Public Land and Resources Law Review

Volume 2

Regulation of Hydro-Electric Development: State Versus Federal Control

Charles J. Seifert

REGULATION OF HYDRO-ELECTRIC DEVELOPMENT: STATE VERSUS FEDERAL CONTROL

I. INTRODUCTION

For assorted reasons,[1] but fundamentally out of careful concern for resources close to home, many states attempt to regulate the construction of energy-producing facilities within their borders.[2] This comment specifically examines the regulation of hydro-electric facility construction on navigable waterways and waterways within the public domain. Its primary purpose is to evaluate the pre-eminence of federal over state authority under the Federal Power Act [hereinafter FPA].[3]

II. GENESIS OF FEDERAL REGULATION: THE FEDERAL POWER ACT

> [I]f we could work out a comprehensive plan under which the millions of potential horsepower energy now running to waste in the rivers and streams throughout the various States of the Union could be developed and utilized for the benefit and comfort of mankind we would have performed a service second to none, and worthy to rank with the highest rendered by any previous Congress in our history.[4]

Passage of the FPA was accomplished at a time when the patriotic passion of Americans was at a zenith—the United States was fighting World War I.[5] Some members of Congress believed development of the nation's water resources had been stalled by a fear in the private sector that construction of hydro-electric facilities, which to that point had occurred under the sole regulation of the various states, risked frustration through an abrupt assertion of the federal government's right to regulate navigable waterways.[6] American business would not risk enormous amounts of labor and capital to watch its efforts

---

1. *See, e.g.*, MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 75-20-101—1205 (1979). Section 75-20-102 (1979) states:

> Policy and legislative findings. (1) It is the constitutionally declared policy of this state to maintain and improve a clean and healthful environment for present and future generations, to protect the enviromental life-support systems from degradation and prevent unreasonable depletion and degradation of natural resources, and to provide for administration and enforcement to attain these objectives.

2. *See* the Montana Major Facility Siting Act, MCA §§ 75-20-101—1205 (1979), or the Wyoming Industrial Development and Siting Act, WYO. STAT. §§ 35-12-101—121 (1977).

3. 16 U.S.C. §§ 791a-828c (1976 & Supp. I 1977 & Supp. II 1978 & Supp. III 1979).

4. 56 CONG. REC. 9108 (1918) (remarks of Rep. LaFollette).

5. *See* 56 CONG. REC. 9109 (1918) (remarks of Rep. LaFollette).

6. The United States Congress is given the power to "[r]egulate commerce with foreign nations, and among the several states . . . ." U.S. CONST. art. I, § 8. This commerce power has been construed to vest the federal government with authority over navigable waterways insofar as that authority involves interstate commerce. Shibely v. Bowlby, 152 U.S. 1, 40 (1893); Scott v. Lattig, 227 U.S. 229, 243 (1912).

sabotaged by whimsical federal intervention; a federal permit system was needed. With the threat of unexpected federal involvement eliminated, growing industrial needs could be satisfied with abundant, inexpensive water power.

Quite apart from the bullish rhetoric of the early "Roaring '20s," numerous reasons for passage of the FPA were articulated by American courts. It was said the Act encouraged navigation, hydro-electric development, and productive use of the public lands.[7] The fruits of this economic and social stimulus were to be preserved "to the people,"[8] although as will be shown, the generic term "people" ignores the difficult problems of American federalism, namely: Is it the people of the United States, or the people of Colorado, Wyoming, or Montana that benefit from facility-siting in their home states?

Congressional regulatory authority over "navigable waterways" is derived from the Commerce Clause of the United States Constitution.[9] Under the FPA, these waterways are defined as:

> those parts of 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, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.[10]

Courts have been prone to a simpler definition. In *Rochester Gas and Electric Corp. v. Federal Power Commission*,[11] the Court of Appeals for the Second Circuit developed this three-part test: Waters are "navigable" if (1) they are presently being used, or are suitable for use as such; (2) they have been used, or were capable of being used as such in the past; or, (3) they could be made suitable, by reasonable improvements, for such uses in the future,[12] dams and other man-made obsta-

7. Montana Power Co. v. Federal Power Comm'n, 330 F.2d 781 (9th Cir. 1964).

8. United States v. Federal Power Comm'n, 191 F.2d 796 (4th Cir. 1951), *aff'd* 345 U.S. 153 (1952).

9. U.S. CONST. art. I, § 8, *supra* note 6.

10. 16 U.S.C. § 796(8) (1976).

