

**KLAMATH RIVER BASIN
AND
HYDROELECTRIC PROJECT P-2082**

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September 2008

The status of PacifiCorp's proposed relicensing of the Klamath Hydroelectric Project, No. P-2082, is intertwined with issues and proceedings concerning persistently poor water quality and depressed Klamath River salmon runs above and below PacifiCorp's Project.

1. FERC Proceedings.

The FERC relicensing proceeding reached a plateau in November 2007 with issuance of the Final Environmental Impact Statement for Hydropower License, FERC/FEIS-0201F. App. 1. The FEIS examined PacifiCorp's application with the Commission for a new license for the Klamath Hydroelectric Project, which is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California, between Klamath Falls, Oregon and Yreka, California. The Klamath Project has a capacity rating of 169 megawatts (MW), about 2% of PacifiCorp's total capacity, and it generates about 1% (716,800 MWh) of PacifiCorp's average electricity production. The current license expired on March 1, 2006, and the Project is operating under a third annual license.

On March 29, 2006, the U.S. Departments of Commerce and Interior submitted joint preliminary fishway prescriptions. These called for full volitional upstream and downstream fish passage. There are, of course, currently no salmon runs above Iron Gate Dam, the lowest structure in the Klamath Hydroelectric Project, since no fish passage was constructed when Iron Gate was built in 1961. *See* Cal. Ore. Power Co. 25 F.P.C. 579 (Mar. 27, 1961). PacifiCorp filed alternative fishway prescriptions and also requested an administrative hearing pursuant to the Energy Policy Act of 2005. That 2006 hearing (one of the first of its kind under the new EPAct hearing procedures) culminated in a series of orders and findings upholding the prescriptions.¹

On January 29, 2007, Commerce and Interior submitted joint modified fishway prescriptions that took into consideration the results of the EPAct proceeding. FERC, never an agency to acknowledge settled law,² noted in the FEIS that the prescriptions "*may* need to be included in a new license for this project." (emphasis added).

As noted in the Executive Summary, the FEIS considers retirement of the Copco No. 1 and Iron Gate Dams, as well as retirement of J.C. Boyle, Copco I, Copco II and Iron Gate developments. App. 5-6. Table ES-1, App. 8, summarizes the effects of various alternatives, showing that incorporating the mandatory fishway conditions produces a net annual loss of \$20.2 million, retirement of Copco I and Iron Gate Dams would produce a net annual loss of \$6.6 million benefit; and retirement of all of the dams, a net annual loss of \$13.2 million.

2. The KBRA and Dam Removal Negotiations.

The deeply negative benefits of relicensing the Project while complying with treaty fishing rights, the Clean Water Act, and the Endangered Species Act, created an opportunity for

¹ *See*, <http://www.schlosserlawfiles.com/~hoopa/KlamathHydroProjEPActProc.pdf>.

² *See, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); *City of Tacoma v. FERC & Skokomish Indian Tribe*, 460 F.3d 53 (D.C. Cir. 2006) (holding that FERC has no discretion to reject prescriptions promulgated by Departments of Interior or Commerce pursuant to Section 4(e) or 18 of the Federal Power Act).

the parties to negotiate concerning retirement and removal of some or all of the dams. This fit nicely with the Bureau of Reclamation's and irrigation interests' (led by the Klamath Water Users Association and the Klamath Off-Project Water Users Association) wish to establish the seniority of their water rights over those of the Klamath Tribes of Oregon and downstream tribes in California. (The tribes currently have senior rights.) What followed was a long series of negotiation sessions, at first presided over by the Interior Department's representatives, but later by mediator Ed Sheets.

In November 2006, the California Energy Commission in cooperation with the Department of the Interior released a report on Klamath decommissioning costs, Economic Modeling of Relicensing and Decommissioning Options for the Klamath Basin Hydroelectric Project.³ PacifiCorp responded to the Report by retaining Christensen Associates Energy Consulting, LLC ("CAEC") to review the Report. CAEC contended that it found several flaws and argued that, with their corrections to the CEC Report, relicensing the Klamath Hydro Project would cost \$46 million less than decommissioning. App. 12. The CEC replied by issuing an addendum to its original report. The CEC insists that relicensing, including mitigation costs, creates the highest risk for PacifiCorp rate payers. *Id.* The CEC Report tends to support the FERC FEIS conclusions.

On January 15, 2008, approximately 20 negotiating parties (not including the licensee, PacifiCorp) released Draft 11 of the Proposed Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities ("KBRA").⁴ App. 14. That partial agreement proved both incomplete and highly controversial. It was incomplete largely because it depended for its effectiveness upon completion of a Klamath Hydroelectric Project Settlement Agreement (intended to be included as Appendix D of the KBRA), a document which still does not exist. *See* App. 15-16. It was controversial because analysis of the water flows projected at the present site of Iron Gate Dam showed that despite enlargement of Upper Klamath Lake and some planned water efficiencies in the Upper Basin, in approximately 40% of water year types, the flow at the site of Iron Gate Dam would not satisfy the flows required by the National Marine Fisheries Service's Biological Opinion regarding the Bureau of Reclamation's Klamath Project operations from June 1, 2002, through March 31, 2012. Table 9 of that document (BiOp at 70)⁵ prescribes the recommended long-term Iron Gate Dam discharge levels by water year type, a set of requirements made mandatory by *Pacific Coast Federation of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, U.S.D.C. N. Cal. No. C-02-2006 SBA, Order Granting Motion for Injunctive Relief following Remand (Mar. 27, 2006).⁶

3. Biological Opinions.

In October 2006, the Bureau of Reclamation issued a new Biological Assessment on Effects of the Proposed Action to Operate the Klamath Project from April 1, 2008 to March 31,

³ http://www.americanrivers.org/site/DocServer/Klamath_CEC_Report.pdf?docID=5181.

⁴ *See* <http://www.edsheets.com/Klamathdocs.html>.

⁵ <http://www.schlosserlawfiles.com/TrinityRiver/NMFS%20053102%20BiOp%20Table%209.pdf>.

⁶ <http://www.schlosserlawfiles.com/TrinityRiver/Order%20granting%20Inj%20032706.pdf>.

2018 on Federally-Listed Threatened and Endangered Species (“BA”).⁷ While the BA proposed lower flow levels for the Klamath River at Iron Gate than are found in Table 9 of the biological opinion, it nevertheless proposed flows that would exceed the output for the proposed Klamath Basin Restoration Agreement in several water year types.

On June 20, 2008, NMFS released its deliberative draft opinion on the Klamath Project proposal, concluding that the Bureau of Reclamation’s proposed operation is likely to jeopardize the continued existence of threatened Southern Oregon/ Northern California coast coho salmon and adversely modify or destroy its designated critical habitat. In the draft opinion, NMFS also noted that a final biological opinion of December 21, 2007, was also issued on FERC’s relicensing of PacifiCorp’s Hydroelectric Project. That consultation included continuing the current court-ordered Table 9 flow regime for the license duration and the future effects of fish passage caused by the FERC action. The 2007 opinion on relicensing reached a no-jeopardy conclusion. However, Reclamation’s BA proposed flows differ from the court-ordered flow regime and also failed to consider the future effects of fish passage. NMFS requested an independent peer review of its draft opinion and released the draft opinion for review by the Bureau of Reclamation, a review that continues.

