

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 09-1134

HOOPA VALLEY TRIBE,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

**BRIEF OF INTERVENOR PACIFICORP IN SUPPORT OF
RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION**

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DATED: March 30, 2010

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), counsel for Intervenor PacifiCorp hereby certifies as follows:

A. Parties and Amici

All parties and intervenors appearing before the Federal Energy Regulatory Commission and in this court are listed in the Brief for Petitioner Hoopa Valley Tribe.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Respondent FERC.

C. Related Cases

This Court previously reviewed a FERC Order relating to the relicensing of the Klamath Hydroelectric Project (Project No. 2082) in *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008) (Case No. 06-1212).

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(b), Intervenor PacifiCorp filed the required corporate disclosure statement in its motion to intervene in this proceeding. As none of the information in the disclosure statement has changed, the previously filed statement remains accurate.

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
GLOSSARY	viii
STATEMENT OF THE ISSUE	1
STATUTES AND REGULATIONS	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	1
STANDARD OF REVIEW	2
ARGUMENT	3
I. FERC Did Not Abuse its Discretion in Denying the Tribe's Request for Interim Conditions	
a. The Tribe Failed to Make a Threshold Showing of Increased Adverse Impacts to Trigger FERC's Reopener Provision in Article 58 of the License	
b. FERC's Determination that Adverse Impacts Will Not Increase Under the Status Quo is Supported by Substantial Evidence	
c. The Tribe Failed to Show that Continued Operations Will Impede Recovery of an Endangered Species in the Absence of Interim Measures, like in <i>Platte I</i> and <i>Tacoma</i>	
8	

d. FERC Did Not Engage in Standardless Decisionmaking.....	10
II. The Tribe Inappropriately Confuses Long-term Agency Conditions with Short-term Interim Measures.....	11
a. Agency Terms and Conditions Do Not Apply to Annual Licenses	11
b. FERC Was Correct in Not Relying Solely on the ALJ Record in its Decision on Interim Conditions	12
c. PacifiCorp has Voluntarily Implemented Interim Measures as Part of the Settlement Agreement and Additional Measures May Cause the Settlement to Terminate	14
CONCLUSION.....	18

TABLE OF AUTHORITIES**CASES**

<i>Am. Rivers v. FERC</i> , 201 F.3d 1186 (9th Cir. 1999).....	11
<i>Bangor Hydro-Electric Co. v. FERC</i> , 78 F.3d 659 (D.C. Cir. 1996).....	11
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962).....	2
<i>City of Seattle v. FERC</i> , 883 F.2d 1084 (D.C. Cir. 1989)	3
<i>Escondido Mut. Water Co. v. La Jolla Band of Mission Indians</i> , 466 U.S. 765 (1984).....	11
<i>FPL Energy Me. Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	2
<i>Gas & Elec. Dep't of Holyoke v. FERC</i> , 629 F.2d 197 (1st Cir. 1980).....	3
<i>Landy v. Fed. Deposit Ins. Corp.</i> , 486 F.2d 139 (3d. Cir. 1973).....	15
<i>Mo. Pub. Serv. Comm'n v. FERC</i> , 215 F.3d 1 (D.C. Cir. 2000)	2
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	2
<i>Nelson, Inc. v. United States</i> , 355 U.S. 554 (1958)	3
<i>N. States Power Co. v. FERC</i> , 30 F.3d 177 (D.C. Cir. 1994).....	3
<i>Pac. Gas & Elec. Co. v. FERC</i> , 720 F.2d 78 (D.C. Cir. 1983)	3
<i>*Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC (Platte I)</i> , 876 F.2d 109 (D.C. Cir. 1989)	4, 7, 8, 9, 13
<i>*Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC (Platte II)</i> , 962 F.2d 27 (D.C. Cir. 1992).....	4, 9
<i>Rothenberg v. Security Mgmt. Co.</i> , 667 F.2d 958 (11th Cir. 1982).....	15

*Authorities chiefly relied upon are marked with an asterisk

Town of Norwood v. FERC, 962 F.2d 20 (D.C. Cir. 1992) 3

Wis. Power & Light Co. v. FERC, 363 F.3d 453 (D.C. Cir. 2004) 2

ADMINISTRATIVE DECISIONS

**City of Tacoma*, 110 FERC ¶ 61,140 (2005) 8, 9

Ohio Power Co., 71 FERC ¶ 61,092 (1995) 5

Order No. 513-B, Hydroelectric Relicensing Regulations under the Federal Power Act, 50 FERC ¶ 61,241 (1990) 5

Pac. Gas & Elec. Co., 110 FERC ¶ 61,323 (2005) 6

**PacifiCorp*, 125 FERC ¶ 61,196 (2008) 12, 13, 14

**PacifiCorp*, 126 FERC ¶ 61,236 (2009) 4, 5, 6, 7, 10, 11, 12, 14

S. Cal. Edison Co., 94 FERC ¶ 61,326 (2001) 5

Turlock Irrigation Dist., 128 FERC ¶ 61,035 (2009) 5

Wis. Elec. Power Co., 73 FERC ¶ 61,208 (1995) 10

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 500-596
Section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A) 2

Endangered Species Act, 16 U.S.C. § 1536(d) 8

Federal Power Act, 16 U.S.C. §§ 791a-828c
Section 4(e) of the FPA, 16 U.S.C. § 797(e) 11, 12
Section 6 of the FPA, 16 U.S.C. § 799 3
Section 18 of the FPA, 16 U.S.C. § 811 11, 12

*Authorities chiefly relied upon are marked with an asterisk

Section 313(b), 16 U.S.C. 825l(b)	2
Section 241 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (EPAct 2005).....	12
 <u>REGULATIONS</u>	
18 C.F.R. § 16.18(d)	5
 <u>MISCELLANEOUS</u>	
Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses; Interim Final Rule, 70 Fed. Reg. 69,804 (Nov. 17, 2005).....	13
Final Environmental Impact Statement for the Klamath Hydroelectric Project (November 2007)	7

*Authorities chiefly relied upon are marked with an asterisk

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 500-596.
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission.
FPA	Federal Power Act, 16 U.S.C. §§ 791a-828c.
FPC	Federal Power Commission, predecessor agency to the Federal Energy Regulatory Commission.
Interior	United States Department of the Interior.
Order	<i>PacifiCorp</i> , 125 FERC ¶ 61,196 (2008) (Order Denying Motion for Interim License Conditions)
Project	Klamath Hydroelectric Project, FERC Project No. 2082.
Rehearing Order	<i>PacifiCorp</i> , 126 FERC ¶ 61,236 (2009) (Order Denying Rehearing)
Tribe	Petitioner Hoopa Valley Tribe

STATEMENT OF THE ISSUE

Whether FERC abused its discretion in denying the Tribe's motion for interim conditions where the evidence does not show that adverse conditions at the project would increase due to continued operations pending relicensing.

STATUTES AND REGULATIONS

Except for the statutes and regulations set forth in the addendum to this Brief, the applicable statutes and regulations are contained in the addendum to the Brief for Petitioner Hoopa Valley Tribe or the Brief for Respondent FERC.

