

NOTE

AGENCY CONDITIONS ON THE RELICENSING OF HYDROPOWER PROJECTS ON FEDERAL RESERVATIONS

I. INTRODUCTION

As the turn of the century approaches, the need to relicense numerous hydroelectric projects will have widespread implications for the future of hydropower projects in the United States. The forty-year period from 1930 to 1970 marked an era of major U.S. dam-building activity, with the largest dams seen as architectural wonders and further evidence of mankind's technologically-efficient, environmentally-friendly use of natural resources. Pursuant to Part I of the Federal Power Act¹, the Federal Energy Regulatory Commission (FERC) or its predecessor, the Federal Power Commission (FPC), must license all new hydropower projects built by anyone other than the Federal Government. These licenses are valid for a "fixed period, not to exceed fifty years, and a new license is required for a project to continue in operation."² Consequently, we are currently in the midst of the fifty-year expiration period for the licensing of a majority of the nation's largest and most expansive projects. Between 1993 and 2010, "the licenses for 419 projects [will] expire,"³ accounting for 812 of the nation's hydroelectric dams and roughly half of the current total electrical generating capacity of all FERC licensed hydroelectric projects.⁴ In most cases, projects with expired licenses have been operating under annual licenses pending completion of relicensing proceedings.⁵ Therefore, the FERC's resolution of disputes arising over statutory interpretation of the Federal Power Act is critical both in offering guidance in the relicensing procedure and in assessing the authority bestowed upon federal land-regulating agencies in the implementation of licensing conditions.

1. 16 U.S.C. §§ 791-823(b) (1994).

2. Andrew H. Sawyer, *Hydropower Relicensing In The Post Dam-Building Era*, 11 FALL NAT. RESOURCES & ENV'T 12 (1996).

3. *Id.*

4. American Rivers, *Facts about Hydropower and Dams* (visited Feb. 9, 1998) <<http://www.amrivers.org/facts.html>>. American Rivers is a national river-conservation organization. In 1996, the FERC estimated the total electrical generating capacity of all FERC licensed hydroelectric facilities to be about 49.4 GW (49,400,000 KW). *Id.*

5. The FERC issues annual licenses pursuant to section 15(a)(1) of the Federal Power Act. 16 U.S.C § 808(a)(1) (1994).

Enacted initially as the Federal Water Power Act of 1920,⁶ the Federal Power Act controls the issuance of hydropower licenses and was passed during a period when the benefits of hydropower were easily recognizable and the detrimental effects were either unknown or dismissed as incidental. However, recognizing the potential for changes in policy and technology, President Theodore Roosevelt vetoed an earlier hydropower licensing bill which would have granted perpetual licenses. The relicensing requirement permits a later generation to reexamine the validity of the project under the laws and regulations presently in effect and weighed against the public interest, as it is currently perceived.⁷

The passage of time as proven Roosevelt correct. Technological advances have uncovered many adverse effects caused by dams and there has been a strong movement toward protection of the environment, as indicated by the passages of the National Environmental Policy Act⁸, the Clean Water Act⁹, the Endangered Species Act¹⁰, and the Electric Consumers Protection Act of 1986 (ECPA).¹¹ None of these regulations were in effect when the original licenses were granted under the Federal Power Act. Consequently, uncertainty abounds in the relicensing process and business and environmental interests struggle to interpret the Federal Power Act to achieve quite different results.

This Note analyzes the approach adopted by the FERC as it attempts to establish a coherent procedure for relicensing hydropower projects located on federal reservations. Through judicial decisions, the FERC has been denied the authority to reject the recommendations of the governmental agencies in charge of managing these lands. Section II of this Note addresses the specific sections of the Federal Power Act involved in relicensing on federal reservations, as well as some of the existing case law addressing these sections. Section III analyzes the circumstances, arguments, and holding in *Southern California Edison Company v. Federal Energy Regulatory Commission*,¹² which concerns the FERC's interpretation of section 4(e) of the Federal Power Act. Finally, Section IV concludes by identifying the current policy considerations that may have led to the Court's assessment of the newly recognized authority of federal land regulating agencies, and forecasting the effects this holding will have on future applicants.

6. Pub. L. No. 66-280, 41 Stat. 1063 (1920). The statute was amended and reenacted as Part I of the Federal Power Act when Congress passed the Public Utility Act of 1935. 49 Stat. 803 (1935).

7. See *Edwards Manufacturing Co., Inc.*, 81 F.E.R.C. ¶ 61,255 (1997). In *Edwards*, the FERC denied an application for relicensing and after an analysis of the environmental impacts of continued operation, ordered the hydroelectric project removed. *Id.* However, a settlement with the State of Maine was entered into and judicial review of the FERC's authority to order removal was not sought. *Edwards Manufacturing Co., Inc.*, 83 F.E.R.C. ¶ 61,269 (1998).

8. Pub. L. No. 91-190, 83 Stat. 852 (1970).

9. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

10. Pub. L. No. 93-205, 87 Stat. 884 (1973).

11. Pub. L. No. 99-495, 100 Stat. 1243 (1986).

12. *Southern California Edison v. FERC*, 116 F.3d 507, 325 U.S. App. D.C. 163, Util. L. Rep. P 14,164, 27 Env'tl. L. Rep. 21,195 (D.C. Cir. 1997).

II. REGULATION OF HYDROPOWER PROJECTS ON FEDERAL RESERVATIONS¹³

Congress established the FERC's general authority in section 4 of the Federal Power Act.¹⁴ More specifically, subsection (e) applies to the issuance of licenses for the construction, operation and maintenance of dams, conduits, reservoirs, and other project works along bodies of water over which Congress has jurisdiction through its power to regulate commerce or on public lands and reservations of the United States. Section 4(e) provides:

That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.¹⁵

Under this test, a hydropower project must be consistent and can not interfere with the purpose for which the reservation¹⁶ was created or acquired, which was in most instances for timber production and watershed protection.¹⁷ Historically, the FPC rarely found that hydropower projects circumvented these goals and issued numerous new licenses, with few conditions, for over fifty years.¹⁸

However, more recent national concerns over the preservation and

13. For a more detailed, procedural description of the FERC relicensing process and the applicable statutory requirements which must be met in applying for a hydropower license, see Hydropower Reform Coalition, *Relicensing Tool Kit: Guidelines for Effective Participation In The FERC Relicensing Process*, (visited Feb. 9, 1998) <<http://www.snowcrest.net/chrc/toolkit.html>>

14. 16 U.S.C. § 797 (1994).

15. 16 U.S.C. § 797(e) (1994).

