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Expanding Jurisdiction of the Federal Power Commission and the Problem of Federal-State Conflict

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The subject of this note is the extent to which the Federal Power Commission has been permitted to abrogate state law and policy in granting licenses for hydro-electric projects. This subject is but a single part of the tremendously complex problem caused by our federal system of government as it attempts to manage and conserve our water resources. The problem, with its political, social, legal, administrative, and economic ramifications, is due to grow more acute as the competing demands for water increase. Thus, although most of the major cases discussed in this paper arose in the Western states, the problem of federal-state conflict is not limited to that region; it broached itself in litigation there first only because of the intense demands for water. For purposes of organization, this article is divided into five major sections: the background of the Federal Power Commission and the general scope of its jurisdiction, the expansion of the Commission's jurisdiction and the concomitant overriding of state policy, a detailed discussion of a recent conflict between the Commission and state law, the consequences of federal expansion and abrogation, and the need for the protection of state interests.

I. Background and Jurisdiction of FPC

The Federal Water Power Act of 1920[1] was the first major step in the establishment of a national policy for the development of water power on navigable streams.[2] In 1930, an independent Commission[3] was created to administer the Federal Water Power Act, and in 1935, the Federal Power Act[4] was passed, incorporating the provisions of the Federal Water Power Act and authorizing the Commission to regulate the interstate sale and transmission of electricity.[5] These acts, establishing the powers and duties of the FPC and setting up its administrative machinery, remain basically unchanged today.[6] Subchapter I of the Federal Power Act[7] creates the Federal Power Com-

1. 41 Stat. 1063 (1920). For a discussion of the Supreme Court cases delineating Congress's authority over navigable streams and its power to require licenses thereon, see Note, 60 Colum. L. Rev. 967, 978-79 (1960).
2. Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9, 19 (1945).
3. The Reorganization Act of 1930, 46 Stat. 797 (1930).
4. 49 Stat. 838 (1935), 16 U.S.C. §§ 791-828 (1964).
5. Pinchot, *supra* note 2, at 20.
6. 49 Stat. 838 (1935), 16 U.S.C. §§ 791-828 (1964).
7. 49 Stat. 838 (1935), 16 U.S.C. §§ 791-828 (1964).

mission and establishes its licensing powers; sub-chapter II[8] provides for the regulation of electric utility companies engaged in interstate commerce; sub-chapter III[9] establishes certain administrative and procedural practices to be followed by the Commission; and sub-chapter IV[10] exempts state and municipal water conservation facilities from certain requirements of the act. The licensing and regulatory jurisdiction of the Commission extends to public lands and reservations of the United States, to all navigable waters,[11] a phrase that, as will be seen later, has become something of a term of art, and to projects on non-navigable streams that would affect the interests of interstate or foreign commerce.[12]

Although the FPC is not a multi-purpose agency for the development of water resources,[13] *i.e.*, it does not have plenary jurisdiction for planning and development over all waters to which Congress's power under the commerce clause extends, it does perform certain general planning functions.[14] With the aid of its scientists and engineers the Commission conducts comprehensive studies relating to water use and power development in its physical, geographical, and economic aspects. Prospective demands for power development are analyzed, demographic factors are considered, and cost studies are made. The staff also makes studies for the comprehensive development of river basins.[15] The licensing powers of the Commission are tied in with its planning functions; a license is to be granted only when the project is in the national interest and will further a comprehensive

8. 49 Stat. 838 (1935), 16 U.S.C. §§ 824(a)-(h) (1964).

9. 49 Stat. 838 (1935), 16 U.S.C. §§ 825(a)-(u) (1964).

10. 49 Stat. 838 (1935), 16 U.S.C. §§ 828(a)-(c) (1964).

11. Federal Power Act, 49 Stat 838 (1935), 16 U.S.C. § 797(e) (1964). Section 796(8) defines navigable waters as "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

12. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 817 (1964).

13. In fact, the FTC must share its power and responsibility for the development of water resources with several other federal agencies, among which are the Bureau of Reclamation, the Geological Survey, the Fish and Wildlife Service, the Army Corps of Engineers, the Soil Conservation Service, and the Public Health Service. See Englebert, *Federalism and Water Resources Development*, 22 LAW & CONTEMP. PROB. 325, 337 (1957).

14. Gatchell, *The Role of the Federal Power Commission in Regional Development*, 32 IOWA L. REV. 283, 287 (1947).

15. *Ibid.*

plan for the development of water power in a particular region.[16]

The draftsmen of the act desired cooperation rather than conflict between the Commission and state agencies and provided for this cooperation in several areas.[17] But more than just cooperation was intended: the act expressly preserved certain state-created rights[18] and seemingly required applicants for a license to show that they had complied with state law.[19] These two sections are central to the issues discussed in this paper and warrant full quotation. The section "saving" state created rights (hereinafter referred to as section 27)[20] states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The section requiring evidence of compliance with state law, section 9(b), states that the applicant must present:

> Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.[21]

This provision is part of a section requiring that the applicant for a

16. *Id.* at 285. The author of this article, writing in 1947, goes on to say that the FPC, in granting a license, is careful to consider factors other than power development. To support this, he cites instances where the Commission has refused to permit power development because of possible detrimental effects on municipal water supplies, where it has required the maintenance of high reservoir levels for recreational use, and where it has required the construction of fish hatcheries and a flow adequate to sustain fish life. *Id.* at 291-92. Subsequent developments, however, seem to support the proposition that whenever the need for power development is conclusively shown a license will be granted, regardless of competing demands upon the particular stream involved.

17. Section 800 gives preferences to states and municipalities in the issuance of licenses; § 812 provides that licensees that produce electricity shall be subject to the rates and regulations established by state agencies; § 824(h) provides for cooperation between the Commission and state agencies with regard to administrative matters and for the free exchange of information between them.

18. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 821 (1964).

19. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 802(b) (1964).

