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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA, Petitioner v. FEDERAL ENERGY
REGULATORY COMMISSION, ET AL.

CASE NO: 89-333

PLACE: Washington, D.C.

DATE: March 20, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CALIFORNIA, :

4 Petitioner :

5 v. : No. 89-333

6 FEDERAL ENERGY REGULATORY :

7 COMMISSION, ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, March 20, 1990

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 12:58 p.m.

14 APPEARANCES:

15 RODERICK E. WALSTON, ESQ., Deputy Attorney General of
16 California, San Francisco, California; on behalf of
17 the Petitioner.

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20 behalf of the Respondents.

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1 Power Act does not interfere with state laws relating to
2 control, appropriation, use or distribution of water used
3 in irrigation or for municipal or other uses, or any
4 vested right acquired therein.

5 California's flow requirements in this case relate to
6 control, appropriation and use of water for other uses,
7 mainly in-stream uses and also hydropower uses. Indeed,
8 under California law, in-stream fish flows are
9 specifically defined as a beneficial use of water. And
10 therefore, Section 27 literally encompasses the California
11 flow requirements in this case.

12 The legislative history we believe makes especially
13 clear that Congress intended to defer to the states
14 preeminent water rights authority and to preserve the
15 state's existing traditional water right laws.

16 Congress indeed has traditionally deferred the
17 state's water laws, and in passing the Federal Power Act,
18 and particular Section 27, Congress intended to continue
19 the same tradition of deference that has been followed in
20 the past. And that legislative history indicates that
21 Congress specifically intended for hydropower projects to
22 comply with state water laws to the same extent that other
23 persons must comply.

24 Congressman Doremus stated during their legislative
25 debates, "Water power companies organized under this act

1 will be obliged to be obliged to operate under state law."
2 Congressman Mondell stated that the bill disclaims any
3 intent to take over control of water from the states.

4 No congressman during the legislative debates offered
5 any different interpretation of Section 27 or suggested
6 that the hydropower projects are not required to comply
7 with state water laws.

8 QUESTION: Well, literally I take it you would say
9 then that the state would have the authority -- the
10 authority to require a license from the state.

11 MR. WALSTON: Yes, that is correct. And our position
12 is that --

13 QUESTION: Even though it's licensed by the --

14 MR. WALSTON: By the -- by FERC under the Federal
15 Power Act. Yes, that is correct. The scheme established
16 by Congress is this. Section 4 of the Act authorizes FERC
17 to issue licenses for hydropower projects and requires
18 those hydropower projects to comply with FERC-imposed
19 terms and conditions.

20 QUESTION: Well, Mr. Claps, what's -- what has been
21 happening as a practical matter in the years since the
22 First Iowa decision? Have any states been requiring
23 licenses of these hydroelectric projects that are
24 authorized by the Federal government?

25 MR. WALSTON: Yes, Justice O'Connor. As a matter of

1 fact there are 492 hydropower projects now in California
2 that have acquired water rights under state water law or
3 in the process of -- of acquiring such rights. And until
4 this case, no hydropower project in California has
5 challenged the validity of California law as applied to
6 that project.

7 And therefore, the on the ground status quo is that
8 hydropower projects are in fact complying with both
9 Federal law and state law. They are getting licenses from
10 FERC and also getting permits from the state. That is the
11 actual on the ground reality that is occurring today --

12 QUESTION: And have minimum flow requirements been
13 imposed by the state since First Iowa?

14 MR. WALSTON: The states, especially in California,
15 routinely impose minimum flow requirements. That is a
16 common --

17 QUESTION: And if those minimum flow requirements
18 make the project economically infeasible, as is alleged
19 here, that's all right?

20 MR. WALSTON: That is correct. That's the scheme
21 envisioned by Congress, Justice O'Connor. The idea that
22 Congress had in mind was that hydropower projects had to
23 get joint approval. They had to get approval from FERC
24 under Section 4 of the Federal Power Act. They also had
25 to get approval from the state, pursuant to Section 27 of

1 the Federal Power Act.

2 Thereby, the -- what Congress had in mind was that
3 you had -- that the hydropower project has to go both
4 through the Federal process and the state process and has
5 to comply with the conditions and requirements both as --
6 as a condition of operation.

7 QUESTION: Do you think that's the -- the language
8 and understanding of First Iowa, which seemed to take a
9 very restrictive view of the meaning of this particular
10 provision?

11 MR. WALSTON: Well, first, in First Iowa, we think
12 that the Court's discussion of Section 27, Justice
13 O'Connor, was dictum.

14 QUESTION: Well, I know you think that.

15 MR. WALSTON: Because the --

16 QUESTION: But, let's -- let's look at what the Court
17 said, nonetheless, and didn't the Court at least
18 articulate a very restrictive view of the meaning of the
19 Section?

20 MR. WALSTON: Yes, it did. And if this Court were to
21 sustain the First Iowa court's analysis of Section 27,
22 then we could not prevail here. Our view is that the
23 court's interpretation in First Iowa of Section 27 has
24 been undermined by this Court's more recent decision in
25 California v. United States.

1 QUESTION: Moreover, you're telling me that nobody's
2 been paying any attention to it.

3 MR. WALSTON: The reality is that hydropower projects
4 have in fact complied with both Federal water law and
5 state water law. And probably the reason why they have
6 done it is because the state water laws have always been
7 deemed to apply to hydropower projects to the same extent
8 as apply to everyone else.

9 QUESTION: And another reason is it was perfectly
10 feasible and easy to do so. But the point of it here in
11 this case is to comply with the -- with the state law, at
12 least allegedly, would amount to a veto of this project.

13 MR. WALSTON: Well, we -- we don't believe that
14 that's the case, Justice White.

15 QUESTION: I know, but I said arguably.

16 MR. WALSTON: Okay, well --

17 QUESTION: Let's assume that it would.

18 MR. WALSTON: Okay. If -- yes. Certainly First Iowa
19 said in analyzing Section 27 that the states could not
20 impose any kind of condition that would veto a project.

21 QUESTION: Uh-huh.

22 MR. WALSTON: Our view in this case is that the
23 Court's decision in First Iowa -- the analysis of Section
24 27 --

25 QUESTION: Would allow the state to have a veto.

1 MR. WALSTON: Would allow the state to have a veto.

2 QUESTION: And that is -- I think that's your
3 outright argument in your brief.

4 MR. WALSTON: Yes, that's correct. We also argue
5 that the state is not imposing a veto in this case.

6 QUESTION: I know.

7 MR. WALSTON: The state has simply imposed
8 conditions that require the project to meet higher flow
9 requirements than those contained in the FERC license.