16. This includes: National Forests managed by the U.S. Forest Service, recognized tribal lands, and other reservations managed by the U.S. Bureau of Land Management. For the statutory definition of a reservation, see 16 U.S.C. § 796(2) (1994).

17. During the early part of this century, creation of national forests was regulated by the Organic Administration Act of 1897, 16 U.S.C. § 475 (1897), which "allowed national forests 'to be reserved for only two purposes': conserving water flows and furnishing a continuous supply of timber." *Keating v. Federal Energy Regulatory Commission*, 114 F.3d 1265, 1269 (1997) (citing *United States v. New Mexico*, 438 U.S. 696, 707 (1978)). Today's "purposes" differ due to passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1960), directing agencies to manage "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Keating*, 114 F.3d at 1268.

18. Conditions could be implemented by the FERC or the land agency in charge of regulating the particular reservation. In either case, the original reading of section 4(e) limited these conditions to those "which were deemed necessary for the adequate protection and utilization" of the "purpose for which the reservation was created." Due to this limited interpretation, the FERC ruled "that § 4(e) did not require it to accept without modification conditions on which the Secretary deemed necessary." *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 770 (1984)(which overruled the FERC's interpretation and required mandatory inclusion of agency recommendations).

protection of our natural resources, led to the passage of legislation designed primarily to protect the environment or at a minimum, to include environmental concerns in any appraisal of a proposed hydroelectric project. The passage of the Electric Consumers Protection Act of 1986 (ECPA),¹⁹ was Congress' attempt to account for "all relevant 'public interest' factors to determine whether or on what conditions to approve projects."²⁰ The ECPA added language to the end of section 4(e) of the Federal Power Act requiring that the Commission "shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."²¹ The court in *Rainsong Company v. Federal Energy Regulatory Commission (Rainsong)*²² interpreted the additional language in section 4(e) as creating a two-part analysis for the issuance of licenses. The Commission may determine that an applicant meets the first component, that there is consistency or non-interference with the purpose of creation, but could bar the license request for failure to comply with the newly created second aspect of environmental protection and recreational services.²³ A further nuance of this analysis concerns which governing body is allowed to actually take part in this review. More specifically, the District of Columbia Circuit Court of Appeals in *Keating v. Federal Energy Regulatory Commission*²⁴ held that the authority to administer the "consistency/non-interference" analysis lies with the FERC exclusively and need not defer to another agency's recommendations in this portion of its analysis.²⁵

Once a request for a hydropower license survives this two-part analysis, the FERC will issue the license; however, certain conditions could be affixed which could make the project either uneconomical or too burdensome to implement. Section 4(e) further requires that licenses

19. Pub. L. No. 99-495, 100 Stat. 1243 (1986).

20. John D. Echeverria, *The Electric Consumers Protection Act of 1986*, 8 ENERGY L. J. 61, 70 (1987) (quoting H.R. REP. NO. 934, *supra* note 25. See also, H.R. REP. NO. 99-507 (Mar. 25, 1986), stating that one of the purposes of the Act was to "clarif[y] and improv[e] the Commission's licensing process in assuring adequate environmental protections . . .").

21. 16 U.S.C. § 797(e) (1994).

22. 106 F.3d 269 (1997).

23. The *Rainsong* court held that "the 'purpose for which such reservation was created' controls the finding that is a prerequisite to issuing a license within the reservation. But the statute does not limit the Commission to that condition." The court further surmised, "the Commission, 'shall give equal consideration to the purposes of energy conservation, [etc] . . . A proposed license could be consistent with the purpose for which the national forest was created, yet fail this 'equal consideration' test because of its effect on 'environmental quality.'" *Id.* at 275.

24. 114 F.3d 1265 (1997).

25. *Id.* at 1270. The court found that the FERC had treated "§ 4(e)'s 'consistency' provision as if it depended on the [agency]'s § 4(e) 'conditioning' power." *Id.* The court found this interpretation at odds with *Escondido* and relied on *Rainsong* to find that the Commission erred in relying on the agency recommendation. *Id.* See also, *United States v. New Mexico*, 438 U.S. 696, 713 n.21 (1978).

"shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such resource. . . ."²⁶ The FERC originally interpreted this language of the Act as "requir[ing] it 'to give great weight to the judgments and proposals of the Secretaries of the [the land regulating agencies],' but that under section 10(a)"²⁷ it retained ultimate authority for determining 'the extent to which such conditions will in fact be included in particular licenses.'"²⁸ However, the Court of Appeals for the Ninth Circuit overruled the FERC and "requir[ed] the Commission to accept without modification any license conditions recommended by the Secretary, subject to subsequent judicial review of the property of the conditions."²⁹ The Supreme Court affirmed this decision, thereby requiring the Commission to include in a license any conditions the Secretary deems necessary, which would then be reviewable by the courts of appeals to determine their validity.³⁰ However, the Supreme Court did curb the authority of the land regulating agencies slightly by restricting the "section 4(e) conditions apply only to hydroelectric projects actually situated on federal land reservations, not to projects only affecting downstream reservations."³¹

As a result of this newfound authority, federal land management agencies have taken a broad view of the "purpose" of their reservations, and have issued "wideranging conditions that frequently conflict with the FERC requirements on minimum flows, recreational facilities and other nondevelopmental resource issues."³² Although the Supreme Court, in *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, did limit the types of conditions that the agency can require, namely, that such condition must be "reasonably related" to the protection of the reservation and be supported by substantial evidence in the administrative record,³³ the standards have remained largely ambiguous. The Ninth

26. 16 U.S.C. § 787(e) (1994).

27. 16 U.S.C. § 803 (1994).

28. *Escondido*, 466 U.S. at 771 n.8, (quoting from 6 F.E.R.C. ¶ 61,189, at 61,414 (1979)).

29. *Id.* at 771.

30. *Escondido*, 466 U.S. at 777. The Supreme Court relied on Congressional intent and attached plain meaning to the Federal Power Act to deny the FERC's claim that judicial deference should be granted to the FERC's conclusions and surmised, "the fact that in reality it is the Secretary's and not the Commission's judgment to which the court is giving deference is not surprising since the statute directs the Secretary, and not the Commission to decide what conditions are necessary for the adequate protection of the reservation." *Id.* at 778.

31. Michael C. Blumm, *A Trilogy of Tribes v. FERC: Reforming The Federal Role In Hydropower Licensing*, 10 HARV. ENVTL. L. REV. 1, 31 (1986). The FERC later applied this holding of the court in *Minnesota Power & Light Co.*, rejecting conditions where only a portion of the project was located on a reservation. 75 F.E.R.C. ¶ 61,131 (1996), *appeal docketed*, No. 96-1219 (D.C. Cir. Jun. 27, 1996).