STATEMENT OF FACTS

Intervenor adopts the Statement of Facts of Respondent FERC.

SUMMARY OF ARGUMENT

The Commission did not abuse its discretion in denying the Tribe's motion for interim conditions, because the Tribe failed to establish that the adverse impacts resulting from continued operations pending relicensing are likely to exceed those under the status quo. FERC evaluated the overall evidence in the proceeding and concluded that the redband trout fishery at the Project is generally healthy despite the alleged adverse effects caused by project operations. Because FERC evaluated the extensive record and determined that adverse impacts would not increase under an annual license, its decision to deny the Tribe's motion was supported by substantial evidence.

STANDARD OF REVIEW

The standard of review in this case is set forth in Section 313(b) of the Federal Power Act (FPA), 16 U.S.C. § 825l(b) (2006), and Section 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Section 313(b) requires the court to uphold all factual findings by FERC that are “supported by substantial evidence.” 16 U.S.C. 825l(b). This deferential standard “does not demand perfect information,” *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 464 (D.C. Cir. 2004), as it only “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (internal citation omitted). FERC simply must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Section 706(2)(A) of the APA authorizes the court to set aside only those FERC actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under this standard, FERC “must consider the relevant factors.” *Mo. Pub. Serv. Comm’n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000). It “must be able to demonstrate that it has ‘made a reasoned

decision,’’ *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)), and the “path of [its] reasoning” must be clear. *Id.* at 182.

As this case is limited to review of FERC’s interpretation of a hydroelectric license it issued and regulates, the court’s review is particularly deferential. In these circumstances, FERC’s “interpretation of the hydroelectric licenses it issues and oversees is entitled to deference,” *City of Seattle v. FERC*, 883 F.2d 1084, 1087 (D.C. Cir. 1989) (citing *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 84 (D.C. Cir. 1983)), and unless such interpretation is “clearly erroneous, [the court] must uphold that interpretation.” *Gas & Elec. Dep’t of Holyoke v. FERC*, 629 F.2d 197, 202-03 (1st Cir. 1980) (citing *Nelson, Inc. v. United States*, 355 U.S. 554, 558 (1958)).

ARGUMENT

I. FERC Did Not Abuse its Discretion in Denying the Tribe’s Request for Interim Conditions.

- a. The Tribe Failed to Make a Threshold Showing of Increased Adverse Impacts to Trigger FERC’s Reopener Provision in Article 58 of the License.

Section 6 of the FPA provides that licenses may be altered “only upon mutual agreement between the licensee and the Commission.” 16 U.S.C. § 799. Some licenses, like PacifiCorp’s, contain a reservation of authority for the Commission to make future modifications as may be required. Without the

agreement of a licensee, a reopener provision is the sole avenue for FERC to utilize when the Commission determines that there is a need to impose interim conditions on an existing license. *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113-14 (D.C. Cir. 1989) (*Platte I*); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32 (D.C. Cir. 1992) (*Platte II*); *S. Cal. Edison Co.*, 106 FERC ¶ 61,212 at P 38 (2004).

Article 58 in the PacifiCorp license preserves the Commission's authority to impose additional measures on a license "upon findings based on substantial evidence that such . . . modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the [FPA]." License Article 58, JA 80; PacifiCorp, 126 FERC ¶ 61,236 at P 12 (2009) (Rehearing Order), JA 612 (quoting Article 58). FERC is authorized, but not required, to impose interim conditions if the criteria of Article 58 are met. As the Commission articulated in its Rehearing Order, the reopener provision does not "establish a legal standard that, if met, must result in the adoption of such modifications." Rehearing Order at P 13, JA 612. FERC retains the discretion to determine whether to impose conditions, and FERC may deny a request even if adverse impacts exist, provided that the Commission does not act arbitrarily or capriciously or otherwise ignore the evidence.

FERC's regulation allowing it to impose interim conditions "if necessary and practical to limit adverse impacts on the environment" is similarly not a legal standard that compels the Commission to alter the license. Section 16.18(d) of the Commission's regulations must be read in tandem with Section 6 of the FPA, in that FERC may "incorporate additional or revised interim conditions in an annual license if the original license reserved [its] authority to do so." *So. Cal. Edison Co.*, 94 FERC ¶ 61,326 at p. 62,217-18 (2001), *Order No. 513-B*, Hydroelectric Relicensing Regulations under the Federal Power Act, 50 FERC ¶ 61,241 at p. 61,735 (1990). Like the reopener provision, the regulation does not obligate FERC to impose interim measures, and in fact imposes the further limitation that interim conditions must be "necessary and practical" to limit adverse impacts. Rehearing Order at P 17, JA 614.

In addition to the requirements of Article 58, FERC only exercises its discretion to impose interim conditions when continued project operations will "have unanticipated, serious impacts on . . . fishery resources" over and above impacts under the status quo. Rehearing Order at PP 9 and 14, JA 610 and 613; *Ohio Power Co.*, 71 FERC ¶ 61,092 at p. 61,314 n.43 (1995); *Turlock Irrigation Dist.*, 128 FERC ¶ 61,035 at P 87 (2009). When the Commission receives a request to reopen the license to impose interim conditions, it must "first investigate

what effects, if any, may be occurring and whether there is a need to require changes to address those effects.” *Pac. Gas & Elec. Co.*, 110 FERC ¶ 61,323 at P 27 n.33 (2005). If FERC decides, after its investigation, that continued project operations will not have unanticipated, serious impacts on fishery resources, it may decline a request for interim conditions because such conditions are unnecessary. While the “unanticipated, serious impacts” test is a heightened standard from the Article 58 threshold, it is within FERC’s discretion to impose a stricter standard. Where the record shows that adverse impacts will not increase to the level of unanticipated, serious impacts due to continued operations pending relicensing, it is within FERC’s discretion to deny a request to impose interim measures. Rehearing Order at P 14, JA 613. In this case, the Commission had abundant evidence from the existing record that existing operations were not causing the redband trout increased harm and the fishery was healthy under the status quo. Based on this evidence, FERC was within its discretion to deny the request for interim conditions without further inquiry.

b. FERC’s Determination that Adverse Impacts Will Not Increase Under the Status Quo is Supported by Substantial Evidence.

FERC evaluated the overall evidence in the proceeding, including the ALJ record and the FEIS, and reasonably concluded that the redband trout fishery in the J.C. Boyle bypassed and peaking reaches is a generally healthy trout fishery “despite the adverse effects caused by project operations.” Rehearing Order at P

21, JA 615. FERC's denial of the Tribe's request was not a refusal to assess the need for interim conditions, like in *Platte I*, but rather its denial was a reasoned conclusion after careful consideration of the record before it. In light of the extensive record in this case, FERC's actions were supported by substantial evidence and not an abuse of discretion.

