



# RELICENSING REVIEW

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## [1] Still No Settlement as Puget Files Application for Baker License

Puget Sound Energy filed its final license application for the 175 MW Baker hydroelectric project April 30, but parties are still hammering out details of a settlement agreement. The parties said they have tentative agreement on the big issues—instream flows, fish passage and propagation—and said they expect to have it finalized in the near term. The 30-year package being discussed will cost PSE at least \$180 million and more than double Baker's cost of power. The utility will soon file for its Section 401 water quality certification. *Also at [13], Puget is working to keep Skagit County from seeking additional flood storage.*

## [2] Washington PCHB Upholds Lake Chelan 401 Certification

The Washington State Pollution Control Hearings Board on April 21 ruled in favor of Chelan County PUD's Section 401 water quality certification for the Lake Chelan Hydroelectric Project. The PCHB's order brings the PUD one step closer to securing its new, highly coveted and long-sought-after license for the 48 MW project. *But at [14], appellants also claim victory.*

## [3] Upper North Fork Feather Settlement Signed; Details Outstanding

As expected last month, parties in the Upper North Fork Feather River hydroelectric relicensing proceeding signed a settlement agreement for the 362 MW project. A spokeswoman for owner PG&E said that at a ceremonial luncheon held on Earth Day, participants lauded the collaborative process. Although the deal takes care of most issues, others, such as the license term and the temperature impacts of a water curtain, were left unresolved. *At [15], the settlement provides for a wide range of measures affecting flows, fish and wildlife, adaptive management, water quality monitoring, fish planting and many others, while shaving 5.6 percent off the project's generating capability.*

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## [4] PacifiCorp, Cowlitz Submit Application for Lewis River Projects

PacifiCorp and Cowlitz County PUD asked FERC in April for new licenses for four hydroelectric projects along the Lewis River in Washington state. FERC is reviewing the applications and a corresponding preliminary draft environmental assessment detailing protection, mitigation and enhancement measures—including one that would provide 117 miles of new habitat to enhance fish populations in the watershed. *Meanwhile at [16], the two utilities and stakeholders continue to negotiate a settlement agreement, the impact of which has yet to be determined.*

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## [5] Ruling on Snoqualmie Falls Section 401 Certification Clears Path for Relicense

Rejecting numerous assertions from the Snoqualmie Indian Tribe, a Washington state hearing board last month upheld the Section 401 water quality certification issued for Puget Sound Energy's 42 MW Snoqualmie Falls project. The ruling should jump-start the project's 10-year-old relicense proceeding, even though it substantially increases the certificate's critical flow requirement. A case of first impression, the Pollution Control Hearing Board took the opportunity to advise the state legislature to clear up the meaning of "beneficial use" as it pertains to water. The tribe said it will not appeal the ruling, which found no statutory water use contemplates the tribe's spiritual, cultural and aesthetic interests. *But in an unusual twist at [17], the board ordered the removal of text in its decision that urged a state agency rulemaking to declare the "separate aesthetic interests of Tribes" a designated use under state water law.*

## [6] FERC Affirms 36-Year License Term for Big Creek No. 4

FERC will stick with the 36-year term it approved last December for Southern California Edison's 99 MW Big Creek No. 4 hydroelectric project. In a rehearing request, SCE tried to convince the commission to adopt a "flexible" term that would comport with the term of the prospective license it is now working on for a series of projects in the same watershed known as the Big Creek System. But FERC upheld the reasoning of its Energy Office director. SCE said it won't challenge the decision. *Also on rehearing at [18], FERC dealt with SCE's concerns over rules for moving equipment, the removal of certain roads from the project boundary, requirements for protection of valley elderberry longhorn beetles and a conflict over when the water year begins.*

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## [7] Implementation: NOAA BiOp Puts Squeeze on Cowlitz River Timelines

In a new biological opinion, NOAA Fisheries is pushing Tacoma to accelerate work on downstream collection requirements at its 462 MW Cowlitz River project while at the same time forcing the utility to seek extensions from FERC because NOAA hasn't gotten around to reviewing the plans. Tacoma says the rigorous NOAA BiOp goes beyond the terms of the settlement agreement that led to the project's new license, but says it is "something we can live with." *Also at [19], Tacoma gets an extension to file a critical fish hatchery management plan after parties suggested substantial revisions.*

## [8] Consider Decommissioning Klamath, CEC Staff Tells FERC

Staff at the California Energy Commission have asked the Federal Energy Regulatory Commission to consider decommissioning PacifiCorp's Klamath River Hydroelectric Project. The license for the multi-dam system expires in 2006, and FERC is currently reviewing PacifiCorp's relicensing application. Staff of the CEC and other California agencies believe removing the project altogether is a viable option—one that would benefit the river's dwindling salmon and steelhead trout populations. *At [20], PacifiCorp has no intention of giving up the project.*

## [9] After 100 Years Without License, Small Project Must Apply

After operating quietly without a license for most of the past century on a river in northwest Washington State, FERC has ordered the owner of the 1.5 MW Nooksack Falls Project to file for a license or an exemption. The ruling comes several years after Puget Sound Energy, which had all but abandoned the project after a fire, sold it to a private hydro enthusiast. *At [21], FERC says the location of the project's "primary" transmission line on federal land triggers its jurisdiction.*

## [10] Cushman Decommissioning 'Inevitable' Absent FERC Action

Tacoma Power claims two new biological opinions have made the "de facto" decommissioning of its 131 MW Cushman hydroelectric "appear a certainty." Unless FERC reconsiders, decommissioning is "inevitable," along with the loss of a

clean, renewable energy source with a reasonable cost of power. Opponents of the project said the city's latest filing is "an eleventh hour tactical ploy" to avoid the conditions in the disputed license FERC issued Cushman in 1998 after a 24-year proceeding. *Tacoma warns of "regulatory disaster" at [22].*

### [11] Cushman in Court: Parties Await Ninth Circuit's En Banc Ruling

The Skokomish Indian Tribe is suing Tacoma and the United States for \$5.8 billion in damages resulting from the licensing, construction and operation of Tacoma Power's 131 MW Cushman hydroelectric dam. Rebuffed by a federal district judge and two three-judge Ninth Circuit panels, the tribe sought and was granted a rare *en banc* rehearing from a full panel of 11 Ninth Circuit judges. Skokomish tribal members raised thousands of dollars to send over 50 members—nearly 10 percent of their reservation's population—on a 16 hour bus ride to observe the proceedings. *At [23], Relicensing Review offers an extended account of what they heard.*

### [12] OP/ED: Dam Breaching Is Costly, Won't Help Fish Either

Decommissioning is sometimes seen as a dramatic solution to dam problems—particularly those involving fish. Several years back Edwards Dam in Maine was taken out, and the fish swam free once more. Many enthusiasts decided that the Edwards breach suggested more decommissioning was a policy that ought to be emulated far and wide. Among those excited by Edwards and dam busting in general was then Secretary of the Interior Bruce Babbitt, who spoke so often and fondly of dam busting that I took to calling him Buster Babbitt.

Edwards Dam was a questionable model for dam decommissioning policy since it was built when Martin Van Buren was president. A dam-busting policy directed at long-in-the-tooth dams might not ring all that many bells. But now younger dam decommissioning has shown up in various contexts: two marginal Elwha River dams on Washington's Olympic peninsula and four big and fully functional multipurpose federal dams on the lower Snake River.

And possible dam breaching in connection with relicensing has surfaced in the complicated seven-dam Klamath project in Oregon and California. The licensee is PacifiCorp, which has already signed off

on a dam decommissioning settlement with federal, state, tribal and NGO parties involving Condit Dam on the White Salmon River in south central Washington.

PacifiCorp began the Klamath relicensing process in 2000 and filed its final application in February of this year. Various parties early on cited project impacts on salmon and steelhead runs as a reason for consideration of breaching the seven dams. The California Energy Commission last May decided that PacifiCorp would hardly miss the project's 163 MW what with all the thousands of MWs of future resources it would be building anyway.

On April 26, CEC in concert with the California State Water Resources Control Board, the Resources Agency and the Department of Fish and Game recommended to FERC that decommissioning was "viable" and ought to be formally considered in the application process. The full account of these matters is in this issue in the story at [8/20] by Leora Broydo Vestel.

This is apparently the first time that such a recommendation has been made in a relicensing process, and it raises serious issues of costs and benefits—and perhaps even the question of whether in effect dam decommissioning is not actually an instance of dispensing with disorders by killing the patient.

Breaching dams is not a walk in the park, and it may be instructive to observe what happens when Condit Dam is dismantled. This dam was built in 1912-13 and is 125 feet in height. PacifiCorp sources believe it is the largest dam structure ever to be breached. The dam's powerhouse generates 14.7 MW.

Work is now underway with a target of completion in October 2006. But there will be more mitigation to follow, which is scheduled for completion in December 2007. The 1999 dollar cost of decommissioning Condit is \$17.15 million, which PacifiCorp sources say will be more than \$20 million in completion date dollars.

Factors to be taken into account in making decommissioning decisions are part lost energy generation, part costs of decommissioning and part riverine and ecosystem impacts. My back-of-the-envelope calculations on replacement generation and breaching costs plus mitigation goes well past \$300 million.



Tearing out seven dams to "restore" salmonid runs is an example of fools caught up in self-deception. The most likely result would be wiping out salmon and steelhead runs for generations until strays respawn the basin. Decommissioning activity on seven dams in whatever sequence would bring intrusive deconstruction with machines and dirt and would almost certainly turn the Klamath into a death trap for fish.

Tearing out dams is not a habitat silver bullet. And in any case we now know of course that habitat restoration deeds, which may earn feelgood points, are minor variables in salmonid populations. As Bill Rudolph, editor of NewsData's *NW Fishletter*, once wrote in a column on salmon population variability, "It's the ocean, stupid." And so it is the ocean for wise and stupid alike.

I would like not to presume that CEC staffers who swallowed the save-salmon shtick whole were naïve, but that is likely the case. The association of hydropower and its enormous cash flow potential with fish mitigation in a compensatory mode has triggered the most reckless squandering of funds anyone knows about. But the idea of saving salmon is very correct politically, even if the saving is somewhat ironic in that the ultimate objective is having the rescued creature for dinner.

I say reckless because salmon runs can only rise if the ocean and its shifting food supply allow it. No amount of terrestrial mitigation can affect an oceanic cycle. In this context, breaching the Klamath dams would be a bad deal for PacifiCorp and an even worse deal for salmonids [*Cyrus Noë*].

### [13] Still No Settlement as Puget Files

#### Application for Baker License • from [1]

Puget Sound Energy filed its final license application for the 175 MW Baker hydroelectric project on time April 30. But stakeholders were unable to reach settlement by the deadline, despite four years of negotiations.

"Players at the table are still negotiating and talking," said Puget spokesman Roger Thompson. He said the parties will continue to try to hammer out a deal. "Our hope is that within two or three months, we'll have a settlement."

