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## Environmental Law

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## Comment

**\*741 FERC'S ABDICATION OF JURISDICTION OVER HYDROELECTRIC DAMS ON  
NONNAVIGABLE RIVERS: A POTENTIAL SETBACK FOR COMPREHENSIVE STREAM MANAGEMENT**Max J. Mizejewski [\[FNa1\]](#)

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The Federal Energy Regulatory Commission (FERC or Commission) controls the nation's nonfederal hydroelectric development through the issuance of permits for any projects on the nation's waterways. Recently, FERC changed its previous stance on its jurisdiction over hydroelectric projects on nonnavigable rivers. In denying its jurisdiction over three hydroelectric dams on nonnavigable rivers, FERC left thirty-two other such projects' relicensing in question. This Comment discusses the history of the Federal Water Power Act, which established FERC, and the Commission's jurisdiction, and analyzes the possible repercussions from the recent abdication of jurisdiction over hydroelectric projects on nonnavigable rivers.

## I. Introduction

Congress established the Federal Energy Regulatory Commission (FERC or Commission), originally known as the Federal Power Commission (FPC), in the Federal Water Power Act of 1920 (FWPA) [\[FN1\]](#) to provide comprehensive control over nonfederal hydroelectric development on the nation's waters. [\[FN2\]](#) Notwithstanding this mandate, the Commission recently denied that it had jurisdiction to relicense three hydroelectric dams on **\*742** nonnavigable rivers. [\[FN3\]](#) This ruling means that the Commission is likely to excuse thirty-two other similarly situated projects from relicensing in the next few years. [\[FN4\]](#) If FERC relinquishes jurisdiction over these projects, important public and environmental protections may be lost. [\[FN5\]](#)

FERC's uncertainty about its jurisdiction revolves around amendments made to the FWPA over sixty years ago, in 1935, that renamed the FWPA the Federal Power Act (FPA). [\[FN6\]](#) These amendments expanded the Commission's authority to require projects on nonnavigable rivers to be licensed. However, the amendments applied only to projects that had undergone construction or major modification after August 26, 1935, the date of the amendments. [\[FN7\]](#) Therefore, unless FERC determines that a project on a nonnavigable river has undergone major modification since 1935, it must **\*743** find its relicensing authority in the 1920 FWPA. [\[FN8\]](#) The projects that are the subject of this paper were all built before August 26, 1935.

The 1920 FWPA limited the Commission's express licensing authority to projects on navigable rivers. [\[FN9\]](#) However, the Act required the Commission to license projects on nonnavigable rivers if it determined that they affected the interests of interstate commerce. [\[FN10\]](#) The Commission interpreted this provision to give it an implied authority to license projects on nonnavigable rivers, and the Commission licensed approximately 125 such projects between 1920 and 1935. [\[FN11\]](#)

In 1965, in *Federal Power Commission v. Union Electric Company (Taum Sauk)*, the Supreme Court affirmed the Commission's authority to require projects on nonnavigable rivers to be licensed if they were connected to an interstate power grid. [\[FN12\]](#) This decision prompted the FPC to encourage unlicensed projects that were on nonnavigable waters and

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connected to an interstate power grid to file license applications, including those built before 1935. [\[FN13\]](#) After receiving applications from those projects that voluntarily filed, the Commission licensed the ones that were connected to an interstate power grid. Section 23 of the FPA makes it clear that these projects, collectively known as the Taum Sauk projects, are barred from operating without a license once the Commission determines that their connection with an interstate power grid affects interstate commerce. \*744 [\[FN14\]](#) This is true regardless of whether the projects have undergone any post-1935 construction.

In 1972, in *Farmington River Power Co. v. Federal Power Commission*, Farmington River Power Company, the operator of a 1925 project on a nonnavigable river, appealed an FPC order commanding it to file a license application. [\[FN15\]](#) The company argued that section 23 of the 1920 FWPA gave it discretion not to file a license application. [\[FN16\]](#) The Second Circuit agreed, holding that because the original FWPA did not give the Commission authority to investigate a project's effects on interstate commerce unless an operator voluntarily filed a license application, and because the 1935 amendments were not retroactive, the FPC could not require Farmington Power to obtain a license. [\[FN17\]](#)

Recently, FERC interpreted *Farmington* to mean that, absent post-1935 construction, the Commission loses jurisdiction over the Taum Sauk projects after the expiration of their licenses. [\[FN18\]](#) It is unlikely that Congress intended the Commission to relinquish its jurisdiction after making a determination that these projects affect interstate commerce. The Commission's jurisdiction over projects on nonnavigable rivers is now, and has always been, grounded on a determination that the project affects interstate commerce. [\[FN19\]](#) Once the Commission makes this determination, the agency has jurisdiction, which it does not lose unless it determines that the project no longer affects interstate commerce.

FERC's determination that it now lacks jurisdiction over these projects seriously undermines the fundamental purpose of the FPA--to provide comprehensive management of all water-power resources in \*745 which the federal government has a legitimate interest. [\[FN20\]](#) This paper examines FERC's jurisdiction to relicense pre-1935 hydroelectric projects located on nonnavigable rivers that have not undergone any post-1935 construction, are not located on lands of the United States, and do not use water power from a government dam. Part II discusses the history of the FPA and FERC's jurisdiction under the Act. Part III examines the circumstances which led the FPC to license the thirty-six Taum Sauk projects. Part IV discusses FERC's authority over the Bend Project, the first Taum Sauk project over which FERC relinquished its jurisdiction. Part V concludes that FERC's failure to assert jurisdiction over the Taum Sauk projects upon the expiration of their current licenses is a violation of the FPA.

