

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1271

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

HOOPA VALLEY TRIBE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

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

YUROK TRIBE'S CORRECTED AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER AND REMAND

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

AMICUS CURIAE IDENTITY, INTEREST, AND AUTHORITY*

Amicus Curiae Yurok Tribe (“Yurok”) is a federally recognized sovereign Indian tribe. 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015). That status provides Yurok authority to file this brief. *See id.* at 1943. The Yurok Reservation covers one mile on each side of the Klamath River and extends approximately 44 miles from the Pacific Ocean to the Hoopa Valley Reservation. *See* 25 U.S.C. § 1300i-1(c)(1); 54 Fed. Reg. 19,465 (May 5, 1989); *Mattz v. Arnett*, 412 U.S. 481, 507 (1973) (map). Yurok maintains federal reserved fishing rights in the Klamath River and that fishery is essential to Yurok’s existence. *Parravano v. Babbitt*, 70 F.3d 539, 541, 542 (9th Cir. 1995). The Yurok people have relied on the Klamath fishery for their food, culture, traditions, and economy since time immemorial. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1201, 1204 (D. Or. 2001). Also, because anadromous Klamath River salmon “hatch in the upper tributaries of rivers such as the Klamath[,]” *Parravano*, 70 F.3d at 542, Yurok’s fishery interests necessarily extend upstream of the Yurok Reservation.

In addition, Yurok was a party to the Klamath Hydroelectric Settlement Agreement (“Settlement Agreement”), which provided for possible future removal of four Klamath River dams regulated by the Federal Energy Regulatory Commission (“FERC”). *See* Joint Appendix (“JA”) 799. Licensing for those dams

* No counsel for any party authored this brief in whole or in part, and no person or entity other than the Yurok Tribe contributed money intended to fund this brief.

is at issue here, and implementation of the Settlement Agreement was contingent on federal legislation and certain action by the Secretary of the Interior. *Id.* FERC determined that neither that legislation nor those actions were likely at the time of the FERC orders under review here, JA801, and that is made even less likely by Yurok's withdrawal from the Settlement Agreement. All this gives Yurok a strong interest here.

ARGUMENT

The Court should determine that continued indefinite delay in licensing and certification in this case violates the Federal Power Act and the Clean Water Act and remand to FERC for further action consistent with this determination. While relicensing deferral may be warranted when interested parties are actively working to address that in the context of related issues, indefinite deferral is not reasonable and should not be allowed where there is no apparent prospect for the federal legislation and actions necessary for those efforts to come to fruition. Likewise, prospective licensees should not be allowed an unlimited number of successive state water quality certification applications that contravene the public interest.

I. FERC Should Not Allow Indefinite Licensing and Certification Deferral Beyond What Is Reasonable for Settlement Agreement Implementation.

The Federal Power Act makes clear that licensing and relicensing decisions thereunder must be in the public interest. 16 U.S.C. §§ 808(a)(2), 808(e). In turn, state certification under Section 401 of the Clean Water Act ensures that applicants

for federal licenses that may result in discharges into navigable waters comply with applicable water quality standards. *See* 33 U.S.C. § 1341(a)(1). In addition, states must act on water quality certification decisions within a reasonable time not to exceed one year. *Id.* Failure or refusal by a state to act within that time results in waiver of certification requirements. *Id.* That provision limits the amount of time that a state can delay a licensing proceeding by not making a certification decision. *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

Here, PacifiCorp applied to FERC for a new license for its Klamath Hydroelectric Project in 2004. JA798. The prior license expired in 2006, and since then the Project has operated under annual licenses. JA577. “[A]s a result, the many environmental benefits that could accrue under the new license have not occurred.” JA800. Since 2006, PacifiCorp also has annually filed and withdrawn water quality certification applications with the California State Water Resources Control Board (“Board”) and the Oregon Department of Environmental Quality (“Department”). JA851-52.

During this period, Yurok negotiated with PacifiCorp, federal and state agencies, and other stakeholders to establish a comprehensive new plan for the entire Klamath River Basin. This would protect tribes’ federal reserved fishing rights, oversee dam removal, restore natural resources, and provide for the best interests of PacifiCorp customers. These negotiations resulted in the Settlement

Agreement and the Klamath Basin Restoration Agreement (“Restoration Agreement”) in 2010. These represented a stakeholder-led approach to resolving Klamath River Basin issues and provided a path towards dam removal by 2020.

