Hydro Law and the Future of Hydroelectric Power Generation in the United States

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Hydro Law and the Future of Hydroelectric Power Generation in the United States

Dan Tarlock*

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Hydroelectric energy ("hydro") is the oldest major source of noncarbon, renewable energy in the United States. For three reasons, increased hydro generation should be a major element of any national climate change and energy-security policy designed to promote the greater use of renewables to help the country transition to the production of sustainable, i.e., noncarbon-based, energy. First, hydro is relatively clean because it does not cause air pollution or substantial greenhouse gas emissions. Second, hydro is relatively reliable. Third, hydro can help wean the United States from its dependence on imported and often politically unstable hydrocarbon sources of energy, because the resource is widely available, and substantial undeveloped capacity exists. In addition, many nations in Africa, Asia, and Latin America, and Canada are investing heavily in new...
The Energy Information Administration ("EIA") projects that worldwide hydro-generating capacity will grow at a rate of 2% from 2008 to 2035. However, in the United States, hydro is treated as the stepchild of renewable energy law and policy. Given hydro's benefits, it is logical to ask: is the United States as out of step with world energy policy as it is with climate change policy? The current expert consensus answer is no: increased hydro generation will not be a major component of any carbon or noncarbon U.S. energy future. Hydro currently supplies 42% of the 7% of domestic energy production generated by renewable resources. Most "authoritative" energy scenarios suggest that, for the foreseeable future, hydro's share will be flat or experience only modest increases.

The EIA estimates that the United States' hydro-generating capacity is projected to grow at a rate of only 0.1% per year. Initially, this conclusion is paradoxical because the International Energy Agency ("IEA") estimates that the United States has tapped only 16% of its potential hydro production. The conventional answer to this paradox is that hydro is nonetheless a developed technology, has high environmental costs compared to wind and solar energy, and is both a climate change adaptation option and an energy source stressed by climate change. Therefore, the prevailing consensus is that there is no
need to provide substantial incentives for its expansion, like those available for wind, solar, biomass, and other alternative renewables.\textsuperscript{10} To borrow from equilibrium ecology, hydro has reached its climax stage.\textsuperscript{11} This assumption is reflected in state renewable portfolio standards legislation and federal tax incentives,\textsuperscript{12} which exclude conventional hydro from definitions of renewable energy. However, there is some resistance to the exclusion of hydro from classification as a “contemporary” renewable energy source.\textsuperscript{13} To enable Vermont utilities to purchase power from large Quebec hydro projects, the state legislature removed the cap on renewable hydro.\textsuperscript{14}

This Article asks whether there are valid reasons to question the conventional wisdom, and, if so, what steps should be taken to promote the expansion of hydro?\textsuperscript{15} First, the Article reviews the history of hydro in the United States, situating it in the big, multiple-purpose dam era. Second, it sets out the external costs of dams and hydro generation and briefly traces the mounting opposition to dams starting with John Muir’s campaign to block the inundation of Hetch Hetchy Valley (adjacent to Yosemite National Park). Third, the Article traces the development of a complex network of laws that constrain

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\textsuperscript{10} For example, the 2011 Amendments to Illinois’s utility renewable portfolio standards define only “hydropower that does not involve new construction or significant expansion of hydropower dams” as a renewable source of hydro. \textit{20 ILL. COMP. STAT. 3855/1-10} (2011). The purpose is to ensure that most existing hydropower does not count toward the portfolio standard. The failed 2009 Waxman-Markey energy bill, \textit{H.R. 2454}, 111th Cong. \textsection 610(a)(12) (2009), classified hydro as a renewable energy source for the purpose of carbon credits, but the credit calculation was limited to “qualified hydropower,” which was based on either energy efficiency improvements or capacity additions to pre-1992 hydroelectric facilities placed in service after January 1, 1992.


\textsuperscript{12} For a discussion of federal tax incentives for new hydro, see infra notes 186–88 and accompanying text.

\textsuperscript{13} In 2010, the National Association of Regulatory Utility Commissions adopted a resolution recognizing hydro as a \textit{potential} source of renewable energy. \textit{See} David C. Coen & Robert J. Thormeyer, \textit{Should Large Hydroelectric Projects Be Treated as Renewable Resources?}, \textit{32 ENERGY L.J. 541}, 541 (2011).

\textsuperscript{14} \textit{Compare} VT. STAT. ANN. tit. 30, \textsection 8002(2) (West 2012), with Mary C. Powell, \textit{Treatment of Large Hydropower as a Renewable Resource}, \textit{32 ENERGY L.J. 553}, 553 (2011) (explaining the previous cap was two hundred megawatts). For an overview of the legislation’s background, see Powell, supra, at 553–56.

\textsuperscript{15} This Article is an extension of A. Dan Tarlock, \textit{The Legal-Political Barriers to Ramping Up Hydro}, \textit{86 CHICAGO-KENT L. REV. 259} (2011), which briefly explained the reasons for hydro’s steady-state future but did not explore the possibility of inducing greater hydro investment or the legal consequences of more aggressive hydro promotion. \textit{Id.} at 275–76.
both new development and the operation of existing projects. Fourth, it examines the efforts underway to stimulate new "little" hydro projects and improve the operation of "big" projects. Fifth, it asks the heretical question: is it worth considering repealing or modifying the existing laws, primarily the environmental laws put in place in the 1970s that now constrain hydro, to increase hydro capacity? If so, which laws would be on the chopping block and what would be changed? The Article concludes by proposing two scenarios. The first maintains the status quo as an object lesson in externality control for nonhydro renewables. The second proposes a new river management regime premised on the maintenance of base flows for both aquatic ecosystem conservation and hydro production.

I. SETTING THE STAGE: HYDRO TRIUMPHS BUT ITS MARKET SHARE STEADILY DECLINES

Hydro is one of the great technological achievements of the twentieth century. It improved the lives of millions\(^\text{16}\) and supported defense production in World War II.\(^\text{17}\) Hydro developed in an era of almost absolute faith in the ability of technology to promote progress and the efficient use of natural resources. The dominant water ethic posited that the failure to develop the full multiple use potential of a river was waste. The major issue was not whether rivers should be dammed for multiple uses including hydro, but whether this resource should be developed by governments or by the private sector. If the latter, another issue was whether public utilities should have to pay for the privilege of access to and use of water. This ethic allowed the two major external costs of hydro—the loss of fish runs and the


\(^{17}\) See The History of Hydropower Development in the United States, Bureau of Reclamation, U.S. Dept. of Interior, http://www.usbr.gov/power/edu/history.html (last revised Aug. 12, 2009) ("With the advent of World War II the Nation's need for hydroelectric power soared. . . . To produce enough aluminum to meet the President's goal of 60,000 new planes in 1942 alone required 8.5 billion kWh of electric power. . . . Hydropower provided one of the best ways for rapidly expanding the country's energy output. Addition of more powerplant units at dams throughout the West made it possible to expand energy production, and construction pushed ahead to speed up the availability of power."). Federal dams on the Columbia River supplied the power to develop the aluminum industry in the Northwest, which in turn fed new aircraft plants and shipyards on the West Coast. See Michael P. Malone & Richard W. Etulain, The American West: A Twentieth Century History 98, 112 (1989) (detailing how the power supplied by the Bonneville and Grand Coulee Dams provided "federally subsidized cheap power" to the Northwest; explaining how that power fostered the aluminum industry's Northwestern growth).
flooding of scenic areas—to be largely ignored. There were always political objections to dams and modest legal efforts to promote fish ladders and other protection devices, but serious legal constraints on hydro development did not emerge until the 1950s.

Water power has been used for millennia to turn wheels for milling and irrigation, but the modern hydro era began in the late nineteenth century. After Thomas Edison invented his steam-powered electric generator, a small group of progressive business leaders in Appleton, Wisconsin realized that falling and flowing water could also turn the turbines of a generator. In 1882, they built a 12.5 kilowatt plant on the Fox River.\textsuperscript{18} Two years later, Congress authorized the first private power development on a navigable stream.\textsuperscript{19} Because the technology for large dams was already in place,\textsuperscript{20} large-scale production soon followed. Hydro fit nicely with the water agenda of the Progressive Conservation Era. Large multiple-purpose dams and reservoirs including hydroelectric generating capacity became a central feature of the Progressive Conservation Movement’s (1890–1920) project of promoting the efficient, i.e. nonwasteful, development of public water resources.\textsuperscript{21} To promote hydro, public and private

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20. The first dam has been traced to Egypt in the third millennium BCE. Heloisa Yang et al., The History of Dams, UCDAVIS: CIVIL & ENVTL. ENGINEERING (1999), http://cee.engr.ucdavis.edu/faculty/lund/dams/Dam_History_Page/History.htm. In the last two decades of the nineteenth century, the technology for larger concrete and arch dams was developed and encouraged the construction of larger gravity storage dams. \textit{Id.} DAVID P. BILLINGTON & DONALD C. JACKSON, BIG DAMS OF THE NEW DEAL ERA: A CONFLUENCE OF ENGINEERING AND POLITICS 47–70 (2006), sets out the transfer of French dam building technology to the United States and the interagency debates about the merits of massive gravity and arch dams.

21. The leading history remains SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959). Recent historians argue that the movement was not as directed by the scientific and political elite as Hays argues, \textit{e.g.}, JOHN F. REIGER, AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION (3d ed. 2000) and RICHARD W. JUDD, COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND (1997), and that multiple-purpose water was the product of the interplay between regional politics and the vision of progressive, elite scientists, and engineers. DONALD J. PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850-1920 (1996).
\end{flushright}
operators had to be able to obtain secure water rights to this new use of water, which often required the construction of reservoirs to change downstream flow patterns. Water law could have seriously impeded hydro development, but courts and voters removed the major barriers by the end of the 1920s. After several decades of experimentation, Congress authorized the free use of navigable waters in 1920.

The assignment of property rights to exploit a resource is generally thought to be a necessary condition for investment in any energy production. Initially, the law of water rights posed substantial barriers to the intensive development of hydro. The common law of riparian rights, which prevailed east of the Missouri River, in theory prohibited all dams on streams. The natural flow theory gave each riparian on a stream the right to the unobstructed flow until the river flowed to the sea. In practice, the law of riparian rights never in fact prohibited dams. Legislatures intervened to allow mill dams, and courts adopted the reasonable use theory, which allowed dams. But the common law still cast a chill over dam construction and operation, especially in 1926, when the California Supreme Court applied the natural flow theory to effectively bar upstream hydro development. Voters quickly overturned the decision; Article XIV § 3 of the state’s constitution adopted the reasonable use theory, which opened the way for public and private dams. The amendment was quickly interpreted to limit injured downstream riparians’ restitution to money damages.

22. Solar and wind energy are exceptions because the resource is so widely available, and, thus, no private property regime is necessary for development. Exploitation has been able to provide thorough universal access to these two commons.

23. Morton J. Horowitz, The Transformation of American Law, 1780-1860 (1977) traces the rise of these acts, which allowed mill owners to erect dams that flooded upstream lands provided that the compensation was paid. The constitutionality of this early delegation of the power of eminent domain was upheld in Fiske v. Framingham Mfg. Co., 29 Mass. (12 Pick.) 68 (1832).

