REPLY SUPPORTING DEWATERING TRUST RESPONSIBILITY: THE NEW KLAMATH HYDROELECTRIC AND RESTORATION AGREEMENTS

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Abstract: In reply to Rebuttal in Defense of the Klamath Hydroelectric Settlement Agreement this article bolsters the conclusions of Dewatering Trust Responsibility: The New Klamath River Hydroelectric and Restoration Agreements that the Klamath Hydroelectric and Restoration Agreements fail to resolve ecological problems and abdicate the United States' trust responsibility to tribes. The article points to the Federal Energy Regulatory Commission relicensing proceedings and other studies to show that the Rebuttal fails to counter the arguments in Dewatering Trust that the Klamath Basin Restoration Agreement terminates Indian water rights and the Klamath Hydroelectric Settlement Agreement nullifies the public's right to effective enforcement of applicable federal environmental law.

I. INTRODUCTION

Dewatering Trust1 showed that the 2010 Klamath Hydroelectric and Restoration Agreements failed to resolve ecological problems and inequitably put fish resources, upon which Klamath Basin Indian tribes rely, at risk. The article focuses on one of two agreements, the Klamath Basin Restoration Agreement (KBRA), and the priority given to diversions of 378,000 acre-feet per year (more in wetter years), despite the first-in-time, first-in-right water rights of the

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Indian tribes. *Dewatering Trust* shows that the United States, as trustee, has conflicting duties but chose, for its own reasons, to elevate the rights of the Oregon irrigation community and the U.S. Bureau of Reclamation over the rights of the Indian tribes, the public and provisions of federal environmental law.

*Rebuttal in Defense of the Klamath Hydroelectric Settlement Agreement* (KHSA) by Mr. Swiger and Ms. White\(^2\) ignores the thesis of *Dewatering Trust*. It discusses only the Klamath Hydroelectric Settlement Agreement and mentions the KBRA only to state that PacificCorp was not a party to the agreement. Far from “overlook[ing] the effects of water diversions for agriculture,”\(^3\) *Dewatering Trust* focuses on precisely those effects.\(^4\) The areas of disagreement between *Dewatering Trust* and the Rebuttal are thus relatively narrow. The author agrees completely with the Rebuttal that there are “myriad effects” stemming from “a long history in the upper Klamath Basin of water diversions for agriculture, pollution from pesticides and industrial operations.”\(^5\) The existence and operation of the Klamath Hydroelectric Project, however, also causes adverse effects. The Rebuttal fails to exonerate PacifiCorp, the Klamath Hydroelectric Project owner and licensee, from its significant contribution to the poor condition of fish and aquatic resources in the Klamath River.

The arguments made in the Rebuttal show that the flaws in the KBRA and KHSA run even deeper than the United States’ abdication of its trust obligations to Indian tribes. Instead of requiring PacifiCorp to comply with the legal standards and conditions set by the Endangered Species Act, Clean Water Act and Federal Power Act,\(^6\) federal and state agencies are allowing PacifiCorp, the regulated entity, to decide whether and on what terms it will mitigate damage done to both tribal and public resources. The Rebuttal contends that PacifiCorp is taking measures to improve the condition of the Klamath River, but these measures are limited to ones voluntarily

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3. *Id*. at 1.
4. *See Dewatering Trust, supra note 1, at 70–75.*
5. *Rebuttal, supra note 2, at 2.*
agreed to by PacifiCorp—not measures required to meet the standards imposed by federal law. While the KBRA terminates Indian rights, the KHSA nullifies the public’s right to effective enforcement of applicable federal environmental law. Application of these binding environmental laws, now ignored by those entrusted to enforce them, could accomplish dam removal at less cost to the public and without unnecessary termination of Indian rights.

