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**Recreation and Aesthetics in the Public Interest:  
History and Overview of Hydropower License  
Denials by the Federal Energy Regulatory  
Commission**

Introduction .....	88
I. Hydropower Licensing 101—FERC and the Federal Power Act .....	94
II. Recreation and Aesthetics .....	95
III. FERC’s History of Denying Licenses to Preserve Recreation and Aesthetic Values .....	97
A. Namekagon River, Wisconsin—Namekagon Hydro .....	97
B. Hudson River, New York, and Snake River, Idaho— Scenic Hudson and Udall .....	100
C. South Fork American River, California—LaFlamme ....	102
IV. The Public Gets a Seat at the Table—The Electric Consumer’s Protection Act of 1986 .....	105
V. License Denials Post-ECPA .....	107
A. FERC Denials Where the Hydropower Project Is Prohibited by Law .....	107

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B.	License Denials for Purely Recreational and Aesthetic Reasons .....	107
1.	Yantic River, Connecticut—Falls Mills Dam Project.....	107
2.	Poestenkill Creek, New York—Barberville Project.....	109
C.	Denial for Recreation, Aesthetic, and Other Reasons ....	110
1.	Kootenai River, Montana—Kootenai Falls Project..	110
2.	Owens River Basin, Horton Creek, Horsetail, Aspen Park, and Pine Creek and Rovana Projects ...	112
3.	Lena Creek, Washington—Lena Creek Project .....	115
4.	South Fork Payette, Idaho—Oxbow Bend Hydroelectric Project, Intermountain Power Corporation.....	116
5.	Snake River, Idaho—Star Falls Hydroelectric Project, B&C Energy, Inc.....	117
6.	Snake River, Idaho—Eagle Rock Hydroelectric Project, Raft River Hydroelectric Co. ....	118
7.	Snake River, Idaho—Star Falls and Eagle Rock Hydroelectric Projects, Symbiotics, L.L.C.....	119
	Conclusion.....	120

## INTRODUCTION

Unimpaired rivers provide numerous benefits to our society—pure water quality for our drinking water, functioning flood plains that provide flood control, diverse and biologically rich habitat for fish and wildlife, and ample opportunities for recreation, appreciation of natural beauty, and solace. Our rivers have also been harnessed extensively for water supply and hydropower. In the contiguous United States, less than two percent of all rivers remain freely-flowing and relatively undeveloped.<sup>1</sup>

Regardless of their size or generating capacity, hydropower projects have significant environmental and societal impacts, which are well documented.<sup>2</sup> Reservoirs and bypass reaches fragment and

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<sup>1</sup> Brian D. Richter et al., *A Collaborative and Adaptive Process for Developing Environmental Flow Recommendations*, 22 RIVER RES. & APPLICATIONS 297, 297–98 (2006).

<sup>2</sup> See generally GER BERKAMP ET AL., DAMS, ECOSYSTEM FUNCTIONS AND ENVIRONMENTAL RESTORATION (2000), available at <http://intranet.iucn.org/webfiles/doc/archive/2001/IUCN913.pdf> (contributing paper to the World Commission on Dams);

isolate riparian habitats and create distinct upstream and downstream reaches. Dams block fish passage and impede the transportation of sediment, debris, and nutrients. Dam operations impair water quality and temperature and alter natural flow regimes by dewatering or unnaturally pulsing drought-like and flood-like flows over the course of weeks, days, or even hours. Further, they restrict river access, eliminate certain types of recreation, and intrude on the scenic beauty of the area where they are built.

The Federal Power Act<sup>3</sup> governs nonfederal hydropower dam licensure and operation and gives the Federal Energy Regulatory Commission (FERC or Commission)<sup>4</sup> the responsibility of balancing the value that we collectively receive from hydropower with the many other values that rivers provide. Early in the history of the Federal Power Act, Congress directed FERC's predecessor, the Federal Power Commission (FPC), to not only consider the water development and hydropower values of a river when determining whether to license a project but to also consider "other beneficial public uses, including recreational purposes."<sup>5</sup> Despite this, the Commission is known for issuing hydropower licenses that have done little to protect non-power values. In fact, even with the passage of environmental laws such as the Clean Water Act, Endangered Species Act, and the National

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MICHAEL COLLIER ET AL., U.S. GEOLOGICAL SURVEY, DAMS AND RIVERS: A PRIMER ON DOWNSTREAM EFFECTS OF DAMS (2d rev. prtg. 2000), *available at* <http://pubs.usgs.gov/circ/1996/1126/report.pdf>; EPA, GUIDANCE SPECIFYING MANAGEMENT MEASURES FOR SOURCES OF NONPOINT POLLUTION IN COASTAL WATERS, at 6-99 to 6-104 (1993) (listing dam-impact references), *available at* [http://water.epa.gov/polwaste/nps/czara/upload/czara\\_chapter6\\_hydromod.pdf](http://water.epa.gov/polwaste/nps/czara/upload/czara_chapter6_hydromod.pdf); H. JOHN HEINZ III CTR. FOR SCI., ECON. & ENV'T, DAM REMOVAL: SCIENCE AND DECISION MAKING 207-21 (2002) (listing dam-impact references), *available at* [http://water.epa.gov/polwaste/nps/upload/Dam\\_removal\\_full\\_report.pdf](http://water.epa.gov/polwaste/nps/upload/Dam_removal_full_report.pdf); M.P. MCCARTNEY ET AL., ECOSYSTEM IMPACTS OF LARGE DAMS (2001), *available at* <http://intranet.iucn.org/webfiles/doc/archive/2001/IUCN852.PDF> (contributing paper to the World Commission on Dams); MARK J. PETERSON ET AL., U.S. DEP'T OF ENERGY, REGULATORY APPROACHES FOR ADDRESSING DISSOLVED OXYGEN CONCERNS AT HYDROPOWER FACILITIES (2003), *available at* <http://www1.eere.energy.gov/water/pdfs/doewater-11071.pdf>; Christer Nilsson & Kajsa Berggren, *Alterations of Riparian Ecosystems Caused by River Regulation*, 50 BIOSCI. 783, 783-92 (2000).

<sup>3</sup> 16 U.S.C. §§ 791-828(c) (2012).

<sup>4</sup> FERC materials, discussed throughout this article, can be easily accessed through the agency's online library by using the applicable project number (e.g., P-13867) and the accession number (e.g., Accession No. 20130115-3031) provided in the citation. *eLibrary*, FERC, <http://www.ferc.gov/docs-filing/elibrary.asp> (last visited Apr. 3, 2014) (follow "Advanced Search" hyperlink and input relevant search criteria).

<sup>5</sup> Pub. L. No. 74-333, § 10(a), 49 Stat. 803, 842 (1935).

Environmental Policy Act, prior to the mid-1980s the Commission denied a license under its own volition for a new hydropower project just once.<sup>6</sup> In two other cases in the 1960s where FERC had initially issued a license, the courts required the Commission to go back and reconsider.<sup>7</sup>

The tides began to shift in 1986 when Congress amended the Federal Power Act through the Electric Consumers Protection Act (ECPA).<sup>8</sup> The amendments require FERC to give “equal consideration” to energy conservation, fish and wildlife, recreation, and other aspects of environmental quality as it does to the power and development potential of a river.<sup>9</sup> The amendments also require the Commission to ensure that projects not only fulfill plans for hydroelectric development but are also best adapted to comprehensive plans for protecting, mitigating, and enhancing fish and wildlife, recreation, water supply, flood control, and irrigation.<sup>10</sup> The ECPA amendments opened the door for the public to stand up for the things that it values most about rivers. Where in the past hydropower developers could build and operate their projects with little regard for the river, with the ECPA amendments the Commission is required to consider and condition hydropower licenses to account for these additional values. In rare instances, these license applications are being denied as a result.

ECPA has changed the face of hydropower licensing and relicensing. Citizens and public interest organizations, including American Whitewater, have become key stakeholders in shaping the future health of rivers that are impacted by hydropower. This has primarily occurred by engaging in the FERC relicensing process. The ECPA changes came just as a wave of thirty- to fifty-year hydropower licenses were set to expire,<sup>11</sup> and over the last three decades, river advocates and local citizens have restored key values to rivers that were once completely dominated by hydropower.

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<sup>6</sup> See *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

<sup>7</sup> See *Udall v. FPC*, 387 U.S. 428 (1967); *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

<sup>8</sup> Pub. L. No. 99-495, 100 Stat. 1243 (1986).

<sup>9</sup> 16 U.S.C. § 797(e).

<sup>10</sup> *Id.* § 803(a)(1).

<sup>11</sup> There were more than 250 FERC licenses that expired in the 1990s. *BO SHELBY ET AL., U.S. FOREST SERV., STREAMFLOW AND RECREATION* 3 (1992). There were at least 177 license renewals between 2000 and 2010. Richter et al., *supra* note 1, at 298.

In the early 1990s, pioneering hydropower reformists were cutting their teeth on hydropower relicensings and making use of the ECPA amendments. Through their efforts to restore river flows, they improved habitat, recreation, public access and aesthetic values on Northeastern rivers like the Kennebec, Penobscot, Rapid, Dead and Deerfield Rivers. The public used the FERC relicensing proceedings to protect, restore, and enhance key values on over one thousand river miles.<sup>12</sup> Later, these victories spread across the country to rivers that include the Chelan River in Washington,<sup>13</sup> Yuba and Bear Rivers in California,<sup>14</sup> and the Cheoah River in North Carolina.<sup>15</sup>

Hydropower licensing and relicensing proceedings can take upwards of six years, if not longer, and are dominated by the hydropower industry. In order for river advocacy groups to become effective in the process, American Whitewater joined with American Rivers and Trout Unlimited to form the Hydropower Reform Coalition in 1992. Since that time, the Coalition has worked to restore environmental and recreational values on rivers where hydropower projects are undergoing relicensing, while also striving to reform hydropower regulations to guarantee sufficient environmental protections. The Coalition remains active today, with over 150 organizational members.

As we face a changing climate and seek sources of energy that produce less carbon, there is renewed interest in hydropower. This

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<sup>12</sup> Telephone interview with Rich Bowers, Pac. Nw. Coordinator, Hydropower Reform Coal. (Jan. 14, 2014).

