

DEC - 9 2014

United States Court of Appeals
District of Columbia Circuit

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

ORIGINAL
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
DEC - 9 2014
CLERK

HOOPA VALLEY TRIBE,)
Petitioner,)
v.)
FEDERAL ENERGY REGULATORY)
COMMISSION,)
Respondent)

Case No. 14-1271

PETITION FOR REVIEW

Pursuant to 16 U.S.C. § 8251(b) and Federal Rule of Appellate Procedure 15(a), the Hoopa Valley Tribe, a federally recognized Indian tribe, petitions for review of the Federal Energy Regulatory Commission's Order Denying Petition for Declaratory Order, 147 FERC ¶ 61,216 (June 19, 2014) (Exhibit 1) and the Federal Energy Regulatory Commission's Order Denying Rehearing, 149 FERC ¶ 61,038 (October 16, 2014) (Exhibit 2). Both orders are related to the Klamath Hydroelectric Project (FERC Project No. 2082). The Hoopa Valley Tribe requests that the Court set aside the orders and grant such other relief as may be appropriate. Copies of the orders are attached.

Respectfully submitted this 8th day of December, 2014.

Thomas P. Schlosser
Thane D. Somerville
Morisset, Schlosser, Jozwiak & Somerville
801 Second Avenue, Suite 1115
Seattle, WA 98104
(206) 386-5200
Attorneys for Hoopa Valley Tribe

EXHIBIT 1

147 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

PacifiCorp

Project No. 2082-058

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued June 19, 2014)

1. The Hoopa Valley Tribe (Tribe) has filed a petition for a declaratory order asking the Commission to find that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismiss PacifiCorp's relicense application, and direct PacifiCorp to file a plan for decommissioning the project. In the alternative, the Tribe asks the Commission to declare that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. This order denies the petition.

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.¹ The project includes seven hydroelectric developments and one non-generating dam.² The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.³

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the

¹ One development is located on Fall Creek, a tributary to the Klamath.

² See *Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project*, Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

³ See 16 U.S.C. § 808(a)(1) (2012).

project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.⁴ Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement, which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which was contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,⁵ and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,⁶ the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight

⁴ See n.2, *infra*.

⁵ On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

⁶ 33 U.S.C. § 1341(a)(1) (2012).

times. In refileing its applications, PacifiCorp has noted that the Settlement Agreement requires it to do so in order to avoid waiver by the water quality certifying agencies.⁷

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. On June 25, 2012, PacifiCorp, on behalf of itself and 16 other parties, filed an answer opposing the petition. Also on June 25, 2012, the County of Siskiyou and Siskiyou County Flood Control and Water Conservation District filed an answer opposing project decommissioning but urging issuance of a license.

Discussion

10. The Tribe argues that PacifiCorp is not taking action to obtain water quality certification and thus is not diligently pursuing its license application.⁸ The Tribe therefore asks the Commission to dismiss the relicense application and require the company to file a plan to decommission the project.⁹

11. We agree with the Tribe that the circumstances of this case are far from ideal. As noted above, Commission staff issued the EIS in November 2007. The Commission could act on PacifiCorp's application but for the absence of water quality certification.¹⁰ The Klamath Project is operating under the terms of the 1954 license, and, as a result, the many environmental benefits that could accrue under the new license have not occurred.¹¹ Under the express terms of the Clean Water Act, however, the Commission

⁷ See, e.g., letter from Mark A. Sturtevant (PacifiCorp) to Kimberly D. Bose (Commission Secretary), enclosing December 2, 2013 letter from PacifiCorp to Oregon Department of Water Quality (filed December 16, 2013).

⁸ Petition at 1-12.

⁹ *Id.* at 12-13.

¹⁰ There is also a need to conclude consultation under the National Historic Preservation Act, but such matters, as a rule, do not delay license issuance.

¹¹ While we cannot and do not consider the license application now, we note, as a general matter, that all licenses we have issued in recent times contain substantially more environmental measures than those issued 50 years ago, before any of the current environmental statutes were enacted and before the Federal Power Act was amended to enhance consideration of environmental matters.

cannot issue and implement a new license until water quality certification has been issued.

12. We also agree with the Tribe that PacifiCorp has been complicit with the parties to the Settlement Agreement in agreeing to delay water quality certification, and that 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. Again, as the Tribe asserts, infinite delays in licensing proceedings are not in the public interest. Indeed, they are contrary to it.

13. Nonetheless, the remedy suggested by the Tribe – requiring PacifiCorp to file a decommissioning plan – would not resolve the impasse here. Any major decommissioning would likely result in some form of discharge into the navigable waters, meaning that the Commission could not implement decommissioning without a water quality certification.¹² Given that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed.¹³ It seems more probable that they would either deny certification, thereby precluding decommissioning, or work with PacifiCorp and the other parties to repeatedly delay certification, as has already occurred in this case.

