

# SYMPOSIUM\*

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## Hydropower Reform and the Impact of the Energy Policy Act of 2005 on the Klamath Basin: Renewed Optimism or Same Old Song?

I. Background: The Federal Energy Regulatory Commission and Hydropower Licensing .....	4	R
II. Amendments to the FPA in the Energy Policy Act of 2005 .....	9	R
A. New Hearings Process .....	13	R
1. Who Is a Party? How Does One Become a Party?.....	13	R
2. Material Facts .....	16	R
3. Burden of Production and Proof.....	16	R

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2 J. ENVTL. LAW AND LITIGATION [Vol. 22, 1

4.	Discovery and the Conduct of the Hearing .....	17	R
B.	Alternative Conditions .....	17	R
C.	The Legal Challenge to the Interim Regulations .....	20	R
D.	EPAct Provisions Related to Tribal Lands .....	23	R
E.	The Test Case: Klamath Project—The First Full Proceeding Under the New Regulations .....	26	R
III.	Other Hydropower Developments that May Impact the Klamath Basin .....	29	R
A.	<i>City of Tacoma</i> Decision—Reasonableness of Dam Removal .....	30	R
B.	Condit Dam Decommissioning .....	36	R
C.	Contrasting General Stream Adjudication and Litigation with the Relicensing Process .....	37	R
IV.	Non-Hydropower Dynamics at Play in the Klamath Basin Today .....	39	R
A.	The 2001 Shutdown .....	39	R
B.	Coho Biological Opinion Litigation and Injunction .....	40	R
C.	The Takings Claims .....	41	R
V.	Conclusion .....	43	R
Appendix A.	.....	44	R

Hydropower reform efforts and the process for relicensing private hydropower projects emerged as an important tool for river restoration advocates in the mid-1980s.<sup>1</sup> With the removal of the Edwards Dam from Maine’s Kennebec River in 1999, river and fish advocates focused with renewed energy on the possibilities contained in the Federal Energy Regulatory Commission (FERC) relicensing process for restoring rivers across the country.<sup>2</sup> Today, numerous proposals exist to retrofit hydropower fa-

<sup>1</sup> David H. Becker, *The Challenges of Dam Removal: The History and Lessons of the Condit Dam and Potential Threats from the 2005 Federal Power Act Amendments*, 36 ENVTL. L. 811, 812 (2006).

<sup>2</sup> *Id.* at 813; see also Philip M. Bender, *Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 189, 242 (1997) (concluding that survival of salmon on many rivers depends on dam removal); Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism in Hydroelectric Licensing*, 26 COLUM. J. ENVTL. L. 81, 82 (2001) (recognizing the Federal Power Act (FPA) as an influential environmental law to address fish and wildlife concerns, water quality and water-based recreational activities); cf. Charlton H. Bonham, *The Condit Dam Removal and Section 18 of the Federal Power Act: A Co-*

cilities with fish passages and screens, to operate projects in a manner that recognizes natural river function, and in some instances to decommission and remove hydropower facilities from our nation's waterways. Dam decommissioning and removal, a solution once thought unspeakable, has emerged as an important and viable consideration in resolving many of the most contentious water issues in the United States. The FERC relicensing process in the Klamath Basin provides one such example.

For decades the various parties and interests in the Klamath Basin of southern Oregon and northern California have attempted to craft proposals that would resolve long-standing disputes over water quantity and quality. The State of Oregon initiated a general stream adjudication in 1975, and at various points in the administrative process the parties tried to negotiate a satisfactory settlement.<sup>3</sup> In the litigation that followed the water-delivery curtailment to the Bureau of Reclamation Project in 2001, the federal district court attempted to facilitate settlement negotiations among the various parties.<sup>4</sup>

In all, countless hours and massive quantities of money have been spent to address the water allocation issues in the Basin. These efforts were largely unsuccessful until recently for a variety of reasons—not the least of which was the inability of any given process to bring all relevant players actively to the negotiating table. During the *Journal of Environmental Law and Litigation* (JELL) Symposium, “At the Crossroads: In Search of Sustainable Solutions in the Klamath Basin,” for which this Article was prepared, one overriding theme seemed to emerge—the real possibility of settlement in the Basin through a renewal of political attention from the Governors of Oregon and California.<sup>5</sup> This Article explores recent developments inside and outside of the Klamath Basin, particularly in the context of hy-

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*erced Settlement*, 14 J. ENVTL. L. & LITIG. 97, 103, 104 (1999) (concluding that the Condit settlement was the result of coerced negotiations brought about by the financial costs imposed by section 18 fishway prescriptions).

<sup>3</sup> See Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197, 209-210 (2002); Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 ECOLOGY L.Q. 627, 642-43 (1988); see also OR. REV. STAT. §§ 539.005-.350 (2005) (declaring the legislative purpose and providing statutory authority to carry out general stream adjudication in Oregon).

<sup>4</sup> For an in-depth discussion of the post-2001 Klamath Basin litigation, see *infra* Part II.E.

<sup>5</sup> Glen Spain, *Klamath: The Forgotten Basin?*, 34 WATER REPORT Dec. 15, 2006 at 1, 11.

dropower relicensing, that may be contributing to efforts to attain sustainable solutions and resolve some of the long-standing conflicts.

Focusing on the Klamath Basin, this Article examines the major hydropower relicensing provisions of the Energy Policy Act of 2005;<sup>6</sup> evaluates the relevant provisions of the Department of Interior's implementing regulations for section 241 of the Energy Policy Act; and discusses two significant opinions, one administrative and one judicial, that will undoubtedly impact the water users and managers in the Basin. Finally, the Article briefly discusses factors outside of the FERC relicensing process, including the resolution of the legal challenge to the 2001 water curtailment, the results of the challenge to the most recent biological opinion for the coho salmon in the Klamath River, and the pending Fifth Amendment Takings litigation in the Court of Federal Claims that may also contribute to a changed dynamic among the various stakeholders.

## I

### **BACKGROUND: THE FEDERAL ENERGY REGULATORY COMMISSION AND HYDROPOWER LICENSING**

The Federal Energy Regulatory Commission, otherwise known as FERC, has the authority to issue licenses for private hydropower projects for a period of thirty to fifty years.<sup>7</sup> The Federal Water Power Act (FWPA) of 1920 created the Federal Power Commission and vested this commission with the authority to issue hydropower licenses.<sup>8</sup> In 1935, Congress amended the FWPA to create an independent regulatory agency—the Federal Energy Regulatory Commission—and expanded the jurisdiction of this new agency to the licensing and relicensing of non-federal, private hydropower dams on navigable waters.<sup>9</sup> The 1986 Electric Consumers Protection Act, which amended the FPA, made significant strides toward balancing the power and non-power in-

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<sup>6</sup> Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40, and 42 U.S.C.).

<sup>7</sup> 16 U.S.C. § 799 (2006).

<sup>8</sup> Law of June 10, 1920, 41 Stat. 1063 (1920) (codified as amended in Federal Power Act, 16 U.S.C. § 791a-825r (2006)).

<sup>9</sup> Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (1935) (codified as amended in Federal Power Act, 16 U.S.C. § 791a-825r (2006)).

2007]

*Hydropower Reform*

5

terests in the licensing process.<sup>10</sup> As a result of the 1986 amendments, the FPA provides that non-power interests be given “equal consideration” with power interests in the licensing and relicensing processes, and allows interested parties, including tribes and non-governmental groups, the right to participate in the regulatory process relating to hydropower relicensing.<sup>11</sup>

In addition to the forum that the FPA provides for non-governmental interests, the statute also sets forth specific authorities for state and federal resource agencies to protect natural resource and tribal interests in the licensing and relicensing process.<sup>12</sup> These authorities fall into two general categories: mandatory authorities under which FERC has no discretion to reject the recommendations of the agencies and non-mandatory authorities for which FERC retains discretion to make the final decisions.<sup>13</sup>

The mandatory authorities generally exercised by federal resource agencies are found in sections 4 and 18 of the FPA.<sup>14</sup> Section 4(e) provides the Secretaries of the Interior and Agriculture with authority to issue conditions on a license for the adequate protection and utilization of reservations within their jurisdiction.<sup>15</sup> For the U.S. Department of Agriculture, this authority covers all national forest lands.<sup>16</sup> The Department of the Interior houses several agencies with lands that meet the definition of res-

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<sup>10</sup> See Pub. L. No. 99-495, 100 Stat. 1243 (codified as amended in scattered sections of 16 U.S.C.).

<sup>11</sup> 16 U.S.C. § 797(e); see Blumm & Nadol, *supra* note 2, at 101 n.24. See generally, Sarah C. Richardson, *The Changing Political Landscape of Hydropower Project Relicensing*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 499 (2000) (providing an overview of modern hydropower relicensing); Joseph Barwick, *Agency Conditions on the Relicensing of Hydropower Projects on Federal Reservations*, 19 ENERGY L.J. 397 (1998) (analyzing procedures for relicensing under the FPA).

<sup>12</sup> See 16 U.S.C. §§ 791a-823d.

<sup>13</sup> See *id.* §§ 797(e), 803(a)(1), 803(j), 811.

<sup>14</sup> § 401 of the Clean Water Act also includes mandatory conditions for state water quality agencies. See 33 U.S.C. § 1341(a), (d) (2006); Pub. Utility Dist. No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994).

<sup>15</sup> 16 U.S.C. § 797(e); see also *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding that FERC must include the 4(e) conditions in any license it issues, and that once FERC issues the license, the applicant or other parties can seek judicial review, including review of the Department's mandatory conditions).

<sup>16</sup> See 16 U.S.C. §§ 551, 797(e); see also *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 977-78 (2004) (explaining that “[t]he Forest Service, a division of the United States Department of Agriculture, is empowered to act on behalf of the United States by and through 16 U.S.C. § 551 to secure, protect and preserve our national forests”).

R

## 6 J. ENVTL. LAW AND LITIGATION [Vol. 22, 1

ervation under 4(e), including the Bureau of Indian Affairs for Indian reservations, the Bureau of Reclamation for lands associated with reclamation projects, the Bureau of Land Management for reservations of land in the public domain, and the U.S. Fish and Wildlife Service for lands in the National Wildlife Refuge System and certain lands administered by the National Park Service.<sup>17</sup> The Departments of the Interior and Agriculture may issue conditions “deemed necessary” for the “adequate protection and utilization of [the] reservation.”<sup>18</sup> The FPA also provides mandatory authority in section 18 specifically for the Departments of the Interior and Commerce to propose prescriptions on a license for fish passage through a project.<sup>19</sup>

The non-mandatory authorities are found in section 10 of the FPA. Specifically, sub-section 10(a)(1) provides that hydropower licenses must be best adapted to a comprehensive plan for improving or developing waterways, improving water power development, for the adequate protection, mitigation and enhancement of fish and wildlife, and for other beneficial public uses.<sup>20</sup> In determining whether a license is best adapted to this

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<sup>17</sup> Section 4(e) of the FPA provides that licenses issued under that section “shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations.” 16 U. S. C. § 797(e). The term “reservations,” as used in the section 4(e), includes certain lands and facilities under the jurisdiction of the U.S. Forest Service within the Department of Agriculture, and various components of the Department of the Interior (namely, the Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Bureau of Reclamation, or the Bureau of Indian Affairs). Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804, 69,806 (Nov. 17, 2005). Similarly, section 18 of the FPA provides that the Department of the Interior, acting through the Fish and Wildlife Service, and the Department of Commerce, acting through the National Marine Fisheries Service, may prescribe fishways to provide for the safe, timely and effective passage of fish. *Id.*

<sup>18</sup> 16 U.S.C. § 797(e). For purposes of the Federal Power Act,

“reservations” means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interest in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks. . . .

*Id.* § 796(2). “Reservations” refers to lands that are not subject to private appropriation and disposal under public land laws. *Fed. Power Comm’n v. Oregon*, 349 U.S. 435, 443-44 (1955). They include “interests in lands owned by the United States” but do not include water rights. *Escondido Mut. Water Co.*, 466 U.S. at 781.

<sup>19</sup> 16 U.S.C. § 811.

