

Watson
Natural Resources
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FACT PATTERN FOR QUESTIONS #1 - #9

Due to population increases, the demand for electricity in northern California and southern Oregon has risen dramatically in recent years. This fact has not escaped the attention of two entities: the city of Willow Creek, California, and HydroDam, a private business. Both entities believe it would be in their interest to construct and operate a turbine-driven hydropower facility on the Klamath River, located in northern California (see drawing on next page). However, there is only one suitable site for such a facility.

The Klamath River is about 30 miles in length. Its headwaters are found on the western slope of mountains located in the Trinity National Forest. After flowing out of the Trinity National Forest, the Klamath runs through the Hoopa Indian Reservation, and then through the coastal Redwood National Park, before emptying into the Pacific Ocean. The river also runs through privately-held lands, including the land containing the proposed dam site (see drawing).

At the time of California's admission to the Union, the Klamath River was not susceptible to river travel due to numerous sections of whitewater and the presence of boulders and other obstructions. In addition, the river became almost "dry" in the late summer months. In the 1940s, however, considerable efforts were expended to remove obstructions and to "channelize" the river. As a result, canoes and other small craft today can traverse some stretches of the river. Native Americans, fishing enthusiasts, recreationalists, and others now use the river, except during the months of July and August, when the river is usually too low to accommodate any river travel.

The Klamath River, like most rivers in the Pacific Northwest, is the home for several types of salmon. Of particular interest is the coho salmon, which migrates up the Klamath River both in the spring and fall in order to spawn. The spring runs of Klamath coho are healthy; however, the fall runs of the Klamath coho have been significantly reduced by overfishing. In fact, the fall runs of Klamath coho are much smaller than the fall coho runs of other rivers in the Pacific Northwest. Within the Klamath River system itself, the most severe situation is found at South Fork Creek, a tributary of the Klamath and one of the numerous spawning grounds for the Klamath coho. Less than 100 fall coho salmon returned in 1992 to South Fork Creek to spawn. In light of this fact, the Department of Interior's Fish and Wildlife Service (FWS) recently received a petition to list the Klamath fall coho salmon as either a threatened or an endangered species. The petition also requests the FWS to designate a critical habitat area. [Note: please assume that -- because the salmon migrates up freshwater rivers -- it is the FWS, and not the Department of Commerce's National Marine Fisheries Service (NMFS), that is the appropriate expert agency here.]

Willow Creek and HydroDam recently filed competing applications with the Federal Energy Regulatory Commission (FERC) for authorization to build and operate a hydropower facility. Both entities have obtained an option to purchase the private lands necessary for the proposed dam and related facilities. The two license applications are identical, except for the size of the turbines. The city proposes to install larger turbines, which will generate more electricity, and hence will go further towards satisfying regional power needs. The smaller turbines proposed by HydroDam will produce less electricity, but will have fewer adverse environmental impacts. This is because a turbine's size bears a direct relationship to the number of fish that will

be "entrained" or killed as they swim downstream and pass through the turbine.

Finally, it is undisputed that the damming of the Klamath River will completely inundate and submerge three unpatented lode mining claims located in the Trinity National Forest (see drawing below).



THE LISTING DECISION

1. The FWS must follow the directives of the Endangered Species Act (ESA) when it decides what to do with the petition to list the Klamath fall coho salmon either as a threatened or an endangered species. What guidance does the ESA give to the FWS on the listing question? How do the facts set forth above impact on the listing decision here?
2. The ESA also contains directives for the designation of critical habitat. What guidance does the ESA give to the FWS on the critical habitat designation question?

WATER RIGHTS

3. You work for FERC's Office of General Counsel and have been assigned the responsibility of determining whether the proposed projects will interfere with certain claimed rights to the waters of the Klamath River. In particular, you have been assigned to analyze the impact of the proposed projects on the water rights of the following four entities:

The United States Forest Service (USFS) of the Department of Agriculture, claiming water rights on behalf of the Trinity National Forest;

The Hoopa Indian Tribe, claiming rights to the waters of the Klamath River as they pass through the Hoopa Indian Reservation;

The Interior Department's National Park Service (NPS), claiming water rights on behalf of the Redwood National Park; and

Johnny Muir, a private landowner who owns property --located along the Klamath River between the Redwood National Park and the Hoopa Valley Indian Reservation -- that has been continuously irrigated with Klamath River water since 1849.

The USFS, the Hoopas, the NPS, and Mr. Muir are each asserting that the hydropower projects will interfere with their "instream flow" water rights by altering the natural flow of the river.

For each of the four entities, please answer the following questions:

Under what water rights doctrine(s) could the entity in question claim rights to the waters of the Klamath?

