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SENATE

{ REPORT
105-112

FERC LICENSING OF HYDROELECTRIC PROJECTS ON FRESH WATERS IN HAWAII

OCT. 15, 1997.—Ordered to be printed

Filed under authority of the order of the Senate of Oct. 9, 1997

Mr. MURKOWSKI, from the Committee on Energy and Natural
Resources, submitted the following

REPORT

[To accompany S. 846]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 846) to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

S. 846 precludes the voluntary licensing of hydroelectric projects on fresh waters in the State of Hawaii.

BACKGROUND AND NEED

Part I of the Federal Power Act was enacted in 1920 to establish a “complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Electric Coop, v. FPC*, 328 U.S. 152, 180 (1946). Section 4(e) of the Federal Power Act *authorizes* the Federal Energy Regulatory Commission (FERC) to issue licenses for hydroelectric projects that (1) are located on waters over which Congress has jurisdiction under the Commerce Clause, (2) are located on public land or a Federal reservation, or (3) use surplus water or power from a Federal dam. Section 23(b) of the Act *requires* anyone building or operating a hydroelectric project to obtain a FERC license if the project (1) is located on navigable water, (2) is located on public land or a Federal reservation, (3) uses surplus water or

power from a Federal dam, or (4) is located on a body of water over which Congress has jurisdiction under the Commerce Clause, was built after 1935, and affects interstate or foreign commerce.

Although Congress' power regulate interstate and foreign commerce includes the power to regulate navigation, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824), Federal Commerce Clause jurisdiction is broader than the concept of navigability. *United States v. Appalachian Power Co.*, 311 U.S. 377, 426–427 (1940). Thus, the circumstances in which the FERC *may* issue licenses under section 4(e) of the Federal Power Act are broader than the circumstances in which developers of hydroelectric projects *must* obtain a FERC license. As a result, the FERC has the power to issue a license for a hydroelectric project in response to a voluntary application under section 4(e) of the Federal Power Act, even though the applicant is not required to obtain a license under section 23(b) of the Act. *Cooley v. FERC*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

The State of Hawaii has made a case for a limited exemption from FERC licensing based on Hawaii's unique circumstances. Hawaii's streams are isolated on individual islands and run quickly down steep volcanic slopes. There are no interstate rivers in Hawaii, few if any streams crossing Federal land, and no Federal dams. Hawaii's streams are generally not navigable. Hawaii has a unique body of water law that has evolved from Native Hawaiian custom and a comprehensive regulatory program that protects water resources.

In short, none of the bases for FERC's licensing jurisdiction under section 23(b) of the Federal Power Act appear to exist in Hawaii. Indeed, FERC has never licensed a hydroelectric project in Hawaii and has no applications to license one pending.

Nonetheless, as explained above, section 4(e) of the Federal Power Act gives FERC the discretion to license hydroelectric projects in response to voluntary applications even though the project is not required to be licensed under section 23(b) of the Act. The Attorney General of Hawaii has testified that FERC's voluntary licensing authority "can lead to: (1) Claim jumping by business competitors; and (2) attempts to use FERC's claimed preemptive authority to override state stream regulation" to the detriment of Hawaii's waters. S. Hrg. 103–924, p. 14 (1994).

In 1991, the Committee on Energy and Natural Resources favorably reported legislation to eliminate the FERC's voluntary licensing authority over hydroelectric projects on fresh waters in Hawaii as part of its energy policy bill (S. 1220) in the 102nd Congress. S. Rept. 102–72, p. 245. the Senate passed an energy bill (S. 2166) with the Hawaiian exemption in it in 1992, but the provision was substantially rewritten in conference. As ultimately enacted, the provision did not eliminate the FERC's voluntary licensing authority over projects in Hawaii, though it did direct the FERC to study hydroelectric licensing in Hawaii and report to Congress on whether projects in Hawaii should be exempt from FERC licensing.

The FERC submitted its report in 1994. The report did not reach any overall conclusion as to whether the Federal Power Act should be amended to exempt projects on the fresh waters of Hawaii from the FERC's jurisdiction, though it did note that the FERC had never licensed a hydroelectric project in Hawaii.