As explained in Dewatering Trust, the Klamath River rises in central Oregon and flows through northern California to the Pacific Ocean. In Oregon, farmers and ranchers divert large volumes of water from the River to irrigate crops.\textsuperscript{7} Downstream of the irrigation activities, PacifiCorp operates four dams for hydroelectric power generation purposes. The Upper Klamath Basin is blocked from all fish passage by the most downstream dam, Iron Gate, which is in California near Interstate 5.\textsuperscript{8} In this Reply, Part II will discuss the significant linkage between the KBRA and the KHSA that is ignored in the Rebuttal. Part III explains the connection between PacifiCorp’s activities and the conditions that produced the 2002 fish kill. Part IV compares the weak voluntary measures agreed to by PacifiCorp with the measures prescribed by the federal fisheries agencies pursuant to the Federal Power Act. Part V shows how Clean Water Act section 401 is being used to block the FERC licensing process that would improve water quality. Finally, Part VI notes that FERC has declined to exercise its authority to end the impasse and compel environmental improvements.

II. THE REBUTTAL DOES NOT CHALLENGE THE PRIMARY THESIS OF DEWATERING TRUST THAT THE KBRA EFFECTIVELY RESULTS IN TERMINATION OF TRIBAL RIGHTS

The KBRA effectively terminates the existing trust duty of the United States to protect the water and fishing rights of the California Indian tribes of the Klamath Basin. If Congress approves the KBRA and directs the United States to sign it, the United States’ rights and duties as a trustee would be

\textsuperscript{7} See e.g., Kandra v. United States, 145 F. Supp. 2d 1192, 1201–04 (D. Or. 2001).
\textsuperscript{8} See id. at 1197.
restricted to rights retained under that agreement. Under current law, the United States has fiduciary duties that include protecting the water and fishing rights it holds in trust for tribes of the Klamath Basin. As a result, the United States is currently obligated to ensure that the Bureau of Reclamation’s operations do not interfere with those tribal rights.9

The priority given by the KBRA to Klamath River surface water diversions of 378,000 acre-feet per year will have the effect of preventing fish restoration.10 The priority for water diversions is greater in wetter years.11 Under the KBRA, the United States will be unable to defend and protect Indian fishing rights affected by these diversions. In fact, the United States would be compelled to enforce the priority for non-Indian water diversions even if that leaves too little water to restore the fish on which the Indian tribes rely.

By contrast, under existing law:

Reclamation is obligated to ensure that project operations not interfere with the Tribes’ senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation’s trust responsibility to protect tribal trust resources. . . . Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect [the Tribes’ fishing] rights.12

The KBRA changes this by eliminating the duty to avoid interference and to protect tribal trust resources and replacing these duties with a duty to provide the tribal trust resources only the water remaining after specific amounts of water are

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9. See infra note 10 and accompanying text.


11. KBRA sets out a formula which increases the priority diversion baseline amount where the Upper Klamath Lake inflow forecast for March-October exceeds 278,000 acre-feet and increases it again where the forecast exceeds 569,000 acre-feet. Klamath Basin Restoration Agreement, supra note 10, at app. E-1, E.25–26.

diverted from the River.

The KBRA makes the elimination of federal trust responsibility explicit for all Klamath Basin tribes, whether signatories or not. For example, in section 15.3.9 of the KBRA:

The United States, acting in its capacity as trustee for the Federally-recognized tribes of the Klamath basin, hereby provides. . . Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories in a manner, or (ii) tribal water or trust rights, whatever they may be, in a manner that will interfere with the diversion. . . of water for the Klamath Reclamation Project that is. . . provided in Appendix E-1 [378,000, or more, acre-feet per year].13

Congressional ratification of this provision changes the tribal right (enforceable by the federal trustee) from a right to sufficient water to produce the fish on which the Tribes rely, into a right to water left over after diversion per KBRA Appendix E-1, regardless of what the habitat results may be. It is thus similar to termination provisions such as the one affecting the Klamath Tribes of Oregon, which provided “statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Tribes.”14 Congress has had a policy of not terminating such federal obligations unilaterally or prejudicially since the end of the termination policy in the 1960s.15 The KBRA takes Indian policy down the wrong track. Non-signatory tribes should not have their right to federal protection of trust resources stripped without their consent.