24. See, e.g., Mason v. Hoyle, 14 A. 786, 788–89 (Conn. 1888) (explaining that under reasonable use theory water may be detained to secure fair proportion of beneficial use).

25. See Herminghaus v. So. Cal. Edison Co., 252 P. 607, 618–21 (Cal. 1926) (ruling that dams and reservoirs for hydro could not be built because they would divert the usual and ordinary flow of the river to an extent that would essentially withdrawal the water from a large portion of lands downstream).

26. See Norris Hundley, Jr., The Great Thirst: Californians and Water 245 (rev. ed. 2001) (stating that the Herminghaus decision upset the public and “culminated in 1928 with a popularly voted initiative amending the state constitution and prohibiting any ‘waste or unreasonable use of water’”).

27. E.g., Peabody v. City of Vallejo, 40 P.2d 486, 495 (Cal. 1935).
Prior appropriation was better suited for hydro because an appropriator could directly divert water or construct a dam.\textsuperscript{28} Impoundment itself is not a beneficial use of water, but power generation is.\textsuperscript{29} The law, however, could have taken another turn. Early in the twentieth century, there was an attempt to sneak the natural flow rule into prior appropriation. A small Idaho appropriator claimed the entire current of the Snake River to power the water wheels he used to irrigate benchland in the Snake River canyon. A 1912 Supreme Court opinion unanimously rejected this attempt to reintroduce riparianism in the West as heresy; the Court held that an appropriator cannot claim a right to the current of a stream, but rather is limited to the amount of water he can actually put to beneficial use.\textsuperscript{30} This decision removed the major legal barrier to private hydro development in the Mountain West, and public and private projects followed.

Federal law presented a more serious legal constraint because the right to use navigable waters without federal approval was not clear. The Commerce Clause gives the federal government plenary control of navigable waters,\textsuperscript{31} meaning that the federal government can exclude users or charge them to use this federal resource. Prior to hydro, this power had been primarily exercised to improve commercial navigation, so the exclusion issue did not arise. Congress showed no interest in exclusion and reacted swiftly to hydro's promise, but it was not until 1920 that it settled on a permanent legal regime for this resource. Congress first authorized the secretary of the Army to sell surplus power from U.S. Army Corps of Engineers navigation projects.

\textsuperscript{28} Hydro generation is a nonconsumptive use, and, therefore, there have never been serious challenges to this use. However, users of all energy, including hydro, may face challenges that if hydro generation fails to use state-of-the-art water-saving technology, the use is not beneficial. See Katherine A. Abend, Avoiding Water-Intensive Energy Production: How to Keep the Water Running and the Lights On, 41 ENVTL. L. REP., NEWS & ANALYSIS 11020, 11028–29 (2011) (stating that water boards could adopt a policy in which water-intensive energy facilities could be too wasteful to qualify as a beneficial use).

\textsuperscript{29} See generally Idaho Power Co. v. Idaho Dep't of Water Res., 255 P.3d 1152, 1154–56, 1160 (Idaho 2011) (describing the process required to receive a permit to divert water for hydro generation, which requires that a beneficial use of the water be shown before a license to appropriate the water is issued).


In 1890, it authorized the secretary of the Army to approve individual dams on navigable rivers, but Congress did not adopt a general licensing scheme until 1910. The major issues of the era were whether private developers should pay for the privilege of using navigable waters and whether there should be substantial public power development. The final report of President Roosevelt’s Inland Waterways Commission recommended that the government assess “reasonable” charges for the use of power sites. Congress refused to implement the recommendation, but President Roosevelt vetoed a number of authorized private developments, most notably at Muscle Shoals on the Tennessee River, to preserve the public power option.

In the end, President Roosevelt lost the battle for public power and federal charges. The Progressive Conservation dream of large-scale public power on comprehensively planned rivers ended in 1920 with the passage of the Federal Water Power Act, which was merged into the Federal Power Act (“FPA”) in 1935. Congress completely rejected the recommendations of Roosevelt’s Inland Waterways Commission and opted for private development of hydro on navigable rivers. The Federal Power Commission (now the Federal Energy

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33. See The River and Harbor Appropriations Act of 1890, ch. 907, § 7, 25 Stat. 426, 454 (stating that the Secretary of the Army must approve any dam “outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established”); 3 THE PRESIDENT'S WATER RES. POLICY COMM'N, REPORT OF THE PRESIDENT'S WATER RESOURCES COMMISSION: WATER RESOURCES LAW 263–66 (1950) (discussing the federal legislative history of dams between 1890 and 1910). The General Dam Act of 1910 limited dam grants to 50 years. General Dam Act of 1910, ch. 360, § 4, 36 Stat. 593, 595.

34. S. Doc. No. 62-469, app. 1 at 85 (1912).

35. See 3 THE PRESIDENT'S WATER RES. POLICY COMM’N, supra note 33, at 270 (describing how President Franklin D. Roosevelt did not believe private individuals should be given such an element of public value). Muscle Shoals Dam was subsequently authorized in 1916 and completed in 1925. There were various attempts to privatize the dam by sale or lease, but these plans remained in limbo until the election of President Roosevelt. BILLINGTON & JACKSON, supra note 20, at 81–85 (detailing the attempted sale of the dam to Henry Ford, the recommendation that it be leased to a private operator for fertilizer production, and Roosevelt’s statement upon election that he was determined to put Muscle Shoals to work). PRESTON J. HUBBARD, ORIGINS OF THE TVA: THE MUSCLE SHOALS CONTROVERSY, 1920-1932 (1961), is the leading history of pre-New Deal efforts to preserve the Tennessee Valley for public power.

Regulatory Commission) was authorized to issue licenses, but there was no charge for the use of navigable waters. The FPA essentially confirmed the status quo, as small dams on mountain streams were already generating 40% of the nation’s energy. The public power option was preserved by giving the Federal Energy Regulatory Commission (“FERC”) the discretion to deny a private project if the site was better suited to public development. Utilities responded by investing in hydro. In the next five decades, public and private reservoir storage capacity grew from about forty million acre feet to 450 million acre feet. Today, there are more than two thousand FERC-licensed projects.

Public power was initially limited to surplus power from Corps of Engineers and Bureau of Reclamation projects. The Bureau of Reclamation built a few reservoirs with hydro capacity, such as the Theodore Roosevelt Dam, upstream from Phoenix, Arizona on the Gila River. Public power advocates had to wait until the New Deal

37. To avoid confusion, the Article uses Federal Energy Regulatory Commission to refer to both pre-1973 FPC decisions and post-1973 Federal Energy Regulatory Commission decisions.

38. The dream of charging for access to navigable waters lives, but it is hard to achieve for legal and political reasons. Montana tried to charge Federal Energy Regulatory Commission licenses for the use of the beds of the headwaters of three rivers it claimed to own. Under the “equal footing” doctrine, states obtain title to the beds of waters if they were a link in an aquatic highway of commerce at the time of statehood. The Montana Supreme Court ruled that if a portion of a river historically supported commercial navigation, the state acquired title to beds beneath the entire river, and, thus, there was no need for historical proof that each reach of a river actually was a link in the chain of commerce. The U.S. Supreme Court found this approach inconsistent with prior law and unanimously reversed and remanded. A state must prove title to the beds in each segment of the river in question based on historical use and suitability for commercial navigation, a difficult standard for Western states to meet. See PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1227-29 (2012) ("To determine title to a riverbed under the equal-footing doctrine, this Court considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.").


40. 16 U.S.C. § 800(b).


43. The Corps did not embrace multiple-purpose dams until the 1920s, so most federal dams were built by the Bureau of Reclamation.

44. See The History of Hydropower Development in the United States, U.S. DEPT OF THE INTERIOR BUREAU OF RECLAMATION, http://www.usbr.gov/power/edu/history.html (last modified Aug. 12, 2009) (discussing how a hydro plant was first built to assist the construction of the Theodore Roosevelt Dam and how the power subsequently impacted the area’s economy, enhancing the lives of both farmers and individuals in the city).
revived the idea of public river development.\textsuperscript{45} The Tennessee Valley Authority's experiment to use dams to "re-engineer" a backward region has been described as "[a] turning point in the history of large dams ... because for the first time ... the idea of regulating the entire river basin through a series of multiple purpose dams had been put into practice."\textsuperscript{46}

From the 1930s to the 1960s, hydroelectric generation became an integral part of many of the large publically financed multiple-purpose dams in the West.\textsuperscript{47} Hydro revenues helped to finance subsidized irrigation and free flood-control projects.\textsuperscript{48} Today, dams operated by the Tennessee Valley Authority, the Corps of Engineers, and the Bureau of Reclamation primarily on the Colorado, in Columbia, Missouri, and in California generate 51\% of the nation's hydro.\textsuperscript{49} When other public dams are added, the figure jumps to 71\%.\textsuperscript{50} However, even as large federal dams were being built, hydro's share of energy supply progressively declined as coal, oil, and gas came to dominate the electricity energy market outside of the Pacific Northwest\textsuperscript{51} and California. As nuclear plants began to come online in the 1960s, hydro's share further declined. Nuclear plants now generate 70\% of the nation's noncarbon energy.\textsuperscript{52}

The question is: does hydro fit the model of sustainable energy? Sustainable energy production has three criteria: (1) a shift from

\begin{itemize}
  \item \textsuperscript{45} Every major policy initiative has antecedents. In addition to the public power debates during the Progressive Conservation Era (1890-1920), in 1937, the U.S. Army Corps of Engineers was authorized to prepare river basin reports that included the potential for hydro at Corps dams. Thus, the "New Deal did not so much serve as the inspiration for the conception and planning of large federal dams, as it provided a compelling catalyst for their construction." BILLINGTON & JACKSON, supra note 20, at 4.
  \item \textsuperscript{46} Ravi Baghel & Marcus Nuesser, Discussing Large Dams in Asia After the World Commission on Dams: Is a Political Ecology Approach the Way Forward, 3 WATER ALTERNATIVES 231, 231, 235-36 (2010).
  \item \textsuperscript{48} See 3 THE PRESIDENT'S WATER RES. POLICY COMM'N, supra note 33, at 259 ("[T]he drive to economical use of capital investment has placed growing emphasis upon power as the principal and often feasible means of recovering project costs.").
  \item \textsuperscript{50} "Hydroelectric plant ownership in the United States is predominately in hands of the private sector (69%). On the other hand, capacity is predominately owned by federal and non-federal public owners (75%)." Id. at 10.
  \item \textsuperscript{51} Hydro provides about two-thirds of the power in this region. Hydroelectricity, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/cleanenergy/energy-and-you/affect/hydro.html (last updated Dec. 28, 2007). However, coal is a major source of energy in states such as Oregon.
  \item \textsuperscript{52} Matthew L. Wald, Edging Back to Nuclear Power, N.Y. TIMES, Apr. 22, 2010, at F1.
\end{itemize}
nonrenewable to renewable energy sources, (2) user conservation, and (3) the reduction of the environmental external costs and risks of all sources of energy production.\(^5\) Hydro stacks up well on the first criteria, not as well on the third, and is neutral on the second.\(^5\) The question then becomes: is this deficiency fatal or correctable?