20. This provision of the act is § 821 in the 16 U.S.C. compilation, but it is § 27 of the old Federal Water Power Act of 1920, 41 Stat. 1063, 1077, and is generally referred to as section 27. This terminology will be retained here. Section 802(b) of the 16 U.S.C. compilation is generally referred to as § 9(b), its section number in 41 Stat. 1063, 1068; this terminology will also be retained.

21. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 802(b) (1964).

license furnish certain information to the Commission.[22]

II. EXPANSION OF FPC'S JURISDICTION AND CONSTRUCTION—SECTIONS 9(B) AND 27

A. *Navigable Waters Redefined*

The judicial expansion of the FPC's jurisdiction has come about primarily through the broadening of the concept of navigable waters. As this concept has been broadened, it has carried with it the jurisdiction of the Commission and all the incidents thereof, including the federal power of eminent domain.[23] The major case in this broadening process was the *New River* case.[24] There, the United States sought to enjoin the respondent power company from building and operating a hydro-electric dam on the New River without a license. The respondent contended that at the site where it wished to build its dam, the New River was not navigable; therefore, the FPC was without jurisdiction to require a license and the United States without power to enjoin its operations.[25] The Supreme Court abandoned the traditional test of navigability in fact,[26] and held that a river is navigable within the meaning of the constitutional cases defining navigability and within the jurisdiction of the Federal Power Commission if it can be rendered suitable for commerce and transportation by reasonable improvements, the time when the waterway will be needed for commerce and cost of the improvements determining the reasonableness thereof.[27] The Court went on to state that the federal government has plenary power over navigable waters; the states and private parties hold riparian rights in navigable streams subject "to the power of Congress to control the waters for the

22. Sub-section (a) requires information concerning engineering and construction specifications. Sub-section (c) provides that the applicant must furnish such additional information as the Commission may require.

23. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 814 (1964). With this power a licensee may acquire any property needed for the licensed project that cannot be obtained by other means.

24. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), *rehearing denied*, 312 U.S. 712 (1941), *petition denied*, 317 U.S. 594 (1942).

25. *Id.* at 401.

26. This test was established in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

27. United States v. Appalachian Elec. Power Co., *supra* note 24. "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artifical aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use. The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful." *Id.* at 407-08.

purpose of commerce." Since the United States has the power to exclude all structures from navigable streams, it may condition their erection upon a license.[28] The effect of this decision was to give the United States—through the Commission—plenary power over navigable streams, as newly defined, though the purpose behind the exercise of the federal power need not necessarily be the improvement or protection of navigation.[29]

The *New River* decision was further implemented in the Seventh Circuit by a case which held that the Wisconsin River was navigable within the meaning of the Federal Power Act, despite the obstruction of falls and rapids, because in the past the river had been used at high water to transport logs to market, though it was not being so used at the time in question.[30]

B. *Construction of Section 27*

Section 27[31] of the FPA is really not the "saving" clause that it appears to be. The protection given to state-created rights is in part illusory. In *Portland General Electric Co. v. FPC*,[32] it was held that section 27 is a general provision preserving state law; it cannot override specific provisions of the act or be used to defeat its general purpose. Moreover, section 27 does not grant an absolute protection to state-conferred water rights, it merely requires the FPC licensee taking those rights to compensate the holder thereof.[33] Thus, in operation, section 27 merely complements the FPA provision granting the federal eminent domain power to licensees.[34] It should be noted that with this eminent domain power a licensee can condemn not only state-created water and property rights, but also property previously dedicated to public use; otherwise, the purpose of the act would be

28. *Id.* at 423-24; citing United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

29. Scott, *Is Federal Control of Water Power Development Incompatible with State Interests?*, 9 GEO. WASH. L. REV. 631, 641 (1941).

30. Wisconsin Pub. Serv. Corp. v. FPC, 147 F.2d 743 (7th Cir.), *cert. denied*, 325 U.S. 880 (1945).

31. See note 21 *supra* and accompanying text.

32. 328 F.2d 165 (9th Cir. 1964). In this case, as a condition to granting a license, the Commission, acting pursuant to § 11 of the FPA, required the applicant to install facilities for the protection of naviagation. The applicant alleged that the construction of the required facilities would necessitate that certain state-created property rights be destroyed and argued that under § 27, the Commission could not require such a destruction.

33. *Id.* at 167. In support of this proposition the Court cited City of Fresno v. California, 372 U.S. 627 (1963) and Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958). Both are cases construing § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1964), which is practically identical to § 27 of the FPA; the analogous construction is probably sound.

34. See Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 814 (1964).

frustrated by the existence of state lands that stood to be innundated or damaged by a proposed hydro-electric project.[35]

Although section 27 requires that state-conferred rights may not be taken without compensation, it is now settled that this requirement is not to be vitiated by the navigation servitude, which, in the absence of restrictive legislation, permits state-created rights in navigable waterways to be taken by the federal government without compensation, the fifth amendment to the contrary notwithstanding.[36] The *Niagara Mohawk* case[37] held that although certain usufructuary rights recognized by New York were within the scope of the navigation servitude, they were not abrogated by the mere passage of the FPA. The United States may not exercise its dominant servitude to the detriment of pre-existing rights under state law without clear authorization from Congress, and not only is there no such authorization given by the FPA, but the references in section 27 to pre-existing water rights carry a strong implication that Congress intended that those rights should survive, at least until taken over by purchase or otherwise.[38] "Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act."[39]

C. *Construction of Section 9(b)*

In order to secure passage of the Federal Water Power Act, many compromises had to be made, and, as a result, parts of the act were left ambiguous.[40] One such part was section 9(b) in which the exact spheres of state and federal operation were not sharply defined,[41] but were left for judicial determination. In 1946, section 9(b) received

35. Missouri *ex rel.* Camden County v. Union Elec. Light & Power Co., 42 F.2d 692, 698 (W.D. Mo. 1930).

36. Note, 60 COLUM. L. REV. 967, 978-80 (1960). See, *e.g.*, United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913). The theory underlying this taking without compensation seems to be that state-conferred water rights in a navigable stream are never vested, but are at all times subject to the superior navigation servitude of the federal government, Note, 60 COLUM. L. REV. 967, 980 (1960).

37. FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954). The issues in this case arose from a determination of the respondent's amortization reserve liability under § 10(e) of the act. Respondent contended for a lower figure because it had paid some $700,000 for the use of private proprietary rights on the Niagara. The Commission asserted that these funds should be counted as surplus because the FPA and the respondent's license thereunder abrogated the private water rights under state law. 347 U.S. at 244-45.

38. *Id.* at 246-52.

39. *Id.* at 252.

40. Comment, 46 COLUM. L. REV. 837, 838 (1946).

41. *Ibid.*

a definitive construction in *First Iowa Hydro-Electric Corp. v. FPC.*[42] In that case, the FPC, on grounds of non-compliance with section 9(b), dismissed the co-op's application for a license because it had not obtained a permit required by Iowa law. Because of an Iowa statute concerning stream diversion, it appeared that the co-op would never be able to obtain a state permit and at the same time comply with the diversion and construction plans approved by the FPC.[43] The Supreme Court stated that to allow Iowa to exercise a veto power over a federal project by requiring a permit would be to subordinate to the control of the state the comprehensive planning which the act provides shall depend upon the judgment of the FPC.[44] The Commission need only require the presentation of evidence that, *to its satisfaction,* the applicant has complied with "any of the requirements for a state permit on the State waters . . . that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States."[45] Section 27, the Court noted, is the "saving" clause for the states.[46] As distinguished from section 27, 9(b) is merely informational, and absolute compliance therewith is not a condition precedent to the granting of a license.[47] In an interesting part of the opinion, the Court states that the FPC recognizes a dual system of control—a duality between two cooperating agencies, each with final authority in its own sphere. This duality does not require both agencies to share in the final decision of the same issue.[48] Although the Court never delineates the boundaries of the sphere in which the states shall have final authority, it is quite clear that permits conditioned upon compliance with state laws that conflict with FPC licenses are not within that sphere: "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."[49]

42. 328 U.S. 152, *rehearing denied,* 328 U.S. 879 (1946).

43. *Id.* at 157-62. The co-op filed with the FPC an application for a license to construct a dam on the Cedar River near Moscow, Iowa. The Cedar flows into the Iowa and the Iowa into the Mississippi. Under the proposed plan of construction and diversion, all but about 25 c.f.s. of water from the Cedar would be taken at Moscow, and this would correspondingly reduce the flow of the Iowa. The diverted water would enter the Mississippi about twenty miles north of its present entry at the mouth of the Iowa. After extended hearings, the FPC found that the proposed plans of construction and diversion were suitable and constituted an adequate utilization of the resources under consideration. At that point, the State of Iowa intervened with the argument that the co-op had not complied with section 9(b) in that it had not obtained a permit from the State Executive Council of Iowa. The FPC then dismissed the co-op's petition.

44. *Id.* at 164.

45. *Id.* at 167.

46. For the extent to which this statement must now be qualified, see p. *supra.*

47. First Iowa Elec. Co-op. v. FPC, *supra* note 42, at 175.

48. *Id.* at 168.

49. *Id.* at 181.

The rationale of the *First Iowa* case is applicable not only where the Commission is relying upon the "navigable waters" power for its jurisdiction, but also where it bases its jurisdiction upon the "reserved and public lands" power. In the *Pelton Dam* case,[50] a private power company applied for a license to build and operate a hydro-electric project on the Deschutes River, a concededly non-navigable stream. Both the eastern and western termini of the dam were to be located on lands of the United States that had been reserved for power purposes since at least 1913. The State of Oregon objected to the granting of the license upon two grounds: (1) The FPC was without authority to grant the license, and (2) the proposed project would have deleterious effects upon the anadromous fish in the Deschutes River, and the applicant had not obtained a permit from the state fish commission. After finding that there was a severe power shortage in the Pacific Northwest and that the project was consistent with the comprehensive development of the Deschutes River and the Columbia River Basin, the Commission granted the license.[51] The Supreme Court held that the Commission's jurisdiction was based upon the constitutional power of Congress over United States property,[52] since the dam was to be built on United States reservations. To allow a state to veto such a project would be to allow a result precluded by *First Iowa*. To Oregon's contention that the Acts of July 26, 1866,[53] July 9, 1870,[54] and the Desert Land Act of 1877,[55] had delegated to the state the power to establish vested water rights on the property in question, the Court answered that those acts delegated only the power to prescribe water rights on public lands, not on reserved lands; and the Property upon which this project was to be built was reserved land, *i.e.*, it was not subject to sale or disposition to private parties.[56] The Court also found that the Commission had conditioned the license upon construction of facilities designed to conserve the anadromous fish and that these conditions seemed adequate under the circumstances.[57]

50. FPC v. Oregon, 349 U.S. 435 (1955).
51. *Id.* at 440.
52. U.S. CONST. art. IV, § 3.
53. 14 Stat. 253 (1866), 43 U.S.C. § 661 (1964).
54. 16 Stat. 218 (1870), 43 U.S.C. § 661 (1964).
55. 19 Stat. 377 (1877), 43 U.S.C. § 321 (1964).
56. FPC v. Oregon, *supra* note 50, at 448.
57. *Id.* at 452. This decision raised a chorus of critical voices in the West. The primary criticisms were: (1) the *First Iowa* rationale should not have been transported into the *Pelton* situation—the congressional power over non-navigable streams flowing through federal property is of a different nature from the congressional power over navigable waters; (2) the distinction made between public lands and reserved lands was unwise; and (3) the United States should have been treated like any other proprietor along the banks of the Deschutes, and as such it would have been subject to any pre-existing appropriative rights created by state law. Munro, *The Pelton Decision: A New Riparianism*, 36 ORE. L. REV. 221, 244-45 (1957).