FERC relied on the 847-page FEIS¹ in the proceeding, as well as the thousands of pages in the ALJ record and the extensive relicensing record. FERC's reliance on this record reflects a considered judgment about the effect of continued project operations on the trout fishery. After thorough consideration of a variety of sources, FERC concluded that "the Klamath Project presented a picture of a generally healthy trout fishery, despite the adverse effects caused by project operations." Rehearing Order at 21, JA 615. While the Tribe alleges that FERC relied primarily on catch rates which paint a misleading picture as to the health of the fishery (Tribe's Brief at 40-43), FERC clarified that its conclusion "as to the general health of the fishery was based on an overall view of the evidence in those proceedings." Rehearing Order at 21, JA 615. While FERC does not contend that project operations are without impact to the fishery, FERC concluded that these impacts "have not prevented the maintenance of a trout fishery." Rehearing Order

¹ Final Environmental Impact Statement (FEIS) at 3-243, 3-257, 3-263, JA 486, 499, 505; *PacifiCorp*, 125 FERC ¶ 61,196 at P 14 (2008) (Order), JA 526.

at P 22, JA 615. Because the record supports the conclusion that the fishery is healthy, FERC's conclusion that interim measures are unnecessary is supported by substantial evidence and reasonable.

- c. The Tribe Failed to Show That Continued Operations Will Impede Recovery of an Endangered Species in the Absence of Interim Measures, like in *Platte I* and *Tacoma*.

The Tribe inappropriately attempts to equate this case with this Court's decisions in *Platte River*. By doing so, the Tribe ignores the underlying issue presented by the *Platte River* decisions, and then subsequently by the Commission in *Tacoma*. *City of Tacoma*, 110 FERC ¶ 61,140 (2005). In *Platte I*, the court addressed how the ESA and the operation of annual licenses under the FPA could occur, when presented with a claim that species protected under the Act might suffer irreversible harm pending the completion of what was then one of the lengthiest relicensing proceedings. *Platte I*, 876 F.2d at 115. The Department of the Interior, in its ESA Section 7 consultation during the relicensing, expressed "its view directly to FERC that continued operation of the projects under the annual licenses, pending relicensing, posed a potential threat to endangered species" *Id.* at 117. Because the ESA imposes an obligation on federal agencies to avoid jeopardy or any adverse modification or destruction of critical habitat, and further requires that an agency avoid engaging in actions that might result in an "irreversible and irretrievable commitment of resources," 16 U.S.C. § 1536(d), the court held that FERC acted arbitrarily and capriciously in not even exploring potential rough and ready measures

that might avert harm to the species or its habitat during the interim period. *Platte I*, 876 F.2d at 116-17.

The court underscored this point in *Platte II*, where it held that, for licenses lacking any reopeners provision, the Commission should explore voluntary measures to protect listed species; and for licenses with reopeners clauses, the court held that the Commission may impose interim conditions deemed reasonable and supported by the record when appropriate to address potential irreversible damage to a listed species during the pendency of a relicensing proceeding. *Platte II*, 962 F.2d at 35.

In *Tacoma*, parties similarly requested interim conditions for the protection of several species of fish listed as threatened under the ESA. Because the new license was stayed shortly after issuance, the Commission was concerned that the project “had continued to operate for more than five additional years without any conditions to benefit listed species.” *Tacoma*, 110 FERC ¶ 61,140 at P 33. The Commission thereafter lifted the stay to impose interim conditions to protect the listed species pending judicial review. The *Tacoma* relicensing lasted over twenty-five years and judicial review of the license order was anticipated to take years more to complete.

Here, the Tribe does not assert any concern under the ESA. The redband trout, which are not federally listed, do not face imminent harm warranting the need for interim conditions under the ESA. Rather, the question presented to this

Court is whether the Commission acted either contrary to the FPA or arbitrarily and capriciously in responding to the Tribe's request, under the reopeners clause, to impose interim conditions. The Commission found that the Klamath Project has "a generally healthy trout fishery, despite the adverse effects caused by project operations." Rehearing Order at P 21, JA 615.

d. FERC Did Not Engage in Standardless Decisionmaking.

The Tribe erroneously argues that FERC engaged in standardless decisionmaking in violation of the APA. As set forth in section I.a above, FERC has a clear standard under Article 58 and Commission rule and precedent that it must conduct an investigation of the overall record as to whether continued project operations will have unanticipated, serious impacts on fishery resources. Here, FERC considered the voluminous record and concluded that the trout fishery will not suffer from unanticipated, serious adverse impacts by maintaining continued operations pending relicensing or dam removal.² FERC's conclusion not to trigger the Article 58 reopeners was based on substantial evidence in the FERC record and, therefore, was not standardless decisionmaking.

² See *Wis. Elec. Power Co.*, 73 FERC ¶ 61,208 at p. 61,574 (1995) (stating that the requester must present pleadings that make "a threshold case for the collection of information about the need for protective conditions pending a decision on the future of the project").

II. The Tribe Inappropriately Confuses Long-term Agency Conditions with Short-term Interim Measures.

a. Agency Terms and Conditions Do Not Apply to Annual Licenses.

The Tribe conflates the agencies' authority to establish mandatory conditions with the appropriateness of interim conditions. Sections 4(e) and 18 of the FPA grant the Departments of Interior and Commerce mandatory conditioning authority over new licenses issued by the Commission. 16 U.S.C. §§ 797(e), 811. FERC must incorporate the Departments' conditions and prescriptions into any hydropower license it issues under the FPA. *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); *Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996). In formulating its mandatory conditions, federal agencies consider what is necessary to protect resources for the upcoming license term of 30 to 50 years. These conditions are part of a long-term package for a new license, and are not intended to be immediately implemented as emergency measures to protect imminent harm in the near term. The Bureau of Land Management (BLM) indicated no intention that its mandatory conditions be implemented before a new license is issued. As FERC correctly stated in its Rehearing Order, “[t]he fact that resource agencies have fashioned conditions that they believe must be included in new licenses, which will have terms of at least 30 years, does not mean that those conditions are necessary to protect resources from harm that might occur to them

pending the issuance of the new licenses.” Rehearing Order at P 16, JA 614. If interim conditions were warranted in this case, FERC has a set mechanism to reopen the license, with notice and opportunity for hearing, to impose additional measures. License Article 58, JA 80-81. FERC could not have circumvented this procedure by instead adopting prospective agency conditions in the near term as additional measures on the existing annual license.

b. FERC Was Correct in Not Relying Solely on the ALJ Record in its Decision on Interim Conditions.

The Tribe asserts that “FERC ignored the ALJ opinion” in its decision to deny interim conditions and that FERC’s finding is not supported by substantial evidence. Tribe’s Brief at 47-49. On the contrary, FERC considered the ALJ record and its findings on the impacts of project operations, but concluded that the overall record did not warrant interim conditions to address immediate impacts to the fishery. Rehearing Order at 14, JA 613. The scope of the ALJ proceeding did not evaluate the need for interim conditions, and FERC was correct to look instead to the FEIS and the overall record in lieu of deferring to the ALJ decision. Order at 13, JA 525.