## II. FERC's Jurisdiction Under The Federal Power Act

### A. Historical Overview

Early federal management of the nation's rivers focused primarily on navigation. The U.S. Army Corps of Engineers (Corps), the first federal agency in charge of river development, regarded rivers as highways for commercial transportation. [\[FN21\]](#) The Corps viewed all other uses, such as hydropower and irrigation, as secondary to navigation. [\[FN22\]](#) Consequently, early hydroelectric projects were developed under a hodgepodge of federal and local regulations. [\[FN23\]](#)

In the late nineteenth century, the Progressive Conservationists criticized water-power development as being inefficient and based more on local politics than science. [\[FN24\]](#) The Progressive Conservationists sought to give equal consideration to river uses other than navigation, such as irrigation and energy production, in an effort to maximize the efficient use of river systems. [\[FN25\]](#) Largely through their efforts, a policy of comprehensive basin-wide planning for multiple uses eventually replaced the earlier navigation-oriented approach to river development. [\[FN26\]](#) This change in federal water policy laid the foundation for legislation, such as the Federal Water Power Act (FWPA), designed to encourage comprehensive development of the nation's water resources.

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The earliest federal legislation regulating dams was the Rivers and Harbors Act of 1890. [\[FN27\]](#) That statute required the consent of the Secretary of War for all obstructions in U.S. waters that were not within established harbor lines. [\[FN28\]](#) The Act, however, did not specify whether Congress's jurisdiction \*746 extended to nonnavigable rivers. Conservationists argued that a river system, if navigable in part, was a unit from its forest headwaters to its mouth, and that Congress had jurisdiction over the whole river. [\[FN29\]](#) The fact that activities in nonnavigable portions of navigable rivers can affect the navigability of the river downstream supported this notion. Private interests, such as power companies attempting to secure favorable water power legislation, argued that Congress had jurisdiction only over waters actually used for navigation. [\[FN30\]](#)

In 1899, the Supreme Court settled this debate in favor of the conservationists, holding that the Rivers and Harbors Act gave the Corps jurisdiction to the full extent of the Commerce Clause. [\[FN31\]](#) Thus, the Corps could prevent construction in nonnavigable rivers that affected the navigable capacities of the river downstream. [\[FN32\]](#)

Enactment of the FWPA, now renamed the Federal Power Act (FPA), was inspired in large part by America's participation in World War I. By 1917, certain coal and oil reserves, which then almost exclusively fueled the United States, were becoming increasingly sparse, and legislation to encourage alternative power sources had proved inadequate. [\[FN33\]](#) In December of 1917, President Wilson presented a draft water power bill to the relevant congressional committees. [\[FN34\]](#) The bill aimed to encourage development of America's largely untapped hydropower resources. After three years of debate, Congress passed the FWPA in 1920, providing comprehensive water power legislation for the nation's waters. [\[FN35\]](#)

#### \*747 B. FERC's Licensing Authority

The 1920 FWPA gave the Federal Power Commission (FPC) two sources of licensing authority, section 4(d) and section 23. Section 4(d) authorized the Commission to license projects 1) on navigable waters, 2) on public lands, or 3) using surplus water or water power from a government dam. [\[FN36\]](#) Thus, section 4(d) limited the Commission's licensing authority on private lands to projects on navigable waters. However, the Commission interpreted section 23 of the Act to give it an implied authority to license projects on nonnavigable rivers. [\[FN37\]](#) Section 23 allowed operators that were uncertain as to whether the Commission had jurisdiction over them to file a "declaration of intention" to build on a nonnavigable watercourse. [\[FN38\]](#) Filing this document obligated the Commission to determine whether a project would affect the interests of interstate commerce. [\[FN39\]](#) If the Commission determined that it would, the developer could not proceed with construction until obtaining a license. [\[FN40\]](#)

The 1935 amendments, which renamed the FWPA as the FPA, extended the Commission's authority to require projects to obtain a license. Section 4(e) of the amended Act expanded the Commission's express licensing authority to include all projects on "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." [\[FN41\]](#) The purpose of this amendment was to clarify the Commission's pre-existing implied authority to license projects on nonnavigable waters that were required to be licensed under section 23 of the 1920 Act because they affected interstate commerce. [\[FN42\]](#)

The Commission interpreted section 23(b)(1) of the amended Act [\[FN43\]](#) to require licenses for projects 1) located on navigable waters of the United States, 2) occupying public land or reservations of the United States, 3) \*748 using surplus water or water power from a federal dam, or 4) located on nonnavigable waters over which Congress has Commerce Clause jurisdiction and that have undergone construction or major modification after August 26, 1935. [\[FN44\]](#) Under section 23(b)(1), developers wishing to build hydroelectric facilities on nonnavigable rivers are required to file a declaration of intention to build on a nonnavigable watercourse. [\[FN45\]](#) By making this filing requirement mandatory, the 1935 amendment to section 23 extended the Commission's jurisdiction by taking the discretion to file away from the operator, thereby increasing the Commission's investigatory power to determine whether a project affected interstate commerce. The

