

FEDERAL ELECTRIC PREFERENCE POWER
MARKETING IN THE 1980'S —
DEVELOPING LEGAL TRENDS

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I. INTRODUCTION

The law giving "preference" to municipalities, cooperatives and other types of public bodies in the purchase of federally-marketed electric power has, in the last decade, become the focus of increased attention and litigation. This accelerating evolution is prompted by straight-forward cost considerations — federally-marketed power, most of which is hydroelectric, is inexpensive in comparison to most other sources of electric power. The purpose of this article is to survey the developing trends in preference power litigation, beginning with background on the laws and entities most directly involved.

Although the basic motivation for seeking preference power may be simple, the litigation is not. A variety of approaches are being taken by litigants seeking to obtain allocations of federal preference power and by defendants and intervenors seeking to uphold and safeguard existing allocations of power. Since the ramifications can often be far-reaching, multiple party litigation is common,¹ further complicating both the scope and administration of these kinds of cases.

Challenges to the government's power marketing plans are often maintained on several fronts. Almost without exception, the applicable federal "preference" statutes are drawn into play. These statutes essentially contain guidelines governing the manner in which federal power is to be sold. They are commonly referred to as "preference laws" because they provide, in varying forms of expression, that the government is to give "preference" to municipalities, cooperatives and other public bodies in the sale of this power. Most of the litigation has been initiated by so called "preference entities" (*i.e.*, municipalities, cooperatives and other public bodies) claiming an entitlement to an allocation of federal preference power. Two fundamental questions repeatedly posed are: (1) whether the government can lawfully serve some preference entities to the exclusion of others; and (2) whether preference power may be sold to a "non-preference entity" (*i.e.*, an investor-owned utility or industrial customer) when a "preference entity" is competing for the same allocation.

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¹A representative case is *Electricities of North Carolina v. Southeastern Power Admin.*, No. 82-888-CIV-b (E.D. N.C., filed July 29, 1982). Sixty-three cities in the Carolinas and Virginia are suing, directly or indirectly, as plaintiffs. Cities, cooperatives and public bodies numbering in the hundreds have intervened on the side of the defense (again either directly or through organizations of various kinds).

The relatively short, simple language of most preference provisions could mislead one unfamiliar with these kinds of lawsuits into thinking that they involve straight-forward questions of statutory construction.² For example, the operative language of Section 5 of the Flood Control Act of 1944,³ a statute which has been the subject of much litigation, states that the federal marketing official should sell the government power in a manner which "encourages the most widespread use" of that power, "at the lowest possible cost to the consumer consistent with sound business principles."⁴ It also requires that preference be given to public bodies and cooperatives.⁵

Applying and construing this language in the context of operating realities is anything but simple or straight-forward. Does "widespread use" mean that all interested entities should be entitled to receive power, even if the practical effect of serving all of them would be to "spread the power so thin" that it lacks significant value to each? Is it "consistent with sound business principles" for a power marketing agency to acquire various services from a non-preference entity in order to make the power allocations to the purchasing preference entities more beneficial? If so, is it consistent with the "preference" clause for the non-preference entity to derive some benefit from such arrangements, particularly when certain other preference entities wish to, but are not, receiving any federal preference power?

These questions involve complicated, technical matters of electrical engineering, economics and policy. Moreover, resolution of these questions in one instance may not necessarily put them to rest when presented in other circumstances.⁶ For example, marketing arrangements which may be consistent with "sound business principles" for a power marketing administration which neither owns nor controls its own transmission or thermal generating facilities may not be judicially accepted if implemented by another power marketing administration which does own or control such facilities.

Further broadening the scope and complexity of preference litigation are other less "substantive" challenges which may be brought. Whether judicial review of the government's power marketing policies is or should be available is subject to

²In fact, anyone considering this type of litigation, whether as plaintiff or defendant, should anticipate at least the possibility of lengthy (and expensive) litigation. In one case, the Complaint was filed in April, 1977. At this writing, the case is still pending and no firm trial date has been scheduled, although some have come and gone (as have several Secretaries of Energy), despite the early expectation of a relatively quick resolution of the case on summary judgment. See Hearing on Motion for Change of Venue at 28, *Greenwood Utilities Comm'n v. Andrus*, No. 77-0689 (D.D.C.), currently pending as *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

³16 U.S.C. § 825s (1976).

⁴*Id.*

⁵*Id.*

⁶Circumstances often change over time. One contention raised by both the *Greenwood* and *Electricities* lawsuits, both of which involve the Southeastern Power Administration ("SEPA"), is that the "wide-spread use" standard of Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976), should be construed to mean that SEPA is obliged to allocate power to all preference entities located in its 10-state area. At this time, SEPA annually markets approximately 2,712 megawatts of power from 22 projects. Department of Energy, Southeastern Power Administration Ann. Rpt. 4 (1980). Whether it is realistic to require SEPA to "spread its power so thin" will be determined by the courts. It is inconceivable, however, that a party would have urged this same construction of the statute years ago, when SEPA had only two projects from which to market power.

on-going debate.⁷ Another repeated subject of litigation is the question of standing to sue — it is not safe to assume that a preference entity which is not receiving a federal power allocation necessarily has standing to bring a suit to secure some power for itself.⁸

Procedural attacks aimed at upsetting the challenged power marketing plan on the basis that its manner of development was deficient have been attempted as well. Such “procedural claims” have been made under various laws, including the rulemaking provisions of the Administrative Procedure Act,⁹ the Department of Energy Organization Act,¹⁰ the Due Process Clause of the United States Constitution,¹¹ and even the National Environmental Policy Act.¹²

The issues covered by this article may be significant not only to the large number of preference entities seeking to obtain or protect allocations of federal “preference power” and the federal officials and power marketing administrations (“PMA’s”) marketing the power, which tend to be the primary defendants, but to many “non-preference” entities as well. There are non-preference entities which receive either direct or indirect benefits from some federal power marketing policies. Investor-owned utilities are approached by PMA’s in many instances to provide a variety of services needed to implement power marketing policies. Thus, whether as a “have” or “have not,” or as a buyer or provider of services, the legal ground being broken by this litigation probably should not be ignored by any electric power supplier in the industry.

In terms of format, it was thought best to begin by describing the forest before scrutinizing the trees. Background on the types of entities often involved is first provided, followed by an overview of significant preference laws which are the foundation for this kind of litigation.¹³ Against this backdrop, a survey of developing legal trends is undertaken, involving a review of decided and pending litigation.

⁷E.g., compare *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.) (the government has unreviewable discretion in certain respects), *cert. denied*, 439 U.S. 859 (1978) [hereinafter cited as *Santa Clara*] to *Greenwood Utilities Comm’n v. Schlesinger*, 515 F.Supp. 653 (M.D. Ga. 1981) (court may review for an abuse of discretion). See also, *Arizona Power Pooling Ass’n v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) [hereinafter cited as *Pooling Association*]; *Arizona Power Auth. v. Morton*, 549 F.2d 1231 (9th Cir. 1975), *cert. denied*, 434 U.S. 835 (1977) [hereinafter cited as *Power Authority*].

⁸For example, the *Santa Clara* court indicated that a preference entity must show that it is “ready, willing and able” to receive an allocation in order for its application to be in competition with that of a non-preference entity. 572 F.2d at 670. Another standing issue is also presented in the *Greenwood* case, *supra* note 2, wherein the defendants are questioning whether Greenwood, due to its location outside of the geographical marketing area selected by SEPA for the power at issue, has standing to challenge the nature of the marketing arrangements being utilized in that area.

⁹5 U.S.C. §§ 501, *et seq.* (1976).

¹⁰42 U.S.C. §§ 7101, *et seq.* (Supp. 1977).

¹¹U.S. Const. Amend. V.

¹²42 U.S.C. § 4321, *et seq.* (1976).

¹³It is beyond the scope of this article to enter the controversial debate over whether the preference laws represent sound federal policy which should be maintained or whether they should be viewed as having outlived their purpose. Also excluded from the scope of this article are the “preference” provisions governing the Federal Energy Regulatory Commission’s permitting and licensing of hydroelectric projects under Title 1 of the Federal Power Act, 16 USC §§ 791a, *et seq.* (1976). Although the basic purpose and intent of these two kinds of “preference” provisions bear substantial similarity to each other, the hydro “preference” is a subject unto itself. See *City of Bountiful [Transfer Binder]* 11 Fed. Energy Reg. Comm’n (CCH) ¶ 61,337 (June 27, 1980), *aff’d sub nom.*, *Alabama Power Co. v. Federal Energy Reg. Comm’n*, 685 F.2d 1311 (11th Cir. *reh’g denied*, 693 F.2d 135 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3614 (U.S. February 10, 1983) (No. 82-1345). Finally, this article does not specifically discuss wheeling and interconnection issues which may arise in attempting to transmit power from federal generating projects to preference customers. An excellent discussion of such issues is contained in Merriman and Norton, *Current Issues Concerning Interconnections and Wheeling*, *Electric Power: Current Issues in Regulation and Financing* 223 (Prac. L. Inst. 1982).

II. BACKGROUND DISCUSSION OF FEDERAL PREFERENCE POWER

The entities ordinarily involved in preference litigation are: (1) the five federal power marketing administrations operating under the auspices of the Department of Energy, as sellers; (2) existing and would-be buyers (both preference and non-preference entities); and, (3) the intermediaries, such as transmission, firming and scheduling agents, necessary to the actual implementation of many federal power marketing plans. The relationship among these entities, the actual statutory preference provisions, and their underlying purposes when originally enacted are covered in this section.

A. The Entities Involved

1. Federal Power Marketing Administrations

Vested by the Secretary of Energy¹⁴ (and previously by the Secretary of the Interior) with the increasingly difficult task of marketing preference power are the five federal PMA's.¹⁵ They are the Alaska Power Administration, the Bonneville Power Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration. As the name implies, the PMA's are the regional power marketing arms of the federal government. Their essential duties are to develop and implement marketing plans to dispose of surplus electric power generated by numerous single- and multi-purpose projects located throughout the country. In addition, they possess a corollary responsibility for developing power rates which are, *inter alia*, sufficient to achieve repayment of the government's capital investment in the projects which produce the power sold.¹⁶

Each of the PMA's is responsible for a different region of the country. Although their respective jurisdictions are ordinarily described by simply listing the states served by each, it is more accurate to state that each is responsible for marketing the power produced by the federal generating facilities located in those states.

The distinction can be significant. For example, several cases discussed in this article involve attempts by preference entities to secure allocations of federal preference power. The plaintiff preference entity's location in a state covered by the defendant PMA may have little or substantial relevance, depending upon whether the PMA is deemed to be required to serve that state or, in contrast, is recognized as having the narrower responsibility of marketing power generated by

¹⁴See 42 U.S.C. § 7152 (Supp. 1977).

¹⁵One of the more extreme examples of the difficulties confronting PMA's is illustrated by a comparison of two pending lawsuits. In *Electricities*, *supra* note 1, plaintiffs allege that SEPA is violating Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976), by *not* allocating power to every desirous preference entity located in SEPA's 10-state area. Pending at the same time is a lawsuit brought by the State of Arkansas seeking to *prohibit* the Southwestern Power Administration from selling power generated by certain projects anywhere but in Arkansas. *Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed November 12, 1982).

¹⁶The rates promulgated by the PMA's are subject to confirmation and approval, or disapproval, by the Federal Energy Regulatory Commission ("FERC"). The law governing rates and repayment and the FERC's oversight of their development is, like the law of power allocation, becoming subject to increasing amounts of litigation. *See, e.g., In re Western Area Power Admin.*, No. 81-5021 (FERC filed December 29, 1980); *In re Western Area Power Admin.*, No. ER82-5031-000 (FERC filed June 28, 1982).

a project located in that state.¹⁷

It is also important to recognize that the PMA's, for the most part, are more oriented toward marketing than operations. Most of the projects which produce the power marketed by the PMA's are operated by the U.S. Army Corps of Engineers (the "Corps") or the Bureau of Reclamation (the "Bureau"). The PMA's essentially market that power which the Corps or Bureau determines to be in excess of the amount of power needed for use in the project and thereby available for disposition by the PMA's.¹⁸ The PMA's, therefore, must often develop marketing plans which are consistent with any appropriate limitations imposed by the Corps or Bureau for purposes of project operation.¹⁹

Although not yet expressly confirmed (nor denied) by the courts, it seems to be generally accepted that PMA's do not have general public utility responsibility. The statutory requirement contained in certain preference laws²⁰ that marketing plans be developed so as to encourage the "most widespread use" of the power have not been construed to require that all interested customers, or all interested preference entities, be given a power allocation.²¹

The four pre-existing PMA's were made part of the Department of Energy ("DOE") upon its creation in 1977.²² The Western Area Power Administration was created shortly after DOE, pursuant to a congressional requirement that another PMA be organized.²³ Each PMA has a different organizational history since the pre-DOE marketing agencies were formally part of the Department of the Interior and were created by delegation order.²⁴ While the PMA's respective histories are not essential for the purposes of this article, in litigation against a PMA the defendant PMA's precise scope of responsibility and peculiar historical development should be reviewed for possible significance.

