed in the Federal Power Act, to be administered by the Federal Power Commission. First Iowa Hydro-Electric Co-op. v Federal Power Com. (US) and United States v Appalachian Electric Power Co. (US) both supra.

*[357 US 335]

*Section 313(b) of that Act, upon which petitioner's claim of finality depends, provides, in pertinent part:

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located . . . by filing in such court, within 60 days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court *shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.* No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive . . . . *The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.*" (Emphasis added.)

This statute is written in simple words of plain meaning and leaves no room to doubt the congressional

*[357 US 336]

purpose *and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. Cf. NLRB v Cheney California Lumber Co. 327 US 385, 388, 90 L ed 739, 741, 66 S Ct 553. So acting, Congress in § 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. Safe Harbor Water Power Corp. v Federal Power Com. (CA3 Pa) 124 F2d 800, 804, cert den 316 US 663, 86 L ed 1740, 62 S Ct 943. It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which "shall have exclusive jurisdic-

Headnote 3

Headnote 4

15. For a summary of the detailed and comprehensive plan of the Act see First Iowa Case, supra (328 US at 181, note 25).

tion to affirm, modify, or set aside such order in whole or in part," and that "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification . . . ." (Emphasis added.) It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.[16] Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have "exclusive jurisdiction" to review such orders, and that its judgment "shall be final," subject to review by this Court upon certiorari or certification. Such statutory finality need

Headnote 5

*[357 US 337]

not be labeled res *judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.

The State participated in the hearing before the Commission. It there vigorously objected to the issuance of the license upon the grounds, among others, "[t]hat the reservoirs which would be created by the proposed dam would inundate a valuable and irreplaceable fish hatchery owned by the State" and, hence, necessarily require the taking of it by the City under the license sought; that the City had not complied with the applicable laws of the State respecting construction of the project and performance of the acts necessarily incident thereto (note 11); and that the City was not authorized by the laws of the State to engage in such business. The Commission rejected these contentions of the State and made all the findings required by the Act to support its order granting the license (note 9) including the finding that:

"The applicant . . . has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project[17] and is a municipality within the meaning of § 3 (7) of the Act."[18]

*[357 US 338]

*The State then petitioned the Commission for a rehearing, reviving the foregoing contentions and raising others. The petition was denied.

Thereafter, the State, following the procedures prescribed by § 313 (b), petitioned the proper Court of Appeals for review of the Commission's findings and order. After full hearing, that court rejected all contentions there raised by the State, did not disturb any of the Commis-

16. Cf., e. g., Myers v Bethlehem Shipbuilding Corp. 303 US 41, 48–50, 82 L ed 638, 642, 643, 58 S Ct 459; United States v Corrick, 298 US 435, 80 L ed 1263, 56 S Ct 829; Washington Terminal Co. v Boswell, 75 App DC 1, 124 F2d 235.

17. See § 9(b) of the Act, 41 Stat 1068, 16 USC § 802(b).

18. Under § 3(7) of the Act "municipality" means, among other things, a city "competent under the laws [of the State] to carry on the business of developing, transmitting, utilizing, or distributing power." It is no longer disputed that Tacoma is expressly authorized by RCW 80.40.050 to carry on such business, and that it has done so for many years. In fact the State's brief in this Court goes much further, saying that "[i]mplicit in the State Court's ruling is that petitioner in this Court, if licensed, could build a dam on a plan which would not necessitate the destruction of the State's fish hatchery," and that "Tacoma . . . has the right to build the dam in such a way that the fish hatchery will not be damaged."

sion's findings, and affirmed its order without modification. State of Washington Dept. of Game v Federal Power Com. (CA9) 207 F2d 391. It made particular mention of, and approved, the Commission's finding, as rephrased by the court, that the City had submitted "such evidence of compliance with State law as, in the Commission's judgment, would be 'appropriate to effect the purposes of a Federal license on the navigable waters of the United States.'" Id. 207 F2d at 396.

Moreover, in its briefs in the Court of Appeals, the State urged reversal of the Commission's order on the grounds the City "has not shown, nor could it show, that [it] has availed itself of . . . *any right to take or destroy property of the State* of Washington [and that] Tacoma, as a creature of the State of Washington, *cannot act* [under the license] in opposition to the policy of the State or in derogation of its laws." (Emphasis added.) In rejecting these contentions—that the City does not have "any right to take or destroy property of the State" and "cannot act" in accordance with the terms of its federal license—the Court of Appeals said:

"Again, we turn to the First Iowa case, supra. There, too, the applicant for a Federal license was a creature of the State and the chief opposition came from the State itself. Yet, the Supreme Court permitted the applicant to act incon-

*[357 US 339]

sistently with *the declared policy of its creator and to prevail in obtaining a license.

"Consistent with the First Iowa case, supra, we conclude that the State laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States." Id. 207 F2d at 396. (Emphasis added.)

We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had "exclusive jurisdiction" of the proceeding and whose judgment therein as declared by Congress "shall be final," subject to review by this Court upon certiorari or certification. After the Court of Appeals' judgment was rendered, the State petitioned this Court for a writ of certiorari which was denied. 347 US 936, 98 L ed 1087, 74 S Ct 626.

Headnote 6

These were precisely the proceedings prescribed by Congress in § 313 (b) of the Act for judicial review of the Commission's findings and order. They resulted in affirmance. That result, Congress has declared, "shall be final."

But respondents say that the Court of Appeals did not decide the question of legal capacity of the

*[357 US 340]

City to act *under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:

"However, we do not touch the question as to the legal capacity of

the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." Id. 207 F2d at 396, 397.

We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible "indebtedness limitations" in the City's Charter and "questions of this nature," not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license. That this was the meaning of the court, if its meaning might otherwise be doubtful, is made certain by the facts that the court did not disturb a single one of the Commission's findings; affirmed its order without modification; and said, in the sentence immediately preceding the questioned language: "Consistent with the First Iowa case, supra, we conclude that the State laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States." Id. 207 F2d at 396. (Emphasis added.)

The final judgment of the Court of Appeals was effective not only against the State, but also against its citizens, including the taxpayers

*[357 US 341]

of Tacoma, for they, in their *common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment. Wyoming v Colorado, 286 US 494, 506–509, 76 L ed 1245, 1250–1252, 52 S Ct 621; cf. Missouri v Illinois, 180 US 208, 241, 45 L ed 497, 512, 21 S Ct 331; Kansas v Colorado, 185 US 125, 142, 46 L ed 838, 844, 22 S Ct 552; s. c. 206 US 46, 49, 51 L ed 956, 958, 27 S Ct 655; Georgia v Tennessee Copper Co. 206 US 230, 237, 51 L ed 1038, 1044, 27 S Ct 618, 11 Ann Cas 488; Hudson County Water Co. v McCarter, 209 US 349, 355, 52 L ed 828, 831, 28 S Ct 529, 14 Ann Cas 560; Pennsylvania v West Virginia, 262 US 553, 591, 595, 67 L ed 1117, 1129, 1131, 43 S Ct 658, 32 ALR 300; North Dakota v Minnesota, 263 US 365, 373, 68 L ed 342, 345, 44 S Ct 138.

Headnote 7

We conclude that the judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under § 313(b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma; and that the objections and claims to the contrary asserted in the cross-complaints of the State, its Directors of Fisheries and of Game, and the Taxpayers of Tacoma, in this bond validation suit, were impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals. Therefore, the judgment of the Supreme Court of Washington is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SEPARATE OPINION

Mr. Justice **Harlan**, concurring.

I join the Court's opinion, but deem it appropriate to state my understanding of what the Court has held. The Court of Appeals in the earlier proceeding had jurisdiction to determine whether state or federal law governed Tacoma's power to condemn the State's hatchery, and that issue itself was a federal question. Section 313(b) of the Federal Power Act therefore fore-

*[357 US 342]

closed relitigation *of this issue in the present case. I do not understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide any issues of state law if such law were deemed controlling, or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed re-examination of such a decision in other proceedings.

for commerce, merely because it contributes to economy or continuity, rather than to volume, of production. Armour & Co. v. Wantock, supra.[10]

10. The court in the Armour Case, supra, held that employees putting in stand-by time in the employer's auxiliary fire-fighting service are engaged in an occupation "necessary to the production of goods for commerce" within the meaning of the Fair Labor Standards Act, notwithstanding proof that other employers engaged in the same line of business are able to produce their goods without the necessity of such a fire-fighting service. It was pointed out that the employment of the fire-fighting personnel not only helped to safeguard the continuity of production against interruption by fire, but served a fiscal purpose, in that it enabled the employer to obtain insurance which otherwise would not have been available to him unless he had employed extra watchmen.

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*[435]

*FEDERAL POWER COMMISSION, Petitioner,

v.

STATE OF OREGON, Fish Commission of Oregon, Oregon State Game Commission

(349 US 435, 99 L ed 1215, 75 S Ct 832)

SUMMARY OF DECISION

The Federal Power Commission granted, over the objection of the state of Oregon, a license for a power project to use nonnavigable waters located on a federal reservation in that state. The Court of Appeals set aside the Commission's order on the ground that Congress, by its public lands legislation, had transferred to the state such control over the use of nonnavigable waters that it was necessary for the license applicant in the instant case to secure state permission.

BURTON, J., speaking for seven members of the Supreme Court, reversed the court below, taking the view that federal public lands legislation was inapplicable to reserved lands of the kind involved in the instant case, and that the Commission's grant of the license was within the power and discretion vested in it by the Federal Power Act.

DOUGLAS, J., dissented, stating his opinion that existing federal legislation bars the United States from granting water-power project rights in relation to nonnavigable waters within a state without obtaining water rights in accordance with state law.

HARLAN, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Public Service Commissions § 26 — powers — navigable waters.

1. The Federal Power Commission's authority to issue water-power project licenses in relation to navigable waters of the United States springs from the commerce clause of the Constitution.

Public Service Commissions § 26 — powers — nonnavigable waters.

2. The authority of the Federal Power Commission to issue water-power project licenses in relation to nonnavigable waters upon public lands and reservations of the United States springs from the provision.

in Article IV § 3 of the Federal Constitution, that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Public Service Commissions § 26 — powers — nonnavigable waters — licenses.

3. It is within the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a water-power project to use nonnavigable waters on reserved lands of the United States located within a state, provided that, as required by the Federal Power Act, the use of the water does not conflict with the vested rights of others.

State § 28 — public lands — water-power licenses.

4. To allow a state in which reserved lands of the United States are located to veto a grant by the Federal Power Commission of a license for a water-power project using nonnavigable waters on such lands would result in a duplication of authority not called for by the Federal Power Act.

Public Service Commissions § 26; States § 28 — powers — nonnavigable waters — power project.

5. The authorization of a water-power project using nonnavigable waters upon reserved lands of the United States located within a state is within the exclusive jurisdiction of the Federal Power Commission except to the extent that the Commission's jurisdiction is modified by other federal legislation.

Waters § 73 — appropriation — public lands.

6. The Acts of July 26, 1866 (14 Stat 253), and July 9, 1870 (16 Stat 218), which provide, respectively, for protection of vested rights to the use of waters on public lands, and that all patents granted, or pre-emptions or homesteads allowed, shall be subject to such vested water rights, were designed to reflect governmental recognition and sanction of possessory rights on public lands asserted under local laws and customs.

Waters § 73 — appropriation — Desert Land Act.

7. The Desert Land Act (43 USC § 321) operated to sever, for purposes of private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the state of location.

States § 28; Waters § 73 — public lands — water rights — power of Commission.

8. The Acts of July 26, 1866 (14 Stat 253), and July 9, 1870 (16 Stat 218), and the Desert Land Act (43 USC § 321), each of which is concerned with private water rights in the public lands of the United States, are inapplicable to waters upon reserved lands of the United States, since statutes providing generally for disposal of the public domain are inapplicable to lands not unqualifiedly subject to sale and disposition because they have been appropriated for some other purpose, and reserved lands of the United States are not unqualifiedly subject to sale and disposition; hence the authority of the Federal Power Commission to grant a license for a water-power project using nonnavigable waters on a federal reservation within a state is unaffected by the water rights which the state has been granted by these statutes.

Courts § 120 — relation to legislature — water power — public lands.

9. The argument that the Federal Power Commission's grant of a license for a power project to use waters on reserved lands of the United States located within a state will preclude the carrying out of proposed plans for enlarging the fish population of the waters involved is properly directed to the Commission itself or to Congress, and is not a matter to be considered by the Supreme Court in that Court's determination of the propriety of the issuance of the license upon the basis of existing legal rights.

Public Service Commissions § 26 — powers — abuse of discretion — water power — license.

10. No abuse of the discretion vested in the Federal Power Commission by the Federal Power Act is involved in the Commission's grant of a license for a power project to use water on reserved lands of the United States located within a state where (1) any objection that the project will interfere with the flow of water within the state is overcome by the Commission's provision for a reregulating dam to restore the flow, and (2) any deleterious effect the project might have upon fish using the waters involved as a spawning ground is obviated by the agreement of the license applicant to provide facilities for conserving the runs of such fish in accordance with plans approved by the Commission, and to contribute to the cost of maintenance of such fish conservation facilities.

Point from Separate Opinion

Water § 20 — control over water power.
11. The authority of the United States in water power on a navigable stream is complete without reference to state law. [From separate opinion by Douglas, J.]

[No. 367.]

Argued March 2 and 3, 1955. Decided June 6, 1955.

ON WRIT of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, setting aside an order of the Federal Power Commission granting a license for a power project to use waters on lands constituting reservations of the United States located in Oregon. Reversed.

See same case below, 211 F2d 347, setting aside 10 FPC 445, 92 PUR NS 247.

Willard W. Gatchell, of Washington, D. C., argued the cause, and, with Solicitor General Sobeloff, Assistant Attorney General J. Lee Rankin, Special Assistants to the Attorney General Oscar H. Davis and William H. Veeder, and John C. Mason and Louis C. Kaplan, also of Washington, D. C., filed a brief for petitioner:

The Desert and Arid Land Act of 1877 and related acts pertain only to public lands, not to reserved lands of the United States such as are here involved.

Reserved lands are not public lands. United States v. Minnesota, 270 US 181, 70 L ed 539, 46 S Ct 298; Leavenworth, L. & G. R. Co. v. United States, 92 US 733, 23 L ed 634; Cameron v. United States, 148 US 301, 37 L ed 459, 13 S Ct 595; United States v. O'Donnell, 303 US 501, 82 L ed 980, 58 S Ct 708. See also United States v. McIntire (CA9th Mont) 101 F2d 650; Winters v. United States (CA9th Mont) 143 F 740, affd 207 US 564, 52 L ed 340, 28 S Ct 207.

The Desert and Arid Land Act (and related legislation) applies only to public lands.

The terms of the 1877 Act show on their face that this is so.

In historical fact this has been the construction uniformly placed upon the legislation by this Court and the lower Federal courts (including the Ninth Circuit). See Winters v. United States (CA9th Mont) 143 F 740, affd 207 US 564, 52 L ed 340, 28 S Ct 207; United States v. McIntire (CA9th Mont) 101 F2d 650; United States v. Rio Grande Dam & Irrig. Co. 174 US 690, 43 L ed 1136, 19 S Ct 770; California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; United States v. Conrad Inv. Co. (CC Mont) 156 F 123; Minnesota v. Hitchcock, 185 US 378, 46 L ed 957, 22 S Ct 650.

The Pelton dam lands are reserved lands and not public lands. Therefore, they are not subject to the Desert Land (and earlier) Acts. See United States v. Minnesota, 270 US 181, 70 L ed 539, 46 S Ct 298; Winters v. United States (CA9th Mont) 143 F 740, affd 207 US 564, 52 L ed 340, 28 S Ct 207; United States v. McIntire (CA9th Mont) 101 F2d 650; United States v. Walker River Irrig. Dist. (CA9th Nev) 104 F2d 334; Shannon v. United States (CA9th Mont) 160 F 870. See also Anthony v. Veatch, 189 Or 462, 220 P 2d 493, 221 P2d 575.

The United States is the owner of the unused and unappropriated rights to the use of water for the generation of electricity at the point on the Deschutes River where the Pelton power dam and plant would be constructed.

Title to the rights to the use of unappropriated water in a nonnavigable stream on Federal land resides in the United States. See California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; Howell v. Johnson (CC Mont) 89 F 556; Hough v. Porter, 51 Or 318, 95 P 732, 98 P 1083, 102 P 728. Cf. Morgan v. Shaw, 47 Or 333, 83 P 534; Nevada Ditch Co. v. Bennett, 30 Or 59, 45 P 472, 60 Am St Rep 777. See also United States v. McIntire (CA9th Mont) 101 F2d 650; United States v. Walker River Irrig. Dist. (CA9th Nev) 104 F2d 334; Winters v. United States (CA9th Mont) 143 F 740, affd 207 US 564, 52 L ed 340, 28 S Ct 207; Conrad Inv. Co. v. United States (CA9th

Mont) 161 F 829; Bean v. Morris (CA 9th Mont) 159 F 651, affd 221 US 485, 55 L ed 821, 31 S Ct 703; Anderson v. Bassman (CC Cal) 140 F 14; Brown v. Baker, 39 Or 66, 65 P 799, 66 P 193; Williams v. Altnow, 51 Or 275, 95 P 200, 97 P 539; 1 Kinney, Irrigation & Water Rights 2d ed § 411, pp 692, 693; Winters v. United States, 207 US 564, 52 L ed 340, 28 S Ct 207.

The unappropriated right to use the waters of the Deschutes River to generate electricity is a real property right. Cf. United States v. Chandler-Dunbar Water Power Co. 229 US 53, 57 L ed 1063, 33 S Ct 667; Ashwander v. Tennessee Valley Authority, 297 US 288, 80 L ed 688, 56 S Ct 466. See also 1 Wiel, Water Rights in the Western States 3d ed §§ 18, 283, 285, pp 20, 21, 298–301; 2 Kinney, Irrigation & Water Rights 2d ed § 638, p 1118; 19 Rocky Mountain L Rev 63; Davis v. Randall, 44 Colo 488, 99 P 322.

Nothing in the Desert Land Act or its purpose justifies the conclusion that the local laws, customs, and decisions there given recognition include State regulations for the protection of fish. On the contrary, it seems clear that Congress did not intend to confer such power on the State. See The Wildlife Resources Act of August 14, 1946, 60 Stat 1080, 16 USC § 661.

The recommendations of the State agency as to the fish and wildlife resources are to be given due consideration but there is no requirement which makes them controlling. Instead, there is the assertion of Federal control. HR No. 1944, 79th Cong, 2d Sess, p 3; Iowa v. Federal Power Com. (CA8th) 178 F2d 421, cert den 339 US 979, 94 L ed 1383, 70 S Ct 1024.

In the case of a project requiring a license under the Federal Power Act, the final decision as to the resolution of the fishing resources is left to the Federal Power Commission.

As the decisions of the Supreme Court of Oregon recognize (see Hough v. Porter, 51 Or 318, 95 P 732, 98 P 1083, 102 P 728; Nevada Ditch Co. v. Bennett, 30 Or 59, 45 P 472, 60 Am St Rep 777; Brown v. Baker, 39 Or 66, 65 P 799, 66 P 193; Morgan v. Shaw, 47 Or 333, 83 P 534; Williams v. Altnow, 51 Or 275, 95 P 200, 97 P 539), the United States retains title to, and power of control over, all rights to the use of the unappropriated waters in nonnavigable streams to which the Desert Land Act and related acts apply.

The United States has not parted with title or the right to control the unappropriated rights to the use of the water, but reserved and retains such title and rights. See Howell v. Johnson (DC Mont) 89 F 556, cited with approval in California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725, and in Hough v. Porter, 51 Or 318, 95 P 732, 98 P 1083, 102 P 728.

This case does not involve the invasion, encroachment, or interference with any vested rights.

The rights to the use of the water involved in this case are not within the jurisdiction of the State of Oregon.

Oregon does not have and has never had jurisdiction over the fishing rights on the stretch of the Deschutes River here involved.

Arthur G. Higgs, Assistant Attorney General of Oregon, argued the cause, and, with Robert Y. Thornton, Attorney General, both of Portland, Oregon, and E. G. Foxley, of Salem, Oregon, filed a brief for respondents:

The Desert and Arid Land Act (Act of Congress, March 3, 1877, amended 43 USCA § 321) had the effect to sever all waters upon the public domain, not theretofore appropriated from the land itself. California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; Brush v. Commissioner, 300 US 352, 81 L ed 691, 57 S Ct 495, 108 ALR 1428; Ickes v. Fox, 300 US 82, 81 L ed 525, 57 S Ct 412. Cf. Kansas v. Colorado, 206 US 46, 51 L ed 956, 27 S Ct 655; Ashwander v. Tennessee Valley Authority, 297 US 288, 80 L ed 688, 56 S Ct 466.

Under the Federal Acts of 1866, 1870 and 1877 (Title 43 USC § 661, 14 Stat 251, 16 Stat 217) the Federal Government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the Government may have had to control the use of waters of nonnavigable streams in the West. Jennison v. Kirk, 98 US 453, 25 L ed 240; California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; Atchison v. Peterson (US) 20 Wall 507, 22 L ed 414; Basey v. Gallagher (US) 20 Wall 670, 22 L ed 452; Broder v. Natoma Water & Mining Co. 101 US 274, 25 L ed 790;

United States v. Rio Grande Dam & Irrig. Co. 174 US 690, 43 L ed 1136, 19 S Ct 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 US 545, 47 L ed 588, 23 S Ct 338.

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs to the individual states. Kansas v. Colorado, 206 US 46, 51 L ed 956, 27 S Ct 655; Fox v. Ickes, 78 App DC 84, 137 F2d 30.

The waters of the State of Oregon may not be appropriated without its consent. Cf. California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; United States v. Rio Grande Dam & Irrig. Co. 174 US 690, 43 L ed 1136, 19 S Ct 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 US 545, 47 L ed 588, 23 S Ct 338.

The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with § 9 (b) of the Federal Power Act by showing compliance with the laws of the State of Oregon. See First Iowa Hydro-Electric Co-op. v. Federal Power Com. 328 US 152, 90 L ed 1143, 66 S Ct 906; Iowa v. Federal Power Com. 339 US 979, 94 L ed 1383, 70 S Ct 1024; Federal Power Com. v. Niagara Mohawk Power Corp. 347 US 239, 98 L ed 666, 74 S Ct 487.

The refusal of the Fish Commission of Oregon and the Oregon Hydroelectric Commission to approve the Pelton Project is an absolute bar to the licensing of the proposed project. Federal Power Act § 9 (b) (16 USCA § 802 (b)); First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 US 152, 90 L ed 1143, 66 S Ct 906; Iowa v. Federal Power Com. 339 US 979, 94 L ed 1383, 70 S Ct 1024.

Rollin E. Bowles, of Portland, Oregon, argued the cause, and, with L. G. Binford, also of Portland, Oregon, filed a brief for Oregon Division of the Izaak Walton League of America, as amicus curiae:

The Desert and Arid Land Act (Act of Congress, March 3, 1877, amended 43 USCA § 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself. California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; Brush v. Commissioner, 300 US 352, 81 L ed 691, 57 S Ct 495, 108 ALR 1428; Ickes v. Fox, 300 US 82, 81 L ed 525, 57 S Ct 412.

Under the Federal Acts of 1866, 1870 and 1877 (43 USC § 661) (14 Stat 251, 16 Stat 217) the Federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of nonnavigable streams in the West. Jennison v. Kirk, 98 US 453, 25 L ed 240; California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725; Atchison v. Peterson (US) 20 Wall 507, 22 L ed 414; Basey v. Gallagher (US) 20 Wall 670, 22 L ed 452; Broder v. Natoma Water & Min. Co. 101 US 274, 25 L ed 790; United States v. Rio Grande Dam & Irrig. Co. 174 US 690, 43 L ed 1136, 19 S Ct 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 US 545, 47 L ed 588, 23 S Ct 338.

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs to the individual states. Kansas v. Colorado, 206 US 46, 51 L ed 956, 27 S Ct 655; Fox v. Ickes, 78 App DC 84, 137 F2d 30.

Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. Federal Power Com. v. Niagara Mohawk Power Corp. 347 US 239, 98 L ed 666, 74 S Ct 487.

The legislative history of the Federal Power Act compels the conclusion that it was not intended to automatically abolish pre-existing water rights on a nation-wide scale, but that it was intended to be merely regulatory. Id.

By adoption, under the Federal Power Act, of a policy that the Federal Power Commission is to work toward a constructive national program of intelligent, economical utilization of power resources, Congress did not and could not change state ownership or control of waters located within the state.

As owner of the public domain, the Federal government possessed power to dispose of the land and water thereon together or to dispose of them separately, and the fair construction of the Desert Land Act is that Con-

gress intended to establish the rule that, for the future, the land should be patented separately and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the state and territories named.

Regulation of the Deschutes River as it flows through Oregon is one of powers of Oregon's sovereignty, and such power includes power to regulate fish in Oregon waters.

The Federal Power Commission has the legal right to give its approval to the construction of a hydroelectric plant on the Deschutes River in Oregon and had power to grant its permissive license to the construction of such proposed dam upon Federal property, but ownership of power dam site did not empower the Federal government to use the waters of such river either at such site or elsewhere contrary to Oregon law.

The lands reserved for power purposes within the confines of the Pelton project were not lands referred to as reserved lands under the terms of The Desert Land Act, reaching that status long after The Desert Land Act became law, and then by order of the Secretary of the Interior. Thus, reservation by the Secretary of the Interior could not carry with it the right to the control of the waters of the Deschutes River.

The re-regulating dam and the lands flooded by the impoundment it creates are not lands over which the Federal government exercises any authority and over which the Federal Power Commission has jurisdiction.

The question is not whether the Federal Power Commission has required the applicant to provide facilities adequate to preserve the fisheries of the Deschutes River System or whether the rights of prior appropriators of water were protected, but whether the Federal Power Commission has the authority or right to determine those rights in any manner or in any degree. We submit that the Federal Power Commission had no such authority or right.

Motions to appear as amici curiae and adopt the brief of respondents were filed by the States of Indiana, by Edwin K. Steers, Attorney General, of Indianapolis, Indiana; Louisiana, by Fred S. LeBlanc, Attorney General, of Baton Rouge, Louisiana; Michigan, by Thomas M. Kavanagh, Attorney General, Edmund E. Shepherd, Solicitor General, and Daniel J. O'Hara, Assistant Attorney General, all of Lansing, Michigan; Minnesota, by Miles Lord, Attorney General, and Perry G. Voldness, both of St. Paul, Minnesota; Montana, by Arnold H. Olsen, Attorney General, and Charles W. Leaphart, Assistant Attorney General, both of Helena, Montana; Nebraska, by Clarence S. Beck, Attorney General, and Robert V. Hoagland, Assistant Attorney General, both of Lincoln, Nebraska; Nevada, by Harvey Dickerson, Attorney General and W. T. Mathews, both of Carson City, Nevada; North Dakota, by Leslie R. Burgum, Attorney General, of Bismarck, North Dakota; Pennsylvania, by Herbert B. Cohen, Attorney General, and Lois G. Forer, both of Harrisburg, Pennsylvania; Texas, by John Ben Shepperd, Attorney General, of Austin, Texas; Utah, by E. R. Callister, Attorney General, and Robert B. Porter, Assistant Attorney General, both of Salt Lake City, Utah; and Washington, by Don Eastvold, Attorney General, and Joseph T. Mijich and Richard F. Broz, Assistant Attorneys General, all of Olympia, Washington.

Mr. Justice **Burton** delivered the opinion of the Court.

As in First Iowa Hydro-Electric Co-op. v. Federal Power Com. 328 US 152, 90 L ed 1143, 66 S Ct 906, this case illustrates the integration of the federal and state jurisdictions in licensing water power projects under the Federal Power Act.[1] In the First Iowa Case we sustained the authority of the Commission to license a power project to use navigable waters of the United States located in Iowa. Here, without finding that the waters are navigable, the Commission has issued a comparable license for a power project to use waters on lands constituting reservations of the United States located in Oregon. The State of Oregon questions the authority of the Commission to do this and the adequacy of the provisions approved by the Commission for the conser-

1. 41 Stat 1063, as amended, 49 Stat 838, 16 USC §§ 791a-825r.

vation of anadromous fish.[2] For the reasons hereafter stated, we sustain the Commission.

In 1949, the Northwest Power Supply Company of Portland, Oregon, applied to the Federal Power Commission for a license to construct, operate and maintain a hydroelectric plant, constituting Pel- *[438] ton Project No. 2030, *on reserved lands of the United States on the Deschutes River in Oregon,[3] and, in 1951, the Portland General Electric Company of Portland, Oregon, succeeded to a supplementary application for that license.

The Pelton Project is designed to include a concrete dam 205 feet high and a powerhouse containing three 36,000-kilowatt generators. It is to be built across the Deschutes River on reserved lands of the United States located below the junction of its Metolius and Crooked River tributaries.[4] The western terminus of the dam is to occupy lands, within the Warm Springs Indian Reservation, which have been reserved by the United States for power purposes since 1910 and 1913.[5] The east- *[439] ern terminus *of the dam is to be on lands of the United States which, at least since 1909, have been withdrawn from entry under the public land laws and reserved for power purposes.[6] The project calls for no permanent diversion of water as the entire flow of the river will run through or over the dam into the natural bed of the stream. This dam will make available the head and volume of water required for the project and the water impounded by it will create a narrow reser-

2. Fish ascending rivers from the sea for breeding purposes. In this instance, especially salmon and steelhead trout. For an outline of the general problem presented, see Schwartz, Federalism and Anadromous Fish, 23 Geo Wash L Rev 535.

3. In 1924, the Columbia Valley Power Company, Inc., had applied to the Federal Power Commission for a license to develop Pelton Project No. 57 at substantially the same site. That license was issued but, due to the licensee's failure to proceed with construction as required by the Commission, it was canceled in 1936.

4. The Deschutes River is entirely within the State of Oregon. It drains the eastern slope of the Cascade Range and flows northward, across the lands of the United States here involved, to the Columbia River, which it meets about 15 miles above The Dalles. The Commission has made no findings as to its navigability or as to the relation between its flow and the navigability of other streams. Throughout its lower 130 miles, which include the project site, it flows in a narrow canyon with an average fall of 17.6 feet per mile and, apparently, it is generally recognized as incapable of sustaining navigation. Accordingly, throughout this litigation, the river has been treated by all concerned as not constituting "navigable waters" of the United States as defined in § 3(8) of the Federal Power Act, 49 Stat 838, 16 USC § 796(8). We do not pass either upon that question or upon the relationship to interstate commerce of the proposed use of the waters of the river.

5. The Warm Springs Indian Reservation was established by the Treaty of June 25, 1855, with the Indians in Middle Oregon. Ratified by the Senate March 8, 1859, and proclaimed by the President April 18, 1859, it secured to the Indians "the exclusive right of taking fish in the streams running through and bordering said reservation . . . ." 12 Stat 963, 964. Oregon has recognized that it is bound by this Treaty. Anthony v. Veatch, 189 Or 462, 483-485, 220 P2d 493, 502, 503. See also United States v. Winans, 198 US 371, 49 L ed 1089, 25 S Ct 662.

Indian Power Site Reserve No. 2 was created November 1, 1910, and Indian Power Site Reserve No. 294 was created October 8, 1913, both by the Secretary of the Interior under an Act of June 25, 1910, 36 Stat 855, 858.

6. Power Site Reserve No. 66 was created December 30, 1909, by the Secretary of the Interior and made permanent by an Executive Order of July 2, 1910, under an Act of June 25, 1910, 36 Stat 847. In addition, a reservation occurred in connection with the application made to the Federal Power Commission, in 1924, for a license for Pelton Project No. 57. Comparable withdrawals were made in 1949 and 1951 in connection with the present application. See § 24 of the Federal Power Act, 41 Stat 1075, 1076, and amendments, 16 USC § 818.

voir, submerging lands the title to which is or will be in the United States. Variations and interruptions in the flow of the stream, caused by temporary storage or use of water for power purposes, are to be controlled by a "reregulating dam" approved by the Commission and located on private property, to be acquired, about three miles below the power dam. No objection is made to the reregulating dam. To the extent that access to existing spawning grounds for anadromous fish is cut off by the power dam, other facilities on private property, to be acquired, are to be constructed and maintained on terms approved by the Commission and designed to develop an equal or greater fish population. Opportunities for recreational uses of the area are to be enhanced and no issue as to water pollution is before us.

*[440]

*The State of Oregon, the Fish Commission of Oregon, the Oregon State Game Commission and the Oregon Division of the Izaak Walton League intervened before the Commission and each filed objections to the granting of the license. Some of their objections related to the authority of the Commission to grant the license and others to the suitability of the proposed fish conservation facilities.

Following extended hearings, the Commission's presiding examiner recommended the license. After exceptions to that recommendation the Commission issued its opinion and an order granting the license. 10 FPC 445, 450, 92 PUR NS 247. The Commission found that a public need exists for the early completion of the project to meet a severe power shortage in the Pacific Northwest. It found also that the project is in the public interest, will provide for comprehensive development of the affected stretch of the Deschutes River, and will be consistent with further comprehensive development of that stream and of the Columbia Basin. It held that the improvements will contribute valuable public benefits which will not be available if the river is maintained in its present natural condition.[7]

*[441]

The Commission stated that *the project will be subject to all existing rights to the use of the waters of the river, whether perfected or not. It prescribed temporary measures to be taken to meet the needs of the anadromous fish during the construction of the project and approved certain permanent facilities, practices and expenditures in relation to such fish. The opinion stated "that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased." 10 FPC, at 450, 92 PUR NS, at 252.

A rehearing being denied, the State and its agencies sought a review by the Court of Appeals for the Ninth Circuit and the Portland General Electric Company intervened. That court, with one judge dissenting, set aside the Commission's order. 211 F2d 347. It recognized the necessity of a license from the Federal Power Commission but held that Congress, by its public lands legislation, long ago

7. "(44) Under present circumstances and conditions, and upon the terms and conditions hereinafter provided in the license, the project is best adapted to a comprehensive plan for the improvement and utilization of water-power development, for the conservation and preservation of the fish and wildlife resources, and for other beneficial public uses including recreational purposes.

"(45) The Portland General Electric Co. is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for the project." 10 FPC, at 456. And see §§ 9(b) and 10(a) of the Federal Power Act, 41 Stat 1068, 16 USC § 802(b), and 49 Stat 842, 16 USC § 803(a).

had transferred to the State of Oregon such control over the use of nonnavigable waters that the sponsor of the Pelton Project must secure also the permission prescribed by the State. We granted certiorari because of the public significance of the issues but denied leave to the Portland General Electric Company to intervene here. 348 US 868, 99 L ed 683, 75 S Ct 112, 28 USC § 1254(1); 49 Stat 860, 861, 16 USC § 825l(b). Several States filed briefs as amici curiae, usually adopting as their own the brief filed by respondents.

We divide our consideration of the issues into three parts.

I. Applicability of the Federal Power Act.

On its face, the Federal Power Act applies to this license as specifically as it did to the license in the First Iowa Case. There the jurisdiction of the Commission turned

*[442]

*almost entirely upon the navigability of the waters of the United States to which the license applied. Here the jurisdiction turns upon the ownership or control by the United States of the reserved lands on which the licensed project is to be located.[8] The authority to issue

*[443]

Headnote 1

licenses *in relation to navigable waters of the United States springs from the Commerce Clause of the Constitution. The authority to do

Headnote 2

so in relation to public lands and reservations of the United States springs from the Property Clause—"The Congress shall have Power

8. "Sec. 4. The Commission is hereby authorized and empowered—

. . . .

"(e) To issue licenses . . . to any corporation organized under the laws of the United States or any State thereof . . . for the purpose of constructing, operating, and maintaining 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 across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or *upon any part of the public lands and reservations of the United States* . . . : *Provided*, That *licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired*, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the *adequate protection and utilization of such reservation*: . . . .

. . . .

"Sec. 23. . . .

"(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or *upon any part of the public lands or reservations of the United States* (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. *If the Commission shall not so find, and if no public lands or reservations are af-*

to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Art 4, § 3.[9]

In the instant case the project is to occupy lands which come within the term "reservations," as distinguished from "public lands." In the Federal Power Act, each has its established meaning. "Public lands" are lands subject to private appropriation and disposal under *[444] public *land laws. "Reservations" are not so subject.[10] The title to the lands upon which the eastern terminus of the dam is to rest has been in the United States since the cession by Great Britain of the area now comprising the State of Oregon. Even if formerly they may have been open to private appropriation as "public lands," they were withdrawn from such availability before any vested interests conflicting with the Pelton Project were acquired.[11] Title to the bed of the Deschutes River is also in the United States.[12] Since the Indian Treaty of 1855, the lands within the Indian reservation, upon which the western end of the dam will rest, have been reserved for the use of the Indians. More recently they were reserved for power purposes[13] and the Indians have given their consent to the project before us. Accordingly, there is no issue here as to whether or not the title to the tribal lands is in the United States.[14]

There thus remains no question as to the constitutional and statutory authority of the

Headnote 3

Federal Power Commis- *[445] sion *to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others.[15] To allow Oregon to veto

Headnote 4

such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. 328 US 152, 177-179, 90 L ed 1143, 1156-1158, 66 S

fected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." (Italics supplied except for the initial word of the proviso.) 49 Stat 839, 840, 846, 16 USC §§ 797(e), 817.

9. In what is somewhat of a companion case to the one before us, the Court of Appeals for the Ninth Circuit has recognized that, despite contentions as to state control of the use of water and the conservancy of fish within the Columbia River Basin, the Federal Power Commission has the authority to make effective a license and to provide facilities for anadromous fish much as is here proposed, when the waters involved are navigable waters of the United States. Washington Dept. of Game v. Federal Power Com. (CA9th) 207 F2d 391. We denied certiorari April 5, 1954. 347 US 936, 98 L ed 1087, 74 S Ct 626.

10. "Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; . . . . ." 49 Stat 838, 16 USC § 796(1) and (2).

11. See note 6, supra.

12. See United States v. Utah, 283 US 64, 75, 75 L ed 844, 849, 51 S Ct 438.

13. See note 5, supra.

14. See Hynes v. Grimes Packing Co. 337 US 86, 103, 104, 93 L ed 1231, 1246-1248, 69 S Ct 968; Minnesota v. United States, 305 US 382, 386, 83 L ed 235, 240, 59 S Ct 292.

15. "Sec. 27. That nothing herein contained 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

Ct 906. No such duplication of authority is called for by the Act.[16] The Court of Appeals in the instant *[446] case *agrees. 211 F2d, at 351. And see Washington Dept. of Game v. Federal Power Com. (CA9th) 207 F2d 391, 395, 396. Authorization of this project, therefore, is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by other federal legislation. See United States v. Rio Grande Dam Irrig. Co. 174 US 690, 703, 43 L ed 1136, 1141, 19 S Ct 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 US 545, 554, 47 L ed 588, 593, 23 S Ct 338.

Headnote 5

II. Inapplicability of the Desert Land Act of 1877 and Related Acts.

The State of Oregon argues that the Acts of July 26, 1866,[17] July 9, 1870,[18] and the Desert Land Act of *[447] *1877[19] constitute an express con-

in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat 1077, 16 USC § 821.

16. "To require the petitioner to secure the actual grant to it of a state permit . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

. . . .

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. . . .

. . . .

"The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States." First Iowa Hydro-Electric Co-op. v. Federal Power Com. 328 US 152, 164, 167, 168, 171, 90 L ed 1143, 1149-1151, 1153, 66 S Ct 906.

17. "Sec. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, *have vested and accrued*, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of *such vested rights* shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of *any settler on the public domain*, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (Italics supplied except for the initial words of the enacting clause and the proviso.) 14 Stat 253, see 43 USC § 661.

18. "Sec. 17. . . . *all patents granted, or preemption or homesteads* allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act [14 Stat 253, supra] of which this act is amendatory. . . ." (Italics supplied.) 16 Stat 218, see 43 USC § 661.

19. ". . . it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty-five cents per acre—*to file a declaration* under oath with the register

gressional delegation or conveyance to the State of the power to regulate the use of these waters. The argument is that these Acts preclude or restrict the scope of the jurisdiction, otherwise apparent on the face of the Federal Power Act, and require the consent of the State to a project such as the one before us.

The nature and effect of these Acts have been discussed previously by this Court. The purpose of the

Headnote 6 Acts of 1866 and 1870 was governmental recognition and sanction

*[448]

*of possessory rights *on public lands* asserted under local laws and customs. Jennison v. Kirk, 98 US 453, 25 L ed 240. The Desert Land Act

Headnote 7 severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725. See also Nebraska v. Wyoming, 325 US 589, 611–616, 89 L ed 1815, 1827–1831, 65 S Ct 1332.

It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sour-

Headnote 8 ces of water supply upon the public lands . . . ."

The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." United States v. O'Donnell, 303 US 501, 510, 82 L ed 980, 985, 58 S Ct 708. See also United States v. Minnesota, 270 US 181, 206, 70 L ed 539, 549, 46 S Ct 298. The instant lands certainly "are not unqualifiedly subject to sale and disposition . . . ." Accordingly, it is enough, for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States.

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and the receiver of the land district in which any desert land is situated, *that he intends to reclaim a tract of desert land* not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, *on or to any tract of desert land* of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply *upon the public lands and not navigable*, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. *Said declaration shall describe particularly said section of land* if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, *upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid*, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, *a patent for the same shall be issued to him. Provided*, that *no person shall be permitted to enter more than one tract of land* and not to exceed six hundred and forty acres which shall be in compact form." (Italics supplied except for the initial words of the provisos.) 19 Stat 377, 43 USC § 321.

III. Application of the Federal Power Act to This Project.

Finally, respondents question the discretion used by the Commission in granting the license. They point *[449] to *the consequences which the project will have beyond the limits of the reserved lands on which it will be located.

The first consequence is the inevitable variation in, or the temporary interruption of, the flow of the stream. The Commission is satisfied that it has overcome this objection by its provision for a reregulating dam. It has approved the technical features involved and the site for that dam will be acquired in accordance with the property laws of Oregon.[20] In this reregulation of the flow of the stream, the Commission acts on behalf of the people of Oregon, as well as all others, in seeing to it that the interests of all concerned are adequately protected.

There remains the effect of the project upon anadromous fish which use these waters as spawning grounds. All agree that the 205-foot dam will cut off access of some fish to their natural spawning grounds above the dam and that such interruption cannot be overcome by fish ladders.[21] However, the State does not flatly prohibit the construction of dams that cut off anadromous fish from their spawning or breeding grounds.[22] One *[450] alternative, *thus recognized, is the supplying of new breeding pools to which the fish can be removed at appropriate times.[23] The Fish Com-

20. While the final approval of the engineering requirements of this feature rests with the Commission, there is no reason why the Commission and the State of Oregon, which also desires appropriate reregulation of the flow of the stream, should not seek a mutually satisfactory solution. In fact, the applicant for the federal license did submit its proposals for reregulation to the state authorities.

21. The Oregon Fish Commission made a rough estimate of the annual runs of spring chinook and salmon passing the Pelton site, en route upstream, at 2,500 and of summer steelhead trout at 5,000. On the basis of this escapement past the project, the Fish Commission estimated the annual value of the Deschutes salmon and steelhead fishery attributable to the river above the Pelton site to be $177,375. 10 FPC, at 449, 92 PUR NS, at 252.

22. ". . . In the event that any person desires to construct a dam in any of the streams of this state to a *height that will make a fish ladder or fishway thereover impracticable*, in the opinion of the [Fish] commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light, without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with the said plans and specifications. . . ." (Italics supplied.) Ore Comp Laws, 1940, § 83-316.

23. The Federal Power Commission here found that:

"(29) There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant.

"(30) The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods.

"(31) Construction, or operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the reregulating dam.

"(32) There is no substantial evidence in the record to show that the fishery facilities proposed by the applicant in accordance with the plans prepared by the Fish Commission of Oregon will not maintain existing runs, and there is a possibility that the run can be increased." 10 FPC at 455.

mission of Oregon has denied a permit to the Portland General Electric Company to carry out its present proposal but there appears to be no disagreement as to the underlying principle involved.[24]

*[451]

*The applicant has agreed to provide facilities for conserving the runs of anadromous fish in accordance with plans approved by the Federal Power Commission. The capital cost of these facilities and of the reregulating dam, to be borne by the applicant, is estimated at $4,430,000. The total annual cost due to these facilities is estimated at $795,000. The Commission has found each of these estimates to be reasonable. Of the $795,000 annual cost, the applicant will bear $410,000 (cost of borrowed money, depreciation and taxes on the capital investment), and the $10,000 maintenance cost of the reregulating dam. In addition, it has offered to contribute

*[452]

$100,000 annually *toward the estimated $375,000 cost of operation and maintenance of the fish conservation facilities, and the Commission has retained the power to fix the amount of the applicant's contribution if a sum is not agreed upon.

The care given to the preparation of this conservation program and the large investment to be made in it are impressive. It also is of interest that the Fish Commission of Oregon already is operating somewhat comparable but smaller facilities of this kind on the Metolius River.

One argument against the project goes beyond the need to conserve the existing fish population. It is argued that the project will preclude the carrying out of certain plans for the Columbia River Basin which contemplate greatly enlarging the fish population in the Deschutes River area, by concentrating there other runs of fish not now using that river. While such an argument may properly be directed to the Federal Power Commission or to Congress, it is not one for us to answer upon the basis of existing legal rights.

Headnote 9

We conclude, therefore, that, on

24. In addition to its application to the Federal Power Commission, the Portland General Electric Company also sought approval of the Pelton Project by the Oregon Hydroelectric Commission. While we hold that such approval is not necessary, there is no reason why the company should not thus seek state as well as federal approval of the project. In its application for the Federal Power Commission license, the company referred to these simultaneous state proceedings, which did not reach a conclusion until shortly before the granting of the federal license. The license from the Hydroelectric Commission was denied because of the applicant's failure to secure the permit from the Fish Commission of Oregon which it had sought.

The pertinent Oregon provisions are as follows:

"From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof.

. . . .

"The [Oregon Hydroelectric] commission shall have power: . . .

"(b) To issue licenses, as hereinafter provided, to citizens of the United States, associations of citizens, private corporations organized under the laws of the United States or any state thereof, to appropriate, initiate, perfect, acquire and hold the right to the use of the waters within the state, including the waters over which the state has concurrent jurisdiction, and to construct, operate and maintain dams, reservoirs, power houses, conduits, transmission lines, and all other works and structures necessary or convenient for the use of such waters in the generation and utilization of electricity." Or Comp Laws, 1940, §§ 119-103, 119-106.

See also, "The provisions of this act shall not apply to any water-power project or development constructed by the government of the United States." Id., § 119-101.

the facts here presented, the Federal Power Act is applicable in accordance with its terms, and that the Federal Power Commission has acted within its powers and its discretion in granting the license now before us.

Headnote 10

The judgment of the Court of Appeals, accordingly, is

Reversed.

Mr. Justice **Harlan** took no part in the consideration or decision of this case.

Mr. Justice **Douglas**, dissenting.

I would not suppose the United States could erect a dam on this nonnavigable river without obtaining its water rights in accordance with state law. If I am right in that assumption, then this dam can- *[453] not be built without *satisfying Oregon's water-rights law. For the federal licensee who will build this dam acquires all its rights from the United States. And the United States cannot give what it does not have.[1]

The argument pressed on us by the United States is akin to the one urged in Nebraska v. Wyoming, 325 US 589, 611 et seq., 89 L ed 1815, 1826, 65 S Ct 1332. In that case, the United States struggled to be rid of the rule of law that made its water rights on nonnavigable streams of the West dependent on state law. It claimed that it owned all the unappropriated water in the basin of the North Platte River. The argument was made not only under the Reclamation Act of 1902, 32 Stat 388, but also under the Desert Land Act of 1877, 19 Stat 377, the Act involved here. We reserved decision as to whether under some circumstances the United States might be the owner of unappropriated water rights. But we held that under those Acts the United States took its water rights like other landowners, viz., pursuant to state law governing appropriation.

Unless we are to depart from that ruling, we must accept Oregon's claim here.

*[454]

*Oregon's position has for its support two other decisions of this Court, both construing the Desert Land Act. The first of these is California Oregon Power Co. v. Beaver Portland Cement Co. 295 US 142, 79 L ed 1356, 55 S Ct 725, which construed the provision of the Desert Land Act, crucial here, which reads:

"all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The Court interpreted that provision as follows:

"The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land

1. The Deschutes River is nonnavigable and part of the Columbia River Basin. It is, indeed, a direct tributary of the Columbia. Control of this tributary might be important to an effective flood-control program for the Columbia. If so, this dam could find constitutional sanction under the Commerce Clause. See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co. 313 US 508, 525, 85 L ed 1487, 1500, 61 S Ct 1050. That constitutional power over the Deschutes would not be lost through nonuse or through intervening legislation. In case the constitutional power were exercised, private rights would give way. Oregon could demand compensation for the loss of any water-power rights it possessed. See Federal Power Com. v. Niagara Mohawk Power Corp. 347 US 239, 254, 255, 98 L ed 666, 678, 679, 74 S Ct 487. But Oregon could not assert its regulatory powers to defeat the federal program, for the Supremacy Clause would prevent her.

No effort has been made to bring this case under the Commerce Clause. The findings are inadequate for that purpose. The case turns on the authority of the United States as a proprietor.

should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named." 295 US 142, 162, 79 L ed 1356, 1363, 55 S Ct 725.

That case, to be sure, involved a contest between private owners. But the principle announced was shortly applied to the United States as a property owner on a nonnavigable stream.[2] In Ickes v. Fox, 300 US 82, 81 L ed 525, 57 S Ct 412, *[455] the *Court held that by the Desert Land Act, "if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states." Id. 300 US, at 95.

The Fox case involved water rights of farmers under a federal irrigation project, the claim being that the United States, owner of the irrigation system, owned the water rights. The Court rejected that claim and looked to state law to determine who had the water rights; and finding that the farmers owned them, the Court held that the United States was not an indispensable party in litigation concerning them.

Those cases should control here. The Desert Land Act applies to "public lands"; and the Federal Power Act, 41 Stat 1063, as amended, 16 USC §§ 791a et seq., grants the Commission authority to issue licenses for power development "upon any part of the public lands and reservations of the United States." § 4(e). The definition of those terms in the Act says nothing *[456] about water rights.[3] *And, as I have pointed out, it has been the long-term policy of Congress to separate western land from water rights.

The final resort of the Commission is to the Act of June 25, 1910, 36 Stat 847, providing:

2. If this were a navigable stream, the authority of the United States in the water power would be complete without reference to state law. United States v. Chandler-Dunbar Water Power Co. 229 US 53, 57 L ed 1063, 33 S Ct 667; United States v. Chicago, M. St. P. & P. R. Co. 312 US 592, 85 L ed 1064, 61 S Ct 772; United States v. Commodore Park, 324 US 386, 89 L ed 1017, 65 S Ct 803. In that case, the Act authorizes the Commission to proceed, irrespective of the approval of the State where the dam is located. First Iowa Hydro-Electric Co-op. v. Federal Power Com. 328 US 152, 90 L ed 1143, 66 S Ct 906. But the present project, dealing as it does with nonnavigable waters, is dependent on the state law of water rights for its execution. In the First Iowa Co-op Case, we recognized the room left for that degree of control by the States in this situation:

Headnote 11

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue." Id. 328 US, at 167, 168.

3. Those terms are defined as follows in § 3:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; . . . ."

"That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

It was under this Act that some of the lands here involved were reserved for a power site. But the Act of June 25, 1910, by its very terms, did no more than withdraw these public lands "from settlement, location, sale, or entry." The Act did not purport to touch or change in any way the provision of the Desert Land Act that pertains to water rights. If the words of the 1910 Act are to control, water rights remained undisturbed. The lands remained "public lands," save only that settlers could not locate on them. I assume that the United States could have recalled its grant of jurisdiction over water rights, saving, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear.

*[457]

*The reason is that the rule adopted by the Court profoundly affects the economy of many States, ten of whom are here in protest. In the West, the United States owns a vast amount of land—in some States, over 50 percent of all the land. If by mere Executive action the federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow. For the right of withdrawal of public lands granted by the 1910 Act is not only for "water-power sites" but for a host of public projects—"irrigation, classifications of lands, or other public purposes." Federal officials have long sought that authority. It has been consistently denied them. We should deny it again. Certainly the United States could not appropriate the water rights in defiance of Oregon law, if it built the dam. It should have no greater authority when it makes a grant to a private power group.

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*[458]

*JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an Unincorporated Association, Petitioner,

v.

WILLIAM DIXON et al., as Members of the Board of Education of the City of Yonkers, etc.

(349 US 458, 99 L ed 1231, 75 S Ct 850)

SUMMARY OF DECISION

The present proceedings were commenced in a New York state court for an order directing the Board of Education of the City of Yonkers to permit petitioner's organization, the Yonkers Committee for Peace, the use of a schoolhouse for a forum. The constitutional questions involved were whether the Board, in refusing the use of public school buildings as requested by the committee, discriminated against the committee, so as to deprive its members of their rights of freedom of speech, assembly, and equal protection of the laws, under the First and Fourteenth Amendments.

279 US 415, 420, 73 L ed 770, 775, 49 S Ct 358. If, however, the Commission decided that the trackage agreement should be dealt with in the plan, the state court would not have power to proceed further. For respondent's rights would be protected by the provisions of the plan which may be reviewed only by the reorganization court. § 77(e).

Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.

Reversed.

Mr. Justice **Jackson** took no part in the consideration or decision of this case.

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*[152]
*FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION. STATE OF IOWA, Intervener.

(328 US 152-188)

Federal Power Act, § 1 — license — showing as to compliance of project with state laws.

1. A showing that a water-power development project within the jurisdiction of the Federal Power Commission meets the requirements of state law is not required by the provision of Section 9(b) of the Federal Power Act that each applicant for a license shall submit satisfactory 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 the appropriation, distribution, and use of waters for power purposes; but, under the authority conferred, the Commission may require the presentation of satisfactory evidence of the petitioner's compliance with any of the requirements for a state permit on the waters of the state that the Commission considers appropriate to effect the purposes of a Federal license on the navigable waters of the United States.

Federal Power Act, § 1 — integration of state and Federal authority.

2. The Federal Power Act contemplates an integration rather than duplication of state and Federal authority over water-power development.

Federal Power Act, § 1 — saying clause — operation.

3. The words "other uses" in the provision of Section 27 of the Federal Power Act that nothing therein contained "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," refer to uses of the same nature as those enumerated and do not operate to subject the granting of a license by the Federal Power Commission for a water-power project to requirements of state law on the same subject.

[No. 603.]

Argued March 8, 1946. Decided April 29, 1946. Rehearing denied May 27, 1946.

ON WRIT of Certiorari to the United States Court of Appeals for the District of Columbia to review a judgment affirming a dismissal by the Federal Power Commission of an application for a license to construct a water-power project, in which proceeding the State of Iowa had intervened. Reversed.

See same case below, 80 App DC 211, 151 F2d 20.

David W. Robinson, Jr., of Columbia, South Carolina, argued the cause, and, with George B. Porter and Andrew G. Haley, both of Washington, D. C., Ralph U. Thompson, of Muscatine, Iowa, John Connolly, Jr., of Des Moines, Iowa, and Charles E. Thompson, filed a brief for petitioner:

State permit is not required for the construction by petitioner of the proposed power project on the Cedar River in the State of Iowa as provided in chapter 363 of the Iowa Code of 1939 since the Federal Power Commission in its determination upon a declaration of intention filed pursuant to § 23(b)

of the Federal Power Act found that a license for the construction proposed is required under the provisions of the Federal Power Act.

Section 23(b) of the Federal Power Act provides the rule which determines whether a license from the Federal Power Commission is required for petitioner's proposed power project on the Cedar River in the State of Iowa, or whether such project may be constructed in such stream upon compliance with state laws.

A license from the Federal Power Commission is required for the construction, operation, or maintenance of a dam or other project works for electric power development "across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States." United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291; Pennsylvania Water & Power Co. v. Federal Power Commission, 74 App DC 351, 123 F2d 155, writ of certiorari denied in 315 US 806, 86 L ed 1205, 62 S Ct 640; Niagara Falls Power Co. v. Federal Power Commission (CCA 2d) 137 F2d 787, writ of certiorari denied in 320 US 792, 88 L ed 477, 64 S Ct 206; Wisconsin Pub. Serv. Corp. v. Federal Power Commission (CCA 7th) 147 F2d 743, writ of certiorari denied in 325 US 880, 89 L ed 1996, 65 S Ct 1574, 1575.

Chapter 363 of the Iowa Code is a comprehensive water-power act of the State of Iowa and has no valid application where a license is required under § 23(b) of the Federal Power Act.

Chapter 363 of the Iowa Code can have valid application only within the permissive range provided by § 23(b) of the Federal Power Act. See cases supra.

A permit from the Executive Council of the State of Iowa, as provided by chapter 363 of the Iowa Code, cannot be required under § 9(b) of the Federal Power Act since Congress by that Act assumed complete dominion and control over power projects located in navigable waters of the United States. See United States v. Appalachian Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291. Cf. United States v. Bellingham Bay Boom Co. 176 US 211, 44 L ed 437, 20 S Ct 343.

Section 9(b) of the Federal Power Act provides no basis for the claim that the states and the Federal Government are to jointly participate in the issuance of licenses for power projects upon navigable waters of the United States.

Section 27 of the Federal Power Act merely requires that an applicant for a Federal license must show evidence of the acquisition by it of necessary rights required under state laws with respect to beds and banks and the appropriation, diversion and use of water for power purposes before the Federal Power Commission may issue a license for a power project. Cf. Henry Ford & Son v. Little Falls Fibre Co. 280 US 369, 74 L ed 483, 50 S Ct 140.

Petitioner is under no obligation to comply with § 7796 of chapter 363 of the Iowa Code.

Howard E. Wahrenbrock, of Washington, D. C., argued the cause, and, with the Solicitor General McGrath, Bradford Ross, and Louis W. McKernan, also of Washington, D. C., filed a brief for respondent, Federal Power Commission:

After extended legislative consideration, the evolution of a comprehensive and affirmative Federal policy with respect to our water resources culminated in the passage of the Federal Water Power Act of June 10, 1920.