<sup>13</sup> Whitewater boaters convinced FERC to require Chelan PUD to study whitewater recreation opportunities in the Chelan Gorge and eventually include whitewater boating provisions in its final license. Pub. Utility Dist. No. 1 of Chelan Cnty., 119 FERC ¶ 61,055 (Apr. 19, 2007) (order on rehearing) (FERC P-637, Accession No. 20070419-3008); *Chelan (WA)*, AM. WHITEWATER, <http://www.americanwhitewater.org/content/Project/view/id/chelan/> (last visited Mar. 14, 2014).

<sup>14</sup> Although not yet fully implemented as of early 2014, river conservation and recreation groups worked together with state and federal agencies to restore an important part of the natural hydrograph to rivers in the Yuba River Basin. *Success on the Yuba!*, AM. WHITEWATER (June 28, 2012), <http://www.americanwhitewater.org/content/Article/view/articleid/31427/>.

<sup>15</sup> Flows were restored to benefit both recreation and ecological needs below the Tapoco Hydroelectric Project, access was improved, and land areas were protected. Alcoa Power Generating, Inc., 110 FERC ¶ 61,056 (Jan. 25, 2005) (order approving settlement and issuing new license) (FERC P-2169, Accession No. 20050125-0401); *Cheoah River (NC)*, AM. WHITEWATER, <https://www.americanwhitewater.org/content/Project/view/id/Cheoah/> (last visited Mar. 14, 2014).

comes despite the knowledge we now possess about how destructive hydropower is to rivers and the belief that the best sites for hydropower were dammed long ago. Rather than build new dams, there is ample opportunity to add new hydropower capability to existing dams.<sup>16</sup> Despite these factors, in early 2014, there were five active proposals for new hydropower projects in the Pacific Northwest.<sup>17</sup> These include the projects proposed on Whitewater and Russell Creeks in Oregon,<sup>18</sup> the South Fork Skykomish<sup>19</sup> and North

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<sup>16</sup> In contrast to the approximately 2500 dams that produce seventy-eight gigawatts of electricity, there are over 80,000 dams in this country that are over five feet tall that do not produce power. BOUALEM HADJERIOUA ET AL., DOE OAKRIDGE NAT'L LAB., AN ASSESSMENT OF ENERGY POTENTIAL AT NON-POWERED DAMS IN THE UNITED STATES, vii-viii (2012), *available at* [http://www1.eere.energy.gov/water/pdfs/npd\\_report.pdf](http://www1.eere.energy.gov/water/pdfs/npd_report.pdf). Adding hydropower capacity to these dams has the potential to add up to twelve gigawatts of new capacity without the need to destroy another mile of river. *Id.*

<sup>17</sup> The region faced numerous additional applications in recent years. In 2012 and 2013, applications were either cancelled or surrendered for proposed projects. Amnor Hydro West, Inc., 145 FERC ¶ 62,171 (Dec. 11, 2013) (order cancelling preliminary permit) (FERC P-13834, Accession No. 20131211-3023); NortHydro, LLC, 145 FERC ¶ 62,061 (Oct. 24, 2013) (order cancelling preliminary permit) (FERC P-13855, Accession No. 20131024-3027); White River Hydro, LLC, 144 FERC ¶ 62,200 (Sept. 4, 2013) (order cancelling preliminary permit) (FERC P-13804, Accession No. 20130904-3003); Boundary Creek Hydro, LLC, 143 FERC ¶ 62,201 (June 20, 2013) (order cancelling preliminary permit) (FERC Project No. 14284); New Sweden Irrigation District (Mar. 19, 2013) (notice of surrender of preliminary permit for Great Western Canal Hydroelectric Project) (FERC P-14126, Accession No. 20130319-3050); Clean River Power 11, LLC (Jan. 15, 2013) (notice of surrender of preliminary permit for Swamp Creek Hydropower Project) (FERC P-13867, Accession No. 20130115-3031); McKay Dam Hydropower, LLC, 142 FERC ¶ 62,028 (Jan. 11, 2013) (order cancelling preliminary permit) (FERC P-14205, Accession No. 20130111-3043); Clean River Power 12, LLC (Jan. 8, 2013) (notice of surrender of preliminary permit for Ruth Creek Hydroelectric Project) (FERC P-13866, Accession No. 20130108-3060); Clean River Power 12, LLC (Jan. 8, 2013) (notice of surrender of preliminary permit for Barclay Creek Hydroelectric Project) (FERC P-13864, Accession No. 20130108-3059); U.S. Farmers, LLC, 139 FERC ¶ 62,068 (Apr. 25, 2012) (order cancelling preliminary permit) (FERC P-14102, Accession No. 20120425-30245); Letter from Vince Yearick, Director of Hydropower Licensing Division, FERC, to Scott Shankland, Pacific Green Power, LLC (Mar. 22, 2013) (concerning termination of the integrated licensing process for the two girls creek hydroelectric project) (FERC P-14145, Accession No. 20130322-3007). Preliminary permits for projects on East and West Rosebud Creeks and the Madison River in Montana expired in May 2013. *See* Ed Kemmick, *Proposed Hydro Projects on Beartooth Front Dead for Now*, BILLINGS GAZETTE (June 6, 2013, 6:30 PM), [http://billingsgazette.com/news/state-and-regional/montana/proposed-hydro-projects-on-beartooth-front-dead-for-now/article\\_5c5e28d3-95c8-5009-98f2-6e7610f33279.html](http://billingsgazette.com/news/state-and-regional/montana/proposed-hydro-projects-on-beartooth-front-dead-for-now/article_5c5e28d3-95c8-5009-98f2-6e7610f33279.html).

<sup>18</sup> Whitewater Green Energy, LLC, 78 Fed. Reg. 55,069-01 (Sept. 9, 2013) (notice of intent to file license application) (FERC P-14383, Accession No. 20130830-3035).

<sup>19</sup> Pub. Util. Dist. No. 1 of Snohomish Cnty., 138 FERC ¶ 62,197 (Mar. 2, 2012) (order issuing preliminary permit and granting priority to file license application) (FERC P-14295, Accession No. 20120302-3017).

Fork Snoqualmie<sup>20</sup> Rivers, and Calligan<sup>21</sup> and Hancock<sup>22</sup> Creeks in Washington. Outside of the Pacific Northwest, if the proposed Susitna-Watana Hydroelectric Project on the Susitna River in Alaska is constructed, it will be the second tallest dam in the United States.<sup>23</sup>

These rivers and creeks provide a range of values—including high quality aquatic habitat for resident fish and wildlife species; recreational opportunities, such as whitewater boating, fishing, swimming, or nearby hiking; and aesthetic value—all of which are at risk from the proposed projects. This new hydropower is not necessary. Energy-efficiency improvements can effectively meet a significant portion of our energy load growth over the next twenty years.<sup>24</sup> Further, hydropower in the Pacific Northwest produces the most power during winter and spring storms when there is minimal need for additional power.<sup>25</sup>

One key to American Whitewater's work to protect our last and best freely-flowing rivers comes through understanding the background of why FERC has denied applications for new hydropower licenses. This Article outlines the relevant statutory framework and provides an overview of the relevant cases, both

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<sup>20</sup> Black Canyon Hydro, LLC, 137 FERC ¶ 62,049 (Oct. 14, 2011) (order issuing preliminary permit & granting priority to file license application) (FERC P-14110, Accession No. 20111014-3031).

<sup>21</sup> Pub. Util. Dist. No. 1 of Snohomish Cnty., 135 FERC ¶ 62,017 (Apr. 8, 2011) (order issuing preliminary permit & granting priority to file license application) (FERC P-13948, Accession No. 20110408-3055).

<sup>22</sup> Pub. Util. Dist. No. 1 of Snohomish Cnty., 135 FERC ¶ 62,177 (May 27, 2011) (order issuing preliminary permit & granting priority to file license application) (FERC Project No. 13994, Accession No. 20110527-3023).

<sup>23</sup> *Massive Dam in Alaska's Denali Region?!*, SUSITNA RIVER COALITION, <http://www.susitnarivercoalition.org> (last visited Mar. 14, 2014).

<sup>24</sup> The Northwest Power and Conservation Council's 2010 Sixth Power Plan identifies energy efficiency as the most cost-effective and least risky resource. NW. POWER & CONSERVATION COUNCIL, SIXTH NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN 1 (2010), available at <http://www.nwcouncil.org/media/6284/SixthPowerPlan.pdf>. The plan envisions that eighty-five percent of load growth over the next twenty years could be met cost effectively with energy efficiency. *Id.* The plan also predicts that this efficiency will reduce the risk of future electricity shortages, reduce emissions from power plants to help meet regional carbon reduction goals and policies, and cost consumers less than relying solely on new power plants. *Id.*

<sup>25</sup> Memorandum from John Fazio, Senior Power System Analyst, to Nw. Power & Conservation Council Members (Mar. 7, 2012), available at <http://www.nwcouncil.org/media/2455/8.pdf>.

within the Commission and from the courts, where the balance of the public interest tipped toward recreation and aesthetic values.

## I

### HYDROPOWER LICENSING 101—FERC AND THE FEDERAL POWER ACT

The Federal Power Act<sup>26</sup> authorizes FERC to license non-federal hydroelectric projects that meet certain criteria.<sup>27</sup> Hydropower developers seeking to build a new project must apply for and obtain a preliminary permit from FERC.<sup>28</sup> A preliminary permit allows a developer to study the feasibility of a project and have priority over the location for three years,<sup>29</sup> but it does not allow the developer to break any ground.<sup>30</sup> With limited exception,<sup>31</sup> FERC generally issues preliminary permits without substantive consideration or review.<sup>32</sup>

The public has the opportunity to participate early on in the process.<sup>33</sup> After the developer files a Notice of Intent to file an

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<sup>26</sup> 16 U.S.C. §§ 791–828(c) (2012).

<sup>27</sup> *Id.* § 817(1). Projects located on a navigable water of the United States that occupy U.S. land and are located on a Commerce Clause water with modification since 1935 fall under FERC jurisdiction. *Id.*

<sup>28</sup> *Id.* § 797(f).

<sup>29</sup> *Id.* § 798.