**A. The Pros**

The basic case for ramping up hydro production is (1) the technology is proven, reliable, and improving; (2) it is a climate-friendly resource; (3) it has unused potential; (4) flowing water is a “free” renewable resource; and (5) there is a range of increased capacity options short of building new dams. The United States currently generates over three hundred billion kilowatt hours of electricity from hydro plants.\(^5\) The Department of Energy estimates that up to an additional thirty-five thousand megawatts of electricity could be generated from undeveloped sites.\(^5\) This additional capacity could come from the construction of new dams and reservoirs, by increasing the generating capacity of existing facilities, by installing available new technologies, and by placing hydrokinetic devices in streams.\(^5\) At existing dams, turbines could be upgraded, more water

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53. See *The Law of Energy for Sustainable Development* 56 (Adrain J. Bradbrook et al. eds., 2005) (“Sustainable development, although a concept difficult to define precisely, seeks economic development that is ecologically sound, equitable as to both present and future generations, and promote social welfare.”).


55. For this Article, all statistics referring to electrical power measurements have been converted from the original units listed in the citations to megawatts. The purpose of the statistical conversion to megawatts in this Article is to provide the reader a simpler method to compare the statistics referred to throughout the Article. An electrical power unit converter can be found at Power Converter, UNITCONVERSION.ORG, http://www.unitconversion.org/unit_converter/power.html (last visited Aug. 31, 2012).


57. Hydrokinetic devices float on or below the surface of the river and generate electricity from the current. *Daniel B. Botkin, Powering the Future: A Scientist’s Guide to Energy Independence* 82 (2010). Substantial kinetic development is occurring on the Mississippi River, but even if all projects were built, they would only amount to 6% of the region’s energy capacity. Frank Josi, *Surge in Mississippi Hydro Proposals Points to Coming Hydro Boom*, INSIDE CLIMATE NEWS (June 22, 2011), http://insideclimatenews.org/news/20110622/hydroelectric-power-mississippi-river-ferc-coming-boom.
could be put through the existing turbines to generate more power, or new pump storage facilities could be constructed at the facility. 58

For example, the Bonneville Power Authority has installed a new turbine at Chief Joseph Dam on the Columbia River, and the upgrade will generate enough power for thirty thousand homes in the Pacific Northwest. 59 The Electric Power Institute estimates that untapped hydro capacity could increase production by 24 to 27%. 60 The Energy Information Administration puts that total potential increase in hydro for new and upgraded plants at forty million megawatts. 61

B. The Cons

The list of cons is long, and the conventional assumption is that the cons outweigh the pros. Hydro’s fate is entwined with the opposition to large dams on economic, environmental, and social grounds. Dams have multiple adverse impacts. 62 They change river flows and the fish runs that depend on them, alter river chemistry, change riverine landscapes, and inundate large areas including Indian reservations and scenic canyons and valleys. New dam construction is not on the political agenda. The Big Dam Era effectively ended in the 1960s 63 when large dam construction stopped. The net impact of many


59. The Bonneville Power Administration explained further:
The upgraded turbine runner is the first of 10 new and more efficient runners to be installed at Chief Joseph by 2014. The new runners and related refurbishment will increase the dam’s power generation by more than 40 megawatts and boost the efficiency of the turbines to 95 percent or better. That is enough to power more than 30,000 additional Northwest homes compared to the 50-year-old runners being replaced.


60. BOTKIN, supra note 57, at 83.


62. See Deborah Moore, John Dore & Dipak Gyawali, The World Commission on Dams + 10: Revisiting the Large Dam Controversy, 3 WATER ALTERNATIVES 1, 3, 4–5 (2010) (stating that dams create both social and environmental costs); see also EDWARD GOLDSMITH & NICHOLAS HILDYARD, THE SOCIAL AND ENVIRONMENTAL EFFECTS OF LARGE DAMS 51–119 (1986) (discussing the negative effects of dams, such as loss of land and wildlife to flooding, the reduction of fertility downstream, and an increase in insects and diseases).

63. The water historian Donald Pisani has traced this development through the career of the legendary Commissioner of the Bureau of Reclamation, Floyd Dominy. During his tenure
environmental laws adopted after 1970 was to seriously constrain the operation of existing public and private projects. The two major federal water agencies, the Corps of Engineers and the Bureau of Reclamation, remain, but today they largely manage their legacy projects and try to undo the environmental harm that their dams did.  

No coherent federal water policy has emerged to replace dam, levee, and canal building.  

Climate change has added new concerns about the reliability of hydro, and the federal water agencies are struggling with how to factor climate change into existing operating regimes.  

1. Fish Loss

Dams can damage fish runs in many ways by changing their habitats and migration patterns. Anadromous or catadromous species are at the most risk, as both upstream and downstream migration can be impacted.

The construction of a dam on a river can block or delay upstream fish migration and thus contribute to the decline and even the extinction of species that depend on longitudinal movements along the stream continuum during certain phases of their life cycle. Additionally, the number of fish that die during downstream...
migration, either by passing through hydraulic turbines or over dam spillways, can be significant.\footnote{Michel Larinier, Environmental Issues, Dams and Fish Migration, in DAMS, FISH, AND FISHERIES: OPPORTUNITIES, CHALLENGES, AND CONFLICT RESOLUTION 45 (Gerd Marmulla ed., 2001), available at http://www.fao.org/DOCREP/004/Y2785E/y2785e03.htm.}

The best example is the struggle to preserve salmon runs on the Columbia River. To generate power, the optimal strategy is to store spring runoffs for use in the late summer and winter when power demand is high. But, as a result of the Endangered Species Act ("ESA"), water is released in the spring and early summer to benefit migrating juvenile salmon.\footnote{U.S. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF ENERGY, supra note 2, at 16–17.}

2. Land Loss and Scenic Impairment

Dams foreclose productive present and future alternative uses of land. Hydro facilities with large carryover storage reservoirs consume large amounts of land. A 2002 Cornell University study estimated that switching to the maximum amount of renewable energy through hydro, wind, solar, and biomass would reduce fossil-fuel use by only 50% and consume up to one-sixth of the country's land mass. Hydro now occupies approximately sixty-four million acres, and increasing the acreage to its maximum potential would add another forty-two million acres dedicated to this resource.\footnote{See David Pimentel et al., Renewable Energy: Current and Potential Issues, 52 BIOSCIENCE 1111, 1112 (2002).}
The political fights over the loss of scenic canyons propelled the genteel Sierra Club into a national environmental advocacy organization. The inundation of the Fort Berthold Indian Reservation in South Dakota by the Pick-Sloan project still reverberates in the politics of the Missouri River.\footnote{BILLINGTON & JACKSON, supra note 20, at 240; JOHN E. THORSON, RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF THE MISSOURI RIVER 80–83 (1994).}

3. Pollution and Aquatic Ecosystem Modification

In addition to blocking fish runs, dams and stream channelization reduce flood plains, seasonal flood pulses, and the habitats and survival chances of many aquatic and terrestrial species. The chain of Missouri River dams from Montana to South Dakota constructed since the 1930s have had this effect to the point at which "[t]he ecosystem has been simplified and its production of goods and
services has been greatly compromised.72 The dams have also decreased downstream sediment transport to the detriment of endangered species along the Missouri River and contributed to the loss of wetlands in the Mississippi Delta.73

4. Climate Change

One of the biggest unknowns in any strategy to increase hydro production is the impact of climate change on this resource, but the climate change literature provides no clear guidance on the net impact on production.74 Hydro generation is a function of water flow and reservoir storage. Climate change will change water flows and reservoir levels throughout the world both positively and negatively through the alteration of temperature and precipitation schedules.75 In addition, large reservoirs are a source of methane, which is released as decayed plants and animals pass through turbines,76 but more recent research suggests that emission levels are lower than previously estimated.77 The primary concern is that there will be less


73. See M.D. Blum & H.H. Roberts, Drowning of the Mississippi Delta Due to Insufficient Sediment Supply and Global Sea-Level Rise, 2 Nature Geoscience 488, 488 (2009) (stating that 25% of the wetlands associated with the Mississippi delta have been lost and that the reduction of sediment caused by the construction of dams could hinder efforts to protect and restore the coast).

74. See U.S. Dep't of Homeland Sec. & U.S. Dep't of Energy, supra note 2, at 22 ("Although certain temperature trends are evident, the projections of future precipitation remain unclear, leading to uncertainty in possible changes in future streamflow in the Colorado River.").

75. See Hydropower, Center for Climate & Energy Solutions, http://www.pewclimate.org/technology/factsheet/hydropower (last visited Aug. 31, 2012) ("Climate change and the alteration of rainfall and temperature regimes can affect hydropower generation. . . . Although hydropower systems may benefit from more storage and generation capacity, expansion of such capabilities may not be economically and environmentally justified.").

76. See Climate Change and Dams: An Analysis of the Linkages Between the UNFCCC Legal Regime and Dams, United Nations Environmental Programme 26 (2000), available at http://www.indiaenvironmentportal.org.in/files/DAMs%20and%20climate%20change.pdf ("Methane is emitted from reservoirs that are stratified and where the bottom layers are anoxic, leading to degradation of biomass through anaerobic processes. Where the water is well oxygenated, degradation of biomass generates carbon dioxide, not methane."); see also Kirsi Määkinnen & Shahbaz Kahn, Policy Considerations for Greenhouse Gas Emissions from Freshwater Reservoirs, 3 Water Alternatives 91, 95-96 (2010) (summarizing research that confirms earlier concerns on methane emissions).

77. Compare Nathan Barros et al., Carbon Emissions from Hydroelectric Reservoirs Linked to Reservoir Age and Latitude, 4 Nature Geoscience 593, 593 (2011) (stating that the estimates in the study "are smaller than previous estimates on the basis of limited data" and that they estimate hydroelectric reservoirs emit 3 TgC as CH₄), with Ivan B.T. Lima et al., Methane
water to turn turbines in hydro-dependent areas during times of high demand.78

Reservoirs and river flows are fed by snow and rain. Climate change models forecast that higher temperatures can lead to both changes in snowfall and in the timing of snowmelt in watersheds.79 These changes to snowfall and snowmelt could "include an increase in the ratio of rain to snow; a delayed onset of the snow season; a shortened overall snowfall season; an accelerated rate of spring snowmelt; and more rapid and earlier runoff."80 These changes will produce both winners and losers among electricity consumers. For example, a 2011 Intergovernmental Panel on Climate Change report concluded that the global impacts of climate change on hydro will be, "on balance," positive.81

Further, based on research on the potential impact of climate change in Alpine Europe, most climate change scenarios indicate that alpine regions will experience a decrease in water runoff during the summer, which could reduce the ability to generate hydro during the season.82 However, during the winter, alpine regions will experience an increase in water runoff, which could increase the ability for generation. Rainy Norway is projected as a clear climate change winner, because increased precipitation will increase its generating capacity, although the benefits will vary from year to year.83 The more

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78. See Carl J. Bauer, Dams and Markets: Rivers and Electric Power in Chile, 49 NAT. RESOURCES J. 583, 589 (2009) (stating that power generation will be undermined by the scarcity and variability of water).


