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Small Hydroelectric Projects and State Water Rights

A race to develop small scale hydroelectric projects has been underway throughout the west during the last ten years. The scramble to find and develop sites has been described as the “gold rush of the 80's,” a “stampede,” a “tidal wave,” and “hydromania.” By whatever appellation, the interest in hydroelectric power has caused renewed interest in federalism because the “hydromania” was caused by federal incentives. Because the states have elaborate systems to regulate water use, states prefer to regulate the water used in making electricity. The circumstances under which a developer may claim federal authority to supersede state law is the subject of great debate.


3. Sacramento Bee, Oct. 7, 1986, at B1, col. 1 (quoting state Assemblyman as saying that the small power plant projects would damage and perhaps eliminate native trout and recreational use on miles of virgin streams and parts of free flowing rivers).

4. Id. (representative of Independent Energy Producers Association said fear of tidal wave of projects is overblown).

5. San Francisco Chronicle, Sept. 21, 1986, This World, at 15, col. 1 (environmentalists who initially thought hydro was good energy alternative are now concerned about the effects the projects have on sensitive undeveloped regions of California).


In reaction to the energy shortage in the United States in the 1970s, Congress passed the Public Utility Regulatory Policies Act (PURPA) in 1978. One of the goals of PURPA was to expedite the development of small hydroelectric power projects by providing an exemption from the licensing requirements of the Federal Power Act (FPA). In the Energy Security Act of 1980 (ESA), Congress allowed a further exemption from the licensing laws for small hydroelectric projects.

The FPA was enacted by Congress in 1920 to provide a comprehensive plan to improve the development of water power. The FPA created the Federal Energy Regulatory Commission (FERC) to administer the laws created for licensing the construction and operation of hydro projects. As amended by PURPA and the ESA, the FPA does not define the division of state and federal regulatory authority over small hydroelectric development. Whether the federal government exercises final authority over licensed projects with respect to state water rights permits is a subject of controversy and	


The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious. Id. at 98. But see Whittaker, The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities 10 Harv. Envtl. L. Rev. 135 (1986). Whittaker argues that the Federal Water Power Act was a compromise between House members who wanted of the Nation's water resources were not given away, and Senators who wanted to ensure that state regulation of water would not be affected. Id. at 150-54.


17. See Comment, supra note 8, at 1184.
current litigation. The federal preemption doctrine has been applied to many projects licensed under the FPA, thus precluding much state regulation of hydroelectric power. The application of the federal preemption doctrine to projects that are exempt from licensing under federal statutory authority is also questionable.

The history and tradition of water law is marked by a federal deference to state laws. The arid western states manage their water resources through complex schemes of water appropriation. These appropriative systems would be seriously jeopardized if preempted by federal laws for the development of hydroelectric power. In the process of granting appropriative rights, the states must carefully consider and balance a variety of uses and demands for water. The states should not have to subordinate those considerations to energy creation alone.

This comment will examine whether state law is preempted by federal laws regulating hydroelectric projects that are exempt from federal licensing requirements. The FPA and the basis for federal


24. See Comment, supra note 8, at 1205 (water rights systems of the west are carefully designed to deliver water to the maximum number of users).

25. See Sher Statement, supra note 21. Since PURPA was enacted, 484 California projects have applied for a license from FERC. Id. (statement of Assemblyman Sher).


regulation over hydro power will be examined first. A review of the PURPA amendments to the FPA will be discussed. Next, the comment will consider the controversy over the judicial interpretations of the FPA. The importance of preserving appropriative water rights systems will be discussed in light of current litigation. An examination of the small power production facilities that are exempt from federal licensing will follow. The comment will then consider the policies that support the preservation of state water law. Since some aspects of the FPA have recently changed, the Electric Consumer Protection Act of 1986 will be mentioned. This comment will conclude that federal preemption should not apply to the water rights of small projects and in particular should not apply to small projects that are exempt from licensing laws.

THE FEDERAL POWER ACT

A. History

The Federal Power Act (FPA) was enacted to promote the private development of hydroelectric power within the bounds of federal regulations. Congress has the authority to protect the navigable waters of the nation under the commerce clause of the United States Constitution. Congressional power to regulate commerce has undergone great expansion since the enactment of the FPA and therefore the reach of federal authority to regulate hydroelectric power is far more extensive than when the FPA was enacted.

28. See infra text accompanying notes 36-68.
29. See infra text accompanying notes 69-92.
30. See infra text accompanying notes 93-140.
31. See infra text accompanying notes 141-68.
32. See infra text accompanying notes 169-223.
33. See infra text accompanying notes 224-51.
34. See infra text accompanying notes 242-51.
35. See Comment, supra note 8, at 1207 n.136.
39. See Debevoise, The Role of the Federal Energy Regulatory Commission in Licensing Small Hydroelectric Projects, 5 Vt. L. Rev. 279, 280 (1980); Whittaker, supra note 14, at 145-46. The discrepancies between judicial interpretations of Federal Water Power Act and legislative history of the act arise from the difference between the limited navigation servitude and the presently expansive congressional power to affirmatively regulate water resources. Id.
In the beginning of the twentieth century, technological advancements made possible the development of hydroelectric power on a large scale. Large private interests began claiming the hydroelectric sites on major rivers. To protect the federal interest in the navigable waters of the nation, Congress started to regulate the industry. The Rivers and Harbors Act of 1899 ensured that dams could not be constructed on navigable waters without the approval of Congress. A developer of hydroelectric power had to obtain a private bill from Congress to construct and operate a project. The General Dam Act, enacted in 1906, specified the conditions that would attach to all federally approved projects.

As the hydroelectric industry grew, only a few developers were able to obtain congressional authorization to develop hydroelectric power. Private bills allowing development of power sites did not adequately protect the water resources of the nation. These bills were often nothing more than congressional approval to occupy valuable dam sites in perpetuity at no charge. Conservationists advocated legislation to regulate the use of the dam sites by limiting the period of use and to impose charges for use of the sites.

