SELECTED HYDROPOWER CASES

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SUPREME COURT DECISIONS

1. **PUD No. 1 v. Washington Department of Ecology,** 114 S.Ct. 1900 (1994).
As part of section 401 water quality certification, State of Washington set minimum instream flows for the project. Licensee sued, arguing State had no authority.
   - Supreme Court held that a state may deny or condition certification as the state determines to be necessary to protect the beneficial uses designated in the state's water quality standards.
   - This includes the authority to set minimum instream flows
   - There was no conflict with FERC authority, as FERC had not yet acted on the license application.

2. **California v. FERC**, 495 U.S. 490 (1990).
State Water Resources Control Board issued a water rights permit for the project, with the same instream flows that FERC had identified, but the State also reserved the right to change them. FERC determined that only it had the power to set minimum flows, and the State sued.
   - Supreme Court ruled that Congress, through the Federal Power Act, intended to provide FERC with broad authority, and that authority preempted the State from setting minimum instream flows in conflict with FERCs, even if those flows are part of the water right permitting process.

3. **Escondido Mutual Water Co. v. La Jolla**, 466 U.S. 765 (1984).
   - FERC is required to include the 4(e) conditions prescribed by the Secretary of the Interior in hydropower licenses. It is then up to the courts of appeal to determine whether the conditions are valid.
   - The agencies lack the power to veto FERC's decision to issue a license.
   - 4(e) conditions must be necessary for the adequate protection and utilization of a forest reservation. A court will uphold the conditions if they reasonably relate to that goal and are supported by substantial evidence.
   - Congress intended the Secretary's conditioning authority to apply only with respect to the specific reservation upon which any project works were at least partially located and not to other reservations that might be affected by the project.

4. **First Iowa Hydro-Electric Cooperative v. Federal Power Commission**, 323 U.S. 152 (1946).

- The Federal Power Act preempts conflicting state law, with the exception of those relating to the control, appropriation, use or distribution of water for irrigation or municipal use (section 27 savings clause protects).
- The Commission could issue a license for a project even though the licensee was in violation of Iowa law which prohibited the dewatering of a river and required the licensee to obtain a state permit to construct a dam.

LOWER COURT DECISIONS

1. **Wisconsin Valley Improvement Company v. FERC**, 236 F. 3d 738 (D.C. Cir. 2001)
   - FERC is obliged to include Forest Service 4(e) conditions in the license. It has no discretion to decide whether or not to include a proposed condition.
   - A Forest Service condition can require implementation of a plan to save endangered wild rice on private land, where a lake covers both reservation land and private land and it is impossible to confine reductions in the lake level to federally controlled land.
   - The threat of a takings claim by the licensee does not prevent FERC from applying agency 4(e) conditions. If there is a taking, the licensee can pursue that matter in the Court of Federal Claims.

2. **Conservation Law Foundation v. FERC**, 216 F.3d 41 (D.C. Cir. 2000)
   - The existing condition was appropriate for use as the baseline in the "no-action alternative.
   - Treating existing conditions as the baseline did not violate FERC's duty of protecting, mitigating the damage to, and enhancing fish and wildlife.
   - In giving "equal consideration" to nonpower values, FERC was not required to place a dollar value on nonpower benefits, even though it assigned dollar figures to the project owner's economic costs.

3. **City of Centralia v. FERC**, 213 F.3d 742 (D.C. Cir. 2000)
   - FERC could not require construction of a tailrace barrier or preparation of a study to determine its feasibility where concrete data from a study already showed that no real harm to the fish existed from the project. FERC is empowered to require an applicant to conduct a study when there is some evidence of a problem and a study is necessary to determine if a problem exists. But there was no evidence of harm in this case.

4. **American Rivers v. FERC**, 201 F.3d 1186 (9th Cir. 2000)
   - The baseline environmental condition for the purpose of NEPA analysis was the existing project. FERC must still evaluate resource impacts prior to licensing but is not required to gather information to recreate a 50-year old environmental base upon which to make present day development decisions.