10 QUESTION: Well, now what -- what do we know about
11 the effect of those higher flow requirements imposed by
12 the state on the feasibility of this project?

13 MR. WALSTON: I don't think -- as far as I know,
14 Justice -- or Mr. Chief Justice, I don't believe that
15 there's any evidence in the record concerning the effect
16 of these conditions on economic feasibility. I do recall
17 that FERC, in its declaratory order, stated that the
18 project would be economically feasible over the life of
19 the project, but not during the middle years of the
20 project under the state conditions. But I don't think
21 that there is any evidence in the record offered by any
22 parties concerning that question.

23 QUESTION: Well -- evidence or not, the court of
24 appeals thought that it would amount to a veto.

25 MR. WALSTON: Well, yes, the court of appeals said

1 that potentially that could happen. I -- I -- I don't
2 think there is any evidence in the record whatsoever to
3 support the court of appeal analysis on that question.

4 Once again, I stress that the idea that Congress had
5 in mind in 1920 was that the water project would have to
6 go both through the Federal process and the state process.
7 And indeed this was FERC's historic interpretation of the
8 meaning of Section 27.

9 QUESTION: What -- what state laws do you think are
10 affected by the Federal Power Act?

11 MR. WALSTON: What's -- I -- do --

12 QUESTION: What state laws are preempted by the
13 Federal Power Act?

14 MR. WALSTON: In our view the -- the state laws that
15 would be preempted are those that are in contrary --
16 contrary to clear congressional directives. In other
17 words, directives espoused by Congress. And the reason we
18 take that --

19 QUESTION: Such -- such as?

20 MR. WALSTON: Well, I -- as I recall, I think there
21 is a provision in the Federal Power Act for example that
22 prohibits monopolies or restraints of trade. There is --
23 there is an anti-monopoly provision in the Federal Power
24 Act. And therefore, under that provision the states could
25 not impose any condition -- or state could not authorize a

1 cartel or a monopoly --

2 QUESTION: Well, why wouldn't Section 27 then permit
3 it?

4 MR. WALSTON: Section 27 on its face would. But in
5 California v. United States, this Court said that state
6 power under Section 8 is limited by clear congressional
7 directives. We assume that the --

8 QUESTION: Well, that's -- that's all First Iowa, I
9 suppose, meant that if -- if Congress clearly authorized
10 the FERC to -- to build a project, the state couldn't
11 prevent it.

12 MR. WALSTON: I -- I think that's clearly the
13 expectation of Congress. What Congress said in the
14 legislative debate was this. It said that the states own
15 the water, and the Federal Government owns the land and
16 the consent of both must be obtained. The consent of both
17 the state and the Federal Power Commission must be
18 obtained.

19 And indeed, that was FERC'S historic view of Section
20 27 and the Federal Power Act. In 19 -- in its 1930 --
21 1927 annual report, FERC described the effect of the
22 Federal Power Act as follows. At page 20 -- 35 of our
23 brief. Quote -- "The development of water power on the
24 lands of the United States requires the approval of both
25 the state and the Federal government, the former granting

1 the right to use the water, the latter the right to use
2 the land." And thus the expectation of Congress was that
3 the hydropower project had to go both through the state
4 process and the Federal process.

5 QUESTION: How do -- how do you describe under
6 California law the state's interest here? Simply that
7 ownership of the water, or is there some descriptive term
8 for the use of that water for the promotion of fishing?

9 MR. WALSTON: There's specific statutes that protect
10 the public interest in water for in-stream uses, and
11 particularly for the protection of fish, Justice Kennedy.

12 Section 1243 and 1257 of the California Water Code
13 specifically provide that the State Water Resources
14 Control Board must consider, and to the extent necessary
15 protect, fish needs. And it also provides that the state
16 board must balance fish needs against the needs of
17 hydropower projects as well.

18 QUESTION: If -- if you have a riparian owner who
19 wishes to use the water, and the state has an interest in
20 preserving fishing, does that come out of the public trust
21 doctrine or just --

22 MR. WALSTON: No, it, comes -- the riparian doctrine
23 has been so modified in California now that the same
24 conditions that apply to appropriated use also apply to
25 riparian use as well. And therefore, it wouldn't make any

1 difference --

2 QUESTION: All right. Suppose then you had an
3 appropriated user? And that -- and that prior
4 appropriated use seemed to conflict with fishery
5 requirement? Then how would you characterize the state
6 interest?

7 MR. WALSTON: Well, the state interest in that case
8 would be to reassess the appropriated right in order to
9 protect the fish needs to the extent that the state
10 determines that fish needs have to be protected under
11 those circumstances.

12 Of course, it's always a balance. The State of
13 California is not in the business of putting hydropower
14 development out of business in order to protect fish.

15 QUESTION: But, what about putting hydropower
16 development into business? If you assert that in-stream
17 uses are covered by this provision, surely the generation
18 of power is an in-stream use?

19 MR. WALSTON: That's right.

20 QUESTION: So, I presume then, if you read this
21 Section 27 the way you read it, California can license a
22 hydroelectric plant that does not have the approval of
23 FERC because it says nothing herein shall be construed to
24 affect or intended to affect in any way, or in any way
25 interfere with the laws of the respect -- with respect to

1 what you say are in-stream uses.

2 MR. WALSTON: That is correct. California --

3 QUESTION: So, you don't need a FERC license. You
4 can get a California license for a hydroelectric plant.

5 MR. WALSTON: But the project couldn't operate.

6 QUESTION: Why?

7 MR. WALSTON: Because it -- it wouldn't have the FERC
8 license.

9 QUESTION: You don't need the FERC license. It says
10 nothing herein contained shall be construed as affecting
11 or intending to affect or in any way interfere with. And
12 California says you can -- you can operate a hydroelectric
13 plant.

14 MR. WALSTON: If you were to read Section 27 in the
15 abstract and devoid of anything else in the Federal Power
16 Act, you would come to that conclusion, Justice Scalia.

17 QUESTION: That's the way you read it.

18 MR. WALSTON: No, that's not the way you would read
19 it. The way we read it is that Section 27 also has to be
20 read in conjunction with other provisions of the Act,
21 particularly Section 4 of the Act. Section 4 of the Act
22 specifically provides that FERC has the right to issue its
23 own permits and its own flow requirements.

