

126 FERC ¶ 61,236  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

PacifiCorp

Project No. 2082-053

ORDER DENYING REHEARING

(Issued March 19, 2009)

1. By order issued November 20, 2008, we denied a motion filed by Hoopa Valley Tribe (Tribe) to impose interim license conditions in the annual license for PacifiCorp's Klamath Hydroelectric Project No. 2082.<sup>1</sup> The Tribe has filed a request for rehearing of that order. For the reasons discussed below, we deny rehearing.

**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. As part of the relicensing proceeding, Interior filed conditions under section 4(e) of the Federal Power Act (FPA) for the protection of project lands administered by BLM.<sup>2</sup> As pertinent here, Interior's conditions would require the licensee to operate the

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<sup>1</sup> *PacifiCorp*, 125 FERC ¶ 61,196 (2008).

<sup>2</sup> 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.

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 conditions would also 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.

4. In its motion, the Tribe asked us to impose Interior's ramping rate and minimum flow requirements for the J.C. Boyle development as interim conditions. The Tribe asserted that these conditions are critical for the immediate protection of trout and other resident aquatic resources adversely affected by ongoing project operations, specifically the project's peaking operations, which cause daily flow fluctuations, and inadequate flows in the project's bypassed reach. The Tribe stated 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 argued 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 and that the Commission is required to consider temporary "rough and ready" measures to prevent environmental harm pending relicensing.

5. In denying the motion, we acknowledged that the Klamath Project license contains reopener provisions that would permit a license amendment to protect fisheries. We also agreed that we are required to explore the need for interim protective conditions when we are apprised of the potential for irreversible harm to environmental resources pending relicensing of a project. However, we found that the record compiled so far in the relicensing proceeding did not demonstrate that project operations were causing irreversible environmental damage to resident trout; rather, the trout fishery was thriving even though it sustained some adverse effects from existing operations. We concluded that the Tribe had not made a case for our adoption of the extraordinary remedy of imposing conditions on an annual license pending the outcome of a relicensing proceeding.

6. On rehearing, the Tribe contends that we applied the wrong legal standard for the imposition of interim conditions, that our interpretation of our authority to impose such conditions is inconsistent with the FPA and our own regulations, that we erred in determining that instituting an amendment proceeding on the interim conditions would provide no environmental advantage, and that we mischaracterized the health of the trout fishery. The Tribe asks us to impose, or to commence an appropriate amendment proceeding to impose, the ramping rate and minimum flow conditions prescribed by Interior under section 4(e) as interim protective conditions.

## Discussion

7. The Tribe argues that we erred by requiring a showing of “irreversible environmental damage” to justify imposition of interim conditions. It contends that we should order rehearing and grant its motion using the legal standard of license Article 58, which provides for modification of project operations based on substantial evidence that they are necessary and desirable.

8. The Tribe contends that we misconstrued the decisions in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC (Platte I and Platte II)*<sup>3</sup> as a restraint on our authority to impose interim conditions authorized by the terms of the license. It states that, in *Platte I*, the question was only whether the Commission abused its discretion by refusing to undertake any inquiry into the need for environmental protective conditions pending relicensing, while, in *Platte II*, the court simply found that substantial evidence supported the Commission’s decision to impose interim conditions under an “irreversible environmental damage” standard. In neither decision, the Tribe asserts, did the court hold that “irreversible environmental damage” was the legal standard that must be met in order to justify imposing interim conditions. Thus, the court did not hold, as the Tribe claims we suggested, that the Commission is categorically barred from imposing interim conditions absent a showing of “irreversible environmental damage.” Rather, the Tribe emphasizes, the court in *Platte I* stated that “Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary.”<sup>4</sup>

9. 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. At the same time, the court in *Platte II* expressed no reservation about our reliance on a showing of irreversible environmental damage to support the need for interim conditions in that instance. Moreover, the emphasis on irreversible environmental damage to a resource did not originate with us, as the Tribe seems to imply. The court in *Platte I* faulted the Commission for failing to assess the need for interim protection in the form of “temporary ‘rough and ready’ measures to prevent irreversible environmental damage pending relicensing.”<sup>5</sup> Elsewhere, the court referred to the Commission’s failure to seek the cooperation of the licensees “in preventing

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<sup>3</sup> 876 F.2d 109 (D.C. Cir. 1989) (*Platte I*) and 962 F.2d 27 (D.C. Cir. 1992) (*Platte II*).