4. Power Subsidies Removed.

On July 25, 2008, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission’s ruling in *Klamath Water User’s Ass’n v. FERC*, No. 06-1212. That case considered the contention that low-cost electric power for irrigation use in and around the Klamath River Basin pursuant to a contract first executed in 1917, would not be extended by the annual licenses issued to PacifiCorp.⁸ An excellent summary appears in the portion of the opinion at App. 19-22. Under orders issued by the Oregon and California Public Utilities Commissions, irrigation power rates will gradually rise to market levels over several years. Nevertheless, the phase-out of subsidies for water pumping costs is likely to reduce diversions from the river and improve conditions for fish and other aquatic life.

5. Clean Water Act Certifications.

Missing from the relicensing proceeding to date are certifications under Section 401 of the Clean Water Act, 33 U.S.C § 1341. While PacifiCorp made applications in 2006 for Section 401 certifications from the States of Oregon and California, those applications did not include the mandatory federal fishway conditions nor did they analyze whether discharges would affect the waters of the Hoopa Valley Indian Reservation, an “other state” within the meaning Section 401(a)(2).⁹

From 2006-08, PacifiCorp and the California State Water Resources Control Board engaged in a long colloquy concerning providing consultants to assist with the California Environmental Quality Act scoping and in preparing an Environmental Impact Report. Finally, a consultant was hired.

⁷ http://www.usbr.gov/mp/kbao/operations/2008_BA/Assessment_latest.pdf.

⁸ Notably, in this litigation, tribal and environmental organizations aligned with PacifiCorp in opposition to the irrigators’ power subsidy arguments.

⁹ <http://www.hoopa-nsn.gov/departments/tepa/waterquality.htm>.

On July 7, 2008, the State Water Resources Control Board announced planning times and locations for scoping meetings for the requested Section 401 water quality certification, to commence on July 22, 2008. However, on July 11, 2008, counsel for PacifiCorp withdrew PacifiCorp's California application for water quality certification, stating that its action was "to facilitate settlement negotiations for a long-term settlement of the Project." The abrupt halt to Section 401 proceedings in California has alarmed several parties.

PacifiCorp's withdrawal of that application might ordinarily have led FERC to postpone issuance of a Ready for Environmental Analysis notice, *see* 18 C.F.R. § 4.34(b)(5)(i). Here, it instead has stalled the proceedings. Attached at App. 23 is the July 28, 2008 letter of the Karuk Tribe of California protesting PacifiCorp's withdrawal of its application for water quality certification and urging the Commission to order implementation of the interim operating conditions to protect water quality and fisheries.¹⁰ Proceeding in a different direction, on August 30, 2008, Congressman Wally Herger asked the Commission for clarification concerning who would bear the cost of dam removal and for guidance on how rate payers would be affected. *See* App. at 25. Also, PacifiCorp responded to the State Water Resources Control Board on September 10, 2008, expressing concern at statements in the Water Board's letter to the Commission concerning the effect of the Project on water quality and fisheries and promising again to resubmit PacifiCorp's water quality certification application "soon." App. 26. Stay tuned.

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nmc:9/17/08

¹⁰ Karuk Tribe members and others also maintain that the PacifiCorp Project constitutes a nuisance, *McConnell v. PacifiCorp*, No. C07-02382 WHA (U.S.D.C. N.D. Calif.) (motions for summary judgment pending).

**FINAL ENVIRONMENTAL IMPACT STATEMENT
FOR HYDROPOWER LICENSE**

Klamath Hydroelectric Project
FERC Project No. 2082-027

Oregon and California

Federal Energy Regulatory Commission
Office of Energy Projects
Division of Hydropower Licensing
888 First Street, N.E.
Washington, DC 20426

November 2007

SUMMARY

This final environmental impact statement (EIS) for relicensing the Klamath Hydroelectric Project has been prepared by the staff of the Federal Energy Regulatory Commission (Commission or FERC) to fulfill the requirements of the National Environmental Policy Act (NEPA); the Commission's implementing regulations under Title 18, Code of Federal Regulations (CFR), Part 380; and the Council on Environmental Quality regulations for implementing NEPA (40 CFR Parts 1500-1508). The purpose of this document is to inform the Commission, the public, and the various federal and state agencies, tribes, and non-governmental organizations about the potential adverse and beneficial environmental effects of the proposed project and reasonable alternatives.

The Commission must decide whether to relicense the Klamath Hydroelectric Project and, if so, what conditions to place on any license issued. In deciding whether to authorize the continued operation of the hydroelectric project, the Commission must determine that the project will be best adapted to a comprehensive plan for improving or developing a waterway. In addition to the power and developmental purposes for which licenses are issued (e.g., flood control, irrigation, and water supply), the Commission must give equal consideration to the purposes of energy conservation; the protection and enhancement of fish and wildlife (including related spawning grounds and habitat); the protection and enhancement of recreational opportunities; and the preservation of other aspects of environmental quality.

The principal issues that we address in the EIS include the influence of project operations on water quality, including downstream of Iron Gate dam; approaches to facilitate the restoration of native anadromous fish within and upstream of the project; the influence of peaking operations at J.C. Boyle development on downstream biota and whitewater boating opportunities; the effect of project operations on archaeological and historic sites and resources of concern to various tribes; the effects of decommissioning East Side and West Side developments and removing Keno development from the project; and decommissioning other project developments.

PacifiCorp's Proposal

On February 25, 2004, PacifiCorp filed an application with the Commission for a new license for the Klamath Hydroelectric Project, located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California, between Klamath Falls, Oregon, and Yreka, California. The existing project occupies 219 acres of lands of the United States, which are administered by the U.S. Bureau of Land Management or the U.S. Bureau of Reclamation. The current license expired on March 1, 2006, and the project is operating under an annual license.

The existing Klamath Hydroelectric Project consists of eight developments, seven of which are located on the Klamath River. One of the seven developments, Keno, currently regulates water levels of Keno reservoir to facilitate irrigation withdrawals. It has no generation capabilities and PacifiCorp states that it no longer serves project purposes and should be deleted from the project. PacifiCorp also proposes to decommission East Side and West Side developments because the cost of installing screens that would be protective of federally listed suckers that reside in Upper Klamath Lake would be prohibitive. The remaining project developments on the mainstem of the Klamath River include J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate. The Iron Gate Fish Hatchery produces anadromous fish to compensate for lost spawning and rearing habitat between Iron Gate and Copco No. 2 dams. The eighth project development, Fall Creek, is on a Klamath River tributary that flows into Iron Gate reservoir. The installed capacity of the entire project is 169 megawatts (MW) and, on average, the project annually generates 716,800 megawatt-hours (MWh) of electricity.

