
No. 09-1134

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HOOPA VALLEY TRIBE,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

On Petition for Review of Orders
of the Federal Energy Regulatory Commission

PETITIONER HOOPA VALLEY TRIBE'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

NOTE: *Authorities upon which we chiefly rely are marked with asterisks*.

Statutes

Other Authorities

GLOSSARY

AIP	Agreement in Principle
APA	Administrative Procedures Act
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FEIS	Final Environmental Impact Statement
KHSA	Klamath Hydroelectric Settlement Agreement

I. SUMMARY OF REPLY ARGUMENT

The Hoopa Valley Tribe requests that this Court hold as follows: When FERC is asked to impose interim conditions in an annual license that is issued under 16 U.S.C. § 808(a), FERC must evaluate the proposed conditions pursuant to the standard contained in FERC regulation 18 C.F.R. § 16.18(d).[1] Specifically, FERC must consider whether the proposed interim conditions are necessary and practical to limit adverse impacts to the environment. 18 C.F.R. § 16.18(d). While FERC retains discretion to impose interim conditions under this standard, it must not exercise that discretion in an arbitrary and capricious manner. FERC must make a reasoned determination, based on substantial evidence in the record, and guided by its existing regulation, whether the requested interim conditions are necessary and practical to limit adverse impacts to the environment.

Both the "irreversible environmental harm" and "serious, unanticipated impacts" standards put forth by FERC in this case should be rejected as arbitrary and inconsistent with FERC's existing regulation that directly governs the issuance of interim conditions in annual license proceedings. Those restrictive standards are also inconsistent with Congress' intent that FERC exercise whatever legal authority it has to impose interim conditions in annual licenses (which are issued only after the original 30-50-year license term has expired). *Platte River*

[1] The full text of 18 C.F.R. § 16.18(d) and all other applicable statutes, regulations, etc., are provided in the Addendum of the Tribe's Initial Brief.

Whooping Crane Habitat Maint. Trust v. FERC, 876 F.2d 109, 118 (D.C. Cir. 1989). In this proceeding, instead of exercising the legal authority provided to FERC by the Federal Power Act, the Klamath Project license, and its own regulation, FERC imposed artificially burdensome evidentiary standards on the Tribe, ignored evidence in the record, and arbitrarily refused to impose the interim conditions proposed by the Tribe.

Substantial evidence in the record shows that the interim measures requested by the Tribe are necessary and practical to limit adverse impacts to the affected fishery resource. *See* Tribe's Initial Brief, Sections VIII(C) and (D). FERC failed to address the substantial evidence in the record that supports the Tribe's motion and that also contradicts FERC's finding that the affected fishery is "healthy" and "thriving." This Court should vacate FERC's orders and, at minimum, remand to FERC with a direction to evaluate the Tribe's motion under the standard contained in 18 C.F.R. § 16.18(d), and to provide a reasoned explanation of its decision based on the relevant record evidence. Alternatively, the Court should remand with an order to impose the conditions requested by the Tribe (as found at A440).

II. ARGUMENT

A. FERC Now Concedes That *Platte River* Does Not Require A Showing of "Irreversible Environmental Damage" To Support Imposition of Interim Conditions In An Annual License.

FERC originally denied the Tribe's motion for interim license conditions on grounds that the Tribe did not present evidence that the interim conditions were necessary to prevent "irreversible environmental damage" pending conclusion of re-licensing. A525, ¶ 13; A527, ¶ 16, ¶ 18. FERC contended that such evidence of "irreversible environmental damage" was a standard imposed by this Court's decisions in *Platte River*. A527, ¶ 16. The Tribe challenged FERC's misinterpretation of *Platte River* on rehearing. A532.