The ALJ proceeding was conducted pursuant to section 241 of the Energy Policy Act of 2005 (EPAct 2005).³ Section 241 of EPAct 2005 amends sections 4(e) and 18 of the FPA, 16 U.S.C. §§ 797(e), 811, to provide that any party to a

³ Pub. L. No. 109-58, 119 Stat. 594 (codified at 16 U.S.C. §§ 797(e), 811)).

license proceeding is entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, of any disputed issues of material fact with respect to any agency's mandatory conditions or prescriptions.

An EPAct 2005 trial-type hearing evaluates the proposed conditions or prescriptions that the agencies deem necessary for a new license of up to 50 years in the future. The EPAct 2005 hearing does not, however, consider interim measures needed in the present day to prevent adverse impacts due to current operations of the project. Order at P 13, JA 525. The ALJ's factual findings are not binding upon the Commission, but are binding upon the agencies in issuing their final conditions or prescriptions.⁴

The issues set for hearing in this ALJ proceeding, while potentially containing relevant information, did not address the need for interim measures. In addition, neither the agencies' proposed conditions for the new license, nor the ALJ's decision in the trial-type hearing purported to address the need for interim conditions pending relicensing. Order at 13, JA 525. In *Platte I*, Interior, in its ESA Section 7 consultation, expressed "its view directly to FERC that continued operation of the projects under the annual licenses, pending relicensing, posed a potential threat to endangered species . . ." *Platte I*, 876 F.2d at 117. This was a specific warning to FERC that it needed to explore whether interim conditions may

⁴ Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses; Interim Final Rule, 70 Fed. Reg. 69,804, 69,814 (Nov. 17, 2005).

be necessary in the near term to protect against increased adverse impacts on ESA listed species and their critical habitat due to continued operations. Here, none of the agencies suggested that a reopening of the license under Article 58 was necessary to explore the need for interim measures.

The ALJ proceeding was a hearing on disputed issues of material fact with respect to conditions for a new license. Neither the ALJ nor any of the parties to the proceeding contended that immediate measures were necessary for the protection of redband trout. While the ALJ found that certain adverse impacts may be alleviated by adopting Interior's conditions in a new license, Order at 13, JA 525, the "record in that proceeding in fact presents a picture of a healthy trout fishery" and makes no mention of the need for immediate measures to protect the species. Order at P 13, JA 525; Rehearing Order at 21, JA 615. Consequently, the record of the ALJ proceeding cannot be the sole factual basis for imposition of interim measures and FERC was correct to review the overall record in this proceeding.

- c. PacifiCorp has Voluntarily Implemented Interim Measures as Part of the Settlement Agreement and Additional Measures May Cause the Settlement to Terminate.

The Tribe argues that the Settlement Agreement for dam removal would cause the relicensing to be "suspended in a perpetual state of delay" and that "[d]uring the inaction, the project continues to operate and the resources continue

to suffer impacts identified in the administrative record and the trial-type hearing.” Tribe’s Brief at 9-10. The Tribe fails to mention that the Settlement improves the status quo through implementation of voluntary measures during the interim period, improving aquatic resources until removal of the dams.

On February 18, 2010, the United States, the Governors of the States of California and Oregon, PacifiCorp, and a number of local counties, irrigators, tribes, and conservation and fishing groups executed the Klamath Hydroelectric Settlement Agreement (Settlement).⁵ The Settlement provides for the future removal of PacifiCorp’s licensed Klamath River dams. Under the Settlement, PacifiCorp also committed to perform a number of interim measures, including habitat improvements for ESA-listed species and other environmental improvement measures in the basin.

This landmark dam removal Settlement was a result of years of intensive negotiation among the parties, and outreach to other stakeholders in the community. The National Marine Fisheries Service and Interior are parties to the

⁵ This court can take judicial notice of the Klamath Hydroelectric Settlement Agreement, which was signed on February 18, 2010 and filed with the Commission on March 5, 2010, as a subsequent development that is a matter of public record and is relevant to the appeal. *See Rothenberg v. Security Mgmt. Co.*, 667 F.2d 958 (11th Cir. 1982); *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 151 (3d Cir. 1973) (court entitled to take judicial notice of complaint filed after district court rendered a decision). Relevant portions of the Settlement are being attached hereto for the court’s information. The entire Settlement is available at: http://elibrary.ferc.gov:0/idmws/File_List.asp?document_id=13798554.

Settlement. All of the Settlement provisions, especially the interim measures, were carefully conceived to address the immediate needs of species in the Klamath River Basin pending removal of the dams. Certain of these measures are specifically directed at the J.C. Boyle development and commence within 90 days of the Settlement signing.⁶

Imposition of additional interim measures on PacifiCorp's annual license would put the carefully-crafted Settlement in jeopardy for two reasons. First, pursuant to Section 8.11.1.E of the Settlement, imposition of additional interim measures is grounds for termination of the Settlement. If the Settlement terminates, removal of the dams and other purposes of the Settlement will not be accomplished as envisioned, or on the time frame set out in the Settlement. Second, the Settlement is contingent on the J.C. Boyle facility operating under existing conditions until the year 2020. Since the financing for dam removal included in the Settlement is dependent on hydropower generation at J.C. Boyle until 2020, any modification in flows causing a decrease in generation will put the Settlement and dam removal in serious jeopardy.

⁶ Under Interim Measure 7, PacifiCorp will provide annual funding of \$150,000 for implementation of gravel placement in the J.C. Boyle bypass and peaking reach. *See Settlement at D-1.* Under Interim Measure 8, PacifiCorp will begin planning for removal of the rock barrier 3 miles upstream of the J.C. Boyle powerhouse in order to enhance upstream passage of fish including redband trout. *See id.*

The Tribe now seeks to impose ramping rate limitations and minimum instream flow conditions in addition to the interim conditions to which PacifiCorp has already agreed as a part of the Settlement.⁷ Neither FERC nor the federal parties to the Settlement deemed these proposed measures as necessary pending relicensing or dam removal. Further, the status quo will actually improve during the interim period due to the implementation of voluntary interim measures as a part of the Settlement. Therefore, not only will the impacts not increase pending dam removal, but the impacts will actually decrease leading to improved habitat for redband trout.⁸

⁷ The Tribe's two declarations attached to its brief do not add any relevant evidence as to the need for the proposed interim conditions and should be afforded no weight in the Court's decision.

⁸ While the Settlement Agreement was not yet completed when FERC issued its orders in this case, the AIP was filed months before FERC's Rehearing Order. AIP, JA 622-664 [included in the First Supplement to Joint Appendix]. Exhibits 1A through 1C to the AIP describe at length the voluntary interim measures contemplated for inclusion in the final Settlement, including measures directed at improvement of the J.C. Boyle development. Because the AIP was part of the administrative record, FERC was aware that significant interim measures were likely.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

/s/ Michael A. Swiger

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Attorneys for PacifiCorp

Dated: March 30, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing Brief of Intervenor PacifiCorp in Support of Respondent Federal Energy Regulatory Commission contains 4,136 words as counted by Microsoft Word 2007 SP3, and thus complies with the 8,750-word limitation established by Circuit Rule 32.