III. STAGNANT WATER CONDITIONS, LOW DISSOLVED OXYGEN AND INCLEMENT TEMPERATURES CAUSED BY PACIFICORP’S KLAMATH HYDROELECTRIC PROJECTS ARE NOT THE SOLE CAUSE OF THE 2002 FISH KILL.

The Rebuttal correctly indicates that the unprecedented fish-kill of more than 30,000 adult salmon in 2002 resulted

13. Klamath Basin Restoration Agreement, supra note 8, at § 15.3.9.
from the common fish diseases ich and columnaris. No one contends otherwise; but this is somewhat like saying that the salmon died of cardiac arrest. The debate centers on what ecological conditions brought about the epidemic of infections that killed the fish.

Dewatering Trust described the Bush Administration’s successful efforts to get the National Marine Fisheries Service (NMFS) to revise a Biological Opinion and assign to the federal irrigation project the responsibility for releasing only 57% of the water to protect endangered species. The article states that “[t]he resulting low flows caused by irrigation diversions led to a massive fish die-off in September 2002, the largest loss of adult salmon in the United States’ history.” The Rebuttal argues there are multiple causes of “stagnant water conditions, low dissolved oxygen, and increased water temperatures,” but ignores that the Klamath Hydroelectric Project is an important contributor. Indeed, the FERC final EIS states:

[Project operations are causing or exacerbating the following water quality effects: (1) currently limited recreation use at project reservoirs because of toxic algal blooms that occur during the latter half of the summer; (2) nutrient enrichment caused, in part, by nitrogen-fixing algae in project reservoirs fosters downstream growth of algae that creates habitat for the secondary hosts of at least two fish pathogens that have a major adverse effect on Klamath River salmon stock. For these reasons, we consider the relatively high cost of the water quality management plan [recommended by the Hoopa Valley Tribe, Oregon Fish & Wildlife, and various federal agencies] to be warranted.]

FERC thus points the finger directly at the Klamath Hydroelectric Project for fostering the very fish pathogens that caused the die-off below the Project. The California Fish and Game Department’s (CDFG) analysis of the 2002 fish kill revealed that flows in the Klamath River in September 2002 were “atypically low,” and that “low-flows in the river may

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17. Dewatering Trust, supra note 1, at 74, n. 146.
have been an important factor in creating conditions that facilitated the outbreak of disease, and culminated in the fish-kill.”19 The CDFG went on to point out that the Bureau of Reclamation directed PacifiCorp to increase flows from Iron Gate dam in late September and PacifiCorp took additional steps to extend those higher flows for several days after being so directed.20 The CDFG concluded that more flow could have been available in September 2002 and PacifiCorp’s Klamath Hydroelectric Project was one potential source of increased flow at that critical time.21

The Rebuttal describes Dewatering Trust as making dams “convenient scapegoats for the myriad effects of a long history in the Upper Klamath Basin of water diversions for agriculture, pollution from pesticides and industrial operations. . . and other human activities.”22 Surely there are several wrongdoers. Even if many are to blame, that cannot excuse PacifiCorp from the fact that the Klamath Hydroelectric Project contributes to the problem by fostering algae growth that feeds the parasites and by altering water temperatures. Nevertheless, the primary roles of water diversions for agriculture and pollution from pesticides are precisely the point of Dewatering Trust, because they result from policies in which the United States, as trustee for the Indian tribes and tribal fishing and water rights, has chosen to subordinate the trust beneficiaries’ rights to the interests of the Bureau of Reclamation and its irrigation clients.