III. Recent Conflict Between the FPC and State Law—The Cowlitz Project

The purpose of discussing in detail this recent conflict between state law and the Commission is to show the types of state interests that have been abrogated when licenses are granted, the way in which those interests have been asserted, both before the Commission and in the courts, the national policies relied upon in opposing those interests, and the protracted and obviously expensive litigation necessary to establish the supremacy of federal policy and the abrogation of state law and policy.

In 1948, the City of Tacoma filed with the FPC an application for a license to construct a power project, including two dams and appurtenant facilities, on the Cowlitz River.[58] At the hearing to determine whether the license should issue, the State of Washington interverned with a petition alleging that the proposed dams would destroy valuable state fisheries; that a Washington statute requires the State's permission to construct any dam for the storage of ten acre-feet or more of water and that such permission had not been obtained; that a Washington statute prohibits the construction of any dam higher than twenty-five feet on any tributary to the Columbia, downstream from the McNary Dam and within the migratory range of anadromous fish; and that the proposed dams would inundate a state-owned fish hatchery.[59] On November 28, 1951, the Commission granted the license.[60] The state then petitioned for a review of the Commission's order by the Court of Appeals for the Ninth Circuit.[61]

That court[62] upheld the Commission's findings that the city had shown satisfactory compliance with state law "insofar as [is] necessary to effect the purpose of a license for the project," and that the proposed project was consistent with the comprehensive power development of the region and was needed to alleviate a projected power shortage in the area.[63] The court did, however, seem to indicate that there might be valid state restrictions upon the city's capacity to act under the license once it was granted. An indebtedness limitation was mentioned as an example. The state's primary objection concerned the destruction of its fish resources and fish hatchery and the non-

58. City of Tacoma v. Taxpayers, 357 U.S. 320, 324 (1958). A full history of the controversy is given in this opinion.

59. *Id.* at 325.

60. *Re* City of Tacoma, 92 P.U.R. (n.s.) 79 (1951).

61. City of Tacoma v. Taxpayers, *supra* note 58, at 328.

62. Washington Dep't of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

63. *Id.* at 394.

compliance with its laws designed for their protection.[64] The court countered this objection by relying upon *First Iowa* and stating that the Commission had acted within its discretion in not requiring absolute compliance with state law. "If the dams will destroy the fish industry of the river, we are powerless to prevent it."[65] The Commission's order was affirmed.

While the petition for review of the Commission's order was pending in the Ninth Circuit, the City of Tacoma brought an action in the Superior Court of Pierce County, Washington, against the taxpayers of Tacoma and the Directors of Fisheries and Game for a declaratory judgment establishing its right to issue bonds in order to finance the Cowlitz Project. After a great deal of procedural skirmishing (during which time the Court of Appeal's decision was rendered), the trial court held that the question of the city's power to condemn the state fish hatchery was settled by the Court of Appeal's decision, but it enjoined the city from continuing with the project because it would unnecessarily impede navigation on the river in violation of a Washington statute. Tacoma appealed this decision to the Supreme Court of Washington.

The Washington Supreme Court saw the issue as whether a municipal corporation, created by the state of Washington, has the power to condemn lands already dedicated to a public use (the fish hatchery), and, if not, can the federal government endow it with such power?[66] Both questions were answered in the negative. The court held that the Washington state legislature had not authorized cities to condemn lands already dedicated to public use, and, in the absence of such authorization, a city, a creature of the state, cannot condemn such lands. On the issue whether the federal government could endow the city with the power to condemn public lands, the Court of Appeals decision was held not to be res judicata. *First Iowa* was construed as meaning only that a state could not prohibit a project licensed by the FPC when the subject matter of the state statutory prohibitions was exclusively within the jurisdiction of the federal government. The instant case is distinguishable on the ground that here there is no statutory prohibition, but rather a lack of state statutory power in the city. "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as

64. The state offered persuasive evidence that the ladders that were to be used to get the fish around the dams and upstream to their spawning areas were too high and that the dams would destroy the fish coming downstream. This would severely reduce the number of salmon and trout spawning in the Cowlitz and would destroy the fishing industry along this part of the river. *Id.* at 398.

65. *Ibid.*

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

we read it, does not purport to do so."[67] The injunction was affirmed.[68]

The United States Supreme Court, having granted *certiorari* in order to review the Washington court's decision,[69] stated that the United States Courts of Appeal have exclusive jurisdiction to review FPC orders;[70] and subject to review by the Supreme Court, their decisions are final. In the Court of Appeals, the state had expressly presented the argument that the city would have to flood state-owned property; the Court of Appeals was not persuaded by this argument and its decision on the matter was final. It was further held that the Court of Appeals' holding on the point was improperly subjected to collateral attack in the present state suit. Therefore, the decision affirming the injunction was improper.[71]

IV. Consequences of Federal Abrogation

One of the most significant results of the developments discussed above is that the FPC now has jurisdiction over almost every stream of any consequence in the United States.[72] The Commission may choose not to exercise its power over all the streams within its jurisdiction, but this does not change the scope of its permissible jurisdiction or

67. *Id.* at 799-800, 307 P.2d at 576-77.

68. The Washington court stated that the trial court should not have based the injunction on the interference with navigation because state laws protecting navigation had been clearly abrogated by *First Iowa,* but since the injunction was sustainable upon another ground, the lower court was affirmed. *Id.* at 800, 307 P.2d at 577.

69. City of Tacoma v. Taxpayers, 355 U.S. 888 (1957).

70. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 824(1)(6) (1964).

71. City of Tacoma v. Taxpayers, *supra* note 58, at 335-41. Mr. Justice Harlan concurred, but said that the FPA did not give the Commission the authority to determine issues of state law. *Id.* at 341.