24 QUESTION: But this says nothing herein contained
25 shall be construed as affecting or intending to affect.

1 MR. WALSTON: I -- I understand your point. I -- we
2 don't make that argument, Justice Scalia.

3 QUESTION: Well, I know you don't.

4 MR. WALSTON: That's -- that's an argument to
5 which --

6 QUESTION: But -- but it seems to me if you -- if you
7 allow this language to cover in-stream uses, and -- and I
8 don't see any difference in that regard from preserving
9 fish or generating power -- it seems to me you've got the
10 whole act.

11 QUESTION: Well, this --

12 QUESTION: This is on Federal land -- this flows
13 through a national forest, doesn't it?

14 MR. WALSTON: No, that's not correct.

15 QUESTION: Oh? The Federal -- the -- the --

16 MR. WALSTON: Some of the lands involved here are
17 Federal lands and some are private lands.

18 QUESTION: I see.

19 MR. WALSTON: But the Federal lands are administered
20 by the BLM; they're not forest lands.

21 QUESTION: Well, I know. I know.

22 MR. WALSTON: But they are, say, partially Federal
23 and partially private.

24 QUESTION: Where is this project?

25 MR. WALSTON: It's -- it's -- it's a long project

1 that -- that covers both public lands and private lands.
2 It's actually on Rock Creek --

3 QUESTION: Right.

4 MR. WALSTON: -- but, as I say, part of the land is
5 Federal and part of the land is private.

6 The most important point I -- I think that I need to
7 get across to the Court is that the legislative history of
8 Section 27 of the Federal Power Act indicates that the
9 provision was expressly modeled after Section 8 of the
10 Reclamation Act of 1902.

11 The primary author of Section 27 said he copied
12 Section 27 from Section 8. And in California v. United
13 States this Court held that Section 8 requires the
14 Secretary of the Interior to comply with state water laws.

15 In that case, the Solicitor General made the same
16 argument on Section 8 that he makes today on Section 27.
17 He argued that Section 8 is limited simply to proprietary
18 rights. And this Court rejected the argument saying that
19 that argument would trivialize -- and that was the Court's
20 word -- trivialize -- the broad language in policy of
21 Section 8.

22 And since Section 27 -- or that is to say, since
23 Section 8 requires the Secretary of the Interior to comply
24 with state water laws, and since Section 27 is directly
25 modeled after Section 8, it would follow that Section 27

1 requires hydropower projects to comply with state laws as
2 well.

3 In other words, the intent of Congress was that by
4 putting Section 8 into the Federal Power Act hydropower
5 projects would be required to comply with state law to the
6 same extent that Federal reclamation projects are
7 required. And if the result were otherwise, you would
8 have an anomaly and indeed an inconsistency on water
9 rights throughout the West.

10 QUESTION: Do you think -- do you think, really, that
11 on the facts of California that it was inconsistent with
12 First Iowa?

13 MR. WALSTON: On the facts of California?

14 QUESTION: Yeah.

15 MR. WALSTON: No, we -- we think --

16 QUESTION: Well, let me -- let me put another way.
17 Wouldn't the use that was confirmed to California in that
18 case have been -- been within the construction of 27 in
19 First Iowa? That the state could control, namely for
20 irrigation?

21 MR. WALSTON: Well, if I understand your question, I
22 think the answer is yes. In other words, the state law
23 that was involved in California would fit within Section
24 27, if that's what your asking.

25 QUESTION: Under -- under -- in first Iowa?

1 MR. WALSTON: Not as -- not as interpreted by First
2 Iowa, no. As interpreted by First Iowa --
3 QUESTION: Well, I know, but --
4 MR. WALSTON : -- the Court said that --
5 QUESTION: -- what was the -- what was the use
6 involved in --
7 MR. WALSTON: In California?
8 QUESTION: No, in First Iowa?
9 MR. WALSTON: Or in First Iowa? The state there
10 prohibited a dam that would have been an --
11 QUESTION: Been an irrigation dam?
12 MR. WALSTON: Would have done -- virtually prohibited
13 all dams that would have impaired fish in any respect
14 whatsoever.
15 QUESTION: They also said that you had to get a
16 license from the state, didn't they, in First Iowa? You
17 had to go before that board?
18 MR. WALSTON: I don't recall that the Court said
19 that --
20 QUESTION: But I mean, I thought that the State of
21 Iowa had said --
22 MR. WALSTON: Oh, the State of Iowa --
23 QUESTION: -- had said that.
24 MR. WALSTON: I'm sorry.
25 QUESTION: Yeah.

1 MR. WALSTON: Yes, the -- the State of Iowa in the
2 First Iowa case argued that Section 9(b) of the Federal
3 Power Act requires the hydropower project to go to the
4 state to get a permit.

5 And this Court said, no, Section 9(b) is simply an
6 informational provision only; it is not a subsidy
7 provision. It has no force and effect. It simply gives
8 evidence or information to FERC that it needs in the
9 licensing process.

10 And therefore, the Court said you don't have to get a
11 state water right as a condition precedent to getting a
12 FERC license. That's what the Court actually held in
13 First Iowa.

14 Now, that holding could be correct, and indeed we do
15 not challenge it here, and the Court could still sustain
16 California's position here, because in First Iowa the
17 Court did not consider -- or I should say anything that it
18 did consider concerning the effect of Section 27 was
19 extraneous to the decision and, therefore, in our view was
20 dictum.

21 Now certainly the Court had a very crabbed view of
22 Section 27 in the First Iowa case. But as I have said,
23 that crabbed view is inconsistent with the broad view that
24 this Court took of Section 8 in the case of California v.
25 United States. And since one provision was modeled after

1 the other, it is simply incomprehensible that the Court
2 should interpret those statutes inconsistently.

3 QUESTION: Why do you say it was dictum in -- in --

4 MR. WALSTON: Well, because the actual holding in
5 First Iowa was that Section 9(b) of the act simply imposed
6 an informational requirement only and, therefore, that
7 Section 9(b) in itself did not require a hydropower
8 project to obtain a state water right as a condition
9 precedent to getting a FERC license.

10 And that was the whole holding that -- that -- that
11 was the question that First Iowa put before the Court and
12 that was the holding of the Court. Anything the Court
13 said on Section 27 was extraneous to its decision.

14 And indeed, the Court analyzed Section 27 only for
15 the purpose of distinguishing its broad, quote, "subsidy"
16 of effects from what the Court deemed the informational
17 requirements of Section 9(b).

18 And, therefore, we urge this Court to not overrule
19 the holding in First Iowa. We think the holding in First
20 Iowa is adequate and acceptable and not inconsistent with
21 the position we assert here. We rather argue that the
22 Court should disregard the dictum in First Iowa concerning
23 Section 27.