11. 344 F.2d 594 (2nd Cir. 1965).

12. 344 F.2d at 596. Naturally the reader should be familiar with the leading case which decides the general issue of navigability as it relates to applicability of the federal

cles notwithstanding.[13]

Very few cases appear[14] in which the Federal Power Commission's[15] [hereinafter FPC] control over facility siting has been denied on the grounds that the waterways in question were "non-navigable." Despite the paucity of commercially navigable rivers and streams in the inland West, federal involvement will likely be as prominent in that region as in others where commercial water traffic actually exists. Moreover, federal constitutional[16] and statutory[17] authority may be exerted over any waterways running within the public lands or reservations of the United States. Obviously in such cases the issue of navigability does not arise.

Strictly read, the FPA indicates that Congress provided for state participation in the regulatory process. By theoretical design, where no genuine federal interest appears, facility siting is regulated solely by the respective states.[18] For example, nothing in the Act affects the states' roles in controlling the appropriation of water for irrigation or municipal purposes.[19] Most importantly, under Section 9(b) of the act, no

---

commerce power, United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). The United States Supreme Court held:

> It is obvious that the uses to which the streams may be put vary from the carriage of ocean lines to the floating of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western Mountains. The test as to navigability must take these variations into consideration.

Id. at 405-06. The Court further held that: (1) navigability could be considered "in the light of the effect of reasonable [watercourse] improvements," and, (2) a waterway is not non-navigable "merely because artificial aids must make the [river] suitable for use before navigation may be undertaken." *Id.* at 406-07.

13. *See* Montana Power Company v. Federal Power Comm'n, 185 F.2d 491 (D.C. Cir. 1950).

14. The author found only one reported case in which the river in question was shown to be non-navigable. Hudson River Regulating Dist. v. Fonda, J. & G.R. Co., 217 N.Y.S. 781, 127 Misc. 866, *aff'd*, 288 N.Y.S. 686, 223 App. Div. 358 (1926).

15. Regulatory functions performed by the Federal Power Commission under the Federals Power Act were transferred, upon the creation of the Department of Energy in 1977, to either the Secretary of Energy or the Federal Energy Regulatory Commission. 42 U.S.C. §§ 7101-7352 (Supp. II 1978).

16. *See* U.S. CONST. art. 4, § 3:

> The 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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

17. 16 U.S.C. § 817 (1976).

18. *See* Northern N.H. Lumber Co. v. N.H. Water Resources Board, 56 F. Supp. 177, 181 (S.D.N.Y. 1944).

19. 16 U.S.C. § 821 (1976):

> 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.

facility construction permits are to issue except upon a showing of satisfactory evidence, produced by the permit applicant, that it "[h]as complied with the requirements of the laws of the state or states within which the proposed project is to be located."[20] The importance of this provision is explored in detail below.

The legislative history of the FPA indicates that lawmakers fully expected states' decisional roles to be amply protected. In explaining how the federal government would have no plenary power not contemplated by the Constitution, Representative LaFollette put it this way:

> Under this bill we only allow the commission of [federal] supervisory power over those functions entirely within the States' jurisdiction for the period covered by any license *the State having exercised its rights in advance of issue*[21] [of license] . . . . By the enactment of this bill we shall be able to develop our water powers recognizing the States' rights as to water, bed, and bank control.[22] (emphasis added).