32. Donald H. Clarke, *Relicensing Hydropower: The Many Faces Of Competition*, 11-FALL NAT. RESOURCES & ENV'T 8, 10 (1996).

33. *Escondido*, 466 U.S. at 777. See also *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 (1996).

Circuit Court of Appeals, in the *Rainsong* case, addressed the proper standard of review of agency conditions. The Court stated that "review of agency licensing decisions is limited to asking whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law."³⁴ One petitioner raised an arbitrary and capricious challenge in *Bangor Hydro-Electric Company v. Federal Energy Regulatory Commission* (*Bangor*). There, the petitioner contended that "the costs of [agency's] prescription far outweighed any benefits to fish or the general environment and is therefore unreasonable."³⁵ The *Bangor* court concluded that the agency had not "provided reasonable support—'substantial evidence'—for its 'funding' and its requirement was not 'reasonably related to its goal'."³⁶ Despite the outcome in *Bangor*, this ambiguous and imprecise standard offered little guidance in determining the extent of a land managing agency's authority in implementing conditions. Undaunted by *Bangor*, agencies consistently focused on the protection of the environmental and recreational resources on the federal lands, without regard to the pure economic costs of project operation.³⁷ Challenges, as to the scope of agency-derived conditions and their imposition on the relicensing of hydropower projects, are important issues in *Southern California Edison*, and will be discussed at length in section III, *infra*.

Section 15 of the Federal Power Act governs the distribution of "new licenses and renewals."³⁸ Subsection (a) specifically refers to relicensing procedures, terms and conditions, stating that, "the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations."³⁹ However, the section does not elaborate as to the terms and conditions referred to or the requirements to be considered. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*,⁴⁰ the District of Columbia Circuit Court of Appeals determined that the section 15 "requirements and conditions" referred to section 4(e) as a precondition to issuance of any long-term license.⁴¹ Based

34. *Rainsong*, 106 F.3d at 272, (citing to *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 941 (9th Cir. 1994)).

35. *Bangor*, 78 F.3d at 663.

36. *Id.* at 664.

37. Clarke, *supra* note 32 at 10. The Department of the Interior in *Bangor*, preferred the construction of permanent fish passages as opposed to the use of trucks to carry the fish upstream to spawn, at the expense of the hydropower facility. When petitioner estimated the cost at \$2 million and \$30,000 in lost power benefits annually, Interior was "unmoved, explaining: '[w]e will not sacrifice fish passage effectiveness or compromise fishery management objectives ... simply due to cost considerations.'" *Bangor*, 78 F.3d at 661.

38. 16 U.S.C. § 808 (1994).

39. 16 U.S.C. § 808(a)(1) (1994).

40. 510 F.2d 198, 166 U.S. App. D.C. 245 (1975).

41. *Id.* at 212. The dissent in *Lac Courte Oreilles* raises an important point in the application of section 4(e) requirements. "If section 4(e) is given overtly literal interpretation it would prevent the

on this interpretation, section 4(e) conditions would apply to the relicensing of hydropower projects pursuant to section 15, which specifically mentions "relicensing procedures." However, this also is an interpretation challenged by the petitioners in *Southern California Edison* and will be addressed in greater detail in section III, *infra*.

In short, the FERC has jurisdiction over the relicensing of hydropower projects subject to the conditions created by Congress in the Federal Power Act. The FERC, in its discretion, makes the preliminary determination as to whether proposed projects will be inconsistent or interfere with the purpose for which a reservation was created. Federal land regulating agencies, however, have underlying authority to impose conditions on licenses pursuant to the regulation and protection of their reservations. All parties agree that these concepts apply to original licensing. The current (perhaps recently concluded) debate concerns whether the mentioned procedures should also be instituted in the *relicensing* of hydropower projects. Prior to *Southern California Edison*, the applicability of section 4(e) on relicensing had not been judicially determined, although the FERC has claimed to have the authority since 1989.⁴² It is amid this ambiguity that Edison challenged the use of section 4(e) analysis and agency-instituted conditions in the hydropower project relicensing process.

III. INTERPRETATION OF SECTION 4(e) OF THE FEDERAL POWER ACT

In *Southern California Edison Company v. Federal Energy Regulatory Commission*,⁴³ the Southern California Edison Company (*Edison*)⁴⁴ challenged conditions imposed on its new licenses by the FERC, upon the recommendation of the federal agencies responsible for the administration

use of any lands in a 'reservation' (including tribal lands) in a power project if the purpose for which the reservation was created was to 'give sovereignty over tribal lands.'" Arguably, "[t]hat might be the broad purpose behind the creation of every Indian reservation." The dissent settles on an interpretation that the probable congressional intent of section 4(e) was to "prohibit any use of land within a reservation that would *substantially* interfere with the purpose for which the reservation was created or acquired." (emphasis added) *Id.* at 211.

42. *City of Pasadena Water and Power Department*, 46 F.E.R.C. ¶ 61,004 (1989).

43. *Southern California Edison v. FERC*, 116 F. 3d 507, 325 U.S. App. D.C. 163, Util. L. Rep. P 14,164, 27 Envtl. L. Rep. 21,195 (D.C. Cir. 1997). Petitioner Southern California Edison was the original licensee for the Bishop Creek Project, located in eastern central California. See *Southern Cal. Edison Co.*, 68 F.E.R.C. ¶ 62,058, 64,082 (1994), *reh'g denied*, 70 F.E.R.C. ¶ 61,130 (1995). Most of the project's lands lie within the Inyo National Forest. A much smaller portion of the project sits on lands administered by the Bureau of Land Management. The project works consist of thirteen dams, five powerhouses, and related facilities. The project has a capacity of 26.2 megawatts. 68 F.E.R.C. ¶ 62,058, at 64,064.

44. Also named as petitioner was Pacific Gas & Electric (Pacific) the applicant for a new licensee for the Tule River Project, located in Tulare County, California. Most of the project's lands lie within the Sequoia National Forest, consisting of three dams, a powerhouse, and related facilities. The project has a capacity of 7.9 megawatts. See *Pacific Gas & Elec. Co.*, 65 F.E.R.C. ¶ 62,265, 64,633 (1993), *reh'g denied*, 70 F.E.R.C. ¶ 61,185 (1995).

of the federal reservation. Specifically, Edison argued that section 4(e) of the Federal Power Act only controlled the issuance of *original* licensings and that the corresponding section 4(e) conditions were inapplicable to the relicensing of hydropower projects. Further, Edison contended that section 4(e) conditions are limited to those which relate to the *original* purpose for which the reservation was created. Edison finally challenged the conditions sought by the National Forest Service and Bureau of Land Management as not reasonably related to the goal of protecting and utilizing the reservation, as otherwise inconsistent with the Federal Power Act and as unsupported by substantial evidence. Each of Edison's contentions will be analyzed including the major arguments presented and the holding of the court on each challenge.