A more recent chapter in the story of the Washington Supreme Court's running battle with the FPC is the boundary dispute. In this controversy, the city of Seattle was granted a license by the FPC for a hydro-electric project, the construction of which might necessitate the condemnation of property belonging to a public utility district. Such a condemnation was contrary to a Washington statute. The Commission's order was appealed to the Court of Appeals for the District of Columbia, where it was affirmed. Public Utility Dist. No. 1 v. FPC, 308 F.2d 318 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 908, *rehearing denied,* 372 U.S. 956 (1963). Meanwhile, Beezer, a Seattle taxpayer, brought an action in a Washington trial court to have the city enjoined from the expenditure of funds upon a project, which, under state law, it could not complete. The trial court steadfastly refused to make a determination of state law, relying first upon the Supreme Court decision in the Cowlitz dispute and then upon the Court of Appeal's decision in the instant controversy. Finally, the Washington Supreme Court issued a writ of mandamus, directing the trial court to proceed with a determination of state law. The Washington court felt justified in doing this because it believed that the United States Supreme Court had not ruled on its holding in the Cowlitz dispute that the federal government could not endow a municipality with powers beyond those given it by its creator, the state. Beezer v. Seattle, 62 Wash. 2d 569, 383 P.2d 895 (1962). This decision was reversed per curiam by the United States Supreme Court. *Seattle v. Beezer,* 376 U.S. 224 (1964).

72. King, *Federal–State Relations in the Control of Water Resources,* 37 U. Det. L.J. 1, 4 (1959).

restrict the threat to state interests. Although the Federal Power Act indicates that applicants for a license to construct and operate a hydro-electric project must show compliance with state law[73] and that certain state-created rights are to be saved,[74] it is now settled that the federal licensing may be done in violation of state law[75] and that the "saved" water rights may be taken if compensation is given therefor.[76] The FPC has been permitted to wholly preempt the power licensing field[77] with the abrogation of state law that this implies, and it has also been permitted to disregard state conservation interests.[78] This movement toward federal aggrandizement in the control and development of water resources is not peculiar to the FPC alone. It is a movement that seems to have affected all federal agencies concerned with water resources and to have grown with increasing momentum in recent years, impetus coming from the recognition that planning for maximum development of water resources must be done on a large scale and that many of the problems are not amenable to local resolution.[79] But the activities of the FPC have caused more interference with state water law than those of any other federal agency. Moreover, it has been alleged that the cases permitting the FPC to override state laws seem to have encouraged other federal agencies to act in disregard of state law and policy.[80]

It is too early to determine with any degree of precision the cumulative effect of these developments upon state planning for water use and allocation. It seems apparent, however, that the effect can be nothing but detrimental. Federal judgment and policy have been substituted for that of the states, even though a particular state may have a comprehensive plan for the development of its streams and a multi-purpose agency to carry out that plan. If the judgment of the FPC as to the wisdom of a particular hydro-electric project runs counter to a state plan or the judgment of a state multi-purpose agency, it is only too clear which must prevail. The Commission could, for example, by withholding licenses, impede a state plan for

73. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 802(b) (1964).

74. Federal Power Act, 49 Stat. 838 (1935), 16 U.S.C. § 821 (1964).

75. King, *supra* note 72, at 19.

76. Portland Ceneral Elec. Co. v. FPC, *supra* note 32.

77. Martz, *the Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 638 (1957). The extent to which this preemption has occurred is well illustrated by State v. Idaho Power Co., 211 Ore. 284, 312 P.2d 583 (1957). There the Oregon Supreme Court dismissed an indictment brought against the power company for not obtaining a state permit on the ground that a federal license had been obtained, and this was sufficient to make the state requirement superfluous.

78. City of Tacoma v. Taxpayers, *supra* note 58.

79. Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. PA. L. REV. 274, 286 (1938).

80. Towner, *The Role of the State*, 45 CALIF. L. REV. 725, 739 (1957).

power development, or for comprehensive development of any kind.[81] This possibility of the substitution of the judgment of a single federal agency for that of a multi-purpose state agency is unfortunate because at the federal level there is no organizational machinery for coordinated planning and for the reconciliation of conflicting water uses.[82] This causes hit and miss development of water resources and jurisdictional conflicts. The statutes defining the functions of national agencies have compartmentalized responsibility along the lines of particular water uses, thereby precluding multi-purpose planning by a single federal agency.[83]

The effects of the *Pelton Dam* decision[84] upon the states have been decried by several writers and deserve special mention. It will be remembered that the reserved lands in that case had been reserved subsequent to the passage of the Desert Land Act. Thus, there appears to have been an implicit holding that the water rights that had been established by the states under the act can be extinguished without compensation by a subsequent reservation of the lands in question by the United States.[85] Also, once the United States has reserved the riparian property, no further water rights may vest against the government. This will tend to discourage property owners from expending labor and capital on developing appropriation rights in streams affected by the reservation as well as to discourage the states from including such streams in any part of a comprehensive plan.[86] A question seems to exist concerning the extent to which the FPC license guarantees the Pelton licensee, or any similarly situated licensee, the amount of water necessary for its project in the face of a state agency determination that the water is needed for other uses such as irrigation or domestic consumption.[87] It is likely that this question will be settled in favor of the licensee on the ground that the reservation of the land carried with it an implied reservation of the amount of water necessary to develop the reserved land in the intended manner.[88] The conclusions concerning the disruptive effects

81. *Id.* at 741.

82. Note, 56 YALE L.J. 276, 281-82 (1947). A multi-purpose planning agency, for purposes of this article, is one that takes into account all of the various uses to which a river or river basin can be put—power, consumptive, recreational, industrial, fish and game conservation, and irrigational—and attempts to strike a balance between these competing and often exclusive uses.

83. *Ibid.* See also note 13 *supra.*

84. FPC v. Oregon, *supra* note 50.

85. Comment, 31 N.Y.U.L. REV. 400, 402 (1956). For an excellent discussion of the possible theories of federal "ownership" of the stream, see Note, 60 COLUM. L. REV. 967, 989-92 (1960).

86. Note, *supra* note 85, at 995.

87. Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 610-11 (1957).