PacifiCorp proposes to operate the five remaining developments in a manner similar to past operations with a set of 41 environmental measures (described in detail in section 2.2.3), the purposes of which include the following:

- Enhancement of the quality of project-influenced waters by installing a hypolimnetic oxygenation system at Iron Gate reservoir and evaluating other methods to increase dissolved oxygenation, decrease temperature, and decrease nutrient loading and associated problems.
- Enhancement of aquatic habitat in the J.C. Boyle bypassed and peaking reaches by increasing the minimum flows and controlling ramping rates.
- Elimination of the source of major slope failures downgradient of the J.C. Boyle emergency overflow spillway by installation of bypass valves at the powerhouse.
- Facilitation of fish passage at J.C. Boyle dam by installation of a surface collection system upstream of the dam and making improvements to the existing fish ladder.
- Enhancement of spawning habitat in the J.C. Boyle bypassed reach and downstream of Iron Gate dam by gravel placement.
- Enhancement of aquatic habitat downstream of the Fall Creek diversion by increasing the minimum flow to 5 cubic feet per second (cfs).
- Protection of habitat downstream of the Spring Creek diversion dam by not diverting flow during July and August and releasing a minimum flow of 1 cfs for the remainder of the year.
- Facilitation of fish passage at the Fall and Spring Creek diversion dams by installing fish screens and ladders at both sites.
- Enhancement of Iron Gate Hatchery stock management by purchasing and operating a facility capable of marking 25 percent of all Chinook salmon released.
- Management of vegetation resources by implementation of a vegetation resources management plan.
- Management of wildlife resources by implementation of a wildlife habitat management plan.
- Enhancement of recreational opportunities by improving existing and construction of additional recreation sites and facilities and implementation of a recreation resources management plan.
- Enhancement of the appearance of project facilities by reducing their visibility and contrast through vegetative screening at recreation sites and at J.C. Boyle and Iron Gate developments via implementation of a visual resources management plan.
- Coordination of the management of project roads via implementation of a Project Roadway Management Plan.
- Protection of archaeological and historic resources via implementation of a Historic Properties Management Plan.

Staff Alternative

After evaluating PacifiCorp’s proposal, along with the terms and conditions, prescriptions, and recommendations from resource agencies, tribes, and other interested parties, we compiled a set of environmental measures to address the resource issues raised in the proceeding. We call this the “Staff Alternative” (described in detail in section 2.3.2). The Staff Alternative incorporates most of PacifiCorp’s proposed environmental measures, but in some instances, with modifications. Key modifications include:

- Implementation of turbine venting as an initial dissolved oxygen enhancement measure, rather than hypolimnetic oxygenation, and further evaluation of other measures to enhance

water quality with identification of time frames during which specific actions identified during the evaluation would be implemented.

- Implementation of an integrated fish passage and disease management program, including the installation of a downstream passage and fish collection facility at J.C. Boyle dam, modifying adult collection facilities at Iron Gate dam to facilitate trapping and hauling of adult anadromous fish, evaluation of survival of outmigrating wild smolts at project reservoirs, spillways, and powerhouses, an experimental drawdown of Copco and Iron Gate reservoirs to assess effects on smolt outmigration and water quality, water quality monitoring in project reservoirs and to the mouth of the Klamath River, including major tributaries, to assess project contributions to factors that may cause fish diseases in the lower river, and evaluation of the most feasible and effective means to pass fish to and from project waters and minimize the risks associated with fish diseases that are project related.
- Implementation of an adaptive sediment augmentation program in the J.C. Boyle bypassed reach and downstream of Iron Gate dam based on habitat mapping.
- Implementation of a maximum downramping rate of 2 inches per hour during the first peaking cycle after extended periods of run-of-river operation, which would gradually be increased during each subsequent day until PacifiCorp's proposed ramping rates are achieved.
- Increasing the minimum flow in the Copco No. 2 bypassed reach to 70 cfs.
- Increased funding responsibilities for Iron Gate Hatchery operation and maintenance, tagging operations, and full funding of Fall Creek rearing facility operations.
- Implementation of a hatchery and genetics management plan.
- Addition of operation and maintenance responsibilities for Topsy Campground and Day Use area at J.C. Boyle development.
- Inclusion of Fall Creek and Copco No. 2 powerhouses and Copco No. 2 substation in the visual resources management plan.
- Expansion of the geographic scope of PacifiCorp's proposed area of potential effects pertaining to the protection of cultural resources.

The Staff Alternative includes 25 environmental measures in addition to those proposed by PacifiCorp.

Staff Alternative with Mandatory Conditions

Section 18 of the Federal Power Act, 16 U.S.C §811, states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as the Secretaries of the U.S. Department of Commerce (Commerce) and U.S. Department of Interior (Interior) may prescribe. In March 29, 2006, filings with the Commission, Commerce and Interior submitted joint preliminary fishway prescriptions for anadromous and resident fish consisting of 7 general prescriptions and 31 development-specific prescriptions, summarized in section 2.3.1.2. PacifiCorp filed alternative fishway prescriptions by letter dated April 28, 2006, in accordance with section 241 of the Energy Policy Act of 2005, that take an adaptive approach for restoring anadromous fish to historically accessible habitat. On January 29, 2007, Commerce and Interior submitted joint modified fishway prescriptions that take into consideration the results of the Energy Policy Act of 2005 proceeding.

Section 4(e) of the Federal Power Act gives the Secretary of Interior authority to impose conditions on a license issued by the Commission for hydropower projects located on "reservations"

under the Secretary's supervision (16 U.S.C §§796[2], 797[e]). In a March 29, 2006, filing with the Commission, Interior submitted nine preliminary section 4(e) conditions (seven with multiple components) on behalf of the Bureau of Land Management and 7 preliminary section 4(e) conditions (one with multiple components) on behalf of Reclamation (see section 2.3.13). PacifiCorp filed alternative section 4(e) conditions to most of the measures specified by Interior by letter dated April 28, 2006, in accordance with section 241 of the Energy Policy Act of 2005. The alternative conditions, in general, either eliminated the 4(e) condition or reduced the scope of the measure described in the 4(e) condition. On January 29, 2007, Interior, on behalf of the Bureau of Land Management submitted revised section 4(e) conditions that take into consideration the results of the Energy Policy Act of 2005 proceeding.

When finalized, the fishway prescriptions and 4(e) conditions may need to be included in a new license for this project. Incorporation of these mandatory conditions into a new license would cause us to modify or eliminate some of the environmental measures that we include in the Staff Alternative. Because the Staff Alternative does not include East Side, West Side, and Keno developments, we do not include any mandatory conditions associated with these developments in this alternative. Key differences in this alternative compared to the Staff Alternative include the following:

- The minimum flow in the J.C. Boyle bypassed reach would be increased from 200 to 470 cfs or more.
- The ramping rates in the J.C. Boyle peaking reach would be considerably more restrictive.
- J.C. Boyle powerhouse would only be able to operate in a peaking mode once per week.
- The integrated fish passage and disease management program would be replaced by the installation of fishways at each development.
- PacifiCorp would be responsible for operating, maintaining, and monitoring the Spring Island Boaters access, Klamath River Campground, scouting trails at major rapids along the J.C. Boyle peaking reach, and dispersed day-use sites on Bureau of Land Management administered lands.

Retirement of Copco No. 1 and Iron Gate Developments

We have identified for analysis two dam removal and development retirement alternatives, one consists of the removal of Copco No. 1 and Iron Gate developments from the project. This alternative is intended to address water quality issues that originate in the reservoirs associated with both developments, facilitate restoration of anadromous fish to habitat upstream of Iron Gate dam, and retain a substantial portion of the generation capability of the project. In this alternative, we modify or eliminate some of the environmental measures that we include in the Staff Alternative. Key differences in this alternative compared to the Staff Alternative include the following:

- Potential corrective actions to enhance water quality would no longer be necessary, and the water quality management plan would be replaced with a water quality monitoring plan.
- J.C. Boyle and Copco No. 2 developments would operate in a run-of-river mode.
- Sediment augmentation downstream of Iron Gate dam would be eliminated.
- The integrated fish passage and disease management program would be replaced by the installation of upstream and downstream fishways at Copco No. 2 dam, and the spillway of Copco No. 2 dam would be modified to protect downstream migrating smolts.
- Anadromous fish collected at the existing fish ladders at Iron Gate Hatchery and the base of Iron Gate dam not needed for hatchery brood stock would be transported by truck to the upper end of Copco reservoir during the first year from license issuance to establish naturally

reproducing populations prior to the elimination of salmonid stock from Iron Gate Hatchery. When Copco No. 1 dam is removed and upstream and downstream fishways are constructed at Copco No. 2 dam, all fish collected in excess of brood stock would be transported by truck to Iron Gate reservoir until the beginning of deconstruction of Iron Gate dam, which would occur about 5 years from license issuance.