The intention of Congress to secure and promote a comprehensive development of the nation's water resources, and not merely to prevent obstructions to navigation, is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts. See New Jersey v. Sargent, 269 US 328, 70 L ed 289, 46 S Ct 122; United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291; Clarion River Power Co. v. Smith, 61 App DC 186, 59 F2d 861, writ of certiorari denied in 287 US 639, 77 L ed 553, 53 S Ct 88; Alabama Power Co. v. McNinch 68 App DC 132, 94 F2d 601; Pennsylvania Water & Power Co. v. Federal Power Commission 74 App DC 351, 123 F2d 155, writ of certiorari denied in 315 US 806, 86 L ed 1205, 62 S Ct 640; Alabama Power Co. v. Federal Power Commission, 75 App DC 315, 128 F2d 280, writ of certiorari denied in 317 US 652, 87 L ed 525, 63 S Ct 48; Puget Sound Power & L. Co. v. Federal Power Commission, 78 App DC 143, 137 F2d 701; Wisconsin Pub. Serv. Corp. v. Federal Power Commission (CCA 7th) 147 F2d 743, writ of

certiorari denied in 325 US 880, 89 L ed 1996, 65 S Ct 1575; Georgia Power Co. v. Federal Power Commission (CCA 5th) 152 F2d 908. See also §§ 6, 28, 4(e), 4(f), 4(g), and 5, 7(a), 7(b), 10(a), 13, of the statute, 16 USCA §§ 797(e)(f)(g), 798, 799, 800(a) and (b), 803(a), 806, 822.

Neill Garrett, of Des Moines, Iowa, argued the cause, and, with John M. Rankin, Attorney General of Iowa, and Horace L. Lohnes and C. Walter Harris, both of Washington, D. C., filed a brief for intervener, State of Iowa:

Section 9(b) of the Federal Power Act requires submission to the Commission of satisfactory evidence that applicant has complied with the applicable state laws as a prerequisite to the granting of a license by the Commission. See United States v. West Virginia, 295 US 463, 79 L ed 1546, 55 S Ct 789.

The applicable provisions of the Iowa law with which § 9(b) of the Federal Power Act requires satisfactory evidence of compliance, are contained in chapter 363 of the Code of Iowa.

The Federal Power Act contemplates a dual system of control and the exercise of appropriate powers by the state, as well as by the Federal Government. See United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291.

Congress did not intend in the enactment of the Federal Power Act to preempt and take over the whole field nor to supersede or suspend the exercise of the reserve powers of the state.

The Act definitely contemplates a dual system of control by both the state and the Federal Government. See §§ 4(c), 4(f), 7(a), 10(c), 14, 19, 20 and 27, 16 USCA §§ 797(c), 797(f), 800(a), 803(c), 807, 812, 813 and 821, 5 FCA title 16 §§ 797(c), 797(f), 800 (a), 803(c), 807, 812, 813 and 821. See United States v. West Virginia, 295 US 463, 79 L ed 1546, 55 S Ct 789. Cf. United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291; Illinois C. R. Co. v. State Pub. Utilities Commission, 245 US 493, 62 L ed 425, 38 S Ct 170, PUR1918C 1279; Maurer v. Hamilton, 309 US 598, 84 L ed 969, 60 S Ct 726, 135 ALR 1347; Kelly v. Washington, 302 US 1, 82 L ed 3, 58 S Ct 87.

Mr. Justice **Burton** delivered the opinion of the Court.

This case illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act.[1] The petitioner is the First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa with power to generate, distribute and sell electric energy. On January 29, 1940, pursuant to § 23(b)[2] of the Federal Power

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Act, it *filed with the Federal Power Commission a declaration of inten-

1 [June 10, 1920] 41 Stat 1063, c 285, as amended [August 26, 1935] 49 Stat 803, 838, c 687, 16 USCA §§ 791a–825r, 5 FCA title 16, §§ 791a–825r.

2 "Section 23. . . . (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands . . . of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands . . . are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 49 Stat 846, c 687, 16 USCA § 817, 5 FCA title 16, § 817.

tion to construct and operate a dam, reservoir and hydro-electric power plant on the Cedar River, near Moscow, Iowa.[3]

On April 2, 1941, it also filed with the Commission an application for a license, under the Federal Power Act, to construct an enlarged project essentially like the one it now wishes to build. The cost of the enlarged project is estimated at $14,600,000. It calls for an 8,300 foot earthen dam on the Cedar River near Moscow, an 11,000 acre reservoir at that point and an eight mile diversion canal to a power plant to be built near Muscatine on the Mississippi. The canal will create two other reservoirs totaling 2,000 acres. It is alleged that the three reservoirs incidentally will provide needed recreational facilities. The power plant will have four turbo-generating units with a total capacity of 50,000 kw., operating with an average head of 101 feet of water provided by the fall from the canal to the Mississippi. Water will be pumped from the Mississippi up to the head bays of the power intake dam at the plant to meet possible shortages in supply. The tailrace will extend for a mile along the shore of the Mississippi to a point below Dam 16 on that River. Transmission lines will connect the project with a source of steam standby electric current at Davenport, Iowa, 24 miles up the Mississippi. The plant is expected to produce 200,000,000 kwh. of marketable power per year, of which 151,000,000 kwh. will be firm energy in an average year. Interchange of energy is proposed with the Moline-Rock Island Manufacturing Company near Davenport and the project is suggested *[158] as an alternative to the addition *of a 50,000 kw. unit to the plant of that company. The power will be available especially to non-profit rural electrification cooperative associations and to cities and towns in 35 or more nearby counties.

The Cedar River rises in Minnesota and flows 270 miles southeasterly through Iowa to Moscow which is 10 miles west of the Mississippi. From there it flows southwesterly 29 miles to Columbus Junction where it joins the Iowa River and returns southeasterly 28 miles to the Mississippi. The proposed diversion will take all but about 25 c.f.s. of water from the Cedar River at Moscow. This will correspondingly reduce the flow in the Iowa River while the diverted water will enter the Mississippi at Muscatine, about 20 miles above its present point of entry at the mouth of the Iowa River. There are no cities or towns on the Cedar River between Moscow and Columbus Junction and the record indicates that the petitioner has options upon 98% of the riparian rights on the Cedar River in that area. At petitioner's request, this application was treated as a supplement to its then pending declaration of intention to construct the smaller project.

On June 3, 1941, the Commission made the following findings:

"(1) That the Cedar and Iowa Rivers are navigable waters of the United States;

(2) That the diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;

(3) That the alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at

[3] This described a project including an 8,500 foot earthen dam, and a power plant of three 5,000 kw. hydraulic turbine generators operating under a maximum head of 35 feet, with an estimated output of 47,000,000 kwh. per year. The water was to be returned to the Cedar River immediately below the dam.

*[159]

*Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) That the interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) That the two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) That a license for the construction proposed above is required under the provisions of the Federal Power Act." 2 FPC 958.[4]

On August 11, 1941, the petitioner, pursuant to that finding, filed with the Commission an application for a license to construct the project above described. On November 4, 1941, the Commission granted the State of Iowa's petition to intervene and, since then, the State has opposed actively the granting of the federal license.

*[160]

*On January 29, 1944, after extended hearings, the Commission rendered an opinion including the following statements:

"As first presented, the plans of the applicant for developing the water resources o' the Cedar river were neither desirable nor adequate, but many important changes in design have been made. [The opinion here quoted in a footnote § 10(a) of the Federal Power Act.] [5] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.

"Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the act." Re First Iowa Hydro-Electric Cooperative (FPC) 52 PUR(NS) 82, 84.

We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's

[4] On February 7, 1940, the Commission had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings. The record also indicates that twice in the three years before the present proceeding, the Executive Council of the State of Iowa rejected applications of the petitioner requesting state permits to construct a dam near Moscow comparable to that proposed in all of these proceedings, but not including a diversion of water from the Cedar to the Mississippi River. The last application of the petitioner to the Council for such a permit was filed August 12, 1940, and rejected June 25, 1941. No application has been made by the petitioner to the Executive Council for a state permit for construction of the project including the canal diverting most of the flow of the Cedar River to the Mississippi and providing for a plant and tailrace on the bank of the Mississippi. In its petition to intervene in the present proceeding for a federal license, the State alleged that such a diversion would violate § 7771 (in chapter 363) of the Code of Iowa, 1939. That allegation touches the principal question in this case.

[5] "Section 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission 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, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 49 Stat 842, c 687, 16 USCA § 803(a), 5 FCA title 16, § 803(a).

application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9 *[161] (b)[6] *of the Federal Power Act as to the petitioner's compliance with the requirements of the laws of Iowa with respect to the petitioner's property rights to make its proposed use of the affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. The Commission, however, was confronted at that point with a claim by the State of Iowa that the petitioner must not only meet the requirements for a federal license for the project under the Federal Power Act, but should also present satisfactory evidence of its compliance with the requirements of chapter 363 of the Code of Iowa, 1939, hereinafter discussed, for a permit from the State Executive Council of Iowa for the same project.

While it now appears, from its brief and the argument in this Court, that it is the opinion of the Federal Power Commission that the requirements of chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act, yet, at the time of the original hearing, the Commission felt that the courts were the appropriate place for the decision on Iowa's contention as to the applicability and effectiveness of chap- *[162] ter 363 *of its Code in relation to this project. The Commission decided, therefore, to proceed no further until that question had been decided by the courts, and dismissed the petitioner's application, without prejudice, in accordance with the following explanation stated in its opinion:

"The appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application for license on the basis of failure to comply with the requirements of § 9(b), applicant may seek review of our action and its contentions under § 313(b) of the Federal Power Act." 52 PUR(NS) 82, 85.

The Commission also expressly found that—

"The applicant has not presented satisfactory evidence, pursuant to § 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the state of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice;" Id. at 85.

This action, after all, did not save the Commission from passing on the issue, for the order of dismissal was a ruling upon it, adverse both to the petitioner's contentions and to its own views on the law. The Commission would have been justified in following its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

[6] "Section 9. That each applicant for a license hereunder shall submit to the commission—

. . . .

"(b) Satisfactory 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 under this Act." 41 Stat 1068, c 285, 16 USCA § 802(b), 5 FCA title 16, § 802(b).

On the applicant's petition for re-[v]iew of the dismissal, it was af-[fir]med by the United States Court [of] Appeals for the District of Co-[lu]mbia. 80 App DC 211, 151 F2d 20. [W]e then granted certiorari under [§] 240(a) of the Judicial Code, 28 [U]SCA § 347, 8 FCA title 28, § 347, [an]d § 313(b) of the Federal Power

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[A]ct, *49 Stat 860, c 687, 16 USCA [§] 825l, 5 FCA title 16, § 825l, [b]ecause of the importance of the [ca]se in applying the Federal Power [A]ct.

The findings made by the Com-[m]ission on June 3, 1941, in response [t]o the petitioner's declaration of in-[te]ntion are not in question. For the [p]urposes of this application it is set-[tl]ed that the project will affect the [n]avigability of the Cedar, Iowa and [M]ississippi Rivers, each of which [h]as been determined to be a part of [t]he navigable waters of the United [S]tates; will affect the interests of [in]terstate commerce; will flood cer-[ta]in public lands of the United [S]tates; and will require for its con-[s]truction a license from the Com-[m]ission.[7] The project is clearly [w]ithin the jurisdiction of the Com-[m]ission under the Federal Power Act. The question at is-

[H]eadnote 1 sue is the need, if any, for the presentation of [s]atisfactory evidence of the peti-

*[164]

tioner's compliance *with the terms of chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission which dismissed the application solely on the ground of the failure of the petitioner to present such evidence. The laws of Iowa which that State contends are applicable and require a permit from its Executive Council to effect the purposes of the federal license are all in §§ 7767–7796.1 of the Code of Iowa, 1939, constituting chapter 363, entitled "Mill Dams and Races." Section 7767 of that chapter is alleged to require the issuance of a permit by the Executive Council of the State and is the one on which the Commission's order must depend. It provides:

"7767 Prohibition—permit. 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." [8]

To require the petitioner to secure the actual grant to it of a State

[7] "§ 4. The Commission is hereby au-[t]horized and empowered—

. . . .

"(e) To issue licenses . . . to any [c]orporation organized under the laws of [t]he United States or any State thereof, . . . for the purpose of constructing, [o]perating, and maintaining dams, water [co]nduits, reservoirs, power houses, trans-[m]ission lines, or other project works nec-[es]sary or convenient for the development [a]nd improvement of navigation and for [t]he development, transmission, and utili-[z]ation of power across, along, from, or in [a]ny of the streams or other bodies of [w]ater over which Congress has jurisdic-[t]ion under its authority to regulate com-[m]erce with foreign nations and among the [s]everal States, or upon any part of the [p]ublic lands . . . of the United States . . . : *Provided further,* That no li-[c]ense affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: . . . ." 49 Stat 840, c 687, 16 USCA § 797(e), 5 FCA title 16, § 797(e). See also § 23(b), note 2, supra.

[8] Sections 7771, 7776, 7792 and 7796 of chapter 363 have a less direct relation to the issue but would be superseded by the Federal Power Act if § 7767 is superseded by it.

permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.[9]

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*The Commission's order of dismissal avoids this extreme result because, instead of charging the petitioner with failure to present satisfactory evidence of the actual grant to it of a State permit, the order charges the petitioner with failure to present satisfactory evidence merely of its "compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council." While this avoids subjecting the petitioner to an arbitrary and capricious refusal of the permit it does not meet the substance of the objection to the order. For example, § 7776 of the State Code requires that "the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council." This would subject to State control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission.[10] A still greater difficulty is illustrated by § 7771. This states the requirements for a State permit as follows:

"7771 When permit granted. If it shall appear to the council that the construction, operation, or

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*maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied.)

This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers.[11] It is this diversion

[9] See § 10(a), note 5, supra; § 23(b), note 2, supra; and § 4(e), note 7, supra.

[10] See § 10(a), note 5, supra; and also: "§ 10. All licenses issued under this Part shall be on the following conditions: . . .

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder . . . without the prior *approval of the Commission;* and any emergency alteration or addition so made shall thereafter be subject to such modification and change *as the Commission may direct.*

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as *the Commission may from time to time prescribe* for the protection of life, health, and property. . . ." 49 Stat 842, c 687, 16 USCA § 803(b) and (c), 5 FCA title 16, § 803(b) and (c). (Italics supplied.)

[11] Report from the Chief of Engineers on the Iowa River and its tributaries made in 1929 covering navigation, flood

that makes possible the increase in the head of water for power development from a maximum of 35 feet to an average of 101 feet, the increase in the capacity of the plant from 15,000 kw. to 50,000 kw. and its output from 47,000,000 kwh. to 200,000,000 kwh. per year. It is this diversion that led the Federal Power Commission, on January 29, 1944, to make its favorable appraisal of the enlarged project in contrast to its unfavorable appraisal, and to the State's rejection, of the smaller project. It is this feature that brings this project squarely under the Federal Power Act and at the same time gives the project its greatest economic justification.

If a State permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's

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compliance *with the requirements of the State Code for a State permit. Compliance with State requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the State requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it. On the other hand, there is ample opportunity for the Federal Power Commission, under the authority expressly given to it by Congress, to require by regulation the presentation of evidence satisfactory to it of the petitioner's compliance with any of the requirements for a State permit on the state waters of Iowa that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States. This evidence can be required of the petitioner upon the remanding of this application to the Commission.

In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not re-

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quire two *agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a) (b) and (c), and 23(b).[12] In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the requirements" of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most

control, power development and irrigation. H. R. Doc. No. 134, 71st Cong, 2d Sess, 86, 87, 90.

[12] See notes 7, 5, 10 and 2, supra.

of them.[13] The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b)[14] but also subsections (a) and (c).[15] *[169] Section 9(c) permits *the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission.[16]

[13] In addition to those given in the text, another example of conflict between the project requirements of the Iowa statutes and those of the Federal Power Act appears in § 7792 of the Iowa Code. That section requires the beginning of construction of the project dam or raceway within one year and the completion of the plant within three years after the granting of the permit. This conflicts with § 13 of the Federal Power Act which makes this largely discretionary with the Federal Power Commission but generally contemplates that the construction be commenced within two years from the date of the license. So in § 7793 of the Iowa Code, the life of a permit conflicts with the term of a license under § 6 of the Federal Power Act.

[14] See note 6, supra.

[15] "§ 9. That each applicant for a license hereunder shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

. . . .

"(c) Such additional information as the commission may require." 41 Stat 1068, c 285, 16 USCA § 802(a) and (c), 5 FCA title 16, § 802(a) and (c).

[16] These rules and regulations are issued pursuant to §§ 303, 308 and 309, 49 Stat 855, 858, c 687, 16 USCA §§ 825b, 825g and 825h, 5 FCA title 16, §§ 825b, 825g and 825h, interpreting §§ 4 and 9 of the Federal Power Act. Federal Power Commission Rules of Practice and Regulations, 1938, §§ 4.40–4.51, 18 CFR §§ 4.40–4.51. They cover the field so fully as to leave no purpose to be served by filing comparable information required in some alternative form under state laws as a basis for a state permit. Exhibits D and E, required by § 4.41 of the regulations, are to satisfy § 9(b) of the Federal Power Act and have to do especially with property rights in the use of water under the state laws and do not alter the legal situation presented by the Act itself. These exhibits are described as follows:

"Exhibit D.—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the 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 the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.

"Exhibit E.—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evi-

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*The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. 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 that 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.

The State of Iowa, in its petition to intervene in the proceedings before the Commission, stated in relation to the proposed diversion of water from the Cedar River to the Mississippi: "said diversion would be in direct violation of the provisions of § 7771, Code of Iowa 1939." Also, in the State's motion to intervene in the proceedings before the Court of Appeals, it alleged that "By reason of said provisions of law [Code of Iowa 1939, §§ 7767 and 7771], and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed." Furthermore, the Executive Council, which includes the Governor of the State, on

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July 5, *1944, adopted a resolution directing the Attorney General of Iowa to intervene in this case before that court and "thereby take steps to sustain the said order of the Federal Power Commission [dismissing the petitioner's application for a federal license]" because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained." This demonstrates that the State of Iowa not only is opposed to the granting of a State permit but is opposed also to the granting of a federal license for the project. This opposition is based at least in part on the ground that the State statute, as interpreted by the State officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.

Accepting this as the meaning of § 7771 of the Iowa Code brings us to consideration of the effect of the Federal Power Act upon it and the related State statutes. We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a determination to avoid unconstitutional invasion of the jurisdiction of the states. The solution reached is to apply the principle of the division of constitutional powers between the state and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.

Headnote 2

The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are

*[172]

all applied in *the Federal Power Act to the development of the navigable waters of the United States.[17]

The closeness of the relationship

dence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted." Federal Power Commission Rules of Practice and Regulations, effective June 1, 1938, pp 21, 22.

[17] The Federal Government took its greatest step toward exercising its jurisdiction in this field by authorizing federal

of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at *[173] the *expiration of a license, to take over the license project by payment of "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken," plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L ed 23, to United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291." Northwest Airlines v. Minnesota, 322 US 292, 303, 88 L ed 1283, 1290, 64 S Ct 950, 153 ALR 245.

It was in the light of these developments that this petitioner, in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate commerce and to the navigable waters of the United States, that is brought forth by the new recognition of its value when viewed from the comprehensive viewpoint of the Federal Power Commission. Until 1941, this enlarged project had remained dormant at least from the time when its value was recognized in the report to Congress filed by the War Department in 1929.[18]

Further light is thrown upon the

licenses, under the Federal Water Power Act of 1920 (41 Stat 1063, c 285), for terms of 50 years for the development of water power in the navigable waters of the United States. That Act was limited in 1921 by the exclusion from it of water power projects in national parks or national monuments. [March 3, 1921] 41 Stat 1353, c 129, 16 USCA § 797, 5 FCA title 16, § 797. The Commission was reorganized so as to improve its administrative capacity in 1930. [June 23, 1930] 46 Stat 797, c 572, 16 USCA § 792, 5 FCA title 16, § 792. The Act was generally revised and perfected on August 26, 1935, 49 Stat 803, c 687, when it received the name of the Federal Power Act. It was then made Part I of Title II of the Public Utility Act of 1935.

This last step was shortly after the decision of this Court in United States v. West Virginia, 295 US 463, 79 L ed 1546, 55 S Ct 789, and it has served to clarify the law as it existed prior to that decision. Among other things this last step amended § 23 so as expressly to require a federal license for every water power project in the navigable waters of the United States. It also made mandatory, instead of discretionary, the filing with the Federal Power Commission of a declaration of intention by anyone intending to construct a project in non-navigable waters over which Congress had jurisdiction under its authority to regulate commerce. It continued its recital of permission to construct such projects upon compliance with the state laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce and did not affect the public lands or reservations of the United States. These amendments sharpened the line between the state and federal jurisdictions and helped to make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses for the development of water power resources in the navigable waters of the United States. See also the rapid development of federal projects shown in the Annual Reports of the Federal Power Commission 1921–1945.

[18] H. R. Doc. No. 134, 71st Cong, 2d Sess, reflecting the recommendations of the District Engineer, pp 8–90; Division Engineer, p 90; Mississippi River Commission, pp 90–93; Board of Engineers for Rivers and Harbors, pp 3–8; and the Chief of Engineers, pp 1–3. See especially pp 86, 87, 90.

meaning of the Federal Power Act by the statement, made by Representative William L. LaFollette of Washington, a member of the Special Committee on Water Power, which reported the bill which later became the Federal Water Power Act of 1920. In the debate which

*[174]

led to the insertion in § 9(b) *of the reference to state laws as to the bed and banks of streams, he said:

"The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision [United States v. Cress, 243 US 316, 61 L ed 746, 37 S Ct 380], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that cannot be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." 56 Cong Rec 9810. (Italics supplied.)

As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject.[19]

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*Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

"Section 27. That nothing herein contained 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." 41 Stat 1077, c 285, 16 USCA § 821, 5 FCA title 16, § 821.

Section 27 thus evidences the recognition by Congress of the need for an express "saving" clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9(b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a "saving" clause and its location near the end of the Act emphasizes the distinction between

[19] Instances of such provisions are the following: § 4(a) and (c), cooperation of the Commission with the executive departments and other agencies of the State and National Governments is required in the investigation of such subjects as the utilization of water resources, water-power industry, location, capacity, development costs and the relation to markets of power sites, and the fair value of power. § 4(f), notice of application for a preliminary permit is to go to any State or municipality likely to be interested. § 7(a), in issuing permits and licenses preference is to be given to States and municipalities. § 10(e), licenses to States and municipalities under certain circumstances shall be issued and enjoyed without charge. § 14, a right is reserved not only to the United States but to any State or municipality to take over any licensed project at any time by condemnation and payment of just compensation. §§ 19 and 20, regulation of service and rates is preserved to the states.

its purpose and that of § 9(b) which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate "saving" clause in § 27, its failure to use similar language in § 9(b) is persuasive that § 9(b) should not be given the same effect as is given to § 27.

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation,

Headnote 3

*[176]

*use or distribution of water in irrigation or for municipal or other uses of the same nature. 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. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" Alabama Power Co. v. Gulf Power Co. (DC) 283 F 606, 619.

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.[20]

*[177]

*Section 9(b)[21] does not resemble § 27. It must be read with § 9(a) and (c).[22] The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. Where § 9(a) calls for engineering and financial information, § 9(b) calls for legal information. This makes § 9(b) a natural place in which to

[20] The legislative history of § 27 confirms these conclusions. The language is similar to that of § 8 of the Reclamation Act of [June 17,] 1902, 32 Stat 388, 390, c 1093, 43 USCA § 383, 9A FCA title 43, § 383, which provides, "nothing [in several listed sections] 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, . . ."

This restricted clause appeared in a modified and broader form in the Ferris Public Lands Bill of 1916, H. R. No. 408, 64th Cong, 1st Sess:

"Section 13. That 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 relating to the control, appropriation, use, or distribution of water."

It also had appeared as § 14 of the Ferris Bill of 1914, H. R. No. 16,673, 63d Cong, 2d Sess, as follows:

"Section 14. That 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 relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder."

Discussion in Congress further emphasized the purely proprietary sense in which this language was used. 51 Cong Rec 13,630, 13,631.

The clause reappeared in the Bill which became the Federal Water Power Act and was there enacted into the law in its present form. The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language.

[21] See note 6.

[22] See note 15.

describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27 and which, in accordance with the contentions of the State of Iowa, would enable chapter 363 of the Code of Iowa, 1939, to remain in effect although in conflict with the requirements of the Federal Power Act. There is nothing in the express language of § 9(b) that requires such a conclusion.

It does not itself require compliance with any state laws. Its reference to state laws is by way of *[178] suggestion to the *Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.

When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9(b) says that the Commission may wish to have "satisfactory evidence" of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9(b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage. The State of Iowa, however, has sought to sustain the applicability and validity of chapter 363 of the Code of Iowa in this connection, on the ground that the Federal Power Act, by the implications of § 9(b), has recognized this chapter of Iowa law as part of a system of dual control of power project permits, cumbersome and complicated though it be. If it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities, to each proj- *[179] ect, the simple thing would *have been to so provide. In the course of the long debate on the legislation it was proposed at one time to provide for some such a consent in § 9(b).

For example, in the Shields Bill, S. No. 1419, 65th Cong 2d Sess in 1917, a proviso was proposed:

"That before the permit shall be granted under this Act, the 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." (Italics supplied.)

This proviso was not enacted into law but it illustrates the concreteness with which the proposal was before Congress. In 1918, when Representative Mondell, of Wyoming, successfully defended the present language against amendment, he stated the purposes of § 9 (b) as follows:

"There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that *the water power commission shall have the benefit of all of the information* which the States possess relative to the condition of water supply at the point of proposed diversion. That

is a very important reason for a provision of this kind. . . . The second reason is so that the bill shall carry with it *notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*" 56 Cong. Rec. 9813, 9814. (Italics supplied.)

The purpose of this section as thus explained is consistent with the contention of the Commission in this case. It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9(b) amounts to the subjection of the federal license to requirements of the state law on the same subject.

*[180]

The inappropriateness of such *an interpretation is apparent in the light of the circumstances which culminated in the passage of the Federal Water Power Act in 1920. The purposes of the Act were then so generally known as to have made such a restrictive interpretation impossible and a denial of it unnecessary. It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It was a major undertaking involving a major change of national policy.[23] That it was the intention

*[181]

of Congress *to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[24]

The detailed provisions of the Act

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[23] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

"With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.

"For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams. . . ." Pinchot, The Long Struggle for Effective Federal Water Power Legislation (1945), 14 George Washington L Rev 9, 19. See also Kerwin, Federal Water-Power Legislation, c VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong Rec 9797, 9798. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong, 1st Sess, p 5.

[24] New Jersey v. Sargent, 269 US 328, 70 L ed 289, 46 S Ct 122; United States v. Appalachian Electric Power Co. 311 US 377, 85 L ed 243, 61 S Ct 291; Clarion River Power Co. v. Smith, 61 AppDC 186, 59 F2d 361, writ of certiorari denied in 287 US 639, 77 L ed 553, 53 S Ct 88; Alabama Power Co. v. McNinch, 68 AppDC 132, 94 F2d 601; Pennsylvania Water & P. Co. v. Federal Power Commission, 74 AppDC 351, 123 F2d 155, writ of cer-

providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] The con- *[182] tention of the State of *Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in United States v. Appalachian Electric Power Co. 311 US 377, 404, 405, 426, 427, 85 L ed 243, 251, 252, 262, 263, 61 S Ct 291, where this Court said:

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

. . . .

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others.

*[183]

*We accordingly reverse the judgment of the court below with directions to remand the case to the Federal Power Commission for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice **Jackson** took no part in the consideration or decision of this case.

Mr. Justice **Frankfurter** dissenting.

This case does not present one of those large constitutional issues which, because they are so largely abstract, have throughout its history so often divided the Court. The controversy, as I understand it, is concerned with the proper administration of a law in which Congress has recognized the interests of the

tiorari denied in 315 US 806, 86 L ed 1205, 62 S Ct 640; Alabama Power Co. v. Federal Power Commission, 75 AppDC 315, 128 F2d 280, writ of certiorari denied in 317 US 652, 87 L ed 525, 63 S Ct 48; Puget Sound Power & L. Co. v. Federal Power Commission, 78 AppDC 143, 137 F2d 701; Wisconsin Pub. Serv. Corp. v. Federal Power Commission (CCA7th) 147 F2d 743, writ of certiorari denied in 325 US 880, 89 L ed 1996, 65 S Ct 1574; Georgia Power Co. v. Federal Power Commission (CCA 5th) 152 F2d 908.

[25] Sections 4(e) and 10(a), comprehensive plans required; §§ 4(f) and 5, preliminary permits; § 4(g), investigation of power resources; § 6, license term of 50 years; § 7(a), development of water resources on a national basis; § 7(b), developments by the United States itself; § 13, prompt construction required; § 14, recapture of projects and payment for them by the Government upon expiration of licenses, thus giving the Government a direct interest in and reason for control of every feature of each licensed project; § 21, federal powers of condemnation vested in licensee; and § 28, prohibition of amendment or repeal of licenses.

DESCHUTES COUNTY LAW LIBRARY

[438 US 645]
STATE OF CALIFORNIA et al., Petitioners,

v

UNITED STATES

438 US 645, 57 L Ed 2d 1018, 98 S Ct 2985

[No. 77-285]

Argued March 28, 1978. Decided July 3, 1978.

SUMMARY

In connection with construction of the New Melones Dam on the Stanislaus River as part of a reclamation project authorized under the Reclamation Act of 1902 (generally 43 USCS §§ 372 et seq.), the United States Bureau of Reclamation applied for permits from the California State Water Resources Control Board to appropriate the water that would be impounded by the dam and that later would be used for reclamation. Although the Board approved the Bureau's application, it attached a number of conditions to the permits allocating the water. Thereafter, the United States brought an action in the United States District Court for the Eastern District of California to obtain a declaratory judgment that the federal government could impound whatever unappropriated water was necessary for a federal reclamation project without complying with state law. The District Court held that, as a matter of comity, the federal government had to apply to California for an appropriation permit, but that California had to issue the permit without condition if there was sufficient unappropriated water (403 F Supp 874). On appeal, the United States Court of Appeals for the Ninth Circuit affirmed on the ground that § 8 of the Reclamation Act of 1902 (43 USCS §§ 371, 383), rather than comity, required the United States to apply for the permit, and that California could not condition its allocation of water to a federal reclamation project (558 F2d 1347).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and Stewart, Blackmun, Powell, and Stevens, JJ., it was held that under § 8 of the Reclamation Act of 1902, governing the effect of state laws relating to the control, appropriation, use, or distribution of waters upon the Secretary of Interior in regard to reclamation projects, a state could impose a condition

Briefs of Counsel, p 1338, infra.

on a federal reclamation project if the condition was not inconsistent with clear congressional directives respecting the project.

WHITE, J., joined by BRENNAN and MARSHALL, JJ., dissented on the ground that California was without the power under the reclamation laws to impose conditions on the operation of the dam and on the distribution of project water developed by that dam, and that under § 8 a state was not permitted to disentitle the federal government to acquire the property necessary or appropriate to carry out an otherwise constitutionally permissible and statutorily authorized undertaking.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Waters §§ 109, 111 — reclamation project — action of Secretary of Interior — effect of state law

1a, 1b, 1c. Under § 8 of the Reclamation Act of 1902 (43 USCS §§ 371, 383) governing the effect of state laws relating to the control, appropriation, use, or distribution of waters upon the Secretary of Interior in regard to reclamation projects, a state may impose a condition on its allocation of water to a federal reclamation project if the condition is not inconsistent with clear congressional directives respecting the project; § 8 does not require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights, nor does it merely require the Secretary to file a notice with the state of intent to appropriate but to thereafter ignore the substantive provisions of state water law. (White, Brennan, and Marshall, JJ., dissented in part from this holding.)

Waters § 109 — reclamation project — effect of state law — distribution of water

2a–2d. Under § 8 of the Reclamation Act of 1902 (43 USCS §§ 371, 383) governing the effect of state laws relating to the control, appropriation, use, or distribution of waters upon the Secretary of Interior in regard to reclamation projects, state water law does not control in the distribution of reclamation water if it is inconsistent with congressional directives respecting the project.

Appeal and Error § 1750 — Supreme Court's remand — question for Court of Appeals — reclamation project

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

45 Am Jur 2d, Irrigation §§ 90 et seq.
43 USCS §§ 371, 383
US L Ed Digest, Waters § 109
ALR Digests, Waters § 90
L Ed Index to Annos, Reclamation; Waters
ALR Quick Index, Reclamation; Waters and Watercourses
Federal Quick Index, Reclamation; Water

ANNOTATION REFERENCE

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L Ed 2d 942.

3a, 3b, 3c. Upon remand following the United States Supreme Court's decision that a Federal Court of Appeals had erred in affirming a Federal District Court's decision holding that a state could not condition its allocation of water to a federal reclamation project—the Supreme Court having held that under § 8 of the Reclamation Act of 1902 (43 USCS §§ 371, 383) a state may impose a condition on its allocation of water to a federal reclamation project if the condition is not inconsistent with clear congressional directives respecting the project—the Court of Appeals will be free to consider arguments as to whether conditions imposed by the state upon its allocation of water to the reclamation project are inconsistent with congressional directives for the project in question.

Statutes § 161 — Reclamation Act of 1902 — agency interpretation

4a, 4b. Considerable weight must be accorded to interpretations of the Reclamation Act of 1902 (generally 43 USCS §§ 372 et seq.) by the United States Bureau of Reclamation as the agency charged with the Act's operation.

SYLLABUS BY REPORTER OF DECISIONS

The United States Bureau of Reclamation applied to the California State Water Resources Control Board for a permit to appropriate water that would be impounded by the New Melones Dam, a unit of the California Central Valley Project. Congress specifically directed that the Dam be constructed and operated pursuant to the Reclamation Act of 1902, which established a program for federal construction and operation of reclamation projects to irrigate arid western land. Section 8 of that Act provides that "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, . . . and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ." After lengthy hearings, the Board, having found that unappropriated water was available for the project during certain times of the year, approved the Bureau's application, but attached 25 conditions to the permit (the most important of which prohibited full impoundment until the Bureau was able to show a specific plan for use of the water) which the Board concluded were necessary to meet California's statutory water appropriation requirements. The United States then brought this action against petitioners (the State, the Board, and its members) seeking a declaratory judgment that the United States may impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The District Court held that, as a matter of comity, the United States must apply to the State for an appropriation permit, but that the State must issue the permit without conditions if there is sufficient unappropriated water. The Court of Appeals affirmed, but held that § 8, rather than comity, requires the United States to apply for a permit. *Held:*

1. Under the clear language of § 8 and in light of its legislative history, a State may impose any condition on "control, appropriation, use or distribution of water" in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. To the extent that petitioners would be prevented by dicta that may point to a contrary conclusion in Ivanhoe Irrigation District v McCracken, 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174, City of Fresno v California, 372 US 627, 10 L Ed 2d 28, 83 S Ct 996, and Arizona v California, 373 US 546, 10 L Ed 2d 542, 83 S

Ct 1468, from imposing conditions in this case that are not inconsistent with congressional directives authorizing the project in question, those dicta are disavowed.

2. Whether the conditions imposed by the Board in this case are inconsistent with congressional directives as to the New Melones Dam and issues involving the consistency of the conditions remain to be resolved.

558 F2d 1347, reversed and remanded.

Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Blackmun, Powell, and Stevens, JJ., joined. White, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

APPEARANCES OF COUNSEL

Roderick E. Walston argued the cause for petitioners.
Stephen R. Barnett argued the cause for respondent.
Briefs of Counsel, p 1338, infra.

OPINION OF THE COURT

[438 US 647]

Mr. Justice **Rehnquist** delivered the opinion of the Court.

[1a] The United States seeks to impound 2.4 million acre-feet of water from California's Stanislaus River as part of its Central Valley Project. The California State Water Resources Control Board ruled that the water could not be allocated to the Government under state law unless it agreed to and complied with various conditions dealing with the water's use. The Government then sought a declaratory judgment in the District Court for the Eastern District of California to the effect that the United States can impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The District Court held that, as a matter of comity, the United States must apply to the State for an appropriation permit, but that the State must issue the permit without condition if there is sufficient unappropriated water. 403 F Supp 874 (1975). The Court of Appeals for the Ninth Circuit affirmed, but held that § 8 of the Reclamation Act of 1902, 32 Stat 390, as codified 43 USC §§ 372, 383 [43 USCS §§ 372, 383], rather than comity, requires the United States to apply for the permit. 558 F2d 1347 (1977). We granted certiorari to review the decision of the Court of Appeals insofar as it holds that California cannot condition its allocation of water to a federal reclamation project. 434 US 984, 54 L Ed 2d 477, 98 S Ct 608 (1977). We now reverse.

[438 US 648]

I

Principles of comity and federalism, which the District Court and the Court of Appeals referred to and which have received considerable attention in our decisions, are as a legal matter based on the Constitution of the United States, statutes enacted by Congress, and judge-made law. But the situations invoking the application of these principles have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so may it be said that the life of the law is not political philosophy but experience.

The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its

different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the "Great American Desert," brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had.

In order to correctly ascertain the meaning of the Reclamation Act of 1902, we must recognize the obvious truth that the history of irrigation and reclamation before that date was much fresher in the minds of those then in Congress than it is to us today. "[T]he afternoon of July 23, 1847, was the true date of the beginning of modern irrigation. It was on that afternoon that the first band of Mormon pioneers built a small

[438 US 649]

dam across City Creek near the present site of the Mormon Temple and diverted sufficient water to saturate some 5 acres of exceedingly dry land. Before the day was over they had planted potatoes to preserve the seed."[1] During the subsequent half century, irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community.[2] By the turn of the century, however, most of the land which could be profitably irrigated by such small-scale projects had been put to use. Pressure mounted on the Federal Government to provide the funding for the massive projects that would be needed to complete the reclamation, culminating in the Reclamation Act of 1902.[3]

The arid lands were not all susceptible of the same sort of reclamation. The climate and topography of the lands that constituted the "Great American Desert" were quite different from the climate and topography of the Pacific Coast States. As noted in both United States v Gerlach Live Stock Co., 339 US 725, 94 L Ed 1231, 70 S Ct 955, 20 ALR2d 633 (1950), and Ivanhoe Irrigation District v McCracken, 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174 (1958), the latter States not only had a more pronounced seasonal variation and precipitation than the intermountain States, but the interior portions of

1. A. Golze, Reclamation in the United States 6 (2d ed 1961). The author was at the time of publication the Chief Engineer of the California Department of Water Resources and had been formerly Assistant Commissioner of the U.S. Bureau of Reclamation.

2. Id., at 6–12.

3. Id., at 12–13. Private development has continued to be a major contributor to the reclamation of the West. From 1902 to 1950, federal reclamation projects increased the amount of irrigated land by 5,700,000 acres. This still only accounted, however, for approximately one-fifth of the irrigated acreage in the 17 Western States covered by the Reclamation Act of 1902. During the same period from 1902 to 1950, private reclamation opened up over 10,000,000 acres for irrigation. Id., at 14, Table 1-1.

California had climatic advantages which many of the inter-mountain States did not.

> "The prime value in our national economy of the lands of summer drought on the Pacific coast is as a source of
>
> [438 US 650]
>
> plant products that require mild winters and long growing seasons. Citrus fruits, the less hardy deciduous fruits, fresh vegetables in winter—these are their most important contributions at present. Rainless summers make possible the inexpensive drying of fruits, which puts into the market prunes, raisins, dried peaches, and apricots. In its present relation to American economy in general, the primary technical problem of agriculture in the Pacific Coast States is to make increasingly more effective use of the mild winters and the long growing season in the face of the great obstacle presented by the rainless summers. To overcome that obstacle supplementary irrigation is necessary. Hence the key position of water in Pacific Coast agriculture."[4]

If the term "cooperative federalism" had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States. Reflective of the "cooperative federalism" which the Act embodied is § 8, whose exact meaning and scope are the critical inquiries in this case:

> "*[N]othing 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
>
> [438 US 651]
>
> stream or the waters thereof: *Provided,* that the right to the use of water acquired 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." 32 Stat 390 (emphasis added).

Perhaps because of the cooperative nature of the legislation, and the fact that Congress in the Act merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended, there has not been a great deal of litigation involving the meaning of its language. Indeed, so far as we can tell, the first case to come to this Court involving the Act at all was Ickes v Fox, 300 US 82, 81 L Ed 525, 57 S Ct 412 (1937), and the first case to require construction of § 8 of the Act was United States v Gerlach Live Stock Co., supra, decided nearly

4. U. S. Department of Agriculture, Climate and Man at 204 (1941). For a general description of water conditions in California and the Californians' answer to them, see E. Cooper, Aqueduct Empire (1968).

half a century after the enactment of the 1902 statute.[5]

The New Melones Dam, which this litigation concerns, is part of the California Central Valley Project, the largest reclamation project yet authorized under the 1902 Act.[6] The Dam, which will impound 2.4 million acre-feet of water of California's Stanislaus River, has the multiple purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water-quality control, and the protection of fish and wildlife. The waters of the Stanislaus River that will be impounded behind the New Melones Dam arise and flow solely in California.

[438 US 652]

The United States Bureau of Reclamation, as it has with every other federal reclamation project, applied for a permit from the appropriate state agency, here the California State Water Resources Control Board, to appropriate the water that would be impounded by the Dam and later used for reclamation.[7] After lengthy hearings, the State Board found that unappropriated water was available for the New Melones Dam during certain times of the year. Although it therefore approved the Bureau's applications, the State Board attached 25 conditions to the permit. California State Water Resources Control Board, Decision 1422 (Apr. 14, 1973). The most important conditions prohibit full impoundment until the Bureau is able to show firm commitments, or at least a specific plan, for the use of the water.[8] The State Board

[438 US 653]

concluded that without such a specific

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5. Section 8 of the 1902 Reclamation Act has been addressed in only six cases decided by this Court. See Nebraska v Wyoming, 295 US 40, 79 L Ed 1289, 55 S Ct 568 (1935); Nebraska v Wyoming, 325 US 589, 89 L Ed 1815, 65 S Ct 1332 (1945); United States v Gerlach Live Stock Co. 339 US 725, 94 L Ed 1231, 70 S Ct 955, 20 ALR2d 633 (1950); Ivanhoe Irrigation Dist. v McCracken, 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174 (1958); City of Fresno v California, 372 US 627, 10 L Ed 2d 28, 83 S Ct 996 (1963); Arizona v California, 373 US 546, 10 L Ed 2d 542, 83 S Ct 1468 (1963).

6. The New Melones Dam was authorized by the Flood Control Acts of 1944 and 1962, 58 Stat 901, 76 Stat 1191. As in the case of all other reclamation projects, Congress specifically directed that the Dam be constructed and operated "pursuant to the Federal reclamation laws," 76 Stat 1191, the principal one of which is the Reclamation Act of 1902.

7. Under California law, any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal Water Code Ann §§ 1201 and 1225 (West 1971). The Board is to issue a permit only if it determines that unappropriated water is available and that the proposed use is both "reasonable" and "beneficial" and best conserves "the public interest." §§ 1240, 1255, and 1375; Cal Const, Art 10, § 2. In determining whether to issue a permit, the Board is to consider not only the planned use of the water but also alternative uses, including enhancement of water quality, recreation, and the preservation of fish and wildlife. Cal Water Code Ann §§ 1242.5, 1243, and 1257 (West 1971). The Board can also impose such conditions in the permit as are necessary to insure the "reasonable" and "beneficial" use of the water and to protect "the public interest." §§ 1253 and 1391.

8. Other conditions prohibit collection of water during periods of the year when unappropriated water is unavailable; require that a preference be given to water users in the water basin in which the New Melones Dam is located; require storage releases to be made so as to maintain maximum and minimum chemical concentrations in the San Joaquin River and protect fish and wildlife; require the United States to provide means for the release of excess waters and to clear vegetation and structures from the reservoir sites; require the filing of additional reports and studies; and provide for access to the project site by the State Board and the public. Still other conditions reserve jurisdiction to the Board to impose further conditions on the appropriations if necessary to protect the "beneficial use" of the water involved. The

plan of beneficial use the Bureau had failed to meet the California statutory requirements for appropriation.

> "The limited unappropriated water resources of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses." Id., at 16.

II

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. The rivers, streams, and lakes of California were acquired by the United States under the 1848 Treaty of Guadalupe Hidalgo with the Republic of Mexico, 9 Stat 922. Within a year of that treaty, the California gold rush began, and the settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West. Other settlers coming into the intermountain area, the vast basin and range country which lies between the Rocky Mountains on the east and the Sierra Nevada and Cascade Ranges on the west, were forced to the same conclusion. In its place, the doctrine of prior appropriation, linked to beneficial use of the water, arose through local customs, laws,

[438 US 654]

and judicial decisions. Even in this early stage of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law. Thus, in Broder v Water Co. 101 US 274, 25 L Ed 790 (1879), the Court observed that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." Id., at 276, 25 L Ed 790.

In 1850, California was admitted as a State to the Union "on an equal footing with the original States in all respects whatever." 9 Stat 452. While § 3 of the Act admitting California to the Union specifically reserved to the United States all "public lands" within the limits of California, no provision was made for the unappropriated waters in California's streams and rivers. One school of legal commentators held the view that, under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams. In 1903, for example, one leading expert on reclamation and water law observed that "[i]t has heretofore been assumed that the authority of each State in the disposal of the water-supply within its

United States did not challenge any of the conditions under state law, but instead filed the federal declaratory action that is now before us.

borders was unquestioned and supreme, and two of the States have constitutional provisions asserting absolute ownership of all water-supplies within their bounds." E. Mead, Irrigation Institutions 372 (1903).[9] Such commentators were not without some support from language

[438 US 655]

in contemporaneous decisions of this Court. See S. Wiel, Water Rights in the Western States §§ 40–43, pp 84–95 (2d ed 1908). Thus, in Kansas v Colorado, 206 US 46, 51 L Ed 956, 27 S Ct 655 (1907), the Court noted:

"While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.

. . . . .

"In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. . . . But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, Pollard v Hagan, [3 How 212,] [11 L Ed 565]; Shively v Bowlby, [152 US 1,] [38 L Ed 331, 14 S Ct 548]; Hardin v Shedd, 190 US 508, 519, [47 L Ed 1156, 23 S Ct 685]; and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation." Id., at 92 and 95.

And see United States v Rio Grande Dam & Irrig. Co. 174 US 690, 702–703, and 709, 43 L Ed 1136, 19 S Ct 770 (1899).

As noted earlier, reclamation of the arid lands began almost immediately upon the arrival of pioneers to the Western States. Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption. Because a very high percentage of land in the West belonged to the Federal Government, the canals and ditches that carried this water frequently crossed

[438 US 656]

federal land. In 1862, Congress opened the public domain to homesteading. Homestead Act of 1862, 12 Stat 392. And in 1866, Congress for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Mining Act of 1866, ch 262, 14 Stat 251. Because of the fear that these Acts might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:

"[W]henever, by priority of possession, rights to the use of water for

9. Dr. Elwood Mead was Chief of Irrigation Investigations for the Department of Agriculture at the time of his treatise's publication. Dr. Mead was a principal witness before Congress during the hearings on the Reclamation Act of 1902 and later became Commissioner of Reclamation, serving in that position from 1924 until his death in 1936.

Three Western States have adopted constitutional provisions asserting absolute ownership over the waters in their States. See Colo Const, Art 16, § 5; ND Const, Art 17, § 210; Wyo Const, Art 8, § 1. Other States have asserted ownership by statute. See, e.g., Idaho Code § 42-101 (1977). The courts of these States have upheld these provisions on the ground that the States gained absolute dominion over their nonnavigable waters upon their admission to the Union. See, e.g., Stockman v Leddy, 55 Colo 24, 27–29, 129 P 220, 221–222 (1912); Farm Investment Co. v Carpenter, 9 Wyo 110, 61 P 258 1900).

> mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." § 9, 14 Stat 253.

The Mining Act of 1866 was not itself a grant of water rights pursuant to federal law. Instead, as this Court observed, the Act was "'a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use.'" United States v Rio Grande Dam & Irrig. Co., supra, at 705, 43 L Ed 1136, 19 S Ct 770. Congress intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition."[10] Basey v Gallagher, 20 Wall 670, 684, 22 L Ed 452 (1875). See Broder v Water Co., supra, at 276, 25 L Ed 790; Jennison v Kirk, 98 US 453, 459–461, 25 L Ed 240 (1879).[11]

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In 1877, Congress took its first step toward encouraging the reclamation and settlement of the public desert lands in the West and made it clear that such reclamation would generally follow state water law. In the Desert Land Act of 1877, Congress provided for the homesteading of arid public lands in larger tracts

> "by [the homesteader's] conducting water upon the same, within the period of three years [after filing a declaration to do so], *Provided however* that the right to the use of water by the person so conducting the same . . . shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: *and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*" Ch 107, 19 Stat 377 (emphasis added).

This Court has had an opportunity to construe the 1877 Desert Land Act before. In California Oregon Power Co. v Beaver Portland Cement Co. 295 US 142, 79 L Ed 1356,

10. Senator Stewart, the most vocal of the 1866 Act's supporters, noted during debate that § 9 "*confirms* the rights to the use of water . . . as established by local law and the decisions of the courts. In short, it proposes no new system, but *sanctions, regulates, and confirms a system to which the people are devotedly attached.*" Cong Globe, 39th Cong, 1st Sess, 3227 (1866) (emphasis added).

11. Four years later, in the Act of July 9, 1870, 16 Stat 218, Congress reaffirmed that occupants of federal public land would be bound by state water law, by providing that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights." The effect of the 1866 and 1870 Acts was not limited to rights previously acquired. "They reach[ed] into the future as well, and approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." California Oregon Power Co. v Beaver Portland Cement Co. 295 US 142, 155, 79 L Ed 1356, 55 S Ct 725 (1935).

55 S Ct 725 (1935), Mr. Justice Sutherland[12] explained that, through this language, Congress

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"effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." Id., at 158, 79 L Ed 1356, 55 S Ct 725. The nonnavigable waters thereby severed were "reserved for the use of the public under the laws of the states and territories." Id., at 162. Congress' purpose was not to federalize the prior-appropriation doctrine already evolving under local law. Quite the opposite:

> "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' Kansas v Colorado, 206 US 46, 94, [51 L Ed 956, 27 S Ct 655], the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See Wyoming v Colorado, 259 US 419, 465, [66 L Ed 999, 42 S Ct 552]." Id., at 163-164, 79 L Ed 1356, 55 S Ct 725.

See also Gutierres v Albuquerque Land & Irrig. Co. 188 US 545, 552-553, 47 L Ed 588, 23 S Ct 338 (1903); Ickes v Fox, 300 US 82, 95, 81 L Ed 525, 57 S Ct 412 (1937); Brush v Commissioner, 300 US 352, 367, 81 L Ed 691, 57 S Ct 495 (1937).

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Congress next addressed the task of reclaiming the arid lands of the West 11 years later. The opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts. Congress addressed this problem in the Act of Oct. 2, 1888, 25 Stat 527, which provided:

> "[A]ll the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditche, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law."

Unfortunately, this language, which had been hastily drafted and passed,

12. Mr. Justice Sutherland had grown up in Utah and was very familiar with the Westerners' efforts to tame the desert. Elected to Congress in 1900, Sutherland was assigned to the Committee on Irrigation. According to his biographer, Sutherland's "intimate knowledge of the water problem in the West enabled him to make a conspicuous contribution" in this assignment. J. Paschal, Mr. Justice Sutherland: A Man Against the State 43 (1951). Sutherland was one of the principal participants in the formulation of the Reclamation Act of 1902. Id., at 44.

had the practical effect of reserving all of the public lands in the West from settlement.[13] As a result, "there came a perfect storm of indignation from the people of the West, which resulted in the prompt repeal of the extraordinary [1888] provision." 29 Cong Rec 1955 (1897) (statement of Cong. McRae). In the Act of Aug. 30, 1890, 26 Stat 391, Congress repealed the 1888 provision except insofar as it reserved reservoir sites. Then, in the Act of Mar. 3, 1891, 26 Stat 1101, as amended, 43 USC § 946 [43 USCS § 946]. Congress provided for rights-of-way across the public lands to be used by "any canal or ditch company formed for the purpose of irrigation." The apparent purpose of the 1890 and 1891 Acts was to reserve reservoir sites from settlement but to open them for use in reclamation projects.[14] As before, Congress expressly indicated

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that the reclamation would be controlled by state water law:[15]

> "[T]he right of way through the public lands and reservations of the United States is hereby granted . . . for the purpose of irrigation . . . , to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals . . . ; *Provided,* That . . . *the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*" 26 Stat 1101 (emphasis added).

The Secretary of the Interior, unfortunately, interpreted the 1890 and 1891 Acts as reserving governmentally surveyed reservoir sites *from* use rather than *for* use. Congress rectified this interpretation in the Act of Feb. 26, 1897, ch 335, 29 Stat 599, which provided:

> "[A]ll reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or
>
> [438 US 661]
>
> private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respec-

13. See 29 Cong Rec 1948 (1897) (discussion by Cong. Lacey); id., at 1955 (discussion by Cong. McRae).

14. Ibid. And see Report to the Secretary of Interior on the Blue Water Land & Irrigation Co. by the Acting Commissioner of the General Land Office, Nov. 23, 1895.

15. Congress' intent was reflected in contemporary administrative decisions. According to the Department of the Interior, the 1891 Act "relegate[d] the matter of appropriation and control of all natural sources of water supply in the state of California to the authority of that state. The act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state." H. H. Sinclair, 18 ID 573, 574 (1894). In a circular of the same period explaining the 1891 Act, the Interior Department noted that the "control of the flow and use of the water is . . . a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands." 18 ID 168, 169–170 (1894).

tive States and Territories in which such reservoirs are in whole or part situate."

The final provision of the 1897 Act was proposed as a floor amendment by Representative, later Speaker, Cannon to expressly preserve States' control over reclamation within their borders. It was clearly the opinion of a majority of the Congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution.[16] According to Congressman Lacey, Chairman of the House Committee on Public Lands and a principal sponsor of the

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1897 Act, the water through which the reclamation would be accomplished

"does not belong to the [Federal] Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois [Mr. CANNON] relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of the water." 29 Cong Rec 1952 (1897).

Congressman Lacey's statement found reflection in contemporaneous decisions of this Court holding that, with limited exceptions not relevant to reclamation, authority over intrastate waterways lies with the States. In United States v Rio Grande Dam & Irrig. Co., supra, for example, New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande River was challenged. The Court unhesitatingly held that "as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." The Court noted that there are two limitations to the States' exclusive control of its streams—reserved rights "so far as least as may be necessary for the beneficial uses of the government property," 174 US, at 703, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters. "Unquestionably

16. "A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.

. . . .

"[T]he United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States." 29 Cong Rec 1948–1949 (1897) (Cong. Lacey). "It is the State alone that owns and controls the water, under the constitution of our States; and I suppose that is true under the laws of every State." Id., at 1951 (Cong. Bell). "The amendment which has been proposed by the gentleman from Illinois [Mr. CANNON], and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters." Id., at 1952 (Cong. Shafroth). Only Congressman Terry, who unsuccessfully opposed the bill, suggested the contrary. In his view, the Federal Government could use its control of the land to regulate the price of the water stored. See id., at 1949–1950.

the State . . . has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed." Id., at 709, 43 L Ed 1136, 19 S Ct 770.

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Similarly, in Kansas v Colorado, 206 US 46, 51 L Ed 956, 27 S Ct 655 (1907), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power "to control the whole system of the reclamation of arid lands." The Court disagreed and held that state reclamation law must prevail. The United States, of course, could appropriate water and build projects to reclaim its own public lands. "As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property." Id., at 92, 51 L Ed 956, 27 S Ct 655. But federal legislation could not "override state laws in respect to the general subject of reclamation." Ibid. "[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." Id., at 93, 51 L Ed 956, 27 S Ct 655. With respect to the question that had been presented in Rio Grande Dam & Irrig. Co., the Court reaffirmed that each State "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." Id., at 94, 51 L Ed 956, 27 S Ct 655.

III

It is against this background that Congress passed the Reclamation Act of 1902. With the help of the 1891 and 1897 Acts, private and state reclamation projects had gone far toward reclaiming the arid lands,[17] but massive projects were now needed to complete the goal and these were beyond the means of private companies and the States. In 1900, therefore, all of the major political parties endorsed federal funding of reclamation projects. While the Democratic Party's platform specified none of the attributes of a federal program other than to recommend that it be "intelligent,"

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K. Porter & D. Johnson, National Party Platforms 115 (2d ed 1961), the Republicans specifically recommended that the reclamation program "reserv[e] control of the distribution of water for irrigation to the respective States and territories." Id., at 123. In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation and again recommended that state law control the distribution of water.[18]

17. See A. Golze, Reclamation in the United States 9-23 (1961).

18. "The pioneer settlers on the arid public domain chose their homes along streams from which they could themselves divert the water to reclaim their holdings. Such opportunities are practically gone. There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the Government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in*

As a result of the public demand for federal reclamation funding, a bill was introduced into the 57th Congress to use the money from the sale of public lands in the Western States to build reclamation projects in those same States. The projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water. As originally introduced, § 8 of the Reclamation Act provided:[19]

> "[N]othing in this act shall be construed as affecting or intended to affect or to in any way interfere with
>
> [438 US 665]
>
> the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act: *Provided,* That the right to the use of water acquired 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."

From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. According to Representative Mondell, the principal sponsor of the reclamation bill in the House, once the Secretary determined that a reclamation project was feasible and that there was an adequate supply of water for the project, "the Secretary of the Interior would proceed to make the appropriation of the necessary water *by giving the notice and complying with the forms of law of the State or Territory in which the works were located.*" 35 Cong Rec 6678 (1902) (emphasis added). The Secretary of the Interior could not take any action in appropriating the waters of the state streams "which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands." HR Rep No. 794, 57th Cong, 1st Sess, 7–8 (1902). Thus, in response to the

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statement of an opponent to the bill that the Secretary would be allowed to condemn water even if in violation of state law, Representative Mondell briskly responded:

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conformity with State laws and without interference with those laws or with vested rights." HR Doc No. 1, 57th Cong, 1st Sess, xxviii (1901) (emphasis added).

19. In the House, § 8 was amended so as to provide, rather than that state law "shall govern and control," that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with" state law "relating to the control, appropriation, use, or distribution of water." According to Representative Newlands, who had introduced the original bill in the House, the original bill was "identical in its provisions, though differing somewhat in phraseology," to the ultimate Act. 35 Cong Rec 6673 (1902). The bill may have been amended to make clear the congressional intent that state law could not override the specific directives of Congress that water rights would be appurtenant to the land and would not be sold to tracts of greater than 160 acres. See id., at 6674. See generally n 21, infra.