The Rebuttal’s further disagreement with the “assertion that water quality and fisheries conditions in the Basin are actively degrading”23 ignores the reality that federal agencies, applying the Endangered Species Act, listed two Klamath River species of sucker fish as endangered in 1988, and Coho salmon as threatened in 1997.24 Those fish remain in jeopardy

20. Id. at 36.
21. Id.; see also id. at 159.
22. Rebuttal, supra note 2, at 3.
23. Id.
of extinction. On March 10, 2010, the NMFS listed eulachon (smelt) as threatened under the Endangered Species Act and designated critical habitat in the Klamath River. The NMFS is now considering a petition to list spring Chinook salmon in the lower Klamath River as threatened under the Endangered Species Act. Something is wrong with the River: the mighty Klamath salmon runs that together used to number over 500,000 in the 1930s are reduced to remnants and an average in-river run size of 90,000 in 2004–2010. PacifiCorp’s dams must shoulder a significant portion of responsibility.

The Rebuttal argues that NMFS spent over $2 million to improve in-stream habitat in 2009 and that other outlays in the Klamath Basin exceeded $10 million. This response confuses financial output, measured in dollars, with ecological outcomes, measured in fish. Money is being spent but there is no evidence that fish populations are recovering. Instead, fish are dying. The funding may be misdirected or, more likely, simply inadequate.

IV. THE VOLUNTARY INTERIM MEASURES PROVIDED UNDER THE KHSA ARE NECESSARY BUT NOT SUFFICIENT TO PROTECT AQUATIC RESOURCES

The Rebuttal argues the terms and conditions of PacifiCorp’s existing license adequately protect the River’s resources. The Rebuttal further argues that PacifiCorp is implementing additional measures under the Interim Conservation Plan and KHSA that provide further mitigation. The Rebuttal fails to acknowledge that all the existing license measures pre-date currently applicable environmental laws, such as the Clean Water Act, Endangered Species Act and amendments to the codified at 50 C.F.R. pt. 227); Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit of Coho Salmon, 62 Fed. Reg. 24,588 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227).


Federal Power Act. The Rebuttal does not attempt to argue that the current license or the new measures voluntarily agreed to by PacifiCorp are designed to meet the standards required by these modern laws. As a business decision, it makes sense for PacifiCorp to agree to some voluntary mitigation measures where it stands to reap $27 million for every additional year it is allowed to operate without full compliance with applicable law. From a regulatory and ecological perspective, there is no viable explanation for allowing PacifiCorp to continue operating for years beyond its license term without full compliance with the law.

First, with respect to the existing license, FERC amended PacifiCorp’s license several times prior to its expiration in 2006.29 In the 1950s, FERC’s predecessor agency actually required some minimum flows. Modern science has shown those minima are far too low.30 FERC has authority to enforce these 1950 era provisions during an annual license. Those provisions, however, were not drafted with the requirements of the Clean Water Act or the Endangered Species Act in mind, because those statutes had not been enacted when the license was framed.31

Second, while the Rebuttal notes the benefit of minimum flows “prescribed through biological opinions [of] . . . the Bureau of Reclamation’s Klamath Project,”32 PacifiCorp can take no credit for those parties’ actions. The Endangered Species Act’s applicability to the Bureau of Reclamation’s irrigation project has improved fish survival conditions.33 Yet, while the Bureau of Reclamation has made efforts to change its operations to benefit fish, and to comply with the Endangered Species Act, PacifiCorp remains out of

29. Id. at 5.
32. Rebuttal, supra note 2, at 4.
33. See Pacific Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1085–86 (9th Cir. 2005).
compliance. Due to PacifiCorp’s failure to obtain the proper legal authorization, and the failure of the federal agencies to enforce the ESA against PacifiCorp, any of PacifiCorp’s current measures to benefit ESA-listed fish are purely voluntary. There is no evidence that the measures voluntarily agreed to by PacifiCorp are adequate to limit take, prevent jeopardy, or facilitate recovery of the species.

PacifiCorp has funded a series of measures intended to aid environmental resources, as the Rebuttal contends. Some of these were agreed to in the 2008 Interim Conservation Plan and others were added as appendices to the KHSA. PacifiCorp voluntarily agreed to all of the measures and none of the measures are tied to any specific legal standards or performance objectives. When compared with the stringent conditions and prescriptions developed by the Department of Interior and NMFS in 2006, which required increased instream flows and development of fish passage, among other items, PacifiCorp’s voluntary commitment is insufficient. Absent the KHSA, these more stringent conditions developed by the federal agencies would likely be in effect today.