The differences between the PMA's are more than geographic. While most of the PMA's market power produced only from hydroelectric generating facilities, at least one (the Bonneville Power Administration) also markets power from thermal generating resources. Another, the Southeastern Power Administration, neither owns nor controls any transmission facilities, and is therefore dependent upon other entities, most often investor-owned utilities in the area, for transmission service to their customers. The other PMA's do operate and control federally-owned transmission facilities. Whether, to what extent and how each PMA hydraulically and electrically integrates the projects for marketing purposes also varies among them, as well as among the projects handled by a single PMA. In short, the characteristics of each regional power marketing system are unique.

The law governing preference power also varies according to the particular PMA involved. This is because most preference (and repayment) provisions are embodied in the marketing statute, such as Section 5 of the Flood Control Act of 1944, or in the specific legislation authorizing the particular projects or systems which generate the power being marketed (either directly or by reference).²⁵

¹⁷See note 15, *supra*.

¹⁸See 42 U.S.C. § 7152 (Supp. 1977).

¹⁹For example, a multi-purpose project may serve navigational, flood control, irrigation, recreation, and generation purposes simultaneously. Limits may be placed on the times or degree of power generation in order to avoid conflicts with the navigational or other purposes of the project.

²⁰*E.g.*, 16 U.S.C. § 825s (1976).

²¹*E.g.*, Power Authority, 549 F.2d at 1252; Santa Clara, 572 F.2d at 667.

²²42 U.S.C. § 7152 (Supp. 1977).

²³*Id.* at § 7152(a)(3).

²⁴Prior to the transfer of authority to DOE, the Bureau of Reclamation also shared power marketing responsibilities for certain regions. *See Id.* at § 7152(a)(1)(E).

²⁵*E.g.*, 16 U.S.C. § 825s (1976); 43 U.S.C. 485h(c) (1976).

Most "preference" provisions are substantially similar, but the language differences can be of critical importance.²⁶ These variances are to some degree overridden by decisions indicating that the various preference laws are to be construed in *pari materia*.²⁷

2. Preference Entities And Other Customers

The vast majority of the PMA's wholesale customers are preference entities.²⁸ Depending upon which preference provision applies, the term "preference entity" can include municipalities, cooperatives or other public bodies.²⁹ While not the subject of much litigation as yet,³⁰ the term "public bodies" is presumably inclusive enough to grant preference status to other types of political subdivisions, power pooling associations and joint action agencies.³¹

With no known exception, preference entities use their power allocations to help meet their retail loads. Attempts at brokering, whereby a recipient of a wholesale preference power allocation resells that power to another at wholesale,³² generally meet with PMA disapproval, to the point that the "broker's" allocation could be jeopardized.³³ This situation seems to arise rarely, perhaps because most PMA's apparently consider brokering to be a serious breach of the preference clause.

3. Non-Preference Entities

PMA customers are comprised of certain non-preference entities as well. The increased litigation by non-recipient preference entities gives all existing recipients

²⁶For example, the ability of an electric cooperative to qualify as a preference entity could be heavily dependant upon which preference provision applies to the power sought by that cooperative. Under Section 5 of the Flood Control Act of 1944, preference is to be given to "public bodies and cooperatives." 16 U.S.C. 825s. Under Section 9(c) of the Federal Reclamation Project Act of 1939, however, a cooperative must be receiving financing assistance from the Rural Electrification Administration in order to qualify for a "preference" for power generated by projects subject to that provision. See 43 U.S.C. § 485h(c) (1976).

²⁷E.g., Disposition of Surplus Power Generated at Clark Hill Reservoir Project, 41 Op. Att'y Gen. 236, 245 (1955), [hereinafter cited as Clark Hill].

²⁸Preference entities account for 94% of energy sales by SEPA, 52% by the Bonneville Power Administration, 71% by the Western Area Power Administration, and 78% by the Southwestern Power Administration. See DOE, S.E. Power Admin. Ann. Rpt. 8 (1980); DOE, Bonneville Power Admin. Ann. Rpt. 21 (1980); DOE, W. Area Power Admin. Ann. Rpt. 40 (1980); DOE, S.W. Power Admin. Ann. Rpt. 5 (1979).

²⁹Other types of public bodies which have been viewed as preference entities include federal and state agencies, irrigation, electrical and other special purpose, quasi-governmental districts.

³⁰At the time of this writing, a closely related question is awaiting judicial determination. In *ElectricCities*, *supra* note 1, the defendants are questioning whether the plaintiff has standing to sue. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 16, *ElectricCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982). The plaintiff described itself as an unincorporated association comprised of member cities. Since it is the member cities and not the association which seek to purchase preference power, it is unclear whether the association can maintain the lawsuit in its own name as a representative of its member cities, or whether the cities must sue directly.

³¹Two sides of this coin could conceivably be addressed in the pending *ElectricCities* lawsuit, *supra* note 1. On the one hand, the Complaint alleges, *inter alia*, that the Tennessee Valley Authority cannot properly be considered a preference entity. On the other hand, the Virginia Polytechnic Institute has intervened in the case and considers itself to be a preference entity under the "public body" standard. A discussion of "public bodies" under the Niagara Redevelopment Act, 16 U.S.C. §§ 836, 836a, is set forth in *Mun. Elec. Utilities Ass'n v. Power Auth.*, 21 Fed. Energy Reg. Comm'n (CCH) ¶ 61,021 (October 13, 1982).

³²Of course, it is expected that the preference entities will resell the preference power to their retail customers.

³³Although dismissed by stipulation among the parties, the "brokering" issue was raised in *City of Portland v. Munro*, No. 77-928 (D. Or. dismissed March 19, 1981).

good reason not to take their allocations for granted. This is particularly true for non-preference entities which, by virtue of the preference laws, are more vulnerable to challenge.

It is difficult to conceive of an approach which would justify, under the preference laws, the continued allocation of power to a non-preference buyer which provides the PMA with no more than dollars in exchange for the power (especially when there are non-recipient preference entities which are competing for the allocation). Somewhat more defensible are the positions of certain investor-owned utilities which are benefitting PMA's and preference customers in the region by their involvement in the federal power marketing program. In many instances, they are not simply direct purchasers of preference power. Rather, PMA's frequently rely on investor-owned utilities to provide transmission, firming, scheduling and dispatching services with a view towards increasing the amount of firm power available for sale to preference entities. A PMA which neither owns nor controls any transmission facilities necessarily looks to surrounding investor-owned utilities which do own and control such facilities for transmission.³⁴ Without them, the preference entities might have to build new and potentially duplicative lines to the generating projects at substantial cost, thereby offsetting the low-cost advantage of preference power.³⁵

Firming services can also benefit the PMA and recipient preference entities. Most preference power is produced by hydroelectric projects which are naturally dependent on water supplies.³⁶ Without firming, a PMA could prudently allocate firm power to its customers calculated only on the basis of minimally assured water levels.³⁷ To the extent that more than minimum water is available, the additional power would be non-firm, and less attractive to most preference customers.³⁸ Firming services, which involve integration of the hydroelectric projects with each other and with thermal generating facilities, can enable the PMA to market firm power based on average water levels, or better.³⁹ This type of arrangement increases the amount of firm energy available to the PMA for marketing. As preference entities continue to acquire the ability to provide such services, it may become more difficult under the preference laws to defend such involvement by a non-preference entity.

The investor-owned utility which provides such services can realize some benefit to itself. Whether this benefit is violative of the preference laws is an open question.⁴⁰ It does appear, however, that by providing the PMA with substantially more than simple dollars, an investor-owned utility in this kind of position should be better equipped than the non-preference, non-utility recipient to justify its involvement.

Investor-owned utilities not currently providing such services, of course, have no such benefits to defend. Nevertheless, the developing law in this area could still be important to them. From time to time, need prompts a PMA to seek out such cooperation, even to the point of litigating in an effort to obtain it.⁴¹

³⁴Greenwood Utilities Comm'n v. Schlesinger, 515 F.Supp. 653, 656 (M.D. Ga. 1981).

³⁵This is particularly true of preference entities in the area served by SEPA which, by virtue of Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976), cannot freely build transmission lines.

³⁶Central Lincoln Peoples' Util. Dist. v. Johnson, 686 F.2d 708, 710 n.1 (9th Cir. 1982).

³⁷*Id.*

³⁸*Id.*

³⁹Greenwood v. Schlesinger, 515 F.Supp. at 656 n.2.

⁴⁰This question is expected to be addressed in Greenwood Utilities Comm'n v. Edwards, No. 77-179-MAC (M.D. Ga. filed April 19, 1977).

⁴¹See, e.g., Southeastern Power Admin. v. Kentucky Utilities Co., [Transfer Binder] 16 Fed. Energy Reg. Comm'n (CCH) ¶ 63,051 (Sept. 10, 1981).

B. Overview Of Significant Preference Laws

Before focusing on current litigation involving the preference laws, it may be helpful to first present an overview of the statutory provisions involved and the underlying policies which led to their enactment.

The Reclamation Act of 1906⁴² contains the first preference clause applicable to electric power.⁴³ This statute authorized the Secretary of the Interior to lease surplus power from irrigation projects, "giving preference to municipal purposes."⁴⁴ Unfortunately, the statute's legislative history is silent as to why Congress first chose to enact this municipal preference. From then through the late 1930's, several additional reclamation laws were enacted containing an assortment of provisions governing the disposition by the government of electric power.⁴⁵

Two preference provisions which are commonly invoked in preference litigation are those set forth in Section 9(c) of the Reclamation Project Act of 1939⁴⁶ and Section 5 of the Flood Control Act of 1944.⁴⁷ The relevant language of Section 9(c) of the Reclamation Project Act of 1939 authorizes the government to sell or lease electric power,

[p]rovided further, that in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.⁴⁸

The relevant language of Section 5 of the Flood Control Act of 1944 is as follows:

Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles Preference in the sale of such power and energy shall be given to public bodies and cooperatives.⁴⁹

As will be discussed, much ado has been made over this seemingly simple, concise language. Perhaps this should be expected when its application is to a complex, national industry.

⁴²43 U.S.C. § 522 (1976).

⁴³The Reclamation Act of March 3, 1877 contained a preference provision governing the disposition of surplus water. Solicitor, Department of the Interior, History of the Preference Clause I (1958) (available at the Library of the Department of the Interior, Washington, D.C.).

⁴⁴43 U.S.C. § 522 (1976).

⁴⁵*E.g.*, Dam Act of 1910, ch. 360, 36 Stat. 593 (1910); Act of July 25, 1912, ch. 253, 37 Stat. 201 (1912); Act of December 19, 1913, ch. 4, 38 Stat. 242 (1913); Federal Water Power Act of 1920, 16 U.S.C. §§ 791a-828c (1976) (relating to hydroelectric project permitting and licensing, topics beyond the scope of this article); Salt River Project Act, 43 U.S.C. § 598 (1976); Boulder Canyon Project Act, 43 U.S.C. §§ 617-618p (1976); Tennessee Valley Authority Act, 16 U.S.C. §§ 831-831dd (1976); Rural Electrification Act of 1936, 7 U.S.C. §§ 950-950b (1976) (relating to federal financial assistance to certain "public" electric systems rather than to electric power directly); Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832d (1976); Fort Peck Project Act of 1938, 16 U.S.C. §§ 833-833q (1976); Flood Control Act of 1938, 33 U.S.C. §§ 701-709a (1976).

⁴⁶43 U.S.C. § 485h(c) (1976).

⁴⁷16 U.S.C. § 825s (1976).

⁴⁸43 U.S.C. § 485h(c) (1976).

⁴⁹16 U.S.C. § 825s (1976).

Two principal policies underlie the preference laws. The first is the belief that the output of publicly-financed projects located on public waterways should inure to the benefit of as great a portion of the public as is reasonably possible.⁵⁰ Second, Congress sought, by way of the preference clause, to prevent private “monopolistic” interests from controlling these public resources.⁵¹ Such background, coupled with the statutory language utilized, makes it reasonably clear that, all else being equal, Congress sought to ensure that power generated by federal projects would be sold to public bodies and cooperatives, not to investor-owned utilities. Statutes also exist indicating that the “preference” entities should be given a reasonable amount of time⁵² to take steps to make all else equal and still be eligible for a preference in the sale of federal power.⁵³

When weighed against operating realities, the preference laws can pose difficult problems for the PMA's charged with their implementation and for the courts with respect to their interpretation and enforcement. Presumably few would disagree that it is no easy task for a power supplier to market power, especially firm power, from numerous hydroelectric projects with no self-owned or operated transmission facilities. To encourage the most widespread use when marketing such power, at the lowest possible rates to consumers, consistent with sound business principles is yet more challenging. Pancake on top of this the obligation to maintain a preference for public bodies and cooperatives (with an opportunity for them to acquire facilities to enable them to receive federal power), and the job of selling wholesale power could, at least at first blush, seem altogether unrealistic. Yet, officials at PMA's like the Southeastern Power Administration earn their livelihood by daily wrestling with these standards. It is little wonder that litigation results. It is perhaps less wonder that the architects of marketing plans designed to accommodate these various standards are sometimes reluctant to have their craftsmanship subjected to judicial review by judges who are often less experienced in the complexities of the electric power industry.

⁵⁰E.g., Letter by Secretary of the Interior Ickes to Senator Bailey 4 (June 2, 1944); S. Rpt. No. 1030, 78th Cong., 1st Sess. 3 (1944).