<sup>30</sup> *Id.*

<sup>31</sup> FERC has denied preliminary permit applications where it previously denied a license, or recommended as much in the Environmental Assessment prior to license withdrawal, for similar projects in the same location. *Symbiotics, LLC*, 99 FERC ¶ 61,100 (Apr. 25, 2002) (order denying application for preliminary permit) (FERC P-11911, Accession No. 20020429-0114); *Symbiotics, LLC*, 99 FERC ¶ 61,099 (Apr. 25, 2002) (order denying application for preliminary permit) (FERC P-11873, Accession No. 20020425-3076). FERC also denies preliminary permit applications if they meet conditions outlined under 18 C.F.R. section 4.33 or if FERC determines that the applicant has an unsatisfactory compliance record as a licensee or exemptee. *Williams Energy Project*, 111 FERC ¶ 61,072, 61,337 (Apr. 18, 2005) (order denying rehearing) (FERC P-12454, Accession No. 20050418-3058).

<sup>32</sup> “For over two decades, the Commission’s policy has been, as a court sustaining the policy described it, that ‘[u]nless a permanent legal barrier precludes FERC from licensing the project, FERC will issue a preliminary permit.’ The policy was in part a response to the flood of permit applications filed in the early 1980s.” *Symbiotics, LLC*, 99 FERC ¶ 61,100, 61416 (Apr. 25, 2002) (order denying application for preliminary permit) (FERC P-11911, Accession No. 20020429-0114) (quoting *Town of Summersville v. FERC*, 780 F.2d 1034, 1038 (D.C. Cir. 1986)).

<sup>33</sup> FERC uses three different licensing processes: integrated, traditional and alternative. See *Licensing Process*, FERC, <http://www.ferc.gov/industries/hydropower/gen-info/licensing/licen-pro.asp> (last updated Sept. 30, 2013). The Integrated Licensing Process or ILP is the standard process; forthcoming citations regarding licensing procedures assume an ILP process.



application for a license<sup>34</sup> and Pre-Application Document,<sup>35</sup> it develops a study plan with input from agencies, tribes, and the public to determine the potential impacts of the project.<sup>36</sup> After these studies are completed,<sup>37</sup> the developer files a License Application.<sup>38</sup> The studies and comments form the basis for the NEPA documents that FERC reviews as it considers whether to grant a license for the project. State and federal agencies have the authority under sections 10(j) and 18 of the Federal Power Act to prescribe license conditions (with Section 18 conditions being mandatory) in order to protect, mitigate damage to, and enhance fisheries and wildlife.<sup>39</sup> Further, if the project is located on federal lands, under section 4(e) the federal agency responsible for managing the land also has the authority to issue mandatory conditions.<sup>40</sup> The developer is also responsible for obtaining a 401 Water Quality Certification under the Clean Water Act,<sup>41</sup> as well as any other required local permits. From here, FERC either issues or denies a license for the construction and operation of the proposed project.<sup>42</sup>

## II RECREATION AND AESTHETICS

In its purest sense, to recreate literally means “to impart fresh life to; refresh mentally or physically.”<sup>43</sup> In practical terms, most often we think of outdoor recreation as the activity itself—hiking, fishing, camping, or boating. However, in natural settings, recreation as an activity can hardly stand on its own. The aesthetic value of an area

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<sup>34</sup> 18 C.F.R. § 5.5 (2013).

<sup>35</sup> *Id.* § 5.6. A Pre-Application document provides the Commission, agencies, tribes and the public with existing information relevant to the proposed project. The information is used to identify issues and related information needs, develop study plans, and provide a precursor to the environmental analysis.

<sup>36</sup> *Id.* §§ 5.11–5.14.

<sup>37</sup> *Id.* § 5.15.

<sup>38</sup> *Id.* § 5.17.

<sup>39</sup> 16 U.S.C. §§ 803(j), 811 (2012); ROBERT BLACK ET AL., ECONOMIC ANALYSIS FOR HYDROPOWER PROJECT RELICENSING: GUIDANCE AND ALTERNATIVE METHODS 2–3 (1998), available at <http://www.fws.gov/policy/hydroindex.htm> (follow “Overview of the Federal Power Act and the Hydropower Relicensing Process” hyperlink).

<sup>40</sup> 16 U.S.C. §§ 803(j), 811; BLACK ET AL., *supra* note 39.

<sup>41</sup> 33 U.S.C. § 1341.

<sup>42</sup> 18 C.F.R. § 5.25.

<sup>43</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

alone can refresh the body, mind, and spirit no matter what we are doing. Further, healthy habitat and robust wildlife populations are key to a quality recreational experience, whether that involves a day fishing on the water or taking enjoyment in watching salmon runs.<sup>44</sup>

Although Congress directed the FPC to consider recreation in 1935, the Commission did not require recreation plans during the licensing process until 1964.<sup>45</sup> Today, hydropower developers are required to capture recreational and aesthetic values in their Pre-Application Document.<sup>46</sup> FERC requires that the applicant describe the existing recreational and land uses and opportunities both within and adjacent to the project boundary.<sup>47</sup> This includes current and future recreation needs outlined in various local, state, and regional plans.<sup>48</sup> From an aesthetic standpoint, FERC requires that the applicant describe the visual characteristics of the lands and waters that would be affected by the project, including the dam, natural water features, and other scenic attractions of the project and surrounding vicinity.<sup>49</sup> Public input is often critical to ensure that FERC compiles a robust record of these values.

Despite the division within the regulations, attempting to separate the trinity of recreation, aesthetics, and quality habitat can be a futile exercise. In fact, prior to the ECPA amendments, the court affirmed that the phrase “‘recreational purposes’ . . . undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.”<sup>50</sup> This Article, however, focuses on providing an overview of instances where FERC has denied a license where the terms “recreation” and “aesthetics” are clearly discussed.<sup>51</sup>

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<sup>44</sup> See *City of Redding*, 51 FERC ¶ 62,178, 63,270 (May 23, 1990) (order denying license application) (FERC P-2827, Accession No. 19900529-0075). FERC denied the City of Redding a license for the Lake Red Bluff Hydroelectric Project proposed for the Sacramento River in California because of the project’s impacts on Chinook salmon. *Id.* In its denial, FERC recognized that the species is important for its economic, recreational, and aesthetic values. *Id.*

<sup>45</sup> *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965) (citing License Applications-Revision of Regulations, 29 F.P.C. 777 (Apr. 18, 1963), and License Applications, 28 Fed. Reg. 4092 (Apr. 25, 1963)).

<sup>46</sup> 18 C.F.R. § 5.6(d)(3)(viii)–(ix).

<sup>47</sup> *Id.* § 5.6(d)(3)(viii).

<sup>48</sup> *Id.* § 5.6(d)(3)(viii)(D).

<sup>49</sup> *Id.* § 5.6(d)(3)(viii).

<sup>50</sup> *Scenic Hudson Pres. Conference*, 354 F.2d at 614.

<sup>51</sup> It is likely that there are additional cases not covered in this paper that could be classified as a denial for recreation or aesthetic reasons. For example, while FERC noted

### III FERC'S HISTORY OF DENYING LICENSES TO PRESERVE RECREATION AND AESTHETIC VALUES

The Federal Power Act has required that the Commission consider non-power values from the beginning. Section 10(a) of the 1920 law required that the FPC consider “other beneficial public uses” of the river in addition to improving and using rivers for navigation and water-power development.<sup>52</sup> In 1921, Congress amended the Act, prohibiting the construction and operation of hydropower projects in national parks and monuments without express authority.<sup>53</sup> In 1935, Congress added recreation to the list of things to consider when developing comprehensive plans.<sup>54</sup>

Despite these mandates, the Commission has a long history of issuing licenses to the detriment of fish and wildlife habitat, riparian health, water quality, cultural values, recreation, and aesthetics. In fact, prior to the late 1980s, FERC denied a license just once for recreation and aesthetic reasons;<sup>55</sup> in two other instances, FERC initially issued the license but the courts told the Commission to go back and try again.<sup>56</sup>

#### *A. Namekagon River, Wisconsin—Namekagon Hydro*

In 1953, the FPC denied a license to the Namekagon Hydro Co. for a proposed project on the Namekagon River in Wisconsin.<sup>57</sup> *Namekagon* is the foundational case for the Commission denying a license for recreational and aesthetic reasons.<sup>58</sup> The FPC held that

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the importance of Chinook salmon for economic, recreational, and aesthetic reasons in the City of Redding’s proposed Lake Red Bluff Project, City of Redding, 51 FERC ¶ 62,178, 63,270 (May 23, 1990) (order denying license application) (FERC P-2827, Accession No. 19900529-0075), it did not mention recreation and aesthetics in a similar denial for the Lake Redding project. City of Redding, 55 FERC ¶ 62,012 (Apr. 3, 1991) (order denying license application) (FERC P-2828, Accession No. 19910401-0338).

<sup>52</sup> Pub. L. No. 66-280, § 10(a), 41 Stat. 1063, 1068 (1920).

<sup>53</sup> Pub. L. No. 66-369, ch. 129, 41 Stat. 1353, 1353 (1921).

<sup>54</sup> Pub. L. No. 74-333, § 10(a), 49 Stat. 803, 842 (1935).

<sup>55</sup> See *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

<sup>56</sup> See *Udall v. FERC*, 387 U.S. 428 (1967); *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

<sup>57</sup> *In re Namekagon Hydro Co.*, 12 F.P.C. 203 (July 30, 1953) (application for license), *aff’d*, *Namekagon Hydro Co.*, 216 F.2d 509.

