# *HOOPA VALLEY TRIBE v. FERC*: THE EFFORT TO OBTAIN INTERIM PROTECTIVE CONDITIONS IN FERC ANNUAL LICENSES

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## I. INTRODUCTION TO ANNUAL LICENSING AND INTERIM CONDITIONS PENDING RE-LICENSING

In 1956, the Federal Power Commission (now FERC) issued a fifty-year license for operation of the Klamath Hydroelectric Project on an expanse of the Klamath River located in Southern Oregon and Northern California. That license, currently held by PacifiCorp, expired well over four years ago, on March 1, 2006. Since license expiration, PacifiCorp has continued to operate the Klamath Project on the same terms and conditions of its 1950's era license under the authority of annual licenses issued by FERC under Section 15 of the Federal Power Act, 16 U.S.C. § 808(a)(1). PacifiCorp's application to re-license the Klamath Project (filed in 2004) remains pending before FERC.

On February 23, 2007, the Hoopa Valley Tribe, whose reservation is located on the Klamath River downstream of the Project, requested that FERC impose specific interim conditions on PacifiCorp's annual license for the protection of fish and aquatic organisms that are adversely affected by ongoing Project operations. Specifically, the Tribe sought interim conditions that would increase the flow in the Klamath River and that would limit the Project's "ramping rate" to no more than two inches per hour. Although the Federal Power Act and FERC regulations authorize the imposition of interim conditions in an annual license, FERC rejected the Tribe's request, allowing the Project to continue operating on annual licenses that incorporate the terms and conditions of PacifiCorp's expired 1950's era-license.

Upon license expiration, the Federal Power Act requires FERC to issue annual licenses to its licensee so that a project is not required to stop operations and end power service to customers in the event that a new license is not ready for issuance when the original license expires. *See California Trout, Inc. v. FERC*, 313 F.3d 1131, 1137-38 (9th Cir. 2002). The Federal Power Act (FPA) provides that annual licenses must be issued on the "same terms and conditions" as the original license. 16 U.S.C. § 808(a)(1).

Despite the language of 16 U.S.C. § 808(a)(1), FERC has legal authority to impose protective conditions in an annual license, so long as the original license contains a "reopener" provision; that is, a term that reserves FERC authority to make license modifications during a license term. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 114 (D.C. Cir. 1989) (*Platte River I*). Since many licenses do contain some form of reopener, FERC often retains authority to impose interim conditions for protection of the environment during the re-licensing process. Unless FERC affirmatively exercises its authority to impose protective interim conditions in an annual license, the licensee will continue to operate the project on the terms and conditions of the old expired license, without being required to comply with environmental laws such as the Clean Water Act and Endangered Species Act.

The repeated issuance of annual licenses that fail to provide adequate (or any) environmental protection is not unique. For example, the Cushman Hydroelectric Project in Washington State operated from 1974 until July 2010 on annual licenses, which required the licensee to comply only with the terms of a minor part license issued in the 1920s. Idaho Power has operated the Hells Canyon Complex on the Snake River in Idaho on annual licenses since its

license expired in July 1995. Some dams continue to operate on annual licenses for years while details are worked out regarding their potential removal. For example, the Condit Dam license expired in 1992 and the Glines Canyon Dam on the Olympic Peninsula expired in 1976.

Bringing hydroelectric facilities into compliance with applicable federal environmental laws can be expensive and may reduce both the power and revenues generated at a project. *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006). With repeated issuance of annual licenses, lengthy re-licensing proceedings benefit licensees who are allowed to continue operating hydroelectric projects under the laws of the 1920's or 1930's, instead of the more environmentally conscious laws passed in the 1970's or later.

This article discusses the annual licensing process and the largely unsuccessful efforts made in the courts to require licensees operating on expired licenses to comply with applicable environmental laws. The article uses the example of the Hoopa Valley Tribe's recent litigation with FERC to illustrate how difficult it is to obtain interim protection for resources affected by projects operating on expired licenses.

## II. OVERVIEW OF FEDERAL POWER ACT LICENSING PROVISIONS

The Federal Power Act, at 16 U.S.C. § 797(e) grants FERC the authority to:

> issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam . . ..