Is it likely that the water rights of the entity in question include an instream flow right? Why or why not?

LICENSING ISSUES

4. The first question before FERC, of course, is its own jurisdiction. Are the proposed hydropower projects within FERC's licensing jurisdiction under the Federal Power Act? Why or why not?

ASSUME, FOR THE REST OF THE EXAM, THAT FERC HAS LICENSING JURISDICTION UNDER THE FEDERAL POWER ACT

5. Congress has not left the licensing decision solely in FERC's hands. Rather, Congress -- in the Federal Power Act and elsewhere -- has made sure that the FWS also plays a role in the licensing process whenever the project could have an impact on fish and wildlife. In the present

case, the projects clearly will have an impact on the fish and wildlife that utilize the Klamath River. Moreover, you should assume, for the purposes of this question, that the FWS has listed the Klamath River fall coho salmon as an endangered species.

In the context of the present fact pattern, please identify statutes or statutory provisions that require the input of the FWS before FERC renders its decision on the hydropower license applications. Briefly describe what the FWS is required to do under the identified statutes or statutory provisions.

6. How shall FERC choose between the two applicants? What guidance does Congress provide in the Federal Power Act?

MINING CLAIMS

As staff attorney for FERC's Office of General Counsel, you have also been assigned the task of ascertaining the legal consequences of authorizing the construction of a dam which will completely inundate and submerge three unpatented lode mining claims located in the Trinity National Forest. In particular, you have been asked to discuss -- for each mining claim below -- whether FERC can authorize the inundation of the claim without payment of just compensation:

7. Miner #1 validly located her claim, but to date has found nothing despite her continual efforts.

8. Miner #2 validly located his claim, and has extracted "some gold" from the claim. In 1986, the miner failed to do \$100 worth of assessment work as required by §5 of the 1872 Mining Law, 30U.S.C. § 28.

9. Miner #3 validly located her claim, and has extracted "significant amounts" of gold from the claim. In 1986, the miner failed to file her "notice of intention to hold claim" as required by §314 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §1744.

ESSAY QUESTION

10. During a six-year span, from 1974 to 1980, the federal government was quite active with respect to the enactment of legislation, and the promulgation of regulations, dealing with natural resources found on federal lands:

- 1974 The Forest Service issued regulations on hard rock mining in national forests;
- 1976 Congress enacted the Federal Land Policy and Management Act (FLPMA);
- 1976 Congress enacted the Federal Coal Leasing Amendments Act (FCLAA);
- 1976 Congress enacted the National Forest Management Act (NFMA);
- 1977 Congress enacted the Surface Mining Control and Reclamation Act (SMCRA);
- 1978 Congress amended the 1953 Outer Continental Shelf Leasing Act (OCSLA);
- 1980 The Bureau of Land Management (BLM) issued regulations on hard rock mining on public lands.

This flurry of legislative and regulatory activity in the 1970s affected (1) hard rock minerals; (2) coal; (3) timber; and (4) offshore oil and gas.

Please discuss, in the context of one of the four resources listed above, why the federal government felt it was necessary to alter its previous approach to the regulation of the resource in question.

END OF QUESTIONS ON EXAM

ADDENDUM: KEY STATUTES RELATING TO NATURAL RESOURCES LAW

1872 Mining Law
1897 Forest Service Organic Act

1920 FPA Federal Power Act
1920 MLA Mineral Leasing Act
1953 OCSLA Outer Continental Shelf Leasing Act
1955 Common Varieties Act
1955 Surface Resources Act
1960 MUSY Multiple Sustained Yield Act
1969 NEPA National Environmental Policy Act
1973 ESA Endangered Species Act
1974 Forest Service regulations on mining in forests
1976 FLPMA Federal Land Policy and Management Act
1976 FCLAA Federal Coal Leasing Amendments Act
1976 NFMA National Forest Management Act
1977 SMCRA Surface Mining Control and Reclamation Act
1978 OCSLA Outer Continental Shelf Leasing Act Amendments
1980 BLM regulations on mining on public lands
1986 EPCA Electric Consumers Protection Act (amending FPA)
1987 FOOGLRA Federal Onshore Oil & Gas Leasing Reform Act

SURFACE MINING CONTROL AND RECLAMATION ACT. 30 USC 1201 et seq.