The Rebuttal notes the contribution to funding of the Iron Gate hatchery and, under interim measure 11, the possibility of funding up to $5.4 million for water quality improvements in

34. The irony of the Rebuttal’s point is that PacifiCorp’s own operations and interim measures have no incidental take permit or Biological Opinion approving their effects on threatened and endangered species within the Klamath Basin. The Agreement in Principle called for PacifiCorp to “implement the ESA interim conservation plan upon which NMFS, USFWS and PacifiCorp have agreed as noted on page 14 of the Agreement in Principle,” which provides: “PacifiCorp has agreed to work expeditiously and in good faith to cooperatively develop a request that PacifiCorp will file with FERC to incorporate, as appropriate, the interim conservation plan measures as an amendment to the current Project license and request consultation under ESA Section 7 on that request.” Agreement in Principle Between PacifiCorp, State of Oregon, California Resources Board and Department of Interior (Nov. 13, 2008), available at http://www.doi.gov/archive/news/08_News_Releases/klamathaip.pdf [hereinafter Agreement in Principle]. Inexplicably, PacifiCorp has not requested that FERC incorporate such measures; instead, after several years it requested (but as yet has not obtained) NMFS’s approval of a habitat conservation plan that would provide protection from liability for a take of threatened species based on as-yet undefined measures.


36. Interim Measure 11 provides $250,000 per year for water quality “studies or pilot projects.” If the Secretary of Interior renders an Affirmative Determination (to remove dams), PacifiCorp’s funding obligation will increase “up to $5.4 million for implementation of [approved] projects,” plus $560,000 per year for project operation and maintenance expenses prior to dam removal. Klamath Hydroelectric Settlement Agreement, supra note 35, at App. D.
addition to $500,000 annually for water quality monitoring. As discussed in *Dewatering Trust*, these relatively inexpensive and limited measures pale in comparison to the profitability of continuing to operate the Klamath Hydroelectric Project under the annual licenses. The KHSA quantifies the profits PacifiCorp expects to earn annually net of funding the interim measures of the KHSA. PacifiCorp pockets $27 million per year for each year of continued operation of the Klamath Hydroelectric Project under the annual licenses, and will be compensated in that amount if dam removal were to occur at the beginning of 2020 instead of on or after December 31, 2020.\(^37\) Thus, the interim measures taken to help a dying ecosystem amount to little compared to the profit enjoyed by continued operation of the Klamath Hydroelectric Project under annual licenses. By inserting a requirement of Congressional action prior to decommissioning, PacifiCorp has delayed for many years the costs of allowing fish passage, and actions to protect and restore the ecosystem, while assuring itself a tidy profit during each year of delay.

Non-endangered fish species have fared no better. For example, FERC has not approved PacifiCorp’s interim measures. The Rebuttal is correct that in 2007 the Hoopa Valley Tribe petitioned FERC to impose interim environmental conditions on the Klamath Hydroelectric Project annual licenses to restore trout.\(^38\) Specifically, the Tribe asked FERC to adopt the minimum flows and ramping rate restrictions found in the Bureau of Land Management’s conditions submitted pursuant to §4(e) of the Federal Power Act, conditions that must be included in any final license.\(^39\) PacifiCorp challenged those mandatory conditions before an administrative law judge (ALJ), who upheld the conditions.\(^40\)

In response to the Tribe’s motion, FERC did not conduct an investigation or other inquiry as the Rebuttal claims.\(^41\) Instead, FERC relied upon the record analyzed in its own