<sup>20</sup> *Id.* § 803(a)(1).

comprehensive plan, FERC must consider the recommendations of state and federal agencies and Indian tribes.<sup>21</sup> Section 10(j) provides that the U.S. Fish & Wildlife Service, NOAA Fisheries, and state fish and wildlife agencies may make recommendations to FERC on conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project.<sup>22</sup> FERC must accept recommendations made pursuant to section 10(j) unless FERC determines that the recommendation is inconsistent with the purposes and requirements of the FPA.<sup>23</sup>

The Supreme Court held in *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians* that FERC must include the 4(e) conditions in any license it issues.<sup>24</sup> The mandatory nature of section 18 prescriptions has also been upheld in federal court in *American Rivers v. FERC*.<sup>25</sup> Once FERC issues a license, the applicant or other parties can seek judicial review—including review of the federal agency’s mandatory conditions—but FERC has no discretion to deny the inclusion of the mandatory conditions and prescriptions that are presented by the resource agencies.<sup>26</sup> By confirming the mandatory nature of the conditions and prescriptions under the section 4(e) authority, the federal courts empowered the resource agencies to use the relicensing process to protect public interests. Prior to *Escondido* and *American Rivers*, FERC believed it operated as the final arbiter of which conditions and prescriptions were actually included in the license. After these cases, any challenge to a mandatory condition or prescription is resolved by the federal court.<sup>27</sup>

Many of the licenses issued under the FPA for non-federal hydropower are currently in the renewal process. In fact, between 1993 and 2010, a total of 419 projects will be relicensed.<sup>28</sup> The

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<sup>21</sup> *Id.* § 803(a)(2).

<sup>22</sup> *Id.* § 803(j).

<sup>23</sup> *Id.*

<sup>24</sup> 466 U.S. at 777.

<sup>25</sup> *Am. Rivers v. FERC*, 201 F.3d 1186, 1210 (9th Cir. 2000) (holding that FERC cannot modify, reject, or reclassify any section 18 fishway prescription submitted by the Secretaries of Interior or Commerce).

<sup>26</sup> *Escondido Mutual Water Co.*, 466 U.S. at 777; *Am. Rivers*, 201 F.3d at 1210; see also *City of Tacoma v. FERC*, 460 F.3d 53, 64-65 (D.C. Cir. 2006) (holding that FERC cannot refuse to incorporate conditions because they are “untimely” under the FERC regulations).

<sup>27</sup> Judicial review of FERC decisions rests with the courts of appeals under 16 U.S.C. § 8251(b) (2006).

<sup>28</sup> ROBERT BLACK ET AL., U.S. DEP’T OF THE INTERIOR, ECONOMIC ANALYSIS FOR HYDROPOWER PROJECT RELICENSING: GUIDANCE AND ALTERNATIVE METH-

## 8 J. ENVTL. LAW AND LITIGATION [Vol. 22, 1

federal resource agencies are devoting significant time and staff to fulfill the FPA authorities, including mandatory conditions and prescriptions. Non-governmental groups have seized the opportunity to participate in the relicensing process despite how time-consuming and expensive the endeavor may be. Under the new integrated licensing process (ILP),<sup>29</sup> the relicensing process is unlikely to conclude in less than five years given the timelines for each stage. Even at five years, the ILP represents a significant stride toward more efficient resolution of the process. The ILP was designed to streamline the licensing process by allowing the pre-filing consultation process and the scoping process under the National Environmental Policy Act (NEPA) to occur simultaneously rather than sequentially.<sup>30</sup> Even so, the ILP is a multi-year process that involves more than twenty distinct steps and associated deadlines.<sup>31</sup>

The process is divided into two main phases. The pre-application phase requires a pre-application document that sets forth an overview of all existing information related to the project, including known environmental impacts.<sup>32</sup> The pre-application stage also includes scoping under NEPA and the development of a study plan to address issues that are necessary for any condition in the licensing decision.<sup>33</sup> The pre-application stage concludes with the development and filing of the license application, which must be filed with FERC at least two years before the existing license expires.<sup>34</sup> The post-application process involves NEPA compliance, the submission of mandatory terms and conditions, Endangered Species Act (ESA) consultation, water-quality certification, and compliance with the Coastal Zone Management Act and the National Historic Preservation Act.<sup>35</sup> The process ulti-

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ods, 1-2 exhibit 1-1 (1998), available at <http://www.fws.gov/policy/hydrochap1.pdf> (citing OFFICE OF HYDROPOWER LICENSING, FED. ENERGY REGULATORY COMM'N, RELICENSES FORECAST 1993-2010 (1993)).

<sup>29</sup> On July 23, 2003, FERC published a final rule establishing a new process called the integrated licensing process. See 104 FERC ¶ 61,109 (2003). FERC retained its other two processes, the traditional licensing process and the alternative licensing process, but the ILP is now the default process. See 18 C.F.R. §§ 5.1(f), 5.3 (a)-(b)(2007).

<sup>30</sup> See 43 U.S.C. §§ 4321-4370(f) (2006); 104 FERC ¶ 61,109 (2003).

<sup>31</sup> See 18 C.F.R. §§ 5.1-5.26.

<sup>32</sup> 18 C.F.R. § 5.6.

<sup>33</sup> See 18 C.F.R. § 5.9; 40 C.F.R. § 1501.7 (2006).

<sup>34</sup> 18 C.F.R. §§ 5.17-5.18.

<sup>35</sup> See 18 C.F.R. §§ 5.24-5.25 (NEPA compliance); 18 C.F.R. §§ 5.23-5.24 (mandatory terms and conditions); 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.02,



mately concludes with the issuance of a new licensing order by FERC.<sup>36</sup> After the license has been issued, the license, including the Department’s conditions and prescriptions, is subject to re-hearing before FERC and subsequent judicial review in the federal courts of appeals.<sup>37</sup>

**II**

**AMENDMENTS TO THE FPA IN THE ENERGY POLICY ACT OF 2005**

The Energy Policy Act of 2005 (the EPAct of 2005 or EPAct),<sup>38</sup> was the first major energy bill enacted by Congress since 1992.<sup>39</sup> As such, it addressed the full range of energy issues from energy production and alternative fuels, to nuclear power and natural gas. Though compromises to resource protection were made, the final legislation also contained important victories from an environmental protection perspective. For example, Congress ultimately shelved the debate over drilling in the Arctic National Wildlife Refuge.<sup>40</sup> Congress also declined the opportunity to place liability limitations in the context of ongoing litigation on methyl tertiary butyl ether pollution.<sup>41</sup> Despite these gains,

402.14 (ESA consultation); 18 C.F.R. § 5.23(b) (water-quality certification); 16 U.S.C. § 1456 (2006) (Coastal Zone Management Act compliance); 16 U.S.C. §§ 470-470x-6 (National Historic Preservation Act compliance).

<sup>36</sup> 18 C.F.R. § 5.26(e).

<sup>37</sup> 16 U.S.C. § 8251(6) (2006).

<sup>38</sup> Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40 and 42 U.S.C.).

<sup>39</sup> See Paul L. Joskow, U.S. Energy Policy During the 1990s, Prepared for the “American Economic Policy During the 1990s” Conference at the John F. Kennedy School of Government, Harvard University, 13-14, 17 (July 11, 2001) *available at* <http://www.ksg.harvard.edu/hepg/Papers/EnergyPolicy-CEEPR-7-11-01withTables+Figure.pdf> (noting that the Energy Policy Act of 1992 was the only comprehensive energy policy legislation passed during the 1990s).

<sup>40</sup> When the EPAct of 2005 was initially introduced in the House, it included provisions allowing leases on the arctic coastal plain. See H.R. 6, 109th Cong. §§ 2201-2212 (as introduced in House, Apr. 18, 2005). The EPAct included similar provisions when it was introduced in the Senate. See H.R. 6, 109th Cong. (as placed on Senate Calendar, June 9, 2005). However, the EPAct lacked provisions allowing leases in the arctic coastal plain once Congress enacted the Bill. See EPAct, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, 30, 40 and 42 U.S.C.). See also 151 Cong. Rec. S9335 (daily ed. July 29, 2005). Senator Lieberman noted that “[t]here is also good news to be found in what [the EPAct] does not do. . . . It does not include provisions for drilling the Arctic National Wildlife Refuge.” *Id.* at S9351.

<sup>41</sup> Original versions of the EPAct included provisions limiting liability for producers of methyl tertiary butyl ether. See H.R. 6, 109th Cong. §§ 1503-1505 (as intro-

many conservation organizations view the EAct's hydropower provisions as a threat to environmental protection, particularly river restoration. The provisions that generated the greatest concern among river restoration advocates appear in Title II, Subtitle C of the EAct, which specifically deals with renewable energy and hydroelectric power production.<sup>42</sup>

For years private hydropower interests have sought legislation to counter resource agencies' mandatory authorities to prescribe conditions and prescriptions on a new or renewed license. With the amendments to the FPA in 2005, hydropower interests found their reform through the creation of a new layer of administrative review of the conditions and prescriptions that are proposed by federal resource agencies and submitted to FERC. Section 241 of the EAct amends sections 4(e) and 18 of the FPA to provide for expedited agency trial-type hearings when a license applicant or other party to a licensing proceeding challenges disputed issues of material facts that underlie an agency's preliminary proposed conditions and prescriptions submitted by the resource agencies.<sup>43</sup> Conservation groups decried the devastating impact that these changes will have on the willingness of resource agencies to fully defend their conditions and prescriptions.<sup>44</sup> In addition, though all parties to the licensing proceeding can seek a trial-type hearing, the expense and time commitment involved will often make participation too burdensome.

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duced in House, Apr. 18, 2005). However, Congress abandoned these liability-limiting provisions in the final version of the EAct. See EAct, Pub. L. No. 109-58, 119 Stat. 594; see also H. Josef Hebert, Associated Press, *MTBE Makers Lose*, INTELLIGENCER (Wheeling W. Va.), July 25, 2005, at A3, available at 2005 WLNR 11957354 (discussing Congress' rejection of liability limitations for methyl tertiary butyl ether producers).

<sup>42</sup> §§ 241-246, 119 Stat. at 673-79.

<sup>43</sup> See 16 U.S.C. § 797(e) (2006).

<sup>44</sup> Les Blumenthal, *Rewriting Dam Rules Could Have Wide Impact; Relicensing: While Utilities Back Streamlining, Greens Fear Loss of Fish Protections*, NEWS TRIBUNE (Tacoma, Wash.), May 12 2003, at B1; Ben Geman, *Environmentalists call Hydro, NEPA Language a 'Perfect Storm,'* ENV'T & ENERGY DAILY, Apr. 19 2005; Blaine Harden, *Utilities Grasp at Power; Proposed Rule on River Dams Angers Environmentalists*, WASH. POST, May 4, 2003, at A3; Press Release, Am. River, Energy Bill Hydropower Title Breaks What Has Already Been Fixed (Feb. 16, 2005), available at <http://www.hydroreform.org/news/2005/02/16/energy-bill-hydropower-title-breaks-what-has-already-been-fixed>; Press Release, Am. Rivers, Hydropower Industry Exploiting new Regulatory Loophole, Putting America's Rivers at Risk (Dec. 20, 2005), available at [http://www.americanrivers.org/site/News2?JServSessionIdr006=mslmg173c1.app6b&page=NewsArticle&id=8109&news\\_iv\\_ctrl=1130](http://www.americanrivers.org/site/News2?JServSessionIdr006=mslmg173c1.app6b&page=NewsArticle&id=8109&news_iv_ctrl=1130).

2007]

*Hydropower Reform*

11

Section 241 also provides a process for a party to the proceeding to propose alternative conditions and prescriptions from those submitted by the resources agencies.<sup>45</sup> These two amendments essentially create sub-proceedings in the existing relicensing process. The obligation to conduct these sub-proceedings rests with the resource agencies, not FERC, because the agencies hold the mandatory condition and prescription authority. Congress gave the resource agencies ninety days to promulgate regulations that would set forth procedures for trial-type hearings and the submission and consideration of alternative conditions and prescriptions.<sup>46</sup> As a result, the resource agencies promulgated regulations and released the Interim Final Rule on November 17, 2005.<sup>47</sup> The agencies indicated that they would consider promulgation of a “revised final rule” within eighteen months of comments—which would be the summer of 2007.<sup>48</sup>

Now, in addition to the lengthy and time-consuming process set out for relicensing a project with FERC, a license party may also request a sub-administrative proceeding specifically challenging the facts underlying the resource agency’s conditions and prescriptions.<sup>49</sup> The resource agencies are now required to provide an on-the-record administrative hearing, if requested, regarding issues of material fact that arise in the conditions and prescriptions for inclusion in a hydropower license.<sup>50</sup> An administrative law judge must preside over the proceedings.<sup>51</sup> The process includes motions, discovery, and the presentation of arguments and evidence.<sup>52</sup> All of this occurs on a very tight ninety day timeline.<sup>53</sup> Moreover, as the examples below will demonstrate, determining which facts are material to the conditions and prescriptions can prove lengthy and time consuming. For example, the resource agencies spent considerable resources to resolve the underlying material facts associated with the request for an administrative hearing for the conditions and pre-

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<sup>45</sup> See § 823d.

<sup>46</sup> *Id.* § 797(e).

<sup>47</sup> See generally Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804 (Nov. 17, 2005).

<sup>48</sup> See *id.* at 69,804.

<sup>49</sup> See 16 U.S.C. § 797(e). See generally Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804.

<sup>50</sup> See § 797(e).

<sup>51</sup> See *id.*

<sup>52</sup> *Id.*

<sup>53</sup> See *id.*

scriptions proposed by the resource agencies for the Klamath Project.