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amendment expanded who had to file, but did not alter the Commission's preexisting broad licensing authority. [\[FN46\]](#) Section 23 has always required the Commission to license projects on nonnavigable waters if it found they affected interstate commerce. [\[FN47\]](#)

### III. The Taum Sauk Projects

#### A. Taum Sauk

The Taum Sauk Project, owned and operated by Union Electric Company (Union), is a pumped storage hydroelectric facility located on a nonnavigable tributary of the Black River in Missouri. [\[FN48\]](#) The power generated by the facility supplies electricity to Missouri, Illinois, and Iowa. [\[FN49\]](#) In 1962, Union filed a declaration of intention to construct the project, as required by section 23(b)(1) of the Federal Power Act (FPA). [\[FN50\]](#) After an investigation, the Federal Power Commission (FPC) ordered Union to obtain a license based on two findings made by the hearings examiner: First, that the project would affect the downstream navigability of the Black River. Second, that the water power generated by the project would be used for the interstate transmission of electricity, thus affecting the interests of interstate commerce. [\[FN51\]](#)

Union appealed the Commission's order to the courts. [\[FN52\]](#) In 1963, the Eighth Circuit reversed the order, holding that the effects on interstate commerce contemplated by the FPA were limited to effects on downstream\*749 navigation. [\[FN53\]](#) The FPC petitioned to the Supreme Court, and the Court granted certiorari.

In 1965, in *Federal Power Commission v. Union Electric Company*, the Court considered whether, in enacting the Federal Water Power Act (FWPA), Congress intended to invoke its full Commerce Clause authority over hydroelectric projects located on waters subject to federal jurisdiction. Although there were no express references to the interstate transmission of electricity in the FWPA, the Court held that the terms of the Act, particularly section 23, reached beyond the control of navigation, and included the interstate transmission of electricity. [\[FN54\]](#) The Court noted that when Congress wanted to bring aspects of commerce within the full sweep of its constitutional authority, it regulated not only commerce, but also matters which "affect" commerce. [\[FN55\]](#) Thus, the Court concluded that the language of section 23, requiring projects to be licensed if they affected interstate commerce, reflected Congressional intent to give the Commission jurisdiction over all projects within Commerce Clause authority. [\[FN56\]](#)

The FPC interpreted the Court's Taum Sauk decision to mean that all projects connected to an interstate power grid had to be licensed, including those, such as the Bend Project, that were built before 1935. Consequently, the FPC sent letters to all known pre-1935 projects that were connected to an interstate power grid. These letters, which referenced the Taum Sauk decision, encouraged the operators to file applications. [\[FN57\]](#) After reviewing the resulting applications, the Commission issued licenses to those projects it determined affected interstate commerce. [\[FN58\]](#)

#### B. Farmington

The Farmington River Power Company (Farmington Power), operator of a 1925 hydroelectric dam on a nonnavigable portion of the Farmington River in Rainbow, Connecticut, did not file an application when the Commission requested it to do so. Consequently, in 1966, the Commission ordered Farmington Power to file an application. [\[FN59\]](#) Rather than basing its authority to issue this order on a retroactive application of the 1935 amendments, the Commission maintained that it always had jurisdiction over projects on nonnavigable rivers that affected interstate commerce. [\[FN60\]](#)

The Commission explained that the 1935 amendments to section 23 did not affect the basic jurisdictional standards of nonnavigable rivers, contending that the concepts of "jurisdiction under [Congress's] authority \*750 to regulate commerce" and "the interests of interstate or foreign commerce [being] affected by such proposed construction" were included in the original 1920 enactment. [\[FN61\]](#) Farmington Power disagreed with the Commission's interpretation of the FPA, arguing that

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since there had been no project construction after 1935, section 23 of the 1920 FWPA gave it discretion to file a license application. Farmington Power filed an incomplete application under protest and appealed the Commission's order to the Second Circuit. [\[FN62\]](#)

In 1972, the Second Circuit vacated the Commission's order, holding that the FPA only authorized the Commission to require post-1935 projects on nonnavigable rivers to apply for a license, not pre-1935 projects. [\[FN63\]](#) The court held that since Farmington Power was not required to file for a license under the 1920 FWPA, and since the 1935 amendments were not retroactive, the Commission lacked jurisdiction to require a license unless the company voluntarily filed an application. [\[FN64\]](#) The court reasoned that since Farmington Power did not file a voluntary application, the Commission did not have an opportunity to determine whether the project affected interstate commerce; therefore, the FPC had no jurisdiction to require the project to be licensed. [\[FN65\]](#) The Farmington decision did not, however, affect the Commission's authority to relicense projects that voluntarily filed license applications, because the Commission would then have had an opportunity to determine if the projects affected interstate commerce.