Federal authority derived from the navigability doctrine appeared at the time to be quite limited. As Representative Mondell said:

> [I]n other words, the Government would have control of very little water-power development in the New England States except in the lower courses of the rivers, only partial control on the South Atlantic seaboard, very little in [Iowa] none of the streams in the state of Nebraska, and only partial control . . . elsewhere.[23]

The strong possibility that passage of the FPA depended on this narrow view of the Act's application, taken with the declared legislative purpose that the act was designed to *allow* the construction of hydro-electric facilities[24] (rather than to affirmatively regulate[25] that

---

20. 16 U.S.C. § 802(b) (1976):

> (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 purpose of a license under this chapter.

21. This represents a clear reference to what later became Section 9(b) of the Federal Power Act.

22. 56 CONG. REC. 9110 (1918) (remarks of Rep. LaFollette).

23. 56 CONG. REC. 9114 (1918) (remarks of Rep. Mondell).

24. Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties . . . . While the right of water control and the ownership and jurisdiction of bed and banks of our waterways are admittedly in the states, the jurisdiction over the navigation of all streams being in the Government of the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

See 56 CONG. REC. 9109 (1918) (remarks of Rep. LaFollette).

construction), makes the interpretation given the Act by the federal courts surprising if not incredible.

III. CONTEST FOR AUTHORITY: THE CHALLENGE OF SECTION 9(B)

> The cry of "Stop thief" was raised, and raged with great violence for a decade, with the result that our Government, through timberland withdrawals, power-site withdrawals, coal-land withdrawals, and other withdrawals of various kinds, backed up by Congress, always alert to what it seems the people want, swung to the other extreme, and for a decade . . . now there has been practically no development of water power . . . throughout the great West . . . with the natural result following that within a short time our expanding commerce and trade, our manufactories and internal development had drawn so heavily on coal and oil properties already developed as to cause a rapid increase in the price of those commodities, and in many localities an even worse hardship—that of not receiving an adequate supply or none at all.[26]

Originating in Minnesota, the Cedar River flows in a southeasterly direction 270 miles through Iowa, passing Moscow at a point only 10 miles west of the Mississippi River. From Moscow the Cedar flows southwesterly for 29 miles, where it converges with the Iowa River at a point called Columbus Junction, below which the Iowa converges with the Mississippi. On April 2, 1941, the First Iowa Hydro-Electric Cooperative sought a permit from the FPC to construct an earthen dam on the Cedar directly north of Moscow. This dam would back the waters of the Cedar into an 11,000-acre reservoir. Water from the reservoir would feed an eight-mile diversion canal designed to carry the water to a hydro-electric dam, planned for construction on the Mississippi at the town of Muscatine. The project would slow the rate of flow of the Cedar River at Moscow to about 25 cubic feet per second.

The FPC refused to issue a permit on the grounds that the applicant (First Iowa Hydro-Electric Cooperative) had failed to provide satisfactory evidence of its compliance with Iowa's own statutory

---

25. A definition offered by appellant's counsel in Gibbons v. Ogden, 9 Wheat 1 (1824), is helpful here:

> "[T]o regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying in those parts which remain as they were, as well as to those which are altered . . . . It produces a uniform whole.

This definition is offered here to illustrate what the text is designed to illustrate: federal regulation of hydro-electric facility siting works to exclude the action of others (the states) that would operate in the same field.

26. 56 CONG. REC. 9108 (1918) (remarks of Rep. LaFollette).

requirements,[27] pursuant to Section 9(b) of the FPA.[28] The Court of Appeals for the District of Columbia affirmed the FPC's ruling, despite the Cooperative's alternate contentions that either a) the law of Iowa did not require applicants in their position to secure a state permit, or b) if the law of Iowa did so require, the law was unconstitutional.[29] In holding that the FPA did not wholly preempt the state of Iowa from at least sharing in the regulation of facility siting, the court found that Congress' purpose was to "[s]trengthen and assist state control and regulation, rather than to impair or diminish it. The legislative history of the Federal Power Act reveal[ed] such an intention."[30] The court did not reach the petitioner's constitutional challenge, since the statutes in question were "susceptible of an interpretation consistent with constitutionality,"[31] namely, that the FPA contemplated a dual system of control, consistent with the "[p]lain purpose of Section 9(b)."[32] The state of Iowa, therefore, was not powerless to deal with attempts at "environmental rearrangement"[33] within its borders, even when those attempts took the form of electric facility construction on navigable waterways.[34]

