DOE/RA/04934-27
Dist. Category UC-97e

U.S. Department of Energy
Assistant Secretary for Rescource Applications
Industrial and Utility Applications and Operations
Division of Hydroelectric Resources Development
Washington, D.C. 20461

May 1980

MASTER

LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF SMALL SCALE HYDROELECTRIC POWER IN INDIANA

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INTRODUCTION

This memorandum describes in detail the legal and institutional obstacles to the development of small scale hydroelectric energy at the state level. It is designed to aid the developer in the determination of which permits, licenses and laws of the state must be secured or complied with for the development of a project. However, the developer should be aware that the state regulatory system does not comprise the universe of hydroelectric regulation. The federal government also exercises extensive regulatory authority in the area.

This dual regulatory system is a function of the federalist nature of our government. Federalism permits both the federal government and the state government to regulate and license certain aspects of a developer's project. Principles of federalism often support a finding that the federal regulation in question will be superior to comparable state regulation. This superiority of federal law can divest the state of any regulatory authority in a given area. Typically, the developer, with this general principle in mind, is compelled to wonder why he must be concerned with the state system at all. The following discussion will examine the area of federal-state relationships with the aim of creating a more orderly understanding of the vagaries of the system.

Thus, the remainder of this introductory section will examine the dual regulatory system from the standpoint of the appropriate legal doctrine, the law of pre-emption, application of the law to the case of hydroelectric development and will conclude with an inquiry into the practical use of the doctrine by the Federal Energy Regulatory Commission. (Hereinafter the FERC).

A. The Law of Pre-emption[a]

As alluded to above, pre-emption is the term that describes, in a federalist system, the ability of the law of one sovereign to take precedence over the law of a lesser sovereign. Specifically, it is the supremacy of the federal law to the state law.

The doctrine of pre-emption is derived from the U.S. CONST. art. VI, cl. 2, which states: "...[t]his Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This clause is the basis of federal supremacy. On its face, the supremacy clause purports to divest the states of authority. However, the principles of federalism do not support such a reading. The federal government is a government of delegated authority. Its laws can be supreme only within the scope of its delegation.[b]

Thus, before the doctrine of pre-emption can be invoked, the federal measure in question must be within an area of the authority delegated to the federal government. In other words, the federal action must have the capability to pre-empt the state action. It is implicit in the above statement that there are certain areas of regulation in which the federal government does not have a pre-emptive capability. Where pre-emptive capability

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a See generally Gunther, Constitutional Law ch. 5 § 2 (9th Ed. 1975); Tribe, American Constitutional Law § 6-23 et seq. (1978); and Engdahl, Constitutional Power ch. 12 (1974).

b See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 405 (1819), "...government of the Union though limited in its power is supreme within its sphere of action."

is lacking, the state law will control.[c]

Once pre-emptive capability is determined to exist, further inquiry must be made to ascertain whether pre-emption exists. Whether a particular state measure is actually pre-empted by a federal measure depends upon the judicially-determined Congressional intent.[d] At this point, the difficulty becomes one of how to determine the intent of Congress.

The U.S. Supreme Court has, on a case by case basis, articulated factors which it declares to be indicative of the Congressional intent to pre-empt. At times the Court has examined the federal statutes to see if they deal with the matter exhaustively. From exhaustive federal regulation the Court infers an intent of no state regulation.[e] Where the Court can infer a need for national uniform standards, pre-emption will be appropriate.[f] The Court has also found pre-emption proper where there are contradictory federal and state

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See, e.g., Regents v. Carroll, 338 U.S. 586 (1950), where the Court held that the F.C.C. could, pursuant to the federal power of regulating interstate commerce, grant or deny or condition the grant of a radio broadcasting license. Here, the license condition required the unilateral disaffirmance of a contract with a third party. Such a condition violated state law which prohibited unilateral disaffirmance. The Court held that while the federal government has pre-emptive capability in the area of interstate commerce, it had no such privilege in the area of state contract law. Hence, state contract law was supreme.

d
See, e.g., City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).

e
E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

f
E.g., Campbell v. Hussey, 368 U.S. 297, 301 (1961); stating "we do not have the question of whether [state] law conflicts with federal law. Rather we have the question of pre-emption . . . [Here] complementary state regulation is as fatal as state regulation which conflicts with the federal scheme." Cf. Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963) finding pre-emption inappropriate as federal law was concerned with minimum standard rather than uniform standard.

requirements making compliance with both impossible.[g]

Thus, given a finding of the pre-emptive capability of the federal law and a finding that an appropriate basis exists to infer that the Congressional intent was pre-emption, federal law will be superior to state law.

The following section will examine the application of these principles by the Court to the case of hydroelectric development.

B. Pre-emption and Hydroelectric Development

1. The Federal Power Act

In the area of hydroelectric development the Federal Power Act enjoys pre-emptive capability. This pre-emptive capability is based upon the Federal Commerce Clause.[h] That clause gives to the Congress the power "to regulate commerce . . . among the several states."[i] Federal jurisdiction to regulate commerce has been held to include the regulation of navigable waterways.[j] Thus, federal regulation of navigable waterways may preclude state regulation. However, the regulation of property rights is not a federal power and in that area the federal law does not have a pre-emptive capability. State property law will govern the rules pertaining to water rights.[k]

The U.S. Supreme Court has also addressed the issue of whether the Federal Power Act actually pre-empts state licensing authority. The Court held

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g See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

h U.S. CONST. art. I, § 8, cl. 3.

i Id.

j Gibbons v. Odgen, 22 U.S. (9 Wheat) 1, 84 (1824), "...all America understands and has uniformly understood the word 'commerce' to comprehend navigation."

k First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 171-176 (1946). Compare Regents v. Carroll, 338 U.S. 586 (1950).

that an applicant need not comply with state permit requirements to secure a federal license.[l] Further, the Court found that the intent of Congress was to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.[m] Given that finding of intent, the section of the Federal Power Act which requires each applicant to submit satisfactory evidence of compliance with state law[n] was interpreted to only require the Federal Energy Regulatory Commission to consider state laws when granting a federal license, but not to require an applicant to comply with state law.[o] Thus, pre-emption of state licensing by federal licensing is appropriate, given the Congressional call for a "complete scheme" evidencing exhaustive and uniform regulation.

However, the FERC may by regulation require evidence of the applicant's compliance with any of the requirements of a state permit that the Commission considers necessary. Hence, the Commission has the discretionary authority to require compliance with state permit requirements.[p]

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l
First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152 (1946).

m
Id. at 180.

n
16 U.S.C. § 802(b) (1976).

o
First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 177-178 (1946).

p
Id. See F.P.C. v. Oregon, 349 U.S. 435, 445 (1955). The State challenged the adequacy of license provisions approved by the Commission for the conservation of anadromous fish. The Court held that the Commission acted within its power and discretion by granting the license and that the state could not impair the license by requiring the state's additional permission or more stringent requirements.

2. The Public Utility Regulatory Policies Act of 1978

Into the already complicated dual system of hydroelectric power regulation, Congress has injected a surprisingly progressive piece of legislation: The Public Utility Regulatory Policies Act of 1978 (hereinafter cited as PURPA), signed into law by President Carter on November 9, 1978, as part of the 5-bill National Energy Act.[q] The eventual impact of PURPA, whose implementing regulations are being drafted as of this writing, is far from certain.[r] However, a few broad conclusions regarding state and federal jurisdiction can be made based on the legislation, itself, and the Conference Managers Report which accompanied it.

The traditional regulatory scheme of things has been that a person selling electric energy for ultimate distribution to the public would be considered an electric utility and subject to federal jurisdiction if the electricity is sold for resale or in interstate commerce, and state jurisdiction if it is sold intrastate directly to the consumer.[s] As explained above, this system results from the Federal Power Act, the Commerce Clause[t] and the doctrine of pre-emption.

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[q]The other four pieces of legislation comprising the National Energy Act are: National Energy Conservation Policy Act; Energy Tax Act of 1978; Powerplant and Industrial Fuel Use Act of 1978; and Natural Gas Policy Act of 1978.

[r]Rules implementing the legislation herein under discussion are to be issued by FERC by November 8, 1979, to be implemented by state regulatory authorities and nonregulated utilities by November 8, 1980.

[s]16 U.S.C. § 824 (1975), Section 201 of the Federal Power Act.

[t]One of the bases for Commerce Clause invocation is the fact that a utility selling to another utility for eventual resale is interconnecting to an interstate transmission grid and will "affect" interstate commerce even if both the selling and purchasing utilities are located within the same state. See F.P.C. v. Union Electric Co., 381 U.S. 90, reh. denied, 381 U.S. 956 (1965).

PURPA seeks to turn this system upside down in order to further the Congressional intent to encourage the development of small power production facilities, such as small scale hydroelectric plants.[u]

One aspect of this reordering is that a hydroelectric plant which meets the qualifications set out in § 201 of PURPA, i.e., becomes a "qualifying facility" (hereinafter cited as QF), could have its rates determined by a state public utility commission, in spite of the fact that its sales enter the interstate grid and are intended for resale. Although FERC will retain some jurisdiction by setting out the rate-making standards which the state commissions will be required to follow, the day-to-day administration of the wholesale rate-making involved will fall to the states for the first time.

This contravention of traditional jurisdiction is further extended by a provision in PURPA which gives FERC the discretion to exempt QF's from substantial portions of now-existing state and federal law.[v] This exemption authority is premised on the Act's purpose of removing obstacles to the development of small power production facilities. The exemption from certain provisions of federal law, such as parts of the Federal Power Act and the Public Utility Holding Company Act, serves the Congressional goal of removing the extensive scrutiny of organizational and financial details which accompanies governmental regulation of power companies and acts as a substantial disincentive to alternative

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[u]The scope of PURPA encompasses much more than the principles discussed in this introduction. Even the Title II sections which provide the jurisdictional authorities discussed herein apply to facilities other than hydro; e.g., cogenerators. For a complete discussion of PURPA's effects on small scale hydroelectric development see FEDERAL LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF THE SMALL SCALE HYDROELECTRIC POTENTIAL OF THE NINETEEN NORTHEASTERN UNITED STATES, Energy Law Institute (second draft) (1979).

[v]§ 210 (e)(1) of PURPA.

energy development.[w] The exemption from state law, however, meets an additional concern. Without it, the states might have an argument to the effect that the field of wholesale rate regulation has no longer been pre-empted and they are therefore free to step into the void created by the removal of exhaustive federal involvement. Because this would have the effect of subjecting QF's to precisely the kind of utility-type regulation Congress sought to avoid, this idea of pre-emption by exemption was utilized.

Although provisions exempting QF's from certain state and federal regulations will only be implemented if FERC "determines such exemption is necessary to encourage . . . small power production,"[x] a recent FERC Staff paper on this section states: "It is clear from the Conference Report that Congress intended the Commission to make liberal use of its exemption authority."[y]

3. Federal Clean Water Act

A current example of this type of coordination between federal pre-emptive authority and day-to-day administration by the states is found in the area of water quality. Under the Federal Clean Water Act, authority has been conferred upon appropriate state agencies to monitor and enforce various aspects of water quality. Certain state agencies have also been designated to issue § 401

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[w] "...the examinations of the level of rates which should apply to the purchase by the utility of the . . . small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility type regulations over them would act as a significant disincentive to firms interested in . . . small power production." Conference Manager's Report, accompanying § 210 of PURPA.