Along with the application, Puget submitted the applicant-prepared preliminary draft environ-

mental assessment (PDEA) FERC allowed in lieu of an Environmental Report. PSE also recently filed a confidential historic properties management plan, as well as two confidential draft cultural resource reports. Utility officials were in Washington D.C. April 29 where they made a presentation on details of the application to FERC's relicensing staff.

The relicensing for Baker (FERC Project No. 2150), Puget's first experience with the alternative licensing process, has cost about \$15 million, Thompson said.

The project, located on the Baker River in northwest Washington, includes two dams, reservoirs and powerhouses. A short distance below the lower dam, the Baker River flows into the Skagit River. The current license expires April 30, 2006. Thompson said the utility hopes to get a new 50-year license, although parties in the negotiations said talks currently are built around a 30-year term. Puget still must file an application with the state ecology department for its Section 401 water quality certification; it was unclear how soon the utility will file, but the spokesman noted it has up to a year to do so.

The process has involved five working groups and three technical groups, plus a legal working group formed last October. The other work groups are: aquatic resources; fish passage; instream flow; technical scenario teamlet (overseeing the HYDROPS model); wildlife & terrestrial resources; recreational & aesthetic resources; cultural & historical resources; and economics and operations.

The licensing process has involved the completion of some 76 major studies, 14 of them aquatic, 14 terrestrial, nine recreational, five cultural and one on the overall economics of the project.

Puget's Thompson said the settlement package will cost "well over \$100 million," possibly as much \$180 million, and will more than double the project's cost of power to between \$40/MWh to \$45/MWh. But Thompson said that range is based on long term market forecasts. It is expected the final package will "still keep the project within the realm of economic feasibility," he said. Under the existing license, Baker generates an annual average of 701,000 MWh.

Parties directly involved in the talks indicated a settlement is close. Gary Sprague, major projects section manager for the Washington State Department of Fish and Wildlife, said there is "tentative agreement on a great number of these issues." He is

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**"Our hope is that within two or three months, we'll have a settlement."**

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hopeful a final settlement "in concept" can be reached by mid-May, followed by some time to work out exact language. The "agency" alternative in the PDEA carries terms reflecting where the parties were several months ago, he noted. "It does not reflect the settlement discussions and where they are today. But the range that is captured in the PDEA includes what we are talking about."

NOAA Fisheries biologist Steve Fransen said, "In my estimation, all the parties, including the licensee in the aggregate, are fairly close" with "not a lot" of areas of disagreement remaining. "If an agreement in principle can be had, it should be in a short period of time," measurable in weeks, he said. The parties are very cognizant of FERC's strict policy of deadline enforcement. "If it takes very long, FERC is not going to allow time for it," Fransen said.

On April 22, Sprague said that by mid-April, Puget had upped the value of its proposed package of measures to \$185 million over 30 years from about \$165 million two weeks earlier. He said a large group of resource agencies and non-government organizations were pushing a \$250 million package that was coming down. In another week, he expected the parties would be within \$10 million to \$20 million of each other. "Puget has come up a little and ours has come down a lot."

According to Sprague, the organizations supporting the "resource agency package" include NOAA Fisheries, US Fish & Wildlife, US Forest Service, the Washington State Interagency for Outdoor Recreation, the Nature Conservancy, and a number of other NGOs and local governments.

Parties interviewed by *Relicensing Review* said the top issues are instream flows, fish passage and fish propagation. Sprague said his agency wants to enhance existing fish propagation facilities for sock-eye, trout and coho and add others for chinook and steelhead. There are a number of other matters as well, such as aquatic and terrestrial habitat improvements and flood control.

Parties quoted different figures, but said under the existing license, flows below Lower Baker are between 50 cfs and 100 cfs, typically about 80 cfs. But as a result of a lawsuit filed in part by Washington Trout (Ninth Circuit 01-71307), Puget several years ago developed an Interim Protection Plan (IPP) with greater project operating restrictions aimed at helping the Skagit River's endangered chinook.

Although PSE has implemented the IPP, a license amendment reflecting its terms is still pending at FERC, and NOAA Fisheries is working on a biological opinion on it. NOAA will also issue a BiOp on the new license application.

The package proposed by the resource agency group would increase minimum flows to between 1000 cfs and 1200 cfs, while maximum flows would range between 3600 cfs and 5600 cfs, Sprague said. The license application provides for a minimum flow of 300 cfs, but there is a tentative agreement on the agencies' figure. He said any settlement will probably reflect that agreement, unless some other trade-off is made to complete the package.

One of the issues surrounding Lower Baker flows is that the turbine now in place has limited flexibility. It has a capacity of 4100 cfs, and can be ramped down a bit. But PSE's Thompson said, "it's basically an on/off turbine." When it is off, bypass and seepage allows for only about 100 cfs. One of the issues on the table has been how to reconfigure the lower powerhouse's turbine compliment to improve flow flexibility.

"We've gone through a lot of contortions and configurations," Sprague said. Under the tentative agreement, two turbines with a capacity of 750 cfs each would be added.

**Another big issue** is fish passage, both upstream and downstream. Both dams have passage facilities now, but they are 40 to 50 years old. Sprague said tests show downstream passage is only about 50 percent at Upper Baker and an average of about 20 percent at Lower Baker. "We want those both up over 90 percent," he said.

The plan to improve downstream passage includes installation of a floating surface collector in 2007 and a new guidance net system that was to be installed last March. That latter took place, mainly for testing purposes. The new net will ultimately be replaced with one of more durable material, Puget said.

Upstream passage is "working effectively now," Sprague said, but there are about a half dozen places the fish go after being trucked to the upper lake. Better fish handling and sorting facilities are therefore needed, he said.

NOAA Fisheries' Fransen said his agency is currently preparing a mandatory condition to deal with passage. He said the agency has worked with the licensee, its engineers and others to develop "mutually acceptable fish facilities" for passage in

both directions. The outcome will appear in its fish-way prescription, a draft of which is due in July. If a settlement is reached, the prescriptions will reflect its terms, he said. NOAA Fisheries is also working on a biological opinion for the Baker IPP that is due out in the very near future.

Sprague said the fish passage facilities have an estimated cost of \$50 million, although "some of that relates" to the mandatory authorities of the federal agencies. "A lot of the pieces have unequal value because of the authority that goes with them," he said, adding that he did "not want to leave the impression that the federal agencies have been heavy handed, but everyone in the room must recognize that that is where those organizations are going." Sprague said all parties "have worked very hard to try to find a package of measures that works for everyone."

**In another development,** Puget is opposing Skagit County's late motion to intervene in the proceeding in which PSE seeks to amend the existing license with the Interim Protection Plan aimed at assisting ESA-listed fish. Puget had earlier expressed concern over a meeting FERC had with the county, whose public works department filed extensive comments on the preliminary EA in the license proceeding.

Although it says it participated in Baker's alternative licensing process, the county claims its was "generally unaware" of the amendment docket, which was opened in August of 2002.

About half the Baker project is located in Skagit County. Baker River flows into the Skagit River valley, which could experience as much as \$1 billion in damage in the event of a 100-year flood, the county claims; four floods have already cost \$71 million, most recently in 2003. The county says its desire to intervene in the interest of additional flood storage is therefore justified. It said it has been working "diligently" with PSE and the relicensing settlement stakeholders regarding the inclusion of enhanced flood storage for Baker. Skagit argued the proceeding "has essentially been on hold" since 2002 as the parties await the NOAA Fisheries BiOp on the amendment.

Puget argues the county is seeking to expand the scope of the docket two years after it was initiated and four years after consultations on the licensing began. It said the amendment proceeding does not involve the article in its license that deals with the balance between flood control measures and their

economic costs, and that the flood storage element in the article at issue is strictly a fish protection measure.

Puget said the county would have sufficient opportunity to have its interests addressed in the relicensing proceeding, and that its intervention now would "most certainly disrupt" the proceeding and add burdens, since processes to update flood control protocols in various documents would have to be implemented. It said the county's participation, if granted, should at a minimum be limited [*Ben Tansey*].

## [14] Washington PCHB Upholds Lake Chelan 401 Certification • from [2]

In a benchmark ruling that could set the standard for how large a role adaptive management can play in meeting water quality standards in Washington, the state's Pollution Control Hearings Board (PCHB) on April 21 ruled in favor of the Clean Water Act (CWA) Section 401 water quality certification issued for Chelan County PUD's 48 MW Lake Chelan Hydroelectric Project.

The project's 401 certificate was first issued in April 2003 by the Washington State Department of Ecology (Ecology), but was contested the following month by the Columbia River Inter-Tribal Fish Commission (CRITFC) and the Confederated Tribes of the Umatilla Indian Reservation. Because relicensing success hinges on 401 certification, the appeal had prevented the Federal Energy Regulatory Commission (FERC) from granting a new license.

In challenging the 401 certification, appellants argued that a compliance schedule based on a 10-year adaptive management plan (AMP), along with a focus on biological objectives rather than numeric criteria, would not adequately meet requirements of the CWA, nor the water quality standards established by Washington state.

The PCHB did not concur, however, and found ultimately that the 401 certification and the proposed measures outlined in the PUD's Chelan River Biological Evaluation and Implementation Plan do in fact provide "reasonable assurance" that necessary water quality standards will be met.

"The primary aim of the 401 certification in this case," the PCHB said in its order, "is to meet the state water quality standard by complying with the intent and substance of the standards rather than its numeric form."

Craig Gannett, lead counsel for Chelan County PUD, told *Relicensing Review*, "The purpose of the

Clean Water Act is to support resources, and not numeric criteria *per se*." Gannett added that strict adherence to the criteria contained in water quality regulations could in some instances cause specific biological objectives, such as achieving certain numbers of fish species in particular reaches of the river, not to be met.

For example, the PCHB notes that established numeric criteria in Washington state for Class A waters such as the Chelan River dictate that after they reach 18 degrees Celsius naturally, temperatures cannot increase more than another 0.3 degrees due to human activities. The PCHB cautions, however, that while it is likely that natural temperatures in the Chelan River will surpass the 18 degree mark during certain times of the year, flows of at least 1,500 cfs to 2,000 cfs would be necessary to limit temperatures from rising an additional 0.3 degrees.

Although increased flow levels would in fact achieve mandated numeric criteria, the PCHB points out that such flow levels would reduce usable fish habitat in the Chelan River from about 13 acres to 9 acres and also be detrimental to riparian vegetation.

The PCHB said appellants also failed to prove that a 10-year AMP established by Chelan County PUD and approved by Ecology would not meet the CWA requirements. It found that the PUD's five-step plan, when coupled with biological objectives, would adequately "constitute the site-specific solution (standard) until a new numeric component can be found to replace the AMP." It also said Ecology's 401 certification "is sufficiently rigorous due to the specific studies, modeling and monitoring required, the consultation with CRFF [Chelan River Fisheries Forum] members, and the ongoing oversight of the process by Ecology."