/s/ Michael A. Swiger

Michael A. Swiger

Dated: March 30, 2010

ATTACHMENT

KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT

February 18, 2010

8.8 Remedies

This Settlement does not create a cause of action in contract for monetary damages for any alleged breach by any Party of this Settlement. Neither does this Settlement create a cause of action in contract for monetary damages or other remedies for failure to perform a Regulatory Obligation. The Parties reserve all other existing remedies for material breach of the Settlement; provided that Section 8.11 shall constitute the exclusive procedures and means by which this Settlement can be terminated.

8.9 Entire Agreement

This Settlement contains the complete and exclusive agreement among all of the Parties with respect to the subject matter thereof, and supersedes all discussions, negotiations, representations, warranties, commitments, offers, agreements in principle, and other writings among the Parties, including the AIP, prior to the Effective Date of this Settlement, with respect to its subject matter.

8.10 Severability

This Settlement is made on the understanding that each provision is a necessary part of the entire Settlement. However, if any provision of this Settlement is held by a Regulatory Agency or a court of competent jurisdiction to be invalid, illegal, or unenforceable: (i) the validity, legality, and enforceability of the remaining provisions of this Settlement are not affected or impaired in any way; and (ii) the Parties shall negotiate in good faith in an attempt to agree to another provision (instead of the provision held to be invalid, illegal, or unenforceable) that is valid, legal, and enforceable and carries out the Parties' intention to the greatest lawful extent under this Settlement.

8.11 Termination

8.11.1 Potential Termination Events

This Settlement shall be terminable if one of the following events occurs and a cure for that event is not achieved pursuant to Section 8.11.3:

- A. Authorizing Legislation materially inconsistent with Appendix E is enacted, or Authorizing Legislation is not Timely enacted;
- B. The Secretarial Determination: (i) does not provide for the Timely removal of all four dams; (ii) is materially inconsistent with the provisions of Sections 3.3.1 and 3.3.2; or (iii) is not made consistent with Section 3.3.4;
- C. A State does not provide Concurrence;

- D. The Oregon PUC or California PUC do not implement the funding provisions set forth in Sections 4.1 through 4.6;
- E. Conditions of any Regulatory Approval of Interim Measures, denial of Regulatory Approval of Interim Measures including the failure timely to approve ESA incidental take authorization, or results of any litigation related to this Settlement are materially inconsistent with the provisions of Section 6.1 through 6.3 and Appendices C and D;
- F. Conditions or denial of any Regulatory Approval of Facilities Removal or the results of any litigation about such removal, are materially inconsistent with the Settlement;
- G. The DRE notifies the Parties that it cannot proceed with Facilities Removal because it cannot obtain all permits and contracts necessary for Facilities Removal despite its good faith efforts; or
- H. California, Oregon, the Federal Parties, or PacifiCorp is materially adversely affected by another Party's breach of this Settlement.

8.11.2 Definitions for Section 8.11

- A. For purposes of this Section, "materially inconsistent" means diverging from the Settlement or part thereof in a manner that: (i) fundamentally changes the economics or liability protection such that a Party no longer receives the benefit of the bargain provided by this Settlement; or (ii) frustrates the fundamental purpose of this Settlement such that Facilities Removal or the underlying purposes of Interim Measures cannot be accomplished. Events occurring independent of this Settlement, other than those identified in Section 8.11.1, shall not be construed to create a material inconsistency or materially adverse effect.
- B. For purposes of this section, "materially adversely affected" means that a Party no longer receives the benefit of the bargain due to: (i) fundamental changes in the economics or liability protection; or (ii) frustration of the fundamental purpose of this Settlement such that Facilities Removal or the underlying purposes of Interim Measures cannot be accomplished.
- C. For purposes of this Section, a "result of any litigation" is materially inconsistent with this Settlement or a part thereof if a Party is materially adversely affected by: (i) costs to defend the litigation; or (ii) a final order or judgment.

APPENDIX C
Interim Conservation Plan (ICP) Interim Measures²

Interim Measure 2: California Klamath Restoration Fund / Coho Enhancement Fund

PacifiCorp shall establish a fund to be administered in consultation with the California Department of Fish and Game (after providing notice and opportunity for comment to the State Water Resources Control Board and North Coast Regional Water Quality Control Board) and NMFS to fund actions within the Klamath Basin designed to enhance the survival and recovery of coho salmon, including, but not limited to, habitat restoration and acquisition. PacifiCorp has provided \$510,000 to this fund in 2009 and shall continue to provide this amount of funding annually by January 31 of each subsequent year in which this funding obligation remains in effect. Subject to Section 6.1.1, this funding obligation shall remain in effect until the time of decommissioning of all of the Facilities in California.

Interim Measure 3: Iron Gate Turbine Venting

PacifiCorp shall implement turbine venting on an ongoing basis beginning in 2009 to improve dissolved oxygen concentrations downstream of Iron Gate dam. PacifiCorp shall monitor dissolved oxygen levels downstream of Iron Gate dam in 2009 and develop a standard operating procedure in consultation with NMFS for turbine venting operations and monitoring following turbine venting operations in 2009.

Interim Measure 4: Hatchery and Genetics Management Plan

Beginning in 2009, PacifiCorp shall fund the development and implementation of a Hatchery and Genetics Management Plan (HGMP) for the Iron Gate Hatchery. PacifiCorp, in consultation with the National Marine Fisheries Service and the California Department of Fish and Game, will develop an HGMP for approval by NMFS in accordance with the applicable criteria and requirements of 50 C.F.R. § 223.203(b)(5). To implement the HGMP, PacifiCorp, in consultation with NMFS and CDFG, will develop and agree to fund an adequate budget. When completed, CDFG shall implement the terms of the HGMP at Iron Gate Hatchery in consultation with PacifiCorp and NMFS. Funding of this measure is in addition to the 100 percent funding described in Non-ICP Interim Measure 18.

Interim Measure 5: Iron Gate Flow Variability

In coordination with NMFS, USFWS, States and Tribes, PacifiCorp and Reclamation shall annually evaluate the feasibility of enhancing fall and early winter flow variability to benefit salmonids downstream of Iron Gate Dam, subject to both PacifiCorp's and Reclamation's legal

² The complete ICP was filed at FERC on November 25, 2008 and includes some additional measures not reflected in this Appendix that are not part of this Settlement.

and contractual obligations. In the event that fall and early winter flow variability can feasibly be accomplished, PacifiCorp, in coordination with NMFS, USFWS, and Reclamation will, upon a final Incidental Take Permit issued to PacifiCorp by NMFS becoming effective, annually develop fall and early winter flow variability plans and implement those plans. Any such plans shall have no adverse effect on the volume of water that would otherwise be available for the Klamath Reclamation Project or wildlife refuges.