[x] § 210 (d)(1) of PURPA.

[y] STAFF PAPER DISCUSSING COMMISSION RESPONSIBILITIES TO ESTABLISH RULES REGARDING RATES AND EXCHANGES FOR QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES PURSUANT TO SECTION 210 of THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978, page 7; Docket No. RM79-55, Federal Energy Regulatory Commission, June 26, 1979.

water quality certificates and § 402 "point source" permits. As is the case with electric utility regulation under PURPA, in the area of water quality, the federal law applies and is administered by a state agency. The federal law was enacted pursuant to the commerce clause of the constitution and establishes a minimum standard for the states to implement. Consistent with the law of pre-emption, a state may require a higher standard,[z] i.e., a standard which goes even further in carrying out the intent of Congress.

C. The Practical Use of Pre-emption

The above discussion has detailed the legal use of the pre-emption doctrine. The purpose of this section is to describe the doctrine in practice.

The FERC prefers that a developer comply with appropriate state permits before applying to it for a license. The preference is grounded in two rationales. First, the FERC is aware of the federal-state relationship and the possible political ramifications of totally ignoring state input. Second, the FERC must, in granting the license, make a determination that it is a project best suited to the comprehensive development of the waterway. The state has an interest in the use and development of its watercourses and its opinion of their development is important to FERC. Hence, the FERC values state input where it is reasonable.[aa] Thus, the practical application of pre-emption dictates that the hydroelectric developer adhere to the state's legal and regulatory system.

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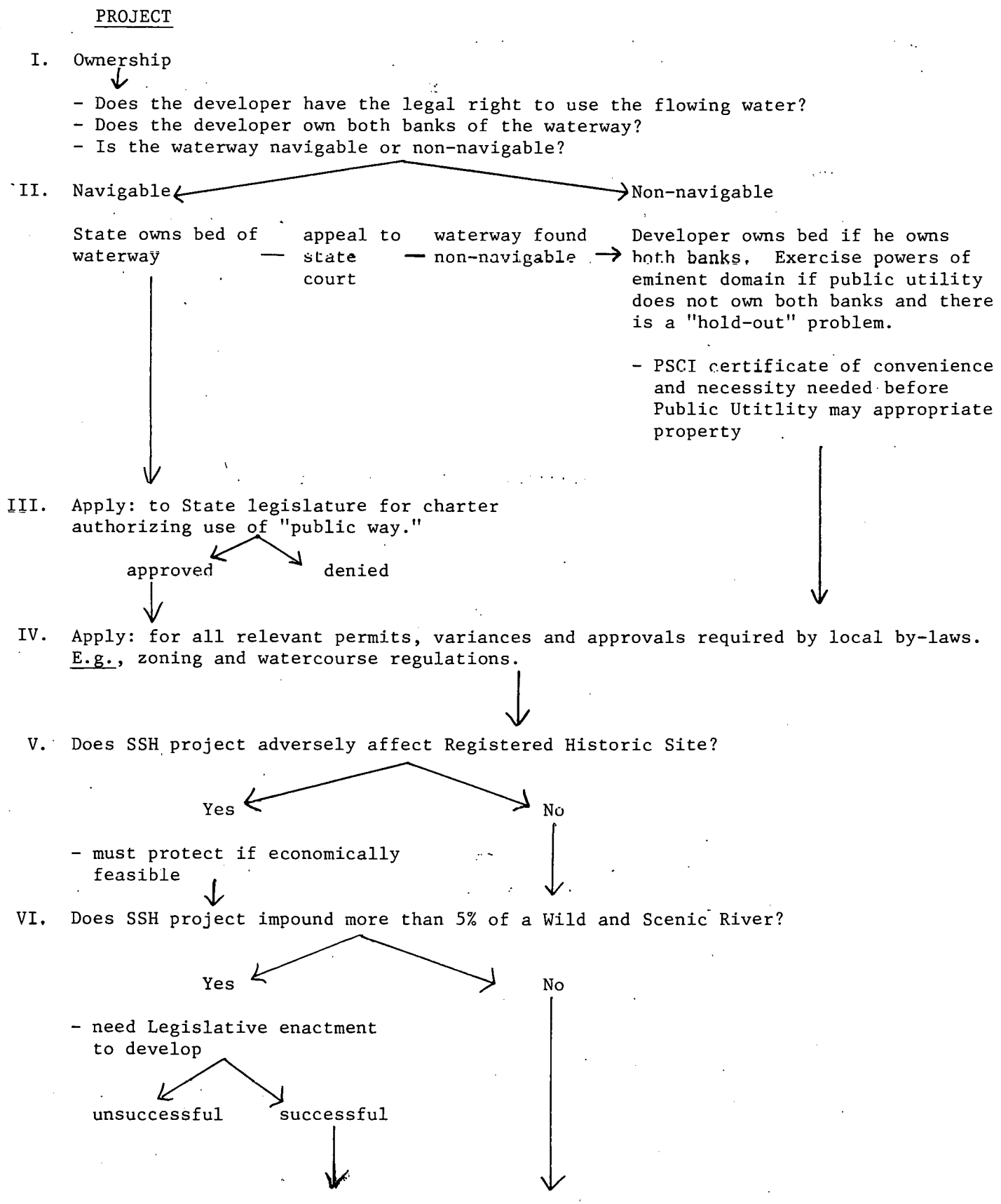
[z] See Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

[aa] See F.P.C. v. Oregon, 349 U.S. 435 (1955).

With respect to PURPA, the federal agency, FERC, will establish the guidelines for rates for sales and exchanges of power between electric utilities and qualifying small hydroelectric projects and will prescribe rules for exemptions from state and federal regulation. These standards and rules will be administered by state agencies, i.e., state public utility commissions. Accordingly, the developer of a SSH project should be aware of the FERC standards on rates and rules on exemptions and should know that he/she will be dealing directly with state agencies.

The regulatory system which is presently in place with regard to clean water will confront the developer at the state level. In most states, this federally-conferred authority will be administered by an agency such as the Department of Natural Resources. These agencies will require the developer to meet certain water quality standards, set by the state and federal government and will mandate that the SSH developer obtain the requisite certificate and permit, as required by the Federal Clean Water Act.

FLOW DIAGRAM OF REGULATION OF SMALL DAMS IN INDIANA



VII. Does SSH project disrupt a Nature Preserve?

Yes

-apply DNR for permit to develop

unsuccessful

successful

No

VIII. Does the SSH project possess any of these characteristics?

1. Drainage area greater than one square mile.
2. Height of dam greater than twenty feet.
3. Volume of water impounded greater than one hundred acre feet.
4. Possible impact on other landowners.

Yes

- Apply to Division of Water in DNR
- Flood Control (local recommendations)
- Dam Safety Regulations
- Fish and Wildlife
  - permit for use of explosives
  - fishladders may be required
  - minimum flow requirements
  - small boat passages may be required
- Lakes and streams
  - lake level requirements
- Engineering
  - dam safety requirements
- Soil and Water Conservation (local recommendations)
- Stream Pollution Control Board (may set effluent standards)
- Environmental Management Board (may require EIS from DNR)
- Natural Resource Commission Approves all permits

Permit Granted

Permit Denied

Appeal to Superior Court

overruled

sustained

Approved by Governor

No

IX. Is the SSH project a public utility?

Yes

- Subject to PSCI jurisdiction
  - selling power at retail level
  - Rural Electric Membership Corporation
    - fixes rates
    - issues public convenience and necessity certificates
  - Municipalities
    - PSCI jurisdiction over rates
  - Non-profit electric cooperatives serving the general public
- Power of Eminent Domain
  - Requires certificate of public convenience and necessity
- PSCI power to inspect dams

No

- selling power at wholesale level
  - subject to FERC jurisdiction
- municipality

X. Taxation of SSH as a Public Utility or Private Enterprise.

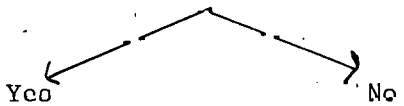
- Distributable Property of Public Utilities assessed by State Board of Tax Commissioners
- Fixed Property of Public Utilities assessed by County Auditor
  - Municipal Utilities Exempt
  - Property of Private Business assessed by County Auditor
- Gross Income Tax
  - Income derived from sales to U.S. government, interstate commerce, and public utilities exempt
  - Non-profit corporation exempt
  - Proprietary activities of municipal utilities not exempt
- Adjusted Gross Income Tax
  - Non-profit corporations exempt
- Supplemental Net Income Tax
- Personal Income Tax
- Intangible Tax
- Sales and Use Tax
  - Public utility sales to manufacturers and other utilities exempt
  - Sales to municipal utilities and non-profit corporations exempt
  - Non-profit corporations exempt from sales and use tax
- PSCI fee for Public Utilities
- Fee for incorporation

XI. Loans for SSH

- Indiana Economic Development Authority
- Department of Natural Resources

XII. Construction, Operation and Maintenance of SSH Dam

- Comply with conditions of all permits and licenses
- Fishways/boat passages
- Utilize power to appropriate
- Liability for dam breach unclear
  - Obtain liability insurance for dam breach
- Is project feasible under prevailing rates?
- In terms of insurance, costs, is project worth risks?



I. INDIANA WATER LAW

A. Ownership Rights

The developer of small scale hydro (SSH) often must compete with others for the right to use the water of a lake or stream. Unlike land, there is no property right of ownership in water; it remains common property, subject to the right of use only, the extent of which is determined by the state's common and statutory law.

Indiana law follows the doctrine of riparianism. Under riparianism, the right to make use of a waterway accrues to "owners of land contiguous to or encompassing a public watercourse."[1] The developer of SSH must acquire right, title, or interest in the land adjacent to the waterway.[2] A leasing arrangement, or an option to buy riparian land, contingent upon the successful outcome of licensing procedures, is adequate to satisfy ownership qualifications, and is a common route taken by private developers.

To construct a dam, or to gain rights to an existing one, the developer must acquire the use of the banks upon which the dam and appurtenant works are located, and the bed to the extent that the dam overlies it. Unless otherwise stated in the deed, if a watercourse is non-navigable, bed ownership generally lies with the adjoining riparians to the center of the stream. On navigable waters, a riparian only has title to the high water mark of the stream; title to the bed is vested in the state.[3]

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[1] IND. CODE ANN. § 13-2-1-3 (Burns) (1973).

[2] Id. § 13-2-20-1.

[3] Ind. Dept. of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950); Bowman v. Wathen, 42 U.S. 189 (1841); U.S. v. Oregon, 295 U.S. 1 (1935).

Ownership of non-navigable lake beds depends on different methods of delineating property lines. At common law, lake owners take title to the bed roughly in proportion to their shoreline footage. The method of dividing the bed depends on the shape of the lake. "[I]f the lake is elongated and narrow, the lines are drawn perpendicular to the median line of the lake, in a manner similar to the division of a non-navigable stream bed. If the lake shape is rounded, lines are drawn so as to shape proportional pie-shaped wedges, but if the shape is so irregular as to prevent any of the above methods, portions are divided in proportion to shore frontage."[4]

The State of Indiana retains the right to control and regulate non-navigable waters for the public welfare.[5] However, a lake or stream's navigability increases the state's jurisdiction over such waters.