<sup>4</sup> *Platte I*, 876 F.2d 109 at 118.

<sup>5</sup> *Id.* at 116.

irreversible harm to critical habitats.”<sup>6</sup> Thus, it is apparent that the court’s concern with the importance of assessing the need for interim conditions focused on the possibility of greater harm to a resource than simply the continuation of adverse effects. In neither *Platte* opinion did the court indicate that we would have a duty to investigate the need for interim protective conditions if some lesser adverse impact to a resource might be occurring.<sup>7</sup>

10. We discussed the *Platte* opinions in our previous order only because the Tribe characterized its request as one for interim protective conditions pending relicensing, and citing *Platte I*, contended that it would be an abuse of Commission discretion if we declined to assess the need for protective conditions in this circumstance. Further, the Tribe insisted that we were required to impose its proposed interim measures, given the project’s continuing detrimental impact on trout and the benefit that the proposed measures would provide. We discussed the role of irreversible environmental damage in *Platte* only to explain why the evidence relating to impacts on resident trout in this proceeding did not rise to the level of adverse effects on resources that supported the adoption of interim protective conditions in *Platte*. Moreover, nothing in the Tribe’s rehearing request causes us to believe that our denial of the Tribe’s motion was inconsistent with either *Platte* opinion. We undertook an assessment of whether protective conditions might be necessary pending relicensing, even though the situation here does not involve serious environmental threats to endangered species, the focus of the court’s concern in *Platte I*. Similarly, while the court in *Platte II* upheld our adoption of interim conditions to address irreversible environmental damage, that opinion does not require the adoption of interim conditions in this case, where such harm to the resource is not present.

11. The Tribe cites the *Platte I* court’s reference to Congress’s desire that we consider reopening licenses to adopt environmental conditions. We believe that, as long as we undertake an inquiry regarding the need for interim protective conditions, the 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. Indeed, even where there were threatened irreversible impacts to an

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<sup>6</sup> *Id.* at 117.

<sup>7</sup> In imputing to our order a misinterpretation of the court’s opinions, the Tribe may be influenced by our statement that its position was not “the standard established by the court in *Platte I* for adopting the extraordinary remedy of imposing conditions on an annual license.” *PacifiCorp*, 125 FERC ¶ 61,196 at P 16. We did not mean to suggest that the court established any particular standard that would have to be met if conditions were to be imposed but rather that it established a standard which, if met, would trigger an obligation to explore the need for interim protective conditions.

endangered species, the *Platte I* court, in remanding the proceeding, made it clear that the Commission “is certainly free to decide, based on substantial evidence, that new license conditions are not called for.”<sup>8</sup>

12. Here, where we do not have the prospect of such impacts, we examine a request to impose interim conditions under the terms of the license essentially in the same manner as if we were being asked to reopen the license. Indeed, the Tribe insists that license Article 58, which requires no prerequisite showing of irreversible environmental damage, establishes the appropriate legal standard for determining whether to impose interim conditions. Under Article 58 of the license, the licensee, as pertinent here, 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 and upon findings based on substantial evidence that such . . . modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the [FPA].

The Tribe asserts that the interim conditions it seeks are consistent with all of the standards of this article: evidence in the record shows that the conditions are necessary and desirable to protect the trout fishery; the conditions would not prevent continued generation of power or require substantial modifications to project facilities; and the conditions are consistent with the FPA since they are taken from Interior’s mandatory conditions submitted pursuant to FPA section 4(e).