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| §402 | §1232 | RECLAMATION FEES |
| §506 | §1256 | PERMITS |
| §509 | §1259 | PERFORMANCE BONDS |
| §515 | §1265 | ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS |
| §516 | §1266 | SURFACE EFFECTS OF UNDERGROUND COAL MINING OPERATIONS |
| §518 | §1268 | PENALTIES |
| §521 | §1271 | ENFORCEMENT |
| §522 | §1272 | DESIGNATING AREAS UNSUITABLE FOR SURFACE MINING |
| §701(28) | §1298(28) | DEFINITIONS -- SURFACE COAL MINING OPERATIONS |

FEDERAL POWER ACT. 16 USC 792 et seq.

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| §1 | §792 | FEDERAL POWER COMMISSION; CREATION; NUMBER; ETC. |
| §3 | §796 | DEFINITIONS |
| §4 | §797 | GENERAL POWERS OF COMMISSION |
| -- | §797a | HYDRO FACILITIES WITHIN NATIONAL PARKS OR MONUMENTS |
| §5 | §798 | PRELIMINARY PERMITS; TRANSFER AND CANCELLATION |
| §6 | §799 | LICENSE - ALTERATION, REVOCATION, SURRENDER |
| §7 | §800 | ISSUANCE OF PRELIMINARY PERMITS OR LICENSES |
| §8 | §801 | TRANSFER OF LICENSE; OBLIGATIONS OF TRANSFEREE |
| §9 | §802 | INFORMATION TO ACCOMPANY APPLICATION FOR LICENSE |
| §10 | §803 | CONDITIONS OF LICENSE GENERALLY |
| §11 | §804 | PROJECTS AFFECTING NAVIGABLE WATERS; REQUIREMENTS |
| §13 | §806 | TIME LIMITS FOR CONSTRUCTION OF PROJECT WORKS |
| §14 | §807 | RIGHT OF GOVERNMENT TO TAKE OVER PROJECT WORKS |
| §15 | §808 | NEW LICENSES AND RENEWALS |
| §18 | §811 | OPERATION OF NAVIGATION FACILITIES; REGULATIONS |
| §20 | §813 | REGULATION OF RATES |
| §21 | §814 | EXERCISE BY LICENSEE OF POWER OF EMINENT DOMAIN |
| §24 | §818 | PUBLIC LANDS IN PROJECT; RESERVATION FROM ENTRY |
| §26 | §820 | PROCEEDINGS FOR REVOCATION OF LICENSE |
| §27 | §821 | STATE LAWS AND WATER RIGHTS UNAFFECTED |
| §28 | §822 | RESERVATION OF RIGHT TO ALTER OR REPEAL CHAPTER |
| -- | §8251 | REVIEW OF ORDERS |

1872 MINING LAW

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| §1 | 30 USC 22 | LANDS OPEN TO PURCHASE BY CITIZENS |
| §2 | 30 USC 23 | LENGTH OF CLAIMS ON VEINS OR LODES |
| §3 | 30 USC 26 | LOCATORS RIGHTS OF POSSESSION (INCLUDING EXTRALATERAL RIGHTS) |
| §5 | 30 USC 28 | MINING DISTRICT REGULATIONS: LOCATION, RECORDATION; ANNUAL LABOR |
| | 30 USC 28-1 | INCLUSION OF CERTAIN SURVEYS IN LABOR REQUIREMENTS OF MINING CLAIMS; CONDITIONS & RESTRICTIONS |

- §6 30 USC 29 PATENTS; PROCUREMENT PROCEDURE; FILING; PAYMENT PER ACRE; OBJECTIONS
- §7 30 USC 30 ADVERSE CLAIMS; JUDICIAL DETERMINATION OF RIGHT OF POSSESSION
- §10 30 USC 35 PLACER CLAIMS; ENTRY AND PROCEEDINGS FOR PATENT UNDER PROVISIONS APPLICABLE TO VEIN OR LODE CLAIMS; CONFORMING ENTRY TO LEGAL SUBDIVISIONS
- 30 USC 36 SUBDIVISIONS OF 10-ACRE TRACTS; MAXIMUM OF PLACER LOCATIONS
- §11 30 USC 37 PROCEEDINGS FOR PLACER PATENT WHERE BOUNDARIES CONTAIN VEIN OR LODE
- §14 30 USC 41 INTERSECTING OR CROSSING VEINS
- § 15 30 USC 42 PATENTS FOR NONMINERAL LANDS: APPLICATION, SURVEY, NOTICE, ACREAGE LIMITATION, PAYMENT

ENDANGERED SPECIES ACT. 16 USC 1532 et seq.

- §1 § 1532 DEFINITIONS
- §4 § 1533 DETERMINATION OF ENDANGERED AND THREATENED SPECIES
- §7 § 1536 INTERAGENCY COOPERATION
- §9 § 1538 PROHIBITED ACTS