B. Navigability

State and federal governments have concurrent jurisdiction over navigable waters. Congress has the power, under the United States Constitution, to regulate commerce among the states, which includes the right to improve navigable waterways so as to keep open and free the natural channels of commerce.[6] Hence, no developer of SSH may obstruct

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[4]See Governor's Water Resource Study Commission, The Indiana Water Resource: Availability, Uses and Needs, Vol. 1 at 205 (1977). (Hereinafter IWRS).

[5]IND. CODE ANN. § 13-2-1-2 (Burns) (1973). See also Id. § 13-2-1-8, which provides that the surface waters of Indiana are to be public waters subject to regulation by the Indiana General Assembly.

[6]U.S. CONST. art. 1, § 8.

navigable waterways without a federal and/or state permit.

In Indiana, navigability is determined by the "navigable in fact" test. The primary Indiana case on this issue is Indiana Dept. of Conservation v. Kivett,[7] a 1950 Indiana Supreme Court decision. In Kivett, the state brought an action seeking an injunction against a commercial riparian for the removal of sand, gravel and minerals from the bed of White River in Morgan County. Following U.S. Supreme Court precedent,[8] the Court outlined the test of navigability as:

> [W]hether or not [the stream] was available and was susceptable for navigation according to the general rules of river transportation at the time Indiana was admitted to the Union [1816]. It does not depend on whether it is now navigable . . . the true test seems to be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times renders the stream unfit for transportation, does not destory its actual capacity and susceptibility for that use.[9]

Hence, if a waterway is capable of being used for useful purposes of navigation, i.e., trade and travel, then the bed of the waters will vest in the state and the waterway will be a public highway.[10] In Kivett, evidence established that the White River was navigable, and, hence, title to the bed vested in the state and the riparian owner had

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[7] 228 Ind. 623, 95 N.E.2d 145 (1950).

[8] The Daniel Ball, 77 U.S. 430 (1874); The Montello, 87 U.S. 430 (1874); United States v. Utah, 283 U.S. 64 (1931).

[9] Kivett, 95 N.E.2d at 147.

[10] Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1, 111 N.E. 932 (1916).

no right to remove sand or other minerals from the bed of the river without license from the state.[11]

The Boards of County Commissioners in Indiana are authorized to declare any stream or watercourse in their respective counties as navigable. Twenty-four (24) freeholders of a county may petition their respective Board of County Commissioners to make such a determination.[12] Declaring a stream's navigability will subject any development on such stream to federal and state regulation.

As stated before, state ownership of the bed of a navigable waterway extends to the high water mark under federal law,[13] and Kivett declared that federal law must be applied to such issues.[14] However, Indiana ownership along the Ohio River extends to the low water mark by virtue of the established state boundary, an exception allowed under federal law.[15]

> The General Assembly has never specified when the state holds title to lake beds. The state can obtain title to a bed by the exercise of eminent domain in reservoir condemnation proceedings and similar actions. However, mere acquiescence to public use by private lake owners does not disturb their title to the bed, as specified in the preamble to the lake level statutes. Some

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[11] Kivett, 95 N.E.2d at 150, 151.

[12] IND. CODE ANN. § 13-2-4-1 (Burns) (1973).

[13] Bowman v. Wathen, 42 U.S. 189 (1841); U.S. v. Oregon, 295 U.S. 1 (1935).

[14] Kivett, 228 Ind. at 629, 95 N.E.2d at 148.

[15] Martin v. City of Evansville, 32 Ind. 85 (1869).

> clarification is needed as to whether the "navigability" of a lake, i.e., the flow of a navigable watercourse into or out of the lake, serves to vest bed title in the state. A 1934 Indiana Supreme Court case, implied that private bed ownership of a lake was predicated on the lake's non-navigability, but never expressly stated its reasoning or precedent. [16]

A developer's right in a navigable waterway is subject to any improvement the state or federal government may make for purposes of navigation. In other words, riparian ownership is subject to the dominant right of the government to improve navigation. Although an improvement might result in substantial injury to a developer's ability to generate power, he will be left without a remedy.[17]

By its police power a state may regulate the use of navigable waterways; pursuant to the commerce clause, the federal government may also regulate navigable waterways. These regulations may diminish, or possibly destroy the value of property. However, as long as the property still remains in the owners possession there is no taking.[18]

For example, the United States Supreme Court has held that an owner of a hydroelectric dam, located on a navigable stream, was not entitled under the Fifth Amendment to compensation from the United States for a reduction in the generating capacity of the plant, which

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[16] See IWRS at 205; Sanders v. DeRose, 207 Ind. 90, 191 N.E. 331 (1934).

[17] See Richard R. Powell, The Law of Real Property, § 723 et seq. (1977).

[18] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

resulted from an authorized navigation improvement that raised the level of the water in the navigable stream above ordinary high water mark.[19] The Court stated that there can be no recovery for damages sustained as a result of an improvement to navigation because the dam owner's right to a certain water level is subordinate to the public's interest in navigable waters.[20]

C. Riparian Rights - Reasonable Use/Natural Flow

Once a developer gains right to the bank of a stream, he is entitled to make certain uses of the water. Riparian rights attach to "surface water" which may be defined as water which flows with regularity and dependability along a definite course and in a definite channel with bed and banks or sides.[21] This may include not only streams and rivers, but also lakes, ponds, swales, and marshes through which a watercourse flows.

Originally, Indiana adhered to the Natural Flow Doctrine, which granted each riparian proprietor the right to have the stream water remain in its natural state, free from any unreasonable diminution in quantity and free from any unreasonable pollution in quality.[22] The Natural Flow Doctrine greatly reduced the efficient use of water; hence, practical considerations led to its modification.

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[19] U.S. v. Willow River Co., 324 U.S. 499 (1945).

[20] Id. at 509.

[21] Trout v. Woodward, 64 Ind. App. 33, 111 N.E. 467 (1916); IND. CODE ANN. § 13-2-1-4(4) (Burns) (1973).

[22] See Robert Emmet Clark, Waters and Water Rights, Vol. VII, § 611 et seq. (1976).

Indiana now follows the Reasonable Use Doctrine which states: (1) all riparian proprietors have co-equal rights to use the streamflow; (2) no one may lawfully use the water to such an extent as to cause material injury to those below him on the stream; and, (3) no owner may injure those above him by obstructing the flow so as to cause it to flood upper lands or reduce the head needed for mill power.[23] Under the Reasonable Use theory, the stress is laid, not on the effect the use has on the stream in its natural condition, but upon the effect the use has on other riparians.

In determining what uses are reasonable under the circumstances, a court of law considers: (1) quantity of water in the stream, whether it is a natural or artificial use; (2) the use which other riparians wish to make; and (3) whether other riparians are materially injured.[24] What may be a reasonable use at one time may not be reasonable at another time and vice versa.

"Domestic" uses of water have priority under Indiana law. Domestic uses include, but are not limited to, water for household purposes and drinking water for livestock.[25] The generation of power on a very small scale for the use in one's home may be considered a domestic use by the courts. In 1899 the Indiana Supreme Court stated that an owner is entitled to "the reasonable use and enjoyment of the stream . . . . He may dam it and divert it for

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[23] City of Elkhart v. Christiana Hydraulic Inc., 223 Ind. 242, 59 N.E.2d 353 (1945).

[24] City of Logansport v. Uhl, 99 Ind. 531, 538 (1855).

[25] IND. CODE ANN. § 13-2-1-3(1) (Burns) (1973).

mechanical purposes."[26] However, the generation of power for sale would most likely be considered a commercial use by the court and would be balanced against other competing social uses. An Indiana Statute lists the generation of power among the various uses which are deemed to be a beneficial use of state water resources.[27]

D. Public Rights

The public has the right to navigation in all navigable waters in Indiana.[28] This right has been expanded to include recreational uses, such as swimming, fishing and boating.[29]

The class of waters susceptible to public rights has been substantially broadened by the Indiana General Assembly to include artificial lakes,[30] waters overlying private lands dedicated to the public,[31] artificial channels adjoining watercourses and public lakes,[32] and rivers designated under the Natural, Scenic and Recreational Rivers Act, which are subject to a "water use easement."[33] However, the Indiana Supreme Court has

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[26] City of Valparaiso v. Hagen, 133 Ind. 337, 340, 54 N.E. 1062, 1063 (1899).

[27] IND. CODE ANN. §§ 13-2-4(10); 13-2-9-1 (Burns) (1973).

[28] See Waite, Public Rights in Indiana Waters, 37 Ind. L.J. 467 (1961-62).

[29] IND. CODE ANN. § 13-2-14-1 (Burns) (1973); IWRS at 96.

[30] IWRS at 197; see also IND. CODE ANN. §§ 13-2-11-3; 13-2-16-1; 14-3-1-20 (Burns) (1973) (Supp. 1978).

[31] IWRS at 197; see also IND. CODE ANN. §§ 13-2-18.5-5; 13-2-26-3(i)-10 (Burns) (1973).

[32] IWRS at 197; see also IND. CODE ANN. §§ 13-2-14-5; 13-2-18.5-5 (Burns) (1973).

[33] IWRS at 197.

held that each owner abutting a non-navigable lake has the exclusive right to enjoin public use of the waters overlying his portion of the lake bed.[34] While this would be true of non-navigable streams as well, lake level statutes have provided that the public is to have recreational use rights in all "lakes which have been used by the public with the acquiescence of any or all riparian owners." There have been no interpretations of this statutory language by an Indiana court, and several questions remain open: To what extent is public use sufficient to establish acquiescence? Since any one owner's acquiescence is all that is required to make the lake "public," what rights, if any, do some lake owners have to prevent other lake owners from allowing public access?[35]

E. Acquisition of Water Rights by Prescription

The right to use water may be gained by prescription, i.e., a mere possessor of another's right may be entitled to enforce that right after a certain period of time has elapsed. The rationale for this transfer of rights is that a continuous user should eventually gain an interest against a riparian who fails to object to the use. If an owner maintains a dam and backfloods neighboring lands continuously for twenty (20) years,[36] without objection by owners whose lands are injured, the dam owner may acquire an "easement," or the right to flood those lands. This right will become part of his ownership deed, after an action to quiet title, and will transfer to subsequent owners.

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[34] Sanders v. DeRose, 207 Ind. 90, 95, 191 N.E. 331, 333 (1934); see also Patton Park, Inc. v. Pollack 115 Ind. App. 32, 55 N.E.2d 328 (1944).

[35] See IWRS at 213; IND. CODE ANN. §§ 13-2-11-3; 13-2-14-2 (Burns) (Supp. 1978).

[36] IND. CODE ANN. § 32-5-1-1 (Burns) (1973).

Although Indiana courts have not specifically addressed the problem of whether an individual may acquire prescriptive rights in public water, the Indiana Supreme Court has held that "an easement cannot be acquired by prescription against the government."[37]

On the other side of the coin, a developer who owns the banks of a non-navigable lake should be aware that the public may gain a prescriptive right to use the lake for recreation, unless he protects his exclusive interest.

In addition, the right to have an unnatural condition maintained may be acquired by prescription. In Burke v. Simonson,[38] a case in which the defendant had maintained a lock for thirty years, the court held that the plaintiff, a downstream owner whose land would have been flooded had the lock been removed, had acquired a prescriptive right to have the lock maintained. Prescriptive rights may be obtained only by riparian owners and only when the use is unreasonable.

