

# Hoopa Valley Tribal Council

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LEONARD E. MASTEN JR  
CHAIRMAN

April 13, 2011

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

Re: Hoopa Valley Tribe's Request to Take Action on the Application for the  
Klamath Hydroelectric Project (P-2082)

Dear Ms. Townsend:

PacifiCorp's fifty-year license to operate the Klamath Hydroelectric Project (P-2082) expired more than five years ago, on March 1, 2006. Since that date, PacifiCorp has continued to operate the Project under annual licenses that incorporate terms and conditions originally issued in 1954. The annual licenses lack any mitigation for the Project's significant impacts to water quality, fish, and other aquatic organisms in the Klamath River. Although FERC has completed all the steps necessary to re-license the Klamath Project with terms, conditions, and mitigation measures required by current law, the re-licensing has permanently stalled due to an agreement entered into between PacifiCorp and the States of California and Oregon, known as the Klamath Hydroelectric Settlement Agreement (KHSA). Under the KHSA, the States have agreed to not process PacifiCorp's application for certification under Section 401 of the Clean Water Act (the last necessary step to complete re-licensing). PacifiCorp and certain parties have unlawfully attempted to circumvent FERC jurisdiction, agreeing, without FERC's consent, to hold this re-licensing proceeding in abeyance.

Under the express terms of the KHSA, PacifiCorp is not diligently pursuing an application to re-license the Klamath Project. Nor is PacifiCorp operating the Project under the terms of a FERC-approved settlement. Commission staff are aware of this. If it fails to take action on PacifiCorp's Section 401 application, the Board will have abdicated its regulatory authority over the Klamath Project to the benefit of PacifiCorp, which continues to receive substantial revenues from the Project's power production, and to the detriment of the Klamath River, its resources, and downstream Indian tribes, which continue to suffer the impacts of PacifiCorp's unmitigated power generation.

The Tribe requests that the Board find that PacifiCorp has failed, and is failing, to diligently pursue re-licensing of the Klamath Project and process PacifiCorp's Section 401 application or issue an order denying PacifiCorp's application.



If FERC finds, pursuant to 40 C.F.R. § 121.16, that the States of California and Oregon have waived their Section 401 certification authority in this matter, FERC can proceed to issue a new license to PacifiCorp that includes the mandatory Section 4(e) and 18 terms and conditions prescribed by the Departments of Interior and Commerce in January 2007. Under no circumstance should the Board or FERC allow the proceeding to remain in its current state of perpetual delay.

#### I. Background of the Klamath Project Re-Licensing

In 1954, the Federal Power Commission issued a fifty-year license for operation of the Klamath Hydroelectric Project on the Klamath River in southern Oregon and northern California. The Commission subsequently changed the effective date of the license to March 1, 1956. That license, currently held by PacifiCorp, expired on March 1, 2006. Since license expiration, PacifiCorp has continued to operate the Project on the same terms of the 1954 license under the authority of annual licenses issued by FERC. PacifiCorp's application to re-license the Project (filed in 2004) remains pending before FERC.

In 2006, the Departments of Interior and Commerce filed conditions and prescriptions for inclusion in the Klamath Project license under the authority of Sections 4(e) and 18 of the Federal Power Act. These conditions include minimum flow and fish passage provisions that would provide substantial mitigation to the imperiled water and fish resources of the Klamath River. PacifiCorp challenged these terms and conditions in a trial-type evidentiary hearing pursuant to the Energy Policy Act of 2005, Public Law 109-58, § 241.

In September 2006, after reviewing extensive testimony from federal, tribal, state, and non-governmental entities, Administrative Law Judge Parlen McKenna dismissed PacifiCorp's challenges, finding that the Section 4(e) and 18 conditions were supported by the evidence in the record and necessary for the protection of affected fish and water resources of the Klamath River. In early 2007, the Departments of Interior and Commerce filed their final mandatory 4(e) and 18 prescriptions. FERC must include those conditions and prescriptions in any new license issued for the Klamath Project. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding FERC has no discretion to reject 4(e) conditions imposed by Interior); *City of Tacoma v. FERC*, 460 F.3d 53, 66-67 (D.C. Cir. 2006) (same).

FERC published its Final Environmental Impact Statement and completed its environmental analysis of the Klamath re-licensing more than three years ago, on November 16, 2007. FERC and the respective federal agencies have completed all steps necessary to re-license the Klamath Project with the mandatory protective terms and conditions. The only missing approval is a Section 401 water quality certification (or waiver) from the States of Oregon and California.