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39. *Id.* See also 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) (holding FERC has no discretion to reject § 4(e) conditions imposed by Interior).
40. *Dewatering Trust*, *supra* note 1, at 62.
41. *Rebuttal*, *supra* note 2, at 5.
Environmental Impact Statement on Relicensing, concluding that it “does not depict a situation for which temporary ‘rough and ready’ measures are necessary to prevent irreversible environmental damage pending relicensing.” FERC conceded that the ALJ determined that “current project operations had adverse effects on resident trout and other aquatic species and that Interior’s section 4(e) conditions would help alleviate those effects.” The ALJ’s determination was supported by testimony of federal, state, tribal and non-governmental biologists that, except for PacifiCorp’s biologist, unanimously advocated for the conditions. None of the requested interim conditions would have required any new infrastructure or expenditure of resources by PacifiCorp—the conditions would have simply changed the amount and reduced the volatility of flow through J.C. Boyle Dam. Nevertheless, FERC declined to act, ruling that the outcome of relicensing for the Klamath Hydroelectric Project was uncertain, because water quality certification by Oregon and California had not yet been granted.

Eventually, the Court of Appeals for the District of Columbia Circuit upheld FERC’s refusal to act, noting that FERC has “considerable discretion in deciding when to condition annual licenses.” The Tribe’s motion asked for relief related to protection of the resident trout fishery and only during the relicensing period, prior to constructing fish passage facilities around or through the dams. FERC had no occasion to consider whether changes in Klamath Hydroelectric Project flows and ramping rates could help salmon below the dams or improve environmental conditions in anticipation of making the Klamath Hydroelectric Project reach accessible to salmon, steelhead, and lamprey. FERC has not yet decided whether PacifiCorp’s voluntarily implemented interim conditions are sufficient for protection of ESA-listed salmon pending implementation of the KHSA.

V. CLEAN WATER ACT SECTION 401 IS BEING USED TO BLOCK WATER QUALITY IMPROVEMENTS

_Dewatering Trust_ explains that PacifiCorp and the California State Water Resources Control Board argued for years over the hiring of a consultant to prepare an

42. PacifiCorp, 125 FERC ¶ 61,196, 62,035 (Nov. 20, 2008).
43. Id. at 5.
44. Rebuttal, supra note 2, at 6.
Environmental Impact Report.\textsuperscript{45} When the Board announced scoping meetings in 2008 pursuant to the California Environmental Quality Act, PacifiCorp withdrew its application for a water quality certification under Section 401. Later that year the parties to the Agreement in Principle gave to PacifiCorp a right to withdraw from the Agreement if they had to incur significant regulatory costs for a Section 401 certification.\textsuperscript{46} The Rebuttal contests none of this and concedes that:

The KHSA included a request for abeyance of the state 401 proceedings in order to allow the parties to the KHSA to focus on implementation of the agreement, including studies of the anticipated impacts of dam removal and of water quality measures for the interim period prior to potential dam removal. Section 6.5 of the KHSA also specifically requires PacifiCorp to withdraw and resubmit its water quality certification applications to avoid a situation in which the states of California and Oregon would be viewed as having waived their respective certification authorities under the CWA.\textsuperscript{47}

Thus, the KHSA is designed not to achieve compliance with the Clean Water Act, but to provide an artificial technical procedure by which certification is never achieved and license issuance never occurs. Where, as here, the parties’ goal is to preserve the State’s authority rather than to require water quality improvement, it is not unreasonable to conclude that the Clean Water Act certification requirement is being used for unintended purposes. The Clean Water Act’s national goal of water quality, which provides for the protection and propagation of fish and wildlife and provides for recreation in and on its waters by 1983, has not been met on the Klamath.\textsuperscript{48} The Rebuttal does not suggest that any of the measures taken by PacifiCorp are adequate to bring the Klamath Hydroelectric Project into compliance with applicable water quality standards.

The Rebuttal cites no legal authority to support its position.

\textsuperscript{45} Dewatering Trust, supra note 1, at 65.
\textsuperscript{46} Agreement in Principle, supra note 34, at 5.
\textsuperscript{47} Rebuttal, supra note 2, at 7–8 (footnotes omitted).
that a continual withdrawal and resubmission of an application for Section 401 certification complies with the Clean Water Act. The express language of Section 401 states that certification must occur within one year or be deemed waived.\textsuperscript{49} The EPA regulations implementing Section 401 provide that the certification requirement is waived upon: “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 period of 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).”\textsuperscript{50}

FERC’s own regulations require a licensee to diligently pursue water quality certification, requiring a licensee to file a copy of its certification, or request for certification, by the time the Ready for Environmental Analysis (REA) Notice is issued.\textsuperscript{51} FERC issued the REA Notice in the Klamath relicensing in December 2005, nearly six years ago.