13. The purpose of a reopener article such as Article 58 is to reserve Commission authority to direct modifications to project operations for the conservation of fish and wildlife resources, not to establish a legal standard that, if met, must result in the adoption of such modifications. While, under Article 58, any modifications that the Commission may direct must be based on substantial evidence that they are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the FPA, this language simply ensures that the licensee will not be required to modify project operations in the absence of these findings. Crafted by the Commission to preserve its discretion to modify project operations after a license is issued, Article 58 is not equivalent to a statutory or regulatory requirement for the imposition of operational

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<sup>8</sup> *Platte I*, 876 F.2d 109 at 119.

modifications. As the Tribe implicitly acknowledges, the terms of the license merely “authorize,” not require, the Commission to require modifications to project operations.<sup>9</sup>

14. We have explained that “[i]f, with the passage of time, a project is found to have unanticipated, serious impacts on . . . fishery resources, the Commission can reopen the license to determine what, if any, additional mitigation measures are required by the public interest, after notice and opportunity for hearing.”<sup>10</sup> In the November 20 Order, we considered the record and concluded that, while existing operations cause some adverse effects, the fishery is nevertheless thriving. 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.

15. The Tribe argues that our order denying its motion is inconsistent with FPA section 4(e), through which Congress, in its 1986 amendments to the FPA, intended to ensure that equal consideration be given to environmental resources in relicensing proceedings. Citing the court in *Platte I*, the Tribe emphasizes that Congress, at that time, also expressed the intention that the Commission consider the need for amending annual licenses to include necessary environmental conditions.<sup>11</sup> The Tribe contends that our failure to impose necessary interim conditions when we have clear authority to do so undermines Congressional intent and the mandatory conditioning authority of the Departments of the Interior and Commerce under FPA sections 4(e) and 18,<sup>12</sup> because it allows a licensee to avoid implementation of mandatory conditions by operating on annual licenses for years after license expiration when, as in the present proceeding, there is a perpetual delay in the relicensing proceeding. To avoid this result, the Tribe asserts,

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<sup>9</sup> See *California Sportfishing v. FERC*, 472 F.3d 593 (9<sup>th</sup> Cir. 2006), where the court, in a different context, stated that reopener provisions “do no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing.”

<sup>10</sup> *Ohio Power Company*, 71 FERC ¶ 61,092, at 61,314 n.43 (1995). We also noted there that the FPA does not require full replacement of all lost resources. In other words, the balancing we undertake under the FPA may result in some losses to some resources, as may be the case here. See also *City of New Martinsville, West Virginia*, 81 FERC ¶ 61,093, at 61,363 n.13 (1997); *Wisconsin Valley Improvement Company*, 80 FERC ¶ 61,054, at 61,166 n.40 (1997).

<sup>11</sup> *Platte I*, 876 F.2d 109 at 117-18.

<sup>12</sup> Under section 18 of the FPA, 16 U.S.C. § 811, the Commission must require a licensee to construct, operate, and maintain such fishways as the Secretaries of Commerce and of the Interior may prescribe.

the Commission should require compliance with final section 4(e) and 18 conditions in annual licenses whenever feasible.

16. Although Congress sought to ensure that increased attention be given to environmental concerns in issuing licenses, there is no basis for inferring an intention to have us routinely amend licenses to incorporate, as interim measures, proposed mandatory conditions that have been submitted in ongoing relicensing proceedings. The fact that resource agencies have fashioned conditions that they believe must be included in new licenses, which will have terms of at least 30 years, does not mean that those conditions are necessary to protect resources from harm that might occur to them pending the issuance of the new licenses. Again, in this proceeding, we considered whether it was necessary to adopt the section 4(e) conditions as interim conditions, and we determined that it was not. Undertaking this analysis fulfilled our obligation in respect to interim conditions.

17. The Tribe states that the Commission's regulations, at 18 C.F.R. § 16.18(d) (2008), authorize the Commission to incorporate interim conditions if "necessary and practical to limit adverse impacts on the environment," without requiring a showing of "irreversible environmental damage." The Tribe contends that, by requiring this more difficult showing, we have interpreted our authority in a manner that is inconsistent with our regulations. In making this argument, the Tribe again conflates Commission discretion with Commission obligation. The cited regulation provides that the Commission "may incorporate additional or revised interim conditions," not that it must, and a determination of what conditions are "necessary" is a matter for the Commission's judgment in each particular situation.