24 And the reason we assert that is because that dictum
25 is inconsistent with this Court's recent decision in

1 California v. United States, which provides an entirely
2 different analysis of Section 8 which was the progenitor
3 of Section 27.

4 QUESTION: (Inaudible) suggesting that if we have
5 another view of the -- the -- of what was said in First
6 Iowa, that we overrule it. We should overrule the case.

7 MR. WALSTON: We don't ask that. If -- if the Court
8 is inclined to overrule First Iowa, the Court --

9 QUESTION: Well, I know, but what if we -- what if we
10 think it isn't just dictum as you say, that it's holding.
11 You -- you want us to overrule it, don't you?

12 MR. WALSTON: We want the Court to disavow the dictum
13 of -- in First Iowa in the same way that in the California
14 case the Court disavowed the dictum of two prior cases
15 that had interpreted Section 8 as limited to proprietary
16 rights.

17 Those two prior cases were Ivanhoe and City of
18 Fresno. Those cases said that Section 8 is limited to
19 proprietary right. And this Court said those -- that
20 analysis was dictum, and this Court specifically said we
21 disavow that dictum.

22 We ask for the Court here to do the same thing that
23 it did in California v. United States, which is to say
24 disavow the dictum of First Iowa in the same sense that it
25 disavowed the dictum in Ivanhoe and City of Fresno.

1 The First Iowa dictum concerning Section 27 is
2 remarkably similar to and indeed as I -- virtually
3 identical to the dictum in the Ivanhoe and City of Fresno
4 cases. This Court put them aside and came out with a
5 broad holding that reaffirmed the broad meaning and effect
6 of Section 8 as intended by the Congress in 1902.

7 And therefore, we ask that the Court do the same
8 thing here in the context of this case: disavow the
9 dictum of First Iowa, allow its holding to remain in
10 effect, but disavow the dictum and hold instead that
11 Section 27 has a broad meaning intended by the Congress in
12 1920.

13 And, indeed, Federal --

14 QUESTION: Now, Mr. Walston, the court in the State
15 Energy Resources Conservation case and in the LaJolla Band
16 of Mission Indians case has described its view taken in
17 First Iowa. And the Court said Congress intended to vest
18 in the Power Commission exclusive authority to issue
19 licenses for hydroelectric projects. And there's
20 considerable language to that effect in our cases. Now,
21 you tell me all that is wrong?

22 MR. WALSTON: Well, I -- I don't believe that that --
23 the holding, or the language that you're describing is
24 central to those decisions, Justice O'Connor. The only --
25 the main language this Court has invoked in past decisions

1 relating to Section 27 that we're -- the parties are
2 concerned with here today, of course, is the language in
3 First Iowa itself.

4 The only -- in our view, the Court need do no more
5 than simply disavow the dictum in First Iowa. That's all
6 we ask the Court to do.

7 QUESTION: Well, then in the state -- in State Energy
8 Resources the Court said that allowing states to veto
9 Federal decisions could destroy the effectiveness of the
10 Federal act, meaning the Federal Power Act.

11 MR. WALSTON: I -- I don't --

12 QUESTION: And it had similar language in the LaJolla
13 Band of Mission Indians case.

14 MR. WALSTON: That -- I -- I can only respond,
15 Justice O'Connor, that that was not the intent of Congress
16 in 1920 when it passed the Federal Power Act. Congress
17 had these issues before it and the people in Congress put
18 Section 27 in the Federal Power Act by a very narrow vote,
19 eight to seven. It was widely discussed, widely debated.

20 After it was put in, then the Congress -- then the
21 congressmen who were behind the bill proceeded to describe
22 its broad effects, and the broad effects were that
23 Congress was going to continue the same deference to state
24 water law that it had always followed in the past.

25 QUESTION: Well, Congress has had before it now the

1 language in First Iowa and the subsequent references, and
2 has done nothing to change that scheme.

3 MR. WALSTON: Well, the -- no, I -- I must
4 respectfully --

5 QUESTION: For a good many years.

6 MR. WALSTON: I must respectfully disagree, Justice
7 O'Connor. I -- I don't believe the Congress has ever had
8 the issue before it recently. The question of whether to
9 overrule First Iowa or modify First Iowa has never been
10 presented to Congress, as far as I know, since the First
11 Iowa case is -- or I should say since --

12 QUESTION: But we assume Congress knows about these
13 cases --

14 MR. WALSTON: Well --

15 QUESTION: -- don't we?

16 MR. WALSTON: Well, certainly Congress knows about
17 it, but I'm not sure that congressional inaction that
18 takes place several generations later is relevant in
19 construing the original meaning of Congress in 1920. This
20 Court has said in many -- on many occasions that you
21 cannot use later silence or inaction by Congress to
22 explain what Congress several generations before may have
23 intended. Which would also --

24 QUESTION: May I ask this question? How do you --
25 how do you explain the sudden interest of 49 sister states

1 and California asking us to make a change in the law if
2 they haven't made any request to Congress? Or you're
3 saying this isn't really a change in the law at all?

4 MR. WALSTON: Well, our -- our view is that -- no,
5 we're not asking -- we're simply asking the Court to
6 consider and decide this case in the same way that it
7 considered and decided the case of California v. United
8 States.

9 QUESTION: But wouldn't you have done the same thing
10 if California v. United States had never been decided?
11 How does that fit into the picture?

12 MR. WALSTON: Well, I --

13 QUESTION: Didn't that suggest to you --

14 MR. WALSTON: -- wait --

15 QUESTION: -- an argument that none of these 49
16 states had thought --

17 MR. WALSTON: We certainly --

18 QUESTION: -- has thought of it for several years?

19 MR. WALSTON: We certainly -- we certainly would
20 probably would have pressed the issue, but I -- I don't
21 think that we would have gotten as far as we have gotten
22 today -- and we certainly wouldn't the mean argument.

23 QUESTION: (Inaudible).

24 MR. WALSTON: Pardon me?

25 QUESTION: You mean you've lost so far?

1 MR. WALSTON: Yes, that's right. And -- and we
2 certainly would -- would not have the main argument that
3 we make to this Court. The main argument --

4 QUESTION: I thought it was your -- your submission
5 that California had in effect changed the -- the law and
6 now everybody was getting on the bandwagon to make sure we
7 take advantage of this change.

8 MR. WALSTON: Well, no, we -- we simply ask this
9 Court to interpret Section 27 in the same way the Court
10 interpreted Section 8. The reason the 49 sister states --

11 QUESTION: With a different statute.

12 MR. WALSTON: -- have joined us is because the states
13 feel very strongly about the issues.

14 QUESTION: But not strong enough to go to Congress on
15 -- on the point?

16 MR. WALSTON: Well, perhaps -- you know, if all else
17 fails, then there's certainly that remedy available to the
18 states. But I --

19 QUESTION: But this is the first place you go to get
20 a change in the law, in other words?

21 (Laughter.)

