125 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

PacifiCorp Project No. 2082-049

ORDER DENYING MOTION FOR INTERIM LICENSE CONDITIONS

(Issued November 20, 2008)

1. By motion filed February 23, 2007, Hoopa Valley Tribe (Tribe) requests that the Commission impose interim conditions to protect resident trout in PacifiCorp's annual license for the Klamath Hydroelectric Project No. 2082. For the reasons discussed below, we are denying this motion.

Background

2. PacifiCorp's 169-megawatt (MW) Klamath Hydroelectric Project is located primarily on the Klamath River, in Klamath County, Oregon, and Siskiyou County, California. The project consists of eight developments. As pertinent here, the J.C. Boyle development, which includes a reservoir, dam, and powerhouse, is located partly on land of the U.S. Department of the Interior's (Interior) Bureau of Land Management (BLM) in Oregon. On February 25, 2004, PacifiCorp filed an application for a new license for the project. The original license expired on March 1, 2006, and since then PacifiCorp has been operating the project under annual licenses.

3. On December 28, 2005, notice was issued indicating that the application was ready for environmental review and soliciting terms, conditions, prescriptions, and recommendations. In response to the notice, Interior filed conditions under section 4(e) of the Federal Power Act (FPA) for the protection of project lands administered by BLM.[1] On September 25, 2006, Commission staff issued a draft Environmental Impact Statement (EIS), in response to which Interior, on January 29, 2007, filed modified

[1] Under section 4(e), 16 U.S.C. § 797(e) (2006), licenses that are issued within a reservation are subject to and must contain such conditions as the secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of the reservation.

section 4(e) conditions. Interior's conditions include ramping rate and minimum flow conditions for the J.C. Boyle development.

4. In its February 23, 2007 motion, the Tribe requests that the Commission impose Interior's ramping rate and minimum flow requirements for the J.C. Boyle development as interim conditions that, the Tribe asserts, are critical for the immediate protection of trout and other resident aquatic resources adversely affected by ongoing project operations.[2] The Tribe states that these conditions would provide a substantial benefit to these resources without requiring structural modification to the project or significant capital expenditure by the licensee. In supporting the imposition of these interim conditions, the Tribe argues that it may be many years before the licensee operates the Klamath Project under a new license with conditions that would adequately protect the affected environment.

5. The Tribe states that the Klamath Project is managed as a peaking operation. Article 36 of the current license provides for a maximum ramping rate at the dam of nine inches per hour. The Tribe contends that operations under this condition entail significant daily flow fluctuations, causing adverse effects on trout and other species in the reach below the J.C. Boyle dam and powerhouse that are documented in the record in the relicensing proceeding. In particular, the Tribe notes that, in a trial-type hearing conducted under the Energy Policy Act of 2005 (EPAct) to consider Interior's conditions,[3] the presiding administrative law judge (ALJ) found that the peaking operations kill large numbers of young fish and aquatic invertebrates through stranding, and that they adversely affect food availability for trout through increased energetic

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[2] Interior's ramping rate conditions would require the licensee to operate the J.C. Boyle development not to exceed an up-ramp or down-ramp rate of two inches per hour when conducting controlled flow events, as measured by gages at the powerhouse and below the dam. Interior's minimum flow conditions would require the licensee to release into the development's bypassed reach no less than 40 percent of the inflow into the reservoir, no less than 470 cubic feet per second (cfs) when calculated inflow is less than 1,175 cfs, and an amount equal to inflow when inflow is less than 470 cfs.

[3] Pursuant to the EPAct, Pub. L. 109-58, section 4(e) of the FPA was amended to provide that the license applicant and any party to a licensing proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing conducted by the relevant resource agency, on any disputed issues of material fact with respect to conditions submitted by the agency under section 4(e). PacifiCorp requested a trial-type hearing on, as pertinent here, Interior's section 4(e) conditions. On September 28, 2006, the presiding administrative law judge issued a decision on the disputed issues of material fact that had not been resolved during the hearing process. This decision was filed with the Commission in the docket for the relicensing proceeding.

demands on salmonids, low macroinvertebrate drift rates (a measure of food availability for trout), and reduced quality and abundance of drift forage for trout. The ALJ concluded that Interior's ramping rate conditions would mitigate this harm.

6. Similarly, the Tribe contends that there is substantial evidence in the record to support Interior's instream flow conditions. It cites statements and studies submitted by Interior and the Oregon Department of Fish and Wildlife (Oregon Fish and Wildlife) to the effect that the existing bypassed reach flows adversely affect spawning habitat and do not adequately provide for a healthy, productive fish community. It also states that the ALJ in the EPAct hearing on Interior's conditions found that the current flow regime contributes to the lack of available spawning gravel in the peaking and bypassed reaches, and that Interior's conditions would provide an overall increase in base flows that would allow for greater inundation of habitat suitable for spawning.

