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Federal Power Commission Resolves Conflict between Priority and Preference in Favor of Private Power Producers

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It is submitted that the UCC conflict of laws provision, by giving wide discretion to the parties in stipulating governing law, and by adopting a flexible test for determining governing law where it is not stipulated has promulgated practical rules for commercial usage. In both situations the UCC has tests that allow courts considerable discretion. Where the UCC has introduced uncertainty, it can often be overcome by stipulation. Where stipulation is impracticable, certainty must await judicial interpretation.

PAUL K. KELLER.

FEDERAL POWER COMMISSION RESOLVES CONFLICT BETWEEN PRIORITY AND PREFERENCE IN FAVOR OF PRIVATE POWER PRODUCERS.—On April 8, 1955, the Federal Power Commission granted Pacific Northwest Power Company¹ a preliminary permit² for Project No. 2173.³ This permit was to be effective for three years. Project No. 2173 consisted of two dams on the Snake River—Mountain Sheep and Pleasant Valley, at river miles 192.6 and 213.2. Later, PNPC's application for a license to build this project was denied on the ground that the Nez Perce dam site at river mile 186.7 was best suited to develop this section of the Snake.⁴ On March 30, 1958, PNPC filed an application for a license to build a dam at the High Mountain Sheep site on the Snake at river mile 189.2. PNPC contended that, under section 5 of the Federal Power Act,⁵ priority of

¹The Pacific Northwest Power Company, hereinafter referred to as PNPC, was organized in 1954, by five Pacific Northwest *private* power companies: Pacific Power and Light, Mountain States Power (subsequently merged with Pacific Power and Light), Portland General Electric, Montana Power Company, and Washington Water Power. Each company owns a one-fourth interest in the larger organization. PNPC was incorporated in Oregon, April 26, 1954, and was subsequently authorized to conduct business in the states of Oregon, Idaho, Washington, and Montana. PNPC was created to provide joint development of major hydroelectric projects, and to insure a suitable supply of electricity when needed by the organizing companies.

²The preliminary permit was issued pursuant to Federal Power Act § 4(f), 49 STAT. 839 (1935), 16 U.S.C. § 797 (1958) which says, "The commission is hereby authorized and empowered . . . to issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 [802] hereof. . . ." This permit does not authorize the party to whom it is granted to begin construction of the project. It merely gives the permittee a period during which it can investigate the proposed site and maintain priority for license application under section 5 [798] of the act. See notes 3 and 5 *infra*. Federal Power Act § 9, 41 STAT. 1068 (1920), 16 U.S.C. § 802 (1958) requires that an applicant for a license submit certain maps, plans, specifications, and estimates of cost to the Commission.

³Pacific Northwest Power Co., Project No. 2173, 14 F.P.C. 644 (1955). The Commission ordered that, "This preliminary permit is issued to Pacific Northwest Power Company. . . for a period of three years, effective as of April 1, 1955, for the sole purpose of maintaining priority of application for license for Project No. 2173."

⁴Pacific Northwest Power Company, Project No. 2173, 19 F.P.C. 127, at 131 (1958). The Commission denied a rehearing on this matter, reaffirming their original holding. Pacific Northwest Power Company, Project No. 2173, 19 F.P.C. 353 (1958).

⁵Federal Power Act § 5, 49 STAT. 841 (1935), 16 U.S.C. § 798 (1958) provides: Each preliminary permit issued under this Part shall be for the sole purpose of *maintaining priority of application for a license* under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. . . . (Emphasis added.)

application for license which was secured by the permit for the Mountain Sheep-Pleasant Valley project would extend to its license application for the High Mountain Sheep project because the application was filed within the effective period of the original permit, and because High Mountain Sheep would develop the same stretch of river as Project No. 2173. On March 15, 1960, Washington Public Power Supply System⁶ filed an application with the Commission for a license to construct a dam at the Nez Perce site. Subsequently, WPPSS attempted to amend its application to include, as an alternative, a project at the High Mountain Sheep site.⁷ WPPSS argued that PNPC's priority under its preliminary permit did not extend to High Mountain Sheep, and that WPPSS, a municipal corporation, should be given preference under section 7 (a) of the Federal Power Act.⁸ Following extensive hearings from late 1960 until October 1962, the Federal Power Commission examiner granted PNPC a license to build the High Mountain Sheep dam.⁹ Exceptions were filed which resulted in the Commission's hearing which is now under consideration. Evidence was submitted by both parties regarding the three projects: PNPC's High Mountain Sheep and WPPSS's Nez Perce or High Mountain Sheep.¹⁰ The Commission found that High Mountain Sheep was best adapted, within the meaning of section 10 (a) of the Federal Power Act,¹¹ for

⁶Washington Public Power Supply System, hereinafter referred to as WPPSS, is a joint power supply agency comprised of sixteen public utility districts in the state of Washington. It was established in January, 1958, under Washington law as a municipal corporation by order of the Washington State Department of Conservation and Development.