Interim Measure 6: Fish Disease Relationship and Control Studies

PacifiCorp has established a fund in the amount of \$500,000 in total funding to study fish disease relationships downstream of Iron Gate Dam. Research proposals will be solicited and agreed upon by PacifiCorp and NMFS for the purpose of determining that the projects are consistent with the criteria and requirements developed by PacifiCorp and NMFS in the ESA review process applicable under Settlement Section 6.2. PacifiCorp will consult with the Klamath River Fish Health Workgroup regarding selection, prioritization, and implementation of such studies, and such studies shall be consistent with the standards and guidelines contained in the Klamath River Fish Disease Research Plan and any applicable recovery plans.

APPENDIX D
Non-ICP Interim Measures³

Interim Measure 7: J.C. Boyle Gravel Placement and/or Habitat Enhancement

Beginning on the Effective Date and continuing through decommissioning of the J.C. Boyle Facility, PacifiCorp shall provide funding of \$150,000 per year, subject to adjustment for inflation as set forth in Section 6.1.5 of the Settlement, for the planning, permitting, and implementation of gravel placement or habitat enhancement projects, including related monitoring, in the Klamath River above Copco Reservoir.

Within 90 days of the Effective Date, PacifiCorp, in consultation with the IMIC, shall establish and initiate a process for identifying such projects to the Committee, and, upon approval of a project by the Committee, issuing a contract or providing funding to a third party approved by the Committee for implementation of the project.

The objective of this Interim Measure is to place suitable gravels in the J.C. Boyle bypass and peaking reach using a passive approach before high flow periods, or to provide for other habitat enhancement providing equivalent fishery benefits in the Klamath River above Copco Reservoir. Projects undertaken before the Secretarial Determination shall be located outside the FERC project boundary.

Interim Measure 8: J.C. Boyle Bypass Barrier Removal

Within 90 days of the Effective Date, PacifiCorp, in consultation with the Committee, shall commence scoping and planning for the removal of the sidecast rock barrier located approximately 3 miles upstream of the J.C. Boyle Powerhouse in the J.C. Boyle bypass reach. Upon Concurrence, and in accordance with a schedule approved by the Committee, PacifiCorp shall obtain any permits required for the project under Applicable Law and implement removal of the barrier. If blasting will be used, PacifiCorp shall coordinate with ODFW to ensure the work occurs during the appropriate in-water work period. The objective of this Interim Measure is to provide for the safe, timely, and effective upstream passage of Chinook and coho salmon, steelhead trout, Pacific lamprey, and redband trout.

Interim Measure 9: J.C. Boyle Powerhouse Gage

Upon the Effective Date, PacifiCorp shall provide the U.S. Geological Survey (USGS) with continued funding for the operation of the existing gage below the J.C. Boyle Powerhouse (USGS Gage No. 11510700). Funding will provide for continued real-time reporting capability

³ The Parties agree that PacifiCorp will implement the interim measures as provided in this Appendix. Pursuant to Section 7.3.6 of the Settlement, if the Parties determine that the schedule for Facilities Removal must extend beyond December 31, 2020, then the Parties shall consider whether modification of Interim Measures is necessary to appropriately balance costs to customers and protection of natural resources based on circumstances at that time.

for half-hour interval readings of flow and gage height, accessible via the USGS website. PacifiCorp shall continue to provide funding for this gage until the time of decommissioning of the J.C. Boyle Facility.

Interim Measure 10: Water Quality Conference

PacifiCorp shall provide one-time funding of \$100,000 to convene a basin-wide technical conference on water quality within one year from the Effective Date of this Settlement. The conference will inform participants on water quality conditions in the Klamath River basin and will inform decision-making for Interim Measure No. 11, with a focus on nutrient reduction in the basin including constructed wetlands and other treatment technologies and water quality accounting. PacifiCorp, the North Coast Regional Water Quality Control Board, and the Oregon Department of Environmental Quality, will convene a steering committee to develop the agenda and panels.

Interim Measure 11: Interim Water Quality Improvements

The purpose of this measure is to improve water quality in the Klamath River during the Interim Period leading up to dam removal. The emphasis of this measure shall be nutrient reduction projects in the watershed to provide water quality improvements in the mainstem Klamath River, while also addressing water quality, algal and public health issues in Project reservoirs and dissolved oxygen in J.C. Boyle Reservoir. Upon the Effective Date of the Settlement until the date of the Secretarial Determination, PacifiCorp shall spend up to \$250,000 per year to be used for studies or pilot projects developed in consultation with the Implementation Committee regarding the following:

- Development of a Water Quality Accounting Framework
- Constructed Treatment Wetlands Pilot Evaluation
- Assessment of In-Reservoir Water Quality Control Techniques
- Improvement of J.C. Boyle Reservoir Dissolved Oxygen

By the date of the Secretarial Determination, PacifiCorp shall develop a priority list of projects in consultation with the Implementation Committee. The priority list will be informed by, among other things, the information gained from the specific studies conducted before the Secretarial Determination and the information generated at the water quality conference specified in Interim Measure 10. Should the Secretary of Interior render an Affirmative Determination, PacifiCorp shall provide funding of up to \$5.4 million for implementation of projects approved by the Oregon Department of Environmental Quality (ODEQ) and the State and Regional Water Boards, and up to \$560,000 per year to cover project operation and maintenance expenses related to those projects, these amounts subject to adjustment for inflation as set forth in Section 6.1.5 of this Settlement. Recognizing the emphasis on nutrient reduction projects in the watershed while

also seeking to improve water quality conditions in and downstream of the Project during the Interim Period, the Parties agree that up to 25 percent of the funding in this measure for pre-Secretarial Determination studies and post-Secretarial Determination implementation may be directed towards in-reservoir water quality improvement measures, including but not limited to J.C. Boyle.

Interim Measure 12: J.C. Boyle Bypass Reach and Spencer Creek Gaging

PacifiCorp shall install and operate stream gages at the J.C. Boyle Bypass Reach and at Spencer Creek. The J.C. Boyle Bypass Reach gaging station will be located below the dam and fish ladder and fish bypass outflow, but above the springs in order to record flow releases from J.C. Boyle Dam. The Spencer Creek gage will utilize an existing Oregon Water Resources Department gaging location. It is assumed that the required measurement accuracy will be provided using stage gaging at existing channel cross-sections with no need for constructed weirs. The installed stream gages shall provide for real-time reporting capability for half-hour interval readings of flow and gage height, accessible via an agreed-upon website, until such time as it is accessible on the USGS website. The Spencer Creek gage shall be installed in time to provide flow indication for Iron Gate Flow Variability (ICP Interim Measure 5). Both gages shall be installed and functional prior to September 1, 2010. Installation of the bypass gage, and measurement and maintenance shall conform to USGS standards. The Spencer Creek gage will be maintained according to USGS standards, as applicable.

Interim Measure 13: Flow Releases and Ramp Rates

PacifiCorp will maintain current operations including instream flow releases of 100 cubic feet per second (cfs) from J.C. Boyle Dam to the J.C. Boyle bypass reach and a 9-inch per hour ramp rate below the J.C. Boyle powerhouse prior to transfer of the J.C. Boyle facility.