The holding in Farmington is inapplicable to the relicensing of projects that the Commission already determined affected interstate commerce. Unlike Farmington Power, the Taum Sauk projects filed complete applications after being encouraged to do so by the Commission. This allowed the Commission to make a determination that the projects affected interstate commerce. The projects cannot opt out of the Commission's jurisdiction once the agency makes this determination. [\[FN66\]](#)

#### IV. The Bend Project

The Bend Hydroelectric Project was the first Taum Sauk project over which Federal Energy Regulatory Commission (FERC) denied relicensing jurisdiction. [\[FN67\]](#) This 1.1 megawatt project is located on a nonnavigable portion of the Deschutes River within the City of Bend, Oregon. [\[FN68\]](#) The original \*751 owner, Pacific Power and Light Company (PP&L), constructed the project in 1913 and installed additional generating units in 1916 and 1917. The project has not undergone any major modification since 1917. [\[FN69\]](#) The project is currently owned and operated by PacifiCorp Electric Company, the successor corporation of PP&L, and is connected to Bonneville Power Administration's (BPA) interstate power system. [\[FN70\]](#)

In 1967, PP&L voluntarily filed an application for a minor license for the Bend Project after receiving a letter from the Commission encouraging it to do so. [\[FN71\]](#) After reviewing PP&L's application, the Commission concluded that the project affected interstate commerce due to its connection with BPA's interstate power grid. [\[FN72\]](#) Section 23 of the Federal Water Power Act (FWPA) requires the project to be licensed once the Commission has made this determination. [\[FN73\]](#) As a result, the Federal Power Commission (FPC) issued a minor license for the project on March 20, 1970, with an expiration date of December 31, 1993. [\[FN74\]](#)

At the time of the licensing hearings, the United States Department of the Interior recommended that the United States Fish and Wildlife Service (USFWS) undertake studies to determine fish migration patterns and the need for fish passage facilities. [\[FN75\]](#) Consequently, Article 14 of the license stated that the "[l]icensee shall consult and cooperate with the U.S. Fish and Wildlife Service . . . for the purpose of conserving and developing fish and wildlife resources . . . and shall make such reasonable modifications of project structures and operations for fish and wildlife." [\[FN76\]](#) However, USFWS did not use this provision to require PP&L to make any modifications.

In 1991, two years before the expiration of its license, PacifiCorp filed an application for renewal of the Bend Project's license. [\[FN77\]](#) FERC's environmental analysis on the relicensing of the project concluded that the project needed major rehabilitation to continue generating throughout a new licensing term. [\[FN78\]](#) Further, the report showed that the project

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needed substantial work to mitigate its effects on wild rainbow and brown trout because the turbine intakes were unscreened, and no downstream or \*752 upstream fish passage facilities existed. [FN79] Consequently, the Secretary of the Interior prescribed upstream and downstream fishways for the project pursuant to his authority under section 18 of the FPA. [FN80] PacifiCorp informed the Commission that installing a downstream fish passage facility would be so costly that it would be more profitable to retire the project than to comply with Interior's fishway prescription. [FN81]

After reconsidering its jurisdiction over the Bend Project, FERC determined that it did not have authority to require PacifiCorp to obtain a subsequent license and allowed PacifiCorp to withdraw its application. [FN82] FERC reasoned that because the project was not on a navigable water as defined by the FPA, [FN83] and had not undergone any post-1935 construction, \*753 relicensing was discretionary. Consequently, according to FERC, PacifiCorp does not have to comply with the environmental protections of the FPA, such as Interior's fishway prescription. Jurisdiction over the project is currently vested in the State of Oregon. [FN84]

The United States Department of the Interior disagreed with FERC's decision and filed for a rehearing. [FN85] Interior claimed that once the Commission determined that the Bend Project affected the interests of interstate commerce and issued it a license, there was no jurisdictional impediment to relicensing. [FN86] The FPA does not give either FERC or the applicant discretion to opt out of FERC's jurisdiction after the agency has made this determination. The statute is clear: projects that the Commission determines affect the interests of interstate commerce, such as the Taum Sauk projects, must be licensed. [FN87] FERC had no authority to relinquish jurisdiction over the Bend Project because both the original and amended acts mandated it. [FN88]

Several environmental groups also opposed the Commission's ruling and intervened in the licensing proceeding. [FN89] But FERC affirmed the order \*754 on rehearing, and none of the parties challenged the decision in the courts. [FN90] Apparently, the parties decided that the Bend Project's adverse effects on trout populations were insufficient to warrant costly litigation. However, it is probable that the Department of the Interior or an environmental group will bring suit if FERC continues to relinquish jurisdiction over the thirty-two remaining licensed projects.

## VI. Conclusion

The Federal Power Act (FPA) was designed to regulate all water power projects in which the federal government had a legitimate interest. Since 1920, section 23 of the original Federal Water Power Act (FWPA) and of the later FPA has contemplated regulation of projects on nonnavigable rivers which affected the interests of interstate commerce. Beginning in 1935, these projects had to notify the Commission of their existence. This mandatory filing requirement gave the Commission the means to assert federal control over all projects affecting interstate commerce, consistent with the original intention of the Act. However, from the beginning, the Commission has had jurisdiction over projects it determined affected the interests of interstate commerce. [FN91] Because FERC determined that the Taum Sauk projects affected the interests of interstate commerce, [FN92] FERC may not relinquish jurisdiction over them. If FERC continues to relinquish jurisdiction over other projects affecting interstate commerce, it will be a major setback to the comprehensive, federal stream management envisioned by the drafters of the FPA and the environmental protection of the nation's waters. [FN93]

[FN94]. J.D. 1997, Northwestern School of Law of Lewis & Clark College; B.A. 1993, University of California, Berkeley. The author would like to thank Professor Michael Blumm for his comments and support.

[FN1]. Ch. 285, § 1, 41 Stat. 1063 (1920).

[FN2]. See Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90, 98 (1965). The FPC, originally composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture, was in charge of improving navigation and

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developing water power through licensing. FWPA, § 4, 41 Stat. at 1065-66 (1920).