- FERC is not required to give in-depth consideration to an alternative denying a license, which would entail subsequent project decommissioning and dam removal.
- Conditions imposed by the Secretary of Interior for fishway passages under §18 of the FPA, like those under §4(e), cannot be rejected or modified by FERC.

5. **American Rivers v. FERC**, 170 F.3d 896 (9th Cir. 1999)
   - Because FERC had not responded to petitioners' request, there was no final agency action and the court lacked jurisdiction to hear petitioners' claim that FERC violated the ESA by failing to initiate consultation with NMFS regarding ongoing operations of the subject project.
   - Final agency action can occur when a law or regulation deems a denial. But FERC regulations state that a petitioner's request for a decision by FERC is deemed denied after 30 days only after a petition for rehearing of a FERC order.

6. **American Rivers and Vermont v. FERC**, 129 F.3d 99 (2nd Cir. 1997).
   - FERC lacks authority to determine whether substantive conditions contained in a certification under section 401 of the Clean Water Act are beyond the scope of the statute and to then reject the conditions.
   - The court identified three curbs on unlawful certification conditions:
     - FERC may refuse to issue a license which, as conditioned, conflicts with the FPA;
     - Applicants for state certification may challenge in court any state-imposed condition that exceeds a state's authority under section 401;
   - The Clean Water and ECPA amendments to FPA (i.e, equal consideration for power and non-power values) are not incompatible, but if they were inconsistent, then section 511 of the Clean Water Act (which says the Act will not be construed to limit the authority of the United States under other laws or regulations not inconsistent with the Clean Water Act) would not apply.
   - When issuing a license subject to section 401, FERC must ascertain whether a valid state certification exists, and as a necessary part of that determination, FERC must determine whether a state had properly revoked any prior certification, but that is the limit of its authority regarding section 401 adequacy.

7. **Skokomish Indian Tribe v. FERC**, 121 F.3d 1303 (9th Cir. 1997).
   - A party denied a preliminary permit is aggrieved within the meaning of section 313(b) of the FPA, and FERC's action is reviewable in the courts of appeal.
   - Tacoma's relicensing application was filed years before the Tribe's application for a preliminary permit. FERC regulations required denial of Tribe's application for a proposed project that could have used the same water that Tacoma proposed to use. 18 C.F.R. § 4.33(a)(2).

- FERC has trust responsibility to Indian tribes which is exercised in the context of the FPA. The trust responsibility in essence consists of acting in the interests of the tribes.

- FERC has rejected the argument that it must afford Indian tribes greater rights than they would otherwise have had under the FPA. Here, the Tribe's permit application is barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance.

8. **Keating v. FERC**, 114 F.3d 1265 (D.C. Cir. 1997). (FS Intervenor).
   - FS may prescribe 4(e) conditions for both Organic Act and Multiple Use Sustained Yield Act purposes. "It is the reservation as it exists now, not the reservation as it existed years ago, that is to be protected and utilized."
   - Court upheld sufficiency of record supporting FS 4(e) instream flow conditions. In generating conditions, FS relied on its own EA, an independent evaluation of instream flows conducted by Oak Ridge Laboratory, FERC's 1986 EIS, and the Inyo Forest Plan.
   - The conditions made the project uneconomic leading FERC to deny a license for the project. Keating did not challenge the validity of FERC's economic determination.
   - Court upheld validity of standard conditions stating: "If Keating were to construct and operate his hydropower project [on the Inyo National Forest], he rightly should have to answer to the Forest Service.
   - FERC is limited to Organic Act purposes in making consistency determinations under 4(e).