⁷The Nez Perce dam site is at Snake River mile 186.2. The project would have a reservoir which extends sixty-one miles up the Snake. Nez Perce and High Mountain Sheep are mutually exclusive and represent alternative developments of the same reach of river.

⁸Federal Power Act § 7(a), 49 STAT. 842 (1935), 16 U.S.C. § 800(a) (1958) provides: In issuing preliminary permits hereunder or licenses where *no preliminary permit has been issued* and in issuing licenses to new licensees under section 15 [808] hereof the Commission shall give *preference to applications therefor by States and municipalities*, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . . (Emphasis added.)

There was no question but that WPPSS, a municipal corporation, qualified for preference under this section.

The *preference* given to public agencies by this section must be distinguished from *priority* of application for license which is secured by a preliminary permit under section 5 of the act, *supra* note 5.

⁹Pacific Northwest Power Company, Project No. 2243; Washington Public Power Supply System, Project No. 2273; Presiding Examiner's Decision Upon Competing Applications For A License Under Section 4(e) of the Federal Power Act, Oct. 8, 1962.

¹⁰A summary of the major events leading to the Commission's hearing is as follows: (1) PNPC was issued a permit for the two dam Mountain Sheep - Pleasant Valley development, (2) PNPC's application for license to build the Mountain Sheep - Pleasant Valley development was denied, (3) PNCP applied for a license to build a dam at the High Mountain Sheep site, (4) WPPSS applied for a license to build a dam at the Nez Perce site or the High Mountain Sheep site. For a detailed chronological history and commentary of this controversy see BESSEY, THE PUBLIC ISSUES OF MIDDLE SNAKE RIVER DEVELOPMENT 67-135 (State of Wash., Dept. of Conservation, Bull. No. 9, 1964).

¹¹Federal Power Act § 10(a), 49 STAT. 842 (1935), 16 U.S.C. § 803 (1958) provides: All licenses issued under this Part shall be on the following conditions: (a) That the project adopted, including the maps, plans, and specifica-

comprehensive improvement and development of the river,¹² and that PNPC should be granted the license to build High Mountain Sheep because of priority which sprung from the preliminary permit issued in 1955.¹³

After the Commission had decided upon the superiority of High Mountain Sheep, it had to resolve an important legal question. The question turned on conflicting priorities and preferences which are established by sections 4 (f), 5, and 7 (a) of the Federal Power Act. The dissenting commissioners captured the real importance of the case when they concluded that "this case represents the first direct legal contest concerning the construction of section 7 (a) in relation to sections 4 (f) and 5."¹⁴ All of the commissioners agreed that this was a "benchmark" decision.

The legal question involved is twofold. Was the priority under the preliminary permit limited to the exact site described, or did the permit and its priority extend to the project best adapted to comprehensive development of that reach of the river? And, secondly, did the preliminary permit given PNPC expire before its stated term of three years upon the Commission's denial of the permittee's application for a license to build the Mountain Sheep-Pleasant Valley project? Although these questions overlap, they can be explored most productively if considered separately.

tions, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreation purposes. . . .

¹²An interesting aspect of the Commission's decision was the emphasis placed upon possible harm to the anadromous fish (summer and fall Chinook salmon, blueback salmon, and steelhead trout), which spawn in the Salmon and Snake Rivers. A high dam at the Nez Perce site will severely obstruct spawning runs in both the Salmon, which is very important as a Columbia River salmon spawning ground, and the less important Snake River. High Mountain Sheep dams the Snake above the confluence of the Snake and the Salmon, and therefore creates a less serious problem to the spawning fish. The Corps of Engineers in a report to the Secretary of the Army stated that, "at least fifteen to twenty years might be necessary to resolve the problem [salmon] that would be created by Nez Perce' while, 'the High Mountain Sheep project could be constructed without being a serious hazard to the anadromous fishery.'" Pacific Northwest Power Company, Project No. 2243, Washington Public Supply System, Project No. 2273, F.P.C. Opinion No. 418 at 18 (Feb. 5, 1964). The Commission found a \$12 million commercial fishing industry dependent upon Columbia River salmon. It also found that the sport fishing industry, on the Salmon River alone, may be worth as much as \$8 million a year.