In addition to the hearings process described above, Congress also amended section 33 of the FPA to allow the license applicant or any other party to the license proceeding to propose alternative conditions and prescriptions to those set forth by the resource agencies, adding another sub-proceeding to an already dense administrative process.<sup>54</sup> The legislation establishes standards to govern whether the secretary of each agency approves or rejects the alternative condition or prescription. Specifically, the amendments direct the appropriate secretary to adopt an alternative condition and/or prescription *unless* the Secretary determines that the alternative condition (1) does not provide for the adequate protection and utilization of the reservation or is no less protective than the proposed fishway, and (2) is not more cost-effective than the original agency condition.<sup>55</sup> Moreover, the EAct provides for a dispute-resolution process if the secretary declines to adopt the proposed alternatives.<sup>56</sup> Parties to the underlying relicensing process, including nongovernmental groups that have previously established themselves as a party to the relicensing proceeding, can invoke both the trial-type hearings and the alternatives process. In the Klamath Project proceedings, parties utilized both new provisions and the administrative processes are complete.<sup>57</sup> Although both the hearings and alternatives process were invoked, the mandatory condition agency dispute-resolution process has not been invoked. As a result, the Klamath Project relicensing provided the community with an opportunity to evaluate the implications of the new EAct provisions.<sup>58</sup>

Interestingly, the relicensing process for PacifiCorp's Klamath Project may provide the catalyst and forum for resolution of broader issues in the Basin. While the FPA and the authority it provides to protect federal reservations and fisheries resources has always been regarded as a powerful tool, the passage of the

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<sup>54</sup> See *id.* §§ 811, 823d.

<sup>55</sup> See § 823d(a)(2).

<sup>56</sup> *Id.* § 823d(a)(5).

<sup>57</sup> For a detailed discussion of the Klamath litigation, see *infra* Part II.E.

<sup>58</sup> Several other relicensing projects have moved through this new process including the Spokane proceeding and the Bar Mills proceeding. For a discussion of cases invoking the new hearings process, see Rick Eichstaedt, Rebecca Sherman & Adell Amos, *More Dam Process: Relicensing of Dams and the 2005 Energy Policy Act*, ADVOC. (forthcoming June 2007) (on file with author).

2007]

*Hydropower Reform*

13

EPAAct of 2005, for some, put a damper on enthusiasm about the relicensing process as a tool for river restoration. The EPAAct called for extensive new administrative procedures, including a trial-type hearing on disputed facts and a process for suggesting alternatives to the conditions placed on a new license.<sup>59</sup> These hearing and alternatives provisions raised questions about the continued viability and feasibility of the relicensing process as a tool for river restoration because of the increased cost and burden on advocates and federal agencies. Often, advocates of river restoration lack significant financial resources, and the changes proposed in the relicensing process created additional and costly administrative proceedings. Moreover, defending proposed conditions and prescriptions is a costly undertaking for federal agencies already strapped for resources. There is a concern that the possibility of a costly and time-intensive hearing might reduce the incentive for the resource agencies to fully utilize their FPA authority. The EPAAct provided no adjustment to the resource agency budgets to accommodate the costs of the trial-type hearings and the alternatives processes. A closer examination of the new hearings and alternatives processes will help to clarify the specific changes that caused the greatest concern in the hydropower community.

***A. New Hearings Process***

Section 241 provides that a party to a license proceeding is entitled to a determination, after an expedited agency trial-type hearing, of any disputed issue of material fact with respect to an agency's mandatory conditions or prescriptions for inclusion in a hydropower license issued by FERC.<sup>60</sup> This provision and the new implementing regulations raise several interesting questions about the trial-type hearing, including (1) who has party status and how does one become a party, (2) what constitutes a material fact, and (3) who has the burden of production and proof in the administrative hearing?

***1. Who Is a Party? How Does One Become a Party?***

In FERC's existing licensing process and in the new administrative process, the applicant for the license is necessarily a party. License applicants had long sought a mechanism to review the

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<sup>59</sup> §§ 797(e), 811, 823d.

<sup>60</sup> § 797(e).

resource agencies' exercise of the mandatory conditioning authority, prior to judicial review in federal courts of appeal. Accordingly, the new hearings provisions were drafted with the applicant in mind, since most often the applicant factually disagrees with the conditions or prescriptions that are provided by the resource agencies. The question of party status, however, for the non-license parties such as tribes, fishing groups, or conservationists, governs who can have an impact on the outcome of the relicensing proceeding. Under FERC's relicensing process, any entity that shows a direct interest in the outcome of the proceeding may intervene to become a party.<sup>61</sup> For example, a membership organization will have a direct interest in a licensing proceeding if its members use the affected lands and waters. An interested party may file a motion for intervention once FERC accepts the relevant application for a new license or renewal of a license.<sup>62</sup> The motion to intervene will be granted automatically unless another party opposes the motion or it is not filed on time.<sup>63</sup> In that case, the motion will be granted only upon FERC's approval.<sup>64</sup> Under the EPAct amendments, in order to file a request for a hearing or become an intervener in the trial-type hearing, one must already be a license party as defined in FERC's regulations.<sup>65</sup>

An intervener in FERC's underlying relicensing process has two fundamental rights: to be served with all documents that are filed in the proceeding and to file a motion to seek rehearing or judicial review upon a final decision from FERC.<sup>66</sup> Nothing in the EPAct limits or alters the existing statutory and regulatory provisions regarding party/intervener status. Thus, under section 241 of the EPAct, a party would be entitled to agency-type hearings on disputed issues of material fact and able to propose alternative conditions and prescriptions that the Secretaries would be

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<sup>61</sup> 18 C.F.R. § 385.214(a) (2007); *see also* HYDROPOWER REFORM COAL., CITIZEN TOOLKIT FOR EFFECTIVE PARTICIPATION IN HYDROPOWER LICENSING 60 (2005), available at [http://www.hydroreform.org/sites/www.hydroreform.org/files/hydroguide\\_11\\_13.pdf](http://www.hydroreform.org/sites/www.hydroreform.org/files/hydroguide_11_13.pdf) [hereinafter HYDROPOWER TOOLKIT].

<sup>62</sup> § 385.210; *see also* HYDROPOWER TOOLKIT, *supra* note 61, at 60.

<sup>63</sup> § 385.214(c)(1).

<sup>64</sup> *Id.* § 385.214(c)(2).

<sup>65</sup> *See* 16 U.S.C. § 797(e). FERC regulations defining "party" are found at section 385.102(c).

<sup>66</sup> 16 U.S.C. § 8251(b); *see also* § 385.713; HYDROPOWER TOOLKIT, *supra* note 61, at 60.

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required to consider in the same manner as alternatives submitted by the license applicant.<sup>67</sup>

As FERC's own materials provide, understanding the licensing process, the regulations and what is expected of each party is key to participating effectively in the process.<sup>68</sup> In fact, increased public involvement is one of the goals for the ILP, and all participants play a key role in the ILP from the beginning of the process.<sup>69</sup> Under the ILP, non-applicant parties to the relicensing proceeding participate in the process selection, developing the pre-application document, scoping under NEPA, study requests, and public commenting on NEPA documents.<sup>70</sup> Now, non-applicant parties can request a trial-type administrative hearing and/or propose alternative conditions and prescriptions under the EPAct amendments.<sup>71</sup> While some in the conservation community have viewed these new proceedings as overly burdensome and cost-prohibitive, others have recognized that the new provisions provide an avenue for non-license applicants with party status to challenge material facts and propose alternatives to resource agencies. However, the limitations in the alternatives provision that any proposal cost significantly less or improve operation may reduce the potential alternatives that non-license applicants may pursue. To the extent that the conservation community seeks alternatives to protect resources, they may cost more or result in more restrictions on the operation of the project. As a result, interested parties with conservation interests can influence the relicensing process, albeit with a significant commitment of time and resources, when they perceive that the resource agencies may not be fully utilizing the mandatory condition and prescription authority or if they want to participate to ensure that their interests in the river are protected. In addition,

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<sup>67</sup> See Resource Agency Procedures for Conditions and Prescriptions in Hydro-power Licenses, 70 Fed. Reg. 69,804, 69,804 (Nov. 17, 2005).

<sup>68</sup> See, e.g., FED. ENERGY REGULATORY COMM'N, DEP'T OF ENERGY, IDEAS FOR IMPLEMENTING AND PARTICIPATING IN THE INTEGRATED LICENSING PROCESS (ILP): TOOLS FOR INDUSTRY, AGENCIES, TRIBES, NON-GOVERNMENTAL ORGANIZATIONS, CITIZENS AND FERC STAFF 4-5 (2006), available at <http://www.ferc.gov/industries/hydropower/gen-info/licensing/ilp/eff-eva/ideas.pdf> (providing a detailed chart of steps in the integrated licensing process and tips for participation) [hereinafter IDEAS FOR ILP].

<sup>69</sup> *Id.* at 7.

<sup>70</sup> 18 C.F.R. §§ 5.3(d), 5.6(a), 5.12; 40 C.F.R. §§ 1501.7, 1502.9(c), 1503.1 (2007); see also IDEAS FOR ILP, *supra* note 68, at 10-20.

<sup>71</sup> See 16 U.S.C. § 797(e). FERC regulations defining "party" are found at 18 C.F.R. § 385.102(c).

conservation groups may intervene to support a strong environmental or tribal resource position taken by the resource agencies in their mandatory conditions and prescriptions.

## 2. *Material Facts*

If a party wishes to utilize the new EAct hearings process, they must identify a dispute about a material fact. The interim regulations define “material facts” as “facts that, if proved, may affect a Department’s decision whether to affirm, modify, or withdraw any condition or prescription.”<sup>72</sup> The regulation preamble provides some guidance indicating that legal and policy issues will not qualify as issues of material fact and provides examples indicating that whether a river has historically been a cold or warm water fishery or whether fish were historically found above a dam would constitute material facts.<sup>73</sup> The Departments have reviewed several requests for trial-type hearings and have objected to any issue that is not factual or is not material.<sup>74</sup> Administrative law judges have issued various responses.<sup>75</sup> Some have suggested that the party requesting the hearing should have the opportunity to develop the facts to demonstrate materiality while others have dismissed outright issues that raise legal, non-material, and policy questions.

## 3. *Burden of Production and Proof*

Congress also left open other details of the administrative sub-proceeding, including the assignment of the burdens of proof. These regulations identify what constitutes the burden of proof

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<sup>72</sup> 43 C.F.R. § 45.2 (2006).

<sup>73</sup> Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804, 69,809 (Nov. 17, 2005).

<sup>74</sup> Information based on author’s personal conversations with Interior Department attorneys. See also 70 Fed. Reg. at 69,807-08 (“The Department involved will review the parties’ submissions to determine whether to stipulate to any facts as stated by the parties, object that any issue raised by a party either is not factual (i.e., is a legal conclusion or a policy determination) or is not material, or agree that the issues raised are factual, material, and disputed.”).

<sup>75</sup> See, e.g., *Idaho Power Co. v. Bureau of Land Mgmt., Hells Canyon Complex Hydroelectric Project*, No. DCHD-2006-01, FERC Docket No. P-1971 (May 3, 2006) (order granting motion to establish burden of proof); *In re Klamath Hydroelectric Project*, No. 2006-NMFS-0001, FERC Project No. 2082 (July 13, 2006) (order granting in part motion to dismiss certain PacifiCorp issues); *Avista Corp. v. U.S. Bureau of Indian Affairs*, No. DCHD-2007-1, FERC Docket Nos. 2545, 12606 (Nov. 1, 2006) (prehearing conference order); *Avista Corp. v. U.S. Bureau of Indian Affairs*, Docket No. DCHD-2007-01, FERC Project Nos. 2545, 12606 (Jan. 8, 2007) (final ALJ decision).



2007]

*Hydropower Reform*

17

in the hearing but do not identify which party bears that burden of proof. The interim regulations mimicked Congress and did not resolve questions of who bears the burden of proof. However, all of the administrative law judges in the relatively few proceedings that have reached this stage have held, consistent with general administrative law principles, that the party requesting the hearing bears the burden of proof.<sup>76</sup>

#### *4. Discovery and the Conduct of the Hearing*

The discovery deadlines and hearing schedule timelines are extremely tight under the new regulations. The parties must agree to, or the administrative law judge must order, discovery,<sup>77</sup> and if discovery is agreed to or ordered, the regulations provide that it must be completed in approximately twenty-five days.<sup>78</sup> The regulations require written direct testimony to be submitted within five days after the completion of discovery,<sup>79</sup> with commencement of a trial within fifteen days after the completion of discovery.<sup>80</sup> Section 45.52 of the interim regulations states that “unless otherwise ordered by the ALJ, all direct hearing testimony must be prepared and submitted in the written form.”<sup>81</sup> It goes on to state that any witness submitting written direct testimony must be available for cross-examination at the hearing.<sup>82</sup> Section 45.51 preceding this section states that the parties’ rights at hearing include the right to present direct and rebuttal evidence, to make objections, to cross-examine witnesses, and to conduct re-direct and re-cross.<sup>83</sup> These sections, when read together, indicate that only cross-examination is conducted orally.