To further ensure success of the AMP, the PCHB amended the 401 certification by adding nine new clarifications. The PCHB emphasized that "the monitoring required under the [AMP] is not intended to stop at the end of the compliance schedule in year 10, but should continue throughout the life of the new license."

Gannett called PCHB's order "very significant," saying it could set a precedent for any hydroelectric project in Washington state that may not immediately be able to comply with one or more numeric standards. "It suggests that in cases where a project cannot comply with numeric standards that an adaptive management approach focusing on biological objectives is legal," he told *Relicensing Review*.

Despite the PCHB's ruling, CRITFC attorney Julie Carter said the decision represents a "victory" and a "giant milestone" for the appellants. "We feel vindicated ... and are happy with the conditions that were amended to the 401 certification that will restore fish habitat," she said. "This would not have happened but for our litigation."

Carter added that the appellants' primary motive was not to dismiss the AMP outright, but to enhance it. New conditions expressed in the order, she noted, will now provide a better balance between achieving biological objectives and adhering to numeric criteria. She stressed that because the AMP can now extend beyond the initial 10-year period, viable populations of fish will be given the chance to develop in targeted reaches of the Chelan River.

Nonetheless, Carter told *Relicensing Review* that the PCHB could have gone further to mitigate the effects of the project and enhance the health of the river. "We still believe that the potential for a cold water conveyance is very high and that the examination of that possibility was unreasonable and cursory," she said. Carter added that CRITFC and the Confederated Tribes are currently mulling whether they will contest the order. Appellants have until May 31 to appeal the decision.

If appealed, Gannett said the matter would go either to Thurston or Chelan County Superior Court, then continue on to the Washington State Court of Appeals. The matter could ultimately find its way to the state's Supreme Court, he said.

After submitting its comprehensive settlement agreement to FERC in October 2003, Chelan PUD says resolution of the 401 certification saga represents the last major hurdle toward receiving a new license to operate the Lake Chelan Project (FERC No. 637). It adds that the appeal has impeded implementation of key PME measures it claims will dramatically improve the health of the Chelan River and its aquatic species.

While the project's original license expired March 1, 2004, FERC recently granted the PUD a temporary, annual license that will extend through March 31, 2005, or until a new license is granted. PUD spokeswoman Suzanne Bacon said that should there be no 401 resolution by next March, the annual license would be extended for another year without requiring additional action from FERC [*Joel Puglisi*].

## [15] Upper North Fork Feather Settlement Signed; Details Outstanding • from [3]

After three-years and 60 meetings, members of collaborative formed by Pacific Gas and Electric for the relicensing of the utility's 362 MW Upper North Fork Feather River hydroelectric development in Northern California have signed a settlement agreement. The deal was signed at a luncheon on Earth Day, April 22, in Chester, CA.

The relicensing effort cost the utility \$11.4 million. A PG&E spokeswoman said under the terms of the settlement, the project's annual generating capacity, currently 1172 GWh, will decrease 5.6 percent. She declined to give a figure for the overall cost of the settlement package, saying it would show up in FERC's National Environmental Protection Act work. She said she did not have a figure for how the settlement will impact the project's cost of power.

"This agreement strikes that necessary balance between the competing needs of the environment, recreation and generation," said Randy Livingston, PG&E's hydro generation manager. He said he is looking forward to working with the parties on implementation.

Spokeswoman Lisa Randle said about 50 people attended the luncheon, and some of the participants spoke. They expressed "deep feelings about how important the collaborative process had been and confidence in the issues that were resolved mutually. There was friendly joking amongst one-another, good laughter, good feelings, a lot of relief" and a lot of appreciation was expressed, she said.

Parties signing the agreement were the utility, the US Forest Service, US Dept. of Interior, Calif. Dept. of Fish and Game, American Whitewater, Plumas County, Mountain Meadows Conservancy, Chico Paddleheads, Shasta Paddlers and California Sport Fishing Protection Alliance. Although they were part of the collaborative, the US Fish & Wildlife Service, National Park Service and California Water Resources Control Board did not sign. PG&E's Randle said that's because those agencies' "management protocols did not allow for signing."

The Water Resources Board has kept arms length from the collaborative's deliberations, saying it did want to prejudice its ongoing review of the project's Section 401 water quality certification application.

In a joint press release, the groups said the agreement now under review at FERC includes a flow regime that will protect and enhance fish and wildlife, and provide channel maintenance and boating opportunities. Minimum water levels were set for Lake Almanor, one of the state's largest recreation lakes, and for ecological and recreational uses.

Other highlights include pulse river flows, ramping rates, water quality monitoring, an adaptive management program, fish planting, habitat improvements, shoreline management at Lake Almanor, a recreation development plan and protection of visual resources.

Not all matters were not resolved. Randle said information is still coming in on the impact of adding a water curtain in Lake Almanor that would divert cold water through the Prattville intake, and the parties will continue to discuss that at future meetings.

Also unresolved is the term of the license; PG&E wants a 50-year license, while the resource agencies support a 40-year term, Randle said. She added the parties went ahead and signed the settlement because they didn't want the deal hung up on just a few issues.

The Upper North Fork Feather project includes five storage dams and generating units along the North Fork of the Feather River that were built between 1921 and 1969. The application, a hybrid of the traditional relicensing process, was filed in October 2002 [*Ben Tansey*].

## [16] PacifiCorp, Cowlitz PUD Submit Application for Lewis River • from [4]

With nearly 600 MW of combined generation capacity at stake, PacifiCorp and Cowlitz County PUD in late April filed applications with the Federal Energy Regulatory Commission to relicense four interconnected hydroelectric projects along the North Fork of Washington state's Lewis River.

If granted, the new licenses would secure the fate of the Merwin, Yale and Swift No. 1 projects, owned and operated by PacifiCorp, as well as the Swift No. 2 project owned by Cowlitz PUD, for up to 50 years. Merwin (FERC No. 935), Yale (2071), Swift No. 1 (2111) and Swift No. 2 (2213) have rated capacities of 136 MW, 134 MW, 240 MW and 70 MW, respectively.

PacifiCorp says its Lewis River projects provide reliable, low-cost energy to over 1.5 million

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**"There was friendly joking amongst one-another, good laughter, good feelings, a lot of relief."**

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retail customers throughout six Western states. The projects also provide generating reserve capacity that enhances the regional grid, said spokesman Dave Kvamme. Swift No. 2, operated by PacifiCorp, is the only generating resource owned by Cowlitz PUD, which uses it to serve about 30 percent of the its residential demand. The PUD says a new project license is integral to its ability to meet its customer demand and maintain stable power costs.

While PacifiCorp and the PUD were required to file separately for their respective licenses, the projects' interconnected nature prompted them to coordinate their licensing processes. Terry Flores, PacifiCorp's hydro licensing director, said the effort has allowed for "a comprehensive look at all of the projects from both an operational and environmental analysis."

To facilitate the process, Flores noted that PacifiCorp in 1999 petitioned FERC to defer Yale's license expiration and also accelerate Merwin's to make all four projects' original licenses coterminous at the end of April 2006. At this time, FERC also approved the utilities' request to coordinate under the Alternative Licensing Process (ALP).

**One outcome of the ALP**, according to Cowlitz, is a coordinated preliminary draft environmental assessment (PDEA) covering all four North Fork Lewis River Projects. The PDEA, which details proposed protection, mitigation and enhancement (PME) measures and highlights the utilities' preferred alternative, was submitted with their license applications.

Flores said to date, the ALP has "worked very well" with respect to the Lewis River relicensing, and has "fed nicely" into settlement agreement (SA) discussions with stakeholders. Citing a confidentiality agreement, Flores would not comment in depth on SA negotiations, but added the proof of the ALP's success should be revealed when PacifiCorp, Cowlitz PUD and all involved stakeholders reach a settlement. "Hopefully, we'll have the settlement agreement shortly," she told *Relicensing Review*.

SA negotiations commenced in March 2002 and have included a number of state, federal, and non-governmental organizations, including the Cowlitz Tribe, NOAA Fisheries, American Rivers, and representatives from the Gifford Pinchot National Forest.

Flores and Cowlitz PUD Project Manager Diana Gritten-MacDonald refrained from discussing existing SA issues, but the most recent, six-month update on the ALP for the Lewis River projects was submitted to FERC March 30. There, the utilities say the "parties

have reached tentative agreement on recreation, flood management and terrestrial issues." It says the parties "hope [to] reach agreement on cultural resources and aquatic issues in the very near future."

In its license application, Cowlitz noted that "throughout the ALP, anadromous salmonids have been the subject of considerable discussion and the participants identified several areas of concern, including fish passage and distribution, aquatic habitat, hatcheries and threatened and endangered species."

To mitigate impacts of the four projects, both Cowlitz PUD and PacifiCorp propose to introduce anadromous salmonids to 117 miles of potential habitat in the Lewis River watershed above the Swift Creek Reservoir. The proposal, which Cowlitz PUD calls "the centerpiece of the PME measures," would provide salmon and steelhead passage by trapping returning adults at Merwin dam and then trucking them to Swift Reservoir. Juvenile fish migrating downstream would be gathered in a large, state-of-the-art surface collector and then transported down river. The collector would also be designed to gather bull trout, currently listed as threatened under the Endangered Species Act. The project is expected to yield "high collection efficiencies," according to Flores.

To improve aquatic connectivity between the Yale Reservoir and the Lewis River bypass reach, PacifiCorp and Cowlitz PUD have also proposed providing the reach with a continuous flow of 50 cfs. Presently, the reach receives no more than 20 cfs, said Flores. Increasing the flow by at least 30 cfs is expected to increase the amount of spawning and rearing habitat for kokanee, cutthroat trout and mountain whitefish.

PacifiCorp's Flores said that thus far, the utility has invested roughly \$18 million in the relicensing process. She added that over the proposed fifty-year term of the new license, PacifiCorp anticipates spending over \$100 million on PME capital costs. To date, Cowlitz PUD has spent close to \$4 million on its relicensing efforts, and under terms of the preferred PME path highlighted in the PDEA, expects to spend \$10 million on capital costs and an additional \$250,000 annually on O&M expenses.

**A final settlement agreement**, however, could yet modify terms and conditions of proposed PME measures, as well as estimated effects on the projects' output and cost of power. Both PacifiCorp and Cowlitz PUD expect the settlement will require license amendments. Cowlitz told FERC a "supplemental environ-

mental assessment analyzing the effects of the SA insofar as they may differ from the alternatives analyzed in the PDEA" may also be necessary.

Nevertheless, Lois Schwennesen, co-mediator for the Lewis River SA discussions, told *Relicensing Review* that settlement negotiations are going well and voiced cautious optimism that agreement would be reached by this summer. While declining to discuss details, Schwennesen said even the most difficult issues appear to be moving toward resolution. "We have not run into any issues that appear to be roadblocks to an agreement," she said [*Joel Puglisi*].