80. Id.

81. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION: SUMMARY FOR POLICYMAKERS 12 (Otmar Edenhofer et al. eds., 2011) available at http://srren.ipcc-wg3.de/report/IPCC_SRREN_Full_Report.pdf ("For hydropower the overall impacts on the global technical potential is expected to be slightly positive.").


83. See Kate Galbraith, Hydropower's Resurgence and the Controversy Around It, N.Y. TIMES, May 15, 2011, http://www.nytimes.com/2011/05/16/business/global/16iht-green16.html?pagewanted=all (citing a study that states that climate change will lead to more rain in Norway, causing better production in power plants; however, climate change will also cause
arid the area is, the greater the stress will be. In southern Europe, climate change is projected to decrease the amount of water runoff, and thus reduce the potential of hydro generation in the region. Also, projections indicate an increased likelihood of drought for the region, which would further stress the availability of water for hydro generation.\textsuperscript{84}

In the United States, the focus has been on the stresses in three major hydro-dependent regions—California, the Columbia Basin, and the Southwest—but the Southeast may also face increased risks of decreased hydro production. The biggest U.S. losers could be California and the arid western states. The region’s water resources are already stressed by competing demands, and the projected temperature increases from the “wetter, warmer, less net water” scenarios for the region will further stress hydro. California is already experiencing a warming trend. The average runoff in California could increase by 77\% according to the high wet forecast, but it could also decrease by 25\% in the driest season.\textsuperscript{85} It is possible that a seasonable increase-decrease pattern may result in no net change in current hydrographs. The rub is that the range of geographic and temporal variation still makes predictions difficult if not impossible.

The arid Colorado River Basin will be the most impacted region. There is a widespread consensus that Basin precipitation is likely to decrease; snowpack decreases are estimated to range around 30\%. Decreased precipitation is expected to lead to about a 10\% decrease in annual runoff, which will have major effects on hydro generation from the large mainstream and tributary reservoirs.\textsuperscript{86} A study of future climate scenarios for the time periods 2010–2039, 2040–2069, and 2070–2098 showed decreased hydro generation by 56, 45, and 53\%, respectively, compared to simulated historical hydro.\textsuperscript{87}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{85} Aspen Envtl. Grp. & M. Cubed, supra note 79, at 3.
\item\textsuperscript{86} Id. at 23.
\item\textsuperscript{87} Id. In 2008, researchers at the Scripps Institute of Oceanography published a paper that concluded that the odds were fifty-fifty that Lake Mead could dry up by 2021 after factoring in both available information on inflows into and outflows from the Lake and various climate change scenarios. Tom P. Barnett & David W. Pierce, When Will Lake Mead Go Dry?, 44 Water Resources Res. (2008). Bureau of Reclamation officials responded that they omitted inflows below Lake Powell and the seven basin state agreement to coordinate the operation of Lake Powell and Lake Mead, which would require at most a five hundred thousand dollar cut back in
\end{itemize}
\end{footnotesize}
The expected reductions in the Basin’s hydropower generation are due to the high sensitivity of the Colorado River system, where current demands are not much less than mean inflows. Thus even slight decreases in the mean inflow could result in significant negative impacts on hydro.

In the Columbia River Basin, the interplay of water flows and energy demand is complex. There is more available water, but there are strong competing demands for uses that conflict with hydro generation. Studies forecast modest changes in winter precipitation over the twenty-first century, but warming temperatures are expected to dominate hydrologic effects in the Basin. These effects include a gradual shift toward diminished snowpacks and earlier snowmelt runoff, accompanied by reduced summer and fall streamflows. Due to the expected reduction in streamflows during the summer and fall, the hydro-generation system would be most affected by its decreasing ability to maintain storage through the summer for late autumn drawdown. The result could be an increase of winter production by around 4% but a summer decrease by between 13 and 16%, with annual reductions estimated between 2 and 4%. By 2080, hydro production is projected to increase by around 7 to 10% in winter and decrease by about 18 to 21% in summer, with annual reductions of about 3%.

The stresses on hydro are substantial, but the major stresses may come from the tension between adapting to decreased capacity...
and meeting the demand for instream flows. In the Columbia Basin, hydrologic changes will increase the competition for reservoir storage between hydro and the instream flow targets developed pursuant to the ESA listing of Columbia River salmonids. The net effect is that people in the Pacific Northwest are likely to be warmer in both the summer and winter. Warmer winter temperatures will make adaptation easier, but come summer, peak electrical loads for air conditioning are likely to increase with the projected warming temperatures of the region.

5. Increased Competition for Water

Climate change aside, hydro production faces increasing competition for both nonconsumptive and consumptive uses of water. Hydro is a nonconsumptive use, but it competes with established consumptive uses. In addition, many federal dams and reservoirs are part of multiple-purpose projects, so hydro must compete with other uses, such as flood protection and irrigation, which can have a higher priority. As discussed in the next Section, efforts to protect fish and restore aquatic ecosystems require that more water be left in the stream or that dam-release patterns be altered to mimic pre-dam conditions. This instream use can conflict with the demand for power and thus constrain generation. Population growth also creates new consumptive use demands. The best example is the conflict over the allocation of Lake Lanier, a major source of water supply for Atlanta, Georgia. Upstream uses impact hydro, navigation, and the integrity of productive oyster fisheries in Florida in two interconnected basins, the Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa.

91. “In order to maintain performance of the [Colorado River Basin] reservoir system with respect to instream flow targets developed under the NMFS Biological Opinion associated with ESA listing of Columbia River salmonids, substantial (10–20%, depending on the future time period) reductions in firm hydropower would be required.” Jeffrey T. Payne et al., Mitigating the Effects of Climate Change on the Water Resources of the Columbia River Basin, 62 CLIMATIC CHANGE 233, 254 (2004). Therefore, even modest warming associated with climate change may cause significant shifts in Colorado River Basin runoff patterns because the hydrology of the region is dominated by the temperature-sensitive cycle of snow accumulation and melt. See id.

92. PAYNE ET AL., supra note 89, at 1–2.

93. HAMLET ET AL., supra note 90, at 188. Due to the expected reduction in hydro generation during the summer, the ability to transfer electrical energy from the Pacific Northwest to other regions is likely to decrease in May, June, July, and August.

94. The Colorado River Compact is an agreement signed by seven western states governing the water rights of the Colorado River. Article IV(b) of the Compact subordinates hydro to “the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.” The Bureau of Reclamation has made a copy of the Compact available at www.usbr.gov/lc/region/g1000/pdfs/crcompct.pdf.
After the states of Alabama, Florida, and Georgia could not agree on a compact allocation, the federal government brokered a temporary solution. The Corps of Engineers unilaterally reallocated 248,858 acre-feet of water in Lake Lanier to Atlanta and planned to use the proceeds from the sale to compensate utilities that lost generating capacity. The D.C. Circuit invalidated the agreement on the theory that only Congress could reallocate the reservoir, but the Eleventh Circuit has reached a different conclusion and remanded the decision for a determination of the Corps' reallocation authority. The broader lesson of this litigation is that hydro is still a major purpose of multiple-use projects, but it is increasingly caught in tugs of war among a wide range of competing uses and cannot be assured that it will continue to prevail over other uses.

6. Aging Infrastructure

Many hydro plants, especially public ones, face the problem of an aging infrastructure due to years of underinvestment. Technology is available to upgrade existing generators and dams; the problem is how to finance upgrades in an era of decreased federal spending for all water resource activities. For example, Corps projects contribute three to four billion dollars per year to the federal treasury, but the agency cannot tap these revenues to repair and upgrade its facilities. Instead, federal power is marketed by four power marketing agencies and the money deposited in the federal treasury. The treatment of public power revenues can, however, differ from project to project, but with the exception of the Bonneville Power Authority and Hoover Dam, the

95. See Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1325 (D.C. Cir. 2008) (holding that only Congress had authority to reallocate the water resources of the reservoir).

96. See In re MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1205 (11th Cir. 2011) (remanding the reallocation decision to the Army Corps of Engineers). The Eleventh Circuit held that water supply was an authorized purpose of Lake Lanier and that municipal supply could not be subordinated to hydro generation; it ordered the Corps of Engineers to consider Georgia's request for an allocation from the Lake after it reexamined its authority to operate the reservoir. Previously, the D.C. Circuit held that only Congress should reallocate the reservoir. See Geren, 514 F.3d at 1325. However, in MDL-1824 Tri-State Water Rights, the Eleventh Circuit held that the Corps was not bound by Geren since the Geren court did not have an opportunity to examine the Corps's full operational authority. See generally Victor Flatt & Jeremy Tarr, Adaptation, Legal Resiliency, and the U.S. Army Corps of Engineers, 89 N.C. L. REV. 1499 (2011) (detailing the Corps's authority).


98. Id. at 4.
other agencies generally lack the authority to finance the operation and maintenance of the plants that they run.\footnote{Id. at 6.}

II. THE ENVIRONMENTAL-RECREATIONAL-TRIBAL NETWORK OF CONSTRAINTS

The major story of hydro in the last fifty years is the effort of the federal and state governments to deal with the external costs of this resource by striking a new balance between hydro generation and releases for fishery conservation. There are two intertwined stories. The first is the opposition to dams for the aesthetic\footnote{E.g., ELIOT PORTER, THE PLACE THAT NO ONE KNEW: GLEN CANYON ON THE COLORADO RIVER 6-7 (1963) (documenting of the loss of access to the floor of Glen Canyon damned by Glen Canyon Dam at Page, Arizona); Kim Murphy, A Hydroelectric Future Faces A Fish Predicament, L.A. TIMES, July 27, 2009, http://articles.latimes.com/2009/jul/27/nation/na-hydro-power27 (explaining the opposition to dams for aesthetic and environmental reasons). Many developing nations are aggressively building dams and these dams generally have substantial adverse social and environmental impacts. See generally THAYER SCUDDER, THE FUTURE OF LARGE DAMS: DEALING WITH SOCIAL, ENVIRONMENTAL, INSTITUTIONAL AND POLITICAL COSTS (2005) (detailing the adverse social and environmental impacts of dam construction in developing nations).} and economic reasons that ended the Big Dam Era. Efforts to stop dams to preserve scenic canyons go back to the epic struggle to stop the construction of a dam in Hetch Hetchy Canyon north of Yosemite National Park.\footnote{In 1913, Congress allowed the construction of O'Shaughnessy Dam in the Hetch Hetchy Valley in Yosemite National Park, which supplies the city of San Francisco with water and power, by authorizing the necessary rights of way through Yosemite National Park. See Raker Act, 38 Stat. 242 (1913). The decision to build the dam was one of the great natural resource fights of the Conservation Era and played a major role in splitting the conservation movement into the utilitarian, multiuse, and preservation wings. See RICHARD WHITE, "IT’S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 413 (1993). California environmentalists have long dreamed of restoring the valley to John Muir’s vision of it as the “flow of nature.” See MICHAEL COHEN, THE PATHLESS WAY: JOHN MUIR AND THE AMERICAN WILDERNESS 330 (1984).} But, the opposition to two “cash register”\footnote{In the 1960s, the Bureau of Reclamation proposed two dams, Marble and Bridge Canyons, solely for the generation of hydro at either end of the Canyon. The big-thinking Bureau proposed that the revenues be used for a massive interbasin transfer from the Columbia River to Arizona and California. After Senator Henry Jackson of Washington state blocked the proposed transfer, the case for the power revenue shifted to supplying the Central Arizona Project (“CAP”) and southern California. For the story of the history of the two dams and the political campaign to defeat them, see PHILIP L. FRADKIN, A RIVER NO MORE: THE COLORADO AND THE WEST 228–34 (2d ed. 1981). Ironically, to supply the CAP, large coal-burning plants were constructed near Page, Arizona, and set off a decades-long air pollution battle to preserve the clarity and vistas of the Four Corners area.} dams at either end of Grand Canyon National Park helped to create the modern environmental protection movement.\footnote{In the 1960s, the Bureau of Reclamation proposed two dams, Marble and Bridge Canyons, solely for the generation of hydro at either end of the Canyon. The big-thinking Bureau proposed that the revenues be used for a massive interbasin transfer from the Columbia River to Arizona and California. After Senator Henry Jackson of Washington state blocked the proposed transfer, the case for the power revenue shifted to supplying the Central Arizona Project (“CAP”) and southern California. For the story of the history of the two dams and the political campaign to defeat them, see PHILIP L. FRADKIN, A RIVER NO MORE: THE COLORADO AND THE WEST 228–34 (2d ed. 1981). Ironically, to supply the CAP, large coal-burning plants were constructed near Page, Arizona, and set off a decades-long air pollution battle to preserve the clarity and vistas of the Four Corners area.} As a result, efforts to promote hydro have
concentrated on smaller projects, often run of the river, and improvements at existing facilities. The second story is the effort to conserve and restore diminished fish runs. Efforts to preserve fish runs can be traced to the dawn of the hydro era, but fish conservation was almost always secondary to hydro development until the ESA in 1973. These two developments have produced an extensive, if fragmented and uncoordinated, network of major legal constraints that have been effectively used by environmental nongovernmental organizations ("NGOs") and Native American tribes\(^\text{103}\) to constrain hydro development and operation.\(^\text{104}\) Public and private turbines continue to spin but often at less than maximum capacity.

