

Fifth Circuit Holds that Federal Power Act Preempts Certain State Property Damage Claims

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On October 9, 2013, in *Simmons v. Sabine River Authority State of Louisiana*, No. 12-30494, the United States Court of Appeals for the Fifth Circuit held that the Federal Power Act (FPA) preempts property damage claims based in state tort law where the alleged damage results from the operation of a hydropower project in compliance with a license issued by the Federal Energy Regulatory Commission (FERC).

BACKGROUND

In October 2010, 28 owners of property located downstream of the Toledo Bend Hydroelectric Project (Project) filed suit in Louisiana state court alleging that flood waters released from the Project dam damaged their property. The plaintiffs' complaint, filed against co-licensee Sabine River Authority, State of Louisiana and purchasers of energy generated by the Project, among others, alleged that defendants breached the duties associated with operation of the Project and asserted various theories of liability, including negligence, nuisance, trespass, and unconstitutional taking. Plaintiffs sought damages and a permanent injunction. Following defendants' removal of the case to federal court, the United States District Court for the Western District of Louisiana held that plaintiffs' state law-based property damage and injunctive relief claims were preempted by the FPA, and dismissed the case with prejudice.

THE FIFTH CIRCUIT'S DECISION

In affirming the district court's dismissal, the Fifth Circuit reviewed plaintiffs' claims in the context of the Supreme Court's decisions in *First Iowa Hydro-Electric v. FPC*, 328 U.S. 152 (1946); *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); and *California v. FERC*, 495 U.S. 490 (1990). Relying on the standards articulated in those earlier decisions, the Fifth Circuit interpreted the FPA, with the exception of a narrow carve-out for water use rights, as occupying the field of power development and other public uses of Project waters. It then concluded that the FPA preempts property damage claims based in state law where the alleged damage is the result of operating a hydropower project in compliance with a FERC-issued license. The court further held that the imposition of such damages would be tantamount to the state governing the duty of care in operation of the licensed project, a duty which belongs only to the FERC.

While section 27 of the FPA states that the statute is not to be construed as affecting or intending to affect or interfere with state law relating to the control, appropriation, use, or distribution of water used in irrigation, municipal, or other uses, the Fifth Circuit narrowly construed this provision as only enabling users of the water to obtain proprietary rights in a continuing quantity of water. According to the court, this exemption cannot be used to control the operation of a hydropower project as required by the terms and conditions of the license issued by FERC. As for section 10(c) of the FPA, which states that a licensee is liable for damages inflicted on the property of others by the operation of the project facilities—and which courts have interpreted to preserve the rights of property owners under state tort law—the court again limited the effect of that language so as not to



interfere with FERC's authority to set the appropriate duty of care for hydropower project operators. Specifically, the Fifth Circuit concluded that section 10(c) of the FPA, which also requires licensees to maintain their projects in conformance with FERC's rules, cannot be interpreted so broadly as to allow state tort law to supplant FERC's exclusive control of hydropower project operations.

Characterizing plaintiffs' complaint as essentially alleging that defendants were negligent by failing to act in a manner that FERC had expressly declined to require, the Fifth Circuit acknowledged that plaintiffs had previously requested that FERC impose changes to Project operations to address flooding, and that FERC considered and denied the requested changes. The court noted that plaintiffs did not assert that FERC's administrative decision was improper. Instead, the court described plaintiffs' claims as an attempt to use state law to accomplish the same objective (alleging negligence for not changing operations). To the extent plaintiffs sought to force changes to the FERC-issued license, the court found that this would constitute a veto of the Project as approved by FERC, and an impermissible collateral attack on the license. Accordingly, the Fifth Circuit upheld the district court's conclusion that the FPA preempts plaintiffs' claim for negligence.

IMPLICATIONS

This case suggests that hydropower licensees, when operating their projects in accordance with the terms of their FERC-issued licenses, are insulated from negligence-based state law damage claims that would establish a different duty of care or otherwise infringe upon FERC's ability to regulate their projects. The Fifth Circuit was careful to note, however, that it did not hold that all state property damage claims are preempted by the FPA. Referencing the United States Court of Appeals for the District of Columbia Circuit's decision in *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988), the Fifth Circuit indicated that a negligence claim would be available if a licensee fails to comply with the terms and conditions of its license, but that state tort law cannot replace FERC's determination of the appropriate duty of care.

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