FERC has authority to issue licenses for up to a fifty-year term. 16 U.S.C. § 799. Licenses are conditioned upon compliance with the Federal Power Act and upon "such further conditions, if any, as the Commission shall prescribe . . ., which said terms and conditions and the acceptance thereof shall be expressed in said license." *Id.* Once issued, licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice." *Id.* While the Commission may reserve its authority to unilaterally amend the license in a "reopener" condition, a license that lacks a reopener can not be amended prior to expiration without the licensee's consent. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir. 1992) (*Platte River II*).

Upon license expiration, the Federal Power Act grants the federal government the opportunity to take over the licensee's interest in the project. 16 U.S.C. § 807(a). A federal takeover is contingent on payment of "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken." *Id*. "If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate [the

project], the Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee." 16 U.S.C. § 808(a)(1).

The Federal Power Act provides specific categories of conditions that must be included in a new license. Most generally, the project must be "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . . ." 16 U.S.C. § 803(a). The Act also requires conditions for the protection, mitigation, and enhancement of fish and wildlife. 16 U.S.C. § 803(j). The Commission must also require the construction, maintenance, and operation of fishways, if such fishway conditions are prescribed by the Secretaries of Interior or Commerce. 16 U.S.C. § 811. If the project is located within the bounds of a federal reservation, such as an Indian reservation, the project license must contain any conditions prescribed by the Secretary of the Interior for the "adequate protection and utilization" of such reservation. 16 U.S.C. § 797(e). The project will also need a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and FERC also must undergo consultation under Section 7 of the Endangered Species Act if endangered or threatened species may be affected.

If the license expires prior to federal takeover, or prior to issuance of a new license to either a new or the existing licensee, the Federal Power Act provides that "the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued." 16 U.S.C. § 808(a)(1). Despite the language of 16 U.S.C. § 808(a)(1), FERC retains authority to impose interim protective measures in an annual license, but only if FERC reserved such authority in a "reopener clause" in the original license. *Platte River I*, 876 F.2d at 114. In addition, interim conditions imposed by FERC must be "necessary and practical to limit adverse impacts on the environment." 18 C.F.R. § 16.18(d).

## III. CONGRESSIONAL DIRECTION TO BALANCE POWER PRODUCTION AND ENVIRONMENTAL PROTECTION

An early case to address annual licensing is *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198 (D.C. Cir. 1975). In that case, the project license issued in 1921 and expired in 1971. FERC issued annual licenses for project operation in 1971, 1972, and 1973. The Court explained that various scenarios may occur upon license expiration: (a) the United States will take over the project; (b) FERC will issue a new license to the original licensee; or (c) FERC will issue a license to a new licensee. FERC may also ultimately decline to issue a new license. *City of Tacoma v. FERC*, 460 F.3d 53, 71 (D.C. Cir. 2006). The Court held that until a final determination occurs, the Commission has no choice but to issue annual licenses upon the same terms and conditions of the 1921 license. The Court described the obligation to issue an annual license as purely ministerial and non-discretionary.

The Court also discussed the legislative intent behind the annual licensing process. When the Federal Power Act was originally passed, Congress was concerned about the possibility of an abrupt termination of generated power. Communities and industry would be built around such generation and would rely upon its continuation. Thus, "annual licenses are designed to prevent a possible hiatus in the operation of a project . . . preserving the status quo at the expiration of a long-term license and thereby guaranteeing that 'industries created by (Commission projects) and dependent upon them may not suffer.'" The annual licensing provisions "afford the Commission and Congress time to make a reasoned decision concerning the desirability of federal takeover of a project, at the same time preserving the status quo while that decision is being made."

The Lac Courte Oreilles Tribe, with foresight, argued that a literal interpretation of Section 15 could lead to the perpetual issuance of annual licenses to projects while FERC and/or Congress decide what to do with a project. The Court, at that time, gave FERC the benefit of the doubt that it would not allow perpetual operation on annual licensing. Assuming that FERC would proceed with due diligence towards a final determination, the Court was persuaded that preservation of the status quo (meaning continued project power generation) was the top priority.

The *Lac Courte Oreilles* opinion was issued eleven years before amendments to the Federal Power Act that now require FERC to give "equal consideration" to non-power and environmental values. *See* Public Law 99-945, 100 Stat. 1243, Sections 1-5 (Electric Consumers Protection Act of 1986 (ECPA)). The passage of ECPA in 1986 reflected a new reality that power generation was no longer the sole priority and that balance with environmental considerations was necessary. *City of Tacoma v. FERC*, 460 F.3d 53, 73-74 (D.C. Cir. 2006).