LEGISLATIVE HISTORY

As noted under “Background and Need,” the Committee on Energy and Natural Resources favorably reported, and the Senate passed, legislation to eliminate the FERC’s voluntary licensing authority over hydroelectric projects on fresh waters in Hawaii during the 102nd Congress, though the provision was substantially amended in conference to preserve the FERC’s current licensing authority and require the FERC to conduct a study on whether Congress should to exempt Hawaiian projects in the future.

Following receipt of the FERC study, the Committee again reported legislation to exempt projects on Hawaii’s fresh waters from the FERC’s voluntary licensing authority in 1994 (S. 2384, S. Rept. 103–336), 1995 (S. 225, S. Rept. 104–70), and 1996 (S. 737, S. Rept. 104–77). The Senate passed two of these three measures (S. 2384 in the 103rd Congress and S. 737 in the 104th Congress), though neither became law.

S. 846 was introduced by Senator Akaka on June 5, 1997. A hearing was held by the Subcommittee on Water and Power on June 10, 1997. (S. Hrg. 105–145)

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on September 24, 1997, by a voice vote with a quorum present, recommends that the Senate pass S. 846 without amendment.

SECTION-BY-SECTION ANALYSIS

S. 846 contains only one section. Section 1 eliminates the FERC’s authority to issue voluntarily requested licenses for hydroelectric projects located on fresh waters in the State of Hawaii.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 30, 1997.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 846, a bill to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the state of Hawaii.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Kim

Cawley (for federal costs) and Pepper Santalucia (for the state and local impact).

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE

S. 846—A bill to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii

CBO estimates that enacting this bill would have no net effect on the federal budget. S. 846 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995. The bill would limit FERC's authority to issue licenses for hydroelectric projects in Hawaii, leaving the state with the authority to license any affected projects. Any increase in the state's workload would be the result of its own regulatory programs.

This provision may have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enactment of this bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Pepper Santalucia (for the state and local impact). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out this measure.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the provisions of the bill. Therefore, there would be no impact on personal privacy.

Little if any additional paperwork would result from the enactment of this measure.

EXECUTIVE COMMUNICATIONS

The pertinent communications received by the Committee from the Federal Energy Regulatory Commission, the Department of the Interior and the Department of Commerce setting forth Executive agency comments relating to this measure are set forth below:

PREPARED STATEMENT OF SUSAN TOMASKY, GENERAL
COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee:

My name is Susan Tomasky, and I am General Counsel for the Federal Energy Regulatory Commission. I am appearing before you as a Commission staff witness and do not speak for individual members of the Commission.

Thank you for the opportunity to be here today to comment on a bill affecting the Federal Energy Regulatory Commission's regulation of non-federal hydropower projects pursuant to Part I of the Federal Power Act and related statutes.

S. 439 would allow for the removal of Commission jurisdiction over a category of hydropower projects five megawatts or smaller in the State of Alaska. The bill would also remove the Commission's voluntary licensing jurisdiction over hydroelectric projects on fresh waters in Hawaii (a provision that has been introduced as a separate bill, S. 846, by Senator Akaka), and would exempt from Commission jurisdiction the transmission line associated with the licensed El Vado Hydroelectric Project in New Mexico. Finally, it would extend the statutory deadline for commencement of hydropower project construction.

NOTE: Section 2 of S. 439 is identical to S. 846.]

*S. 439, Section 2: Voluntary Licensing of Hydroelectric
Projects in the State of Hawaii*

Section 2 of S. 439 would amend Section 4(e) of the Federal Power Act by inserting the following parenthetical limitation: "(except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act)". These words would modify the reference to "several States," so as to partially limit the authority of the Commission to issue licenses under Section 4(e) with respect to proposed hydropower projects in Hawaii.

Section 4(e) of the Act contains the Commission's authority to issue licenses for hydropower projects. Section 23(b)(1) sets forth the circumstances under which a project cannot be constructed, operated, or maintained without a license. In certain circumstances, the Commission has authority to issue a license for a hydropower project in response to a voluntary application under Section 4(e), even though licensing is not required under Section 23(b)(1). *See Cooley v. Federal Energy Regulatory Commission*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

Under S. 439, the Commission would continue to have jurisdiction to issue licenses to construct, operate, and maintain hydropower projects in Hawaii whenever Section 23(b)(1) would require a license for such activities. However, the Commission would be precluded from issuing a license for a project in Hawaii if Section 23(b)(1) did not require a license for such activities.