PacifiCorp applied for water quality certification from the California State Water Resources Control Board on March 29, 2006. PacifiCorp withdrew and re-submitted its application on February 28, 2007 and again on February 22, 2008, and again in 2009 and 2010. On February 13, 2009 FERC's Director, Office of Energy Projects, wrote to the Board urging

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“the Water Board to act as soon as possible on PacifiCorp’s application for water quality certification.”

Under the KHSA, PacifiCorp is now contractually obligated to again withdraw and re-submit its application in 2011. Significantly, PacifiCorp does not desire the State of California to actually process its application, nor does the State apparently intend to. The Board’s Resolution 2010-0024 held in abeyance PacifiCorp’s application unless the required federal legislation was not introduced by June 18, 2010. Nothing was introduced. However, on the request of PacifiCorp, the Board enacted Resolution 2010-0049, which extended the abeyance unless the required federal legislation is not enacted by May 17, 2011. No legislation has been introduced at all, let alone set for hearings or congressional action. Plainly, there will be no enactment by May 17<sup>th</sup>. No doubt PacifiCorp will again ask the Board to move the goal posts.

The withdrawal and re-submission is merely a contractually-mandated technical charade that is designed to obscure the fact that the State of California has waived its Section 401 certification authority. *See* KHSA, Section 6.5 (providing that PacifiCorp agrees to “withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the Interim Period”). By continuing to withdraw and re-submit the application, PacifiCorp intends to circumvent FERC jurisdiction and prevent FERC from issuing a license with mandatory terms and conditions necessary to protect the Klamath River.

In 2008, PacifiCorp, the States, and the United States signed an Agreement in Principle (“AIP”) that prevented Oregon and California resource agencies from imposing any costs on PacifiCorp (absent PacifiCorp’s consent) relating to water quality certification studies during negotiations on the KHSA. In February 2010, PacifiCorp completed negotiations and executed the KHSA, in which the States agreed to put the Section 401 certification process in abeyance. *See* KHSA, Section 6.5 (entitled “Abeyance of Relicensing Proceeding”). PacifiCorp, in signing the KHSA, has effectively suspended the FERC re-licensing process until at least 2020, allowing itself at least fourteen additional years of unmitigated power generation beyond the date of license expiration. Significantly, if the KHSA fails or terminates (which is likely), the process will simply return to FERC for additional (but significantly delayed) re-licensing proceedings.

PacifiCorp wrongly touts the KHSA as an agreement to remove the dams of the Klamath Project. The KHSA does not require the removal of any dams of the Klamath Hydroelectric Project, but instead establishes a planning process that could potentially lead to the commencement of dam removal after 2020 (nearly ten years from now). Such commencement of dam removal in 2020 is not guaranteed, but is expressly subject to the achievement of contingent events that include, but are not limited to: (a) enactment of federal legislation; (b) California voter approval of a \$250 million bond package; (c) an affirmative determination by the Secretary of the Interior that dam removal is in the public interest; and (d) separate concurrences by the states of Oregon and California that dam removal is in the public interest.

There is no evidence that even one of the required contingencies will occur. To date, no federal legislation supporting the KHSA has been passed. In fact, no such legislation has yet

been introduced by any member of Congress. Similarly, no action has been taken on the required California bond package. The bond was originally scheduled for a public vote on November 2, 2010; however, the California State Legislature voted to postpone the measure to the November 2012 election. The Secretarial Determination process is also now in jeopardy due to the fact that the House of Representatives recently approved amendments to terminate federal funding to study dam removal. Given Congressional reluctance to fund less than \$2 million for the KHSA-studies, it is highly doubtful that Congress will fund the \$1 billion necessary to implement the subsidies required by the legislation that the KHSA depends upon. Finally, the concurrence of the Governors of the States of Oregon and California (which is a purely discretionary political decision) is no longer guaranteed as both of the respective Governors that signed the KHSA have now left office. It is highly unlikely that any of the necessary contingencies required for dam removal will occur. The only certainty is continued delay, absent affirmative FERC intervention.