Beginning in the 1980's, courts confirmed that FERC is not the only agency with regulatory authority over project licensees. Other entities, such as federal and state fish, wildlife, and water quality agencies play a significant role in developing license terms. In *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), the Supreme Court held that FERC is required to accept conditions prescribed by the Secretary of the Interior for the protection of Indian reservations that contain project works. So long as the "Secretary concludes that the conditions are necessary to protect the reservation, the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal, otherwise consistent with the FPA, and supported by substantial evidence." Such conditions must be included in the license even if they could potentially make the project unprofitable. *City of Tacoma v. FERC*, 460 F.3d 53, 74 (D.C. Cir. 2006).

Later, the Supreme Court confirmed that states also have broad authority to impose conditions on FERC projects to ensure protection of state water quality, including imposition of minimum flow conditions. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). This authority is exercised through Section 401 of the Clean Water Act, which requires a licensee to obtain certification that its project will comply with state water quality standards. *See also* S.*D. Warren Company v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (affirming that dams are subject to certification requirements of Section 401). FERC has no authority to reject or modify conditions imposed in the section 401 certification. *American Rivers, Inc., v. FERC*, 129 F.3d 99 (2d Cir. 1997). FERC also must

adopt fishway prescriptions submitted by the Secretaries of Interior or Commerce under Section 18 of the Federal Power Act. *American Rivers, Inc., v. FERC,* 201 F.3d 1186 (9th Cir. 1999).

## IV. EFFORTS TO INCLUDE ENVIRONMENTAL PROTECTION IN ANNUAL LICENSES

### A. The Platte River Litigation

Since the *Lac Courte* decision in 1975, and the passage of ECPA in 1986, the balance of interests under applicable law has shifted considerably. Status quo power production is not supposed to be the top priority. FERC is mandated to include in licenses (1) conditions to protect federal reservations or Indian reservations in which project works are located; (2) fish passage prescriptions; and (3) conditions imposed by state water quality agencies.

With this framework in mind, the D.C. Circuit considered challenges to the annual licensing process brought by the Platte River Whooping Crane Critical Habitat Maintenance Trust. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC,* 876 F.2d 109, 114 (D.C. Cir. 1989) (*Platte River I*); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC,* 962 F.2d 27, 32-33 (D.C. Cir. 1992) (*Platte River II*). The Platte River litigation involved two large hydroelectric projects operated by power and irrigation districts on the Platte River. This case brought in the intersection of an expired license, annual licensing, and the potential extinction of ESA listed species. One of the project's licenses (the NPPD license) contained a reopener clause; the other (the Central license) did not. Petitioners sought the imposition of interim conditions in the annual licenses for both projects to protect the species pending re-licensing.

The projects were licensed in 1941 and the licenses expired in the summer of 1987. The licensees had failed, with FERC's consent, to submit a complete application for re-licensing at the time of license expiration. Apparent that licenses would not issue in the near future, the Trust petitioned FERC to consider the need for interim protective conditions in the annual licenses that would issue upon license expiration. FERC denied the request on grounds that "the Commission is empowered to amend an annual license, for example by adding conditions for the protection of fish and wildlife, only if the existing license contains reservation of authority or the licensee agrees to such additional conditions" and that "the existing licenses . . . contain no such reservations of authority." *Platte River I,* 876 F.2d at 112. After the Trust pointed out that the NPPD license did contain an express reservation of authority or "reopener" provision, FERC denied the request for interim conditions on the alternate ground that the Commission lacked sufficient information to determine appropriate interim conditions. The Commission gave the licensees an additional two years to complete their *application* for new license and confirmed that annual licenses would continue to issue on same terms and conditions as the 1941 license.

On appeal, the D.C. Circuit Court of Appeals held that FERC abused its discretion in failing to undertake any inquiry into the need for interim conditions. Although the record was incomplete, there was sufficient evidence regarding the harm to species, including species listed under the ESA, to warrant an initial inquiry into the need for such conditions. For example, the US Fish and Wildlife Service had informed FERC that continued operation of the projects under the annual licenses pending relicensing posed a threat to the endangered whooping crane. "It

was irresponsible for FERC to ignore this expert opinion and refuse even to conduct a preliminary investigation into this threat and the availability of interim measures to combat it." *Platte River I*, 876 F.2d at 117.