18. The Tribe argues that our interpretation of our authority violates our fiduciary duties to Indian tribes, because a prudent trustee would not wait for irreversible environmental damage to occur before acting to limit adverse impacts. However, this statement assumes that, if we do not act to impose interim conditions, irreversible environmental damage will occur. The evidence that we considered in our order denying the motion did not suggest that that would be the case, as noted more particularly below.

19. The Tribe contends that we mischaracterized the health of the trout fishery. It criticizes our finding that the trout fishery is "thriving" as based primarily on catch rates, which it asserts are misleading and not indicative of the actual health of the fishery. Relying particularly on the record and the findings of an administrative law judge (ALJ) in a trial-type hearing conducted to consider Interior's section 4(e) conditions,<sup>13</sup> the Tribe

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<sup>13</sup> As we explained in our order denying the motion, this hearing was held pursuant to the Energy Policy Act of 2005, Pub. L. 109-58, which amended section 4(e) of the FPA 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

(continued...)

argues that extreme daily flow fluctuations resulting from the development's peaking operations adversely affect the trout population through stranding of fish and microinvertebrates, increased energetic demands on resident fish, lack of food availability, downstream displacement of fish and macroinvertebrates, and reduced habitat. The Tribe insists that we should consider this evidence of adverse impacts using the correct legal standard, under which the protective interim conditions would be "necessary and desirable" for the conservation of the trout fishery.

20. In making this argument, the Tribe does not introduce new evidence but relies on information that we considered in our order denying its motion. There, we acknowledged the ALJ's determination that current project operations had adverse effects, which we noted specifically,<sup>14</sup> on resident trout and that Interior's section 4(e) conditions would help alleviate those effects. However, as we stated, the record in that proceeding was developed in response to PacifiCorp's challenge to the factual bases supporting Interior's section 4(e) conditions for the new license, and the ALJ's determination addressed whether there is sufficient evidence to support including these conditions for the term of the new license, not whether there is a need for interim measures pending completion of the relicensing proceeding.

21. Moreover, we concluded that a review of the record in the trial-type hearing and the Commission staff's subsequently-issued final Environmental Impact Statement (EIS) for relicensing the Klamath Project presented a picture of a generally healthy trout fishery, despite the adverse effects caused by project operations. Although the Tribe, on rehearing, questions the validity of relying on catch rates, which staff cited in its EIS as a measure of the quality of the trout fishery,<sup>15</sup> the conclusion in our order as to the general health of the fishery was based on an overall view of the evidence in those proceedings.

22. Despite the ALJ's findings of negative effects, the record does not suggest that the existing operations are causing the trout fishery to deteriorate to the extent that interim protective conditions are needed. Rather, the record depicts conditions that have persisted during the license term but have not prevented the maintenance of a trout fishery. Moreover, the Tribe does not argue that continued project operations would

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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 Interior's section 4(e) conditions, and the decision issued by Interior's presiding administrative law judge was filed with the Commission in the docket for the relicensing proceeding.

<sup>14</sup> *PacifiCorp*, 125 FERC ¶ 61,196 at P 5, 6, 14, and 15.

<sup>15</sup> EIS at 3-243 and 257.

impede the recovery of endangered species or their habitat in the absence of interim measures, as was the case in *Platte*. In any event, considering this evidence again here under the provisions of license Article 58, we do not find that it demonstrates that the proposed interim measures are necessary for the conservation of resident trout.

23. In denying the Tribe's motion, we explained that imposing the proposed conditions on annual licenses would require a separate license amendment proceeding, for which there would have to be notice and opportunity for comment, as well as issuance or waiver of water quality certification by Oregon under section 401 of the Clean Water Act. We stated that there would be no environmental advantage in instituting such an amendment proceeding now since completion of the relicensing proceeding itself is awaiting issuance of water quality certification. The Tribe argues that recent developments in the relicensing proceeding invalidate this rationale.