The Cooperative appealed to the United States Supreme Court, which reversed the court of appeals in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* [hereinafter *First Iowa*],[35] that the FPA did not contemplate a dual system of overlapping final authority,[36] but rather a comprehensive system of federal control subject to the authority "saved" the states by Section 27 of the Act: state laws were protected from preemption in the limited area of appropriation of water for use in irrigation and for related uses.[37] The Court held that Section 9(b) required the applicant to furnish the federal licensing authority with evidence of its compliance with the legal requirements of

---

27. IOWA CODE § 7767 (1939):

> 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.

28. *See* note 20, *supra*.

29. First Iowa Hydro-Electric Co-op. v. Federal Power Comm'n, 151 F.2d 20, 22-23 (D.C. Cir. 1945).

30. 151 F.2d at 26.

31. 151 F.2d at 24.

32. *Id.*

33. IOWA CODE § 7771 (1930) contained a specific prohibition of the sort of diversion proposed by First Iowa Co-op.

34. *See* 151 F.2d at 26. The Court of Appeals took pains to formulate a mode of analysis with which the preemptive capabilities of federal legislation could be measured.

35. First Iowa Hydro-Electric Co-op. v. Federal Power Comm'n, 328 U.S. 152 (1946).

36. 328 U.S. at 108.

37. 328 U.S. at 175.

the particular state, only insofar as the *FPC* was satisfied those state requirements had constitutional force:[38]

> 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.[39]

The Supreme Court thus disagreed with the "plain purpose" ascribed to Section 9(b) by the court of appeals, choosing instead to rule—on grounds that a dual system of final authority would be "difficult,"[40] "unworkable,"[41] or "impossible"[42]—that federal authority would ultimately control in the area, and state authority would (as it must under the Supremacy Clause[43] and Commerce Clause[44]) play a secondary role.

The Court's construction of the FPA included this analysis:

> 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 reqired 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

---

38. Mr. Justice Frankfurter observed in his dissenting opinion that the effect of the majority's holding was to allow the Federal Power Commission to attach a meaning to state laws which theretofore might not have been construed by the state's own high court:

> It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: "to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books . . . .
> Before conflict can be found between federal and State legislation, construction must be given the State legislation. Avoidance of conflict is itself an important factor relevant to construction. And so, construction of State legislation relating to the matters dealt with in the Federal Power Act is subtle business and a subtlety within the duty, skill, and understanding of State judges.

See 328 U.S. at 185-87 (dissenting opinion).

39. 328 U.S. at 178.

40. 328 U.S. at 168.

41. *Id.*

42. *Id.*

43. U.S. CONST. art. IV, ¶ 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

44. *See* Gibbons v. Ogden, *supra* note 25. (Johnson, J., concurring):

> There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; . . . . By common consent, those laws dropped lifeless from their statute books, for want of sustaining power that had been relinquished to Congress.

the United States over the navigability of its waters.[45]

The record of the debate in Congress over the FPA, however, reveals this quote from one of the Act's chief sponsors:

> If we make it one of the *conditions precedent* to the granting of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion,[46] and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or a license can not issue.[47] (emphasis added).

It appears the high court either failed or refused to notice the clearly expressed legislative intent regarding state enactments and water power facility siting. In this instance, *stare decisis* charges the states with difficult regulatory doctrine.

IV. Growth of Federal Authority

Because of the language of Section 9(b), federal courts have expressed reluctance to totally pre-empt state regulatory power that, after *First Iowa*, they still possess. In 1977, for example, a federal judge commented: "Congress was careful not to cast the regulation of hydroelectric plants in an entirely federal mold."[48] But the functional judicial use of *First Iowa* has, in practicality, proven exactly the opposite. For example, in *Florida Lime and Avocado Growers, Inc., v. Paul*,[49] the United States Supreme Court relied on *First Iowa* for the proposition that federal and state authority may operate independently in the same field if such independence would not impair "[f]ederal superintendence in the field."[50] The critical consideration to the Court was not the possibility of conflict between federal and state law in theoretical purpose, but whether the *effects* of state law might infringe on the federal prerogative.