The Trust won the case, but their reward was a remand to FERC for additional assessment of the need for interim conditions. On remand, the Commission determined that interim conditions were appropriate, but that it only had legal authority to impose conditions on the NPPD project. Without a relevant reopener in the Central license, the Court was bound by the language of 16 U.S.C. § 808(a)(1), which required issuance of annual licenses "under the same terms and conditions of the existing license." Because, in FERC's opinion, the interim conditions would be effective only if applied to both projects, the Commission stayed its order. Both the licensees and the Trust again appealed. Three years after *Platte River I*, with both projects still operating under annual licenses and no interim conditions in place, the D.C. Circuit issued its ruling in *Platte River II*.

On appeal in *Platte River II*, the Trust argued that the lack of an express reopener provision in the Central Project license should not foreclose the imposition of interim conditions that are necessary to protect endangered species. The Court rejected the Trust's arguments that Sections 4(e) or 10(a) of the Federal Power Act authorizes FERC to unilaterally impose interim conditions. The Court also rejected the Trust's argument that Section 7(a)(2) of the ESA requires FERC to impose interim conditions for the protection of listed species – finding that the ESA only mandates agencies to use their existing authority to protect species. Because the Federal Power Act bars imposition of conditions not permitted by the existing license, FERC lacked "existing authority" to include protective conditions under the ESA. The Court reaffirmed the rule of law that FERC lacks authority to impose interim conditions in an annual license unless the existing license contains a "reopener" clause. In addition to affirming FERC's refusal to impose interim conditions on the Central Project license, the Court affirmed FERC's imposition of interim conditions on the NPPD license, finding that the NPPD license contained a reopener and that the need for such interim conditions was supported by substantial evidence.

B. FERC's Evaluation of Interim Conditions Since *Platte River*

The following section provides examples of how FERC has addressed requests for interim conditions in recent years:

1. Wanapum-Priest Rapids Project

In 1994, the "Joint Fishery Parties" filed a motion for interim conditions in FERC's proceeding on the re-licensing of the "Mid-Columbia" dams, which includes the Wanapum-Priest Rapids Project operated by Grant County PUD No. 2. The motion requested "increased spring and summer spill during the 1994 juvenile anadromous fish migration season." FERC granted the motion for interim conditions. 67 FERC ¶ 61,225 (May 25, 1994).

In analyzing the motion, FERC stated that "there must be substantial evidence to support the need for interim measures and substantial evidence to support a finding that the interim measures will maintain the status quo pending a final decision." 67 FERC ¶ 61,225, at 61,684. FERC noted that, "in the context of a degrading environmental condition, maintaining the

status quo may require enhanced interim measures to prevent further degradation, rather than continuing to implement existing measures that allow further degradation to occur." *Id.* at fn. 23. FERC concluded that "the resources at issue are in a state of continuing and serious decline" and that "prompt emergency measures are needed to prevent potentially irreversible environmental damage." *Id.* at 61,685. FERC rejected the argument that its authority to impose interim conditions was limited to protection of ESA-listed species. *Id.* at fn. 27.

2. Santa Ana River Project

In 1946, the Commission issued a 50-year license to Southern California Edison Company for the Santa Ana Project located on the Santa Ana River. Edison filed an application for a new license in 1994. Upon license expiration in 1996, the Commission began issuance of annual licenses. *In re Southern California Edison Company*, 94 FERC ¶ 61,326 (March 19, 2001). After issuance of another annual license in May, 2000, California Trout, Inc., filed a request for rehearing, arguing that FERC lacked authority to issue an annual license absent a water quality certification under Section 401 of the Clean Water Act.

Although a new license clearly must obtain certification from the state water quality agency, FERC rejected California Trout's argument on grounds that the issuance of an annual license is simply a ministerial and non-discretionary act. In FERC's view, the licensee does not apply for an annual license and thus there is no applicant to trigger certification under Section 401. FERC ruled that a licensee need not obtain certification prior to issuance of an annual license.

The Ninth Circuit Court of Appeals affirmed FERC's ruling in *California Trout, Inc. v. FERC*, 313 F.3d 1131 (9th Cir. 2002). "We think that when Congress required applicants for a license to provide a State certification, it intended to give States control over new or altered projects, not over the continued operation of a lawfully licensed project pending its relicensing. Reading Section 15(a)(1) and Section 401(a)(1) in context, we conclude that Congress did not intend "applicant" to have its literal effect so as to include a recipient of an annual license." Thus, pending re-licensing, projects may continue to operate even if they cause or contribute to violations of state water quality standards.