<sup>58</sup> *Id.*

“[t]he proposed project [was] not best adapted for beneficial public uses of the Namekagon River, including the use of the stream for recreational purposes.”<sup>59</sup>

The Namekagon Hydro Co. applied for a license for a hydropower project on the Namekagon River twelve miles upstream from its confluence with the St. Croix River in 1951.<sup>60</sup> The proposed 25-foot high, 383-foot long dam would have created a 6.5-mile long reservoir in an area that was considered to be one of the “principal recreation areas of the Nation” for canoeing and small-mouth bass fishing.<sup>61</sup>

The FPC gave weight to the recreational and “other beneficial public uses” in this case, noting that

the provisions of section 10(a) of the act require us to find before issuing a license that the company’s water-power project is best adapted to a comprehensive plan for the improvement and utilization of water power development and *most important of all we are required to find that the project is best adapted for all other beneficial public uses including recreational purposes.*<sup>62</sup>

In its denial, the FPC held that although the project had engineering feasibility, there was a ready market for the power, and the developer had adequate financing for the project, the river had unique recreational value because it was “relatively gentle and . . . [had] an unusual uniformity of depth,” making it accessible to children and adults learning to canoe.<sup>63</sup> The FPC also noted that smallmouth bass fishing in the area was disappearing quickly and that the activity on the river was one of the “highest types” of fishing where fishermen return year after year.<sup>64</sup>

These recreational and scenic values were found near the large metropolitan areas of Milwaukee, Chicago, and the Twin Cities, St. Paul and Minneapolis.<sup>65</sup> The Wisconsin Conservation Commission had listed the Namekagon River as one of the “few remaining undeveloped rivers” and recommended “that it be preserved in its present relatively natural state.”<sup>66</sup> The FPC noted that there were tremendous quantities of falling water that had remained untouched

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

because of the falls' scenic or recreational value, such as the falls of the Yellowstone River and Niagara.<sup>67</sup> Further, the FPC highlighted the idea that "recreational resources of a *unique and most special type* fall within a wide range as to their local, regional or national importance. The consideration of public interest is no less because a unique and special type [of] recreational resource may have local or regional interest."<sup>68</sup>

Namekagon Hydro Co. appealed the FPC's decision, and the Seventh Circuit upheld the denial, affirming the Commission's responsibility to protect the public interest under section 10(a)<sup>69</sup> and its right to deny a license application.<sup>70</sup> The court stated, "No modification of the project short of its prohibition would serve the public interest. We think that it is a necessary corollary to the power of the Commission to grant a license when certain conditions are met, that the Commission has the right to deny such license for failure to comply."<sup>71</sup>

The court also noted the Namekagon River was unique because of impacts to other rivers in the state. There were ten thousand miles of free flowing rivers in Wisconsin at the time of statehood, and only 770 at the time of the opinion.<sup>72</sup> It was also significant that the State of Wisconsin Conservation Commission was working to preserve these remaining rivers in their free-flowing state and had targeted the lower twenty-two miles of the Namekagon.<sup>73</sup> The Court described the Namekagon River as "a beautiful stretch of water," noting its national importance for smallmouth black bass fishing and that "the uniqueness of the river is more apparent to those who take a float trip."<sup>74</sup>

The language from the FPC and the court in *Namekagon* provided a solid foundation for future license denials. However, it certainly did not mark a shift in policy for the Commission, as it did not take similar action for decades. Some suggest that the denial was

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Namekagon Hydro Co. v. FPC*, 216 F.2d 509, 512 (7th Cir. 1954).

<sup>70</sup> *Id.* at 513.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 512.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

“‘allowed through the mill’ to pacify a new Commissioner identified as a ‘birds and bees’ man.”<sup>75</sup> With a capacity of only 1500 kilowatts, the project was considered to be minor and therefore an easy one to let go.<sup>76</sup>

While *Namekagon* highlighted the importance of unique and special values of a river and resulted in the FPC denying the license,<sup>77</sup> it is interesting to note that this concept has also been used to support the opposite outcome. In the case of the Davis Pumped Storage Project on the Blackwater River in West Virginia, the unique recreation values of the reservoir created by the project was used, in part, to support licensing the project.<sup>78</sup>

### ***B. Hudson River, New York, and Snake River, Idaho—Scenic Hudson and Udall***

Although it showed that the Commission did in fact have the gumption to deny a license, the *Namekagon* denial was an anomaly. Despite the FPC’s declaration that its “responsibility under section 10(a) is to protect the public interest,”<sup>79</sup> the public went to court to ensure that the Commission upheld its duty in two key cases in the 1960s and one in the mid-1980s. In these cases, a common issue was whether the Commission’s record was complete enough for it to give proper consideration to the public interest.

In *Scenic Hudson Preservation Conference v. FPC*, local citizen groups and municipalities challenged the FPC’s decision to grant a license for the Storm King Mountain pumped storage project on the Hudson River.<sup>80</sup> The project would have been the largest pumped storage project in the world, and local citizens were concerned that it would have significant negative impacts to water supply, fisheries, scenery, and the historic significance of the mountain, which the FPC

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<sup>75</sup> Comment, *Of Birds, Bees, and the FPC*, 77 YALE L.J. 117, 118, n.6 (1967) (citing Interview with Lee C. White, Chairman, FPC, in Washington, D.C. (Oct. 28, 1966)).

<sup>76</sup> *Id.*

<sup>77</sup> *Namekagon Hydro Co.*, 216 F.2d at 512.

<sup>78</sup> *In re Monongahela Power Co.*, 58 F.P.C. 451 (Apr. 21, 1977) (opinion & order granting license).

<sup>79</sup> *In re Namekagon Hydro Co.*, 12 F.P.C. 203 (July 30, 1953) (application for license), *aff’d*, *Namekagon Hydro Co.*, 216 F.2d 509.

<sup>80</sup> 354 F.2d 608, 611 (2d Cir. 1965).

had not adequately considered.<sup>81</sup> The court described the area as “one of the finest pieces of river scenery in the world.”<sup>82</sup>

The court remanded the decision and required the FPC to compile a complete record and study the preservation of the natural beauty, historic shrines, and fisheries in the area.<sup>83</sup> Citing *Namekagon*, the court relied on the Seventh Circuit’s decision to uphold “the Commission’s denial of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a ‘beautiful stretch of water’ were threatened.”<sup>84</sup> The Court also referred to the FPC’s history of considering the public interest, and called on it to take a more active role:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.<sup>85</sup>

Two years later, the Supreme Court heard similar issues in *Udall v. FPC*.<sup>86</sup> The Department of Interior sued the FPC for issuing a license to Northwest Power for the High Mountain Sheep Dam on the Snake River.<sup>87</sup> The 670-foot high dam was proposed to be located just one mile upstream from the mouth of the Salmon River in Idaho.<sup>88</sup> The Department of Interior believed that the dam would have severe

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<sup>81</sup> *The Scenic Hudson Decision*, MARIST ENVTL. HISTORY PROJECT, <http://library.marist.edu/archives/mehp/scenicdecision.html> (last visited Mar. 14, 2014).

<sup>82</sup> *Scenic Hudson Pres. Conference*, 354 F.2d 608 at 613.

<sup>83</sup> *Id.* at 624. The battle over the Storm King project stretched through 1981. On remand, the FPC recommended once again that the license be issued. *Re Consolidated Edison Co., Inc.*, 44 F.P.C. 350 (Aug. 19, 1970) (opinion & order issuing license). In the end, Consolidated Edison surrendered the license as part of a settlement agreement relating to fisheries issues at existing plants. *The Scenic Hudson Decision*, MARIST ENVTL. HISTORY PROJECT, <http://library.marist.edu/archives/mehp/scenicdecision.html> (last visited Mar. 14, 2014).

<sup>84</sup> *Scenic Hudson Pres. Conference*, 354 F.2d at 614 (citing *Namekagon Hydro Co. v. FPC*, 216 F.2d 509, 511–12 (7th Cir. 1954)).

<sup>85</sup> *Id.* at 620.

<sup>86</sup> 387 U.S. 428 (1967).

<sup>87</sup> *Id.* at 432–34; John Harrison, *Hells Canyon*, NW. POWER & CONSERVATION COUNCIL (Oct. 31, 2008), <http://www.nwcouncil.org/history/HellsCanyon>.

<sup>88</sup> *Udall*, 387 U.S. at 430.

impacts on the environment, with particular concern for salmon and steelhead.<sup>89</sup>

While the District Court affirmed the license approval, the Supreme Court reversed.<sup>90</sup> Concerning the public interest requirement in section 10(a), Justice Douglas wrote that the Commission's inquiry of the public interest does not stop at questioning whether the project's proponents will be able to use the power or whether there is a regional need for it:

The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.<sup>91</sup>

Justice Douglas made a larger point about the question of hydropower and other river values, stating that

If . . . this additional dam would destroy the waterway as spawning grounds for anadromous fish . . . or seriously impair that function, the project is put in an entirely different light. The importance of salmon and steelheads in our outdoor life as well as in commerce is so great that there certainly comes a time when their destruction might necessitate a halt in so-called 'improvement' or 'development' of waterways.<sup>92</sup>

Regarding recreation, Justice Douglas stated, "The objective of protecting 'recreational purposes' means more than that the reservoir created by the dam will be the best one possible or practical from a recreational viewpoint."<sup>93</sup>

### *C. South Fork American River, California—LaFlamme*

In 1983, just prior to the ECPA amendments, FERC approved a license for the Sayles Flat Project on the South Fork of the American River in California.<sup>94</sup> The project would have involved an 8.4-foot

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<sup>89</sup> *Id.* at 437.

<sup>90</sup> *Id.* at 451.

<sup>91</sup> *Id.* at 450.

<sup>92</sup> *Id.* at 437 (citation omitted).

<sup>93</sup> *Id.*

<sup>94</sup> Joseph M. Keating, 24 FERC ¶ 61,343 (Sept. 26, 1983) (order issuing license) (FERC P-3195, Accession No. 19830927-0331), *vacated & remanded*, *LaFlamme v. FERC*, 842 F.2d 1063 (9th Cir. 1988), *amended & superseded*, 852 F.2d 389 (9th Cir. 1988).



high, 130-foot-long diversion dam.<sup>95</sup> Local citizens expressed overwhelming concern about the destruction of four cascades on the river, impacts to vegetation and wildlife from inadequate flows, and the loss of 4,200 feet of flowing water and its related recreational and aesthetic opportunities.<sup>96</sup> Despite this, FERC found that the project was best adapted to a plan for comprehensive development and that there was no need to do an Environmental Impact Statement because there was no significant impact affecting the quality of the human environment.<sup>97</sup>

In 1985, a concerned citizen named Harriet LaFlamme filed for rehearing with FERC in part because the agency had not considered the project's impact on scenic and aesthetic resources and had done an inadequate assessment and accommodation for recreational, cultural, water quality, and environmental reasons.<sup>98</sup> When FERC denied LaFlamme's rehearing request, she brought the matter to court.<sup>99</sup>

The Ninth Circuit vacated FERC's order issuing the license and set aside the order denying LaFlamme's request for rehearing and found that the Commission violated the FPA and NEPA when it failed to complete a comprehensive plan and adequately review the project's recreational use, visual quality, and cumulative impacts.<sup>100</sup>

In an interesting twist, Keating requested that the court modify its opinion and not vacate the license during FERC's analysis. Keating argued that his project was already substantially complete and ceasing operations would cause irreparable harm.<sup>101</sup> The court subsequently amended its order to suspend the license rather than vacate it<sup>102</sup> and eventually affirmed FERC's denial of LaFlamme's request for rehearing and reinstated the license.<sup>103</sup> However, Keating surrendered the project's license in 1995 because he was unable to secure a power

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<sup>95</sup> *Id.* ¶ 61,733.