- Funding obligations for Iron Gate Hatchery would increase to provide 100 percent of the cost of operating the hatchery until Iron Gate dam is removed, after which the disposition of the hatchery would be determined. The Fall Creek rearing facility would not be funded.
- Operation and maintenance requirements for existing recreational facilities at Copco No. 1 and Iron Gate developments would be eliminated, as would proposed new facilities at both developments.
- A new day use area would be constructed near Copco No. 2 dam that would also serve as a whitewater boater take-out point for boaters putting in downstream of J.C. Boyle dam. PacifiCorp would no longer be responsible for maintaining Fishing Access sites 1-6 and the State Line Take-out facility.
- Proposed visual enhancements at Iron Gate development would be eliminated.
- Consultation with the California Historic Preservation Officer regarding measures to protect or mitigate for historic properties associated with both developments would be necessary.

Retirement of J.C. Boyle, Copco No. 1, Copco No. 2 and Iron Gate Developments

The second dam removal and development retirement alternative would entail removal of the four lowermost project dams on the mainstem of the Klamath River. The Fall Creek development, with an authorized capacity of 2.2 MW, would be the only remaining project development in a new license for this project, assuming East Side, West Side, and Keno developments are removed from the project, as PacifiCorp proposes. As with the previously discussed two dam removal alternative, this alternative is intended to address water quality issues that originate in the reservoirs associated with Iron Gate and Copco No. 1 developments, and facilitate restoration of anadromous fish to habitat upstream of Iron Gate dam. In this alternative, we modify or eliminate most of the environmental measures that we include in the Staff Alternative. Key differences in this alternative compared to the two dam removal alternative include the following:

- All sediment augmentation would be eliminated.
- Upstream and downstream fishways would not be constructed at Copco No. 2 dam, but anadromous fish would still be trapped at Iron Gate dam and trucked to the upper portion of Copco reservoir until Copco No. 1 and Copco No. 2 dams are removed. Anadromous fish then would be placed in Iron Gate reservoir until the beginning of Iron Gate dam deconstruction, about 5 years following license issuance.
- Operation and maintenance requirements for existing recreational facilities at J.C. Boyle development would no longer be implemented, as would proposed new facilities at this development. The only recreational facility remaining in the project would be the proposed Fall Creek trail, and the recreation resources management plan would be modified to only account for construction, operation, and maintenance of this trail.
- Our recommended visual enhancements at Copco No. 2 development would be eliminated.
- Consultation with the Oregon and California Historic Preservation Officers regarding measures to protect or mitigate for project-related historic structures associated with all four developments would be necessary.

Other Alternatives Considered

Under the No-action Alternative, the project would continue to operate under the terms and conditions of the existing license and existing agreements. No new environmental measures would be implemented. We use this alternative to establish baseline conditions for comparison with PacifiCorp's Proposal, the Staff Alternative, the Staff Alternative with Mandatory Conditions, the Retirement of Copco No. 1 and Iron Gate Developments, and the Retirement of J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate Developments, and to judge the benefits and costs of any measures that might be required under a new license. We also considered federal takeover, issuance of a nonpower license, project decommissioning with dams in place, and decommissioning Fall Creek development, but concluded that none of these alternatives are reasonable in the context of this proceeding.

Project Effects

We summarize the more substantial differences between PacifiCorp's Proposal, the Staff Alternative, the Staff Alternative with Mandatory Conditions, Retirement of Copco No. 1 and Iron Gate Developments, and Retirement of J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate Developments in table ES-1. Based on our detailed analysis of the environmental benefits and costs associated with the four alternatives considered in detail in this EIS, we conclude that the best alternative for the Klamath Hydroelectric Project would be to issue a new license consistent with the environmental measures specified in the Staff Alternative.

Table ES-1. Summary of effects of PacifiCorp’s Proposal, the Staff Alternative, the Staff Alternative with Mandatory Conditions, Retirement of Copco No. 1 and Iron Gate Developments, and Retirement of J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments. (Source: Staff)

| Resource | PacifiCorp’s Proposal | Staff Alternative | Staff Alternative with Mandatory Conditions | Retirement of Copco No. 1 and Iron Gate Developments | Retirement of J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate Developments |
|-------------------------------|---|--|---|---|--|
| Power Benefits | | | | | |
| Annual generation (MWh) | 675,738 | 663,381 | 533,879 | 443,694 | 12,817 |
| Net annual power benefits | \$17,031,370 | \$2,076,740 | -\$20,244,360 | -\$6,571,040 | -\$13,186,870 |
| Geology and Soils | | | | | |
| Sediment Supply and Transport | Relatively minor enhancement of spawning gravel supply from recurring placement in J.C. Boyle bypassed reach and downstream of Iron Gate dam. | Deposition of sediment downstream of J.C. Boyle dam would provide a moderate enhancement of spawning gravel supply and could increase channel complexity and enhance riparian habitat in the bypassed reach. Diverting all flow to the J.C. Boyle bypassed reach for 7 days during the spring, when inflows to the reservoir exceed 3,300 cfs could serve to transport deposited, and naturally occurring sediment from the bypassed reach into the peaking reach, where it could also enhance habitat. Amount and frequency of sediment | Same as Staff Alternative | Similar to Staff Alternative for J.C. Boyle bypassed reach. During and immediately after removal of Copco No. 1 and Iron Gate dams, about 84 percent of the eroded sediment would remain in suspension until it reached the ocean (GEC, 2006). If Copco No. 1 dam is removed before Iron Gate dam, about 40 percent of the resuspended sediment would pass through Iron Gate reservoir, and remain in suspension in the lower Klamath River. Copco No. 2 dam may trap some sediments released from Copco reservoir, but would | Similar to Retirement of Copco No. 1 and Iron Gate dam alternative. Most sediment released from J.C. Boyle is expected to be sand, which would settle out relatively quickly. Sediments would no longer be prevented from moving downstream by project dams, which would enable more natural fluvial geomorphic processes to occur, thus enhancing |

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**ECONOMIC MODELING OF RE-LICENSING AND
DECOMMISSIONING OPTIONS FOR THE
KLAMATH BASIN HYDROELECTRIC PROJECT**

ADDENDUM A

***Response to PacifiCorp's
Comments on the
Klamath Project Alternatives
Analysis Model***

CONSULTANT REPORT

Prepared for:
California Energy Commission

In Cooperation with:
U.S. Department of the Interior

Prepared by:
M.Cubed

RESPONSE TO PACIFICORP'S COMMENTS ON THE KLAMATH PROJECT ALTERNATIVES ANALYSIS MODEL

After reviewing the PacifiCorp filing to the Federal Energy Regulatory Commission (FERC), the California Energy Commission issues this addendum to the original *Klamath Project Alternatives Analysis Model Consultant Report (KPAAM Consultant Report)*. This supplement includes new analysis based on information provided by PacifiCorp that shows that it makes more economic sense to remove the dams and buy replacement power than the earlier analysis had indicated. The Klamath Project Alternatives Analysis Model (KPAAM) original inputs were revised and the appropriate corrections from PacifiCorp's consultant were used. The results reconfirm and strengthen staff's original results -- based on the new inputs and assumptions, decommissioning the project, rather than relicensing, **increases** the economic benefits to PacifiCorp's ratepayers ranging from \$32 million to \$286 million.