### ***B. Alternative Conditions***

The EPAAct adds a new section to the FPA. New section 33 allows the license applicant or any other party to a license proceeding to propose an alternative condition and the Depart-

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<sup>76</sup> *Idaho Power Co.*, Docket No. DCHD-2006-01, FERC Docket No. P-1971; see also *In re Klamath Hydroelectric Project*, Docket Number 2006-NMFS-0001, FERC Project No. 2082 (July 6, 2006) (order granting motion to confirm the burden of proof).

<sup>77</sup> 43 C.F.R. § 45.40.

<sup>78</sup> *Id.* § 45.41(i).

<sup>79</sup> *Id.* § 45.52(a)(iii).

<sup>80</sup> *Id.* § 45.50(a).

<sup>81</sup> *Id.* § 45.52.

<sup>82</sup> *Id.*

<sup>83</sup> § 45.51.

ments' regulations set out procedures for the appropriate Secretary to consider and approve or reject these alternatives.<sup>84</sup>

Regardless of whether a license party requests a hearing on disputed material facts as described above, the license party may submit one or more alternatives to the conditions and prescriptions set forth by the resource agencies.<sup>85</sup> Each department must formally analyze the alternative conditions or prescriptions and file a written statement explaining the basis for the decision to accept or reject the alternative condition(s) or prescription(s).<sup>86</sup> These alternatives must be submitted to the appropriate Department within thirty days of the issuance of the preliminary conditions and prescriptions by the resource agencies, the same timeline as the request for a hearing on disputed material facts.<sup>87</sup> If a party invokes the hearings process and submits alternatives, the resource agencies can find themselves in simultaneous administrative proceedings on the same set of conditions and prescriptions. The appropriate Secretary must make a final decision on the alternatives within sixty days of the close of the comment period on the environmental impact statement or environmental assessment for the license.<sup>88</sup> By contrast, a hearing must be completed within ninety days.<sup>89</sup>

In practice, the Departments have postponed consideration of the alternatives until after the findings of fact have been made. The regulations provide that the findings of fact will be considered by the Secretary in determining whether to modify a preliminary condition or prescription.<sup>90</sup> So, essentially this creates another layer of internal review and justification regarding the alternatives that can take place after the trial-type hearing has concluded.

In determining whether to accept or reject a proposed alternative condition, the resource agencies must consider all evidence, including information from any license party and FERC, comments received on the department's preliminary conditions and

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<sup>84</sup> See 16 U.S.C. § 823d (2006); Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804, 69,814-15 (Nov. 17, 2005).

<sup>85</sup> 16 U.S.C. § 823d.

<sup>86</sup> 43 C.F.R. § 45.73(c).

<sup>87</sup> See Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804, 69,810, 69,814 (Nov. 17, 2005).

<sup>88</sup> *Id.* at 69,814.

<sup>89</sup> *Id.*

<sup>90</sup> 70 Fed. Reg. at 69,808.

2007]

*Hydropower Reform*

19

on FERC's NEPA documents, findings of fact from the administrative law judge if there is a hearing, and the information provided in support of the alternative condition.<sup>91</sup> The resource agency must adopt a proposed alternative if it will both (1) either cost significantly less to implement or result in improved operation of the project for electricity implementation, and (2) if it will provide for adequate protection and utilization of the reservation in the case of 4(e) conditions or will not be less protective than the original fishway prescriptions in the case of section 18.<sup>92</sup> If the Secretary wants to reject an alternative, she must make a negative finding that the alternative is sufficiently protective of reservation resources or as protective as the original fishway prescription. Thus, even a proposed alternative that is less costly or results in improved power production may be rejected on the basis of being less protective of the reservation or fish resources. Though the language in the amendments is unclear, arguably the Secretary still retains her underlying authority under the FPA and could reject a proposed alternative if it is not as protective of the resource. If the Secretary decides to adopt an alternative, she must find that the reservation will still be adequately protected in the case of a 4(e) condition or that the alternative will not be less protective than the original section 18 prescription and the cost/improved operation prong.<sup>93</sup>

Interestingly, Congress chose different language to evaluate an alternative for a section 4(e) condition and a section 18 prescription. The section 4(e) alternative must provide for adequate protection and utilization of the reservation,<sup>94</sup> but the section 18 alternative must not be less protective than the original prescription.<sup>95</sup> Ultimately, the standards may be interpreted such that they have the same substantive effect, but the section 18 standard seems to provide a greater level of deference to the prescriptions initially proposed by the resource agency. In contrast, the section 4(e) standard seems to allow a party to challenge the condition and evaluate it against the statutory language—adequate protection and utilization of the reservation—rather than against the original proposed condition. Arguably, the Secretary retains

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<sup>91</sup> 43 C.F.R. § 45.73(a).

<sup>92</sup> *Id.* at § 45.73(b).

<sup>93</sup> *Id.*

<sup>94</sup> 16 U.S.C. § 797(e) (2006).

<sup>95</sup> *Id.* § 823d.

broad discretion, however, to determine adequate protection and utilization of the reservation under either provision.

When the resource agency files its modified conditions or prescriptions with FERC, the resource agency must also file a written statement explaining the basis for its adopted conditions and prescriptions, as well as the reasons for rejecting any alternatives not adopted.<sup>96</sup> The agency must demonstrate that it gave equal consideration to the effects of the modified condition and/or prescription and any alternative not adopted on energy supply, distribution, cost, and use; flood control; navigation; water supply; air quality; and the preservation of other aspects of environmental quality.<sup>97</sup> In addition to the written statement, the Secretary is required to submit all studies, data, and other factual information available and relevant to the Secretary's decision.<sup>98</sup>

The EPAct also sets forth a dispute-resolution process for alternative conditions and prescriptions. If FERC determines that a final condition or prescription is inconsistent with applicable law, FERC may refer the condition to the Commission's dispute-resolution service. The Commission's dispute-resolution service must issue a non-binding advisory within ninety days.<sup>99</sup> The resource agency may accept the advisory unless the recommendation will not adequately protect the reservation.<sup>100</sup> The Secretary must submit this advisory and the Secretary's written determination regarding the advisory into the record before FERC.<sup>101</sup>

### *C. The Legal Challenge to the Interim Regulations*

The interim final regulations apply to all license proceedings for which no license had been issued as of November 17, 2005, including pending applications with previously filed conditions and prescriptions.<sup>102</sup> The inclusion of pending applications under the new regulatory framework proved very controversial among river restoration groups. The regulations provide the license party with thirty days to request a hearing or propose alterna-

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<sup>96</sup> 43 C.F.R. § 45.73(c).

<sup>97</sup> *Id.* § 45.73(c)-(d).

<sup>98</sup> *Id.* § 45.73(c).

<sup>99</sup> 16 U.S.C. § 823d(a)(5).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Resource Agency Procedures for Conditions and Prescriptions in Hydro-power Licenses, 70 Fed. Reg. 69,804, 69,804-05 (Nov. 17, 2005).

tives to the proposed conditions and prescriptions.<sup>103</sup> In order to request this administrative hearing or submit alternative prescriptions or conditions, one must already be a party to the underlying license or relicensing proceeding.<sup>104</sup>

River restoration advocates criticized the interim regulations and, ultimately, a coalition of non-governmental organizations challenged the regulations in federal district court.<sup>105</sup> Their first concern was that the interim regulations essentially allowed for the reopening of previously negotiated conditions and prescriptions;<sup>106</sup> parties feared that licenses that had been through the process and were already settled on conditions and prescriptions would be reopened just before the final step of FERC granting the license. Second, the interim regulations were released without any allowance for notice and comment rulemaking.<sup>107</sup> Finally, though not specific legal claims, non-governmental groups raised concerns that rules seemed to encourage or tip the balance in favor of accepting alternative prescriptions and conditions, because Congress set the standard for the Secretary's denial of an alternative so high. Similarly, the challenging parties raised concern that license applicants would use the trial-type hearing process to delay and extend the already lengthy relicensing process. As a result, license applicants may be the only parties that could afford to participate for the duration of the proceeding. Adding

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<sup>103</sup> *Id.* at 69,807.

<sup>104</sup> *Id.*

<sup>105</sup> First Amended Complaint for Declaratory and Injunctive Relief, *Am. Rivers v. U.S. Dep't of Interior*, 2006 WL 1176934, (W.D. Wash. May 19, 2006) (No. 05-2086-MJP); Press Release, American Rivers, Hydropower Industry Exploiting New Regulatory Loophole, Putting America's Rivers at Risk (Dec. 20, 2005) (on file with author), available at [http://www.americanrivers.org/site/News2?JServSessionIdr006=mslmg173c1.app6b&page=NewsArticle&id=8109&news\\_iv\\_ctrl=1130](http://www.americanrivers.org/site/News2?JServSessionIdr006=mslmg173c1.app6b&page=NewsArticle&id=8109&news_iv_ctrl=1130). The challenge by conservation groups discussed below is not the only one. Pend Oreille County PUD and Ponderay Newspring brought suit in district court challenging the Department of the Interior's decision not to afford those parties a trial-type hearing for the Box Canyon Project. See *Pub. Utility Dist. No. 1 v. FERC*, Nos. 05-1387 and 06-1389 (D.C. Cir.). The denial was based on the fact that FERC had already issued a new license at the time the statute was passed. *Id.* The case is currently stayed because the licensee has also appealed the terms of the license to the D.C. Circuit and the issues may be addressed at the appellate level. Information based on author's personal conversations with Jennifer Frozena, Attorney-Advisor, U.S. Dep't of the Interior, Solicitor's Office, Division of Indian Affairs. See also Press Release, Pend Orville Pub. Utility Dist., PUB Receives Stay for Box Canyon License Conditions (Jan. 18, 2007) (on file with author).

<sup>106</sup> First Amended Complaint for Declaratory and Injunctive Relief, *Am. Rivers*, 2006 WL 1176934.

<sup>107</sup> *Id.*

another administrative step further increased the costs and time for non-governmental groups, tribes, resource agencies, and interested citizens.

Dismay with the EAct amendments and the interim regulations was not uniform. Many groups, particularly license applicants, praised the amendment and regulations as important tools to reform the hydropower relicensing process, because the new procedures gave license applicants a voice in the condition and prescription process and were designed to address concerns over the inability to administratively appeal mandatory conditions and prescriptions set by resource agencies. The trial-type hearing and alternatives process created a mechanism to challenge the resource agency conclusions within the agency itself before “final” conditions and prescriptions were submitted to FERC. Additionally, many believed that the amendments represented an effort to streamline the relicensing process. However, because the changes add additional procedures, it was questionable whether they truly streamlined the process.

A coalition of conservation groups including American Rivers, Idaho Rivers United, Friends of the River, American Whitewater, Trout Unlimited, Upper Chattahoochee Riverkeeper Fund, Inc., and North American Outdoors ultimately filed a facial challenge to the regulations.<sup>108</sup> Their challenge included two basic claims. First, they asserted that the regulations violated Section 706 of the Administrative Procedures Act (APA) by retroactively impairing final and preliminary license conditions and prescriptions.<sup>109</sup> Second, they argued that the agencies violated the APA by failing to provide notice and comment rulemaking.<sup>110</sup>

The U.S. District Court issued its opinion on October 3, 2006, rejecting plaintiffs’ claims.<sup>111</sup> The court reasoned that the Interim Regulations were exempt from the APA’s notice and comment requirements because they were procedural and interpretive rules, not substantive provisions.<sup>112</sup> Further, the court held that the EAct and the Interim Regulations were not impermissible retroactive applications of law because the conditions and prescriptions that had been previously submitted did

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<sup>108</sup> *Am. Rivers v. U.S. Dep’t of the Interior*, No. C05-2086P, 2006 WL 2841929 (D. Wash. 2006).

<sup>109</sup> *Id.* at \*1, \*3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*15.