**A. Mitigation of Lost Fish Runs Pre-NEPA and ESA**

The first efforts to deal with the external costs of hydro resulted in the construction of fish ladders and passages. As far back as 1888, the secretary of the Army was given the **discretion** to require fish passages for navigation improvements.\(^\text{105}\)

This idea was incorporated into the 1920 FPA, which required FERC to impose conditions in its licenses to construct and operate "such fishways as may be prescribed by the Secretary of Interior."\(^\text{106}\) Starting in 1934, Congress began to mandate the incorporation of fish protection facilities into federal dams and water-related projects.\(^\text{107}\) The first Fish and Wildlife Coordination Act required any federal agency that directly impounds or licenses the impoundment of water to first consult with the Fish and Wildlife Service ("FWS") of the Department of Interior and the head of the affected state wildlife agency about available fishery-conservation migration options.\(^\text{108}\)

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108. Id. The modern FWS was created in 1939 when two bureaus dealing with fish, Fisheries and the Biological Survey, were moved from the Department of Agriculture to the Department of the Interior. See *Origins of the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERVICE, http://training.fws.gov/History/TimelinesOrigins.html (last updated May 21, 2009). Consultation was first mandated in 1946. Act of August 14, 1946, 60 Stat. 1080.
However, until the 1950s, there was no legal basis to force FERC or the federal government to reduce the broader external costs of hydro. In 1958, the Act was strengthened to require that federal agencies give wildlife conservation equal consideration “with other features of federal resource development programs.” Under this amendment, fish ladders were installed on many dams; even after it was revealed that they would not be effective on large dams, the dams continued to be built. The FWS was a marginal agency within the Department of Interior during the Big Dam Era, and thus the Act never became a major constraint on hydro development because it was construed not to apply to pre-1970 projects. In addition, pre-National Environmental Policy Act (“NEPA”) administrative law imposed almost insurmountable barriers to challenging agency actions applying the NEPA.

The story is different for FERC. The agency took the Fish and Wildlife Coordination Act seriously, consistently imposed fish flow releases in its licenses, and relied on the Act to reinforce its discretion to impose conditions over the objections from states. States often claimed that FERC conditions were insufficient, and water right holders argued that such conditions interfered with their state-created water rights. In the 1950s, opposition to dams began to mount, and the opposition slowly worked its way into FERC license applications. Section 10 of the Act requires that “the project adopted ... will be best adapted to a comprehensive plan ... for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat).” FERC never implemented section 10, but in 1954, it denied a license on a Wisconsin river that eventually was incorporated into the Wild and Scenic Rivers Act.

109. Fish and Wildlife Coordination Act § 661.
110. For example, the five hundred foot high Grand Coulee Dam was too high for fish to climb the ladders. “Having cut off the upper third of the Columbia’s spawning habitat, the salvage effort focused on transforming the fish runs above Grand Coulee into composite, hybridized stocks suitable for artificial propagation and transfer to tributaries below the dam.” History, SALMON FOR ALL, http://www.salmonforall.org/history/ (last visited Sept. 7, 2012).
111. See Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235–36 (9th Cir. 1990) (holding that damage NEPA intended to prevent had already occurred).
In a landmark decision, the Seventh Circuit upheld FERC's section 10 discretion to deny a hydro license for aesthetic reasons because no project or "conservation" alternative was an option in any comprehensive river plan.

The Act was given a boost by the Supreme Court in the last gasp of the public power debate after FERC rejected the secretary of Interior's recommendation that FERC deny a license for the High Mountain Sheep Dam on the Snake River in Idaho. Secretary Stuart Udall had urged FERC to recommend to Congress that the site be publically developed as part of a comprehensive plan of public power. Justice William O. Douglas—the most avid environmentalist to serve on the Court—used the Act to bolster his almost unprecedented conclusion that FERC breached its section 7 duties to consider public development of the site. He found the record "relatively silent" on the merits of public versus private development and remanded the decision to FERC.

Modern environmental law has further eroded FERC's discretion. A well-financed challenge to a FERC decision gave birth to the new area of environmental law. FERC licensed a pump-storage plant on an iconic reach of the Hudson River at scenic Storm King Mountain. In 1965, a coalition of NGOs convinced the Court of Appeals for the Second Circuit to read the FPA, which had only been construed to confer discretion on the agency, to consider aesthetic values (a then much-contested idea). The coalition also convinced the Second Circuit to impose a mandatory duty on an agency to consider environmental values and to more fully justify decisions not to deny a license when the impacts were substantial. The Second Circuit remanded the case because FERC failed to consider the aesthetic and fish and wildlife impacts of the project. FERC reissued

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116. See Namekagon Hydro Co. v. Fed. Power Comm'n, 216 F.2d 509, 511–13 (7th Cir. 1954) (holding FERC had discretion to deny a hydro license for aesthetic reasons).
117. See generally WILLIAM O. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1964) (laying out Justice Douglas's avid environmentalism). The honor of the most effective environmental justice goes to Justice Thurgood Marshall who recognized marginalization when he saw it.
119. See Scenic Hudson Pres. Conference, 354 F.2d at 624–25 (holding that an agency must consider environmental values and justify decisions not to deny licenses when there are substantial environmental impacts).
the license, and the Court upheld the decision, but in *Scenic Hudson I*, the Court articulated the two core ideas—advance, detailed environmental assessment and substantial, if not equal, weight to fishery conservation—that have shaped both environmental law generally and the law of hydro in the past five decades.

Three years later Congress effectively ended the Big Dam Era by withdrawing many potential hydro sites from public and private development. After a decade of advocacy by wildlife conservation scientists such as John Craighead, Congress passed the Wild and Scenic Rivers Act. The Act applied the Wilderness Act preservation model to water by creating three classes of free-flowing rivers. Section 1 declares that

> Certain selected rivers of the Nation which, in their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition... and their immediate environments shall be protected for the benefit and enjoyment of future generations.

The section went on to declare that the “established national policy of dam construction... needs to be complemented by a policy that would preserve other selected rivers or sections.” FERC is specifically prohibited from licensing any facility on a designated river, although the protection is not absolute. Dams are permitted above and below preserved reaches so long as the project will not “invade the area or unreasonably diminish the scenic, recreational, and fish or wildlife values present in the area on the date of the designation of the river.”

The afterglow of the Big Dam Era lived on for another decade as the dam-building agencies and their constituencies—especially in the West—did not initially appreciate that Congress was losing its appetite for subsidized large-scale water development. Large multiple-purpose projects continued to be proposed until Jimmy Carter issued

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120. Id.
123. Id. § 1271.
his infamous 1977 "hit list." Hopes that the Reagan Administration would reverse this heresy were dashed when it turned out that the Reagan Administration's cold-eyed economists wanted to end federal water development subsidies. Since the 1980s, the diminishing federal budget devoted to water has been increasingly spent on aquatic ecosystem restoration rather than dam construction.

B. NEPA and ESA Change the Game

Environmental law, specifically the NEPA, turned the Fish and Wildlife Coordination Act from a shield into a sword, if a relatively dull one, and the Endangered Species Act ("ESA") transformed the marginalized FWS into a powerful agency within and outside of the Department of Interior. NEPA suits began to include an allegation that agencies were also violating the Fish and Wildlife Coordination Act, and courts quickly merged the two—so compliance with the NEPA was presumed compliance with the Act. Courts initially refused to require agencies such as the Corps of


128. The Act, unlike the later Clean Air Act and Clean Water Act, does not contain a citizen suit provision and, under the Supreme Court's restrictive standards, does not create a private right of action. See San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003) (explaining that "it is well settled that the FWCA provides no private right of action for citizen suits"), aff'd, 417 F.2d 1091 (9th Cir. 2005). However, some courts have found that the NEPA private right of action includes Fish and Wildlife Act violations. See Profitt Found. v. U.S. Army Corps of Eng'rs, 175 F. Supp. 2d 755, 770 (E.D. Pa. 2001) (noting that some courts find that the NEPA private right of action includes Fish and Wildlife Act violations), aff'd on other grounds, 343 F.3d 119 (2d Cir. 2003).

129. Envtl. Def. Fund, Inc. v. Froehkle, 473 F.2d 346, 356 (8th Cir. 1972) (leading case holding that complying with NEPA in good faith necessarily involves taking into consideration all required factors under the FWA); accord Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 492 F.2d 1123, 1138 (5th Cir. 1974) (holding that the Corps complied by consulting with FWS in preparing EIS for Tennessee-Tombigbee navigation project and the Corps had no duty to obtain cabinet level approval); Bergen County v. Dole, 620 F. Supp. 1009 (D. N.J. 1985) (finding that NEPA and FWA compliance are intertwined), aff'd, 672 F.2d 1297 (8th Cir. 1980).
Engineers to adopt FWS recommendations, but agencies quickly learned that if they adopted some fish mitigation measures suggested by FWS, courts were likely to uphold their decision to proceed with a project.