14. In addition, while we do have the authority to order a licensee to decommission a project,¹⁴ we have done so only once in the absence of the licensee's consent, upon a finding that the facts of the case required that outcome.¹⁵ Here, we have not concluded based on the record that decommissioning is required, and thus lack a basis for imposing

¹² See, e.g., *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 (2007) at PP 33-36 (stating that Commission could not accept license surrender, which included dam removal, without state water quality certification), *reh'g denied*, 123 FERC ¶ 61,069 at 17-21 (2008), *aff'd*, *Jackson County v. FERC*, 589 F.3d 1284 (D.C. Cir. 2009).

¹³ Another likely outcome might be for PacifiCorp to file the Settlement Agreement as its decommissioning plan, even though the plan could not be implemented absent Congressional and executive department action.

¹⁴ See *Edwards Manufacturing Company, Inc. and City of Augusta, Maine*, 81 FERC ¶ 61,255 at 62,207-09 (1997).

¹⁵ *Id.*

such a requirement.¹⁶ We are also unsure how demanding that PacifiCorp file a decommissioning plan when it had already taken substantial steps in that direction in concert with a large number of parties would yield a positive result. If we had a viable way to require the parties to move forward, we would certainly consider it. We do not see such an option before us.

15. The Tribe asks that, if we do not dismiss PacifiCorp's license application for lack of diligence and require a decommissioning plan, we issue a license, based on the conclusion that California and Oregon have waived water quality certification by failing to act by the deadline established by the Clean Water Act – a reasonable period of time, not to exceed one year from the filing of a request for certification.¹⁷ The Tribe contends that the states' failure to act within one year and their agreement with PacifiCorp not to do so amount to waiver.¹⁸

16. Again, we have some sympathy with the Tribe's argument. Indefinite 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 best adapted to a current comprehensive plan for improving or developing a waterway in the public interest.¹⁹ We have previously stated that we "cannot endorse procedures that result in undue extensions of the licensing process. . . . [Such an] inordinate delay was hardly what Congress contemplated in crafting the one-year certification deadline."²⁰

17. In this case, however, we see little to be gained from finding that the states have waived certification and then issuing a license. It is clear that PacifiCorp and the other settling parties are committed to the process envisioned in the Settlement Agreement. PacifiCorp states in its opposition to the petition that it is endeavoring to implement the terms of the Settlement Agreement, and will pursue relicensing if the agreement terminates. Given that we cannot require a licensee to accept a license, and that

¹⁶ Without in any way prejudging the merits of the relicensing proceeding, we note that the EIS prepared by our staff recommended decommissioning only some of the project dams, consist with PacifiCorp's licensing proposal. We would at a minimum seriously consider staff's recommendation in acting in this case.

¹⁷ See 33 U.S.C. § 1341(a) (2012).

¹⁸ Petition at 14-21.

¹⁹ See 16 U.S.C. § 808(a) (2012).

²⁰ *Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167, at P 16, n.14 (2005).

PacifiCorp views itself as bound to follow the settlement, we see little point in pursuing a course that would almost certainly leads to protracted litigation and would be unlikely to resolve the issues in this proceeding.

The Commission orders:

The petition for declaratory order filed by the Hoopa Valley Tribe on May 25, 2012, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

P-2082-058.DOCX.....1-6

EXHIBIT 2

149 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

PacifiCorp

Project No. 2082-061

ORDER DENYING REHEARING

(Issued October 16, 2014)

1. The Hoopa Valley Tribe (Tribe) has requested rehearing of the Commission's June 19, 2014, order¹ denying the Tribe's petition for a declaratory order either (1) finding that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismissing PacifiCorp's relicense application, and directing PacifiCorp to file a plan for decommissioning the project, or (2) in the alternative, declaring that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. As discussed below, we deny rehearing.

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.² The project includes seven hydroelectric developments and one non-generating dam.³ The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.⁴

¹ *PacifiCorp*, 147 FERC ¶ 61,216 (2014) (June 19 Order).

² One development is located on Fall Creek, a tributary to the Klamath.

³ See *Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project*, Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

⁴ See 16 U.S.C. § 808(a)(1) (2012).

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.⁵ Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement, which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which is contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,⁶ and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,⁷ the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with

⁵ See n.2, *infra*.

⁶ On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

⁷ 33 U.S.C. § 1341(a)(1) (2012).

Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight times.