In the early 1900s, charging for the privilege of developing water power was not clearly authorized under the commerce power. The threatened imposition of charges sparked a serious debate in Congress regarding the proper division of authority between the states and the federal government. States' rights advocates maintained that the

41. See generally Pinchot, The Long Struggle for Effective Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945); Comment, supra note 37, at 538.
42. Chemehuevi Tribe, 489 F.2d at 1217.
44. Id.
45. Id. §§ 1, 3, 34 Stat. 386 (1906). Among the conditions were approval by the Secretary of War and the Chief of Engineers of the plans, specifications, and locations of projects. The developers could be required to construct navigation facilities and establish fishways. Id.
46. See Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90, 98 n.11 (1965); Chemehuevi Tribe, 489 F.2d at 1219 n.54; Comment, supra note 37, at 538.
47. Chemehuevi Tribe, 489 F.2d at 1225.
48. Comment, supra note 37, at 538.
49. Id. at 539. The conservationists, who fought for regulation of the hydroelectric power industry, saw the fight as one to stop the "great giveaway of the nation's resources." Id. at 538.
50. Chemehuevi Tribe, 489 F.2d at 1219. See also Whittaker, supra note 14, at 150 (excellent review of the history of the FPA).
51. Chemehuevi Tribe, 489 F.2d at 1220 n.61; Whittaker, supra note 14, at 150-53.
federal government could not charge for the use of the water to create electricity because water had been traditionally controlled by the states. The states feared that the federal use charges would ensure federal preemption of all state water laws. The agreement reached by Congress replaced the use charge with a charge to cover only the cost of processing the licenses, thereby maintaining the authority of the states to regulate the water within their boundaries. In 1920 the compromise charge provision was incorporated into the Federal Water Power Act, as one of the conditions placed on a federal license to develop hydroelectric power.

Through the regulations enacted pursuant to the FPA, Congress sought to promote private development of hydroelectric power while retaining control over the navigable waters of the nation. During the debates that led to the adoption of the FPA, the states voiced two primary concerns. First, the states wanted to promote hydroelectric development. Second, they sought to maintain control of water distribution and appropriation. Congress attempted to balance the traditional rights of states to regulate water with the federal authority to regulate navigation under the commerce power. Thus, section 9(b) of the FPA requires an applicant to submit satisfactory evidence that state law pertaining to the use of water for power purposes has been satisfied. Section 27 reserves to the states their authority over the regulation of water.

The FPA established the general principle of federal regulation of water power projects by clearly regulating the construction and

53. Whittaker, supra note 14, at 151. The objection to the charge provision was that "it is wholly inequitable and unjust to compel parties who are building dams with their own money and without expense to the Government to pay compensation to the federal government for property that belongs to a state." Id. at 150 (quoting Senator Nelson). "The corpus of a water resource, including its potential to produce power, remained in the trusteeship of the individual states, to be allocated according to their own freely adopted regulatory systems." Id. at 151.

54. Id. at 150.

55. Id. at 152-53.

56. Id.


58. The license term is limited to 50 years. 16 U.S.C. § 799 (1982).

59. Comment, supra note 37, at 539.

60. Id.

61. Id.

62. The preface to the Act states that it was "to provide for the improvement in navigation; the development of water power; the use of public lands in relation thereto . . . and for other purposes." 41 Stat. 1063 (1920).


operation of hydroelectric facilities. The Act created the Federal Power Commission and gave the Commission jurisdiction over projects, located on federal lands or navigable streams, that affect interstate commerce. Proposed projects that fall within the jurisdiction of the Commission cannot be built unless the developer obtains a license or an exemption from FERC.

B. PURPA and the Energy Crisis

The FPA was amended in 1978 and 1980 to encourage the production of energy through the development of small hydroelectric projects. As a result of the OPEC oil embargo, Congress adopted legislation to encourage domestic power production. PURPA amended the FPA to provide incentives to stimulate domestic power produced through renewable resources. The PURPA incentives produced a dramatic increase in the number of applications filed to develop small hydroelectric power projects.

PURPA requires electric utilities to offer to buy energy produced by "qualifying facilities" at a rate not to exceed "the incremental

67. 16 U.S.C. § 797(e) (1982). See Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965). In Union Electric, the Court held that "commerce" referred not only to commerce on navigable waters, but to the nonnavigable headwaters of a navigable river. Id. at 96-98. Union Electric also established that the production of power that moves interstate, affects interstate commerce in electricity. This interpretation gives FERC a jurisdictional basis to license practically all hydro projects. Id. at 94. But see City of Centralia v. Federal Energy Reg. Comm'n, 661 F.2d 787 (9th Cir. 1981) (effect on interstate commerce must be real and substantial).
71. Idaho Power Co. v. Federal Energy Comm'n, 766 F.2d 1348, 1350 (9th Cir. 1985) (Congress believed that encouraging "qualifying projects" under PURPA would reduce country's demand for fossil fuels).

72. See supra note 9.
74. PURPA did not define "renewable resource" but the conference report designated water as a renewable resource. H.R. REP. No. 1750, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7797, 7823.
75. See infra text accompanying note 86. See also Fenn, Renewable Power Generation: Beyond the Shakeout, PUB. UTILITY FORUM, Nov. 10, 1986, at 27.
76. 16 U.S.C. § 796(17)(A) (1982). A small power production facility is defined as a

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cost to the electric utility of alternative electric energy.’’ The Federal Energy Regulatory Commission (FERC) interprets this language to mean that the incremental cost should be the utility’s "full avoided cost," which is the cost the utility company would pay to use the next best source of power. By providing a guaranteed buyer for producers of small hydroelectric power, the regulation artificially creates economic viability. Other incentives such as a five-year depreciation schedule and investment tax credits of twenty-one percent were available through the end of 1985.

To expedite the development of small hydroelectric projects, PURPA and the Energy Security Act (ESA) provide two categories of hydroelectric projects that are exempt from the licensing requirements of the FPA. PURPA exempts hydroelectric projects that produce power by the placement of a turbine in an existing manmade water conveyance such as a pipe or a canal. The ESA exemption applies to projects that produce power by placing the necessary generating equipment at an existing dam or diversion.