In its rehearing order, FERC argued that it was not actually applying an "irreversible environmental damage" standard, despite the clear language to the contrary in its original order. However, even on rehearing, FERC continued to suggest that its duties to consider and/or adopt interim conditions might only arise upon a showing of "irreversible harm." *See* A611, ¶ 9 (suggesting that FERC has no duty to investigate the need for interim protective conditions if some impact lesser than irreversible harm might be occurring to a resource); ¶ 10 (stating that *Platte River* "does not require the adoption of interim conditions in this case, where such harm [referring to "irreversible environmental damage"] to the resource is not present"). Now, on appeal, FERC affirmatively concedes that this

Court's *Platte River* decisions do not require FERC to find evidence of "irreversible environmental damage" as a prerequisite to imposing interim license conditions in an annual license. Response Brief, at 13. FERC concedes that it may impose interim conditions even if there is not any risk of "irreversible environmental damage" from ongoing project operations.

This Court should confirm that nothing in this Court's *Platte River* decisions, or in any other law, require application of an "irreversible environmental damage" standard when FERC evaluates the need for interim conditions in an annual license. This Court should further rule that an "irreversible environmental damage" standard is arbitrary and inconsistent with FERC's regulation, 18 C.F.R. § 16.18(d), which authorizes interim conditions upon a finding that such conditions are "necessary and practical to limit adverse impacts on the environment." It is arbitrary and capricious for FERC to impose a standard on petitioners that is more burdensome and restrictive than the standard expressly contained in its regulation. The Court should vacate FERC's orders and remand so that the Tribe's motion for interim conditions can be evaluated under the proper standard.

B. The "Unanticipated, Serious Impact" Standard Is Also Inconsistent With 18 C.F.R. § 16.18(d) and the Federal Power Act.

In its response brief, FERC's counsel argues that the Commission applied an "unanticipated, serious impact" standard when evaluating the Tribe's petition for interim conditions. The Tribe disagrees. FERC's position on rehearing was that it

had essentially unfettered discretion to decide whether to impose interim conditions on an annual license. A611-614, ¶ 11, 13, 16-17. FERC never stated that it was analyzing the Tribe's motion under an "unanticipated, serious impact" standard, nor has it ever applied such a standard in the context of annual licensing. FERC's *post hoc* interpretation of its orders is purely a litigation position that warrants no deference in this Court. *North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 663 (D.C. Cir. 1994); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (stating that "courts may not accept agency counsel's *post hoc* rationalizations for agency [orders]").

Even if FERC did apply an "unanticipated, serious impact" standard in this proceeding to reject the Tribe's motion, application of that standard is also arbitrary and unlawful because it is inconsistent with and more restrictive than the existing FERC regulation that addresses imposition of interim conditions at 18 C.F.R. § 16.18(d). It is prejudicial to require the Tribe to arbitrarily prove the existence of "unanticipated, serious impacts" or "irreversible environmental damage" when FERC has promulgated a regulation that authorizes interim conditions upon a lesser showing; specifically, upon a showing that the conditions are "necessary and practical to limit adverse impacts to the environment."

Neither FERC nor the intervenor PacifiCorp cite any prior order where FERC has actually applied an "unanticipated, serious impact" standard to evaluate

imposition of interim conditions in an annual licensing proceeding. In prior cases, FERC simply assessed the need and practicality of imposing interim conditions for the mitigation of existing adverse impacts. *See In re Turlock Irrigation Dist.*, 128 FERC ¶ 61,035 para. 99 (2009) (commencing hearing to assess "the conditions [in the River] that may affect these fish, and any interim protective measures, including minimum flows, that may be needed to improve conditions for the fishery resources"); *In re City of Tacoma*, 110 FERC ¶ 61,140, 61,548 fn.34 (2005) (stating the appropriate standard for analyzing interim conditions is simply "whether there is a need for interim conditions, not whether there is a need to prevent irreversible damage to listed species"). In neither *Turlock* nor *Tacoma* did FERC evaluate whether the impacts to the species were also "unanticipated."