### [17] 401 Certification Ruling Clears Path for Snoqualmie Falls Relicense • from [5]

Puget Sound Energy overcame a major obstacle on its long path to the relicense of 42 MW Snoqualmie Falls last month when a state hearing board substantially upheld its Section 401 water quality certification. However the Washington State Pollution Control Hearing Board (PCHB) did require a significant critical flow increase pending the results of a study called for in the 401 certificate. And while it rejected most assertions made by the Snoqualmie Indian Tribe, it implored the state legislature to clear up confusion over what constitutes a "beneficial use" under the state's water laws.

The Snoqualmie Tribe said it would not challenge the PCHB ruling (03-156) but it has continued the fight over the project at FERC, arguing that since the tribe received federal recognition after FERC's final environmental impact statement was completed, a supplemental EIS should be prepared. The latest filing was accompanied by a letter to the tribe from the mayor of the city of Snoqualmie expressing support for tribal "efforts to secure the decommissioning and eventual removal" of the project for the benefit of the tribe, citizens of the city and visitors "from around the world" who come to see the waterfall around which the project was built.

The PCHB decision came in two separate rulings issued April 7. The board accelerated the schedule for certain hearings and pleadings in the case so that it could issue its final order by that date. It said it did this so as not to run afoul of a Federal District Court ruling, now under appeal in the Ninth Circuit, that both agency action and judicial review of state Section 401 determinations must be completed within one year.

Snoqualmie Falls (FERC Project No. 2493), a run-of-river project located on 259 acres within the

city of Snoqualmie, WA, consists of two power plants 3.5 miles down from the confluence of three branches of the Snoqualmie River in northwest Washington. Plant 1, built in 1898, was the first generating plant to be built entirely underground. It is upstream of the Snoqualmie Falls waterfall, a tourist attraction that receives some one million annual visitors. Downstream of the falls is Plant 2, built in 1910.

The project has been operating under annual license since the original license expired in 1993. PSE filed for relicense in 1991.

Andrea Rodgers of the Western Environmental Law Center, which represented the tribe, said the PCHB "omitted" and "glossed over" several critical facts about how the state Department of Ecology, which issued the 401, came up with the flow regime, which she said was done in the early 1990s prior to an ESA listing and the tribe's formal recognition by the government. But she said the Tribe was happy to see the increase in the critical flow level below which ramping must take place.

"We concur with the [PCHB's] decision," said PSE spokesman Roger Thompson. He said it moves the utility "one step closer" to approval of its \$40 million relicense package, which includes installing a new, durable plastic inflatable weir that would allow operators to reduce water elevation up to four feet during high water, minimizing flooding that effects the city of Snoqualmie. The money would also go to replace five old generators at Plant 1 with two new ones with the same total output; and to retrofitting the turbine at Plant 2 in a manner that will increase output without greater use of water.

These improvements replace an earlier plan to raise the project's head, an idea that Thompson said "was not well received by some parties." PSE is also proposing to put more water over the falls during certain times of the year and during daylight hours, which will enhance the aesthetic impact of the falls.

Washington DOE approved a Section 401 water quality certification for the project on September 24, 2003. It set a schedule of instream flows over the falls, and a minimum flow below the falls of 300 cfs or natural river flow, whichever is less. It also set ramping rates and a critical flow of 1700 cfs. The current license sets no ramping rates or critical flow.

Last October, the Snoqualmie Indian Tribe appealed the Section 401 certification issued by DOE, saying project operations do not adequately protect fisheries and that the certification violated the state's

antidegradation policy because it did not protect the tribe's spiritual, cultural and aesthetic interest in the falls.

In its rulings, the PCHB said the falls are sacred to the tribe. "They do not consider the falls to be separate from themselves, but part of who they are." The water fall "is their church...The water flowing over the falls is considered to be life, and a gift from the Creator. The mists, which arise from the water flowing from the falls, have a particular spiritual connection with members of the Snoqualmie tribe."

The tribe argued its historical, cultural and spiritual interest in the falls should be considered a "beneficial or characteristic use" under state statute, because its use is "necessary for the well being of the tribe," the PCHB order related. But the board said lists of beneficial uses under neither of the applicable statutes expressly include such interests, and that under the legal rule *ejusden generis*, they could not be read into the more general terms of one of the statutes that says uses "include, but are not limited to" the itemized list. That's because the tribe's interest in the falls "is not of the same type or class as the beneficial uses" listed in the statute, the board said. "Tribal uses are of a completely different nature" and its interests "are not beneficial uses" under state law.

Nor is the tribe's "characteristic use" of the falls of a type or class allowed for in statute. Aesthetic enjoyment is a characteristic use, the PCHB conceded. But citing the tribe's own arguments, it said "the tribe's interest is in much more than the beauty of the falls; the falls are part of their life and culture."

The tribe's assertions about "the existence of a separately recognized beneficial use for tribal" interests presented "a case of first impression" the PCHB noted. But it emphasized the "linkage between the uses and the water quality criteria." For example, it said, water quality criteria must provide for the listed characteristic use of fish, but there are no separate criteria for Indians and non-Indians. "The list of characteristic uses, at least as it currently exists, does not draw distinctions between types of people."

Despite all this, the board's April 7 order included two sentences "encourag[ing] Ecology to

consider developing a regulation which would address separate aesthetic interests of Tribes as a characteristic use" in state statute; and that "a rule making proceeding would enable the department to determine the scope of interest and opposition to such a proposal."

**But in an unusual** and very short order issued 12 days later, the PCHB said these sentences were included in the original order "inadvertently" and that "they should be deleted" to reflect the board's actual intent. There was no further explanation. The deletion order does not repeat the sentences, but refers only to their location in the original order. The sentences do not appear in the version of the order now on the PCHB's website.

The Snoqualmie's Rodgers said she was disappointed the PCHB felt it couldn't declare the tribe's interest in water to be a cultural use. By law, "they could have done that," she asserted. She said the Law Center is currently researching how best to pursue having the tribe's interests in water declared a characteristic use.

State water policy prohibits the degradation of "existing beneficial uses." Although it accepts the 401 certificate's balance of hydropower, fish and wildlife, and aesthetic flows, PSE in a summary judgment motion argued that hydropower is a "beneficial use" that must be protected under state water law. The PCHB took notice of DOE's acknowledgement that hydroelectric power is a recognized "beneficial use" under water allocation rules, but not under its water pollution laws. The board skirted the issue, noting PSE did not appeal the 401 certification on the basis that its requirement for increased flows impaired its water right claim for hydropower.

But the PCHB said it recognized "the complexities surrounding the beneficial use question." It observed that DOE both administers and has adopted "conflicting regulations" defining beneficial uses. These conflicting definitions "may become problematic at some point, if they are not already." It said "legislative clarification, followed by administrative action, are necessary" to clear things up.

The board went on to reject the tribe's other assertions about the certification's deficiencies. Among others, it said the claim that the 401 certifi-

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**"The water flowing over the falls is considered to be life, and a gift from the Creator."**

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**"The list of characteristic uses, at least as it currently exists, does not draw distinctions between types of people."**

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cation did not provide adequate flows to protect fish was disputed by un rebutted testimony to the contrary from DOE and the Department of Fish & Wildlife (DFW); and that concerns over the impact on water quality due to dissolved oxygen, fecal coliform bacteria and temperature relied on testimony from a witness who on cross examination "admitted he had no information the project negatively affects fish."

But in what was at least a temporary victory for the Snoqualmie Tribe, the PCHB did order an increase in critical flows, a matter the board said was "controversial" and which has been negotiated for years. PSE based its 1700 cfs request on 15-year old photos, while the DFW wanted 2500 cfs. The board said the figures are important because a critical flow above 1700 cfs means there is no requirement for ramping, which would otherwise be necessary to protect against the stranding of fish. FERC approved 1700 cfs contingent on a multi-party critical flow study below Plant 2.

But FERC's figure was based on project capacity and while it was "not clear" if FERC biologists had even visited the site, DFW personnel came out "numerous times" and were familiar with the channel. The PCHB said it appeared that "FERC used an improper factor" to set its rates when it used project capacity as the basis. Concerned about the 800 cfs difference between the FERC and DFW figures, it concluded the FERC figure "could degrade fish habitat" and said that until the critical flow study is completed and approved, it would set the figure at DFW's 2500 cfs. Significantly, DFW is responsible for final approval of the study [*Ben Tansey*].

### **[18] FERC Affirms 36-year License Term for Big Creek No. 4 • from [6]**

FERC on April 20 rejected Southern California Edison's request to adopt a "flexible license term" for the license FERC issued last December for the 98.8 MW Big Creek No. 4 hydroelectric project along the San Joaquin River in California's Sierra National Forest (FERC No. 2017-020). SCE said it will not challenge the decision. The commission also ruled on several other matters SCE raised in its rehearing request.

FERC can approve a license for no less than 30 years nor more than 50 years. It noted its policy of basing the term on the amount of new construction, capacity, redevelopment or additional environmental measures the license requires. In the case of Big Creek 4, the director of FERC's office of energy

projects determined only "modest measures" were built into Big Creek 4's new license. The director issued a term of 36 years, so as to enable coordination of the license term with the terms of new licenses SCE is seeking for other projects in the Big Creek System, which includes six reservoirs and nine powerhouses operating under several licenses that expire between 2003 and 2009. That would allow for the possibility that all the new licenses would expire at about the same time, assuming the other projects are relicensed for 30-year terms.

Edison said there is no guarantee the other licenses will end up with such terms. It said the commission should adopt a flexible term of the lesser of 50 years or the term of the next license issued for one of the Big Creek System projects currently set to expire in 2009. The actual term for Big Creek 4 would then be confirmed by the commission when the new Big Creek System license is issued.

But FERC said no. It said while as a matter of policy it tries to coordinate terms for related projects when possible, this "cannot always be accomplished." It said the director's 36-year term was a "reasonable attempt to achieve similar expiration dates" for the Big Creek projects.

"Even if it develops that those expiration dates are within a few years of each other, the commission would still have the option of coordinating the consideration of the relicense applications."

Geoffrey Rabone, SCE Big Creek project manager, said he did not anticipate SCE would pursue the matter. "They could have given us 30 years," he noted. "So we'll probably just take it and be thankful for the extra 6 years." SCE hopes to get a 50-year license for the Big Creek System project. He said Edison would only go back to the Big Creek 4 matter if there is a significant difference in the terms given to the various licenses. SCE also favors having all related projects in a system having similar expiration dates, he added.

**In its rehearing request**, SCE also complained that a license condition requiring it to clean equipment and give the Forest Service 10 working days notice before moving equipment was burdensome and impractical, since SCE frequently moves vehicles and equipment across project boundaries. FERC said the requirement was a mandatory condition of the Forest Service—part of its plan to prevent the spread of noxious weeds. As such, FERC said SCE's only recourse is to work with the Service as it

prepares its noxious weed management plan. It threw the utility a bone, opining that the language of the license condition "suggests that the Forest Service could agree to more flexible" measures.