[FN3]. The three orders in which FERC relinquished jurisdiction were: PacifiCorp Elec. Operations, Project No. 2643, [73 F.E.R.C. P 61,365 \(1995\)](#); Duke Power Co., Project No. 2465, [74 F.E.R.C. P 61,291 \(1996\)](#); and Duke Power Co., Project No. 2406, [74 F.E.R.C. P 61,292 \(1996\)](#).

[FN4]. 17 Hydrowire No. 7 (Apr. 8, 1996). Most of these projects are under 5 megawatts (MW). However, 4 are over 15 MW, the largest one being PacifiCorp's 61 MW Cutler project. The projects have a total capacity of 195.8 MW. The projects are located in the following states: Maine (Project Nos. 2552, 2555, 2556, 2557, 2559, and 2613), Vermont (Project Nos. 2396, 2397, 2399, 2400, 2489, 2490, and 2513), Wisconsin (Project Nos. 2476, 2522, 2525, 2546, 2560, 2582, and 2587), North Carolina (Project Nos. 2541 and 2607), Washington (Project Nos. 2544 and 1587), California (Project No. 2687), Georgia (Project No. 2336), Massachusetts (Project No. 2608), Montana (Project No. 2543), New York (Project No. 2616), Oregon (Project No. 2643), Utah (Project No. 2687), and Virginia (Project No. 2466). The **Condit dam** (Project No. 2342) in Washington was recently removed from this list because FERC determined that it was on a navigable waterway due to historic log drives. [76 F.E.R.C. P 62,268 \(1996\)](#).

[FN5]. Licensing protects consumers of electricity by securing public consent before operators undertake development. Licensing also provides protection to fish and wildlife. The Electric Consumers Protection Act (ECPA), which amended the FPA in 1986, requires the Commission to give "equal consideration" to power development and preservation of recreational, ecological, and other non-power values of rivers. [Pub. L. No. 99-495](#), 100 Stat. 1243 (1986) (codified at [16 U.S.C. § 797\(e\) \(1994\)](#)). ECPA also requires the Commission to consider the recommendations of federal and state agencies, as well as Indian tribes, that have jurisdiction over resources which may be affected by hydroelectric development and to solicit proposed terms and conditions from these agencies and tribes. *Id.* (codified at [16 U.S.C. § 803\(a\)\(2\)\(B\) \(1994\)](#)). There are several provisions in the FPA designed to achieve these conservation goals. For example, section 18 allows the Secretary of the Interior to require projects to have fishways. [16 U.S.C. § 811 \(1994\)](#). Also, section 10(j) encourages conservation by requiring the Commission to give "due weight" to recommendations made by the National Marine Fisheries Service (NMFS), the United States Fish and Wildlife Service (USFWS), as well as state fish and wildlife agencies. *Id.* [§ 803\(j\)](#). However, while section 10(j) directs FERC to consider environmental issues in the hydropower licensing process, it has been criticized as being ineffective because it does not delineate specific guidelines for the Commission to follow. See, e.g., [Randal G. Buckendorf, FERC Interaction With Fish and Wildlife Agencies in Hydropower Licensing Under the Federal Power Act Section 10\(j\) Consultation Process](#), 27 *Tulsa L.J.* 433 (1992) (evaluating FERC's revamped section 10(j) consultation process after the ECPA amendments).

[FN6]. The FWPA was amended by Title II of the Public Utility Act of 1935, ch. 687, § 201, 49 Stat. 838 (1935), and codified as Part I of the FPA, [16 U.S.C. §§ 791-823 \(1994\)](#).

[FN7]. Pennsylvania Elec. Co., Project No. 2370, [56 F.E.R.C. P 61,435, 62,548 \(1991\)](#).

[FN8]. *Id.*

[FN9]. Ch. 285, § 4(d), 41 Stat. 1065 (1920).

[FN10]. Section 23 of the 1920 FWPA reads as follows:

[Operators wishing to build on a nonnavigable watercourse] may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed

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construction...[operators] shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act.

Ch. 285, § 23, 41 Stat. 1075 (1920). This section makes filing discretionary, but makes licensing mandatory once an application is filed if the Commission determines that the project would affect interstate commerce. The 1935 amendments changed "may in their discretion file" to "shall before such construction file" so that section 23(b)(1) of the amended FPA reads:

[Operators wishing to build on a nonnavigable watercourse] shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, [operators] shall not construct, maintain, or operate such dam...until it shall have applied for and shall have received a license under the provisions of this Chapter.

[16 U.S.C. § 817\(1\) \(1994\)](#) (emphasis added).

[FN11]. Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce, 74th Cong. 469 (1935) (statement of Dozier DeVane, solicitor, Federal Power Commission).

[FN12]. [381 U.S. 90, 95 \(1965\)](#).

[FN13]. [Nantahala Power and Light Co., 36 F.P.C. 119, 121 \(1966\)](#).

[FN14]. [16 U.S.C. § 817\(1\) \(1994\)](#).

[FN15]. [455 F.2d 86 \(2d Cir. 1972\)](#).

[FN16]. [Id. at 88](#).

[FN17]. [Id. at 90-91](#).