The first issue presented to the District of Columbia Circuit Court of Appeals was whether the mandatory conditioning requirement of section 4(e) applies to new licenses as well as to the original licenses.⁴⁵ The Court recognized that it must interpret the Federal Power Act in order to evaluate the FERC orders, and reviewed the FERC's approach under the standards of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*⁴⁶ Under the test in *Chevron*, "if the intent of Congress is clear, that is the end of the matter" and effect must be given to "that unambiguously expressed intent."⁴⁷ However, if "Congress has not directly addressed the precise question at issue" deference will be granted to the FERC's construction as long as it is "permissible,"⁴⁸ that is, reasonable in light of the Act's text, legislative history, and purpose.⁴⁹

Having set the *Chevron* stage, the Court examined Edison's argument for the inapplicability of section 4(e) conditions on the relicensing of hydropower projects. According to Edison, several phrases in section 4(e) demonstrate that Congress intended to restrict that section to original licensing. Statutory language indicates that licenses are issued for the purposes of "constructing, operating, and maintaining" hydropower facilities and that the section's second proviso requires approval from the Army Corp of Engineers for certain "contemplated improvement[s]."⁵⁰ Edison argued that these words imply that section 4(e) applies only to projects that have yet to be built, not to existing projects.⁵¹

The Court found that although the statutory language is clear that section 4(e) applies to original licensings, it saw nothing in the language to bar the section's application, as the FERC argued, to relicensings as well. In fact, several other phrases in section 4 suggest Congress intended it to

45. *Southern Cal. Edison*, 116 F.3d at 509.

46. 467 U.S. 837 (1984). See also *Oconto Falls v. FERC*, 41 F.3d 671, 674 (D.C. Cir. 1994).

47. *Id.* at 842-43.

48. *Chevron USA Inc.*, 467 U.S. at 843.

49. *Southern Cal. Edison*, 116 F. 3d at 511. See, e.g., *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996).

50. 16 U.S.C. § 797 (e) (1994).

51. *Southern Cal. Edison*, 116 F.3d at 511.

apply to all licenses issued under the act. Section 4 “authorize[s] and empower[s]” the Commission to undertake seven activities, including investigating water resources, cooperating with state governments, and publicizing the results of its research.⁵² The fifth activity is issuing licenses. As the FERC points out, section 4(e) refers simply to “licenses,” not “original licenses.” Moreover, that section lists the general qualifications for all hydropower licensees, original or new, and the general purposes of all licenses granted under the Power Act.⁵³

Edison further argued that section 4(e) authorizes the Commission to license “project works,” whereas section 15 authorizes the Commission to license “projects.” Pointing out that the Act distinguishes the meanings of these terms quite precisely, Edison contends that this reflects the different types of licenses to which the two sections apply. Projects are “complete unit[s] of improvement or development,” including “water-rights, . . . lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.”⁵⁴ Project works are only the “physical structures of a project.”⁵⁵ Section 4(e)’s reference to “project works,” according to Edison, shows that the section is concerned with the creation of projects, and thus initial licensings, whereas section 15’s reference to “projects” assumes the projects being licensed are in existence, thus confining that section to relicensings.⁵⁶

The Court agreed that these terms confirm their understanding of the general relationship between sections 4(e) and 15, the former addressing at least original licensings and the latter addressing relicensings. The Court, however, held that such an argument falls short of demonstrating that section 4(e)’s mandatory conditioning language does not apply to relicensings. Section 15 authorizes the FERC to issue new licenses “upon such terms and conditions as may be authorized or required under the then existing laws and regulations.”⁵⁷ While this clause does not specifically mention section 4(e), the Court found it reasonable to read the clause, as the FERC did, to encompass that section.⁵⁸ The Court also notes that a 1986 amendment to the Federal Power Act⁵⁹ seems to ignore the distinction between “projects” and “project works,” making the Court

52. 16 U.S.C § 797 (1997).

53. 16 U.S.C § 797(e) (1997). Qualifications for hydropower licensees require that they must be “citizens of the United States, or . . . any association of such citizens, or . . . any corporation . . . or . . . any State or municipality.” *Id.* Qualifications on the purposes of all licenses require “the development and improvement of navigation and . . . the development, transmission, and utilization of power . . .”. *Id.*

54. 16 U.S.C § 796 (11) (1994).

55. *Id.* § 796 (12).

56. *Southern Cal. Edison*, 116 F. 3d at 511-12.

57. 16 U.S.C. § 808(a)(1) (1994).

58. *See Lac Courte Oreilles*, 510 F.2d at 205. (where the court derived a similar interpretation of the relationship between sections 4(e) and 15 of the Federal Power Act).

59. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

even more hesitant to place too much stress on this distinction.⁶⁰

Looking beyond the text of sections 4(e) and 15, Edison argued that the structure of the Act as a whole and the relationship between these sections and other parts of the statute demonstrate that Congress did not intend section 4(e)'s mandatory conditioning requirement to apply to new licenses under section 15. Section 15 authorizes the FERC to issue "new licenses," referring back to section 14,⁶¹ which preserves the federal government's right to take over projects when their original licenses expire. They also point out that sections 9(b) and 10(d) refer to relicensings under section 15.⁶² Despite Edison's analysis of the Federal Power Act as a whole, the Court remained unimpressed with the textual evidence holding that it does not address whether that section incorporates the mandatory conditioning requirement of section 4(e).⁶³

Edison further argued that incorporating section 4(e) conditions into section 15 would conflict with or duplicate Commission licensing authority preserved in other parts of the Act. According to Edison, not only do sections 10(a) and 10(j) already give the Commission authority to consider the interests protected by land-administering agencies through their section 4(e) conditioning authority,⁶⁴ but including section 4(e) conditions in new licenses would also undermine the Commission's authority under section 24 of the Act,⁶⁵ to protect project lands for hydropower development.⁶⁶

The Court acknowledged the apparent inconsistencies but found that the internal conflicts and irrational redundancies, perceived by the petitioner in the Act, "taint" original as much as new licensings.⁶⁷ The "inconsistencies" thus told the Court nothing about what Congress intended regarding section 4(e) conditioning in relicensings. Moreover, in a case concerning original licensings, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*,⁶⁸ the Supreme Court considered and rejected a similar argument concerning the supposed tension between sections 10(a) and 4(e). Noting that section 10(a) gives the Commission ultimate authority and responsibility to ensure that projects will be "best adapted" to serve a number of interests,⁶⁹ the Supreme Court found no conflict between this authority and the land-administering department's power to impose conditions under section 4(e). Thus, to the extent that these sections, combined with section 4(e), create a measure of institutional redundancy for the protection of non-hydropower interests,

60. *Southern Cal. Edison*, 116 F.3d at 512.