9. **Southern California Edison, et al. v. FERC**, 116 F.3d 507 (D.C. Cir. 1997). (FS and DOI, Intervenors)
   - 4(e) conditions may be imposed in both original and new licenses.
   - Southern California Edison (SCE) had argued that imposition of FS 4(e) conditions in new licenses threatens to deprive project proponents of the reasonable returns to which they are entitled. The court rejected this position, explaining: "[N]either Congress' general findings about relicensings nor the record in this case support petitioners' contention that they are in danger of being deprived of reasonable returns on their long-term investments. According to the House Report on the 1986 Act, many licensees are simply struggling to defend the particularly rich returns they stand to reap if they can gain new licenses without section 4(e) conditions."
   - 4(e) "unambiguously" permits the FS to rely on broader purposes than those contained in the original authorizing statutes and proclamations in prescribing conditions.
   - Court rejected the contention that FS must produce substantial evidence to support standard conditions for each project. It explained that the standard conditions do not turn on any particular characteristic of a project. The court adopted the FS' rationale that the conditions are necessary to ensure that the

FS will "know what is being done to its lands in order to properly manage them."

10. **Rainsong v. FERC**, 106 F.3d 269 (9th Cir. 1997)(withdrawing 78 F.3d 659).
    - FERC's consistency finding under section 4(e) of the FPA is an independent, threshold determination FERC must make before balancing economic and environmental factors in deciding whether to issue a hydropower license.
    - FERC may not give "presumptive weight" to Forest Plans in making consistency findings under section 4(e)
    - On remand, FERC again found project not consistent with the purposes of the reservation. Rainsong appealed yet again to the Ninth Circuit. The Court of Appeals dismissed the appeal as untimely filed. 151 F.3d 1231 (9th Cir. 1998).

11. **Farmington River Power Co. v. FERC**, 103 F.3d 1002 (D.C. Cir. 1997).
    Farmington owned a hydropower dam on private land that received "headwaters" benefits from upstream dams. Headwaters benefits are even and predictable flows of water, which allow downstream facilities to operate continuously at higher capacity. Farmington had acquired vested rights under an act of Connecticut's legislature and pursuant to a series of agreements with local water boards. FERC attempted to assess Farmington a fee for the headwaters benefits pursuant to section 10(f) of the FPA.
    - The court struck down the assessment for lack of notice.
    - Court also struck down the assessment as a violation of section 27 of the FPA which precludes FERC interference with State laws relating to the control, appropriation, use, or distribution of water, or any vested rights acquired in water.

12. **City of New Martinsville v. FERC**, 102 F.3d 567 (D.C. Cir. 1996).
    Background: Project on non-federal lands. Under section 10(a) of the FPA, FERC is authorized to impose costs on project proponents to ensure that projects are adapted to a comprehensive plan for beneficial pubic uses including recreational purposes. The fish at issue in the case, gizzard shad, were not recreational fish but instead had the misfortune of being forage for recreational fish.
    - Court struck down FERC's imposition of costs on proponent to compensate for loss of gizzard shad for insufficient evidence that the project would harm the shad population.
    - FERC stated that gizzard shad mortality from entrainment combined with other sources of shad mortality "may be sufficient to impact gizzard shad abundance." The court rejected the sufficiency of this finding as "deal[ing] in possibilities not probabilities. It required FERC to "demonstrate that adverse impacts on fish populations are more than purely speculative."
    - The court also found that FERC lacked authority to impose costs on the proponent for non-game fish. The court helpfully recognized the condition could have been sustained "[i]f there were a finding that gizzard shad

entrainment mortality threatened game fish populations", but noted that "the Commission made no such finding."

- The City of New Martinsville had negotiated an agreement with the State under which it would pay $40,000 to the State to compensate for the loss of game fish through project entrainment. The court stated that "it makes no sense for [FERC] to treat the city's attempt to reach a negotiated settlement as some sort of waiver of the city's objections to [FERC's] liability determination."