Provided that if anadromous fish have volitional passage⁴ to the J.C. Boyle bypass reach after removal or partial removal of the lower dams and before J.C. Boyle is transferred, PacifiCorp will operate J.C. Boyle as a run of river facility with a targeted ramp rate not to exceed 2 inches per hour, and flows will be provided in the J.C. Boyle bypass reach to provide for the appropriate habitat needs of the anadromous fish species. The operation will also avoid and minimize take of any listed species present. Daily flows through the J.C. Boyle powerhouse will be informed by reservoir inflow gages below Keno Dam and at Spencer Creek. Provided further that if anadromous fish have volitional passage upstream of Iron Gate Dam before the Copco Facilities are transferred, PacifiCorp will operate the remaining Copco Facility that is furthest downstream as a run of the river facility with a targeted ramp rate not to exceed 2 inches per hour and coordinate with NMFS and FWS to determine if any other flow measures are necessary to avoid

⁴ Volitional passage shall not be deemed to have occurred if presence of anadromous fish is the result of anthropogenic placement of such fish above, within or below the J.C. Boyle Bypass Reach, including as a result of scientific studies, experiments or investigations, prior to removal of Facilities downstream of the J.C. Boyle Bypass Reach to the extent sufficient to provide fish passage past those Facilities.

or minimize take of any listed species present. In either event, flows in the respective bypass reaches will be based on species-specific habitat needs identified by the IMIC.

The Parties agree that if dam removal occurs in a staged manner, J.C. Boyle is intended to be the last dam decommissioned. If, however, the Secretarial Determination directs a different sequence for Decommissioning and Facilities Removal, then the Parties shall Meet and Confer to identify adjustments necessary to implement the Secretarial Determination in a manner that is consistent with PacifiCorp's Economic Analysis.

Interim Measure 14: 3,000 cfs Power Generation

Upon approval by OWRD in accordance with Exhibit 1, PacifiCorp may divert a maximum of 3,000 cfs from the Klamath River at J.C. Boyle dam for purposes of power generation at the J.C. Boyle Facility prior to decommissioning of the facility. Such diversions shall not reduce the minimum flow releases from J.C. Boyle dam required of PacifiCorp under Interim Measure 13. The implementation of this interim measure shall not: reduce or adversely affect the rights or claims of the Klamath Tribes or the Bureau of Indian Affairs for instream flows; affect the operation of Link River dam or Keno Dam or any facility of the Klamath Reclamation Project; or otherwise adversely affect lake levels at Upper Klamath Lake, flows in Link River, or Keno reservoir elevations. Within 9 months of the Effective Date, PacifiCorp and the Committee shall develop a protocol for quantifying and managing any additional flows in the Klamath River made available through implementation of the KBRA and for coordinating with operation of the J.C. Boyle Facility the timing and manner of release of such KBRA flows to meet fish habitat needs.

Interim Measure 15: Water Quality Monitoring

PacifiCorp shall fund long-term baseline water quality monitoring to support dam removal, nutrient removal, and permitting studies, and also will fund blue-green algae (BGA) and BGA toxin monitoring as necessary to protect public health. Funding of \$500,000 shall be provided per year. The funding shall be made available beginning on April 1, 2010 and annually on April 1 until the time the dams are removed. Annual coordination and planning of the monitoring program with stakeholders will be performed through the Klamath Basin Water Quality Group or an entity or entities agreed upon by the Parties and in coordination with the appropriate water quality agencies. The Regional Board and ODEQ will take responsibility for ensuring that the planning documents will be completed by April 1 of each year. Monitoring will be performed by the Parties within their areas of regulatory compliance or Tribal responsibility or, alternatively, by an entity or entities agreed upon by the Parties. Monitoring activities will be coordinated with appropriate water quality agencies and shall be conducted in an open and transparent manner, allowing for participation, as desired, among the Parties and water quality agencies.

Significant disputes that may arise between the Parties, or with the Regional Board, regarding the monitoring plan content or funding will be resolved by the Implementation Committee, acting on input and advice, as necessary, from the water quality agencies. Notwithstanding the forgoing,

the Oregon Department of Environmental Quality and the California State Water Resources Control Board shall make final decisions regarding spending of up to \$50,000 dedicated to BGA and BGA toxin monitoring as necessary to protect public health.

Interim Measure 16: Water Diversions

PacifiCorp shall seek to eliminate three screened diversions (the Lower Shovel Creek Diversion – 7.5 cfs, Claim # S015379; Upper Shovel Creek Diversion – 2.5 cfs, Claim # S015381; and Negro Creek Diversion – 5 cfs, Claim # S015380) from Shovel and Negro Creeks and shall seek to modify its water rights as listed above to move the points of diversion from Shovel and Negro Creeks to the mainstem Klamath River. Should modification of the water rights be feasible, and then successful, PacifiCorp shall remove the screened diversions from Shovel and Negro creeks associated with PacifiCorp's water rights prior to the time that anadromous fish are likely to be present upstream of Copco reservoir following the breach of Iron Gate and Copco dams. To continue use of the modified water rights, PacifiCorp will install screened irrigation pump intakes, as necessary, in the Klamath River. The intent of this measure is to provide additional water to Shovel and Negro creeks while not significantly diminishing the water rights or the value of ranch property owned by PacifiCorp. Should costs for elimination of the screened diversions and installation of a pumping system to provide continued use of the water rights exceed \$75,000 then the Parties will Meet and Confer to resolve the inconsistency.

Interim Measure 17: Fall Creek Flow Releases

Within 90 days of the Effective Date and during the Interim Period for the duration of its ownership while this Settlement is in effect, PacifiCorp shall provide a continuous flow release to the Fall Creek bypass reach targeted at 5 cfs. Flow releases shall be provided by stoplog adjustment at the diversion dam and shall not require new facility construction or the installation of monitoring equipment for automated flow adjustment or flow telemetry.

Additionally, if anadromous fish have passage to the Fall Creek following removal of the California dams, flows will be provided in the Fall Creek bypass reach to provide for the appropriate habitat needs of the anadromous fish species of any kind that are naturally and volitionally present in the Fall Creek bypass reach. Flows will be based on species specific habitat needs identified by the IMIC. The operation will also avoid and minimize take of any listed species present.

Interim Measure 18: Hatchery Funding

Beginning in 2010, PacifiCorp shall fund 100 percent of Iron Gate Hatchery operations and maintenance necessary to fulfill annual mitigation objectives developed by the California Department of Fish and Game in consultation with the National Marine Fisheries Service and consistent with existing FERC license requirements. PacifiCorp shall provide funding of up to

\$1.25 million dollars per year for operations and maintenance costs, subject to adjustment for inflation as set forth in Section 6.1.5 of the Settlement. These operations and maintenance costs shall include a program for 25 percent fractional marking of chinook at the Iron Gate Hatchery facilities as well as the current 100 percent marking program for coho and steelhead. Labor and materials costs associated with the 25 percent fractional marking program (fish marking, tags, tag recovery, processing, and data entry) shall be included within these operations and maintenance costs. This operations and maintenance funding will continue until the removal of Iron Gate Dam.