FERC also said portions of some roads that were incorporated within the project boundary by the relicense order could be removed. SCE had previously proposed to remove the roads entirely as they were not necessary to serve project purposes. But FERC said SCE still uses portions of the roads.

Edison also complained that the license article requiring it survey longhorn beetle habitat was confusing because it did not specify the size of the area to be surveyed, did not adequately specify the meaning of "ground-disturbing activity" and the requirement that it file an application for ground-disturbing activity is not required by, and is redundant to, the US Fish & Wildlife Service incidental take permit incorporated into the license. FERC agreed "FWS's intentions are not entirely clear." It said FWS and the licensee should work out a solution and submit it as part of an elderberry longhorn beetle management plan.

FERC accepted some of the requests SCE made for details of the plans and reports required in the license for water quality certification, mostly to allow resource agencies to modify their conditions in certain situations.

FERC also agreed with SCE that there is a conflict about when the water year begins. In one condition, it is in April; in another May. FERC noted the conditions were mandatory so "we cannot direct the licensee to adopt one to the exclusion of the other." But it consented to a plan to resolve the issue in the flow monitoring plan required by another license article, and said it assumed once agreement was reached, the agencies would modify their mandatory conditions accordingly [*Ben Tansey*].

## [19] NOAA BiOp Puts Squeeze on Cowlitz River Collection Timeline • from [7]

The new NOAA Fisheries Biological Opinion for Tacoma Power's 462 MW Cowlitz River Hydroelectric Project "takes a pretty rigorous approach in adding monitoring and review on some of our license articles," says Debbie Young, Tacoma natural resource manager. "It's something we can live with, but it goes beyond the settlement agreement," she said.

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**"We're working as fast as we can, but it will be tough to meet" the new deadline.**

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Tacoma used the applicant-prepared environmental assessment approach to relicensing Cowlitz River (FERC Project No. 2016). A settlement agreement was signed in August of 2000, and the license was issued in March 2002. But it was stayed due to an appeal of its Clean Water Act Section 401 water quality certification that was filed by the Friends of the Cowlitz, Cowlitz Tribe and CPR Fish. The stay was lifted last July, whereupon the utility entered implementation mode.

NOAA issued the BiOp even though it has yet to review Tacoma's draft plans under three license articles. Already behind schedule, NOAA issued the BiOp March 23. Young said that in addition to adding greater monitoring requirements, the document shortens the timeline for work on the downstream collection of out-migrating smolts at Cowlitz Falls, a Lewis County PUD project upstream. "We're working as fast as we can, but it will be tough to meet" the new deadline, she said.

The original license articles gave Tacoma six months to complete a downstream collection plan, then one year to complete construction followed by two consecutive intervals of 18 months to achieve certain fish passage survival rates. But under the new BiOp, all of this must take place within three years of when the BiOp was issued. "We have to do the construction and get it to work about one year faster," Young said. "Maybe more," she added, because NOAA has needed so much extra time to review the plans that Tacoma has twice been forced to go to FERC for extensions to comply with the license articles. On April 29, FERC granted an extra 90 days. "Our time gets shorter and shorter," Young said.

Keith Kirkendall, branch chief of NOAA Fisheries FERC and Water Diversion section, acknowledged the changed schedule but said he did not see it as an "acceleration." The way it was put forward in the license articles "was a little ambiguous, so we just tightened it up some." He said NOAA had a conference with Tacoma and the Cowlitz Tribe "and this is what we came to as the best way to go forward."

As for the delays in reviewing Tacoma's plans, Kirkendall said the agency is a member of a subcommittee that's supposed to work on "these things," whereupon the utility must come to NOAA for final approval. Due to a staffing issue, NOAA had not been active on the subcommittee, he allowed, but

Tacoma had gone to FERC for approval without first running it by the agency. He said NOAA got clarification from FERC on this matter. "They had to come back and put us in the approval loop [but] they didn't allow us to see and approve [the plan] outside the group," in contravention of the license. "We were not about to not let that happen."

Tacoma is working with the PUD and with BPA, which purchases all of the output from the PUD's dam, to come up with a solution to the downstream collection matter. There is already a fish collection facility, but it is not achieving the success rate desired by NOAA Fisheries. Young said the parties have yet to come up with a method to achieve the rates NOAA seeks. They are still in the research and data collection mode, she said, and the parties are meeting regularly. Last month, Tacoma filed the 39<sup>th</sup> monthly progress report. In it, Young said the parties in March discussed implementation of interim measures.

Meantime, Young said the utility had been working on the plans mandated in the FERC license. Drafts were recently sent out for review by agencies. Among these is a fish hatchery and management plan (FHMP) under Article 6 of the license that Young said is a "key document" aimed at bringing together all fish management in the Cowlitz River.

Tacoma sent a draft FHMP to parties in January and held several public meeting. On April 28, the utility received FERC approval to extend the deadline for submission of the FHMP to Aug. 18. FERC said the extension was justified because Tacoma said it had received "divergent comments" on the FHMP, "including recommendations for significant revisions."

Parties participating in the review, under the auspices of the utility's Fisheries Technical Committee established in the settlement agreement, include US Fish & Wildlife, the Washington Depts. of Ecology and Fish & Wildlife, NOAA Fisheries, the Yakama Nation, and a joint representative from American Rivers and Trout Unlimited.

Tacoma is also working on implementing other license articles, including recreation improvements that will add 100 camp sites and upgrades to comply with the Americans with Disabilities Act. "We'll be busy over the next few years," Young observed.

When the settlement was signed, the estimated cost of the capital improvements came to \$60 million, Young said, while the cost of the relicensing process itself topped out at \$11 million.

Meantime, the license and settlement themselves still face a challenge from the Cowlitz Tribe. The complaint involves FERC's failure to issue the license without having completed ESA consultations. The Ninth Circuit Court of Appeals has ordered the parties to mediation. "We have been working hard at getting that done," NOAA's Kirkendall said [*Ben Tansey*].

## [20] CEC Staff Asks FERC to Consider Shutting Klamath Facility • from [8]

California Energy Commission staffers have taken the unprecedented step of filing comments with the Federal Energy Regulatory Commission concerning PacifiCorp's application to relicense its Klamath River hydroelectric project. It is the first time CEC staff has offered comments to FERC on energy and environmental issues associated with a hydroelectric facility relicensing application, noted the April 26 filing.

PacifiCorp submitted its nearly 7,000-page application to FERC in February, but has been meeting with state and federal regulatory bodies, environmental groups and tribes to discuss the project since 2000. The current license for the Klamath project (FERC No. 2082), issued in 1956, expires on March 1, 2006.

The complex system, with facilities in both Oregon and California, includes seven dams and seven powerhouses. It has 161 MW of total capacity and an annual average production of 656 GWh.

The relicensing effort has attracted intense scrutiny because the project is located in waters that are habitat for salmon and steelhead trout listed for protection under the Endangered Species Act.

PacifiCorp offers a number of "system enhancements" in its application to address impacts on fish populations. These include the decommissioning of two powerhouses with a total capacity of 3.8 MW; increasing minimum flows; augmenting "spawnable gravel"; and adding fish screens and fish ladders at various locations. Other proposed changes would facilitate downstream fish passage, according to the application.

But a powerful group of California agencies is asking that FERC consider another alternative: decommission some or all of the facility.

The California Energy Commission, along with the State Water Resources Control Board, the Resources Agency and the Department of Fish and Game, has determined that decommissioning is a "viable option," and should be "developed and fully evaluated as

an alternative" during federal review of PacifiCorp's application.

"We note that low power/high impact energy facilities can create substantial net environmental benefits if decommissioning proves to be feasible and cost-effective and if replacement energy is available," wrote CEC staff in the recent filing. "Fully 300 miles of main-stem and tributary salmonid habitat could be made accessible to Klamath River salmonids if the barriers to passage created by PacifiCorp's lower project dams ... were removed."

A CEC staff paper, issued last May, found that loss of some or all of the system "would not significantly affect PacifiCorp's ability to provide electricity to its 1.6 million customers" [700-03-007].

Replacement energy for such a "small energy facility" is available, the report noted, in the form of a 484 MW natural-gas cogeneration plant and a 93 MW combustion-turbine peaker project—both recently built in Klamath County, Oregon. Additionally, two new combined-cycle projects totaling about 1,600 MW are planned for Klamath County, and are currently undergoing licensing review by Oregon state officials.

In its April commentary on PacifiCorp's application, CEC staff also had questions about the methodology the company used to establish the project's annual energy value. The application put that value at \$70/MWh and \$48.5 million annually. Staff intimated these numbers might be high when looking at other estimates.

The staff commentary offered four different forecasts and estimates of wholesale and avoided energy costs "that may help inform the record on the project's appropriate energy value." An avoided-cost estimate filed by PacifiCorp in 2003 with the Oregon Public Utility Commission, for example, valued its 2004 peak energy at \$28.74/MWh, according to the report.

"Based on our review of FERC's regulations and appropriate methods for estimating current energy replacement costs, there is insufficient information to evaluate the energy value estimates provided in the application," staff wrote. It asked FERC to provide "additional clarification on the requisite methodology and calculations" used in the application.

"Valuation of the project's energy is one of the most important elements in the relicensing review process because all environmental mitigation cost estimates, alternatives and the ultimate balancing of project costs

and benefits are reference to this valuation of project energy."

For its part, PacifiCorp is still reviewing the CEC staff submission. But it is clear the company will be standing firm on its support for the project.

"We did not consider decommissioning in our application because this project has value in providing low-cost, pollution-free electricity to California," said Jon Coney, spokesperson for PacifiCorp.

Coney added that the project serves all of PacifiCorp's customers in Northern California, of which there are close to 43,000. "It's a valuable project," he said. "We want it to remain in place" [Leora Broydo Vestel].

## [21] FERC Orders Small, 100-Year Old Project to File for License • from [9]

A 1.5 MW hydroelectric project on the North Fork of the Nooksack River in northwest Washington state must have a FERC license even though it is not on a navigable stream and was constructed decades before 1935, a FERC administrator has ruled.

In his 21-page decision dated March 25, Joseph D. Morgan, director of FERC's division of hydropower administration and compliance, said the finding was necessary because the project's seven-mile primary transmission line occupies federal land (JR02-1-000).

"Now that we can start the licensing process, we can work toward making sure that enough environmental measures are in place to protect the river" said Connie Kelleher of American River, which filed for late intervention in the case.

The Nooksack Falls Project began operating in 1906, well before FERC existed, but the question of FERC's jurisdiction has been unresolved since at least 1962, when a Forest Service easement expired.

FERC commission staff found the river was navigable. Puget Sound Hydro LLC, which bought the project in 2003 from Puget Sound Energy, believes no license is required. American Whitewater, the Nooksack Indian Tribe, Northwest Ecosystem Alliance and Welcome Springs filed comments saying a license is required. The Washington State Dept. of Ecology and US Forest Service intervened, but took no position.