22 MR. WALSTON: Well, it's -- it's -- we don't think
23 that we're getting a change in the law. We're asking for
24 the Court simply to interpret Section 27 in the way that
25 Congress originally intended, and I --

1 QUESTION: And contrary to the way the Court
2 interpreted whether it's dictum or not in a case of about
3 40 years ago.

4 MR. WALSTON: Yes, but what has changed, Justice
5 Stevens, I think, is that in California v. United States
6 this Court took another look at those issues.

7 QUESTION: In a different statute. It didn't even
8 cite the First Iowa case.

9 MR. WALSTON: Well, it wasn't -- no, and it wasn't
10 call on to. And -- although the Solicitor General did, by
11 the way, say this case is just like First Iowa, which, of
12 course, is opposite from to the argument he makes today.
13 In fact, he urged this Court -- he said you -- you can't
14 overturn Section -- the prior decisions concerning Section
15 8 because First Iowa has already decided these issues.
16 And this case is just like First Iowa. That was his
17 argument to the Court.

18 QUESTION: But he's quite about that because there
19 are differences between the cases. They're different
20 statutes, among other things.

21 MR. WALSTON: The statutes are very similar, Justice
22 Stevens, and I -- I cannot accept the proposition that
23 they are different in any fundamental way --

24 QUESTION: Is there a counterpart to Section in the
25 other statute?

1 MR. WALSTON: Pardon me?

2 QUESTION: Why don't you go ahead?

3 MR. WALSTON: All right. The point is that if you
4 back to the language of the statutes, Section 27's
5 language was borrowed right from Section 8. If you go
6 back to the legislative history, the legislative history
7 indicates that Congress meant to take Section 8 and put it
8 in -- into the Federal Power Act.

9 That's precisely what Congress said during the
10 legislative debates. And therefore, if it is true that
11 Section 8 is not limited to proprietary rights and does
12 indeed authorize state regulation of water, then it must
13 follow that Section 27 does the same thing in a hydropower
14 context. Otherwise, this Court is in the unenviable
15 position -- unenviable position of providing a different
16 interpretation of two statutes, one of which was modeled
17 after the other, and both of which contain the same
18 language.

19 QUESTION: But you -- you seem to agree that you
20 can't just take -- construe the section -- Section 27
21 literally, the way it reads.

22 MR. WALSTON: No, and neither did the Court in
23 California v. United States.

24 QUESTION: And so how do we go about sorting out
25 which controls Section 7 allows the state to impose and

1 which ones that it doesn't?

2 MR. WALSTON: The Court should treat Section 27 in
3 the same way that it did Section 8 in California v. United
4 States. In California said that Section 8 is limited by
5 any clear congressional directives that on its face or
6 implicitly preempts state law. And we would therefore
7 urge that the same result should --

8 QUESTION: Despite Section 27?

9 MR. WALSTON: Yes, that's correct. Did I --

10 QUESTION: And so -- but -- but that means that the
11 state can set a -- a different in-stream flow than the
12 Federal Power Commission sets.

13 MR. WALSTON: It could only set a more stringent, a
14 higher standard of flow. If it sets a higher standard of
15 flow, the project has to meet the higher state standard.

16 QUESTION: And -- and --

17 MR. WALSTON: If -- if the reverse --

18 QUESTION: And then -- and completely veto the
19 project?

20 MR. WALSTON: Well, it could lead to that. Of
21 course, the state is not doing that here. The states
22 rarely have an incentive to do that because the state's
23 own citizens are the -- are the beneficiary of hydropower
24 development. The states are interested in promoting
25 hydropower development. But they are also interested in

1 balancing hydropower needs against competing needs that
2 are very important to the state as well.

3 The state's water right process has been followed for
4 many years. Congress has consistently followed and
5 deferred to state water laws and this Court has
6 consistently sustained Congress' judgment.

7 Section 27 is no garden-variety savings clause.
8 Rather, it is a fundamental -- an expression -- an
9 expression of a fundamental principle of Federalism. And
10 that principal of Federalism is that the states have
11 sovereign interest in water, and that the states have the
12 primary right to regulate the allocation and use of water.

13 Congress itself has traditionally followed this --
14 this tradition for many years. This Court has sustained
15 Congress' judgment. It is First Iowa that is the
16 aberration that stands out there all by itself.

17 Therefore, we ask that this Court reaffirm the
18 enduring principle of California v. United States and
19 reject the dictum in the First Iowa decision that we think
20 goes contrary.

21 I'd like to reserve my remaining time for rebuttal.

22 QUESTION: Very well, Mr. Walston.

23 Mr. Nightingale.

24 ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

25 ON BEHALF OF THE RESPONDENTS

1 MR. NIGHTINGALE: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 In the Federal Power Act Congress has delegated to
4 the Commission responsibility for licensing those
5 hydroelectric projects that in the Commission's judgment
6 are best adapted to the development of the waterways in
7 issue.

8 In each such licensing, the Commission weighs a
9 variety of interests, including the requirements of
10 interstate and foreign commerce, irrigation, navigation,
11 the environment and many others.

12 The question presented by this case is when the
13 Commission has undertaken that task, balanced those
14 interests and issued a license, Section 27 reserves to the
15 states authority to prevent the judgment from being put
16 into effect.

17 Now, our fundamental contention is that this Court
18 has reached and resolved that question in, among other
19 cases, the First Iowa case and Federal Power Commission v.
20 Oregon, the Pelton Dam case. In both those cases, state
21 laws were asserted that would have blocked hydroelectric
22 projects that had been licensed by FERC, or in the --
23 excuse me, in the First Iowa case the Commission had
24 expressed approval of the project though it had not
25 actually issue the license and this Court held that those

1 state laws could not be applied to veto the implementation
2 of the project.

3 QUESTION: Mr. Nightingale, is it the government's
4 position here that the state cannot impose any
5 requirements that the FERC doesn't, even though the
6 requirement wouldn't constitute a veto?

7 MR. NIGHTINGALE: Your Honor, our position is that
8 the state cannot impose conditions that are inconsistent
9 with the license terms. Now, in this case the Commission
10 has explained how its minimum flow requirements implement
11 a balance between, on the one hand the requirements of
12 power generation, and on the other hand the protection of
13 fish.

14 And it has explained that in-stream flow requirements
15 different from those established are inconsistent with
16 those of the state. So, our position is that the state
17 cannot impose conflicting conditions.