3. Cushman Project

At the request of the Skokomish Indian Tribe, FERC considered the need for interim license conditions in the Cushman re-licensing. *City of Tacoma, Washington*, 110 FERC ¶ 61140 (Feb. 14, 2005). The Cushman re-licensing began in 1974. After 24 years of operation on annual licenses, FERC issued a new license to Tacoma in 1998, which called for a restoration of 240 cfs (or inflow) to the North Fork Skokomish River. However, the flows were stayed pending judicial review. In the interim, the Project continued operating on annual licenses and certain species affected by the Cushman project were listed as threatened under the ESA. On March 3, 2003, the Tribe requested FERC to partially lift its stay and require the 240 cfs (or inflow) flows as an interim measure for the protection of the listed species. FERC referred the matter to an administrative law judge and ultimately determined that the minimum flows should be implemented as interim measures for the protection of species pending conclusion of judicial review.

Evaluating the licensee's request for rehearing, FERC noted that between 1998 (when it issued the license order) and 2004, the licensee had continued to operate its project without any conditions to benefit listed species other than a voluntary increase in flow to 60 cfs. In addition, during that period, new biological opinions were published that suggested a minimum flow of 240 cfs was necessary to mitigate impacts on listed species. FERC also noted that updated cost information suggested that the licensee could afford to release the additional flow at negligible cost to ratepayers.

The licensee argued that there was no evidence of "irreparable harm" to species that warranted interim conditions. The Commission responded that:

> Tacoma's reference to the need to avoid irreparable harm to listed species comes from the first *Platte River* case, which directed the Commission to consider the need for temporary, 'rough and ready' measures to prevent irreversible damage pending relicensing. The court subsequently upheld the Commission's decision to require interim protective measures in one of the two licenses at issue. We find nothing in these cases to suggest that we may not require interim protective measures unless we first find that there is a need to prevent irreversible damage during the interim period.. . . . We believe the appropriate standard is whether there is a need for interim conditions, not whether there is a need to prevent irreversible damage to listed species.

*City of Tacoma, Washington*, 110 FERC ¶ 61140, fn. 34 (2005).

4. Oroville Project

The Oroville Project began operating on annual licenses on February 1, 2007. On May 22, 2009, Butte County, California filed a motion requesting "interim conditions . . . pending the relicensing of the project, to require [the licensee] to reimburse Butte County for costs associated with providing public services to the project." *County of Butte, California v. FERC*, 129 FERC ¶ 61,133 (Nov. 19, 2009). FERC declined to order such conditions, finding that *Platte River* only required FERC to undertake an assessment of interim conditions where necessary to protect against "serious environmental threats" yet Butte County had failed to show "imminent environmental harm of any kind." *Id.* at 61,558. Moreover, Butte County had failed to establish that the license contained a reopener provision that would allow FERC to impose interim conditions. FERC also denied the contention that Sections 4(e) or 10(c) of the Federal Power Act authorize FERC to unilaterally open the license to impose interim conditions.

5. New Don Pedro Project (Turlock Irrigation District)

The Commission issued a license to the Turlock and Modesto Irrigation Districts in 1964 for operation of the New Don Pedro Project on the Tuolumne River in the Central Valley of California. The current license expires in 2016 and the process for re-licensing will begin in 2011. In 1998, the National Marine Fisheries Service (NMFS) listed the Central Valley ESU (evolutionarily significant unit) of steelhead as threatened under the ESA. In 2002, NMFS

requested that FERC initiate consultation under Section 7 of the ESA to consider the effects of the Don Pedro Project's operations on the threatened species. In 2003, NMFS also moved to amend the license to increase flows for the protection of the species. FERC ultimately declined to initiate formal consultation and declined to amend the license to increase flows. 128 FERC ¶ 61,035 (July 16, 2009). Note that this motion came during the original license term and not in the context of annual licensing.

Regarding consultation under Section 7 of the Endangered Species Act, FERC ruled it was not obligated to initiate consultation during the term of an existing license, citing to *California Sportfishing Protection Alliance v. FERC*, 472 F.3d 593 (9th Cir. 2006). In that case, petitioners argued that FERC should initiate consultation to evaluate the ongoing project impacts on listed endangered species. The Court refused to require consultation, finding there was no agency action to consult on with respect to operations under a previously issued license. *See also National Association of Homebuilders v. Defenders of Wildlife*, 420 F.3d 946 (2007) (consultation under ESA only required for discretionary agency approvals). Although *California Sportfishing* was not presented in the context of an annual license, FERC would likely decline to initiate consultation in annual license proceedings on grounds that issuance of an annual license is purely ministerial.