88. Note, *supra* note 85, at 995-96.

of the *Pelton Dam* decision upon state water law may be summarized as follows: (1) it deprived the seventeen western states of effective control over the waters necessary for irrigation; (2) it confused the status of water rights supposed to exist in private, municipal, and corporate users; and (3) it brought into existence a new doctrine of riparian rights by introducing the concept of residual federal water rights based upon ownership of land.[89]

In defense of the *Pelton Dam* decision, it has been pointed out that most of its critics are concerned with the possibility of the uncompensated taking of vested private rights; yet, *Pelton* itself did not deal with private rights, and any fears concerning such rights must perforce be based upon inferences.[90] Moreover, since that decision, no case has arisen involving the uncompensated taking of private vested rights under similar circumstances.[91] California has long recognized that the United States is the owner of the waters running through public lands and that any right to appropriate water on the public lands of the United States was not derived from the state.[92] Thus, the situation in California for eighty years has been that an appropriator on private land secures no rights against a subsequent patentee of upstream riparian public lands—the situation apparently created by *Pelton*—and yet California appropriators have prospered under the system.[93] Nor is the *Pelton* case an abrupt departure from prior law, for, since the *Winters* case[94] was decided in 1908, it has been an accepted doctrine that the states do not own the waters flowing through federally reserved lands, rather, that the reservation of the lands impliedly reserves the water needed for the purposes of the reservation. A conservative and apparently carefully thought-out statement of the effect of the *Pelton* case is that,

> the United States by reserving land also reserves the water necessary for the beneficial use of the land, and that all rights initiated after the reservation is established are junior to the United States' rights. The right of the United States is neither riparian nor appropriative but is *sui generis*, a right to protect the assets of the nation in the public interest as that interest is defined in the laws of the United States.[95]

V. PROTECTION OF STATE INTERESTS

Any recommendations for the protection and reassertion of state interests must take into account the delicate, dynamic balance neces-

89. Munro, *supra* note 57, at 222.
90. Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 4 (1964).
91. *Id.* at 5.
92. *Id.* at 11; citing Lux v. Haggin, 69 Cal. 55, 10 Pac. 674 (1886).
93. *Ibid.*
94. Winters v. United States, 207 U.S. 564 (1908).
95. Goldberg, *supra* note 90, at 20-21.

sary for the operation of our federal system of government at maximum efficiency and must carefully assay the protection of legitimate national interests in the development of water resources. The failure to take this balance into account and to respect such national interests has been the major inadequacy in many legislative proposals designed to vitiate the *Pelton Dam* decision, some of which would summarily sweep away almost all effective national control of water resources in the western states.[96] Some matters are so clearly in the national interest that Congress certainly cannot be expected to relinquish its constitutional power and legislative prerogatives in such areas to the states. These interests include the protection of national parks and monuments, the effectuation of international adjustments through treaties, the protection of existing Indian water rights and reservations, and the fostering of commerce through flood control.[97] Quite probably the federal government could, through the powers now held to be granted by the property clause, the commerce clause, and the general welfare clause, if it were so disposed, proceed to develop water resources without regard to the desires of the states.[98] Such a contingency is highly unlikely and would have incalculable effects upon our federal system, but the existence of such a possibility serves to illustrate that the constitutional issues of state versus federal authority are now settled against the states; the future of state developments rests not upon constitutional protections, but upon political and administrative decisions.[99]

The proper roles of the federal and state governments vis-a-vis water resources, though never static, should be grounded in the following general principles. First, the federal government is trustee of our common welfare and as such it has a responsibility for the development of our limited natural resources so as to promote the social and economic welfare of the entire country.[100] This responsibility includes the task of making the democratic processes play as large a role as is practicable in decisions involving the allocation of water resources and the development of water plans.[101] It also includes the duty to see that the benefits of water development projects do not accrue only to the few and that state and federal comprehensive, long-range plans for development of water resources are not wrecked

96. For discussion and critical analyses of these proposals, see Corker, *supra* note 87; Goldberg, *supra* note 90.

97. Bennett, *The Role of the Federal Government*, 45 CALIF. L. REV. 712, 721 (1957).

98. Goldberg, *supra* note 90, at 35.

99. WHITE, THE STATES AND THE NATION 4 (1953); King, *supra* note 72.

100. Martz, *supra* note 77, at 627.

101. Engelbert, *supra* note 13, at 335.

by the short-sightedness or rapacity of private interests.[102] Second, the federal government should be able to provide investment capital and technical assistance for local projects that will contribute to the national economy, but cannot be financed at the local level.[103] Third, problems involving our major river basins are regional in nature and sound planning can only be accomplished at the regional or national level.[104] Fourth, the states can protect their position by endeavoring to make as many local decisions as possible concerning water planning, and they should strenuously assert their claims to waters which are also being subjected to competing claims from other states and from federal agencies.[105] Only in this way can the competing demands be recognized and balanced, a process essential to the viability of our federal system. Fifth, the states must strive for improvement of their water resources planning systems and the development of multipurpose planning agencies. A state cannot protect its own interests or the interests of its citizens without accepting the responsibility for providing adequate machinery for the administration of water resources. Centralized planning at the federal level is preferable to no planning at all. Sixth, the primary administration of water resources has been developed within the framework of state laws and government and this administration and the rights and laws acquired and developed thereunder should be disrupted only when absolutely necessary.[106]

With the foregoing general considerations in mind, we may now proceed to a discussion of some specific recommendations for the protection of state policies.

A. *Conferring of Ultra Vires Functional Capacity Upon Corporations*

The FPC should not be permitted to invest municipal or business corporations or any state sub-divisions with functional powers that are expressly forbidden those bodies by a state statute or constitutional provision. This step is necessary if the states are to continue to exercise their traditional roles as creators and regulators of municipal and business corporations. It should be made clear that this restriction on the Commission will not change the basic policy decision made in *First Iowa.* An applicant for a federal license would still not be

102. *Ibid.* Indeed, one of the main reasons for the passage of the Federal Water Power Act in the first place was the inability or unwillingness of states to effectively regulate private interests. See Pinchot, *The Long Struggle for Effective Federal Water Power Legislation,* 14 GEO. WASH. L. REV. 9 (1945).