13. **Kelley v. FERC**, 96 F.3d 1482 (D.C. Cir. 1996).
    - Michigan had requested the Director of the Office of Hydro Licensing (OHL) on several occasions to consider its request that funds be set aside for the potential future decommissioning of the project under section 10(j) of the FPA. Section 10(j) recommendations are entitled to considerable deference from FERC. The Director declined to treat the funding request under section 10(j). On rehearing before the Commission, Michigan sought reversal of OHL's decommissioning decision on the grounds that the decision was arbitrary, capricious, and otherwise unlawful.
    - The court ruled that Michigan had not raised the specific section 10(j) issue on decommissioning before the Commission and was now barred from raising it in court under section 313(b) of the FPA.
    - OHL had considered Michigan's fish and wildlife recommendations under section 10(j) and rejected them. The Commission rejected OHL's treatment of the recommendations under 10(j). Michigan never sought rehearing of whether the recommendations should have been considered under 10(j).
    - Court ruled that Michigan was barred from challenging the decision not to consider the conditions under section 10(j) because it had not sought rehearing of the proper characterization of the conditions before the Commission.
    - FERC is not required to order Company to set funds aside for future decommissioning of a project where FERC had reserved authority to require the Company to conduct studies, make financial provisions or otherwise make reasonable provisions for decommissioning of the project.

14. **Bangor Hydro-Electric v. FERC**, 78 F.3d 659 (D.C. Cir. 1996).
    - A court is to sustain 4(e) conditions if they are consistent with law and supported by the evidence presented to the Commission, either by the agency promulgating the conditions or other interested parties. The record may not "be shore[d]" up by presenting evidence in the first instance to the courts of appeal.
    - FERC performs primarily as a "neutral forum" responsible for compiling the record for the benefit of the court of appeals. It is not the Commission's role to judge the validity of the agency's position--substantively or procedurally.
    - Providing "conclusory assertions" in support of conditions is not reasonable support, or substantial evidence, for a court to uphold 4(e) conditions.

15. **Wisconsin Public Service Corp. v. FERC**, 32 F.3d 1165 (7th Cir. 1994).
    - FERC had authority under the Federal Power Act to include, in licenses issued for hydroelectric projects upon relicensing, fishway reopener conditions which required reopening a license if justified by changed environmental conditions.
    - Project proponent had complained that it was unfair to require licensees to decide whether to proceed with projects when reopener conditions prevented them from knowing, before they undertook activity, whether activity would be commercially viable.
    - The FPA cannot be read to require the Commission to protect the economic viability of all hydroelectric projects.

16. **Sayles Hydro Associates v. Maughan**, 985 F.2d 451 (9th Cir. 1993).
    State wouldn't issue water rights permit without further studies; licensee already had FERC license and instream flow requirements, and refused to undertake more studies.
    - Court holds that the only authority States get over federal power projects relates to allocating proprietary rights in water, following California v. FERC .
    - As there was no evidence of conflicting water rights, State was in effect compelled to issue water right permit.

17. **State of California v. FERC**, 966 F.2d 1541 (9th Cir. 1992).
    Background: BLM issued a FLPMA right-of-way permit for the project, requiring higher instream flows than FERC had required in the FERC license. FERC denied Cal Department of Fish and Game's instream flow recommendations under section 10(j), then reconsidered and following further negotiations, raised the instream flow level (from 5 cfs to 7 cfs). FERC determined California State Water Resources Control Board had waived its section 401 water quality certification authority. This was challenged by a party who argued that BLM did not have authority to issue a FLPMA permit for the project, and that FERC had erred in re-opening the 10(j) negotiations. The State Water Board challenged FERC's determination that the section 401 certification had been waived. The Ninth Circuit ruled that:
    - FERC could reopen its 10(j) negotiations, and is entitled to deference in interpreting that process.
    - "equal consideration" under section 4(e) (as added by ECPA) of power and non-power values does not mean "equal treatment;" FERC can reject fish and wildlife recommendations in balancing the public interest.
    - "substantial evidence" for supporting FERC's conditions "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
    - Section 401 of the CWA allows a project to proceed without certification if the certifying agency has failed to act on the applicant's request within one year; FERC's determination that the one year period started when the certifying agency receives the applicant's request (not when the agency

accepts it as complete) upheld as reasonable, and as applied in this case, meant SWRCB had waived certification
- BLM did not have authority to issue a separate permit under FLPMA authority. **NOTE**: this holding was reversed by Congress in a 1992 amendment to FLPMA, see 43 U.S.C. § 1761(a)(4) and (d) (BLM/FS can issue FLPMA permits for new hydro projects; cannot issue them to existing projects unless those projects received such permits prior to 10/24/92, or additional lands are involved).