## V. *HOOPA VALLEY TRIBE v. FERC*: ANOTHER FIGHT FOR INTERIM PROTECTION DURING RE-LICENSING

### A. Background of the Re-Licensing Proceeding (2004-2007).

On February 25, 2004, PacifiCorp filed an application with FERC for a new operating license for its Klamath Hydroelectric Project. PacifiCorp's fifty-year license to operate the Project expired on March 1, 2006. Since March 2006, PacifiCorp has continued to operate its Project pursuant to annual licenses issued by FERC.

The Klamath Project is located on the Klamath River upstream from the Hoopa Valley Reservation. The Project consists of eight independent developments that span approximately 64 river miles within northern California and southern Oregon. In February 2007, the Tribe moved FERC to impose specific flow-related interim conditions on the operation of the Klamath Project pending conclusion of the re-licensing. The Tribe's request focuses on the operations of the J.C. Boyle Dam component of the Klamath Project. The J.C. Boyle development includes a reservoir, dam, and powerhouse, and is partially located on federal lands under the jurisdiction of the Bureau of Land Management.

Power production at J.C. Boyle is managed as a "peaking" operation with daily flow fluctuations ranging from 1,000 cubic feet per second (cfs) to 2,600 cfs for most of the year. When daily power generation operations begin, water is sent through the J.C. Boyle powerhouse and discharged downstream into a reach of the Klamath River known as the J.C. Boyle "peaking reach." The discharge of water through the powerhouse rapidly increases the flow and water level in the peaking reach. Conversely, when power operations cease for the day, water is no longer sent through the powerhouse and flow and water levels in the peaking reach decrease

significantly. Testimony in the FERC record suggests that these flow fluctuations adversely affect fish and other aquatic species in the reaches below J.C. Boyle Dam.

In 2006, the Department of Interior submitted a preliminary license condition to FERC that limits the "ramping rate" (the rate at which water can be raised and lowered below the dam) to no more than 2-inches per hour. Interior submitted this condition pursuant to its Section 4(e) mandatory conditioning authority for the protection of aquatic resources within the federal (BLM) reservation located downstream of J.C. Boyle. 16 U.S.C. § 797(e). Interior also prescribed a minimum flow condition that would increase the current 100-cfs minimum flow to: (1) no less than 40% of inflow when inflow is 1,175 cfs or greater; (2) 470 cfs when inflow is less than 1,175 cfs; or (3) an amount equal to inflow when inflow is less than 470 cfs.

In 2006, PacifiCorp challenged the factual basis for Interior's ramping rate and minimum flow conditions in a "trial-type" evidentiary hearing held under the Energy Policy Act of 2005. Public Law 109-58, § 241. Experts from federal, tribal, state, and non-governmental entities submitted extensive testimony and exhibits in support of Interior's flow conditions. At the conclusion of the hearing, Administrative Law Judge Parlen McKenna ruled in favor of Interior, finding that PacifiCorp's current flow operations adversely affect fish and other aquatic resources below J.C. Boyle. McKenna ruled that "the current peaking operations and their unnatural ramp rates create several conditions that are harmful to the trout fishery." McKenna also found that the minimum flow conditions prescribed by Interior would provide substantial benefit to affected species.

In January 2007, the Department of Interior filed its final mandatory flow prescriptions under Section 4(e) of the Federal Power Act for the protection of the federal reservation and its resources. Yet, today, in November 2010, PacifiCorp continues to release only 100 cfs into the river and continues to operate under the 9-inch per hour ramping rate that was included in its 1956 license.

FERC has completed its environmental review of the Klamath Project pursuant to NEPA and is ready to issue a new license with the Secretary of Interior's Section 4(e) conditions and the Secretary of Commerce's fishway prescriptions. Yet, at this time, final license issuance (with the new protective terms and conditions) is delayed because the States of Oregon and California have not completed the water quality certification process under Section 401 of the Clean Water Act. 33 U.S.C. § 1341 (stating no license shall be granted until Section 401 certification is obtained or waived).