⁵¹Colorful, even if not agreeable to all, support is found in the remarks of Congressman Weideman of Michigan in connection with the Tennessee Valley Authority Act:

I am also interested in removing the tentacles of the Power Trust from the natural resources of the country; and knowing this to be a step in that direction, I shall vote for it

I am not so interested in what becomes of the Alabama Power Co. or any other power company. . . .

We have been under the control and domination of the Power Trust, . . . for too long a time. Now is the time to remove those shackles of control from our Government so that the people will benefit from the operation of Muscle Shoals and other natural resources, rather than a few coupon clippers on Wall Street.

77 Cong. Rec. 2280 (1933). See also, e.g., Hearings before the Senate Commerce Committee on H.R. 4485 (Flood Control), 78th Cong., 2d Sess. 311 (1944).

⁵²See 16 U.S.C. §§ 831k, 832c(c),(d) (1976) (the so-called “reasonable time” provision); Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation under the Federal Reclamation Statutes*, 9 Envtl. L. 601, 633 n.111 (1979); Clark Hill, 41 Op. Att’y Gen. 236 (1955).

⁵³The Ninth Circuit has thus far tended not to be overly influenced by this concept, although its decisions have added more “gloss” to the preference laws than those of other courts to date. See *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978); *Arizona Power Pooling Ass’n v. Morton*, 527 F.2d 721 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

III. DEVELOPING LEGAL TRENDS

A noteworthy characteristic of preference power lawsuits is that very few can be described as "single issue" cases. They generally involve multiple parties, multiple issues of disputed law and fact, and a highly charged collection of competing self-interests. For example, a plaintiff seeking a single allocation of federal power from a governmental marketing agency, when all of the power is already committed under existing contracts, invites the wrath of every other purchaser of federal power in the region. The reason is fairly clear. The existing customers are fearful that they may have to yield a portion of their low-cost power allocation in order for the marketing agency to meet the new demand. The contest between the "have's" and "have nots" can include internecine warfare among preference entities; disputes between preference and non-preference entities; or a combination of the two. Of course, at the heart of the dispute is the government official or marketing agency which tried to allocate the power in the first place.

Although each case must be construed in the context of the particular preference statutes involved, as well as the unique characteristics of the parties (*e.g.*, preference, non-preference, federal, associational), a number of general legal trends have begun to evolve. Several issues have become well-clarified, if not completely resolved, while others have become the subject of contrasting interpretations by trial and appellate courts. Included in the following survey are pending lawsuits,⁵⁴ as well as cases which have been disposed of prior to adjudication,⁵⁵ in order to present the full kaleidoscope of ideas and feints tested thus far by entities competing for a piece of an increasingly prized resource.

A. Application Of The Preference Clause

One of the earliest lawsuits dealing with a preference power dispute is *Arizona Power Pooling Association v. Morton*.⁵⁶ This case held, *inter alia*, that the preference clause contained in the Federal Reclamation Project Act of 1939⁵⁷ was intended by Congress to apply to government sales of thermally-generated power as well as to hydroelectric power.⁵⁸ This holding represented a rather significant development, since the preference clause had previously been deemed to apply only to hydroelectric power.⁵⁹

⁵⁴*E.g.*, *Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed Nov. 13, 1982); *Electricities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982); *Greenwood Utilities Comm'n v. Mississippi Power Co.*, No. J80-0350(C) (S.D. Miss. filed July 31, 1980); *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAQ (M.D. Ga. filed April 20, 1977).

⁵⁵*E.g.*, *City of Portland v. Munro*, No. 77-928 (D. Or., dismissed March 19, 1981); *City of Lamar v. Andrus*, Nos. 75-C-216-C and 76-C0374-C (D. Okla., dismissed May 2, 1977).

⁵⁶*Arizona Power Pooling Ass'n v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). The case involved an appeal to the Ninth Circuit from an order of the U.S. District Court for the District of Arizona (William P. Copple, J.) granting the government's motion for summary judgment and dismissing with prejudice plaintiff's action, which sought federal preference power from the Navajo power plant. The Ninth Circuit reversed and remanded the case to the trial court, where it ultimately was settled. Author Vince served as special counsel for the Arizona Power Pooling Association with his partner Donald R. Allen, and general counsel Michael A. Curtis.

⁵⁷43 U.S.C. § 1554 (1976).

⁵⁸*Pooling Association*, 527 F.2d 721.

⁵⁹*Id.* at 725.

Pooling Association involved a claim by the Arizona Power Pooling Association, a non-profit Arizona corporation comprised of three preference entities⁶⁰ against the Secretary of Interior and four investor-owned utilities located in the southwestern United States.⁶¹ The Pooling Association asserted that the Secretary of Interior had violated his statutory duty under the Colorado River Basin Project Act.⁶² Specifically, the plaintiff alleged that the Secretary had improperly contracted to sell interim electric power from the Navajo Power Plant, a thermal generating component of the Central Arizona Project,⁶³ to privately-owned utility companies without first offering the Pooling Association an opportunity to purchase it.⁶⁴

The Colorado River Basin Project Act incorporated by reference the Federal Reclamation Project Act of 1939, which in turn contained a preference clause.⁶⁵ After determining that the preference clause applied to thermal as well as hydroelectric power, the Ninth Circuit noted that the actual text of the preference clause was drafted in mandatory terms. The clause states that “preference *shall* be given” to certain public entities in the sale of federal electric power.⁶⁶

On rehearing, however, the Court was careful to clarify that this preference clause does *not* provide preference customers with an “automatic entitlement” to power sold by the federal government.⁶⁷ Thus, other criteria set forth in the Act also had to be taken into account by the Secretary of Interior in determining how to sell such power. For example, the section of the Act containing the preference clause also directed that “[n]o contract relating to . . . electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the Project for irrigation purposes.”⁶⁸

Upon remand, the trial court was instructed to determine, *inter alia*, whether the sale of power to the plaintiff would “impair the efficiency of the project for irrigation purposes.”⁶⁹ The plain implication was that, absent such a finding, the government should sell power to the competing preference entities. The lawsuit was settled “amicably” before actual trial when the private utility defendants agreed to provide the Pooling Association with substantial amounts of power at reduced prices.

B. *Competition Between Preference And Non-Preference Utilities*

One theme that has surfaced consistently in recent preference lawsuits is that the discretion of governmental authorities to sell federal power is by no means unfettered.⁷⁰ This is especially true when preference entities have submitted applications for power contemporaneously with competing non-preference entities. As the following cases indicate, preference clauses have been uniformly construed to require the governmental authority responsible for marketing federal power to

⁶⁰Arizona Electric Power Cooperative, Electrical District Number Two, located in Pinal County, Arizona, and the City of Mesa, Arizona.

⁶¹Arizona Public Service Company, Tucson Gas & Electric, Nevada Power Company and Southern California Edison.

⁶²43 U.S.C. § 1501 *et seq.* (1976).

⁶³43 U.S.C. §§ 1521-28 (1976).

⁶⁴*Pooling Association*, 527 F.2d at 724.

⁶⁵*Id.* The preference clause appears at 43 U.S.C. § 485h(c) (1976).

⁶⁶*Pooling Association*, 527 F.2d at 727; 43 U.S.C. § 485h(c) (1976).

⁶⁷*Pooling Association*, 527 F.2d at 730.

⁶⁸43 U.S.C. § 485h(c) (1976); *Pooling Authority*, 527 F.2d at 729 n.3.

⁶⁹*Pooling Association*, 527 F.2d at 727.

⁷⁰*Id.*

defer to the congressional objective of allocating power to public bodies first, provided that such sales do not conflict with other requirements in the statutes authorizing such sales.⁷¹

1. *Attorney General Brownell's "Clark Hill" Opinion and its Adoption by the Ninth Circuit In Pooling Association*

One of the earliest and most respected pronouncements on this subject came not from a federal court, but from a U.S. Attorney General. In the *Clark Hill* Opinion, rendered in 1955,⁷² Attorney General Brownell advised the Secretary of Interior on the propriety of the Secretary's plan for allocating federal hydroelectric power generated by the Clark Hill Reservoir Project. In so doing, Attorney General Brownell provided his interpretation of Section 5 of the Flood Control Act of 1944,⁷³ which authorized the Secretary to sell power from the Clark Hill Project.⁷⁴ The Attorney General, in an oft-quoted passage,⁷⁵ stated:

[W]hen the Secretary of Interior has before him two competing offers to purchase power, one by a preference customer and the former does not have at the time the physical means to take and distribute the power, he must contract with the preference customer on condition that such customer will, within a reasonable time to be fixed by the Secretary, obtain the means for taking and delivering the power. If within the fixed period the preference customer does not do so, the Secretary is then free to contract with the non-preference customer. ⁷⁶

The Ninth Circuit refined the edict of *Clark Hill*, without specifically citing the Attorney General's Opinion, in *Pooling Association*.⁷⁷ After determining that the Secretary of Interior had contracted with certain non-preference customers while simultaneously refusing to allow a preference customer (the Pooling Association) to have an opportunity to purchase the power,⁷⁸ the Court stated:

It is not the ultimate sale of the interim power to [non-preference customers] which is alleged to be a violation of the preference clause, but rather the undisputed refusal of the federal appellees to offer appellant the opportunity to purchase the power prior to offering it to the private utility companies. . . . The potential preference customers had sought, and had been refused, the chance to participate in the purchase of the government's entitlement to interim thermal power . . . ⁷⁹

In point of fact, the Pooling Association's representatives had requested an opportunity to purchase the government's power on numerous occasions. The government not only refused to sell, but also declined to allow the representatives access to meetings where the disposition of such power was being discussed.⁸⁰

⁷¹*Id.*

⁷²Disposition of Surplus Power Generated at Clark Hill Reservoir Project, 41 Op. Att'y Gen. 236 (1955).

⁷³16 U.S.C. § 825s (1976).

⁷⁴The Flood Control Act of 1944 contains a preference clause which is substantially similar to that contained in the Federal Reclamation Project Act of 1939; *Santa Clara v. Andrus*, 572 F.2d 660, 670 n.6 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); *Anaheim v. Kleppe*, 590 F.2d 285, 289 n.6 (9th Cir. 1978).

⁷⁵*E.g.*, *Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981); *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); *Arizona Power Pooling Ass'n v. Morton*, 527 F.2d 721 (9th Cir. 1975).

⁷⁶41 Op. Att'y Gen. at 243 (1955).

⁷⁷527 F.2d 721.

⁷⁸The Ninth Circuit actually assumed this factual contention for purposes of the summary judgment motion. *Pooling Association*, 527 F.2d at 728.

⁷⁹*Pooling Association*, 527 F.2d at 726, *quoted in* *Anaheim v. Kleppe*, 590 F.2d at 289 (9th Cir. 1978).

⁸⁰Deposition of Oakley Jordan, *Pooling Association*, 527 F.2d 721 (9th Cir. 1975).

2. *Santa Clara*

The next case to favor preference customers in competition for federal power against private utilities was *Santa Clara*.⁸¹ Citing *Pooling Association* and *Clark Hill*, the Ninth Circuit in *Santa Clara* established a new standard stating: “[i]t is only if the available supply exceeds the demands of interested preference customers that the secretary may offer federal power to private entities.”⁸² The facts involved in *Santa Clara* are described more fully *infra*, in Section III E.

Before preference entities had an opportunity to become complacent with the rulings in *Pooling Association* and *Santa Clara*, however, the Ninth Circuit summarily rejected the positions of several other preference entities that had been seeking allocations of federal power from the Navajo Plant in two related decisions: *City of Anaheim v. Kleppe*⁸³ and *City of Anaheim v. Duncan*.⁸⁴

3. *City of Anaheim v. Kleppe*

In *City of Anaheim v. Kleppe*, the plaintiff Cities sought a preliminary injunction to compel the Secretary of Interior to sell them Navajo Project power that was then being sold to non-preference investor-owned utilities. Clearly preference entities, the Cities asserted that the Secretary of Interior had improperly neglected to offer power to them subject to their ability to acquire sufficient transmission capacity to receive the power at a later time. The Cities also contended that the Secretary exceeded his statutory authority when he entered into contracts with the private utilities. Their basic position was that the contracts should have contained provisions enabling the Secretary to withdraw power from the private utilities in the event that the Cities were later able to acquire transmission capability.⁸⁵

When the U.S. District Court for the District of Arizona (Judge Walter Craig) refused to issue a preliminary injunction, the Cities took an interim appeal to the Ninth Circuit.⁸⁶ One of the critical elements which needed to be proven before preliminary relief could be granted was that there was a substantial likelihood that the plaintiff would prevail on the merits of the case when the matter reached trial. In order to meet this demanding burden, the Cities relied upon *Santa Clara* and *Clark Hill*.⁸⁷ They argued, *inter alia*, that these authorities established the proposition that offers to purchase federal power by preference customers should *automatically* prevail over competing offers by non-preference investor-owned utilities.⁸⁸

The Ninth Circuit, however, held that *Santa Clara*, *Pooling Association* and *Clark Hill* were each inapposite because the Cities' offers had *not* in fact, been filed contemporaneously or in competition with the private utilities' offers to purchase power.⁸⁹ Indeed, the Court noted that the Cities had not offered to buy the federal power until nearly three years after the Secretary of Interior had contracted to sell

⁸¹*Santa Clara*, 572 F.2d at 670.