"Whereabouts does the gentleman find any such provision as he is arguing? Whereabouts in the bill is there anything that attempts to give the Federal Government any right to condemn or to take any water right or do anything which an individual could not do? Will the gentleman point out any place or any provision for the Federal Government to do anything that I could not do if I owned the public land?

"Mr. RAY of New York. Do you say there is nothing in this bill that provides for condemnation?

"Mr. MONDELLO *The bill provides explicitly that even an appropriation of water can not be made except under State law*" 35 Cong Rec 6687 (1902) (emphasis added).[20]

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[2a, 3a] Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, "the control of waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow." Id., at 2222. As Senator Clark went on to explain:

"[I]t is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.

"Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be some-

20. Earlier in the debates, Representative Mondell observed that under the Reclamation Act the Secretary of the Interior would only have the power to condemn water rights in compliance with state law. "In some of the arid States . . . water rights can be condemned for the purposes contemplated in this bill, and in such States the Secretary of the Interior would have as much authority to condemn as any other individual, and no more. Where the State laws do not recognize the right to condemn property for the purposes contemplated in the act, it will not be condemned, and there is the end of it . . . . [W]here the State laws do not authorize condemnation, and projects can not be carried on without condemnation, those particular projects will not be undertaken, and others, where there is no such obstacle, will." 35 Cong Rec 6680 (1902).

In response to Representative Mondell's statement, Representative Ray asked whether he had "forgotten . . . that they have in this bill a provision which purports to confer upon the Secretary of the Interior power to condemn water and water rights for the purpose of carrying out this scheme." Representative Mondell responded that the power existed only "[w]herever the State law gives him authority to do so." Id., at 6688.

Representative Sutherland also noted that the "Secretary must proceed in the condemnation proceedings under the laws of the State." Id., at 6769.

> thing little less than suicidal. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer . . . ." Ibid.

As Representative Sutherland, later to be a Justice of this Court, succinctly put it, "if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail." Id., at 6770. Different water rights in

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the same State would be governed by different laws and would frequently conflict.[21]

21. Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use, and in § 5 Congress forbade the sale of reclamation water to tracts of land of more than 160 acres. It is conceivable, of course, that Congress may not have intended to actually override state law when inconsistent with these other provisions but instead only intended to exercise a veto power over any reclamation project that, because of state law, could not be operated in compliance with these provisions. A project simply would not be built by the Federal Government if such a conflict existed. As the House Report explained the workings of the 160-acre limitation and the appurtenance requirement:

"The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected." HR Rep No. 794, 57th Cong, 1st Sess, 6 (1902).

Some support for this interpretation of the congressional intent can also be found in contemporaneous administrative material of the Department of the Interior. See, e. g., Department of the Interior, Proceedings of First Conference of Engineers of the Reclamation Service 103 (1904) ("Before the filing of the first notice of appropriation of water in any State the matter of the advisability of making such filing should be submitted to the chief engineer, because some of the State laws may be such that it is impossible to comply with them in conducting operations under the reclamation act"); Department of the Interior, Second Annual Report of the Reclamation Service 33 (1904) ("[C]areful study must be made of the effect of State laws upon each project under consideration in that particular State. It appears probable that in some of the States radical changes in the laws must be made before important projects can be undertaken").

[2b, 3b] In previous cases interpreting § 8 of the 1902 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. See Ivanhoe Irrigation District v McCracken, 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174 (1958); City of Fresno v California, 372 US 627, 10 L Ed 2d 28, 83 S Ct 996 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. See n 25, infra. 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 appropriation of water and condemnation of water rights. Under the 1902 Act, the Secretary of the Interior was authorized in his discretion to "locate and construct" reclamation projects. As the legislative history of the 1902 Act convincingly demonstrates, however, if state law did not allow for the appropriation or condemnation of the necessary water, Congress did not allow for the appropriation or condemantion of the necessary water, Congress intend the Secretary of the Interior to initiate the project. Subsequent legislation authorizing a specific project may by its terms signify congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question, but no such legislation was considered by the Court of Appeals in its opinion in this case. That court will be free to consider arguments by the Government to this effect on remand. See Part V, infra.

A principal motivating factor behind Congress' decision to

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defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. Congress also intended to "follo[w] the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water." Id., at 6678 (Cong. Mondell). As Representative Mondell noted after reviewing the legislation discussed in Part II of this opinion: "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard." Id., at 6679.[22]

Both sponsors and opponents of the Reclamation Act also expressed constitutional doubts as to Congress' power to override the States' regulation of waters within their borders. Congress was fully aware that the Supreme Court had "in

[438 US 670]

several decisions recognized the right of the State to regulate and control the use of water within its borders." Ibid. (Cong. Mondell). According to the House Report, "Section 8 *recognizes State control over waters of nonnavigable streams* such as are used in irrigation." HR Rep No. 794, 57th Cong, 1st Sess, 6 (1902) (emphasis added).[23]

IV

[1b] For almost half a century, this congressionally mandated division between federal and state authority worked smoothly. No project was constructed without the approval of the Secretary of the Interior, and the United States through this official preserved its authority to determine how federal funds should be expended. But state laws relating to water rights were observed in accordance with the congressional directive contained in § 8 of the Act of 1902. In 1958, however, the first of two cases was decided by this Court in which private landowners or municipal corporations contended that state water law had the effect of overriding specific congressional directives to the Secretary of the Interior as to the operation of federal reclamation projects. In Ivanhoe Irrigation District v McCracken, 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174 (1958), the Supreme Court of California decided

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that California law forbade the 160-

22. In addition to the legislation discussed in Part II of this opinion, Congressman Mondell also cited to the National Forest Act of 1897, 30 Stat 36, "provid[ing] for the use of waters on such reserves 'under the laws of the State wherein such forest reservations are situated.'" 35 Cong

23. Opponents of the 1902 Reclamation Act also expressed doubt whether Congress could constitutionally override the States' regulation of waters within their borders:

"Again, to be clear, the United States as to its public lands in a State is only an owner with the rights of private ownership, the same as those of an individual. When territory is admitted into the Union as a State the sovereignty of the United States is surrendered to the new State and the sovereignty of the State attaches and becomes paramount as to every foot of soil, unless expressly reserved to the General Government, and subject to the right of that Government to condemn for a public use of the United States necessary to the performance of its governmental functions or to its preservation." HR Rep No. 794, 57th Cong, 1st Sess, pt 2 (Minority Views), 16–17 (1902).

See also id., at 8; 35 Cong Rec 6687 (1902) (Cong. Ray).

acre limitation on irrigation water deliveries expressly written into § 5 of the Reclamation Act of 1902, and that therefore, under § 8 of the Reclamation Act, the Secretary was required to deliver reclamation water without regard to the acreage limitation. Both the State of California and the United States appealed from this judgment, and this Court reversed it, saying:

> "Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . .' Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." 357 US, at 291–292, 2 L Ed 2d 1313, 78 S Ct 1174.

Five years later, in City of Fresno v California, 372 US 627, 10 L Ed 2d 28, 83 S Ct 996 (1963), this Court affirmed a decision of the United States Court of Appeals for the Ninth Circuit holding that § 8 did not require the Secretary of the Interior to ignore explicit congressional provisions preferring irrigation use over domestic and municipal use.[24]

[438 US 672]

[2c] Petitioners do not ask us to overrule these holdings, nor are we presently inclined to do so.[25] Petitioners instead ask us to hold that a State may impose any condition on the "control, appropriation, use, or distribution of water" through a federal reclamation project that is not inconsistent with clear congressional

24. "Section 9(c) of the Reclamation Project Act of 1939 . . . provides: 'No contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary [of the Interior], it will not impair the efficiency of the project for irrigation purposes.' . . . It therefore appears clear that Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, irrigation will not be adversely affected.," 372 US, at 630–631, 10 L Ed 2d 28, 83 S Ct 996.

The Court also concluded in a separate portion of its opinion: "§ 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. . . . Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." Id., at 630, 10 L Ed 2d 28, 83 S Ct 996. Because no provision of California law was actually inconsistent with the exercise by the United States of its power of eminent domain, this statement was dictum. It also might have been apparent from examination of the congressional authorization of the Central Valley Project that Congress intended the Secretary to have the power to condemn any necessary water rights. We disavow this dictum, however, to the exent that it implies that state law does not control even where not inconsistent with such expressions of congressional intent.

25. **[2d]** As discussed earlier in n 21, it is at least arguable that Congress did not intend to override state water law when it was inconsistent with congressional objectives such as the 160-acre limitation, but intended instead to enforce those objectives simply by the Secretary's refusal to approve a project which could not be built or operated in accordance with them. This intent, however, is not clear, and Congress may have specifically amended § 8 to provide that state law could not override congressional directives with respect to a reclamation project. See n 19, supra. Ivanhoe and City of Fresno read the legislative history of the 1902 Act as evidencing Congress' intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law. Even were this aspect of Ivanhoe res nova, we believe it to be the preferable reading of the Act.

directives respecting the project. Petitioners concede, and the Government relies upon, dicta in our cases that may point to a contrary conclusion. Thus, in Ivanhoe, the Court went beyond the actual facts of that case and stated:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. . . . We read nothing in § 8 that compels the
>
> [438 US 673]
>
> United States to deliver water on conditions imposed by the State." 357 US, at 291–292, 2 L Ed 2d 1313, 78 S Ct 1174

Like dictum was repeated in City of Fresno, supra, at 630, 10 L Ed 2d 28, 83 S Ct 996, and in this Court's opinion in Arizona v California, 373 US 546, 10 L Ed 2d 542, 83 S Ct 1468 (1963), where the Court also said:

> "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in Ivanhoe Irr. Dist. v McCracken, . . . and reaffirmed in City of Fresno v California . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [Ivanhoe], we cannot, consistently with Ivanhoe, hold that the Secretary must be bound by state law in disposing of water under the Project Act." Id., at 586–587, 10 L Ed 2d 542, 83 S Ct 1468.

While we are not convinced that the above language is diametrically inconsistent with the position of petitioners,[26] or that it squarely supports the United States, it undoubtedly goes further than was necessary to decide the cases presented to the Court. Ivanhoe and City of Fresno involved conflicts between § 8, requiring the Secretary to follow state law as to water rights, and other provisions of Reclamation Acts that placed specific limitations on how the water was to be distributed. Here the United States contends that it may ignore state law even if no explicit congressional directive conflicts with the conditions imposed by the California State Water Control Board.[27]

[438 US 674]

In Arizona v California, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate reclamation project on the Colorado River.[28] After reviewing the

26. Part of the Court's opinion in Ivanhoe indeed would appear to directly support petitioners' position. Thus, the Court concluded that under § 8 of the 1902 Reclamation Act the United States must "comply with state law when, in the construction and operation of a reclamation project, *it becomes necessary for it to acquire water rights* or vested interests therein." 357 US, at 291, 2 L Ed 2d 1313, 78 S Ct 1174 (emphasis added).

27. The State of California was an appellant in Ivanhoe and supported the decision of the Court of Appeals for the Ninth Circuit in City of Fresno.

28. The Special Master agreed with the States that they had such power under § 14 of the Project Act, 43 USC § 617m [43 USCS § 617m], which incorporated the Reclamation Act of 1902, and § 18 of the Project Act, 43 USC § 617q [43 USCS § 617q], which provided that nothing in the Act should be construed "as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their bor-

legislative history of the Boulder Canyon Project Act, 43 USC §§ 617 et seq. [43 USCS §§ 617 et seq.], the Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary's power to determine with whom and on what terms water contracts would be made.[29] While the Court in rejecting the States' claim repeated the language from Ivanhoe and City of Fresno as to the scope of § 8, there was no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act.

[1c] But because there is at least tension between the above-quoted dictum and what we conceive to be the correct reading of § 8 of the Reclamation Act of 1902, we disavow the dictum to the extent that it would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question. Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That

[438 US 675]

section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water." Nor, as the United States contends, does § 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law. The Government's interpretation would trivialize the broad language and purpose of § 8.

[4a] Indeed, until recently, it has been the consistent position of the Secretary of the Interior and the Bureau of Reclamation, who are together responsible for executing the provisions of the Reclamation Act of 1902, that in appropriating water for reclamation purposes the Bureau must comply with state law. The Bureau's operating instructions, for example, provide:

"State and Federal law and policy establish the framework for project formulation.

"State and Federal law and policy establish the framework of project formulation. *Project plans must comply with State legal provisions or priorities for beneficial use of water* . . . . In some cases, . . . State laws . . . have been modified to meet specific conditions in the authorization of particular projects." U. S. Department of Interior, Bureau of Reclamation, Reclamation Instructions § 116.3.1 (1959).

"The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carry-

ders." The Court disagreed, with three Justices dissenting.

29. Even though concluding that the power of the States was so limited, the Court went on to note that the Project Act "plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river." 373 US, at 588, 10 L Ed 2d 542, 83 S Ct 1468.

ing out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the States regarding

[438 US 676]

reservoir operating limitations." Id., § 231.5.1 (1957). (Emphasis added.)

With respect to the Central Valley Project, the Bureau advised Congress that "'[r]eclamation law . . . recognizes State water law and rights thereunder'" and that "Bureau filings on water are subject to State approval." 95 Cong Rec A961 (1949).[30]

Indeed, until the unnecessarily broad language of the Court's opinion in Ivanhoe, both the uniform practice of the Bureau of Reclamation and the opinions of the Court clearly supported petitioners' argument that they may impose any condition not inconsistent with congressional directive. In holding that the United States was not an indispensable party in Nebraska v Wyoming, 295 US 40, 79 L Ed 1289, 55 S Ct 568 (1935), this Court observed:

"[T]he Secretary of the Interior, pursuant to the [1902] Act, applied to the state engineer of Wyoming and obtained from him permission . . . to appropriate waters, and was awarded a priority date. . . . All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming.

. . . . .

"The bill alleges, and we know as matter of law [citing § 8 of the 1902 Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming

[438 US 677]

in the same manner as a private appropriator or an irrigation district formed under the state law." Id., at 42–43, 79 L Ed 1289, 55 S Ct 568.

Ten years later, in its final decision in Nebraska v Wyoming, 325 US 589 89 L Ed 1815, 65 S Ct 1332 (1945), the Court elaborated on its original observation:

"All of these steps make plain that [the Reclamation] projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in Ickes v Fox, [300 US 82, [81 L Ed 525, 57 S Ct 412] (1937)]: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the gov-

30. **[4b]** A remarkably similar history of administrative construction and advice to Congress was given weight in United States v Gerlach Live Stock Co. 339 US, at 735–736, 94 L Ed 1231, 70 S Ct 955, 20 ALR2d 633. Considerable weight must be accorded to these interpretations of the Reclamation Act by the agency charged with its operation. See Zemel v Rusk, 381 US 1, 14 L Ed 2d 179, 85 S Ct 1271 (1965); Perkins v Matthews, 400 US 379, 27 L Ed 2d 476, 91 S Ct 431 (1971); General Electric Co. v Gilbert 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976).

ernment, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water . . . ., with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'

. . . . .

"We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. . . ." Id., at 613–615, 89 L Ed 1815, 65 S Ct 1332.

The United States suggests that, even if the Congress of 1902 intended the Secretary of the Interior to comply with state law, more recent legislative enactments have subjected reclamation projects "to a variety of federal policies that leave no room for state controls on the operation of a project or on

[438 US 678]

the choice of uses it will serve."[31] Brief for United States 89. While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives. The Flood Control Act of 1944, 58 Stat 888, for example, which first authorized the New Melones Dam provides that it is the "policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control." Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 USC § 666(a) [43 USCS § 666(a)], which subjects the United States to state-court jurisdiction for general stream adjudications:

"In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

. . . . .

"Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State,

[438 US 679]

if there is to be a proper administration of

31. It is worth noting that the original Reclamation Act of 1902 was not devoid of such directives. That Act provided that the charges for water should "be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and . . . be apportioned equitably" and that water rights should "be appurtenant to the land irrigated, and beneficial use . . . the basis, the measure, and the limit of the right"; the Act also forbade sales to tracts of more than 160 acres. Despite these restraints on the Secretary, however, it is clear from the language and legislative history of the 1902 Act that Congress intended state law to control where it was not inconsistent with the above provisions.

the water law as it has developed over the years." S Rep No. 755, 82d Cong, 1st Sess, 3, 6 (1951).

V

[3c] Because the District Court and the Court of Appeals both held that California could not impose any conditions whatever on the United States' appropriation permit, those courts did not reach the United States' alternative contention that the conditions actually imposed are inconsistent with congressional directives as to the New Melones Dam. Nor did they reach California's contention that the United States is barred by principles of collateral estoppel from challenging the consistency of the permit conditions. Assuming, arguendo, that the United States is still free to challenge the consistency of the conditions, resolution of their consistency may well require additional factfinding. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SEPARATE OPINION

Mr. Justice **White,** with whom Mr. Justice **Brennan** and Mr. Justice **Marshall** join, dissenting.

Early in its opinion, the majority identifies the critical issues in this case as to the "meaning and scope" of § 8 of the Reclamation Act of 1902. In quest of suitable answers, the majority launches on an extensive survey of 19th- and 20th-century statutory and judicial precedents that partially delineate the relationship between federal and state law with respect to the conservation and use of the water resources of the Western States. At the end of this Odyssean journey, the conclusion seems to be that under the relevant federal statutes containing the reclamation policy of the United States, the intention of the Congress has been to recognize local and state law as controlling both the "appropriation and distribution"

[438 US 680]

of the water resources that are the object of federal reclamation projects.

Straightaway, however, and with obvious reluctance, it is conceded in a footnote that § 8 does not really go so far and that Congress, after all, "did not intend to relinquish total control of the actual distribution of the reclamation water to the States." Ante, at 668, n 21, 57 L Ed 2d, at 1034. Where following state law would be inconsistent with other provisions of the Reclamation Act or with congressional directives to the Secretary contained in other statutes, § 8 and local law must give way.[1] Otherwise, however, it is in-

1. Section 8 of the Reclamation Act, 32 Stat 390, now 43 USC §§ 372, 383 [43 USCS §§ 372, 383], provided:

"[N]othing 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 the use of water acquired 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."

JASEN, JONES, WACHTLER, MEYER and KAYE, JJ., concur.

SIMONS, J., taking no part.

Order reversed, etc.

60 N.Y.2d 315

In the Matter of the POWER AUTHORITY OF the STATE of New York, Respondent,

v.

Henry WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation, et al., Respondents,

and

Catskill Center for Conservation and Development, Inc., et al., Intervenors-Appellants.

Court of Appeals of New York.

Nov. 29, 1983.

Appeal was taken from judgment of the Supreme Court, Special Term, Albany County, Lawrence E. Kahn, J., dismissing application in Article 78 proceeding to annul declaratory ruling of Department of Environmental Conservation which held that a proposed hydroelectric generating project was subject to the Clean Water Act. The Supreme Court, Appellate Division, 86 A.D.2d 57, 449 N.Y.S.2d 80, reversed, with the Court of Appeals, 58 N.Y.2d 427, 461 N.Y.S.2d 769, 448 N.E.2d 436, reversed and remitted. On remand, Special Term denied application for state pollutant discharge elimination system, and appeal was taken. The Supreme Court, Appellate Division, Third Department, Kane, J., 94 A.D.2d 69, 464 N.Y.S.2d 252, remitted, and appeal was granted. The Court of Appeals, Jones, J., held that in acting on an application for state certification of a hydroelectric project as a prerequisite to the issuance of a federal license therefor, Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met, and is not empowered to base his decision on a balancing of needs of the project against adverse environmental impact.

Reversed and remitted.

1. Electricity ⚷8.5(1)

Power of Court of Appeals to grant intervenors leave to appeal from nonfinal order of Appellate Division annulling determination of Commissioner of Environmental Conservation denying certification for hydroelectric project was not diminished by the fact that the intervenors would be able to appeal from Commissioner's disposition after remittal and thus obtain a review of the immediate order. McKinney's CPLR 5602(a), par. 2.

2. Electricity ⚷8.5(1)

In acting on an application for state certification of a hydroelectric project as a prerequisite to the issuance of a federal license therefor, Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met, and is not empowered to base his decision on a balancing of needs of the project against adverse environmental impact.

Robert C. Stover and Stanley Bryer, New York City, for intervenors-appellants.

Charles M. Pratt, Stephen L. Baum, Peter A. Giuntini and James P. Rigano, New York City, for Power Authority of the State of New York, respondent.

Robert Abrams, Atty. Gen. (Marcia J. Cleveland, Asst. Atty. Gen., New York City, R. Scott Greathead, Deputy First Asst. Atty. Gen., James A. Sevinsky, Asst. Atty. Gen., Albany, and Lawrence A. Rapoport, New York City, of counsel), for Henry G. Williams, respondent.

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Philip H. Gitlen, Albany, for Natural Resources Defense Council, Inc., and others, amici curiae.

OPINION OF THE COURT

JONES, Judge.

In acting on an application for State section 401 certification of a hydroelectric project as a prerequisite to the issuance of a Federal license therefor, the Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met and is not empowered to base his decision on a balancing of need for the project against adverse environmental impact.

This case arises out of the decision by the Power Authority of the State of New York (PASNY) to construct a pumped storage power facility in the Catskill Mountains about 40 miles southwest of Albany, near Prattsville, New York (the Prattsville Project). The project involves the pumping of water from the Schoharie Reservoir to a reservoir to be constructed at an elevation some 1,000 feet higher, there to be retained until periods of peak power demand, when the water would be returned to generate power through the authority's turbines, then to flow by way of a tailrace back to Schoharie Reservoir, which feeds water into Esopus Creek—a heavily fished, nationally known trout stream. There are conservationists (including the intervenors in the present action) who are apprehensive about the effect the project may have on the quality of water of the reservoir and the creek and on their fish population.

Because a license for such a facility was required by the Federal Power Act (U.S. Code, tit. 16, §§ 791a–828c), on May 26, 1977 PASNY filed an application with the Federal agency authorized to issue such licenses (the Federal Power Commission, subsequently succeeded by the Federal Energy Regulatory Commission [FERC]) for issuance of the necessary license. Inasmuch as an amendment to the Federal Water Pollution Control Act (U.S.Code, tit. 33, § 1251 *et seq.* [FWPCA]), effected by the enactment of section 401 (subd. [a], par. [1]) of the Federal Clean Water Act (U.S. Code, tit. 33, § 1341, subd. [a], par. [1]), prohibited the issuance of such a license for a facility which would result in a "discharge into the navigable waters" unless the State of New York either issued a certificate that the facility would comply with water quality standards adopted by the State in compliance with section 303 of FWPCA (U.S.Code, tit. 33, § 1313) or waived such certification (U.S.Code, tit. 33, § 1341, subd. [a], par. [1]), PASNY also applied to the State Department of Environmental Conservation (DEC, the appropriate State agency [ECL 3–0301, subd. 2, par. j]) for what has become known as section 401 certification. By agreement between PASNY and DEC, consideration of the State application was postponed until conclusion of hearings on the Federal, FERC application so that the record produced at those hearings would be available to DEC.

After the conclusion of extensive FERC hearings in October, 1981, hearings on PASNY's application to DEC for section 401 certification were conducted in February and March, 1982. Introduced in evidence were portions of the FERC record together with additional direct testimony and exhibits. On April 9, 1982 respondent Commissioner of Environmental Conservation denied the power authority's application on the ground that it had failed to demonstrate that the relevant water quality standards would be met.[1] It was evident from the decision that the result was predicated solely on the finding of noncompliance with water quality standards, and that no balancing of other factors, such as general environmental impact and the policy reflected in the State's Energy Law, had been considered.

1. The denial extended also to an alternative request by PASNY for modification of the water quality standards found applicable and to a request for a State pollutant discharge elimination system permit sought in connection with the section 401 certification.

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On July 6, 1982 the administrative law judge who had presided at the FERC hearings issued his initial decision which granted the FERC license for the Prattsville Project, subject to PASNY's securing section 401 certification from DEC. The power authority then commenced the present CPLR article 78 proceeding to challenge the commissioner's April 9, 1982 denial of such certification, in which the Catskill Center for Conservation and Development and other environmental groups, which had participated in the FERC proceedings, were permitted to intervene.

The proceeding was transferred to the Appellate Division, Third Department, which, by the order now before us,[2] annulled the determination of the commissioner and remitted the matter to the commissioner and the department for further proceedings. In its decision the court observed that, although FERC (in compliance with what the court found was a mandate of the Federal Power Act) had engaged in a meticulous balancing of all relevant factors (including future power demand and supply, alternate sources of power, and the public interest in preserving rivers, fish and wilderness for recreational purposes) in determining to issue a license for the Prattsville Project, the State commissioner in denying section 401 certification had undertaken no similar balancing of the need for the project in order to meet State energy requirements against its environmental impact.

The court acknowledged the commissioner's position that the only issue to be considered by him in passing on an application for section 401 certification was whether the proposed facility would comply with applicable water quality standards, but rejected that position in reliance on the requirement, which it found in the State Energy Law, that all State agencies conduct their affairs "so as to conform to the state energy policy expressed in this chapter" (Energy Law, § 3–103) and on its conclusion that the Prattsville Project is the only project that can meet needs described in the State energy master plan adopted on March 25, 1982 pursuant to authority conferred by the Energy Law (§ 3–101, subds. 1, 7). Stating that "a careful weighing of the environmental impact in light of the over-all public interest in the matter [i.e., 'the public interest with respect to any energy project that meets the requirements of the State's long-range plan']" was a necessary component of action on PASNY's certification application, and remarking that "[s]uch considerations were exhaustively reviewed by the presiding administrative law judge for the FERC", the Appellate Division remitted the matter to the commissioner and the department, with the observation that the court perceived "no need for further proceedings under ECL article 8 in view of the proceedings before FERC and the contents and findings of its order and decision of July 6, 1982". (*Matter of Power Auth. v. Flacke,* 94 A.D.2d 69, 78, 464 N.Y.S.2d 252.)

[1] An appeal from the order of the Appellate Division has been taken to our court by the intervenors pursuant to leave granted by us under CPLR 5602 (subd. [a], par. 2). That section authorizes our court to grant leave to appeal from a nonfinal order of the Appellate Division in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers when, following remittal by that order to the public officer or body, the officer or body will be called on to act in an adjudicatory capacity and will thus be unable, for lack of aggrievement by its own action, to take an appeal from its determination on remittal for the purpose of obtaining a review of the prior nonfinal order of the Appellate Division (*Matter of F.J. Zeronda, Inc. v. Town Bd.,* 37 N.Y.2d 198, 371 N.Y.S.2d 872, 333 N.E.2d 154). As we noted in *Zeronda,* the statute accords its benefit to every party to the proceeding if any one

2. Related litigation, involving the power of DEC to have issued a declaratory ruling concerning the Prattsville Project, was previously before us (*Matter of Power Auth. v. New York State Dept. of Environmental Conservation,* 58 N.Y.2d 427, 461 N.Y.S.2d 769, 448 N.E.2d 436).

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party comes within its ambit (37 N.Y.2d 198, 201, 371 N.Y.S.2d 872, 333 N.E.2d 154, n; cf. *Matter of Queens Farms v. Gerace*, 60 N.Y.2d 555, 468 N.Y.S.2d 1025, 455 N.E.2d 1265). So here, the inability of respondent commissioner, after disposition on remittal by the Appellate Division of PASNY's application for section 401 certification, to obtain a review of the Appellate Division's order returning the matter to him by means of an appeal from his subsequent determination activates our power to grant leave at the request of the intervenors. That power was not diminished by the fact that the intervenors—although not the commissioner—would be able to appeal from the commissioner's disposition after remittal and thus obtain a review of the intermediate order. Although the intervenors might have chosen to pursue such an appeal, they would be under no obligation to do so. We also observe that, the appeal having been taken by the intervenors with our permission, the commissioner and the Department of Environmental Conservation now join the intervenors in urging reversal of the determination at the Appellate Division.

[2] We reverse the order of the Appellate Division and remit the case to it for consideration of issues raised by PASNY in this proceeding, other than its contention that the commissioner erred in not considering energy and general environmental factors as well as conformity to water quality standards in making his decision on PASNY's application. Unless the resolution of another issue posed becomes dispositive, such consideration will include address to the question whether the commissioner's determination of nonconformity to applicable water quality standards is supported by substantial evidence—the question normally posed by a challenge on the merits to an administrative determination made after an evidentiary hearing (CPLR 7803, subd. 4).

In reaching the result we do we have no need to determine whether, as the intervenors assert, the Appellate Division was effectively mandating the commissioner to accept the conclusion of the FERC administrative law judge that a balancing of interests established that the project should be approved and thereby left nothing open to the commissioner on remittal, or whether, as PASNY asserts, the court did no more than require a balancing, allowing a broad exercise of discretion by the commissioner in determining how and to what extent to take into consideration the various factors and interests.

The outcome of this appeal has been preordained by our decision in *Matter of de Rham v. Diamond*, 32 N.Y.2d 34, 343 N.Y.S.2d 84, 295 N.E.2d 763, a case which involved the very issue on which the Appellate Division annulled the commissioner's action in the present case—i.e., the scope and breadth of the commissioner's inquiry in passing on an application for the water quality certification required by FWPCA as a prerequisite to Federal licensing of certain hydroelectric power projects. The language of Chief Judge Fuld, speaking of the extent of the authority of the commissioner in determining whether to issue the certification of reasonable assurance that a proposed project would not violate applicable water quality standards, required by then subdivision (b) of section 21 of FWPCA (predecessor to present § 401), is conclusive:

"Congress, by the Federal Power Act (U.S.Code, tit. 16, § 792 *et seq.*), has vested the Federal Power Commission with broad responsibility for the development of national policies in the area of electric power, granting it sweeping powers and a specific planning responsibility with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States. The Commission's jurisdiction with respect to such projects preempts all State licensing and permit functions. [Footnote and authorities omitted.]

"Section 21 (subd. [b]) of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the

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narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' of the State. That is all that section 21 (subd. [b]) did, and all that it was designed to do. Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

"With this in mind, it is clear that the State Commissioner was required only to consider water quality standards which may be affected by discharges from Con Ed's project into the Hudson River—in other words, to ascertain whether the project would offend against the applicable regulations (6 NYCRR 701.3) governing 'Class B' waters, the classification of the River at Cornwall (6 NYCRR 858.4). It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many other issues—which had been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it had conducted". (32 N.Y.2d 34, 44–45, 343 N.Y.S.2d 84, 295 N.E.2d 763.)

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PASNY asserts however that the *de Rahm* decision does not take into account the Energy Law and the State's energy planning process, which did not exist in their present form when that case was decided. It contends that as a State officer the commissioner is now bound, particularly by the mandate in section 3–103 of the statute that State agencies conduct their affairs "so as to conform to the state energy policy", to take into account the prevalent energy program—specifically the current State energy master plan, which it is said would be advanced by construction of the Prattsville Project.

Although professing to acknowledge "the preemptive nature of the FERC's jurisdiction over hydroelectric projects under the Federal Power Act", which pre-emptive nature PASNY describes as "clear and strong", it nevertheless tenders an imaginative, but unpersuasive, argument that, in determining whether to issue section 401 certification as to compliance with water quality standards, the commissioner must use as a component of his considerations the State's energy needs as manifested in the energy master plan.

The argument of course runs counter to the acknowledgment of Federal pre-emption, overlooks the fact that pre-emption could not have been overcome by the enactment of the State Energy Law, and disregards the very limited nature of the activity left by FWPCA to State action in section 401 certification. The certification referred to in the Federal Clean Water Act, insofar as relevant to the Prattsville Project, is simply of compliance with section 303 of the Federal statute (U.S.Code, tit. 33, § 1313), which provides for either State-adopted, Federally approved water quality standards or the promulgation of standards by the Federal Environmental Protection Agency. In the case of New York State, the standards adopted by DEC and Federally approved establish use classifications of waters within the State with specific, individual standards, relating to such things as turbidity and temperature change, assigned to the various classifications (e.g., 6 NYCRR 701.4, 704.2[b]). The section 401 certification process is accomplished by a determination that a proposed project will meet the particular water quality standards for the applicable classification. To extend that process, as the order of the Appellate Division would do, to consideration of countervailing energy and environmental interests with the possibility of issuance of section 401 certification despite noncompliance with water quality standards on the basis of overriding energy needs would be to countenance both a failure by the commissioner to perform the function reserved to him under FWPCA and an intrusion by him in the area of responsibility pre-empted for the Federal agency.[3]

3. It does not follow, however, from the inability of the commissioner to consider more than compliance with water quality standards in acting on an application for section 401 certifica-

The Appellate Division erred in remitting PASNY's application for section 401 certification to respondent commissioner who had neither authority nor responsibility to engage in balancing economic, energy, environmental or other factors or to reflect public interest other than as it is set forth in the State water quality standards. It also erred in denying intervenors' motion to strike from the appendix on appeal the initial decision of the FERC administrative law judge issued July 6, 1982, which was issued subsequent to the commissioner's denial of section 401 certification on April 9, 1982 and which was irrelevant to the propriety of that denial.

Because there remain other objections in point of law to the commissioner's action raised by PASNY in this proceeding as well as its challenge to his decision as unsupported by substantial evidence, none of which has been passed on by the Appellate Division, we remit the matter to that court for its further consideration, rejecting the request by the intervenors that we finally rule on each of the remaining objections. It is not appropriate for this court to undertake the initial judicial review of the determination of respondent commissioner.

The order of the Appellate Division should be reversed, with costs to the intervenors, and the case remitted to that court for further consideration in conformity with this opinion.

COOKE, C.J., and JASEN, WACHTLER, MEYER, SIMONS and KAYE, JJ., concur.

Order reversed, with costs, and matter remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein.

tion that all other factors are necessarily disregarded or beyond reach at the State level. To the contrary, public interests of broad scope are implicated both in the classification of State waters, which is required to be done "in accordance with considerations of best usage in the interest of the public" (ECL 17–0301, subd. 2), and in the fixing of standards of purity within classifications, which are to be established consistent with a variety of interests—"public health and public enjoyment thereof, the propagation and protection of fish and wild life, including birds, mammals and other terrestrial and aquatic life, and the industrial development of the state" (ECL 17–0101). Indeed, under section 303 (subd. [c], par. [2]) of the FWPCA the use and value of State waters for industrial purposes is one of the factors which must be taken into consideration in the adoption of State water quality standards if they are to receive Federal approval (U.S.Code, tit. 33, § 1313, subd. [c], par. [2]).

60 N.Y.2d 329

In the Matter of the GUARDIANSHIP and CUSTODY OF ALEXANDER L., an Infant;

Bienvenida L., Appellant;

Cardinal McCloskey Children and Family Services et al., Respondents.

Court of Appeals of New York.

Nov. 29, 1983.

A children and family service agency filed a petition seeking termination of mother's parental rights predicated on mental illness. The Family Court, New York County, Jack Turret, J., granted the petition, and the mother appealed. The Supreme Court, Appellate Division, First Department, 92 A.D.2d 755, 458 N.Y.S.2d 969, unanimously affirmed. Leave to appeal was granted. The Court of Appeals, Jones, J., held that a parent who is to be examined by a court-appointed psychiatrist in a proceeding to terminate the parental relationship on account of the parent's mental illness is entitled to have his or her attorney present during the examination if the parent so desires, even without a demonstration of how the attorney's presence would impair validity and effectiveness of the particular examination.

Order reversed and matter remitted.

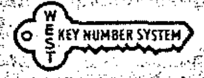
1. Infants ⚿205

Mother who was about to be examined by court-appointed psychiatrist in proceed-

JASEN, JONES, WACHTLER, MEYER and KAYE, JJ., concur.

SIMONS, J., taking no part.

Order reversed, etc.



60 N.Y.2d 315

In the Matter of the POWER AUTHORITY OF the STATE of New York, Respondent,

v.

Henry WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation, et al., Respondents,

and

Catskill Center for Conservation and Development, Inc., et al., Intervenors-Appellants.

Court of Appeals of New York.

Nov. 29, 1983.

Appeal was taken from judgment of the Supreme Court, Special Term, Albany County, Lawrence E. Kahn, J., dismissing application in Article 78 proceeding to annul declaratory ruling of Department of Environmental Conservation which held that a proposed hydroelectric generating project was subject to the Clean Water Act. The Supreme Court, Appellate Division, 86 A.D.2d 57, 449 N.Y.S.2d 80, reversed, with the Court of Appeals, 58 N.Y.2d 427, 461 N.Y.S.2d 769, 448 N.E.2d 436, reversed and remitted. On remand, Special Term denied application for state pollutant discharge elimination system, and appeal was taken. The Supreme Court, Appellate Division, Third Department, Kane, J., 94 A.D.2d 69, 464 N.Y.S.2d 252, remitted, and appeal was granted. The Court of Appeals, Jones, J., held that in acting on an application for state certification of a hydroelectric project as a prerequisite to the issuance of a federal license therefor, Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met, and is not empowered to base his decision on a balancing of needs of the project against adverse environmental impact.

Reversed and remitted.

1. Electricity ⟹8.5(1)

Power of Court of Appeals to grant intervenors leave to appeal from nonfinal order of Appellate Division annulling determination of Commissioner of Environmental Conservation denying certification for hydroelectric project was not diminished by the fact that the intervenors would be able to appeal from Commissioner's disposition after remittal and thus obtain a review of the immediate order. McKinney's CPLR 5602(a), par. 2.

2. Electricity ⟹8.5(1)

In acting on an application for state certification of a hydroelectric project as a prerequisite to the issuance of a federal license therefor, Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met, and is not empowered to base his decision on a balancing of needs of the project against adverse environmental impact.

Robert C. Stover and Stanley Bryer, New York City, for intervenors-appellants.

Charles M. Pratt, Stephen L. Baum, Peter A. Giuntini and James P. Rigano, New York City, for Power Authority of the State of New York, respondent.

Robert Abrams, Atty. Gen. (Marcia J. Cleveland, Asst. Atty. Gen., New York City, R. Scott Greathead, Deputy First Asst. Atty. Gen., James A. Sevinsky, Asst. Atty. Gen., Albany, and Lawrence A. Rapoport, New York City, of counsel), for Henry G. Williams, respondent.

Cite as 457 N.E.2d 726 (N.Y. 1983)

Philip H. Gitlen, Albany, for Natural Resources Defense Council, Inc., and others, amici curiae.

OPINION OF THE COURT

JONES, Judge.

In acting on an application for State section 401 certification of a hydroelectric project as a prerequisite to the issuance of a Federal license therefor, the Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met and is not empowered to base his decision on a balancing of need for the project against adverse environmental impact.

This case arises out of the decision by the Power Authority of the State of New York (PASNY) to construct a pumped storage power facility in the Catskill Mountains about 40 miles southwest of Albany, near Prattsville, New York (the Prattsville Project). The project involves the pumping of water from the Schoharie Reservoir to a reservoir to be constructed at an elevation some 1,000 feet higher, there to be retained until periods of peak power demand, when the water would be returned to generate power through the authority's turbines, then to flow by way of a tailrace back to Schoharie Reservoir, which feeds water into Esopus Creek—a heavily fished, nationally known trout stream. There are conservationists (including the intervenors in the present action) who are apprehensive about the effect the project may have on the quality of water of the reservoir and the creek and on their fish population.

Because a license for such a facility was required by the Federal Power Act (U.S. Code, tit. 16, §§ 791a–828c), on May 26, 1977 PASNY filed an application with the Federal agency authorized to issue such licenses (the Federal Power Commission, subsequently succeeded by the Federal Energy Regulatory Commission [FERC]) for issuance of the necessary license. Inasmuch as an amendment to the Federal Water Pollution Control Act (U.S.Code, tit. 33, § 1251 *et seq.* [FWPCA]), effected by the enactment of section 401 (subd. [a], par. [1]) of the Federal Clean Water Act (U.S. Code, tit. 33, § 1341, subd. [a], par. [1]), prohibited the issuance of such a license for a facility which would result in a "discharge into the navigable waters" unless the State of New York either issued a certificate that the facility would comply with water quality standards adopted by the State in compliance with section 303 of FWPCA (U.S.Code, tit. 33, § 1313) or waived such certification (U.S.Code, tit. 33, § 1341, subd. [a], par. [1]), PASNY also applied to the State Department of Environmental Conservation (DEC, the appropriate State agency [ECL 3–0301, subd. 2, par. j]) for what has become known as section 401 certification. By agreement between PASNY and DEC, consideration of the State application was postponed until conclusion of hearings on the Federal, FERC application so that the record produced at those hearings would be available to DEC.

After the conclusion of extensive FERC hearings in October, 1981, hearings on PASNY's application to DEC for section 401 certification were conducted in February and March, 1982. Introduced in evidence were portions of the FERC record together with additional direct testimony and exhibits. On April 9, 1982 respondent Commissioner of Environmental Conservation denied the power authority's application on the ground that it had failed to demonstrate that the relevant water quality standards would be met.[1] It was evident from the decision that the result was predicated solely on the finding of noncompliance with water quality standards, and that no balancing of other factors, such as general environmental impact and the policy reflected in the State's Energy Law, had been considered.

1. The denial extended also to an alternative request by PASNY for modification of the water quality standards found applicable and to a request for a State pollutant discharge elimination system permit sought in connection with the section 401 certification.

On July 6, 1982 the administrative law judge who had presided at the FERC hearings issued his initial decision which granted the FERC license for the Prattsville Project, subject to PASNY's securing section 401 certification from DEC. The power authority then commenced the present CPLR article 78 proceeding to challenge the commissioner's April 9, 1982 denial of such certification, in which the Catskill Center for Conservation and Development and other environmental groups, which had participated in the FERC proceedings, were permitted to intervene.

The proceeding was transferred to the Appellate Division, Third Department, which, by the order now before us,[2] annulled the determination of the commissioner and remitted the matter to the commissioner and the department for further proceedings. In its decision the court observed that, although FERC (in compliance with what the court found was a mandate of the Federal Power Act) had engaged in a meticulous balancing of all relevant factors (including future power demand and supply, alternate sources of power, and the public interest in preserving rivers, fish and wilderness for recreational purposes) in determining to issue a license for the Prattsville Project, the State commissioner in denying section 401 certification had undertaken no similar balancing of the need for the project in order to meet State energy requirements against its environmental impact.

The court acknowledged the commissioner's position that the only issue to be considered by him in passing on an application for section 401 certification was whether the proposed facility would comply with applicable water quality standards, but rejected that position in reliance on the requirement, which it found in the State Energy Law, that all State agencies conduct their affairs "so as to conform to the state energy policy expressed in this chapter" (Energy Law, § 3-103) and on its conclusion that the Prattsville Project is the only project that can meet needs described in the State energy master plan adopted on March 25, 1982 pursuant to authority conferred by the Energy Law (§ 3-101, subds. 1, 7). Stating that "a careful weighing of the environmental impact in light of the over-all public interest in the matter [i.e., 'the public interest with respect to any energy project that meets the requirements of the State's long-range plan']" was a necessary component of action on PASNY's certification application, and remarking that "[s]uch considerations were exhaustively reviewed by the presiding administrative law judge for the FERC", the Appellate Division remitted the matter to the commissioner and the department, with the observation that the court perceived "no need for further proceedings under ECL article 8 in view of the proceedings before FERC and the contents and findings of its order and decision of July 6, 1982". (*Matter of Power Auth. v. Flacke*, 94 A.D.2d 69, 78, 464 N.Y.S.2d 252.)

[1] An appeal from the order of the Appellate Division has been taken to our court by the intervenors pursuant to leave granted by us under CPLR 5602 (subd. [a], par. 2). That section authorizes our court to grant leave to appeal from a nonfinal order of the Appellate Division in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers when, following remittal by that order to the public officer or body, the officer or body will be called on to act in an adjudicatory capacity and will thus be unable, for lack of aggrievement by its own action, to take an appeal from its determination on remittal for the purpose of obtaining a review of the prior nonfinal order of the Appellate Division (*Matter of F.J. Zeronda, Inc. v. Town Bd.*, 37 N.Y.2d 198, 371 N.Y.S.2d 872, 333 N.E.2d 154). As we noted in *Zeronda*, the statute accords its benefit to every party to the proceeding if any one

2. Related litigation, involving the power of DEC to have issued a declaratory ruling concerning the Prattsville Project, was previously before us (*Matter of Power Auth. v. New York State Dept. of Environmental Conservation*, 58 N.Y.2d 427, 461 N.Y.S.2d 769, 448 N.E.2d 436).

party comes within its ambit (37 N.Y.2d 198, 201, 371 N.Y.S.2d 872, 333 N.E.2d 154, cf. *Matter of Queens Farms v. Gerace*, 60 N.Y.2d 555, 468 N.Y.S.2d 1025, 455 N.E.2d 1265). So here, the inability of respondent commissioner, after disposition on remittal by the Appellate Division of PASNY's application for section 401 certification, to obtain a review of the Appellate Division's order returning the matter to him by means of an appeal from his subsequent determination activates our power to grant leave at the request of the intervenors. That power was not diminished by the fact that the intervenors—although not the commissioner—would be able to appeal from the commissioner's disposition after remittal and thus obtain a review of the intermediate order. Although the intervenors might have chosen to pursue such an appeal, they would be under no obligation to do so. We also observe that, the appeal having been taken by the intervenors with our permission, the commissioner and the Department of Environmental Conservation now join the intervenors in urging reversal of the determination at the Appellate Division.

[2] We reverse the order of the Appellate Division and remit the case to it for consideration of issues raised by PASNY in this proceeding, other than its contention that the commissioner erred in not considering energy and general environmental factors as well as conformity to water quality standards in making his decision on PASNY's application. Unless the resolution of another issue posed becomes dispositive, such consideration will include address to the question whether the commissioner's determination of nonconformity to applicable water quality standards is supported by substantial evidence—the question normally posed by a challenge on the merits to an administrative determination made after an evidentiary hearing (CPLR 7803, subd. 4).

In reaching the result we do we have no need to determine whether, as the intervenors assert, the Appellate Division was effectively mandating the commissioner to accept the conclusion of the FERC administrative law judge that a balancing of interests established that the project should be approved and thereby left nothing open to the commissioner on remittal, or whether, as PASNY asserts, the court did no more than require a balancing, allowing a broad exercise of discretion by the commissioner in determining how and to what extent to take into consideration the various factors and interests.

The outcome of this appeal has been preordained by our decision in *Matter of de Rham v. Diamond*, 32 N.Y.2d 34, 343 N.Y.S.2d 84, 295 N.E.2d 763, a case which involved the very issue on which the Appellate Division annulled the commissioner's action in the present case—i.e., the scope and breadth of the commissioner's inquiry in passing on an application for the water quality certification required by FWPCA as a prerequisite to Federal licensing of certain hydroelectric power projects. The language of Chief Judge Fuld, speaking of the extent of the authority of the commissioner in determining whether to issue the certification of reasonable assurance that a proposed project would not violate applicable water quality standards, required by then subdivision (b) of section 21 of FWPCA (predecessor to present § 401), is conclusive:

"Congress, by the Federal Power Act (U.S.Code, tit. 16, § 792 *et seq.*), has vested the Federal Power Commission with broad responsibility for the development of national policies in the area of electric power, granting it sweeping powers and a specific planning responsibility with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States. The Commission's jurisdiction with respect to such projects preempts all State licensing and permit functions. [Footnote and authorities omitted.]

"Section 21 (subd. [b]) of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the

narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' of the State. That is all that section 21 (subd. [b]) did, and all that it was designed to do. Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

"With this in mind, it is clear that the State Commissioner was required only to consider water quality standards which may be affected by discharges from Con Ed's project into the Hudson River—in other words, to ascertain whether the project would offend against the applicable regulations (6 NYCRR 701.3) governing 'Class B' waters, the classification of the River at Cornwall (6 NYCRR 858.4). It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many other issues—which had been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it had conducted". (32 N.Y.2d 34, 44–45, 343 N.Y.S.2d 84, 295 N.E.2d 763.)

PASNY asserts however that the *de Rahm* decision does not take into account the Energy Law and the State's energy planning process, which did not exist in their present form when that case was decided. It contends that as a State officer the commissioner is now bound, particularly by the mandate in section 3–103 of the statute that State agencies conduct their affairs "so as to conform to the state energy policy", to take into account the prevalent energy program—specifically the current State energy master plan, which it is said would be advanced by construction of the Prattsville Project.

Although professing to acknowledge "the preemptive nature of the FERC's jurisdiction over hydroelectric projects under the Federal Power Act", which pre-emptive nature PASNY describes as "clear and strong", it nevertheless tenders an imaginative, but unpersuasive, argument that, in determining whether to issue section 401 certification as to compliance with water quality standards, the commissioner must use as a component of his considerations the State's energy needs as manifested in the energy master plan.

The argument of course runs counter to the acknowledgment of Federal pre-emption, overlooks the fact that pre-emption could not have been overcome by the enactment of the State Energy Law, and disregards the very limited nature of the activity left by FWPCA to State action in section 401 certification. The certification referred to in the Federal Clean Water Act, insofar as relevant to the Prattsville Project, is simply of compliance with section 303 of the Federal statute (U.S.Code, tit. 33, § 1313), which provides for either State-adopted, Federally approved water quality standards or the promulgation of standards by the Federal Environmental Protection Agency. In the case of New York State, the standards adopted by DEC and Federally approved establish use classifications of waters within the State with specific, individual standards, relating to such things as turbidity and temperature change, assigned to the various classifications (e.g., 6 NYCRR 701.4, 704.2[b]). The section 401 certification process is accomplished by a determination that a proposed project will meet the particular water quality standards for the applicable classification. To extend that process, as the order of the Appellate Division would do, to consideration of countervailing energy and environmental interests with the possibility of issuance of section 401 certification despite noncompliance with water quality standards on the basis of overriding energy needs would be to countenance both a failure by the commissioner to perform the function reserved to him under FWPCA and an intrusion by him in the area of responsibility pre-empted for the Federal agency.[3]

3. It does not follow, however, from the inability of the commissioner to consider more than compliance with water quality standards in acting on an application for section 401 certifica-

Cite as 457 N.E.2d 731 (N.Y. 1983)

The Appellate Division erred in remitting PASNY's application for section 401 certification to respondent commissioner who had neither authority nor responsibility to engage in balancing economic, energy, environmental or other factors or to reflect public interest other than as it is set forth in the State water quality standards. It also erred in denying intervenors' motion to strike from the appendix on appeal the initial decision of the FERC administrative law judge issued July 6, 1982, which was issued subsequent to the commissioner's denial of section 401 certification on April 9, 1982 and which was irrelevant to the propriety of that denial.

Because there remain other objections in point of law to the commissioner's action raised by PASNY in this proceeding as well as its challenge to his decision as unsupported by substantial evidence, none of which has been passed on by the Appellate Division, we remit the matter to that court for its further consideration, rejecting the request by the intervenors that we finally rule on each of the remaining objections. It is not appropriate for this court to undertake the initial judicial review of the determination of respondent commissioner.

The order of the Appellate Division should be reversed, with costs to the intervenors, and the case remitted to that court for further consideration in conformity with this opinion.

COOKE, C.J., and JASEN, WACHTLER, MEYER, SIMONS and KAYE, JJ., concur.

Order reversed, with costs, and matter remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein.

tion that all other factors are necessarily disregarded or beyond reach at the State level. To the contrary, public interests of broad scope are implicated both in the classification of State waters which is required to be done "in accordance with considerations of best usage in the interest of the public" (ECL 17-0301, subd. 2), and in the fixing of standards of purity within classifications, which are to be established consistent with a variety of interests—"public health and public enjoyment thereof, the propagation and protection of fish and wild life, including birds, mammals and other terrestrial and aquatic life, and the industrial development of the state" (ECL 17-0101). Indeed, under section 303 (subd. [c], par. [2]) of the FWPCA the use and value of State waters for industrial purposes is one of the factors which must be taken into consideration in the adoption of State water quality standards if they are to receive Federal approval (U.S.Code, tit. 33, § 1313, subd. [c], par. [2]).

60 N.Y.2d 329

In the Matter of the GUARDIANSHIP and CUSTODY OF ALEXANDER L., an Infant;

Bienvenida L., Appellant;

Cardinal McCloskey Children and Family Services et al., Respondents.

Court of Appeals of New York.

Nov. 29, 1983.

A children and family service agency filed a petition seeking termination of mother's parental rights predicated on mental illness. The Family Court, New York County, Jack Turret, J., granted the petition, and the mother appealed. The Supreme Court, Appellate Division, First Department, 92 A.D.2d 755, 458 N.Y.S.2d 969, unanimously affirmed. Leave to appeal was granted. The Court of Appeals, Jones, J., held that a parent who is to be examined by a court-appointed psychiatrist in a proceeding to terminate the parental relationship on account of the parent's mental illness is entitled to have his or her attorney present during the examination if the parent so desires, even without a demonstration of how the attorney's presence would impair validity and effectiveness of the particular examination.

Order reversed and matter remitted.

1. Infants ⚷205

Mother who was about to be examined by court-appointed psychiatrist in proceed-

The trouble with this procedural tactic is that it does not come to grips with the problem of self-censorship raised in the *Smith* case, namely, that the bookseller will tend to limit his stock to books which he has read and can guarantee.

It is, of course, not necessary that there be eyewitness testimony that the bookseller had read a book in order to prove his knowledge of its contents but it seems clear that legislation, such as section 235.-10, which sanctions conviction of the bookseller for selling obscene material without any proof whatsoever that he knew or was familiar with its nature, is afflicted with precisely the same vice and produces the same objectionable result as the statute struck down in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, *supra*. In other words, such legislation requires the bookseller to go forward with affirmative proof that he had no knowledge of the content of the publication in order to prevent a finding of guilt.

I would emphasize that making the presumption rebuttable does not make it less effective as a restraint. In either case, a bookseller would be compelled to become a censor and, under compulsion of the statute, would tend to restrict the books to those he read or investigated. In consequence, the State is permitted to indirectly suppress what it could not suppress directly. Thus, the rationale underlying the decision in *Smith*—the very real danger of self-imposed restriction of freedom of expression—also renders the presumption in this case impermissible and unconstitutional.

Although the State may generally regulate the allocation of the burden of proof through legislation, it is clear that a statute may not, where the First Amendment is involved, declare a person presumptively guilty of a crime or presume that he has committed one of its material elements. (See Speiser v. Randall, 357 U.S. 513, 523–524, 78 S.Ct. 1332, *supra*; Smith v. California, 361 U.S. 147, 150–151, 80 S.Ct. 215, *supra*: Grove Press v. Evans, D.C., 306 F.Supp. 1084, 1087–1088; see, also, Note, Obscenity Prosecutions, 41 N.Y.U.L. Rev. 791, 797.) Freedom of speech is too important a right to allow it to be seriously impeded or impaired by a presumption.

The convictions should be reversed and the informations dismissed.

BURKE, JASEN and GABRIELLI, JJ., concur with BREITEL, J.

FULD, C. J., dissents and votes to reverse in a separate opinion in which JONES and WACHTLER, JJ., concur.

Order affirmed.

32 N.Y.2d 34

In the Matter of Richard D. de RHAM, as Treasurer of Scenic Hudson Preservation Conference, et al., Appellants,

v.

Henry L. DIAMOND, as State Commissioner of Environmental Conservation, Respondent,

and

Consolidated Edison Company of New York, Inc., et al., Intervenors-Respondents.

Court of Appeals of New York.

March 14, 1973.

Conservation groups and others instituted Article 78 proceeding to review Environmental Conservation Commissioner's issuance of a certificate of "reasonable assurance" that proposed construction of pumped storage hydroelectric facility on the Hudson River will not violate applicable water quality standards. The Supreme Court, Special Term, DeForest C. Pitt, J., 69 Misc.2d 1, 330 N.Y.S.2d 71, set aside

Commissioner's determination and certification, and Commissioner appealed. The Supreme Court, Appellate Division, 39 A.D.2d 302, 333 N.Y.S.2d 771, confirmed the Commissioner's determination and dismissed the petition in its entirety. Upon petitioners' appeal, the Court of Appeals, Fuld, C. J., held that record established that the Commissioner gave due considerato every factor which had a bearing on applicable water quality standards and that his "reasonable assurance" was rational and reasonable; specifically, there was ample evidence to support his determination that there would be neither thermal pollution, nor salt intrusion, nor danger to fish life; lastly, besides the fact that the Catskill Aqueduct is not a navigable waterway, the proposed project would not discharge into the Aqueduct and thus would not pollute it.

Affirmed.

Breitel, J., took no part.

1. States ⟹4.12

Federal Power Commission's jurisdiction with respect to hydroelectric facilities affecting the navigable waters of the United States preempts all state licensing and permit functions. Federal Power Act, § 1 et seq., 16 U.S.C.A. § 792 et seq.

2. Navigable Waters ⟹35

Federal Water Pollution Control Act provision requiring a federal license applicant, who is to conduct any activity which may result in a discharge into navigable waters, to provide the Power Commission with a certification from the state in which the discharge will originate that there is "reasonable assurance" that such activity will be conducted in a manner not violative of water quality standards relinquishes only one element of the otherwise exclusive jurisdiction granted the Commission by the Federal Power Act; it simply authorizes states to determine the narrow question of whether there is reasonable assurance that operation of the project will not violate applicable state water standards. Federal Water Pollution Control Act, § 21(b) as amended 33 U.S.C.A. § 1171(b).

3. Navigable Waters ⟹35

Record established that Environmental Conservation Commissioner gave due consideration to every factor which had a bearing on applicable water quality standards and that his determination that there was "reasonable assurance" that proposed construction of pumped storage hydroelectric facility on the Hudson River would not violate applicable water standards was rational and reasonable; specifically, there was ample evidence to support his determination that there would be neither thermal pollution, nor salt intrusion, nor danger to fish life; lastly, besides the fact that the Catskill Aqueduct is not a navigable waterway, the proposed project would not discharge into it and thus would not pollute it. Federal Power Act, § 1 et seq., 16 U.S.C.A. § 792 et seq.; ECL § 17–0301; Federal Water Pollution Control Act, § 21(b) as amended 33 U.S.C.A. § 1171(b); Federal Water Pollution Control Act Amendments of 1972, § 308, 86 Stat. 816.

4. Health and Environment ⟹28

Environmental Conservation Commissioner's certification that there was a present "reasonable assurance" that water quality standards would not be contravened by the construction of pumped storage hydroelectric facility on the Hudson River was not negated by the inclusion in the certificate of four conditions, the first of which required power company to monitor the operation of the project and the other three of which provided that operation of the facility would be terminated "upon evidence" that such operation violated or threatened to violate state water quality standards. Federal Power Act, §§ 1 et seq., 10(a), 16 U.S.C.A. §§ 792 et seq., 803(a); Federal Water Pollution Control Act, § 21(b) as amended 33 U.S.C.A. § 1171(b); ECL § 17–0301.