7. The Tribe states that the Commission has the authority to impose interim conditions in the project's annual license because the license contains at least three relevant reopener clauses. Article 58, the Commission's standard "fish and wildlife article," provides that the licensee shall, for the conservation and development of fish and wildlife resources, comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission, after notice and opportunity for hearing, upon a finding that such modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the purposes of the FPA. Article 36, which establishes the 9-inch per hour limitation on changes in the river level, provides that the permissible limits and rate of change will be subject to review and adjustment by the Commission from time to time, after notice and opportunity for hearing. Article 18 provides that the licensee shall release water from the project reservoir at such rate or volume as the Commission may prescribe for the protection of life, health, and property. With respect to the latter article, the Tribe states that it has federally protected property rights in the Klamath fishery and the water rights that support that fishery.

8. Citing *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC (Platte I)*,[4] the Tribe argues that failure to assess the need for protective conditions in an annual license is an abuse of the Commission's discretion. It contends that the Commission must consider temporary "rough and ready" measures to prevent environmental harm pending relicensing. Moreover, the Tribe asserts, given the project's continuing detrimental impact on trout and other aquatic resources and the immediate benefit that Interior's ramping rate and minimum flow conditions would provide to these resources, the Commission is required to impose these "rough and ready" measures while the relicensing proceeding remains pending.

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[4] 876 F.2d 109 (D.C. Cir. 1989).

9. The Tribe states that it holds federal Indian reserved fishing rights in the Klamath fishery, including the right to prevent other water users from depleting the river's waters below a level that is protective of the fishery. The Tribe argues that, because the United States has a trust responsibility to protect tribal trust resources, the Commission is required to order immediate compliance with Interior's ramping rate and minimum flow conditions.

10. PacifiCorp and Siskiyou County filed answers in opposition to the Tribe's motion. Collectively, they argue that the Tribe has failed to identify any substantial and irreversible harm that the existing minimum flow and ramping rate conditions are causing and that would warrant the extraordinary remedy of interim conditions. PacifiCorp points out that the Tribe has not shown that interim conditions are necessary to prevent harm to any species listed as threatened or endangered under the Endangered Species Act. The opponents assert that the redband trout fishery in the J.C. Boyle bypassed and peaking reaches is abundant, healthy, and of a high quality for sport fishing, as reflected in both the record and the decision in the EPAct proceeding. PacifiCorp states that the imposition of these conditions would raise the water temperature downstream of the natural springs in the bypassed reach, could violate Oregon state water quality standards, and would reduce power generation. Both opponents assert that adoption of these conditions would severely limit whitewater boating opportunities, an activity important to the county's economy. PacifiCorp adds that institution of a license amendment proceeding to consider these conditions as interim conditions would unnecessarily delay the relicensing proceeding.

Discussion

11. Where the Commission is apprised of the possibility that, pending relicensing, potential irreversible harm to important environmental resources may result from the operations of a hydropower project, the Commission must at least explore the need for interim protective conditions.[5] In *Platte I*, the court concluded that, where a license contained an express reservation of authority to impose environmental protective conditions, the Commission abused its discretion in refusing even to consider a request to assess the need for such conditions for wildlife in annual licenses pending the completion of relicense proceedings. In so ruling, the court noted that the Commission had been well aware of the existence of serious environmental threats to certain endangered species from the projects in question. The court stressed that the issue was not the resolution of the ultimate environmental/power issues but the consideration of temporary "'rough and ready' measures to prevent irreversible environmental damage pending relicensing."[6] On

[5] *Platte I*, 876 F.2d 109 at 116.

[6] *Id.* at 116.

remand, the Commission determined that certain aspects of the Platte River habitat "have degraded and will continue to degrade pending relicensing" as a result of project operations.[7] The Commission decided that interim conditions were justified since, in their absence, "project operations will continue to affect Platte River habitat, impeding the recovery of endangered or threatened bird species populations . . . and thereby may affect the continued existence of these species and result in irreversible environmental damage."[8] On that basis, the Commission adopted the interim conditions that had been proposed, with slight modifications; that order and the Commission's order on rehearing of that order[9] were affirmed by the court on appeal.[10]

12. In the present case, there is no question that the annual license, whose terms have been carried over from the original license, contains reopener provisions that would enable us to impose interim conditions to protect fisheries and aquatic resources if a need for such conditions were demonstrated. The issue is whether the record demonstrates a need for imposing the conditions proposed by the Tribe.

13. In his decision issued in the EPAct proceeding, the ALJ determined that current project operations had adverse effects on resident trout and other aquatic species and that Interior's section 4(e) conditions would help alleviate those effects. However, the record in that proceeding was developed in response to PacifiCorp's challenge to the factual bases supporting Interior's section 4(e) conditions and certain other agency conditions and prescriptions intended for the new license. The ALJ's decision did not purport to address the need for the imposition of conditions before completion of the relicense proceeding. Moreover, the record did not demonstrate either that project operations were causing "irreversible environmental damage" to resident trout or that imposition of those conditions was necessary to prevent such damage pending relicensing. As described collectively by the Tribe and the opponents to the Tribe's motion, the record in that proceeding in fact presents a picture of a healthy trout fishery which nevertheless sustains certain adverse effects that are caused by project operations and that may be alleviated by adopting Interior's conditions.