18 QUESTION: Supposing it sought to impose a
19 requirement which didn't conflict?

20 MR. NIGHTINGALE: If it -- if there were no conflict
21 between the state regulation and the terms of the license,
22 it would be our position that it would not be preempted.
23 Assuming it was -- that would be our position, yes.

24 QUESTION: I thought you -- Section 27 refers to the
25 state's regulations with respect to irrigation, municipal

1 use -- and what else is it?

2 MR. NIGHTINGALE: Section 27 refers to state laws
3 relating to the control, appropriation, use or
4 distribution of water used in irrigation or for municipal
5 or other uses.

6 QUESTION: Or other uses. I thought your position
7 was that -- that in-stream flows just wasn't one of the
8 uses that the state was -- was protected on here?

9 MR. NIGHTINGALE: Our position is that Section 27
10 expressly saves state law from preemption. In other
11 words, if the state law is one that falls within Section
12 27, it's saved.

13 It's not our position, though, that the Federal Power
14 Act occupies the entire field --

15 QUESTION: No, no.

16 MR. NIGHTINGALE: -- such that --

17 QUESTION: But isn't it your position that -- that a
18 state regulation dealing with in-stream flows just isn't
19 within Section 27?

20 MR. NIGHTINGALE: Yes, in this case because it
21 doesn't create a proprietary right in water. The --

22 QUESTION: Well, what if -- what if in this case
23 instead of the Commission finding that, you know, we set
24 the minimum flow because we wanted the minimum flow at
25 that point -- we wanted this kind of balance -- the

1 Commission says, well, sure, we set the minimum flow but
2 it really doesn't make a lot of difference to us, and then
3 the state came along and set a smaller minimum flow.

4 And the Commission can say, well, that really won't
5 have any -- make any difference to the feasibility of the
6 project. Now, is that -- is the state preempted there?

7 MR. NIGHTINGALE: Your Honor, I think it's
8 hypothetical that would not arise because the way the
9 process works is to channel state concerns through the
10 licensing process. Were the Commission to establish a
11 minimum flow requirement and to state along with it that
12 it wasn't prescriptive in any sense, I suppose there would
13 be room for the states to do different things. But that
14 is not the Commission's practice.

15 Let me make it clear. The Commission's minimum flow
16 requirements express its judgments about the appropriate
17 balance between the use of water for hydropower purposes
18 and the protection of fish. It does not, to my knowledge,
19 set minimum flow requirements without meaning them to be
20 prescriptive.

21 Because our position begins with the First Iowa case,
22 I think it's important to lay to rest the suggestion that
23 the analysis there about the scope of Section 27 and the
24 preemptive effect of the Federal Power Act was dicta. In
25 that case, it's important to recognize the Court accepted

1 that it would be impossible for the state to comply with
2 the licensing requirement that was in issue. That
3 requirement provided that the water for a stream would
4 have to be returned at the nearest practical place. And
5 the essence of the project was to divert the flow of the
6 Cedar River through a canal to the Mississippi,
7 effectively dewatering the last 29 miles of the stream, so
8 that there was no suggestion that there was a possibility
9 that the project could be licensed and compliance with the
10 state law could be worked out later.

11 The Court understood the case in those terms. The
12 questions presented included the question whether the
13 issue had been superseded. The applicant for the license
14 had not tried to get a state permit and, therefore, argued
15 -- at every stage of the proceeding it relied on the
16 argument that the requirement for compliance was
17 preempted.

18 And the -- the Court's reasoning in that case, I
19 believe, leaves no doubt that the Court reached and
20 decided the question whether the state licensing
21 requirement was enforceable. And in reaching that
22 conclusion and reaching the conclusion, in the Court's
23 words, that the question whether the project should go
24 forward was one for the Commission and not for the
25 authorities of the state, the Court necessarily considered

1 and resolved three propositions I believe.

2 First, it analyzed the structure of the Act as a
3 whole and reached the conclusion that the entire scheme
4 was designed to place in the Commission responsibility for
5 resolving the issue presented by the licensing statute.

6 Second, it found that Section 9(b) did not save state
7 laws, did not -- despite the inference that could be drawn
8 from the remainder of the statute, Section did -- B did
9 not preserve the enforceability of -- of the state law.

10 And finally, it reached and addressed the argument
11 presented by the State of -- Iowa in that case that
12 Section 27 independently saved the state law, and it
13 discussed the scope of Section 27, both in response to
14 Iowa's assertion and because it was necessary to the
15 judgment in the case. Aware that Section 27 was there,
16 the Court couldn't very well find the state statute
17 preempted without considering whether Section 27 saved it.

18 Now, any -- any doubt on that score, we submit, was
19 laid to rest in the Pelton Dam case. In that case, one of
20 the requirements that the applicant for a license had not
21 complied with was a state statute that required a license
22 to appropriate water for the dam. And the Ninth Circuit
23 had held in that case that the FERC could issue only a
24 permissive license, not a license that would confer a
25 complete right to build the dam. And this Court rejected

1 the argument that compliance was required.

2 And I'd like to refer the Court to a portion of the
3 opinion not cited in our brief, which was footnote 24 of
4 -- at 349 U.S. at 450 to 451. The state statute with
5 which there had been no compliance -- the permit
6 requirement is quoted there, and the Court noted that
7 under its decision compliance was not required.

8 So, I think there's no doubt at this stage that First
9 Iowa set out the analysis that's appropriate for
10 determining whether state laws have been superseded in the
11 Court's words.

12 Now, Justice O'Connor inquired about the status quo
13 on the ground in light of First Iowa. We have a different
14 view than California on that score. We've cited a number
15 of decisions in our brief in which courts have
16 consistently applied First Iowa. I'm referring to page 24
17 at footnote 15. To our knowledge, there has been no case
18 in the lower courts in which a court has taken the
19 position that First Iowa is anything less than good law as
20 it purports to be. So we believe --

21 QUESTION: The state -- the state argues that under
22 California, where the state's interests are represented,
23 what's going to happen is the same water and the same
24 stream is going to be subject to really a differential
25 degree of preemption that doesn't seem to make any sense.

1 You recall a hypothetical they had in the brief? What is
2 your comment on that?

3 MR. NIGHTINGALE: Well, I think it's considerably
4 overstated. First of all, as a general matter, we're not
5 talking about, as California would put it, two systems of
6 water law on the same river. What we are talking about is
7 a situation where state law will have to incorporate and
8 abide by those conditions that are established in a FERC
9 license. And that's not an unfamiliar thing for state
10 water law to have to do.