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning of the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. In the June 19 order, the Commission denied the Tribe's petition. We explained that, while the circumstances of the Klamath project relicensing are far from ideal, the Commission is barred by the Clean Water Act from issuing a new license in the absence of water quality certification from Oregon and California. We further concluded that ordering PacifiCorp to file a decommissioning plan would be unlikely to resolve the current impasse, given that the great majority of parties to the relicensing are pursuing implementation of the settlement, and that decommissioning would probably require water quality certification, which the states, as supporters of the settlement process, would not likely issue.⁸ With respect to the Tribe's assertion that we should find that California and Oregon have waived water quality certification, we found that there was little point in pursuing a course that would almost certainly lead to protracted litigation and would be unlikely to resolve the issues in this proceeding.⁹

10. On July 18, 2014, the Tribe filed a timely request for rehearing.

Discussion

A. Dismissal of the Relicensing Application

11. The Tribe reiterates its assertions that PacifiCorp is diligently pursuing neither the issuance of a new license nor water quality certification, and that delay in relicensing is not in the public interest.¹⁰ It asserts that our conclusion that a decommissioning plan would require water quality certification that the states would be unlikely to issue is

⁸ June 19 Order, 147 FERC ¶ 61,216 at P 11.

⁹ *Id.* P 17.

¹⁰ Request for rehearing at 12-14. The Tribe notes that the Commission has the authority to deny a new license to an applicant seeking relicensing. *Id.* at 14. While this is true, it does not assist us in resolving this case. Denying a new license where no party, other than the Tribe, seeks such a result, and, indeed, where our staff in the Final EIS recommended issuing a new license, would be difficult to justify.

Project No. 2082-061

- 4 -

unsupported by the record and an insufficient basis for denying its petition.¹¹ The Tribe further argues that, if the Commission were to grant the Tribe's petition, decommissioning would be the only appropriate course of action. It contends that the Commission must not let the settlement process play out, but should either dismiss PacifiCorp's application for lack of prosecution or find that the states have waived water quality certification.¹²

12. Given that neither the Federal Power Act nor our regulations impose any requirements with respect to situations such as that presented here, we have considerable discretion with respect to administering this proceeding. Indeed, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments."¹³ The Tribe points to nothing in law, regulation, or precedent that requires us to find that PacifiCorp's application should be dismissed.

13. As we explained in the June 19 order, lengthy delays in licensing proceedings are contrary to the public interest.¹⁴ At the same time, we see little to be gained by taking steps that would likely result in further delay, litigation, and extensive expenditures of time and money by the parties and the Commission. While it is unfortunately the case that there are relicensing proceedings that have been pending for many years awaiting water quality certification,¹⁵ there has been no such instance in which we have dismissed

¹¹ *Id.* at 14-17.

¹² *Id.* at 17-20. The Tribe asserts that the fact that we have not taken action on the Settlement Agreement is contrary to our settlement policy. *Id.* at 5, n.8 (citing *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 (2006)). Nothing in our policy or practice requires us to act on settlements where, as here, the parties explicitly file an agreement for the Commission's information only, and not for Commission action.

¹³ *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524-25 (1978).

¹⁴ June 19 Order, 147 FERC ¶ 61,216 at P 12.

¹⁵ For example, relicensing of the Hells Canyon Project No. 1971 and the Poe Project No. 2107 has been pending since 2003, while the Upper North Fork Feather River relicensing has been awaiting water quality certification since 2002, and the Waterbury Project No. 2090 has been pending since 1999. Of 43 pending license applications regarding which our staff has completed its environmental analysis, 29 (67 percent) are awaiting water quality certification.

a relicense application for the licensee's failure to diligently pursue the application, in large part because of the confusion such an action would cause and because we have not seen a clear path to resolving the issues in these cases.¹⁶

14. We disagree with the Tribe's assertion that we lacked a basis in the record for suggesting that California and Oregon would be no more likely to issue water quality certification for a project decommissioning proceeding than they have been during the relicensing proceeding.¹⁷ In the June 19 Order, we explained that "[g]iven that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed."¹⁸ There is indeed no direct evidence in the record as to how the agencies would react were we to grant the Tribe's petition,¹⁹ but our experience, both in this proceeding and generally, led us to conclude that California and Oregon could not be expected to act more promptly to authorize an outcome they do not support²⁰ than they have in the relicensing proceeding. We continue to find this conclusion reasonable.

15. The Tribe is also incorrect in asserting that requiring a decommissioning plan would be the only alternative in the case of a dismissed application. We could, for example, consider the project to be orphaned and seek other applications,²¹ or we could issue PacifiCorp a non-power license for all or part of the project.²²

¹⁶ We continue to consider whether there are actions or incentives we can take that may be appropriate in individual proceedings to break these logjams.

¹⁷ Request for Rehearing at 16.

¹⁸ June 19 Order, 147 FERC ¶ 61,216 at P 13.

¹⁹ It is difficult to envision what evidence there could be, absent a statement by the agencies as to what they would do in a hypothetical situation.

²⁰ As noted in the June 19 order, a number of parties, including PacifiCorp, Oregon DEQ, and the California Water Board, opposed the Tribe's petition.

²¹ See 18 C.F.R. § 61.25 (2014). While this section explicitly deals with instances in which a license fails to file a timely, complete application, we believe that it would be applicable in the case of an application that we elected to dismiss later in a proceeding.

²² See 16 U.S.C. § 808(f) (2012).