In the late 1940s,[51] the city of Tacoma, Washington, received a permit from the FPC to construct two hydro-electric dams on the Cowlitz River. The city intended to issue and sell utility revenue bonds to finance construction of the dams, and to finance condemnation of certain property—notably Washington's Mossyrock Fish Hatchery and a section of state highway—which would be inundated by the project.

45. 328 U.S. at 170.
46. *See* note 33, *supra*.
47. 56 Cong. Rec. 9110 (1918) (remarks of Rep. LaFollette).
48. Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1200 (5th Cir. 1977).
49. 373 U.S. 132 (1963).
50. 373 U.S. at 142.
51. An exact date does not appear in the case as reported.

Opposing construction of the dams were the state of Washington and initially, the Washington State Sportsmen's Council, Inc..

By 1957, the various resulting lawsuits had formed what one judge called a "Hydra-headed controversy,"[52] which found its way, on two occasions, to the Supreme Court of Washington. In one case, *City of Tacoma v. Taxpayers of Tacoma* [hereinafter *City of Tacoma*],[53] the Washington court was faced with resolving two critical questions: 1) Did a municipal corporation have the power to condemn state-owned land already dedicated to a public purpose? 2) If such a power ordinarily did not exist, did the federal permit to construct the two dams) confer the needed power upon the city?[54] After holding that the city did not possess by statute the power of eminent domain, the court held that the FPA did not purport to confer such authority on a municipal license-holder.[55] The case presented, in fact, no issue of federal authority; the central question involved merely a lack of state statutory power in the city.[56] The significant question raised in *Florida Lime and Avocado Growers, Inc. v. Paul* was again presented in *City of Tacoma*: does the refusal by the state of Washington to allow condemnation of state-owned land make the grant of the federal permit meaningless, or does such a refusal effectively intrude upon some aspect of federal power? Although the Washington court refused to allow the FPA to preempt a legitimate state regulatory scheme simply on the basis of that scheme's *effect* on a federal permit, the United States Supreme Court disagreed:

> Consistent with the *First Iowa* case . . . 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* . . . .[57] (emphasis added).

Hence, an attempted resistance to federal authority grounded upon a classic assertion of state power—the power of eminent domain—was wholly overcome. Ironically, the municipality of Tacoma, armed with the permit of a federal agency, had prevailed over the very authority (the state of Washington) that gave it life as a functioning governmental entity. State authority, in the end, had yielded where the effect on an otherwise viable assertion of state authority infringed on the federal prerogative. This was a far cry from the plan conceived

52. City of Tacoma v. Taxpayers of Tacoma, 49 Wash. 2d 781, 307 P.2d 567, 572 (1957).

53. *Id.*

54. 49 Wash. 2d 781, 307 P.2d at 572.

55. *Id.*

56. 49 Wash. 2d 781, 307 P.2d at 577.

57. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

merely to allow the construction of water power facilities on the nation's rivers and streams.

V. FEDERALISM: CONTEXT FOR CONFLICT

The constitutional truisms that 1) the federal government is one of delegated powers, and 2) power not delegated to the federal government, nor prohibited the states, resides in the states,[58] on their face lead to the conclusion that the primary governmental authority in American life is state government. Certainly the matter is not so easy. A more realistic perception of the federal/state relationship—that relationship we designate as federalism—is that the federal government and the various states are "[p]itted against one another for authority or jurisdiction, with the judiciary as the final arbiter."[59] Within the area of facility-siting regulation, we shall see that if a dominance has evolved, it does not weigh on the side of the states.