[FN18]. PacifiCorp Elec. Operations, Project No. 2643, [73 F.E.R.C. P 61,365, 62,138-39 \(1995\)](#). The FPA limits license terms to a maximum of 50 years. [16 U.S.C § 799 \(1994\)](#). This limit represents a compromise between those members of Congress who wanted to encourage private control over rivers and those members who wanted increased public control. The limit encourages private control by ensuring that developers will be able to operate projects for a sufficient number of years to recoup the original investment and make a reasonable profit. On the other hand, the limit serves the public interest by forcing the Commission to do a periodic review of the project at least once every 50 years. Relicensing is not intended to be a rubber stamp, non-public process. The procedures and substance applicable to original licenses, including the treatment of non-developmental values, apply fully in relicensing. The Commission has a duty, especially in light of the ECPA, to ensure that older projects are modified to achieve a better balance between power generation and protection of environmental resources. Dam existence is properly part of the "environmental baseline" as defined by [50 C.F.R. § 402.02 \(1996\)](#). See [Idaho Dep't of Fish and Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 894 \(D. Or. 1994\)](#) (finding that the environmental baseline should consider effects of a dam). However, upon relicensing, the Commission considers operation of the existing dam as the no-action alternative rather than the natural river as it existed before the dam. See [City of Tacoma, Project No. 460, 71 F.E.R.C. P 61,381 \(1995\)](#) (rejecting Trout Unlimited's argument that pre-project conditions be considered as the environmental baseline).

[FN19]. [16 U.S.C. § 817\(1\) \(1986\)](#).

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[FN20]. [Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90, 98 \(1965\)](#).

[FN21]. Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement 1890-1920* 8 (1959).

[FN22]. *Id.*

[FN23]. H.R. Rep. No. 66-61, at 2-3 (1919).

[FN24]. Hays, *supra* note 21, at 271.

[FN25]. *Id.* at 100-05.

[FN26]. *Id.*

[FN27]. Ch. 907, § 1, 26 Stat. 426 (1890).

[FN28]. *Id.* § 7, 26 Stat. at 454.

[FN29]. See [Farmington River Power Co., Project No. 2577, 44 F.P.C. 1393, 1406 \(1970\)](#) (giving a historic overview of the scope of Congress's jurisdiction over the nation's water resources).

[FN30]. *Id.*

[FN31]. [United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 \(1899\)](#).

[FN32]. [Id. at 708-09](#).

[FN33]. President Roosevelt vetoed all but four of the twenty-five bills drafted to allow dams under the General Dam Act of 1906. The President was particularly dissatisfied with the bills because they did not provide for a license fee or limit the license term to a fixed number of years. Congress revised the General Dam Act in 1910 to comply with the President's concerns. However, due to imperfections in that bill, only two of the fourteen special waterpower acts passed by Congress resulted in operating dams. In all, of the twenty-nine special acts passed under the General Dam Acts of 1906 and 1910, only eight went to completion, providing a total energy capacity of only 140,000 horsepower. H.R. Rep. No. 66-61, at 2-3 (1919).

[FN34]. *Id.* at 4.

[FN35]. Most of the federal power statutes enacted prior to the FWPA focused on coal and oil resources because steam power could be developed more quickly and easily than hydropower, with fewer legal restrictions and with greater security to the investment. The FWPA encouraged development of water power in at least three ways. First, the Act coordinated the administration of water power in a single commission whose energies were intended to focus on creating a constructive national program of intelligent, economical utilization of the nation's water power resources. Second, the preliminary permit provision, which maintained the priority of the application while the applicant conducted preliminary studies, allowed for the security of capital initially invested. Third, a federal license allowed preemption of state and local laws so that developers could rely on a standardized regulatory scheme. *Id.* at 5.

[FN36]. Ch. 285, § 4, 41 Stat. 1063, 1065 (1920).

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[FN37]. See [Cooley v. Federal Energy Reg. Comm'n](#), 843 F.2d 1464, 1467 (D.C. Cir. 1988).

[FN38]. Ch. 285, § 23, 41 Stat. 1063, 1075 (1920).

[FN39]. *Id.*

[FN40]. Section 23 provides that if, after receiving a declaration of intention, the Commission finds that the project affects interstate commerce, the operator "shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this act." *Id.* (emphasis added).

[FN41]. [16 U.S.C. § 797\(e\)](#) (1994).

[FN42]. See [Cooley](#), 843 F.2d at 1469. In a floor debate regarding the amendment, Representative Robert Crosser (D-Ohio) stated: "this amendment simply clarifies what is already the law of the land...the [Commission has the] right to regulate not only the waters that are actually navigable but other waters over which Congress has jurisdiction by virtue of its right to regulate interstate commerce." 79 Cong. Rec. 10,339, 10,568 (June 29, 1935); see also, Hearings on H.R. 5423 before the House Comm. on Interstate and Foreign Commerce, 74th Cong. 470 (1935) (statement of Dozier DeVane, solicitor, Federal Power Commission) (stating that the 1935 amendments did not add anything to section 4 jurisdiction, but merely made express the implied power which the Commission already had to issue licenses in cases where it determined a project on a nonnavigable stream would affect interstate commerce under section 23).

[FN43]. [16 U.S.C. § 817\(1\)](#) (1994).

[FN44]. Pennsylvania Elec. Co., Project No. 2390, [56 F.E.R.C. P 61,435, 62,548](#) (1991).

[FN45]. [16 U.S.C. § 817\(1\)](#) (1994).

[FN46]. See [Federal Power Comm'n v. Union Elec. Co.](#), 381 U.S. 90, 97 (1965).

[FN47]. See *supra* note 42 and accompanying text.