F. Mill Dam Act

The Mill Dam Acts were passed in many eastern states during the colonial period of the country; they enabled a mill owner to backflood his neighbor's land, pay damages, and acquire an easement. The legislative intent behind the acts was explained in a 1910 Indiana Supreme Court case:[39]

> The important advantage of mills to the inhabitants of the country in general, is too obvious to require any elucidation . . . . Few sites are to be found where a mill can be erected without so raising the water as more or less to

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[37] Verrill v. School City of Hobart, 222 Ind. 214, 216, 52 N.E.2d 619, 620 (1944).

[38] 104 Ind. 173, 2 N.E. 309 (1885).

[39] Sexaver v. Star Milling Co., 173 Ind. 342, 348, 90 N.E. 474, 477 (1910).

> affect the property of other persons besides the owner of the mill. If no remedy was provided for this inconvenience, the consequences would be, that every person, whose land was in any degree injured, would be entitled to an action for the damages sustained, and once being entitled to recover, he would be entitled to recover again and again for every continuance of the injury, as long as the dam would remain. In this situation of things, no man would build a mill, unless he was able first to purchase all the lands contiguous to or that would be in any degree injured by, the dam.

This being the case, and mills being deemed a public good, Indiana passed their Mill Dam Act in 1881, which is still on the books today.[40] To apply for Mill Dam rights a riparian owner should petition the circuit or proper court of the county for a writ of assessment of damages.[41] The court must then:(1) ascertain whether any other lands besides those belonging to the petitioner will be damaged by the impoundment; (2) inquire whether fish or navigation will be obstructed and whether the health of the neighborhood will be injured; (3) examine alternative means to obstruction; and, (4) determine whether the use is a public use.[42]

Both the United States Constitution and the Indiana Constitution state that private property may only be taken for public use.[43] And even though the Indiana legislature has granted Mill Dam owners the power to backflood private property, the constitutional grant of this power, in terms of public use, has been a much litigated issue.[44]

Aside from the power granted under the Mill Dam Acts, the Indiana legislature has declared public utilities' production of electricity

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[40] IND. CODE ANN. §§ 34-56-2; 34-56-3 (Burns) (1973).

[41] Id. § 34-1-56-3.

[42] Honestine v. Vaughan, 7 Black F. 520 (1845).

[43] U.S. CONST. amend. V; IND. CONST. art. 1, § 21.

[44] See generally 2 Nicols, Eminent Domain, § 7.623 (1976); The Constitutional Basis of the Right to Tax and the Taking by Eminent Domain in Indiana, 7 Notre Dame Lawyer 359 (1931-32).

to be a public use, entitling a public utility to acquire private property for the production of electricity.[45] The United States Supreme Court has upheld state statutes providing for condemnation of property for water power purposes.[46] Hence, electric companies, that are public utilities, are constitutionally authorized to exercise the power of eminent domain, Hydroelectric producers, who are not defined as public utilities, cannot constitutionally exercise the power of eminent domain. The procedure to be followed by a public utility utilizing eminent domain powers will be discussed in Part III of this paper.

Granting the power of eminent domain to public utilities greatly reduces the common law barriers to developing SSH. The power of eminent domain eliminates "hold out" problems due to riparians who refuse to sell out to a utility which is developing SSH, thus making the development of SSH more expedient and economical.

Because other avenues to obtaining the power of eminent domain exist, and because courts are reluctant to uphold the Mill Dam Acts, the developer of SSH should avoid using the Mill Dam Acts as a means of appropriating private property.[47] Instead, the SSH developer should employ the legislative acts which grant the power of eminent domain to public utilities.[48]

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[45] IND. CODE ANN. §§ 8-1-8-1 (Burns) (1973); 32-11-3-1 (Burns) (1974).

[46] Mt. Vernon - Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).

[47] See generally Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927); Great Western Natural Gas and Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N.E. 765 (1903).

[48] Supra note 45. Not every SSH developer will be a public utility. See Part IV of this paper for the statutory definition of "public utility".

G. Liability for Dam Breach

In Indiana, there is confusion as to the liability of a dam owner for dam breach.[49]

In Mikesell, an Indiana Appellate Court held a railway company liable for damages sustained by plaintiff when a railroad embankment collapsed, releasing a great volume of surface water. Applying a negligence standard of due care, the Court imposed liability upon the railroad company because the embankment's washout and the plaintiff's subsequent injury were reasonably foreseeable.[50]

In Wabash, the defendant railway company constructed an embankment over a stream which was periodically dry in the summer, but discharged large quantities of water during times of heavy rain. One summer, as a result of unusual, extraordinary and unprecedented rainfalls, the embankment broke and both upper and lower riparians were injured. A Circuit Court of Indiana, applying a negligence standard, held that since the causes of the injuries could not have been anticipated or guarded against by the exercise of ordinary and reasonable foresight, care and skill, the defendant was not liable.[51] The Court went on to say that the railroad company is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its embankments; it is not liable for damages if the embankment breaches as a result of extraordinary floods.

In contrast to the above cases, an Indiana Appellate Court, in Goodman, held that if a landowner alters natural conditions so as to change the course of water, or concentrates it at a particular point,

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[49] See Central Indiana Coal Co. v. Goodman, 111 Ind. App. 480, 39 N.E.2d 484 (1946); Gumz v. Bejes, 163 Ind. App. 55, 321 N.E.2d 851 (1975). Compare Central Indiana Railway Co. v. Mikesell, 139 Ind. App. 478, 221 N.E.2d 192 (1966); Central Trust Co. of New York v. Wabash, 57 F. 441 (1893).

[50] Mikesell, 139 Ind. App. at 490, 221 N.E.2d at 199.

[51] Wabash, 57 F. at 446.

or by artificial means increases its volume, he becomes liable for any injury caused thereby.[52] Under Goodman, a dam owner is strictly liable for the breach of his dam. Recently, an Indiana Appellate Court affirmed the Goodman rationale in Gumz. The Gumz court held a defendant landowner strictly liable for damages caused when the defendant allowed water from a damlike obstruction to escape and flood plaintiff's lands.[53] Both Goodman and Gumz state that landowner may not impound the flow of waters, permit them to escape, thereby causing damage to his neighbors, without liability.

The risk attendant with dam breach is of great concern to the developer of SSH. The greater the risk of ownership, the greater the costs will be to construct and maintain a SSH project.

If dam owners are liable only for negligence for dam breach this will not constitute a significant obstacle to the development of SSH. Dam owners will merely be required to use reasonable due care in building dams. Such a standard of due care is a normal risk which will not, for example, make the costs of insuring a dam prohibitive.

Holding dam owners strictly liable for dam breach constitutes a significant obstacle to the development of SSH. Dam owners will be liable for dam breach, regardless of fault. This creates a greater risk of ownership and may make the cost of insurance, for example, prohibitive.

A developer of SSH may be able to argue that a dam owner should only be liable for negligence for dam breach, since the Division of Water, within the Department of Natural Resources, merely requires a developer to exercise prudence, due care, and sound and accepted engineering principles in

[52] Goodman, 39 N.E.2d at 487.

[53] Gumz, 321 N.E.2d at 856,857.

constructing his dam. In other words, a dam owner may only be liable if he did not exercise prudence and ordinary due care in constructing his dam. This dam safety requirement does not settle the confusion concerning liability for dam breach, but does strengthen the argument that dam owners should only be held liable for negligence for dam breach.

II. DIRECT REGULATION

A. Construction Permit - Department of Natural Resources

1. Division of Water

After choosing a site and obtaining the necessary property rights, the developer must apply for a construction permit from the Division of Water in the Department of Natural Resources (DNR). The permit must be obtained by anyone desiring to construct a dam unless all of the following conditions apply:

(a) The drainage area above the site is less than one (1) square mile;

(b) The height of the dam above the natural streambed or the lowest point on the valley floor will be less than twenty (20) feet;

(c) the volume of water impounded by the dam to the emergency spillway level will be less than 100 acre feet;

The permit requires detailed plans, specifications, and data on the engineering aspect of the project. The Division of Engineering in DNR is available for consultation and will release information concerning drainage and reclamation of lands to interested parties. If necessary, the Division is also authorized to request additional information from the developer before granting a Dam Construction or Safety Permit.[55] In the event that the construction of the

[54]Department of Natural Resources, Division of Water, Instructions for Making Application for Approval of Construction in a Floodway (1979). (Hereinafter DOW Applications).

[55]IND. CODE ANN. § 14-3-1-15 (Burns) (1973).

proposed project will require the use of explosives in or under the water, a permit is necessary from the Division of Fish and Wildlife in DNR. Such applications may be submitted together with the application for the permit for construction in a floodway.[56]

2. Division of Fish and Wildlife

The permit will then be sent for approval to applicable divisions within DNR. As a condition of the permit, the Division of Fish and Wildlife has the authority to require that any dam used for the production of electricity, that is to be constructed across a waterway with a watershed greater than fifty (50) square miles, maintain a downstream minimum flow and a sufficient head of water above the impoundment to support fish life. The guidelines are aimed at maintaining the natural environment of the habitat; specifically, the downstream flow must be equal to the upstream waters which flow into the impoundment.[57] This requirement restricts the developer's control over the release of water for power.

The Division of Fish and Wildlife may also require, at any time, that fish ladders and/or a small boat passage be constructed. The Division prescribes the design and the materials to be used to construct such facilities, and the developer must bear the facilities' cost.[58] Fishladder requirements depend on factors such as: the type of fish, their scarcity and their importance, as well as the location of the waterway. The Division will discuss fishladder

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[56] Supra note 54.

[57] IND. CODE ANN. § 14-2-5-9(1) (Burns) (1973).

[58] Id. § 14-2-5-9(2).

requirements, prior to the formal permit process, if the developer wants such a determination.[59]

3. Division of Lakes and Streams

The Division of Lakes and Streams in DNR has jurisdiction over lake levels of all public water lakes.[60] The Acts concerning lake levels are extensive.[61] A "normal" lake level is the legally established level determined by the average normal level between high water, which occurs as a result of excessive precipitation, and low water, which occurs during protracted dry periods. Should data be unavailable, then the normal water level is the level "where the presence and action of the water has been so constant as to give to the bed of the lake a character so distinct from that of the surrounding land . . . ."[62]

In the case where a developer will be constructing a dam in a stream or river where none had existed previously, there will be no way to determine a "normal water level." If the new impounded area is to be open to public access, the Division may put lake level maintenance requirements in the dam construction license.[63] This could have a significant effect on the developer's ability to produce peaking power. Therefore, it may be in the developer's best interest

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[59]Telephone conversation with Mr. Joe Janesch, Biologist, DNR, Division of Fish and Wildlife (July 19, 1979).

[60]IND. CODE ANN. §§ 13-2-11-1; 13-2-14-2 (Burns) (1973). A public lake is defined as all lakes which have been used by the public with the acquiescence of any or all riparian owners.

[61]Id. §§ 13-2-11-1 to 13-2-18.5-6.

[62]Id. §§ 13-2-11-3; 13-2-13-2; 13-2-14-2; 13-2-15-3.

[63]Telephone conversation with Mr. Jim Hebenstreet, DNR, Division of Lakes and Streams (June 20, 1979).

to prevent public access to the impoundment. Where this option is not available, a developer may have to compromise some power potential.