PacifiCorp will provide one-time capital funding of \$1.35 million for the 25 percent fractional marking program. This funding will include the purchase of necessary equipment (e.g. electrical upgrades, automatic fish marking trailer, tags and a wet lab modular building for processing fish heads). PacifiCorp will ensure the automatic fish marking trailer is available for use by April 2011. PacifiCorp is not responsible for funding the possible transition to a 100 percent Chinook marking program in the future.

Interim Measure 19: Hatchery Production Continuity

Within 6 months of the Effective Date of the Settlement, PacifiCorp will begin a study to evaluate hatchery production options that do not rely on the current Iron Gate Hatchery water supply. The study will assess groundwater and surface water supply options, water reuse technologies or operational changes that could support hatchery production in the absence of Iron Gate Dam. The study may include examination of local well records and the feasibility of increasing the production potential at existing or new hatchery facilities in the basin.

Based on the study results, and within 6 months following an Affirmative Determination, PacifiCorp will propose a post-Iron Gate Dam Mitigation Hatchery Plan (Plan) to provide continued hatchery production for eight years after the removal of Iron Gate Dam. PacifiCorp's 8 year funding obligation assumes that dam removal will occur within one year of cessation of power generation at Iron Gate Dam. If dam removal occurs after one year of cessation of power generation at Iron Gate Dam, then the Parties will Meet and Confer to determine appropriate hatchery funding beyond the 8 years. PacifiCorp's Plan shall propose the most cost effective means of meeting hatchery mitigation objectives for eight years following removal of Iron Gate Dam. Upon approval of the Plan by the California Department of Fish and Game and the National Marine Fisheries Service, PacifiCorp will begin implementation of the Plan. Plan implementation may include PacifiCorp contracting with the owners or administrators of other identified hatchery facilities and/or funding the planning, design, permitting, and construction of measures identified in the Plan as necessary to continue to meet mitigation production objectives. Five years after the start of Plan implementation, PacifiCorp, the California Department of Fish and Game and the National Marine Fisheries Service shall meet to review the progress of Plan implementation. The five year status review will also provide for consideration of any new information relevant to Plan implementation. Plan implementation shall ultimately result in production capacity sufficient to meet hatchery mitigation goals for the eight year period being in place and operational upon removal of Iron Gate Dam.

Interim Measure 20: Hatchery Funding After Removal of Iron Gate Dam

After removal of Iron Gate Dam and for a period of eight years, PacifiCorp shall fund 100 percent of hatchery operations and maintenance costs necessary to fulfill annual mitigation objectives developed by the California Department of Fish and Game in consultation with the National Marine Fisheries Service. The hatchery mitigation goals will focus on chinook production, with consideration for steelhead and coho, and may be adjusted downward from current mitigation requirements by the California Department of Fish and Game and National Marine Fisheries Service, in consultation with the other Klamath River fish managers, in response to monitoring trends.

Interim Measure 21: BLM Land Management Provisions

Beginning in 2010 and continuing until transfer of the J.C. Boyle facility, PacifiCorp shall fund land management activities by the Bureau of Land Management as specified in this interim measure. BLM will provide PacifiCorp an annual Work Plan for the management measures described below for road maintenance, invasive weed management, cultural resource management, and recreation. The Work Plan will include the status of Work Plan tasks from the prior year, a description of the prioritized tasks for the upcoming year, and their estimated costs. PacifiCorp or BLM will mutually establish the annual delivery date of the Work Plan taking into consideration fiscal and maintenance calendars and may request a meeting to coordinate the content of the plan. PacifiCorp will provide funding within 60 days of concurring with the Work Plan. Administrative services, environmental review or permitting efforts, if necessary, to implement actions under the funds shall not require additional PacifiCorp funding beyond the amounts specified below.

- A. PacifiCorp shall provide up to \$15,000 per year to BLM towards projects identified through the coordination process described above for the purpose of road maintenance in the Klamath Canyon. This funding will be used to annually maintain the access road from State Highway 66 to the J.C. Boyle Powerhouse and terminate at the BLM Spring Island Boat Launch. Remaining funds will be used to do non-recurring road maintenance work on roads within the Canyon as mutually agreed upon in writing by BLM and PacifiCorp.
- B. PacifiCorp shall provide up to \$10,000 per year to BLM for use by the Oregon Department of Agriculture (ODA) towards projects identified through the coordination process described above for the purpose of integrated weed management of invasive weed species along the road system and river corridor within the Klamath Canyon. Noxious weed control projects will be coordinated with Siskiyou County to ensure that weeds are controlled along the river corridor from the Oregon-California boundary to the top of Copco Reservoir.
- C. PacifiCorp shall provide up to \$10,000 per year to BLM towards projects identified through the coordination process described above for the management of the following 5 BLM cultural sites which are within, or partially within, the T1 terrace of the J.C. Boyle full flow reach: 35KL21/786, 35KL22, 35KL24,

35KL558, and 35KL577. Management of additional sites with these funds can occur with mutual written agreement between PacifiCorp and BLM.

- D. PacifiCorp shall provide up to, but no more than, \$130,000 in funding for the development and implementation of a Road Management Plan to be implemented during the Interim Period. The Road Management Plan shall be developed by BLM and PacifiCorp and will determine priorities for operation and maintenance, including remediation or restoration of redundant or unnecessary facilities, of the shared BLM/PacifiCorp road system within the Klamath River Canyon from J.C. Boyle Dam to the slack water of Copco Reservoir.

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Section 18 of the FPA, 16 U.S.C. § 811	A-1
Endangered Species Act, 16 U.S.C. § 1536.....	A-2

Section 18 of the FPA, 16 U.S.C. § 811**§ 811. Operation of navigation facilities; rules and regulations; penalties**

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection ^[1] and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825o of this title.

Endangered Species Act, 16 U.S.C. § 1536

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)

(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)

(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371 (a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371 (a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or

threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

- (1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").
- (2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.
- (3) The Committee shall be composed of seven members as follows:
 - (A) The Secretary of Agriculture.
 - (B) The Secretary of the Army.
 - (C) The Chairman of the Council of Economic Advisors.
 - (D) The Administrator of the Environmental Protection Agency.
 - (E) The Secretary of the Interior.
 - (F) The Administrator of the National Oceanic and Atmospheric Administration.
 - (G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.
- (4)
 - (A) Members of the Committee shall receive no additional pay on account of their service on the Committee.
 - (B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem

in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)

(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)

(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)

(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means

(i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or
 (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly

(i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and

(ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section.

The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and
(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)

(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—
(i) regardless whether the species was identified in the biological assessment; and
(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]:
 Provided, That an environmental impact statement which discusses the impacts upon endangered

species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action.

Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540 (g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532 (13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for

(1) any circuit wherein the agency action concerned will be, or is being, carried out, or
 (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533 (d) and 1538 (a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

- (1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and
- (2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines

- (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and
- (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this day caused to be served copies of the foregoing document upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated on the attached service list.

Dated at Washington, D.C., this 30th day of March, 2010.

/s/ Michael A. Swiger

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