<sup>112</sup> *Id.* at \*6, \*15.

not meet the test of the kind of settled expectations protected from retroactive application.<sup>113</sup>

There are three exceptions to the requirements of notice and comment rulemaking under the APA. First, procedural rules, those involving agency organization, procedure, and practice, are not subject to notice and comment provisions.<sup>114</sup> Second, interpretive rules issued by an agency to advise the public of the agency's construction of statutes and rules it administers are not subject to notice and comment requirements.<sup>115</sup> Under this exception, if an agency's rule merely clarifies or explains existing laws and regulations or engages in discretionary fine-tuning, the notice and comment requirements provided in the APA do not need to be followed.<sup>116</sup> Third, the APA provides an exception to notice and comment rulemaking for good cause, which includes situations where notice and comment procedures would be impracticable, unnecessary, or contrary to the public interest.<sup>117</sup> As the district court noted, the Interim Regulations at issue in this case were exempt because they qualified as procedural and interpretive rules.<sup>118</sup>

#### ***D. EPA Act Provisions Related to Tribal Lands***

The EPA Act also contains several specific provisions relating to the development of energy resources on tribal lands.<sup>119</sup> While these provisions do not deal specifically with hydropower licensing, the inclusion of these provisions might help to explain the trade-offs that tribal entities considered when they decided whether to support the EPA Act provisions on the hearings and alternatives discussed above.<sup>120</sup> Indian tribes face unique questions with regard to energy development on tribal lands in addition to the issues that arise in the context of protecting reservation lands in the hydropower relicensing process. Title V, called the Indian Tribal Energy Development and Self-Determination Act of 2005, amended the Department of Energy Organi-

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<sup>113</sup> *Id.* at \*10-11, \*15.

<sup>114</sup> *Id.* at \*4 (citing 5 U.S.C. § 553(b)(A)-(D) (2006)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*10-11, \*15.

<sup>119</sup> See 25 U.S.C. §§ 3502-3506 (2005).

<sup>120</sup> See Andrea S. Miles, *Tribal Energy Resource Agreements: Tools For Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities?*, 30 AM. INDIAN L. REV. 461 (2005-2006).

zation Act to create the Office of Indian Energy Policy and Programs within the Department of Energy.<sup>121</sup> Title V also provides for an alternative process for approval of contracts between tribes and third parties regarding energy projects on tribal lands, including leases and rights of way across tribal lands.<sup>122</sup> If the tribes enter into a Tribal Energy Resource Agreement with the Department of Energy, approval of third-party contracts by the Department of the Interior is not required.<sup>123</sup> These provisions may raise issues if a business agreement affects allotted lands. According to the language of the EAct, Tribal Energy Resource Agreements can cover (1) lease or business agreements for the purpose of energy resource development, which includes exploration, extraction, processing, and other development of energy mineral resources located on tribal lands; (2) construction and operation of electric generation, transmission, or generation facilities located on tribal lands; (3) facilities to process or refine energy developed on tribal lands; and (4) rights of way for pipelines or electric transmission or distribution lines.<sup>124</sup>

The EAct also provided standards for approval of the Tribal Resource Agreements. First, the tribe must demonstrate it has the capacity to regulate the development of energy resources.<sup>125</sup> Second, the tribe needs to show that it has a plan to get necessary information from the applicant.<sup>126</sup> Third, the Tribal Resource Agreement must contain provisions to deal with amendments and renewals.<sup>127</sup> Fourth, the tribe must address economic return and appropriate environmental review, provide a public notification process, and outline a process to consult with affected states.<sup>128</sup> During debates on passage of the EAct, concerns were raised that these provisions were simply a mechanism to avoid compliance with federal environmental laws, including NEPA and the ESA.<sup>129</sup> Without these agreements, secretarial approval would be a federal action triggering environmental compliance.

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<sup>121</sup> See 42 U.S.C. § 7144e (2006); 25 U.S.C. § 3502(b) (2006).

<sup>122</sup> 25 U.S.C. § 3504.

<sup>123</sup> *Id.* § 3504(a)(2)(C).

<sup>124</sup> *Id.* § 3504(a)(1), (b), (e).

<sup>125</sup> *Id.* § 3504(e)(2)(B)(i).

<sup>126</sup> *Id.* § 3504(e)(2)(B)(iii)(I).

<sup>127</sup> *Id.* § 3504(e)(2)(B)(iii)(III).

<sup>128</sup> *Id.* § 3504(e)(2)(B)(iii) (IV),(VI)-(X).

<sup>129</sup> Miles, *supra* note 120, at 463-66.



Finally, the EPAct provided grants for new energy programs on tribal lands. Within the Department of the Interior, the Act authorized development grants to tribes and tribal energy-resource-development organizations for use in developing or obtaining managerial and technical capacity.<sup>130</sup> In addition, the Department is authorized to make low-interest loans to tribes and organizations for use in promoting energy resource development on tribal lands.<sup>131</sup> The Act also provides that the Department shall make funds available to an “appropriate,” as determined by the Secretary, tribal environmental organization that represents multiple tribes to establish a national resource center to develop tribal capacity and carry out tribal environmental programs.<sup>132</sup>

At the Department of Energy, the EPAct authorized a competitive grant program for work in energy conservation, research, planning, development and maintenance, and carbon sequestration.<sup>133</sup> Congress also directed the Department of Energy to provide a Loan Guarantee Program for up to ninety percent of the unpaid principal and interest on any loan made to a tribe for energy development.<sup>134</sup> Each federal power-marketing administration (Bonneville Power, Western Area Power Administration) was to encourage tribal energy development and consider the unique relationship between the United States and tribes. The Secretary of Energy must submit a report to Congress that describes the federal power allocation to or for the benefit of tribes in a service area of the power marketing administration.<sup>135</sup> Congress made clear that nothing in the EPAct absolves the United States from any responsibility towards tribes, “including, but not limited to, those which derive from the trust relationship or from any treaties, statutes, and other laws of the United States, Execu-

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<sup>130</sup> 25 U.S.C. § 3502(a)(2)(A).

<sup>131</sup> *Id.* § 3502(a)(2)(C).

<sup>132</sup> *Id.* § 3502(a)(2)(D).

<sup>133</sup> *Id.* § 3502(b). See generally Leslie R. Dubois, *Curiosity and Carbon: Examining the Future of Carbon Sequestration and the Accompanying Jurisdictional Issues as Outlined in the Indian Energy Title of the 2005 Energy Policy Act*, 27 ENERGY L.J. 603 (2006) (examining the three types of sequestration promoted by the EPAct and the jurisdictional issues related to tribal supervision and control of carbon trading).

<sup>134</sup> 25 U.S.C. § 3502(c)(1).

<sup>135</sup> *Id.* § 3505(e)(1).

tive orders, or agreements between the United States and any Indian tribe.”<sup>136</sup>

***E. The Test Case: Klamath Project—The First Full Proceeding Under the New Regulations***

One of the concerns and challenges faced by hydropower interests involves integrating the new hearings and alternative sub-proceedings into the existing administrative process. The underlying licensing process under the ILP begins with an applicant filing a Notice of Intent. After a relatively long period of information gathering, FERC prepares a draft environmental assessment or environmental impact statement; the resource agencies then submit preliminary conditions and prescriptions.<sup>137</sup> At this stage in the process, as discussed above, an applicant can request a hearing and propose alternative conditions and prescriptions.<sup>138</sup> FERC then issues the draft final environmental impact statement.<sup>139</sup> Based on the results of the administrative hearing and within sixty days of the close of the NEPA comment period, the resource agencies submit the final modified conditions and prescriptions.<sup>140</sup> The Department’s interim final regulations fit the administrative, trial-type hearing into the very tight window between the release of FERC’s draft environmental impact statement and the revision of that draft. The sixty-day timeframe results in a very aggressive and demanding schedule for the administrative hearing.

By fall 2006, the hearings process had been invoked in at least five major relicensing proceedings—two separate requests in the Hells Canyon proceeding in Idaho, requests in the Merrimac proceeding in New York, the Santee Cooper Hydroelectric Project in South Carolina, the Spokane River Project in Washington,<sup>141</sup> and finally for the Klamath Project in Oregon. Of these five,

<sup>136</sup> *Id.* § 3504(e)(6)(B); see Miles, *supra* note 120 at 472-74 (discussing possible effects of Title V on Federal Indian Trust obligations).

<sup>137</sup> 18 C.F.R. §§ 5.23-5.26 (2007).

<sup>138</sup> See 16 U.S.C. §§ 797(e), 823d (2006).

<sup>139</sup> 18 C.F.R. § 5.25(a).

<sup>140</sup> 18 C.F.R. § 5.25(d).

<sup>141</sup> For an in-depth discussion of these cases, see generally Eichstaedt, Sherman & Amos, *supra* note 58. This information is also derived from communications between the author and Interior Department attorneys. The hearing process for the Spokane River Project concluded on January 8, 2007, with the issuance of a final decision by the Administrative Law Judge. See *id.*

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three settled before the proceedings,<sup>142</sup> and only the Klamath and Spokane River Projects have proceeded through the full administrative process.<sup>143</sup> Appendix A compares and integrates the ILP and the new hearings and alternatives processes.<sup>144</sup> The regulations also established a deadline for any retroactive EPA Act challenges in pending licensing proceedings.<sup>145</sup> Approximately fifteen licensees requested hearings under this retroactive provision.<sup>146</sup>

In the Klamath proceeding, PacifiCorp, the owner and operator of the Klamath Project, requested a hearing under the new regulations. The relicensing process for the PacifiCorp dams in the Klamath Basin was the first hearing process completed and provides a useful example of how the administrative pieces all come together.<sup>147</sup> However, the Klamath Project is also distinct because the ILP was not being used. The hearing included nearly thirty attorneys, more than thirty linear feet of documents including expert reports and written testimony, and seven days of testimony and cross-examination.<sup>148</sup> The case concerned disputed issues of material fact with respect to preliminary conditions and prescriptions that the National Marine Fisheries Service and Department of the Interior agencies submitted for inclusion in the new license for the operation of the Klamath Hydroelectric Project.<sup>149</sup> The project, located on the upper Klamath River in an area that covers southern Oregon and northern California, consists of five mainstem dams.<sup>150</sup>

As the party requesting the hearing, the burden of proof rested with PacifiCorp to establish its version of the facts on each disputed issue of material fact by a preponderance of the evidence.<sup>151</sup> PacifiCorp challenged the fishway prescriptions contained in the National Marine Fisheries Services Preliminary

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<sup>142</sup> *See id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See* Suzanne Piluso, Timeline Integrating ILP with Hearing and Alternatives Process, Appendix A.

<sup>145</sup> Eichstaedt, Sherman & Amos, *supra* note 58.

<sup>146</sup> *Id.*

<sup>147</sup> At the time of publication, the Spokane River proceeding has also been completed. *See id.*

<sup>148</sup> *See In re* Klamath Hydroelectric Project, Docket No. 2006-NMFS-0001, FERC Project No. 2082, (July 13, 2006).

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* at 2 (citing the court's July 6, 2006, order granting motion to confirm burden of proof; 5 U.S.C. § 556(d) (2006) (establishing that the burden of proof rests

Prescriptions for the Klamath Hydroelectric Project, FERC project No. 2082.<sup>152</sup> Those preliminary prescriptions were developed jointly by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The Bureau of Land Management and Bureau of Reclamation (BOR) each filed separate preliminary conditions with FERC; PacifiCorp also requested a hearing on several disputed issues involving these conditions.<sup>153</sup> The California Department of Fish and Game, Klamath Tribes, Hoopa Valley Tribes, Yurok Tribe, Karuk Tribe, Klamath Water Users Association, Siskiyou County, State of Oregon, and conservation groups<sup>154</sup> all filed notices of intervention.<sup>155</sup> The agencies decided to consolidate the hearing requests, and the matter was assigned to Judge Parlen L. McKenna to issue a decision on the disputed issues of material fact within ninety days from the date of referral, as required by the EPAct and implementing regulations.<sup>156</sup> An initial pre-hearing conference was held on July 6–7, 2006, in which the disputed issues of material fact were narrowed.<sup>157</sup> The hearing was held in Sacramento, California, on August 21, 2006, and ended on August 25, 2006. Post-hearing briefs, including proposed findings of fact, were filed on September 5, 2006. Reply briefs were filed on September 11, 2006.<sup>158</sup>

The administrative law judge ruled on each party's findings of fact.<sup>159</sup> Of the fourteen disputed material facts, PacifiCorp prevailed on issues related to the recreational use of the river and issues on lamprey habitat and survival.<sup>160</sup> However, the ALJ did specifically find that the Pacific lamprey would benefit from access to habitat within the Project reach and determined that PacifiCorp failed to show that the Pacific lamprey would not benefit from access with the Project reaches.<sup>161</sup> On the central fac-

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with the proponent); and 50 C.F.R. § 221.57 (2006) (adopting the preponderance of the evidence standard of proof)).

<sup>152</sup> *Id.* at 3.

<sup>153</sup> *Id.* at 3-4.

<sup>154</sup> The conservation groups were: American Rivers, Trout Unlimited, Northcoast Environmental Center, Pacific Coast Federation of Fishermen's Associations, Institute of Fisheries Resources, WaterWatch of Oregon, California Trout, Friends of the River, and Oregon Natural Resources Council. *Id.* at 4.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 5.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 11-87.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 38, 70.