In a newsletter published by the Northwest Indian Fisheries Commission, Bob Kelly, director of Nooksack Natural Resources, said "If this dam gets even close to withdrawing as much [water] as [Puget

Sound Hydro] claim[s] they will, the impact to fish could be devastating."

Morgan ran the project against several tests for jurisdiction: stream navigability, construction since 1935 and occupation of federal land.

He rejected the FERC staff finding, saying the stream is not navigable because the reach above the project is considered by whitewater rafters to be of Class IV difficulty, and FERC does not consider Class IV reaches navigable. Although there is an exception for commercial rafting, Morgan said no commercial rafting outfits put in the river above the dam.

Morgan found no new construction at the project since 1935, but noted there is an exception to the rule for projects restored after having been abandoned. Intervenor argued that after a fire at the plant in 1997, Puget Sound Energy had effectively abandoned it, and that new construction took place when Puget Sound Hydro restored some "project works" that PSE had ripped out. But Morgan said while PSE ceased operations, its continued maintenance of the site, "while not exemplary," was sufficient to prevent it from qualifying for the abandonment exception.

Licensing can also be triggered if a project occupies federal land. Although the project is on private land, the "primary transmission line," which is still owned by PSE, traverses the Mt. Baker-Snoqualmie National Forest on its way to a PSE substation.

Morgan found the line is on federal land even though Puget Hydro sought to argue that the line will soon serve a metered residential structure and interpretative site on private land 200 feet from the project, and so will no longer be "primarily" for delivery of project output.

Morgan said he agreed with intervenor comments that Puget Hydro "is attempting to bootstrap its asserted use of PSE's 'system' power into evidence of the transmission line's use for a distribution/retail function." Doing so would render the primary line test "essentially meaningless," he said. In addition, there is no case law "to support the notion that the mere installation on the primary line of a retail meter...suffices to render the line no longer primary."

Morgan ordered Puget Hydro to file a license or exemption application, an emergency action plan and other material.

Nooksack has been operating since May of 2003, selling output to PSE. The owner expects to continue operations pending the license application. More recently, American Rivers sought to intervene and request the project be shut down until a license is granted.

Puget Sound Hydro questioned the group's standing to intervene and said the shutdown request has "absolutely no support in law or in fact." It also cited the group's concession that the record is devoid of any evidence of project impacts on natural resources. Moreover, it noted the licensing decision is still subject to rehearing and judicial review [*Ben Tansey*].

## [22] Cushman Decommissioning 'Inevitable' Absent FERC Action • from [10]

In a last ditch effort to prevent the policy "trainwreck" of "*de facto* decommissioning," Tacoma Power filed a pleading with FERC to reconsider the new license it issued for the 131 MW Cushman hydroelectric project along the Skokomish River in western Washington. With the release of two new BiOps, "shut-down and decommissioning of the Cushman Project now appear a certainty," wrote Tacoma attorney Mike Swiger. That will be "the inevitable result if the commission does not reconsider its previous licensing orders."

In a motion for relief, Tacoma asked FERC to reconsider the applicability to Cushman of FERC's 1994 Decommissioning Policy Statement and its 1995 Mead decision, which Tacoma said eliminates from the Federal Power Act's public interest assessment the consideration of economic impacts on licensees. It should also decide whether to supplement "an undoubtedly flawed" and aging final EIS.

Tacoma said a hearing should be held "to provide a process for exploring workable long-term solutions" as well as to work out disputes over factual matters. Were the existing license to stand, Tacoma's cost of power would increase

by \$5 million, the utility said, resulting in a net loss of over \$2 million per year, compared to the cost of alternative power. "Tacoma has made clear that it would be forced to reject such a grossly uneconomic license."

The Cushman matter garnered a letter to FERC from Congressman Norm Dicks (D-WA), who warned that endorsement of the two new BiOps

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**"Tacoma has made clear that it would be forced to reject such a grossly uneconomic license."**

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could lead FERC "once again [to] issue a license order that is bitterly contested and that leads to many more years of litigation." He urged the commission to "carefully consider whether an alternative solution can be developed" to avoid project shutdown.

The Skokomish Indian Tribe, American Rivers and an assortment of resource agencies opposed Tacoma's motion. In a joint filing, the Tribe and American Rivers called it "an eleventh-hour tactical ploy to once again delay the inevitable—i.e., a conditioned license."

In 1998, after 24 years, FERC issued Cushman a new 30-year license with a \$92 million package of measures, but it was stayed pending Tacoma's appeal of the licensing conditions, which it said would render the project uneconomic. In the meantime, two new fish species impacted by the dam were listed under the ESA. So in 2000, the Court of Appeals for District of Columbia remanded the matter back to FERC for Section 7 consultations.

The Skokomish Tribe, which is suing Tacoma for \$6.8 billion in damages stemming from the dam [See (11/23)], has moved to partially lift the stay and implement interim measures. FERC agreed, and ordered an unusual proceeding overseen by an administrative law judge to do so. Last December, the ALJ recommended flows in the North Fork of the Skokomish River to be increased to 240 cfs, the same figure in the relicense that Tacoma says would amount to *de facto* decommissioning. Tacoma currently releases 60 cfs.

The ALJ, H. Peter Young, chided both sides for their lack of cooperation in coming up with a set of stipulated facts. The proceeding produced a Recitation of Disputed Essential Facts, which Young called "exceedingly problematic. Contrary to my intention and repeated admonitions, it constitutes the overwhelming weight of the record on which the parties would have the commission rely. Moreover, many of the Recitation's proposed findings of fact are carelessly crafted, conclusory, argumentative and utterly unsupported by the record." Even "more disturbing," Young added, "is the pervasive inability/unwillingness to satisfy minimum commission standards of practice...the most egregious by far that I have experienced in seven years" as a FERC ALJ, he wrote.

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**"The replacement power costs are an appropriate component of Tacoma's cost of generating electricity."**

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On the merits, Young said while the cost to replace foregone power was disputed, the issue "is far less essential...than it appears." He said "the replacement power costs are an appropriate component of Tacoma's cost of generating electricity" and of its rates. "If the Cushman project is, in fact, not viable when the operational cost of discharging 240 cfs...is factored into the project's total cost of service, it is economically inefficient and should be decommissioned."

Young said the interim remediation proposal Tacoma offered was "inadequate in the extreme." He said, "Tacoma blithely refuses to acknowledge the overwhelming evidence that the absolute minimum" flow needed to protect the viability of endangered fish is 240 cfs.

FERC has yet to rule on Young's recommendations, Tacoma's motion or the remand from the DC Circuit. Cushman appeared on FERC's agenda for May 5, but was struck moments before the meeting began.

**Two months ago**, both the National Marine Fisheries Service and the US Fish and Wildlife Service issued long-delayed biological opinions that substantially uphold the 1998 licensing conditions and "unquestionably signal a regulatory disaster," according to Tacoma. The municipal utility says the BiOps "lack substantial evidentiary or scientific support," and their adoption into the license would "result in a *de facto* decommissioning" of Cushman.

Shutting Cushman down "would cost Tacoma and the entire region a clean, renewable energy source and would be contrary to the sound public policy of ensuring an adequate energy supply at reasonable cost." Other public benefits would also be lost and the failure "to issue a balanced license...would be inconsistent" with FERC's obligations under the FPA. Tacoma cited a recent decision in which FERC "and particularly Chairman [Pat] Wood...expressed 'reluctance' and 'regret' regarding the prospect of losing even a small 1.5 MW project."

Some observers have speculated that Tacoma is betting on the turnover in FERC commissioners since the 1998 relicense as its best hope for saving Cushman.

The Tribe and American Rivers denied the license would lead "to bankruptcy or decommissioning." They cited ALJ Young's finding that the cost of replacing the 49.7 GWh in foregone gen-

eration would have a "negligible" effect producing "a rate increase of only about one percent." They also pointed to the ALJ's language about Tacoma having "reaped a tremendous windfall over many decades" from Cushman. They claim that between 1925 and 1997, Tacoma received \$926 million in 1997 dollars from Cushman, a 47 percent annual rate of return, enough to recover its investment "at least five times."

Tacoma reminded FERC that while its Decommissioning Policy Statement asserted FERC's authority to deny a license and order decommissioning, it has never been tested in court, since the only instance in which it has been applied, the Edwards Dam case, was resolved through a settlement. Applying either this policy or the Mead decision to "a financially viable project" like Cushman "is neither wise nor defensible." If it cannot offer a viable license to an otherwise healthy project, FERC must turn the matter over to Congress, Tacoma said.

The city said it "does not believe [FERC] has the authority to order decommissioning directly," although this appears to be odds with the city's defense against the Skokomish Tribe's lawsuit. There, Tacoma's US attorney co-counsel conceded the respondents' theory of the FPA as "comprehensive scheme" for water works in the US implies FERC's authority to order dam removed.

But Tacoma maintains the FPA requires FERC to issue new licenses "'upon reasonable terms.' A license that forces decommissioning through onerous conditions that render the project grossly uneconomic is *per se* unreasonable."

The utility also made a case for why FERC should do a supplemental EIS before issuing a license that would result in decommissioning. Its existing final EIS is eight years old, Tacoma said. Such a review would result in a "more informed decision" and square with the Council of Environmental Quality's advice that EIS's more than 5 years old should be "carefully reexamined" to determine if a supplement is necessary.

The Tribe and American Rivers rejected the need for an evidentiary hearing or supplemental EIS. "The commission only grants [evidentiary hearings] requests when there are material issues of fact in dispute that cannot be resolved on the basis of the written record." Nor, they said, has Tacoma "presented any new information that warrants a supplemental EIS."

In early May, the battle between Tacoma and the tribe continued. The utility moved to have FERC take notice of a recent Eastern Washington District Court decision ordering NOAA Fisheries to decide by May 28 whether the delisting of certain listed fish species, including the two impacted by Cushman, are warranted. "A finding by NOAA that delisting these species is warranted...would be highly relevant to issues pending before the commission regarding the Cushman project."

The Skokomish Tribe responded, telling FERC it should deny the motion. "Tacoma is using commission rules governing official notice as a thinly veiled attempt to again delay commission proceedings and avoid inevitable instream flows." It said the city "presents a one-side, inaccurate view" of the meaning of the district court's order. Delisting of the two species is "certainly not imminent," the tribe asserted. "It is highly unlikely that NOAA Fisheries will answer Tacoma's prayers" [*Ben Tansey*].

### [23] Cushman in Court: Parties Await Ninth Circuit's En Banc Ruling • from [11]

"This has been a long and convoluted process which is not over with."