The initial environmental laws passed by Congress did not directly target hydro, but they eventually imposed serious constraints on the operation of existing facilities and made it more difficult to construct new ones, especially public projects. The ESA has become a basis for the imposition of mandatory flow release conditions to protect at-risk species. Hydro facilities on the Columbia and Colorado Rivers have been impacted by the ESA. Courts have ordered releases from dams to protect listed species and have held that diversions can constitute an ESA section 9 taking. In addition, Indian water-rights settlements are another source of minimum flows. Indian Tribes have federally reserved water rights, which entitle them to the water necessary to support the purposes for which their reservation was established. In the past twenty years, these rights have been quantified primarily through congressional settlement acts, and some impact dam operation. For example, in 2004, the state of Idaho, the federal government, and the Nez Perce tribe, entered into a creative settlement that provides for a more stable flow regime on lower Snake River, which can benefit both salmon restoration efforts and hydro generation.


131. Missouri ex rel. Ashcroft, 526 F. Supp. at 677 n.7 ("Defendants are making an effort to minimize adverse effects of the operation of the [] project upon fish and wildlife.").

132. See supra note 91 and accompanying text (detailing the impact of the ESA on hydro facilities on the Columbia River).

133. See infra note 162 and accompanying text (detailing the impact of the ESA on hydro facilities on the Colorado River).


136. Winters v. United States, 207 U.S. 564, 577 (1908) (establishing that Native American Tribes have federally reserved water rights).

Hydro initially got a pass from the Clean Water Act ("CWA"). The CWA requires that all "point sources" of pollution acquire a discharge permit. In addition, a permitted charge cannot violate state water quality standards. For "institutional" reasons, an early influential D.C. Circuit Court of Appeals decision rejected the argument that dams were point sources. FERC initially also assumed that it was immune from the CWA. Starting with the New Deal, the Supreme Court consistently held that FERC had the exclusive authority to regulate the operation of its licensed facilities on the fiction that the agency was conducting the unified river basin planning required by the FPA. Not only were dams nonpoint sources, but power releases were not considered pollution discharges because nothing was added to the water.

Washington state ultimately found a way to subject dam releases to state regulation in a rare proenvironmental Supreme Court decision. Section 401 of the CWA requires that federal licensees obtain a state certification that the operation of the project will not violate state water quality standards. Section 401 certification applies to both public utilities and state-operated hydroelectric facilities. PUD No. 1 of Jefferson County v. Washington Department of Ecology was a challenge to fishery maintenance flow release conditions on a public utility. The Court held that section 401 allowed the state to impose minimum flows for fish protection and aesthetic enhancement. The utility argued that the conditions were water quantity, not quality, conditions, but Justice O'Connor dismissed the distinction as artificial. FERC had to accept the section 401 conditions.

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139. See Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161 (D.C. Cir. 1982) (rejecting the argument that dams are point sources). Dams could be classified as point sources because they confine water and can be operated to control downstream adverse water quality impacts, but the court chose to exclude them in large part because other regulatory regimes were better suited to deal with the problem. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 312 (2d ed. 1994) (arguing other regulatory schemes are better suited to deal with water quality problems).


imposed by the state. Thus, the section turned into a frequently used opportunity for environmental NGOs to impose minimum flow or environmental flow release conditions on FERC licensees.

C. Parity for Fish and White Water Rafters in FERC Licensing

In 1986, Congress both broadened FERC's power to consider the environmental impact of the operation of its licensed facilities and imposed new duties to exercise this power by limiting the agency's power to sacrifice the wellbeing of fish populations to gain power-generation benefits. The Federal Water Power Act of 1920 authorized fifty-year renewable licenses. In the mid-1980s, the issue changed from the licensing of new projects to the relicensing of existing projects. As the original licenses reached their golden anniversary, Congress enacted the Electric Consumers Protection Act of 1986 ("ECPA"), which amends the FPA and mandates that FERC give equal weight to the benefits of relicensing the project and to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)." The ESA still applies to all FERC projects as well, but the ECPA applies whether or not the project will jeopardize a listed species. Hydro-rich states such as Oregon have a similar rigorous review process for new and relicensed non-FERC facilities.


144. E.g., CAL. ENVTL. PROT. AGENCY, STATE WATER RES. CONTROL BD., ORDER WQ 2009-0007, IN THE MATTER OF PETITIONS FOR RECONSIDERATION OF WATER QUALITY CERTIFICATION FOR THE RE-OPERATION OF PYRAMID DAM FOR THE CALIFORNIA AQUEDUCT HYDROELECTRIC PROJECT FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO 2426, ORDER PARTIALLY GRANTING PETITION FOR RECONSIDERATION AND AUTHORIZING ISSUANCE OF REVISED WATER QUALITY CERTIFICATION (2009), available at http://www.waterboards.ca.gov/ board_decisions/adopted_orders/water_quality/wq09.shtml (requiring California to operate a project to stimulate natural flow conditions "to the extent operationally feasible" to protect the federally listed arroyo toad while rejecting NGO petition to increase summer minimum flows).


The ECPA has changed the way that FERC does business, but it has not prevented relicensing. The first case to consider the statute told FERC to stop marginalizing fish, but subsequent cases make it clear that the statute does not disturb FERC's discretion to make the final balancing among hydro, fish, and recreation. *National Wildlife Federation v. FERC*[^147] remanded seven preliminary permits to develop license applications for hydro projects along the Salmon River in Idaho. The court held, *inter alia*, that the record did not support FERC's refusal to develop a comprehensive plan for hydroelectric development in the Salmon River Basin and not to collect baseline environmental data before granting the permits. FERC argued that its experience with these kinds of permits obviated the need for a plan, but the court found that this traditional deference to agency expertise arguments was inadequately justified and conflicted with the statements of FERC's own scientist who chaired the preliminary permit hearings. In language that echoed *Scenic Hudson I*, the court concluded that "the unique nature of the Salmon River Basin and the large number of applications filed made it imperative that a comprehensive plan be prepared before preliminary permits were issued." Because the Northwest Power Act also imposed new substantive requirements on FERC,[^148] the court did not need to reach the issue of whether FERC violated the ECPA. Instead, on remand, it instructed FERC to "consider the evidence in the record, articulate reasons supported by the record for whatever decisions it makes, and consider the Council's Program to the fullest extent practicable." Thus, "if and when a future appeal is taken, whether the consideration [FERC] has given to fish and wildlife at this point satisfies the 'equitable treatment' requirement will no longer be an issue."[^149]

Subsequent cases have retreated from *National Wildlife Federation*, but FERC cannot ignore fish conservation. FERC's discretion to make the final balance between fish and hydro was first applied to a small project and then extended to larger ones. *National Wildlife Federation*[^150] allowed FERC to trade off protection of a state-


[^149]: Nat'l Wildlife Fed'n, 801 F.2d at 1515.

listed endangered fish against nonpower benefits, including water supply. FERC studied the benefits from development of the dam and concluded that those benefits justified the environmental costs. The court acknowledged that the ECPA requires FERC “to give equal consideration to environmental values and the need for development,” but concluded “it is not necessarily required to give these sets of competing values equal weight in every situation.”151 U.S. Department of Interior v. FERC152 extended the tradeoff discretion to the licensing of sixteen projects on the upper Ohio River. Specifically, it held that the ECPA does not require FERC to conduct studies that fish and wildlife agencies deemed necessary in order to give equal consideration to environmental concerns because it only required that the agency “address each recommendation.”153 It also rewarded FERC for exercising its discretion to deal with the uncertain future impacts through extensive license conditions and reopeners.154 Conservation Law Foundation v. FERC held that FERC may use existing dam conditions in deciding what protection should be given to fish runs.155 In addition, the court stated:

[Even if the statute refers generally to all “fish and wildlife” it hardly follows that FERC must imagine the [channel] as it existed before 1899 and assess the effect of relicensing by pretending that [the] [d]am does not exist – at least when no one advocates decommissioning the ... Project and tearing down the dam.]156

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151. Id. at 1481.
154. See U.S. Dep’t of Interior, 952 F.2d at 547:
FERC liberally used license conditions to protect against unknown risks. Despite a finding on minimum flows necessary to maintain [dissolved oxygen] levels at the eleven dams rated fair-to-good aerators, FERC not only conditioned the licenses on flow maintenance but also conditioned them on maintaining the 6.5 mg/l level – thereby eliminating any uncertainty due to the flow prediction model. . . . FERC additionally required that licensees build their projects to accommodate the future addition of fish protective devices . . . .
The Court added:
[The Final EIS] examined several studies and concluded that mortality would not exceed 10 percent and that, even at that worst-case level, the projects licensed were in the public interest. The ten percent figure was based on substantial evidence: FERC pointed to studies conducted at several sites and noted that higher mortality levels in some experiments were not controlling because the turbines to be used in the licensed projects were substantially different.
Id. at 546.
156. Id. at 46.
III. FROM WORKING RIVERS TO RIVERS THAT WORK

The laws enacted since the Wild and Scenic Rivers Act have not only constrained individual hydro projects, but they have also laid the foundation for a paradigm shift in water resources management that is still working its way into the law of hydro. From the Conservation Era to the beginning of the modern environmental era, the ideal river was a working one. For the first half of the twentieth century, rivers were viewed as imperfect examples of nature that could be improved by harnessing them with dams, levees, and ditches so that little water would be wasted through non-use.

We are now transitioning to the vision of a river that works for both humans and the environment. It is not a new vision. John Muir saw the mighty Columbia River as “gathering a glorious harvest of crystal water to be rolled through forest and plain in one majestic flood to the sea.”

There are two visions of the normative river: the rational and the wild. The first may mean the curtailment of generation options, and the second may mean the loss of existing facilities. The rational vision is grounded in the physical and social sciences. It seeks both to describe the pre-dam functions of the river and to quantify the value of such ecosystem services if some measure of the pre-dam hydrograph were to be restored. Ecosystem “services” include biodiversity enhancement, pollution filtering, and flood retention. The best articulation of this vision of a river that works is the “normative river.” The normative river largely accepts the reality that a return to predevelopment (pre-dam) conditions is unrealistic on most large,

157. See W. WATER POLICY REVIEW COMM’N, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 4-21 (1998). For the distinction between a working river, which is dammed and managed for flood control, irrigation, hydroelectric generation, and municipal water supply, and a river that works by providing a wide range of ecosystem services, see id. at 2-13; see also id. at 3-2, 3-3 (arguing rivers that work can accommodate sustainable, non-wasteful levels of consumptive use and non-consumptive uses such as hydro generation).

158. See NAT’L RESEARCH COUNCIL, supra note 64, at 34–41 (sketching the trends within the “pure doctrine of river management”).

159. BILLINGTON, supra note 20, at 153–54.


regulated rivers such as the Columbia-Snake, Colorado, and Missouri. Instead, the objective is to manage dam releases to create a new, synthetic hydrograph that performs a reasonable range of pre-dam and predevelopment functions within constraints such as existing water rights and the legislative mandates that control reservoir operation. Hydro operations continue under this scenario, but will be subject to periodic revenue losses. Dams will remain because they can help improve aquatic ecosystems through reoperation that produces flow regimes closer to pre-dam conditions.