2007]

*Hydropower Reform*

29

tual disputes, including whether anadromous fish stock occurred above the project facilities, whether “trap and haul” proposals were sufficient, and whether current conditions above the facilities would support repopulation of those fish stocks, Judge McKenna found against PacifiCorp and in support of the positions taken by the resource agencies, Tribes, and conservation groups.<sup>162</sup>

Despite legitimate concerns about the time, expense, and motivation behind the new hearings procedures, the federal resource agencies, conservation groups, and tribes achieved an extremely positive result through the hearings process. The factual conclusions included in the order represent a well-reasoned and scientifically based record as the relicensing process moves forward. While it may be rare that the federal agencies, tribes, and conservation organizations can devote the necessary amount of resources into the hearing process, the Klamath proceeding is, at minimum, an example of the benefits that may flow from the investment. By contrast, however, the new EAct provisions fall short of achieving the goal of a streamlined process and arguably further complicate an already litigious situation.

**III****OTHER HYDROPOWER DEVELOPMENTS THAT MAY  
IMPACT THE KLAMATH BASIN**

In addition to the EAct changes to the licensing process, other developments involving hydropower may also have an impact on the settlement dynamics in the Klamath Basin. First, the more widespread acceptance of dam decommissioning and removal make the parties increasingly willing to consider this option. Several judicial decisions in recent years, including the decision from the D.C. Circuit on the Cushman Project in the City of Tacoma,<sup>163</sup> have made clear that a resource agency’s conditions and prescriptions do not necessarily need to preserve the economic viability of the project. Short of recommending decommissioning outright, the resource agencies may submit conditions and prescriptions that ultimately make decommissioning inevitable.

Second, PacifiCorp has experience with the decommissioning and removal process with its Condit Dam facility in Washington

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<sup>162</sup> *Id.* at 11-87.

<sup>163</sup> *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

and the Powerdale Dam in Oregon. The ongoing efforts to remove the Condit and Powerdale Dams may impact PacifiCorp's approach and negotiating position in the Klamath Basin. In addition, as Glen Spain's article addresses, the cost of energy production and the unavailability of continued reduced rates in the basin may change the constituencies that support decommissioning, particularly if there are significant gains to the protection of listed species and tribal trust resources such that the pressure can be reduced on the deliveries to the Klamath Project.<sup>164</sup> Finally, the very nature of the administrative proceeding in a relicensing varies from the other forums that have been used to seek settlement in the basin, in that more of the relevant parties are already in the process.

#### A. City of Tacoma Decision—Reasonableness of Dam Removal

A recent decision involving the Cushman Project and the City of Tacoma, issued in August of 2006, followed the Supreme Court's guidance in *Escondido* and further clarified the relationship between the resource agencies and FERC. In *City of Tacoma*, the D.C. Circuit held that FERC cannot refuse to incorporate conditions because they are "untimely" under the FERC regulations.<sup>165</sup> Further, the court held that reasonable conditions and prescriptions can include requirements that ultimately render a project uneconomical.<sup>166</sup> This decision may also contribute to the willingness to consider dam removal on the Klamath.<sup>167</sup>

The case, involving the City of Tacoma and the Skokomish Indian Tribe, concerned the City's operation of the Cushman Project hydroelectric operation on the Skokomish River.<sup>168</sup> The Skokomish Indian Reservation, established in 1855 through the Treaty of Point No Point, lies downstream of the original Cushman Project.<sup>169</sup> Although the Treaty of Point No Point reserved to the Skokomish Indian Tribe "[t]he right of taking fish at usual and accustomed grounds," the Cushman Project diverts

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<sup>164</sup> Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. ENVTL. L. & LITIG. 49 (2007).

<sup>165</sup> *City of Tacoma*, 460 F.3d at 64-65.

<sup>166</sup> *Id.* at 73-74.

<sup>167</sup> See generally *City of Tacoma*, 460 F.3d 53.

<sup>168</sup> See *id.* at 59.

<sup>169</sup> *Id.*

almost the entire flow of the North Fork of the Skokomish River.<sup>170</sup> The North Fork flows along the edge of the Reservation and forms part of the boundary, while the main stem of the Skokomish River flows through the Reservation.<sup>171</sup>

FERC issued the original license for the Cushman Project in 1924.<sup>172</sup> This original license, however, was a “minor part” license because FERC interpreted its authority at the time to be limited to federal reservations.<sup>173</sup> While parts of the Cushman Project were on privately owned lands and did not need a permit under FERC’s early interpretation of its statutory authority, parts of the Project were on federal lands.<sup>174</sup> A second hydroelectric plant was built and situated within the boundary of the Skokomish Reservation on property the City of Tacoma owns in fee, but “an access road and transmission line runs across [R]eservation property.”<sup>175</sup> In the view of the D.C. Circuit Court, as stated in its 2006 opinion, the Project diverts about ninety-two percent of the North Fork of the Skokomish River’s flow while only allowing sixty cubic feet per second of water to pass the project.<sup>176</sup> Despite a determination in 1963 that FERC’s hydropower licensing jurisdiction extended to the whole project and not just those parts that occupied federal lands, Tacoma continued to operate until 1974 under the minor part license.<sup>177</sup> In 1974, after fifty years of operation, the original minor part license expired.<sup>178</sup>

The City of Tacoma applied for a new license in 1974, and under section 15—which relates to relicensing as opposed to an original application—FERC was required to issue annual renewal licenses.<sup>179</sup> The Project operated under these annual renewals for another twenty-four years until 1998.<sup>180</sup>

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<sup>170</sup> *Id.* at 59, 62. As the court noted, the treaty right to take fish at usual and accustomed grounds “is now of little value, because the water has disappeared, and with it, the fish.” *Id.* at 12.

<sup>171</sup> *Id.* at 59.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 59-60.

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

In 1998, FERC issued a new forty-year major license for the Cushman Project and the license required measures to protect the environment, remedy past impacts, restore fish populations, and mitigate project impacts on the tribes.<sup>181</sup> The license specifically called for the project to release 240 cubic feet per second of water into the North Fork River.<sup>182</sup> FERC initially stayed implementation of the license conditions including these flows.<sup>183</sup> In 2005, after a FERC ALJ issued a report emphasizing the critical importance of releasing the 240 cubic feet per second, FERC partially lifted the stay.<sup>184</sup> The court of appeals then stayed the minimum-flow provision pending appeal. As the court of appeals stated, “Tacoma thus continues to operate the Cushman Project without any significant license conditions as it has done for approximately eighty years.”<sup>185</sup> Even though the license contained some conditions, FERC rejected Interior’s 4(e) conditions because they were untimely and addressed issues outside the Reservation.<sup>186</sup> Both the Tribe and Cushman appealed.<sup>187</sup> While the appeal was pending, several species were listed pursuant to the ESA.<sup>188</sup> Subsequent to the ESA consultation between FERC, the Fish and Wildlife Service, and the National Marine Fisheries Service, the appeal went to the D.C. Circuit.<sup>189</sup>

The Tribe’s claim centered primarily on the idea that for eighty years the Cushman Project operated with no consideration of the impacts to the tribal reservation or tribal resources.<sup>190</sup> First, the Tribe argued that the 1974 application should have been an original application rather than a relicensing proceeding, because the 1924 license was never valid.<sup>191</sup> The court, however, ruled that FERC did not err in proceeding with the relicensing rather than an original application.<sup>192</sup>

Second, the Tribe argued that FERC violated the FPA by failing to include Interior’s 4(e) conditions because they were un-

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 60.

<sup>184</sup> *Id.* at 61.

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* at 60, 64-67.

<sup>187</sup> *Id.* at 60-61.

<sup>188</sup> *Id.* at 61.

<sup>189</sup> *See id.* at 61.

<sup>190</sup> *See id.* at 61-62.

<sup>191</sup> *See id.* at 62.

<sup>192</sup> *Id.* at 63.



timely.<sup>193</sup> On this issue the court ruled that FERC could not set time limits on the Secretary's authority under 4(e) of the FPA.<sup>194</sup> FERC's regulation that set time frames for the Secretary to file conditions exceeded its statutory authority.<sup>195</sup> Agencies can agree on a timeline, but FERC cannot impose a timeline on the agencies with separate statutory authority to impose conditions and prescriptions.<sup>196</sup> The court ultimately remanded the issue for FERC to include Interior's 4(e) conditions.<sup>197</sup> Moreover, the court stated that the transmission line and access road on reservation lands were sufficient to trigger 4(e) authority.<sup>198</sup> Section 4(e) authority exists if any or some of the project is on the reservation, and there is no requirement that it be a significant amount.<sup>199</sup> Finally, 4(e) conditions are not limited to mitigating the impact of the portions of the project that are on the reservation (here the transmission lines and the access road).<sup>200</sup> Rather, 4(e) conditions impose measures to mitigate the effect of the *project* as a whole on the reservation.<sup>201</sup> The term "reservation" as used in the FPA means any federally owned land within the reservation, not all land comprising the reservations, which can include some fee land.<sup>202</sup> The court's decision represented a strong affirmation of the principles set out by the U.S. Supreme Court in *Escondido* more than twenty years ago.<sup>203</sup>

Third, the Tribe argued that FERC violated the Clean Water Act by not confirming that the State of Washington issued its certification with public notice and comment.<sup>204</sup> Section 401 of the Clean Water Act requires procedures for public notice and

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<sup>193</sup> *Id.* at 64.

<sup>194</sup> *Id.* at 65.

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 78.

<sup>198</sup> *Id.* at 65-66.

<sup>199</sup> *See id.*

<sup>200</sup> *Id.* at 66-67.

<sup>201</sup> *Id.*

<sup>202</sup> *See* Federal Power Act, 16 U.S.C. § 796(2) (2006). The Federal Power Act defines "reservations" as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." *Id.*

<sup>203</sup> *See City of Tacoma*, 460 F.3d at 65-67; *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

<sup>204</sup> *City of Tacoma*, 460 F.3d at 67-68.

comment.<sup>205</sup> The court ruled that FERC is required, at least, to confirm that the state has facially satisfied the express requirements of section 401, specifically that state certification was made with notice to the public and opportunity to comment.<sup>206</sup> However, since FERC must reconsider Interior's 4(e) conditions anyway, FERC should seek affirmation from the Washington Department of Ecology that it complied with notice requirements when it issued certification. The failure to confirm notice and comment alone would not have been enough to declare the 1998 license invalid.<sup>207</sup>

The Tribe also asserted that FERC violated the National Historic Preservation Act and the Coastal Zone Management Act.<sup>208</sup> The court found no violation of either of these statutes.<sup>209</sup> Finally, the Tribe claimed that FERC failed to consider that the City of Tacoma lacks water rights to operate the project.<sup>210</sup> The court ruled that FERC had no authority to make decisions regarding water rights claims.<sup>211</sup>

The City of Tacoma also challenged the conditions and prescriptions imposed on the license. First, the City argued that the 1998 license was a de facto decommissioning of the Cushman Project.<sup>212</sup> As a result, the new license, they suggested, did not satisfy the reasonableness requirement of the FPA.<sup>213</sup> The court held that reasonable terms under the FPA can, in some cases, include terms that may have the effect of shutting a project

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<sup>205</sup> See Clean Water Act, 33 U.S.C. § 1341(a)(1) (2006). The Clean Water Act provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived." *Id.* To obtain certification from a state, the state "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." *Id.*

<sup>206</sup> *City of Tacoma*, 460 F.3d at 68.

<sup>207</sup> See *id.* at 68-69. Declining to invalidate Tacoma's license for want of certification under the Clean Water Act, the court expressed concern that if the license was invalid, FERC would merely issue another annual temporary license to Tacoma that would lack the 240 cubic feet per second requirement, and therefore be even more environmentally detrimental. See *id.*

<sup>208</sup> *Id.* at 69.

<sup>209</sup> See *id.* at 69-70.

<sup>210</sup> *Id.* at 70-71.

<sup>211</sup> See *id.* at 71.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 71-72.

2007]

*Hydropower Reform*

35

down.<sup>214</sup> Whether the federal government or the licensee pays for a decommissioning was raised but not resolved.<sup>215</sup>

The City also argued there was no consideration in the NEPA documents of the environmental impacts if the project were to be shut down.<sup>216</sup> The court responded that, by including Interior's 4(e) conditions, FERC will need to re-evaluate impacts anyway.<sup>217</sup> These concerns could be part of that analysis on remand.<sup>218</sup> Finally, the City argued that FERC relied on flawed biological opinions issued under section 7 of the ESA.<sup>219</sup> The court ruled that FERC's reliance on the biological opinion was allowable because Tacoma presented no new information that was not considered in the biological opinion process.<sup>220</sup>

The court of appeal's opinion in *City of Tacoma* is significant for several reasons. First, the court established that FERC could not exclude resource agencies' 4(e) conditions because they were untimely pursuant to FERC regulations.<sup>221</sup> The court noted that FERC could no more tell the Secretary how to exercise his authority than the Secretary could tell FERC how to exercise its authority.<sup>222</sup> Second, the court recognized that any or some part of the project on a reservation triggers the Secretary's 4(e) conditioning authority.<sup>223</sup> Conditions are designed to mitigate the impacts of an entire project, not just those associated with the project components that occur on tribal lands.<sup>224</sup> Third, the court clearly held that the reasonableness language in the FPA did not mean that the project had to remain economically viable or that the conditions could not operate as de facto decommissioning.<sup>225</sup> The court clearly responded to Tacoma's argument by saying that reasonable conditions may include measures that result in a project being shut down—a move that put dam removal squarely on the table in relicensing proceedings.<sup>226</sup>

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<sup>214</sup> See *id.* at 74.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> *Id.* at 74-75.