Background

The Klamath River is one of the most important rivers for imperiled populations of Chinook salmon, Coho salmon, and steelhead trout on the West Coast of the United States. PacifiCorp's 169-megawatt Klamath Hydroelectric Project is a major contributor to the loss of salmon from more than 300 miles of habitat in the upper Klamath Basin. The FERC is reviewing the project's existing Federal Power Act license and will impose mitigation measures to reduce environmental impacts if it issues a new license. The *KPAAM Consultant Report* shows that decommissioning the project and replacing its electricity from other sources is more cost effective than relicensing the project and installing fish ladders and water quality improvement devices to meet modern legal and scientific standards.

The California Energy Commission–Department of Interior Consultant Report *Economic Modeling of Relicensing and Decommissioning Options for the Klamath Basin Hydroelectric Project* is the only thorough, objective and transparent assessment tool that analyzes the cost differences between two broad alternatives. The first option is to decommission the four hydroelectric dams (Copco 1 and 2, Irongate and JC Boyle), purchase replacement power over a 30-year license period and restore the Klamath Basin salmon fisheries. The second option is to relicense the four dams with full mitigation measures. This is the first time an objective study has been done that examines the complete economics of a hydroelectric facility and identify the optimal benefits for everyone – PacifiCorp's ratepayers and shareholders, farmers, tribes, salmon fishermen, salmon and the public.

The government agencies developed a rigorous and transparent economic model, KPAAM, to provide the parties involved with relicensing and settlement negotiations the best possible analysis of the economic pros and cons of the

relicensing and decommissioning options. Dr. Richard McCann of M.Cubed, a well qualified and highly regarded energy economics firm¹ prepared the model and report. The study uses standard economic analysis methods and the best available public data in a broad range of technical areas, including mitigation costs, operational and investment costs, risk factors and power forecasts. Because PacifiCorp declined to contribute to the modeling work with specific, relevant inputs or assumptions, much of the data was drawn from PacifiCorp's own certified filings with the Federal Energy Regulatory Commission (FERC) and filings and attestations before the Public Utilities Commissions in Oregon and California.

KPAAM was designed as a tool for public discourse and clearly states that the inputs can and should be changed to reflect different assumptions or accommodate new information as it becomes available. The analysis was not intended to provide a "precise" forecast, instead offering a range of plausible economic outcomes.

The Energy Commission and other agencies welcome a good faith scrutiny of the KPAAM. This model was developed to allow other stakeholders to add their preferred assumptions and data to the model.

Review of PacifiCorp/Christensen Associates' Critique

PacifiCorp retained Christensen Associates Energy Consulting, LLC (CAEC), to review the KPAAM. CAEC contended that it found a "number of flaws" and in their judgment determined that KPAAM is not "capable of providing an adequate assessment of whether the Klamath Project should be relicensed."

This assertion that the model is not credible is not supported by the CAEC report. PacifiCorp's consultants did not fault the fundamental principles and structure of KPAAM. The staffs of both the California Energy Commission and the Department of the Interior (DOI) agree that the CAEC review supports KPAAM as a rigorous, flexible and well-designed model that is appropriate as the primary economic analytic tool for the Klamath project. The KPAAM is the only economic analysis model that has been developed and made available to all parties in the settlement negotiations and relicensing proceedings.

CAEC did not criticize the model's basic principle that "options should be evaluated when directly comparing relicensing to decommissioning." As stated in the *KPAAM Consultant Report*, PacifiCorp must invest substantially in either mitigation or decommissioning to bring the Klamath into conformance with modern environmental regulations. The FERC license expired March 2006 for this facility and status quo operations will end when a new license is issued.²

¹ The U.S. Bureau of Reclamation's Technical Services Center prepared the hydrological model for KPAAM.

² PacifiCorp is currently operating the Klamath Project on an annual FERC license extension using the old license conditions until a decision is made by FERC.

More importantly, the CAEC critique makes a **stronger** case for decommissioning when their data is used in the KPAAM model.

CAEC identified 14 "errors" that can be sorted into four categories:

1. Input and logic flow errors due to the complexity of data and model
2. Data inputs incorrectly labeled by CAEC as "errors" when the "best available public data" was used because PacifiCorp did not share or disclose the necessary information.
3. Incorrect changes by CAEC to the original KPAAM assumptions and inputs that remain unchanged because they are accurate.
4. Differences in professional practices between CAEC and California and federal government economists and analysts that result in differing perspectives and must continue to be discussed.

CAEC argues that with their corrections to KPAAM, relicensing the Klamath hydro project would be \$46 million less than decommissioning (using the assumptions for the midline case and PacifiCorp's 2005 power forecast). The cost increase results described in CAEC report using the KPAAM model cannot be duplicated.

Putting Risk and Costs in the Proper Context – Considering Additional Factors

Relicensing with the associated mitigation costs creates the highest risk for PacifiCorp ratepayers. The engineering and scientific issues associated with trying to maintain power production and mitigate impacts are complex and expensive. The *KPAAM Consultant Report* finds that mitigation to stop and begin reversing the environmental damage from the Klamath hydroelectric operations will cost between \$230 and \$470 million, power production will be reduced by 23 percent, and the project will be unable to provide quick power during peak periods of electricity demand. The PacifiCorp ratepayers will bear the greatest economic risk for unsuccessful mitigation strategies aimed at fisheries and water quality. PacifiCorp shareholders and ratepayers risk not recouping all of the potential costs associated with long-term mitigation and power production. Ultimately, the Oregon and California Public Utilities Commissions will determine the accurateness of the cost accounting.

Cost is just one of the parameters used by the FERC and the regulatory agencies to determine the best possible outcome for the endangered salmon fisheries, tribes, salmon fishermen, basin farmers, and PacifiCorp ratepayers. The correct interpretation of the *KPAAM Consultant Report* is that within a range of power cost estimates and mitigation estimates, it would be less costly to decommission than to relicense. To account for uncertainty and the need for ongoing refinement of potential relicensing and decommissioning costs, the *KPAAM Consultant Report* includes an error range of plus or minus 30 percent. The resulting range of the cost differences - from low to high - is nearly \$300 million over a 30-year study period. The changes recommended by the CAEC,

and the CAEC contention that their results using the corrections are correct, are well within this error range and do not alter the overall conclusion that decommissioning costs are lower than relicensing costs.

PacifiCorp asserts that KPAAM ignores significant additional risks associated with decommissioning and securing replacement power, including: 1) risk of removing an emissions-free generating resource in an era of increasing regulatory scrutiny on greenhouse gas emissions, 2) unknown costs of sediment removal and mitigation (including sediment management); and 3) possible ongoing legal liability related to unexpected outcomes of removal.

1) Risks of Greenhouse Gas Emissions and Replacement Power

Decommissioning the Klamath project will require PacifiCorp to find replacement power. The 169-megawatt (MW) Klamath project represents about two percent of PacifiCorp's total capacity and about one percent of PacifiCorp's average electricity production. Electricity generated from PacifiCorp's 6,585 megawatts (MW) of coal accounts for 78 percent of PacifiCorp's generating capacity and 68 percent of its total power production.