Often a developer will lease or buy an already existing dam. The deed may specify his claim to the water level, as when water rights are acquired under the Mill Dam Act. Where rights to the water level have not been acquired, the state of Indiana may regulate water levels in the interest of its citizens for recreation and other ordinary purposes, "and no person owning lands bordering any such lakes shall have the exclusive right to the use of waters . . . ."[64]

Lakes of ten (10) acres or more require the written approval of the Division before any alteration is undertaken which may endanger the water level. If the Division determines that the proposed project will not endanger the water level, because certain safeguards are implemented, then the Division may make those safeguards a condition of approval. Should the Division decide to withhold its permission, the Division will arrange for public notice to be given and a hearing on the issue. Any decision made by the Division may be appealed to the Circuit or Superior Court where the lake is situated.[65]

Lakes of twenty (20) acres or more may not be lowered except for the generation of electric energy.[66] Because lake levels are set by the Indiana courts, no lake level may be lowered without

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[64] IND. CODE ANN. § 13-2-11-1 (Burns) (1973).

[65] Id. §§ 13-2-15-1; 13-2-15-2.

[66] Id. §§ 13-2-16-1; 13-2-16-2.

a court's approval. Exempting hydroelectric dams from this requirement releases the developer from convincing a court to lower a lake level, and only requires him to obtain the written approval from the Division of Lakes within DNR.[67]

4. Dam Safety

The Division of Water in DNR is authorized to inspect and demand repair of any dam and appurtenant works unless the dam is specifically exempt by statute. At the present time, "all dams constructed for the purpose of hydroelectric power generation, owned by public utilities, and under the jurisdiction of the Public Service Commission of Indiana," are exempt from DNR inspection.[68] In the event that a dam does not fall under the jurisdiction of the Public Service Commission, the Division of Water is directed to make an engineering inspection of dams, at least once a year or more, and may order the developer to alter or repair the dam's construction. If a dam's condition is so dangerous to life and property as not to permit sufficient time for the issuance of an order, the Division may declare an emergency situation. The Division may then take the necessary measures to remedy the situation.[69] The cost of

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[67] Telephone conversation with Mr. Jim Hebenstreet, DNR, Division of Lakes and Streams (June 20, 1979).

[68] IND. CODE ANN. § 13-2-20-4 (Burns) (1973). See also DNR, Maintenance and Repair of Dams, Dikes and Floodwalls, Circular No. 6 (1961).

[69] IND. CODE ANN. §§ 13-2-20-1 to 13-2-20-8 (Burns) (1973).

maintenance and repair, as well as inspection, is borne by the developer.[70]

The standards of safety depend upon the type of dam, its location, and the consequences of its breach. In general, the developer is required to exercise prudence, due care and sound and accepted engineering principles in constructing his dam.[71] Requiring a dam developer to use prudence and due care in constructing a DNR project may signify that a dam owner will only be liable for negligence for dam breach. The developer should compare this dam safety requirement with the section concerning liability for dam breach in this paper.

5. Natural Resources Commission

The Natural Resources Commission is composed of 6 lay members appointed by the Governor, who sit on the Board with the Directors of various State agencies.[72] The Commission holds hearings on permits, submits reports to the Governor and has final jurisdiction over municipal agency actions concerning the state's natural resources.[73] The Commission acts as an overseer to the administration of the Department of Natural Resources and officially approves all permits.[74]

Appeal may be taken de novo on any of the Commission's decisions adversely affecting the developer to the Circuit or Superior Court of the county where the land in dispute is located.[75]

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[70] Id. §§ 13-2-20-4; 13-2-20-5; 14-3-2-3.

[71] Id. §§ 13-2-20-2; 13-2-20-30.

[72] Id. § 14-3-1-15.

[73] Id. §§ 14-3-3-3; 18-7-4.5-16 (Burns)(Supp. 1978).

[74] Id. § 14-3-3-6 (Burns) (1973). See DOW Applications.

[75] IND. CODE ANN. § 13-2-15-2 (Burns) (1973).

III. INDIRECT REGULATION

A. Environmental Regulation

1. Environmental Management Board/Stream Pollution Control Board

The Environmental Management Board (EMB) has the power and the duty to preserve, protect and enhance the quality of the state's environment and to develop programs which provide for the most beneficial use of its resources.[76] In furtherance of this mandate, the EMB is to evolve standards and regulations to be implemented as part of a comprehensive, long-term program.[77]

The Stream Pollution Control Board (SPCB), operating under the general overview of the EMB, is authorized to control and prevent pollution in the waters of the state. This involves the determination of qualities or properties which are to be classified as pollutants and subsequent regulations for restriction. "Water pollution," as defined by the Indiana Legislature, means "alteration of the physical, thermal, chemical, biological, bacteriological, or radioactive properties of any waters. . . ."[78]

The environmental impact of hydroelectric power dams has not yet been determined. Apparently, dams may adversely affect vegetation and fish life by releasing oxygen-depleted water through its conduits, increasing temperatures of downstream waters, or by saturating downstream waters with nitrogen. The data available, however, is too inconclusive. Consequently, there have been no

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[76] Id. § 13-7-1-1.

[77] Id. §§ 13-7-3-1; 13-1-3-7.

[78] Id. § 13-7-1-2 (13).

effluent standards set by the Federal Environmental Protection Agency for SSH. As a result, effluent standards for SSH are formulated by the Indiana EMB/SPCB for all projects that are licensed by the state.

A spokesperson for the EMB stated that SSH is not treated as a point source of pollution. No permit or approval is required from the Board(s) and dam sites are not regulated as polluters. The opportunity for review of a proposed project is available to the Board(s) through the Director of the SPCB, who sits as a voting member on the Natural Resources Council, which must officially approve all permits for construction in a floodway. However, it is the firm policy of the EMB/SPCB, that their jurisdiction, to implement effluent standards for SSH, will not be exercised until such time as regulations are promulgated on a federal level, and the state is directed to implement them.[79]

Environmental policy in Indiana does require an environmental impact statement (EIS) from all state agencies involved in a project that significantly affects the quality of the environment. The EMB is to determine when a project is "significant" through evaluation of an environmental assessment form.[80] At the present time it is unlikely that a SSH developer will have to deal with the EIS process at the state level. Should one be necessary, the agency responsible for the statement would be the Department of

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[79]Telephone conversation with Mr. Robert Carter, Environmental Management Board (July 23, 1979).

[80]IND. CODE ANN. §§ 13-1-10-3(c); 13-7-3-1(4) (Burns) (1973).

Natural Resources. It is the duty of the developer to supply the agency with requested information. As with all administrative agency requests for information, unless undue hardship results, the cost of gathering the necessary data is the responsibility of the developer.[81] This can be a sizable expense in proportion to the total cost of the project. Therefore, it is important to the development of SSH that it maintain its status as a non-polluting facility.

B. Nature Preserves

Under the auspices of the Natural Resources Commission, and the Department of Natural Resources, the Division of Nature Preserves has been given the authority to purchase, through condemnation, all rights to areas of unusual natural significance, to be held in trust for the people of Indiana.[82] The Division identifies an area it deems worthy of protection and enters it on a state register. Upon acquiring the right, title, or interest to the area, the Division "dedicates" the land by placing Articles of Dedication on public record in the county or counties in which the area is located. Land that is dedicated may not be disturbed or developed except in the interest of its preservation.[83]

A developer interested in developing a hydroelectric facility, which is located in a nature preserve, will face virtually insurmountable

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[81] Telephone conversation with Mr. Jim Buck, Assistant Engineer, DNR, Division of Water (July 23, 1979).

[82] IND. CODE ANN. §§ 14-4-5-1; 14-4-5-4; 14-4-5-6 (Burns) (1973).

[83] Id. § 14-4-5-6.

obstacles and a long legal battle.[84] The Natural Resources Commission must hold a public hearing concerning any development in a nature preserve. If the Commission determines that there exists an imperative and unavoidable public necessity which requires alteration of the area, and the Governor gives final approval, the development may take place.[85]

C. Natural and Scenic Rivers

The Outdoor Recreation Division, under the jurisdiction of DNR, may recommend that a river be included in the state natural, scenic and recreational river system. Once included, the original classification of a river must be maintained and any use or development of the river is subject to an extensive review and an environmental impact assessment.[86] A dam may not be constructed that impounds more than 5% of the designated watercourse. The permit required for such construction is the same permit needed for construction in a floodway, which may be obtained from the DNR. The goal of the Division, for natural and scenic rivers, is to place representative habitats on their register for protection. Legislative enactment would be necessary to relieve a river from this control.[87] It appears that even a federally licensed and/or funded

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[84] Telephone conversation with Mr. James Keith, Director, Division of Nature Preserves (July 23, 1979). Recently, a municipality unsuccessfully attempted to undedicate a preserve in a two-year long struggle.

[85] IND. CODE ANN. §§ 14-4-5-8; 14-4-5-9 (Burns) (1973).

[86] Id. §§ 13-2-26-4 to 13-2-26-7.

[87] Telephone conversation with Mr. Jerry Page, Division of Outdoor Recreation, DNR (July 25, 1979).

project would be subject to the restrictions of this Act.[88]

D. Historic Preservation

The development of hydroelectric facilities may require the flooding of lands or the retrofitting of an old mill site. To protect any objects of significance to Indiana's state history, architecture, archeology and culture, the Natural Resources Commission is authorized to prepare extensive state-wide surveys, and to place on a state register all historic property that conforms to the criteria established by the Secretary of the Interior.[89] A developer acquiring rights to a site that may have historical significance should check with the Historic Preservation Commission to ascertain whether his project affects structures or lands registered or eligible for registration on the state or national list.

The Commission will review license applications for federally licensed projects, projects receiving state funding, and projects located on state property. It does not have jurisdiction to investigate a developer's private property even though the project requires a state license.[90]

Should the area in question be listed in the register, the Commission does a cost/benefit analysis, weighing the importance of the site against whether or not it is economically feasible to preserve it. The burden is on the developer to demonstrate that preservation

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[88] Supra note 87. See also 16 U.S.C. § 1284 (1976). This Act concerns wild and scenic rivers in the United States, and does not indicate federal preemption of state control over a state's wild and scenic rivers.

[89] IND. CODE ANN. § 14-3-3-3.5(1) (Burns) (1973). See also 16 U.S.C. § 470 (1976).

[90] Telephone conversation with Mr. Dick Ames, Historic Preservation (July 23, (1979).

is not possible and that the project is too beneficial to stop. In cases where the jurisdiction of the Commission is exercised, if no survey of the area is available, the Commission may require the developer to hire an archeological historian to present an evaluation.[91]

On a local level, apart from the jurisdiction of the state Commission, any governmental unit may decide, by ordinance, to establish an Historic District Board of Review.[92] The Board is to be concerned with structures subject to public view and may designate those of historical significance. Upon approval of a historic site by ordinance, no alterations creating a conspicuous change in appearance may be caused without a certificate of appropriateness from the Board.[93] Should a developer acquire a mill site designated as an historic structure, he may apply for a certificate showing that (1) his alterations will not conspicuously affect the visual appearance of the structure, or (2) that relocation of the structure to an area that will preserve its historical and architectural character is possible. If the developer is denied a certificate of appropriateness, he may show that the structure is incapable of earning an economic return on its value, as appraised by a qualified real estate appraiser. He may then demolish the structure if, after public notice, no governmental unit or interested persons arrange for its preservation.[94] The Board cannot require a developer to preserve a historic site, if it is not listed on the state or national register and if the site is incapable of earning an economic return on its historic value.