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Albert K. Butzel, Peter A. A. Berle and David Sive, New York City, for Richard D. de Rham and others, appellants.

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John M. Burns, III, New York City, for The Hudson River Fishermen's Association, Inc., appellant.

Louis J. Lefkowitz, Atty. Gen. (Julius Feinstein, Ruth Kessler Toch and Stanley Fishman, Albany, of counsel), for respondent.

Carl D. Hobelman and G. S. Peter Bergen, New York City, for intervenors-respondents.

FULD, Chief Judge.

The State Commissioner of Environmental Conservation, acting pursuant to section 21 (subd. [b]) of the Federal Water Pollution Control Act, determined that there is "reasonable assurance" that construction and operation of Consolidated Edison's Cornwall Project will not violate or contravene water quality standards applicable to the waters of the Hudson River. On this appeal, the scope of judicial review being limited, we are called upon, not to weigh the facts or merits of this long-drawn-out controversy *de novo*, but simply to decide whether the Commissioner acted in accordance with the law and had a reasonable basis for his determination.

In 1963, Consolidated Edison (hereafter referred to as Con Edison or Con Ed) applied to the Federal Power Commission, as required by the Federal Power Act (U.S. Code, tit. 16, § 792 et seq.), for a license to construct and operate a pumped storage hydroelectric facility on the western shore of the Hudson River, at Storm King Mountain, in Cornwall, New York, about 40 miles north of New York City.[1] The Commission initially granted a license in 1965 but, following court review, the licensing order was set aside by the United States Court of Appeals for the Second Circuit and the case was remanded to the agency for further proceedings. (See Scenic Hudson Preservation Conference v. Federal Power Comm., 2 Cir. 354 F.2d 608, cert. den. 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540.) Following the proceedings on remand—which involved 100 hearing days, the testimony of some 60 expert witnesses and filled a record of more than 19,000 pages—the Commission again granted Con Ed a license on August 19, 1970.[2]

The contemplated project, if and when constructed, will be the largest pumped storage plant in the world. It will consist of an upper storage reservoir and a tunnel between that reservoir and a powerhouse and transmission facilities. Water will be pumped from the Hudson River at night and on weekends to the reservoir—which would be situated some 10,000 feet south

1. Pumped storage projects consist of a lower and an upper reservoir and a connecting tunnel housing reversible pump-turbines. Such projects function as giant storage batteries for previously generated electricity.

2. In October, 1971, the Federal Court of Appeals, on petitions for review, upheld the Commission's determination. (See Scenic Hudson Preservation Conference v. Federal Power Comm., 2 Cir. 453 F.2d 463, cert. den. 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813.) In reaching that conclusion, the court wrote (p. 470): "In its opinion the Commission reviewed the power needs of the area served by Con Ed and considered possible alternatives to the Storm King project in terms of reliability, cost, air and noise pollution, and overall environmental impact. * * It held that the scenic impact would be minimal, that no historic site would be adversely affected, that the fish would be adequately protected and that the proposed park and scenic overlook would enhance recreational facilities. The Commission found that further undergrounding of transmission lines would result in unreliability in the delivery of power and would be too costly. The Commission determined that construction of the project would entail no appreciable hazard to [New York City's Catskill] Aqueduct."

and west of the powerhouse in a natural mountain basin behind Storm King Mountain—and then be discharged as electricity is needed during the day, through a number of reversible pump-turbine generators, having a capacity of 2,000 megawatts (2,000,000 kilowatts), back to the Hudson River. The principal function of the facility will be to supply electricity to the metropolitan New York region and to interconnected utility systems—denominated the New York Power Pool—during periods of peak demand and during periods of emergency.

Since the project is completely dependent on off-peak power supplied from other plants located in other areas, no coal, oil, gas or other fuel will be burned at the Cornwall site. Falling water provides the only energy source for the project's generation of electricity.[3]

In March, 1971, about six months after the Federal Power Commission had granted the utility a license, Con Ed applied to the New York State Department of Environmental Conservation for a "certificate of reasonable assurance" that applicable New York State water quality standards would not be violated by its proposed project. This application was made pursuant to section 21 (subd. [b]) of the Federal Water Pollution Control Act (U.S.Code, tit. 33, § 1171, subd. [b]); it provides, in part, as follows:

> Any applicant for a Federal license * * * to conduct any activity, including * * * the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing * * * agency [the Federal Power Commission in this case] a certification from the State in which the discharge originates or will originate * * * that there is reasonable assurance, as determined by the State * * * that such activity will be conducted in a manner which will not violate applicable water quality standards."

The Department of Environmental Conservation gave public notice of the application and thereafter public hearings were held in which extensive testimony was taken. At the conclusion of the hearings, and by letter dated August 17, 1971, the Commissioner of Environmental Conservation, Henry L. Diamond, issued the requested certification of "reasonable assurance" that the State's water standards "will not be contravened" by the construction and operation of the facility at Cornwall.[4] In addition, the Commissioner attached to his certification four conditions "[i]n order * * * to insure", as he put it, "that the operation of this facility in the future will not contravene the [State's] adopted water standards".[5]

3. Fuel will be used at the other plants within their present legal authorization, and it is that fuel which will supply the pumping power for the project.

4. The portion of the Hudson River from which the project will pump, and to which it will discharge, water has been assigned Class B standards (see, *infra*, pp. 45, 46, 343 N.Y.S.2d p. 91, 295 N.E.2d p. 768).

5. These are the conditions which the Commissioner imposed:

"A. Consolidated Edison will continuously monitor the operation of said pumped storage hydroelectric generator facility in order to prevent any and all contravention of the water quality standards assigned to the Hudson River or any of the waters of the State attributable to the operation of said facility.

"B. That Consolidated Edison will immediately terminate the operation of said project upon any evidence of violations or contravention of the water quality standards assigned to the Hudson River or any of the waters of the State attributable to the operation of said projects.

"C. That Consolidated Edison will immediately terminate the operation of said facility upon evidence that the temperatures of any of the waters of the State at any point, place or location, are affected so as to contravene the State's thermal standard due to the operation of said facility, directly or indirectly as a result of the intake or discharges of water at or in the vicinity of the facility or at or in the vicinity of other affected body

The petitioners—conservation groups, individuals, the Town of Poughkeepsie and the City of New York, who have been actively opposed to the Cornwall Project for many years—thereafter instituted this article 78 proceeding to review the Commissioner's determination. In essence, they asserted, in a petition consisting of eight "claims," not only that the Commissioner acted arbitrarily and capriciously in certifying that there is reasonable assurance that the project would not violate applicable water quality standards but also that he failed to consider several relevant matters in making his determination.

Following the filing of answers by the Commissioner and Con Edison, the court at Special Term annulled the certification. It was its view that the Commissioner had acted "in excess of his jurisdiction and in violation of law." (69 Misc.2d 1, 4, 330 N.Y.S.2d 71, 74.) On appeal, the Appellate Division unanimously confirmed the Commissioner's determination and dismissed the petition in its entirety (39 A.D.2d 302, 333 N.Y.S.2d 771).[6] It was its conclusion that the Commissioner gave "due consideration * * * to all factors which would directly affect all aspects of water quality in the immediate vicinity of the project and indirectly affect water quality at other places on the Hudson River and in the State of New York" and that there was "a *reasonable* basis" for issuance of the certificate (p. 305, 333 N.Y.S.2d p. 774).

We gain a clearer perspective of this case and a better understanding of the arguments urged upon us if we realize the very limited authority granted the State Commissioner by section 21 (subd. [b]). (See, e. g., Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm., 146 U.S.App.D.C. 33, 449 F.2d 1109, 1123.)

[1] Congress, by the Federal Power Act (U.S.Code, tit. 16, § 792 et seq.), has vested the Federal Power Commission with broad responsibility for the development of national policies in the area of electric power, granting it sweeping powers and a specific planning responsibility with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States.[7] The Commission's jurisdiction with respect to such projects pre-empts all State licensing and permit functions. (See First Iowa Coop. v. Power Comm., 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; see, also, Federal Power Comm. v. Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215; City of Tacoma

of water in the State resulting from the furnishing of power for use in connection with the operation of said facility.

"D. That Consolidated Edison shall immediately initiate any change in the operation of said facility which may be required to halt and reverse any significant salt water intrusions in any area of the Hudson River, caused by such operation, which may endanger, adversely affect or impair the use thereof as a public water supply to the extent of terminating operations if need be."

6. The Appellate Division's order is termed a modification, rather than a reversal, in view of the fact that Special Term had dismissed the petitioners' claim that the Commissioner should have considered and reviewed the scenic and aesthetic aspects of the proposed project.

7. The act, it has been noted, "was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources" in a manner compatible with the environment. (Scenic Hudson Preservation Conference v. Federal Power Comm., 354 F.2d, at p. 613; Scenic Hudson Preservation Conference v. Federal Power Comm., 453 F.2d, at p. 467.) To assure appropriate environmental protection, the statute requires the Commission to determine that the proposed project "shall be such as in the judgment of the Commission 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 waterpower development, and for other beneficial public uses, including recreational purposes" (U.S.Code, tit. 16, § 803, subd. [a]).

v. Taxpayers, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345.)

[2] Section 21 (subd. [b]) of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question whether there is "reasonable assurance" that the construction and operation of a proposed project "will not violate applicable water quality standards" of the State. That is all that section 21 (subd. [b]) did, and all that it was designed to do. Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

With this in mind, it is clear that the State Commissioner was required only to consider water quality standards which may be affected by discharges from Con Ed's project into the Hudson River—in other words, to ascertain whether the project would offend against the applicable regulations (6 NYCRR 701.3) governing "Class B" waters, the classification of the River at Cornwall (6 NYCRR 858.4). It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many other issues--which had been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it had conducted —such as, for instance, (1) the safety of the Catskill Aqueduct, (2) the appearance of the Hudson River shoreline or (3) the protection of the River's fish life, apart from the effect that destruction of, or injury to, fish may have, by introduction of waste or pollutants, on the water quality standards required by the applicable regulations. We would, however, note that it is apparent from the record before the Commissioner in this proceeding that there is, as found by the Federal Power Commission and affirmed by the Federal Court of Appeals, reasonable assurance that construction of the project would not, in fact, result in any damage to the Aqueduct (453 F.2d, at pp. 478–480) or adversely affect, in any significant way, the River's fish resources (453 F.2d, at pp. 476–478).

[3] It is our judgment, as it was the Appellate Division's (39 A.D.2d 302, 333 N.Y.S.2d 771), that the Commissioner gave due consideration to every factor which had a bearing on the applicable water quality standards and that his determination, made in his administrative capacity, far from being arbitrary or capricious, was rational and reasonable (CPLR 7803, subd. 3; see, e. g., Matter of Older v. Board of Educ., 27 N.Y.2d 333, 337, 318 N.Y.S.2d 129, 131, 266 N.E.2d 812, 813; Matter of 125 Bar Corp. v. State Liq. Auth., 24 N.Y.2d 174, 178, 299 N.Y.S.2d 194, 197, 247 N.E.2d 157, 158).

In our court, the petitioners repeat their contentions that the Commissioner acted in an arbitrary and capricious manner, first, in purporting to find "reasonable assurance" that there would be neither thermal pollution, salt intrusion nor danger to the Hudson River's fish life and, second, in failing to consider the danger which the project would pose to the Catskill Aqueduct and to the fisheries resources. As already indicated, we find no substance to any of these arguments.

The Hudson River at Cornwall has been classified, pursuant to the Public Health Law (§§ 1205, 1210 [now ECL, §§ 17–0301, 17–0303]), as "Class B" (6 NYCRR 858.4). The applicable regulations governing such Class B waters (6 NYCRR 701.3) provide that the requisite standard is not satisfied (1) if "Floating solids; settleable solids; [or] sludge deposits" are visible and attributable to sewage or industrial or other wastes; (2) if "Sewage or waste effluents" are not effectively disinfected; (3) if the "pH" level—i. e., level of acidity-alkalinity —is less than 6.5 or more than 8.5; (4) if the "Dissolved oxygen" content of the waters affected—which are nontrout waters—is less than 4.0 parts per million; or

(5) if "Toxic wastes, oil, deleterious substances," etc., in amounts or at temperatures to be injurious to fish life, make the waters unsafe or unsuitable for bathing or impair the waters for any other best usage.

Since the petitioners do not contest the Commissioner's findings with respect to item 2 (sewage or waste effluents), items 3 and 4 (pH and dissolved oxygen levels) or item 5 (toxic wastes, oil, etc.), we shall discuss only item 1 (floating solids, etc.).

The hearing examiner expressly concluded that there is reasonable assurance that neither the construction nor the operation of the project "would cause discharge of floating solids, settleable solids, or sludge deposits to the Hudson River in a manner which would violate the applicable water quality standards", and the record fully supports that conclusion. The project will simply cause the Hudson River water which is pumped into its storage reservoir to be discharged, unchanged and unadulterated, back into the River; in other words, only those solids present in the River water which is pumped into the reservoir will be discharged unchanged back into the River. Construction of the project, it is true, will involve a certain amount of dredging and will require the deposit of rock excavated from the project powerhouse and tunnels to be made along the waterfront near the Village of Cornwall. Such dredging and deposit of rock will involve the addition of a certain amount of temporary turbidity to the River water in the immediate vicinity of construction but none of this turbidity would be attributable to sewage, industrial waste or other waste and, after a reasonable opportunity for mixing, these particles would not be readily visible, if at all present.

The record also establishes, contrary to the claim of the several petitioners, that the Commissioner was justified in certifying that there is reasonable assurance that the project will neither adversely affect the River's fish life nor cause salt water intrusion or thermal pollution.

Effect on Fish Life

Finding as a fact that "there is not likely to be any significant adverse effect to fish of the River from a pumped generating plant at Cornwall," the hearing examiner concluded that there is "reasonable assurance" that construction and operation of the project "will not have a significant adverse effect upon fish life in the Hudson."

The record before us sustains that conclusion. In the first place, the plans for the project include protective screens designed to protect small fish from entering the facility's intake. In the second place, the subject of Hudson River fishery was extensively considered by the Federal Power Commission. At the hearing before that body, fishery biologists, experts in the design and operation of screening devices and others testified. One witness (Dr. Alfred Perlmutter of New York University) declared that the project "will have no measurable effect on the Hudson River fishery" and a staff member of the Commission itself stated that fish losses caused by the project's operation "would not significantly affect the Hudson River fishery resources." And, in the third place, the Hudson River Policy Committee—consisting of top-flight experts of the New York State Conservation Department, the New Jersey Division of Fish and Game, the United States Bureau of Commercial Fisheries and the United States Bureau of Sports Fisheries and Wildlife—following a three-year study (1965–1968) of the effect of the project on aquatic life, reported that "there would not be any significant adverse effects to the striped bass and American shad fisheries of the Hudson River from a pumped storage generating plant in Cornwall".

It is noteworthy that the Federal Power Commission reached the same conclusion after a careful investigation of the entire project. Beyond that, under the terms of the Federal Power Commission license, Con Ed is required to conduct further studies relating to the entire subject and, indeed, the license is conditioned upon the

utility's installing fish protective facilities and making any modifications that may be ordered by the Commission.

In short, as already stated, there is ample evidence in the record that danger to fish life will be minimal and that the Commissioner was justified in determining that there is reasonable assurance that water quality standards would not be affected in this regard.

Salt Water Intrusion

The court at Special Term stated that the examiner's report "noted * * * a complete absence of studies concerning salt water contamination" (69 Misc.2d, at p. 3, 330 N.Y.S.2d at p. 74). This, however, ignores the hearing examiner's finding that "[u]ncontroverted expert opinion supports the anticipation that salt intrusion will be minimal and inconsequential". In fact, although there was conflicting testimony, one witness, a sanitary and environmental engineer (Dr. Lawler), testified that, having made an "extensive study of the natural behavior of salt in the [Hudson River] estuary", it was his opinion that there was no basis for the petitioners' suggestion that the project's operation would cause upstream movement of salt water in the Hudson.

Actually, the evidence adduced shows that the salinity of the Hudson River varies greatly from season to season under natural conditions. Thus, an aquatic biologist (Dr. Lauer) testified that the so-called "salt line" may be as far south as the Tappan Zee Bridge in the springtime when the fresh water flow is greatest and as far north as Newburgh during the drier periods of the year. And the sanitary and environmental engineer (Dr. Lawler) also stated that significant upstream movement of salt water as a result of the project operation could not occur because any disturbance of the river occasioned by the Cornwall Project would not possess the magnitude, duration and oscillatory effect necessary to have any impact on those factors which control such salt water movement from the ocean.

Although the Commissioner found that there was reasonable assurance that the project would not result in salt water intrusion, he, nevertheless, took note of the petitioner's apprehensions and insured against even the remote possibility of such intrusion by attaching conditions "B" and "D" to his certification (see, *supra*, p. 42, n. 5, 343 N.Y.S.2d p. 88, 295 N.E.2d p. 766). Those conditions require termination of the project operation and initiation of any changes in the operation necessary to halt and reverse any significant salt water contamination.

Possible Thermal Pollution

Since the project is a pumped-storage facility rather than a conventional type of fuel-burning plant, the project, the record makes clear, will cause no heated liquids or cooling water to be discharged into the River. Theoretically, we are told, operation of the project could cause a negligible heating of the water pumped up and released through the tunnel by reason of friction and, possibly, by exposure to sunshine during storage in the reservoir. However, such a theoretical amount of temperature increase is, as the hearing examiner found, inconsequential.

It follows, therefore, that the Commissioner was warranted in deciding that there is reasonable assurance that the project would not cause thermal pollution of the waters of the Hudson or violate applicable standards at Cornwall. In point of fact, the petitioners do not contest this. They do, however, contend that heated waters would be discharged at other power generating stations, along the Hudson and elsewhere, which might be utilized to produce energy to pump the Cornwall facility and that, absent affirmative supporting evidence, the Commissioner was not justified in concluding that there was reasonable assurance that there would be no unlawful thermal discharges, no violation of water quality standards at those other locations.

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We find the argument without substance. Indeed, we agree with the respondents that, in advancing it, the petitioners overlook the fact that every existing and future steam-electric generating station, wherever located, must at all times comply with the water quality standards applicable to the waterway from which its cooling water is withdrawn (6 NYCRR Parts 701–704). There must be compliance with those standards regardless of whether the electricity from any power station is used to pump a particular facility, illuminate city streets or serve some other purpose. As far as the thermal effects on the receiving water adjacent to any such plant are concerned, the ultimate utilization of the power produced by any particular steam-electric plant is irrelevant. The thermal limits of receiving waters should be and are set in accordance with the physical and biological requirements of each receiving waterway (ECL, § 17–0301); they are not related to the place where generated electricity is transmitted and utilized.

Also significant is the fact that the Conservation Department must review, indeed is presently reviewing, the operation of all steam-electric plants, existing and under construction in New York State, in order to determine whether there is reasonable assurance that, as independent plants, they will not violate applicable water quality standards. Such review, totally separate from the project, arises from the recent and separate Federal requirement that all steam-electric plants obtain "discharge permits" and from the fact that such permits are independently subject to the requirements of section 21 (subd. [b]) (Exec.Order No. 11574; see U.S.Code, tit. 33, § 407; Federal Water Pollution Control Act Amendments of 1972 [86 U.S.Stat. 816, 880], § 402). In connection with its application for these discharge permits, the record discloses that Con Ed has applied to the Commissioner for "water quality certificates" for all plants pursuant to that section. It is the practice of the department, in reviewing these section 21 (subd. [b]) applications for thermal discharge permits to assume—in evaluating the effect of such discharges—that the plant under consideration will be operated at maximum generating capacity on a continuous basis. It is apparent that, if each plant meets this test, energy used to pump the Cornwall Project could not possibly cause heated discharges in excess of applicable standards. Be that as it may, though, the Commissioner insured against the possibility of thermal pollution at other power generating stations by expressly providing—in condition "C" attached to his certification (*supra*, p. 42, n. 5, 343 N.Y.S.2d p. 88, 295 N.E.2d p. 766)—that Con Ed will terminate operation of the facility "upon evidence that the temperatures of any of the waters of the State *at any point, place or location*" exceed permissible standards "resulting from the furnishing of power for use in connection with the operation of said facility."

Conditions Attached to Certificates

[4] As already noted, the Commissioner's certificate contained four conditions. The first requires Con Edison to monitor the operation of the project and the other three provide that it will terminate operation of the facility "upon evidence" that such operation violates or threatens violation of required standards. Inclusion of such conditions was not, as the petitioners insist, a negation of the certification that there was a present reasonable assurance that the water standards will not be contravened. The conditions quite obviously relate to the future and, as the Commissioner stated, they were inserted "In order * * * to insure that the [facility's] operation * * * in the future will not contravene" applicable water standards. In other words, they were attached to the certificate to provide ongoing reassurance that those standards will be satisfied in the years ahead. Indeed, the Commissioner was authorized to impose the conditions both by State law (ECL, § 17–0303, subd. 4, par. d; cf. Matter of Sperry Rand Corp. v. Water Resources Comm., 30 A.D.2d 276, 291 N.Y.S.2d 716, mot. for lv. to app. den. 24 N.Y.2d 737, 299 N.Y.S.2d 1028, 247 N.

E.2d 669)[8] and by section 21 (subd. [b]) of the Federal Statute.[9]

Nor is there any basis for the claim that the Commissioner, by requiring Con Ed to monitor the project operations, delegated his powers to the utility or surrendered his statutory authority. All that the certificate required was that Con Ed sample and test the quality of the River water on a continuing basis and make the results available to the Commissioner—standard practice, we are informed, in pollution control regulation (see Federal Water Pollution Control Act Amendments of 1972 [86 U.S.Stat. 816, 858], § 308; 37 Federal Register 24093 [1972], Code of Fed.Reg., tit. 40, § 124.61).

In short, then, there is no warrant for the petitioner's claim that the conditions are invalid. Authorized by State law and by section 21 (subd. [b]), the conditions are reasonable and unquestionably advance the purpose of the latter provision.

Possible Damage to Catskill Aqueduct

The petitioners also urge, and Special Term agreed with them, that the Commissioner should have required evidence on, *and assessed, the effect of the construction* and operation of the Cornwall Project on the structural safety of New York City's Catskill Aqueduct.

The Aqueduct is a water conduit which transports water from New York City's reservoir in the Catskills to the city. (See Scenic Hudson Preservation Conference v. Federal Power Comm., 453 F.2d 463, 478–480, *supra.*) It crosses deep below the Hudson River at Cornwall at a point where the granite rock is suitable for such a crossing. Thus, the section of the Aqueduct tunnel on the Hudson's west bank, known as the Moodna Tunnel, crosses horizontally some 400 feet beneath the surface in the vicinity of the site where the project powerhouse is to be built; as originally planned in 1963, it would have been at least 400 feet from the tunnel, a distance acceptable to the city. After the Federal court had reversed the Commission's determination in 1965 (Scenic Hudson Preservation Conference v. Federal Power Comm., 354 F.2d 608, *supra*), the powerhouse was redesigned—in order to meet objections that the project might impair the scenery of the area—to be placed entirely underground. Doing so, however, required that the tunnel and the powerhouse be closer together than originally planned. The city objected, in 1968, and refused to accept Con Edison's proposal to relocate a section of the tunnel so as to maintain a distance deemed acceptable to it. The Federal Power Commission ordered that the proceeding be reopened to consider evidence that location of the powerhouse at a distance of 140 feet from the tunnel, as now planned, might endanger the structural integrity of the Aqueduct. Following the taking of extensive engineering testimony from a number of the country's foremost authorities on the subject, the Commission found that the Aqueduct's safety would not be jeopardized and, on appeal, the Court of Appeals stated (453 F.2d, at pp. 479, 480):

> "The Commission concluded that excavation of the powerhouse site would not cause damage to the Moodna Pressure Tunnel, that controlled blasting during construction would not endanger the Aqueduct and, generally, that 'the probability of damage to the Aqueduct is remote.' We think that there is substantial evi-

8. Section 17–0303 (subd. 4, par. d) of the Environmental Conservation Law authorizes the Commissioner to "Issue or deny permits under such conditions as may be prescribed for the prevention and abatement of pollution".

9. A regulation of the United States Environmental Protection Agency issued pursuant to the Water Pollution Control Act, expressly prescribes that a State agency may include in the certificate required by section 21 (subd. [b]) "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge or the activity" (Code of Fed.Reg., tit. 40, § 115.2, subd. [a], par. [4]).

dence in the record to support the Commission's determination. [p. 479]

* * * * * * *

"It is clear that the resolution of highly complex technological issues such as these was entrusted by Congress to the Commission and not to the courts. Where the Commission's conclusions are supported by substantial evidence, the courts must accept them [p. 480]".[10]

We thoroughly agree with the Commissioner and Con Ed that it is improper to relitigate the Aqueduct matter in this proceeding. It is an issue already litigated between the same parties in the Federal courts and may well be concluded by the doctrine of *res judicata*. (See, e. g., City of Tacoma v. Taxpayers, 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 et seq., *supra*.)

However, quite apart from that, it is clear that the petitioners' argument misconceives the proper scope of the limited certificate proceeding pursuant to section 21 (subd. [b]). That provision, as previously noted, requires the State Commissioner merely to consider the water quality standards which may be affected by discharges from a proposed project into navigable waterways. The Aqueduct is, of course, a water main, not a stream. But even more important, the Cornwall Project will not discharge into the Aqueduct, and there is not the slightest suggestion that its contents would be polluted by the project. Presiding Justice Herlihy stated the matter succinctly and well in his opinion for the Appellate Division below (39 A.D.2d, at pp. 305–306, 333 N.Y.S.2d at 774):

"In regard to New York City's contention that the implementation of the project may cause physical damage to 'The Catskill Aqueduct', such a consideration has no bearing on water quality and if such damage does result, it is a matter of concern between the licensee and the City and the certificate issued by the appellant Commissioner is obviously not a permission by the State to cause physical injury to another's property. (Cf. Van Buskirk v. State of New York, 38 A.D. 2d 349, 329 N.Y.S.2d 381.) It should be noted that the Federal Power Commission concluded from the evidence 'that the probability of damage to the Aqueduct is remote'."

In conclusion, then, the Commissioner's determination that there is reasonable assurance that construction and operation of the Cornwall Project would not violate applicable water quality standards—amply supported, as it is, by the record—was rational and reasonable.

The order appealed from should be affirmed, without costs.

BURKE, JASEN, GABRIELLI, JONES and WACHTLER, JJ., concur; BREITEL, J., taking no part.

Order affirmed.

10. The court then went on to say that "[i]t seems to us that it would be very difficult indeed to argue that the evidence supporting the Commission's determination with respect to the Aqueduct is insubstantial. In fact the argument presented to us on this issue appears to be either that some higher burden of proof should be imposed with respect to the matter or that the city should be able to exercise what, in effect, amounts to a veto power. However, there is no authority whatever to support the imposition of any greater burden of proof than that provided in the statutory standard and '[s]uch a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the [city] the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.' First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 164, 66 S.Ct. 906, 90 L.Ed. 1143" (453 F.2d, at p. 480).

POWER AUTHORITY OF the STATE OF NEW YORK, Plaintiff,

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF the STATE OF NEW YORK, and James L. Biggane, as Commissioner of the Department of Environmental Conservation of the State of New York, and Individually, Defendants.

No. 74–CV–151.

United States District Court,
N. D. New York.

May 2, 1974.

Power authority sought mandatory, injunctive, and declaratory relief against state Department of Environmental Conservation, alleging that Environmental Department was without authority to hold hearings on question of whether it should issue certificate for water discharge from proposed power plant. On power authority's motion for preliminary injunction and Environmental Department's motion to dismiss, the District Court, James T. Foley, Chief Judge, held that the lack of formalized final administrative action precluded federal court from granting relief; that, where the only dispute was over the extent of Environmental Department's power to hold hearings, and not over any decision on the merits, there was no case or controversy; and that Environmental Department had the power to hold some hearings.

Dismissed.

1. Navigable Waters ⇐35

Where only action taken by state Environmental Department with respect to power authority's application for certificate for water discharge from proposed power plant was issuance of notice for hearing and the holding of one day of hearings, which dealt chiefly with power authority's objection to the hearing, insufficient administrative actions had been taken to give federal court jurisdiction to hear suit for injunctive relief based on allegation that state Environmental Department was proceeding improperly. Federal Water Pollution Control Act Amendments of 1972, §§ 301, 302, 306, 307, 401, 401(a)(1), 33 U.S.C.A. §§ 1311, 1312, 1316, 1317, 1341, 1341(a)(1).

2. Navigable Waters ⇐35

State Environmental Department has authority under Federal Water Pollution Control Act to hold hearings with respect to decision on whether to issue certificate for water discharge from proposed power plant, based on evidence as to whether discharge will comply with various sections of the Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 301, 302, 306, 307, 401, 401(a)(1), 33 U.S.C.A. §§ 1311, 1312, 1316, 1317, 1341, 1341(a)(1).

3. Federal Civil Procedure ⇐2731

There is no recognized right for a statutory or corporate entity, a creature of the state, to be free from providing information or defending a public position it chooses to assert without sharing legal costs.

4. Injunction ⇐144

Allegation by power authority that, if it were required to participate in hearings to be held by Environmental Department with respect to issuance of certificate for discharge of water from proposed power plant, it would incur considerable expenses for legal counsel and expert witnesses was insufficient to show irreparable harm required for issuance of temporary injunction against proposed hearings.

5. Courts ⇐260.4

Where there were no issues ripe for judicial decision, application of doctrine of abstention by Federal Court would be pointless.

6. Courts ⇐281

Where power authority sought to prevent Environmental Department from holding hearings on question of whether it should issue certificate for water dis-

charge from proposed power plant on ground that hearing would cover matters beyond the Department's jurisdiction and where power authority challenged only the right of the Department to hold the hearings and was not challenging any specific decision on the merits, power authority's request for mandatory, injunctive, and declaratory relief did not present a case or controversy. 28 U.S.C.A. §§ 2201, 2202; U.S.C.A. Const. art. 3, § 2.

7. Declaratory Judgment 🔑5, 274

Federal court has jurisdiction to adjudicate a controversy and the power to render a declaratory judgment, but the question of whether to entertain the action and grant relief is a matter within the discretion of the court. 28 U.S.C.A. § 2201.

8. Courts 🔑260.4

Federal courts must give due respect to a suitor's choice of a federal forum for hearing and decision of federal constitutional claims, even though the state courts have the same solemn responsibility as federal courts.

9. Navigable Waters 🔑2

Congress has vested in the Federal Power Commission practically exclusive jurisdiction over the regulation and licensing of hydroelectric power plants affecting the navigable waters of the United States.

10. States 🔑4.12

States retain right to set more restrictive standards with respect to discharges from hydroelectric power plants than those imposed by the Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 401(a), 33 U.S.C.A. §§ 1251 et seq., 1341(a).

Scott B. Lilly, Gen. Counsel & Atty., Power Authority of the State of New York, New York City, for plaintiff; John R. Davison, Associate Gen. Counsel, Francis X. Wallace, Sp. Counsel, Albany, N. Y., of counsel.

Louis J. Lefkowitz, Atty. Gen. of the State of New York, Albany, N. Y., for defendants; Stanley Fishman, Olin Harper LeCompte, Asst. Attys. Gen., Howard A. Fromer, Deputy Asst. Atty. Gen., of counsel.

JAMES T. FOLEY, Chief Judge.

MEMORANDUM-DECISION and ORDER

Plaintiff, the Power Authority of the State of New York (PASNY), seeks a mandatory injunction and declaratory and other relief against the Department of Environmental Conservation of the State of New York and its Commissioner, James L. Biggane, as Commissioner and individually. The defendant Department will be referred to herein as ENCON. Jurisdiction is asserted under 28 U.S.C.A. § 1337 and 28 U.S.C.A. § 1331(a).

PASNY proposes the construction of a dam and two reservoirs near Breakabeen, N. Y., on Schoharie Creek, in this district in connection with its "Breakabeen Pumped Storage Project." Its application for the necessary federal license has been pending before the Federal Power Commission (FPC) since March 30, 1973, as Project Number 2729, and the FPC has taken jurisdiction of this particular proceeding.

On August 15, 1973, more than eight months ago, PASNY applied to ENCON, pursuant to § 401(a)(1) of the Federal Water Pollution Control Act for a certificate that its discharge from the Breakabeen facility will comply with Sections 301, 302, 306 and 307 of the Act. See 33 U.S.C.A. § 1341.

The basis for the dispute now presented to this federal Court is that prior to issuance of the requested certificate, ENCON set in motion procedures by public notice to hold a public hearing on December 4, 1973, at Cobleskill, N.Y., stating the hearing would be held pursuant to § 401(a)(1) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA) and Part 608.16 of 6 NYCRR. Plaintiff protested vigorously at this first hearing held on December 4,

1973, that the issues itemized for hearing purposes by an ENCON attorney would entail the discussion of ones outside the proper scope of the State's authority and would enter areas claimed to be preempted under the federal act for the jurisdiction solely of the Federal Power Commission (See Ex. B—Excerpt of Stenographic Record—Attached to complaint). In the face of this vigorous opposition, the Chief Hearing Officer postponed the hearing without date, and it is interesting to note that on that date, December 4, 1973, the representatives of PASNY at the hearing assured that prompt judicial clarification of the matter would be sought. (Ex. B—P. 33).

In a substantial decision dated March 22, 1974, Commissioner Biggane set forth in good legal form the analysis and interpretation of federal and state law and regulations that upheld jurisdiction and authority in ENCON to hold the hearings and directed the hearings to proceed. Pursuant to such direction, the Hearing Officer by determination dated March 26, 1974, denied the motion of the Power Authority and directed the hearing to commence on April 15, 1974.

The complaint for the relief previously described was filed in this Court on April 8, 1974 and process served. A temporary restraining order was issued by visiting Judge Charles L. Brieant, Jr. on April 9, 1974. Arguments were heard by me for the preliminary injunction on April 15, 1974. The TRO was continued with consent to April 29, 1974 when defendant's motion to dismiss the complaint was heard. At the time of hearing on April 29, 1974, the motion to dismiss, after being informed by ENCON that the hearing was noticed anew for May 6, 1974, I continued the TRO for good cause until this expedited decision could be handed down, hopefully, before that date.

There are then two motions before this Court: One for a preliminary injunction and the other to dismiss the action. Although defendants have requested an order from this Court extending the allowable one-year time to perform its certifying procedure [see 33 U.S.C.A. § 1341(a)], in my judgment such action is inconsistent with my finding of lack of jurisdiction hereinafter made and in light of this expedited decision such extension of time sought that may belong to the administrative power must be considered as unnecessary in this type of judicial determination.

Plaintiff was granted a temporary restraining order on April 9, 1974, to maintain the status quo pending full briefing, argument and research of the Federal Water Pollution Prevention and Control Act of 1948 (FWPCAA), amended 1972; 33 U.S.C.A. § 1251 et seq.

Defendants, while originally claiming a lack of subject matter jurisdiction, in later arguments and briefing concede subject matter and personal jurisdiction. However, despite the concession, for the reasons stated herein, this Court will not exercise jurisdiction over the alleged subject matter of this suit because, in my judgment after review and careful consideration, there are no questions to my mind which are ripe for adjudication under federal law at this threshold stage of State administrative hearings. Abbott Laboratories v. Gardner, 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

[1] The lack of any formalized final administrative action compels a federal court not to enter such a dispute in the embryonic stage. Indeed, aside from a tersely worded Notice for Hearing and one day of proceedings consisting chiefly of plaintiff's objection and recognition thereof by the ENCON Hearing Officer, no administrative action has been taken. The role has been accorded to each state by Congress to:

> establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

33 U.S.C.A. § 1341.

Thus, unquestionably, the singular, yet significant, role of each state would not be allowed to follow its natural course

of the issuance of a certificate before being interrupted if the drastic injunctive relief sought were granted. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507–510, 63 S.Ct. 339, 87 L.Ed. 424 (1943); Luff v. Ryan, 128 F.Supp. 105, 109 (D.C.1955). There is an old and well settled principle fitting this dispute like a glove, I think, that it is inappropriate for a district court to adjudicate administrative matters before a decision has been "formalized"; in this case being for the State of New York to complete its important, yet singular, task in the federal licensing procedure, of issuing a certificate of compliance with certain state laws. Myers v. Bethlehem Shipping Corporation, 303 U.S. 41, 50–51, 58 S.Ct. 459, 82 L.Ed. 638 (1938). As there is a need to protect the integrity of a court's process by minimizing interlocutory appeals, except in extraordinary cases, so it is necessary to afford at least this protection to a state administrative agency that is trying to act pursuant to a specific Congressional intent to increase state participation in solving the serious environmental problems we face. 1972 U.S. Code Congressional and Administrative News, pp. 3669–3677; FPC v. Louisiana Power & Light Company, 406 U.S. 621, 647, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972); Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 652, 93 S.Ct. 2488, 37 L.Ed. 2d 235 (1973). The Supreme Court clearly drew this analogy in McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) when it explained this principle:

> A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals . . . .

Id., at 193–194, 89 S.Ct. at 1662–1663.

[2] While the plaintiff steadfastly maintains that ENCON has no authority to hold any hearings, I find this position untenable in view of the clarity of both the statute and its legislative history. Plaintiff's real objection, it seems to me, boils down to the permissible scope of the hearings under federal and state law. See 33 U.S.C.A. § 1341. But if these hearings should go awry from what plaintiff considers relevant, its objection can be duly entered at that time and still afford the full protection in the ordinary course of judicial review thereafter. Pharmaceutical Manufacturers Association v. Gardiner, 259 F.Supp. 764, 765–766 (D.C.1966), aff'd 127 U.S.App. D.C. 103, 381 F.2d 271 (1967).

If delay were to be considered a significant factor facing plaintiff's cause, it must be considered that it was plaintiff's objection on December 4, 1973, the first and only day of hearings, which brought them to an abrupt halt. This objection was treated seriously and ruled upon by Commissioner James L. Biggane on March 22, 1974, in a decision that evidences careful consideration and sets forth persuasive reasons in support of the directive that authority existed to continue the hearing. There is no reason to believe from the presentation to me that plaintiff will not be accorded its rights and the opportunity to object to the procedures to preserve any questions of jurisdiction and scope for possible judicial review at the proper time.

Specifically, in terms of plaintiff's motion for a preliminary injunction, I find none of the required conditions are met for the granting of this extraordi-

nary remedy. Likelihood of success on the merits need not be depended upon greatly in view of the lack of ripeness on the merits. Additionally, plaintiff can hardly argue that the public interest is not better served by favoring public hearings on important questions as are involved in this case. Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1938); see Jaffe, The Administrative Agency and Environmental Control, 20 Buffalo Law Rev. 231, 236 (1970).

[3, 4] But the most glaring deficiency which also further emphasizes the prematurity of this litigation is the absence of irreparable harm that can be perceived with any degree of reasonable certainty. Plaintiff contends that it will incur considerable cost for expenses in the nature of legal counsel and expert opinion in participating in these ENCON hearings. This contention seems dubious and speculative at best and hard to place in the area of precise money amounts. There is no recognized right for a statutory or corporate entity, a creature of the state, to be free from providing information or defending a public position it chooses to assert without sharing legal costs. Coca-Cola Company v. F. T. C., 475 F.2d 299, 304 (5th Cir. 1973), cert. den., 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed. 2d 122 (1973); *cf.* Powelton Civic Home Own. Ass'n v. Department of H. & U. Dev., 284 F.Supp. 809, 840 (E.D.Pa. 1968); compare Public Utilities Comm'n of Ohio v. United Fuel Co., 317 U.S. 456, 469, 63 S.Ct. 369, 87 L.Ed. 396 (1943). Serious environmental considerations, in my judgment, were intended by Congress to be given full hearings so that the nation as well as the state will have the benefit of exploring all relevant conflicting interests. The money estimate of $250,000.00 that plaintiff estimates will be incurred for proper presentation of its position at the proposed hearing, from my experience, seems quite high. In any event, although the taxpayer's money is and should be a major concern, this amount may not be considered excessive when it is estimated we are dealing with a $100,000,000.00 project, originated by the plaintiff.

Once plaintiff admits that some hearings are proper, as it must, any estimate of money saved by *a priori* limiting the scope of the hearing, realizing the plaintiff's expenses are highly speculative and contingent upon its mode of presentation, is surely insignificant in terms of the irreparable harm needed to justify the extraordinary relief of an injunction.

The question of scope is for the reasonable men participating in this hearing to work out in the first instance. S. E. C. v. Brigadoon Scotch Dist. Co., 480 F.2d 1047, 1053 (2d Cir. 1973), review denied. 415 U.S. 915, 94 S.Ct. 1410, 39 L.Ed.2d 469; Bristol-Meyers Company v. F. T. C., 469 F.2d 1116, 1118 (2d Cir. 1972). It is as much in the State's interest as in plaintiff's to conduct an efficient hearing which is not unduly prolonged. The estimate of the defendants from past experience is that thirty days ordinarily suffices. I therefore find the issuance of any injunction inappropriate.

[5] The issue of abstention has been raised but has not been advocated as an ultimate position of either party. Because it is my judgment that there are no issues ripe for decision prior to a hearing and final determination by the state agency, abstention would be "pointless". See Public Utilities Comm'n of Ohio v. United Fuel Gas Co., supra, 317 U.S. at 463, 63 S.Ct. 369 (1943); Mayor of Philadelphia v. Educational Equity League, 415 U.S. 605, 628, 94 S.Ct. 1323, 39 L.Ed. 2d 630 (1974); see also Swift & Co. v. Wickham, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965).

[6] Thus, it is in the context that an injunction is inappropriate, and that abstention is pointless, that the Court turns to the motion to dismiss the action. Although it has not been raised by the parties, the most significant question is whether there is a "case" or "controversy" within the meaning of Article III, § 2 of the Constitution, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. The Supreme Court has very re-

cently held that the requirements of those sections are satisfied, and a case or controversy found to exist, when "the challenged governmental activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." Super Tire Engineering Company v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974). While these factors may well be present in this case, I believe that a case or controversy does not presently exist and a declaratory judgment should not be issued because the "challenged governmental activity" is only the right of a state administrative agency to hold hearings on matters it believes to be in its jurisdiction.

[7] A federal district court has jurisdiction to adjudicate a controversy, and the power to render a declaratory judgment under 28 U.S.C. § 2201, but the question of whether to entertain the action and grant relief is a matter within the discretion of the court. Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); PPG Industries, Inc. v. Continental Oil Company, 478 F.2d 674, 679 (5th Cir. 1973). The United States Supreme Court has emphasized that the declaratory judgment procedure is not to be used to preempt or prejudge issues that are committed to initial decision to an administrative body. Public Service Commission v. Wycoff Company, 344 U.S. 237, 246, 73 S.Ct. 236, 97 L.Ed. 291 (1952); see also State of California v. Oroville-Wyandotte Irrig. District, 409 F.2d 532, 535–536 (9th Cir. 1969). The Supreme Court was even more emphatic with regard to the use of the declaratory judgment procedure for proceedings pending before a *state* administrative agency:

> Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

Public Service Commission, supra, 344 U.S. at 247, 73 S.Ct. at 242.

[8] The Supreme Court noted that federal rights are protected by adequate review procedures in the federal courts. Thus, while the agency's decision as to its own jurisdiction is not the last word, "it must assuredly be the first." Federal Power Commission v. Louisiana Power & Light Company, supra, 406 U.S. 621, 647, 92 S.Ct. 1827, 1842, 32 L.Ed.2d 369. Mr. Justice Harlan's definition of the ripeness doctrine clearly fits this case:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, supra, 387 U.S. 148–149, 87 S.Ct. 1515.

The Court therefore believes and repeats that this case is not ripe for adjudication. To my mind, and to be frank, the state courts of New York are a far more appropriate forum for the plaintiff to challenge the scope of the hearings on its two contentions of the immunity conferred by the New York State Legislature in the Power Authority Act, and the lack of authority conferred by the FWPCAA of 1972. See New York CPLR §§ 7801, 7803. I am conscious of the principle that federal courts must give due respect to a suitor's choice of a federal forum for hearing and decision of federal constitutional claims, even though the state courts have the same solemn responsibility as the federal courts.

Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). But I firmly believe it should also be kept in mind that, as Justice Black said, we have had from the beginning two separate and independent legal systems that end up with the same right of ultimate review in the United States Supreme Court.' Atlantic C.L.R. Co. v. Engineers, 398 U.S. 281, 286–287, 90 S. Ct. 1739, 1742–1743, 26 L.Ed.2d 234 (1970). The steady recourse to the federal courts for many problems, particularly on federal questions that the state courts could just as quickly and effectively process, has become a matter of serious concern. See Federal Jurisdiction: A General View, Judge Henry J. Friendly; see also Alberda v. Noel, 322 F.Supp. 1379, at 1384 (E.D.Mich.1971).

[9, 10] I do not discount the arguments that there may be serious questions as to the relevancy and power of the defendants to attach conditions to the certificate pertaining to some of the areas in which they propose to inquire. It may be helpful, despite my disinclination to entertain jurisdiction for declaratory judgment and injunctive relief in regard to administrative hearings, to set forth some general observations and the results of legal research. The United States Supreme Court has stated, and the New York Court of Appeals has acknowledged, that Congress has vested in the Federal Power Commission practically exclusive jurisdiction over the regulation and licensing of hydroelectric power plants affecting the navigable waters of the United States. See First Iowa Coop. v. Power Comm., 328 U.S. 152 at pp. 167–169, 174, 181–182, 66 S.Ct. 906, 90 L.Ed. 1143 (1946); City of Tacoma v. Taxpayers, 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); Mtr. De Rham v. Diamond, 32 N.Y.2d 34, 343 N.Y.S.2d 84, 295 N.E.2d 763 (1973). This jurisdiction in the licensing or permit area of the Federal Power Commission can be modified by other federal legislation. Federal Power Commission v. Oregon, 349 U.S. 435, 446, 75 S.Ct. 832, 99 L.Ed. 1215 (1955). As the New York Court of Appeals recognized, this jurisdiction was in fact modified by Section 21(b) of the Federal Water Pollution Control Act of 1970. Mtr. De Rham, supra, 32 N.Y.2d at 44, 343 N.Y.S.2d 84, 295 N.E.2d 763. Section 21(b) was superseded, but without substantial changes, by Section 401 of the Federal Water Pollution Control Act Amendments of 1972. The legislative history indicates that Section 21(b) was amended to assure consistency with the change of emphasis from water quality standards to effluent limitations on the discharge of pollutants. Both the Senate and the House bills were similar in this respect. See 1972 U.S.Code Congressional and Admin.News at pp. 3735 and 3815. Section 401 requires that any applicant for a federal license or permit which may result in any discharge into navigable waters must provide a certificate from the originating state that such discharge complies with various sections of the Act. 33 U.S.C. § 1341. The states must establish procedures for public notice of all applications for certifications, and they may also, to the extent they deem appropriate, hold public hearings in connection with specific applications. Section 401(d), upon which the defendants place great reliance as a broad grant of authority to hold the hearing, requires that the certificate of the State set forth effluent and other limitations, and monitoring requirements, so as to assure that the applicant will comply with various sections of the Act, "and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). Therefore, the Congressional intent is clear that the states retain the right to set more restrictive standards than those imposed by the Act. See 33 U.S.C. § 1370; 1972 U.S.Code Cong. and Admin.News at pp. 3751, 3825.

This legislative history and these statutory provisions noted unquestionably establish the right of hearing by the State in a situation of this kind to the extent it deems appropriate and also for the purpose of attaching necessary con-

ditions to the State certificate. It must be recognized, however, that the plain wording of the statutory provisions noted herein does indicate the areas of proper State inquiry, and important case law of New York does exist that spells out these limits of hearings of this exact nature as judicially viewed. Mtr. De Rham, supra, 32 N.Y.2d at 44–45, 343 N.Y.S.2d 84, 295 N.E.2d 763; Matter of Lloyd Harbor v. Diamond (unreported) (Sup.Ct., Albany Co., 1972, Pennock, J.).

The Court of Appeals, Second Circuit, has written on the statutory responsibilities of the Federal Power Commission in the consideration of license applications. Scenic Hudson Preservation Conf. v. Federal Power Commission, 354 F.2d 608, 617 (2d Cir. 1965), cert. den. sub nom. 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966); see also Scenic Hudson Preservation Conf. v. Federal Power Commission, 453 F.2d 463, 470–473 (2d Cir. 1971), cert. den., 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972); 16 U.S.C. § 803(a). It is important also to recognize that ENCON has the right to and has in fact intervened in the Federal Power Commission proceeding considering the Breakabeen project application, and can present and develop the matters that are reserved for federal appraisal and decision before the Commission. The point I make is that the New York State Authority and the New York State Department involved here should, in the interests of the New York citizens and taxpayers, make responsible judgments to keep the extent of State hearings within the proper bounds of the areas delineated by statutory and judicial guidelines.

In conclusion, for the reasons stated, the motion to dismiss the complaint filed by the defendants is granted on the *sua sponte* ground of lack of subject matter jurisdiction. In addition, the motion to dismiss is granted on the ground of failure to state a claim upon which proper declaratory or injunctive relief can be granted, and also upon the exercise of discretion not to entertain the complaint for the issuance of declaratory judgment. The temporary restraining order in effect is vacated as of Friday, May 3, 1974 at 2:00 P.M. The motion for preliminary injunction is denied and dismissed, based on my findings that there is no showing of likelihood of success or irreparable harm by the plaintiff, even though there be error in the dismissal of the complaint.

It is so ordered.

AVENUE STATE BANK, Plaintiff,

v.

Joseph L. TOURTELOT et al., Defendants.

No. 74 C 259.

United States District Court,
N. D. Illinois, E. D.

May 3, 1974.

Action by lending bank against corporate borrower, its president and its director alleging violations of federal and state securities laws. On defendants' motion to dismiss for lack of subject matter jurisdiction, the District Court, Marovitz, J., held that borrowing of money in ordinary commercial bank loan transaction by corporate borrower from bank and giving of promissory note to evidence the indebtedness did not constitute the "sale of a security" within meaning of Securities Act of 1933 and thus could not be basis for action alleging violations of antifraud provisions of Act.

Motion granted.

1. Securities Regulation ⟹12

Words used in definition of "security" as used in Securities Act of 1933 are

ment, and protective measures proposed by the applicant. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality and quantity in the affected stream or other body of water. The report must include:

(i) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes;

(ii) A description of the seasonal variation of existing water quality for any stream, lake, or reservoir that would be affected by the proposed project, including (as appropriate) measurements of: significant ions, chlorophyll *a*, nutrients, specific conductance, pH, total dissolved solids, total alkalinity, total hardness, dissolved oxygen, bacteria, temperature, suspended sediments, turbidity and vertical illumination;

(iii) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(iv) A quantification of the anticipated impacts of the proposed construction and operation of project facilities on water quality and downstream flows, such as temperature, turbidity and nutrients;

(v) A description of measures recommended by Federal and state agencies and the applicant for the purpose of protecting or improving water quality and stream flows during project construction and operation; an explanation of why the applicant has rejected any measures recommended by an agency; and a description of the applicant's alternative measures to protect or improve water quality stream flow;

(vi) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams; a description of anticipated impacts on groundwater and measures proposed by the applicant and others for the mitigation of impacts on groundwater; and

(vii) As an appendix, either:

(A) A copy of the water quality certificate (or agency statement that such certification is waived) as described in Section 401 of the Federal Water Pollution Control Act (Clean Water Act) [*see* 33 U.S.C. 134]; or

(B) A copy of a dated letter from the applicant to the appropriate agency requesting such certification.

(3) *Report on fish, wildlife, and botanical resources.* The applicant must provide a report that describes the fish, wildlife, and botanical resources in the vicinity of the proposed project; expected impacts of the project on these resources; and mitigation, enhancement, or protection measures proposed by the applicant. The report must be prepared in consultation with the state agency or agencies with responsibility for these resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the proposed project may affect anadromous, estuarine, or marine fish resources), and any state or Federal agency with managerial authority over any part of the proposed project lands. The report must contain:

(i) A description of existing fish, wildlife, and plant communities of the proposed project area and its vicinity, including any downstream areas that may be affected by the proposed project and the area within the transmission line corridor or right-of-way. A map of vegetation types should be included in the description. For species considered important because of their commercial or recreational value, the information provided should include temporal and spatial distributions and densities of such species. Any fish, wildlife, or plant species proposed or listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service [*see*

ture project may do so if upon submission of such program the Administrator determines such program is adequate to carry out the objective of this chapter.

June 30, 1948, c. 758, Title III, § 318, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95–217, § 63, 91 Stat. 1599.

Historical Note

1977 Amendment. Subsec. (a). Pub.L. 95–217 added "pursuant to section 1342 of this title" following "Federal or State supervision".

Subsec. (b). Pub.L. 95–217 struck out ", not later than January 1, 1974," following "The Administrator shall by regulation" in existing provisions and added provisions that the regulations required the application to the discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title, as the Administrator determines necessary to carry out the objectives of this chapter.

Subsec. (c). Pub.L. 95–217 added subsec. (c).

Legislative History. For legislative history and purpose of Pub.L. 92–500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95–217, 1977 U.S. Code Cong. and Adm.News, p. 4326.

Code of Federal Regulations

Procedure for discharge, see 40 CFR 115.1 et seq.

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

Compliance with applicable requirements; application; procedures; license suspension

(a)(1) 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 in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reason-

able period of time (which shall
such request, the certification r
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shall be granted until the cert
been obtained or has been wai
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denied by the State, interstate
case may be.

(2) Upon receipt of such app
or permitting agency shall imm
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The Administrator shall at s
recommendations with respect
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or permit in such manner as
with applicable water quality
ditions cannot insure such com
license or permit.

(3) The certification obtai
subsection with respect to the
the requirements of this sub
connection with any other Fe
operation of such facility unl
agency, or Administrator, as
the Federal agency to whom a
cense or permit, the State, or
the Administrator, notifies su
of such notice that there is n
will be compliance with the
1312, 1313, 1316, and 1317 o
construction license or permit
struction or operation of the
waters into which such disch
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or other requirements. This
case where the applicant fo
failed to provide the certify

state agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

Compliance with other provisions of law setting applicable water quality requirements

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable ef-

fluent imitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Authority of Secretary of Army to permit use of spoil disposal areas by Federal licensees or permittees

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

Limitations and monitoring requirements of certification

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95–217, §§ 61(b), 64, 91 Stat. 1598, 1599.

Historical Note

1977 Amendment. Subsec. (a). Pub.L. 95-217 added reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which had provided that no Federal agency be deemed an applicant for the purposes of this subsection, and redesignated former par. (7) as (6).

Administration of Refuse Act Permit Program. Administration of Refuse Act Permit Program to regulate discharge of pollutants and other refuse matter into navigable waters of the United States or their tributaries, see Ex.Ord. No. 11574, Dec. 23, 1970, 35 F.R. 19627, set out as a note under section 407 of this title.

Legislative History. For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S. Code Cong. and Adm.News, p. 4326.

Library References

Navigable Waters ⇐35.

C.J.S. Navigable Waters § 11.

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1. Construction with other laws

Obedience to water quality certifications under this section is not mutually exclusive with procedures under National Environmental Policy Act of 1969, section 4321 et seq. of Title 42, and does not preclude performance of duties under latter Act, since certifications essentially establish minimum condition for grant of license; Atomic Energy Commission can conduct balancing analysis of environmental effect of proposed action despite prior certification. Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission, 1971, 449 F.2d 1109, 146 U.S.App.D.C. 33.

2. State standards

States retain right to set more restrictive standards with respect to discharges from hydroelectric power plants than those imposed by this section. Power Authority of State of N. Y. v. Department of Environmental Conservation of State of N.Y., D.C.N.Y.1974, 379 F.Supp. 243.

3. Local laws

Oil spillage ordinance requiring that persons unloading fuel or oil from vessels obtain a permit, give advance notice of unloading and pay into a special fund to provide for cleaning costs resulting from oil spillage could not be said, as a matter of law, to be an unconstitutional infringement upon the exclusive maritime and admiralty jurisdiction of the federal government. Mobil Oil Corp. v. Town of Huntington, 1972, 339 N.Y.S.2d 139, 72 Misc.2d 530.

4. Applicants for certification

Federal agencies are not "applicants" for federal permits and thus need not obtain state certificates of water quality compliance. State of Minn. by Spannaus v. Hoffman, C.A.Minn.1976, 543 F.2d 1198, certiorari denied 97 S.Ct. 1672, 430 U.S. 977, 52 L.Ed.2d 373.

Private dredgers, like all other applicants for federal permits, must obtain water quality compliance certificates from the states in order to obtain federal permit. Id.

Owner and operator of oil terminal facility which sought permit to construct a new pier over state-owned submerged land had standing to request certification under this section, which certification was a prerequisite to its application for a construction permit from the Army Corps of Engineers. King Resources Co. v. Board of Environmental Protection, Me.1978, 383 A.2d 383.

5. Grant of certification

Certification from State of Rhode Island that proposed dumping of dredged spoil from federal project into navigable ocean waters would comply with state water quality standards was not required from Corps of Engineers nor from dredging contractor on project. Save Our Sound Fisheries Ass'n v. Callaway, D.C. R.I.1974, 387 F.Supp. 292.

Provision of former section 1171 of this title which required a federal license applicant, who was to conduct any activity which might result in a discharge into navigable waters, to provide the Federal Power Commission with a certification from the state in which the discharge would originate that there was "reasonable assurance" that such activity would be conducted in a manner not violative of water quality standards relinquished only one element of the otherwise exclusive jurisdiction granted the Commission by the Federal Power Act, section 792 et seq. of Title 16; it simply authorized states to determine the narrow question of whether there was reasonable assurance that operation of the project would not violate applicable state water standards. de Rham v. Diamond, 1973, 295 N.E.2d 763, 32 N.Y.2d 34, 343 N.Y.S.2d 84.

6. Conditions of certification

Environmental Conservation Commissioner's certification that there was a present "reasonable assurance" that water quality standards would not be contravened by the construction of pumped storage hydroelectric facility on the Hudson River was not negated by the inclusion in the certificate of four conditions, the first of which required power company to monitor the operation of the project and the other three of which provided that operation of the facility would be terminated "upon evidence" that such operation violated or threatened to violate state water quality standards. de Rham v. Diamond, 1973, 295 N.E.2d 763, 32 N.Y. 2d 34, 343 N.Y.S.2d 84.