Replacing electricity from the Klamath Project can be done without increasing greenhouse gas emissions, while allowing for the restoration of a significant salmon fishery. The *KPAAM Consultant Report* includes a carbon neutral energy replacement option – the Oregon Department of Energy (DOE) proposal for 30 MW of energy efficiency and 30 MW of biomass – at an estimated cost below the cost of natural gas power plant replacement options.

2) Risks of Dam Removal

PacifiCorp alleges the KPAAM does not account for financial risks associated with dam removal, sediment management and site restoration. This is not correct. The *KPAAM Consultant Report* relies on *Klamath River Sediment and Dam Investigation*³. The report concludes that the toxicity of the sediment is low and will not affect the method or cost of dam removal, and that downstream erosion of sediment is a feasible method of sediment management under a dam removal scenario. The same consultant has done similar engineering studies for other dam decommissioning projects in the Pacific Northwest. Energy Commission staff is not aware of any documented engineering analysis that contradicts these results.

3) Risks of Legal Liabilities

PacifiCorp is correct that KPAAM does not quantify potential legal liabilities for the decommissioning scenario. The model makes no representations about potential legal liabilities for either scenario. Both scenarios entail some risk of legal liabilities; for relicensing these would include the Clean Water Act TMDL

³ *Klamath River Sediment and Dam Investigation*, Gathard Engineering, November 2006, and submitted to the FERC record by the California Coastal Conservancy

PROPOSED
KLAMATH RIVER BASIN RESTORATION AGREEMENT
FOR THE
SUSTAINABILITY OF PUBLIC AND TRUST RESOURCES AND AFFECTED
COMMUNITIES

January 15, 2008 (Draft 11)

January 15, 2008 (Draft 11)

Confidential and Privileged Settlement Communication

1.2. General Recitals.

1.2.1. Klamath Hydroelectric Project.

The Klamath Hydroelectric Project (FERC No. 2082), located on the Klamath River and its tributaries, blocks the upstream passage of anadromous and other fish at River Mile 195 and has other adverse impacts as a result of flow regulation. Through the Klamath Hydroelectric Project Settlement Agreement (Appendix D) (Hydropower Agreement), the Parties and PacifiCorp have agreed to propose for Regulatory Approvals measures for interim operations and eventual removal of dams and appurtenant facilities as an alternative to a new license.

1.2.2. Klamath Reclamation Project and Other Irrigation Deliveries.

The Parties enter into this Agreement to resolve longstanding disputes between them regarding the amounts, timing, and other conditions of diversion and delivery of water for irrigation, National Wildlife Refuges, and related uses within the Klamath Reclamation Project and by non-federal entities in the Upper Klamath Basin; regarding flows and lake levels that support Fish Species and wildlife. The resolution achieved here is intended to protect the sustainability of the agricultural uses and communities along with public and trust resources.

1.2.3. Sustainable Tribal Communities.

Tribes in the Klamath River Basin have lived in the Basin for millennia and are expected to continue to do so using sustainable resource-based economies. There are tribal fishing rights in various locations that have associated water rights for the fish to propagate and produce sufficient numbers for harvest. The Tribes, irrigators, and the United States have differed in administrative and judicial settings over the amounts of water needed for fish. This Agreement seeks to resolve these substantial differences and also to provide the Tribes with both sustainable natural resources and sustainable communities.

1.3. Goals of the Agreement.

The Agreement is intended to result in effective and durable solutions which: (i) in concert with Dam Removal, restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin; (ii) establish reliable water and power supplies which sustain agricultural uses and communities and National Wildlife Refuges; (iii) contribute to the public welfare and the sustainability of all Klamath Basin communities through these and other measures provided herein to resolve the disputes described in Section 1.2.

1.4. Structure of Agreement.

The Agreement consists of nine parts.

Confidential and Privileged Settlement Communication

Part I (Sections 1 - 7) states general provisions. These include the purpose of the Agreement, the Parties' obligations to support and implement, funding, dispute resolution, governance, and other general provisions.

Part II (Section 8) states the Parties' obligations to support the Hydropower Agreement (Appendix D). This provides for the removal of the Hydropower Project under conditions that protect and advance the public interest.

Part III (Sections 9 - 13) states the Fisheries Habitat Restoration, Reintroduction, and Monitoring Program. This will contribute to the sustainability and robust harvestable surplus of anadromous and other fisheries throughout the Klamath Basin.

Part IV (Sections 14 - 19) states the Water Resources Program. This consists of schedules, plans, and other provisions to substantially change the management of delivered water supply for irrigation and related uses in the Klamath Reclamation Project, Upper Klamath Basin, and National Wildlife Refuges. Additionally, it addresses other matters related to the Klamath Reclamation Project and the National Wildlife Refuges.

Part V (Sections 20 – 24) states the regulatory assurances under the federal Endangered Species Act and other laws, related to the performance of the Fisheries and Water Resources Programs.

Part VI (Sections 25 - 28) states the Power Resources Program. This will provide power cost security for the Klamath Reclamation Project and Off-Project Water Users and will result in efficiency improvements and renewable power.

Part VII (Sections 29 – 32) states the Counties' Impacts Mitigation and Benefits Program. This will assure that the removal of the Hydropower Project and the performance of other obligations under this Agreement will occur in a manner that benefits the interests of Klamath County, Oregon; Humboldt and Siskiyou Counties, California and their residents.

Part VIII (Sections 33 - 36) states the Tribal Program. This will assure that the removal of the Hydropower Project and the performance of other obligations under this Agreement will occur in a manner that benefits the interests of the Hoopa Valley Tribe, Karuk Tribe, Yurok Tribe, and Klamath Tribes and their members.

Part IX (Sections 37 – 39) provides for execution of the Agreement.

The Appendices are certain documents which implement the Agreement.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 13, 2007

Decided July 25, 2008

No. 06-1212

KLAMATH WATER USERS ASSOCIATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

PACIFICORP, ET AL.,
INTERVENORS

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

George K. Kiely argued the cause for petitioner. On the briefs was *Edward A. Finklea*.

Samuel Soopper, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. On the brief were *John S. Moot*, General Counsel, *Robert H. Solomon*, Solicitor, and *Jeffery S. Dennis*, Attorney.

Sam Kalen, *Michael A. Swiger*, *Charles R. Sensiba*, *Thomas P. Schlosser*, *Glen H. Spain*, *Howard M. Crystal*, and *Joshua Randolph Stebbins* were on the brief for intervenors in support of respondent.

Before: HENDERSON, GARLAND, and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: For nearly one hundred years, the operator of the Link River Dam provided low-cost electric power for irrigation use in and around the Klamath River Basin in southern Oregon and northern California, pursuant to a contract first executed in 1917 and later extended in connection with the licensing of the dam. In 2006, the Federal Energy Regulatory Commission (FERC) decided that an annual license issued to the dam's operator would not include the terms of that contract. The Klamath Water Users Association (KWUA) challenges that decision as error.

We cannot reach the merits of KWUA's challenge because it has not shown that the injury to its members would be redressed by a favorable ruling from this court. California and Oregon have independent authority to fix the rates charged by the operator to its retail customers, and each has already held that it will not be bound by the contract rates. KWUA has offered no reason to believe that a decision requiring FERC to include the contract in the operator's annual license would affect those state decisions.