⁸²*Id.* The Ninth Circuit later reiterated this view in *Anaheim v. Kleppe*, 590 F.2d at 289.

⁸³*Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978).

⁸⁴*Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981) (*see* asterisk). These two cases involved essentially the same parties; however, the Secretary of Energy succeeded the Secretary of Interior as the responsible power marketing official.

⁸⁵*Anaheim v. Kleppe*, 590 F.2d at 287.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.* at 287-89.

⁸⁹*Id.* at 288.

the power to the private utilities.⁹⁰ The Court also observed that one of the Cities had actually sat on the steering committee which had solicited offers from the private utilities and thus was aware of the government's impending sales. In denying the Cities' request for preliminary relief, the Ninth Circuit reiterated the axiom earlier espoused in *Pooling Association* to the effect that preference customers do not have an automatic entitlement to preference power.⁹¹

4. *City of Anaheim v. Duncan*

The same preference customers that sued the Secretary of Interior in *City of Anaheim v. Kleppe* lost a second round against competing private utilities in *City of Anaheim v. Duncan*.⁹² The two Ninth Circuit decisions involved essentially the same lawsuit, except that during the pendency of the litigation, the Secretary of Energy replaced the Secretary of Interior as the power marketing authority.⁹³

After their bid for a preliminary injunction was denied in *City of Anaheim v. Kleppe*, the case was remanded to the trial court, where the Cities were subsequently dismissed on summary judgment. On their second appeal to the Ninth Circuit, the Cities again relied, *inter alia*, upon *Clark Hill*, *Pooling Association* and *Santa Clara* to support three contentions:

1. the U.S. government's obligation to contract with preference entities can be triggered by an affirmative expression of interest, which need not amount to a formal offer;
2. the sale of power to private utilities was illegal because two of the three plaintiff cities had not been notified of the intended sale; and,
3. the Secretary should have inserted "withdrawability" provisions in his contracts which would have allowed the Government to withdraw power from the private utilities for reallocation to the preference entities.⁹⁴

The Ninth Circuit, however, was not persuaded.⁹⁵

Instead of attempting to detract from *Clark Hill*, *Pooling Association*, or *Santa Clara*, the Court simply held that the particular facts of the case did not support the positions taken by the Cities. After emphasizing that the Secretary had been under unusual time pressure to sell the interim Navajo power,⁹⁶ it was noted that fulfillment of the Cities' position would have impeded, if not cancelled, the U.S. Government's ability to proceed with the Navajo Project. Under these circumstances, said the Ninth Circuit, the preference clause was not intended by Congress to override the primary purpose of the Federal Reclamation Project Act of 1939 — water conservation and reclamation.⁹⁷

C. *Judicial Review Of Federal Power Allocation Decisions*

An extremely controversial issue in many preference power lawsuits is the question of the extent to which the federal marketing official's discretion in

⁹⁰*Id.* at 289.

⁹¹*Id.*, citing *Pooling Association*, 527 F.2d at 730.

⁹²*Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981).

⁹³*Id.*; Department Of Energy Organization Act, 42 U.S.C. § 7101 (Supp. 1977).

⁹⁴*Anaheim v. Duncan*, 658 F.2d at 1329.

⁹⁵*Id.*

⁹⁶*Id.* at 1330.

⁹⁷*Id.*

allocating power is subject to judicial review. The Ninth Circuit has held unequivocally in *Arizona Power Authority v. Morton*⁹⁸ and *Santa Clara*⁹⁹ that the federal marketing official's discretion is *not* reviewable if the matter involves selection among preference entities, rather than competition between preference and non-preference entities.

In *Greenwood*, however, the U.S. District Court for the Middle District of Georgia reached a different conclusion, determining that the breadth of the agency's discretion does not preclude judicial review to investigate alleged abuses of that discretion.¹⁰⁰ If and when the *Greenwood* case is resolved on appeal, it is conceivable that a split could occur between the Ninth and the Eleventh Circuits.

The issue will almost certainly be raised in two other jurisdictions as well. The *ElectriCities v. Southeastern Power Administration*¹⁰¹ lawsuit is now pending before the United States District Court for the Eastern District of North Carolina, which is within the Fourth Circuit, and the *Arkansas v. Hodel*¹⁰² lawsuit is pending before the United States District Court for the Eastern District of Arkansas, in the Eighth Circuit. A brief survey of the leading lawsuits dealing with this subject is set forth below, beginning with the Ninth Circuit cases.

1. *Power Authority*

*Power Authority*¹⁰³ was commenced by the Arizona Power Authority and eight other public utilities in the State of Arizona against the Secretary of Interior and Commissioner of the Bureau of Reclamation. The plaintiffs challenged certain general power marketing criteria issued by the Secretary which allocated an allegedly disproportionate amount of federal power to public utilities in the states of Colorado, Utah, New Mexico, and Wyoming (the "upper basin" states). The power in question was generated by Colorado River Storage Project hydroelectric plants.¹⁰⁴

The central issue in the case was whether Congress had provided a legal standard for the Court to apply in reviewing the Secretary of Interior's formulation of power marketing criteria (which contained a clearcut geographic preference).¹⁰⁵ Both parties raised the issue via motions for summary judgment.¹⁰⁶

In a lengthy opinion by Circuit Judge Wallace, the Ninth Circuit held that the preference clause contained in the Federal Reclamation Project Act of 1939¹⁰⁷ "permitted the Secretary [of Interior] to discriminate against some preference entities in favor of others."¹⁰⁸ Citing the U.S. Supreme Court decision in *Arizona v. California*,¹⁰⁹ the Court observed that the "general authority to make contracts normally includes the power to choose with whom . . . the contracts will be made."¹¹⁰ The Court concluded that in light of the Secretary of Interior's "broad discretion" under the authorizing statute, the Secretary could adopt whatever "geographical

⁹⁸549 F.2d 1231 (9th Cir. 1975), *cert. denied*, 434 U.S. 853 (1977).

⁹⁹*Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

¹⁰⁰*Greenwood Utilities Comm'n v. Schlesinger*, 515 F. Supp. 653 (M.D. Ga. 1981).

¹⁰¹*ElectriCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982).

¹⁰²*Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed Nov. 13, 1982).

¹⁰³*Arizona Power Auth. v. Morton*, 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977).

¹⁰⁴*Id.* at 1232.

¹⁰⁵*Id.* at 1240.

¹⁰⁶*Id.* at 1232-3.

¹⁰⁷43 U.S.C. § 485h(c) (1976).

¹⁰⁸*Power Authority*, 549 F.2d 1231; *Santa Clara*, 572 F.2d at 667.

¹⁰⁹*Arizona v. California*, 373 U.S. 546 (1963).

¹¹⁰*Id.* at 580.

preference" he desired. Thus, there was deemed to be no jurisdiction to support judicial review of the Secretary's decision to market to preference entities in one geographical area to the detriment of preference entities located elsewhere.¹¹¹

2. *Santa Clara*

The theme of permissible "discrimination" among preference entities was echoed several years later in *Santa Clara*, when the Ninth Circuit stated that the preference clause only required that public bodies be provided a preference over *private* entities in the marketing of federal power. The Court went on to say that the preference clause does not require that "all preference entities be treated equally or that all potential preference customers must receive an allotment of federal power."¹¹² In a particularly strident statement, the Court declared that "[i]f he so chooses, the Secretary can market *all* available [Central Valley Project] power to a single public entity without running afoul of the preference clause."¹¹³

3. *Ninth Circuit Formula For Judicial Review*

The Ninth Circuit utilized roughly the same formula for determining judicial reviewability in *Pooling Association*, *Power Authority* and *Santa Clara*, although with differing results. The starting point was to examine the statute pursuant to which the federal marketing official was authorized to sell power. In *Pooling Association*, this statute was the Colorado River Basin Project Act¹¹⁴ which, in turn, incorporated the Federal Reclamation Project Act of 1939.¹¹⁵ After examining both statutes, the Court focused upon the question of whether the Secretary's discretion under the governing statute was so wide-ranging as to be free from judicial scrutiny under the Administrative Procedure Act ("APA").¹¹⁶ The APA provides judicial review for any person adversely affected or injured by agency action except in two narrowly prescribed situations: (1) where the statute in question "expressly precludes judicial review"¹¹⁷; and, (2) where "agency action is committed to agency discretion by law."¹¹⁸

In focusing on the latter prong of the two-part exception, the Ninth Circuit emphasized that judicial review of administrative action "is the rule" and that the concept of non-reviewability should be employed only in situations where it could be demonstrated with "clear and convincing evidence" that the legislature intended to preclude judicial review.¹¹⁹ This principle is embodied in the landmark case of *Citizens to Preserve Overton Park v. Volpe*.¹²⁰

In *Overton Park*, the U.S. Supreme Court ruled that the APA's preclusion of judicial review of matters "committed to agency discretion" is an extremely narrow

¹¹¹Power Authority, 549 F.2d at 1241.

¹¹²*Santa Clara*, 572 F.2d at 667.

¹¹³*Id.*

¹¹⁴43 U.S.C. § 1501 *et seq.* (1976).

¹¹⁵43 U.S.C. § 485h(c) (1976).

¹¹⁶5 U.S.C. § 701 (1976); *Pooling Association*, 527 F.2d at 726.

¹¹⁷*Pooling Association*, 527 F.2d at 727.

¹¹⁸*Id.*; 5 U.S.C. § 701(a) (1976).

¹¹⁹*Pooling Association*, 527 F.2d at 727 *citing* *Barlow v. Collins*, 397 U.S. 159, 166 (1969); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

¹²⁰*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

exception applicable only in “those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.”¹²¹ Applying this test to the proviso in the Colorado River Basin Act (which required that power sales not impair project efficiency for irrigation purposes)¹²² and the preference clause contained in the Federal Reclamation Project Act of 1939 (which required that preference be given to certain public bodies),¹²³ the Ninth Circuit found that there was sufficient “law to apply” under the circumstances and that the *Overton Park* exception would be disallowed.¹²⁴

In *Power Authority* and *Santa Clara*, however, the question of judicial review arose in the context of allocations among potential preference customers rather than competition between preference and non-preference entities. As a result, the Ninth Circuit declined jurisdiction, but utilized the same formula.

In *Power Authority*, for example, the Court scrutinized the Colorado River Storage Project Act¹²⁵ which incorporated by reference the preference clause contained in Section 9 of the Federal Reclamation Project Act of 1939.¹²⁶ The plaintiffs alleged, unsuccessfully, that the Secretary’s geographic preferences had violated the clear congressional intent of these statutes. In determining that it had no jurisdiction to review the plaintiff’s claims, the Court stated that the statutes failed to provide sufficient law or standards to warrant limitation of the Secretary’s discretion.¹²⁷ In other words, Congress had clearly required that preference entities be favored over non-preference utilities, but had chosen not to dictate how specific selections among preference entities should be made.

Similarly, in *Santa Clara*, the Ninth Circuit examined the Central Valley Project Authorization Act,¹²⁸ which also incorporated the Federal Reclamation Project Act of 1939.¹²⁹ Citing *Power Authority* for the proposition that the preference clause contained in the reclamation laws provided no law for the Court to apply in limiting the Secretary’s discretion to select among preference entities, the Court held that plaintiff’s claim was not reviewable.¹³⁰

The *Santa Clara* Court also studied Section 5 of the Flood Control Act of 1944¹³¹ as an alternate benchmark against which the Secretary of Interior’s power marketing program could be measured.¹³² The Court focused on the provisions of this statute,¹³³ which require, *inter alia*, that power from federal projects within the purview of the Act be allocated “ . . . in such a manner as to encourage the most widespread use thereof . . . consistent with sound business principles.”¹³⁴ These

¹²¹*Id.* at 410; *Pooling Association*, 527 F.2d at 727.

¹²²43 U.S.C. § 1554 (1976).

¹²³43 U.S.C. § 485h(c) (1976).

¹²⁴*Pooling Association*, 527 F.2d at 728.

¹²⁵Colorado River Storage Project Act, Ch. 203, 70 Stat. 105 (1956) (codified as amended at 43 U.S.C. § 620 *et seq.* (1976)).

¹²⁶43 U.S.C. § 485h(c) (1976); *Power Authority*, 549 F.2d at 1237.

¹²⁷*Power Authority*, 549 F.2d at 1252.

¹²⁸Central Valley Project Authorization Act, Pub. L. No. 75-392, 50 Stat. 844, 850 (1937).

¹²⁹43 U.S.C. § 485h(c) (1976).

¹³⁰*Santa Clara*, 572 F.2d at 667.

¹³¹16 U.S.C. § 825s (1976).

¹³²*Santa Clara*, 572 F.2d at 667.

¹³³The Ninth Circuit did not attempt to determine whether Section 5 of the Flood Control Act of 1944 applied to power generated by the Central Valley Project, but discussed the meaning of that provision anyway.