The normative river has not been legislatively codified, but it is no longer an abstract idea. A number of ad hoc river-restoration experiments implement the idea either de facto or de jure. The most ambitious de jure effort is the Comprehensive Everglades Restoration Plan, enacted as part of the omnibus Water Resources Development Act of 2000, which seeks to recreate a normative river of grass in the Everglades after decades of human alteration. The ecosystem depends on seasonal sheet flows of water from the Kissimmee River in central Florida and Lake Okeechobee. To make South Beach and Miami what they are today, these flows were substantially diverted for agricultural and urban development and flood control. The objective of the legislation is no less than to replumb the Everglades to restore some measure of prediversion flows.

162. In 1982, the Bureau of Reclamation announced plans to rewind the eight generators at Glen Canyon Dam on the Colorado River. The decision triggered concerns about the dam’s operations on endangered fish in the Colorado and Lower Colorado Rivers, rafting in the Grand Canyon, the Grand Canyon ecosystem, and Tribal interests. The Bureau responded by funding extensive studies of the dam’s environmental impacts. As a result of review by the National Research Council, see NAT’L RESEARCH COUNCIL, RIVER AND DAM MANAGEMENT: A REVIEW OF THE BUREAU OF RECLAMATION’S GLEN CANYON ENVIRONMENTAL STUDIES (1987), the Western Area Power Administration was instructed to develop a minimum flow release pattern to replace the pattern of fluctuating discharges. Trevor C. Hughes, Reservoir Operations, in NAT’L RESEARCH COUNCIL, COLORADO RIVER ECOLOGY AND DAM MANAGEMENT: PROCEEDINGS OF A SYMPOSIUM 207, 214 (1991). Eventually, a permanent Glen Canyon Adaptive Management Program was established. Under this program, the Bureau has engaged in controlled flood releases to try and rebuild beaches on the Canyon floor by flushing sediment out of the tributaries to replace sediment flows arrested by the dam. The merits of the experiment remain contested, but the magnitude of the lost power revenues is clear. A 2008 controlled flood cost four million dollars in lost power revenues. Lawrence Susskind, Alejandro E. Camacho & Todd Schenk, Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale, 35 COLUM. J. ENVTL. L. 1, 25–26 (2010).


164. U.S. ARMY CORPS OF ENGR’RS & S. FLA. WATER MGMT. DIST., CENTRAL AND SOUTHERN FLORIDA COMPREHENSIVE REVIEW STUDY, FINAL INTEGRATED FEASIBILITY REPORT AND
Many argue that the ultimate conclusion of the normative river idea is to return a river to its wild, pre-dam state through dam removal. Removal was first proposed for small dams that have exceeded their planned useful life or no longer perform their intended functions. Some small, marginal hydroelectric dams have been removed in Maine. The largest ongoing removal is the 108-foot high Elwha Dam on the Elwah River in Washington state. There have been proposals to take down large multipurpose dams such as Glen Canyon on the Colorado River and O'Shaughnessy Dam north of Yosemite National Park. Environmentalists have set their sights on


166. A Maine conservation organization, the Penobscot River Restoration Trust, raised twenty-five million dollars to supplement a fifteen million dollar federal grant to purchase and remove two hydroelectric dams at the lower end of the river and to build a fish run around a third. The hope is that fish will return to the watershed. The river was a major source of economic development as logs were floated from the headwater forests to downstream paper mills, but much of the resulting pollution has now been cleaned up. Katie Zezima, Maine Conservationists Reach Milestone in Plan to Buy Three Dams, N.Y.Times, Aug. 21, 2008, at A13.


169. See supra note 101 and accompanying text (discussing the decision to build the O'Shaughnessy Dam). The issue of the dam still resonates in California. See WHITE, supra note 101, at 413; see also COHEN, supra note 101, at 330 (discussing California environmentalists' dreams of restoring the valley to John Muir's vision of it as the "flow of nature"); SPRECK ROSEKRANS ET AL., ENVTL. DEF., PARADISE REGAINED: SOLUTIONS FOR RESTORING YOSEMITE HETCH HETCH VALLEY (2004) (giving a comprehensive effort to simulate a removal debate). In 1987, one of President Reagan's Secretaries of the Interior, Donald Hodel, was the first high-ranking official to suggest removal. Environmentalists viewed the suggestion as a ploy to split green northern California. In 2007, the Bush II Administration proposed a seven million dollar removal feasibility study, but Senator Dianne Feinstein, the former mayor of San Francisco and staunch Hetch Hetchy defender, was not amused. In 2012, the Senator was photographed in
the Snake River. To improve salmon runs on the Columbia-Snake River, proposals to breach four dams on the upper Snake River have been floated.\footnote{The efforts to restore salmon runs on the Columbia River and its tributaries are an epic tale and illustrate the role that dam removal can play in the future resolution of such conflicts. After a court suggested that the federal government conduct a study to evaluate the removal of eleven dams on the Columbia and the Snake Rivers, the Clinton Administration began a study to assess the consequences of breaching four major dams on the Snake River. However, the Bush II Administration rejected the idea, although a 2002 Rand Corporation Report found that four Lower Snake River dams could be removed with no disruption to the regional economy. \textit{Pernin et al., supra} note 8, at 27–32; \textit{see also Hawley, supra} note 165 (arguing that the dams should be removed). \textit{See generally Michael C. Blumm, Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia Basin Salmon} (2002).} Major dam removal decisions must be made by Congress, but FERC has the power to order the removal of at least some licensed dams. Congressional approval is not required for the removal of FERC-licensed dams. Dam removal is now a relevant consideration in many relicensing applications because the FPA has been construed by the courts to give the agency the authority to deny a license-renewal application and order that a dam be decommissioned if the facility has become uneconomic.\footnote{See \textit{City of Tacoma v. Fed. Energy Regulatory Comm'n}, 460 F.3d 53, 73 (D.C. Cir. 2006) (holding uneconomic licenses would be per se unreasonable); \textit{see also Jackson Cnty. v. Fed. Energy Regulatory Comm'n}, 589 F.3d 1284, 1291 (D.C. Cir. 2009) (holding that FERC reasonably accepted the surrender of a license and plan to remove a dam and powerhouse and had no power to compel transfer of the license to the county).}

IV. HYDRO'S FUTURE

Energy law and policy are never static.\footnote{See, e.g., Jad Mouawad, \textit{Fuel to Burn: Now What?}, \textit{N.Y. Times}, Apr. 11, 2012, at F8 (arguing that years of concern in the United States about shortages of domestic sources oil, and to a lesser extent natural gas, and higher energy costs have led to extensive drilling in the United States, and that these new oil and gas reserves, along with Canadian tar sands, will ensure that oil and gas will be the major sources of the country's energy for the foreseeable future.)} Although hydro has been pronounced a retro-energy source and consigned to a steady-state future, it is currently enjoying a mini boom. Its fate remains tied, however, to the price and environmental policies regarding the big three hydrocarbons—oil, natural gas, and coal. To chart its future, it is useful to distinguish between big and little hydro. The distinction is not a hard and fast one, but it captures a crucial difference between small-scale projects and large power plants at dams. State and federal
alternative energy legislation extends various benefits, such as credit under state alternative energy portfolio standards and tax incentives to new, small-scale hydro projects. Thus, little hydro is trailing behind wind, solar, and biomass. In contrast, the previously discussed regulatory framework for big hydro, a federally funded, multiple-purpose project or a FERC license, remains in place. This said, small hydro must comply with applicable environmental laws. The current boom is primarily in little hydro, run-of-the-river, and kinetic projects.\footnote{173} However, some efforts to ramp up big hydro are emerging.

\textit{A. Is the Capacity There?}

The first question that must be asked before any strategy to increase hydro production aggressively can be considered is whether the capacity is there. There is no simple answer to this question. Congress mandated a Department of Energy ("DOE") study in 2005.\footnote{174} A 2011 study prepared for the Corps of Engineers summarized the results of this study and those of an earlier Electric Power Research Institute ("EPRI") one.\footnote{175} The two studies are a classic case of trying to compare apples and oranges. The DOE's study focused on technical feasibility and excluded constraints, such as environmental impact. It is a parody of the punch line of a joke in which an engineer, a scientist, and an economist are charged with opening a can on a desert island without any tools. The economist's solution is "to first assume a can opener." The EPRI's study speculated in a different direction. It developed a series of incentive scenarios such as green portfolio purchases, tax incentives, and federal loans. The DOE came up with the figure of 467 megawatts of undeveloped power compared to the EPRI's study. The DOE concludes that most of the increases will come from small, new dams or pumped storage.\footnote{176} It did not venture into the political landmine of large, new dams. The Corps of Engineers study concluded that "new hydropower development in the U.S. will

\begin{footnotes}
\item[175] \textsc{Sale}, \textit{supra} note 97, at 28–30.
\item[176] For a discussion of a variety of small, new hydro projects, many at existing dams, at various stages of licensing or construction, see \textit{Adding Hydro at Existing Dams: Project Profiles}, \textsc{HydroWorld.Com}, http://www.hydroworld.com/articles/hr/print/volume-27/issue-5/feature-articles/adding-hydro-at-existing-dams-project-profiles.html (last visited Oct. 2, 2012).
\end{footnotes}
most likely be accomplished by”177 FERC-licensed projects. The EPRI did a similar study, but it came up with a figure of only 0.5 megawatts and agreed with the DOE that the future was in small dams and pumped storage.

B. The Small-Scale Upgrade Scenario

The current “action” is in little hydro. There are many untapped sources of falling water at low gradients.178 Currently, the United States is using tax credits and efforts to speed up FERC licensing as the major inducements for small hydro. The United States’ first effort to do the latter did not end well. In 1978, Congress enacted legislation designed to bring new, smaller low-head plants online.179 Studies projected that new, cost-effective facilities could produce one hundred thousand megawatts of clean power.180 The carrot was the requirement that public utilities purchase the electricity generated from qualifying facilities.181 FERC interpreted this to be the utility’s avoided cost, and the Supreme Court upheld the standard.182 However, the increased generation produced by the act has been well below the initial expectations.183 The reasons for the lack of increased generation include the multitude of regulatory approvals required for a plant and avoided cost contracts that exceeded market rates.184 FERC currently encourages small projects by exempting projects from licensing if they are located in existing conduits such as aquifers or produce less than five megawatts.185

177. See SALE, supra note 97, at 29.
178. New York City is looking at its water system as a source of hydro. A New York City ordinance mandates a study of generating hydro as New York City’s water flows from the Catskill Mountains to the city, although major technical problems exist. Jim Dwyer, Seeing Sources of Electricity in Water Pipes, N.Y. TIMES, May 9, 2011, at A16.
183. See STEVEN FERRY, LAW OF INDEPENDENT POWER § 3.4 (1989).
There is less need for “feed in tariffs,” as they are called in Europe, because today, there are many merchant power plants that do not sell to utilities.\textsuperscript{187}

In 2005, Congress focused on relicensing by speeding up the process and providing tax credits, which have been extended by the 2008–2009 stimulus bills. The Energy Policy Act of 2005 requires that FERC “take an adaptive approach for restoring anadromous fish to their historically accessible habitat” when relicensing hydroelectric projects.\textsuperscript{188} However, the Act also weakened habitat protection. Section 241(b) created an expedited trial of ninety days on all material facts in dispute between any party and the applicant.\textsuperscript{189} Section 33 of the Energy Policy Act of 2005 requires applicants and other parties to propose alternatives to conditions established by the Departments of Interior, Commerce, and Agriculture.\textsuperscript{190} Specifically, section 33 requires that FERC must accept the project if (1) the secretary of any of the three agencies determines that it meets environmental conditions and is “no less protective than the fishway initially prescribed,” and (2) in comparison with the original proposal, the project will “cost significantly less to implement; or result in improved operation of the project works for electricity production.”\textsuperscript{191} Since both the applicant and any other interested party can propose these conditions, this standard would seem to allow the secretaries a way to

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A small conduit hydroelectric facility up to 15 megawatt (MW) (up to 40 MW for certain municipal projects) using a man-made conduit operated primarily for non-hydroelectric purposes may be eligible for a conduit exemption. The applicant must have all the real property interests necessary to develop and operate the project or an option to obtain the interests (18 CFR 4.31(b)(2)). The facility cannot occupy federal lands. The conduit on which the project is located is not included as a project work. Applications for exemptions of small hydroelectric conduits are categorically exempt from the requirement for an Environmental Assessment (EA) or Environmental Impact Statement (EIS) to be prepared by the Commission. However, this does not mean that the Commission cannot require an EA or EIS to be prepared if your project appears to have adverse effects on the environment.