The incentives have been so successful in encouraging the development of small hydroelectric power projects that the total number

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footnotes:

77. 16 U.S.C. § 824a-3(b) (1982).
80. See Wolfe, supra note 2, at 853. See also Sher Statement, supra note 21. Sher states that California faces an oversupply of energy and if a substantial number of the alternative energy projects come on line, these projects will displace cheaper, existing sources of power. Sher also relates the perception that the hydropower projects will enrich private entrepreneurs at the expense of ratepayers. Id.
84. 16 U.S.C. § 823a (1982) (exemption applies to projects with a maximum installed capacity of 15 megawatts; 40 megawatt capacity allowed if the conduit provides municipal water supply).
85. Id. § 2705(d) (1982) (exemption only applies to projects that have no more than five megawatts of energy generating capacity). "One megawatt is generally sufficient to supply the average electrical needs (including industrial needs) of 500 people or the domestic-residential needs of 1,000 people." Burke, supra note 9, at 845 n.208.
of applications filed for preliminary permits, exemptions, and licenses increased from 79 in 1977 to 2,363 in 1981.86 Exempt projects represent a significant portion of current hydro power development.87 The dramatic proliferation of small hydroelectric projects has, however, created increased demands on limited resources.88

The increased number of small hydroelectric projects spawned by PURPA has created conflicts between the states and the federal government over the regulation of water rights,89 and has generally intensified the debate over federalism.90 The FPA appeared to create a system in which the federal government maintained authority over the development of hydroelectric power, while leaving the regulation of water to the states.91 The two sections of the FPA which purported to protect state interests were interpreted by the Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Commission.92 Since First Iowa, the courts have held that the federal government has exclusive control over the licensing of hydroelectric projects.

86. Small Hydro, supra note 22 (letter from FERC chairman, answer to question C.3.a).
87. Burke, supra note 9, at 846 n.216. FERC estimated in 1981 that between 20% and 75% of developable hydroelectric power falls within the exemptions. Id.
88. See Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Envtl. L. Rev. 1, 3 (1986). Blumm describes much of the criticism FERC has received for ignoring the adverse effects of many of the projects on important national resources. He suggests that FERC was simply unable to handle the flood of applications given the structure of their bureaucracy, the small number of staff, and their formal procedures. He relates the belief of environmentalists that FERC's regulation of hydropower development does not reflect the public interest, as demonstrated by the many lawsuits filed challenging FERC decisions. Id. at 2-5.
89. See generally Small Hydro, supra note 22; Wolfe, supra note 2, at 867-79.
90. See generally Arnold, Emerging Possibilities for State Control of Hydroelectric Development, 13 Envtl. L. Rep. 10,135, 10,143 (1983) (states should be encouraged to assert their interests aggressively in the regulation and control of hydro development); Blumm, supra note 88, at 6 (FERC's discretion to regulate hydroelectric development has been curbed by recent cases, but fundamental reform needed in regulatory system); Plouffe, Forty Years After First Iowa: A Call for Greater State Control of River Resources, 71 Cornell L. Rev. 833, 833 (1986) (federal government's preemptive power should be reexamined to allow for state comprehensive river plans); Whitaker, supra note 14, at 138 (states have regulatory responsibilities to determine the best uses of water resources); Wolfe, supra note 2, at 896 (states are in a better position than the federal government to determine the issues of water use essential to hydro development); Comment, supra note 8, at 1185 (congressional intent for states to retain authority to regulate water should be recognized in licensing hydroelectric projects); Comment, supra note 37, at 537 (arguing that state water law is not displaced by FPA); Comment, Regulation of Hydro-Electric Development: State v. Federal Control, 2 Pub. Land L. Rev. 109, 121-22 (1981) (conflict between resource rich states and plenary power over hydroelectric facility siting).
92. 328 U.S. 152 (1946).
JUDICIAL INTERPRETATION

A. First Iowa Hydro-Electric Cooperative v. Federal Power Commission

In First Iowa Hydro-Electric Cooperative v. Federal Power Commission,93 the Supreme Court held that the dual licensing procedures required by the state and the federal government under the FPA would be unworkable.94 The Federal Power Commission refused to issue a license for construction of a water project because the applicant did not demonstrate compliance with an Iowa statute regulating construction, operation, and maintenance of a dam.95 The Court stated that the FPA established a dual system of control but the system did not give both the states and the federal government final authority over the same issue.96 A duplicative system that required "conformity to both standards would be impossible in some cases and probably difficult in most of them."97

The Court in First Iowa construed the meaning of section 9(b) of the FPA.98 Section 9(b) requires an applicant for a federal license to submit evidence of compliance with applicable state laws.99 The Court held that section 9(b) did not require an applicant for a federal license to obtain a state permit as a condition precedent to obtaining a federal license.100 The Supreme Court reasoned that requiring an applicant to obtain a state permit could destroy the effectiveness of the FPA by giving the state a veto power over the project.101 The Court stated that the detailed provisions of the federal regulatory plan did not leave room for conflicting state controls.102 The reference to state laws in section 9(b) merely suggested that compliance with

93. Id.
94. Id. at 168.
95. Id. at 161.
96. Id. at 167-68.
97. Id. at 168.
98. Id. at 168-82.
99. Id. 16 U.S.C. § 802(b) (1982). The applicant for a license must submit "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes ...." Id.
100. 328 U.S. 152, 170 (1946).
101. Id. at 164.
102. Id. at 181. When state law conflicts with a federal law, the state law must yield under the supremacy clause. U.S. CONST. art. IV., § 2.
state laws is required only when the Commission deems compliance necessary.\textsuperscript{103} The \textit{First Iowa} Court also interpreted section 27 narrowly. Section 27, the savings clause section of the Act, provides that the states retain regulatory responsibility over water.\textsuperscript{104} While the Court stated that the section protected state laws relating to the control, appropriation, use, or distribution of water, the opinion limited section 27 to the protection of proprietary rights.\textsuperscript{105} Thus, the Court construed section 27 as a savings clause that provides for compensation in the event of destruction of water rights.\textsuperscript{106} While the Supreme Court held that the FPA did not give the federal government complete control over hydro power development, the states have had a limited regulatory role since \textit{First Iowa}.\textsuperscript{107}

As commentators have noted,\textsuperscript{108} the Supreme Court has never directly considered whether section 27 of the Federal Power Act permits preemption of state laws regarding the appropriation of water.\textsuperscript{109} \textit{First Iowa} did not resolve the water rights issue because the developer possessed enough riparian rights to operate the project.\textsuperscript{110} Riparian rights are rights to the water resulting from the ownership of land that borders a waterway.\textsuperscript{111} Appropriative rights, on the other

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\textsuperscript{103} \textit{First Iowa}, 328 U.S. at 181. The reference to state laws was "by way of 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." \textit{Id.} at 177-78.

\textsuperscript{104} 16 U.S.C. § 821 (1982).