¹³⁴16 U.S.C. § 825s (1976).

guidelines are in addition to the preference clause which is also contained in Section 5.¹³⁵

The Court decided that, even assuming that the Flood Control Act was applicable by analogy to the Central Valley Project Act, the "most widespread use" standard was "too vague and general to provide law to apply."¹³⁶ Reviving a somewhat colorful description from an earlier opinion, the Ninth Circuit remarked: "[t]he provisions of this statute breathe discretion at every pore."¹³⁷ Accordingly, it held that the proper allocation of Central Valley Project power among potential preference customers constituted an "action committed to agency discretion by law" within the meaning of the APA. As a result, the marketing decision was not properly subject to judicial review.¹³⁸

4. *Greenwood*

Just as the issue of reviewability appeared to be acquiring an element of clarity in the Ninth Circuit, a seemingly contrary ruling was handed down in *Greenwood Utilities Commission v. Schlesinger*,¹³⁹ a suit which is still pending. Filed in the United States District Court for the District of Columbia and then transferred to the Middle District of Georgia, this case reintroduced many of the issues contained in *Santa Clara*, but was premised upon substantially different underlying transactions and facts.¹⁴⁰

The plaintiff, a city in Mississippi, challenged the decision of the Southeastern Power Administration ("SEPA") to market power from three new federal hydroelectric projects in a geographic area which did not include Greenwood. After years of legal wrangling, the defendants filed a motion for partial summary judgment contending, *inter alia*, that SEPA had unreviewable discretion to select a geographic marketing area.¹⁴¹ The defendants cited *Power Authority* and *Santa Clara* and noted that SEPA's actions were governed by the same statute (Section 5 of the Flood Control Act of 1944) which the *Santa Clara* Court viewed as "breathing discretion at every pore."¹⁴²

District Court Judge Wilbur D. Owens, Jr. acknowledged the holding of *Santa Clara*, but ruled that "even if Section 5 of the Flood Control Act were found to be so vague as to breathe discretion at every pore," the Court would nevertheless retain jurisdiction to review for "abuse of that discretion."¹⁴³ Since *Greenwood* has not yet reached trial, nor appellate review, it is uncertain whether a split will develop between the Ninth and Eleventh Circuits on the subject of reviewability.

¹³⁵*Id.*

¹³⁶*Santa Clara*, 572 F.2d at 668.

¹³⁷*Id.*, citing *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975).

¹³⁸*Santa Clara*, 572 F.2d at 668.

¹³⁹*Greenwood Utilities Comm'n. v. Schlesinger*, 515 F. Supp. 653 (M.D. Ga. 1981).

¹⁴⁰Authors Adams and Vince were designated by the committee of defense counsel in this lawsuit to serve as lead counsel for handling of pretrial discovery. Author Robbins has also been deeply involved. After five years of frequently intense skirmishing, the case has not yet reached trial. It has acquired an interesting patina, however, having been transferred from the U.S. District Court for the District of Columbia by Judge Gerhard Gesell to Chief Judge Wilbur D. Owens, Jr. of the Middle District of Georgia, to Senior Judge William A. Bootle in the Middle District and then back again to Chief Judge Owens.

¹⁴¹*Greenwood v. Schlesinger*, 515 F. Supp. 653.

¹⁴²*Greenwood v. Schlesinger*, 515 F. Supp. at 657, citing *Santa Clara v. Andrus*, 572 F.2d at 668.

¹⁴³*Greenwood v. Schlesinger*, 515 F. Supp. 653, citing *Ortego v. Weinberger*, 516 F.2d 1005, 1009 (5th Cir. 1975). At the time of this ruling, Georgia was still within the purview of the Fifth Circuit.

5. *ElectriCities*

One of the most recent preference lawsuits to be filed is *ElectriCities v. Southeastern Power Administration*,¹⁴⁴ which is before the United States District Court for the Eastern District of North Carolina.¹⁴⁵ In this case, plaintiffs are challenging SEPA's entire marketing plan for the southeastern United States, with particular focus on SEPA's Georgia-Alabama and Kerr-Philpott systems of projects.¹⁴⁶ Although the lawsuit is still in its infancy, the defendants have indicated their intention to eventually seek dismissal on the grounds that SEPA's discretion to allocate power among preference customers is so broad as to be non-reviewable.¹⁴⁷

6. *Arkansas v. Hodel*

The latest preference lawsuit to be filed prior to completion of this article for publication is *Arkansas v. Hodel*.¹⁴⁸ In this dispute, the State of Arkansas is suing the Secretary of Energy and the Administrator of the Southwestern Power Administration ("SWPA"). Arkansas is seeking injunctive and declaratory relief to prevent defendants from marketing federal power to locations outside of the river basin in which the federal power is generated. Arkansas has alleged that over 47% of the hydroelectric power marketed by SWPA is generated at facilities located within the borders of the State of Arkansas. It is challenging the fact that under SWPA's new marketing plan, power would be moved out of the state and shared equally with preference entities in Kansas, Louisiana, Missouri, Oklahoma, and Texas.¹⁴⁹

Arkansas has raised five specific claims in its Complaint, two of which will undoubtedly raise issues involving judicial review. One of the claims alleges that SWPA's final power allocations constitute an abuse of discretion by violating "congressional intent that the power be marketed in the river basin in which the generating facilities are located, and particularly the areas adjacent to the dams."¹⁵⁰ The statute that will need to be scrutinized to resolve this issue is Section 5 of the Flood Control Act of 1944, pursuant to which SWPA markets its power. This is the same statute that was discussed in *Santa Clara* and *Greenwood*, and which also will undoubtedly govern in *ElectriCities*.

The other such claim raised in Arkansas' Complaint¹⁵¹ is actually the converse of the first (in which Arkansas alleged a violation of congressional intent by the

¹⁴⁴*ElectriCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982).

¹⁴⁵Each of the authors is involved in this lawsuit, representing defendant/intervenor Municipal Electric Authority of Georgia and the Cities of Fort Valley and Thomasville, Georgia.

¹⁴⁶Complaint, *ElectriCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982).

¹⁴⁷Defendants Motion to Dismiss at 4, note * and Reply of Defendant Intervenor Municipal Electric Authority of Georgia and Cities of Fort Valley and Thomasville, Ga., to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 4, note 1, *ElectriCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982).

¹⁴⁸This case is presently pending before the United States District Court for the Eastern District of Arkansas, Western Division (Civil Action No. LR-C-82-807 filed Nov. 13, 1982).

¹⁴⁹See Complaint, *Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed Nov. 13, 1982). To some extent this case presents the "flip-side" of plaintiff's argument in *ElectriCities*, where certain cities in the Carolinas and Virginia are seeking to receive federal power generated by projects located in other states such as Georgia and Alabama.

¹⁵⁰See Complaint "First Claim" ¶ 21 at 4.

¹⁵¹Complaint "Fifth Claim" ¶ 25 at 5.

Secretary). In this claim, Arkansas alleges:

[i]f the court should find that there was no Congressional intent that power from the projects served by SWPA be marketed in the river basin and particularly near the dam where the power is generated, then Arkansas submits that Congress has failed to place any limits on the area in which SWPA can market power. By failing to specify the boundaries in which SWPA may operate, the Congress has provided insufficient standards to guide the administration in its decision-making process. Therefore, the legislation authorizing the SWPA to market power is an unconstitutional delegation of legislative authority.¹⁵²

The Justice Department recently filed its Answer to Arkansas' Complaint, together with a motion to transfer to the jurisdiction where SWPA is located.¹⁵³ It is uncertain which standard of review the U.S. District Court of Arkansas will choose to apply, as the Eighth Circuit has not yet had an opportunity to speak on the subject of judicial review of a SWPA marketing decision.¹⁵⁴

D. Due Process Protection

The question of whether a preference entity is entitled to due process of law under the Fifth Amendment of the U.S. Constitution in seeking an allocation of federal power is complex and not yet fully resolved. As is the case with judicial review, the question seems to hinge in large part on whether the preference entity is seeking an allocation *vis-a-vis* other potential preference customers, or against a non-preference private utility. The reason is that the extent of due process protection that would be allowed a preference entity is directly related to the degree of "property" interest in federal power that would warrant such protection. A preference entity is more likely to be deemed to have a "property interest" in a contest against a non-preference entity.¹⁵⁵ As the following cases indicate, property interests are not inferred just because the applicant has an abstract need or unilateral expectation in the federal power sought. Rather, the preference entity must have a legitimate claim of entitlement to the power.

1. Santa Clara

In *Santa Clara*, the Ninth Circuit presented a fairly rigorous analysis on the issue of due process. First, the Court seemed to reject a private utility defendant's claim that the City of Santa Clara was not a "person" entitled to due process protection under the Fifth Amendment.¹⁵⁶ The defendant had cited a U.S. Supreme Court decision in *South Carolina v. Katzenbach*,¹⁵⁷ which held that a "state" is not a "person" entitled to due process protection. The defendant argued that a municipality (Santa Clara) therefore could not be deemed to be a person within the scope of the Fifth

¹⁵²*Id.*

¹⁵³Defendants Motion to Transfer, *Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed Nov. 13, 1982).

¹⁵⁴SWPA was sued in the earlier case of *City of Lamar v. Andrus*, Nos. 75-C-216-C and 76-C-374-C (D. Okla. dismissed May 21, 1977), but the case was dismissed upon stipulation after the plaintiffs were able to work out arrangements to receive federal power. The City of Lamar, Missouri, had commenced suit against the Secretary of Interior and Administrator of SWPA pursuant to the Administrative Procedure Act and Federal Reclamation Act of 1902. See Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 *Env'tl. L.* 601, 607-608 n.26 (1979).

¹⁵⁵*E.g.*, *Santa Clara*, 572 F.2d at 675.

¹⁵⁶*Id.*

¹⁵⁷*South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

Amendment if its “progenitor”, the state, was not.¹⁵⁸ *In dicta*, the Ninth Circuit appeared to disagree, mentioning a Second Circuit decision in *Township of River Vale v. Town of Orangetown*¹⁵⁹ which held that “a municipal corporation like any other corporation is a ‘person’ within the meaning of the [Constitution].”¹⁶⁰ Without providing a final ruling on this issue, the Court assumed that *Santa Clara* was a “person” for purposes of the summary judgment motion under review.¹⁶¹

Next, the question of whether Santa Clara had a protectible “property” interest in Central Valley Project power was divided into two separate inquiries: (1) *vis-a-vis* preference entities; and, (2) *vis-a-vis* non-preference entities. In considering the City of Santa Clara’s “property” interest as against other preference entities, the Court acknowledged that the test for determining whether such interest is sufficient to warrant application of the Due Process Clause “is not clearly defined.”¹⁶² The test ultimately adopted was the one set forth by the Supreme Court in *Board of Regents v. Roth*.¹⁶³

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.¹⁶⁴

Following this broad guideline, the Ninth Circuit ruled that Santa Clara had no “entitlement” to Central Valley Project power as against other preferred entities. It reasoned that although Santa Clara was entitled to a statutory preference under the reclamation laws, the Secretary of Interior had nonreviewable discretion to “discriminate” among preference customers in determining exactly who would receive an allocation.¹⁶⁵ As a result, Santa Clara’s expectations were not tantamount to an actual property right.

Next, the Court considered Santa Clara’s due process rights as against a *non-preference* private utility. Relying upon *Pooling Association*, it succinctly concluded that such rights existed and should be protected because Santa Clara derived a clearcut “entitlement” *vis-a-vis* private utilities under the preference clause.¹⁶⁶

Having decided that due process protection should be afforded to Santa Clara when competing against non-preference utilities, the next step was to determine: “[w]hat process is due?”¹⁶⁷ Without providing a final answer to its own riddle, the Court discussed two possible contingencies.

First, the Court noted that it would be a violation of the preference clause for the Secretary of Interior to sell federal power to a non-preference private utility while refusing to sell to an “eligible” preference entity that had offered to purchase the power.¹⁶⁸ The Court implied that an eligible preference entity is one that is “ready, willing and able” to receive the federal power.¹⁶⁹

¹⁵⁸*Santa Clara*, 572 F.2d at 675.

¹⁵⁹*Township of River Vale v. Town of Orangetown*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

¹⁶⁰*Id.* at 1100-01.

¹⁶¹*Santa Clara*, 572 F.2d at 675.

¹⁶²*Id.*, quoting *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976).

¹⁶³*Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹⁶⁴*Id.* at 577.

¹⁶⁵*Santa Clara*, 572 F.2d at 676.

¹⁶⁶*Id.*

¹⁶⁷*Id.*

¹⁶⁸*Id.*

¹⁶⁹*Id.*; *Central Lincoln Peoples’ Util. Dist. v. Johnson*, 686 F.2d 708, 715 (9th Cir. 1982).

Second, the Ninth Circuit stated that there could only be one acceptable justification for refusing to sell Central Valley Project power to a preference entity while selling to a non-preference entity: "that, in the judgment of the Secretary, to sell to the preference entity will 'impair the efficiency of the project for irrigation purposes' . . . ," a result disallowed by the reclamation laws.¹⁷⁰

The conclusion reached was that the two contingencies should be evaluated and ruled upon by the trial court, without need for remand to the Secretary of Interior for a due process-type hearing.¹⁷¹ The case was settled among the parties following its remand to the trial court.