The proposed Nez Perce project is capable of producing more power at a lower unit cost, and is more beneficial in terms of flood control than High Mountain Sheep. But, the Commission felt that it was compelled to overlook these advantages of Nez Perce in view of their commitment to "other beneficial public uses, including recreation purposes. . . ." as established by section 10 (a) of the act, and the serious fish problem which faced any dam at the Nez Perce site. The Commission felt that between the two claims to our natural resources, the claim of the fisheries industries must prevail.

¹³The Commission denied application for rehearing and motions to stay filed by the Department of the Interior, the Department of Conservation of the State of Washington, and WPPSS; and motions to strike filed by PNPC. Pacific Northwest Power Company, Project No. 2243, Washington Public Power Supply System, Project No. 2273, F.P.C. Opinion No. 418-A (April 30, 1964).

¹⁴F.P.C. Opinion No. 418, *supra* note 12, at 19 (dissenting opinion).

The first question created the greatest problem for the Commission. Likewise, its answer should be most important to future developers of the country's hydroelectric resources.

The Commission agreed that the purpose of the priority provision in section 5 of the act was to encourage developers to expend money for exploration and investigation of hydroelectric sites by giving some protection to money so spent. They did not agree, however, as to how far in distance or time the protection should extend. They did not agree on whether section 5 should receive a broad or narrow interpretation.¹⁵

The majority of the Commission believed that the priority clause of section 5 of the Federal Power Act should be construed liberally, saying, "to construe these statutory provisions narrowly would be, in effect, to write them out of the Act."¹⁶ The broad interpretation which they advocated would allow the priority of license application secured by a preliminary permit to extend to any project which would develop the same stretch or reach of river with which the permit was concerned. The majority insists that only by such liberal interpretation of the statute will the permit have the flexibility necessary to insure that permittees fully investigate and seek alternative means of developing a given stretch of river.

The majority said that High Mountain Sheep, which is 3.4 miles downstream from the Mountain Sheep site, will develop essentially the same reach of the Snake River as the Mountain Sheep-Pleasant Valley project for which the preliminary permit was granted. Consistent with its broad interpretation of the priority clause, the Commission gave PNPC's application for license to build High Mountain Sheep priority because of the permit.

The dissenting commissioners sought a narrower interpretation of section 5 and the preliminary permit issued to PNPC. They wanted to protect the relative advantage of state and municipal producers by protecting the preference given them by section 7 (a) of the Federal Power Act. They feared that the broad interpretation proposed by the majority would camouflage the real scope of a permit, thereby denying other parties effective notice of the permittee's plans. Following an examination of congressional debate on the Federal Power Act, from which the dissenters concluded that Congress did mean to give preference agencies a substantial advantage, they said:

It cannot be assumed that Congress intended that the permits, which are the sole means of extinguishing their preference rights, were to be awarded in such vague and uncertain terms that preference agencies would have no notice that their preference

¹⁵Commissioners L. J. O'Connors, Jr. and Harold C. Woodard, joined Commissioner Charles R. Ross, who wrote the opinion of the Commission. Commissioners Joseph C. Swindler, chairman, and David S. Black dissented on both of the legal questions presented.

interest in particular locations was involved in a permit application.¹⁷

The dissenting commissioners reasoned that the priority granted by the preliminary permit should not extend beyond the one or two specific sites mentioned on the face of the permit. Flexibility, they said, could be given to the permit by means of amendment, as authorized by the Commission's regulations.¹⁸ Consistent with their narrow interpretation of the priority clause, the minority would not extend priority under the original Mountain Sheep-Pleasant Valley permit to PNPC's application for a license to build High Mountain Sheep. They concluded that WPPSS, a preference agency, whose plans were "equally well adapted to conserve and utilize in the public interest the water resources of the region," should be granted the license to build the project.

Neither the majority nor the minority had strong precedent upon which to base its opinion.¹⁹ This was, therefore, a problem of first impression. It is submitted that the majority's broad interpretation of the statute is proper in view of the general aims of the Federal Power Act, and the norms which are necessary for efficient and speedy development of our water resources.