61. 16 U.S.C. § 807 (1994).

62. 16 U.S.C. §§ 802(b), 803(d) (1994).

63. *Southern Cal. Edison*, 116 F.3d at 512.

64. 16 U.S.C. § 803(a), (j) (1994).

65. 16 U.S.C. § 818 (1994).

66. *Southern Cal. Edison*, 116 F.3d at 512.

67. *Id.*

68. 466 U.S. 765 (1984).

69. 16 U.S.C. § 803 (a) (1994).

that redundancy, an understandable byproduct of Congress's protection of such interests through the Act's general provisions concerning all hydropower licenses, applies only to projects on federal reservations.⁷⁰ According to this Court, nothing about these amendments suggests that Congress intended to eliminate the potential redundancy approved by the Supreme Court in *Escondido*.

The Court went on to reject the argument that including section 4(e) conditions in new licenses conflicts with section 24 of the Federal Power Act. Section 24 assures that once a party applies for a hydropower license for a project on federal land, the government will preserve the land from alternative private uses until the Commission acts on the application or Congress intervenes.⁷¹ Further, section 24 imposes no restrictions on either the FERC's or the land-administering department's authority to include conditions in the license if the FERC issues one. Consequently, the Court found no conflict between sections 4(e) and 24.

Edison also relied on legislative history,⁷² arguing that congressional debate on the Federal Water Power Act,⁷³ the source of sections 4(e) and 15, proves Congress intended mandatory conditioning to apply to original licenses only. Pointing out that one of that Act's central goals was promotion of private investment in hydropower development, Edison maintained that including section 4(e) conditions in new licenses, independent of a project's viability, might deprive licensees of the ability to continue operating projects profitably.⁷⁴ Further, indications of congressional intent to exclude section 4(e) from relicensing are: the addition of the phrase "upon reasonable terms" to the proviso at the end of section 15,⁷⁵ comments pertaining to this modification by the Senate Commerce Committee⁷⁶ and comments by a sponsor to the amendment.⁷⁷ Unconvinced by this contention, the Court found that the body of section

70. *Southern Cal. Edison*, 116 F.3d at 513.

71. See 16 U.S.C. § 818 (1994).

72. *Southern Cal. Edison*, 116 F.3d at 513.

73. Pub. L. No. 66-280, 41 Stat. 1063 (1920).

74. *Southern Cal. Edison*, 116 F.3d at 513.

75. See S. REP. NO. 66-180, at 16 (1919); See also H. R. REP. NO. 66-61, at 1-5 (1919); S. REP. NO. 66-180, at 1-3; 59 CONG. REC. 6330 (1920) (Senate receipt of conference report); *Id.* at 7778-79 (Senate vote on final passage). As enacted, the proviso states, "That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license . . ." Pub. L. No. 66-280, § 15, 41 Stat. 1063, 1072 (1920).

76. The Commerce Committee report states:

It is the opinion of practically all those acquainted with investments of this kind that this language is necessary to insure the investment of capital in these great and much needed enterprises. The interests of the Government and the public are not impaired. The works must be continued in operation at the end of 50 years in order that the industries created by them and dependent upon them may not suffer. Private capital should not be required to do this upon unreasonable terms nor should its property be confiscated.

S. REP. NO. 66-180, at 2; See also 59 CONG. REC. 1049 (Jan. 5, 1920) (Statement of Sen. Myers).

77. *Southern Cal. Edison*, 116 F.3d at 513.

15 directs the FERC to issue new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations,"⁷⁸ indicative of a "broad and evolving conditioning authority."⁷⁹ Additionally, since section 4(e) conditions must themselves be reasonable,⁸⁰ the requirement of reasonable conditions in section 15 presents no conflict with language of section 4(e).⁸¹

However, the Court agreed with Edison that the Water Power Act's legislative history is reflective of Congress's concern with promoting private hydropower investment, but found that the Act accomplishes that goal primarily through its guarantee of fixed license terms⁸² and stable license conditions.⁸³ The Court also recognized that the legislative history reflects a countervailing concern, ignored by Edison, about excessively generous public subsidization of hydropower developers.⁸⁴ Consequently, the Court found that "this small bit of legislative history" could not carry the interpretive weight called on by Edison.⁸⁵

Finally, Edison sought support from the language and legislative history of several of the Act's amendments. Drawing on the 1968 amendments to the Federal Power Act,⁸⁶ and the Electric Consumers Protection Act of 1986,⁸⁷ Edison claimed that Congress explicitly expressed the applicability of section 4(e) either through direct language or implicitly through the use of qualifying language. The Court found that the emphasized language could easily be read in a variety of ways and could essentially be used to support or defeat the same contentions.

78. 16 U.S.C. § 808 (1994).

79. *Southern Cal. Edison*, 116 F.3d at 514.

80. *Escondido*, 466 U.S. at 778, 104 S. Ct. at 2113.

81. *Southern Cal. Edison*, 116 F.3d at 514.

82. See *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983); see also *Chemehuevi Tribe v. FPC*, 420 U.S. 395, 407 (1975). Prior to the Federal Power Act's passage in 1920, licenses to develop hydropower projects were issued in one of two ways, either by the Secretary of the Interior, which were revocable at will and of little value to private investors, or by individual acts of Congress, which were perpetual. Accordingly, the Federal Power Act "was designed to insure that the licenses granted by the FERC promote secure licensee expectations," thus promoting private hydropower investment. *Pacific Gas & Elec.*, 720 F.2d at 83.

83. See *Pacific Gas & Elec.*, 720 F.2d at 83-84 nn. 12-13. Sections 6, 10(b) and 28 contain language restricting the power of licensee's to unilaterally modify licensed projects, while at the same time restricting "future Congresses to amend the Federal Power Act in any way that would adversely affect extant licenses." *Id.* at 83.

84. *Southern Cal. Edison*, 116 F.3d at 513. See, e.g., *Water Power*, 65th Cong. 28-30 (1918) (statements of Rep. Ferris).

85. *Id.* at 514.