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[91] Supra note 90.

[92] IND. CODE ANN. § 18-7-22-3 (Burns) (Supp. 1978).

[93] Id. §§ 18-7-22-4; 18-7-22-5; 18-7-22-8.

[94] Id. § 18-7-22-11. Often a town has a private foundation that will relocate a historic structure at its own expense.

Although the Board may not be able to prevent demolition of a structure not listed on the state or national register, it may politically pressure a developer into not disturbing a local historic site.[95]

E. Soil and Water Conservation Act

Soil and Water Conservation Districts are established by petition of twenty-five (25) landowners after a public hearing and determination of need by the State Soil and Water Division of DNR is made. The Districts are supervised by the state division which serves as an information center for activities and technological improvements.[96]

The function of these Districts is to plan and implement programs that will conserve soil and water resources in the public interest. Hydroelectric power is listed among the interests to be protected.[97]

The District Committees have no direct impact on the dam developer, although they may make recommendations concerning a project to DNR through the state office. There are no powers of eminent domain granted to District Committees. They may, however, make improvements on land or water for the general welfare, and charge landowners the cost for the benefit they receive as a result of such improvements.[98] Requiring a SSH developer to pay for benefits received as a result of land or water improvements may affect the cost of operating a SSH facility, but it is unlikely that this expense will be significant.

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[95]Telephone conversation with Mr. John Stamper, Historic Preservation District, South Bend, St. Joseph County (July 23, 1979).

[96]IND. CODE ANN. §§ 13-3-1-4; 13-3-1-5 (Burns) (1973).

[97]Id. § 13-3-1-1(b).

[98]Id. § 13-3-1-8(8)(12).

1. Conservancy Districts

Conservancy Districts are created for the purpose of flood control, improving drainage, providing for irrigation, providing for water supply, providing waste treatment facilities, developing forest and wildlife, preventing soil erosion, improving stream flow and improving water works for recreational purposes.[99] A District is established upon approval by the Natural Resources Commission and all programs must be submitted to the Commission before action is taken. Final approval is required from the Circuit Court of the county which may hold hearings to determine if the plan is necessary to accomplish the purpose of the District.[100] The Board of Directors of the District Committee may exercise eminent domain powers.[101] Therefore, it is possible that a developer's reservoir or water supply may be appropriated by a Conservancy District.

F. Wabash Valley Compact - Commission

The purpose of the Wabash Valley Compact is to organize and facilitate the development of the Wabash Valley which includes the Wabash River, its tributaries, and all lands that are drained by the river and lie within the States of Indiana and Illinois. A Commission was formed under the Compact to serve primarily as an advisory body to the member States with respect to local and state zoning within the

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[99] Id. § 19-3-2-3.

[100] Id. §§ 19-3-2-54 to 19-3-2-57.

[101] Id. § 19-3-2-61(e).

area. It may also recommend plans and programs for the highest utilization of the area's resources, including the suitability of power generation.[102] A developer considering a site in this location should contact the Commission for information.

G. Ohio Valley Compact - Commission

The Ohio Valley Compact applies to the Ohio River, its tributaries, and all lands drained by it that lie within the member states. The states eligible to participate in the agreement, should their respective legislatures so decide, are Indiana, Illinois, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia. A representative Commission acts as an advisory body concerned with use of the area's natural resources.[103]

H. Great Lakes Basin Compact

The Great Lakes Basin Compact covers a wide area and invites participation by Indiana, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin as well as the Provinces of Ontario and Quebec. The Compact establishes an intergovernmental agency to assist in the coordination of the development of all ponds and watercourses within the Great Lakes' watershed. Each member state is to consider the Commission's proposals in respect to suitable hydroelectric development.[104]

I. Ohio River Valley Sanitation Compact

This Compact pledges cooperation among the signatory states with

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[102] Id. § 13-5-1-1.

[103] Id. § 13-5-6-1.

[104] Id. § 13-5-3-1.

respect to the control of any pollution of the rivers, streams and waters of the Ohio River Basin. The Compact creates the Ohio Valley Water Sanitation Commission which is authorized to administer and enforce the Compact's provisions. The Compact requires all signatory states to treat sewage and wastes discharged into the Ohio River and its tributaries.[105]

The Compact does not declare dams to be a point source of pollution; however, if a dam increased the pollution of the Ohio River waters, then it is likely that the Commission would have jurisdiction over the SSH project. A developer of SSH should contact the Commission in regards to regulations affecting SSH.

J. River Basin Commissions

1. Little Calumet River Basin Commission

The jurisdiction of the Little Calumet River Basin Commission is limited to activity within that part of the Little Calumet River Basin which begins at the point where Burns Ditch empties into Lake Michigan and runs southernly and westerly to the Indiana - Illinois state line. The Commission works with the Regional Planning Commission on comprehensive planning for the area, and may enter into agreements with Illinois. All programs are submitted to DNR for approval.[106] A developer planning to use resources within this area may wish to contact the Commission.

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[105] Id. § 13-5-5-1.

[106] Id. §§ 18-7-19-1 to 18-7-19-7 (Burns) (1974).

2. Kankakee River Basin Commission

The Kankakee River Basin Commission is authorized to coordinate development of the Basin through planning and purchase. All actions of the Commission must be approved by DNR and any affected Regional Planning Commission. The Commission may cooperate with agencies in Illinois. Information concerning water resources in this area may be obtained through the Commission.[107]

K. Municipal Regulation

1. Zoning

A city has the power to control the improvement, maintenance and use of real property, i.e., it may regulate, license or prohibit the location and physical characteristics of certain structures.[108] Hence, SSH projects may be subject to local zoning ordinances. The limitations upon a city's power to zone are that such ordinances cannot be unreasonable or arbitrary, and that they must have a substantial relation to the community's health, safety or morals.[109]

2. City Control of Water and Watercourses

A city is empowered to establish, maintain and control watercourses. To this end it may regulate, license and prohibit the alteration of any watercourse for commercial purposes.[110]

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[107] Id. §§ 18-7-23-1 to 18-7-23-21.

[108] Id. § 18-1-1.5-10.

[109] See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[110] IND. CODE ANN. § 18-1-1.5-9 (Burns) (1974). See Also § 18-5-10-4.

For example, a city is empowered to regulate, license and prohibit any action which changes the condition of heat or cold in the water or affects the flow of the water in such a way as to endanger the public health, safety or welfare, or cause injury to property.

A city's power to regulate activities which change water temperature is significant to SSH, since SSH may affect downstream water temperatures. A city may regulate this and other activities affecting waters within a distance of ten (10) miles from the city's corporate limits, but not beyond its county line.[111]

Any power exercised by a city under its authority to zone or regulate watercourses is subject to review, approval or regulation by any state agency to the extent provided by any other law, including but not limited to the Division of Water within DNR, the Stream Pollution Control Board, and any other local governmental agency to which specific authority has been delegated, including Planning Commissions and Zoning Boards.[112]

3. Local Flood Plain Commissions

Local Flood Plain Commissions may be established to operate under the auspices of the Natural Resources Commission. Flood Plain Commissions are empowered to investigate local conditions and make recommendations to DNR.[113] Ordinances which are passed and approved by the Commission under this Act may affect the development of hydroelectric facilities. Fees may be required locally to construct in a

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[111] Id. § 18-1-1.5-9.

[112] Id. § 18-1-1.5 -22.

[113] Id. §§ 18-7-4.5-11; 18-7-4.5-16 (Burns)(Supp. 1978).

floodway.[114] Also, an injunction may be issued against a development violating an ordinance under this Act.[115] Although ultimate jurisdiction rests with the Natural Resources Commission, a developer should investigate the extent to which local ordinances may affect his project and try to get an interpretation of their impact.[116]

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[114] Id. § 18-7-4.5-13.

[115] Id. § 18-7-4.5-17.

[116] Telephone conversation with Mr. Dave Bear, Area Planning Commission, St. Joseph's County (July 23, 1979).

IV. PUBLIC SERVICE COMMISSION OF INDIANA

The Public Service Commission of Indiana (PSCI) is an administrative board which regulates public utilities operating within the state.[117] Only public utilities are under the jurisdiction of PSCI.[118] Not every producer of hydroelectric power will be subject to PSCI regulation.

In general, a public utility is defined as an entity which produces transmits, or furnishes electric power either directly or indirectly to the public.[119] A private developer and producer of electricity who does not sell his electricity but uses it solely for his own purposes, will not be considered a public utility and, thus, will not be subject to PSCI's regulation. A developer of SSH who sells his power at the retail level to one or more consumers will be under PSCI jurisdiction. A developer selling his power wholesale to public utilities for resale will be regulated by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, rather than PSCI.[120] In sum, wholesale sales are regulated by FERC; retail sales are regulated by PSCI.[121] A Federal District Court extended PSCI jurisdiction to non-profit cooperative associations that are willing to serve the general public either within or outside a town's boundaries.[122] Municipal utilities are exempt from PSCI regulation.[123]

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[117] IND. CODE ANN. § 8-1-2-1 (Burns) (1973).

[118] See General Telephone Co. v. PSCI, 238 Ind. 646, 150 N.E.2d 891 (1958).

[119] IND. CODE ANN. § 8-1-2-1 (Burns) (1973).

[120] 16 U.S.C. § 812, 813 (1976).

[121] Telephone conversation with Mr. Larry Wallace, Chairman of PSCI (July 19, 1979).

[122] Batesville Telephone Co. v. PUC, 38 F.2d 511 (S.D. Ind. 1930).

[123] IND. CODE ANN. § 8-1-2-1 (Burns) (1973); see Meyers v. Evansville Water Works Dept., 147 Ind. App. 372, 261 N.E.2d 88 (1970).

A. Certificate of Public Convenience and Necessity

With the exception of municipal utilities, no power utility may operate in any municipality where a public utility is already providing a similar service without first obtaining a certificate of public convenience and necessity from the PSCI. The Commission holds a public hearing on this issue and then issues a declaration concerning the applications.[124] There are no guidelines to determine "convenience" and "necessity." However, the Indiana Supreme Court, in a 1969 decision, articulated the policy behind the grant of a franchise:

> The law of Indiana has for years recognized the validity of regulating the utility business to the end that we not have duplication of utility facilities and unnecessarily expensive utility service since this would adversely affect the public in receiving efficient and economical service. Competition between utilities should be permitted only after the Commission finds it in the public interest that such competition should exist. . . . [P]ermits to a utility where another utility is lawfully serving . . . should be withheld until the Commission has determined that public convenience and necessity requires competing services.[125]

If the "duplication of services prohibition" is applied to SSH, it is unlikely that a developer of SSH will be able to transmit his power for retail sale. Since an applicant for the Certificate must show "public convenience and necessity," a SSH developer should argue that SSH utilizes the state's renewable resources, and hence satisfies the public interest of conserving and utilizing natural resources. From a policy viewpoint, this may satisfy the requirement of public convenience and necessity. In addition, it is a condition of the certificate that the applicant be a corporation organized under the laws of the State, or be an Indiana citizen.[126]

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[124] IND. CODE ANN. § 8-1-2-86 (Burns) (1973).

[125] Southern Ind. G. & E. Co. v. Indiana Statewide R.E. Coop., 251 Ind. 459, 242 N.E.2d 361 (1968).