<sup>96</sup> *LaFlamme I*, 842 F.2d at 1065.

<sup>97</sup> Joseph M. Keating, 24 FERC at ¶¶ 61,736–61,737.

<sup>98</sup> Joseph M. Keating, 32 FERC ¶ 61,290 (Aug. 23, 1985) (order denying rehearing) (FERC P-3195, Accession No. 19850827-0425).

<sup>99</sup> *LaFlamme I*, 842 F.2d 1063.

<sup>100</sup> *Id.* at 1074.

<sup>101</sup> *LaFlamme v. FERC II*, 852 F.2d 389, 391 (9th Cir. 1988).

<sup>102</sup> *Id.* at 393.

<sup>103</sup> *LaFlamme v. FERC III*, 945 F.2d 1124, 1130 (9th Cir. 1991).

purchase agreement.<sup>104</sup> The project was dismantled and most of the site was restored (to the extent possible given the developer's financial situation).<sup>105</sup>

With the *Scenic Hudson* and *Udall* cases, the courts gave the FPC much clearer direction to take non-power interests into account. Despite this direction and the mandate of Congress through the Federal Power Act, there was no way to insure that non-power interests had a platform before the Commission. This underlying problem had to be addressed before change could happen.

*LaFlamme* highlighted FERC's duty to fully consider all river values and that doing so required that these issues be on the record. The case came during a transition at the Commission, beginning in the midst of a rush on hydropower projects in the early to mid 1980s and ending as non-power values were getting a seat at the table through the ECPA amendments. This rush on hydropower came shortly after Congress passed the Public Utility Regulatory Policies Act (PURPA)<sup>106</sup> in 1978. The Act guaranteed independent power producers a market for small facilities at existing dams.<sup>107</sup> Under PURPA, a "small" facility was defined as less than 80 megawatts (MW), which is not so small for hydropower.<sup>108</sup> Although Congress intended to make PURPA benefits available only for development at existing dams,<sup>109</sup> FERC's implementing rules allowed developers to apply them to new hydropower projects on freely flowing rivers.<sup>110</sup> This intensified the need for an established system that insured that the Commission would hear public interest issues.

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<sup>104</sup> Sayles Hydro Assocs., 82 FERC ¶ 61,091 (Feb. 2, 1998) (order accepting license surrender) (FERC P-3195, Accession No. 199802023057).

<sup>105</sup> *Id.* ¶¶ 61,345–61,346.

<sup>106</sup> Pub. L. No. 95-617, 92 Stat. 3117 (1978).

<sup>107</sup> JOHN D. ECHEVERRIA ET AL., RIVERS AT RISK: THE CONCERNED CITIZEN'S GUIDE TO HYDROPOWER 24 (1989).

<sup>108</sup> *Id.* Of the licenses issued by FERC in early 2014, eighty-eight percent had an authorized capacity under 80 MW. See *Hydropower*, FERC, <http://www.ferc.gov/industries/hydropower.asp> (last visited Mar. 28, 2014) (follow "Complete List of Issued Licenses" hyperlink within the "Licensing" section).

<sup>109</sup> ECHEVERRIA ET AL., *supra* note 107.

<sup>110</sup> *Id.* at 24–25.

#### IV

### THE PUBLIC GETS A SEAT AT THE TABLE—THE ELECTRIC CONSUMER’S PROTECTION ACT OF 1986

Congress amended the Federal Power Act in 1986 through the Electric Consumer’s Protection Act,<sup>111</sup> which was, in part, a response to the consequences of PURPA. The amendments required that FERC give “equal consideration” to non-power values and ensure that each project is adapted to a comprehensive plan that also includes fish and wildlife considerations.<sup>112</sup> Congress noted

that there are instances in which careful and thoughtful consideration of the impact of a proposed project would and should lead to the conclusion that an original license ought not to be issued . . . . If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original license, even deny a license on a waterway.<sup>113</sup>

ECPA added teeth to two key provisions of the Federal Power Act. Sections 10(a) and 4(e) require the Commission to consider the public interest and non-power values in determining whether and how to license a project. Section 10(a)(1) requires FERC to ensure projects are

best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, *for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)*, and for other beneficial uses, including *irrigation, flood control, water supply*, and recreational and *other purposes referred to in section 797(e)* . . . .<sup>114</sup>

Under section 10(a)(2), FERC considers comprehensive plans from federal or state agencies.<sup>115</sup> FERC has a process under which it formally recognizes these plans.<sup>116</sup> Where the Commission does not recognize a state or federal comprehensive plan under section

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<sup>111</sup> Pub. L. No. 99-495, § 3, 100 Stat. 1243, 1243 (1986).

<sup>112</sup> *Id.*

<sup>113</sup> H.R. Rep. No. 934, 99th Cong., 2d Sess. 21 (1986).

<sup>114</sup> Federal Power Act, 16 U.S.C. § 803(a)(1) (2012) (emphasis added).

<sup>115</sup> *Id.* § 803(a)(2).

<sup>116</sup> OFFICE OF ENERGY PROJECTS, FERC, LIST OF COMPREHENSIVE PLANS (2013) (discussing the public interest analysis in the background section of the report), *available at* <http://www.ferc.gov/industries/hydropower/gen-info/licensing/complan.pdf>.

10(a)(2), it is considered under the public interest in section 10(a)(1).<sup>117</sup> FERC is also required to consider recommendations of federal and state agencies with control over relevant resources, and Indian tribes affected by the project.<sup>118</sup>

As FERC weighs all of these factors, section 4(e) requires that the Commission give equal consideration not only “to the power and development purposes for which licenses are issued,” but also “to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, . . . the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”<sup>119</sup>

ECPA opened the door for the public to have a seat at the table, but change did not come quickly. Several years after the EPCA amendments were implemented, river and hydropower reform advocates noted that

[d]espite [the] important legislative reforms, the Commission has responded slowly to its evolving mandate; the original goal of facilitating hydroelectric development through centralized regulatory control remains entrenched in the thinking at FERC. An understanding of the Commission’s institutional bias for promoting hydropower is essential if an effective strategy for dealing with a hydropower proposal is to be developed.<sup>120</sup>

Although we have made great progress in relicensing existing dams over the last three decades, this sentiment largely remains true, particularly for licensing new projects. Since the 1980s, FERC has denied hydropower licenses only a handful of times for environmental,<sup>121</sup> recreational, and aesthetic reasons. *Namekagon*

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<sup>117</sup> *Id.*

<sup>118</sup> 16 U.S.C. § 803(a)(2)(B).

<sup>119</sup> *Id.* § 797(e).

<sup>120</sup> JOHN D. ECHEVERRIA ET AL. *supra* note 107, at 17.

<sup>121</sup> *See generally* City of Idaho Falls, 80 FERC ¶ 61,342 (Sept. 24, 1997) (order denying license) FERC P-5090, Accession No. 19970925-3154) (holding that the proposed twenty-five-foot-high, five-hundred-foot-long dam with seven-MW capacity on the Snake River for the Shelly Hydropower Project was inconsistent with five comprehensive plans that collectively represented a coordinated effort to balance the values of fish and the twenty-three dams already existing on fifty percent of the river); Double O Hydro Co., 57 FERC ¶ 62,161 (Nov. 27, 1991) (order denying license) (FERC P-7301, Accession No. 19911202-0540) (denying a license for the Upper Squaw Creek Project for a two-foot-high, fifteen-foot-long diversion structure on Squaw Creek in Idaho due to moderate to high potential for sedimentation and mass wasting, which was impacting fish populations and habitat; the mitigation proposed in the EIS was found to be inadequate, and the flows necessary to protect fish would render the project marginally

continues to have an influence on how FERC determines whether impacts to aesthetic and recreation values outweigh the benefits of power: the importance of the “unique and most special types” of river values is cited often.<sup>122</sup>

## V

### LICENSE DENIALS POST-ECPA

#### *A. FERC Denials Where the Hydropower Project Is Prohibited by Law*

In some instances, FERC’s duty to balance power and non-power values is trumped by its duty to deny a license where new hydropower projects are prohibited by law. This was the case on Hope Creek in Oregon in 1988 where FERC denied an application for Louis J. Travis’ proposed Hope Creek Water Project.<sup>123</sup> Hope Creek is located within Hell’s Canyon National Recreation Area where legislation prohibits FERC from licensing a project in the recreation area.<sup>124</sup> FERC also found that the project was inconsistent with comprehensive plans.<sup>125</sup>

#### *B. License Denials for Purely Recreational and Aesthetic Reasons*

##### *1. Yantic River, Connecticut—Falls Mills Dam Project*

In 1992, FERC granted a license to Summit Hydropower for the Falls Mill Dam Project on the Yantic River in Norwich, Connecticut.<sup>126</sup> The Yantic River Falls are part man-made and part natural. At the Upper Falls, the river flows over a fifteen-foot high dam with a defunct powerhouse and intake gate, which Summit

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economically feasible); Double O Hydro Co., 57 FERC ¶ 62,160 (Nov. 27 1991) (FERC P-7334, Accession No. 19910220-0538) (order denying license) (denying a license for the Grave Creek Project for similar reasons to the Upper Squaw Creek Project—in both instances, the licenses were ultimately denied because the applicant failed to respond in time to agency correspondence).

<sup>122</sup> See *In re Namekagon Hydro Co.*, 12 F.P.C. 203 (July 30, 1953).

<sup>123</sup> Louis J. Travis, 43 FERC ¶ 62,007 (Apr. 5, 1988) (order denying license application) (FERC P-8515, Accession No. 19980421-0222).

<sup>124</sup> 16 U.S.C. § 460gg-2(a) (2012).

<sup>125</sup> Louis J. Travis, 43 FERC at ¶ 63,005.

<sup>126</sup> See *Summit Hydropower*, 58 FERC ¶ 61,360 (Mar. 31, 1992) (order issuing minor license and denying late intervention) (FERC P-8263, Accession No. 19920403-0080).