16. In sum, the Tribe has shown no error in our decision to deny its request that we dismiss PacifiCorp's application and we deny rehearing on this matter.

B. Waiver of Water Quality Certification

17. The Tribe argues that we erred in not determining that California and Oregon have waived water quality certification. The Tribe notes that section 401(a)(1) of the Clean Water Act provides that if a state "fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification . . . shall be waived . . .,"²³ and states that the question whether waiver has occurred is a federal question to be decided by the Commission.²⁴ The Tribe cites a number of cases, as well as legislative history, for the proposition that Congress intended the one-year deadline to avoid undue state delay of the federal proceedings.²⁵

18. We agree with the Tribe that continued delays in completing the water quality certification are inconsistent with Congress' intent. We further agree that, in licensing proceedings before it, the Commission has the obligation to determine whether a state has complied with the procedures required by the Clean Water Act, including whether a state has waived certification.²⁶

19. We part company with the Tribe on whether certification has been waived in this case. The Tribe carefully hedges its argument, maintaining that it "does not ask the Commission to declare that the practice of 'withdrawal and resubmission' is unlawful in every instance,"²⁷ but is so only under the facts of this case, including the states' not acting within one year of the initial certification requests, the passage of time since the original requests, the delay in the relicensing proceeding, the states' agreement with the

²³ See 33 U.S.C. § 1341(a)(1) (2012).

²⁴ Request for Rehearing at 20-21.

²⁵ *Id.* at 22-23.

²⁶ See, e.g., *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011) (affirming, as a federal question, the Commission's determination that a state had not waived certification); *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (stating that the Commission was obligated to inquire as to whether a state satisfied the Clean Water Act's notice requirements); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (holding that the Commission was obligated to determine the effectiveness of a state's purported revocation of certification).

²⁷ Request for Rehearing at 25.

licensee not to move forward on certification, and the fact the licensee continues to operate its project under the terms of its existing license.²⁸

20. We continue to be concerned that states and licensees that engage in repeated withdrawal and refile of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying the issuance of new licenses that better meet current-day conditions than those issued many decades ago, and that these entities are clearly violating the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions; however, notwithstanding that concern, we do not conclude that they have violated the letter of that statute. Section 401(a)(1) provides that a state waives certification when it does not act on an application within one year. The Act therefore speaks solely to *state action or inaction*, rather than the repeated withdrawal and refile of applications. By withdrawing its applications before a year has passed, and presenting the states with new applications, PacifiCorp has, albeit repeatedly, given the states new deadlines. The record does not reveal that either state has in any instance failed to act on an application that has been before it for more than one year. Again, while the Commission continues to be concerned that these entities are violating the spirit of the Clean Water Act, the particular circumstances here, including the length of the delay, do not demand a different result because the Act speaks directly only to state action within one year of a certification request. Accordingly, we find that California and Oregon have not waived water quality certification in this case.

21. The Tribe's reliance on *Central Vermont Public Service Corporation*²⁹ is unavailing. In that case, although the state and the licensee had agreed that the licensee would withdraw and refile its water quality certification application on an annual basis, the licensee ultimately failed to do so and the state did not act on the then-pending application before the one-year deadline. We held that the passage of the deadline resulted in waiver, regardless of the fact that the two parties had intended to continue the withdrawal and refile process: the governing fact was the expiration of the one-year period.³⁰ Here, whether for good or ill, PacifiCorp has withdrawn and refiled its certification applications numerous times. The Tribe does not assert that the states missed the one-year deadline with respect to any single one of the company's applications. In essence, PacifiCorp and the states have avoided the error that Vermont and the licensee in that proceeding made. Accordingly, *Central Vermont* is inapposite here.

²⁸ *Id.* at 25-26.

²⁹ 113 FERC ¶ 61,167 (2005) (*Central Vermont*). See Request for Rehearing at 23-24.

³⁰ See *Central Vermont* 113 FERC ¶ 61,167 at PP 15-16.

Project No. 2082-061

- 8 -

22. The Tribe goes on to argue that our decision not to declare that California and Oregon have waived water quality certification is arbitrary, capricious, and an abuse of discretion. The Tribe again asserts that our conclusions that the parties to the settlement are committed to it is unsupported by the record and that the public interest requires us to issue a new license or a decommissioning order.³¹

23. As we have explained, it is the Clean Water Act that prescribes when a state agency has waived certification; it is not an exercise of discretion vested in the Commission. If our interpretation of the statute is incorrect, that would be for the courts to determine.³² As to the adherence of the settling parties to their agreement, we have no way of knowing how firm their commitment is, but we think it a reasonable assumption that entities will support an agreement which they have voluntarily negotiated and signed.