7. Due process

Denial of permission to construct upland canal, on ground that it would adversely affect class III waters where not arbitrary or capricious, did not deprive landowners of property without due process of law. Farrugia v. Frederick, Fla. App.1977, 344 So.2d 921.

8. Jurisdiction

Since proper forum for judicial review of state certification under this chapter was in state court, water pollution program as administered by Alabama Water Improvement Commission required knowledge of local factors which should and were weighed in reaching final determination, and adequate state court review was available, intervention of federal court in connection with Commission's

denial of certification of oil company's application to drill offshore test well on land leased by oil company was not necessary for protection of federal rights and abstention was therefore appropriate in oil company's action for declaratory and injunctive relief. Mobil Oil Co. v. Kelley, D.C.Ala.1976, 426 F.Supp. 230.

9. **Substantial evidence**

Substantial evidence supported action of Florida Environmental Regulation Commission denying property developer permission to construct upland canal on ground that it would affect waters reserved for recreation, propagation and management of fish and wildlife. Farrugia v. Frederick, Fla.App.1977, 344 So.2d 921.

10. **Review**

State certification under this chapter is set up as exclusive prerogative of state and is not to be reviewed by any agency of federal government, and thus proper forum for judicial review of state certification is in state court. Mobil Oil Corp. v. Kelley, D.C.Ala.1976, 426 F.Supp. 230.

§ 1342. National pollutant discharge elimination system

Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on Octo-

§ 1324. Clean lakes

[See main volume for text of (a) and (b)]

(c) Grants; limitation of amount; authorization of appropriations; equitable distribution

(1) The amount granted to any State for any fiscal year under this section shall not exceed 70 per centum of the funds expended by such State in such year for carrying out approved methods and procedures under this section.

(2) There is authorized to be appropriated $50,000,000 for the fiscal year ending June 30, 1973; $100,000,000 for the fiscal year 1974; $150,000,000 for the fiscal year 1975, $50,000,000 for fiscal year 1977, $60,000,000 for fiscal year 1978, $60,000,000 for fiscal year 1979, $60,000,000 for fiscal year 1980, $30,000,000 for fiscal year 1981, and $30,000,000 for fiscal year 1982 for grants to States under this section which such sums shall remain available until expended. The Administrator shall provide for an equitable distribution of such sums to the States with approved methods and procedures under this section.

(As amended Oct. 21, 1980, Pub.L. 96–483, § 1(f), 94 Stat. 2360.)

1980 Amendment. Subsec. (c)(2). Pub.L. 96–483 added authorization of $30,000,000 for each of fiscal years 1981 and 1982.

Legislative History. For legislative history and purpose of Pub.L. 96–483, see 1980 U.S.Code Cong. and Adm.News, p. 5047.

§ 1326. Thermal discharges

Notes of Decisions

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2. Cooling water intake structures
Administrator's order requiring Environmental Protection Agency's staff to file nonadversary report at remand hearing on approval of proposed once-through cooling system for nuclear power plant was not improper. Seacoast Anti–Pollution League v. Costle, C.A.1, 1979, 597 F.2d 306.

3. Rules and regulations
Congress has ruled out consideration by the Environmental Protection Agency, in setting "best practicable" water pollution regulations, of "receiving water capacity", i.e., the ability of the waters into which effluent is discharged, and especially of oceans, to absorb or dilute pollution. Weyerhaeuser Co. v. Costle, 1978, 590 F.2d 1011, 191 U.S.App.D.C. 309.

4. Hearing
Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 [main volume] certiorari denied 99 S.Ct. 94, 439 U.S. 824, 58 L.Ed.2d 117.

5. Record
Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 [main volume] certiorari denied 99 S.Ct. 94, 439 U.S. 824, 58 L.Ed.2d 117.

6. Remand
Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 [main volume] certiorari denied 99 S.Ct. 94, 439 U.S. 824, 58 L.Ed.2d 117.

7. Evidence
Conclusions of Administrator that design of proposed nuclear power plant would assure protection and propagation of balanced, indigenous population of shellfish, fish and wildlife and that location, design, construction, and capacity of cooling water intake structures reflected best technology available for minimizing adverse environmental impact were supported by substantial evidence. Seacoast Anti-Pollution League v. Costle, C.A.1, 1979, 597 F.2d 306.

8. Review
Administrator's decision under this section, involving approval of proposed once-through cooling system for nuclear power plant, must be affirmed if supported by substantial evidence. Seacoast Anti-Pollution League v. Costle, C.A.1, 1979, 597 F.2d 306.

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

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3. Local laws
Because discharge pipe from nuclear power plant was on Indiana side of 1792 low-water mark of north shore of Ohio river and because that latter mark had been determined by United States Supreme Court to represent boundary between Indiana and Kentucky, operators of plant were not required to get a permit from Commonwealth of Kentucky for their discharges. Com. of Ky. ex

rel. Stephens v. U.S. Nuclear Regulatory Commission, 1980, 626 F.2d 995, 200 U.S.App.D.C. 131.

5. Grant of certification

Although one particular creek was one of the surface waters listed in environmental impact statement which would be adversely affected during construction, where discharge would not originate there, there was no requirement under this section, to get certification from state in which creek was located, as the facility being constructed was located in another state. Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corps of Engineers, D.C.Pa.1981, 526 F.Supp. 1063, affirmed 701 F.2d 1392.

6. Conditions of certification

Although Maryland would be affected by sewage discharge permit issued to District of Columbia municipal sewage plant, Maryland water quality management plan did not require inclusion of denitrification requirement in the permit as although Maryland plan, which was approved as part of continuing planning process, was to serve as a source of guidance in issuing permit at issue, the plan was intended to govern permits to Maryland facilities and not to establish new water quality standards of a kind that Environmental Protection Agency was required to translate into effluent limitations for the D.C. facility under this chapter. Montgomery Environmental Coalition v. Costle, 1980, 646 F.2d 568, 207 U.S.App.D.C. 233.

Certification proceeding under this section, with respect to whether proposed water power project complied with applicable state water quality standards, did not limit the Commissioner of the Department of Environmental Conservation to consideration only of whether proposed facility complied with state water quality standards and effluent limitations, but instead required a careful weighing of the environmental impact in light of the overall public interest in the matter under review. Power Authority of State of N.Y. v. Williams, A.D.3 Dept. 1983, 464 N.Y.S.2d 252.

7. Due process

State certification or waiver of certification is prerequisite to issuance of federal permit license under this chapter, and action of state taken thereupon constitutes state action for due process purposes. Snyder v. Callaghan, W.Va.1981, 284 S.E.2d 241.

7a. Notice

Where there were many exchanges of information between federal and state representatives and the interagency technical team which was overseeing project was represented by Environmental Protection Agency administrators and representatives of the State Department of Environmental Resources, notice requirements of subsec. (a)(2) of this section were met even if Army Corps of Engineers had not formally notified Environmental Protection Agency administrator of receipt of state certificate. Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corps of Engineers, D.C.Pa.1981, 526 F.Supp. 1063, affirmed 701 F.2d 1392.

7b. Hearing

Director of Department of Natural Resources' duty under Department regulations to afford hearing to persons affected by issuance of proposed water quality certification is mandatory. Snyder v. Callaghan, W.Va.1981, 284 S.E.2d 241.

Director of Department of Natural Resources was bound by validly promulgated rules and regulations of Department and thus had legal duty to afford hearing to persons whose riparian property interests were directly affected by Department's certification of upstream construction work, granting permittee right to interfere with water course in which persons claimed property interest. Id.

A riparian owner who claims to be injured as result of state's approval of upstream construction work which involves introduction of foreign material into water course has asserted a property interest which is directly affected by state action so as to constitute an infringement of property right and to entitle holder of riparian rights to a due process hearing under Department of Natural Resources' regulations. Id.

7c. Standing to sue

Organization, which alleged that its members lived on, used and owned land and water rights located at and downstream from proposed construction site and would thus be subjected to whatever harmful effects might result from introduction of foreign material into water, which sought to protect rights of its members to voice their concern at alleged harmful effects of proposed construction and to advocate alternative methods of flood control, which sought prospective relief to secure hearing on behalf of its members, and whose claim did not require individualized proof, had standing to maintain action in mandamus on behalf of its membership to compel Director of Department of Natural Resources to hold hearing on Director's certification of upstream construction activity. Snyder v. Callaghan, W.Va.1981, 284 S.E.2d 241.

8. Jurisdiction

1972 amendments to this chapter did not provide exception to general rule granting jurisdiction to district court over suit challenging validity of denial by Environmental Quality Board of Puerto Rico of water quality certificate and seeking equitable and declaratory relief therefrom. U.S. v. Com. of Puerto Rico, D.C.Puerto Rico 1982, 551 F.Supp. 864.

9a. Res judicata

Where both administrative board and appellate courts considered issue of whether certification granted by state officials satisfied federal Environmental Protection Agency regulations, state court action barred, on res judicata grounds, subsequent federal challenge to Army Corps of Engineers discharge permit on grounds that there had not been proper certification by state officials. Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corps of Engineers, D.C.Pa.1981, 526 F.Supp. 1063, affirmed 701 F.2d 1392.

10. Review

Proper forum to review appropriateness of state's certification is state court, and federal courts and agencies are without authority to review validity of requirements imposed under state law or in state's certification, therefore, Environmental Protection Agency lacked authority to review conditions imposed by state of Maine on construction of oil refinery. Roosevelt Campobello Park Com'n v. U.S. E.P.A., C.A.1, 1982, 684 F.2d 1041.

State certification under this section is set up as exclusive prerogative of the state and is not to be reviewed by any agency of the federal government. Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corps of Engineers, D.C.Pa. 1981, 526 F.Supp. 1063, affirmed 701 F.2d 1392.

Appeal provided tenants of riparian farm property and organization composed of owners and users of riparian property by W.Va.Code § 29A-5-4 governing entitlement of party adversely affected by final order or decision to judicial review was not adequate remedy at law sufficient to preclude their resort to mandamus to compel Director of Department of Natural Resources to afford them hearing on certification of upstream construction activity which involved alteration and filling of riverbed where requiring them to seek judicial review would only result in undue delay in adjudication of issues presented. Snyder v. Callaghan, W.Va.1981, 284 S.E.2d 241.

11. Waiver

State may make an affirmative decision to waive certification of federally licensed project which may result in any discharge into its navigable waters. Environmental Defense Fund v. Alexander, D.C.Miss.1980, 501 F.Supp. 742.

12. Declaratory ju

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436, 58 N.Y.2d 42

§ 1342. National pollutant discharge elimination systen

Transfer of Functions. The enforcement functions of the Administrator or other appropriate official or entity in the Environmental Protection Agency related to compliance with national pollutant discharge elimination system permits provided for in this section as they relate to pre-construction, construction, and initial operation of an approved transportation system for the transport of Canadian natural gas and Alaskan natural gas as such terms are defined in the Alaskan Natural Gas Transportation Act of 1976, section 719 et seq. of Title 15, Commerce and Trade, were transferred to the Federal Inspector for the Alaska Natural Gas Transportation System, effective July 1, 1979, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, pursuant to sections 102(a) and 203(a) of 1979 Reorg.Plan No. 1, June 12, 1979, 44 F.R. 33663, 33666, 93 Stat. 1373, set out in the Appendix to Title 5, Government Organization and Employees.

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Construction ½
Necessity of permit 14a
Point source of pollution 28
Time for compliance 27
Weight and conclusiveness of Agency's findings 23a

½. Construction

Language of this section will be given a common sense interpretation in harmony with the
discernible intent c
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1. Construction v

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State certification under this section is set up as exclusive prerogative of the state and is not to be reviewed by any agency of the federal government. Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corps of Engineers, D.C.Pa. 1981, 526 F.Supp. 1063, affirmed 701 F.2d 1392.

Appeal provided tenants of riparian farm property and organization composed of owners and users of riparian property by W.Va.Code § 29A-5-4 governing entitlement of party adversely affected by final order or decision to judicial review was not adequate remedy at law sufficient to preclude their resort to mandamus to compel Director of Department of Natural Resources to afford them hearing on certification of upstream construction activity which involved alteration and filling of riverbed where requiring them to seek judicial review would only result in undue delay in adjudication of issues presented. Snyder v. Callaghan, W.Va.1981, 284 S.E.2d 241.

11. Waiver

State may make an affirmative decision to waive certification of federally licensed project which may result in any discharge into its navigable waters. Environmental Defense Fund v. Alexander, D.C.Miss.1980, 501 F.Supp. 742.

12. Declaratory judgment

Department of Environmental Conservation improperly made declaratory ruling that a proposed hydroelectric generating project was subject to this section upon assumed fact where assumed facts were never shown to conform to circumstances actually presented by the project, in that Department of Environmental Conservation exceeded its jurisdiction and power and abused its discretionary authority under McKinney's N. Y. State Administrative Procedure Act, § 204 which authorizes declaratory rulings. Power Authority of State of N. Y. v. New York State Dept. of Environmental Conservation, 1982, 449 N.Y.S.2d 80, 86 A.D.2d 57.

13. Authority of Department of Environmental Conservation

Department of Environmental Conservation had authority to issue declaratory ruling declaring that proposed hydroelectric generating project required certification by Department under this section or the State Pollutant Discharge Elimination System, despite fact that facts upon which Department was requested to rule were not established by evidence or conceded by parties. Power Authority of State of N.Y. v. New York State Dept. of Environmental Conservation, 1983, 448 N.E.2d 436, 58 N.Y.2d 427, 461 N.Y.S.2d 769.

§ 1342. National pollutant discharge elimination system

Transfer of Functions. The enforcement functions of the Administrator or other appropriate official or entity in the Environmental Protection Agency related to compliance with national pollutant discharge elimination system permits provided for in this section as they relate to pre-construction, construction, and initial operation of an approved transportation system for the transport of Canadian natural gas and Alaskan natural gas as such terms are defined in the Alaskan Natural Gas Transportation Act of 1976, section 719 et seq. of Title 15, Commerce and Trade, were transferred to the Federal Inspector for the Alaska Natural Gas Transportation System, effective July 1, 1979, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, pursuant to sections 102(a) and 203(a) of 1979 Reorg.Plan No. 1, June 12, 1979, 44 F.R. 33663, 33666, 93 Stat. 1373, set out in the Appendix to Title 5, Government Organization and Employees.

Notes of Decisions

Addition of pollutants 10a
Cause of action 17a
Compliance with terms and conditions of permit 29
Construction ½
Necessity of permit 14a
Point source of pollution 28
Time for compliance 27
Weight and conclusiveness of Agency's findings 23a

½. Construction

Language of this section will be given a common sense interpretation in harmony with the discernible intent of Congress. National Wildlife Federation v. Gorsuch, D.C.D.C. 1982, 530 F.Supp. 1291, reversed on other grounds 693 F.2d 156, 224 U.S.App.D.C. 41.

1. Construction with other laws

Reporting provisions and financial penalties found in this section providing for changes in permits and enforcement of more stringent controls over discharges even during life of an existing permit in cases where circumstances have changed since issuance of original permit act as sufficient deterrent to undesirable activities and would make application of penalties under section 1321 of this title governing discharge of hazardous substances redundant and wholly unnecessary. Manufacturing Chemists Ass'n v. Costle, D.C.La. 1978, 455 F.Supp. 968.

Since limitations are founded upon ascertainment of "best practicable control technology" which can be applied to relevant discharges coming from relevant industries, with considerations of "harm to the environment" being indirect and subliminal at best, applications for amended permits should be filed through a more reasonable and ordered process and permit violations should then be penalized solely under this section providing for changes in permits in cases involving a change in circumstances rather than section 1321 of this title governing discharge of harmful substances. Id.

2. Purpose

In enacting this chapter, Congress did not intend that only the definitional list of pollutants, strictly interpreted, be controlled under the National Pollution Discharge Elimination System Program and that all other problems subsumed under the broader definition of pollution, i.e.,

tainty. Petitioners cannot suffer, for Pittston cannot build. Pittston cannot suffer, for our refusal to review its "1975 rules" PSD permit neither adds to nor subtracts from its rights under that permit and current law. Admittedly, the parties may suffer from theoretical harm in that they are denied early notice of whether the agency decisions to date have been legally correct, but this harm is suffered whenever a court denies interlocutory review. In sum, all the issues raised in these challenges can be raised later should EPA take final steps to modify the "begin construction" prong. We see no particular need to decide or virtue in deciding these issues unless, and until, it is necessary to do so.

In determining whether it is appropriate to dismiss these cases, we note that the court review provision of the Clean Air Act § 307(b), 42 U.S.C. § 7607(b), states that "any petition for review ... shall be filed within sixty days from the date notice of such ... action appears in the Federal Register...." Ordinarily, in reviewing "final" agency action, a court can review the preceding interlocutory determinations as well. *See FTC v. Standard Oil Co.,* 449 U.S. 232, 245, 101 S.Ct. 488, 496, 66 L.Ed.2d 416 (1980). Hence, ordinarily delaying review of the "1975 rules" permit until amendment of the grandfather rule's second prong would raise no time-bar problem. In terms of EPA's venue statute, however, the "1975 rules" permit decision might be considered a "local" or "regional" matter, making review appropriate here, while the "second prong" amendment might be considered a matter of "nationwide scope," making review appropriate in the Court of Appeals for the District of Columbia. *See* 42 U.S.C. § 7607(b) (1976). In order to forestall any consequent complications growing out of the time-bar of the court review provision or its special jurisdictional provision, we shall hold Nos. 78-1484, 78-1486, and 78-1487 on our docket for six months, subject to extension at the request of any party. In the event that EPA enacts an amendment we can then, following determination of the threshold legal questions, consider the "1975 rules" permit objections, should it be necessary to do so.

So ordered.

ROOSEVELT CAMPOBELLO INTERNATIONAL PARK COMMISSION, et al., Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

The Pittston Company, et al., Intervenors.

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., et al., Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

The Pittston Company, et al., Intervenors.

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., et al., Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

The Pittston Company, et al., Intervenors.

Nos. 81-1548, 81-1560 and 81-1773.

United States Court of Appeals, First Circuit.

Argued April 6, 1982.

Decided Aug. 10, 1982.

As Amended on Denial of Rehearing and Rehearing En Banc Oct. 7, 1982.

Environmental groups challenged final decision of Environmental Protection Agency Administrator to issue national pollutant

discharge elimination system permit to oil refinery. The Court of Appeals, Coffin, Chief Judge, held that: (1) there was no need to supplement environmental impact statement in order to accommodate most recent data and policy shift in energy conservation and use; (2) no purpose would be served by requiring Agency to study exhaustively all environmental impacts at each alternative site after Agency had concluded alternative sites were not substantially preferable to proposed site; (3) Agency did not fail to consider all alternatives which were feasible and reasonably apparent at time of drafting environmental impact statement; (4) Agency's consideration of alternative sites was not inadequate, nor was its conclusion to reject those sites arbitrary and capricious; and (5) administrative law judge's failure to require, that "real time simulation" studies be done to assure low risk of oil spill prior to granting of permit was error.

Vacated and remanded.

1. Health and Environment 🔑25.10(6)

Where at time that environmental impact statement was drafted, there was forecasted need for type of refinery planned by refiner, it was federal policy to encourage construction of such refineries, and there was demand for domestic refineries capable of processing high sulfur crude oil into low sulfur products, there was no need to supplement environmental impact statement in order to accommodate most recent data and federal policy shifts.

2. Health and Environment 🔑25.5(9)

Environmental Protection Agency's role in reviewing privately sponsored projects such as privately owned oil refinery is to determine whether proposed site is environmentally acceptable and to search for alternatives that would be "substantially preferable" from environmental standpoint.

3. Health and Environment 🔑25.5(9)

Where Environmental Protection Agency had reasonably concluded that no alternative would be substantially preferable to proposed site for oil refinery, and guidelines adopted by Agency to limited study of alternatives were consistent with rule of reason, no purpose would be served by requiring Agency to study exhaustively all environmental impacts at each alternative site considered.

4. Health and Environment 🔑25.10(8)

Environmental Protection Agency's duty under National Environmental Policy Act is to study all alternatives that appear reasonable and appropriate for study at time of drafting environmental impact statement, as well as "significant alternatives" suggested by other agencies or public during comment period. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

5. Health and Environment 🔑25.15(6)

Under National Environmental Policy Act, in order to preserve alternative issues for review, it is not enough simply to make facially plausible suggestion of alternative, but rather, intervenor must offer tangible evidence that alternative site of project might offer substantial measure of superiority than proposed site. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

6. Health and Environment 🔑25.10(8)

Where environmental groups did not suggest any reasonable alternatives to Environmental Protection Agency during comment period on proposed oil refinery, alternative of monobuoy off mid-Atlantic coast was raised for first time at adjudicatory hearing and too late for inclusion in environmental impact statement, and Agency had rejected offshore monobuoy in New England due to fierce public opposition to similar proposals, Agency did not fail to consider alternatives which were feasible and reasonably apparent at time of drafting environmental impact statement for proposed oil refinery.

7. Health and Environment 🔑25.10(8)

Where environmental impact statement for proposed oil refinery contained comparative analysis of effects of proposed

project on air quality, water quality, present land and sea uses, terrestrial and aquatic flora and fauna, and aesthetics at various sites, one area was eliminated because its shallow channel was unable to accommodate very large crude carriers, second area was eliminated due to lack of suitable land, and third area was eliminated because heavy tourism as well as lobster, clam and fishing industry in area made that site undesirable, Environmental Protection Agency's consideration of sites was not inadequate nor was its conclusion to reject alternative sites arbitrary and capricious.

8. Fish ⇐12
Game ⇐3½

Although 1979 Amendments to Endangered Species Act softened obligation of agency from requiring agency to insure species would not be jeopardized to requiring agency to insure that jeopardy was not likely, agencies still are under substantial mandate to use all methods and procedures which are necessary to prevent loss of any endangered species, regardless of cost. Endangered Species Act of 1973, § 7(a)(2), (g, h) as amended 16 U.S.C.A. § 1536(a)(2), (g, h).

9. Fish ⇐12
Game ⇐3½

Agency's duty under Endangered Species Act to consult with Secretary of Commerce or Interior, depending on particular endangered species, does not divest agency of discretion to make final decision that it has taken all necessary action to insure that actions will not jeopardize continued existence of endangered species. Endangered Species Act of 1973, § 2 et seq. as amended 16 U.S.C.A. § 1531 et seq.

10. Fish ⇐12
Game ⇐3½

Initial determination of whether species is endangered is within Secretary of Interior's exclusive authority, and administrative law judge reviewing agency action under Endangered Species Act has no authority to review that finding. Endangered Species Act of 1973, § 4(c)(1) as amended 16 U.S.C.A. § 1533(c)(1).

11. Fish ⇐12
Game ⇐3½

In light of Environmental Protection Agency's duty to insure that construction of oil refinery was unlikely to jeopardize endangered whales or eagles, administrative law judge's failure to require, at minimum, that real time simulation studies be done to assure low risk of oil spill prior to granting refinery permit violated duty to use best scientific data available where Agency, state of Maine, and Coast Guard all viewed real time simulation studies as necessary to finding of determination of safety. Endangered Species Act of 1973, § 7(a)(2) as amended 16 U.S.C.A. § 1536(a)(2).

12. Health and Environment ⇐25.5(9)

Proper forum to review appropriateness of state's certification is state court, and federal courts and agencies are without authority to review validity of requirements imposed under state law or in state's certification, therefore, Environmental Protection Agency lacked authority to review conditions imposed by state of Maine on construction of oil refinery. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(C), 401(a, d), 510, 511(c)(2) as amended 33 U.S.C.A. §§ 1311(b)(1)(C), 1341(a, d), 1370, 1371(c)(2).

13. Health and Environment ⇐25.5(9)

Where state at no time waived its right to certify proposed charge from oil refinery, administrative law judge lacked authority to exclude previously imposed state conditions from federal permit, but rather, those conditions were required to be included in national pollutant discharge elimination system permit for oil refinery.

Bruce J. Terris, Washington, D. C., and Alan Wilson, Boston, Mass., with whom Karen H. Edgecombe, Washington, D. C., Kenneth T. Hoffman, Douglas I. Foy, and Kathleen C. Farrell, Boston, Mass., were on brief, for petitioners.

Gregory W. Sample, Asst. Atty. Gen., with whom James E. Tierney, Atty. Gen., and Kay R.H. Evans, Asst. Atty. Gen., Au-

gusta, Me., were on brief, for the State of Maine, amicus curiae.

Jonathan B. Hill, with whom John P. Schnitker, Dow, Lohnes & Albertson, Washington, D. C., Bruce W. Chandler, and Marden, Dubord, Bernier & Chandler, Waterville, Me., were on brief, for the Pittston Co., intervenor.

Rosanne Mayer, Atty., Dept. of Justice, with whom Carol E. Dinkins, Asst. Atty. Gen., Land and Natural Resources Div., Donald W. Stever, Jr., Atty., Dept. of Justice, Washington, D. C., and Susan Studlien, Atty., E. P. A., Boston, Mass., were on brief, for U. S. E. P. A., respondent.

Wayne S. Henderson, Boston, Mass., for New England Legal Foundation, et al., intervenor.

Before COFFIN, Chief Judge, BOWNES and BREYER, Circuit Judges.

COFFIN, Chief Judge.

In these three consolidated appeals petitioners challenge the final decision of the EPA Administrator to issue a National Pollutant Discharge Elimination System (NPDES) permit to the Pittston Company pursuant to § 402 of the Clean Water Act, 33 U.S.C. § 1342. The permit authorizes the Pittston Co. to construct and operate a 250,000 barrel per day oil refinery and associated deep water terminal at Eastport, Maine, in accordance with specified effluent limitations, monitoring requirements, and other conditions. Petitioners contend that EPA's actions violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Pittston proposes to construct an oil refinery and marine terminal in Eastport, Maine, a relatively pristine area of great natural beauty near the Canadian border. The area is known for being the foggiest on the East Coast, experiencing some 750–1000 hours of fog a year; daily tides approximate twenty feet. The plan contemplates that crude oil shipments will arrive several times a week in supertankers, or Very Large Crude Carriers (VLCCs), as long as four football fields, or slightly less than a quarter of a mile. The tankers will travel through Canadian waters[1] around the northern tip of Campobello Island, where the Roosevelt Campobello International Park is located, *see* 16 U.S.C. § 1101 *et seq.*, down Head Harbor Passage to a refinery near Eastport where they will be turned and berthed. Numerous barges and small tankers will carry the refined product from Eastport to destination markets in the Northeast.

The protracted procedural history of this case begins in April 1973, when Pittston applied to the Maine Board of Environmental Protection (BEP) for permission to locate the refinery in Eastport. After public hearings, the BEP approved the proposal under the Maine Site Location of Development Law, 38 M.R.S.A. § 481 *et seq.*, subject to a number of pre-construction and pre-operation conditions designed primarily to reduce the risk of oil spills. Pittston subsequently filed an application with EPA to obtain an NPDES permit, and submitted an Environmental Assessment Report to aid EPA in its duty to prepare an Environmental Impact Statement (EIS) pursuant to NEPA. *See* 33 U.S.C. § 1371(c)(1); 42 U.S.C. § 4332(2)(C). EPA promulgated a draft EIS recommending issuance of the permit as conditioned by the Maine BEP, held a joint public hearing with the Army Corps of Engineers in Eastport, and received approximately 600 responses during a public comment period. In September 1977, the Maine Department of Environmental Protection certified, under § 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), that the proposed discharge would satisfy the appropriate requirements of state and federal law. In June 1978, the final EIS was issued, again recommending that the permit be issued pursuant to the BEP conditions.

1. The Canadian government has consistently, since 1973, opposed the transit of large quantities of oil through Head Harbor Passage. The resolution of this issue is obviously beyond the realm of this court.

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Several months later, the National Marine Fisheries Service (NMFS) of the Department of Commerce and the Fish and Wildlife Service (FWS) of the Department of Interior initiated consultations with EPA concerning the proposed refinery's impact on endangered species—the right and humpback whales, and the northern bald eagle, respectively—under § 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. In November, the NMFS issued a threshold determination that there were insufficient data to conclude that the project was not likely to jeopardize the continued existence of the endangered whales. In December, the FWS concluded that the project was likely to jeopardize the bald eagle. In light of these opinions and of the value of the natural resources in the Eastport area as noted in the EIS, EPA's Region I issued a notice of determination to deny Pittston's application for an NPDES permit in January 1979. Pittston thereafter sought an adjudicatory hearing and administrative review of this decision.[2]

Prior to the hearing, extensive consultation between EPA, NMFS, FWS, and Pittston took place to consider mitigation measures proposed by Pittston. In May, NMFS concluded on the basis of the best scientific data available that EPA was unable to comply with the statutory mandate that it "insure that [the project] is not likely to jeopardize the continued existence of" endangered whales. 16 U.S.C. § 1536(a)(2). In June FWS reaffirmed its previous determination that the refinery was likely to jeopardize the bald eagle. EPA Region I amended its decision to include these new findings.

The adjudicatory hearing took place over five weeks in January and February of 1980. More than fifty witnesses testified and were cross-examined; several hundred exhibits were introduced. In January 1981, the ALJ rendered EPA's Initial Decision, overturning EPA Region I and ordering that the NPDES permit issue. He concluded that the EIS was adequate to comply with NEPA, and that no supplemental EIS was necessary: that the risk of oil spills was "minute" and that the refinery was therefore not likely to jeopardize any endangered species; and that the conditions imposed by the Maine BEP, and assumed by the EIS, were not required to be conditions of the federal permit. Petitioners subsequently sought review before the EPA Administrator, and also moved to reopen the record to admit a recent study showing an increased number of endangered whales in the Eastport region. Both motions were denied, and in September 1981 EPA Region I issued the NPDES permit to the Pittston Company. Petitioners now seek review in this court pursuant to § 509(b)(1)(F) of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(F).

I. The National Environmental Policy Act

A. *The Standard of Review*

It is now well settled that there are two aspects to a court's review of agency action subject to the requirements of NEPA:

> "First, the court makes a substantive review of the agency's action to determine if such action is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706. This substantive review, although conducted on the basis of the entire administrative record, is quite narrow in scope. The court should only assure itself that the agency has given good faith consideration to the environmental consequences of its actions and should not pass judgment on the balance struck by the agency among competing concerns.
>
> Second, a reviewing court must assess the agency's compliance with the duties NEPA places upon it. These duties are 'essentially procedural'. The primary procedural mechanism embodied in NEPA is the requirement that an agency prepare 'a detailed statement' discussing,

2. Pittston also sought an exemption from the requirements of the ESA pursuant to 16 U.S.C. § 1536(g)(1), but this application was ruled not ripe for review until final action by EPA denying a permit. *Pittston Co. v. Endangered Species Comm.*, 14 Env't Rep.Cas. (BNA) 1257 (D.D.C.1980).

inter alia, 'alternatives to the proposed action', 42 U.S.C. § 4332(2)(C). Requiring an agency to discuss alternatives within the EIS serves numerous goals. The detailed statement aids a reviewing court to ascertain whether the agency has given the good faith consideration to environmental concerns discussed above, provides environmental information to the public and to interested departments of government, and prevents stubborn problems or significant criticism from being shielded from internal and external scrutiny." *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (citations & footnote omitted). *See also Silva v. Lynn*, 482 F.2d 1282, 1283–84 (1st Cir. 1973).

B. *The Need for the Project*

In order to weigh the benefits of the project against the potential environmental costs, the EIS contained an analysis of the justification for the project and the anticipated economic benefits. The project was deemed consistent with a longstanding federal policy of encouraging the construction of domestic refining capacity in order to promote national security. New England, heavily dependent on imported oil, had no regional refining capacity. The project was designed to accommodate VLCCs, thus taking advantage of the cost savings offered by economies of scale. Constructing a refinery in the United States rather than abroad had the additional advantage of retaining jobs and investments in this country. Finally, the project was particularly attractive because it was designed to handle high sulfur crude oil and refine it into low sulfur fuels, thus facilitating compliance with new environmental standards. Such a refinery was "of an entirely different design" than most existing domestic refineries, which were built to handle domestic and steadily depleting sources of low sulfur crude.

[1] Petitioners argue that the EIS was faulty because it failed to consider the possibility of conservation and the use of alternative fuels instead of the construction of additional oil refining capacity. We note first that petitioners failed to raise this concern in a meaningful way during the comment period. In any case, it is clear that at the time the EIS was drafted, there was a forecasted need for the type of refinery planned by Pittston, and that it was federal policy to encourage the construction of such refineries. Nor are we persuaded by petitioners' argument that the discussion in the EIS of the need for the project is "totally outdated and of no present use." Even accepting their contention—based, we might add, primarily on statements of energy policy under President Carter, which might themselves be considered outdated—that there is no longer a strong need for additional refining capacity, it remains uncontested that there is still a demand for domestic refineries capable of processing high sulfur crude into low sulfur products. Given this continuing national and regional need, we see no need to supplement the EIS in order to accommodate the most recent data and federal policy shifts. *Cf. New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 96–98 (1st Cir. 1978).

C. *Adequacy of Consideration of Alternatives*

Petitioners contend that the EIS failed to discuss adequately a number of alternatives to the proposed refinery at Eastport. First, they argue that EPA erred by conducting a less searching analysis of alternatives to this privately sponsored project than it would have had the project been publicly funded. Second, they urge that EPA unreasonably limited its consideration of alternative sites to three locations in Maine. Finally, they allege that EPA's comparison of the various sites was inadequate.

[2] EPA's evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects "is to determine whether the proposed site is environmentally acceptable", and not, as in the case of a publicly funded project, "to undertake to locate what EPA would consider to be the optimum site for a new facility." Therefore, EPA considered

its purpose in this case to be to search for alternatives "that would be substantially preferable from an environmental standpoint." EPA concluded that "[t]his different purpose affects the extent of the information on alternatives necessary to make a decision."

[3] We are unable to fault EPA's reasoning. Petitioners concede that the substantive standard—"substantially preferable"—was correctly stated. *Cf. New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d at 95–96 ("obvious superiority"). No purpose would be served by requiring EPA to study exhaustively all environmental impacts at each alternative site considered once it has reasonably concluded that none of the alternatives will be substantially preferable to the proposed site. Moreover, the guideline adopted by EPA to limit its study of alternatives appears, in this case, to be consistent with the "rule of reason" by which a court measures federal agency compliance with NEPA's procedural requirements. *See, e.g., Grazing Fields Farm*, 626 F.2d at 1074; *Massachusetts v. Andrus*, 594 F.2d 872, 884 (1st Cir. 1979).

EPA's choice of alternative sites was focused by the primary objectives of the permit applicant, the Pittston Co. Pittston stated that its basic consideration was to find a port with deep water near shore in order to accommodate VLCCs. Only by using such supertankers could Pittston take advantage of economies of scale, thereby making the project economically feasible. Therefore, after Pittston had reviewed and rejected a number of sites lacking such deep water, EPA limited its consideration to the only ports providing deep water access. Three alternative areas in Maine were considered: Portland, Machias, and Penobscot/Blue Hill.[3]

[4, 5] EPA's duty under NEPA is to study all alternatives that "appear reasonable and appropriate for study at the time" of drafting the EIS, as well as "significant alternatives" suggested by other agencies or the public during the comment period. In order to preserve an alternatives issue for review, it is not enough simply to make a facially plausible suggestion; rather, an intervenor must offer tangible evidence that an alternative site might offer "a substantial measure of superiority" as a site. *See Seacoast Anti-Pollution League v. NRC*, 598 F.2d 1221, 1228–33 (1st Cir. 1979).

[6] In light of this standard, petitioners' argument that EPA erred by restricting its consideration to alternative sites in Maine must fail, because they did not suggest any reasonable alternatives to EPA during the comment period. One alternative—a monobuoy off the mid-Atlantic coast—was raised for the first time at the adjudicatory hearing, too late for inclusion in the EIS. Although petitioners now contend that EPA *should* reasonably have been aware of such an alternative earlier, their citation to a 1976 study by the Office of Technology falls far short of persuading us; nor have they explained their failure to bring the report to EPA's attention in a timely manner. Another possibility, an offshore monobuoy in New England, was rejected by EPA in spite of its potential environmental benefits because of fierce public opposition to similar proposals off the coast of Massachusetts and New Hampshire. We cannot say that EPA acted unreasonably in concluding that such an option was not feasible. In short, we are not convinced that EPA failed to consider all alternatives which were feasible and reasonably apparent at the time of drafting the EIS.

[7] Petitioners next urge that EPA's consideration of these alternative sites was inadequate. The EIS contained comparative analysis of the effects of the proposed project on air quality, water quality, present land and sea uses, terrestrial and aquatic flora and fauna, and aesthetics at the various sites. The Portland area was

3. The EIS also considered two alternative modifications of the project at Eastport: the use of an offshore monobuoy, and the use of smaller tankers. Both alternatives were rejected as being not substantially preferable to the current proposal, and petitioners do not challenge the adequacy of these comparisons.

eliminated by Pittston because its shallow channel is unable to accommodate VLCCs and suitable land for a refinery site and marine terminal was not available. EPA considered an offshore monomooring system near Portland, but rejected it due to the vulnerability of the proposed location to the elements and the chronic spills associated with monomooring which would interfere with the nearby fishing and recreation industries.[4] The Machias site was considered substantially similar to Eastport from an environmental perspective, but was eliminated by Pittston because suitable land was unavailable. EPA also noted that the harbor at Machias was more exposed to wind and weather than that at Eastport, thus making a tanker approach more hazardous. Heavy tourism at Penobscot/Blue Hill made a refinery undesirable; the area is also a center for Maine's lobster, clam and fishing industry. Finally, the tanker approach at the area is quite long with numerous islands, increasing the risk of mishap close to shore and inhabited areas. Consequently, EPA concluded that none of the alternative sites would provide a significantly greater degree of environmental protection than the Eastport site. Having carefully reviewed the record, we cannot say that EPA's consideration of these sites was inadequate, or that its conclusion to reject them was arbitrary and capricious.

We defer our consideration of additional NEPA issues raised by petitioners—the adequacy of the risk spill analysis in the EIS, and the need for a supplemental EIS—until after our discussion of the risk of oil spills in the context of the Endangered Species Act.

II. The Endangered Species Act

A. *The Procedural History*

As noted earlier, EPA Region I originally issued a notice of determination not to issue the permit based on the opinion of the NMFS and the FWS that EPA could not insure that the project was not likely to jeopardize the right and humpback whales, and the bald eagle, respectively. The ALJ, in his Initial Decision, rejected these biological opinions and held that the project was *not* likely to jeopardize the continued existence of these species. While administrative review was being sought, the National Oceanic and Atmospheric Administration (NOAA) moved to reopen the record, proffering a 1980 study indicating the presence in the Eastport region during the summer of a significant portion of the north Atlantic right whale population. The acting Administrator of EPA, assuming arguendo the validity of the study, concluded that the new information was not significant because of the ALJ's supportable finding that any risk of a major oil spill was minute. At the same time, he summarily affirmed the initial decision, and EPA Region I subsequently issued the NPDES Permit to Pittston.

B. *Legal Standards*

The obligation imposed on EPA by section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) is to "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species." An action would "jeopardize" the species if it "reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 C.F.R. § 404.02 (1980).

[8] Although the 1979 Amendments to ESA softened the obligation on an agency from requiring the agency to "insure" the species would not be jeopardized to requiring the agency to "insure" that jeopardy is

4. Petitioners rely on two planning studies done for the State of Maine to argue that Portland is preferable to Eastport as an oil port. This information was considered in the EIS, which recognized that an advantage of Portland was that it is already a busy marine terminal, whereas Eastport is relatively pristine. But EPA could reasonably rely in part on the facts that Maine had approved the Eastport site for the project, and had not suggested any alternative sites during the comment period, to conclude that the state did not consider any alternative site to be substantially preferable.

not "likely", Pub.L.No.96–159, § 4(1)(C), 93 Stat. 1225, 1226 (1979), the legislative intent was that the Act "continues to give the benefit of the doubt to the species." H.Conf.Rep.No.96–697, 96th Cong., 1st Sess. 12, *reprinted in* [1979] U.S.Code Cong. & Ad.News, 2557, 2572, 2576. Agencies continue to be under a substantive mandate to use "*all methods* and procedures which are necessary", *TVA v. Hill*, 437 U.S. 153, 185, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978) (quoting 16 U.S.C. §§ 1531(c), 1532(2), emphasis added by the court), "to *prevent* the loss of any endangered species, regardless of the cost." *Id.* at 188 n.34, 98 S.Ct. at 2299 n.34 (emphasis in original). The Act does, however, create a special "exemption" procedure (not at issue here, *see* note 2, *supra*) designed to allow necessary actions even if they threaten the loss of an endangered species. *See* 16 U.S.C. §§ 1536(g), (h).

[9] An agency's duty to consult with the Secretary of Commerce or Interior, depending on the particular endangered species, does not divest it of discretion to make a final decision that "it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species". *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976). The consultation process, however, is not merely a procedural requirement. Not only is a biological opinion required of the Secretary of Commerce or Interior, "detailing how the agency action affects the species or its critical habitat", 16 U.S.C. § 1536(b), but the 1979 Amendments to ESA require that in fulfilling its consultation duty and in insuring the absence of likelihood of jeopardy "each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Moreover, the legislative history emphasizes that "[c]ourts have given substantial weight to these biological opinions as evidence of an agency's compliance" with the Act, that "[t]he Amendment would not alter this state of the law or lessen in any way an agency's obligation" under § 7, and that a federal agency which "proceeds with [an] action in the face of inadequate knowledge or information ... does so with the risk that it has not satisfied the standard of" § 7(a)(2). H.Conf.Rep. at 12, *reprinted in* [1979] U.S.Code Cong. & Ad.News at 2576. *See also* H.R.Rep.No.95–1625, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S.Code Cong. & Ad.News 9453, 9462.

In reviewing an agency's decision after consultation our task is "to ascertain whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *National Wildlife Federation v. Coleman*, 529 F.2d at 372 (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823–824, 28 L.Ed.2d 136 (1971)). We must also inquire into whether the ALJ "followed the necessary procedural requirements." *Overton Park*, 401 U.S. at 417, 91 S.Ct. at 824.

C. *The Administrative Law Judge's Initial Decision*

1. The Bald Eagle

The FWS biological opinion concerning the risk of jeopardy to the bald eagle began with its identification of Cobscook Bay (adjacent to the proposed Eastport refinery) as the most productive of three areas essential to conservation of the species in Maine and the northeastern United States. The specific threats included air pollution containing mercury emissions and increased acidification of lakes dangerously adding to the already high concentrations of heavy metals in eagle eggs and the food chain; the intrusion of economic development and human population; and a number of problems caused by oil spills, including the mortality of embryos and young eagles, reduction in the fish and bird food supply of eagles, fouling of wings, and ingestion problems.

The ALJ found that the FWS claim as to mercury emissions rested on an assumed daily emission of 200 grams. After a review of the evidence, he determined that, on a "worst case" basis, there might be a daily emission of 17.6 grams. He concluded that this amount, as well as negligible amounts of lead and vanadium, would not

affect the eagle's food chain. The ALJ also found that refinery emissions would have no important impact on the acidity of lakes, one year's exposure to such emissions being equivalent to that in six hours of rainfall. The threats based on human activity were found to be inconsequential in view of the difficulty of access to nesting areas, the demonstrated tolerance of human presence by eagles, the recreation-inhibiting inclement spring weather during the time of greatest eagle sensitivity, and proposed mitigation measures.

[10] We cannot say that these findings were not adequately supported, that the relevant factors were not considered, or that the ALJ made a clear error of judgment.[5] But there was one additional finding: that although a significant oil spill would have an adverse impact on eagles and their reproduction, the risk of such a spill was "very small or minute", so that the species was not jeopardized. The validity of this finding will be considered below.

2. Right and Humpback Whales

The NMFS biological opinion singled out right and humpback whales as being subject to adverse impact, their population being limited and their migratory pattern placing them in the Eastport area during spring and summer. The anticipated harm from oil spills included illness from ingestion, skin irritation, fouling of baleen plates, and contamination of food.

The ALJ accepted an estimate of a total north Atlantic right whale population of between 70 and 100, and a humpback whale population of 2000 or more. He concluded, based on the combination of the brief periods when the whales were in Eastport waters and, given the navigational safeguards and restrictions to be imposed on Pittston by both the State of Maine and the Coast Guard, the low probability of a massive oil spill, that there was no reasonable likelihood that the continued existence of the two whale populations would be jeopardized.

The low risk of spills was also central to EPA's determination not to reopen the record to receive a 1980 New England Aquarium study estimating that a minimum of 48 right whales, or approximately one half the total population, had been in or near the proposed tanker approaches to Eastport in that year. Repeating the analysis relied upon by the ALJ, the EPA acting Administrator concluded that the new study was not sufficiently probative to open the record. In his words, the "[a]bsence of risk, rather than the absence of whales" underlay the ALJ's decision, and his own decision to affirm the granting of the permit.

We now proceed to outline the ALJ's reasoning leading to his finding, crucial to

5. There is controversy as to whether the ALJ's determination that the bald eagle population to be considered included not only the northeastern United States population as referred to by FWS in its biological opinion but also that of New Brunswick, Nova Scotia, and Cape Breton Island, played any part in his decision. Although at one point he stated that the question of the population segment to be considered was "controlling", his ultimate conclusion of absence of risk of a significant oil spill would seem to render the definition determination superfluous.

In the event definition becomes relevant in any further proceedings, we observe that EPA has not attempted to defend the ALJ's definition on the merits. It seems clear to us that under 16 U.S.C. § 1533(c)(1) the Secretary of the Interior is given the exclusive duty and power to publish a list specifying "with respect to each ... species over what portion of its range it is endangered". Certainly the initial determination of whether the species is endangered is within the Secretary's exclusive authority, *TVA v. Hill*, 437 U.S. at 171–72, 98 S.Ct. at 2290–2291, and the ALJ has no authority to review this finding. We see no reason why the Secretary should not have similar authority to ascertain the appropriate *range* in which the species is endangered or why the ALJ should not lack authority to alter this determination. In any case, the legislative history appears to authorize the Secretary to deem a species endangered in the United States, or a portion thereof, even if it is abundant elsewhere. *See* H.R.Rep.No.93–412, 93rd Cong., 1st Sess. 10 (1973); S.Rep.No.96–151, 96th Cong., 1st Sess. 7 (1979). Even if testimony that Canadian eagles migrated to the United States or interbred with eagles nesting in the United States could make consideration of the Canadian eagle population relevant, the ALJ refused to base his conclusion of no jeopardy on any such factual basis.

both ESA issues, of the unlikelihood of a significant oil spill.

3. The Finding as to Risk of Oil Spill

The ALJ's conclusion that the risk of a major oil spill was minute was based primarily on three items of evidence. First, the ALJ relied heavily on assurances from the Coast Guard which, after reviewing the testimony of Pittston's witnesses before the BEP and other data, wrote EPA on March 28, 1977, that the channel in Head Harbor Passage was "adequate for safe navigation by 250,000 DWT tankers" if four conditions were met. These conditions were

> "(1) that the channel passage area depths, configurations and current data shown on nautical charts and surveys be confirmed by hydrographic survey, (2) provision for a navigation system wherein the existence and movement of all traffic in the area could be monitored, communicated with and scheduled. (3) provision for means to control movement of tankers in the event of steering and/or propulsion failure during transit and (4) development and strict adherence to an operating procedure for tanker passage."

In response to a request by the Council on Environmental Quality that the Coast Guard assist Pittston in carrying out "real time simulation" studies[6] in order to ascertain the precise conditions for safe navigation prior to granting the permit, Rear Admiral Fugaro of the Coast Guard responded in August 1977 that it could not divert scarce resources until "final clearance had been granted for construction of a refinery ... [so that] no possibility exists that these efforts may be wasted." After explaining the Coast Guard's "function in port development",[7] he concluded:

> "The Coast Guard feels it can be premised that tank vessels can safely navigate the channel approaches to Eastport under certain conditions—and the Coast Guard fully intends to determine those conditions and see to their implementation. Although we will continue to work closely with the Pittston Company, the Environmental Protection Agency, and the State of Maine and other affected and concerned groups as required and within available resources, we feel that further delay of the project for the purpose of studying the issue of channel adequacy appears unjustified at this time. *In that any major Federal action taken to implement operational restrictions and control procedures would necessarily be the subject of an additional EIS,* I believe that both the spirit and letter of NEPA are well served." (emphasis added)

Subsequently, on December 31, 1979, the Coast Guard clarified its position as to item 2 in its March 28, 1977, letter (provision for a navigation system) by saying that notwithstanding the capability of any navigation system, there would be some meteorological conditions, e.g., fog producing poor visibility, which would preclude safe transit.

6. Real time simulation studies are tests run with actual tanker pilots on a device capable of simulating the responses of a ship to certain conditions of wind, tide, fog, current, etc. What it adds to completely computerized tests is the human reaction factor. The Council on Environmental Quality had included in its comments on the draft EIS the recommendations that "EPA complete its analysis of real time tanker simulation studies, and the twelve trial tanker voyages through Head Harbor passage (required by Maine's Board of Environmental Protection as one of the conditions for granting a refinery permit) before making its permit decision."

7. For the sake of completeness, we reproduce the explanation:

> "It is the Coast Guard's function in port development to review the adequacy of waterways for the safe navigation of shipping. To this end we consider all the factors involved to insure that only a minimum risk is involved. Coast Guard efforts are directed towards minimizing these risks by the imposition of additional requirements where found necessary for the safety of navigation. With the vagaries of the environment in which vessels are operated and the possibility of personnel error, there is no way that a fail-safe guarantee could be provided for any port in the United States. There is always an element of risk in any transportation system. Other modes of transportation where highly sophisticated safeguards are in place still have an occasional accident."

Second, the ALJ found confirmation of the Coast Guard's assurance in the computer simulation studies of Dr. Eda, who concluded that a loaded 250,000 DWT tanker could maintain a trajectory close to a desired track in Head Harbor Passage without tug assistance in a 60 knot wind. Although these studies could not account for the human factor, i.e., could not test any difficulty on the part of the human pilot in perceiving the location, heading and rate of change of heading of the ship, the ALJ understood there was "an encouraging correlation" between computer simulation and actual sea trial. The ALJ accepted Dr. Eda's statement that "for obtaining an overall perspective of the suitability of a particular channel for ship traffic of specific sizes under particular conditions, off-line computer studies are adequate."

Also cited with approval by the ALJ was a second study by Frederick R. Harris, Inc. premised on provision for a more adequate turning basin for the VLCCs than an earlier study which had approved the project subject to severe restrictions and "a high order of seamanship and prudence." This study, the ALJ found, deemed the proposed approach "satisfactory for the type and size of vessels specified providing navigational aides are installed, and providing recommended operational procedures were followed." These included tug assistance from entry into channel, lighted buoys and radar reflectors, an electronic guidance system involving land based radar and electronic range finders, confining berthing and deberthing to slack tide, limiting Head Harbor transit to daylight or clearly moonlit hours, proscribing entrance to the Passage if visibility is less than a mile, and barring tankers awaiting a berth from anchoring in Eastport waters.

Finally, the ALJ made rather minute review of testimony concerning prevailing currents and cross-currents, fog, wind, and duration of oil spill effects, concluding in general that currents were not excessive for shipping, that the expected presence of fog was not so great as to bar shipping during most of the time, that winds were in general within tolerable limits, and that the effects of large known oil spills had not been long lasting over a period of years.[8]

D. *Analysis of the Assessment of Risks*

[11] We have set forth in some detail and full strength all of the strands of the decision of the ALJ because we conclude that, in light of EPA's duty to *insure* that the project is unlikely to jeopardize endangered whales or eagles, the ALJ's failure to require, at a minimum, that "real time simulation" studies be done to assure the low risk of an oil spill prior to granting the permit violated his duty to "use the best scientific ... data available."[9] Given the Supreme Court's statement that the ESA is designed to prevent the loss of any endan-

8. The ALJ also cited to the discussion in the EIS of the British port of Milford Haven, which has experienced no major spills in nine years of operation. Pittston's witnesses testified that Eastport was less hazardous than Milford Haven because of better channel configuration, an improved navigation system, and planned operating restrictions. The ALJ defended the use of this comparison in the EIS, noting that the dense fog at Eastport and its rockier bottom than Milford Haven would be compensated for by the "specific operating procedures [which] will be established by the Coast Guard after real time simulation and whatever other studies are considered necessary."

The extensive comparison of Eastport and Milford Haven in the EIS for the purpose of estimating "oil spills during routine transfer operations", as opposed to the risk of a major spill, has not been challenged by petitioners.

9. We read the requirement that the agency, here EPA, use such quality of data in the consultation process, as applying not only to such matters as the presence, vulnerability, and criticality of the endangered species, but also to the likelihood of an occurrence that might jeopardize it. We see no basis for requiring a first class effort on the former and not on the latter. Where a more limited use of such "best scientific and commercial data" is intended, the statute speaks clearly; *e.g.*, 16 U.S.C. § 1536(c)(1) ["If the Secretary advises, based on the best scientific and commercial data available, that such species *may be present*...." (emphasis added.)]. *Cf.* 16 U.S.C. § 1536(h)(2)(B) ["An exemption shall be permanent ... unless (i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species...."].

gered species, "regardless of the cost", *TVA v. Hill*, 437 U.S. at 188 n.34, 98 S.Ct. at 2299 n.34, we cannot see how the permit can issue when real time simulation studies, which EPA, the State of Maine, and the Coast Guard all view as being necessary to a final determination of safety, are to be delayed until the Coast Guard has adequate funds to undertake them.

We begin with the linchpin—the Coast Guard opinion. From what we have reported above, we think it quite clear that the Coast Guard was not purporting to do a risk analysis. It was, in effect, signifying its willingness to accept the problem of devising procedures to minimize navigation risks for vessels of certain characteristics transiting via Head Harbor Passage to Eastport. That this is a correct reading is confirmed by the testimony of Rear Admiral Fugaro, who candidly stated of the Coast Guard opinion that "[i]t's not designed to provide a risk analysis." His letter to EPA, which we have quoted, makes clear that he expected any set of Coast Guard orders and procedures to go through the EIS process.[10]

This was also the understanding of Wallace Stickney, the EPA Region One Director responsible for drafting the EIS, who viewed the Coast Guard evaluation not as describing "what the actual risks were intrinsically", but as purely a comparison to other supertanker ports. We see the Coast Guard "assurances" as falling short of what Coast Guard Admiral Barrow, relied on by the ALJ when he rejected the use of worldwide statistics relating to oil spills (*see* note 12, *infra*), prescribed: "[A]ny comprehensive and meaningful oil spill study for the development of spill probability and expected spill size must be concerned with site specific factors such as tanker fleet composition, density, navigation systems, route characteristics, operational conditions, regulatory regimes etc."

We cannot presume to know what issues may be posed as the result of real time simulation studies, or, for that matter, real sea trials by VLCCs under ballast. Risks of collisions or grounding may be identified whose assured prevention may entail costs unacceptable to Pittston or measures involving other environmental intrusions or, simply, unacceptable risks which may persist despite the most stringent and expensive procedures and equipment. That those further studies are conceded to be vital is demonstrated by the following testimony of EIS drafter Stickney:

> "Q. So, basically, then you decided that that [results of real time simulation studies] wasn't information that was needed to determine whether this refinery should be built or not?
>
> A. We felt the information was needed and that if the facility failed the real time simulation study it would never be built.
>
> * * * * * *
>
> Q. It will be too late, will it not, if that study, for example, shows some problems that you haven't anticipated in the final EIS, it will be too late for EPA to say at that point, now the weighing of risk versus benefit is different than we originally thought? Will it not be too late for that?
>
> A. No, sir."

We see absolutely no justification for issuing an NPDES permit before a closer and feasible risk assessment is made.[11]

10. His testimony at the adjudicatory hearing proceeded as follows:

"Q. And do you[r] records indicate whether there is a plan to require that quantification when your role does become involved?

A. The records do not indicate that, but that would be a responsibility of my division, and there is absolutely no doubt in my mind that we would undertake a regulatory project if the permit were to issue.

In that case, we'd go through the full processes including the environmental assessment, the full regulatory processes, under the Administrative Procedures [sic] Act."

11. We can sympathize with the always penurious Coast Guard in not eagerly volunteering to run costly tests, but we have seen no reason why Pittston has not financed both the hydrographic survey and real time simulation studies and perhaps the real tanker trial runs it will need to comply with the Maine BEP permit. EPA has reported in its responses to comments on the EIS that Pittston has contracted with the National Marine Research Facility of the Department of Commerce for the studies. This

Additionally, we note the Coast Guard's requirements of a hydrographic survey to make sure that the depth figures on the navigation chart fairly represent the entire length, width, and depth of the channel, face of pinnacles and outcroppings, so that VLCCs with draft beginning at 65 feet may pass without danger of grounding during the lowest of tides. Should the hydrographic data reveal embarrassing obstructions, this fact and ways of dealing with it must receive the most careful scrutiny.

The other grounds relied on by the ALJ leading to his conclusion of small or minute risk are even less persuasive than the Coast Guard undertaking. Dr. Eda's computer simulations were avowedly valuable for obtaining "an overall perspective of ... suitability"; they could not approach even a rough approximation of risk, nor could they account for human error in confronting diverse weather conditions. The second Harris study merely pronounced a route "acceptable" if fairly rigorous conditions were complied with, but none of these conditions were incorporated in the federal permit. Finally, the ALJ's analyses of current, wind, fog, and duration of spills gave only general assurance that prudence, procedures, and equipment can, most of the time and absent human error, compensate for difficult conditions of tide, current, fog, wind and weather.

We stress that our disagreement with the ALJ does not involve challenging his credibility judgments, although we do not share his view that the "overwhelming weight" of evidence pointed to the feasibility of safe transit.[12] Were the issue whether, by a preponderance of the evidence, it had been established that VLCCs could make the transit through Head Harbor Passage to Eastport with reasonable safety, the ALJ's

seems to us well within the concept of "best scientific ... data available". Particularly does this seem true when the whole structure of reasoning about the hazard to two endangered species depends on the force of the conclusion that there is an almost complete absence of risk of a catastrophic oil spill.

12. In addition to the evidence referred to above, upon which the ALJ primarily relied, a number of witnesses testified favorably both at the adjudicatory hearing and at the hearing before the Maine BEP. These witnesses included a number of Captains, Coast Guard Admirals, and weather observers.