In its rehearing order, FERC does state that it has used an "unanticipated, serious impact" standard when evaluating whether to re-open a license and impose additional mitigation measures during an ongoing license term. A613, ¶ 14. *City of New Martinsville, West Virginia*, 81 FERC ¶ 61,093, at 61,363 n.13 (1997) (discussing re-opener to address serious, unanticipated impacts that occur during license term); *Ohio Power Co.*, 71 FERC ¶ 61,092, at 61,314 n.43 (1995) (same). However, this case does not involve the re-opening of a license during its initial 30-50 year term. This case involves imposition of interim conditions on a license

whose term has long-expired, the situation directly addressed by 18 C.F.R. § 16.18(d).

Even if it is reasonable for FERC to apply an "unanticipated, serious impact" standard to re-opener proceedings that occur during an ongoing license term, such standard is not applicable after license expiration. During the term of a license, the licensee reasonably expects that it will receive the benefit of the license terms and conditions as written and not be subject to additional mitigation measures. The licensee has no such reasonable expectation once its license expires, as it has already obtained the full benefit of its 30-50 year license. FERC's regulation, 18 C.F.R. § 16.18(d), further confirms FERC's authority to impose interim measures in annual licenses that are issued after license expiration.

Upon license expiration, the balance of public interests related to resource protection and power production significantly changes, as twice confirmed by this Court. In *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), this Court confirmed that upon license expiration, FERC has a statutory mandate to re-evaluate projects in light of the modern federal laws that place environmental protection on an equal footing with power production. *Id.* at 72-74. Congress specifically imposed time limits on licenses so that the environmental and power interests could be re-balanced in accordance with changes in national policy. *Id.*

Congress did not intend existing projects to "operate indefinitely despite changes in national priorities." *Id.* at 74.

In *Platte River*, 876 F.2d 109 (D.C. Cir. 1989), this Court confirmed Congress' intent that the environmental considerations now mandated by federal law should also enter into the annual licensing process. *Id*. at 118. "Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary." *Id.* The balance of interests at issue in the annual licensing process is much different than during the term of the license, and favors the imposition of additional measures to protect affected resources pending final Commission action.

FERC has promulgated 18 C.F.R. § 16.18(d) to address the situation at issue in this case: the imposition of interim measures in annual licenses that are issued after the original 30-50 year license term has expired. Application of section 16.18(d) is limited to the annual licensing process, and does not apply to re-openers during the standard license term. Under FERC's regulation, imposition of interim conditions in an annual license is permissible if the conditions are "necessary and practical to limit adverse impacts on the environment." 18 C.F.R. § 16.18(d). Nothing in FERC's regulation requires a showing that the relevant impacts are also "serious" and "unanticipated."

Incorporating an "unanticipated, serious impact" standard into the annual licensing process would essentially re-write 18 C.F.R. § 16.18(d), creating additional evidentiary hurdles prior to the imposition of interim conditions. If FERC wishes to revise its existing regulation to restrict its authority to impose interim conditions in annual licenses, it must do so through valid rulemaking procedures. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (stating "It is well established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation").

In its orders below, FERC never suggested that it was interpreting the existing language of 18 C.F.R. § 16.18(d) to require a showing of unanticipated, serious impacts. FERC did not even mention 18 C.F.R. § 16.18(d) in its initial order. FERC's only discussion of its regulation in its rehearing order is limited to one paragraph, which does not discuss the relevance of "unanticipated, serious impacts" at all. A614, ¶ 17. In this proceeding, FERC largely disregarded its existing regulation, opting to create and apply more burdensome and restrictive standards to the Tribe's motion outside of the existing regulatory framework.

The "unanticipated impacts" test is also inappropriate for use in an annual licensing proceeding because impacts that occur after a license term has expired are *per se* unanticipated. Licenses are issued for a set number of years. Thus,

when the Klamath Project was licensed for a fifty-year term in 1956, it was not reasonably anticipated that the Project would continue to operate on that license in 2010. *See City of Tacoma*, 460 F.3d at 73 (noting Congress imposed time limits on licenses so that projects and their impacts could be re-evaluated from time to time). Impacts that continue to occur after license expiration are *per se* unanticipated.