2. *Greenwood*

The question of whether a preference entity is entitled to and deprived of due process was again raised in *Greenwood* by way of defendants' motion for partial summary judgment. Relying upon *Santa Clara*, the defendants argued that *vis-a-vis* other preference entities, Greenwood had no property interest that would entitle it to due process.¹⁷² They explained that since SEPA had nonreviewable discretion to select among preference entities for the sale of federal power, the plaintiff could not reasonably expect to have an entitlement to such power under Section 5 of the Flood Control Act of 1944.¹⁷³

As to *non-preference* entities, the defendants argued that plaintiff had no definable property interest because it was located outside of the geographic marketing area designated by SEPA for the power in question. In addition, Greenwood had never before received or been entitled to receive SEPA power. If anything, argued the defendants, Greenwood's position was even weaker than the City of Santa Clara's because the latter suffered a withdrawal of power rather than the denial of an initial request to purchase.¹⁷⁴

Finally, the defendants in *Greenwood* asserted that even if plaintiff had possessed a quantifiable property interest in SEPA's power and therefore was entitled to receive due process protection (as against both preference and non-preference entities), the facts in the record established that the plaintiff nevertheless had been afforded "that process which was due."¹⁷⁵

Without reaching the merits of the defendants' first two contentions, the U.S. District Court agreed that the plaintiff had, in fact, been provided sufficient due process even though it had not been given an opportunity for a full evidentiary hearing.¹⁷⁶ In so holding, the Court referred to three factors listed by the U.S. Supreme Court in *Mathews v. Eldridge*¹⁷⁷ for determining what due process protections are required in a given situation: (1) " . . . the private interest that will be affected by the official action; [(2)] . . . the risk of an erroneous deprivation of that interest through procedures used and what value there may be to additional or

¹⁷⁰*Santa Clara*, 572 F.2d at 676, citing 43 U.S.C. § 485h(c) (1976).

¹⁷¹*Santa Clara*, 572 F.2d at 677.

¹⁷²*Id.*; *Greenwood v. Schlesinger*, 515 F. Supp. at 661.

¹⁷³*Greenwood v. Schlesinger*, 515 F. Supp. at 661.

¹⁷⁴*Id. see*, Memorandum of Points and Authorities in Support of Motion of Defendant Municipal Electric Authority of Georgia For Partial Summary Judgment at 34, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

¹⁷⁵*Greenwood v. Schlesinger*, 515 F. Supp. at 661.

¹⁷⁶*Id.*

¹⁷⁷*Mathews v. Eldridge*, 424 U.S. 319 (1976).

substitute procedural safeguards; [and, (3)] . . . the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail."¹⁷⁸

After considering these factors, the Court noted that considerable correspondence had been exchanged between SEPA, plaintiff and plaintiff's United States Senators (pursuant to congressional inquiries) explaining the details of SEPA's power marketing plan. The Court also found that SEPA had afforded plaintiff an informal meeting during which its representatives had been allowed the unfettered opportunity to offer information to SEPA and to question SEPA's personnel. This meeting was conducted *prior* to SEPA's implementation of its marketing plan.

On the basis of these undisputed facts, the *Greenwood* Court concluded that SEPA had provided plaintiff with the essential element of due process: "an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ¹⁷⁹ *Greenwood's* due process claim was thus rejected.

3. *The DOE Act and PMA Procedures For Public Participation in the Formulation of Marketing Policies*

The DOE Act transferred to the Secretary of Energy all power marketing functions of the Secretary of Interior and the Bureau of Reclamation.¹⁸⁰ This transfer included all functions of the government's five regional PMA's.¹⁸¹ An important component of the DOE Act is Section 7191, which governs administrative rulemaking by DOE and the PMA's in conjunction with the Administrative Procedure Act.¹⁸² The DOE Act sets forth certain basic requirements that apply to notice, publication, participation in rulemakings and certain other due process considerations. As a result of the Act, the PMA's have developed their own procedures for public participation in the formulation of power marketing policies.¹⁸³

These procedures have helped to clarify the issue of "what process is due" for entities seeking preference power. For example, the recent *ElectriCities* lawsuit¹⁸⁴ does not include the same type of due process and APA-related procedural

¹⁷⁸*Greenwood v. Schlesinger*, 515 F. Supp. at 661.

¹⁷⁹*Greenwood v. Schlesinger*, 515 F. Supp. at 661, 662, *quoting* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

¹⁸⁰Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.* (Supp. 1977).

¹⁸¹42 U.S.C. § 7252 (Supp. 1977).

¹⁸²5 U.S.C. §§ 501 *et seq.* (1976).

¹⁸³*E.g.*, Southeastern Power Administration Public Participation in Formulation of Marketing Policy, Final Procedure, 43 Fed. Reg. 29,186 (1978).

¹⁸⁴*ElectriCities v. Southeastern Power Admin.*, No. 82-888-CIV-5 (E.D. N.C. filed July 29, 1982); *but see*, *Arkansas v. Hodel*, No. LR-C-82-807 (E.D. Ark. filed Nov. 13, 1982).

allegations that were so significant in *Santa Clara* and *Greenwood*.¹⁸⁵ Indeed, the procedures that have been adopted by the PMA's appear to provide even greater due process protection to the public-at-large than is required under the law.¹⁸⁶

Section 7191(a) of the DOE Act incorporates the APA by reference.¹⁸⁷ Section 7191(b) supplements the APA and requires that notice of any proposed rule, regulation or order must be published in the Federal Register.¹⁸⁸ Such publication must be accompanied by a statement setting forth the need for and probable effect of such proposed agency action. Provision is also made for utilization of other "effective means of publicity" to notify concerned persons of the nature and probable effect of the rule, regulation or order. In each instance, a minimum of thirty days following publication must be allowed to provide an opportunity for comment before the agency action is promulgated.¹⁸⁹

Section 7191(c) sets forth rulemaking procedures which the Secretary of Energy must follow in situations that could be deemed to include the development of federal marketing policies.¹⁹⁰ Specifically, the Secretary must provide an opportunity for oral presentation of views, data, and arguments.¹⁹¹ In addition, affected persons may submit written material supporting their positions¹⁹² and a transcript of the oral presentation must be kept.¹⁹³

E. Challenges To The Form Of The Power Marketing Plan

One aspect of preference power litigation which requires careful attention to detail by both the litigants and the courts is examination of the form of the marketing plan in question. At this point in the article, it should come as no surprise that preference clauses ordinarily apply to "sales" of federally-marketed power. The fact that a sale of power is being made, however, does not necessarily preclude differing opinions over the nature of the sale and the question of who the sellers and buyers are for purposes of the preference clause. The fungibility of electrons, coupled with the fact that contractual arrangements often are not literally descriptive of the

¹⁸⁵The issue in *Greenwood v. Schlesinger* of whether SEPA was required by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 *et seq.* (1976), to make or publish rules or regulations relating to the development of its marketing policy for three hydroelectric projects is still partially unresolved. At the time the *Greenwood v. Schlesinger* suit was filed, § 553(a)(2) of the APA provided SEPA with a "public property" exception to the rulemaking requirement of the APA. Since federal power from the hydroelectric projects is deemed to be public property, SEPA was not required to develop any formal rules concerning the disposition of its power. In § 7191(b)(3) of the DOE Act, Congress eliminated the "public property" exception; however, this legislation did not have a retroactive effect (42 U.S.C. § 7295(c)(1) and (2) (Supp. 1977)), and therefore did not apply in *Greenwood v. Schlesinger*. Still at issue in *Greenwood v. Schlesinger* is the question of whether SEPA did, in fact, promulgate formal rules even though it was not so required. If rules were developed, the Court has indicated that they should have been published pursuant to § 552 of the APA, which requires publication of existing rules. 515 F. Supp. at 659-61. For a recent decision declaring a PMA's power marketing procedures inconsistent with the Administrative Procedure Act and the Department of Energy Organization Act, see *City of South Sioux City v. Western Area Power Admin.*, No. CV82-L-107 (D. Neb. January 31, 1983).

¹⁸⁶*E.g., compare* Southeastern Power Administration Public Participation in Formulation of Marketing Policy, Final Procedure, 43 Fed. Reg. 29,186 (1978) to Section 7191 of the DOE Act. See also, *Santa Clara*, 572 F.2d 660 and *Greenwood v. Schlesinger*, 515 F. Supp. 653.

¹⁸⁷42 U.S.C. § 7191(a) (Supp. 1977).

¹⁸⁸*Id.* at § 7191(b).

¹⁸⁹*Id.*

¹⁹⁰*Id.* at § 7191(c).

¹⁹¹*Id.* at § 7191(c)(1).

¹⁹²*Id.* at § 7191(c)(2).

¹⁹³*Id.* at § 7191(c)(3).

underlying operations utilized to fulfill contractual commitments, can add to the difficulty of determining the exact legal components of the sales transaction and the proper identities of the involved parties.

The decisions discussed below all included an investigation into the form of the contractual arrangements involved. One lesson which can be gained from these decisions is that the form of the contractual arrangements may or may not accurately reflect their true substance.

1. *The Clark Hill Opinion*

In *Clark Hill*,¹⁹⁴ the Attorney General addressed the validity of certain marketing arrangements proposed by the Georgia Power Company under Section 5 of the Flood Control Act of 1944¹⁹⁵ for the Clark Hill reservoir project.¹⁹⁶ Although SEPA sought to market the project's output to preference entities, neither they nor the government owned transmission facilities connecting their systems to the project.¹⁹⁷ The Georgia Power Company, a non-preference investor-owned utility, owned the only available transmission facilities.¹⁹⁸

Under the proposed contract, SEPA was to sell Clark Hill power to Georgia Power at agreed-upon rates. Georgia Power agreed in turn to sell power to preference entities designated by SEPA at a higher rate in order to cover the costs of "carrying, transforming and delivering the energy."¹⁹⁹ Incorporated into the contract was a recitation of the Section 5 standards and a representation that the sales to Georgia Power satisfied those provisions.²⁰⁰ The contract was submitted to the Attorney General by SEPA as a result of objections raised by the Georgia Electric Membership Corporation ("GEMC"), a preference entity which wished to purchase Clark Hill power from SEPA directly, but which lacked existing transmission facilities needed for the proposed purchase.

Attorney General Brownell read into Section 5 the "reasonable time" provision of certain other preference statutes,²⁰¹ and determined that GEMC's then-existing lack of transmission facilities would not void the preference due it unless GEMC failed to acquire the ability to take the power within a reasonable time.²⁰² He then addressed the sale-resale form of the proposed arrangement:

Nor, in the circumstances here present, does the Secretary, in my judgment, discharge his statutory duty of giving a preference in "the sale" of power to public bodies and cooperatives by disposition to a private company under an arrangement whereby the latter obligates itself to sell an equivalent amount of power to preference customers to be designated by the Secretary. *Cf. United States v. City and County of San Francisco*, 310 U.S. 16. This is what the proposed contract amounts to: it is not a wheeling arrangement for transmission of power belonging to another over the lines of the Georgia Power Company.²⁰³

¹⁹⁴41 Op. Att'y Gen. 236 (1955).

¹⁹⁵16 U.S.C. § 825s (1976).

¹⁹⁶41 Op. Att'y Gen. at 236.

¹⁹⁷*Id.* at 238.

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰*Id.*

²⁰¹*E.g.*, the Bonneville Project Act, 16 U.S.C. § 832c (1976).

²⁰²41 Op. Att'y Gen. at 244.

²⁰³*Id.*

benefit of certain preference entities, did not constitute a "sale" of power to PG&E in violation of the preference laws.²²⁹ The Ninth Circuit disagreed.²³⁰

The decisions of neither the trial court²³¹ nor the Ninth Circuit describe these contractual arrangements²³² in detail, but they are essentially as follows. With respect to the handling of excess capacity deliveries by the Government, the contract established a "Capacity Account" reflecting the accumulated sales and purchases of capacity between the Government and PG&E since January 1, 1965.²³³ A "Capacity Exchange Account" was also established.²³⁴ PG&E agreed to purchase any excess capacity delivered, and the Government agreed to purchase sufficient capacity from PG&E to compensate for any shortfall between the delivered capacity and the total demands of the preference customers served.²³⁵ The Government's purchases were charged first against the Capacity Account to the extent that PG&E's purchases of excess capacity constituted a positive balance in that account.²³⁶ If the Capacity Account had a zero balance, the Government's purchases were charged against the Capacity Exchange Account unless the purchase was caused by the Government's delivery of less than the contractually-required minimum.²³⁷ In that event, the Government purchases were not credited to any account.

The Government was charged monthly for these purchases. Similarly, PG&E was charged monthly for capacity purchased for its own use from the Government.²³⁸ The Government's capacity purchases "from" the Capacity Exchange Account were to be repaid in kind within five years, from capacity which otherwise would be sold to PG&E.²³⁹ A capacity "surcharge" equal to 15% of the amount required to be returned was to be added to the Government's payback obligation if the capacity was not repaid within five years.

The arrangements concerning the "banking" of energy were similar, providing for two "Energy Accounts." Energy Account No. 1 was established with a positive balance equal to the amount of PG&E's energy purchases from the Government before execution of the contract.²⁴⁰ Energy Account No. 2 was designed to reflect the accumulated balance of energy purchases between PG&E and the Government.²⁴¹ Energy supplied by PG&E to supplement the shortfall between the Government's deliveries and the total power allocations to preference customers was charged sequentially against Energy Account Nos. 1 & 2 until their balances reached zero and, thereafter, against other "sources available" to PG&E.²⁴² The Government was charged for the energy monthly, at different rates depending upon the account or source from which the energy was "obtained" from PG&E.²⁴³ PG&E was similarly

²²⁹*Id.* at 669.