There was substantial negative evidence which the ALJ refused to credit. He rejected efforts to consider world-wide statistics as to oil spills, an approach which has been used in studying other ports, *see, e.g., Sierra Club v. Sigler*, 532 F.Supp. 1222 (S.D.Tex.1982), concluding that such statistics were unreliable or meaningless and that a site-specific focus was more appropriate. A study by Engineering Computer Opteconomics, using such data, had calculated a 48% probability of a major oil spill (loss of 365,000 barrels or more) over an assumed 25 year life of the refinery. He did not accept a 1976 report of the Canadian Coast Guard, highly negative as to the feasibility of safe supertanker traffic in Head Harbor Passage, observing that three years earlier the Canadian government had opposed the project. He rejected an adverse rating of the Atlantic Pilotage Authority for "extreme inconsistency". Two VLCC captains, Huntley and Crook, were discredited for the inaccuracy of their observations and for being too conservative. A contrary witness, Captain Peacock, was credited in his testimony that piloting a VLCC through the Passage was not "insurmountable", but his later testimony that he would want trial runs in ballasted tankers before construction was deemed "inexplicable". A 1972 study by Frederick R. Harris, Inc., a company commissioned by Pittston, which had conditioned its approval on severe restrictions and a "high order of seamanship and prudence", was discounted as a limited budget study based on a premise, since abandoned, of a confined turning area.

Additional negative evidence or critical witnesses included the statement of the Maine Board of Environmental Protection, in issuing its permit, that "the combination of currents, tides, fog, extremes of weather and rocky shores make Eastport one of the more difficult ports of the world.... VLCCs are extremely hazardous vessels which ought not to be operated in these difficult waters"; a study by the Corps of Engineers; a study by Arthur D. Little ("severely wanting"); an evaluation by National Bulk Carriers ("more difficult than any other location"); Captain Musse of Texaco ("not feasible"); National Salvage Association ("hairy navigation problem"); Captain Mills ("I can't think of anything to compare with this"); Captain Kennedy ("call[s] for a degree of accuracy ... heretofore unheard of").

Finally, we note that the EIS itself concluded that the proposed refinery "ultimately will experience its share of severe spills, as have other comparable refineries."

decision might be accepted. But the issue is a harder one: whether, after using the best data available, it is established that the risk of significant oil spills from the proposed tanker traffic is so small as to insure that there is no likelihood of jeopardizing the two endangered species. All witnesses have agreed that real time simulation studies would contribute a more precise appreciation of risks of collision and grounding. We think the same could be said of a hydrographic survey of the depth of the channel, and perhaps of trial runs by VLCCs in ballast. If so, such methodologies obviously represent as yet untapped sources of "best scientific and commercial data".

It may very well be that, after conducting real time simulation studies and any other tests and studies which are suggested by the best available science and technology, the most informed judgment of risk of a major oil spill will still have a large component of estimate, its quantitative element being incapable of precise verification. But at least the EPA will have done all that was practicable prior to approving a project with such potentially grave environmental costs.

We also conclude, for many of the same reasons, that the real time simulation studies and other new data must be the subject of a supplemental EIS, both to assess the magnitude of risk and, if acceptable, to establish appropriate conditions of navigation. The testimony quoted above demonstrates that EPA and the Coast Guard have acknowledged the need for such a supplemental EIS on this issue. *See also Alaska v. Andrus*, 580 F.2d 465, 477–80 (D.C.Cir.), *other portion of holding vacated on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922, 99 S.Ct. 303, 58 L.Ed.2d 315 (1978). The EIS itself recognizes that "real time simulation studies ... will help to settle the navigation [safety] issue." Given the importance of the studies to the crucial issue of the risk of oil spills, NEPA provides an additional ground for overturning the issuance of a permit until the studies have been conducted, circulated, and discussed. *See NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975); *Silva v. Lynn*, 482 F.2d at 1287–88.

III. The Clean Water Act

Petitioners' final argument is that the ALJ erred by ruling that conditions imposed on the project by the Maine BEP under state law are not incorporated into the federal NPDES permit. They allege that the certification issued by the State of Maine pursuant to § 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), though making no explicit mention of the conditions previously imposed by the Maine BEP, incorporated these terms by implication. Therefore, these requirements must also be "a condition on any Federal license or permit." § 401(d), 33 U.S.C. § 1341(d). The State of Maine, as amicus curiae, makes a somewhat different argument. It argues that the prior certification is irrelevant, because the proposal as approved by the state had been substantially modified by the ALJ. But the state contends that it has been denied its right to certify the *new* proposed discharge, and therefore the NPDES permit is invalid. Respondents argue that the state has waived its right to certify the proposed modified discharge because it failed to intervene in the hearing before the ALJ or to certify the discharge within 30 days of receiving notice that the prior proposal had been amended. 40 C.F.R. § 125.32(e)(8)(v) & (vi) (1978). They also urge that the ALJ's finding that the prior state certification did not incorporate the BEP conditions was not clearly erroneous, and must be upheld.

The ALJ considered testimony and evidence to determine whether the state certification implicitly incorporated the conditions previously imposed by the Maine BEP. Contrary to respondents' contention, he found as a factual matter that "the conditions of the Maine BEP Order are conditions precedent to the effectiveness of" the state's certification. He further ruled, however, as a matter of law, that § 401(d)

of the Act precludes the state from including in its certification requirements of state law which do not relate to "water quality standards, effluent limitations or schedules of compliance." *See* § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Finally, he concluded that "conditions of the Maine BEP relating to test runs with tankers prior to delivering oil, limiting the size of tankers . . ., requiring real time simulation studies, stating times and conditions of navigation of Head Harbor Passage, and other matters unrelated to water quality may not legally be regarded as part of the State of Maine's Sec. 401 certification, irrespective of the intention of the issuer of the certification."

[12] Petitioners argue, with some force, that the conditions listed above are related to water quality, since they are designed to minimize the risk of an oil spill which would severely impair water quality. We believe that the ALJ made a more fundamental error by seeking to determine which requirements of state law were appropriately affixed to the state's certification. Section 401(a) of the Clean Water Act empowers the state to certify that a proposed discharge will comply with the Act and "with any other appropriate requirement of State law." Any such requirement "shall become a condition on any Federal license or permit." § 401(d). EPA has interpreted this provision broadly to preclude federal agency review of state certification. "Limitations contained in a State certification must be included in a NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law." EPA, Decision of the General Counsel No. 58 (March 29, 1977); *see also* Decision of the General Counsel No. 44 (June 22, 1976). The NPDES regulations state that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made" through the procedures established in the federal regulations. 40 C.F.R. § 124.55(e) (1981). The courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification. *See United States Steel Corp. v. Train,* 556 F.2d 822, 837–39 & n.22 (7th Cir. 1977); *Lake Erie Alliance v. U.S. Army Corps of Engineers,* 526 F.Supp. 1063, 1074 (W.D.Pa.1981); *Mobil Oil Corp. v. Kelley,* 426 F.Supp. 230. 234–35 (S.D.Ala. 1976).

Our conclusion that EPA lacked authority to review the conditions imposed by the State of Maine is also supported by the statutory scheme of the Clean Water Act. Section 511(c)(2) of the Act, 33 U.S.C. § 1371(c)(2), makes clear that "[n]othing in the National Environmental Policy Act . . . shall be deemed to authorize any Federal agency . . . to review any effluent limitation or other requirement established pursuant to this Act *or the adequacy of any certification under section 401* of this Act." (emphasis added). Section 510 of the Act, 33 U.S.C. § 1370, specifically preserves the right of a state to "adopt or enforce . . . any requirement respecting control or abatement of pollution", even if it is more stringent than those adopted by the federal government. Finally, it is clear that even in the absence of state certification, EPA would be bound to include in the federal permit "any more stringent limitations . . . established pursuant to any State law or regulations (under authority preserved by section 510)." § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *see United States Steel Corp.,* 556 F.2d at 837–39; Decision of the General Counsel No. 44, at 5.

[13] The regulations cited by respondents do not compel a different result. The 1978 regulation cited by EPA—which provided that failure to certify a proposed permit, within thirty days after the state is notified that the permit has been modified, "shall be deemed a waiver of such certification rights"—was no longer in force in 1980 when the decision to modify the proposal was made by the ALJ. The new regulation,

40 C.F.R. § 124.55(d) (1981), states that "[a] condition in a draft permit may be changed during agency review in any manner consistent with" state certification without requiring recertification. This regulation clearly does not authorize EPA to amend a permit in a manner *inconsistent* with state certification by deleting conditions imposed by the state during the certification process. Although the new regulations also require the state to cite to state law when imposing more stringent conditions on a draft permit, 40 C.F.R. § 124.53(e)(1) (1981), and to indicate the extent to which the condition can be relaxed without violating state law, 40 C.F.R. § 124.53(e)(2) (1981), it would be inequitable to hold that the state has waived its rights here by failing to comply with these requirements when no similar requirements were in force in 1977 when state certification took place. Since the state at no time waived its rights to certify the proposed discharge, and the ALJ lacked authority to exclude the previously imposed state conditions from the federal permit, these conditions must be included in any NPDES permit for the Pittston project to be issued in the future, unless the conditions are modified according to law. *See* 40 C.F.R. § 124.55(b) (1981).

IV. Conclusion

Accordingly, we vacate EPA's decision to issue the NPDES permit to Pittston, and remand the case to EPA to conduct further proceedings consistent with this opinion. EPA's jeopardy determination under the Endangered Species Act must be reconsidered in light of the results of real time simulation studies of Head Harbor Passage, and any other studies, such as a hydrographic survey and the 1980 whale study by the New England Aquarium, which EPA determines to be necessary to meet its statutory obligation to use the best scientific data available. If, in light of the studies, EPA decides to recommend approval of the project, this proposal shall be the subject of a supplemental EIS relating to the conditions of navigation necessary to minimize the risk of oil spills. Finally, the conditions imposed by the State of Maine in its certification of the proposed discharge must be included in any federal permit unless the conditions are subsequently modified according to law.[13]

So ordered.

UNITED STATES of America, Appellee,

v.

Carmine ROMANO and Peter Romano, Defendants-Appellants.

Nos. 1175, 1185, Dockets 82-1052, 82-1054.

United States Court of Appeals, Second Circuit.

Argued May 26, 1982.

Decided June 24, 1982.

Certiorari Denied Nov. 15, 1982. See 103 S.Ct. 375, 376.

Defendants were convicted before the United States District Court for the Southern District of New York, Lee P. Gagliardi, J., of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act and of aiding and abetting violations of the Taft-Hartley Act and other offenses, and

13. In light of our holding, it is unnecessary to address in detail petitioners' argument that a supplemental EIS is necessary to consider significant changes in the project and new information. With respect to Pittston's decision to dispose of the refinery's sludge by burial rather than incineration, we direct petitioners to request EPA, rather than this court, to require a supplemental EIS once a specific proposal is made. *See, e.g., EDF v. Marsh*, 651 F.2d 983, 992 (5th Cir. 1981); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980). With respect to new data about the economic value of the commercial fishing industry, we do not view this information as being sufficiently significant to reopen the record. We assume that any new, significant information relating to endangered species and the risk of spills will be considered by EPA on remand.

[455 US 331]

NEW ENGLAND POWER COMPANY, Appellant,

v

NEW HAMPSHIRE et al. (No. 80-1208)

MASSACHUSETTS, et al., Appellants,

v

NEW HAMPSHIRE et al. (80-1471)

DENNIS J. ROBERTS, II, Attorney General of the State of Rhode Island, et al., Appellant,

v

NEW HAMPSHIRE et al. (80-1610)

455 US 331, 71 L Ed 2d 188, 102 S Ct 1096

[Nos. 80-1208, 80-1471 and 80-1610]

Argued December 7, 1981. Decided February 24, 1982.

Decision: State public utility commission's order requiring privately-owned and federally-licensed public utility to sell within state hydroelectric energy it had been exporting, held violative of commerce clause (Art I, § 8, cl 3).

SUMMARY

The Commonwealth of Massachusetts, the Attorney General of Rhode Island, and a privately-owned public utility which generated and transmitted electricity at wholesale from several hydroelectric plants within New Hampshire and which was licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (16 USCS §§ 792 et seq.) appealed to the Supreme Court of New Hampshire an order of the New Hampshire Public Utilities Commission requiring the utility to arrange to sell within New Hampshire hydroelectric energy which it had previously exported to, among other places, Massachusetts and Rhode Island. They claimed that the order was preempted by Parts I and II of the Act (16 USCS §§ 792-824k) and imposed impermissible burdens on interstate commerce.

SUBJECT OF ANNOTATION

Beginning on page 890, infra

Validity, under commerce clause of Federal Constitution, of state restrictions on interstate movement of goods, products, and natural resources originating from within state

Briefs of Counsel, p 888, infra.

The court rejected those arguments, concluding that the "savings clause" of § 201(b) of the Act (16 USCS § 824(b))—which provides that the Act's provisions delegating exclusive authority to FERC to regulate the transmission and sale at wholesale of electric energy in interstate commerce "shall not . . . deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line"—granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the state, and holding that the New Hampshire Commission's order did not interfere with FERC's exclusive regulatory authority over rates charged for interstate sales of electricity at wholesale (120 NH 866, 424 A2d 807).

On certiorari, the United States Supreme Court reversed. In an opinion by BURGER, Ch. J., expressing the unanimous view of the court, it was held that the New Hampshire Commission's order restricted the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the commerce clause of the Federal Constitutional (Art I, § 8, cl 3), the "savings clause" in § 201(b) of the Federal Power Act not providing an affirmative grant of authority to the state to issue such an order.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Commerce § 203; Energy § 29 — state ban on exports of hydroelectric energy — commerce clause — effect of Federal Power Act

1a–1c. A state cannot constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally licensed facility, or otherwise reserve for its own citizens the "economic benefit" of such hydroelectric power, and therefore an order of a state's public utility commission requiring a privately-owned producer of hydroelectric energy to arrange to sell within the state energy which it had previously exported restricts the flow of

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26 Am Jur 2d, Electricity, Gas, and Steam § 15; 64 Am Jur 2d, Public Utilities §§ 295, 303

USCS, Constitution, Article I, Section 8, clause 3

US L Ed Digest, Commerce § 203; Energy § 29

L Ed Index to Annos, Commerce; Electricity; Public Utilities

ALR Quick Index, Commerce; Electricity and Electric Companies

Federal Quick Index, Commerce; Electricity; Federal Power Act; Hydroelectric Power

ANNOTATION REFERENCE

Validity, under commerce clause of Federal Constitution, of state restrictions on interstate movement of goods, products, and natural resources originating from within state. 71 L Ed 2d 890.

privately owned and produced electricity in interstate commerce in a manner inconsistent with the commerce clause of the Federal Constitution (Art I, § 8, cl 3), where the producer's facilities within the state were licensed by the Federal Energy Regulatory Commission pursuant to the Federal Power Act (16 USCS §§ 792 et seq.), the "savings clause" of § 201(b) of the Act (16 USCS § 824(b))—which provides that the Act's provisions delegating exclusive authority to the Commission to regulate the transmission and sale at wholesale of electric energy in interstate commerce "shall not . . . deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line" —not providing an affirmative grant of authority to the state to issue such an order.

[See annotation p 890, infra]

Waters § 12.5 — regulation of navigable waters — preeminence of federal authority

2a, 2b. Whatever the extent of a state's proprietary interest in a river that flows within its borders, the preeminent authority to regulate the flow of navigable waters resides with the federal government.

Commerce § 150 — commerce clause — direct burdens on interstate transactions

3. Direct and substantial burdens on transactions in interstate commerce which are state-imposed cannot be squared with the commerce clause of the Constitution (Art I, § 8, cl 3) when they serve only to advance simple economic protectionism.

Commerce § 113 — regulation of interstate commerce — ability of states — congressional delegation

4. Congress may use its powers under the commerce clause of the Constitution (Art I, § 8, cl 3) to confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.

Courts § 116 — commerce clause — judicial review of state legislation

5. When Congress has not expressly stated its intent and policy to sustain state legislation from attack under the commerce clause of the Constitution (Art I, § 8, cl 3), the United States Supreme Court has no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind.

SYLLABUS BY REPORTER OF DECISIONS

Appellant New England Power Co., a public utility generating and transmitting electricity at wholesale, sells most of its power in Massachusetts and Rhode Island; its wholesale customers service less than 6% of New Hampshire's population. New England Power owns and operates hydroelectric units, some of which are located in New Hampshire. The units are licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act. A New Hampshire statute, enacted in 1913, prohibits a corporation engaged in the generation of electrical energy by water power from transmitting such energy out of the State unless approval is first obtained from the New Hampshire Public Utilities Commission. The statute empowers that Commission to prohibit the exportation of such energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." Since 1926, New England Power or its predecessor periodically obtained the Commission's approval to transmit electricity produced in New Hampshire to points outside the State. However, in 1980, after an investigation and hearings, the Commission withdrew such approval and ordered New England Power to arrange to sell the previously exported hydroelectric energy within New Hampshire. New England Power, the Commonwealth of Massachusetts, and the Attorney General of Rhode Island appealed the Commission's order to the New Hampshire Supreme Court, contending that the order was pre-empted by the Federal Power Act and imposed impermissible burdens on

interstate commerce. The court rejected those arguments, holding, inter alia, that the "saving clause" of § 201(b) of the Federal Power Act granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. Section 201(b), which was enacted in 1935, provides that the Act's provisions delegating exclusive authority to the FERC to regulate the transmission and sale at wholesale of electric energy in interstate commerce "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

Held: New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so.

(a) Absent authorizing federal legislation, the Commerce Clause precludes a state from mandating that its residents be given a preferred right of access over out-of-state consumers to natural resources located within its borders or to the products derived therefrom. The New Hampshire Commission's order is precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states. Moreover, the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce that cannot be squared with the Commerce Clause when they serve only to advance simple economic protectionism.

(b) In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy. Nothing in the legislative history or language of the statute evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause, or to modify this Court's earlier holdings concerning the limits of state authority to restrain interstate trade. When Congress has not expressly stated its intent to sustain state legislation from attack under the Commerce Clause, this Court has no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind.

120 NH 866, 424 A2d 807, reversed and remanded.

Burger, C. J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Samuel Huntington argued the cause for appellant in 80–1208.

Donald K. Stern argued the cause for appellants in 80–1471 and 80–1610.

Gregory H. Smith argued the cause for appellees.

Briefs of Counsel, p 888, infra.

OPINION OF THE COURT

[455 US 333]

Chief Justice **Burger** delivered the opinion of the Court.

[1a] These three consolidated appeals present the question whether a state can constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally licensed facility, or otherwise reserve for its own citizens the "economic benefit" of such hydroelectric power.

I

Appellant New England Power Co. is a public utility which generates and transmits electricity at wholesale. It sells 75% of its power in Massachusetts and much of the remainder in Rhode Island; less than 6% of New Hampshire's population is serviced by New England Power's wholesale customers. New England Power owns and operates

six hydroelectric generating stations on the Connecticut River, consisting of 27 generating units. Twenty-one of these units—with a capacity of 419.8 megawatts, or about 10% of New England Power's total generating capacity—are located within the State of New Hampshire. The units are licensed by the Federal Energy

[455 US 334]

Regulatory Commission pursuant to Part I of the Federal Power Act, 41 Stat 1063, as amended, 16 USC §§ 791a–823 (1976 ed and Supp IV) [16 USCS §§ 791a–823]. Since hydroelectric facilities operate without significant fuel consumption, these units can produce electricity at substantially lower cost than most other generating sources.

New England Power is a member of the New England Power Pool, whose utility-members own over 98% of the total generation capacity, and virtually all of the transmission facilities, in the six-state region. The objectives of the Power Pool, as described in the agreement among its members, are to assure the reliability of the region's bulk power supply and to attain "maximum practicable economy" through, inter alia, "joint planning, central dispatching . . . and coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants . . . ." New England Power Pool Agreement § 4.1, App 31a. All member-owned generating facilities are placed under the control of the Power Pool's Dispatch Center. A computer calculates the cost of generation for each generating unit and assigns each unit an operating schedule that will minimize the cost of the region's total power supply. Power generated at the various units, including New England Power's Connecticut River hydroelectric stations, flows freely through the Pool's regional transmission network, or "grid." The energy is dispatched to members' customers as their power needs arise, without regard to generating source. The Pool bills each member the amount it would have cost the utility to meet its customers' load using only its own generating sources, minus that member's share of the savings resulting from the centralized dispatch system.[1]

[455 US 335]

A New Hampshire statute, enacted in 1913, provides:

> "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business." NH Rev Stat Ann § 374:35 (1966).

The statute empowers the New Hampshire Commission to prohibit the exportation of such electrical energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." Ibid.

1. Testimony before the New Hampshire Public Utilities Commission in these cases indicated that the savings have been substantial. For example, in 1979, the savings attributable to the Power Pool's centralized dispatch system were reported at over $44 million. App 35a, 56a. See generally Federal Energy Regulatory Commission, Office of Electric Power Regulation, Power Pooling in the United States 15–23, 39–41, 69–79 (1981), for a description of efficiencies attributable to pooling arrangements.

Since 1926, New England Power or a predecessor company periodically applied for and obtained approval from the New Hampshire Commission to transmit electricity produced at the Connecticut River plants to points outside New Hampshire. However, on September 19, 1980, after an investigation and hearings, the Commission withdrew the authority formerly granted New England Power to export its hydroelectric energy, and ordered the company to "make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire . . . ."[2] In its report accompanying the order,

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the Commission found that New Hampshire's population and energy needs were increasing rapidly; that, primarily because of its low "generating mix" of hydroelectric energy, the Public Service Company of New Hampshire, the State's largest electric utility, had generating costs about 25% higher than those of New England Power; and that if New England Power's hydroelectric energy were sold exclusively in New Hampshire, New Hampshire customers could save approximately $25 million a year. The Commission therefore concluded that New England Power's hydroelectric energy was "required for use within the State" of New Hampshire, and that discontinuation of its exportation would serve the "public good." App to Juris Statement in No. 80-1208, pp 25-39.

The Commission did not, however, order New England Power to sever its connections with the Power Pool. So long as the electricity produced at New England Power's hydroelectric plants continues to flow through the Pool's regional transmission network, it will be impossible to contain that electricity within the State of New Hampshire in any physical sense. Although the precise contours of the Commission's order are unclear, it appears to require that New England Power sell electricity to New Hampshire utilities in an amount equal to the output of its in-state hydroelectric facilities, at special rates adjusted to reflect the entire savings attributable to the low-cost hydroelectric generation.[3]

2. The order reads:

"ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

"FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

"FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation."

3. For example, the Commission's staff economist testified at the hearings that New England Power could "allocate the benefits of low-cost hydroelectric power to New Hampshire through billing mechanisms" pursuant to which the power would be sold in New Hampshire at "economic cost"—i. e., the cost of producing the power, including depreciation, plus a return on invested capital. App 38a-39a. The economist's analysis of the benefits which would ensue from restricting the "exportation" of hydroelectric energy in this manner—upon which the New Hampshire Commission relied heavily in its report—was based on the assumption that New England Power would simply enter into new unit power contracts with New Hampshire utilities for an amount of kilowatt hours equal to New England Power's average hydroelectric generation over the course of a number of years. 3 Tr of Hearings before the NH Public Utilities Comm'n in DE 79-223, pp 23-24, 1-35. Although the record is not entirely clear on this point, it appears that the "economic benefit," or "savings," attributable to New England

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New England Power, the Commonwealth of Massachusetts, and Dennis J. Roberts II, Attorney General of Rhode Island, appealed the Commission's order to the Supreme Court of New Hampshire. They contended that the order was preempted by Parts I and II of the Federal Power Act, 16 USC §§ 791a–824k (1976 ed and Supp IV) [16 USCS §§ 791a–824k], and imposed impermissible burdens on interstate commerce. The court rejected these arguments, concluding that the "saving clause" of § 201(b) of the Federal Power Act, 16 USC § 824(b) (1976 ed, Supp IV) [16 USCS § 824(b)], granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. Appeal of New England Power Co. 120 NH 866, 876–877, 424 A2d 807, 814 (1980).[4] The court further held that the New Hampshire Commission's order did not interfere with the Federal Energy Regulatory Commission's exclusive regulatory authority over rates charged for interstate sales of electricity at wholesale. It thus remanded the case to permit the parties to "develop the mechanics of implemention" of the New

[455 US 338]

Hampshire Commission's order, and mandated that New England Power "make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power." Id., at 878–879, 424 A2d, at 815.[5]

We noted probable jurisdiction, 451 US 981, 68 L Ed 2d 837, 101 S Ct 2311 (1981), and we reverse.

II

[2a] The Supreme Court of New Hampshire recognized that, absent authorizing federal legislation, it would be "questionable" whether a state could constitutionally restrict interstate trade in hydroelectric power. 120 NH, at 876, 424 A2d, at 814. Our cases consistently have held that the Commerce Clause of the Constitution, Art I, § 8, cl 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. E.g., Hughes v Oklahoma, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727 (1979); Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300 (1923); West v Kansas Natural Gas Co. 221 US 229, 55 L Ed 716, 31 S Ct 564 (1911). Only recently, in Philadelphia v New Jersey, 437 US 617, 627, 57 L Ed 2d 475, 98 S Ct 2531 (1978), we reiterated that "[t]hese cases stand for the basic principle that a 'State is without

Power's hydroelectric facilities is currently reflected in the company's general wholesale rates, and thus shared pro rata by its customers in Massachusetts, Rhode Island, and New Hampshire. App 15a–18a. See also Brief for Appellant in No. 80-1208, p 7.

4. The court also dismissed several arguments advanced only by appellants Massachusetts and Roberts—that § 201(b), as so interpreted, exceeded Congress' power under the Commerce Clause, Art I, § 8, cl 3, and violated both the Privileges and Immunities Clause, Art IV, § 2, cl 1, and the Tenth Amendment of the Constitution.

5. The parties inform us that the New Hampshire Commission has refrained from acting on remand pending this Court's disposition of the appeals.

power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State'" (quoting Foster-Fountain Packing Co. v Haydel, 278 US 1, 10, 73 L Ed 147, 49 S Ct 1 (1928)).[6]

[455 US 339]

[3] The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. Moreover, it cannot be disputed that the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce. See Public Utilities Comm'n v Attleboro Steam & Electric Co. 273 US 83, 71 L Ed 549, 47 S Ct 294 (1927). Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism." Philadelphia v New Jersey, supra, at 624, 57 L Ed 2d 475, 98 S Ct 2531.

[4] The Supreme Court of New Hampshire nevertheless upheld the order of the New Hampshire Commission on the ground that § 201(b) of the Federal Power Act expressly permits the State to prohibit the exportation of hydroelectric power produced within its borders. It is indeed well settled

[455 US 340]

that Congress may use its powers under the Commerce Clause to "[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v BT Investment Managers, Inc. 447 US 27, 44, 64 L Ed 2d 702, 100 S Ct 2009 (1980). See Southern Pacific Co. v Arizonaex rel. Sullivan, 325 US 761, 769, 89 L Ed 1915, 65 S Ct 1515 (1945). The dispositive question, however, is whether Congress in fact has authorized the states to impose restrictions of the sort at issue here.

III

The national concern for planning,

6. [2b] We find no merit in New Hampshire's attempt to distinguish these cases on the ground that it "owns" the Connecticut River, the source of New England Power's hydroelectricity. Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government, United States v Twin City Power Co. 350 US 222, 100 L Ed 240, 76 S Ct 259 (1956), which has licensed New England Power to operate its Connecticut River hydroelectric plants pursuant to a determination that those facilities are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce," 16 USC § 803(a) [16 USCS § 803(a)]. New Hampshire's purported "ownership" of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. See First Iowa Hydro-Electric Cooperative v FPC, 328 US 152, 90 L Ed 1143, 66 S Ct 906 (1946). Moreover, New Hampshire has done more than regulate use of the resource it assertedly owns; it has restricted the sale of electric energy, a product entirely distinct from the river waters used to produce it. See Utah Power & Light Co. v Pfost, 286 US 165, 179–181, 76 L Ed 1038, 52 S Ct 548 (1932). This product is manufactured by a private corporation using privately owned facilities. Thus, New Hampshire's reliance on Reeves, Inc. v Stake, 447 US 429, 65 L Ed 2d 244, 100 S Ct 2271 (1980)—holding that a state may confine to its residents the sale of products it *produces*—is misplaced.

development, and comprehensive utilization of the country's water resources was very early expressed by Congress under its Commerce Clause powers. The Federal Water Power Act, now Part I of the Federal Power Act, 16 USC §§ 791a–823 (1976 ed and Supp IV) [16 USCS §§ 791a–823], was enacted in 1920. The potential of water power as a source of electric energy led Congress to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelectric power generation "to meet the needs of an expanding economy." FPC v Union Electric Co. 381 US 90, 99, 14 L Ed 2d 239, 85 S Ct 1253 (1965).

In 1935, Congress enacted Part II of the Federal Power Act, 16 USC §§ 824–824k (1976 ed and Supp IV) [16 USCS §§ 824–824k] which delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production. United States v Public Utilities Comm'n of California, 345 US 295, 97 L Ed 1020, 73 S Ct 706 (1953). The 1935 enactment was a "direct result" of this Court's holding in Public Utilities Comm'n v Attleboro Steam & Electric Co., supra, that the states lacked power to regulate the rates governing interstate sales of electricity for resale. United States v Public Utilities Comm'n of California, supra, at 311, 97 L Ed 1020, 73 S Ct 706. Part II of the Act was intended to "fill the gap" created by Attleboro by establishing exclusive federal jurisdiction over such sales. 345 US, at 307–311, 97 L Ed 1020, 73 S Ct 706.

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[1b] Section 201(b) of the Act provides, inter alia, that the provisions of Part II "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." However, this provision is in no sense an affirmative grant of power to the states to burden interstate commerce "in a manner which would otherwise not be permissible." Southern Pacific Co. v Arizona ex rel. Sullivan, supra, at 769, 89 L Ed 1915, 65 S Ct 1515. In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, § 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise "lawful." The legislative history of the Act likewise indicates that Congress intended only that its legislation *"tak[e] no authority from* State commissions." HR Rep No. 1318, 74th Cong 1st Sess, 8 (1935) (emphasis added). Nothing in the legislative history or language of the statute evinces a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause," United States v Public Utilities Comm'n of California, supra, at 304, 97 L Ed 1020, 73 S Ct 706, or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade. E. g., Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658 (1923); West v Kansas Natural Gas Co., 221 US 229, 55 L Ed 716, 31 S Ct 564 (1911). Rather, Congress' concern was simply "to define the extent of the federal legislation's pre-emptive effect on state

law." Lewis v BT Investment Managers, Inc., supra, at 49, 67 L Ed 2d 702, 100 S Ct 2009.[7]

To support its argument to the contrary, New Hampshire relies on a single statement made on the floor of the House of

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Representatives during the debates preceding enactment of Part II. Congressman Rogers, of New Hampshire stated:

> "[T]he Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire." 79 Cong Rec 10527 (1935).

From this expression of "hope," New Hampshire concludes that Congress specifically intended to preserve the very statute at issue here.

Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and "a step to be taken cautiously." Piper v Chris-Craft Industries, Inc., 430 US 1, 26, 51 L Ed 2d 124, 97 S Ct 926 (1977); United States v Public Utilities Comm'n of California, supra, at 319–321, 97 L Ed 1020, 73 S Ct 706 (Jackson, J., concurring). However, even were we to accord significant weight to Congressman Rogers' statement, it would not support New Hampshire's contention that § 201(b) was intended to permit states to regulate free from Commerce Clause restraint. Congressman Rogers simply urged his colleagues not to "deprive" the State of New Hampshire of "rights" it already possessed—i. e., to ensure that the Act itself would not be read as pre-empting otherwise valid state legislation.

[5] To be sure, some Members of Congress may have thought that no further protection of state authority was needed.[8]

[455 US 343]

Indeed, given that the Commerce Clause—independently of the Federal Power Act—restricts the ability of the states to regulate matters affecting interstate trade in hydroelectric energy, § 201(b) may in fact save little in the way of "lawful" state authority.[9] But when Congress has not "expressly stated its intent and policy" to sustain state legislation from attack under the Commerce Clause, Prudential Ins. Co. v Benjamin, 328 US 408, 427, 431, 90 L Ed 1342, 66 S Ct 1142, 164

7. Indeed, had Congress intended § 201(b) to confer upon the states powers which they would have lacked in the absence of the federal legislation, it would have been anomalous to speak in terms of "authority *now exercised.*" This language plainly assumes the prior existence of valid state authority; in addition, it appears to limit the saving effect of the provision to those few States in which the authority was in fact "exercised" in 1935.

8. On the other hand, it would not have been at all unusual had Congress taken care that the 1935 enactment not displace state authority in the area, without consideration of the scope of that authority or the extent to which it might be constrained by other provisions of federal law. See Milwaukee v Illinois, 451 US 304, 329, n 22 68 L Ed 2d 114, 101 S Ct 1784 (1981).

9. We need not speculate here as to the precise contours of § 201(b)'s saving effect.

ALR 476 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See United States v Public Utilities Comm'n of California, 345 US, at 319, 97 L Ed 1020, 73 S Ct 706 (Jackson, J., concurring); see also id., at 311, 97 L Ed 1020, 73 S Ct 706. We must construe § 201(b) as it is written, and as its legislative history indicates it was intended—as a standard "nonpre-emption" clause.[10]

[455 US 344]

IV

[1c] We conclude, therefore, that New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce, in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so. For these reasons, the judgment of the Supreme Court of New Hampshire is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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10. Even were we to conclude that Congress intended § 201(b) to override restraints placed on state regulatory power by the Commerce Clause, there would remain a substantial question whether the order of the New Hampshire Commission was entitled to protection under that provision. Section 201(b) seeks to protect only state regulation relating to the "exportation" of hydroelectric power. However, New England Power cannot terminate its out-of-state transmission of hydroelectricity without substantial alterations in the regional transmission system to which its hydroelectric facilities are connected—alterations which the New Hampshire Commission did not appear to contemplate would be made. Appeal of New England Power Co. 120 NH 866, 876–877, 424 A2d 807, 814 (1980). The operative effect of the Commission's order would be to compel New England Power to enter into new wholesale contracts with New Hampshire utilities, at rates fixed by the New Hampshire Commission to reflect the "economic cost" of the company's hydroelectric production. See supra, at 336, and n 3, 71 L Ed 2d, at 193. Appellants argue that such state regulation is incompatible with Part II of the Federal Power Act—which vests in the Federal Energy Regulatory Commission exclusive ratemaking jurisdiction over "the sale of electric energy at wholesale in interstate commerce," 16 USC §§ 824(b), 824d–824f (1976 ed and Supp IV) [16 USCS §§ 824(b), 824d–824f] —and conflicts directly with § 205(b) of the Federal Power Act, 16 USC § 824d(b) [16 USCS § 824d(b)], which prohibits utilities from maintaining "any unreasonable difference in rates . . . as between localities" with respect to sales subject to federal jurisdiction. Given our holding that the New Hampshire Commission's order violates the Commerce Clause, we need not decide this issue.

EDITOR'S NOTE

An annotation on "Validity, under commerce clause of Federal Constitution, of state restrictions on interstate movement of goods, products, and natural resources originating from within state—Supreme Court cases," appears p 890, infra.

TOWN OF SPRINGFIELD, VERMONT, and Vermont Public Power Supply Authority

v.

V. Louise McCARREN, Rosalyn L. Hunneman, and Samuel S. Bloomberg, in their official capacities as members of the State of Vermont Public Service Board,

Town of Cavendish, Vermont, Defendant-Intervenor.

Civ. A. No. 82-157.

United States District Court, D. Vermont.

Oct. 15, 1982.

Action was brought for declaratory judgment that Federal Energy Regulatory Commission had exclusive jurisdiction over licensing of hydroelectric project on navigable river and that Vermont Public Service Board's ruling that it had concurrent jurisdiction to issue certificate of public good was beyond its jurisdiction and void. On defendants' motion for preliminary determination of jurisdictional issues and plaintiffs' motion for summary judgment, the District Court, Holden, Chief Judge, held that: (1) federal preemption issue arose under Constitution, laws or treaties of United States so as to establish that Court had federal-question jurisdiction over the action; (2) action was not within proscription of doctrine of sovereign immunity exemplified in Eleventh Amendment; (3) Board's ruling was not to be given res judicata effect; (4) Anti-Injunction Act did not apply; (5) principles of equity, comity and federalism would not preclude Court from reaching merits of action; and (6) jurisdiction of FERC to act on application for license to develop project was exclusive of jurisdiction assumed by majority of members of Board over the improvements, works, facilities, features and elements of the project within such application.

Motion for summary judgment granted.

1. Federal Courts ⟹192

Federal preemption issue, which was raised in action for declaratory judgment that Federal Energy Regulatory Commission had exclusive jurisdiction over licensing of hydroelectric project on navigable river and that Vermont Public Service Board's ruling that it had concurrent jurisdiction to issue certificate of public good was beyond its jurisdiction and void, arose under Constitution, laws or treaties of United States so as to establish that federal District Court had federal-question jurisdiction over the action; fact that the federal question could possibly arise as a defense to some state court action would not deprive federal court of jurisdiction. 28 U.S.C.A. §§ 1331, 2201, 2202.

2. Declaratory Judgment ⟹61

Declaratory Judgment Act is intended to provide a tool to be used to test validity of propositions of federal law if they are ripe and a justiciable controversey exists. 28 U.S.C.A. §§ 2201, 2202.

3. Declaratory Judgment ⟹1

Declaratory Judgment Act exists as instrument to protect citizen against dangers and damages which may result from erroneous belief as to his rights under state or federal law. 28 U.S.C.A. §§ 2201, 2202.

4. Civil Rights ⟹11.5

"Redlining" is mortgage credit discrimination based on characteristics of the neighborhood surrounding the would-be borrower's dwelling.

See publication Words and Phrases for other judicial constructions and definitions.

5. Courts ⟹107

Fact that a Supreme Court justice failed to get three other justices to join him to grant certiorari did not establish that eight justices approved the lower court's reasoning.

6. Federal Courts ⟹269

Suit against individual members of Vermont Public Service Board for declara-

tory judgment that Federal Energy Regulatory Commission had exclusive jurisdiction over licensing of hydroelectric project on navigable river and that the Board's ruling that it had concurrent jurisdiction to issue certificate of public good was beyond its jurisdiction and void was not within the proscription of doctrine of sovereign immunity exemplified in Eleventh Amendment. U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐269

Illegal action by state officials is not the action of the state for purposes of doctrine of sovereign immunity exemplified in Eleventh Amendment. U.S.C.A. Const. Amend. 11.

8. Judgment ⇐641

Vermont's Public Service Board's ruling that it had concurrent jurisdiction in regard to licensing of hydroelectric project on navigable river was not to be given res judicata effect in view of fact that Board's lack of jurisdiction was clear, that the jurisdictional determination hinged entirely on a question of law, that policy of federal preemption was strong and that Board was administrative agency, rather than a court of limited jurisdiction.

9. Judgment ⇐489

Where a state court exercises jurisdiction over a matter entrusted to exclusive federal jurisdiction, its judgment and any attempt to enforce the judgment may be nullities subject to collateral attack.

10. Administrative Law and Procedure ⇐500

Rulings of state administrative agency, which takes jurisdiction over a matter committed to exclusive federal jurisdiction, are subject to collateral attack.

11. Administrative Law and Procedure ⇐229

"Doctrine of administrative exhaustion" requires that would-be litigants, who seek to challenge state administrative action in federal court, are to make sure that the state in its final legislative action would not respect what the plaintiffs think their rights to be before plaintiffs resort to the courts of the United States.

See publication Words and Phrases for other judicial constructions and definitions.

12. Courts ⇐508(2)

Anti-Injunction Act does not bar injunctions against administrative actions of a state court. 28 U.S.C.A. § 2283.

13. Courts ⇐508(2)

Even if Anti-Injunction Act would prevent federal court interference against some quasi-judicial proceedings of state administrative agencies, unless those proceedings are in rem the agency must, at the least, have the power to enforce its own orders for the agency to be deemed a "court" within meaning of the Act. 28 U.S.C.A. § 2283.

See publication Words and Phrases for other judicial constructions and definitions.

14. Courts ⇐508(2)

Anti-Injunction Act did not apply so as to preclude federal District Court from reaching merits of action for declaratory judgment that Federal Energy Regulatory Commission had exclusive jurisdiction over licensing of hydroelectric project on navigable river and that Vermont Public Service Board's ruling that it had concurrent jurisdiction to issue certificate of public good was beyond its jurisdiction and void, in view of fact that Board lacked power to enforce its orders and had not exercised in rem jurisdiction when it made such ruling. 28 U.S.C.A. §§ 2202, 2283; 30 V.S.A. § 15.

15. Courts ⇐508(2)

If aggrieved with a final state administrative order, a party with a claim of federal right may pursue state remedies, or may elect to proceed at once to federal courts to enjoin enforcement of the order.

16. Federal Courts ⇐51

Principles of equity, comity and federalism would not preclude federal District Court from reaching merits of action for declaratory judgment that Federal Energy Regulatory Commission had exclusive jurisdiction over licensing of hydroelectric

project on navigable river and that Vermont Public Service Board's ruling that it had concurrent jurisdiction to issue certificate of public good was beyond its jurisdiction and void, especially in view of fact that the challenge to Board's ruling was predicated on supremacy clause and federal preemption. U.S.C.A. Const.Art. 1, § 8, cl. 3.

17. Federal Courts ⚖42

Abstention is peculiarly inappropriate when federal claim is that the state has been ousted from jurisdiction.

18. States ⚖4.10

Federal jurisdiction over licensing of hydroelectric projects on navigable waters of the United States preempts state licensing authority.

19. Electricity ⚖8.4

Federal Power Act's provision, which states that an applicant for a license from Federal Energy Regulatory Commission is to submit satisfactory evidence of compliance with state laws relating to use of water for power purposes, does not require compliance with any state laws, but, rather, merely suggests subjects as to which FERC may wish to have some proof submitted to it of the applicant's progress. Federal Power Act, § 9(b), 16 U.S.C.A. § 802(b).

20. Electricity ⚖8.4
States ⚖4.10

Under Federal Power Act and supremacy clause, jurisdiction of Federal Energy Regulatory Commission to act on application for license to develop hydroelectric project on navigable river was exclusive of jurisdiction assumed by majority of members of Vermont Public Service Board over the improvements, works, facilities, features and elements of the project within such application. U.S.C.A. Const.Art. 1, § 8, cl. 3; Federal Power Act, §§ 9(b), 10(a), 27, 16 U.S.C.A. §§ 802(b), 803(a), 821.

John Parker, Parker, Lamb & Ankuda, P.C., Springfield, Vt., Richmond F. Allan, Duncan, Weinberg & Miller, P.C., Washington, D.C., Stephen Walke, Paterson, Walke & Pratt, P.C., Montpelier, Vt., for plaintiffs.

Harriet A. King, King & King, Waitsfield, Vt., for defendants.

Sarah E. Vail, Chester, Vt. and Joseph E. Frank, Paul, Frank & Collins, Inc., Burlington, Vt., for defendant-intervenor.

MEMORANDUM OF DECISION

HOLDEN, Chief Judge.

Plaintiffs in this action seek a declaratory judgment that the Federal Energy Regulatory Commission has exclusive jurisdiction over the licensing of the hydroelectric project they propose to build, and the Vermont Public Service Board's order finding that it had concurrent jurisdiction to issue a certificate of public good was beyond its jurisdiction, illegal, and void. The defendant Public Service Board members and the defendant-intervenor Town of Cavendish contend the Public Service Board does have jurisdiction over the licensing of the project, but they urge the court not to reach that question. They argue that absence of federal question jurisdiction, the Eleventh Amendment, the doctrine of *res judicata*, the Anti-Injunction Act, and principles of equity, comity, and federalism prevent the court from reaching the merits of the case. The defendants have moved for a preliminary determination of the jurisdictional issues, and the plaintiffs have moved for summary judgment. The court concludes that none of the jurisdictional barriers advanced by the Board members and Cavendish precludes declaratory relief on the merits, and the plaintiffs are entitled to summary judgment.

BACKGROUND

The Town of Springfield, Vermont, and the Vermont Public Power Supply Authority have applied to the Federal Energy Regulatory Commission (FERC) for a license to construct and operate a hydroelectric project near Springfield on the Black River, a navigable river. FERC has taken jurisdiction and is considering the application.

On January 25, 1980, the Town of Cavendish petitioned the Vermont Public Service Board for a declaratory ruling that the Black River project was subject to the Public Service Board's jurisdiction. The Town of Springfield appeared as respondent before the Board, and the Concerned Citizens of the Black River Valley were allowed to intervene. In an order dated April 7, 1982, and filed April 8, 1982, a majority of the Public Service Board ruled, 2–1, that it had jurisdiction over the project. *Petition of the Town of Cavendish*, P.S.B. Docket No. 4444 (April 8, 1982). The Board's order also forbade Springfield from commencing site preparation until the Board had issued a certificate of public good. *Id.*, slip op. at 4. Defendant Samuel Bloomberg was the dissenting member of the Board.

Springfield did not appeal the Board's ruling to the Vermont Supreme Court. On May 4, 1982, the plaintiffs brought this action against the Public Service Board. The parties filed extensive briefs, and on July 30, 1982, the court heard oral argument on the defendant's application for a preliminary determination of jurisdiction and the plaintiffs' motion for summary judgment. On August 3, 1982, the court granted the plaintiffs leave to amend their complaint to substitute the individual Board members as parties defendant.

DISCUSSION

I. JURISDICTION AND RELATED ISSUES

The court turns first to the jurisdictional challenges advanced by the Board members and the Town of Cavendish as intervenor.

A. *Federal Question Jurisdiction*

[1] The Town of Cavendish and the Public Service Board defendants urge that this court is without subject matter jurisdiction. This argument must be rejected. As Judge Coffrin held in an earlier action for declaratory and injunctive relief brought by these same plaintiffs against another Vermont state agency that sought to exercise jurisdiction over the Black River project, "it cannot seriously be doubted that the federal preemption issue here 'arises under the Constitution, laws, or treaties of the United States' so as to establish federal question jurisdiction under 28 U.S.C. § 1331." *Town of Springfield v. State of Vermont Environmental Board*, 521 F.Supp. 243, 248 (D.Vt.1981).

[2, 3] That the federal question presented here could possibly arise as a defense to some state court action is not controlling. "[I]f there is never [federal] jurisdiction when a state defendant has a dispositive defense grounded in federal law, the Anti-Injunction Act would be surplusage." *United Air Lines, Inc. v. Division of Industrial Safety*, 454 U.S. 944, 949, 102 S.Ct. 485, 488, 70 L.Ed.2d 255 (1981) (opinion of White, J., dissenting from the denial of certiorari). The plaintiffs' claim here is that a federal agency has exclusive jurisdiction. This is a proposition of federal law that the plaintiffs have a right to test in federal court. The Declaratory Judgment Act was intended to provide such plaintiffs as these a tool that they might use to test the validity of propositions of federal law—assuming, of course, that a ripe and justiciable controversy exists for the court to adjudicate. The Act "exists as an instrument to protect the citizen against the dangers and damages that may result from erroneous belief as to his rights under state or federal law." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 250–51, 73 S.Ct. 236, 243, 97 L.Ed. 291 (1952) (concurring opinion of Reed, J.).

The *Wycoff* case is one of the leading cases construing the Declaratory Judgment Act. In *Wycoff*, a carrier of motion picture films and newsreels sought a declaratory judgment that it was engaged in interstate commerce, and an injunction perpetually forbidding the Public Service Commission of Utah from "interfering" with its activities on routes authorized by the Interstate Commerce Commission. The plaintiff offered no evidence at trial of any past, threatened, or pending interference, and limited its proof to showing that it was engaged in interstate commerce. *Id.*, 344

U.S. at 240, 73 S.Ct. at 238 (opinion of the Court). The trial court found that no interference had been made or threatened. *Id.* Consequently, the Supreme Court held that there was no showing of that danger of irreparable injury which is necessary to equitable relief by injunction. *Id.* at 240–41, 73 S.Ct. at 238. To the Court, it appeared that that plaintiff (the respondent on appeal) had "abandoned the suit as one for injunction but [sought] to support it as one for declaratory judgment." *Id.* at 241, 73 S.Ct. at 239. The Court accordingly directed its attention to the prerequisites for jurisdiction in a declaratory action.

The Court found the "disagreement" between the parties was too "nebulous," *id.* at 244, 73 S.Ct. at 240:

> The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. *It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step.* It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, "So what?" To that ultimate question no answer is sought.

Id. (emphasis added).

Because the question as to whether the Wycoff Company was engaged in interstate commerce was too abstract, unripe, and meaningless except as a defense to a possible state action, the Court ordered that the case should be dismissed. The opinion contains a widely-quoted but somewhat ambiguous dictum:

> Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

Id. at 248, 73 S.Ct. at 242.

While the Court did no more than express doubts about the existence of federal question jurisdiction in such cases, *see United Air Lines, Inc. v. Division of Industrial Safety, supra,* 454 U.S. at 949–50, 102 S.Ct. at 488 (opinion of White, J., dissenting from the denial of certiorari), lower courts have since adopted the dictum as a basis for holding that no federal question jurisdiction existed in particular settings. There is, however, a split of authority on the proper interpretation and application of the *Wycoff* dictum. Some courts have held that, while federal question jurisdiction is lacking where the declaratory plaintiff seeks a declaration of federal rights that has no meaning apart from a state court action, federal question jurisdiction does exist where the declaratory plaintiff has an actual and present controversy with the declaratory defendant and seeks a declaration of federal law that has meaning independent of any state case, even though the federal right might also be asserted as a defense in a state case. In cases where the declaratory plaintiffs challenge state regulatory schemes on federal preemption grounds, these courts hold that federal question jurisdiction exists if there is a ripe and justiciable controversy and the declaratory plaintiffs are subject to conflicting state and federal regulation, even though the declaratory plaintiffs may be defendants in state court actions. A second body of precedent holds that federal preemption can only be in the nature of a defense to a state court action and provides no independent basis for federal question jurisdiction in a suit for a declaratory judgment.

The First and Fifth Circuits, and, with one aberration, the Ninth Circuit, have adopted the first approach; the Sixth, Eighth, and Tenth Circuits have hewed to the latter approach; the Third Circuit, after expressly reserving decision, also appears to have taken the latter approach; and the Second Circuit has apparently not yet spoken.[1] *See First Federal Savings & Loan Association v. Greenwald,* 591 F.2d 417, 423 n. 8 (1st Cir.1979); *Braniff International, Inc. v. Florida Public Service Commission,* 576 F.2d 1100, 1104–06 (5th Cir. 1978); *Conference of Federal Savings and Loan Associations v. Stein,* 604 F.2d 1256, 1259 (9th Cir.1979), *aff'd mem.,* 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980); *and Rath Packing Co. v. Becker,* 530 F.2d 1295 (9th Cir.1975), *aff'd sub nom. Jones v. Rath Packing Co.,* 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *but cf. United Air Lines, Inc. v. Division of Industrial Safety,* 633 F.2d 814 (9th Cir.1980), *cert. denied,* 454 U.S. 944, 102 S.Ct. 485, 70 L.Ed.2d 255 (1981). *Contra, Exxon Corp. v. Hunt,* 683 F.2d 69 (3d Cir.1982); *Michigan*

1. While the court has been unable to locate any Second Circuit case discussing federal question jurisdiction in a declaratory suit challenging state regulation on the ground of federal preemption, another case may provide some inkling of how it might rule. In *Warner-Jenkinson Co. v. Allied Chemical Corp.,* 567 F.2d 184 (2d Cir.1977), the Second Circuit dealt with a related problem of federal question jurisdiction, and took a somewhat broader view of jurisdiction than other courts have done. *Warner-Jenkinson* was a licensee's challenge to the validity of a patent. The Third Circuit had previously held that a licensee could not bring suit in federal court for a declaration of patent invalidity when the licensor had threatened to bring suit for breach of the licensing agreement. *Thiokol Chemical Corp. v. Burlington Industries, Inc.,* 448 F.2d 1328 (3d Cir.1971), *cert. denied,* 404 U.S. 1019, 92 S.Ct. 684, 30 L.Ed.2d 668 (1972). Under these circumstances, the Third Circuit held, invalidity of the patents at issue could only arise as a defense to a state law suit. *Id.,* 448 F.2d at 1330–31. The D.C. Circuit subsequently criticized the holding in *Thiokol Chemical Corp.* as being "of questionable force." *Hanes Corp. v. Millard,* 531 F.2d 585, 594 n. 8 (D.C.Cir.1976). The Second Circuit, in *Warner-Jenkinson,* did not definitively adopt the position of either the Third Circuit or the D.C. Circuit:

> If the plaintiffs were seeking a declaration of their right to assert patent invalidity as a defense to a contract action for royalties, which itself could not be brought in federal court [citations omitted], one might conclude that no 'arising-under' jurisdiction would be present. See *Thiokol Chemical Corp. v. Burlington Industries* [citation omitted]. See also *Hanes Corp. v. Millard,* 174 U.S.App. D.C. 253, 531 F.2d 585, 594–95 n. 8 (1976).

Warner-Jenkinson, supra, at 186–87. But the court found it unnecessary to take sides because in *Warner-Jenkinson* there was no breach of contract suit pending in state court, and the declaratory defendant could either bring a contract suit in state court or a patent infringement suit in federal court. Thus patent invalidity, while a possible defense to a state suit, also created federal question jurisdiction. *Id.* at 187.

The Second Circuit cited *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671–72, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950), for the thesis that "an action for declaratory judgment may be brought in federal court ordinarily only if there would exist a basis for federal jurisdiction in a coercive action between the parties." *Warner-Jenkinson, supra,* 567 F.2d at 186. The *Skelly Oil Co.* Court had articulated the point in this way:

> Prior to [the Declaratory Judgment Act], a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to a federal court. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requisites of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

Skelly Oil Co., supra, 339 U.S. at 671–72, 70 S.Ct. at 879. The Harvard Law Review note cited with apparent approval in *Skelly Oil Co., id.* at 674, 70 S.Ct. at 880, suggested that federal jurisdiction over a declaratory suit is proper where a coercive cause of action had already accrued to either party, "or if it is relatively certain that coercive [federal court] litigation will eventually ensue between the same parties if a declaration is refused." *Developments in the Law—Declaratory Judgments—1941–1949,* 62 Harv.L.Rev. 787, 794 (1949).

Adopting this line of analysis, the court finds it need not determine at this point whether the plaintiffs currently have a good coercive cause of action—that is to say, whether they are now entitled to injunctive relief—because it is relatively certain that in the absence of declaratory relief, the plaintiffs would eventually satisfy the prerequisites for injunctive relief.

Savings and Loan League v. Francis, 683 F.2d 957, 961–62 (6th Cir.1982) (2–1)[2]; *Lawrence County v. State of South Dakota,* 668 F.2d 27, 30–32 (8th Cir.1982); *Home Federal Savings and Loan Association v. Insurance Department,* 571 F.2d 423, 426 (8th Cir.1978); *cf. Madsen v. Prudential Federal Savings & Loan Association,* 635 F.2d 797, 803–04 (10th Cir.1980), *cert. denied,* 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981). *See also Trent Realty Associates v. First Federal Savings & Loan Association,* 657 F.2d 29, 34 (3d Cir.1981) ("We need not decide whether an original action by First Federal in which the complaint specifically referred to the federal regulations and sought declaratory and injunctive relief on the ground of federal preemption could be maintained in federal court"); *compare Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission,* 465 F.2d 237, 241 (3d Cir.1972), *cert. denied,* 410 U.S. 943, 93 S.Ct. 1367, 35 L.Ed.2d 609 (1973) (dictum implying no federal jurisdiction would exist but for diversity of parties), *with National State Bank v. Long,* 630 F.2d 981 (3d Cir.1980) (assuming jurisdiction *sub silentio* on facts virtually identical to those of *Conference of Federal Savings and Loan Associations v. Stein, supra,* in which the Ninth Circuit upheld jurisdiction, and *Michigan Savings and Loan League v. Francis, supra,* in which the Sixth Circuit found there was no jurisdiction).

In *First Federal Savings & Loan Association v. Greenwald, supra,* the First Circuit held that federal question jurisdiction existed where the declaratory plaintiffs sought an adjudication that certain Massachusetts banking legislation was preempted by the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* In that case, First Federal had been sued in state court by the Massachusetts Commissioner of Banks, and had removed that action to federal court. First Federal filed a counterclaim in federal court seeking a declaratory judgment that the state legislation had been preempted. In addition, First Federal, together with a number of other savings and loan associations, instituted a separate civil action also praying for a declaratory judgment of preemption. The two lawsuits were consolidated for hearing and decision. While the First Circuit considered the question whether the Commissioner's state action had been properly removed "not easy," *id.* at 423,[3] it found that question unneces-

2. The majority in *Michigan Savings and Loan League, supra,* cited *Williams v. First Federal Savings and Loan Association of Arlington,* 651 F.2d 910 (4th Cir. 1980), for the proposition that the Fourth Circuit has joined the Eighth and Tenth Circuits in holding that federal preemption cannot form the basis for a declaratory action in the federal courts. *See Michigan Savings and Loan League, supra,* 683 F.2d at 962. This interpretation of *Williams* is highly questionable. The Fourth Circuit, in *Williams,* in fact took jurisdiction over the case but found it unnecessary to reach the question of federal preemption because it resolved the suit on state law grounds. *Williams, supra,* 651 F.2d at 921–23. While the *Williams* court expressed some doubts as to federal question jurisdiction in the case, it proceeded on the belief that all of the cases consolidated for decision properly raised a federal question. *Id.* at 913 n. 2. Indeed, the *Williams* case was cited by the appellee, First Federal, in *Trent Realty Associates v. First Federal Savings and Loan Association,* 657 F.2d 29 (3d Cir. 1981), as support for the proposition that federal question jurisdiction existed in that case, in which First Federal had won a summary judgment on the merits in the district court. The Third Circuit found it difficult to parse the *Williams* decision. *Trent Realty,* 657 F.2d at 35.

3. There is a split of authority as to whether removal jurisdiction exists where the defendant contends that the plaintiff's state law claims have been preempted by federal law. Among the cases upholding removal jurisdiction under such circumstances are *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (state court suit seeking injunction against strike in violation of "no-strike" provision of collective bargaining agreement held properly removed to federal court; suit deemed to arise under § 301 of the Labor Management Relations Act, which preempts state law); *North Davis Bank v. First National Bank of Layton,* 457 F.2d 820 (10th Cir.1972) (state suit for injunction against construction of branch bank allegedly in violation of Utah banking law held properly removed because definition of "branch bank" arises under federal law); *Johnson v. England,* 356 F.2d 44 (9th Cir. 1966), *cert. denied,* 384 U.S. 961, 86 S.Ct. 1588, 16 L.Ed.2d 674 (1966) (state suit seeking order compelling arbitration of labor dispute held properly removed because federal labor law preempts state law); *Teamsters Local Un-*

sary to decide, since "[t]he matter of preemption and related federal issues were the focal point of the declaratory judgment suit, hence federal question jurisdiction existed in that case under any analysis." *Id.* (footnote omitted).