86. Pub. L. No. 90-451, 82 Stat. 616 (1968); H.R. REP. NO. 90-1643 (1968), reprinted in 1968 U.S.C.C.A.N. 3081; The House Report accompanying the amendment states, "The existing provisions of the Federal Power Act assign the Commission the same powers to condition new licenses under section 15 as it has to condition original licenses under section 4." H.R. REP. NO. 90-1643, at 8, reprinted in 1968 U.S.C.C.A.N. 3088.

87. Pub. L. No. 99-495, 100 Stat. 1243 (1986). The 1986 Act added the following language to the end of section 4(e), "In deciding whether to issue any license under this Part for any project, the Commission . . ." *Id.* at § 3(a) (codified at 16 U.S.C. § 797(e)).

Consequently, the Court found that these textual arguments were inconclusive and failed to resolve the Power Act's ambiguity regarding the inclusion of section 4(e) conditions in new licenses.⁸⁸

From its review of the Power Act's text, structure, and legislative history, the Court concluded that Congress did not "address[] the precise question at issue,"⁸⁹ that is, whether the mandatory conditioning authority of section 4(e) applies to new licenses as well as original ones.⁹⁰ Although the Court found a number of Edison's arguments relevant, in the aggregate the utility's arguments left the Court unconvinced that Congress had acted with a clear intent as to the applicability of section 4(e) to relicensings.⁹¹ Based on this finding, the Court moved on to the second inquiry of the *Chevron* analysis: whether the FERC's resolution was reasonable.

According to the FERC, Congress' main reason for giving the land-administering departments the authority to recommend mandatory section 4(e) conditions for inclusion in original licenses was to "ensur[e] that reservations under their respective supervision were adequately protected,"⁹² which ultimately applies with equal force to relicensings.⁹³ The Court not only agreed with the FERC's interpretation but found Edison's contentions counterintuitive, for "[w]hy would Congress give the land-administering departments authority to protect the lands under their supervision during the thirty-to-fifty-year terms of original licenses but deprive them of the authority to continue protecting the lands once the original license expires?"⁹⁴ Edison attempted to rebut this argument by asserting that allowing land regulating agencies the authority to condition, would effectively undermine the FERC's commissioning authority, a result undesired by Congress. However, the Supreme Court in *Escondido* dismissed this same argument,⁹⁵ holding that it was Congress' intent for the FERC to retain exclusive authority over the issuance of licenses, but was to operate concurrently with the land regulating agencies in the administration of conditions on licenses.⁹⁶ Edison further contended that "allowing the imposition of more stringent conditions in new licenses threatens to deprive them of the reasonable returns to which they are

88. *Southern Cal. Edison*, 116 F.3d at 515.

89. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782.

90. *Southern Cal. Edison*, 116 F.3d at 515.

91. *Id.*

92. *Escondido*, 466 U.S. at 773, 104 S. Ct. at 2111.

93. *Southern Cal. Edison*, 116 F.3d at 516.

94. *Id.*

95. *Escondido*, 466 U.S. at 775.

96. *Id.* The Supreme Court held:

[I]t is thus clear that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play a major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions.

Id.

entitled.”⁹⁷ The FERC estimated that the cost of section 4(e) conditions included in Edison’s licenses “would reduce the projects’ ‘levelized annual benefits’ by only approximately 10-15%, leaving the projects as the lowest-cost producers of power by several million dollars annually.”⁹⁸ The Court accepted this estimate, coupled it with Congress’s general findings about relicensing,⁹⁹ and found Edison’s claim of being deprived of reasonable returns on their long-term investment largely unsupported. Moreover, the Court determined that “Congress has now made clear that it expects [the FERC] to assess projects in light of current environmental, recreational, and aesthetic values.”¹⁰⁰ For all of the aforementioned reasons, the Court concluded that the FERC’s interpretation that section 4(e) conditions apply in relicensing passes muster under *Chevron*’s deferential standard of review.¹⁰¹ The Court acknowledged its circumscribed role by stating “we reach that conclusion mindful that our role is not to determine for ourselves the most reasonable interpretation of the statute, but to make sure that [the FERC’s] interpretation is reasonable, that is ‘rational and consistent with the statute.’”¹⁰²

Edison also argued that the FERC is not entitled to *Chevron* deference because the Commission has not consistently interpreted the Power Act in the present manner and the FERC’s current interpretation represents “an unexplained break with Commission policy.”¹⁰³ As

97. *Southern Cal. Edison*, 116 F.3d at 516.

98. *Id.*; See also *Southern Cal. Edison*, 68 F.E.R.C. ¶ 62,058, at 64,066-71; *Pacific Gas & Elec.*, 65 F.E.R.C. ¶ 62,265, at 64,634, 64,638.

99. The Court quotes from the House Report on the 1986 Act stating:

[L]icense renewals for existing projects are perhaps even more highly coveted than initial licenses to construct and operate new hydroelectric facilities. By the time a license comes up for renewal, the project has been operating for 30 to 50 years and is substantially, if not fully, depreciated. The cost of the power generated represents little more than operation and maintenance expenses.

H.R. REP. NO. 99-507, at 14, reprinted in 1986 U.S.C.C.A.N. 2501.

100. *Southern Cal. Edison*, 116 F.3d at 516. The Court also states that it found the committee reports on the Electric Consumers Protection Act of 1986 quite illuminating. In discussing the 1986 Act’s amendment of section 4(e), the conference report explains,

[I]n exercising its responsibilities in relicensing, the conferees expect the FERC to take into account existing structures and facilities in providing for these non-power and non-developmental values. No one expects the FERC to require an applicant to tear down an existing project. But neither does anyone expect ‘business as usual.’ Projects licensed years earlier must undergo the scrutiny of today’s values as provided in this law and other environmental laws applicable to such projects.

H.R. CONF. REP. NO. 99-934, at 22 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2538.

101. *Southern Cal. Edison*, 116 F.3d at 517.

102. *Id.* See *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); See, e.g., *General Elec. Co. v. United States Envtl. Protection Agency*, 53 F.3d 1324, 1327 (D.C. Cir. 1995); *American Fed’n of Gov’t Employees v. FLRA*, 778 F.2d 850, 861 (D.C. Cir. 1985); See also, *CSX Transp. v. United States*, 867 F.2d 1439, 1444-47 (D.C. Cir. 1989) (Edwards, J., dissenting).