The dissenting commissioners' fear that broad interpretation of section 5 will not give adequate notice of the real scope of a permittee's priority is unfounded. Construction of one major project will tie up an entire stretch of river whether the preliminary permit has referred to the entire stretch or not. The present case is a good example of this proposition. The three alternative projects which may be used to develop the middle Snake—Mountain Sheep-Pleasant Valley, High Mountain Sheep, and Nez Perce—are within 5.9 miles of each other. Nez Perce, the furthest downstream, includes a reservoir which would extend sixty-one miles up the Snake, inundating the other sites. It is readily apparent that construction of any one of these projects will preclude construction of the others. When PNPC applied for a preliminary permit for the Mountain Sheep-Pleasant Valley project, there was ample notice that they intended

¹⁷F.P.C. Opinion No. 418, *supra* note 12, at 8 (dissenting opinion).

¹⁸FPC Reg., 18 C.F.R. § 4.84 (1961). "Application for amendment of preliminary permit shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application. . . ."

¹⁹The majority relied solely upon the Montana Power Company, Project No. 2223, 17 F.P.C. 834 (1957), in which the Commission refused to grant an amendment, reasoning that the investigations made under the previous preliminary permits should cover the site for which the amendment was sought. The *Montana Power* decision is distinguishable from the present case in four particulars. In the earlier case there was no competing private or preference customer before the Commission; there was no real need for an amendment; there was no priority issue; and there was no real need for a preliminary permit.

The minority relied upon Chantanika Power Co., Project No. 2294, 26 F.P.C. 751 (1961), and Linoma Power Co., Project No. 2202, 8 F.P.C. 99 (1949), neither of which more than mention in passing the scope of the permit; and Appalachian Electric Power Co., Project No. 2210, 11 F.P.C. 8 (1957). The *Appalachian* decision should be distinguished from the present case because the amendment referred to a dam which was to be built on a river where the project described in the permit.

to be the sole developers of that stretch of the Snake. The preference agencies did have notice that their preference interests in these projects were in jeopardy.

Further, the flexibility which the minority meant to give permits, by means of amendment, is illusory. The minority's reason for requiring an amendment before alternative development under a permit is allowed, must be to give notice of the permittee's change in plans. If this notice-giving feature of the amendment is to have any usefulness, other parties must be allowed to contest the issuance of the amendment by competing application for permits or licenses. In such a contest the original permittee should not have the benefit or priority. If such contest is not allowed, or if priority from the original permit extends to such contest, the amendment procedure and its notice-giving feature amounts to little more than a formality.²⁰ In terms of continuing priority, the amendment procedure proposed will not give flexibility to a preliminary permit.

The necessity of giving flexibility to the permit through broad interpretation of section 5 is strongly indicated by the fact that there is a persistent variance between the description of a project in the permit and the application for a license. There are no cases in which the project as finally described in the application for license corresponds exactly with the description in the permit.²¹ This should not be surprising. By definition the permit "is for the purpose of making survey to determine what power installation would be justified."²²

²⁰Essentially the same argument was proposed by the majority. See F.P.C. Opinion No. 418, *supra* note 12, at 28, and F.P.C. Opinion No. 418-A, *supra* note 13, at 8-9.

²¹The Commission mentioned in F.P.C. Opinion No. 418, *supra* note 12, at 23, and in F.P.C. Opinion No. 418-A, *supra* note 13, at 8, that they were not aware of any case in which the preliminary permit and the license application corresponded exactly. The Commission's observation was correct. An examination of all the Commission's orders granting licenses for major projects does not disclose one case in which the description of the project was the same in both the permit and the license application.

For an example of the problems which face permittees see, In the Matter of Pacific Gas and Electric Application for License, 2 F.P.C. 300 (1940). At 304, the Commission said, "the applicant made further studies after filing its application for preliminary permit, and in the testimony presented certain modifications of its original plan."

In the following cases the description of the project in the license application varied from that in the preliminary permit. In City of Eugene, Oregon, Project No. 2059, 10 F.P.C. 1270 (1951), the Commission issued a preliminary permit for two storage dams. The license, which was issued for construction of the project, approved two dams on the same stretch of river, but at different locations. In The Matter of City of Eugene, Oregon, By and Thru Its Eugene Water and Electric Board, Project No. 2059, 14 F.P.C. 408 (1955). Public Utility District No. 2 of Grant County, Washington, Project No. 2114, 13 F.P.C. 462 (1954). The permit described one dam at river mile 397. License for Project No. 2114, called for a two dam development of the Priest River, one dam at river mile 397 and another at river mile 415. Public Utility District No. 2 of Grant County, Washington, Project No. 2114, 14 F.P.C. 1067 (1955). Alabama Power Co., Project No. 2146, 13 F.P.C. 1235 (1954). The permit described five dams as did the license, but in the license three of the dams were in different locations than contemplated in the permit. Alabama Power Co., Project No. 2146, 18 F.P.C. 265 (1957); Georgia Power Co., Project No. 2177, 14 F.P.C. 728 (1955). The preliminary permit referred to one dam. The project as finally constructed under a license bearing the same project number was a three dam development of the same stretch of river. Georgia Power Co., Project No. 2177, 21 F.P.C. 296 (1959).