[FN48]. See [Union Electric](#), 381 U.S. at 92. Pumped storage plants are used to supplement the energy produced by other plants during periods of peak demand. The Taum Sauk Project uses power from other sources to pump water into an upper pool during off-peak periods. Then, during periods of peak demand, the project releases this water through hydroelectric units. *Id.*

[FN49]. Approximately 350 MW are generated for use in Missouri, Illinois, and Iowa. [Id.](#) at 93.

[FN50]. [Id.](#) at 92.

[FN51]. [Union Elec. Co.](#), 27 F.P.C. 801, 818 (1962).

[FN52]. Aggrieved parties can apply for a rehearing within 30 days of a FERC order. [16 U.S.C. § 8251\(a\)](#) (1994). Federal Circuit courts have jurisdiction to hear appeals from the Commission's order on rehearing as long as the suit is filed within 60 days of the final order. *Id.* [§ 8251\(b\)](#).

[FN53]. [Federal Power Comm'n v. Union Elec. Co.](#), 326 F.2d 535, 537 (8th Cir. 1963).

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[FN54]. [Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90, 105-06 \(1965\).](#)

[FN55]. [Id. at 96](#) (citing [Polish Nat'l Alliance v. Labor Bd., 322 U.S. 643, 647 \(1943\)](#)).

[FN56]. [Id.](#)

[FN57]. [Nantahala Power and Light Co., 36 F.P.C. 119, 121 \(1966\).](#)

[FN58]. See, e.g., [Pacific Power & Light Co., Project No. 2643, 43 F.P.C. 465 \(1970\)](#) (issuing license to project that affected interstate commerce because of its connection to an interstate power grid).

[FN59]. [The Farmington River Power Co., Project No. 2577, 44 F.P.C. 1393, 1432 \(1970\).](#)

[FN60]. [Id. at 1396.](#)

[FN61]. [Id. at 1395-96.](#)

[FN62]. [Farmington River Power Co. v. Federal Power Comm'n, 455 F.2d 86, 87 \(2d Cir. 1972\).](#)

[FN63]. [Id. at 91.](#)

[FN64]. [Id. at 89-91.](#)

[FN65]. [Id.](#)

[FN66]. This situation is analogous to in personam jurisdiction: once the developers submitted to FERC's jurisdiction by having minimum contacts with the agency, they were bound by its jurisdiction. See [International Shoe Co. v. Washington, 326 U.S. 310 \(1945\)](#) (holding that due process requires only "minimum contacts" for a court to have jurisdiction).

[FN67]. See [PacifiCorp Elec. Operations, Project No. 2643, 73 F.E.R.C. P 61,365 \(1995\).](#)

[FN68]. [Id.](#) The Deschutes River basin occupies an area of 10,400 square miles in north central Oregon. The river has its headwaters in the Three Sisters area of the Oregon Cascades and flows north along the eastern slopes of that range before joining the Columbia River near the Dalles.

[FN69]. [Id.](#)

[FN70]. [PacifiCorp Elec. Operations, 73 F.E.R.C. at P 62,136.](#)

[FN71]. [Pacific Power & Light Co., Project No. 2643, 43 F.P.C. 465 \(1970\).](#) A "minor water power project" is one that has a total installed generating capacity of 1.5 MW or less. [18 C.F.R. § 4.30\(17\) \(1996\).](#)

[FN72]. [Pacific Power & Light Co., 43 F.P.C. at 466.](#)

[FN73]. [16 U.S.C. § 817\(1\) \(1994\).](#)

[FN74]. [Pacific Power & Light Co., 43 F.P.C. at 467.](#)

[FN75]. [Id. at 465.](#)

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[FN76]. [Id. at 467-68.](#)

[FN77]. [PacifiCorp Elec. Operations, 73 F.E.R.C. P 61,365, 62,136 \(1995\)](#). A "subsequent license" is "a license for a water power project issued under Part I of the Federal Power Act after a minor or minor part license that is not subject to sections 14 and 15 of the Federal Power Act expires." [18 C.F.R. § 16.2\(d\) \(1996\)](#).

[FN78]. John H. Clements, Director, Division of Project Review, F.E.R.C., Bend Project No. 2643 Environmental Analysis, at vi (1995).

[FN79]. *Id.* Rainbow and brown trout are known as "resident fish" because they do not migrate to the sea like anadromous fish, such as salmon. However, the term "resident" is a misnomer because many resident fish, such as the wild rainbow trout in the upper Deschutes River, migrate over long distances during their lifetime. Almost all river fish tend to move towards headwaters to spawn and their migratory nature requires them to be able to pass through river sections blocked by dams. The Oregon Department of Fish and Wildlife Habitat Conservation Division estimated that of the approximately 26,400 wild trout to pass through the Bend Project's powerhouse between January and October of 1990, approximately 5,700 perished. *Estimated Mortality of Wild Trout at the Bend Hydroelectric Project (1990)* (on file with Oregon Department of Fish and Wildlife).