103. Engelbert, *supra* note 13, at 335; Martz, *supra* note 77, at 627.

104. Martz, *supra* note 77, at 627.

105. Engelbert, *Federalism and Water Resources Development,* 22 LAW & CONTEMP. PROB. 325, 337 (1957).

106. Sato, *Water Resources—Comments Upon the Federal-State Relationship,* 48 CALIF. L. REV. 43, 56 (1960).

required to show absolute compliance with state law or state permit restrictions relating to the construction of hydro-electric projects, for example, that a dam must not exceed a certain height. It means that where a state has forbidden certain functions, such as the power to operate a hydro-electric facility or the power to incur bonded indebtedness beyond a set limit, to certain types of corporations, the FPC cannot endow those corporations with such functional capacities. The distinction between lack of compliance with a state law regarding the construction and maintenance of a proposed hydro-electric project and a lack of functional capacity under state law will not always be an easy one to make,[107] but it is one that will protect the already limited role of the states in power development, and the courts should try to preserve it so long as it serves to protect state policy without damaging national interests. This distinction would seem to be in line with the "dual control" contemplated by *First Iowa*,[108] with each governmental unit supreme in its own sphere—the state supreme in the sphere of the determination of corporate capacity, and the FPC supreme in the sphere of requirements for a license. It would also seem to be consistent with the result reached in the Cowlitz dispute. There the power which the state argued could not be conferred upon a municipal corporation was the federal power of eminent domain—a functional capacity expressly given to *all* licensees by the FPA. The type of ultra vires functional capacity that is deprecated here is the kind that is denied by the state and inures in the very existence of the corporation and yet would be conferred by the mere granting of the FPC license, although no provision of the act expressly granted such a power to licensees. Where Congress has expressly granted a power to licensees, it may be presumed that that power is to be in addition to any state-conferred powers and perhaps in spite of any state restrictions; but where no such express grant is given and the mere granting of the license is relied upon to confer the additional powers, no such presumption can be entertained. It is, of course, possible that a state legislature might attempt to disable all corporations or private persons from constructing and operating hydro-electric projects and thereby make a complete sacrifice of power development in favor of other water uses. This sort of situation would be left to the political processes of the state for correction; or, if the national interest in power development in that area were compelling, the

107. For example, a state could provide that no Class A municipal corporation shall have the power to construct and operate a hydro-electric project without securing a permit from the Game and Fish Commission. Although cast in the form of a functional disability, this is in substance a requirement for a state permit and should be regarded as such by the courts.

108. See text accompanying notes 42-57 *supra*.

federal government could undertake such power development on its own initiative.[109]

B. *Protection of Game and Fish*

A state's protection of its fish and game is a peculiarly sensitive area. The states seem to assert something akin to a proprietary right in the wildlife within their borders, and such a right, in the form of a trusteeship for the good of all their citizens, is within the police power and is recognized by the Supreme Court.[110] Because of the unique proprietary interest and the often vociferous assertions of conservation groups, a state's interests in its fish and game can be interfered with only at the expense of a bitter struggle.[111] This is as it should be, for the state government, with its sensitivity to local issues and problems and its conservation agencies, rather than the FPC, is the proper unit to judge when local fishery interests, either industrial or recreational, should be deferred to power development. This is not to say that the decision of a state commission or agency charged with the protection of fisheries should be binding on the Commission, or that the protection of fisheries is an absolute value; but rather it is to suggest that the Commission should be extremely careful in weighing the demands for power development when fish and game conservation interests, long-range as well as short-range, hang in the balance.

C. *Multi-purpose planning*

Multi-purpose planning for the development of water resources should, insofar as is possible, be left to the states. Some form of water planning is now, or will become, necessary in every state and major river basin because competing demands for water as an economic good cannot be left to market forces for their resolution, that is, priorities for the allocation of scarce water resources cannot be adequately determined by spenders who, preferring one use over another will pay a higher price for that use.[112] This is so because water, in many of its uses, cannot meet two requirements for a marketable good: it is not packageable in the sense that it can be differentiated as a commodity, and it is not appropriable in the sense that someone can secure legal title so as to exclude other would-

109. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

110. Ward v. Race Horse, 163 U.S. 504 (1896); Geer v. Connecticut, 161 U.S. 519 (1896). This "proprietary" interest or right is not absolute; it must yield to superior national interests. See, *e.g.*, Toomer v. Witsell, 334 U.S. 385 (1948); Missouri v. Holland, 252 U.S. 416 (1920).

111. The *Pelton Dam* case aud the Cowlitz dispute are examples of this.

112. Ostrom, *The Water Economy and Its Organization*, 2 NAT. RES. J. 55-56 (1962).

be possessors.[113] Although this is certainly true of such in-channel uses as recreation and transportation,[114] it is not completely correct with respect to a consumptive use such as irrigation or an in-channel use such as power production.[115] But in the case of these latter uses, the freemarket dynamic is impaired by the fact that these projects, to be successful, require large-scale capital investment. Generally, such projects tend to become quite large and to have a monopoly in their particular service areas; whereupon they become subject to stringent regulation as public utilities and the market ceases to play a major role in their pricing and rate policies.[116]

Once competing demands for water reach a certain level of intensity and it becomes obvious that market forces will not adequately resolve these demands, the only feasible alternative is planning for development and allocation by a governmental agency. If no multi-purpose state agency is created to serve this need, it is probably better for the federal single-purpose agencies to fill the gap rather than to have no systematic planning and allocation at all. But where state multi-purpose agencies are in existence, as in California[117] and Oregon,[118] and are developing comprehensive programs, they should be allowed and encouraged to proceed by cooperation from the federal government, not interference from it. This is especially true since there is no comprehensive federal planning and allocation agency, and it is hoped that one will not be needed.