Hydropower sought to rehabilitate.<sup>127</sup> At the Lower Falls, which have a historic man-made dam and natural features, the channel drops fifty-four feet over the course of a three-hundred foot stretch through a deep and narrow rock-ledged gorge.<sup>128</sup> These falls are a major aesthetic attraction for the City of Norwich and have significant cultural and historic value.<sup>129</sup> The project would have reduced the volume of the flows, impacting the visual and auditory quality of the falls, and the powerhouse would have been a visual intrusion on the landscape.<sup>130</sup> Initially, FERC tried to mitigate these project effects through a specific design for the powerhouse and prescribed flows to enhance the falls on weekends and holidays.<sup>131</sup>

The City of Norwich filed a request for rehearing with FERC, arguing that the miniscule amount of power that would be produced by the project (just one MW) did not justify the loss of the aesthetic, historic, and recreation qualities at the falls.<sup>132</sup> The City asserted that the proposed minimum flows did not meet the needs of the region, that flow restoration only on weekends and holidays was not based on any facts or concrete data, and that the falls were instead a week-long attraction.<sup>133</sup>

On rehearing, the Commission noted the unique aesthetic, historical, and recreational qualities of Yantic Falls and found that adequately mitigating the flows in order to protect the recreational activity of viewing the falls all week would make the project uneconomical.<sup>134</sup> FERC reversed its initial decision and denied the license in part because the Lower falls were “not only Norwich’s most outstanding natural feature but one of the prime waterfall gorge combinations in the state.”<sup>135</sup> FERC’s decision was further bolstered by the fact that the City was going to enhance the recreational qualities of the area with grants received from the National Park Service, the State, and private donors.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Summit Hydropower, 61 FERC ¶ 61,010, 61,078 (Oct. 5, 1992) (order granting rehearing, rescinding license & denying license application) (FERC P-8263, Accession No. 19921008-0123).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

2. *Poestenkill Creek, New York—Barberville Project*

On June 19, 1995, FERC similarly denied a license application by Thomas Hohman for the proposed Barberville Project on Poestenkill Creek in New York.<sup>136</sup> The project was proposed to be located above and below Barberville Falls, a ninety-two-foot-tall waterfall that cascades over a steep rock face into a broad plunge pool.<sup>137</sup> In its order denying the license, FERC recognized the unique value of the Falls and their significance as a local and regional recreational and visual resource.<sup>138</sup> The Rensselaer County Environmental Management Council designated the area in its Natural Resources Inventory as one of eleven scenic sites in the town of Poestenkill.<sup>139</sup> Barberville Falls are featured on the town hall sign and businesses use the image, supporting the conclusion that the Falls had a significant contribution to the “identity and character of the local community.”<sup>140</sup> The Commission also recognized that the aesthetic qualities of the falls provided substantial public recreational benefit.<sup>141</sup>

While Hohman proposed to leave fifteen cubic feet per second (cfs) in the river for the falls, FERC found that “even with [the developer’s] proposed mitigative measures and additional measures considered, major adverse aesthetic effects would be unavoidable.”<sup>142</sup> FERC concluded that the Falls are of more value to the public interest as they are, noting that

[t]he reduction in the quality, duration, and variability of water flows would affect the visual and auditory character of the Falls and would degrade the quality of the vibrations generated by the naturally cascading waterfall and the mist and ice formations created by water flowing over the rock face. The discharge from the powerhouse into the pool would also distract the viewers of the falls and attract the attention to the powerhouse.<sup>143</sup>

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<sup>136</sup> See Thomas Hohman, 71 FERC ¶ 61,355 (June 19, 1995) (order denying license) (FERC P-11213, Accession No. 19950620-3056).

<sup>137</sup> *Id.* ¶ 62,433.

<sup>138</sup> *Id.* ¶ 62,410.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* ¶¶ 62,423–62,424.

<sup>141</sup> *Id.* ¶ 62,423.

<sup>142</sup> *Id.* ¶ 62,412 (citation omitted).

<sup>143</sup> *Id.*

The *Yantic* denial<sup>144</sup> and *Namekagon* case<sup>145</sup> informed FERC's decision. The Commission noted that it had "denied a license application where it . . . concluded that the project's adverse impacts on aesthetics and recreation are unacceptable and are unmitigable for technical or economic reasons."<sup>146</sup>

### *C. Denial for Recreation, Aesthetic, and Other Reasons*

#### *1. Kootenai River, Montana—Kootenai Falls Project*

In 1987, FERC denied a license to Northern Lights, Inc. for its proposed project at Kootenai Falls on the Kootenai River in Montana.<sup>147</sup> The 144-MW project would have consisted of a 925-foot-long, thirty-foot-high diversion dam that would have diverted all but 750 cfs from the river.<sup>148</sup> This was a mere trickle in comparison to the mean annual flow of 12,170 cfs, with maximum flows reaching 121,000 cfs and minimum flows of 895 cfs.<sup>149</sup> Northern Lights proposed that the project be operated as a "run-of-river" project,<sup>150</sup> with a 3.5-mile long reservoir.<sup>151</sup>

Kootenai Falls' multilevel ledges drop seventy feet over the course of less than one mile.<sup>152</sup> In addition to the recreational and aesthetic importance of the falls described below, there were a number of other key values that played a role in FERC's decision. Primarily, the Falls are very significant to the religious practices of the Kootenai

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<sup>144</sup> Summit Hydropower, 61 FERC ¶ 61,010, 61,078 (Oct. 5, 1992) (order granting rehearing, rescinding license & denying license application) (FERC P-8263, Accession No. 19921008-0123).

<sup>145</sup> *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

<sup>146</sup> Thomas Hohman, 71 FERC ¶ at 62,412.

<sup>147</sup> *N. Lights, Inc.*, 39 FERC ¶ 61,352 (June 25, 1987) (opinion & order affirming initial decision denying license) (FERC P-2752, Accession No. 19870707-0111).

<sup>148</sup> *Id.* ¶ 62,102.

<sup>149</sup> *Id.* ¶ 62,103.

<sup>150</sup> See N. Leroy Poff & David D. Hart, *How Dams Vary and Why It Matters for the Emerging Science of Dam Removal*, 52 BIOSCI. 659, 661–62 (2002) (noting that distinctions between the various operational classes of dams are imprecise and recommending the use of ecological classifications as providing a more useful tool for evaluating the environmental impacts of dams), available at <http://www.fws.gov/habitatconservation/Dams.pdf>. "Run of river" hydropower projects also have detrimental impacts to rivers and are not as environmentally benign as the name might imply. *Id.* These projects divert water out of the river and have an impact on the timing and frequency of flows. *Id.*

<sup>151</sup> *N. Lights, Inc.*, 39 FERC at ¶ 62,105.

<sup>152</sup> *Id.* ¶ 62,103.



people,<sup>153</sup> for whom the Falls were described by FERC to be the “holiest of temples or shrines . . . where the most central ceremonies are practiced and revelations are sought and reoccur on a continuing basis.”<sup>154</sup> FERC also found that the proposed project was not best adapted for the wildlife and aquatic habitat purposes of the river.<sup>155</sup>

FERC found that the Falls were the main recreational attraction of the area<sup>156</sup> and noted that they were “one of the last remaining undeveloped waterfalls on a major river in the northwest and, consequently, it is sufficiently unusual or unique to be worth saving in the public interest in its existing relatively natural condition.”<sup>157</sup> The Commission also noted that the proposed project would “significantly and permanently” change Kootenai Falls<sup>158</sup> by

significantly reducing the amount of white water, changing and reducing the decibel level of the roar of the water, eliminating the spray, mist and rainbows permanently, exposing to view considerably more rock, eliminating the daily flow fluctuations, introducing man-made structures into an otherwise natural waterway,<sup>159</sup> and, generally, making the falls less attractive to visitors.

The project also would have an adverse impact on the recreational value of the wild rainbow trout fishery located above and below the falls, and the resulting reservoir would eliminate “one of the best blue ribbon rainbow trout fisheries in Montana.”<sup>160</sup> Ironically, this trout fishery was created with the construction and operation of the Libby Dam, located upstream from Kootenai Falls.<sup>161</sup> A great deal of planning and resources were invested in operating the dam in a way that supported the fishery.<sup>162</sup> The 3.5 miles of river that the Kootenai project would have inundated were found to be the best part of the reach for public access, fishing pressure, and catch rate.<sup>163</sup>

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<sup>153</sup> *Id.* ¶ 62,102.

<sup>154</sup> *Id.* ¶ 62,108 (quoting Exhibit 16A).

<sup>155</sup> *Id.* ¶ 62,101.

<sup>156</sup> *Id.* ¶ 62,104.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* ¶ 62,103.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* ¶ 62,105.

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

<sup>163</sup> *Id.*

The Kootenai denial also highlights an important point from *Namekagon* that FERC has “‘the right to consider’ that there is nothing unusual or unique about a body of water that is impounded by a proposed hydroelectric development, and that such an impoundment would provide recreational opportunities . . . that are comparable to the opportunities found at other nearby lakes.”<sup>164</sup> FERC noted that Lake Koocanusa, created by the upstream Libby Dam, already provided flatwater opportunities comparable to the proposed reservoir.<sup>165</sup> FERC placed specific emphasis on the fact that Lake Koocanusa was created by destroying forty-eight wild river miles.<sup>166</sup>

2. *Owens River Basin, Horton Creek, Horsetail, Aspen Park, and Pine Creek and Rovana Projects*

In the mid-1980s, there were a number of proposals for hydropower projects in the Owens River Basin in California.<sup>167</sup> The Owens River Basin was well known for its trout streams at the time, making a significant contribution to recreational opportunities in the area.<sup>168</sup> Additionally, the aesthetic resources of the Basin served as a key attraction for the Eastern Sierra where both the Forest Service and the BLM had identified visual resources as important qualities of the valley.<sup>169</sup> Existing development—both hydropower and otherwise—had already resulted in losses in these resources,<sup>170</sup> particularly because the high mountainous and desert-like character of the region made the aesthetic impacts of existing projects more noticeable because of the lack of vegetation.<sup>171</sup> From a recreational standpoint, the area is also in close proximity to large population centers and other recreation areas and features camping and water-specific recreation opportunities, such as angling and relief from high temperatures.<sup>172</sup>

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<sup>164</sup> *Id.* ¶ 62,106 (citing *Namekagon Hydro Co. v. FPC*, 216 F.2d 509, 512 (7th Cir. 1954)).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Joseph M. Keating, 42 FERC ¶ 61,030 (Jan. 20, 1988) (order denying applications for license) (FERC P-6156, Accession No. 19880204-0339).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