³¹ Request for Rehearing at 26-30. The Tribe also objects to what it asserts is the Commission's "failure to reinitiate the licensing process [because] it cannot require a licensee to accept a license." *Id.* at 29. In the June 19 Order, 147 FERC ¶ 61,216 at P 17, we simply intended to indicate that the likely negative reaction to our issuing a license that ignored the wishes of the settling parties gave us little incentive to pursue untested legal theories. We nonetheless fully agree with the Tribe that we must issue licenses that satisfy the public interest standards established by the Federal Power Act, and we do not base licensing decisions on whether the applicant (or any other entity) will be pleased by our actions. We further agree, as noted above, that a new license would bring the project in line with current environmental standards. Were we to determine that water quality certification has been waived here, we would then issue a license that we concluded met the public interest, as we have done in other cases involving waiver. *See, e.g., Central Vermont, supra; FPL Energy Maine Hydro LLC*, 139 FERC ¶ 61,215 (2012); *Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241 (2005); *Gustavus Electric Company*, 109 FERC ¶ 61,105, *reh'g denied*, 110 FERC ¶ 61,334 (2004).

³² *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C.Cir.2003) (noting that the Commission's interpretation of Section 401 of the Clean Water Act is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act, and that judicial review of the Commission's interpretation of Section 401 is de novo).

Project No. 2082-061

- 9 -

The Commission orders:

The request for rehearing filed by the Hoopa Valley Tribe on July 18, 2014, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

P-2082-061.DOCX.....1-9

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 8, 2014, I sent for filing the original and four copies of the Hoopa Valley Tribe's Petition for Review, via Federal Express Overnight Delivery, to:

Mark Langer, Clerk
U.S. Court of Appeals - D.C. Circuit
333 Constitution Avenue, NW, Room 5205
Washington, DC 20001

I further hereby certify that on December 8, 2014, a true and accurate copy of the Hoopa Valley Tribe's Petition for Review was served on the following parties that participated in the agency sub-docket proceeding below (P-2082-058; P-2082-061):

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(served by first class mail)

Michael Swiger
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW
7th Floor
Washington, DC 20007
mas@vnf.com
Attorneys for PacifiCorp
(served by electronic mail and first class mail)

Brian L. Morris, County Counsel
P.O. Box 659
Yreka, CA 96097
bmorris@co.siskiyou.ca.us
Attorneys for County of Siskiyou and Siskiyou County Flood Control and Water Cons. Dist.
(served by electronic mail and first class mail)

I further certify that on December 8, 2014, a true and accurate copy of the Hoopa Valley Tribe's Petition for Review was also served upon each person designated on the official service list compiled by the Secretary in the agency proceeding below (P-2082). A copy of the official

service list is attached hereto as Attachment A. Service was accomplished by electronic mail or by first class mail if no e-mail address was provided.

I declare the above to be true and correct under penalty of perjury.

Executed this 8th day of December, 2014.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



Thomas P. Schlosser, Attorney for Petitioner

Service List for P-2082-000 PacifiCorp

Contacts marked ** must be postal served

Party	Primary Person or Counsel of Record to be Served	Other Contact to be Served
American Rivers	Steve Rothert Director California Field Offi American Rivers 432 Broad St Nevada City, CALIFORNIA 95959 UNITED STATES srothert@amrivers.org	
American Rivers	Richard Roos-Collins Director, Legal Services Natural Heritage Institute 2140 Shattuck Avenue, Ste. 801 Berkeley, CALIFORNIA 94704-1229 UNITED STATES rrcollins@waterpowerlaw.com	
ARGONNE NATIONAL LABORATORY		Gary W Frey ARGONNE NATIONAL LABORATORY 200 Union Blvd Ste 530 Lakewood, COLORADO 802281832 Jefferson garyfrey@anl.gov
Bureau of Reclamation		**Dave Sabo Area Manager Bureau of Reclamation Klamath Basin Area Office 6600 Washburn Way Klamath Falls, OREGON 976039365
California Department of Fish and Wildlife	Nancee Murray Senior Staff Counsel California Department of Fish and Wildlife Office of General Counsel 1416 Ninth St., 12th Floor Sacramento, CALIFORNIA 95814 UNITED STATES nmurray@dfg.ca.gov	Stephen Puccini Senior Staff Counsel California Department of Fish and Wildlife Office of the General Counsel 1416 Ninth Street, 12th Floor Sacramento, CALIFORNIA 95814 spuccini@dfg.ca.gov