24. The Tribe notes that, on November 24, 2008, PacifiCorp filed with the Commission an Agreement in Principle, executed by it, the governors of California and Oregon, and the United States Departments of Agriculture, Commerce, and the Interior, for the continued operation and potential future removal of project facilities. Also, on November 25, 2008, PacifiCorp filed a copy of a proposed Interim Conservation Plan, developed with the National Marine Fisheries Service and U.S. Fish and Wildlife Service, under which PacifiCorp and the Services would work to develop a proposed license amendment that would incorporate the plan's interim conservation measures. The Tribe states that PacifiCorp anticipates that this plan would remain in effect for no more than five years after issuance of a biological opinion by the Services analyzing the proposed license amendment.

25. The Tribe concludes that, as envisioned in the Agreement in Principle, no new license will be issued in the foreseeable future and the project will continue to be operated under annual licenses. The Tribe asserts that this projected delay in issuing a new license underscores the need for adopting protective conditions for the trout fishery in the annual licenses, while a separate amendment proceeding to consider the Tribe's proposed interim conditions would not adversely affect the relicensing schedule since any amendment to incorporate the Interim Conservation Plan's conservation measures would also require issuance or waiver of water quality certification. The Tribe urges us to initiate an amendment proceeding now on its own motion for interim conditions and not to wait for PacifiCorp to initiate amendment proceedings on the Interim Conservation Plan, which, it asserts, contains no measures to address the project's effects on resident trout. The Tribe argues that, if we exercise our discretion to amend the annual licenses as proposed by PacifiCorp, we must also include the Tribe's proposed interim conditions.

26. The Agreement in Principle contemplates that the United States signatories would conduct further studies of the costs, feasibility, benefits, liabilities, and effects of removing four of the Klamath Project's developments, including J.C. Boyle. The United States would make a determination no later than March 31, 2012, as to whether the

facilities should be removed. If it is decided that they should be removed, they would be transferred, sequentially, to an entity that would remove them upon transfer, with a target date of 2020 for the transfer. If it is decided that the facilities should not be removed, the relicensing proceeding would continue. The Agreement in Principle is only provisional, and the signatories intend to supplant it with a final agreement to be executed by June 30, 2009.

27. While this proposal contemplates further delay in issuing a new license, we cannot be certain that delay is inevitable. The parties have not yet executed a final agreement, and it is uncertain whether resolution of the issues relating to the relicensing of this project will occur in accordance with such an agreement. Among other things, the proposal is dependent on prospective federal and state legislation whose passage is not assured. Further, PacifiCorp has not yet filed a request to amend the annual license to incorporate the Interim Conservation Plan, and we cannot speculate here as to our future disposition of such a request. In any event, even if the project continues to operate under annual license until the relicensing proceeding is concluded as envisioned in the Agreement in Principle, this does not alter the fundamental reason for our denial of the Tribe's motion, which is the Tribe's failure to convince us that harm to the resource requires amending the license to include the Tribe's interim conditions.

28. The evidence depicts environmental conditions that are less than ideal for resident trout, but it does not support a conclusion that the resource is declining or its habitat deteriorating. In the absence of such evidence, there is not now a more urgent need for interim conditions to protect resident trout simply because more time may pass before action is taken on the relicense application. In any event, our statement that there would be no environmental advantage in instituting yet another proceeding that would have to await water quality certification was only incidental to our determination that the protective conditions are not needed, and it was made primarily to point out why amending the license would not be as simple as the Tribe had suggested.

29. The Tribe does not convince us on rehearing that the proposed modifications to project operations are necessary as interim measures for the conservation of resident trout pending resolution of the relicensing proceeding. For this reason, the Tribe's request for rehearing of our previous order is denied.

The Commission orders:

The request filed December 19, 2008, by the Hoopa Valley Tribe for rehearing of our November 20, 2008 order denying its motion for interim license conditions is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.