²³⁰*Id.* at 670.

²³¹*Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), *aff'd sub nom.* *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

²³²*See* Contract Between the United States of America and Pacific Gas and Electric Company for the Sale, Interchange, and Transmission of Electricity Capacity and Energy, Contract No. 14-06-200-2948A [hereinafter cited as PG&E Contract].

²³³PG&E Contract, Article 20(a).

²³⁴PG&E Contract, Article 20(e).

²³⁵PG&E Contract, Article 22.

²³⁶PG&E Contract, Article 21(a)(1).

²³⁷PG&E Contract, Articles 20(e), 21(a)(2).

²³⁸PG&E Contract, Article 22(b).

²³⁹PG&E Contract, Article 20(e)(2).

²⁴⁰PG&E Contract, Article 20(b).

²⁴¹PG&E Contract, Article 20(c).

²⁴²PG&E Contract, Article 21(b).

²⁴³PG&E Contract, Article 22(c)(2).

charged for energy purchased for its own use, even if credited to an account.²⁴⁴

Finally, the contract also established an annual "Energy Exchange Account." Under this account, PG&E provided the Government with energy needed in connection with the Central Valley Project. The Government was required to return as much of the energy as possible within each calendar year. Since it was possible that the Government could return more energy than it purchased in a given year, PG&E and the Government agreed that the difference would be purchased by the appropriate party at a specified rate.²⁴⁵

The basic intent of these complicated provisions was, according to the Government, to "[s]tor[e] up power with the utility [PG&E] for the future benefit of selected preference customers."²⁴⁶ Although agreeing that the intent was consistent with the preference laws, the Court determined that the means to that end were not:

A sale is no less a sale because the buyer is obliged, upon the seller's demand, to resell an equivalent amount to the seller. The plain fact is that the power which is conveyed to PG&E does not sit idly in storage, awaiting withdrawal by the government. Instead it is resold by PG&E to its own customers at a substantial mark up. This is a sale, regardless of the verbiage employed to characterize the arrangement.²⁴⁷

Noteworthy is that the accumulated balances in the accounts were substantial.²⁴⁸ The Court itself noted that the "sales to PG&E are in such high quantity that this non-preference customer has become the Bureau's [*i.e.*, the Government's] largest customer."²⁴⁹

The invalidation of "banking" in *Santa Clara* should not be construed as necessarily marking the end of contractual mechanisms generally referred to as "banking" arrangements. They are widely and beneficially used by other PMA's in a variety of forms. Any reader who has braved the above description of the *Santa Clara* contract provisions should at least appreciate their complexity. A meaningful evaluation of these arrangements can be made on little more than a case by case basis, although perhaps with a common standard in mind. The inquiry should be: do the "banking" provisions, when viewed in the context of operating realities and practical considerations, frustrate or further the preference policy of maximizing low cost preference power allocations to public bodies and cooperatives?²⁵⁰

5. *Central Lincoln*

Unlike the majority of preference lawsuits, *Central Lincoln*²⁵¹ involved a contest between industrial and preference customers. At stake was non-firm power

²⁴⁴PG&E Contract, Article 22(b)(2).

²⁴⁵PG&E Contract, Article 20(d).

²⁴⁶*Santa Clara*, 572 F.2d at 671.

²⁴⁷*Id.*

²⁴⁸As of September 30, 1976, it is understood that the Energy Account No. 1 had a balance of approximately 12.2 billion kWh, Energy Account No. 2 had a balance of approximately 15.4 billion kWh, and the Capacity Account's balance was approximately 30 million kilowatt months.

²⁴⁹*Santa Clara*, 572 F.2d at 670 n.7.

²⁵⁰A case with the potential to shed more light on the validity of so-called "banking" arrangements is *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 19, 1977). The complaint there alleges, *inter alia*, that SEPA is violating Section 5 of the Flood Control Act of 1944 "by selling federal power to non-preference customers while denying such power to Greenwood." Of course, the plaintiff and the defendants have differing views as to what, if any, bearing the *Santa Clara* decision should have on the validity of the energy "banking" arrangements embodied in the subject contracts.

²⁵¹*Central Lincoln Peoples' Util. Dist. v. Johnson*, 686 F.2d 708 (9th Cir. 1982).

marketed by the Bonneville Power Administration ("BPA") under the Pacific Northwest Electric Power Planning and Conservation Act (the "Act").²⁵²

BPA interpreted the Act to require a departure from its traditional view that the preference clause of the Bonneville Project Act²⁵³ applied to firm and non-firm power alike.²⁵⁴ In the first contracts offered under the Act, BPA broke with the past by selling non-firm energy to its Direct Service Industrial customers ("DSI's") first, and to its preference customers second.²⁵⁵ Defendants' position was that the DSI's effectively acquired a preference for non-firm energy²⁵⁶ over BPA's preference entities under the Act.

In authorizing BPA to sell energy to existing DSI's, Congress stated in Section 5(d)(1)(A) of the Act that "[s]uch sales shall provide a portion of the Administrator's reserves for firm power loads within the region."²⁵⁷ "Reserves" are defined in Section 3(17) of the Act as power needed to avoid shortages to firm power customers.²⁵⁸ BPA argued that allocating non-firm energy to preference customers first and DSI's second would render the DSI's non-firm power a reserve for the non-firm preference customers, rather than as a reserve for firm customers as Section 5(d)(1)(A) provides.²⁵⁹ In other words, at times when the available non-firm energy was insufficient to meet the needs of both preference entities and DSI's, the DSI's would forfeit their energy in order that BPA meet the preference entities' non-firm needs to the extent possible, effectively backing up (or acting as a reserve to) the non-firm preference entities.

The Court disagreed. The fact that the application of the preference clause to the non-firm energy could deprive the DSI's of non-firm power did not mean that the DSI's energy was being used as a reserve for preference entities' non-firm energy.²⁶⁰ Such an interruption to DSI service would be due to the lack of enough energy to satisfy both groups' needs, not from the use of energy allocated to any reserve.²⁶¹ Energy subject to the reserve requirements of Section 5(d)(1)(A) would exist only when there was a surplus of energy over the non-firm needs of both preference and DSI customers.²⁶² The Court noted that some support for both positions could be found in the Act's legislative history, but would not assume that long-standing preference policy was intended by Congress to be overridden in such a roundabout manner.²⁶³

Also rejected by the Court was the claim that these arrangements were in the overall interest of preference customers and therefore consistent with the preference clause.²⁶⁴ Since the rates charged by BPA to the DSI's were higher than those charged to preference entities, BPA argued that it would profit more and thereby be able to keep preference rates low and build reserves simultaneously.²⁶⁵

²⁵²Pub. L. No. 96-501, 94 Stat. 2697 (1980).

²⁵³16 U.S.C. § 832c(a) (1976).

²⁵⁴*Central Lincoln*, 686 F.2d at 711.

²⁵⁵*Id.* at 710.

²⁵⁶Under the Act, each quartile of DSI power is subject to different restrictions. *Id.* At issue in *Central Lincoln* was first quartile energy, and the characterization in the text of BPA's preference should presumably be limited to such energy.

²⁵⁷*Central Lincoln*, 686 F.2d at 711.

²⁵⁸*Id.* at 712.

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹*Id.*

²⁶²*Id.*

²⁶³*Id.*

²⁶⁴*Id.* at 715.

²⁶⁵*Id.*

Even if true, the immediate effect was to prefer DSI's over preference customers, not *vice versa*, and was therefore considered by the Court to be contrary to the preference clause and *Santa Clara*.²⁶⁶

The Ninth Circuit's decisions in *Central Lincoln* and *Santa Clara* indicate that a trend may be in the works — deferred gratification is insufficient to satisfy the preference clause. In each case, the Court examined the form of the marketing arrangements involved, matching both conceptual contract and actual operating effects against the preference clause and concluded that long-term or future compliance with the preference clause does not justify intermediate departures.

F. Antitrust Challenges To Federal Power Marketing

The application of the antitrust laws to federal power marketing is an area where the waters are still largely uncharted. The threshold questions are whether the antitrust laws apply at all; and if so, which laws and in what context.

The entire issue of whether the antitrust laws apply to federal power marketing was raised in *Greenwood*.²⁶⁷ The plaintiff City of Greenwood tried to inject several antitrust claims into an ongoing lawsuit challenging a SEPA marketing program by means of an amended Complaint filed several years after the original suit was commenced. Although the motion was denied, several of plaintiff's contentions are worth noting because they may reappear in later proceedings.²⁶⁸

First, plaintiff alleged in Count I of its Proposed Amended Complaint that SEPA had additional limitations, other than those set forth by Congress in the Flood Control Act of 1944, when marketing power. By arguing that SEPA must sell its power in conformity with the federal antitrust laws, plaintiff essentially requested that the Sherman²⁶⁹ and Clayton²⁷⁰ Acts be "read into" SEPA's enabling act as a supplement to the power marketing guidelines of Section 5 of the Flood Control Act of 1944.

Greenwood also contended that SEPA's contracts with certain private utilities represented an unlawful restraint of trade and an attempt to monopolize trade or commerce in electric power to areas served by the private utilities in violation of

²⁶⁶*Id.*

²⁶⁷*Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977). The case was originally captioned *Greenwood Utilities Comm'n v. Andrus*, but the Secretary of Energy was substituted as the chief defendant when administrative jurisdiction over the Southeastern Power Administration was shifted from the Department of Interior to the Department of Energy pursuant to Section 302(a) of the Department of Energy Organization Act, 42 U.S.C. § 7152 (Supp. 1977).

²⁶⁸The Complaint was filed on April 20, 1977. Plaintiff submitted its motion for an amended Complaint on July 17, 1979. The Motion was ultimately denied by Senior Judge W. A. Bootle during oral argument conducted on November 5, 1979. See Transcript of Oral Argument before the Honorable William A. Bootle on November 5, 1979, *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

²⁶⁹15 U.S.C. § 1, 2 (1976).

²⁷⁰Act of Congress of October 15, 1914, as amended, 15 U.S.C. §§ 15, 26 (1976).

Sections 1 and 2 of the Sherman Act.²⁷¹ Plaintiff alleged that SEPA and the private utilities had:

- (a) established a restrictive division of markets for federal power limited to the territories of the respective utility companies for the sale, transmission, or delivery of power from federal projects;
- (b) barred any competition for acquisition of federal power by entities not in the service territory of defendant utility companies;
- (c) restricted the benefits of peaking power from the federal projects to the exclusive use of defendant utility companies;
- (d) restricted the wheeling of power to electric systems located within the territory of the defendant utility companies; and
- (e) prevented Plaintiff from obtaining benefits from economy energy, interchange generation and other benefits of pooling.²⁷²

In Count II of its Proposed Amended Complaint, plaintiff introduced an entirely new claim for relief seeking, *inter alia*, treble damages against the proposed private utility defendants for alleged violations of Sections 4 and 16 of the Clayton Act and Sections 1 and 2 of the Sherman Act.²⁷³

The Court denied plaintiff's attempt to amend its Complaint in part for procedural and logistical reasons, as well as potential prejudice to certain defendants. The Court noted its concern with the substance of plaintiff's position, however, during oral argument on the attempted amendment. At one point, Senior U.S. District Court Judge W. A. Bootle interrupted plaintiff's attorney and observed:

THE COURT: I have a little difficulty. The Ninth Circuit, didn't it hold [in *Santa Clara and Arizona Power Authority*] among other things that this Secretary could discriminate all he wanted to as between preference customers? How would you square that with the duty to abide by anti-trust laws if he can discriminate all he wants to as between preference customers?²⁷⁴

Shortly after plaintiff's motion to amend its Complaint was denied, the City of Greenwood commenced an independent cause of action against Mississippi Power Company,²⁷⁵ alleging many of the same types of claims that it had attempted to raise in *Greenwood*. In particular, plaintiff alleged violations of the Clayton and Sherman Acts and requested treble damages as well as injunctive relief. Since the case is still pending, and no federal marketing officials are named as defendants, it is difficult to evaluate the extent to which the outcome will affect federal power marketing decisions.²⁷⁶

G. *Can Congressional Approval Of Project Appropriations Absolve Violations Of The Preference Laws?*

An issue that often arises in preference lawsuits is whether congressional approval of project appropriations can be construed as ratification of federal

²⁷¹Plaintiff's Amended Complaint for Injunctive and Declaratory and Other Required Relief and Treble Damages and To Add Parties, Count I, ¶ 6 at 3, *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

²⁷²*Id.*, Count I, ¶ 10 at 5.

²⁷³*Id.*, Count II at 10.

²⁷⁴Transcript of Oral Argument before the Honorable William A. Bootle on November 5, 1979, at 14, *Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

²⁷⁵*Greenwood Utilities Comm'n v. Mississippi Power Co.*, No. J80-0350(C) (S.D. Miss. filed July 31, 1980).