<sup>220</sup> See *id.* at 76.

<sup>221</sup> See *id.* at 64-65.

<sup>222</sup> See *id.* at 65.

<sup>223</sup> See *id.* at 65-66.

<sup>224</sup> See *id.* at 66-67.

<sup>225</sup> See *id.* at 73-74.

<sup>226</sup> See *id.* at 74.

For example, in the current Klamath relicensing, the conditions and prescriptions that were unsuccessfully challenged by PacifiCorp in the hearings process will now, as modified, become part of the license. Commentators have speculated that the fishway prescriptions will be so costly that continued operation of the Project may be impacted. PacifiCorp has indicated, however, that they will continue to seek relicensing of the Klamath Project. The *City of Tacoma* decision compromises the argument that for the conditions and prescriptions to be reasonable, they must protect the economic viability of the project.

### ***B. Condit Dam Decommissioning***

Like the *City of Tacoma* decision, the Condit Dam removal process in Washington State may also be illustrative in evaluating the Klamath Basin. In late 1999, PacifiCorp and a myriad of other parties reached an agreement to remove the Condit Dam on the White Salmon River in Washington.<sup>227</sup> While proponents of dam removal had been working since the mid-1980s and the Edwards Dam in Maine had been removed in July of 1999,<sup>228</sup> a removal agreement for the Condit was significant because it will be the tallest hydropower dam ever removed.<sup>229</sup> The parties agreed to remove the Condit Dam and drain the reservoir by October of 2006.<sup>230</sup> The Condit Dam Settlement marked an agreement between dam owner PacifiCorp and fifteen environmental groups, two tribal entities, and five government agencies.<sup>231</sup> PacifiCorp determined that it would be uneconomical for the company to continue to operate the dam with the additional fish and wildlife protection requirements that relicensing would require.<sup>232</sup> Additionally, the cultural and recreational resources of a free-flowing White Salmon River outweighed the benefits of keeping the dam.<sup>233</sup>

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<sup>227</sup> Press Release, U.S. Dep't of the Interior, PacifiCorp—American Rivers—Yakama Nation: Historic Condit Dam Removal Agreement to be Signed (Sept. 22, 1999) (on file with author), available at [www.doi.gov/news/archives/pacifi.html](http://www.doi.gov/news/archives/pacifi.html); see also Becker, *supra* note 1, at 813.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 813.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See *id.* at 826.

<sup>233</sup> See *id.* at 819-20.

The agreement allowed PacifiCorp to operate the dam in order to pay for its removal.<sup>234</sup> However, several approvals from various government agencies on the federal, state, and local level remained and, ultimately, lead to the extension of the removal process,<sup>235</sup> brought up the potential for litigation,<sup>236</sup> and further stalled the dam removal process. Currently, removal of the Condit Dam is slated for 2008.<sup>237</sup> Based on the proceedings for the Condit facility in Washington, PacifiCorp has significant experience evaluating the relative benefits and costs associated with fishway construction as compared to decommissioning. As a result, PacifiCorp will likely approach the economics of the Klamath relicensing process differently than a license applicant without such experience.

***C. Contrasting General Stream Adjudication and Litigation with the Relicensing Process***

Previous settlement efforts in the Klamath Basin arose in the context of judicial proceedings, both state and federal—the ongoing general stream adjudication initiated by the State of Oregon and most recently the federal litigation over the implementation of the biological opinions issued for the operation of the Klamath Reclamation Project. While the hydropower relicensing process possesses some characteristics of a judicial proceeding, particularly with the addition of the hearings process, it remains essentially an administrative licensing process. In addition to its administrative character, the relicensing process also differs from federal litigation and state adjudication in that “interested parties,” who may not be official parties in the federal litigation or parties asserting water rights in the state adjudication, can become active participants in the licensing process.

In the general stream adjudication, only those with claims to water rights are allowed to participate.<sup>238</sup> Thus, non-water-rights holders with significant interests in the allocation of water among the various rights holders in the basin are relegated to observing the proceedings rather than participating and representing their interests. To the extent that settlement arises from the state adjudication, those settlement efforts will not include these non-

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<sup>234</sup> *Id.* at 827.

<sup>235</sup> *See id.* at 828, 830-41.

<sup>236</sup> *See id.* at 841-43.

<sup>237</sup> *Id.* at 814.

<sup>238</sup> *See, e.g.*, OR. ADMIN. R. 690-028-0010(4) (2005).

water-righted interests—which in the Klamath Basin includes the fishing industry, local recreational interests, and conservation organizations. As a result, any settlement in this context would not address the full scope of the interests and issues at stake despite resolving the various water claims. Without addressing the broader issues of the fishing, recreational, and conservation communities, any agreement that is reached is open to collateral attack by the interests that were excluded.

The federal court litigation in the Basin suffers from many of the same issues as the general stream adjudication. The Klamath Basin has a rich history of litigation in federal court. The various judicial decisions in the Basin represent important resolutions of particular issues between particular parties, but have not provided a context for considering all of the competing demands and interests at stake. For example, in the litigation that followed the 2001 water shutdown, the federal courts attempted to bring the parties together to discuss opportunities to resolve what seemed to be the devastating conflict in the Basin over water allocation.<sup>239</sup> Despite the best intentions, the settlement efforts, like so many other attempts in the Basin, ultimately failed.<sup>240</sup> The failure may have been based in large part on the fact that not all of the various interests were fully present at the negotiation table. While the federal court efforts brought in parties from outside the litigation, those parties did not have the same kind of stake in the outcome of the settlement, because they did not have interests in the underlying litigation. As a result, some parties were at the table in body, but not in mind and spirit.

The process for relicensing a private hydropower project, as described above, differs from the general stream adjudication and federal litigation because interested parties can intervene early in the process and become parties to the license. For example, with the Klamath Project many of the non-water-righted interests in the Basin have attained party status in the relicensing proceeding.<sup>241</sup> As a result, a broader range of parties in the Basin are fully participating in the process and have a vested interest in the outcome of the proceedings. The ability of all interested parties to participate sets the table differently for any

<sup>239</sup> See Dan A. Tarlock & Holly D. Doremus, *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 321 (2003).

<sup>240</sup> Spain, *supra* note 164, at 78-79.

<sup>241</sup> See *In re Klamath Hydroelectric Project*, No. 2006-NMFS-0001, FERC Project No. 2082 (July 13, 2006).

settlement negotiations and may result in strong settlement opportunities that are less likely to be subject to collateral attack.

**IV**

**NON-HYDROPOWER DYNAMICS AT PLAY IN THE KLAMATH BASIN TODAY**

To think that the hydropower relicensing process alone has set the stage in the Klamath Basin for settlement would be short-sighted. As Glen Spain’s Article in this Symposium edition comprehensively describes, many factors have brought the Basin where it is today.<sup>242</sup> Among the various factors described in the Symposium, this Article focuses on three—the 2001 water shut-down and the resulting litigation, the ongoing litigation by Pacific Coast Federation of Fishermen’s Associations on the biological opinions for Coho salmon in the Basin, and the Fifth Amendment takings claims brought in the U.S. Court of Federal Claims.

**A. *The 2001 Shutdown***

In 2001, for the first time, the BOR closed the head gate that delivers water from Upper Klamath Lake to a reclamation project in order to comply with biological opinions issued for two fish species under the authority of the ESA.<sup>243</sup> As a result, irrigation deliveries were halted to the farming community inside the Klamath Reclamation Project and a dramatic summer unfolded.<sup>244</sup> The irrigation community immediately sought an injunction to prohibit the BOR from withholding water for the project lands.<sup>245</sup> The federal district court denied the injunction and suggested that the parties try to resolve the water allocation struggles in the Basin outside of the litigation process.<sup>246</sup> Over the next several years the science underlying the biological opinion was questioned, including a report by the National Research Council, an arm of the National Academy of Sciences, that concluded there was no firm evidence of a relationship between lake levels and flows and increased rates of survival for the listed fish.<sup>247</sup> As a result, the federal agencies released new biological

<sup>242</sup> See generally Spain, *supra* note 164, at 49.

<sup>243</sup> Tarlock & Doremus, *supra* note 164, at 283-84.

<sup>244</sup> *Id.* at 283.

<sup>245</sup> *Kandra v. United States*, 145 F. Supp. 2d 1192, 1195 (D. Or. 2001).

<sup>246</sup> See *id.* at 1211.

<sup>247</sup> COMM. ON ENDANGERED & THREATENED FISHES IN THE KLAMATH RIVER BASIN, NAT’L RESEARCH COUNCIL, SCIENTIFIC EVALUATION OF BIOLOGICAL OPIN-

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opinions based on the ten-year plan proposed by the BOR for the operation of the project. The biological opinion issued by the U.S. Fish and Wildlife Service, citing to additional scientific reviews from Oregon State University and the University of California at Davis, concluded that the ten-year operation plan would cause jeopardy to the listed species of fish in Upper Klamath Lake.<sup>248</sup> The Fish and Wildlife's biological opinion called for the lake to be maintained at levels sufficient to protect the lake fish.<sup>249</sup> The biological opinion issued by the National Marine Fisheries Service for the listed coho salmon in the Klamath River, on the other hand, issued a jeopardy opinion, but called for an increase of flows to be phased in over time.<sup>250</sup>

### ***B. Coho Biological Opinion Litigation and Injunction***

A coalition of fishing groups, led by the Pacific Coast Federation of Fishermen's Association, and environmental groups filed suit challenging the 2002 National Marine Fisheries Service biological opinion, specifically alleging that phasing in the increased flows was inconsistent with the requirements of the ESA.<sup>251</sup> In 2003, the district court ruled that the ten-year biological opinion was arbitrary and capricious because it was based on speculative and future events, such as the development of a water bank and enforcement of state water law—all of which were outside the control of the action agency, here the BOR.<sup>252</sup> The court reasoned that the BOR could not rely on such actions, even if they were reasonably certain to occur, to avoid jeopardy to the species today.<sup>253</sup> The water users appealed the decision to the Ninth Cir-

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IONS ON ENDANGERED AND THREATENED FISHES OF THE KLAMATH RIVER BASIN 26 (2002) available at [http://books.nap.edu/catalog.php?record\\_id=10296#toc](http://books.nap.edu/catalog.php?record_id=10296#toc).

<sup>248</sup> U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, BIOLOGICAL/CONFERENCE OPINION REGARDING THE EFFECTS OF OPERATION OF THE BUREAU OF RECLAMATION'S KLAMATH PROJECT ON THE ENDANGERED LOST RIVER SUCKER (*Deltistes luxatus*), ENDANGERED SHORTNOSE SUCKER (*Chasmistes brevirostris*), THREATENED BALD EAGLE (*Haliaeetus leucocephalus*), AND PROPOSED CRITICAL HABITAT FOR THE LOST RIVER/SHORTNOSE SUCKERS iii (2001) available at <http://soda.sou.edu/awdata/021111c1.pdf>.

<sup>249</sup> *Id.*

<sup>250</sup> NAT'L MARINE FISHERIES SERV., BIOLOGICAL OPINION, KLAMATH PROJECT OPERATIONS 52-53 (2002) available at <http://swf.nmfs.noaa.gov/psd/klamath/KpopBO2002finalMay31.PDF>.

<sup>251</sup> Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, No. 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745, at \*20 (N.D. Cal. July 14, 2003).

<sup>252</sup> *Id.* at \*69.

<sup>253</sup> *Id.* at \*56-57.



cuit Court of Appeals, and in 2005, the appellate court went further than the district court, holding additional provisions of the biological opinion invalid.<sup>254</sup> On remand, the district court issued an injunction requiring minimum instream fish flows for the Klamath River.<sup>255</sup> The injunction is currently back on appeal to the Ninth Circuit.

The ESA litigation in the Klamath Basin has impacted the possibilities for settlement in several ways. First, few involved with the Basin ever anticipated that the 2001 shutdown would occur, particularly under the leadership of Gale Norton, Bush's Secretary of the Interior at the time. Of all the BOR projects in the West, the potential for the first major clash to occur on the Colorado River, the Middle Rio Grande, or the Platte River seemed much higher. As a result, the perspectives on the operation of the ESA, positive and negative, may have changed expectations about the kind of settlement terms that may be acceptable.