18. **LaFlamme v. FERC**, 945 F.2d 1124 (9th Cir. 1991).
- "[W]hen a lead agency prepares environmental statements, there is no need for other cooperating agencies involved in the action or project to duplicate that work."
- Forest Service had decided not to prepare an independent EA or EIS for a hydropower project on NFS lands in addition to the environmental documentation prepared by FERC for the project. However, the Forest Service was a cooperating agency for the EA for the project.

19. **California Save Our Streams Council, Inc. v. Yeutter**, 887 F.2d 908 (9th Cir. 1989).
- Under Escondido and the hydropower statutory scheme, the legality of 4(e) conditions, including conformity to NEPA, must be challenged in the first instance in the circuit courts of appeal. District courts lack jurisdiction to review such claims.
- Plaintiffs attacked the adequacy of the Forest Service's compliance with NEPA in connection with determining § 4(e) conditions.

20. **Yakima Indian Nation v. FERC**, 746 F.2d 466 (9th Cir. 1984).
- FERC is required to examine all factors identified in the Federal Power Act before, not after, issuing a license.
- FERC had wanted to resolve the fishery questions in a comprehensive proceeding covering five dams on the Columbia River.
- FERC is required under the FPA to make the same inquiry into fishery issues in relicensing as required when initially licensing a project. The same section 10 statutory duties apply for relicensing as for initial licensing.

21. **Pacific Gas and Electric Co. v. FERC**, 720 F.2d 78 (D.C. Cir. 1983).
- A County Water District applied to FERC for a hydropower license that would have adversely impacted a hydropower project operated by Pacific Gas and Electric (PG & E) pursuant to prior license grants from FERC. The Water District asserted that FERC was required under section 10 of the FPA to approve the license because the project would generate more electricity than did PG &E's. Section 10 requires projects licensed by FERC to be best adapted to a comprehensive plan for improving or developing a waterway. FERC declined to approve a license for the Water District that adversely affected the PG & E project.

- Section 6 of the FPA prohibits the alteration of an existing license without the consent of the licensee. The court explained that section 6 reflects Congress' policy that development should be financed largely by private investment, and seeks to promote that investment by making licenses secure.
- Other Water District adverse impacts on PG & E's operation were considered to be de minimus. The court ruled that minor adverse impacts on existing projects did not violate section 6 and approved the de minimus part of the license.

22. **Lac Courte Oreilles Band v. FPC**, 510 F.2d 198 (D.C. Cir. 1975).
    - Any new license, whether issued to the original licensee or to a new applicant, must be issued according to, among other things, the standards of the FPA, § 10.

23. **Tacoma v. FERC**, No. 05-1054 (D.C. Cir. 2006)
    - FERC's license order determined that the Department of the Interior could only exercise 4(e) authority over those portions of the project on the "reservation." The Court concluded that so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including utilization of the reservation in a manner consistent with its original purpose.
    - The Skokomish Tribe asserted that FERC violated section 4(e) of the Federal Power Act by not including DOI's 4(e) conditions. FERC rejected DOI's conditions by stating they "were not timely filed." The Court concluded that FERC exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated to other agencies.
    - Tacoma Power challenged FERC's reliance upon a Biological Opinion prepared pursuant to the Endangered Species Act. The Court ruled that FERC was justified in relying on the Biological Opinion and did not act arbitrary and capricious.

Unpublished Decisions

24. **Umpqua Valley Audubon v. FERC**, 9th Circuit, Not Published, No. 04-72600
    - The Court affirmed the Forest Service's policy change that it will no longer issue a record of decision when filing 4(e) conditions at FERC and that FERC is the lead agency under NEPA.