103. *Southern Cal. Edison*, 116 F.3d at 517; As evidence of this “about face” interpretation, Edison cites the FERC’s 1975 decision in *Pacific Gas & Electric CO.*, 53 F.P.C. 523 (1975). There, the FERC refused to include a Forest Service section 4(e) condition concerning recreational facilities for a project located partially on national forest lands. *Id.* at 526. The FERC held that, “Initially we note

evidence of the FERC's historic interpretation, Edison presented language from a *single* prior FERC decision,¹⁰⁴ which the Court found to "hardly amount[] to a reasoned statement of [the FERC] policy."¹⁰⁵ Moreover, the Court stated that in a subsequent 1989 FERC decision,¹⁰⁶ the "Commission authoritatively set forth its view that section 4(e) conditions do apply to relicensings,"¹⁰⁷ and characterized its previous inconsistent position as not having been "definitely resolved."¹⁰⁸ The Court also distinguished the circumstances in a further inconsistent 1990 FERC decision,¹⁰⁹ raised by Edison, before holding that there was "no doubt that, at least since 1989, the FERC has consistently held that section 4(e)'s mandatory conditioning requirement applies to relicensings."¹¹⁰

Edison still contended that even if section 4(e) conditions apply to new licenses, the conditions imposed in this case are invalid because they go beyond protecting the original purposes of the reservations in which their projects are located.¹¹¹ The Court readily conceded that the Forest Service and Bureau of Land Management looked beyond these original purpose and instead focused on wildlife protection, promotion of recreational opportunities, and other considerations that Congress has identified through passage of recent legislation dealing with the

that under the Act new licenses are issued under section 15 rather than under section 4(e)." *Id.*

104. *Pacific Gas & Elec.*, 53 F.P.C. 523 (1975).

105. *Southern Cal. Edison*, 116 F.3d at 517.

106. *City of Pasadena*, 46 F.E.R.C. ¶ 61,004 (1989).

107. *Southern Cal. Edison*, 116 F.3d at 517.

108. *City of Pasadena*, 46 F.E.R.C. ¶ 61,004 at 61,011.

109. *James River II, Inc.*, 53 F.E.R.C. ¶ 61,096 (1990), *reh'g denied*, 55 F.E.R.C. ¶ 61,034 (1991), *vacated on other grounds*, 69 F.E.R.C. ¶ 61,045 (1994). In this decision, the FERC rejected section 4(e)'s applicability in a relicensing under section 15, in what the Court describes as an unusual situation. The project was located partially on national park land, a type of land originally included in the definition of federal reservations but later removed. *See James River II*, 55 F.E.R.C. ¶ 61,034, at 61,089. The FERC therefore denied agency conditions based on their interpretation of the "under the then existing laws and regulations" language of 16 U.S.C. §808(a)(1), as referring only to the appropriate types of conditions to be included, not to the FERC's general authority to issue licenses. *James River II*, 55 F.E.R.C. ¶ 61,034, at 61,091-93.

110. *Southern Cal. Edison*, 116 F.3d at 518.

111. *Id.* The conditions imposed by the Forest Service include: 102/103 – Requiring Edison to get approval from the Forest Service prior to building or relocating project facilities, 104 – Requiring Edison to consult annually with the Forest Service about plans for protecting natural resources, 105 – establishes minimum water flows to protect fish populations in Bishop Creek, 106 – requires Edison to install particular types of gages to measure the flows, 107 – requires Edison to pay for constructing a number of access trails and for operating and maintaining recreation facilities connected to the lakes created by the project's reservoirs, 108-110 – require Edison to carry out Forest Service plans concerning soil erosion and waste and hazardous substance disposal, 111/112 – require Edison to file plans for the disposal of construction material and for the design of certain project facilities, and 113 – requires Edison to undertake certain measures to protect sensitive plants and wildlife. The Bureau of Land Management's conditions adopt the Forest Service conditions, institute a separate minimum-flow requirement for the portion of the project on Bureau land, and require Edison to get permission from the Bureau before removing minerals from that portion of the reserve managed by the Bureau. *Southern Cal. Edison*, 68 F.E.R.C. ¶ 62,058, at 64,076.

administration of federal lands.¹¹² However, the Court found nothing "improper in the departments' reliance on these broader purposes in fashioning their section 4(e) conditions."¹¹³ The Court cited statutory language from section 4(e) stating: "the license . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."¹¹⁴ The Court reasoned that implementation of section 4(e) requires two separate and independent determinations, the first by the FERC and the second by the land regulating agency.¹¹⁵ According to the Act's plain language, the FERC must perform its consistency determination in relation to the reservations' original purpose, whereas agency "protection and utilization" determinations are not subject to the same scrutiny.¹¹⁶ The Court summarizes its holding on this issue by stating: "the [land regulating agency's] determinations are affirmative and discretionary, whereas the FERC's determination is negative and mandatory; the FERC must simply make a finding that the proposed license will not interfere or be inconsistent with the reservations original purpose."¹¹⁷ In other words, once the FERC finds consistency with the original purpose, that standard falls away and the land agencies may institute any conditions they deem necessary for the adequate protection and utilization of such reservations.

Finally, Edison contested the section 4(e) conditions contained in its licenses. More specifically, Edison argued that the Forest Service must "demonstrate how these conditions relate to the specific characteristics of the projects at issue here."¹¹⁸ The Court seemed to limit the apparent subjective standard for implementation of agency conditions, hinted at by the plain language of section 4(e), by stating it would sustain conditions if they are reasonably related to [the] goal of protecting and utilizing the reservation, "otherwise consistent with the [Power Act], and supported by substantial evidence."¹¹⁹ Consequently, a conditions justification "turns on whether they are reasonably necessary to the land-administering departments' meeting their responsibility to assure the 'adequate protection and utilization'¹²⁰ of the land under their supervision."¹²¹ Based on this standard, the Court found all the conditions contained in Edison's license reasonable and therefore valid. The Court did not however

112. See Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1994); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(8) (1994).

113. *Southern Cal. Edison*, 116 F.3d at 518.

114. 16 U.S.C. § 797(e) (1994).

115. *Southern Cal. Edison*, 116 F.3d at 518.

116. *Id.*

117. *Southern Cal. Edison*, 116 F.3d at 519.

118. *Id.*

119. *Escondido*, 466 U.S. at 778, 104 S. Ct. at 2113; See also *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996); 16 U.S.C. § 825l (b) (1997).

120. See 16 U.S.C. § 797(e) (1994).

121. *Southern Cal. Edison*, 116 F.3d at 518.

address Forest Service article 107's condition requiring Edison to bear much of the operation and maintenance expenses for recreation facilities connected with the project.¹²² Immediately prior to the submission of briefs to the Court, the Forest Service, responding to Edison's petition, reduced the required payments by half.¹²³ Feeling that the Forest Service's administrative resolution had "adequately address[ed]" Edison's concern, the Court chose not to address the validity of the condition altogether.¹²⁴

Ultimately, the Court in *Southern California Edison Company v. Federal Energy Regulatory Commission*, held that the conditions imposed by the FERC, through the recommendation of the federal agency responsible for the administration of the federal reservation, pursuant to section 4(e) of the Federal Power Act, applies to the issuance of new licenses (renewal of existing licenses) as well as original licenses (where dam has yet to be built).