I

KWUA is a nonprofit corporation comprising irrigation districts and agricultural businesses in the Klamath River Basin. As part of the Department of the Interior's Klamath Irrigation Project, KWUA members receive water from the Link River Dam, which was constructed by PacifiCorp's predecessor (hereinafter "PacifiCorp") pursuant to a 1917 contract with the United States. That contract had a fifty-year term and provided

that PacifiCorp would convey the dam to the United States, but that it would retain the right to operate the dam in exchange for furnishing water and low-cost electric power to the United States and the irrigators.

In the 1950s, FERC's predecessor, the Federal Power Commission (FPC), determined that PacifiCorp's Klamath Hydroelectric Project (which includes the Link River Dam) was subject to its licensing authority and issued PacifiCorp a fifty-year license. In the licensing order, the FPC directed PacifiCorp to file the 1917 contract, either with amendments or as a new contract with substantially the same terms, to cover at least the same fifty-year period as the license. *In re California Oregon Power Co.*, 13 F.P.C. 1, 1954 WL 47779, at *8 (1954). The FPC also found, in accordance with section 10(e) of the Federal Power Act (FPA), 16 U.S.C. § 803(e), that the consideration and benefits provided in the 1917 contract were reasonable and adequate to compensate the United States for PacifiCorp's use of the dam. *Id.* at *9.

In January 1956, pursuant to the FPC's order, PacifiCorp filed a revised and extended version of the 1917 contract. Under the revised contract, PacifiCorp agreed to provide electric power at fixed rates to the United States and customers of the Klamath Irrigation Project, for use in pumping irrigation water. The 1956 contract stated that it was for a term of fifty years, effective from the date it was approved by both the Oregon and California public utility commissions. The states' approval yielded an expiration date of April 16, 2006. In February 1956, the FPC issued an order finding that the contract adequately compensated the United States for use of the dam, amending PacifiCorp's license to reflect the 1956 contract, and changing the license's effective date to make its term fall within that of the contract. *In re California Oregon Power Co.*, 15 F.P.C. 14 (1956). The license was set to expire on February 28, 2006.

In 2004, anticipating the February 2006 expiration of its license, PacifiCorp filed an application with FERC for a new license to continue operating the Klamath Hydroelectric Project. While that application was pending, PacifiCorp was entitled to annual licenses pursuant to section 15(a)(1) of the FPA, which provides that “the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued.” 16 U.S.C. § 808(a)(1). In September 2005, the Interior Department petitioned FERC for a declaratory ruling that any annual license issued to PacifiCorp would require that the 1956 contract, including the rates for electric power specified in that contract, continue in effect. Interior contended that the FPC had made the terms of the 1956 contract “an integral part of the license.” *PacifiCorp*, 114 F.E.R.C. ¶ 61,051, at 61,141 (2006) (“*PacifiCorp Order*”) (internal quotation marks omitted). Thus, according to Interior, the contract’s terms were also terms and conditions of PacifiCorp’s existing license that had to be part of any annual license granted to PacifiCorp pursuant to FPA section 15(a)(1). KWUA intervened in the FERC proceedings in support of Interior.

On January 20, 2006, FERC denied Interior’s petition. It assumed without deciding that the 1956 contract was a term of PacifiCorp’s license, but held that the contract expired by its own terms on April 16, 2006. Hence, FERC ruled, “any annual license for the project following the license expiration date of February 28, 2006, will not include the terms of the 1956 Contract beyond April 16, 2006.” *Id.* at 61,142. In March 2006, FERC issued PacifiCorp an annual license for the continued operation of the Klamath Hydroelectric Project.

While the FERC proceedings were ongoing, the Oregon Public Utility Commission (OPUC) and California Public

Utilities Commission (CPUC) initiated proceedings to set electric rates for the Klamath Irrigation Project's farmers and irrigators. In June 2005, the Oregon commission denied PacifiCorp's motion to delay action pending FERC's ruling on Interior's petition, holding that it, and not FERC, had jurisdiction over retail rates and that it must conduct an independent review of the contract rates even if FERC were to extend those rates in PacifiCorp's annual licenses. *In re Pacific Power & Light*, No. UE 171, at 5, 2005 WL 1529760 (O.P.U.C. June 6, 2005) (Order No. 05-726). In April 2006, OPUC determined that the 1956 contract would expire on April 16, 2006, and it decided to shift irrigation customers to full general irrigation tariff rates over several years. *In re Pacific Power & Light*, No. UE 170, 2006 WL 1675377 (O.P.U.C. Apr. 12, 2006) (Order No. 06-172). The California commission similarly decided to transition irrigation customers to full tariff rates following the April 16, 2006, expiration of the contract. *In re Application of PacifiCorp*, No. U 901-E, 2006 WL 1049355 (C.P.U.C. Apr. 13, 2006) (Decision No. 06-04-034).

On April 20, 2006, FERC denied Interior's petition for rehearing and affirmed that the 1956 contract terms would not be included in annual licenses issued to PacifiCorp. *PacifiCorp*, 115 F.E.R.C. ¶ 61,075 (2006) ("*PacifiCorp Order Denying Rehearing*"). FERC pointed out that "the 1956 contract became effective, not upon any approval by this Commission, but upon approval by California and Oregon." *Id.* at 61,226. This showed, FERC said, that it had "never purported to approve or fix [PacifiCorp's] retail irrigation rates, but only found that the 1956 Contract adequately compensate[d] the United States for the use of its property." *Id.* And it noted that both Oregon and California had recently elected to exercise their independent authority to modify PacifiCorp's retail electric rates. *Id.*

The Interior Department did not petition this court for review of FERC's decision, but KWUA did. KWUA contends that its members face increases in their power costs of more than 1000% as a result of FERC's decision. KWUA Br. 5. Adopting Interior's argument before the Commission, KWUA maintains that the electric power rates contained in the 1956 contract were an express condition of PacifiCorp's license and that FPA section 15(a)(1) requires FERC to issue annual licenses for the project that include those rates. We do not reach the merits of this argument because KWUA has not demonstrated that it has standing to pursue it.

II

In its opening brief, KWUA claimed standing on the ground that it had been an intervenor in the FERC proceedings. KWUA Br. 6. But “[p]etitioners do not have a right to seek court review of administrative proceedings merely because they participated in them. Unlike an agency, our authority to hear a case is limited by the standing requirements of the United States Constitution.” *Competitive Enter. Inst. v. U.S. Dep’t of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988). Those “irreducible constitutional minimum” requirements are that the petitioner suffered an injury-in-fact, that the injury is fairly traceable (causally connected) to the challenged agency action, and that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); see *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Because we agree with FERC that KWUA has failed to demonstrate redressability, we do not address the other standing requirements.

FERC argues that, “to the extent [KWUA] claim[s] injury from the loss of the favorable rates for retail electric power contained in the 1956 Contract, that injury cannot be redressed

Karuk Tribe of California



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Post Office Box 282
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(530) 627-3446 Fax (530) 627-3448

Administrative Office
Post Office Box 1016
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(530) 493-5305 Fax (530) 493-5322

Karuk Tribal Health Clinic
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(530) 627-3552 Fax (530) 627-3445

July 28, 2008

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 NE First Street, Room 1A
Washington, D.C. 20426

FILED
SECRETARY OF THE
COMMISSION
2008 AUG 13 P 2:22
FEDERAL ENERGY
REGULATORY COMMISSION

RE: Docket number P-2082 (PacifiCorp's withdrawal of Clean Water Section 401 Permit Application)

Dear Ms. Salas:

On July 11, 2008, PacifiCorp withdrew its application for water quality certification of the Klamath Hydroelectric Project from the California Water Resources Control Board. This withdrawal of a water quality permit application by PacifiCorp, without resubmission of any application, leaves the California Water Resources Control Board with no application to consider and stalemates the FERC licensing process. We are writing to urge the Commission to order PacifiCorp either submit a clean water permit application or withdraw its application for a new license from the Commission. Regardless of which course of action PacifiCorp chooses, the Commission should also order implementation of interim operating conditions to protect water quality and fisheries damaged by this Project.