²⁷⁶In its Answer, however, Mississippi Power Company has alleged that SEPA and affected preference entities are indispensable parties. Answer of Mississippi Power Co., *Greenwood Utilities Comm'n v. Mississippi Power Co.*, No. J80-0350(C) (S.D. Miss. filed July 31, 1980).

marketing decisions.²⁷⁷ To date, the argument has not been made successfully.²⁷⁸

1. *Pooling Association*

In *Pooling Association*, the defendants contended that Congress had effectively “approved” the Secretary of Interior’s plan for allocation of interim power to non-preference private utilities by virtue of its annual appropriations for the Central Arizona Project. The defendants argued that such approval sanctioned any conceivable violation of the preference clause contained in related reclamation laws, hence, the matter was not reviewable by the courts. The Ninth Circuit disagreed.²⁷⁹

The Court readily acknowledged that Congress had been provided ample access to committee reports listing the non-preference private utilities that would be receiving federal power. Nevertheless, the Ninth Circuit reasoned that this fact alone did not warrant the inference of congressional ratification of activities that were alleged by plaintiff to have been conducted in violation of the preference laws. Instead, the Court noted that there was no evidence to indicate that Congress was ever informed that preference entities had sought, but had been denied, the opportunity to purchase the federal power in question.²⁸⁰ Presumably, if such a showing had been properly made in the record, the Ninth Circuit would have been obliged to rule otherwise.

2. *Santa Clara*

Similarly, in *Santa Clara* the federal defendants contended that Congress had approved the Secretary of Interior’s power marketing program when it appropriated funds for the construction of a high-voltage intertie between the Pacific Northwest and the Pacific Southwest. The Ninth Circuit rejected this position stating that in order to sustain a showing of congressional ratification, the Government must “sustain the heavy burden of demonstrating congressional knowledge of the precise course of [agency] action alleged to have been acquiesced in.”²⁸¹

3. *Central Lincoln*

The most recent ruling on congressional ratification in a preference lawsuit was relegated to a footnote in *Central Lincoln*.²⁸² The federal defendants and non-preference defendant/intervenors argued that the Bonneville Administrator had informed Congress of his proposed allocation scheme prior to the enactment of the Pacific Northwest Electric Power Planning and Conservation Act,²⁸³ and that by approving the legislation, Congress had accepted Bonneville’s position. The Ninth

²⁷⁷*Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); *Central Lincoln Peoples’ Util. Dist. v. Johnson*, 686 F.2d 708 (9th Cir. 1982); *Arizona Power Pooling Ass’n v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Defendants’ Answer*, *Greenwood Utilities Comm’n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

²⁷⁸*E.g.*, *Santa Clara v. Andrus*, 572 F.2d 660; *Central Lincoln*, 686 F.2d 708; *Pooling Association*, 527 F.2d 721.

²⁷⁹*Pooling Association*, 527 F.2d at 725.

²⁸⁰*Id.* at 726.

²⁸¹*Santa Clara v. Andrus*, 572 F.2d at 672; *see*, *United States v. Beebe*, 180 U.S. 343, 354 (1901); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 102 n.28 (9th Cir. 1970).

²⁸²*Central Lincoln Peoples’ Util. Dist. v. Johnson*, 686 F.2d at 712 n.4 (9th Cir. 1982).

²⁸³*Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No. 96-501, 94 Stat. 2697 (1980).

Circuit once again rejected this argument, citing *Pooling Association*. The Court observed that there was again no evidence in the record or legislative history of the Act to show that Congress was aware that its approval of appropriations would be interpreted as sanctioning a violation of preference rights.

The message to trial counsel is clear. Any party making this kind of argument bears an extremely heavy burden of proof. Moreover, detailed evidence must be presented indicating clear congressional awareness of the precise violation of preference rights that is alleged to have been sanctioned by Congress.

H. Federal Power Marketing Decisions Versus The National Environmental Policy Act

1. Santa Clara

One of the more refreshing aspects of preference litigation is the ingenuity often demonstrated by attorneys on all sides of the dispute. A particularly creative argument was made in *Santa Clara* to the effect that the Secretary of Interior violated the National Environmental Policy Act ("NEPA")²⁸⁴ by not filing an environmental impact statement. The plaintiff, City of Santa Clara, contended that such a filing should have been made prior to the Secretary's denial of Santa Clara's requests for firm power and before initiating power withdrawals.²⁸⁵ Section 102(2)(c) of NEPA²⁸⁶ requires that federal agencies file impact statements for certain categories of governmental actions. For example, whenever "major Federal actions" are to be undertaken which "significantly affect the quality of the human environment,"²⁸⁷ an impact statement must be prepared.

Santa Clara's attorneys alleged to the trial court that if the City could not obtain low-cost federal power from the Central Valley Project, it would have to construct its own generating facilities or seek power from other sources, which in turn would need to construct new facilities. In either contingency, argued Santa Clara, the environment would be adversely affected. The City also claimed that the loss of low-cost federal power would cause local industries to relocate, thus leaving "diminished resources for Santa Clara to maintain essential services and a pleasing and healthful cultural and physical environment within which to work and prosper."²⁸⁸

Neither the trial court,²⁸⁹ nor the Ninth Circuit,²⁹⁰ were swayed by plaintiff's eloquence. Describing the City's claims as "fanciful hypotheses," the appellate court nevertheless assumed their accuracy for purposes of considering the defendants' summary judgment motion.²⁹¹

Both the trial court²⁹² and the Ninth Circuit²⁹³ relied heavily upon a decision of

²⁸⁴42 U.S.C. §§ 4321 *et seq.* (1976).

²⁸⁵*Santa Clara v. Andrus*, 572 F.2d at 679.

²⁸⁶42 U.S.C. § 4332(2)(c) (1976).

²⁸⁷*Id.*

²⁸⁸*City of Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1263 (N.D. Cal. 1976), *aff'd sub nom.* *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

²⁸⁹*Id.*

²⁹⁰*Santa Clara v. Andrus*, 572 F.2d at 680.

²⁹¹*Id.*

²⁹²*Santa Clara v. Kleppe*, 418 F. Supp. at 1264-65.

²⁹³*Santa Clara v. Andrus*, 572 F.2d at 680.

the Second Circuit in *Hanley v. Kleindienst*²⁹⁴ in arriving at their rulings. In pertinent part, the Second Circuit stated:

[I]n deciding whether a major federal action will "significantly" affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.²⁹⁵

The Ninth Circuit's conclusion regarding NEPA was that it would be highly improbable that one allocation scheme would have a more "deleterious impact than any other," when the entire geographic area served by the Central Valley Project is taken into account.²⁹⁶

2. *Greenwood*

The question of whether a federal marketing agency was required to prepare an environmental impact statement, prior to implementing its marketing plan, was also raised in *Greenwood*. Plaintiff contended that SEPA's action in refusing to include Greenwood's geographic area in its marketing plan was improper under Section 102 of NEPA, absent an impact statement.²⁹⁷

Finding that Greenwood's position was similar to the plaintiff's in *Santa Clara*, U.S. District Court Judge Wilbur D. Owens, Jr. rejected the claim. The Court noted that plaintiff had submitted no evidence to indicate that there would be "any substantial quantitative or qualitative increase in any adverse conditions presumably existing at the time the decision not to market power to plaintiff was made."²⁹⁸

An interesting point never reached in *Greenwood* is that the plaintiff's goals probably would not have been achieved even if Greenwood's allegations concerning the need for an environmental impact statement had been accepted by the Court. The City was unable to explain why it would not also have been necessary for SEPA to prepare an impact statement before allocating power to Greenwood, which was the only form of relief sought.²⁹⁹

I. *Available Forms Of Judicial Relief*

Surprisingly, one of the less convoluted aspects of preference litigation to date has been the type of relief which can be granted by a court in the event the plaintiff successfully establishes a violation of the preference laws. The complainants generally seek declaratory and injunctive relief deeming the power marketing plan in question void, prohibiting the Government from implementing the voided plan and, perhaps, ordering the government to develop a lawful power marketing plan.

²⁹⁴471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

²⁹⁵*Id.* at 830-31, *cited in* *Santa Clara v. Kleppe*, 418 F. Supp. at 1264.

²⁹⁶*Santa Clara v. Andrus*, 572 F.2d at 680.

²⁹⁷*Greenwood v. Schlesinger*, 515 F. Supp. at 662.

²⁹⁸*Id.* at 663.

²⁹⁹*See* Memorandum of Points and Authorities in Support of Motion of Defendant Municipal Electric Authority of Georgia For Partial Summary Judgment at 41, *Greenwood v. Schlesinger*, 515 F. Supp. 653 (M.D. Ga. 1981).

Upon a finding of a violation, the courts have consistently remanded the case to the trial court or administrative agency, as the case may be, for further consideration consistent with the court's opinion.³⁰⁰

This is, of course, consistent with the fact that judicial review of power marketing policies has been governed by the review sections of the Administrative Procedure Act.³⁰¹ Although the appropriate scope of judicial review has received its share of attention,³⁰² the form of relief seems to either have been taken for granted or flowed naturally from the determination of the scope of review. In addition, general principles of administrative law would not ordinarily permit the courts to enter the power marketing business, and the courts are undoubtedly thankful for that.

Difficult problems are presented when a preference customer seeks retroactive relief to compensate it for the period, if any, during which it was deprived of lower cost preference power. Although monetary damages could conceivably compensate the injured preference entity for its economic losses, money damages do not appear to be recoverable from the government in this type of lawsuit, for the reasons discussed below.

By way of an amendment to the Administrative Procedure Act, Congress waived sovereign immunity in cases where "relief other than money damages" is sought.³⁰³ Of course, the Federal Tort Claims Act³⁰⁴ exposes the Government to monetary liability in tort. Even if a plausible argument could be concocted to characterize the denial of a preference power allocation as a tort, it appears that money damages for previous denials of preference power still would not be available. Excluded from the types of claims for which money damages can be granted are, *inter alia*, claims "based upon the act or omission of an employee of the Government, executing due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid"³⁰⁵ Also excepted are cases founded on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"³⁰⁶ An apparently untested tack in preference litigation to date is a claim that the agency did not "exercise due care" in executing the preference laws and that monetary liability under the Federal Tort Claims Act to compensate for lost power allocations should therefore be available.

An alternative form of relief would be a "retroactive" preference power allocation.³⁰⁷ *Santa Clara*³⁰⁸ represents the only decision discovered addressing this point. The City of Santa Clara succeeded in voiding a marketing arrangement by which the Government "banked" large amounts of preference power with PG&E, to the partial exclusion of Santa Clara, a preference entity.³⁰⁹ The Ninth Circuit offered

³⁰⁰*E.g.*, Pooling Association, 527 F.2d at 728, 730; *Santa Clara v. Andrus*, 527 F.2d at 680; *Central Lincoln*, 686 F.2d at 715.

³⁰¹5 U.S.C. §§ 701, 702.

³⁰²*See* discussion *supra* Section III C.

³⁰³5 U.S.C. § 702, as amended by Pub. L. No. 94-574, 90 Stat. 2721 (1976).

³⁰⁴28 U.S.C. § 2672 (1976).

³⁰⁵*Id.* § 2680(a).

³⁰⁶*Id.*

³⁰⁷The word "retroactive" is used figuratively because it is not physically possible to actually store or warehouse large amounts of electric power, except to the extent that batteries or pumped storage projects are considered to be an equivalent to storage.

³⁰⁸572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

³⁰⁹*See* discussion *supra* Section III E.

the following observations regarding Santa Clara's request for a "retroactive" allocation to cure this violation:

The retroactive power allocation which Santa Clara seeks would not, we think, work an intolerable burden on governmental functioning. As noted above, the relief requested by the City can be granted by simply adjusting the government's bank account with PG&E. Such an adjustment would not affect prior transactions between the government and its other CVP [i.e., preference] customers. It would merely hasten depletion of the bank account and so would accelerate the date upon which customer demand for CVP power will exceed the available supply. Inasmuch as all of the banked power is ultimately committed to preference users, depletion of the account with PG&E is, in any event, inevitable.³¹⁰

That huge amounts of power³¹¹ were "stored" in the Government's account with PG&E was undoubtedly critical to Santa Clara's success in achieving judicial approval of a "retroactive" allocation. The quoted language expressly recognizes that: (1) depletion of the account was inevitable anyway; and (2) probably most important, the "retroactive" allocation would *not* affect prior transactions with other preference entities.³¹² It is probably the rare case which would present such fortuitous circumstances from the standpoint of the entity seeking a "retroactive" allocation.

The pending *Greenwood* lawsuit³¹³ bears the potential for further consideration of the propriety of "retroactive" allocations. The issue has neither been expressly presented nor decided, but received brief attention during a status conference among the parties and the Court.³¹⁴

IV. CONCLUSIONS

Whether long-standing federal policy giving preference in the sale of federally-marketed electric power to municipalities and other public bodies will withstand the rigors of increased litigation is yet to be determined. Preference laws should not be construed in the abstract without regard to operating realities or other pragmatic considerations, nor should they be undermined by the litigation process. For the most part, strict but sensible interpretations of the preference laws seem to have been achieved thus far. Perhaps the one truism which has been underscored by the cases considered in the article is that, at least from a customer's perspective, the key difference between a good and bad marketing plan is that a good plan makes preference power available to your system and a bad plan does not.

³¹⁰*Santa Clara v. Andrus*, 572 F.2d at 679.

³¹¹*See* note 248, *supra*.

³¹²*Santa Clara*, 572 F.2d at 679.

³¹³*Greenwood Utilities Comm'n v. Edwards*, No. 77-179-MAC (M.D. Ga. filed April 20, 1977).

³¹⁴*Id.*, *see* Transcript of Status Conference at 11, 35 (April 13, 1982).