\textsuperscript{187} DOUGLAS G. HALL, A STUDY OF UNITED STATES HYDROELECTRIC POWER PLANT OWNERSHIP, at v (2006) (“Private owners that are not utilities own 38% of the plants corresponding to only 4% of the total capacity . . . .”).


\textsuperscript{189} Energy Policy Act of 2005, Pub. L. No. 109-58, § 241(b), 119 Stat. 594, 674–75; see also § 241(a) (requiring a “determination on the record” invoking a formal hearing, consistent with the statute requiring parties to have the “opportunity to undertake discovery and the right to cross-examine witnesses”).

\textsuperscript{190} Id. § 33(a)–(b)(5) (amending section 4(e) of the Federal Power Act).

\textsuperscript{191} Id. § 33(b)(2)(a)–(b)(2)(b)(ii).
dismiss those alternatives that are not economically favorable to the
dam operator.

Little hydro is the beneficiary of tax credits and other credits. The Energy Policy Act of 2005 gave a tax credit of 0.9 cents per kilowatt hour for efficiency increases at existing facilities put in place by 2009. New power generated from existing dams that does not require a project enlargement or new impoundment is eligible for incentive payments of 1.8 cents per kilowatt hour for ten years. Under section 1301 of the Energy Policy Act of 2005, the Internal Revenue Code allowed plant operators to apply incremental production gains from efficiency improvements or capacity additions to existing hydroelectric facilities placed into service after August 8, 2005 and before January 1, 2014. These incentives are sparking a mini boom in hydrokinetic projects. For example, in 2008, FERC approved the installation of two twenty-five-kilowatt hydrokinetic devices, projected to generate 364 megawatt hours per year, within the footprint of a municipal FERC-licensed dam on the Mississippi River at Hastings, Minnesota.

192. Id. § 1301.
193. Id. § 242.

We construe ‘efficiency improvements’ to encompass additional generation from existing equipment in the form of upgrades to generators or turbines. Examples include rewinding generators, replacing turbines with more efficient units, and computerizing control of turbines and generators to optimize regulation of flows for generation. We construe ‘additions of capacity’ to mean any increase in generating capacity other than an addition resulting from an efficiency improvement or an addition resulting from an operational change. An example of addition of capacity is installation of a minimum flow generating unit. Examples of operational changes not directly associated with efficiency improvements or additions to capacity include raising the pond level to increase head and reducing spill flows required for environmental protection.

Id.

C. Big Hydro

1. Private Financing of Project Upgrades

Big hydro is in a steady state because the federal government is not building multiple-purpose dams, utilities are not investing in large hydro dams, and funding for upgrades is inconsistent. Increased big hydro is likely to come from pumped-storage projects and turbine upgrades. This strategy assumes that only modest increases in hydro production should be tolerated in light of the environmental costs of dams and turbines. Nonetheless, recent developments in turbine design, runner configuration, and generator efficiency make it possible to modify existing dams and squeeze out 15 to 25% more power from the same water flows. At the present time, the major effort to ramp up big hydro is a 2010 Memorandum of Understanding ("MOU") among the Department of Energy, the Department of Interior, and the Corps of Engineers. The signatories are to assess federal facilities suitable for increased production and to select "low impact" pilot projects in identified basins. The hope is that the agencies can identify environmentally sustainable projects, especially pumped-storage projects at existing facilities, and get an early approval from likely objecting stakeholders. The MOU is a positive step, but it fails to address the real problem: lack of money for federal project upgrades.

The fundamental issue for federal hydro is how to upgrade the aging infrastructure. The major barrier is the general inability of the operating agencies to use power revenues to finance these upgrades. As discussed earlier, with the exception of the Tennessee Valley Authority, the major dam-owning agencies do not have access to the revenues that they generate. For example, most of the two to four

196. See, e.g., id. (discussing how only three of the nation's twenty highest dams have been built since 1970; one, Seven Oaks Dam in southern California, is only for flood control and the hydro capacity at the other two, New Melonies and Don Pedro, is relatively small).


198. SALE, supra note 97, at 9–12.

199. Id.

billion dollars in annual power revenues go into the Treasury's general fund. Any revenues that are partially recaptured are used to cover Power Marketing Administration operating costs; to repay the federal capital investment costs and interest of the construction of the hydroelectric facility; and to cover operations and maintenance costs incurred from the operation of the hydro facility, as well as costs such as environmental-mitigation costs incurred due to the operation of the hydro facility. One possible solution is to adapt the concept of Energy Savings Performance contracts adopted in the Energy Policy Act of 1992. The Act authorized contracts to finance energy-efficiency improvements and allowed the financing entity to recoup the costs avoided due to the improvements. For hydro, the entity would finance the upgrade and then receive the resulting incremental power revenues to recoup the costs of the improvements.201

2. Integrating Hydro Production with the Environmental Protection Network

This Article has shown that hydro and environmental protection operate on two separate legal tracks. They intersect when a specific project threatens an endangered species or an environmental resource. Hydro might be better served by a tighter integration. The Conservation Era dream of the rational development of all major river basins needs to be rethought and adapted to the demands of sustainable energy and climate change adaptation. As discussed above, technological advances in generation could generate more power from the same amount of water, but they could also support environmental objectives such as ecosystem restoration. New technologies make it possible to generate the current output with 15 to 25% less water. The challenge is to make the idea of the normative river, discussed in Part V, compatible with hydro generation.202

The central question for future water and hydro policy is what magnitude of functions, from power generation to ecosystem protection, can a river that “works” be legitimately asked to perform as we adapt to climate change and try to move toward more


sustainable power generation? The first step in answering the question should be implementation of the core idea of the normative river and the establishment of artificial base ecosystem maintenance flows on major rivers. This is consistent with the rational view of the normative river that recognizes that it will not be possible to maintain the base flows under all conditions. Instead, any effort to more rationally integrate hydro and environmental protection must be seen as an ongoing experiment. Thus, species conservation and ecosystem restoration must be subject to continuing, rigorous assessment using adaptive management.  

Adaptive management is a response to static or deterministic environmental assessment using decision-tree analysis. It recognizes that most resource management decisions must be made under conditions of uncertainty and with what has come to be called nonequilibrium ecology. The central idea is that management decisions must be constantly monitored, evaluated, and modified or reversed when new information so counsels. Adaptive management must be seen as a rigorous science-based tool and must be supported, as it is not now, by a clear legislative framework.

FERC, the Corps of Engineers, the Bureau of Reclamation, and public utilities will not embrace adaptive management easily. The concept has usually meant that some production must be foregone at certain times of the year to serve environmental objectives. However, adaptive management offers at least two major benefits to public and private hydro. First, the concept can support heretical ideas such as assessing wild and scenic rivers to determine if there are delisting candidates with high hydro benefits and low environmental costs. It can also support the placement of performance and time constraints on all ecosystem restoration experiments, including those driven by the ESA, to determine if the actual benefits produced justify


204. HOWARD RAIFFIA, DECISION ANALYSIS (1968).


206. See infra notes 207–11 and accompanying text.
foregone hydro production. Second, established flows would make it easier for generators to assess the longer-term risks of altered flows for a variety of reasons, from global climate change to aquatic ecosystem restoration. It might also provide inducements for more flexible operating regimes in cases were the long-term costs of hydro are small.\textsuperscript{207} No option should be off the table, from dam removal to eliminating or scaling back a fish conservation program.

Adaptive management has the potential to help strike a balance between hydro production and fish protection weighted toward increased production. At the present time, any efforts would be hampered by the lack of coherent U.S. water policy and a dysfunctional water management structure.\textsuperscript{208} Although the political and environmental costs of this strategy would be substantial, the project is worth undertaking given the stresses that U.S. water resources will undergo in the future.\textsuperscript{209} In 2010, the National Research Council called for a new adaptation paradigm.\textsuperscript{210} However, the closest that Congress has come was in the Clean Energy and Security Act of 2009 which called for state climate change adaptation initiatives.\textsuperscript{211} Thus, federal water and climate adaptation policy remains in "silos," leaving utilities and consumers to rely on FERC, the Corps of Engineers, and the Bureau of Reclamation to arbitrate competing demands and to set flow release patterns that do not seriously compromise hydro revenues.

V. CONCLUSION

Realistically, hydro's most probable future is the preservation of the status quo. The resource will continue to be subordinated to aquatic ecosystem conservation. It will therefore fluctuate between


\textsuperscript{208} See NAT'L WATER COMM'N, supra note 65 (reaching this conclusion for the first time); see also, e.g., NAT'L RESEARCH COUNCIL, supra note 64, at 46.

\textsuperscript{209} See Abrams, supra note 207 (arguing states need more authority over water allocation and that both the U.S. Army Corps of Engineers and FERC's power should be curtailed).

\textsuperscript{210} See generally NAT'L RESEARCH COUNCIL, ADAPTING TO THE IMPACTS OF CLIMATE CHANGE 1 (2010).

\textsuperscript{211} See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., § 479(c)(1)(C) (2009) (requiring state plans which "prioritized" the particular risks that the state faces and detailing a list of cost-effective projects and strategies "to assist fish, wildlife, plant populations, habitats, ecosystems, and associated ecological processes in becoming more resilient, adapting to, and better withstanding" the impacts of climate change).
marginal increases in capacity, primarily from little hydro, and the continued imposition of operating constraints and the removal of old dams. As a 2010 National Academies study concluded, "[t]he future of hydropower will play out in the public policy debate, where the benefits of the electric power are weighed against its effects on the ecosystem." 212 However, if global climate change begins to impact hydro production, Congress may eventually be forced to deal with adaptation and to more directly address the question of where hydro generation fits in any environmental policy, such as it is, and energy strategy and to provide a more stable adaptation regime. Hydro is the oldest major source of noncarbon, renewable energy and is the only conventional renewable resource in the current energy mix. Increased hydro capacity would seem to be a key element of any U.S. energy policy designed to promote the greater use of renewable resources.

212. NAT'L ACADS. OF SCI. ET AL., supra note 8, at 99.