²²Fresno Irrigation District, Pacific Gas and Electric Company, Project No. 1925 and <https://scholarworks.montana.edu/works/doc/105248>, at 354 (1949).

Narrow interpretation of section 5 of the act would put most permittees in a difficult situation. Unless it was unusually accurate at the time of filing for the permit, the permittee would have to apply for an amendment to the permit or apply for a license to build a project other than that covered by the permit. In either case the priority which Congress intended to confer and which the permittee believed it had would be lost. This result is particularly oppressive when a non-preference producer is challenged by a preference agency which has taken an interest in the stretch of river after the preliminary permit was issued.²³ As the majority said:

Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigation coincided precisely with the permittee's guesstimate at the time the permit application was filed?²⁴

On the second question, concerning the termination of the preliminary permit, there was also a rift within the Commission. Three of the commissioners believed that sections 4 (f) and 5 of the act should be broadly interpreted on this issue, while the two dissenters believed that they should be interpreted narrowly. The majority held that a preliminary permit can survive a license application if the application is made within the effective period of the permit. The minority said that the permit is merely incidental to a license application and therefore merges with the application and disappears when the application is filed. Only the minority had any authority for its position. They relied on an opinion of the Commission's chief counsel, issued in 1923.²⁵ The majority termed this authority "obscure" and said it was not persuasive, ignoring it in the original decision and distinguishing it at the rehearing.²⁶

²³In F.P.C. Opinion No. 418, *supra* note 12, at 32, the Commission posed an interesting argument that may benefit non-preference producers in license disputes with preference agencies. The Commission noted that the companies which comprise PNPC depend upon Bonneville Power Administration power to varying degrees. This power is subject to being "pulled back," or taken away from these companies if the Administration decides that the energy is needed to satisfy the requirements of public bodies or cooperatives who are *preference customers* under section 4 (a) of the Bonneville Power Act. Pull back of power is within the discretion of the Secretary of the Interior pursuant to authority given him by section 5 (a) of the Bonneville Power Act. The Commission then said:

In view of these statutory provisions, it is our opinion that PNPC is not able to rely on any power supply that BPA may have available, and the company can reasonably claim a need for its own supply. In fact, we think it owes a duty to its customers to obtain power that is not subject to this statutory disability.

In contrast, the commissioners found that WPPSS, a preference customer under the Bonneville Power Act, had no such problem. They decided that WPPSS did not need the High Mountain Sheep power as badly as PNPC because "WPPSS is in a far better position to include BPA power as a resource in its planning than is PNPC." This argument, concerning the relative need for High Mountain Sheep's power, will take on added significance if the Commission's decision concerning PNPC's priority is overturned in the federal courts.

²⁴F.P.C. Opinion No. 418, *supra* note 12, at 23.

²⁵Federal Power Commission Ann. Rep. 222-23 (1923).

²⁶F.P.C. Opinion No. 418, *supra* note 12, at 26; F.P.C. Opinion No. 418-A, *supra* note

Flexibility of the terminal point of the permit is very important. This is dramatically illustrated by the series of events which led to the present case. The Commission denied PNPC's application for a license to build the Mountain Sheep-Pleasant Valley project because of the supposed superiority of the Nez Perce site. Within a few years it became apparent that the Commission's decision on this matter was wrong. Nez Perce was not best adapted to develop that stretch of the Snake.²⁷ But for the majority decision, that a preliminary permit can survive a license application, PNPC's priority would have been lost because of a premature holding. The majority's decision on this issue is sound in light of the numerous, and often confusing, elements which confront permittees and the Commission whenever application is made for a license to build a major hydroelectric project.²⁸

The schism within the Commission directly reflects a conflict of intents which exists within the Federal Power Act itself. In 1920 when the act was passed, there was a strong national interest in speedy, yet efficient, development of our largely untouched water power resources. The main purpose of the Federal Power Act was, therefore, to facilitate and encourage investment of private and public funds in a manner which would insure these ends.²⁹ Another, but subordinate, purpose of the act was to give a statutory boost to public power enterprises. Section 7 (a) was included in the act to effectuate this purpose. The present case shows how these two purposes of the act may conflict. It is a conflict between a part and the whole.