It is also relevant that a licensee suffers no prejudice from imposition of reasonable interim conditions in an annual license. While a licensee may reasonably expect to be free from additional license conditions during a license term, it has no such reasonable expectation once its term is expired. Upon license expiration, the licensee has already obtained the full benefit of its license. *See City of Tacoma*, 460 F.3d at 74. Moreover, the licensee continues to generate power under its annual licenses, without the costs of complying with the environmental laws that apply to new and re-licensed projects. While the licensee has a significant interest in limiting its costs of complying with current law, and maintaining its competitive advantage in the power marketplace, those are not interests recognized by Congress once the licensee is operating on an expired license. There is no unfairness in requiring the licensee to comply with reasonable interim conditions to mitigate impacts related to its continued unmitigated power production pending conclusion of re-licensing.

In contrast, the Tribe has been significantly prejudiced by FERC's shifting standards and arbitrary conduct in this case. The Tribe's motion was first denied because it failed to provide evidence of irreversible environmental harm. A521. Then, on rehearing, the Tribe's motion was rejected by FERC without clear reference to any applicable standard, but simply pursuant to an exercise of FERC's allegedly unlimited discretion. A608. Now, on appeal, the Tribe learns that its motion was actually rejected because it failed to show an "unanticipated, serious impact." In its motion to FERC, the Tribe had argued that its proposed conditions were "necessary and practical" because that is the language used by FERC in its regulation. FERC ignored its regulation throughout this process, imposing more restrictive tests, and requiring the Tribe to hit a moving evidentiary target. Rather than exercising the legal authority that it has to impose interim conditions, FERC developed arbitrary rationales to avoid imposing the Tribe's conditions. FERC's arbitrary and *ad hoc* conduct in this case is exactly what the APA and its judicial review procedures are designed to avoid. 5 U.S.C. § 706.

In summary, FERC has promulgated a regulation that directly applies to the issuance of interim conditions in annual licensing proceedings, like the one at issue in this case. That regulation provides the standard by which FERC is to evaluate the Tribe's motion for interim conditions. In this proceeding, FERC refused to consider whether the Tribe's conditions were necessary and practical, while

arbitrarily imposing more burdensome evidentiary requirements on the Tribe. Substantial evidence in the record, which FERC ignored, supports the Tribe's argument that the requested interim conditions are necessary and practical to limit adverse impacts on the environment pending re-licensing. *See* Tribe's Initial Brief, Sections VIII(C) and (D). This Court should reject the "serious, unanticipated impact" standard as arbitrary and inconsistent with FERC's existing regulation that governs this proceeding, and remand to FERC for evaluation of the Tribe's motion under the applicable standard found in 18 C.F.R. § 16.18(d).

C. PacifiCorp's Arguments in FERC's Defense Lack Any Merit.

PacifiCorp argues that 18 C.F.R. § 16.18(d) does not independently allow FERC to impose interim conditions in licenses that lack re-openers. Even if correct, that argument is irrelevant here since it is undisputed that the Klamath license has a re-opener. A525, ¶ 12. Where, as here, the license contains a re-opener, FERC's regulation in 18 C.F.R. § 16.18(d) provides the standard by which FERC must evaluate the appropriateness of interim conditions. Assuming the presence of a re-opener, nothing in the Federal Power Act limits or constrains FERC's authority to impose interim conditions in an annual license. *Platte River*, 876 F.2d at 114.

PacifiCorp's argument that interim conditions are appropriate only if impacts to the affected resource would increase under an annual license is

meritless. Not even FERC advocates that extreme position. Such a standard would never permit imposition of interim conditions, because the impacts occurring at the time of license expiration are identical to those occurring when the project begins operating on annual licenses. The relevant question is whether it is appropriate for FERC to impose some minimal level of protection to the public resources, in a manner consistent with current federal law, during the interim period in which the licensee continues to utilize public resources on an expired license. The Court should not accept PacifiCorp's restrictive test; rather, the Court should require FERC to apply the legal standard already contained in FERC's existing regulation. Interim measures are appropriate if they are necessary and practical to limit adverse impacts to the environment. 18 C.F.R. § 16.18(d).