Comments

Pursuant to Section 2408 of the Energy Policy Act of 1992, the Commission on April 13, 1994, submitted to the Senate and House Committees a study of regulation of hydropower projects in Hawaii. The study noted that the Commission has never licensed a hydropower project in Hawaii, and is thus not currently regulating any project in Hawaii. Our data bases currently do not show any pending or outstanding preliminary permits, licenses, or exemptions in the State of Hawaii. Therefore, Section 2 of S. 439 would not disrupt the Commission's current operations, and we would not object to its enactment.

THE SECRETARY OF THE INTERIOR,
Washington, DC, September 19, 1997.

Hon. FRANK MURKOWSKI,
*Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department with respect to a bill, S. 439, to Provide for Alaska State jurisdiction over small hydroelectric projects, and for other purposes.

The Department is strongly opposed to S. 439.

The proposed legislation would make several amendments to the Federal Power Act (FPA) (16 U.S.C. 1791 et seq.). Section 1 would amend section 23 of the FPA to transfer jurisdiction over hydroelectric projects of 5,000 kilowatts or less from the Federal Energy Regulatory Commission (FERC) to the State of Alaska. Section 2 would provide for voluntary licensing of hydroelectric projects in fresh waters in the State of Hawaii. Section 3 would exempt from licensing the transmission line portion of a hydroelectric project located in New Mexico. Section 4 extends the period for the commencement of construction for hydroelectric projects.

Section 1 of S. 439 would amend section 23 of the FPA by adding new subsections (c), (d), (e), and (f). Subsection (c) would transfer to the State of Alaska hydroelectric projects in the State that are not part of a project already licensed, that are not part of a project for which an application for license has been received, that have a production capacity of 5,000 kilowatts or less, and that are not located on any Indian reservation, unit of the National Park System component of the Wild and Scenic Rivers System or segment of a river designated for study for potential addition to the system. Subsection (d) allows licensees already licensed by FERC to transfer jurisdiction to the State.

In general, the Department objects to the focus of this legislation, which seeks to remove certain hydroelectric projects from Federal jurisdiction. The Department opposed similar amendments in 1994, and we continue to oppose the effort to remove hydroelectric projects from Federal jurisdiction. Allowing Alaska or Hawaii to assert jurisdiction over certain hydroelectric projects contradicts the

intent of the FPA, which was enacted to establish a uniform system of licensing over hydroelectric projects in the United States. The FPA already includes provisions for exempting small projects and excludes from its jurisdiction certain projects which fail to meet the mandatory licensing criteria in section 23. Allowing one or two States to begin exercising independent jurisdiction will very likely lead to similar provisions for other States and a patchwork of regulatory programs and of related environmental review and enforcement, thereby defeating the intent of Congress in enacting the FPA in 1920 and subsequent Federal laws.

The transfer would take effect upon the Governor's notification to the Secretary of Energy that the State has in place a comprehensive process for regulating the facilities. The State process is to give appropriate consideration to the improvement or development of the State's waterways for the use or benefit of commerce, for the improvement and use of water power development, for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds), for Indian rights, and for other beneficial public uses, including irrigation, flood control, water supply, recreation and other purposes.

We object to the Governor's unilateral determination and notification. Under this proposal the determination that the State's regulations give appropriate consideration to a variety of factors and circumstances is made unilaterally by the State. The State merely notifies the Secretary of Energy when it has regulations in place. There is no provision for approval or even review or consultation in the development of the State process by the Secretary of Energy or by any other Federal agency with an interest in the many purposes specified to be covered by the plan to be proposed by the Governor.

We also object to the limited exception provided in subsection (c). Exceptions include Indian reservations, National parks, and wild and scenic rivers system lands, but not National Wildlife Refuge System units and other conservation units, components of the National Wilderness Preservation System, wilderness study areas, other areas of critical environmental concern, and lands provided to Alaska Natives pursuant to the Alaska Native Claims Settlement Act.