The Rebuttal further concedes that PacifiCorp requested that the California State Water Resources Control Board delete from its abeyance resolution any requirement of federal legislation as a condition to continuing the abeyance of proceedings on the Section 401 certification.\textsuperscript{52} Yet, enactment of legislation is a specific condition of proceeding toward dam removal under the KHSA as approved by PacifiCorp. In other words, PacifiCorp seeks a delay of the Section 401 certificate even if the KHSA cannot proceed for lack of legislation.

The delay continues. There is no disagreement that FERC cannot carry out its statutory duty to issue an appropriately conditioned license so long as California and Oregon’s authority to specify water quality requirements remained unexercised. PacifiCorp makes no effort to show that this satisfies the requirement of Section 401, that if a State “fails or refuses to act on a request for certification. . .within a reasonable period of time (which shall not exceed one year). . .the certification requirements of this subsection shall be waived.”\textsuperscript{53} On February 13, 2009, the Director of FERC’s Office of Energy Projects wrote to the California Water Resources

\begin{itemize}
\item \textsuperscript{49} \textit{Id.} § 1341(a)(1).
\item \textsuperscript{50} 40 C.F.R. § 121.16 (2011).
\item \textsuperscript{51} 18 C.F.R. § 4.34(b)(5)(i) (2011).
\item \textsuperscript{52} Rebuttal, supra note 2, at 8.
\end{itemize}
Control Board and the Oregon Department of Environmental Quality urging the states “to act as soon as possible on PacifiCorp’s application for water quality certification.”  

FERC noted that it was unable to act on PacifiCorp’s license application “because neither the state of Oregon nor California has acted on PacifiCorp’s request for water quality certification under Section 401 of the Clean Water Act.” In response, the parties to the KHSA inserted a requirement intended, as the Rebuttal puts it, “to avoid a situation in which the states of California and Oregon would be viewed as having waived their respective certification authorities under the CWA,” while continuing to prevent FERC from issuing a license that would impose water quality improvement requirements. Whether FERC will exercise its remaining authority and reject the states’ effort to block license conditions that would help the ecosystem, remains unclear. FERC’s response, or lack thereof, to an opportunity to assert its authority, will be an excellent measure of the degree to which FERC recognizes its trust responsibility.

VI. TO DATE, FERC HAS ABDICATED ITS AUTHORITY OVER THE KLAMATH HYDROELECTRIC PROJECT, DEFERRING TO THE KHSA AND THE VOLUNTARY MEASURES AGREED TO BY ITS LICENSEE.

The Rebuttal argues that Dewatering Trust mischaracterized “FERC’s ability to regulate the dams and environmental conditions.”  

FERC action, however, is not simply a matter of ability or authority. If FERC has failed to give the required “equal consideration” to the needs of fish, it is not because the agency lacked authority to do more. The Rebuttal concedes “that the KHSA is structured so Congress must authorize the decommissioning and transfer of the dams


55. Id. at 1.

56. Rebuttal, supra note 2, at 9.

57. Id. at 5.

instead of FERC.” Absent the KHSA, which contractually prevents the final issuance of a Clean Water Act certification, FERC would have issued a new license to PacifiCorp, as early as 2008, imposing significant terms, conditions and costs on PacifiCorp. By preventing the final issuance of a Clean Water Act certification, the KHSA is intentionally designed to prevent FERC from exercising its authority over the Klamath Hydroelectric Project. If FERC were able to issue a license, the cost of implementing the necessary conditions and prescriptions would lead to certain decommissioning and dam removal without any need for the provisions of the KHSA that benefit PacifiCorp over the next decade.