So said Phil Lynch, US attorney for the Western District of Washington, when asked by a Ninth Circuit Court of Appeals judge, if, through its role in the licensing of Tacoma's 131 MW Cushman dam, the US government had violated its treaty with the Skokomish Tribe. The response came to one of numerous questions judges asked during a 70-minute oral hearing March 23 in courtroom 4 on the third floor of the court's San Francisco headquarters.

The occasion was an *en banc* hearing before a full panel of 11 Ninth Circuit judges, including the chief judge. Frequently requested, the court grants *en banc* hearings less than two percent of the time. It elected to do so in this case to review a June 2003 split decision of one of its three-judge panels, which upheld a District Court ruling that said the tribe was barred from pursuing a \$5.8 billion damage claim against the government, and that the suit amounted to a collateral attack against the even longer and more tortured proceeding involving Cushman's license, was granted 80 years ago June 3.

Tacoma, the US government and the Skokomish Tribe are still awaiting a decision.

At the behest of attorney Mason Morisset, tribal members pulled out all the stops to show the court how important the case is to them. Some

elected tribal council members flew down for the hearing. Other members of the tribe launched a grassroots fund raising effort among the 700 residents of the reservation that included bake, chili and beef stew sales to raise the thousands of dollars needed to send some 50-plus members to the hearing. The group, including children and an elder woman confined to a wheelchair, traveled round trip via bus, 16 hours each way.

"This is the making of history," said tribal member LuAnne Kennedy. At least a dozen members wore full tribal regalia into the courtroom; others carried staffs or wore cedar headbands.

By contrast, the respondent's contingent was slight—Tacoma Superintendent Steve Klein arrived with two of the utility's attorneys and the US attorney.

Tribal attorney Mason Morriset said it was clear the judges had read the briefs, and acknowledged he'd encouraged tribal members to attend the hearings. "I wanted the court to know they were interested," he said. In the event of an adverse ruling, Morriset said any decision about a Supreme Court appeal would fall to the tribal council. He said it would depend in part on finances. "This is basically a poor tribe. These guys are scratching to keep this thing alive." But even more important will be the nature of the decision. "There's a hundred ways to get pecked to death by ducks," he noted.

But Morriset, who's 36-year legal career includes a perfect 3-0 record at the Supreme Court—all of them involving tribal rights, including the famous "Boldt" decision—said he is "confident that I am on the proper side of this case legally—in some ways even more so" than in his Supreme Court cases. "But it is a difficult [legal] question," he allowed. "The central issue is whether the damage case is barred by the Federal Power Act."

The Skokomish argue the license Tacoma got did not authorize any of the activities connected with Cushman but the inundation of 8.8 acres of federal land on the outskirts of the project boundary. Morriset said licensees of other projects, such as Box Canyon Dam, got licenses for multiple activities, but were held liable for doing only one thing for which they were not licensed. The question becomes, "What happens if you step outside the license?" He

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**"Congress clearly stated the arbiter with respect to water power projects is FERC."**

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**"There's a hundred ways to get pecked to death by ducks."**

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said the Cushman case may prove and even stronger precedent than Box Canyon.

Tacoma has indicated it will seek redress from the Supreme Court in the event of an adverse decision. There is strong likelihood the court would take it, said Tacoma attorney Rick Creatura, because it would be a matter of first impression involving the FPA.

But Creatura also expressed confidence in the case. Over the years, one commission and three courts—including Judge Boldt—have already dealt with identical issues, he noted. Creatura emphasized the fundamental issue for

Tacoma is that, "We always operated within the scope of the license, ever since it was approved in 1924."

The tribe's fishing rights under the 1855 Treaty of Point No Point, he said, amount to only the "right to use a resource." He quoted former Supreme Court judge William O. Douglas: "The tribe doesn't own the fish, they own the right to catch a fish." Creatura said in its brief, even the Tribe disclaimed an "immutable right. They understand this is a resource that has to be managed. So if we assume that treaty fishing rights are adaptive, and that there is going to be change, then the question is: Who is the arbiter of that change. Congress clearly stated the arbiter with respect to water power projects is FERC."

According to minutes of recent meetings, Tacoma Power allocated an additional \$140,000 to pay the legal costs of defending the case before the *en banc* panel, "and potentially more work involved with a petition to the US Supreme Court." It also allocated an additional \$800,000 to cover the legal costs for the ongoing relicensing of Cushman before FERC [See (10/22)].

## II

The court hearing was recorded, but it is not always possible to determine which judge is speaking. Witnesses said all 11 judges asked questions at some point. Because of the unusual nature of the case, *Relicensing Review* offers the following extended summary of the oral argument.

For all its convolutions, the outline of the dispute is fairly simple. The tribe is making claims for numerous violations of its treaty rights under the Federal Claims Tort Act (FTCA), especially for the loss of a fishery, as well as violations of state and federal law.

The US argues that it qualifies for liability exemptions under the FCTA and the Federal Power Act (FPA). Tacoma argues it is absolved because the statute of limitations has expired on all claims except any that were affirmatively preserved under the Indian Claims Limitations Act (ICLA), and that those have no merit.

**The respondents' defense theory** is that FERC and the FPA were meant as a "comprehensive scheme" for the management of dams and water works in the United States. Since any and all claims relating to projects should therefore be brought to FERC, the lawsuit constitutes an impermissible "collateral attack" upon the that comprehensive plan, and the relicensing proceeding in particular. The tribe argues the licensing proceeding must stand on its own, and that it has a common law right to bring its damage claim to district court.

The case revolves around the three-page 1924 minor license FERC granted approving the flooding of 8.8 acres of federal land.

Morrisset, representing the plaintiff, was the first to face questions from the court. "What did the United States do to interfere" with the tribe's fishing rights, he was asked. The US failed to meet its trust responsibility to the tribe because it did not move under the FPA to impose appropriate conditions for the license that would protect the tribe's interests, he replied.

One of the judges said that sounded more like "a claim for exercise of authority to regulate." That's not covered by the FTCA, which holds the government liable only to the extent a private citizen would be. A private person cannot regulate or exercise a tribal trust responsibility, the judge noted. The court wondered if the tribe wasn't trying to make a FTCA claim out of a claim under the Tucker Act, which gives the Federal Claims Court jurisdiction for a wide range of claims against the US.

Morrisset was then asked about Section 803(c) of the Federal Power Act, which makes hydroelectric licensees liable for all damages caused by their project, and expressly exempts the United States from liability. The court wanted to know why 803c didn't simply preclude the tribe's action against the US.

Morrisset said the claim does not have to do with the operation or construction of the project, but with the failure of the US, under its trust responsibility to the tribe, to see to the provision of license conditions protective of the tribe's interests.

So if the Federal Drug Administration approves a drug for sale, one judge asked, and it turns out to have side effects and people die, "You think you can sue the United States?" Yes, Morrisset replied in substance.

Another judge wanted to know why, even if there is a tort claim against the US, it was not barred by the statute of limitations. Morrisset said under ICLA, which gave tribes a renewed opportunity to file claims against the US, the claims had been indefinitely tolled because the Secretary of Interior—to whom the claims are submitted—has not acted on them. Both the Tribe and Interior reserved claims under the act, although there is a dispute as to their number and specificity. "I'm sorry I can't be clearer on this," Morrisset said. "The records as to the details of these claims are, shall we say, in the bowels" of the Dept of Interior and it is "difficult to find out exactly what was discussed."

Morrisset was then asked if the statute of limitations had not run out on the state claims. The Tribe's position is that they have not, at least on the so-called aggradation claims, because the existence of aggradation was not affirmed by the parties until a date that fell within the limitation.

Judge Marsha Berzon, who participated in the hearing by phone, wanted a clarification of the tribe's federal causes of action are. "You characterize them as tort claims, so I gather they are not claims under the treaty?" Morrisset said the treaty is only one of the bases for claims of property rights damaged by "Tacoma's tortuous actions." There are also federal common law causes of action for the taking of fish guaranteed by treaty and the partial destruction of homeland, he added. The tribe claims a "Treaty right to a harvestable population" of fish.

But if the aggradation claims are time barred, what is left, Berzon persisted. "All claims flowing from the loss of fish," state and federal, and those to do with inundation of usual and accustomed fishing stations and cultural sites, Morrisset replied.

**The US' Phil Lynch** then stepped up. He said the US agrees with Tacoma's view that the only claims preserved under the ICLA are fishery-related claims. Before he could say much more Judge Ronald Gould asked him why Section 803(c) of the FPA should give the government a "complete pass" if it violated a treaty obligation. The exemption is only for construction and operation of the dam, the judge noted. "The claims here are much broader."

Section 803(c) immunizes the US for construction and operation of the dam, but not for breach of fiduciary duty, Lynch replied. But the latter should be filed under the Tucker Act, he said.

What of the government's failure to get protective provisions in the license, Gould asked. That goes to the so-called "discretionary function exception" (DFE) under the FTCA, Lynch replied. The DFE kicks in if the government action at issue—in this case a hydro licensing—involves a matter of judgment and if so, whether it involves social, economic or political policy considerations. Lynch said his principal clients—FERC and the Depts. of Interior and Commerce—provide input to the licensing, "but it is a discretionary decision on the part of FERC as to whether a license is issued." Both the DFE and the statute of limitations under ICLU preclude the tribe's action, he said.

But didn't the license require the government to take into account the needs of the tribe, another judge asked. Yes, but as an economic decision, it is immunized from "judicial second guessing," Lynch asserted. So if the government "totally abdicates its responsibility to protect the interests of the tribe, it's immunized?" It is immunized from claims under the FTCA, but not from claims of fiduciary breach under the Tucker Act, Lynch repeated.

The court then asked for the government's position on "the contention that the tribe was supposed to have a right to take fish at usual and accustomed places and the licensing of this dam may have wiped out their fishery?"

Lynch said that matter is still under consideration by the DC Circuit Court of Appeals, which remanded to FERC issues surrounding challenges to the 1998 Cushman relicense. The court wanted to know if, in that proceeding, the tribe was seeking mitigation measures to make up for "past wrongs or only for the future." It was, Lynch replied.

**The court then inquired** about what FERC could say in a license. It cannot give compensatory damages, but could it order a fishway, an excavation of the river bottom, or other things? Lynch said that would depend on recommendation of the federal resource agencies.

Judge Gould then asked a surprising question. "Could FERC require the dam to be taken off the river? Would that be beyond their power?"

Lynch paused and then said, "Your honor, I am not sure." But he then fell back on the respondent's basic theory of their defense against the alleged "collateral attack" and amended his response. Since FERC and the FPA are supposed to be "comprehensive schemes" for water works in the US, "I suppose it could," said the US Attorney, whose Western Washington jurisdiction includes no less than 2000 MW of FERC-licensed projects spread out among some 25 projects owned by about a dozen investor-owned utilities, PUDs, cities and private non-utility companies. He said he felt sure Tacoma would sue if FERC took such an action, however.

Less than three weeks earlier in the relicense proceeding at FERC, Tacoma filed a motion in which it stated, "Tacoma does not believe that [FERC] has the authority to order decommissioning directly."