11 Reserve -- Federal reserved water rights, for
12 example, are taken account of within an overall structure
13 of state law; there are Federal statutes which impact on
14 state water decisions. And this is a case in which what
15 we're talking about basically is where state water law
16 will have to incorporate and abide by the prescriptive
17 conditions in a FERC license.

18 QUESTION: What happens if the dam is for reclamation
19 and power purposes?

20 MR. NIGHTINGALE: If Congress has authorized the
21 project to include hydropower purposes, the Secretary of
22 the Interior, I understand, takes that. I'll -- I
23 understand your question as dealing with the situation in
24 which the authorization extends only to nonpower purposes.

25 In that situation, FERC is authorized to license the

1 hydroelectric development of the project. When it does
2 that under Section 10(a) it's obligated to consider the
3 effect of its decision on various beneficial uses of the
4 water. And under the new statute, the '86 statute, the
5 Electric Consumers Protection Act, it will have to
6 incorporate all recommendations regarding the fish and
7 wildlife unless it makes a -- an affirmative finding that
8 they're inconsistent with the purposes of the Federal
9 Power Act.

10 Remember that when we think about hypotheticals in
11 which there is a conflict between a commissioned licensing
12 decision and the exercise of state authority in this
13 matter, that it won't arise until after FERC has first
14 balanced all the interest involved and its balancing
15 decision will be subject to judicial review.

16 It will only be in those situations where FERC has --
17 has made a good faith balancing decision that there will
18 be a potential for conflict. I think you can overstate
19 the potential for inconsistency if you -- if you lose
20 sight of the fact that FERC is empowered and required to
21 consider the effect of its decisions on other use of water
22 in the river and to consider under ECPA specifically the
23 input of the state agencies that are responsible for that
24 function.

25 Now --

1 QUESTION: Mr. Nightingale --

2 MR. NIGHTINGALE: Yes?

3 QUESTION: -- is it the fact that states have been
4 licensing these hydropower projects and engaging in the
5 kind of activity that the state seeks to have us confirm
6 here?

7 MR. NIGHTINGALE: Yes, Your Honor. Under Section
8 9(b) of the Act an applicant is required to submit
9 satisfactory evidence with respect to compliance with
10 state laws and it's been FERC's practice to look for that
11 evidence.

12 The act requires applicants to go through the
13 application procedure in effect. FERC isn't interested in
14 relieving applicants from any obligation to go forward
15 with procedures that may surface, problems that it should
16 be aware of.

17 QUESTION: So, as a practical matter, FERC has been
18 requiring full compliance with any state requirement?

19 MR. NIGHTINGALE: I won't say full compliance; people
20 go through the process. The reported decisions indicate
21 that when conflicts have arisen the Courts have resolved
22 those conflicts in favor of the -- in the manner of First
23 Iowa and in favor of Federal authority where there's been
24 an actual conflict.

25 I believe there have been few conflicts because

1 people understand the way the system works and -- and
2 problems are adjusted in accordance with the existing
3 scheme. I'm not aware of a lot of situations in which
4 there's insistence that hardens into a dispute that needs
5 to be resolved judicially.

6 We disagree with the California's suggestion that
7 absence of conflict reflects a general acceptance of the
8 idea that compliance with state law is necessary. We
9 think it reflects a general understanding about the way
10 the system has worked since First Iowa.

11 Because my opponent's principal point is based on
12 California v. United States I think it's important for me
13 to address that now. I think what is clear from the
14 argument here, if it wasn't before, is that no one is
15 arguing for literal compliance with Section 27. No one is
16 arguing that if a -- if an argument can be made that a
17 state law relates to the use of water for any use, it's
18 automatically enforceable without respect to any other
19 provision of Federal or -- Federal law.

20 The question is how can we attempt to give effect to
21 that provision and also effect to what -- to the substance
22 of what Congress was evidently attempting to achieve in
23 the Federal Power Act.

24 We submit that the First Iowa accommodation, an
25 accommodation that respects the affirmative licensing

1 judgment conferred on the Commission and also describes
2 that category of state law that is saved as an entirely
3 plausible and entirely reasonable provision that has
4 worked for some time and doesn't deserve to be
5 reconsidered.

6 But even under the framework of California, we
7 believe that we are entitled to win this case. Under
8 California, one looks to identify a clear congressional
9 directive and then recognizes that section -- that a
10 savings clause will not be deemed to supersede it.

11 Now, there's nothing in California that suggests that
12 a clear congressional directive must take a prescriptive,
13 clear form such as no more than 160 acres, which was the
14 issue in the Ivanhoe case. We believe that Congress can
15 express an intention to delegate affirmative
16 responsibility to a Federal agency to make a particular
17 judgment call and that when it has made that judgment call
18 it's entitled to the same respect as a congressional
19 action itself.

20 Let me suggest a -- an example that may clarify the
21 point. In the Fresno case the Court noted that the
22 savings clause would not save state law, which granted a
23 priority to municipal uses of water. The Court noted that
24 the Reclamation Act required the Secretary to provide --
25 to favor irrigation and to provide water for municipal use

1 only when he first determined that it would not undercut
2 the use of a project for irrigation purposes.

3 Let's suppose that instead that statute had said that
4 the Secretary shall have authority to provide water which
5 in his judgment is best adapted -- to those uses that in
6 his judgment would best adapt the project to a
7 comprehensive plan for the distribution of water for
8 irrigation, power, navigation, interstate commerce and
9 other beneficial uses. We submit that that affirmative
10 grant of authority would qualify as a express
11 congressional directive, a clear congressional directive.

12 It's clear why Congress had to proceed by that means
13 in the Federal Power Act. It couldn't personally
14 supervise the hundreds of hydropower projects in various
15 situations that would be necessary across the United
16 States. It had to act by means of a broad delegation to
17 someone else to study the details and to make a judgment
18 call about whether they were the appropriate ones.

19 QUESTION: Well, Mr. Nightingale, would you
20 distinguish California against the United States on the
21 basis of the type of condition that the state sought to
22 attach to the use of water there as opposed to the stream
23 flow requirement here as perhaps all in the light of
24 Section 8 or 27?

25 MR. NIGHTINGALE: Our first position is that First

1 Iowa should be enforced according to its terms. But our
2 second position is that the express delegation of
3 authority to the Commission is the kind of clear
4 congressional directive, when exercised, that is exempted
5 from the savings clause.

6 QUESTION: But you would not distinguish the two
7 cases on the basis of the nature of the conditions which
8 the state sought to attach?