One should not causally conclude that federal preemption of state authority receives a preference in the law. In *Parker v. Brown*,[60] Mr. Justice Stone wrote:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control . . . is not lightly to be attributed to Congress.[61]

In theory, then, preemption occurs specifically, where there is a clear manifestation of congressional intent to displace state authority,[62] or impliedly, as in situations where the aim of a federal regulatory scheme could not admit a collateral assertion of state authority.[63] A judicial hesitance to finally end the exercise of state authority in areas which *could*[64] be the subject of unilateral federal control clearly appears in *National League of Cities v. Usery*,[65] where the United States Supreme Court held that the federal Fair Labor Standards Act of 1938 (as amended) did not reach states acting *qua* states, even though

58. U.S. CONST. amend. X:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

59. Mills and Woodson, *Energy Policy: a Test for Federalism*, 18 ARIZ. L. REV. 405 (1976).

60. 317 U.S. 341 (1943).

61. 317 U.S. at 351.

62. *See* California v. Zook, 336 U.S. 725, 733 (1949).

63. *See* Pennsyvlania v. Nelson, 350 U.S. 497, 504 (1956).

64. For an illustration of the chronological growth of federal authority over inter- and intrastate activities under the Commerce Clause, read Gibbons v. Ogden, 9 Wheat 1 (1824), in conjunction with Katzenbach v. McClung, 379 U.S. 294 (1964).

65. 426 U.S. 833 (1976).

viewed alone, the activity might have been appropriately subject to the federal commerce power. Mr. Justice Rehnquist wrote "[w]e think there would be little left of the states' 'separate and independent existence' " to hold otherwise.[66]

Judicial prejudice against plenary federal authority in resource regulatory schemes becomes important when considered with the growing awareness of states' residents of first, the innate aesthetic and fragile resources of their particular states, and second, the possible utilization of those resources in efforts to solve national energy problems. One author describes the situation like this:

> [B]asically, the Western States are determined to acquire additional control over development activities within their borders regardless of whether such development occurs on private, state, or federal lands. State interest in this matter has reached the point where, in the absence of federal provisions authorizing states to participate in and affect management decisions respecting exploitation of resources on federal lands, the states are unilaterally seeking to assert jurisdiction over such land.[67]

But if local efforts to control development on navigable rivers and public lands are to be at all meaningful they must be evaluated in the legal context of federal authority. For example, the territorial jurisdiction of a state traditionally has extended to the beds and banks of its waterways,[68] even though those waterways may be "navigable" *vis a vis* the federal commerce power. However this authority was limited in *Lewis Blue Point Oyster Cultivation Company v. Briggs*, [hereinafter *Briggs*],[69] where the "public right of navigation"[70] was held to be superior to the theretofore absolute property right of bed and bank ownership.[71] This dominant interest of navigation, manifest in federal authority, included "the right to use the bed of the water[s] for every purpose which is in aid of navigation."[72] The logic of preserving to the

66. 426 U.S. at 851, *citing*: Coyle v. Oklahoma, 221 U.S. 559, 580 (1911).

67. Shapiro, *Energy Development on the Public Domain: Federal/State Cooperation and Conflict Regarding Environmental Land Use Control*, 9 NAT. RES. L. 397, 398 (1976).

68. Pollard's Lessee v. Hagan, 3 How. 212, 230 (1845):

> [T]his right of eminent domain over the shores and the soils under navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to deprive the States of the power to exercise a numerous and important class of police powers.

69. 229 U.S. 82 (1913).

70. 229 U.S. at 87.

71. *See* Brown v. United States, 81 F. 55 (C.C.E.D. Va. 1897).

72. 229 U.S. at 87.

federal government the actual oversight of free-flowing waterways in the interest of commerce is readily understood. But "the interest of navigation," through judicial decision, was later cast in the different context of taking (condemning) river beds and banks to erect structures which themselves could end actual navigation on any particular waterway.