California Department of Fish and Wildlife	**Kim Rushton California Department of Fish and Wildlife 8638 Lakeview Rd Hornbrook, CALIFORNIA 960449765 UNITED STATES	**Mike Rode California Department of Fish and Wildlife 3 N Old Stage Rd Mount Shasta, CALIFORNIA 960679701
California Department of Fish and Wildlife		**Steven M Turek California Department of Fish and Wildlife 601 Locust St Redding, CALIFORNIA 960012711 Shasta
California Department of Water Resources	Marianna Aue Graduate Legal Assistant California Department of Water Resources Sacramento, CALIFORNIA 95814 UNITED STATES maue@waterboards.ca.gov	
Fish & Wildlife Service, Region 1		**Steve Thompson CA/NV Oper. Manager Fish & Wildlife Service, Region 1 Region 1 2800 Cottage Way Sacramento, CALIFORNIA 958251846
Fish & Wildlife Service, Region 1		**David Allen Regional Director Fish & Wildlife Service, Region 1 Attention: Estyn Mead 911 NE 11th Ave Portland, OREGON 97232-4169
Friends of the River		Ronald Martin Stork Friends of the River 1418 20th Street Suite 100 Sacramento, CALIFORNIA 95811 rstork@friendsoftheriver.org
GREAT LAKES ELECTRIC CONSUMERS ASSOCIATION		**Frank W. Frisk Contact/Addr No Longer Valid GREAT LAKES ELECTRIC CONSUMERS ASSOCIATION

HOOPA VALLEY INDIAN TRIBE	Thomas Schlosser HOOPA VALLEY TRIBE 801 Second Ave., Suite 1115 Seattle, WASHINGTON 98104 UNITED STATES t.schlosser@msaj.com	
HOOPA VALLEY TRIBE	Thomas Schlosser Morisset, Schlosser & Jozwiak 801 Second Ave. Suite 1115 Seattle, WASHINGTON 98104 UNITED STATES t.schlosser@msaj.com	**MICHAEL ORCUTT DIRECTOR HOOPA VALLEY TRIBE PO Box 417 Hoopa, WASHINGTON 95546-0417
Humboldt County, California		**TAMARA C FALOR Esquire Humboldt County, California 825 5th St Eureka, CALIFORNIA 955011153 Humboldt
INDIVIDUAL	Maureen Burke INDIVIDUAL 1737 Hyland Street Bayside, CALIFORNIA 95524 UNITED STATES mo@khum.com	
INDIVIDUAL	Brian Inouye INDIVIDUAL 1123 Maple Dr Tallahassee, FLORIDA 32301 UNITED STATES bdinouye@bio.fsu.edu	
INDIVIDUAL	Carol Wilson INDIVIDUAL 2004 St. Maru Lane McKinleyville, CALIFORNIA 95519 UNITED STATES capepeirce@yahoo.com	

INDIVIDUAL	<p>Vivien Richards INDIVIDUAL 3686 Glenwood St Eureka, CALIFORNIA 95501 UNITED STATES vrich@northcoast.com</p>	
INDIVIDUAL	<p>Don Allan, INDIVIDUAL 821 Second Ave Trinidad, CALIFORNIA 95570 UNITED STATES don@nrsrcaa.org</p>	
Industrial Customers of Northwest Utilities	<p>S. Bradley Cleve Davison Van Cleve, PC Davison Van Cleve, P.C. 333 S.W. Taylor, Suite 400 Portland, OREGON 97204 UNITED STATES mail@dvclaw.com</p>	<p>Michael Early Industrial Customers of Northwest Utilities 333 S.W. Taylor Suite 400 Portland, OREGON 97007 mearly@icnu.org</p>
INSTITUTE FOR FISHERIES RESOURCES		<p>Glen H. Spain NW Regional Director INSTITUTE FOR FISHERIES RESOURCES PO Box 11170 Eugene, 97440-3370 klamathcoalition@aol.com</p>
INSTITUTE FOR FISHERIES RESOURCES	<p>Glen Spain NW Regional Director INSTITUTE FOR FISHERIES RESOURCES PO Box 11170 Eugene, OREGON 97440-3370 UNITED STATES fishlifr@aol.com</p>	
Karuk Tribe of California		<p>Ronnie M Pierce FERC Coordinator Karuk Tribe of California 1111 Forson Road McKinleyville, CALIFORNIA 95519 segep@aol.com</p>

KLAMATH COUNTY		**W. Daniel Bunch KLAMATH COUNTY 305 Main St Fl 2 Klamath Falls, OREGON 976016332 Klamath
Klamath Off-Project Water Users	S. Bradley Cleve Davison Van Cleve, P.C. 333 S.W. Taylor Suite 400 Portland, OREGON 97204 UNITED STATES mail@dvclaw.com	
Klamath Tribes		**Torina Case Klamath Tribes PO Box 436 Chiloquin, 97624-0436 Klamath
Klamath Tribes		Carl Ullman Klamath Tribes Box 957 Chiloquin, OREGON 97624 bullman3@earthlink.net
KLAMATH WATER USERS ASSOCIATION		Greg Addington Executive Director KLAMATH WATER USERS ASSN 735 Commercial St. Suite 3000 Klamath Falls, OREGON 97601 greg@kwua.org
KLAMATH WATER USERS ASSOCIATION	**Paul Simmons Somach, Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CALIFORNIA 95814-2403 UNITED STATES	
KLAMATH, COUNTY OR		COUNTY COURT KLAMATH FALLS, OREGON 97601