\textsuperscript{105} The court stated that § 27 "expressly 'saves' certain state laws relating to property rights as to the use of water" from preemption by the Federal Power Act. \textit{Id.} at 175.

\textsuperscript{106} \textit{Id.} at 176-77. See \textit{infra} notes 108-18 (arguing that the Court's construction of § 27 may only be dicta).


\textsuperscript{108} Comment, \textit{supra} note 8, at 1197 n.91; Comment, \textit{supra} note 37, at 537.

\textsuperscript{109} \textit{Id.} See also State Board's Opening Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, Sayles Hydro Assoc. v. United States, No. CIVS-86-0868 LKK (E.D. Cal. filed July 21, 1986) (copy on file at \textit{Pacific Law Journal}) [hereinafter cited as State Board].

\textsuperscript{110} \textit{First Iowa}, 328 U.S. at 158; State Board, \textit{supra} note 109.

\textsuperscript{111} F. TREELSE & G. GOULD, \textit{WATER LAW} (1986).
\end{flushleft}
hand, depend specifically upon terms granted by the state for these rights. Because appropriative rights were not involved in *First Iowa*, section 27 of the FPA was not necessary to decide the case. The narrow issue before the Court in *First Iowa* was whether section 9(b) compelled compliance with the terms of the Iowa Mills, Dams, and Races statute. The Court drew a distinction between state water laws, which are saved by section 27, and state laws that regulate the construction and operation of hydro projects. Since no issue of state water law was before the court, the interpretation of section 27 of the FPA in *First Iowa* is merely dicta. Therefore, the application of state appropriative water laws would not be barred by *First Iowa*.

Theoretically, states can regulate aspects of hydroelectric projects that do not conflict with the federal regulations or represent a veto power over the federal program. In practice, however, there are few ways to regulate hydro projects after *First Iowa* that do not

    Under the appropriation doctrine water is declared the property of the state or public. The essence of the creation of an appropriative water right is application of the water to be a legislatively defined beneficial use. The right, allowing continued beneficial use, is then protected against subsequent appropriations. Application of this principle promotes stability of existing economies predicated upon water use and insures maximum beneficial use as defined by the public.

113. *First Iowa*, 328 U.S. at 166.
114. *Id.* at 162-63.
115. *Id.* at 165-66.
    When permit granted. If it shall appear to the council that the construction, operation, or 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.

116. *Id.* (quoting *Iowa Code* § 7771 (1939)).
117. *Id.* at 175-76.
represent a conflict with the federal scheme.\textsuperscript{120} If state water rights laws are deemed to be precluded by the FPA, the role of a state water agency could be limited to determining whether available water exists.\textsuperscript{121} Regulation of water rights has traditionally been an area the federal government has left to state control.\textsuperscript{122} While First Iowa set the precedent for federal preemption of most state laws relating to hydro power, the decision did not resolve whether state water laws are preempted by the FPA.\textsuperscript{123} The legislative history of the FPA supports an argument that Congress intended the states to retain the right to control water use.\textsuperscript{124} A recent case from the United States Supreme Court, \textit{California v. United States},\textsuperscript{125} strongly supports the power of states to regulate water rights.

B. California v. United States

In \textit{California v. United States}, respect for state water laws was demonstrated in the context of the Reclamation Act.\textsuperscript{126} \textit{California v. United States} concerned the New Melones Dam,\textsuperscript{127} a dam built in California under the Reclamation Act.\textsuperscript{128} The Bureau of Reclamation applied for a water right permit from the state and was granted a permit subject to various conditions.\textsuperscript{129} The United States sought a

\begin{itemize}
\item \textsuperscript{120} See supra note 107.
\item \textsuperscript{121} Complaint for Declaratory and Injunctive Relief, Sayles Hydro Assoc. v. United States, No. CIVS-86-0868 LKK (E.D. Cal. filed July 21, 1986) (copy on file at \textit{Pacific Law Journal}) [hereinafter cited as Complaint]. Determining only water availability would be a significant limitation on the state role. See infra text accompanying notes 141-52.
\item \textsuperscript{122} See generally \textit{California v. United States}, 438 U.S. 645 (1978).
\item \textsuperscript{123} Comment, supra note 37, at 546. No court passed judgment on the interrelationship of state water laws and the FPA. In \textit{Federal Power Comm'n v. Oregon}, the Court allowed a licensed project to proceed without the appropriate state water permit. The project, however, was located on federal land reserved for power purposes. 349 U.S. 435, 444-45 (1955). The presently pending litigation in California is similar in this respect. Sayles Hydro Assoc. v. United States, No. CIVS-86-0868 LKK (E.D. Cal. filed Dec. 19, 1986).
\item \textsuperscript{124} See Statement by David Kennedy, Director of California Department of Water Resources, before the Committee on Energy and Natural Resources, United States Senate (Sept. 12, 1986) (Congress clearly intended deference to the substance and procedure of state law) (copy on file at \textit{Pacific Law Journal}) [hereinafter cited as Kennedy Statement]; State Board, supra, note 109 (extensive legislative history to support state regulation of water).
\item \textsuperscript{125} 438 U.S. 645 (1978).
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} 43 U.S.C. §§ 371-600e (1982).
\item \textsuperscript{129} \textit{California v. United States}, 438 U.S. at 652. For example, water collection was prohibited until the Bureau showed a specific plan for use of the water. The state also required a preference be given to water users in the local water basin. Storage releases were provided for the maintenance of fish and wildlife and the State Board reserved jurisdiction to impose further conditions if necessary to protect the beneficial use of the water. Id. at 653 n.8.
\end{itemize}
declaratory judgment that the federal government could impound whatever unappropriated water necessary without compliance with state laws.130 The Court held that the state may impose conditions that are not inconsistent with federal directives regarding the New Melones Dam project.131 The holding of the Court was based on the meaning of section 8 of the Reclamation Act.132

The language of section 8 is virtually identical to that of section 27 of the FPA.133 Section 8 had previously been construed by the courts as providing compensation only for loss of property rights.134 The Supreme Court dismissed the prior interpretations as dicta and held that under section 8 the Secretary of the Interior must comply with state laws as to the appropriation, purchase, or condemnation of water rights.135 The Court found that Congress intended to preserve state power to regulate the distribution and appropriation of water.136

This decision can be used to interpret section 27 of the FPA because section 8 of the Reclamation Act was used as a model for section 27.137 Moreover, the Court in First Iowa pointed to the similarity of purpose and language in concluding that both sections should be construed in the same manner.138 The disavowal of the prior interpretations of the Reclamation Act savings clause in Cali-

130. Id. at 647.
131. Id. at 674.
132. Id. at 675.
133. 43 U.S.C. §§ 372, 383 (1976). Section 8 of the Reclamation Act states:
Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws . . .

Id. Compare § 8 of the Reclamation Act with § 27 of the FPA, 16 U.S.C. § 821, supra note 104.
135. California v. United States, 438 U.S. at 672-75. The Court said:
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 . . . 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 section 8.

Id. at 674-75.
136. Id. at 675.
137. State Board, supra note 109; Kennedy Statement, supra note 124; see also Comment, supra note 37, at 551.
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California v. United States should likewise be extended to section 27 of the Federal Power Act. While a narrower interpretation of section 27 may be justified by the different context of the FPA, section 27 should be reconsidered in light of the expansive scope given the savings clause in California v. United States. To understand why a broad interpretation of section 27 is so important to the states, an examination of an appropriative rights system is required.

STATE WATER RIGHTS

The doctrine of prior appropriation is used in most western states to maximize the use of water and provide certainty of water distribution to individual users. Appropriative rights, granted by the state, are specific rights to use a certain amount of water for a particular purpose. Before an appropriation is granted, the state must determine that unappropriated water is available, that the use is a beneficial use, and that the grant of an appropriative permit is in the public interest. The public interest consideration is a very important means by which the states balance competing values to achieve efficient water use. The permit process incorporates state policy with a highly complex distribution system and allows a state to choose water uses which produce the greatest societal benefits.

Under California law, the State Water Resources Control Board (SWRCB) reviews all water right applications to determine water availability and consistency with the public interest. The evaluation of the public interest requires that recreation, fish, wildlife, and environmental values be given consideration. The permit process is critical to hydroelectric development because through the appropriative permit the state can promote power use while protecting vested...

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139. See Whittaker, supra note 14, at 176; Comment, supra note 37, at 551.
140. Whittaker, supra note 14 at 176 (identical purpose of such savings clauses; California v. United States emphasized broad purpose of saving clauses is to fully protect state water law systems).
141. Trelease, supra note 26, at 752-55.
144. Trelease, supra note 26, at 752-55.
145. Id. at 754.
146. Id.
147. CAL. WATER CODE § 1253 (West 1971). The evaluation of the public interest involves consideration of a wide scope of environmental values. Id. §§ 1243, 1257. Additionally, the California Constitution requires that all uses of water be reasonable and beneficial. CAL. CONST. art. X, § 2. The requirements under the California Environmental Quality Act (CEQA) must also be met. CAL. PUB. RES. CODE §§ 21100-21176 (West 1986).
rights, future water development, and environmental values.\textsuperscript{149} If state water law is ignored by the federal promotion of hydroelectric power, the legitimate state interest in protecting property rights and planning future development through an appropriative water rights system could be threatened.\textsuperscript{150} Numerous disruptive effects of damming or diverting water for hydroelectric power projects are recognized\textsuperscript{151} and can be addressed by means of the appropriative permit procedure.\textsuperscript{152}

Developers of small hydroelectric projects generally seek to impound as much water as possible in order to maximize the electricity production.\textsuperscript{153} Unregulated impoundment could have serious effects on downstream water users by reducing the amount of water available.\textsuperscript{154} Even small hydro projects that do not impound water but instead operate as "run of the river" projects could have deleterious effects on state water systems if unregulated. Many small projects in the western mountains are run of the river projects that take advantage of the steep mountain slopes.\textsuperscript{155} This type of project diverts water into a pipe known as a penstock, runs the water down the mountainside to the turbine and generator, then returns the water to the stream.\textsuperscript{156} By controlling the diversion of water into the penstock, a state can protect the rights of those users of water who are between the point of diversion and the point of return to the stream.\textsuperscript{157}

A current case in California, \textit{Sayles Hydro Associates v. United States},\textsuperscript{158} demonstrates the conflict between the states and the federal government over the division of regulatory authority over hydroelectric power projects. A hydroelectric facility was licensed by FERC for a site close to Highway 50, on a scenic stretch of the south fork of the American River.\textsuperscript{159} The project has drawn the attention of

\begin{thebibliography}{99}
\bibitem{149} Id.
\bibitem{150} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{151} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{152} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{153} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{154} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{155} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{156} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{157} Id. See also Sher Statement, \textit{supra} note 21 (run of the river projects can dewater streams, destroy fishery habitat, block spawning access, and impair navigable streams). Id.
\bibitem{158} Sayles Hydro Assoc. v. United States, No. CIVS-86-0868 LKK (E.D. Cal. filed Dec. 19, 1986).
\bibitem{159} Id.
\end{thebibliography}
state legislators, cabin owners, fishermen, and environmentalists among others. The private developer is challenging the requirement of an appropriative permit from the state, claiming that *First Iowa* is dispositive of the issue. The hydroelectric developer maintains that the state is preempted by the FPA and cannot compel duplicative requirements. The developer contends that the role of the SWRCB is limited to determining whether there is sufficient unappropriated water to operate the project without injury to vested rights. The developer claims that the environmental requirements for the appropriative permit are not property rights protected under section 27, as analyzed in *First Iowa*. The State Board maintains *First Iowa* does not mandate preemption of the state water right permit because *California v. United States* compels a "reconsideration of the broad dicta contained in *First Iowa* regarding a hydroelectric power licensee's obligation to comply with State water right law." The state argues that the holding of *California v. United States* should control because the appropriative permit process that was upheld with regard to New Melones Dam is the same process that must be used for this hydroelectric facility. The broad purpose of a savings clause is to protect state water law systems, and section 27 should be recognized as preserving state regulation of water rights for hydroelectric projects.

**EXEMPTIONS FROM FEDERAL LICENSING REQUIREMENTS**

While most state laws regarding hydroelectric projects have been preempted by the FPA, federal preemption of state laws may not apply to projects that are exempt from the licensing requirements.

