

Draft Public Statement

Dam Removal Victory in *Hoopa Valley Tribe v. FERC*

January 25, 2019

A federal court of appeals today unanimously sided with the Hoopa Valley Tribe, ruling that FERC, the states of California and Oregon, and PacifiCorp can no longer stall dam license conditions to protect fish. For decades, the Hoopa Valley Tribe has urged aggressive actions to address the degraded water conditions in the Klamath River. PacifiCorp's FERC license for operation of the Klamath Project which expired in 2006. Mandatory conditions and prescriptions for fish passage and water flows followed in 2007, but they have been disregarded to date because of delays by the State Water Board, Oregon Department of Environmental Quality, and FERC." This case shows that states must not ignore the rights and interests of tribes with co-management authority regarding fisheries," said Hoopa Tribal Chairman Ryan Jackson. Further, Jackson noted that "present conditions in the Klamath River, the 2nd largest river system in California, are on the verge of ecologic collapse given the chronic and degraded water quality in the Klamath River caused by operation of the PacifiCorp owned dams under the antiquated conditions contained in its expired 1956 FERC license". Further, it's a travesty to the communities in the Klamath Basin, that FERC has allowed the unlawful practice to continue.

A FERC license requires state certification, pursuant to section 401 of the Clean Water Act, that the project will meet state water quality standards. In 2006, the California and Oregon agencies received an application for a section 401 water quality certification for a new license but they neither granted nor denied it. In 2012, the Hoopa Valley Tribe petitioned FERC for an order declaring that Oregon and California had waived their water quality certification authority by agreeing to not act on PacifiCorp's request for certification. FERC denied that request but today the Court of Appeals for the District of Columbia Circuit approved the Tribe's request. Protracted delays in the state 401 certification process were caused in large part by the side-bar Klamath Hydropower Settlement Agreement (KHSA), an agreement that was signed by Oregon,

California, Interior, PacifiCorp, and three local tribes. The Hoopa Valley Tribe did not sign the agreements which enabled the dams continuance and ultimately only benefitted the PacifiCorp corporate profits at the expense of a dying Klamath River.

The Court said: “This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp’s withdrawals-and-resubmissions were not just similar requests, they were not new requests at all. The KHSA makes clear that PacifiCorp never intended to submit a “new request.” Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . *in the same one-page letter . . . for more than a decade*. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project. . . . Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing.”

The Hoopa Valley Tribe’s appeal has no immediate effect on the separate effort by the Klamath River Renewal Corporation (KRRC) to obtain the license for the Lower Klamath Project, surrender it, and remove the dams. However, that effort is faltering. The amended Klamath Hydroelectric Settlement Agreement (KHSA) places a cap on PacifiCorp customer, State, and federal contributions to dam removal costs. Delays in the KRRC preparations are escalating the costs. Also, the Amended KHSA provides for an abeyance in relicensing proceedings while the KRRC’s surrender application is pending. The court ruling may expedite action on the KRRC request or may force PacifiCorp to withdraw its flawed application for relicensing of the Lower Klamath Project.