Subsection (e) requires that State authorizations for project works located in whole or in part on Federal lands be subject to the approval of the Secretary having jurisdiction with respect to such lands, and subject to such terms and conditions as the Secretary may prescribe. Subsection (f) States that Federal environment, natural and cultural resource protection laws continue to apply to the lands transferred under subsection (c). These provisions, while potentially helpful, leave many questions unanswered.

Would the State enforce compliance of federally-identified terms and conditions under the State authorization? What mechanism or procedure would be available if the

Secretary with jurisdiction did not agree with the State's enforcement actions?

Applications for license filed with FERC under Sec. 24 of the FPA withdraw public land from the operation of public land laws. The issuance of a license by FERC further withdraws the land from mining. Would applications and authorizations filed with and granted by the State of Alaska also segregate the public lands? Section 24 of the FPA also controls the opening of withdrawn lands. What would the State's role and authority be with regard to opening Federal lands?

Since enactment of Federal Land Policy and Management Act (43 U.S.C. 1701 et seq.) (FLPMA), power projects involving Bureau of Land Management (BLM) lands require both a FERC license (or an exemption from licensing) and a FLPMA right-of-way. Does this section include Federal land use authorization with the issuance of the State authorization, or would there be a separate FLPMA right of way?

This bill would remove small projects in Alaska from the Commission's evaluation under the National Environmental Policy Act. (NEPA). How would NEPA be applied to the State process?

In the absence of a current State capability, the Department cannot predict which role and authority we would have in an as yet undisclosed State process. This legislation could seriously impair or eliminate our review and mitigation formulation roles under the Federal Power Act and the Fish & Wildlife Coordination Act and the mandatory conditioning authority now exercised by the Federal fishery agencies to prescribe conditions for fish passage. Our mission requires us to exercise trust responsibility for migratory birds, resident and anadromous fish, endangered species, and certain marine mammals. If we do not have authority under this bill at least as strong as under the FPA, we will be unable to undertake our trust responsibilities and the Nation's and Alaska's fish and wildlife resources will suffer.

The references included in the bill to "Federal lands" and to "any Indian reservation" do not adequately address the rights of Alaska Natives afforded under the Alaska Native Claims Settlement Act, and the Alaska National Interest Conservation Lands Act and thus may fail to provide adequate protection of Alaska Natives, their lands, and their traditional way of life. The bill is silent on Alaska Native corporations, their lands and their selections. Moreover, the Department objects to any provision in the bill which may be construed to assign to a State authority to delineate Indian rights.

There is no provision in the proposed legislation to assure that State promulgated regulations would provide appropriate consideration of responsibilities under the *subsistence provisions* of section VIII of ANILCA.

Section 2 of the bill amends section 4(e) of the FPA to “except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act.” The applicability of this provision is unclear. Apparently, it seeks to exclude projects on fresh waters in Hawaii from Federal licensing, but limits that exclusion to those projects which do not require licensing under section 23 and which would be exempt from Federal licensing even without this proposal. In any case this provision will likely fragment Federal licensing authority.

Section 3 would exempt from FERC jurisdiction a 12-mile transmission line extending from the El Vado Project switchyard. FERC issued a compliance order in 1993, finding the Project Licensee in violation of its license, in that the transmission line was not located within the project boundaries. Apparently, through this exemption, the Licensee seeks to remove itself from FERC’s enforcement and penalty authority, even though when accepting the license, it accepted the condition requiring location of the transmission line within the project boundaries. We oppose this exception. FERC’s enforcement authority, and the various reviews and conditions attendant to the license, will be meaningless if licensees can seek legislative exemption from the license conditions to which they originally agreed.

Section 4 amends section 13 of the FPA, which currently provides for a two year period in which to commence construction of a project, to extend the commencement of construction period up to 10 years. Currently, section 13 allows the Commission to grant an extension of two years for commencement, and additional extensions for the completion of construction. Numerous licensees now obtain legislative extensions, a practice about which the Department expressed concerns on the 1994 amendments, which contained several project-specific extensions. This proposal for a general extension is new.

The Department’s concerns about the specific legislative extensions are even more applicable to this long general extension. Extending the time for commencement of a construction up to 10 years will render the environmental evaluation, and other evaluations performed in the licensing proceeding, stale. Conditions can change drastically in 10 years. Protections afforded by license reviews may be rendered meaningless. Licenses should not be granted if projects are not ripe for development and construction is to be delayed for such an extended period. Extensions are much better handled administratively and on a case-specific basis.