The language of section 4(e) of the Federal Power Act, which explicitly states: "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" does not limit the conditions imposed by the Secretaries of Agriculture and the Interior to only those which relate to the "original purpose" for the creation of the reservation, but may encompass any reasonable condition that is "deem[ed] necessary for the adequate protection and utilization of the reservation".

The conditions imposed by the Secretaries of Agriculture and the Interior in this particular instance are sustained, as they are "reasonably related to [the] goal of protecting and utilizing the reservation, otherwise consistent with the [Power Act] and supported by substantial evidence."

IV. SOUTHERN CALIFORNIA EDISON COMPANY V. FERC : A NEW INTERPRETATION OF LAW TO ACCOUNT FOR A CHANGE IN POLICY

It is quite obvious that environmental concerns play a greater role in federal regulation today than they did at the beginning of this century. No longer do we live in a world of limitless resources. It is no longer possible to "degrade" and move on, as we have logistically run out of space. The disposal ecosystem no longer exists. As a result, activities on federal lands must be reevaluated and tradeoffs must be made in order to ensure that our remaining resources are utilized in a manner beneficial to *all* the interests involved.

The court in *Southern California Edison* accounted for environmental interests in its interpretation and application of the Federal Power Act. It must be remembered that under the Chevron doctrine, the court was not obligated to determine the best possible interpretation of the Federal

122. *Southern Cal. Edison*, 116 F.3d at 520.

123. *Id.*

124. *Id.* at 520-21.

Power Act, but rather to merely ascertain the reasonableness of the interpretation made by the FERC. The imposition of agency conditions as part of the issuance of "new licenses" for existing projects allows for agencies to more effectively manage and protect the lands under their supervision. The court may have been persuaded by the current trend towards preservation and a wise use of our resources at the expense of economic development, echoed by the passages of the Endangered Species Act¹²⁵ and National Environmental Policy Act,¹²⁶ which were not in effect when the original hydropower licenses were granted. The fifty year limit on these project licenses essentially gives federal agencies a second "bite at the apple" to address current environmental concerns and, in many instances, to secure financial assistance to implement programs by assessing the costs against the licensee.

The alleged economic prosperity of the energy industry was certainly another factor that influenced the court's holding. Reference was made to the House Report on the 1986 Electric Consumers Protection Act¹²⁷ that stated, "many licensees are struggling to defend the particularly rich returns they stand to reap if they can gain new licenses without section 4(e) conditions."¹²⁸ The report continues to describe that after fifty years of operation the project is essentially fully depreciated, where costs are made up of largely operation and maintenance expenses.¹²⁹ The court expressed that in the case at hand, "section 4(e) conditions . . . would reduce the . . . 'levelized annual benefits' by only approximately 10-15%, leaving the projects as the lowest-cost producers of power by several million dollars annually."¹³⁰ Apparently, the court felt the economic benefits Edison accrued through the fifty years of operation of its Bishop Creek project minus the cost of any capital investment accrued since construction, were sufficient enough to find a 10-15% reduction thereof reasonable. Had the conditions caused greater losses or made continued operation economically unfeasible, perhaps the outcome may have been decided differently; however, the court did not address this question. Despite the court's attempt to trivialize the loss of benefits to Edison, the fact remains that business is being hemmed in as environmental interests tug on the pocketbook of corporate America. As a result, uncertainty abounds as to the continued imposition of similar legislation and its effects on the deregulation of the energy industry.

The court's application of section 4(e) conditions to relicensings also reestablishes the expansive authority enjoyed by federal land regulating agencies. Agencies are allowed to impose any condition they deem

125. Pub. L. No. 93-205, 87 Stat. 884 (1973).

126. Pub. L. No. 91-190, 83 Stat. 852 (1970).

127. Pub. L. 99-495, 100 Stat. 1243 (1986).

128. *Southern Cal. Edison*, 116 F.3d at 516; H.R. REP. NO. 99-507, at 14, reprinted in 1986 U.S.C.C.A.N. 2501.

129. H.R. REP. NO. 99-507, at 14, reprinted in 1986 U.S.C.C.A.N. 2501.

130. *Southern Cal. Edison*, 116 F.3d at 516; See *Southern Cal. Edison*, 68 F.E.R.C. ¶ 64,066, at 64,071; *Pacific Gas & Elec.*, 65 F.E.R.C. ¶ 64,634, at 64,638.

necessary for the protection and utilization of the federal reservation, subject only to the requirement that such condition is "reasonably related to [these] goal[s]" and "otherwise consistent with the [Power Act] and supported by substantial evidence."¹³¹ Further, the FERC has no discretion as to whether or not to impose these conditions upon issuance of the license. The applicant must challenge these unacceptable conditions in a separate proceeding against the individual land-regulating agency. The FERC is left with the authority to deny licenses that interfere or are inconsistent with the reservation. Arguably, the real authority to re-license has passed to the land-regulating agencies, which are in a better position to address the specific concerns of a particular reservation, for example, the Forest Service's condition that Edison bear much of the operation and maintenance expenses for recreation facilities connected to the lakes created by the project's reservoirs.¹³² Such far-reaching authority should be troubling to the licensees possibly affected by such conditions.

As a result of the decision in *Southern California Edison*, future licensees face two barriers to licensing. First, the applicant must convince the FERC that the hydropower project will not circumscribe the original purpose for which the reservation was created. Such "purpose for creation" has been liberally construed and presents no real barrier outside of the reservation of federal land for Native Americans.¹³³ The second obstacle is agency imposition of conditions, which may cause continued operation financially infeasible if economic obligations created in the conditions become too great. Consequently, the "salad days" are over for hydroelectric projects and economics is forced to take a backseat to the environment, as policy concerns have turned an about face in the fifty years since passage of the Federal Power Act.

Joseph R. Barwick

131. *Escondido*, 466 U.S. at 778, 104 S. Ct. at 2113; *See also*, *Bangor*, 78 F.3d at 663; 16 U.S.C. § 8251 (1994).

132. *Southern Cal. Edison*, 68 F.E.R.C. ¶ 64,066, at 64,076.

133. *Escondido*, 466 U.S. at 770; *See also* Blumm, 10 HARV. ENVTL. L. REV. 1 (1986).