[FN80]. *PacifiCorp Elec. Operations*, 73 F.E.R.C. at P 62,136. Section 18 of the FPA provides the Secretary of the Interior the authority to prescribe fishways. [16 U.S.C. § 811 \(1994\)](#). The regulations issued by FERC in 1991 defined "fishways" as facilities to allow for the upstream and downstream passage of anadromous fish. [18 C.F.R. § 4.30\(b\)\(9\)\(iii\) \(1991\)](#). Resident fish, such as trout, were excluded from the mandatory section 18 prescriptions. *Id.* In May of 1991, FERC expanded the definition of "fishway" to allow the Secretary of the Interior to prescribe fishways for any type of fish. [56 Fed. Reg. 23,108, 23,116 \(May 20, 1991\)](#). However, FERC overruled this order later that year, limiting the Secretary's authority to prescribe fishways to cases where "passage of a population is necessary for the life cycle of a fish species." [56 Fed. Reg. 61,137, 61,142 \(Dec. 2, 1991\)](#) (codified at 18 C.F.R. pts. 4 and 16 (1991)). Commissioner Elizabeth Moler dissented from the Commission's amended order, arguing that this limitation trespassed on the Department of the Interior's statutory responsibility to determine when to require fishways. [Id. at 61,158](#). Commissioner Moler reasoned that the decision to prescribe fishways necessarily includes a determination of which type of fish are to be protected. *Id.* Congress agreed with Commissioner Moler and vacated FERC's 1991 definition of "fishway" in the Energy Policy Act of 1992, requiring any new definition to be concurred in by the Secretaries of Commerce and Interior. [Pub. L. No. 102- 486, § 1701\(b\), 106 Stat. 3008 \(1992\)](#) (codified at [16 U.S.C. § 811 \(1994\)](#)).

[FN81]. *PacifiCorp Elec. Operations*, 73 F.E.R.C. at P 62,137.

[FN82]. *Id.* at P 62,143.

[FN83]. *Id.* Section 3(8) of the FPA defines "navigable waters" 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...after investigation under its authority ....

[16 U.S.C. § 796\(8\) \(1994\)](#). The U.S. Department of the Interior, as well as several conservation groups, took issue with the Commission's navigability finding in the Bend case. *PacifiCorp Elec. Operations*, 73 F.E.R.C. at P 62,139. There are licensed

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projects on navigable portions of the Deschutes River both upriver and downriver of the Bend Project (Central Oregon Irrigation District's 5.5 MW Central Oregon Siphon Power Project, Project No. 3571, is located approximately three river miles upstream from the Bend Project and the Pelton-Round Butte Hydroelectric Project, Project No. 2030, is located approximately fifty-eight river miles downstream from the Bend Project). This suggests that the Deschutes River, as a whole, should be considered navigable under the broad FPA definition of navigability which allows navigable rivers to include interruptions in navigability due to falls, rapids or other barriers. See, e.g., [United States v. Appalachian Elec. Power Co., 311 U.S. 377, 382-83 \(1940\)](#) (finding that since the river was navigable below and above the rapids and falls in the vicinity of the project, the rapids and falls themselves were navigable waters). However, FERC ruled that the twenty mile reach of whitewater near the Bend Project was too far to be considered a "mere interruption" in navigability as defined by the Act, and too rough to be considered navigable. *PacifiCorp Elec. Operations*, 74 F.E.R.C. at P 61,871. FERC's most recent interpretation of FPA navigability requires an average recreational canoeist to be able to negotiate the entire river. [Pennsylvania Elec. Co., 56 F.E.R.C. P 61,435, 62,549 \(1991\)](#).

[FN84]. The Oregon Department Fish and Wildlife (ODF&W) is the primary agency responsible for regulating resident fish in Oregon, such as the wild rainbow trout inhabiting the Deschutes River near the Bend Project. ODF&W played a major role in the FERC proceeding advocating for fish passage facilities. Under the FPA, the agency had no power to prescribe fishways because section 18 vested this responsibility in FERC, the Secretary of the Interior, and the Secretary of Commerce. [16 U.S.C. § 811 \(1994\)](#); see also *supra* note 80 (reviewing history of fishway definition). Now that FERC has relinquished federal control over the project, ODF&W can prescribe fish passage facilities pursuant to [Or. Rev. Stat. § 498.351](#). [Or. Rev. Stat. § 498.351](#) requires all dams in waters in which game fish exist to have a state approved fish passageway. However, the agency appears not to want to use this provision to force PacifiCorp to build a fishway, preferring to work cooperatively with the company. The project currently has a "power claim" under [Or. Rev. Stat. § 543.050](#) which allows it to operate indefinitely without a fixed term license. [Or. Rev. Stat. § 543.050](#) allows the Oregon Water Resources Commission to authorize operation of private projects that were built before the Oregon licensing requirement.

[FN85]. See *PacifiCorp Elec. Operations*, 74 F.E.R.C. at P 61,872.

[FN86]. *Id.*

[FN87]. [16 U.S.C. § 797\(e\) \(1994\)](#).

[FN88]. See *supra* text accompanying notes 36-48.

[FN89]. *PacifiCorp Elec. Operations*, Project No. 2643, [73 F.E.R.C. P 61,365, 62,136 n.2 \(1995\)](#). The following parties intervened in the licensing proceeding: Coalition for the Deschutes, Oregon Department of Fish and Wildlife, American Rivers, Pacific Rivers Council, Oregon Trout, Trout Unlimited, Bend Metro Park and Recreation District, City of Bend, Deschutes County, and the Department of the Interior. *Id.*

[FN90]. See [PacifiCorp Elec. Operations, Project No. 2643, 74 F.E.R.C. P 61,262, 61,873 \(1996\)](#).

[FN91]. See *supra* text accompanying note 41.

[FN92]. See *supra* text accompanying note 56-58.

[FN93]. See *supra* notes 5, 35.

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