PacifiCorp's argument that interim conditions are only appropriate if ESA-listed species are affected directly conflicts with past Commission orders and is not supported by *Platte River. In re Public Utility Dist. No. 2 of Grant County, Washington*, 67 FERC ¶ 61,225, at p. 61,684, fn. 19 (1994); *In re Central Nebraska Pub. Power and Irrigation Dist.*, 50 FERC ¶ 61,180, at p. 61,351, fn. 34 (1990). Although not listed under the ESA, the redband trout is listed as a state sensitive species under Oregon law. A89; A205. Under Oregon law, designated "sensitive" species are those wildlife species, subspecies, or populations that are subject to a decline in number of sufficient magnitude to qualify their listing as

threatened due to loss in quantity or quality of habitat or other factors. OAR 635-100-0001; 635-100-0040. The designated listing of the species as "sensitive" under Oregon law is in direct conflict with PacifiCorp's and FERC's overly optimistic view of the "health" of the fishery.

PacifiCorp also argues that it is inappropriate to impose "long-term agency conditions" as interim measures. In this proceeding, the Tribe has argued that its requested conditions are identical to those imposed by the Department of Interior as mandatory Section 4(e) conditions. This is relevant because FERC will be required to impose these exact conditions once a license is issued. *City of Tacoma*, 460 F.3d at 66-67. Thus, if specific Section 4(e) conditions also meet the "necessary" and "practical" standards imposed by 18 C.F.R. § 16.18(d) (which the Tribe's conditions do), there is no reasonable basis to delay imposition of the conditions. The Tribe does not argue that FERC must impose all Section 4(e) conditions as interim conditions in all circumstances, but if a Section 4(e) condition meets the criteria of 18 C.F.R. § 16.18(d), FERC should exercise the authority it has to impose those conditions immediately. *Platte River*, 876 F.2d at 118. Neither FERC nor PacifiCorp provide a reasonable explanation of why these conditions are less important to the resource today than in a few years from now.

Substantial evidence in the record shows that the interim measures requested by the Tribe are necessary to mitigate adverse impacts to the affected resource, and

that they are practical (since they are purely operational in scope and require no structural modifications or capital investment to implement). The fact that these conditions are mandatory conditions under Section 4(e) of the Federal Power Act, and have been upheld by an ALJ in an EPAct trial-type hearing, further supports the Tribe's argument that the conditions are appropriate to implement now, since they will have to be implemented in any future license issued to PacifiCorp.

D. FERC Fails To Rebut the Tribe's Argument That FERC's Orders In This Proceeding Are Not Supported by Substantial Evidence.

In its opening brief, the Tribe argued that FERC's factual determination regarding the health of the affected fishery was based on unreliable data, not supported by substantial evidence, and was in direct conflict with the vast weight of the evidence in the record. *See* Tribe's Initial Brief, Sections VIII(C) and (D). In its response brief, FERC continues to rely on the same unreliable catch rate data, adding only that PacifiCorp's expert also relied on catch rate data in the licensee's unsuccessful effort to attack the validity of Interior's Section 4(e) flow conditions. *See* FERC Response Brief, p. 18-19. As the Tribe argued in its opening brief, the unreliable and unscientific catch rate data does not provide the substantial evidence necessary to support FERC's decision here. *Darrell Andrews Trucking v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002) (remanding for further consideration based on showing that evidence relied upon by agency was unreliable)

FERC also weakly asserts that it based its decision on its "overall view of the evidence." This conclusory and unsupported assertion does not warrant any deference by this Court. An agency's decision can be upheld only on the basis of the reasoning contained within that decision. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998). It is a fundamental aspect of administrative law that an agency must explain the reasoning for its decision. *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must examine whether there is a rational connection between the facts found and the choice made. *Id.* FERC can not immunize its decision from effective judicial review by generally asserting, with no further explanation, that it based its decision on an "overall" view of the record.