161. Complaint, *supra* note 121. But see Sher Statement, *supra* note 21. Sher states: "if the plaintiffs in the Sayles Flat case prevail, I fear it will establish an extremely bad precedent for more than 200 hydro projects previously licensed by FERC but still awaiting water right permits." Id. at 5.
163. Id.
164. Id.
166. Id.
169. This lack of clarity is demonstrated by the fact that some hydropower developers maintain this position regarding federal preemption. See Arnold, *supra* note 90, at 10,142. But cf. Wolfe, *supra* note 2, at 880 n.112.
Neither the courts nor the Commission has had occasion to address this issue.\textsuperscript{170} The legislative histories of the acts do not resolve the issue either. The only clear message is that Congress intended to expedite the development of certain qualifying hydroelectric projects.\textsuperscript{171}

If FERC has jurisdiction over a proposed hydroelectric project, but the project does not qualify for an exemption, the developer must file a declaration of intent to construct and operate a hydroelectric facility\textsuperscript{172} and an application for a preliminary permit is required.\textsuperscript{173} The subsequent procedure for licensing the project depends on the type and size of the project.\textsuperscript{174} A license applicant for a large project\textsuperscript{175} must supply FERC with a considerable amount of detailed information and particularly rigorous environmental disclosure requirements.\textsuperscript{176} The application for an exemption from licensing requires less information and is easier to satisfy than a license application.\textsuperscript{177}

Two categories of projects are exempt from licensing requirements.\textsuperscript{178} Section 213 of PURPA provides that certain small conduit\textsuperscript{179} hydroelectric projects of fifteen megawatts\textsuperscript{180} or less may be exempt from licensing requirements.\textsuperscript{181} Qualifying projects must be located

\textsuperscript{170} Small Hydro, supra note 22 (statement by FERC Chairman, in answer to question 1.9).
\textsuperscript{172} 16 U.S.C. § 817 (1982).
\textsuperscript{174} 18 C.F.R. §§ 4.30-4.84 (1986).
\textsuperscript{175} 18 C.F.R. § 4.40 (1986) (large project defined as having over five megawatts of installed capacity).
\textsuperscript{176} Id. § 4.41 (1986). The contents of the application for a major project include: a very detailed description of the project, a statement of project operation and resources utilization, a proposed construction schedule, an environmental report that includes 11 subsections enumerating reports that must be filed in addition to general descriptions, and general design drawings. Id. But see Sher Statement, supra note 21. Because FERC has never formally cited an operator for license violations, there is no reason to believe that FERC can or will adequately regulate the projects. Id.
\textsuperscript{177} See id. §§ 4.40-4.108 (1986).
\textsuperscript{178} 16 U.S.C. §§ 823a, 2705(d) (1982).
\textsuperscript{179} Id. § 823(a)-(d) (1982). A "conduit" is "any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity." 18 C.F.R. § 4.30(b)(2) (1986).
\textsuperscript{180} Congress recently increased the installed capacity of these conduit facilities to 40 megawatts, provided the conduit is used solely for municipal water supply. Pub. L. No. 99-495, § 7(a), 100 Stat. 1248 (1986).
\textsuperscript{181} 16 U.S.C. § 823a (1982).
on nonfederal lands and must use a manmade water conduit that is operated primarily for nonhydroelectric uses. The second exemption category, created by the Energy Security Act of 1980 (ESA), applies to projects with a capacity of five megawatts or less which utilize an existing dam or natural water feature.

The exemption provided under the ESA is the principal exemption used by hydro developers and it is also the more significant of the two exemptions because it motivates the development of projects on natural bodies of water. According to the legislative history of the ESA, the natural water feature provision was meant to apply to sites where there is no need for a dam or an impoundment structure. FERC defined a natural water feature to include "diversion structures up to ten feet, impounding less than two acre-feet of water, and not increasing natural hydraulic head by more than five percent." FERC's liberal interpretation of a natural water feature was struck down in *Tulalip Tribes v. Federal Energy Regulatory Commission* as being contrary to the plain meaning of the statute. FERC, therefore, could not grant exemptions for new dams or impoundments.

The *Tulalip* court held that Congress wanted not only to expedite the development of small hydroelectric projects but also to protect the environment by confining exemptions to existing dams and impoundments. This interpretation was recently reinforced by Congress in the Electric Consumer Protection Act of 1986 (ECPA). The ECPA clearly provides that the PURPA benefits do not apply

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182. *Id.*. The small conduit exemption does not present many conflicts, as the placement of a turbine in existing conduits does not effect many changes in the environment or water systems.


187. *Id.* at 1454-55. See Blumm, *supra* note 88, at 12.

188. 732 F.2d 1451 (9th Cir. 1984).

189. *Id.* at 1455. The court held that interpreting dam and impoundment according to their plain meanings will not frustrate congressional intent to expedite and encourage development of small hydro projects. *Id.*

190. *Id.*. Interpreting the inconclusive legislative history of § 2708(b), the court stated that the natural water feature exemption is limited to projects that will not have adverse effects on such natural water features as water flow and water level. *Id.*

191. *Id.*

to any project involving a new dam or diversion unless there are no substantial adverse effects on the environment.\(^{193}\) In addition, the project must not be located on a protected river, and must meet the terms and conditions set by fish and wildlife agencies.\(^{194}\) The ECPA reinforced the proposition that PURPA and the ESA provide exemption procedures in order to accelerate the development of hydroelectric projects that have minimal effects on the environment.\(^{195}\)

During congressional hearings on small hydroelectric projects, the Chairman of FERC stated that in his opinion issuance of an exemption preempts some state regulatory action.\(^{196}\) Exempt projects are removed from the powers under part I of the FPA, which means that “exemptees do not possess the power of Federal eminent domain.”\(^{197}\) Federal law, therefore, does not preempt state property law with respect to the acquisition of existing land and water rights.\(^{198}\) The Chairman, however, further maintained that the exemptions were authorized in order to expedite the development of hydroelectric power and that purpose could be “significantly hampered” by the imposition of state requirements.\(^{199}\)

The Chairman appears to be saying that the exemptions are exemptions for some purposes and expedited licenses for other purposes. If the exemptions represent a short form of licensing, then exempt projects should arguably enjoy the same federal protection from state interference that licensed projects have pursuant to the commerce power of the Congress.\(^{200}\) FERC has jurisdiction over the exempt projects that affect interstate commerce through the production of electricity and projects that might interfere with the navigable waters of the United States.\(^{201}\) Since most projects will meet the expansive commerce power test, FERC would have jurisdiction.