Kokopelli River Guides, UKOA	<p>Matt Dopp owner INDIVIDUAL 1655 Parker St. Ashland, OREGON 97520 UNITED STATES info@kokopelliriverguides.com</p>	
MID-WEST ELECTRIC CONSUMERS ASSOCIATION		<p>Thomas Graves MID-WEST ELECTRIC CONSUMERS ASSN 4350 Wadsworth Blvd, Suite 330 Wheat Ridge, COLORADO 80033 meconsumers@qwest.net</p>
momentum river expeditions inc	<p>pete wallstrom, Owner momentum river expeditions inc 1257 Siskiyou Blvd #1178 Ashland, OREGON 97520 UNITED STATES pete@momentumriverexpeditions.com</p>	
National Center for Conservation Science & Policy	<p>Brian Barr National Center for Conservation Science & Policy 84 Fourth Street Ashland, OREGON 97520 UNITED STATES brian@nccsp.org</p>	
National Rural Electric Cooperative Assn.		<p>Mary Ann Ralls National Rural Electric Cooperative Assn. 4301 Wilson Blvd. Arlington, VIRGINIA 22203 MaryAnn.Ralls@nreca.org</p>
Natural Heritage Institute		<p>Richard Roos-Collins Director, Legal Services Natural Heritage Institute 2140 Shattuck Avenue, Ste. 801 Berkeley, CALIFORNIA 94704-1229 rrcollins@waterpowerlaw.com</p>

NOAA National Marine Fisheries Service	Christopher Fontecchio Attorney-Advisor NOAA General Counsel, Northwest 7600 Sand Point Way NE Seattle, WASHINGTON 98115 chris.fontecchio@noaa.gov	David King White Hydraulic Engineer NOAA National Marine Fisheries Service 777 Sonoma Avenue Suite 325 Santa Rosa, CALIFORNIA 95404 david.k.white@noaa.gov
NOAA National Marine Fisheries Service	Dan Hytrek Attorney NOAA National Marine Fisheries Service 501 W. Ocean Blvd., Suite 4470 Long Beach, CALIFORNIA 90802 UNITED STATES Dan.Hytrek@noaa.gov	Ken Homolka Hydropower Program Leader Oregon Department of Fish & Wildlife 4034 Fairview Industrial Dr. SE Salem, OREGON 97302-1142 Ken.Homolka@state.or.us
Oregon Department of Fish & Wildlife	Ted Wise Regional Hydropwer Coordinator Oregon Department of Fish & Wildlife 61374 Parrell Road Bend, OREGON 97702 UNITED STATES ted.g.wise@state.or.us	James McCarthy Policy Analyst OREGON NATURAL RESOURCES COUNCIL 5825 N Greeley Ave Portland, OREGON 97217 jm@oregonwild.org
OREGON NATURAL RESOURCES COUNCIL	Alex Phillips, Program Coordinator Oregon Parks and Recreation Department 725 Summer Street NE, Suite C Salem, OREGON 97301 alex.phillips@state.or.us	Mary S Grainey Hydroelectric Program Coord Oregon Water Resources Department 725 Summer Street, Suite A Salem, OREGON 97301 Mary.s.grainey@wrp.state.or.us
Oregon Parks and Recreation Department	Jesse Ratcliffe Assistant Attorney General Oregon Department of Justice 1162 Court St NE Salem, OREGON 97301-4096 UNITED STATES jesse.d.ratcliffe@doj.state.or.us	Attachment A Page 7
Oregon Water Resources Department		

Oregon Water Resources Department	Ronald Craig Kohanek Oregon Water Resources Department 725 Summer St. NE, Suite A Salem, OREGON 97301-1271 Ron.C.KOHANEK@wrд.state.or.us	
PacifiCorp	Mark Sturtevant Managing Director PacifiCorp Energy 825 NE Multnomah, Suite 1500 Portland, OREGON 97232 mark.sturtevant@pacificorp.com	
PacifiCorp	Michael Swiger Partner Van Ness Feldman, LLP 1050 Thomas Jefferson Street, NW 7th Floor Washington, DISTRICT OF COLUMBIA 20007 UNITED STATES mas@vnf.com	Tim Hemstreet Program Manager PacifiCorp 825 NE Multnomah, Suite 1500 Portland, OREGON 97232 tim.hemstreet@pacificorp.com
Public Utility Commission of Oregon	**Bill McNamee Public Utility Commission of Oregon PO Box 1088 Salem, 97308-1088 Marion	
Public Utility Commission of Oregon	Jason Jones Assistant Attorney General Public Utility Commission of Oregon 1162 Court St. NE Salem, OREGON 97301-4096 UNITED STATES jason.w.jones@state.or.us	
Quartz Valley Indian Community	David Rapport Rapport and Marston Law Offices of Rapport and Marston 405 West Perkins Street Ukiah, CALIFORNIA 95482 drapport@pacbell.net	