It is preferable that comprehensive planning and allocation functions be delegated to a state multi-purpose agency because of the multitudinous interests that are of primary interest to the state and are only of secondary interest, if any, to the national government. Such interests include irrigation, municipal uses, industrial development, fish and game conservation, and even power development. The state is closer to these problems both in the sense of political responsibility and in the sense of geographical proximity. The state is also better equipped to handle the plethora of administrative details that are involved in a comprehensive planning program and it is likely to be much more responsive than the national government to the voices and votes of its citizens as

113. *Ibid.*

114. Professor Ostrom states that practically all water uses can be classified as either in-channel or consumptive. For example, transportation, providing a habitat for fish and game, and recreation are in-channel uses. Domestic uses, uses of water in industrial processes, and irrigation are consumptive. Power production appears to be a hybrid—little or no water is actually consumed, but a consumable product is produced. *Ibid.*

115. *Id.* at 58-59.

116. *Id.* at 57-59.

117. Towner, *supra* note 80, at 739. See CAL. WATER CODE §§ 120-235.

118. Ostrom, *supra* note 112, at 71. See ORE. REV. STAT. §§ 536.210-.560 (1963).

the priorities and patterns for water uses shift and move in the kaleidoscope created by engineering and scientific developments, climactic changes, and population movements. Thus, once a multi-purpose state agency, in response to the needs and desires of its residents and water-users, has embarked upon a master plan for the development of its water resources, maximum utilization of water with a minimum of litigation and confusion will be achieved if the FPC will respect that master plan and the private water rights vested thereunder.[119] This does not mean that the FPC must stand by while national interests are jeopardized; it should still perform its function of ascertaining whether proposed power developments are consistent with the comprehensive development of the river basin in question and whether they are in the national interest. It should not, however, grant a license to an applicant who is acting in disregard of a state-sanctioned comprehensive plan when there is no particular national interest to be furthered or protected by the construction of the project under consideration. Where an applicant is attempting to act in derogation of a state plan, the Commission should grant the license only upon a finding of a compelling national interest, such as defense or economic development. A finding that a region or city of the state involved is experiencing, or is about to experience, a power shortage should not, of itself, be sufficient to justify the overriding of a state plan for comprehensive development, which, in theory at least, will have weighed the contemplated power shortage against some other conflicting use of the water and decided in favor of that use.

D. *River Basin Development*

The above discussion concerning the deference that the FPC should pay to a comprehensive plan evolved by a state multi-purpose agency is subject to one major qualification: where a river basin is involved that is of concern to more than one state, in the absence of some sort of interstate organizational structure, the FPC should maintain its primary responsibility for the planning for power development, and the final decision as to the necessity and desirability of a project should be the Commission's. The problem of how to best administer a multi-state river basin is one of the most difficult problems of water resources administration in the United States. Suggestions for handling the problem have included proposals for a network of Tennessee Valley Authorities,[120] for multipurpose interstate compacts,[121] for inter-

119. See Towner, *supra* note 80, at 740.

120. See Engelbert, *supra* note 105, at 338.

121. See ZIMMERMAN & WENDELL, THE INTERSTATE COMPACT SINCE 1925 (1951).

agency basin committees,[122] for national corporations with certain powers over water resources delegated to it by interstate compacts,[123] and for leaving matters as they are, with the best result to be reached by the push and pull of conflicting agencies.[124] Where an interstate compact or TVA type agency is established, a state must subordinate its interests to those of the interstate unit, trusting that its best interests will be served in the long run by such subordination. In the absence of such an agency, the need for paramount federal control is obvious—planning for development cannot be left to one state for disputes as to allocation do not respect state boundaries and cannot possibly be adequately dealt with by a single state.

It may be argued that any stream, no matter how small, eventually affects a major interstate river basin and therefore the FPC must maintain its primary responsibility for planning and allocation over all the streams within its jurisdiction even though a state has created a multi-purpose agency for comprehensive planning and development. This may well be true with regard to transportation, flood control, or water needs on public lands—clear examples of paramount national interest in any event—or conflicting consumptive uses,[125] an area with which the FPC is not directly concerned. But it is not true of the in-channel uses which mainly concern the Commission or of non-conflicting consumptive uses. Where these latter uses are concerned, as was pointed out in the preceding section, the states as sovereigns have a major role to play in determining the purposes to which the waters flowing through their boundaries shall be put, and, in the absence of interstate conflict, the Commission should respect this role.

V. Conclusion

After exploring federal-state conflicts in the granting of licenses for hydro-electric projects, it is clear that, thus far, the FPC has won most of the disputes; and this is not altogether bad, for there are certainly legitimate national interests to be protected here. But there are also legitimate state interests to be protected, not out of concern for the preservation of federalism as a political theory, but because the state is the political unit with the primary concern and responsibility for certain matters and because it can administer and regulate

122. See Engelbert, *supra* note 105, at 342. The basin committees are composed of representatives from the various federal agencies operating in the basin, along with the governors of the states concerned.

123. Note, 56 Yale L.J. 276, 295 (1947).

124. Ostrom, *supra* note 112, at 72-73.

125. A good example of conflicting consumptive uses making federal intervention and control necessary is the dispute over the diversion of the waters of the Colorado River for irrigation. See Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 Sup. Ct. Rev. 158.

those matters with a higher degree of effectiveness than can any other political unit. This paper has called for the protection of those interests, for a redressing of the balance between the state and national governments. This protection can be effectuated in different ways in different areas. For example, in the area of fish and wildlife protection, the sound administrative judgment of the FPC must be relied upon; while in the area of ultra vires functional capacities, the task must be left to Congress and to courts that will assume the burden of making the distinction discussed above.[126] However this protection is to be achieved, the possibility that it will be achieved is real; for the relative powers of state and federal governments in water control are far from settled, but are still evolving in the legislatures, in the administrative agencies, and in the courts.[127]

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126. See text accompanying notes 100-06 *supra*.
127. Engelbert, *supra* note 105, at 326-28.