Liberal interpretation of the priority clause of section 5 and the preliminary permit is necessary to effectuate the main purpose of the Federal Power Act. Liberal interpretation of section 5 will encourage producers to invest funds in investigation and exploration. Such investment is necessary in order to discover the most efficient means of developing our water power resources. Liberal interpretation of section 5 is essential to give preliminary permits needed flexibility. Flexibility will encourage permittees to look for and to suggest optimum alternative means of developing given rivers and streams. Only by broad interpretation of section 5 will the conflict between priority and preference be kept in proper

²⁷See the discussion of the anadromous fish problem *supra* note 12.

²⁸In the present case the Commission was faced with no less than nine elements to consider: (1) the fish problem, (2) various power potentials of the competing sites, (3) flood control necessity and potential, (4) irrigation necessity and potential, (5) ability of the applicants to engineer and finance projects, (6) geological characteristics and relative safety of the various sites, (7) power requirement of the applicant, (8) possibility of federal construction, and (9) time within which the various projects could be completed.

²⁹The history and purpose of federal water power legislation are outlined in a report by Mr. Esch, chairman of the House Committee on Water Power. H.R. REP. NO. 61, 66th Cong., 1st Sess. 2 (1919). At one point the report said, "Congress for the last six or eight years has been seeking to enact legislation which, while encouraging the investment of private capital, would yet safeguard public interest. . . ." The Committee hoped that H.R. 3184, which became known as the Federal Power Act, would accomplish this purpose.

perspective, and the objectives of the Federal Power Act, as a whole, be achieved.³⁰

The Commission's decision correctly resolved the conflict between priority and preference. Because of its recognition that the priority created by section 5 of the act must be paramount, the usefulness of the preference clause has been severely limited. The preference given public agencies will not be applicable unless public and private producers happen to apply simultaneously for a preliminary permit, or a license for which no permit has been issued.

BRUCE L. ENNIS.

DIVORCE—RECRIMINATION IS NO LONGER AN ABSOLUTE DEFENSE—A DECREE OF DIVORCE MAY BE AWARDED TO BOTH PARTIES IN CERTAIN SITUATIONS.—Plaintiff wife commenced an action in district court for separate maintenance. Defendant husband cross-claimed for a divorce. Plaintiff's complaint was amended to seek an absolute divorce. The trial court granted a decree of divorce to each party and alimony and support to the wife. On appeal by the wife to the Montana Supreme Court,¹ held, affirmed. The doctrine of recrimination, as established by Montana statute, is not an inflexible rule to be mechanically applied. Where both parties to a divorce action have established grounds for divorce and the trial court finds that the legitimate objects of marriage have been destroyed, the court may, in its discretion, award a divorce to both parties. *Burns v. Burns*, 400 P.2d 642 (Mont. 1965).

Montana has dramatically reversed its position on the strongly criticized doctrine of absolute recrimination,² and has become one of the few jurisdictions to adopt the double divorce.³ The following discussion is an analysis of the legal rules and reasons employed in those cases in which both spouses have established a cause of action for divorce.

³⁰Petitions to review and set aside the Federal Power Commission order licensing PNPC to build High Mountain Sheep were entered in June, 1964, in the United States Court of Appeals for the District of Columbia Circuit. Petitions were filed separately by WPPSS, the Washington State Department of Conservation, and the Secretary of the Interior through the U. S. Attorney General. All three argued that the Federal Power Commission erred in matters of law and fact, and all sought remand of the case to the Federal Power Commission—the first two with court orders in favor of WPPSS's application, and the last in favor of federal development.

¹The appeal was based on two grounds: that the lower court's award of alimony was inadequate, and that the court erred in granting a double divorce. Instant case at 643.

²The instant decision was anticipated in *Bissel v. Bissel*, 129 Mont. 187, 284 P.2d 264 (1955), where the court, in a lengthy discussion of recrimination, gave approval by way of dictum to cases which abandoned strict application of the doctrine in other jurisdictions.

³*E.g.*, *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P.2d 598 (1952); *Flagg v. Flagg*, 192 Wash. 679, 74 P.2d 189 (1937); *Simmons v. Simmons*, 122 Fla. 325, 165 So. 45 (1936); *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952); *Barber v. Barber*, 28 Tenn. App. 359, 192 S.W.2d 49 (1945).