In order to facilitate negotiation and implementation of the Settlement Agreement and the Restoration Agreement, the Board and the Department authorized PacifiCorp to annually resubmit its Klamath Project certification applications while water quality certification was held in abeyance. JA383, 499-502, 508-09, 522-23. Specifically, in the Settlement Agreement, the Department committed to support the process to consider the transfer and removal of the Klamath Project leading to a determination by the Secretary of the Interior to either relicense or remove the Klamath Project (“Secretarial Determination”). JA498; *see also* JA360-64. In turn, the Board recognized that further analysis of environmental impacts and dam removal economics under the Settlement Agreement would benefit its water quality certification process and that interim monitoring and studies would be important for improving long-term Klamath River water quality. JA500. Notably, the Board authorized its Executive Director or Chief Deputy Director to lift the abeyance upon a finding that removal of the California facilities was unlikely to proceed in a reasonably timely manner or that action was necessary to avoid a waiver of water quality certification. JA501, 523.

The Settlement Agreement was not submitted to FERC for approval. JA799. Instead, it provided for a Secretarial Determination on whether removal of four Klamath Project dams would advance salmon fisheries restoration and be in the public interest, including considering impacts on Yurok. JA360. The Settlement Agreement also identified certain authorizing legislation necessary for implementation to be passed by the federal, Oregon, and California legislatures. JA361-62. It also prohibited the Secretary of the Interior from making the Secretarial Determination until materially consistent federal legislation had been enacted. JA361. Unfortunately, despite the key federal authorizing legislation being introduced in Congress multiple times, JA572, 851, “there is no apparent prospect of the federal legislation called for by the settlement being passed or of the necessary actions by the Secretary of the Interior taking place.” JA801. This situation recognized by FERC itself in the order under review here is necessarily exacerbated by Yurok’s withdrawal from the Settlement Agreement.

As FERC also has recognized, “infinite delays in licensing proceedings are not in the public interest. Indeed, they are contrary to it.” *Id.* Also, “[i]ndefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act and have the effect of preventing us from issuing new licenses that are . . . in the public interest.” JA802. This Court should respect those fundamental policies underlying the governing statutes here and remand for further proceedings

to fulfill those purposes. This will allow interested parties to pursue the best way forward in the aftermath of the Settlement Agreement's demise.

II. FERC's Continued Authorization of Repeated Withdrawal and Resubmission of Water Quality Certification Applications Contravenes Section 401 of the Clean Water Act, the Public Interest, and Environmental Protection.

As noted above, a state must act on a water quality certification request within a reasonable period of time not to exceed a year. 33 U.S.C. § 1341(a)(1). In both its initial order here and in denying rehearing, FERC recognized that “continued delays in completing water quality certification are inconsistent with Congress’ intent” in setting “the one-year certification deadline.” JA802, 855. FERC also expressed concern that “state and licensees that engage in repeated withdrawal and refiling of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying implementation of new licenses that better meet current-day conditions” JA856. Those conclusions should be honored here by a remand.

Despite good faith efforts of the Settlement Agreement parties, the federal legislation and Secretarial Determination that the Settlement Agreement required have not been achieved for over five years, and there are no viable prospects for their successful conclusion. From 2006 through last year, PacifiCorp had submitted and withdrawn state certification applications eight times to each of Oregon and California. JA798-800. PacifiCorp also continues to operate under its existing

license despite new conditions having been identified that would benefit the public interest. *See, e.g.*, JA112-25. These circumstances alone support a remand here to fulfill the statutory policy concerns that FERC itself already has identified.

If that were not enough, Yurok has expressed concerns regarding the consistency of the introduced legislation with the Settlement Agreement and the Restoration Agreement, and has been unable to resolve those and other related concerns for the past year and a half. Yurok now has withdrawn from the Settlement Agreement due to the inability to secure the bargained-for-benefits of the Settlement Agreement and the Restoration Agreement. This makes it even less reasonable to allow repeated state certification application withdrawals in the hope of securing Settlement Agreement implementation. Instead, and especially in these exacerbated circumstances, the repeated withdrawals violate the reasonable time requirement for state certifications under Section 401 of the Clean Water Act. Allowing repeated ongoing withdrawals also disserves both the public interest and environmental protection.

CONCLUSION

Yurok respectfully requests that the Court find that the Federal Power Act and the Clean Water Act do not allow indefinite relicensing deferrals and repeated withdrawals of water quality certification applications. These unwarranted delays are unreasonable, contrary to the public interest, and impermissibly subvert basic

statutory objectives for environmental protection. This especially applies to the findings by FERC in the orders under review here as augmented by the additional circumstances identified in this amicus brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 1,667 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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Dated: October 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2015, I served the foregoing document electronically to the following counsel of record for all parties by filing it through the CM/ECF system of the United States Court of Appeals for the District of Columbia:

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