The fact that FERC may have jurisdiction over exempt projects does not, however, mean that state laws will necessarily be preempted by the FPA.\(^{202}\) In preemption analysis, the courts are principally

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193. Id. at § 8(a), 100 Stat. 1243, 1249 (1986).
194. Id.
195. Id. This recent act provided that “a State has the authority to protect a waterway from projects built with PURPA incentives if, in the State’s determination, the waterway would be adversely impacted by such development.” H.R. 934, 99th Cong., 2d Sess. 31 (1986).
196. Small Hydro, supra note 22 (letter from FERC Chairman, answer to question 1.9).
197. Id.
198. Id.
199. Id.
200. See id. See supra text accompanying notes 93-106 (discussion of First Iowa).
201. See supra text accompanying notes 67-68.
202. Freyfogle, Federal Lands and Local Communities, 27 Ariz. L. Rev. 653, 659 (1985);
concerned with finding that Congress manifested a clear intent to preempt state regulation.\textsuperscript{203} Two types of preemption analyses are utilized to discern congressional intent.\textsuperscript{204} The first analysis inquires whether Congress evidenced an intent to occupy the entire legislative field by means of a pervasive scheme of federal regulation.\textsuperscript{205} The second test analyzes whether the state law conflicts with the federal law in such a way as to present an obstacle to fulfilling the purposes and objectives intended\textsuperscript{206} by Congress. Preemption is not presumed, but instead requires a balancing approach much like that used in commerce clause analysis.\textsuperscript{207}

To the extent that exempt projects have to comply with federal requirements under the \textit{First Iowa} reasoning, comparable state requirements might be preempted.\textsuperscript{208} To obtain an exemption, an applicant has to comply with various resource protection procedures\textsuperscript{209} and compliance with any conditions to protect instream flows.\textsuperscript{210} If \textit{First Iowa} applies, compliance with these resource protection requirements would preempt any similar state environmental regulation if the state regulation could create a veto power over the project.\textsuperscript{211}

The national goal of developing domestic small-scale renewable energy is within the commerce clause authority of the federal government and prohibitive state regulations could frustrate such national policy.\textsuperscript{212} If the projects that are exempt from federal licensing are

\begin{itemize}
  \item[205.] Freyfogle, \textit{supra} note 202, at 659.
  \item[208.] \textit{See supra} text accompanying notes 93-101.
  \item[209.] 18 C.F.R. §§ 4.92, 4.107 (1986). Among the procedures for resource protection are compliance with any requirements that the National Marine Fisheries Service, United States Fish and Wildlife Service and analogous state agencies might impose, and meeting requirements under the National Environmental Protection Act (NEPA). \textit{Id.}
  \item[210.] 18 C.F.R. § 4.106 (1986). \textit{But see} Sher Statement, \textit{supra} note 21 (FERC has not monitored or enforced license conditions such as instream flow requirements); Position of WSWC, \textit{supra} note 7. Montana is concerned that FERC granted an exemption with conditions placed on the exemption for the maintenance of instream flows. Montana maintains that the condition was set without regard for state law regarding instream flows. This raises the question of who is to be responsible for assuring the maintenance of the instream flows. The State of Washington has also had problems with FERC relating to instream flows, because FERC (unlike Washington) does not consider nonfishery uses when determining reservations for instream flows. \textit{Id.}
\end{itemize}
merely licensed projects in expedited form, then preemption may apply as dictated by First Iowa and subsequent cases. Any changes in the preemption analysis that might result from a broad reading of section 27, as suggested by California v. United States, would also apply. State regulations that clearly conflict with congressional directives would be preempted by the federal legislation.

The exempt projects are not, however, equivalent to licensed projects in short form. Since they are exempt from federal licensing requirements of the FPA, these small projects should not acquire the benefits of the licensed projects. While the application for an exemption may implicate some federal regulations, federal regulation is not so thorough as to justify preemption. Because these projects are exempt from the federal licensing obligations, state licensing would not create a "dual licensing" problem as was the case in First Iowa. The developer of an exempt project does not obtain any power of federal eminent domain, so the developer cannot condemn existing water rights. Therefore, the states should be able to regulate a small, federally exempt project by means of the appropriative right permit when no water is available.

The conclusion that Congress truly meant to create exemptions that would have no power of federal preemption is certainly reasonable. The legislative histories of PURPA and the ESA indicate that Congress simply intended to expedite the development of small hydro projects. There is no indication of congressional intent to preempt state laws.

**Deferece to State Water Laws**

Congress has the constitutional authority through the commerce clause and the supremacy clause to occupy the entire field of will carry equal burdens. In fact, a study of small renewable energy development shows that California is the definitive leader in such development. Hydroelectric development was found in 18 states. California is ranked second in hydro development, Louisiana is ranked first. Fenn, supra note 75, at 27.

213. See supra text accompanying notes 93-106.
214. See supra text accompanying notes 126-40.
216. Comment, supra note 8, at 1207 n.136.
217. Freyfogle, supra note 202, at 664 n.60 (federal agency permit process possesses preemptive weight only if the state and local concerns are fully and fairly considered).
218. Arnold, supra note 90, at 10,142.
220. City of Centralia v. Federal Energy Reg. Comm'n, 799 F.2d 475 (9th Cir. 1986); Small Hydro, supra note 22 (letter from FERC Chairman, answer to question I.9).
221. Small Hydro, supra note 22 (letter from FERC Chairman, answer to question I.9).
222. Arnold, supra note 90, at 10,142.
223. Small Hydro, supra note 22 (letter from FERC Chairman, answer to question I.9).
224. U.S. Const. art. I, § 8, cl. 3.
225. U.S. Const. art. IV, § 2.
hydroelectric power. The pertinent policy question, however, is whether Congress should assert that authority.\textsuperscript{226} The broad category of “small-scale renewable energy projects” does not represent a significant amount of the nation’s overall energy supply.\textsuperscript{227} The projects account “for less than one-half of one per cent of total generating capacity.”\textsuperscript{228} The fact that small hydroelectric power projects contribute miniscule amounts to the total energy needs of the nation provides support for the argument that the impact on interstate commerce is not substantial.\textsuperscript{229} While a finding of substantial impact is not invariably necessary to current commerce clause jurisprudence,\textsuperscript{230} a ninth circuit case held that a substantial effect on interstate commerce was essential to an analysis of the jurisdiction of FERC.\textsuperscript{231}