The KHSA parties tried to end-run FERC licensing authority, but the Rebuttal is correct that FERC retains legal jurisdiction over the Klamath Hydroelectric Project. FERC is neither a party to the KHSA, nor bound by it. Congress vests FERC with the responsibility to regulate the use of public resources by private hydropower projects. FERC is not required to abdicate this authority simply because its licensee and state governments have contracted to delay issuance of a Section 401 certification. FERC regulations require licensees to diligently pursue water quality certification, which is not happening on the Klamath. While FERC cannot issue a license without Clean Water Act certification, FERC has authority to deny license applications if, among other reasons, the licensee is not diligently pursuing re-licensing. An order dismissing PacifiCorp’s license application would leave PacifiCorp without authority to operate its Klamath Hydroelectric Project and ultimately lead to project decommissioning. Yet, due to the KHSA and the potential

59. **Rebuttal, supra note 2, at 4–5.**

60. FERC issued its Final EIS on re-licensing the Klamath Hydroelectric Project in November 2007. Upon certification, a license could have issued any time after that date.

61. **Dewatering Trust, supra note 1, at 67** (noting the CEC’s conclusion that the cost of relicensing the Klamath Hydroelectric Project would be more than decommissioning and FERC’s assessment that decommissioning at least two dams was the most cost-effective option).


64. City of Tacoma v. FERC, 60 F.3d 53, 53 (D.C. Cir. 2006) (discussing FERC authority to deny license applications); Mountain Rhythm Resources, 90 FERC ¶ 61,088 (Jan. 31, 2000) (dismissing license application for failure to show due diligence in prosecution of CZMA certification); 18 C.F.R. § 4.32(g) (2011) (discussing FERC authority to “dismiss the application, hold it in abeyance, or take other appropriate action”).

65. Pacifi Corp., 81 FERC ¶ 61,225 (1997) (denying application for new license and
promise of future voluntary dam removal, FERC has failed to invoke its authority and allowed the licensee to decide what conditions are appropriate to mitigate the impacts of its Klamath Hydroelectric Project on the public resource. FERC’s failure to assert its regulatory authority, and its willingness to allow the licensee to dictate the terms and conditions of license operation, should cause concern not only to affected tribes, but to all who care about protection of our nation’s public resources.

VII. CONCLUSION

_Dewatering Trust_ focuses on the failures of the two Klamath River agreements—the KBRA and the KHSA—to resolve ecological problems, with emphasis on the federal trustee’s efforts in the KBRA to prioritize water diversions for commercial agriculture over tribal rights and the requirements of the River. That trust breach has little to do with the provisions of the KHSA. Yet the Rebuttal offers little explanation for why PacifiCorp required that federal legislation must authorize the KBRA, as well as the KHSA, for dam removal to occur.

By shaping an agreement which requires Congressional action in order to achieve dam removal, and then linking it to legislative approval of a huge water rights settlement with certain tribes which calls for millions in subsidies to agricultural pumping costs and land acquisition, PacifiCorp has successfully blocked the normal operation of the Federal Power Act. Ordinarily, when relicensing antiquated dams, FERC would issue a license containing conditions and prescriptions submitted by federal agencies with jurisdiction over affected species and lands.66 In situations such as the Klamath Hydroelectric Project, which was built in an era prior to public sensitivity to environmental impacts, loss of unique species, and national objectives of swimmable, fishable water, the FERC process would ordinarily result in a license requiring substantial and immediate remedial measures. Faced with such a license, PacifiCorp would have chosen, as it has for other projects such as Condit,67 to remove the dams

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66. See, e.g., _City of Tacoma v. FERC_, 460 F.3d 53.
rather than repair them. Through the KHSA, PacifiCorp has postponed this cost for many years to come. This is a great outcome for PacifiCorp shareholders, but a poor result for the Klamath River ecosystem, and a feeble outcome by the federal trustee who long ago committed to protecting the Indian tribes’ rights to make a livelihood based upon taking of salmon and other fish.