PacifiCorp contends that FERC "relied on the 847-page FEIS . . . as well as thousands of pages in the ALJ record and the extensive relicensing record" and also asserts that FERC gave "thorough consideration to a variety of sources" in making its determination. Intervenor Brief, at 7. PacifiCorp lacks a sufficient basis for these assertions. FERC's order denying the Tribe's motion cites a handful of pages in the FEIS as support for its discussion of "catch rates." A526. Those pages of the FEIS, with their discussion of unreliable catch rate data, do not support FERC's conclusion that the fishery is "healthy" and "thriving." *See* Tribe's Initial Brief, Section VIII(C)(1). FERC does not refer to even one page

from any other document in the ALJ record or the extensive re-licensing record in its order. A526. Nor does FERC address or respond to the contradictory expert evidence in the record. *See* Tribe's Initial Brief, Section VIII(C). The order on rehearing cites to two pages from the FEIS and nothing more from the record. A615. Nothing in FERC's orders indicates that FERC gave "thorough consideration" to the relevant evidence, including the substantial evidence which contradicted its decision.

In *Tenneco Gas v. FERC,* 969 F.2d 1187, 1214 (D.C. Cir. 1992), this Court stated that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence." Here, FERC neglected numerous pertinent facts, including substantial evidence that contradicted its factual findings on the "health" of the affected fishery. FERC failed to consider whether catch rate data was a reliable indicator of the health of a species. It also failed to address the substantial expert evidence in the record that the affected fishery is in poor condition and in significant need of protection. *See* Tribe's Initial Brief, Sections VIII(C) and (D). It failed to reconcile its conclusion that the Klamath Redband Trout is "healthy" with the species' designation as a "sensitive species" under Oregon state law. *See* A89; A205 and definition of "sensitive species" *supra*. FERC also failed to meaningfully take the ALJ's decision in the Klamath EPAct hearing into account, and failed to explain its reasoning as to why the conditions were not "necessary" or

"practical" at this time, even though they will have to be implemented upon re-licensing. *Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1116 (D.C. Cir. 1989) (stating "an agency's 'departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision'"). FERC's decision is arbitrary and capricious and not supported by substantial evidence in the record. *State Farm*, 463 U.S. at 43 (agency acts in arbitrary and capricious manner where it offers explanation for its decision that runs counter to the evidence in the record).

The record in this case provides near unanimous support from state, federal, tribal, and non-governmental scientists that the affected fishery is in need of interim protection and that the conditions requested by the Tribe would mitigate the existing impacts. *See* Tribe's Initial Brief, Sections VIII(C) and (D). That near unanimous view is weakly contradicted by the unreliable and unscientific catch rate data. FERC did not adequately explain its decision to ignore the weight of contradictory expert evidence. *Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 167 (D.C. Cir. 2005) (vacating order because agency failed "to consider contradictory record evidence where such evidence is precisely on point"); *see id.* at 177 (stating, "the court may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn") (internal quotations omitted).

At minimum, this case must be remanded to FERC for further consideration, in light of the substantial contrary evidence in the record that supports the current need and the practicality of the interim conditions requested by the Tribe. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (remanding due to FERC's failure to adequately address relevant evidence); *City of Vernon v. FERC*, 845 F.2d 1042, 1048-49 (D.C. Cir. 1988); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (stating that "answers [to questions not adequately addressed in FERC's orders] can be imagined, but it is FERC that must formulate and adopt them in the first instance").

E. The Interim Measures Provided For In The Klamath Settlement Agreement Are Not Relevant To The Court's Determination Here.

PacifiCorp cites to interim measures that it has voluntarily agreed to implement, outside of the FERC licensing process, as part of the so-called Klamath Hydroelectric Settlement Agreement (KHSA). Neither the Tribe nor FERC are parties to the KHSA. PacifiCorp has not asked FERC to approve the KHSA, nor has PacifiCorp asked FERC to include any of the agreed-upon interim measures as conditions in its current annual license. The KHSA has no effect without future Congressional approval. KHSA, Section 2.1.1. If the KHSA ultimately fails, PacifiCorp's promise to implement the voluntary measures terminates. KHSA, Section 6.1.1. PacifiCorp has not filed notice with FERC of any interim measures that are currently being implemented. As it has since 2006, PacifiCorp continues

to operate the Klamath Project and kill fish on an expired license under the same terms and conditions imposed in the 1950's.