First, in *Kohl v. United States*, [hereinafter *Kohl*][73], a federal power of eminent domain, limited to the sphere of appropriate federal action, was particularly recognized:

> [W]ithin its own sphere, [the national government] may employ all the agencies for exerting [power] which are appropriate or necessary, and which are not forbidden by the law of its being . . . . The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned.[74]

It appears then that the commerce power and *Kohl* establish a federal right of eminent domain over navigable waterways to be exerted, obviously, not over water, but over the beds and banks of various watercourses; the very area of regulation thought earlier to be the particular province of the states.[75]

Secondly, the United States Constitution grants Congress the power to "[e]xercise exclusive legislation in all cases whatsoever . . . for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings*,"[76] (emphasis added) where the property thereby affected has been ceded to the federal government by a particular state. In *James v. Dravo Contracting Company*, [hereinafter *James*],[77] the respondent contracted with the federal government for the construction of certain locks and dams in Ohio's Kanawha River. The state sought to subject the respondent to its Gross Sales and Income Tax Law, the effect of which was to levy a 2 per cent tax on the gross proceeds of the respondent's business. The critical issue presented for decision was whether the state had jurisdiction to impose the tax.[78] Consistent with *Pollard's Lessee v. Hagan*,[79] the Court affirmed that jurisdiction over the bed of the Kanawha remained in the state of Ohio.[80] But the Court

73. 91 U.S. 367 (1875).
74. 91 U.S. at 372.
75. *See* congressional debate, *supra* note 4.
76. U.S. CONST. art. I, § 8.
77. 302 U.S. 134 (1937).
78. 302 U.S. at 138.
79. 3 How. 212 (1845). *See also* note 68, *supra*.
80. 302 U.S. at 140, 141.

also held that locks and dams were "other needful buildings" under Article 1, Section 8 of the Constitution.[81] The jurisdiction of the state was therefore limited by the federal government's right to improve the bed of the Kanawha in the interests of navigation;[82] this, in reliance on *Briggs*. In a 5-4 decision, imposition of the tax was sustained on the ground that it interfered with no strictly federal governmental function.[83] However the federal government's affirmative right to erect dams in navigable waterways was firmly established, even though this same federal interest was *initially* limited to merely preserving the actual possibility of navigation in the interests of commerce.[84]

VI. CONCLUSION

> I have watched for years the pendulum swing from excess of liberality to a worse extreme of niggardliness, and, like the dog in the manger, we could or would not eat the hay ourselves, neither would we allow the horse to eat it. We would not, and no doubt wisely not, develop our water powers ourselves, neither would we pass laws under which private capital properly regulated could safely be invested in water-power development.[85]

The drafters of the FPA may have thought the traditional authority of individual states over non-navigable as well as navigable waterways would preserve meaningful state control over water power facility construction. But judicial interpretation of the Commerce Clause and the broad definition given the term "navigable" makes any such authority meaningless. Under *Briggs*, the authority is *subject to* a federal interest in navigation which, under *James*, includes the affirmative power to construct dams and other structures, state authority notwithstanding. *Kohl* gives this affirmative right greater meaning in view of the federal government's sovereign right of eminent domain. Indeed, *City of Tacoma* indicates that this power may be *imparted* to private parties holding federal permits; recall that no state law can prevent the FPC from issuing a federal permit, or bar the licensee from acting thereunder. Resting at the base of this line of authority is *First Iowa*, which might be called the paradigm of judicial misinterpretation of clear congressional intent. Nonetheless, the conclusion is inescapable: federal power over hydro-electric facility siting is plenary.

A combination of energy scarcity and high energy demand has

81. *See* text and note 76, *supra*.
82. 302 U.S. at 140.
83. 302 U.S. at 161.
84. *See generally*, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).
85. 56 CONG. REC. 9112 (1918) (remarks of Rep. LaFollette).

dealt our industrialized society a vicious blow. A related problem has evolved in that energy resources, which may exist in scattered, sparsely populated states, are sought for domestic and industrial use on a nationwide basis. The possibility that the resource-rich states may, as "the dog in the manger," jealously protect their treasures indicates that seriously divisive questions of federalism await us in the future. Perhaps we are apprised of what future outcomes will be by Mr. Justice Jackson's simple analysis: "[O]ur economic unit is the nation."[86]

Charles J. Seifert

86. Hood v. DuMond, 336 U.S. 525, 537 (1948).