9 MR. NIGHTINGALE: No. And let me emphasize three
10 things about the delegation that we believe underscore the
11 importance of respecting Congress' choice of that term.

12 First of all, it's an affirmative delegation.
13 Congress in this case has not given the Commission the job
14 of certifying compliance with certain minimum standards.
15 Its job under Section 10(a) of the Act is to determine
16 whether the project is best adapted to a variety of
17 interests. And that's a -- a -- it's supposed to make an
18 affirmative judgment, and we think that that phrasing
19 suggests that it must have meant that when the Commission
20 determined what was best, that would be put into effect.

21 Secondly, the matters committed to the Commission's
22 judgment are comprehensive. In the words of this Court in
23 the Udall case, it's supposed to consider all interests
24 relevant to the public interest. The strong suggestion is
25 that there is -- that what -- when it's done that

1 properly, disputes with state authority will take the form
2 of differing judgments about matters that have been
3 committed to the Commission's judgment.

4 And we believe that, again, there's another -- that's
5 another very strong indication that Congress must have
6 meant its judgments to be implemented -- the Commission's
7 judgments to be implemented.

8 Finally, the Commission's judgment encompasses
9 matters of national and regional scope, matters that may
10 not be fully reflected in state law, in particular
11 interstate and foreign commerce and navigability and, in
12 the background, the nation's need for renewable resources
13 of energy as opposed to coal and oil-fired plants.

14 Again, those three characteristics of the delegation
15 to the Commission -- its affirmative nature, its
16 comprehensive nature and its national nature -- are very
17 strong indication that Congress meant for what the
18 Commission judged to be best would be put into effect.

19 And in considering that I think that it's important
20 as well to remember that while this particular project
21 involves a relatively small stream in California, that the
22 Act as a whole applies nationwide to projects of a much
23 greater scope.

24 We've cited in our brief the Allegheny Power case, in
25 which the Commission considered an application --

1 considered applications for 19 licenses in the upper Ohio
2 River basin simultaneously and granted 16 of them. Those
3 -- those projects were in two states. The Ohio River is
4 obviously a state that is -- it crosses state boundaries
5 and in which --

6 QUESTION: (Inaudible).

7 MR. NIGHTINGALE: I'm sorry. The Ohio River crosses
8 several state lines and presents serious interstate
9 issues. So, I -- I -- when -- when construing the
10 statute, trying to determine the relationship within the
11 overall scheme of the Commission's licensing authority and
12 Section 27, it's important to recognize that the
13 accommodation will apply across the board, not just to
14 relatively small projects.

15 The suggestion that it is available to the Court to
16 disavow the dictum in First Iowa I think understates the
17 nature of the change in law that would be necessary to
18 adopt California's position in this case.

19 As I've indicated, I believe that the Federal Power
20 Commission v. Oregon case cannot stand along with a
21 decision that every Federal hydropower project is required
22 to obtain a Federal license on the terms that a state may
23 choose to give it. That was a case in which an applicant
24 failed to get a state license and the Court nevertheless
25 held that the project could go forward.

1 Finally, I'd like to follow through on the point that
2 Justice O'Connor raised about the status quo. I think
3 there is a -- there would be a significant -- that a
4 decision in effect overruling First Iowa subordinating
5 Federal hydropower projects to all state water law would
6 have a significant impact in three significant respects.

7 First, in 1986 Congress passed a statute, the
8 Environmental Consumer -- I mean Electrical Consumers
9 Protection Act, which reinforced the Commission's
10 responsibility to consider and address environmental
11 issues in its licenses.

12 Under that statute, the Congress created procedures
13 whereby concerns about the environment would be funneled
14 through the licensing process. The Commission is required
15 to solicit recommendations from state and Federal agencies
16 with wildlife concerns. It's also required to consider
17 state plans for comprehensive development in its licensing
18 decisions.

19 The very clear implication of that legislation is
20 that the Commission was to have the final say, with the
21 benefit of the views of the states. A decision that the
22 states could implement their own policy choices through
23 state water law would seriously undercut that scheme, we
24 submit.

25 Secondly, there's nothing in California's argument

1 that would limit its interpretation to those state water
2 laws that apply at the threshold of a hydroelectric
3 project. There are a number of projects in operation
4 right now that have been licensed, we believe, on the
5 assumption that First Iowa was good law.

6 California, among other states, have begun to revise
7 state water law to permit changes in water appropriations
8 after an initial license or permission to use water has
9 been granted under the public trust doctrine.

10 We believe that there would be considerable
11 uncertainty engendered if California's view were adopted
12 and that body of state law were potentially applicable to
13 licensed existing projects.

14 Finally, projects are relicensed on a regular basis.
15 Licenses are issued for terms of up to 50 years but a
16 number of major projects come up for renewal on a regular
17 basis, and we believe that the result for which California
18 argues in this case could have a serious unsettling effect
19 on those procedures as well.

20 Unless the Court has any further questions, thank you
21 very much.

22 QUESTION: Thank you, Mr. Nightingale.

23 Mr. Walston, do you have rebuttal?

24 REBUTTAL ARGUMENT OF RODERICK E. WALSTON

25 ON BEHALF OF THE PETITIONER

1 MR. WALSTON: Some comments, Mr. Chief Justice. I
2 understood the Solicitor General to say that the FERC
3 licenses -- the hydropower components of Federal projects.
4 And if that's what he said, that is not correct.

5 Indeed, FERC has no jurisdiction over the hydropower
6 component of Federal projects. But on the other hand,
7 under this Court's decision in California v. United
8 States, the states do have jurisdiction over hydropower
9 components of the Federal projects. Thus the FERC
10 argument in this case means in effect that the state can
11 regulate the hydropower component of Federal projects, but
12 not of private projects.

13 And this doesn't make any sense to us at all. As a
14 matter of fact the Federal project has much deeper Federal
15 interest connected with it than the private project, where
16 the Federal projects that state law is applied to under
17 California v. United States are authorized by Congress,
18 built and operated by Federal agencies, funded by the
19 American taxpayer.

20 The hydropower projects here, on the other hand, are
21 built, financed and operated by private entities. And
22 therefore, the Federal interest is much more involved with
23 respect to Federal project than the private one.

24 I'd like to briefly go over the hypothetical that
25 Justice Kennedy had in mind in his question to the

1 Solicitor General.

2 My time is up, Mr. Chief Justice.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walston.

4 The case is submitted.

5 (Whereupon, at 1:56 p.m., the case in the above-
6 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-333 - CALIFORNIA, Petitioner V. FEDERAL ENERGY REGULATORY COMMISSION,
ET AL.

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BY *Leona M. May*
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