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[7] *Central Nebraska Public Power and Irrigation District and Nebraska Public Power District*, 50 FERC ¶ 61,180, at 61,532 (1990).

[8] 50 FERC ¶ 61,180 at 61,532.

[9] *Central Nebraska Public Power and Irrigation District and Nebraska Public Power District*, 51 FERC ¶ 61,257 (1990).

[10] *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC (Platte II)*, 962 F.2d 27 (D.C. Cir. 1992).

14. Since the Tribe filed its motion, Commission staff, in November 2007, issued a final Environmental Impact Statement (EIS) for relicensing the Klamath Project. In the EIS, staff found that the J.C. Boyle bypassed and peaking reaches support high quality fisheries for rainbow trout, as reflected by angler catch rates reported by Oregon Fish and Wildlife and PacifiCorp.[11] Staff found that the bypassed reach is popular for trout fishing and that catch records indicate good angler success.[12] While flow downramping in the bypassed reach has the potential to strand fish in areas of the channel that are relatively low-gradient or where pockets or side channels exist in the river channel, under current conditions downramping occurs rarely.[13]

15. As to the peaking reach, staff found that, according to 2006 stranding surveys, the first several peaking cycles of that year caused substantial mortality of small fish, crayfish, and invertebrates, with the potential to reduce the forage base available to trout and to adversely affect trout growth and survival. Flow fluctuations in the peaking reach may have the potential to cause fish stranding, especially for smaller fish that favor shallow-water habitats.[14] However, staff also found that, according to available information, the rainbow trout population in the peaking reach is highly productive. As reported by PacifiCorp, trout population estimates and angler catch rates in the Oregon section of this reach[15] are comparable to or exceed those reported for other high quality trout streams in Oregon.[16] Information from the California Department of Fish and Game indicated that annual angler catch rates in the California section of the peaking reach are among the highest of the wild trout rivers managed by that agency.[17]

16. The record analyzed in the EIS, which includes the record considered by the ALJ in the EPAct proceeding, does not depict a situation for which temporary "rough and ready" measures are necessary to prevent irreversible environmental damage pending relicensing. While existing operations cause some adverse effects to the trout fishery, that fishery is nevertheless thriving. The Tribe does not allege that interim conditions are

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[11] EIS at 3-243 and 257.

[12] *Id*. at 3-252.

[13] *Id*. at 3-256 and 5-38.

[14] *Id*. at 3-265.

[15] The upstream 11.1 miles of the 17.3-mile-long peaking reach is in Oregon, and the downstream 6.2 miles are in California. EIS at 3-258.

[16] EIS at 3-257, 3-264, and 5-40.

[17] *Id*. at 3-264 and 5-40.

necessary to protect any threatened or endangered species. The Tribe essentially argues that Interior's conditions would clearly alleviate some adverse effects on the fishery, and that this benefit might as well be realized now while the project is still operating under annual licenses, since the conditions will ultimately have to be included in the new license anyway. This is not the standard established by the court in *Platte I* for adopting the extraordinary remedy of imposing conditions on an annual license pending the outcome of a proceeding to issue a new license. While it is still unclear when the relicensing proceeding for the Klamath Project will be concluded, since water quality certification by Oregon and California has not yet been granted,[18] this factor does not diminish the need for a showing that proposed interim conditions are necessary to prevent irreversible environmental damage.

17. Moreover, the imposition of Interior's conditions on annual licenses for the Klamath Project would not be the simple matter that the Tribe suggests. Imposition of the conditions in an annual license would require a separate license amendment proceeding, for which there would have to be notice and an opportunity for comment. Further, any amendment that would result in an increased discharge at this development would require issuance or waiver of water quality certification from Oregon under section 401 of the Clean Water Act.[19] Since completion of the relicensing proceeding is itself awaiting issuance of water quality certification, there would be no environmental advantage in instituting yet another proceeding that could not be completed until water quality certification were issued.

18. The Tribe argues that immediate compliance with Interior's ramping rate and minimum flow conditions is necessary to meet the Commission responsibility to protect tribal trust resources. PacifiCorp disputes the nature of the fishing rights that the Tribe claims to have. It is unnecessary to address the extent of the Tribe's fishery rights here. The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. We carry out our responsibilities towards Indian tribes in the context of the FPA and other statutes that govern the Commission's actions.[20] As discussed above, the Tribe has not shown that there is a need for interim conditions in the annual license to prevent irreversible environmental damage to the fishery pending relicensing. Accordingly, the Tribe's rights can be adequately protected by taking their concerns into account and considering the effects of the Klamath Project on the Tribe's rights and interests.

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[18] Action on the applications for certification need not be taken by those states before February (Oregon) and September (California) 2009.

[19] *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003).

[20] *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997).

19. For these reasons, the Tribe's motion to impose interim conditions is denied.

The Commission orders:

The motion filed February 23, 2007, by the Hoopa Valley Tribe for imposition in the annual license for the Klamath Project No. 2082 of interim conditions to protect resident trout is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.