As one commentator has noted, FERC should be encouraged to decline jurisdiction over the small projects.\textsuperscript{232} The promotion of small hydroelectric projects could be better achieved through cooperation between the state and federal government.\textsuperscript{233} Additionally, the purpose of the FPA is to promote the development of hydroelectric power, not mandate its use.\textsuperscript{234}

The states, by means of existing water regulations, are in a better position than FERC to enforce restrictions placed on small hydroelectric projects.\textsuperscript{235} The imposition of conditions by FERC to protect instream flows creates problems because it is not clear whether the state or federal government has the authority and responsibility to

\begin{footnotes}
\item 227. See Fenn, \textit{supra} note 75, at 24. \textit{First Iowa} involved a project that would produce more than 150 megawatts. The projects that are exempt from federal licensing are less than five megawatts and do not produce power as consistently as large projects.
\item 228. Fenn, \textit{supra} note 75, at 24. The 0.5\% figure consists of not only hydroelectric power, but geothermal, solar thermal, wind, biomass, and photovoltaic power as well. \textit{Id.} at 27.
\item 231. \textit{City of Centralia v. Federal Energy Reg. Comm'n}, 661 F.2d 787 (9th Cir. 1981). A local activity that belongs to a class of activities that has a cumulative effect on interstate commerce may fall within the commerce power. The effect on the national interest must be “real and substantial.” \textit{Id.} at 791.
\item 232. Wolfe, \textit{supra} note 2, at 881-82. FERC has declined jurisdiction in one case. See \textit{Comment, supra} note 90, at 111. See also \textit{City of Centralia}, 661 F.2d at 791 (evidence concerning electricity produced by hydro facility did not support finding of real and substantial effect on interstate commerce); \textit{Sierra Pac. Power Co. v. Federal Energy Reg. Comm'n}, 681 F.2d 1134 (9th Cir. 1982) (FERC without licensing jurisdiction over Truckee River because river held not to be navigable water of the United States).
\item 233. See Wolfe, \textit{supra} note 2, at 886-87.
\item 234. \textit{Whittaker, supra} note 14, at 185.
\item 235. See, \textit{e.g.}, \textit{Cal. Water Code} § 1410 (West 1971) (hearing; notice; grounds for revocation of permit).
\end{footnotes}
enforce the conditions.\textsuperscript{236} Although allowing the states to impose licensing requirements may appear to be contrary to congressional intent, the states are better able to assess and monitor hydroelectric projects.\textsuperscript{237} The effects of the small projects are primarily local in nature and adverse effects of the projects are experienced primarily at the local level.\textsuperscript{238} The regulatory scheme under the FPA should preempt state law, as one commentator has argued, only when the federal license determination is based on detailed, site specific determinations.\textsuperscript{239} The state interest is substantial and state law should not be preempted unless it is truly duplicative or there is a strong, overriding national interest.\textsuperscript{240} While state regulation of exempt projects may "significantly hamper" congressional intent to expedite the development of hydro power, Congress did not intend to expedite the development by removing both state and federal regulation of small federally exempt projects.\textsuperscript{241}

Recent legislation may mean an end to the race to develop small hydroelectric power projects.\textsuperscript{242} By amending section 4(e) of the FPA, the Electric Consumer Protection Act of 1986 (ECPA) makes clear that "equal consideration is to be given to the purposes of energy conservation and environmental values, including fish and wildlife and recreation, in deciding whether to issue the license for power and developmental purposes."\textsuperscript{243} A new section has been added, section 10(j), which guarantees that fish and wildlife agencies must be consulted during the licensing process.\textsuperscript{244}

\textsuperscript{236} Position of WSWC, supra note 7. See also Sher Statement, supra note 21 (increasing public perception that compliance monitoring and enforcement by FERC is lax).

\textsuperscript{237} For example, in a California case, FERC determined, that no environmental impact statement was necessary under National Environmental Protection Act (NEPA). The state has been unable to obtain sufficient information to determine whether the project complies with the California Environmental Quality Act (CEQA) because the developer maintains that the determination regarding NEPA preempts any requirements under CEQA. State Board, supra note 109.

\textsuperscript{238} See Comment, supra note 8, at 1205-07 (effects of FPA preemption on state water systems).

\textsuperscript{239} Freyfogle, supra note 202, at 664 n.60.

\textsuperscript{240} Wolfe, supra note 2, at 896.


\textsuperscript{243} \textit{Id. at} § 3(b)(2).

\textsuperscript{244} \textit{Id. at} § 3(c). If, after attempting to resolve inconsistencies among agencies, FERC does not adopt any condition recommended by a consulting agency, FERC must publish an explanation for rejecting the condition.
The ECPA did not, however, change much of the law regarding exemptions. The act did include the National Marine Fisheries Service in the list of agencies that must be consulted and which has the power to set conditions on the exemptions. The exemption for manmade conduits was changed to allow forty megawatt facilities to qualify, provided the conduit is used only for municipal water supply. The act further amended PURPA to allow fees to be charged for the fish and wildlife studies.

The changes made by the ECPA to the licensing laws reflect congressional concern for both the environment and state authority. Congress made substantial changes limiting the application of PURPA benefits. The act makes clear that the PURPA incentives were intended to apply to hydro projects utilizing existing dams. The act also recognizes state authority to protect a waterway from a project built with PURPA incentives if the state determines that the waterway would be adversely affected by such development.

**CONCLUSION**

Hydroelectric power is an attractive alternative to nuclear or fossil fuel, because it is relatively clean and is generated from a renewable resource. To avoid the local disruption caused by small hydropower facilities, FERC regulations should thoroughly consider the local issues. Federal preemption of state regulatory action should not be applied to state water laws because the small hydro projects do not implicate a strong national interest. Since Congress has not evidenced a clear intent to preempt, state regulation of water law should be fully recognized.

An examination of the FPA indicates that Congress was concerned with controlling large private interests from likely interference with the navigable waters of the nation. The PURPA amendments to the FPA were designed to facilitate the development of clean and renewable forms of domestic energy. The FPA does not appear to preclude states from regulating water rights for small hydroelectric projects.

245. Id. § 7(b).
246. Id. § 7(a).
247. Id. § 7(c).
250. Id.
251. Id. § 8(a).
First Iowa however presents formidable precedent against states wishing to regulate hydro power.

Water is a unique resource and has traditionally been left to state regulation. California v. United States reinforces the principle of deference to state water rights and should be applied to hydro power. The small projects, particularly the exempt projects, are best left to state control.

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