FERC considered the cumulative impact of seven proposed hydropower projects in the Owens River Basin through a Cluster Impact Assessment Procedure (CIAP).<sup>173</sup> These projects were examined for their impacts to recreation and aesthetic values, in addition to resident trout, riparian vegetation, riparian associated wildlife, and the local economy.<sup>174</sup> FERC denied three of the seven licenses in a 1988 order, finding that licensing them would adversely impact the critically important recreation resources in the Owens River Basin.<sup>175</sup>

The final environmental impact statement (FEIS) found that there would be unmitigable impacts to the aesthetic values of the Horton Creek Project,<sup>176</sup> where Horton Creek was noted to be one of the only unaltered streams remaining in that portion of the Eastern Sierras.<sup>177</sup> The FEIS also found there would be unmitigable impacts to the aesthetics, recreation, riparian vegetation, and associated wildlife from the Aspen Park Project.<sup>178</sup> At the Horsetail Project on McGee Creek, FERC found that the project was uneconomical with the necessary mitigation measures to address aesthetic impacts.<sup>179</sup>

The order states that

[g]iven the importance of the target resources to the environmental integrity and aesthetics of the Owens River Basin and the recreational pursuits that are undertaken in the basin and the fact that the target resources have suffered significant losses in the past,

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<sup>173</sup> *Id.* These projects included Rancho Riata, Big Pine Creek No. 2, Tinemaha and Red Mountain Creek, Pine Creek, Rovana, Horton Creek, Horsetail, and Aspen Park. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The three projects that did receive licenses were never built. The Rancho Riata Project on the Hall-Indian Irrigation Ditch System surrendered its license in 1995 because the project was no longer economically feasible. Rancho Riata Hydro Partners, Inc., 72 FERC ¶ 62,105, 64,182 (Aug. 10, 1995) (order accepting surrender of license) (FERC P-4669, Accession No. 19950816). No ground disturbing activities occurred. *Id.* The developer withdrew the application for the Big Pine Creek No. 2 Project on Big Pine Creek. Joseph M. Keating, 42 FERC ¶ 61,030 (Jan. 20, 1988) (order denying applications for license) (FERC P-6156, Accession No. 19880204-0339). The license for the Tinemaha and Red Mountain Creeks Project on Tinemaha, Red Creeks, and Malone Spring was ultimately terminated in 2007 because the developer did not commence construction in time. Sierra Hydro, Inc. (Jan. 23, 2007) (order denying request for extension of time & terminating license) (FERC P-6188, Accession No. 20070123-3005).

<sup>176</sup> Joseph M. Keating, 42 FERC ¶ 61,030.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

we believe the importance of preventing the adverse cumulative and site-specific impacts that would occur to these resources as a result of licensing the six projects as proposed outweigh the minor displacement and economic benefits that would accrue from licensing them as proposed.<sup>180</sup>

In its order, FERC also denied a minor license for a previously pending license application for the Zack Brothers Project on Pellisier Creek because the mitigation measures required to sustain the riparian vegetation on the creek would render the project uneconomical.<sup>181</sup>

Finally, in the 1988 order, FERC put consideration of the Pine Creek and Rovana development on hold to review a revised project proposal.<sup>182</sup> In 1993, FERC denied the license for several reasons.<sup>183</sup> Tax incentives that had previously been available were reduced, rendering the proposed developments uneconomical.<sup>184</sup> FERC also found that it was inconsistent with the Inyo National Forest Plan with respect to impacts on fisheries, riparian vegetation, wildlife, aesthetics, and recreation.<sup>185</sup> Notably, the Environmental Assessment found that there would be

[u]navoidable adverse effects to the visual resource from . . . the partial dewatering of the stream, and from the introduction of project structures and slow-to-heal construction scars into the landscape . . . . Even with mitigation . . . . [t]he construction of the forebay impoundment will alter the nature of current recreational use. It will create a still-water atmosphere and encourage activities associated with still-water (such as swimming, rafting, etc.) in contrast to the free-flowing water activities now pursued.<sup>186</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Joseph M. Keating, 65 FERC ¶ 61,103 (Oct. 22, 1993) (order denying application for license) (FERC P-3258, Accession No. 19931025-3041).

<sup>184</sup> *Id.* ¶ 61,565.

<sup>185</sup> *Id.* ¶ 61,570.

<sup>186</sup> *Id.* ¶¶ 61,569–61,570. Keating filed a request for rehearing with FERC, but FERC denied the request. Joseph M. Keating, 70 FERC ¶ 61,240 (Feb. 28, 1995) (order denying rehearing) (FERC P-3258, Accession No. 19931025-3041). In its order, FERC used the Inyo National Forest Plan to support a provision in section 4(e) that requires 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 . . . .” *Id.* ¶ 61,742 (quoting 16 U.S.C. § 797(e)). Keating challenged the order in court, arguing that FERC erred in relying on the Forest Plan to determine the purpose for which the Inyo National Forest was created or acquired and that FERC should only deny the license for economic reasons. *Keating v. FERC*, 114 F.3d 1265, 1266 (D.C. Cir 1997). The court held that the Inyo Forest Plan cannot be used to determine whether a project is inconsistent with the forest’s current purposes. *Id.* at 1269.

3. *Lena Creek, Washington—Lena Creek Project*

In 1987, FERC denied a license to the Rainsong Company for a 5-MW project on Lena Creek, which is a tributary of the Hamma Hamma on Washington's Olympic Peninsula.<sup>187</sup> The Commission held that the proposed project was inconsistent with the Lena Lake Special Management Area, as outlined in the Canal Front Land Management Plan.<sup>188</sup> The management plan called for the area to be managed in a way that would preserve and protect the area's recreation values and specifically prohibited road construction and logging.<sup>189</sup>

Rainsong appealed the decision, and FERC gave the company an opportunity to redesign the project so that it would be consistent with the Canal Front Land Management Plan.<sup>190</sup> In 1990, the Forest Service updated the Olympic National Forest Plan, specifying that the area Rainsong proposed for the project site was designated for undeveloped, non-motorized recreation in a natural or natural-appearing environment.<sup>191</sup> Rainsong filed an amended application in 1991.<sup>192</sup> Additionally, in 1992, the Forest Service issued its FEIS for the Northern Spotted Owl, which amended Forest Plans in Washington, Oregon, and California and prohibits timber harvest and road construction in Spotted Owl Habitat Conservation Areas.<sup>193</sup> The majority of the project was proposed within a Habitat Conservation Area.<sup>194</sup>

The Environmental Assessment found that the project was inconsistent with the 1990 Forest Plan and 1992 Spotted Owl Plan

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The Forest Service had filed section 4(e) conditions, which Keating challenged as well. *Id.* at 1268. The court upheld them because they were reasonably related to protecting the national forest. *Id.* at 1268–69. The FERC denial was ultimately upheld because the project was “economically infeasible.” *Id.* at 1271.

<sup>187</sup> Rainsong Co., 63 FERC ¶ 61,157 (May 5, 1993) (order denying license application) (FERC P-6287, Accession No. 19930511-0109) (citing Rainsong Co., 39 FERC ¶ 62,442, 63,957 (June 29, 1987) (order denying license application) (FERC P-6287, Accession No. 19930511-0109)).

<sup>188</sup> *Id.* (citing Rainsong Co., 39 FERC ¶ 62,442).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

and noted that the visibility of the powerhouse and tailrace outlet would detract from the natural appearance and experience of the area.<sup>195</sup> Further, the Environmental Assessment “determined that the project facilities would mar the aesthetic appearance of the area, and that the diversion facilities and impoundment would attract, and pose a hazard to, hikers, thus requiring warning signs, fences, etc. . . . [thereby] further detracting from the area’s natural appearance.”<sup>196</sup> FERC ultimately denied the license because the project would “interfere and be inconsistent with a designated purpose of the Olympic National Forest.”<sup>197</sup>

#### 4. *South Fork Payette, Idaho—Oxbow Bend Hydroelectric Project, Intermountain Power Corporation*

FERC denied a license in 1992 for the Oxbow Bend Hydroelectric Project proposed for the South Fork Payette River in Idaho by the Intermountain Power Corporation.<sup>198</sup> The company proposed to build a thirty-foot long, ten-foot high diversion dam on a river that the Boise National Forest had found eligible for inclusion in the federal wild and scenic rivers system.<sup>199</sup> The forest’s Land and Resource Management Plan outlined the goal for managing this eligible river as to protect its free flowing character and water quality, as well as its

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<sup>195</sup> *Id.*

<sup>196</sup> *Rainsong Co.*, 78 FERC ¶ 61,352 (Mar. 28, 1997) (order on remand) (FERC P-6287, Accession No. 19970402-0035).

<sup>197</sup> *Rainsong Co.*, 63 FERC ¶ 61,157. Similar to its action in *Keating*, in its 1993 denial, FERC relied on the Olympic National Forest Plan to determine that the proposed project was inconsistent with section 4(e)’s requirement 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.” *Id.* (quoting 16 U.S.C. § 797(e)). After FERC denied the license for a second time and denied *Rainsong*’s subsequent request for rehearing, *Rainsong* appealed in court. *Rainsong Co. v. FERC*, 78 F.3d 1435 (9th Cir. 1996), *withdrawn & superseded*, 106 F.3d 269 (9th Cir. 1997). There, the court remanded the case back to FERC, finding that FERC had erred in relying on the Forest Plan, rather than the Organic Act, to determine that the project was consistent with the purposes of the Olympic National Forest. *Id.* at 275. On remand, FERC again denied the license. *Rainsong Co.*, 78 FERC ¶ 61,352. FERC found that the proposed project was still inconsistent with the purposes of the Olympic National Forest and that it would deny the license even if this were not the case for other reasons under section 4(e). *Id.* ¶ 62,485. *Rainsong* filed to appeal in court again, but the case was dismissed due to an untimely filing. *Rainsong Co. v. FERC*, 151 F.3d 1231 (9th Cir. 1998).

<sup>198</sup> *Intermountain Power Corp.*, 58 FERC ¶ 62,227 (Mar. 19, 1992) (order denying license application) (FERC P-6329, Accession No. 19920324-0183).