Similarly, in *Rath Packing Co. v. Becker, supra,* the Ninth Circuit held that the district court had federal question jurisdiction over a suit in which a bacon processor sought declaratory and injunctive relief against the enforcement of California's meat labelling laws on the ground that they were preempted by the Wholesome Meat Act of 1967, 21 U.S.C. § 601 *et seq.*, and a federal regulation promulgated thereunder. As in *First Federal Savings & Loan, supra,* the course of events began with state enforcement efforts. State officials first ordered 84 lots of Rath bacon "off sale" for short weight. Subsequently, they commenced litigation in two state courts to enforce the state meat weight labelling law. Rath removed both actions to federal district court and also filed two declaratory judgment actions in federal district court. After the filing of the declaratory complaints, the district court remanded the enforcement actions to the state courts, but it later refused to dismiss Rath's declaratory suits. The Ninth Circuit affirmed the district court's jurisdictional determination. *Rath, supra,* 530 F.2d at 1302–03.

The Court of Appeals in *Rath* contrasted the case with *Chandler v. O'Bryan,* 445 F.2d 1045 (10th Cir.1971), *cert. denied,* 405 U.S. 1049, 92 S.Ct. 1310, 31 L.Ed.2d 592 (1972). In *Chandler,* O'Bryan had brought a libel action against Chandler, a United States district judge, in state court. O'Bryan alleged that Chandler had libelled him in statements made to a newspaper. Chandler removed the action to federal court, but the federal district court, finding that the statements were not made in the course of Chandler's official duties or under the color of his office, remanded the case to state court, since there was no diversity of citizenship. After O'Bryan won a verdict in state court, Chandler sued in federal court for a declaratory judgment to set aside the state judgment. The Tenth Circuit, reversing the trial court, held that the federal courts lacked subject matter jurisdiction, since "Judge Chandler's assertion of judicial im-

ion No. 116 v. Fargo-Moorhead Automobile Dealers Association, 459 F.Supp. 558 (D.N.D. 1978), *rev'd on other grounds,* 620 F.2d 204 (8th Cir.1980) (state suit for enforcement of labor arbitration award held properly removed); *First Federal Savings & Loan Association of Jackson County v. First Federal Savings & Loan Association of Huntsville,* 446 F.Supp. 210 (N.D.Ala.1978) (state suit expressly based entirely upon state and common law of unfair competition held properly removed because law of unfair competition between federal savings and loan associations was preempted by federal regulations); *State of New York v. Local 144,* 410 F.Supp. 225 (S.D.N.Y.1976) (state suit founded on state statutory and constitutional provisions held properly removed because federal law had preempted the law relating to strikes against health care institutions); and *Rettig v. Arlington Heights Federal Savings and Loan Association,* 405 F.Supp. 819 (N.D.Ill.1975) (state suit charging breach of fiduciary duties and improper diversion of funds under state law held properly removed because federal law relating to federal savings and loan associations was preemptive).

Other cases hold to the contrary. *First National Bank of Aberdeen v. Aberdeen National Bank,* 627 F.2d 843 (8th Cir.1980) (state suit relying on state law of unfair competition held improperly removed; federal preemption of banking regulations is only in the nature of a defense to the state suit); *State v. American League of Professional Baseball Clubs,* 460 F.2d 654 (9th Cir. 1972) (state case alleging violations of state and federal antitrust laws held improperly removed; since the state court had no jurisdiction over federal antitrust claims, the federal court could have no jurisdiction on removal of those claims; as for state antitrust claims, "federal preemption is a matter of defense to a state law claim, and not a ground for removal," *id.* at 660); *Marquette National Bank of Minneapolis v. First National Bank of Omaha,* 422 F.Supp. 1346 (D.Minn.1976) (state suit alleging, *inter alia,* violation of Minnesota usury law held improperly removed; contention that federal regulation of national banks preempts state law was a matter of defense); *State of New York v. Local 115,* 412 F.Supp. 720 (E.D.N.Y.1976) (if the plaintiff's claim depends upon the continued vitality of state labor law, contention that federal labor law had preempted the field was not enough to support removal).

Whatever the proper resolution of this issue may be, removal jurisdiction is not implicated in the instant case.

munity [was] 'in reality in the nature of a defense' to that suit." *Id.*, 445 F.2d at 1056.

The *Rath* court distinguished the two cases:

> Unlike *Chandler*, Rath's claims have vitality in the absence of the litigation in state court; Rath had the right to a federal forum before the institution of the state court actions. Chandler's federal claim was purely in the nature of a defense to the libel action. Brought without reference to the underlying state court proceeding, Chandler's claim would be a useless gesture: no one would care whether Chandler acted under the protection accorded by the courts to his office if O'Bryan had refrained from suing him. That Rath's claim is or can be the basis for a defense to the state court actions states a mere truism; the test is whether Rath has created a federal controversy where none existed or is seeking an adjudication of a claim which is essentially meaningful only when pleaded as a defense to the particular pending state court actions.

Rath, supra, 530 F.2d at 1305–06 (footnote omitted). Because Rath was subjected to conflicting state and federal requirements, there was a ripe and ongoing controversy that gave rise to federal question jurisdiction. The Supreme Court, in affirming the Ninth Circuit on the merits, did not deem the defendants' jurisdictional objections worthy of discussion. Despite the fact that the jurisdictional issue had been raised below and was addressed at length by the Court of Appeals, *see id.*, 530 F.2d at 1302–06, both the Supreme Court majority and Justices Rehnquist and Stewart, dissenting in part, proceeded directly to the merits without questioning jurisdiction over the case. *Jones v. Rath Packing Co., supra*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 *passim.*

[4] The reasoning of another panel of the Ninth Circuit in *Conference of Federal Savings and Loan Associations v. Stein, supra*, was similar to that of the Court of Appeals in *Rath*. *Stein* was a challenge to state "anti-redlining" regulations. "Redlining" is mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling. The Federal Home Loan Bank Board had promulgated anti-redlining regulations implementing the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 *et seq.*, and various federal civil rights statutes. California also adopted a statute that set up a detailed anti-redlining regulatory scheme. The plaintiffs, all federally chartered savings and loan associations, sued for a declaratory judgment that the California Housing Financial Discrimination Act of 1977, as applied to them, was preempted by federal legislation and regulations. The defendant contended there was no federal question jurisdiction because preemption was only a defense to a potential state case, citing *Public Service Commission v. Wycoff Co., supra.* The court rejected this contention, distinguishing *Wycoff* on the ground that in that case "there was no proof of any threatened or probable act by the state commission which might cause the irreparable injury essential to equitable relief or which could serve to create the actual controversy necessary for declaratory judgment jurisdiction." *Stein, supra*, 604 F.2d at 1259. The *Stein* court noted that, as in *First Federal Savings & Loan, supra*, "'Both the state and federal regulations [were] currently in effect, subjecting the associations to conflicting requirements,'" and accordingly "[a]n actual justiciable controversy [was] thus presented." *Stein, supra*, 604 F.2d at 1259. On appeal, the Supreme Court summarily affirmed. *Stein v. Conference of Federal Savings and Loan Associations*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980) (mem.).

In *Braniff International, Inc. v. Florida Public Service Commission, supra*, the Fifth Circuit was also called upon to construe *Wycoff.* The district court had dismissed the case for want of subject matter jurisdiction, so the only question on appeal was the existence *vel non* of federal question jurisdiction. The facts were similar to those of the instant case. The plaintiffs, six airlines, were required under federal law to obtain "Certificates of Public Convenience

and Necessity" from a federal agency, the Civil Aeronautics Board. The Florida Legislature passed a statute subjecting airlines to further regulation by the defendant Florida Public Service Commission. One of the plaintiff airlines had failed to comply with a Florida Public Service Commission rule regarding notice of change of schedule. A state-certified airline filed a complaint before that body, which then issued an order that the offending airline, Southern Airways, Inc., show cause why it should not be fined or ordered to cease and desist from the offending conduct. Southern, instead of complying with the show cause order, joined with five other airlines in filing suit against the Commission and its individual members in federal district court for declaratory relief that the State regulatory scheme violated the Supremacy Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The complaint also sought an injunction against enforcement of the state regulatory plan.

The district court, relying on *Wycoff,* dismissed the case:

> [P]laintiffs have failed to make out a case for federal-question jurisdiction. This action seeks merely to obtain for plaintiffs a federal defense to the action pending before the Florida Public Service Commission. The cause of action which defendants threaten to institute will involve only an issue of state law—whether plaintiffs should be required to comply with the PSC's notice provision. That a defense based on federal law will be asserted is immaterial to the jurisdiction of this court.

Quoted in Braniff International, id., 576 F.2d at 1103.

The Fifth Circuit, speaking through Circuit Judge Elbert Tuttle, reversed. At the outset, the court noted that "during the 26 years since its decision in *Wycoff,* the Supreme Court has never invoked the rationale [of the dictum in *Wycoff*] to obtain the result reached by the district court here." 576 F.2d at 1104. Judge Tuttle conceded that several courts of appeals had relied on the *Wycoff* dictum to sustain dismissals for lack of subject matter jurisdiction. "However, the only common threat [*sic*] appearing in these cases is the dearth of discussion and analysis." *Id.* The court proceeded to identify several features of the *Wycoff* case that limit the applicability of its dictum:

> The *Wycoff* Court, with the benefit of a full trial record, had determined on the merits that no injunction could issue, since there was "no proof of any threatened or probable act of the defendants which might cause the [requisite] irreparable injury." In the present case the state, through the Commission, already had set in motion the very regulatory processes whose constitutionality was challenged through appellants' suit. As developed by the pleadings and other matters thus far a part of the record, it simply cannot be said that injunctive relief is foreclosed here as it was in *Wycoff.* Appellants' suit, therefore, cannot be characterized as nothing more than an attempt "to ward off possible action of the appellees by seeking a declaratory judgment to the effect that [they] will have a good defense when and if" that action is taken.
>
> Nor can it be doubted that these appellants, whose standing in this matter cannot seriously be questioned, have not presented a true "case or controversy" as required by Article III. That defect undoubtedly played a crucial role in the judicial demise of the *Wycoff* plaintiff's claim. Here, however, the circumstances show that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant [relief]."

Id. at 1105 (citations and footnote omitted) (bracketed text supplied by the Fifth Circuit).

The Fifth Circuit concluded: "That appellants' constitutional claim is or may be a defense to the Commission's actions states a mere truism; it is not, under the circumstances, a limitation upon the power of the district court to entertain the controversy before it." *Id.* at 1106. It held that where

a party seeks declaratory and injunctive relief against the enforcement of an unconstitutional state statute, if the other requirements for the taking of federal question jurisdiction are met, the "mere fact that the constitutional claims might be raised before a state administrative body charged with enforcement of the statute does not alone deprive the court of jurisdiction." *Id.* (footnote omitted).[4]

Those courts of appeals that have held federal preemption cannot form the basis for federal question jurisdiction in a declaratory action have rested their decisions on the ground that federal preemption was 'actually' in the nature of a defense to a state law claim. *E.g., United Air Lines, Inc. v. Division of Industrial Safety, supra,* 633 F.2d at 817 ("United's allegations of federal question jurisdiction in this appeal remain defensive in nature"). This reasoning proves too much. Parties who object to state statutes, regulations, or administrative rulings on Supremacy Clause or other federal law grounds frequently prefer to bring anticipatory challenges, for declaratory or injunctive relief, or for both, rather than await the opportunity to make their defense in state enforcement actions in which they face the danger of punishment should their objections turn out to be ill-founded. *Cf. Ex parte Young,* 209 U.S. 123, 165, 28 S.Ct. 441, 456, 52 L.Ed. 714 (1908). All such anticipatory, declaratory and injunctive actions are essentially "defensive in nature." Nonetheless, if the controversy is ripe and justiciable, the federal courts have jurisdiction to declare the rights of the parties.

In the *United Air Lines* case, *supra,* United Air Lines brought suit to enjoin the enforcement of California health and safety regulations at United's facilities at the San Francisco International Airport. United alleged that the jurisdiction of the Federal Aviation Agency over their facilities was exclusive, and that California law was preempted. The Court of Appeals reversed the district court's grant of a preliminary injunction. Without citing either *Conference of Federal Savings and Loan Associations v. Stein, supra,* or *Rath Packing Co. v. Becker, supra,* both of which were recent Ninth Circuit precedents that had been affirmed by the Supreme Court, the court held there was no subject matter jurisdiction. "It is Hornbook Law that federal jurisdiction must affirmatively appear in the complaint." *United Air Lines, supra,* 633 F.2d at 815. "It is not enough that a federal question appears in the complaint as an anticipation of or reply to a probable defense [citations omitted], or that the claim asserted is in the nature of a defense to a threatened or pending action." *Id.* at 816–17.

The Supreme Court denied certiorari. *United Air Lines, Inc. v. Division of Industrial Safety, supra,* 454 U.S. 944, 102 S.Ct. 485, 70 L.Ed.2d 255 (1981). Justice White dissented from this disposition of the case. He considered the Ninth Circuit to have "confused two distinct lines of reasoning." *Id.* at 946, 102 S.Ct. at 486 (opinion of White, J., dissenting from the denial of certiorari). One of those lines was the familiar rule in the *Mottley* case, *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), that a plaintiff cannot get into federal court on the basis of a federal defense the plaintiff expects the defendant to assert:

> In each of the above cases [*Mottley, Tennessee v. Union and Planters Bank,* 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894); *Metcalf v. Watertown,* 128 U.S. 586, 9 S.Ct. 173, 32 L.Ed. 543 (1888)], the federal plaintiff's cause of action against the defendant was not grounded in federal

4. Here, the plaintiffs' Supremacy Clause challenge is not directed at a state statute, but at an administrative ruling. This distinction does not make the Fifth Circuit's analysis inapplicable. Moreover, though plaintiffs seek only declaratory relief, plus "such other and further relief as is just and appropriate," it is "relatively certain," *see above,* note 1, that in the absence of declaratory relief the plaintiffs would eventually have a coercive cause of action for equitable relief since, as in *Braniff International,* here the Public Service Board "already had set in motion the very regulatory processes" whose constitutionality is challenged. *Id.,* 576 F.2d at 1105.

law; he merely sought to adjudicate the validity of an anticipated defense to his action. Here, United's complaint, as I read it, included the claim that under federal law the Federal Aviation Administration had exclusive jurisdiction to oversee safety at airline maintenance facilities and therefore, under the supremacy clause, state regulation was foreclosed. No part of this claim was grounded in state law.

United Air Lines, Inc. v. Division of Industrial Safety, supra, 454 U.S. at 947, 102 S.Ct. at 487 (opinion of White, J., dissenting from the denial of certiorari).

The second line of reasoning, Justice White wrote, "substantially misread [the Supreme Court's] previous cases on when the 'defensive' character of a federal question is insufficient to create federal-court jurisdiction." *Id.* at 946, 102 S.Ct. at 486. He construed the dismissal in *Wycoff* to have resulted "because the federal claim was too abstract, anticipatory, and not ripe for decision." *Id.* at 949, 102 S.Ct. at 488. He criticized the holding of the Court of Appeals:

> The suggestion that a defendant in a pending or threatened state action based on state law is foreclosed on jurisdictional grounds from seeking a federal declaratory judgment or an injunction based on the claim that the state action is barred by federal statute or the Federal Constitution makes little sense in light of the holdings of this Court. Under the *Younger v. Harris,* 401 U.S. 37 [91 S.Ct. 746, 21 L.Ed.2d 639] (1971), line of cases, comity and federalism require a federal court to hold its hand and dismiss rather than interfere with a pending state criminal proceeding, by adjudicating a federal defense that has been or might be raised in that proceeding. Certain civil proceedings are subject to the same rule. But these holdings do not rest on jurisdictional grounds, and they do not apply when a state proceeding is not pending and in any event do not apply to all civil proceedings. Furthermore, if there is never federal jurisdiction when a state defendant has a dispositive defense grounded in federal law, the Anti-Injunction Act would be surplusage. Under this theory, all such litigants would be required to pursue their federal claims in state court. Perhaps they should, but that is not what the present jurisdictional statutes and our cases construing them require.
>
> ....
>
> In my view, the holding below is wrong.

United Air Lines, supra, 454 U.S. at 948–50, 102 S.Ct. at 488.

[5] Counsel for the Town of Cavendish suggested at oral argument that since Justice White failed to get three of his colleagues to join him to grant certiorari, all eight remaining Justices approved the lower court's reasoning. There is no merit whatever to this contention. The denial of certiorari means nothing other than that the Supreme Court chose not to review the case. As Justice Frankfurter once explained:

> The sole significance of ... denial of a petition for certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of "sound judicial discretion." A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result.... Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final .... A case may raise an important issue but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 917–18, 70 S.Ct. 252, 254, 94 L.Ed. 562 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). The Supreme Court has since reiterated that it is "well-settled" that a denial of certiorari imports no implication concerning its view of the merits. *Hughes*

Tool Co. v. Trans World Airlines, 409 U.S. 363, 366 n. 1, 93 S.Ct. 647, 650 n. 1, 34 L.Ed.2d 577 (1973).

As Justice White pointed out in *United Air Lines, supra,* 454 U.S. at 948, 102 S.Ct. at 488, no Supreme Court case has ever held that a federal court cannot take cognizance of an action predicated on federal question jurisdiction and seeking a declaration that federal law preempts state regulation. On the contrary, the Supreme Court has routinely heard cases asking for declaratory or injunctive relief against state regulation alleged to be preempted by federal law, and it has adjudicated those cases on the merits, without any doubt as to jurisdiction. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Jones v. Rath Packing Co., supra,* 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *Burbank v. Lockheed Air Terminal,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Florida Avocado Growers v. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Heinz v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), *cited in United Air Lines, supra,* 454 U.S. at 948, 102 S.Ct. at 488 (opinion of White, J., dissenting from the denial of certiorari). Counsel has not called to the attention of the court any Second Circuit case adopting the approach of the circuit court in *United Air Lines, supra,* nor has the court been able to locate any such Second Circuit case. The court chooses to follow the First and Fifth Circuits, *see First Federal Savings & Loan Association v. Greenwald, supra,* and *Braniff International, supra;* the two Ninth Circuit precedents affirmed by the Supreme Court, *Rath* and *Stein,* discussed above; and this District's own precedent, *Town of Springfield v. State of Vermont Environmental Board, supra,* and finds the reasoning of the circuit court in *United Air Lines, supra,* unpersuasive. This case is "quite different from *Public Service Comm'n v. Wycoff Co.,* 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291, where a carrier sought relief in a federal court against a state commission in order 'to guard against the possibility,' *id.,* at 244, 73 S.Ct. at 240, that the Commission would assume jurisdiction." *Public Utilities Commission v. United States,* 355 U.S. 534, 538–39, 78 S.Ct. 446, 450, 2 L.Ed.2d 470 (1958). Here, as in *Public Utilities Commission v. United States, id.,* the Public Service Board has already assumed jurisdiction. The court is satisfied that the plaintiffs' case rests on its own footing on a proposition of federal law. The controversy is ripe and justiciable. Accordingly the court has jurisdiction under 28 U.S.C. § 1331 to hear the case.

B. *Sovereign Immunity*

[6] The defendants contend the court lacks jurisdiction over the case because the Eleventh Amendment "bars suits against members of the Vermont Public Service Board in their official capacities." Answer to First Amended Complaint, ¶ 14. This defense is of no avail to them.

The Public Service Board was initially impleaded as the sole defendant. The Town of Cavendish urged that sovereign immunity barred the suit. By order dated August 3, 1982, the court granted the plaintiffs leave to amend their complaint to substitute the individual members of the Board as parties defendant, since "the court decline[d] at [that] stage to dismiss the case for technical reasons without affording an opportunity to remedy the defect." *Town of Springfield v. State of Vermont Public Service Board,* No. 82–157, slip op. at 1 (D.Vt. Aug. 3, 1982).

There can be no doubt that the Eleventh Amendment is no bar to this suit in its present posture:

> It is established that the Eleventh Amendment bars unconsented suits against state agencies as well as States, even where the relief sought is equitable in nature. *Alabama v. Pugh,* 438 U.S. 781 [98 S.Ct. 3057, 56 L.Ed.2d 1114] (1978) *(per curiam).* But it is equally well established, and it is a bulwark of our regime of rule by law, that courts have the power to restrain lawless conduct by government officials. *Ex parte Young,* 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908); *Association of American Medical Colleges v. Carey,* 482 F.Supp. 1358,

1361–62 (N.D.N.Y.1980). Thus any suit seeking only equitable relief against state officials can be heard, provided the equitable relief does not in fact amount to retroactive damages, *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), if only individuals are named defendants, and if there is an allegation of conduct that violates state or federal law, *cf. Cory v. White,* —— U.S. ——, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982).

Town of Springfield v. State of Vermont Public Service Board, supra, slip op. at 1.

The court now entertains some doubt as to whether the doctrine of sovereign immunity was a bar to this suit even in its original posture. *Cf. Mississippi Railroad Commission v. Illinois Central Railroad Co.,* 203 U.S. 335, 340, 27 S.Ct. 90, 92, 51 L.Ed. 209 (1906): "The first objection raised by the appellant is, that this suit is, in substance, one against a State. The commission was created by the State of Mississippi, under the authority of its constitution and laws, for the purpose of supervising, and to some extent controlling, the acts of railroads within the State. Such a commission is subject to a suit by a citizen [citing cases]." *Accord, Prentis v. Atlantic Coast Line,* 211 U.S. 210, 230, 29 S.Ct. 67, 71, 53 L.Ed. 150 (1908) (Holmes, J.) ("We may add that when the rate is fixed a bill *against the commission* to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, *and will be the proper form of remedy*") (emphasis added); *Murray v. Transit Commission,* 11 F.Supp. 27, 28–29 (S.D.N.Y.1935), *aff'd per curiam on opinion below,* 104 F.2d 1017 (2d Cir.1939) (L. Hand, Swan, and Chase, JJ.).

[7] In any event, this suit as it is now cast against the individual Public Service Board members is not within the proscription of the doctrine of sovereign immunity exemplified in the Eleventh Amendment. In the eyes of the law, illegal action by state officials is not the action of the State. "[T]he use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act on the part of a state official ...." *Ex parte Young, supra,* 209 U.S. at 159, 28 S.Ct. at 453. Defendants' Eleventh Amendment defense is without merit.

C. *Res judicata*

[8] The Public Service Board defendants and the Town of Cavendish urge that the Board's ruling is *res judicata,* and therefore cannot be collaterally attacked. Judge Coffrin, relying on *Durfee v. Duke,* 375 U.S. 106, 114, 84 S.Ct. 242, 246, 11 L.Ed.2d 186 (1963), rejected a similar argument in *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 246–47. In *Durfee,* the Court recognized that "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." *Durfee,* 375 U.S. at 114, 84 S.Ct. at 246, *citing Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), and *United States v. United States Fidelity Co.,* 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940).

The Town of Cavendish contends that Judge Coffrin's reliance upon *Durfee* was "mistaken" because in neither of the two cases cited by the Court was the issue of subject matter jurisdiction actually litigated in the first tribunal. Intervenor's Memorandum of Law on Defenses Exclusive of Merits of the Plaintiffs' Claim, dated July 15, 1982, at 7, *citing Durfee, supra,* 375 U.S. at 114 n. 12, 84 S.Ct. at 247 n. 12.

The footnote the Town of Cavendish cites does not support its argument. After noting that in neither *Kalb v. Feuerstein, supra,* nor *United States Fidelity, supra,* was the jurisdictional issue actually litigated, that footnote goes on to set forth a multifactor test for exceptions to the finality of jurisdictional determinations:

> The Restatement of Conflict of Laws recognizes the possibility of such exceptions:

"Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

"(a) the lack of jurisdiction over the subject matter was clear;

"(b) the determination as to jurisdiction depended upon a question of law rather than fact;

"(c) the court was one of limited and not of general jurisdiction;

"(d) the question of jurisdiction was not actually litigated;

"(e) the policy against the court's acting beyond its jurisdiction is strong."

Durfee, supra, 375 U.S. at 114 n. 12, 84 S.Ct. at 247 n. 12, *citing* Restatement, Conflict of Laws [1st], § 451(2) (Supp.1948).

Even if the Public Service Board were a court, the application of this five-factor analysis to the case at hand would strongly indicate that the policy against permitting it to act beyond its jurisdiction outweighs the policy underlying the doctrine of *res judicata.* For the reasons given below, the Board's lack of jurisdiction is clear. The jurisdictional determination hinged entirely on a question of law, since it is undisputed that the Black River is a navigable river. The Board is certainly not a court of general jurisdiction. And the policy of federal preemption here is strong. The only factor militating in favor of deference to the Board's ruling is that the question of jurisdiction was actually litigated. Here, this is not enough.[5]

Moreover, the Public Service Board is not a court of limited jurisdiction. It is an administrative agency, albeit one with some quasi-judicial functions.[6] As Judge Coffrin

5. The Town of Cavendish cites the recent case of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* — U.S. —, — n. 9, 102 S.Ct. 2099, 2104 n. 9, 72 L.Ed.2d 492 (1982), for the proposition that

> [a] party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist. v. Bank,* 308 U.S. 371 [60 S.Ct. 317, 84 L.Ed. 329] (1940); *Stoll v. Gottlieb,* 305 U.S. 165 [59 S.Ct. 134, 83 L.Ed. 104] (1938).

Insurance Corp. of Ireland held that it did not violate due process to subject a foreign corporation to *in personam* jurisdiction as a sanction for failure to cooperate in discovery of facts relating to personal jurisdiction. The Court's statement quoted above is not inconsistent with the holding here. The principles of *res judicata* apply to jurisdictional determinations, but those principles include certain exceptions. On the very same day a unanimous Supreme Court held that "[t]he [federal district] court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action," *Chicot County Drainage Dist., supra,* 308 U.S. 371, 377, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940) (citing *Stoll v. Gottlieb, supra*), that same unanimous Court held that, while "[i]t is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack [citing, *inter alia, Chicot County Drainage Dist., supra,* and *Stoll v. Gottlieb, supra*]," nonetheless, "Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally." *Kalb v. Feuerstein, supra,* 308 U.S. at 438–39, 60 S.Ct. at 345 (1940) (footnotes omitted). Similar federal preemption concerns dictate that the administrative ruling challenged here not be given conclusive *res judicata* value.

6. *See McFeeters v. Parker,* 113 Vt. 139, 143, 30 A.2d 300 (1943):

> The public service commission is to be classed as an agency of the Legislature, and is not a court in the strict sense. *Trybulski v. Bellows Falls Hydro-Elec. Co.,* 112 Vt. 1, 7, 8, 20 A.2d 117, 120. As there said, omitting citations, "The public service commission is an administrative body, clothed in some respects with *quasi* judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to deter-

noted in *Town of Springfield v. State of Vermont Environmental Board, supra,* "finality rules are further relaxed for agency rulings." *Id.* at 247, *citing Grose v. Cohen,* 406 F.2d 823, 824 (4th Cir.1969) ("*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings."). *Cf. United States v. California,* 403 F.Supp. 874, 900–01 (E.D.Cal.1975), *aff'd,* 558 F.2d 1347 (9th Cir. 1977), *rev'd on other grounds,* 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

[9, 10] Where a state court exercises jurisdiction over a matter entrusted to exclusive federal jurisdiction, its judgment and any attempt to enforce the judgment may be "nullities subject to collateral attack." *Kalb v. Feuerstein, supra,* 308 U.S. at 439, 60 S.Ct. at 346 (footnote omitted) (state court proceedings involving the estate of a petitioner in bankruptcy held null and void, whether or not the issue of jurisdiction was actually litigated in the state court, *id.* at 444, 60 S.Ct. at 348). When a state administrative agency takes jurisdiction over a matter committed to exclusive federal jurisdiction, its rulings are likewise subject to collateral attack. The Public Service Board order here challenged is not *res judicata.*

D. *The Anti-Injunction Act*

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Defendants contend this statute prohibits the court from granting declaratory relief voiding the already completed proceedings of a state administrative agency, the Public Service Board. While this initially implausible contention has somewhat more substance to it than might appear on first look, in the last analysis, it must be rejected.

That the statute does not in terms bar declaratory relief makes no difference. Ordinarily, the practical effect of injunctive and declaratory relief will be the same. *Samuels v. Mackell,* 401 U.S. 66, 73, 91 S.Ct. 764, 768, 27 L.Ed.2d 688 (1971). A court that issues a declaratory judgment has the power to enforce it through "[f]urther necessary and proper relief," including an injunction. 28 U.S.C. § 2202.

The defendants argue that the fact that the Public Service Board is an administrative agency does not make the Anti-Injunction Act inapplicable. They contend that the Board, in issuing the declaratory ruling here challenged, was "sitting as a court." Memorandum Supporting Defendant's Application for a Preliminary Determination on the Issues of Jurisdiction, dated June 18, 1982, at 10. Their argument proceeds by analogy from two related but distinct legal doctrines.

[11] The first is the doctrine of administrative exhaustion announced in *Prentis v. Atlantic Coast Line, supra,* 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150. This doctrine requires would-be litigants in federal court seeking to challenge state administrative action to "make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." *Id.* at 230, 29 S.Ct. at 71. In *Prentis,* the Virginia State Corporation Commission set railroad rates, subject to review by the Virginia Supreme Court of Appeals. The Supreme Court, speaking through Justice Holmes, held that the Virginia Supreme Court of Appeals, in reviewing rates, was exercising a "legislative" rather than a judicial function. *Id.* at 227, 29 S.Ct. at 69. *Prentis,* thus, mandates a functional analysis as a part of the inquiry

mine facts upon which existing laws shall operate, and having in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly."

See also Vermont Electric Power Co., Inc. v. Anderson, 121 Vt. 72, 84, 147 A.2d 875 (1959).

into whether further state administrative action is required before a federal court should take jurisdiction.

[12] The second doctrine on which the defendants rely is the rule that the Anti-Injunction Act does not bar injunctions against the administrative actions of a state court. This doctrine was also first set forth in *Prentis:* "Proceedings legislative in nature are not proceedings in a court within the meaning of [the Anti-Injunction Act], no matter what may be the general or dominant character of the body in which they may take place." *Id.* at 226, 29 S.Ct. at 69. Thus, where a state court exercises such nonjudicial powers as control over bar admissions, *Feldman v. Gardner,* 661 F.2d 1295 (D.C.Cir.1981), *petition for cert. filed,* 50 U.S.L.W. 3769 (Feb. 23, 1982); *Harris v. Louisiana State Supreme Court,* 334 F.Supp. 1289, 1299 (E.D.La.1971); approving an Indian's conveyance of land, *Armstrong v. Maple Leaf Apartments, Ltd.,* 508 F.2d 518 (10th Cir.1975); or declaring election returns, *Roudebush v. Hartke,* 405 U.S. 15, 21, 92 S.Ct. 804, 808, 31 L.Ed.2d 1 (1972), the Anti-Injunction Act does not apply.

The defendants urge that when a state administrative agency acts in a judicial capacity, the Anti-Injunction Act should preclude federal court interference. As the plaintiffs correctly point out, this was a question expressly pretermitted in *Prentis, supra,* 211 U.S. at 224–26, 29 S.Ct. at 68–9. In *Prentis,* the Court noted that the Virginia State Corporation Commission had the "power to enforce compliance with its order by adjudging and *enforcing, by its own appropriate process,* against the offending company the fines and penalties established by law." *Id.* at 225, 29 S.Ct. at 69 (emphasis added). The Court went on to "assume, without deciding, that, if it was proceeding against the appellees *to enforce the order and to punish them for a breach,* it then would be sitting as a court and would be protected from interference on the part of the courts of the United States." *Id.* at 226, 29 S.Ct. at 69 (emphasis added).

[13] The court finds it unnecessary to address this assumption, expressly left undecided in *Prentis* and undecided since. *Cf. Gibson v. Berryhill,* 411 U.S. 564, 573 n. 12, 93 S.Ct. 1689, 1695 n. 12, 36 L.Ed.2d 488 (1973); *Delaware Coach Co. v. Public Service Commission,* 265 F.Supp. 648, 652 (D.Del.1967). For the court concludes that, assuming the bar of the Anti-Injunction Act may prevent federal court interference against some quasi-judicial proceedings of state administrative agencies, unless those proceedings are *in rem* the state administrative agency must, at the least, have the power to enforce its own orders for the agency to be deemed a "court" within the meaning of the Act. "A judicial inquiry investigates, declares, *and enforces* liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis, supra,* 211 U.S. at 226, 29 S.Ct. at 69 (emphasis added).[7] "The nature of the final act determines the nature of the previous inquiry." *Id.* at 227, 29 S.Ct. at 69.

[14] That the Vermont Public Service Board may have certain judicial powers, and may observe all the refinements of courtroom procedure, does not alter the fact that it lacks the power to enforce its own orders. By Vermont law, the Public Service Board must apply to the Vermont Su-

7. In *Prentis,* Chief Justice Fuller concurred in the result but dissented from the opinion. He would have held that the Virginia State Corporation Commission was a "court," and, consequently, the Anti-Injunction Act would bar the relief sought. In reaching this conclusion, he considered the following powers of the Corporation Commission important:

> It issued, executed *and enforced* its own writs and processes; it could issue *and enforce* writs of mandamus and injunction; it punished for contempt ... *and its judgments, decrees and orders had the same force and effect as those of any other court of record in the State, and were enforced by its own proper processes. It was not subject to restraint by any other state court,* and from any and every ruling or decision by it an appeal lay to the Supreme Court of Appeals of the State ... and pending the decision of such appeal the order appealed from *might* by a supersedeas be *suspended* in its operation ....

Prentis, supra, at 233, 29 S.Ct. at 72 (opinion of Fuller, C.J., concurring in the judgment, dissenting from the opinion) (emphasis added).

preme Court to enforce its orders. 30 V.S.A. § 15. And although "'[o]rdinarily, when properly applied for, a mandate to enforce such an order would issue almost as a matter of course,'" the Supreme Court will refuse to enforce the order if it represents an abuse of discretion or if the Board's powers were not exercised according to law or in a manner that injures property rights unjustly. *McFeeters v. Parker*, 113 Vt. 139, 144, 30 A.2d 300 (1943), *quoting from West Rutland v. Rutland Ry. Light and Power Co.*, 98 Vt. 508, 511, 129 A. 303 (1925).[8]

Defendants submit that the fact that the Public Service Board must apply to the Vermont Supreme Court for enforcement of its orders is irrelevant, since "[a] proceeding before the Vermont Supreme Court would clearly be a 'State court proceeding' within the purview of the Act." Defendant's Reply to Plaintiffs' Memorandum on the Issues of Jurisdiction Raised in Defendant's Application for a Preliminary Determination, dated July 23, 1982, at 4. A unanimous Supreme Court rejected a similar argument, advanced in a case decided two years before *Prentis* and analogous to the instant case:

> It is also objected that an injunction will not lie from a United States court to stay proceedings in a state court, because of the provisions of [the Anti-Injunction Act]. The [Mississippi Railroad] [C]ommission is, however, not a court, and is a mere administrative agency of the State, as held by the Mississippi court.
>
> It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission, having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision of the state statute in regard to the enforcement solely by the state court of the order of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected.

Mississippi Railroad Commission v. Illinois Central Railroad Co., supra, 203 U.S. 335, 341, 27 S.Ct. 90, 93, 51 L.Ed. 209 (1906) (citations omitted) (Peckham, J., for a unanimous Court). *Cf. Hill v. Martin,* 296 U.S. 393, 402 and n. 14, 56 S.Ct. 278, 282 and n. 14, 80 L.Ed. 293 (1935).

Policy, as well as precedent, supports this interpretation of the Anti-Injunction Act. Where a state chooses to confer a part of its judicial business on an administrative agency and grants the agency the power to enforce its own orders, it makes that agency a part of the state's judicial apparatus. The same considerations of comity between parallel judicial systems that underlie the Anti-Injunction Act's bar against federal court interference with state court proceedings militate against interference with the agency's proceedings. Where a state reserves to its courts the power to enforce an agency's orders, the state court system retains a certain power of oversight over the agency. As already mentioned, in Vermont, the state Supreme Court will not enforce an order of the Public Service Board that it concludes represents an abuse of discretion. *McFeeters v. Parker, supra,* 113 Vt. at 144–45, 30 A.2d 300. For the federal courts to share this power of oversight creates no unseemly intrusion into a parallel judicial system. This shared responsibility for oversight is but an incident of the concurrent obligation of state and federal courts to enforce state and federal law.

[15] If aggrieved with a final state administrative order such as that at issue here, a party with a claim of federal right may pursue state remedies, or may elect to proceed at once to the courts of the United

8. *See* footnote 6, *supra.*

States to enjoin the enforcement of the order. *Bacon v. Rutland Railroad Co.,* 232 U.S. 134, 34 S.Ct. 283, 58 L.Ed. 538 (1914) (Holmes, J., for a unanimous Court) (held, party aggrieved by order of the predecessor of the Vermont Public Service Board could seek equitable relief in the United States District Court for the District of Vermont in lieu of an appeal to the Vermont Supreme Court). The choice of forum belongs to the plaintiff.

At least where the state has drawn a line between state court and state administrative agency by denying the latter the power to enforce its own orders, and if the state administrative agency is not exercising *in rem* jurisdiction, the Anti-Injunction Act does not bar a federal court from enjoining enforcement of the state agency's order. Whether and under what circumstances the Anti-Injunction Act does prevent a federal court from issuing injunctive relief against a state administrative agency that possesses the power to enforce its orders is a question that need not be decided here.

Defendants seek to rely on *Prouty v. Citizens Utility Co.,* 257 F.2d 692 (2d Cir. 1958), *cert. denied,* 358 U.S. 867, 79 S.Ct. 98, 3 L.Ed.2d 99 (1958), a case they allege is "in all material respects, identical" to this case. *Prouty,* however, "rest[ed] on a principle of narrow compass," *id.,* 257 F.2d at 694:

> Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other. The petition for condemnation was a proceeding *in rem,* where the state tribunal must control the property to give effect to its jurisdiction.

Id. (footnote omitted). Since in this case the Public Service Board has not exercised *in rem* jurisdiction, *Prouty* is inapposite to the Anti-Injunction Act issue here.

It is one matter to say that when a state court exercises administrative functions, the Anti-Injunction Act does not apply, *see Feldman v. Gardner, supra;* it is entirely another matter to conclude that an agency exercising certain quasi-judicial powers thereby is a "court" protected by that Act. The Public Service Board lacks the power of enforcement. It exercises narrow, "special and statutory powers not according to the common law, as to which nothing will be presumed in favor of its jurisdiction." *McFeeters v. Parker, supra,* 113 Vt. at 144, 30 A.2d 300. "The courts have power to prevent an abuse of discretion" by the Board, *id.,* and if circumstances justify equitable relief, "the court of chancery will afford a remedy." *Id.* at 145, 30 A.2d 300. Because the Public Service Board is an agency that lacks the power to enforce its order and was not exercising *in rem* jurisdiction in the ruling here collaterally attacked, the Anti-Injunction Act does not apply, and this court shares with the courts of Vermont the power to restrain the Board's proceedings in an exclusively federal domain outside its proper jurisdiction.

E. *Principles of Equity, Comity, and Federalism*

[16] Defendants request that this court abstain from deciding this case for reasons of equity, comity, and federalism. These principles are generally identified with *Younger v. Harris, supra,* and its progeny, but the doctrine of equitable restraint underlying the *Younger* decision has long been applied to both criminal and certain civil proceedings. *Douglas v. City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *cf. Huffman v. Pursue, Ltd.,* 420 U.S. 592, 603–05, 95 S.Ct. 1200, 1207–09, 43 L.Ed.2d 482 (1975). The Supreme Court has recently applied the *Younger* doctrine to preclude federal court interference with pending state enforcement actions in which important state interests in the efficient functioning of the state judicial system or other important state policies are at stake. *Middlesex County Ethics Committee v. Garden State Bar Association,* —— U.S. ——, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (disciplinary proceedings against a lawyer brought by a state agency under the control of the state supreme court); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994

(1979) (emergency custody litigation initiated by the State to protect children from parental abuse); *Trainor v. Hernandez,* 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (attachment proceedings to recover money fraudulently obtained through state welfare programs); *Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (civil contempt proceedings essential to effectuate state court judgments); *Huffman v. Pursue, Ltd., supra,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (public nuisance proceedings initiated by the State).

The proceeding before the Public Service Board was not a state enforcement proceeding, but, rather, was initiated by the Town of Cavendish. Cavendish sought to protect environmental, aesthetic, historical preservation, and economic values, and such other values as "the traditional attachment to home and hearth in Vermont." *See Petition of the Town of Cavendish,* P.S.B. Docket No. 4444, document submitted by Cavendish entitled Scope of Project, filed April 2, 1980, at 2. While these concerns are all important to Vermonters, it cannot escape comment that the Town of Cavendish balanced these values somewhat differently than did the Town of Springfield. Both appeared before the Board essentially as private parties. Both sought to influence the course of the Board's administrative actions. In short, because the proceeding before the Board was begun by a municipality to protect chiefly local interests, and the Vermont courts were not involved at any stage, the two principal reasons for *Younger v. Harris* abstention—deference to a State's efforts to enforce important state policies, and respect for the integrity of the state judicial system, *cf. Huffman v. Pursue, Ltd., supra,* 420 U.S. at 608–09, 95 S.Ct. at 1210—are present here in attenuated form.

[17] To be sure, Cavendish's application to the Public Service Board resulted in the Board's taking jurisdiction over the Town of Springfield's hydroelectric project, and the court is certain that the Board, in exercising that jurisdiction, would desire to enforce policies of importance to the people of Vermont. But the customary deference to state enforcement efforts is suspended when, as in the instant case, the plaintiffs' challenge is that those efforts are preempted under the Supremacy Clause. As Judge Friendly has written, "abstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction." *Chemical Specialties Manufacturers Association, Inc. v. Lowery,* 452 F.2d 431, 433 (1971). Although Judge Friendly was not referring specifically to *Younger v. Harris* abstention, his reasoning applies here in full force. "[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." *Public Utilities Commission v. United States, supra,* 355 U.S. at 540, 78 S.Ct. at 451. *See also Public Utilities Commission v. United Fuel Gas Co.,* 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943); *cf. People v. King,* 463 F.Supp. 749, 751 (D.Nev.1979) (dictum) ("Thus, there is no question that King could have brought an action for declaratory relief against the State in this Court. And, there is no question that, had he done so under the Commerce Clause and preemption theories which he asserts here, this Court would have original jurisdiction over the matter and abstention would be inappropriate.").

In *Bacon v. Rutland Railroad Co., supra,* the Supreme Court unanimously rejected the argument of the Public Service Board's predecessor that until the complainant "had taken the appeal from the order [of the Public Service Commission] to the Supreme Court of the State that is provided by [the predecessor statutes to current 30 V.S.A. §§ 12, 14], it ought not to be heard to complain elsewhere." *Id.,* 232 U.S. at 136–37, 34 S.Ct. at 283. Justice Holmes, writing for the Court, repeated the teaching of *Prentis, supra,* that "at the judicial stage," the plaintiff "had a right to resort to the courts of the United States at once." *Bacon, supra,* at 137, 34 S.Ct. at 284. *Bacon v. Rutland Railroad Co.* remains good law. *See Huffman v. Pursue, Ltd., supra,* 420

U.S. at 610 n. 21, 95 S.Ct. at 1211 n. 21. Accordingly, principles of equity, comity, and federalism do not preclude this court from proceeding to the merits of the plaintiffs' case, especially since plaintiffs' challenge to the Public Service Board's order is predicated on the Supremacy Clause and federal preemption.

II. THE MERITS

As the Public Service Board majority recognized in *Petition of the City of Winooski*, P.S.B. Docket No. 4606 (Jan. 14, 1982), a long line of cases has held that federal jurisdiction over the licensing of hydroelectric projects on navigable waters of the United States preempts state licensing authority. *Id.*, slip op. at 2–3, *citing, inter alia, First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946); *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); *Washington Dept. of Fish and Game v. Federal Power Commission*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087 (1954); *Town of Springfield v. State of Vermont Environmental Board, supra; Citizens Utilities Co. v. Prouty*, 122 Vt. 443, 176 A.2d 751 (1961), *cert. denied*, 369 U.S. 838, 82 S.Ct. 867, 7 L.Ed.2d 842 (1962); *In re Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443, 47 A.2d 409 (1946). "All of this precedent notwithstanding," the majority wrote, "it appears to us that the United States Supreme Court, which is the ultimate authority on matters of federal preemption, has, by a recent decision, signaled its rejection of *First Iowa* and all of its progeny." *Petition of Winooski, supra*, slip op. at 3, *citing California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). In the declaratory ruling challenged in this case, *Petition of the Town of Cavendish, supra*, the Public Service Board found the issue "identical" to that in *Petition of Winooski*, and "adhere[d] to the views expressed in the majority opinion therein." *Petition of Cavendish, supra*, slip op. at 4.

[18] The question for decision is thus whether the Supreme Court has in *California v. United States, supra*, implicitly overruled *First Iowa*. The short answer to this question is that it has not. Six weeks after the Public Service Board issued its ruling in *Petition of Winooski, supra*, and six weeks before it ruled in *Petition of Cavendish, supra*, a unanimous Supreme Court cited *First Iowa* with approval for the proposition that "New Hampshire's purported 'ownership' of the Connecticut River ... provides no justification for restricting or conditioning the use of these federally-licensed [hydroelectric] units." *New England Power Co. v. New Hampshire*, 455 U.S. 331, —— n.6, 102 S.Ct. 1096, 1100 n.6, 71 L.Ed.2d 188 (1982).

In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. *First Iowa* had examined federal preemption of the licensing of hydroelectric projects, and construed § 27 of the Federal Power Act, now codified at 16 U.S.C. § 821. *California v. United States* explored state and federal authority over federal reclamation projects, and interpreted § 8 of the Reclamation Act of 1902, codified at 43 U.S.C. §§ 372, 383. Notwithstanding some similarity in the wording of the statutes, they serve different objectives, and relate to federal actions fundamentally dissimilar in nature.

Section 27 of the Federal Power Act provides:

> 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.

16 U.S.C. § 821.

In *First Iowa*, the Supreme Court construed this statute as being "limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature."

Id., 328 U.S. at 175–76, 66 S.Ct. at 917. The Court rejected an interpretation of § 27 that would have preserved concurrent state jurisdiction over the licensing of hydroelectric plants on navigable waters. *Id.* at 178–81, 66 S.Ct. at 918. It stressed that the Federal Power Act created an "integration" rather than a "duplication" of federal and state jurisdictions. *Id.* at 176, 66 S.Ct. at 917. Certain matters, such as irrigation, were left to the States to regulate, provided such regulation was not inconsistent with federal law. *Id.* at 174–75 and n. 19, 66 S.Ct. at 916 and n. 19. Other matters, such as hydroelectric plant licensing, were left exclusively to the Federal Government. Thus, "without setting up a divided authority over any one subject," both the States and the Federal Government were given a voice in the regulatory plan. *Id.* at 174, 66 S.Ct. at 916 (footnote omitted).

Concurrent jurisdiction over licensing was impermissible, the Court held:

> A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the requirements" of such a duplicated system would be impossible in some cases and probably difficult in most of them.

Id. at 168, 66 S.Ct. at 913 (footnote omitted). Because "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls," concurrent state licensing up to the point of veto was condemned along with the clearly improper "veto power over the federal project" that the power to withhold a state permit implies. *Id.* at 181, 66 S.Ct. at 919 (footnote omitted), 164, 66 S.Ct. at 911. In the licensing stage, federal law covers the field.[9]

[19] Section 9(b) of the Federal Power Act, 16 U.S.C. § 802(b), requires the applicant for a Federal Energy Regulatory Commission (FERC) license to submit "satisfactory evidence" of compliance with state laws relating to the use of water for power purposes. But this subsection "does not itself require compliance with any state laws." *First Iowa, supra,* 328 U.S. at 177, 66 S.Ct. at 918. It is merely a "suggestion to [FERC] of subjects as to which [it] may wish to have some proof submitted to it of the applicant's progress." *Id.* at 177–78, 66 S.Ct. at 918. FERC may wish to see proof of "the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service." *Id.* at 178, 66 S.Ct. at 918. As Judge Coffrin noted in the *Environmental Board* case, "the import of [§ 9(b) and regulations implementing it] leaves no doubt that it is the function of FERC, to the exclusion of the [Environmental] Board and any other state agencies, to act on behalf of the people of Vermont, as well as all others, to ensure that the interests of all concerned are adequately protected." *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 250.

9. As Public Service Board member Bloomberg pointed out in dissent in *Petition of Winooski:*

> A federal license is a comprehensive and detailed document. Directly or by reference to the parties' exhibits, it specifies the size, location and design of the dam, penstocks, powerhouse, generators and other equipment. It further specifies operating conditions, minimum releases, safety requirements, access routes and recreational facilities; and it mandates provisions for the protection of fish and other wildlife, historic sites and the natural environment generally. Moreover, the federal authorities maintain continuing jurisdiction over the project, and may alter the terms of the license or may revoke it if the project is not operated according to its requirements. Because the federal agency is charged with a concern for the financial liability of the project, it must also be presumed that the various conditions imposed by the license constitute the maximum limits consistent with the project's economic health.
>
> There are therefore, virtually no conditions that a local authority could impose that would not be inconsistent with the terms of the federal license. At best, only the most trivial specifications could be required, a result which cannot justify the effort, expense and time required for the Board's review of major generating projects. It would be completely pointless for the Board to act with its powers thus restricted.

Petition of Winooski, supra, dissenting opinion of Samuel S. Bloomberg, slip op. at 5–6.

[20] In *California v. United States, supra,* the Supreme Court held that § 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, requires the Secretary of the Interior to comply with state water law, including any law requiring the obtaining of a state permit, in carrying out federal reclamation projects, unless the state law is clearly inconsistent with a Congressional directive. The statute at issue in the case provides:

> Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 432, 434, 439, 461, 491 and 498 of this title 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 such sections, shall proceed in conformity with such laws, and nothing in such sections 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.

43 U.S.C. § 383.

Justice Rehnquist's opinion for the Court begins with a detailed history of federal and state involvement in the reclamation of the arid lands of the Western States. The lessons of history were important to the Court because

> the situations invoking the application of [principles of comity and federalism] have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so may it be said that the life of the law is not political philosophy but experience.

California v. United States, supra, 438 U.S. at 648, 98 S.Ct. at 2987. The federal experience in reclaiming the arid lands of the West has been that there is a need for uniformity in the regulation of water rights. Rather than create a uniform federal water law from scratch, or create a system of dual rights that would inevitably result in "legal confusion ... if federal water law and state water law reigned side by side in the same locality," *id.* at 669, 98 S.Ct. at 2998. Congress elected to pursue uniformity by deferring to state regulation. *See id.* at 665–70, 98 S.Ct. at 2996–98. The Supreme Court concluded from amply chronicled legislative history that, in impounding water to be used in a federal reclamation project, the Secretary of the Interior must comply with state water law, including the requirement of obtaining a state permit for appropriation of water, if needed, and satisfying any conditions attached to the permit which are not inconsistent with federal law. *Id.* at 647, 98 S.Ct. at 2987.

If there is one theme that runs through both *First Iowa* and *California v. United States,* it is that duplicative regulation is to be avoided. Both the States and the Federal Government have roles to play in regulating the use of our Nation's waters, but their roles are different. The States have been given primary jurisdiction over proprietary rights in water. Local regulation is appropriate because of the legal and geographical differences between the arid Western States, where the doctrine of prior appropriation generally prevails and water rights are subject to strict state regulation, and the Eastern States, where water rights are governed by the doctrine of riparian rights and an abundance of water obviates the need for complex state water distribution plans. On the other hand, the Federal Government has taken exclusive jurisdiction over the licensing of hydroelectric projects on navigable waters. It has established a specialized federal agency, the Federal Energy Regulatory Commission, which has the expertise to evaluate such projects in light of "comprehensive" criteria. *Cf.* 16 U.S.C. § 803(a); *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 249–50. That agency's control over the licensing of hydroelectric projects on navigable waters of the United States is plenary. The proper means by which the Public Service Board and the Town of Cavendish may make sure that

their concerns are taken into account in the construction of the hydroelectric plant the plaintiffs propose to build is to appear before the FERC as parties, as they have a right to do, *see* 18 C.F.R. § 1.8, rather than to subject the plaintiffs to duplicative, and possibly conflicting, regulation.

In sum, *California v. United States* does not implicitly overrule *First Iowa*. The two cases are consistent. Both recognize the need for a uniform system of regulation in which the States perform certain functions and the Federal Government performs other functions. While the Vermont Public Service Board may eventually have jurisdiction over certain aspects of the Black River hydroelectric project, such as rate-setting, it is without jurisdiction over the licensing and approval of the project.

It is DECLARED and ADJUDGED that, under the Federal Power Act and the Supremacy Clause, the jurisdiction of the Federal Energy Regulatory Commission to act on the plaintiffs' application for a license to develop the proposed Black River hydroelectric project is exclusive of the jurisdiction assumed by the majority of the members of the Vermont Public Service Board over the improvements, works, facilities, features, and elements of the Black River project within the plaintiffs' application to FERC for a license for the project. Accordingly, the order entered by the Public Service Board on April 7, 1982, and filed on April 8, 1982, in *Petition of the Town of Cavendish*, P.S.B. Docket No. 4444, exceeds its jurisdiction, and is without legal force and effect. Since no disputed issue of fact is presented, the plaintiffs' motion for summary judgment is GRANTED.

It is so ORDERED.

Ross SUMMERS, Plaintiff,

v.

SEARS, ROEBUCK & CO., Defendant.

Civ. No. 81-73233.

United States District Court,
E.D. Michigan, S.D.

Oct. 18, 1982.

Employee brought action against employer alleging breach of employment contract and unlawful age discrimination, and employee's wife filed claim for loss of consortium. The District Court, Ralph M. Freeman, J., held that: (1) employee could not recover for breach of employment contract based upon his demotion, since employment contract which permitted employer to terminate employee without just cause precluded a legitimate expectation of a just cause determination prior to demotion, and since there was no evidence of any objective circumstances of employee's employment which would support a finding of an implied contract prohibiting employer from demoting employee without just cause; (2) employee's allegation that he was demoted so that a younger person could replace him was insufficient to establish prima facie case of age discrimination under Michigan statutes; and (3) wife could not recover from husband's former employer for loss of consortium, since that claim was wholly derivative of husband's claims of breach of employment contract and age discrimination.

Defendant's motions for summary judgment and dismissal granted.

1. Federal Civil Procedure ⇐2544

Party moving for summary judgment bears burden of clearly establishing the nonexistence of any genuine issue of fact material to a judgment in his favor.

2. Federal Civil Procedure ⇐2544

If movant for summary judgment establishes by use of pleadings, depositions, answers to interrogatories and admissions

state agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

Compliance with other provisions of law setting applicable water quality requirements

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable ef-

fluent imitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Authority of Secretary of Army to permit use of spoil disposal areas by Federal licensees or permittees

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

Limitations and monitoring requirements of certification

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95–217, §§ 61(b), 64, 91 Stat. 1598, 1599.

Historical Note

1977 Amendment. Subsec. (a). Pub.L. 95–217 added reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which had provided that no Federal agency be deemed an applicant for the purposes of this subsection, and redesignated former par. (7) as (6).

Administration of Refuse Act Permit Program. Administration of Refuse Act Permit Program to regulate discharge of pollutants and other refuse matter into navigable waters of the United States or their tributaries, see Ex.Ord. No. 11574, Dec. 23, 1970, 35 F.R. 19627, set out as a note under section 407 of this title.

Legislative History. For legislative history and purpose of Pub.L. 92–500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95–217, 1977 U.S. Code Cong. and Adm.News, p. 4326.

Library References

Navigable Waters ⟹35.

C.J.S. Navigable Waters § 11.

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"In many States there is no legal authority to finance the payment of salaries from State funds based on a hope, or belief, that Federal funds will sooner or later be forthcoming. In addition, the uncertainty of retroactive pay would encourage employees to seek employment elsewhere. Replacement of these valued and experienced employees, when Federal funds do become available, would be extremely difficult. We do not believe the Nation can or should tolerate such a severe disruption in the continuity of its protection of the water environment."

Mr. President, I do not believe that the men and women whose valuable talents have meant so much to progress in water pollution control on the Federal, State and local levels should be held hostage while debate continues over the future shape and scope of the Federal effort. Since only Congress can provide the means to continue their work—either by insisting that S. 2770 become law, or by sustaining a veto and fulfilling its responsibility to enact continuing authority, I urge that you act one way or the other on this legislation before the end of this week so that Congress will have an opportunity to respond.

Sincerely,

EDMUND S. MUSKIE,
U.S. Senator.

LETTER FROM WILLIAM RUCKELSHAUS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION, TO THE OFFICE OF MANAGEMENT AND BUDGET, OCTOBER 11, 1972, RECOMMENDING PRESIDENTIAL APPROVAL OF S. 2770, THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The essential provisions of each Title of the bill are set out below:

Title I—RESEARCH AND RELATED PROGRAMS

1. Goals and Policy—A national goal to eliminate the discharge of pollutants by 1985 is announced. An interim goal—the attainment of water quality to support fish and wildlife and recreation by 1983—is also provided.
2. The law would be changed to provide that EPA determine the need for and the value of water storage in Federal water resource projects for purposes of water quality control.
3. No hydroelectric projects can include storage for the purpose of water quality control unless the Administrator certifies the need. (This is a new provision.)
4. The old section 3(c), Basin Planning Projects, and Federal support are retained.
5. There is a requirement that a national water quality surveillance system monitoring the quality of navigable water, the contiguous zone and ocean be established. EPA is to utilize the resources of NASA, NOAA, USGS, and the Coast Guard in designing such a system.
6. Research on tools and techniques for making cost-benefit studies of activities subject to regulation under the Act shall be conducted and reported to the Congress.
7. The enrolled bill requires that EPA construct the National Marine Water Quality Laboratory.
8. Research and demonstrations on vessel waste systems have been transferred from EPA to the Coast Guard.
9. A waste oil disposal and utilization study is required with a report to the Congress within 18 months.
10. Annual reports will be required on research activities devoted toward developing methods and systems for reducing the total flow of sewage.

Grants for research and development

1. Grants are provided for demonstration river programs.
2. Grants are authorized to assist in the development of waste management methods directed toward no discharge of pollutants and toward new and improved testing methods.