Sierra Club - Redwood Chapter	Kristen Boyles Staff Attorney EARTHJUSTICE 705 Second Ave. Suite 203 Seattle, WASHINGTON 98104 UNITED STATES kboyles@earthjustice.org	Diane Fairchild Beck Conservation Chair Sierra Club - Redwood Chapter 3200 Greenwood Hts. Dr. Kneeland, CALIFORNIA 95549 dfbeck@northcoast.com
SOUTHEASTERN POWER RESOURCES COMMITTEE	**Forrest Stacy Contact/Addr No Longer Valid Oglethorpe Power Corporation UNITED STATES	
SOUTHWESTERN POWER RESOURCES ASSOCIATION		Ted Coombes Executive Director SOUTHWESTERN POWER RESOURCES ASSN 3840 South 103rd East Avenue, Suite 117 Tulsa, OKLAHOMA 74146 tcoombes@sbcglobal.net
State of Oregon	Mike Reynolds State of Oregon 725 Summer St. NE Suite A Salem, OREGON 97301-1271 UNITED STATES mike.j.reynolds@wrд.state.or.us	
Taylor Ranch		Richard Taylor Taylor Ranch PO Box 637 Ashland, 97520-0022 admin@pacificwestcom.com
Trout Unlimited		Brian J. Johnson California Director Trout Unlimited 4221 Hollis Street Emeryville, CALIFORNIA 94608 bjohnson@tu.org

U.S. Bureau of Indian Affairs		Thomas Dang General Engineer U.S. Bureau of Indian Affairs 2800 Cottage Way Sacramento, CALIFORNIA 958251846 tdanghydro@aol.com
U.S. Bureau of Land Management		**Jon Raby Area Manager U.S. Bureau of Land Management 2975 Anderson Ave Bldg 25 Klamath Falls, OREGON 976037886 Klamath
U.S. Bureau of Land Management - WY		**Steven A Ellis Contact/Addr No Longer Valid U.S. Bureau of Land Management - WY Lake
U.S. Department of Interior	**BARBARA SCOTT-BRIER Contact/Addr No Longer Valid U.S. Department of Interior UNITED STATES	**Stephen R Palmer U.S. Department of Interior 2800 Cottage Way, W2517 Sacramento, CALIFORNIA 95825-1846 Sacramento
U.S. Department of Interior		**William Bettenberg Contact/Addr No Longer Valid U.S. Department of Interior District of Columbia
U.S. Department of Interior		Nolan Shishido Attorney U.S. Department of Interior Office of the Regional Solicitor 805 SW Broadway, Suite 600 Portland, OREGON 97205 nolan.shishido@sol.doi.gov

U.S. Department of Interior	Kerry O'Hara Assistant Regional Solicitor U.S. Department of Interior 2800 Cottage Way, Rm. E-1712 Sacramento, CALIFORNIA 95825 UNITED STATES SOL-FERC@sol.doi.gov	
U.S. Fish & Wildlife Service		**Phil Detrich U.S. Fish & Wildlife Service 1829 S Oregon St Yreka, CALIFORNIA 960973446 Siskiyou
U.S. National Park Service		Stephen M. Bowes U.S. National Park Service 333 Bush St Ste 500 San Francisco, CALIFORNIA 94104-2828 stephen_bowes@nps.gov
WATERWATCH OF OREGON	Lisa Brown Staff Attorney WATERWATCH OF OREGON 213 SW Ash St, Ste. 208 Portland, OREGON 97204 UNITED STATES lisa@waterwatch.org	
WATERWATCH OF OREGON	Lisa Brown Staff Attorney WATERWATCH OF OREGON 213 SW Ash St, Ste. 208 Portland, OREGON 97204 UNITED STATES lisa@waterwatch.org	
WORLD WILDLIFE FUND	Brian Barr Program Officer WORLD WILDLIFE FUND 116 Lithia Way Suite 7 Ashland, OREGON 97520 UNITED STATES brian@wwfks.org	

YREKAM, TOWN OF		YREKAM, CALIFORNIA 96097
YUROK TRIBE	Curtis Berkey Alexander, Berkey, Williams & Weathers LLP 2030 Addison Street Suite 410 Berkeley, CALIFORNIA 94704 UNITED STATES mmorales@abwwlaw.com	
YUROK TRIBE		John Corbett YUROK TRIBE PO Box 1027 Klamath, 95548-1027 del Norte jcorbett@yuroktribe.nsn.us
YUROK TRIBE	Michael Belchik Senior Fisheries Biologist YUROK TRIBE PO Box 196 Hoopa, CALIFORNIA 95546 UNITED STATES mbelchik@snowcrest.net	**Lori J Melendrez Paralegal YUROK TRIBE PO Box 1027 Klamath, CALIFORNIA 95548-1027 del Norte
Back to Query Service List	Back to FEROnline	