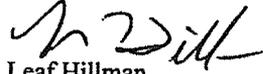
Dam relicensings are long and complicated proceedings requiring a great investment of time and resources by affected parties. Any delay in the relicensing process simply provides PacifiCorp with additional time to operate the project under status quo conditions which is in the company's financial interests. Clearly, implementation of the mandatory terms and conditions for a new license as prescribed by federal agencies will result in a project that operates at an economic deficit according to analyses by both FERC and the California Energy Commission. Certainly, given the negative impact the project has on water quality and fisheries resources, status quo operations are not in the interests of the Karuk Tribe nor the general public.

In PacifiCorp's letter to the California Water Resources Control Board withdrawing their clean water permit application the company states that the purpose of withdrawing the application is to "facilitate settlement negotiations for a long-term settlement of the project." However, no meetings have been held with settlement parties since the issuance

of said letter. A meeting slated for August 4, 2008 to consider a draft agreement in principle was cancelled and no draft agreement or settlement proposal has been offered to settlement parties to date.

Given the above mentioned facts, the Karuk Tribe hereby respectfully urges the Commission to order PacifiCorp to either withdraw its application for a new license or resubmit a clean water permit application to the California Water Resources Control Board within 30 days. We appreciate the Commission's kind consideration of our request.

Yootva,

A handwritten signature in black ink, appearing to read "Leaf Hillman". The signature is stylized and cursive.

Leaf Hillman
Vice-chairman

09/02/2008 09:06 15302235897

PAGE 02/02

WALLY HERGER
IN DISTRICT, CALIFORNIA

- PLEASE REPLY TO:
- WASHINGTON OFFICE:
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(202) 225-8070
 - DISTRICT OFFICES:
 - 66 INDEPENDENCE CIRCLE, SUITE 104
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(530) 893-8300
 - 410 MEMPHIS DRIVE, SUITE 118
REDDING, CA 96002
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COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEES:
CHAIRMAN
HUMAN RESOURCES
TRADE

Congress of the United States
House of Representatives
Washington, DC 20515-0502

August 30, 2008

Carol E. Conners, Deputy Director,
Division of Congressional and Intergovernmental Affairs
Federal Energy Regulatory Commission
888 First Street NE, Room 11 H
Washington, DC 20426

Dear Carol:

I am writing to seek clarification regarding certain issues associated with the potential decommissioning of hydroelectric facilities in Northern California. As you are aware, PacifiCorp is licensed to operate seven hydroelectric facilities on the Klamath River. That federal license expired in March of 2006.

My personal view is that hydroelectric dams provide multiple benefits such as clean, renewable, electricity, flood control, and surface water storage. California needs more of these benefits, not less. However, the decision to decommission these dams rests largely with PacifiCorp. While I do not support dam removal, PacifiCorp may in the end make a legitimate business decision to decommission their dams if the mitigation costs of relicensing are not justified by the economic value provided by the dams.

In the event PacifiCorp does make the decision to decommission the aforementioned project, what do current regulations require regarding who bears the cost of dam removal? That is, in the absence of a specific legislative remedy, what would be the cost scenario we could expect to see? Do federal regulations require PacifiCorp to bear those costs? How would the ratepayers currently served by the project be affected?

Thank you for your assistance in clarifying this matter.

Sincerely,

Wally Herger
WALLY HERGER
Member of Congress

WH:hh

September 10, 2008

Dorothy Rice
Executive Director
State Water Resources Control Board
1001 I Street, 15th Floor
Sacramento, CA 95814

Re: State Water Resources Control Board's Request for Resubmission of Water Quality Certification Application for the Klamath Hydroelectric Project, FERC No. 2082

Dear Ms. Rice:

This letter acknowledges receipt of your August 22, 2008, letter requesting PacifiCorp resubmit to the State Water Resources Control Board (SWRCB) an application for water quality certification associated with PacifiCorp's relicensing of the Klamath Hydroelectric Project (FERC No. 2082). Your letter specifically requests that PacifiCorp resubmit the certification application by September 30, 2008, if settlement has not been reached by that date. PacifiCorp appreciates the SWRCB's recognition of the importance and sensitivity of ongoing negotiations among PacifiCorp and federal and state agencies (including representatives of the SWRCB). At the same time, PacifiCorp also is mindful of our mutual obligations to continue the traditional FERC licensing process, including the water quality certification process, in the event that settlement is not achieved. PacifiCorp and other settlement parties do not intend to unreasonably delay the relicensing process, and PacifiCorp plans to resubmit the certification application soon and in a manner consistent with settlement discussions and state and federal regulations.

PacifiCorp is troubled by certain statements contained in your August 22 letter about the affect of the Project on water quality and fisheries. Your letter seems to pre-judge Project-related impacts that are yet to be thoroughly evaluated and ultimately determined through the water quality certification process. For example, your letter states that "the State Water Board is ... concerned about ... ongoing water quality impacts that the project as it currently operates has on the beneficial uses of the Klamath River." The letter continues:

It is imperative to move ahead with the water quality certification process, including preparation of environmental documentation meeting the requirements of the California Environmental Quality Act (CEQA), as soon as reasonably possible, so that water quality can be satisfactorily addressed and the relicensing process can move ahead. This need is underscored by indications that the river's water quality and ability to support healthy fisheries is declining: there is substantial evidence to indicate an increase in fish disease in the river, an increase in the toxic blue-green algae *Microcystis aeruginosa*, and an overall decline in fish populations.

Dorothy Rice
September 10, 2008
Page 2

These statements suggest an oversimplification of the role and effect of the Project on otherwise complex water quality and fisheries conditions and issues in the Klamath River, which have been and are caused by many factors in the Basin. If the SWRCB already has reached conclusions about the specific effects of the Project on beneficial uses in the Klamath River, as distinguished from the effects from other causal factors on water quality and fisheries conditions in the Basin, please provide us with additional information about the specific beneficial uses that are impacted by the Project, the extent to which the Project contributes to such impacts, and the data that support those conclusions.

Additionally, I would like to highlight the extensive ongoing monitoring and study program that PacifiCorp is carrying out to better understand and address water quality and fisheries issues in the Basin. PacifiCorp's monitoring and study programs are continuing even during this period when the water quality certification application is withdrawn. Given the complexity of factors affecting water quality conditions in the Klamath River, the monitoring and studies are absolutely essential to make meaningful and informed management decisions to improve water quality and fisheries in the Klamath River.

In conclusion, PacifiCorp intends to resubmit its water quality certification application soon. Upon resubmittal of its application for water certification, PacifiCorp would like to meet with SWRCB staff and management to discuss the process for moving forward with the water quality certification process, including CEQA. We suggest that this meeting occur before any additional time or expense is invested in the CEQA process, including public scoping meetings. We look forward to continued cooperation with the SWRCB towards the development of a fully informed, factually supported and pragmatic water quality certification decision.

Please contact me at (503) 813-6011 or by e-mail (cory.scott@pacificorp.com) if you have any questions or comments.

Sincerely,



Cory Scott
Klamath Licensing Manager

cc: Marianna Aue, SWRCB
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