In late 2008, PacifiCorp, the States of Oregon and California, and the United States signed an agreement (called the "AIP") in which Oregon and California expressly agreed not to impose any costs on PacifiCorp (without PacifiCorp's consent) relating to water quality certification studies while settlement negotiations related to potential dam removal proceed. Those parties subsequently entered into a settlement agreement in early 2010 called the Klamath Hydroelectric Settlement Agreement (KHSA) that carried forward the restrictions on completing the certification process. Under the KHSA, which still requires enactment of new federal legislation to become fully effective, PacifiCorp proposes to continue operating the Klamath Project under annual licenses through at least 2020 and perhaps longer. The KHSA creates a

process that could lead to dam removal, but does not require such removal and establishes many conditions and contingencies that are likely to block dam removal in the future. However, as a result of the Settlement Agreement, which neither FERC nor the Hoopa Valley Tribe signed, the FERC licensing process is suspended in perpetual delay and PacifiCorp continues to operate its project with the flow conditions permitted by its 1956 license.

B. The Tribe's Motion for Interim Conditions and FERC's Responses (2007-2009)

In February 2007, the Hoopa Valley Tribe moved FERC to impose the ramping rate and minimum flow conditions in the annual license for the Klamath Project as interim measures pending conclusion of the re-licensing. The Tribe's request was narrowly focused on the ramping rate and minimum flow conditions because: (1) they are purely operational measures that can be implemented immediately without any capital expenditure by the licensee; and (2) those flow measures, and the associated benefits, have been challenged, evaluated, and affirmed by an ALJ in the 2006 trial-type hearing. The Tribe argued that there is no reasonable basis to delay implementing the conditions, especially since FERC will have no discretion to reject these Section 4(e) flow conditions upon conclusion of the licensing.

Eighteen months later, on November 20, 2008, FERC issued its Order Denying Motion for Interim License Conditions, 125 FERC ¶ 61,196. FERC denied the Tribe's motion on grounds that the Tribe had failed to establish the interim conditions were necessary to prevent "irreversible environmental damage" to the fishery pending re-licensing. FERC also made a factual determination that the affected fishery was "thriving" and "healthy" making interim relief unnecessary. FERC discounted the relevance of the 2006 ALJ determination, contending that the ALJ had not evaluated the value of the flow conditions as interim measures. FERC also suggested its duty to impose interim measures only arose if endangered species were affected.

On rehearing, FERC agreed with the Tribe that a showing of "irreversible environmental damage" is not required. Order Denying Rehearing, 126 ¶ 61,236 (March 19, 2009). In its rehearing order, FERC stated: "Contrary to the Tribe's assertion, we did not view the Platte holdings as constraining us from imposing interim conditions absent a showing of irreversible environmental damage." Nevertheless, FERC denied the Tribe's request for rehearing on grounds that the law grants FERC discretion to decide whether interim conditions are necessary and FERC has determined, in this case, they are not. "We believe that, as long as we undertake an inquiry regarding the need for interim protective conditions, the [*Platte River*] court's finding that Congress expected the Commission to exercise its authority to impose conditions 'that in its judgment appear necessary' affords us considerable discretion as to their adoption." FERC again placed much reliance on its finding that the fishery was sufficiently healthy and not in need of interim protection. FERC ultimately concluded that: "Because the project is not having an unanticipated, serious impact on the trout fishery, it was an appropriate exercise of our discretion to deny the Tribe's request to reopen the license to impose interim conditions."

C. The Tribe's Appeal to the D.C. Circuit Court of Appeals (2009 – present)

With the project continuing to operate on its expired 1950's era-license without interim measures, the Tribe petitioned for review of FERC's order in the D.C. Circuit Court of Appeals on May 11, 2009.

On appeal, the Tribe has argued that the appropriate standard by which FERC should evaluate the need for interim conditions is found in its regulation at 18 C.F.R. § 16.18(d), which states that: "In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment." The Tribe argued that it submitted more than sufficient evidence to meet that standard, and that FERC's order denying the motion for interim conditions was arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act. The Tribe's briefing further argued that the D.C. Circuit should clarify that nothing in its *Platte River* rulings requires a petitioner to submit evidence of irreversible harm to justify imposition of interim conditions.

The Tribe also disputed FERC's contention on rehearing that a petitioner must show evidence of "unanticipated" impacts to justify interim conditions. In its rehearing order, FERC stated that it uses an "unanticipated, serious impact" standard when evaluating whether to re-open a license and impose additional mitigation measures during an ongoing license term, citing *City of New Martinsville, West Virginia*, 81 FERC ¶ 61,093, at 61,363 n.13 (1997) (discussing re-opener to address serious, unanticipated impacts that occur during license term); *Ohio Power Co.*, 71 FERC ¶ 61,092, at 61,314 n. 43 (1995) (same).