The interim measures voluntarily agreed to by PacifiCorp do not include any of the measures advocated by the Tribe in this proceeding. Thus, nothing in the KHSA makes the conditions requested by the Tribe unnecessary. As PacifiCorp points out, the Agreement in Principle (AIP) that preceded the KHSA and which contains a description of the "voluntary" interim measures, was known to FERC during rehearing, yet FERC did not rely on the AIP or the interim measures contained therein when evaluating the Tribe's request.

PacifiCorp argues that an adverse ruling in this proceeding would impact the "carefully crafted" settlement agreement. To the extent that contention is correct, it is irrelevant. The Tribe's request for interim conditions was filed three years before the KHSA was signed. Despite the contingent settlement, FERC retains its existing authority to protect affected resources pending conclusion of the re-licensing or dam removal, whichever occurs first. PacifiCorp and the settling parties had knowledge of the Tribe's motion for interim conditions, and this appeal proceeding, during the settlement negotiations. PacifiCorp and the settling parties could have accounted for the possible imposition of interim conditions resulting from this case, but for whatever reason, they chose not to.

The settlement agreement is, of course, relevant to show that there is no longer any active effort to complete the re-licensing of the Klamath Project and that absent interim measures, the Project will continue to operate on terms of its 1950's era license for many years to come. KHSA, Section 6.5. Any assertion that the agreement will result in dam removal by 2020 is pure speculation and fails to acknowledge the many conditions and contingencies, including passage of federal and state legislation, which must be satisfied to achieve such removal. KHSA, Section 8.11.1. If the requisite legislation fails to materialize, or the settlement terminates for some other reason, the re-licensing will recommence. KHSA, Section 7.7. Regardless of what course of action ultimately unfolds, the Project will continue operating on its expired license for years to come and the Klamath River's aquatic resources will continue to suffer the associated impacts.

III. CONCLUSION AND RELIEF REQUESTED

PacifiCorp's license term, and its corresponding privilege to use the water resources of the Klamath River, expired more than four years ago. The private utility company received the full benefit of its 50-year license. PacifiCorp has now received the benefit of four additional years of power generation revenues at the expense of the public resources and without being required to comply with current federal resource-protection laws.

Three years ago, the Tribe asked FERC to impose purely operational conditions that would increase the minimum flows in the Klamath River and reduce operational impacts on affected fishery resources pending final FERC action in the re-licensing. These measures mirror mandatory flow conditions that FERC will be required to impose whenever it issues a new license for the Klamath Project. Substantial evidence in the record shows that the conditions are both necessary to limit adverse impacts to affected resources and practical for immediate implementation. Without justification, FERC declined the Tribe's motion, imposing a more burdensome standard than permitted by law, relying on unreliable and unscientific data, and ignoring the expert evidence in the FERC record that supports the need for the conditions.

The Tribe requests that this Court vacate FERC's order denying the Tribe's motion for interim conditions and subsequent order on rehearing. The Tribe also requests that this Court remand with a direction to impose the Tribe's requested interim conditions (at A440) or, at minimum, remand for further consideration by FERC under the proper legal standard and based on a complete review of the relevant evidence in the record.

Respectfully submitted this 15th day of April, 2010.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 5,116 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word (Office XP version) in 14 point Times New Roman font.

DATED this 15th day of April, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I filed the foregoing Petitioner Hoopa Valley Tribe's Reply Brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties in this matter.

In addition, I filed eight paper copies of the Reply Brief with the Clerk of the Court via first class mail. I further certify that, in addition to electronic service described above, one paper copy of the Reply Brief was mailed USPS first class mail to:

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Dated this 15th day of April, 2010.

/s/ Thomas P. Schlosser
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