[126] IND. CODE ANN. § 8-1-2-91 (Burns) (1973).

B. Indeterminate Permits

Every license, permit or franchise granted to any public utility has the effect of an "indeterminate permit." The utility is subject to the regulations of the PSCI and the privilege granted is of unlimited duration, unless revoked for cause.[127] A utility with an indeterminate permit may be purchased by a municipality. In addition, all rights relative to condemnation, such as judicial determination of necessity, are forfeited by the utility.[128]

C. Rates

Public utilities are under a common law duty to serve all who apply, without discrimination, so long as facilities are available. There is also the obligation to serve at a reasonable charge, since a business "affected with the public interest" could make exorbitant charges and manipulate its customers.[129] The PSCI has a duty to see that rates charged are both fair and reasonable, both to consumers and to the utility. Proper rates are those which produce a fair and nonconfiscatory return, which will enable the company, if it is under efficient management, to maintain its utility property and service to the public, and which provide a reasonable return upon fair value of its used and useful property. Comparison with industry similarly situated may be used.[130]

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[127] Id. § 8-1-2-92.

[128] Id. § 8-1-2-93.

[129] Id. § 8-1-2-4. See also Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955); Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N.E. 818 (1893); Winfield v. Public Service Commission, 187 Ind. 53, 118 N.E. 531 (1911).

[130] IND. CODE ANN. §§ 8-1-2-6; 8-1-2-19 (Burns) (1973); see Public Service Commission v. Indiana Bell Tel. Co., 235 Ind. 1, 130 N.E.2d 467 (1955).

To this end, utilities are obligated to keep accounts of all business transactions, following a uniform system of accounting, from which rates are determined by the Commission.[131]

Valuation for the purpose of setting rates is determined according to the guidelines contained in the Public Utility Act.[132] Only property "used and useful" may be valued and no account may be taken of presumptive value resting on unused natural resources.

A municipality, any 10 consumers or a utility may appeal the rate decision of the PSCI to a Circuit or Superior Court. The burden of proof is on the complainant, however, to show that the Commission's decision is "unreasonable" and "unlawful," i.e., not sustained by substantial evidence. The discretion of the Commission is broad due to the fact that, as an agency invested with a specific function, its members are deemed to have an expertise beyond that of a court. The Commission's determination of "fair value" need only be within the legislative guidelines of the statute to be final. It is not a function of the court to substitute its judgment for the findings of the Commission.[133] Therefore, appeal from a PSCI determination carries a difficult burden of proof.

To bring an appeal, the above parties must file the complaint with the Clerk of the Circuit or Superior Court within thirty (30) days of the PSCI decision. The court will hear the case immediately in order to quickly settle the differences between the utility and the consumer. Pending final judgment, the utility may charge either at the old rate or at the new

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[131] IND. CODE ANN. § 8-1-2-10 (Burns) (1973).

[132] Id. § 8-1-2-6.

[133] PSC v. City of Indianapolis, 235 Ind. 70, 131 N.E.2d 308 (1955); see also PSC v. Indiana Bell Tel. Co., 235 Ind. 1, 130 N.E.2d 467 (1965).

rate, whichever is higher subject to refund upon decision.[134]

D. Public Utility Powers of Eminent Domain

A public utility has the right to condemn lands for structures, dams, or right-of-ways that are necessary to carry out its service. Lands or easements in lands appropriated by a utility must be acquired as if the utility purchased such rights on the market. Before discussing the procedure and scope of eminent domain, it is important to note that limitations are placed on an electric utility's power to appropriate property. Indiana law provides that no public utility is given "any right or authority to appropriate any land or easement within the corporate limits of any city for overflowage by back-water from any dam, nor to appropriate or acquire any existing dam, race or sluiceway or any interest in either . . . ."[135] The statute also requires that hydroelectric dams not "unreasonably interfere with or disturb the natural flow of the stream . . . ." This is consistent with the doctrine of reasonable use.

A public utility appropriating lands must obtain a certificate of public convenience and necessity. This requires a public hearing of all interested parties, and proof of necessity.[136]

An Indiana Appellate Court has held that a public utility appropriating an easement for power lines across private lands need not comply

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[134] IND. CODE ANN. § 8-1-2-6 (Burns) (1973).

[135] Id. § 8-1-8-1. (Emphasis added.)

[136] Id. § 8-1-8-3.

with the requirements of a certificate of public convenience and necessity.[137] The Court gave public utilities a broad discretionary right to appropriate the amount of land it deems necessary for its proper uses and purposes. The utility, however, must make a "good faith effort" to buy the property in question. In the event that such attempts to purchase fail, the utility has the right to appropriate property, without a public hearing. In addition, a utility's judgment cannot be questioned, or superseded by the Court's except for fraud, capriciousness or illegality.[138] The Court also held that a utility does not qualify as an "agency" invested with the responsibility of an environmental impact report as a prerequisite to condemnation.[139]

To initiate condemnation proceedings, the party seeking to condemn may file a complaint with the Clerk of the Circuit or Superior Court. The complaint must contain: 1) the condemning party; 2) the present owners; 3) the use and right of the condemnor; 4) a description of the property in question; 5) possible benefits to the present owner that may accrue to him as a result of the appropriation; and, 6) a statement alleging a good faith effort to purchase. Notice is then issued to all

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[137] Graham Farms, Inc. v. Indianapolis Power and Light Co., 249 Ind. 498, 233 N.E.2d 656 (1968); Lowe v. Indiana Hydroelectric Power Co., 197 Ind. 430, 151 N.E. 220 (1926).

[138] Alabach v. Northern Indiana Public Service Co., 164 Ind. App. 471, 329 N.E.2d 645 (1975).

[139] J.M. Forster Co., Inc. v. Northern Ind. Public Service Co., Inc., 164 Ind. App. 72, 362 N.E.2d 584 (1975). Both Alabach and Forster contain important discussions of public utilities' rights of condemnation.

defendants by the court and publication is entered in a local newspaper. Should the court decide that the exercise of eminent domain is proper in the circumstances, it will appoint 3 disinterested freeholders of the county to assess the benefits and damages. An appeal proceeding is available at this stage to contest either the jurisdiction of the court, or the defendant's right to exercise eminent domain powers.[140]

The appraisers ascertain the fair market value of all the land in issue with its existing improvements as well as any damage that will be caused to the residue of the owners' land through construction on the appropriated land.[141] Fair market value is generally defined as the price the land may be sold for on the date of the condemnation, if the owner was willing to sell, and anything affecting the sale value at that time is a proper matter for a jury's consideration. Due consideration is to be given to the land's potential future use and value, but future improvements may not be compensated for because they are not then in existence.[142] In some instances, at the discretion of the court, the "income approach," where not too speculative, may be taken into account. This is the value which the property's net earning power will support based on the capitalization of net income. In all cases, the goal is to reach a result that is "just compensation," that is, fair to the public as well as to the owner of the property taken.[143]

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[140] IND. CODE ANN. §§ 32-11-1-2 to 32-11-1-6 (Burns) (1973).

[141] Id. § 32-11-1-6.

[142] Southern Indiana Gas and Electric Co. v. Gerhardt, 241 Ind. 389, 172 N.E.2d 204 (1961); Southern Indiana Gas and Electric Co. v. Riley, 260 Ind. 643, 299 N.E.2d 173 (1973).

[143] State Highway Commission v. Jones, Ind. App. , 363 N.E.2d 1018 (1977). See generally 4 Nichols, Eminent Domain, Third Edition § 12.1 (1967).

E. Dam Safety

The PSCI has responsibility for dam inspection, maintenance and repair for all public utility dams. Presently, however, the PSCI has promulgated no administrative procedures or regulations in this area.[144]

F. Municipal Utilities

Municipal utilities are exempt from the PSCI's jurisdiction. However, they are directly responsible to the citizens of the city or town. Before a municipality may condemn, purchase, or establish a utility, it must submit the proposal to its voters. The proposal must pass by a majority vote before any action may be taken. Five percent (5%) of the voters may also petition for the purchase of a utility which will then be submitted to a general vote in the same manner.[145]

Municipal utilities in cities with a population under 150,000 are operated by a Common Council or Board of Public Works.[146] The Council must determine that the public convenience and necessity requires a new utility in those towns where an existing utility is providing similar service before it may be submitted to a vote. The Council is also responsible for purchasing a private utility, either through contract or condemnation, should the proposal be approved. The municipality may exercise its powers of eminent domain over all used and useful utility property within six miles of its corporate limits, so long as it does not enter the boundary of another municipality.[147]

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[144] IND. CODE ANN. § 13-2-20-4 (Burns) (1973). Telephone conversation with Mr. Larry Wallace, Chairman PSCI (July 23, 1979).

[145] IND. CODE ANN. §§ 8-1-2-1; 8-1-2-99 (Burns) (1973).

[146] Id. § 8-1-2-100.

[147] Id. § 8-1-2-99.

Once the utility is in operation, a Utility Service Board may be established through majority-voter approval. The Board would serve under the Council and would have general supervision over the utility. Municipal utilities are subject to the jurisdiction of the PSCI for rate setting purposes, unless the voters of a municipality vote to place utility rates under the jurisdiction of the Utility Service Board or Municipal Council.[148] Extensive penalties exist for discrimination in sales or service by a municipal utility or its agent.[149]

Acts passed in 1977 by the General Assembly authorize municipalities to cooperate with one or more municipalities or public utilities enabling each co-op member to maintain an undivided interest as a tenant in common in a project situated within the state. Although ownership is not partitioned, each municipality or utility is liable for its own acts.[150]

Prior to acquiring any interest in the enterprise, the governing body of a municipality must determine the future power requirements of the municipality in light of all alternatives.[151] The Act is particularly applicable to hydroelectric generation that is able to use one upstream reservoir to regulate the flow of water into more than one downstream power station. Should the separate reservoirs used in the same system be located in different towns, the municipalities are now authorized to cooperate in the purchase, operation, and transmission of the power.

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[148] Id. § 8-1-2-100.

[149] Id. §§ 8-1-2-102 to 8-1-2-107.

[150] Id. § 8-1-2.1-2 (Burns) (Supp. 1978).

[151] Id.

G. Rural Electric Membership Corporation Act - REMC

The Rural Electric Membership Corporation Act (REMC) was passed in many states to allow nonprofit cooperatives to incorporate and to provide electric utility services within unserviced areas.[152] In Indiana, eleven (11) or more persons may create a REMC by applying to the PSCI for a certificate of public convenience and necessity. After a public hearing, the PSCI will either grant or deny the establishment of a REMC.[153]

A REMC remains under the jurisdiction of the PSCI for rate fixing and the issuance of public convenience and necessity certificates to exercise eminent domain. The corporation is required to furnish reasonably adequate service and the charge for its service must be non-discriminatory, reasonable, and just.[154]

A rural development fund has been established through legislative act "to take any and all steps necessary to aid in the growth of rural areas within the state of Indiana." This fund may be applied to the leasing or purchase of property and to studies concerning the construction of publicly owned utilities. Grants are made to municipalities directly from the General Assembly of the State.[155] Under the Joint Venture Act which allows municipalities to cooperate with other utilities, a REMC may be able to receive funding from the program.[156]

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[152] Id. § 8-1-13-2 (Burns) (1973).

[153] Id. § 8-1-13-5.