In its appeal briefing, the Tribe argued that, even if it is reasonable for FERC to apply an "unanticipated, serious impact" standard to re-opener proceedings that occur during an ongoing license term, it is not reasonable to apply such a standard after license expiration. During the term of a license, the licensee reasonably expects that it will receive the benefit of the license terms and conditions as written and not be subject to additional mitigation measures. However, the licensee has no such reasonable expectation once its license expires, since it has already obtained the full benefit of its 30-50 year license.

The Tribe also argued that application of an "unanticipated, serious impact" standard in the context of annual licensing would effectively re-write the FERC regulation, at 18 C.F.R. § 16.18(d) that is directly applicable to interim conditions in annual licensing. Nothing in 18 C.F.R. § 16.18(d) requires a showing of an unanticipated impact. The Tribe argued that if FERC desires to revise its existing regulation, it must do so through valid rulemaking procedures. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

The licensee PacifiCorp has intervened in support of FERC on appeal and has argued for an even more burdensome standard to justify interim conditions. PacifiCorp suggested that interim conditions are appropriate only if impacts to affected resources would increase during the annual licensing period. In the Tribe's view, this argument misses the mark. The Tribe argued that such a standard would never permit imposition of interim conditions, because the impacts occurring at the time of license expiration are identical to those occurring when the project begins operating on annual licensees.

Under any of the applicable standards, FERC will retain discretion and ultimate decision-making authority over when to impose interim measures. However, there are limits and bounds to FERC discretion. FERC must rationally explain, on the face of its order, why the interim conditions sought by the Tribe are not necessary or practical to limit adverse impacts to the environment. The Tribe cited to a wealth of evidence in the FERC record regarding the impacts to fish species resulting from PacifiCorp operations, which was not addressed by FERC in its orders.

FERC's exercise of discretion is also governed, and limited by, the Federal Power Act, which imposes time limits on licenses and requires FERC to give equal consideration of power and non-power resources in the re-licensing process. 16 U.S.C. § 797(e). In *City of Tacoma*, the D.C. Circuit Court of Appeals explained that Congress expected FERC to evaluate existing projects completely anew upon re-licensing, that FERC must impose conditions in accordance with existing laws and regulations, and that FERC has no obligation to issue a new license at the time of re-licensing if the Project cannot be operated consistently with current environmental laws. 460 F.3d at 73-74. The equal consideration principle extends to annual licensing, although FERC only has an obligation to impose "rough and ready" measures in annual licenses. *Platte I*, 876 F.2d at 118. The Tribe contends that, while FERC has discretion to act, it must do more under the equal consideration standard than simply make a conclusory and unsupported determination that interim conditions are not necessary.

FERC discretion is also governed by the Administrative Procedures Act (APA), which bars agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Under the APA, FERC must engage in reasoned decision-making. *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000). FERC must show its work and articulate a rational connection between the facts found, the applicable legal standard, and the decision made. *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Federal Power Act also requires FERC orders to be based on substantial evidence. 16 U.S.C. § 825l(b). Thus, it is clear that FERC does not have unfettered discretion to deny a motion for interim conditions.

The Tribe contends that FERC abused its discretion for the following reasons: First, the FERC order failed to address the substantial evidence in the administrative record that shows existing project operations have adverse impacts on the fishery. Second, the order fails to address the findings of ALJ Parlen McKenna, which conflict with FERC's assessment that the fishery is "healthy" and "thriving." Third, FERC based its determination of the health of the fishery primarily, if not exclusively, on "catch-rate" data shown to be unscientific. In addition, FERC failed to recognize or acknowledge that the affected fishery, the Klamath redband trout, has been designated a "sensitive species" under Oregon state law – a designation somewhat analogous to the threatened species designation under the federal ESA. Finally, FERC failed to acknowledge the analysis in a prior EIS that it developed in 1990, which acknowledged the impacts caused to the fishery by the J.C. Boyle dam. Since the adverse impacts are supported by the record, and since the flow conditions could be implemented immediately, the Tribe argues that there is no basis for delay and that FERC abused its discretion in rejecting the Tribe's motion. The D.C. Circuit Court of Appeals heard oral argument on September 21, 2010.