<sup>199</sup> *Id.* ¶ 63,554.

scenic, recreational, cultural, wildlife, and fishery values.<sup>200</sup> FERC denied the license and held that the proposed project was inconsistent with a comprehensive plan.<sup>201</sup>

5. *Snake River, Idaho—Star Falls Hydroelectric Project, B&C Energy, Inc.*

In 1994, FERC denied a license to B&C Energy, Inc. for the proposed Star Falls Hydroelectric Project on the Snake River.<sup>202</sup> The project would have had an installed capacity of 26.8 MWs and consisted of a twenty-foot high, 400-foot-long dam and a 3.3-mile-long reservoir.<sup>203</sup> The project was proposed to be located just upstream of the thirty-five-foot-high Star Falls and in a three-thousand-foot-wide canyon that FERC described as being virtually unchanged from the landscape experienced by the earliest European-American explorers.<sup>204</sup> The Fall's plunge pool, known as Caldron Linn, is a National Register Historic Site.<sup>205</sup>

Several state agencies filed a motion to intervene, expressing concern that construction and operation of the project “would cause a major reduction in resident fisheries and the associated recreational fishing, . . . eliminate or reduce riparian wildlife habitat, reduce game bird-hunting opportunities, and eliminate canoeing, rafting, and kayaking in a portion of the river because of the dangerous intake structure.”<sup>206</sup> FERC agreed with these concerns, finding that “preservation of the natural scenic beauty, wildlife habitat, and last undeveloped waterfall on this stretch of the Snake River Canyon in its historic condition is a far more valuable use of the resource than the proposed development of the site’s potential for generating hydroelectric power.”<sup>207</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> B&C Energy, Inc., 69 FERC ¶ 61,177 (Nov. 9, 1994) (order denying license) (FERC P-5797, Accession No. 19941117-0387).

<sup>203</sup> *Id.* ¶ 61,701.

<sup>204</sup> *Id.* ¶ 61,705–61,706.

<sup>205</sup> *Id.* ¶ 61,706.

<sup>206</sup> *Id.* ¶ 61,702.

<sup>207</sup> *Id.* ¶ 61,705.

The state also denied the project's 401 Water Quality Certification under the Clean Water Act,<sup>208</sup> however, FERC made it clear that it had denied the license because it was inconsistent with several comprehensive plans.<sup>209</sup> These plans included the state water plan, which prohibited hydropower;<sup>210</sup> the Idaho Statewide Comprehensive Outdoor Recreation Plan, which sought to develop new recreation facilities in the county and preserve natural, historical, and cultural resources;<sup>211</sup> the Environmental Analysis, which found that the project would increase angling use and catch but reduce hunting and whitewater boating;<sup>212</sup> the Bureau of Land Management Monument Resource Management Plan for the Snake River Rim Special Recreation Management Area, which called "for the protection, maintenance and enhancement of wildlife habitat";<sup>213</sup> and the Bureau of Land Management's Interim Management Guidelines for possible additions to the wild and scenic rivers system, which considered the eligibility of the river as a wild and scenic river.<sup>214</sup> Symbiotics requested a rehearing on December 9, 1994, but FERC denied it.<sup>215</sup>

6. *Snake River, Idaho—Eagle Rock Hydroelectric Project, Raft River Hydroelectric Co.*

In 1982, FERC was likely going to deny an application for a hydropower license at Eagle Rock on Idaho's Snake River.<sup>216</sup> The proposed project would have eliminated whitewater boating on the

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<sup>208</sup> *Id.* ¶ 61,702.

<sup>209</sup> *Id.* ¶ 61,703.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* ¶ 61,704.

<sup>212</sup> *Id.* ¶ 61,721.

<sup>213</sup> *Id.* ¶ 61,704.

<sup>214</sup> *Id.* In its request for a rehearing, B&C Hydro argued that the BLM's interim management guidelines for river systems being studied for eligibility were not a comprehensive plan. *Id.* FERC responded that the guidelines may not constitute a comprehensive plan under section 10(a)(2)(A) of the Federal Power Act (FPA), but they did warrant consideration under section 10(a)(1) as to whether the project would be in the public interest. *Id.*

<sup>215</sup> B&C Energy Inc., 73 FERC ¶ 61,042, 61,101 (Oct. 6, 1995) (order denying rehearing) (FERC P-5797, Accession No. 19951010-3050).

<sup>216</sup> Symbiotics, LLC, 99 FERC ¶ 61,100, 61,416 (Apr. 25, 2002) (order denying application for preliminary permit) (FERC P-2789, Accession No. 20020429-0114). The scope of this article focuses on final orders and decisions by FERC regarding approval or denial of licenses for aesthetic and recreational reasons. It would be interesting to know how many other projects, such as the Eagle Rock Project, were headed toward a denial but withdrawn by the developer before the ECPA was implemented.



river, along with a trout fishery that FERC found to be a unique and valuable resource with local and regional importance.<sup>217</sup> The project also would have had adverse impacts on wildlife, as well as prehistoric and historic resources.<sup>218</sup> FERC also noted that there were a limited number of remaining, undisturbed stretches of the river.<sup>219</sup> For these reasons, the FEIS recommended that the license be denied, and shortly thereafter, Raft River Hydro withdrew its application.<sup>220</sup>

*7. Snake River, Idaho—Star Falls and Eagle Rock Hydroelectric Projects, Symbiotics, L.L.C.*

The 1994 denial of the Star Falls license and 1984 withdrawal of the Eagle Rock application are particularly noteworthy because they lay the foundation for a rare approach by FERC regarding preliminary permits. FERC's policy is to grant all preliminary permit applications, "unless a permanent legal barrier precludes FERC from licensing the project,"<sup>221</sup> leaving environmental and public interest considerations for the licensing phase. However, in 2001, a developer applied to construct new projects at the same sites at Star Falls and Eagle Rock on the Snake River.<sup>222</sup> The Commission noted that the application lacked additional information that demonstrated that the new projects were different from the previous applications, and, in 2002, the Commission denied the preliminary permits, stating that they would do so where a license had been denied or a FEIS recommended denial.<sup>223</sup> Symbiotics filed a request for a rehearing, which FERC ultimately denied.<sup>224</sup> The company appealed the denial to the Tenth Circuit, where the court affirmed the Commission's decision.<sup>225</sup>

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<sup>217</sup> *Id.* ¶ 61,417.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (referencing Raft River Rural Elec. Coop. (Apr. 20, 1984) (withdrawal of application) (FERC P-2789, Accession No. 19840502-0181)).

<sup>221</sup> *Id.* ¶ 61,416 (quoting *City of Summersville v. FERC*, 780 F.2d 1034, 1038 (D.C. Cir. 1986)).

<sup>222</sup> *Id.* ¶ 61,415.

<sup>223</sup> *Id.* ¶¶ 61,416–61,417.

<sup>224</sup> Symbiotics, LLC, 100 FERC ¶ 61,004 (July 1, 2002) (order denying rehearing) (FERC P-11911, Accession No. 20020703-0203).

<sup>225</sup> *Symbiotics, LLC v. FERC*, 110 F. App'x 76 (10th Cir. 2004).

### CONCLUSION

Although there are few cases where the Commission has denied a license for recreation and aesthetic reasons, the cases described above have common threads and important points that stand out. The overarching theme established by *Namekagon* is the importance of establishing the unique and special value of a river or falls.<sup>226</sup> Where impacts to the unique and special value of a river cannot be mitigated, it appears that proposed projects are more likely to be denied. As outlined by *Namekagon*, the interest in the river need not be national—it can be local or regional as well.<sup>227</sup> Per *Namekagon* and FERC's denials at Kootenai, Yantic, and Barberville Falls, part of what makes a river or stream unique or special is if it is a primary recreation or aesthetic attraction in the area. It is also important to highlight if the attraction is within close proximity to a major metropolitan area, as was the case in *Namekagon* and Owens Valley, or whether local, state, or federal agencies have formally recognized the unique values of the attraction, as was the case in *Namekagon* and at Yantic, Barberville, and Star Falls. Unfortunately, as was the most common thread among the cases outlined above, a river or falls has unique value if other rivers in the region, or reaches on that river, have already been lost or suffered significant impacts from development. And finally, as highlighted in *Namekagon* and Kootenai Falls, FERC is free to consider that there may be nothing unique or special about the reservoir that may be created by a new project.

FERC considers license applications on a case-by-case basis, and these common themes have not yet taken hold as a guide for how FERC will approach each proposal. Certainly, the ECPA amendments continue to play a vitally important role in allowing the public to have its voice heard as the Commission considers whether to license a new project or relicense an existing one. However, the licensing and relicensing process continues to be dominated by the industry and more often than not favors hydropower development.

In an example from 2013, FERC issued a license for the Enloe Hydroelectric Project on the Similkameen River in Washington,<sup>228</sup> where the Okanogan Public Utilities District is preparing to re-energize an old dam that sits just upstream of Similkameen Falls. The

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<sup>226</sup> In re Namekagon Hydro Co., 12 F.P.C. 203 (July 30, 1953) (emphasis added).

<sup>227</sup> *Id.*

<sup>228</sup> Pub. Util. Dist. No. 1 of Okanogan County, 144 FERC ¶ 62,018 (July 9, 2013) (order issuing new license) (FERC P-12569, Accession No. 20130709-3025).

falls, both over the dam and the natural falls, have significant aesthetic value and are an official viewpoint on the Pacific Northwest National Scenic Trail. In order to make the project economical, however, the PUD will need to virtually dewater the falls, reducing the natural flows by more than ninety percent.<sup>229</sup> When the state gave this plan the green light in its 401 Water Quality Certification, conservation groups and concerned citizens challenged the decision before the State's Pollution Control Hearings Board.<sup>230</sup> In its decision, the Board required that an aesthetics study be completed only after the project is built,<sup>231</sup> creating uncertainty for the future. Despite this, and without a full assessment of the impacts to the aesthetic values, FERC moved forward and issued the license.

In the future, as in the past, it will continue to be up to the public to do what it can to ensure that the Commission understands that many rivers are simply more valuable to the public interest as freely flowing than they are buried under a reservoir and diverted through a pipe.

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<sup>229</sup> *Ctr. for Env'tl. Law & Policy v. Wash. State Dep't of Ecology* (Wash. Pollution Control Hearings Bd. July 23, 2013) (findings of fact, conclusions of law, & final order), available at <http://www.eho.wa.gov/Decisions.aspx#srch> (select "2013" for year issued and follow "PCHB No. 12-082" hyperlink).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