Although the KHSA was signed in early 2010 by the licensee, PacifiCorp, FERC has taken no action to obtain public comment or to initiate any review of the KHSA. The basis for FERC's failure to review the KHSA is not clear to the Tribe, especially since the agreement appears to be an unlawful attempt to strip FERC of its regulatory authority over the Klamath Project. FERC's failure to take any action at all on the Settlement Agreement also appears directly inconsistent with FERC's Policy Statement on Hydropower Licensing Settlements (PL06-5-00, September 21, 2006). The Tribe requests the Board to step in and re-assert control over this proceeding, as described in more detail below.

II. The Board Should Exercise Its Authority To Deny PacifiCorp's Application Due to PacifiCorp's Failure to Diligently Pursue Water Quality Certification.

FERC regulations require a licensee to diligently pursue water quality certification. A licensee must file within 60 days from the date of issuance of the Ready for Environmental Analysis (REA) Notice: (a) a copy of the water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of water quality certification. 18 C.F.R. § 4.34(b)(5)(i). The regulation shows that FERC expects certification or waiver to have occurred by the time the REA Notice is issued or shortly thereafter. Here, more than 60 months has passed since FERC issued its REA Notice in December 2005.

Under well-established FERC policy, "indefinite delays in processing applications are not in the public interest." *Georgia-Pacific Corporation*, 35 FERC ¶ 61,120 (1986); *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034, 1040 (D.C. Cir. 1986). Failure to diligently prosecute a license application is adequate grounds for dismissal. *In re Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (2000) (dismissing license application for failure to show due diligence in prosecution of CZMA certification); *see also In re Swift River Company*, 41 FERC ¶ 61,146 (1987) (requiring applicant whose 401 certification was denied to exercise due diligence in pursuing any available appeal remedies).

FERC policy clearly requires a licensee to show “due diligence” in pursuing certification, and absent such diligence, FERC has authority (and arguably an obligation under the public interest mandate of the FPA) to dismiss the license application. At this date, PacifiCorp is taking no action whatsoever to obtain a Section 401 certification. In fact, PacifiCorp has contracted with the States of Oregon and California to hold FERC’s re-licensing process in abeyance. PacifiCorp is failing to act with “due diligence” and its actions are causing “indefinite delay.”

III. Alternatively, FERC May Exercise Its Legal Authority To Deem The Section 401 Certification Waived And Promptly Proceed To Issue A License That Contains the Mandatory Section 4(e) and 18 Prescriptions.

Absent action by the Board, FERC may and should deem the Section 401 certifications waived and promptly proceed to issue a license to PacifiCorp for operation of the Klamath Hydroelectric Project in accordance with the Department of Interior and Commerce’s mandatory Section 4(e) and 18 prescriptions, in addition to other mitigation measures deemed appropriate by FERC. Once FERC deems the certification waived, which is wholly within its authority, it may issue a license and terminate this unduly protracted re-licensing proceeding.

The failure of the States of Oregon and California to exercise their regulatory authority over the Klamath Project and issue a Section 401 certification does not bar FERC from taking final action on the license. To the contrary, 40 C.F.R. § 121.16 provides:

The certification requirement with respect to an application for a license or permit shall be waived upon: (a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or (b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed one year).

*See also* 33 U.S.C. § 1341(a)(1) (expressly mandating that certification must occur “within a reasonable period of time (which shall not exceed one year)”). PacifiCorp submitted its initial application for Section 401 certification five years ago. Both Congress, in the express language of Section 401 of the Clean Water Act, and EPA, in its regulations implementing the Clean Water Act, have mandated that the certification decision must happen within one year. FERC regulations also support timely certification. Here, PacifiCorp has wholly frustrated Congressional intent, EPA policy, and FERC policy, by obtaining the agreement of the States of Oregon and California to abandon their regulatory authority, and refuse to certify the Project, solely for the purpose of delaying any and all action on the license by FERC.

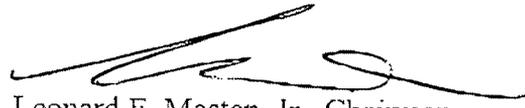
The Klamath Project license is ready for issuance. The only obstacle is the lack of a Section 401 certification, or formal waiver, from the States of Oregon and California. It is clear that neither of those States intends to issue a certification or a formal waiver for years to come.

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In the meantime, the Project simply continues operating without compliance with current law. The Board must step in and re-assert its control over this re-licensing proceeding.

Thank you for your consideration to this important matter.

Sincerely,  
HOOPA VALLEY TRIBAL COUNCIL



Leonard E. Masten, Jr., Chairman