Another judge spoke up. "My question is if the government has noticed that harm was happening and refuses to do anything about it, just watches as injuries take place...at some point, isn't the government responsible in tort for the loss of property that it's causing?"

Under state law, yes, Lynch responded. But it would be subject to the statute of limitations under the FCTA.

"Do we know as a matter of law what that is?" the judge asked. "Why should we decide that here?"

Neither the three-judge panel or the district court reached that issue, Lynch observed. It was dismissed under the 803(c) exemption.

"So wouldn't it make sense to remand under the statute of limitations?"

Lynch somewhat reluctantly allowed that if the court determined neither the 803(c) immunization or the discretionary function exception applied, then "those are issues that would have to be addressed."

If the discretionary function exception did not "wash out" the statute of limitations, then wouldn't there be a problem with the original license, Judge Berzon asked. Hasn't it been conceded that the original licensing was an "abuse of discretion?" she asked. The 1924 commission should have looked at all aspects of the project but it did not. So as far as the discretionary function exception is concerned, "it would appear there was a direct violation of what we now understand the statute to mean?"

Lynch said FERC has in later years considered this matter several times and concluded that while

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**"At some point, isn't the government responsible in tort for the loss of property that it's causing?"**

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the original license decision is now considered to have been mistaken when it was considered in 1924, the government felt issuing a minor part license was appropriate. The FTCA was not passed until more than 20 years later, he noted.

In response to another question, Lynch said the government's position is that the tribe's suit is a collateral attack on both the original license and the relicense approved in 1998. But he said FERC still has this matter under consideration in the remand from the DC circuit, which is where it belongs since the FPA is a "comprehensive scheme. They would like the opportunity to finish their determination and have it reviewed by the DC circuit." He said FERC would like to see the matter put in abeyance until then.

The respondents parted company on this matter too. Later when he spoke, Tacoma attorney Rick Creatura said putting the matter in abeyance would simply allow for a collateral attack after FERC issues its final rulings. There is the prospect of inconsistent rulings, he noted. "This court clearly needs to state that this belongs at FERC and not in this court."

But the court questioned Lynch about how the suit constituted a collateral attack on either the original or the new license. Does it seek to modify or nullify the license in any way? And if so, how?

Lynch paused for some time. "It would be a challenge to what would happen with the dam," he finally said.

One judge allowed the possibility that a damage award might constitute a collateral attack. But he returned to the issue of the minor part. "The problem here is FERC has said they didn't consider the whole project. If they had...then I agree it would be a collateral attack. But if they didn't consider the whole project, but only a handful of acres in a minor part license, then how is that a collateral attack? It doesn't seem like from what I have read that in the original licensing they were really thinking about the tribe's overall interests."

Lynch said the three-judge panel determined that the interests of the tribe were considered upon relicense.

The panel "could say the Moon is made of green cheese," the judge replied. "It wasn't considered," he said flatly. "What does the record show?"

Lynch reiterated the finding of the three-judge panel.

"They conceived of their licensing authority at that point as being limited to whether or not it was OK to flood 8.8 acres," Berzon injected. "That is all they determined. They were very specific that that was all they determined. So why would they take the tribe into account?"

Lynch maintained that even though only a minor part license was examined, the three-judge panel found they "did consider the effect of the project on the Skokomish."

Later, Tacoma provided the court several pages of excerpts from 15 of its exhibits, mostly letters to or from federal agency personnel prepared between 1913 and 1923, which in some way mention the project's impact on the tribe, some saying there will be no effect, some saying it will be adverse.

One of the exhibits is a seven-page, 1913 report by Department of Interior official L. M. Holt. A part of that report states that "Practically all of the Indians feel that the construction of this dam...would be a menace to their lives and homes and that they would not care to live below [it]. [They] also claim ...that this would destroy their fishing as there would then be no water in [the North Fork]."

But this report was not prepared for Tacoma, which filed for the licensee in 1923, but 10 years earlier for Seattle, when that city was considering a dam at the site.

**A 1917 letter** to Tacoma's Light Commissioner from another Interior official connected to Tacoma's scoping for the project says the complaints Holt related should be investigated. It goes on to say since no diversion of the North Fork is contemplated, it "will meet with no objection on behalf of the Indians." But the license application Tacoma ultimately filed in 1923 acknowledged the diversion of "substantially all of the waters" of the North Fork Skokomish. In 1999, Tacoma voluntarily began restoring a flow of 60 cfs to that channel.

Lastly is the three-page license FERC (then the Federal Power Commission) approved, which says "the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired."

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**"It doesn't seem like from what I have read that in the original licensing they were really thinking about the tribe's overall interests."**

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The court took issue with this language.

"When I read it in context, I thought when they used the term 'reservation,' they are talking about the reserved federal eight acres, not about the Skokomish's reservation. The term 'reservation' can refer to the federal land."

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**"Isn't that just an insurmountable barrier to your argument?"**

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Tacoma maintains that the term "reservation" did refer to the Skokomish reservation. The tribe's Morriset told *Relicensing Review*

the commission "made no findings as to what the impact would be. You can't just say something. You have to say what you did and what you base it on." Otherwise such a finding is arbitrary and capricious, he said. Morriset maintains there is no evidence the FPC looked at any of materials in Tacoma's exhibits.

Chief judge Mary Schroeder then pointed out the respondents had only five minutes left, though Tacoma's attorney had not yet spoken. Tacoma sought to object, but the court assured them they would be allowed to complete their thoughts.

Tacoma attorney Rick Creatura made the case for the lawsuit as a collateral attack on the "comprehensive scheme" for the management of water power projects contemplated by the FPA and administered by FERC, subject to review in the appeals courts. This scheme affords the court an opportunity to focus on the "oversight, as opposed to management of resources," he said. The tribe's lawsuit "constitutes a collateral attack against that licensing process that should not be allowed."

Why doesn't Section 803(c) allow the tribe to bring a case under state law against Tacoma, Creatura was asked. He said under case law, a challenge is allowed only "to the extent that [Tacoma] violates the terms of the license."

Berzon said even if that is the case, the question is still whether Section 803(c) "preserves whatever state cause of action that might have existed, rather than pre-empting or superceding it." Creatura said Section 803(c) of the FPA preserves any state law claims for violations against the licensee. But when it comes to the state law claims, "that's where the ICLA statute of limitations problem applies." Contrary to the representation made by Morriset, he said, the district court judge did in fact consider this, and ruled all the state law claims violated the statute of limitations.

As for the federal claims, Creatura cited the three Ninth Circuit decisions concerning the Kalispel Tribe's claims against Pend Oreille PUD concerning the 60 MW Box Canyon project. There, he said, the licensee failed to disclose that tribal property would be inundated. He said the court therefore allowed certain annual permit charges under a different section of the FPA. That is exactly contrary to the Cushman case, he said. "The FPC was fully aware of the entire scope of this project."

"But the FPC didn't license the entire scope project," Berzon again objected. "Isn't that just an insurmountable barrier to your argument?"

They took into consideration the entire project, Creatura countered.

"Why does it matter what they took into account? Why doesn't matter what they actually licensed? All they did was license 8.8 acres."

If that had been the dispute, Creatura replied, then there should have been a lawsuit filed under the FPA.

But Berzon persisted. The commission took a narrow view of its authority, she said. "They only did 'X.' And if they only did 'X' then presumably it is only with regard to 'X' that they made anything binding on anything." No one has to be complaining about anything else then, for someone to come and say, "The City of Tacoma damaged us by doing things that were not licensed by the federal government."

Creatura disagreed. If the US felt a minor part license was not sufficient to operate the entire project, then it should at the time, acting as a trustee for the tribe, have filed suit. In granting relicense, FERC has twice ruled that it authorized the entire project despite the minor part issue. He quoted the license: "Although the commission found the minor part license it had issued was under inclusive, it did not invalidate them. It continued to recognize their continued legal force and effect."

He agreed there is no dispute that the entire project was considered upon relicense, and that the

tribe had sought damages in that proceeding. "That is what the congressional scheme anticipates," Creatura said. He noted the claims in that proceeding are identical to those in the instant suit.

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**"Although the commission found the minor part license it had issued was under inclusive, it did not invalidate them."**

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"FERC also decided it could look backwards and try to remedy things they thought were in inadequate with the first relicensing." In 1998, FERC said "past environmental effects are relevant and may be taken into account for purposes of analysis of terms and conditions." Tacoma disagreed with this, Crea-tura noted, but FERC said it nonetheless.

On rebuttal, Morisset was asked if the tribe wasn't seeking "double recovery"—from a Tacoma jury damage award and from mitigation built into a new Cushman license from FERC.

"There has been constant obfuscation on this point," Morisset complained. All the changes the tribe has asked for in the new license—in which, he emphasized, the US and the state of Washington have joined—are forward looking, particularly with respect to the possible restoration of fish runs. But

that would not compensate the tribe for "the effects of the last 70 years of damages" when there have been no fish to catch or income from fishing. These are damages for the fact that "this project was not properly licensed. FERC did not consider this reservation."

But then isn't the tribe attacking the original license, a judge asked. "It's hard for me to get my brain around it. I mean, either the license is OK or it's not OK. And if it's not OK, then aren't you attacking it, necessarily?"

"What would you have attacked?" Morisset asked. The license was issued in 1924. The license was fine as to what it did, but "it didn't do anything."

The judge answered. "I would have gone right in and said, 'Wait just a minute. It doesn't have an effect on 8.8 acres. It's going to cut off our riparian rights, because we're downstream from this thing and we're going to get hit.'"

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**"It's going to cut off our riparian rights, because we're downstream from this thing and we're going to get hit."**

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Morisset said the original application was "minimal," but the judge pointed out the application talks about two dams and other structures. "Everyone knew what was being applied for," the judge said.

"I don't think that's true," Morisset rejoined.

The court also wanted to know why the tribe "took so long to get a handle" on the whole matter. "It took until the 1990s to realize there was an effect on fisheries?" a judge asked.

No, Morisset said, but the briefs explain at length the many attempts the tribe made that were rebuffed, including by the US. He said the government first would not allow funds to sue, then said the tribe would have to let the US sue, and then refused to do it.

He also complained that Tacoma's "entire ap-

proach to this case has been: "'You didn't tell us we can't do it, so therefore we're going to do it.' Evidently under their theory they could have build three dams. The could have diverted another two or three rivers nearby. None of this was in the license."

Morisset agreed with the court that the tolled ICLA claims do not preserve any state causes of action. Finally, he reiterated that the license proceeding "stands on its own. This is not a collateral attack. We must follow the FPA" to deal with complaints about the current license. FERC has admitted it has no jurisdiction over past damages and no jurisdiction to order damages for what has been done in the past." Even if FERC provides for mitigation in the new license, "restoring the river will not compensate the tribe for the past 70 years of damage."

After another clarification or two, the court adjourned [*Ben Tansey*].