[154] Id. § 8-1-13-17.

[155] Id. § 18-7-20.1 (Burns) (1974).

[156] Id. § 8-1-2.1-2 (Burns) (Supp. 1978).

V. FINANCIAL CONSIDERATIONS

A. Taxation

SSH will be taxed as a public utility if it is classified as a public utility. However, in Indiana, public utilities are not taxed much differently than private business enterprises. Public utility property is assessed by the State Board of Tax Commissioners instead of being assessed by a county auditor, and the rate of tax levied upon the gross receipts of public utilities is different than the rate charged some other retailers.[157]

1. Taxing Public Utilities

Companies engaged in the business of selling or distributing electricity will be taxed as a public utility, whether the company is operated by an individual, a partnership, an association, a corporation, a fiduciary or any other entity.[158]

The fixed property of a hydroelectric company, for purposes of taxation, include:

a) automotive and other mobile equipment;

b) office furniture and fixtures;

c) tangible personal property not used as part of the company's production plant, transmission system, or distribution system; and,

d) real property which is not part of the company's right-of-way, transmission system or distribution system.[159]

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[157] Id. §§ 6-1.1-8-25; 6-2-1-3 (Burns) (1978).

[158] Id. §§ 6-1.1-8-2(8); 6-1.1-8-3.

[159] Id. § 6-1.1-8-9. Water power rights are a taxable property right. Telephone conversation with Mr. Tom Hunt, Corporate Revenues Tax Examiner (June 11, 1979).

A hydroelectric company's property which is not described as fixed property, is definite-situs distributable property. This property includes, but is not limited to:

a) turbo-generators;

b) boilers;

c) transformers;

d) transmission lines;

e) distribution lines; and,

f) pipelines.[160]

Each year the public utility must file a statement concerning the value and description of the property owned or used by the company, to the State Board of Tax Commissioners. The utility must also file a statement with the auditors of each county in which the company's property is located. The statement must contain an analysis of the company's business and a description of the company's property located in the county. Annually, a township assessor assesses the fixed property owned or used by a public utility company located in the township. The State Board of Tax Commissioners annually assess the distributable property owned or used by a public utility company. Both the county auditor and the State Board of Tax Commissioners assess property according to the property's true value, following such factors as book value, cost of replacement, and cost of establishing or developing the business. Assessed values of distributable property is apportioned to the proper taxing districts of counties for taxation

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[160] IND. CODE ANN. § 6-1.1-8-9 (Burns) (1978). "Definite-situs" means a permanent location in one taxing district or a customary location for use in one taxing district.

purposes.[161] Assessed value means an amount equal to 33 1/3% of the true cash value of the property.[162] Note, that property owned by a municipality owned utility is exempt from property taxation.[163]

With respect to taxing gross income of persons producing, transmitting, furnishing, wholesaling or retailing electrical energy, the rate of tax is 1.45% for such income in 1979, 1.40% in 1980, and for each year after 1980, the tax rate will reduce .05% from the rate of the preceding year and after December 31, 2007, no tax will be imposed.[164] Exempt from gross income tax is income derived from interstate commerce, sales to the United States, and sales to the municipally owned utilities.[165]

Indiana has a sales tax of 4% on gross retail sales, and a 4% use tax.[166] A public utility furnishing or selling electrical energy to consumers must pay a sales tax. However, sales to consumers for use in manufacturing, mining, production, refining, oil or mineral extraction and irrigation, or to other public utility companies are exempt. In addition, sales receipts from the provision, installation construction, servicing or removal of tangible personal property used

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[161] IND. CODE ANN. §§ 6-1.1-8-19 to 6-1.1-8-27 (Burns) (1978).

[162] Id. § 6-1.1-1-3.

[163] Id. § 6-1.1-10-5.

[164] Id. § 6-2-1-3.

[165] Id. §§ 6-2-1-3(7); 6-2-1-7.

[166] Id. § 6-2-1-37.

in connection with the furnishing of any such public utility service or commodity, are exempt.[167]

No gross retail sales or use tax applies to personal property sold to hydroelectric public utilities, when such personal property is directly used by such utilities in the direct production of electrical energy.[168]

In addition to paying general taxes, public utilities, subject to PSCI jurisdiction, must pay a fee, to the PSCI, of .001% on their gross income. Such fee is not to produce an amount exceeding $2,000,000.[169]

2. Regular Business Taxes

If for some reason a developer's SSH project is not taxed as a public utility, then it shall be subject to regular business taxes.

Real and personal property is assessed at a uniform and equal rate and on a just valuation at true cash value (33 1/3% of true cash value).[170]

The total state property tax rate is limited to .01% on each $100 of valuation.[171] In all other incorporated cities and towns the total tax rate is limited to 2% on each 100 dollars valuation, and in all unincorporated areas the total tax rate is limited to 1.25% on each 100 dollars of valuation. These limitations, however, are rendered partially ineffective since political subdivisions may declare emergency levies, which are without statutory limitations.[172]

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[167] Id. § 6-2-1-38(c).

[168] Id. §§ 6-2-1-39(16); 6-2-1-43.

[169] Id. §§ 8-1-6-3 to 8-1-6-7 (Burns) (1973).

[170] Id. §§ 6-1.1-1-3; 6-1.1-2-2 (Burns) (1978).

[171] Id. § 6-1.1-18-2.

[172] Id. § 6-1.1-18-3.

Real estate is assessed at the place where it is located by township assessors, and personal property is assessed to the owner at the place of his domicile, or where the property is situated on the assessment date if it is regularly used or permanently located where it is situated.[173]

Intangibles, such as promissory notes, stocks and bonds, are taxed upon their taxable value.[174] The taxable value of an annual intangible is: (1) the closing bid or sale price on the last market day of December in the reporting period if the intangible is listed or traded on a recognized market; (2) the total time balance on the execution date in the year of execution, or the total time balance on the anniversary of the execution date in each succeeding year if the intangible has a face value and cannot be valued under (1) above; or (3) the amount determined by the Department of Revenue. The taxable value of a current intangible is the face value on the execution date.[175]

The tax rate on general intangibles is 1/4 of 1% of the taxable value of an intangible.[176] The taxing situs of general intangibles is at the residence or domicile of the owner.[177] The tax is paid at the same time as the taxpayer pays his gross income tax on adjusted gross income.[178] Note, that a public utility is liable for

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[173] Id. § 6-1.1-3-1.

[174] Id. § 6-5.1-2-2.

[175] Id. §§ 6-5.1-3-2; 6-5.1-3-3.

[176] Id. § 6-5.1-2-2.

[177] Id. § 6-5.1-1-7.

[178] Id. § 6-5.1-6-1.

property and intangible taxes at the same rate as is any other business. Hence, property and intangible tax rates apply to public utilities as well as to regular businesses.

Domestic and interstate corporations, including public utilities, pay a tax of 3% on adjusted gross income derived from sources within Indiana. A 3% supplemental net income tax is imposed on corporations as well.[179] In addition, the gross income of all persons or corporations doing business in Indiana, derived from sources within the state, are subject to tax. Therefore, since corporations are subject to both the adjusted gross income tax and the gross income tax, corporations must compute their liability under each tax and pay the greater of either the adjusted gross income tax or the gross income tax.[180] The tax rate on gross income of wholesalers, display advertisers, retailers, dry cleaners and launderers (not public utilities) is .3625% in 1979, .35% in 1980 and thereafter the rate will be reduced 0.05% from the rate of the preceding year. After December 31, 2007, no tax will be imposed.[181]

A tax of 2% (1.9%, effective January 1, 1980) is imposed upon the adjusted gross income of resident individuals.[182] Each Indiana County is authorized to levy an adjusted gross income tax on resident individuals at a rate not to exceed 1%.[183] In addition, Indiana counties,

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[179] Id. §§ 6-3-1-10; 6-3-2-1; 6-3-8-3; 6-3-8-4.

[180] Id. §§ 6-2-1-2; 6-3-3-2.

[181] Id. § 6-2-1-3.

[182] Id. §§ 6-3-1-14; 6-3-2-1.

[183] Id. § 6-3-.5-1-2.

cities, and towns may impose a 1.5% occupation income tax upon employees income. Employees are entitled to a credit against the tax equal to the lesser of (1) their Indiana adjusted gross income tax liability, or (2) their liability under this tax.[184]

As stated before, Indiana has a 4% retail sales and use tax. Sales of electricity are subject to this tax whether the hydroelectric company is taxed as a public utility or not. Certain sales, as stated above, are exempt from this tax.[185]

In addition to these taxes, domestic corporations, upon filing articles of incorporation, must pay to the Secretary of the State a fee based on the corporation's capital stock over 1,000 shares at the rate of .02 per share on the first 200,000 shares; .01 per share on the next 800,000 shares; and .002 per share on all additional shares, whether the stock has par value or not. The minimum fee is 30 dollars.[186]

Not-for-profit corporations, such as REMC's, are exempt from the gross income tax, the adjusted income tax and the sales and use tax.[187] Sales made to nonprofit corporations are also exempt from the sales and use taxes.[188]

Property of municipally owned utilities is exempt from taxation.[189] The gross income received by municipal corporations in the performance

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[184] Id. §§ 6-3.5-3-1; 6-3.5-3-2; 6-3.5-3-6.

[185] Id. § 6-2-1-39.

[186] Id. § 23-3-2-2 (Burns) (1972).

[187] Id. §§ 6-2-1-7(i)(1); 6-3-4-9; 6-2-1-39; 6-2-1-43 (Burns) (1978).

[188] Id. §§ 6-2-1-39; 6-2-1-43.

[189] Id. § 6-1.1-10-5.

of private or proprietary activities or businesses are subject to the gross income tax and to the sales and use tax.[190] However, sales to municipal corporations are exempt from sales and use taxes.[191]

B. Loans

There is little incentive for hydroelectric development through state loans and funding. A small business fund exists which is to be used by the Indiana Economic Development Authority to encourage small business enterprises.[192] An applicant may contact the Authority through the Commerce Department. This is only a guaranteed loan fund, however, and not a direct grant. A Board of Directors decides whether to back the developer. Manufacturing enterprises qualify for application, and electricity is classified as manufacturing.[193]

The State Energy Office does not have a loan or grant program, nor are they aware of any for hydroelectric development.[194] The Department of Natural Resources has flood control dams that could conceivably be leased for hydroelectric retrofitting. However, the ability to do so would depend upon a decision by the Natural Resources Council. The Department may not enter into a joint venture with a private developer; therefore, any multiple-use structure, i.e., flood control dam/hydroelectric facility, could not be constructed with joint funds.[195]

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[190] Id. §§ 6-2-1-10; 6-2-1-38.

[191] Id. §§ 6-2-1-39; 6-2-1-43.

[192] Id. § 4-23-5-9.5 (Burns) (1974).

[193] Telephone conversation with Mr. Tom Hunt, State Tax Examiner for Corporate Revenue (June 11, 1979).

[194] Telephone conversation with Mr. Bob Berlin, State Energy Office (June 20, 1979).

[195] Telephone conversation with Mr. Bill Andrews, Deputy Director, Bureau of Water and Mineral Resources, DNR (July 27, 1979).

*U.S. GOVERNMENT PRINTING OFFICE : 1980 0-311-119/135

UNITED STATES
DEPARTMENT OF ENERGY
WASHINGTON, D.C. 20585

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