State program grants

State program grants authority under existing law is substantially revised.
1. Authorizations are increased to $60 million in Fiscal Year 1973 and $75 million in Fiscal Year 1974.

... discharger can demonstrate to the satisfaction of the Administrator that a proposed effluent limitation based upon best practicable control technology and best available control technology is more stringent than necessary to protect fish and shellfish, etc., in which event a less stringent effluent limitation may apply. Cooling water intake structures will require best available control technology.

Title IV—PERMITS AND LICENSES

1. A State certification mechanism like that now provided by Section 21 of the Federal Water Pollution Control Act is in the enrolled bill, provided that in place of water quality standards as the determinative criteria, the effluent limitations, guidelines and other requirements of the new law are substituted.

2. No discharge of any pollutant will be permitted, except as authorized by a permit issued under the new Act. No Refuse Act permit may be issued after enactment of the legislation. However, Refuse Act permits heretofore issued shall continue in force and effect as though issued under authority of this enrolled bill.

3. States may be authorized to continue existing permit programs for the purpose of issuing permits under this bill from the date of enactment for up to [illegible] days after enactment. Such State-issued permits are subject to Federal veto.

4. EPA will issue guidelines identifying an adequate State program. EPA in its permit program must conform to these guidelines. After State assumption of a permit-issuing authority, EPA will retain the right, unless waived, to review and approve any permit which affects another State, or any proposed permit, to determine adherence to requirements under the enrolled bill. EPA, after notice and public hearing, may withdraw State permit-issuing authority in the event it determines State failure to adequately implement the requirements of the enrolled bill.

5. When application for a permit has been made, but no final disposition with respect to such application is made prior to December 31, 1974, prosecutions with respect to the discharge which is the subject of such permit application may not be commenced.

6. The Administrator is required to promulgate within 180 days after enactment criteria with respect to ocean waters. These criteria addressing the effect of pollutants on marine ecosystems, etc., parallel the criteria in the ocean dumping legislation now pending. Permits for discharge into the territorial sea, the contiguous zone or ocean waters must be in accord with these criteria.

7. The Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria. EPA may restrict the discharge of dredge material in specified sites if the Administrator determines that such discharge will have an unacceptable adverse effect on municipal water supplies, fishery resources or recreational areas.

8. Additional criteria and a potential additional permit would be required for the disposal of sewage sludge into the navigable waters, notwithstanding the fact that a permit for such dumping may have been obtained pursuant to the ocean dumping Act.

Title V—GENERAL PROVISIONS

1. The enrolled bill provides that the Administrator may seek injunctive relief to restrain any discharge that presents an imminent and substantial danger to public health and welfare (the latter limited to effect on livelihood).

2. Standing to sue is provided citizens or groups to enforce non-discretionary actions of the Administrator or to enforce effluent standards or limitations or orders of the Administrator. Such standing is limited to persons having an interest which is or may be adversely affected. Such suits may not be maintained prior to the rendering of 60-day notice to the alleged violator, the Administrator, and the State concerned or in the event that the Administrator or a State is diligently prosecuting such violation.

3. The Attorney General shall represent the Administrator in all litigation unless the Attorney General fails to take appropriate action within a reasonable time, in which event the Administrator may be represented by his own attorneys.

4. Provisions are made in the law to protect employees who have cooperated in the enforcement and implementation of the enrolled bill.

5. A judicial review of Administrator's action in promulgating standards, containing new source performance standards, effluent limitations, prohibitions, or in issuing or denying any permit may be obtained by interested persons in U.S. Court of Appeals for the appropriate Circuit.

SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972

AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT

Mr. MUSKIE. Mr. President, I submit a report of the committee of conference on S. 2770, and ask for its immediate consideration.

The PRESIDING OFFICER (Mr. Cannon). The report will be stated by title.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2770) to amend the Federal Water Pollution Control Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all the conferees.

The PRESIDING OFFICER. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

Mr. MUSKIE. Mr. President, may I say to my colleagues that we have a 30-minute time agreement here and we should not be troubled by the size of the documentation before me as I shall not take more than 2 minutes to present the report and then there will be several colloquies on points in the report which are of interest to particular Senators. Thus, we should be able to cover the ground quickly in the next 30 minutes.

Mr. President, the conference report on the Federal Water Pollution Control Act Amendments of 1972 is the pending business of the Senate. The Senate approved this legislation on November 2, 1971; the House acted on March 29; and the conference committee began its deliberations on May 11 of this year. Since that first session, we have held 39 meetings of the conference, often starting early in the morning and running late into the evening.

I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope.

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities

CERTIFICATION [Section 401]

The Conferees intend that the certification provision will assure a State water pollution control agency an opportunity to determine whether or not effluent limitations established for discharges subject to a section 402 permit will be at least as stringent as any applicable requirements of existing State program. Secondly, the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State. The Conferees do not intend that any such State conditions would be less strict than the requirements which would be otherwise required by Federal law.

NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM [Section 402]

The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements. The Conferees have retained that portion of the Senate bill which permits the Administrator to waive entirely his authority to review permits for certain categories and classes of pollution sources to all States which receive a delegation. The Administrator is also permitted to specify categories and classes for which he will not review for specific States on the basis of the programs which are in existence in those States.

Additionally, the Conferees have retained the provision of the Senate bill which permits the Administrator to notify a State of intent not to review a specific permit within 90 days in order that the permit issuing process can be expedited. The Conferees also agreed that there should be no enforcement action taken for failure to have a permit until December 31, 1974, in order to provide an adequate opportunity for the Administrator to review and issue or not issue permits for the applications that are pending on date of enactment or will be pending as a result of expansion of the program.

Concern has been expressed that the "immunity" provision will cause dismissal of pending enforcement actions under the Refuse Act of 1899. Section 4 provides the following relevant words pertaining to the Refuse Act: "No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act."

Without any question it was the intent of the Conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other Acts of Congress.

Additionally, it should be noted that the Administrator may immediately act on pending permit applications. Should he deny a permit to an applicant, the enforcement provisions of Section 309 also would be available immediately.

It was suggested to the Conferees that if the Act's definition of "point source" is strictly and literally construed, it would subject discharges from marine engines on recreational vessels to the requirement for obtaining a permit under this Act. Since there are more than 6 million owners of recreational vessels which would be required to obtain permits if this interpretation were adopted, the Conferees believe that inclusion of recreational marine engines under the permit program would result in an unreasonable expenditure of administrative effort. It was further recognized that to require each and every boat owner to obtain a permit for his engine would be unreasonable.

We expect the Coast Guard and the Environmental Protection Agency to review the problems associated with regulation of marine engine discharges and to recommend to the Senate and House Public Works Committees any necessary legislation. Pending the submission of this report we would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines or to institute any prosecution for failure to obtain such a permit. This does not, of course, preclude the Administrator from taking action against the discharges from marine engines of harmful quantities of oil under Section 311 of the Act.

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92D CONGRESS, 1st Session — SENATE — REPORT No. 92-414

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE

TOGETHER WITH

SUPPLEMENTAL VIEWS

TO ACCOMPANY

S. 2770

OCTOBER 28, 1971.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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TITLE IV—PERMITS AND LICENSES

SECTION 401—CERTIFICATION

This section, largely taken from present law, requires that any applicant for a Federal license or permit provide the licensing agency with a certification from the State in which the discharge occurs that any such discharge will comply with Sections 301 and 302.

This section is substantially section 21(b) of existing law (enacted as a part of the Water Quality Improvement Act of 1970) amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.

Subsection (a)(7) has contained a grandfather provision allowing facilities on which construction under a Federal license or permit began before April 3, 1970, three years before any certification would be required. This provision is amended in this bill to except permits under section 402 of this Act or section 13 of the Rivers and Harbors Act of 1899. Certification will be required for all such permits from the date of enactment on, regardless of the time construction of the facility began.

Existing law is further modified by section 401 of this bill to include a definition of certification. The certification provided by a State in connection with any Federal license or permit must set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law and such a certification becomes an enforceable condition on the Federal license or permit.

In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

SECTION 402—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The Administrator may issue a permit for the discharge of pollutants into the navigable waters, or beyond, if the discharge meets applicable requirements of Sections 209, 301, 302, 306, 307, or 308. Any permit issued under Section 13 of the 1899 Refuse Act prior to June 30, 1972, shall be considered a permit pursuant to this section.

92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 92–911

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

MARCH 11, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLATNIK, from the Committee on Public Works, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11896]

The Committee on Public Works, to whom was referred the bill (H.R. 11896) to amend the Federal Water Pollution Control Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * * * *

BACKGROUND

America's waters are in serious trouble, thanks to years of neglect. ignorance and public indifference. Almost from its inception in 1946 the Committee on Public Works has been trying to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset.

Prior to the Reorganization Act of 1946 there had been some legislation enacted in this general field—The Refuse Act of 1899, the Public Health Service Act of 1912 and the Oil Pollution Act of 1924. However, it was not until after the Committee on Public Works was established and considered the problem of water pollution control to be sufficiently serious for national attention that, in 1948, the first comprehensive measure aimed specifically at that problem was enacted. This landmark legislation was Public Law 80–845.

Public Law 80–845 essentially had a five-fold purpose:

1. Authorized the Surgeon General to assist in and encourage State studies and plans, interstate compacts, and creation of uniform State laws to control pollution.

Timely submittal of the required report and recommendations for legislation and financing methods for the post 1976 period is expected.

Section 318—Aquaculture

It is the intention of the Committee to encourage the recycling of pollutants. There is a possibility of doing this with aquaculture. This, however, shall not result in a degradation of the aquatic environment. Therefore, the program is considered to be experimental and the permit program must be carefully controlled and evaluated to insure that the broad public interest in the aquatic environment is not compromised while at the same time making possible the investigation of the potential promise of aquaculture.

Any discharge of pollutants must be in accordance with a permit issued by the Administrator pursuant to regulation. Such regulation shall authorize, on a selective basis, discharges which would otherwise be prohibited as in violation of the requirements of this Act, but which clearly will be controlled in such a way as not to contribute to pollution outside the designated project area. Applicants will be expected to demonstrate, to the satisfaction of the Administrator, that the project will be beneficial, will be controlled so as to preclude the possibility of pollutants reducing waters outside the project area, and that the project will not interfere with designated beneficial uses of the waters in question.

Any permit issued under this section will be enforced by the Administrator pursuant to application provisions of section 309.

TITLE IV—PERMITS AND LICENSES

Section 401—Certification

Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.

Subsection (a)(1) of Section 401 requires any applicant for a Federal license or permit to conduct any activity (this includes constructing or operating facilities) which may result in any discharge into navigable waters to provide the licensing or permitting agency with a certification from the State in which the discharge originates or will originate or a certification from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate if such certification is appropriate from such interstate agency rather than from the State of origin. This certification must state that any such discharge will comply with the "applicable" provisions of sections 301, 302, 306, 307 and 316 of this Act.

The Committee notes that the term "applicable" as used in section 401 has two meanings. It means that the requirement which the term "applicable" refers to must be pertinent and apply to the activity and the requirements must be in existence by having been promulgated or implemented. For example, if a thermal discharge regulation has no relevance to an activity, the State need not certify that the activity will comply with section 316. Similarly, if an effluent limitation has not been established under section 302, obviously a State could not certify that the activity will comply with an effluent limitation under that section.

In the case of any activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, applicable standard under sections 306 and 307 and applicable regulation under section 316, the State would so declare in its certification.

The State is required to provide public notice with respect to all applications received by it for certification and, to the extent that the State determines it appropriate, to establish procedures for holding public hearings with respect to specific applications. If a State or interstate agency has no authority to make such a certification, then the certifications must be obtained from the Administrator of EPA.

In order to insure that sheer inactivity by the State, interstate agency or Administrator as the case may be, will not frustrate the Federal application, a requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on the request for certification, then the certification requirement is waived. If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal if the applicant wishes to do so. No Federal license or permit shall be granted unless this certification has first been obtained or there has been a waiver of the requirement as provided by this subsection. Denial of certification by a State, interstate agency, or the Administrator, as the case may be, results in a complete prohibition against the issuance of the Federal license or permit.

Subsection (a)(2) of section 401 provided that when a licensing or permitting agency receives an application and a certification, it must immediately notify the Administrator thereof. Whenever such a discharge may affect the quality of the waters of any other State as determined by the Administrator then the Administrator shall, within 30 days of the date he is notified of the application for the Federal license or permit, notify such other State, the licensing or permitting agency, and the applicant. If within 60 days thereafter the State so determined to be affected determines that the discharge will affect the quality of its waters so as to violate any water quality requirements in that State and within that 60-day period notifies the Administrator and the licensing or permitting agency of its objection to the issuance of the license or permit and requests a public hearing on its objection, such a public hearing shall be held by the licensing or permitting agency. At that hearing the Administrator shall submit his evaluation and recommendations with respect to the objection to the licensing or permitting agency. Based upon the recommendations of the State, the Administrator, and any additional evidence presented at the hearing, the agency shall condition the license or permit so as to insure compliance with applicable water quality requirements. If conditions cannot insure this compliance, the license or permit shall not be issued.

In the case where a Federal license or permit is required both as to the construction of a facility and its operation, the initial certification required for the construction license or permit shall fulfill the requirements of this subsection with respect to certification for a Federal license or permit to operate that facility unless the certifying State, interstate agency, or Administrator, as the case may be, after having been given notice of the application for an operating license

or permit by the agency to whom the application is made notifies the agency within 60 days that there is no longer reasonable assurance of compliance with applicable provision of sections 301, 302, 306, 307, and 316 because of changes since the construction license or permit certification was issued in (1) the construction or operation of the facility, (2) the characteristics of the waters into which the discharge is made, (3) the water quality criteria applicable to those waters, or (4) applicable effluent limitations or other requirements. This paragraph is made inapplicable if the applicant for the operating license or permit has not provided the certifying State, interstate agency, or Administrator, as the case may be, with notice of any proposed changes in the construction or operation of the facility which changes may result in violation of sections 301, 302, 306, 307, or 316.

Before the initial operation of a federally licensed or permitted facility or activity with respect to which a certification has been obtained under this provision which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee is required to provide an opportunity to the certifying State, agency, or Administrator as the case may be, to review the manner of operation of the facility for the purpose of assuring that applicable effluent limitations or other applicable water quality requirements will not be violated. Upon notification by such certifying State, agency, or Administrator, as the case may be, that operation of this facility will violate applicable effluent limitations or other limitations the Federal agency may, after public hearings suspend the license or permit until notification is received from the certifying State, agency or Administrator, as the case may be, that there is reasonable assurance that the facility or activity will not violate applicable provisions of sections 301, 302, 306, 307 or 316. This right to review the manner of operation of a facility or activity is not to be construed as authority to the State, agency, or Administrator, as the case may be, to impose operational requirements with respect to that facility or activity.

If a judgment is entered under the Federal Water Pollution Control Act that a federally licensed or permitted facility or activity has been operated in violation of applicable provisions of sections 301, 302, 306, 307 or 316, then the Federal license or permit with respect to which a certification has been obtained under this provision may be suspended or revoked by the Federal agency issuing that license or permit.

No Federal agency is to be deemed to be an applicant for the purposes of this subsection.

If the actual construction of a facility has been lawfully commenced prior to April 3, 1970 (the date of enactment of the Water Quality Improvement Act of 1970), then no certification is to be required for a license or permit issued thereafter to operate such facility except that if such a license or permit is issued without this certification it shall terminate April 3, 1973 unless before such date a proper certification is submitted to the licensing or permitting agency and the person having that license or permit otherwise meets the requirements of this subsection.

Subsection (b) provides that nothing in this section is to be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable

water quality requirements. The Administrator is also directed to provide technical assistance to carry out the purposes of this Act.

The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency.

Subsection (c) authorizes the Chief of Engineers to permit the use of spoil disposal areas under his jurisdiction by a Federal licensee or permittee, to charge for that use, with the moneys received to be deposited in miscellaneous receipts of the Treasury. In considering the "public interest" the Chief of Engineers should take into consideration the necessity to maintain non-Federal dock and berthing facilities which are essential to the functioning of the Federal navigation project. In determining the needs and utilization of spoil disposal areas under the jurisdiction of the Chief of Engineers, he should give appropriate consideration to the related requirements of the non-Federal dredging activities and should consider their needs for disposal on the same basis as those of the Federal Government. Where local interests donates land, or shares in the costs of construction of spoil disposal areas, local interest should be permitted reasonable use of the area, utilizing the same standards as set forth in the two preceding sentences, at nominal charge.

Subsection (d) provides that any certifications must set forth any effluent limitations and other limitations and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations (section 301, 302) or standard of performance (section 307), prohibition, effluent standard or pretreatment standard (section 307), or any regulation (section 316) of the Federal Water Pollution Control Act, and the effluent limitations and other limitations and any monitoring requirements will become a condition on any Federal license or permit.

It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters. It is not intended that State certification is or will be required for discharges into the contiguous zone or the oceans beyond the territorial seas.

Section 402—National pollutant discharge elimination system

During the Committee's extensive hearings—oversight and legislative—on water pollution control, one question which kept appearing and reappearing was the appropriate relationship between the Federal Water Pollution Control Act and the permit program initiated by the Corps of Engineers under the authority of the Refuse Act of 1899. Information gathered during the hearings made it abundantly clear that the two programs needed to be consolidated and not left each to go its own direction. The Committee was particularly concerned that the overall administration of the Refuse Act permit program was in the Corps of Engineers and not EPA. Although the Committee has

ESCONDIDO MUTUAL WATER COMPANY, et al., Petitioners

v

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, and PALA BANDS OF MISSION INDIANS et al.

— US —, 80 L Ed 2d 753, 104 S Ct —

[No. 82-2056]

Argued March 26, 1984. Decided May 15, 1984.

Decision: FERC held required to include Interior Secretary's conditions in hydroelectric project licenses for projects within Indian reservations, but Indian Bands' consent not required.

SUMMARY

On competing hydroelectric project licensing applications, the Federal Energy Regulatory Commission ruled that (1) since § 4(e) of the Federal Power Act (16 USCS § 797(e)) does not require it to accept without modification conditions which the Secretary of the Interior deems necessary for the adequate protection and utilization of Indian reservations affected by the project, the Commission would not include in the license conditions proposed by the Secretary for the protection of the Indian reservations, (2) since § 4(e) applies only to reservations physically occupied by project facilities, the Commission would not impose conditions on the licensees with respect to other reservations, and (3) since § 8 of the Mission Indian Relief Act does not empower Mission Indian Bands to veto the issuance of licenses, the Commission granted a license without requiring the licensees to obtain the Indian Bands' consent. The United States Court of Appeals for the Ninth Circuit reversed each of these three rulings (692 F2d 1223, amended 701 F2d 826).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by White, J., expressing the unanimous view of the court, it was held that (1) the Commission was required to include in the license any conditions which the Secretary of the Interior deemed necessary for the protection and utilization of the three reservations in which project works are located, (2) the Commission was required to

nclude the Secretary's conditions in the license only with respect to reservations within which licensed project facilities were located, and (3) the Commission was not required to seek the Indian Bands' permission before exercising its licensing authority with respect to their lands.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Statutes § 164 — construction — language

1. Absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive.

Public Service Commissions § 26.5 — licenses — conditions

2. Under § 4(e) of the Federal Power Act (16 USCS § 797(e)), which provides that hydroelectric project licenses issued thereunder "shall be subject to and contain such conditions as" are deemed necessary to protect government reservations by the Secretary of the department under whose supervision the reservation falls, there are limits on the types of conditions that the Secretary can require to be included in the license, the Secretary has no power to veto all Federal Energy Regulatory Commission's decision to issue a license, and the conditions which the Secretary insists upon must be reasonably related to the protection of the reservation and its people, but the Commission must include in the license the conditions that the Secretary deems necessary, leaving to the Courts of Appeals the determination of whether the conditions are valid.

Public Service Commissions 26.5, 36 — licenses — review

3. Under § 4(e) of the Federal Power Act (16 USCS § 797(e)), which provides that hydroelectric project licenses issued thereunder "shall be subject to and contain such conditions as" are deemed necessary to protect government reservations by the Secretary of the department un-

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64 Am Jur 2d, Public Utilities § 299

24 Federal Procedure, L Ed, Natural and Marine Resources §§ 56:241 et seq.

16 USCS § 797

US L Ed Digest, Public Service Commissions § 26.5

L Ed Index to Annos, Federal Power Commission; Indians

ALR Quick Index, Federal Power Commission; Indians

Federal Quick Index, Federal Energy Regulatory Commission; Indians

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der whose supervision the reservation falls, the Federal Energy Regulatory Commission is required to adopt as its own those conditions which the Secretary concludes are necessary to protect the reservation, and the court is obligated to sustain them if they are reasonably related to that goal, otherwise consistent with the Federal Power Act, and supported by substantial evidence.

Public Service Commissions §§ 26.5, 36 — licenses — review

4a, 4b. If the Federal Energy Regulatory Commission objects to conditions which a department Secretary concludes are necessary to protect government reservations and therefore should be included in hydroelectric project licenses for projects within the reservations, the Commission can refuse to issue a license if it concludes that, as conditioned, the license should not issue, or it can issue the license with the conditions, but express its disagreement with the conditions not only in connection with the issuance of the license but also on review, which allows the license applicant in either event to seek review of the conditions in the Court of Appeals; however, the court must sustain the conditions if they are consistent with law and supported by the evidence presented to the Commission, either by the Secretary or other interested parties.

Public Service Commissions § 26.5 — license — conditions

5a, 5b. Since the Federal Energy Regulatory Commission is not authorized to seek review of its own decisions, conditions placed in a hydroelectric project license under § 4(e) of the Federal Power Act (16 USCS § 797(e)) at the instance of a department Secretary will go into effect notwithstanding the Commission's objection to them if none of the parties to the licensing proceeding seeks review.

Statutes § 157 — agency interpretation

6a, 6b. An agency's interpretation of its governing statute, even if well established, cannot be sustained if it conflicts with the clear language and legislative history of the statute.

Administrative Law § 238 — review — new issues

7a, 7b. Hydroelectric project licensees from the Federal Energy Regulatory Commission who do not object, in their petition for rehearing to the Commission, to the Commission's conclusion that their application is subject to the new licensing statutory provisions rather than to the relicensing provisions, may not challenge that conclusion before the United States Supreme Court.

Public Service Commissions § 26.5 — licenses — conditions

8. The proviso to § 4(e) of the Federal Power Act (16 USCS § 797(e)) providing that hydroelectric project licenses issued "within" government reservations "shall be subject to and contain such conditions as the Secretary of the department under whose jurisdiction such reservation falls shall deem necessary for the adequate protection and utilization of such reservation," imposes no obligation on the Federal Energy Regulatory Commission or power upon the Secretary with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works.

Public Service Commissions § 26.5 — licenses — conditions

9. In complying with its duty u[illegible]

der 16 USCS § 803(a) to shape a hydroelectric project license so that the project is best adapted for the improvement and utilization of water-power development and for "other beneficial purposes, including recreational purposes," the Federal Energy Regulatory Commission can require the licensee to structure the project so as to avoid any undue injury to federal reservations, and can even require that, as a condition of the license, the licensee surrender some of its water rights in order to protect such reservations if the Commission determines that such action would be in the public interest.

Indians § 33.5; Public Service Commissions § 26.5 — reservations — licenses

10. Section 8 of the Mission Indian Relief Act (26 Stat 712 et seq.), which authorizes private parties to enter into contracts with Mission Indian Bands for water rights of way across tribal lands, does not empower the Mission Indian Bands to veto the issuance of a license for hydroelectric project works on an Indian reservation; hence, the Federal Energy Regulatory Commission need not seek the Bands' permission before it exercises its licensing authority with respect to their lands.

Indians § 10 — sovereignty — defeasance

11a, 11b. All aspects of Indian sovereignty are subject to defeasance by Congress.

SYLLABUS BY REPORTER OF DECISIONS

Section 4(e) of the Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (Commission) to issue licenses for the construction, operation, and maintenance of hydroelectric project works located on the public lands and reservations of the United States, including lands held in trust for Indians. The section contains a proviso that such licenses shall be issued "within any reservation" only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired, and "shall be subject to and contain such conditions as the Secretary of the Department under whose jurisdiction such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." Section 8 of the Mission Indian Relief Act of 1891 (MIRA), pursuant to which six reservations were established for respondent Indian Bands (respondents), provides that any United States citizen, firm, or corporation may contract with the Bands for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through their reservations, which contract shall not be valid unless approved by the Secretary of the Interior (Secretary) under such conditions as he may see fit to impose. When the original license covering hydroelectric facilities located on or near the six reservations, including a canal that crosses respondent La Jolla, Rincon, and San Pasqual Bands' reservations, was about to expire, petitioner Escondido Mutual Water Co. (Mutual) and petitioner city of Escondido filed an application with the Commission for a new license. Thereafter the Secretary requested that the Commission recommend federal takeover of the project,

and respondents applied for a non-power license. After hearings on the competing applications, an Administrative Law Judge concluded that the project was not subject to the Commission's licensing jurisdiction. The Commission reversed and granted a license to Mutual, Escondido, and petitioner Vista Irrigation District, which had been using the canal in question. The Court of Appeals in turn reversed the Commission, holding, contrary to the Commission, (1) that § 4(e) of the FPA required the Commission to accept without modification any license conditions recommended by the Secretary; (2) that the Commission was required to satisfy its § 4(e) obligations with respect to all six of the reservations and not just the three through which the canal passes; and (3) that § 8 of the MIRA required the licensees to obtain right-of-way permits from respondent La Jolla, Rincon, and San Pasqual Bands before using the license facilities located on their reservations.

Held:

1. The plain command of § 4(e) of the FPA requires the Commission to accept without modification conditions that the Secretary deems necessary for the adequate protection and utilization of the reservations. Nothing in the legislative history or statutory scheme is inconsistent with this plain command.

2. But the Commission must make its "no inconsistency or interference" findings and include the Secretary's conditions in the license only with respect to projects located "within" the geographical boundaries of a federal reservation. It is clear that Congress concluded that reservations were not entitled to the protection of § 4(e)'s proviso unless some of the licensed works were actually within the reservation. Thus, the Court of Appeals erred in holding that the Commission's § 4(e) obligation to accept the Secretary's conditions and to make such findings applied to the three reservations on which no licensed facilities were located.

3. Section 8 of the MIRA does not require licensees to obtain respondents' consent before they operate license facilities located on reservation lands. While § 8 gave respondents authority to determine whether to grant rights-of-way for water projects, that authority did not include the power to override Congress' subsequent decision in enacting the FPA that all lands, including tribal land, could, upon compliance with the FPA, be utilized to facilitate licensed hydroelectric projects.

692 F2d 1223 and 701 F2d 826, affirmed in part, reversed in part, and remanded.

White, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Paul D. Engstrand argued the cause for petitioners.

Jerome M. Feit argued the cause for respondent Federal Energy Regulatory Commission, urging reversal.

Elliott Schulder argued the cause for respondent Secretary of Interior.

Robert S. Pelcyger argued the cause for respondents Mission Indian Bands.

Justice White delivered the opinion of the Court.

Section 4(e) of the Federal Power Act (FPA), 16 USC § 797(e) [16 USCS § 797(e)], authorizes the Federal Energy Regulatory Commission (the Commission)[1] to issue licenses for the construction, operation and maintenance of hydroelectric project works located on the public lands and reservations of the United States, including lands held in trust for Indians. The conditions upon which such licenses may issue are contained in § 4(e) and other provisions of the FPA. The present case involves a dispute among the Commission, the Secretary of Interior (the Secretary), and several Bands of the Mission Indians over the role each is to play in determining what conditions an applicant must meet in order to obtain a license to utilize hydroelectric facilities located on or near six Mission Indian reservations.

I

The San Luis Rey River originates near the Palomar Mountains in northern San Diego County, California. In its natural condition, it flows through the reservations of the La Jolla, Rincon, and Pala Bands of Mission Indians. The reservations of the Pauma, Yuima,[2] and three-quarters of the reservation of the San Pasqual Bands of Mission Indians are within the river's watershed. These six Indian reservations were permanently established pursuant to the Mission Indian Relief Act of 1891 (MIRA), ch 65, 26 Stat 712 et seq.

Since 1895, Petitioner Escondido Mutual Water Company (Mutual) and its predecessor in interest have diverted water out of the San Luis Rey River for municipal uses in and around the cities of Vista and Escondido. The point of diversion is located within the La Jolla reservation, upstream from the other reservations. Mutual conveys the water from the diversion point to Lake Wohlford, an artificial storage facility, by means of the Escondido canal, which crosses parts of the La Jolla, Rincon, and San Pasqual reservations.[3]

In 1915, Mutual constructed the Bear Valley powerhouse downstream from Lake Wohlford. Neither Lake Wohlford nor the Bear Valley plant is located on a reservation. In 1916, Mutual completed construction

1. The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 USC §§ 7172(a), 7295(b) [42 USCS §§ 7172(a), 7295(b)].

2. The Yuima tracts of land are under the jurisdiction of the Pauma Band. Thus, while there are six Mission Indian reservations involved in the present dispute, only five Indian Bands are represented.

3. Various agreements, dating back to 1894, among the Secretary of the Interior, the Bands whose land the canal traverses, and Mutual and its predecessor purportedly grant Mutual rights-of-way for the canal in exchange for supplying certain amounts of water to the Bands. The validity of these agreements is the subject of separate, pending litigation instituted by the Bands in 1969. Rincon Band of Mission Indians v Escondido Mutual Water Co, Nos. 69-217A, 72-276-S & 72-271-S (SD Ca).

In addition, the Bands have sued the United States pursuant to the Indian Claims Commission Act, ch 959, 60 Stat 1049, 25 USC 70 et seq. [25 USCS §§ 70 et seq.], for failure to protect their water rights. Long v United States, No. 80-A1 (Ct Cl). That proceeding is also pending.

of the Rincon powerhouse, which is located on the Rincon reservation. Both of these powerhouses generate electricity by utilizing waters diverted from the river through the canal.

Following the enactment of the Federal Water Power Act of 1920, ch 285, 41 Stat 1063 (codified as part I of the FPA, 16 USC §§ 791a et seq. [16 USCS §§ 791a et seq.]), Mutual applied to the Commission for a license covering its two hydroelectric facilities. In 1924, the Commission issued a 50-year license covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses.

The present dispute began when the 1924 license was about to expire. In 1971, Mutual and the City of Escondido filed an application with the Commission for a new license. In 1972, the Secretary requested that the Commission recommend federal takeover of the project after the original license expired.[4] Later that year, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to § 15(b) of the FPA,[5] applied for a non-power license under the supervision of Interior, to take effect when the original license expired. The Pauma and Pala Bands eventually joined in this application.

After lengthy hearings on the competing applications,[6] an administrative law judge concluded that the project was not subject to the Commission's licensing jurisdiction because the power aspects of the project were insignificant in comparison to the project's primary purpose—conveying water for domestic and irrigation consumption.[7] The Commission, however, reversed that decision and granted a new 30-year license to Mutual, Escondido, and the Vista Irrigation District, which had been using the canal for sometime to convey water pumped from Lake Henshaw, a lake located some nine miles above Mutual's diversion dam.

In its licensing decision, the Commission made three rulings that are the focal point of this case. First, the Commission ruled that § 4(e) of the

4. Section 14(b), 16 USC § 807(b) [16 USCS § 807(b)], of the FPA authorizes the Commission to recommend to Congress that the federal government take over a project following expiration of the license. If Congress enacts legislation to that effect, the project is operated by the government upon payment to the original licensee of its net investment in the project and certain severance damages.

5. Section 15(b), 16 USC § 808(b) [16 USCS § 808(b)], authorizes the Commission to grant a license for use of a project as a "nonpower" facility if it finds the project no longer is adapted to power production. In that event, the new licensee must make the same payments to the original licensee that are required of the United States pursuant to Section 14(b). See note 4 supra.

6. Earlier, the Secretary of Interior and the La Jolla, Rincon, and San Pascual Bands filed complaints with the Commission, alleging that Mutual violated the provisions of the 1924 license by permitting Vista Irrigation District to use the project facilities and by using the canal to divert water pumped from a lake created by Vista nine miles above Mutual's diversion dam. They sought, among other things, an increase in the annual charges paid to the Bands under the license. These complaints were considered in conjunction with the competing applications, and the Commission awarded readjusted annual charges to the three Bands. The Commission's resolution of that issue is not before us.

7. The Bear Valley powerhouse has a generating capacity of only 520 kilowats. The Rincon powerhouse is capable of producing only 240 kilowats. The administrative law judge noted that "[t]he horsepower generated by the entire project is not even the equivalent to that produced by a half dozen modern automobiles." JA at 358.

FPA did not require it to accept without modification conditions which the Secretary deemed necessary for the adequate protection and utilization of the reservations.[8] Accordingly, despite the Secretary's insistence, the Commission refused to prohibit the licensees from interfering with the Bands' use of a specified quantity of water, Appendix to Petition for Certiorari, at 148 & n 146, or to require that water pumped from a particular groundwater basin[9] not be transported through the licensed facilities without the written consent of the five Bands, id., at 149 & n 147. Other conditions proposed by the Secretary were similarly rejected or modified. See id., at 147–155. Second, although it imposed some conditions on the licensees in order to "preclude any possible interference or inconsistency of the power license . . . with the purpose for which the La Jolla, Rincon, and San Pasqual reservations were created,"[10] id., at 173, the Commission refused to impose similar conditions for the benefit of the Pala, Pauma, and Yuima reservations, ruling that its § 4(e) obligation in that respect applies only to reservations that are physically occupied by project facilities. Finally, the Commission rejected the arguments of the Bands and the Secretary that a variety of statutes, including § 8 of the MIRA, required the licensees to obtain the "consent" of the Bands before the license could issue.

On appeal, the Court of Appeals for the Ninth Circuit reversed each of these three rulings. 692 F2d 1223, *amended,* 701 F2d 826 (CA9 1983). The court held that section 4(e) requires the Commission to accept without modification any license conditions recommended by the Secretary, subject to subsequent judicial review of the propriety of the conditions, that the Commission is required to satisfy its § 4(e) obligations with respect to all six of the reservations affected by the project and not just the three through which the canal passes, and that § 8 of the MIRA requires the licensees to obtain right-of-way permits from the La Jolla, Rincon, and San Pasqual Bands before using the licensed facilities located on the reservations.[11] Mutual, Escondido, and Vista filed the present petition for certiorari, which we granted, —— US ——, 78 L Ed 2d 253, 104 S Ct 272, challeng-

8. The Commission concluded that section 4(e) required it "to give great weight to the judgments and proposals of the Secretaries of the Interior and Agriculture" but that under § 10(a), it retained ultimate authority for determining "the extent to which such conditions will in fact be included in particular licenses." Appendix to Petition for Certiorari, at 146.

9. Groundwater is water appearing beneath the surface of the earth. The condition suggested by the Secretary applied to water which Vista pumped from the Warner groundwater basin underlying Lake Henshaw and its headwaters in order to augment the natural flows into the lake.

10. For example, the Commission required the licensees to permit the three Bands to use certain quantities of water under certain circumstances. See Appendix to Petition for Certiorari, at 173–190.

11. Judge Anderson dissented from the order entered on petition for rehearing, 701 F2d, at 827–831, concluding that neither § 8 of the MIRA nor § 16 of the Indian Reorganization Act, 25 USC § 476 [25 USCS § 476], requires that tribal consent be obtained before the Bands' lands can be used for a hydroelectric project licensed under the FPA. He also concluded that the Secretary's § 4(e) conditions have to be included in the license only to the extent they are reasonable and that the reasonableness determination is to be made initially by the Commission.

ing all three of the Court of Appeals' rulings.[12] We address each in turn.

II

Section 4(e) provides that licenses issued under that section "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 USC § 797(e) [16 USCS § 797(e)]. The mandatory nature of the language chosen by Congress appears to require that the Commission include the Secretary's conditions in the license even if it disagrees with them. Nonetheless, petitioners[13] argue that an examination of the statutory scheme and legislative history of the Act shows that Congress could not have meant what it said. We disagree.

[1] We first note the difficult nature of the task facing petitioners. Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" North Dakota v United States, —— US ——, ——, 75 L Ed 2d 77, 103 S Ct 1095 (1983) (quoting Consumer Product Safety Commission v GTE, 447 US 102, 108, 64 L Ed 2d 766, 100 S Ct 2051 (1980)). Congress' apparent desire that the Secretary's conditions "shall" be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary.

Petitioners initially focus on the purpose of the legislation that became the relevant portion of the FPA. In 1920, Congress passed the Federal Water Power Act in order to eliminate the inefficiency and confusion caused by the "piecemeal, restrictive, negative approach" to licensing prevailing under prior law. First Hydro-Electric Cooperation v FPC, 328 US 152, 180, 90 L Ed 1143, 66 S Ct 906 (1946). See HR Rep No. 61, 66th Cong 1st Sess 4–5 (1919). Prior to passage of the Act, the Secretaries of Interior, War, and Agriculture each had authority to issue licenses for hydroelectric projects on lands under their respective jurisdiction. The Act centralized that authority by creating a Commission, consisting of the three Secretaries,[14] vested with exclusive authority to issue licenses. Petitioners contend that Congress could not have intended to empower the Secretary to require that conditions be included in the license over the objection of the Commission because that would frustrate the purpose of centralizing licensing procedures.

Congress was no doubt interested in centralizing federal licensing authority into one agency, but it is clear that it did not intend to relieve

12. The Court of Appeals affirmed the Commission's conclusion that it had jurisdiction over the project, and the parties have not sought review of that ruling.

13. The Commission did not petition for review of the Court of Appeals' decision but filed a brief and appeared at oral argument urging reversal. Since the Commission's arguments largely parallel those presented by Mutual, Escondido, and Vista, our use of the term petitioners includes the Commission.

14. In 1930, the Commission was reorganized as a five-person body, independent from the Secretaries. Act of June 23, 1930, ch 572, 46 Stat 797.

the Secretaries of all responsibility for ensuring that reservations under their respective supervision were adequately protected. In a memorandum explaining the Administration bill, the relevant portion of which was enacted without substantive change,[15] O. C. Merrill, one of the chief draftsmen of the Act and later the first Commission Secretary, explained that creation of the Commission "will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers." Memorandum on Water Power Legislation From O. C. Merrill, Chief Engineer, Forest Service, Dated October 31, 1917, J. A., at 371. With regard to what became Section 4(e), he wrote:

> "4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and War.
>
> "This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction." Id., at 373–374.

Similarly, during hearings on the bill, Secretary of Agriculture Houston explained that the Grand Canyon did not need to be exempted from the licensing provisions, stating:

> "I can see no special reason why the matter might not be handled safely under the provisions of the proposed measure, which requires that developments on Government reservations may not proceed except with the approval of the three heads of departments—the commission—with such safeguards as the head of the department immediately charged with the reservation may deem wise." Water Power: Hearings Before the House Comm on Water Power, 65th Cong, 2d Sess 677 (1918) (emphasis added).

The members of Congress understood that under the Act the Secretary of the Interior had authority with respect to licenses issued on Indian reservations over and above that possessed by the other Commission members. Sen. Walsh of Montana, a supporter of the Act, explained:

> "[W]hen an application is made for a license to construct a dam within an Indian reservation, the matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. *Furthermore, the head of the department must agree; that is to say, the*

15. Between 1914 and 1917, four bills dealing with the licensing of hydroelectric projects were introduced into Congress, none successfully. In 1918, a bill prepared by the Secretaries of War, Interior, and Agriculture, at the direction of President Wilson, was introduced. HR 8716, 65th Cong, 2d Sess (1918). It contained the language of the § 4(e) proviso basically as it is now framed. Because of the press of World War I and other concerns, the legislation was not enacted until 1920. See J Kerwin, Federal Water-Power Legislation 217–263 (1926).

> *Secretary of the Interior in the case of an Indian reservation must agree that the license shall be issued.*" 59 Cong Rec 1564 (1920) (emphasis added).

It is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdiction. The legislative history concerning § 4(e) plainly supports the conclusion that Congress meant what it said when it stated that the license "shall . . . contain such conditions as the Secretary . . . shall deem necessary for the adequate protection and utilization of such reservations."[16]

Petitioners next argue that a literal reading of the conditioning proviso of § 4(e) cannot be squared with other portions of the statutory scheme. In particular, they note that the same proviso that grants the Secretary the authority to qualify the license with the conditions he deems necessary also provides that the Commission must determine that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 USC § 797(e) [16 USCS § 797(e)]. Requiring the Commission to include the Secretary's conditions in the license over its objection, petitioners maintain, is inconsistent with granting the Commission the power to determine that no interference or inconsistency will result from issuance of the license because it will allow the Secretary to "veto" the decision reached by the

16. Petitioners note that in 1930, when the structure of the Commission was changed, see note 14, supra, James Lawson, then Acting Chief Counsel of the Commission, stated that under the structure then in existence, "[t]he Commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation." Investigation of Federal Regulations of Power: Hearings Pursuant to S Res 80 and S 3619 Before the Senate Comm on Interstate Commerce, 71st Cong, 2d Sess 358 (1930). This snippet of post-enactment history does not help petitioners' cause at all. All parties agree that the Commission has the authority to make a finding that "the license will not interfere *or be inconsistent* with the purpose for which such reservation was created or acquired." 16 USC § 797(e) [16 USCS § 797(e)]. This is separate from the Secretary's authority to condition the license for the adequate protection and utilization of the reservation. Lawson's statement was clearly concerned with the former. Indeed, a contemporaneous memorandum by the Commission's legal staff (of which Lawson was the head), stated that the Secretary of Interior had authority under what is now § 4(e) "to prescribe conditions to be inserted in the license for the protection and utilization of the reservation." Memorandum of Sept. 20, 1929, at 23; Certificate of Record in the Court of Appeals, at 24, 421. It may well be that in a particular case the conditions suggested by the Secretary will unduly undermine the Commission's licensing judgment. However, as noted at ——, infra, 80 L Ed 2d ——, that is a determination the court of appeals is to make.

Similarly misplaced is petitioners' reliance on the fact that once the bill was passed, President Wilson, at the request of the Secretary of the Interior, withheld his signature until Congress agreed that it would pass legislation in its next session removing national parks and monuments from the scope of the Act. Contrary to petitioners' assertion, this does not show that the Secretary knew that § 4(e) did not grant him enough authority to protect these lands, which were within his "conditioning" jurisdiction. Rather, the Secretary objected to the inclusion of national parks and monuments in the legislation because he believed that Congress, not the Commission, should decide on a case-by-case basis whether any hydroelectric development should occur in these areas. HR Rep 1299, 66th Cong 3d Sess 2 (1921).

Commission. Congress could not have intended to "paralyze with one hand what it sought to promote with the other," American Paper Institute, Inc. v American Electric Power Service Corp., —— US ——, ——, 76 L Ed 2d 22, 103 S Ct 1921 (1983) (quoting Clark v Uebersee Finanz-Korporation, A.G., 332 US 480, 489, 92 L Ed 88, 68 S Ct 174 (1947)), petitioners contend.

[2] This argument is unpersuasive because it assumes the very question to be decided. All parties agree that there are limits on the types of conditions that the Secretary can require to be included in the license:[17] the Secretary has no power to veto the Commission's decision to issue a license and hence the conditions he insists upon must be reasonably related to the protection of the reservation and its people.[18] The real question is whether the Commission is empowered to decide when the Secretary's conditions exceed the permissible limits. Petitioners' argument assumes that the Commission has the authority to make that decision. However, the statutory language and legislative history conclusively indicate that it does not; the Commission "shall" include in the license the conditions the Secretary deems necessary. It is then up to the courts of appeals to determine whether the conditions are valid.[19]

[3, 4a, 5a, 6a] Petitioners contend that such a scheme of review is inconsistent with traditional principles of judicial review of administrative action. If the Commission is required to include the conditions in the license even though it does not agree with them, petitioners argue, the courts of appeals will not be in a position to grant deference to the Commission's findings and conclusions because those findings and conclusions will not be included in the license. However, that is apparently exactly what Congress intended. If the Secretary concludes that the conditions are necessary to protect the reservation, the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal, otherwise consistent with the FPA, and supported by substantial evidence.[20] The fact that in

17. Even the Secretary concedes that the conditions must be "reasonable and supported by evidence in the record." Brief for the Secretary of the Interior, at 37. See also Oral Transcript, at 20.

18. By its terms, § 4(e) requires that the conditions must be "necessary for the adequate protection and utilization of such reservations." At oral argument, the Secretary agreed that the conditions should ultimately be sustained only if they "are reasonably related to the purpose of ensuring that the purposes of the reservation are adequately protected, and that the reservation is adequately utilized." Oral Transcript, at 22.

19. Section 313(b) of the FPA provides that the Commission's orders, including licenses, can be reviewed "in the United States court of appeals for any circuit wherein the licensee . . . is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 16 USC § 8251(b) [16 USCS § 8251(b)].

20. **[4b]** Of course, the Commission is not required to argue in support of the conditions if it objects to them. Indeed, it is free to express its disagreement with them, not only in connection with the issuance of the license but also on review. Similarly, the Commission can refuse to issue a license if it concludes that, as conditioned, the license should not issue. In either event, the license applicant can seek review of the conditions in the court of appeals, but the court is to sustain the conditions if they are consistent with law and supported by the evidence presented to the Commission, either by the Secretary or other interested parties. 18 USC § 8251(b) [18 USCS § 8251(b)].

reality it is the Secretary's, and not the Commission's, judgment to which the court is giving deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation.[21] There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.[22]

[7a] In short, nothing in the legislative history or statutory scheme is inconsistent with the plain command of the statute that licenses issued within a reservation by the Commission pursuant to § 4(e) "shall be subject to and contain such conditions as the Secretary . . . shall deem necessary for the adequate protection and utilization of such reservations." Since the Commission failed to comply with this statutory command when it issued the license in this case, the Court of Appeals correctly reversed its decision in this respect.[23]

[5b] We note that in the unlikely event that none of the parties to the licensing proceeding seeks review, the conditions will go into effect notwithstanding the Commission's objection to them since the Commission is not authorized to seek review of its own decisions. The possibility that this might occur does not, however, dissuade us from interpreting the statute in accordance with its plain meaning. Congress apparently decided that if no party was interested in the differences between the Commission and the Secretary, the dispute would best be resolved in a non-judicial forum.

21. Petitioners also contend that the Secretary's authority to impose conditions on the license is inconsistent with the Commission's authority and responsibility under § 10(a) to determine that "the project adopted . . . will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial uses." 16 USC § 803(a) [16 USCS § 803(a)]. Our discussion of the alleged conflict between the Commission's authority to make its "no interference or inconsistency" determination and the Secretary's conditioning authority applies with equal force to this contention. The ultimate decision whether to issue the license belongs to the Commission, but the Secretary's proposed conditions must be included if the license issues. Any conflict between the Commission and the Secretary with respect to whether the conditions are consistent with the statute must be resolved initially by the courts of appeals, not the Commission.

[6b] Petitioners' assertion that the conditions proposed by the Secretary in this case were outside the Commission's authority to adopt goes to the validity of the conditions, an issue not before this Court. It may well be that the conditions imposed by the Secretary are inconsistent with the provisions of the FPA and that they are therefore invalid (something we do not decide), but that issue is not for the Commission to decide in the first instance but is reserved for the court of appeals at the instance of the licensees and with the participation of the Commission if it is inclined to present its views.

22. [7b] Petitioners also contend that the Commission's longstanding interpretation of § 4(e) is entitled to deference, citing language from its early decisions. E.g., Pigeon River Lumber Co., 1 FPC 206, 209 (1935); Southern California Co. v Edison Co., 8 FPC 364, 386 (1949). Petitioners' concede, however, that the Commission never actually rejected any of the Secretary's conditions until 1975. Pacific Gas & Electric Co., 53 FPC 523, 526 (1975). Even then, the issue was not squarely presented because there was some question whether § 4(e) even applied in that proceeding. Ibid. It is therefore far from clear that the Commission's interpretation is a longstanding one. More importantly, an agency's interpretation, even if well established, cannot be sustained if, as in this case, it conflicts with the clear language and legislative history of the statute.

23. Mutual, Escondido, and Vista assert that § 4(e) is not at issue in this case because this is a relicensing procedure governed by § 15(a). The Commission was of a different view and dealt with the case as an original licensing procedure since the new license included facilities not covered by the 1924 license and since the project being relicensed

III

The Court of Appeals also concluded that the Commission's § 4(e) obligations to accept the Secretary's proposed conditions and to make findings as to whether the license is consistent with the reservation's purpose applied to the Pala, Yuima, and Pauma reservations even though no licensed facilities were located on these reservations. Petitioners contend that this conclusion is erroneous. We agree.

Again, the statutory language is informative and largely dispositive. Section 4(e) authorizes the Commission:

> To issue licenses . . . for the purpose of constructing dams . . . or other project works . . . upon any part of the public lands and reservations of the United States . . . *Provided,* that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose jurisdiction such reservation falls shall deem necessary for the adequate protection and utilization of such reservations . . . .

If a project is licensed "within" any reservation, the Commission must make a no interference or inconsistency finding with respect to "such" reservation, and the Secretary may impose conditions for the protection of "such" reservation. Nothing in the section requires the Commission to make findings about, or the Secretary to impose conditions to protect, any reservation other than the one within which project works are located. The section imposes no obligation on the Commission or power upon the Secretary with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works.

The Court of Appeals, however, purported to discover an ambiguity in the term "within." Positing that the term "reservations" includes not only tribal lands but tribal water rights, the Court of Appeals reasoned that since a project could not be "within" a water right, the term must have a meaning other than its literal one. This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive.

[8] There is no doubt that "reservations" include "interests in lands owned by the United States"[24] and that for many purposes water rights are considered to be interests in

was "so materially different from the project . . . which was licensed in 1924 that little more than the project number remains the same." Appendix to Petition for Certiorari, at 137. The licensees did not object to this conclusion in their petition for rehearing to the Commission, and they may not challenge it now, 16 USC § 8251(b) [16 USCS § 8251(b)]. Accordingly, we have no reason to decide whether § 4(e) applies to relicensing proceedings.

24. Section 3(2) of the FPA provides:

"'[R]eservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws . . . ." 16 USC 796(2) [16 USCS § 796(2)].

among other things,[26] "no public lands or reservations are affected." 16 USC § 817 [16 USCS § 817]. Respondents argue that it would make no sense to conclude that Congress intended to require the Commission to exercise its licensing jurisdiction when a reservation is "affected" by such a project if it did not also intend to afford those reservations all of the protections outlined in § 4(e). However, that is exactly the conclusion that the language of § 4(e) compels, and, contrary to Respondents' argument, there is nothing illogical about such a scheme.

Under § 4(e), the Commission is authorized to license projects in two general types of situations, when the project is located on waters (navigable or non-navigable) over which Congress has jurisdiction under the Commerce Clause and when the project is located upon any public lands or reservations. It is clear that the Commission's obligations to make a "no inconsistency or no interference" determination and to include the Secretary's conditions in the license apply only in the latter situation—when the license is issued "within any reservation." The fact that a person is required to obtain a license in the former situation anytime a project on non-navigable waters affects a reservation indicates only that Congress concluded that in such circumstances the possible disruptive effects of such a project were so great that the Commission should regulate the project through its licensing powers. That is not, as Respondents seem to imply, a meaningless gesture if all of the provisions of § 4(e) do not apply.

[9] Even if the Commission is not required to comply with all of the requirements of § 4(e) when it issues such a license, it is still required to shape the license so that the project is best adapted, among other things, for the improvement and utilization of water-power development and for "other beneficial purposes, including recreational purposes." 16 USC § 803(a) [16 USCS § 803(a)]. In complying with that duty, the Commission is clearly entitled to consider how the project will affect any federal reservations and to require the licensee to structure the project so as to avoid any undue injury to those reservations. See Udall v FPC, 387 US 428, 450, 18 L Ed 2d 869, 87 S Ct 1712 (1967). As noted above, ——, supra, 80 L Ed 2d ——, the Commission can even require that, as a condition of the license, the licensee surrender some of its water rights in order to protect such reservations if the Commission determines that such action would be in the public interest. However, it is clear that Congress concluded that reservations were not entitled to the added protection provided by the proviso of § 4(e) unless some of the licensed works were actually within the reservation.

The scheme crafted by Congress in this respect is sufficiently clear to require us to hold that the Commission must make its "no inconsistency or interference" determination and include the Secretary's condi-

26. The statute authorizes the construction of project works without a license on non-navigable waters over which Congress has Commerce Clause jurisdiction if the Commission finds that "the interests of interstate or foreign commerce would [not] be affected by such proposed construction . . . and if no public lands or reservations are affected." 16 USC § 817 [16 USCS § 817].

tions in the license only with respect to projects located "within" the geographical boundaries of a federal reservation.

IV

The final issue presented for review is whether § 8 of the MIRA requires licensees to obtain the consent of the Bands before they operate license facilities located on reservation lands. Section 8 provides in relevant part that

> "Subsequent to the issuance of any tribal patent,[27] or of any individual trust patent . . ., any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose." 26 Stat 714.

The Court of Appeals concluded that this provision, which by its terms authorizes private parties to enter into a contract with the Bands, precludes the Commission from licensing those parts of the project that occupy reservation land without the consent of the Indians. When the legislative histories of § 8 and of the FPA are considered, however, the Court of Appeals' interpretation cannot stand.

Section 8 appeared in the M
just prior to its passage. Several
gation companies were seel
rights-of-way across the reservati
The Secretary of the Interior
concluded that irrigation ditches
flumes would benefit both the
tlers and the Indians. HR Rep
3282, 50th Cong, 1st Sess 3–4 (1
Two Attorneys General, howe
had ruled that only Congress c
authorize the alienation of In
lands. Lemhi Indian Reservation
Atty Gen Op 563 (1887); Dan
Lake Winnibigoshish, 16 Atty
Op 552 (1880). In light of these o
ions, the Secretary prepared
amendment to the bill, authori
the Bands to contract for the sal
rights-of-way, subject to Inter
approval. HR Rep No. 3282, su
at 2. Section 8 was therefore
signed to authorize the Indians
the Secretary to grant rights-of-
to third parties; it was not inter
to act as a limit on the sover
authority of the federal governn
to acquire or grant rights-of-
over public lands and reservation

In essence, § 8 increased
Bands' authority over its land
that they had almost the s
rights as other private landowne
The Bands were authorized to n
tiate with any private party wis
to acquire rights-of-way and to e
into any agreement with those
ties, something they were previo
unable to do. And, until some o
riding authority was invoked,
Bands, like private landowners,
complete discretion whether to g
rights-of-way for hydroelectric
ect facilities. However, there i

27. Trust patents were issued on Sept. 13, 1892, for the La Jolla and Rincon reservations, and on July 10, 1910, for the San Pasqual reservation.

28. The Bands' situation was some
different since it was necessary to secur
approval of the Secretary for any such
tracts.

indication that once Congress exercised its sovereign authority to use the land for such purposes the Bands were to have more power to stop such action than would a private landowner in the same situation—both are required to permit such use upon payment of just compensation.[29] Therefore, the only question is whether Congress decided to exercise that authority with respect to Indian lands when it enacted the FPA. The answer to that inquiry was clearly articulated in a somewhat different context more than twenty years ago.

> "The Federal Power Act constitutes a complete and comprehensive plan . . . for the development, transmission and utilization of electric power in any streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—'tribal lands embraced within Indian reservations.' See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." FPC v Tuscarora Indian Nation, 362 US 99, 118, 4 L Ed 2d 584, 80 S Ct 543 (1960).

It is equally clear that, when enacting the FPA, Congress did not intend to give Indians some sort of special authority to prevent the Commission from exercising the licensing authority it was receiving from Congress. Indeed, Congress squarely considered and rejected such a proposal. During the course of the debate concerning the legislation, the Senate amended the bill to require tribal consent for some projects. Section 4(e) of the Senate version of the bill provided that "in respect to tribal lands embraced within Indian reservations, which said lands were ceded to Indians by the United States by treaty, no license shall be issued except by and with the consent of the council of the tribe." 59 Cong Rec 1534 (1920). However, that amendment was stricken from the bill by the conference, the conferees stating that they "saw no reason why waterpower should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." HR Rep No. 910, 66th Cong, 2d Sess 8 (1920).

[10, 11a] In short, while § 8 of the MIRA gave the Bands extensive authority to determine whether to grant rights-of-way for water projects, that authority did not include the power to override Congress' subsequent decision that all lands, including tribal lands, could, upon compliance with the provisions of the FPA, be utilized to facilitate licensed hydroelectric projects. Under the FPA, the Secretary, with the duty to safeguard reservations, may

29. The FPA requires that when licenses involve tribal lands within a reservation, "the Commission shall . . . fix a reasonable annual charge for the use thereof." 16 USC § 803(e) [16 USCS § 803(e)]. When a licensed facility is on private land, the licensee must acquire the appropriate right-of-way from the landowner either by private negotiation or through eminent domain. 16 USC § 814 [16 USCS § 814].

condition, but may not veto, the issuance of a license for project works on an Indian reservation. We cannot believe that Congress nevertheless intended to leave a veto power with the concerned tribe or tribes. The Commission need not, therefore, seek the Bands permission before it exercises its licensing authority with respect to their lands.[30]

V

The Court of Appeals correctly determined that the Commission was required to include in the license any conditions which the Secretary of Interior deems necessary for the protection and utilization of the three reservations in which project works are located. It was in error, however, in concluding that the Commission was required to fulfil this and its other § 4(e) obligations with respect to the other three reservations affected by the project and that § 8 of the MIRA empowered the Bands to prevent the licensing of facilities on their lands. The court's judgment is affirmed in part and reversed in part, and the case is remanded to the court for further proceedings consistent with this opinion.

It is so ordered.

30. **[11b]** The Bands suggest that even in the absence of § 8 of the MIRA, their consent would be necessary before the license could issue because of their sovereign power to prevent the use of their lands without their consent. Respondents' Brief, at 37-39. However, it is highly questionable whether the Bands have inherent authority to prevent a federal agency from carrying out its statutory responsibility since such authority would seem to be inconsistent with their status. See Oliphant v Susquamish Indian Tribe, 435 US 191, 208-209, 55 L Ed 2d 209, 98 S Ct 1011 (1978). In any event, it is clear that all aspects of Indian sovereignty are subject to defeasance by Congress, United States v Wheeler, 435 US 313, 323, 55 L Ed 2d 303, 98 S Ct 1079 (1978), and, from the legislative history of the FPA, supra, at ——, 80 L Ed 2d —— that Congress intended to permit the Commission to issue licenses without the consent of the tribes involved.