For all of the above reasons, the Department is strongly opposed to S. 439.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration’s program.

Sincerely,

BRUCE BABBITT.

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, DC, September 22, 1997.

Hon. FRANK H. MURKOWSKI,
*Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This letter responds to your request for the views of the Department of Commerce on S. 439, a bill to amend the Federal Power Act (FPA). The Department is strongly opposed to S. 439, because it would eliminate certain important marine resource protections provided under the FPA. Specifically, by removing small hydropower projects in Alaska and all freshwater hydropower projects in Hawaii from the jurisdiction of the Federal Energy Regulatory Commission (Commission), the bill would eliminate the ability of the Federal Government to provide adequate protection of anadromous fish and other federally protected and managed resources.

The Department, through the National Oceanic and Atmospheric Administration (NOAA), is responsible for ensuring the protection of anadromous and marine fishery resources and their habitats, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and other statutes. The National Marine Fisheries Service (NMFS) exercises this authority with respect to hydropower licensing on rivers pursuant to certain sections of the FPA, including sections 10(j) and 18, as well as the Fish and Wildlife Coordination Act.

In general, the FPA authorizes the Commission to require of hydroelectric projects to undertake actions to protect fish and wildlife resources. These protections are imposed as conditions of operating licenses granted by the Commission. The Commission must, with certain exceptions, include in the license NMFS recommendations for the protection of, mitigation of damages to, and enhancement of fish resources as required by section 10(j). The Commission must also include fishway prescriptions issued by NMFS pursuant to section 18. When a hydropower project qualifies for a license exemption, the Commission must include NMFS' conditions for fish protection.

We believe the current responsibilities under the FPA should continue, providing necessary fish protection at the state and Federal level. However, S. 439 would remove small hydropower projects in Alaska and all freshwater hydropower projects in Hawaii from the jurisdiction of the Commission.

Alaska has the last remaining healthy stocks of anadromous fish, and we have a statutory responsibility to protect them. We believe that the existing exemption requirement appropriately addresses the interests of states and the Federal Government. However, by making small projects subjects to the exclusive authorizing authority of the state, S. 439 fails to ensure that fish protection measures determined to be necessary pursuant to Federal stat-

ute would be undertaken. Projects of 5,000 kilowatts or less may have significant environmental consequences. Damming an anadromous fish stream will have adverse impacts regardless of the project's size. Further, small hydroelectric projects in particular are often located near anadromous fish spawning habitat and can effectively block fish access to the upstream areas. We believe that such projects should remain subject to conditions for fish protection issued by Federal agencies such as NMFS.

In addition, S. 439 would limit the Department's ability to protect species listed under the Endangered Species Act (ESA). The ESA required that Federal agencies undertaking an action that would potentially affect a listed species first consult with the appropriate Federal resource agency. However, S. 439 would eliminate Federal agency actions in connection with the licensing of hydropower projects, without imposing a corresponding requirement for the state to consult with the Federal resource agencies.

The Department also has concerns regarding hydropower projects located in whole or in part on Federal lands. S. 439 would require that the Secretary having jurisdiction with respect to such lands must approve the State of Alaska's authorization for the hydropower project. However, the bill fails to require any consultation with the Federal fish and wildlife resource agencies before such approval is provided. Federal trust resources may be affected, as well as Federal resource management plans.

The Department has similar concerns regarding the bill's exemption for all hydroelectric projects on fresh waters in the State of Hawaii from the jurisdiction of the Commission. The effect would be to free operators of hydroelectric projects in Hawaii from requirements needed to protect fish and wildlife resources that are imposed as conditions of operating licenses granted by the Commission. While the Department currently has not needed to become involved in hydropower licensing in Hawaii, we should not be precluded from doing so in the future, if appropriate.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ANDREW J. PINCUS.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing rules of the Senate, changes in existing law made by the bill S. 846, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

The Act of June 10, 1920, Chapter 285

PART I

* * * * *

SEC. 4. * * *

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(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which congress had jurisdiction under its authority to regulate commerce with foreign nations and among the [several States, or upon] *several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, 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.*¹ *Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy con-*

ervation, 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.

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