The extended litigation regarding the 2002 biological opinion for the coho salmon<sup>256</sup> has further demonstrated that the courts are evaluating agency decisions in biological opinions with increased skepticism. Rather than deferring to the National Marine Fisheries Service assessment that reasonably certain future actions would avoid jeopardy, the district court delved into the details of the ESA and the regulatory requirements to find it an unacceptable calculation of jeopardy to the species.<sup>257</sup> With increased scrutiny from the federal courts, the agencies involved in the Klamath Basin may be increasingly unwilling to delay measures for avoiding jeopardy to listed species.

### C. *The Takings Claims*

Finally, the likelihood of a comprehensive settlement has been impacted by the Court of Federal Claims' ruling on the nature of the property interest held by Project water users.<sup>258</sup> After the federal court denied the injunction in 2001, the water users in the Klamath Project sought relief by filing a takings claim alleging that the federal government had exacted a Fifth Amendment

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<sup>254</sup> See *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1095 (9th Cir. 2005).

<sup>255</sup> *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, No. 02-2006 SBA, 2006 U.S. Dist. LEXIS 24893, at \*25 (N.D. Cal. Mar. 27, 2006).

<sup>256</sup> See *generally id.*

<sup>257</sup> *Id.* at \*9-25.

<sup>258</sup> See *Tarlock & Doremus, supra* note 239, at 331.

taking without compensation in violation of the Constitution.<sup>259</sup> The claim asserted \$1 billion in compensation.<sup>260</sup> In August of 2005, Judge Allegra issued an opinion holding that the interests held by the water users in the Klamath Reclamation Project were contract rights, not vested property interests subject to compensation when taken by the government under the Fifth Amendment.<sup>261</sup> As such, the water users' remedy lies in contract law, not the Takings Clause.<sup>262</sup> Recently, Judge Allegra issued his opinion on the contract claims holding that the water users were unable to recover on a contract theory.<sup>263</sup>

While the decision of the Court of Claims will likely be subject to appeal, the rationale underlying the decision is strong and may also impact the expectations of various interests in the Basin regarding the strength of their claims to water as a matter of property law rather than contract law. In addition, the Klamath takings litigation represents a departure for the water users in the Project from a position of fighting the substantive provisions of the ESA to a position of seeking relief from the application of the ESA. A takings claim, by its very nature, acknowledges that the underlying act by the federal government is legal, but that the result creates the need for compensation. Finally, the shift from takings claims to contract claims has raised a host of federal contracting issues that illuminate more fully the expectations and agreements between the water users in the Klamath Basin and the BOR over the years. As a result, the parties in the Basin may be situated nearer settlement in light of the developments since 2001 than seemed possible during prior settlement negotiations.

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<sup>259</sup> Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005).

<sup>260</sup> See Tarlock & Doremus, *supra* note 239, at 331.

<sup>261</sup> Klamath Irrigation Dist., 67 Fed. Ct. at 524 (“Accordingly, the Court must conclude that the individual irrigators here are third-party beneficiaries of the district contracts. Because of this, their claims against the United States sound in contract, not in takings.”).

<sup>262</sup> *Id.* at 534. *Contra* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) (holding that water users holding contracts with a state water project had a compensable property interest as against the federal government).

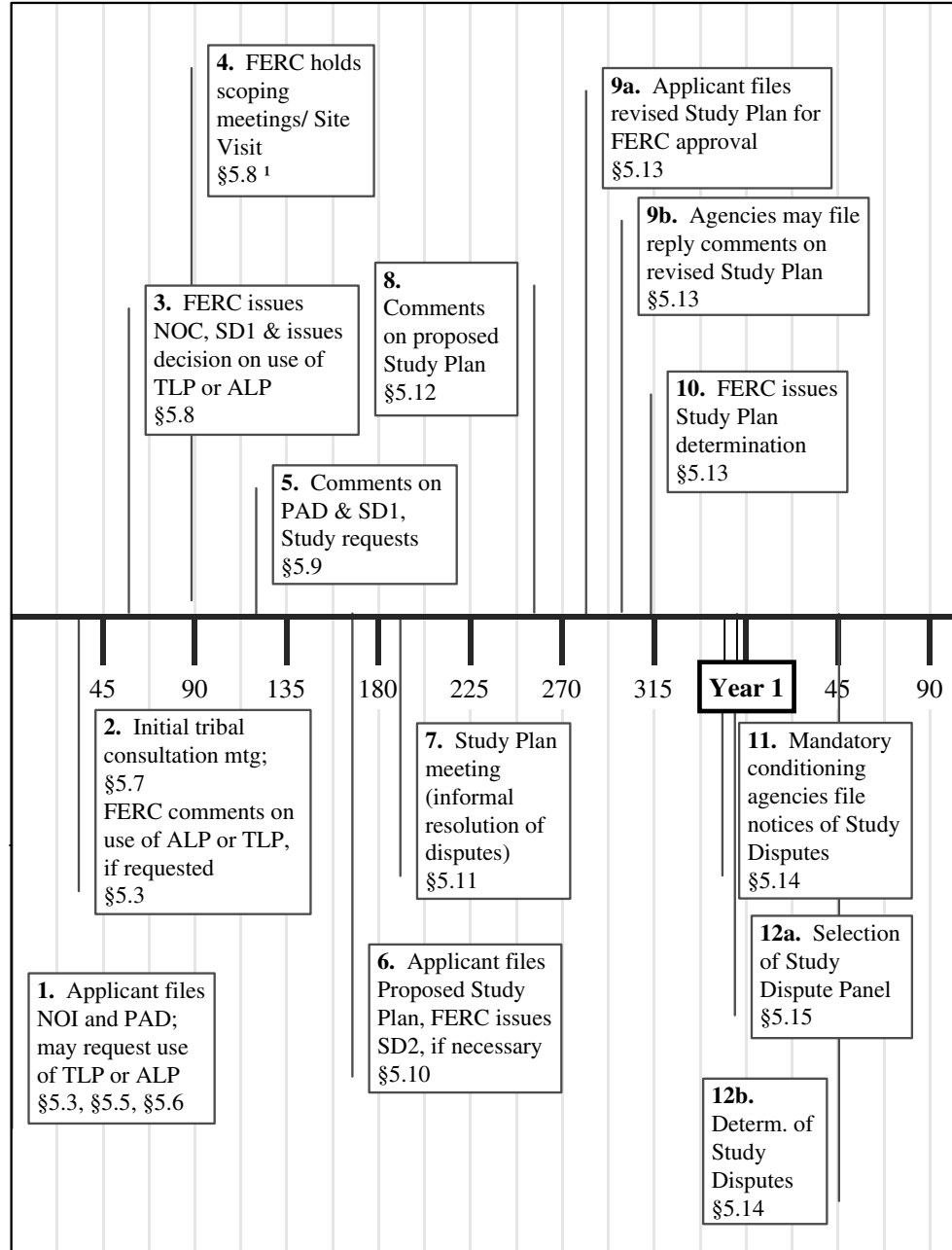
<sup>263</sup> Klamath Irrigation Dist. v. United States, Nos. 01-591 L, 01-5910 L through 01-59125 L (Fed. Cl. Mar. 16, 2007).

**V****CONCLUSION**

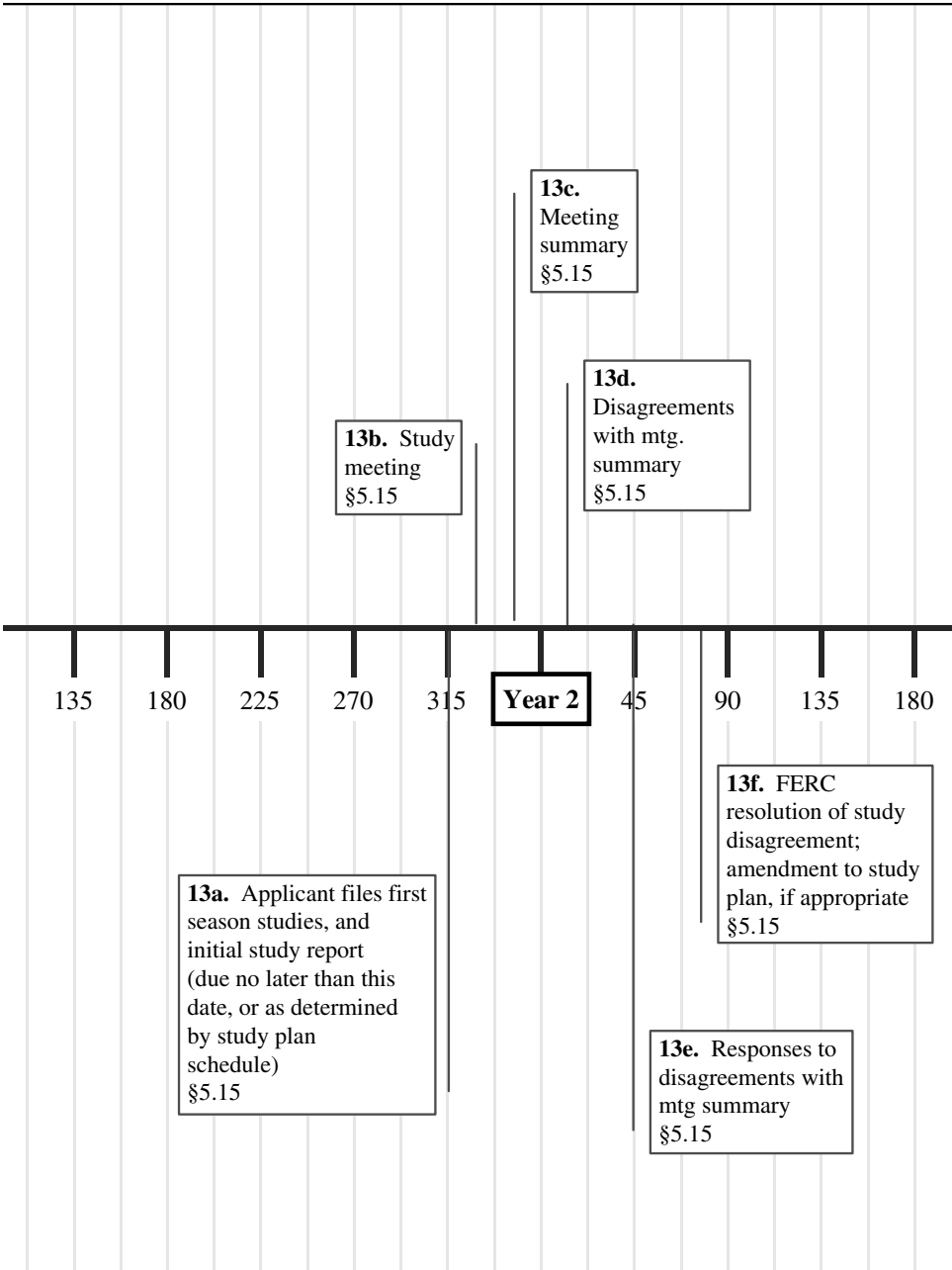
Overall, the Klamath Basin remains a complicated and dynamic system. This Article sets out some of the reasons behind the tentative, but revived, sense of optimism for settlement in the Basin that has developed over the past several years. Certainly the new hydropower regulations, while decried as a detriment to river restoration, have resulted in a solid factual record for fishway prescriptions, and potentially for dam decommissioning and removal in the Klamath Basin. The Skokomish decision and PacifiCorp's experience with the Condit Dam in Washington may also represent significant influences as the relicensing proceeding moves forward. Outside the hydropower context, the ESA and takings litigation over the past decade may help to set the table for settlement. In the end, however, the issues remain contentious, and livelihoods and cultural traditions are on the line.

That said, for anyone who attended the JELL Symposium, the sense of renewed optimism about the possibilities for sustainable solutions and settlement was clear. Many of the various interests in the Basin were represented and spoke about their perspectives on the future of water use and allocation in the basin. During her welcome, Melissa Peterson, the Symposium Editor for JELL, commented on the level of respect and admiration she observed among all the various parties as she organized the conference. The parties in the Basin may be close to realizing the return on their investment of time and energy in search of sustainable solutions. The hydropower relicensing process may become the forum for part of this realization. But, like so many lasting solutions, the secret may be the timing. It is hard to imagine any sustainable solutions emerging without all of the various factors—hydropower related and not—coming to bear. And like so many conflicts, only time will tell. The stakeholders in the Klamath Basin have an opportunity to resolve the difficult issues of competing demand, over-allocated water resources, and the balance of societal interests. In our modern age, this story is increasingly common throughout the West. If sustainable solutions can be found in the Klamath Basin, the strategies and mechanisms can be used as a model in basins where the story is repeated.

**APPENDIX A:  
TIMELINE INTEGRATING THE ILP WITH THE ALTERNATIVES  
AND HEARING PROCESSES**

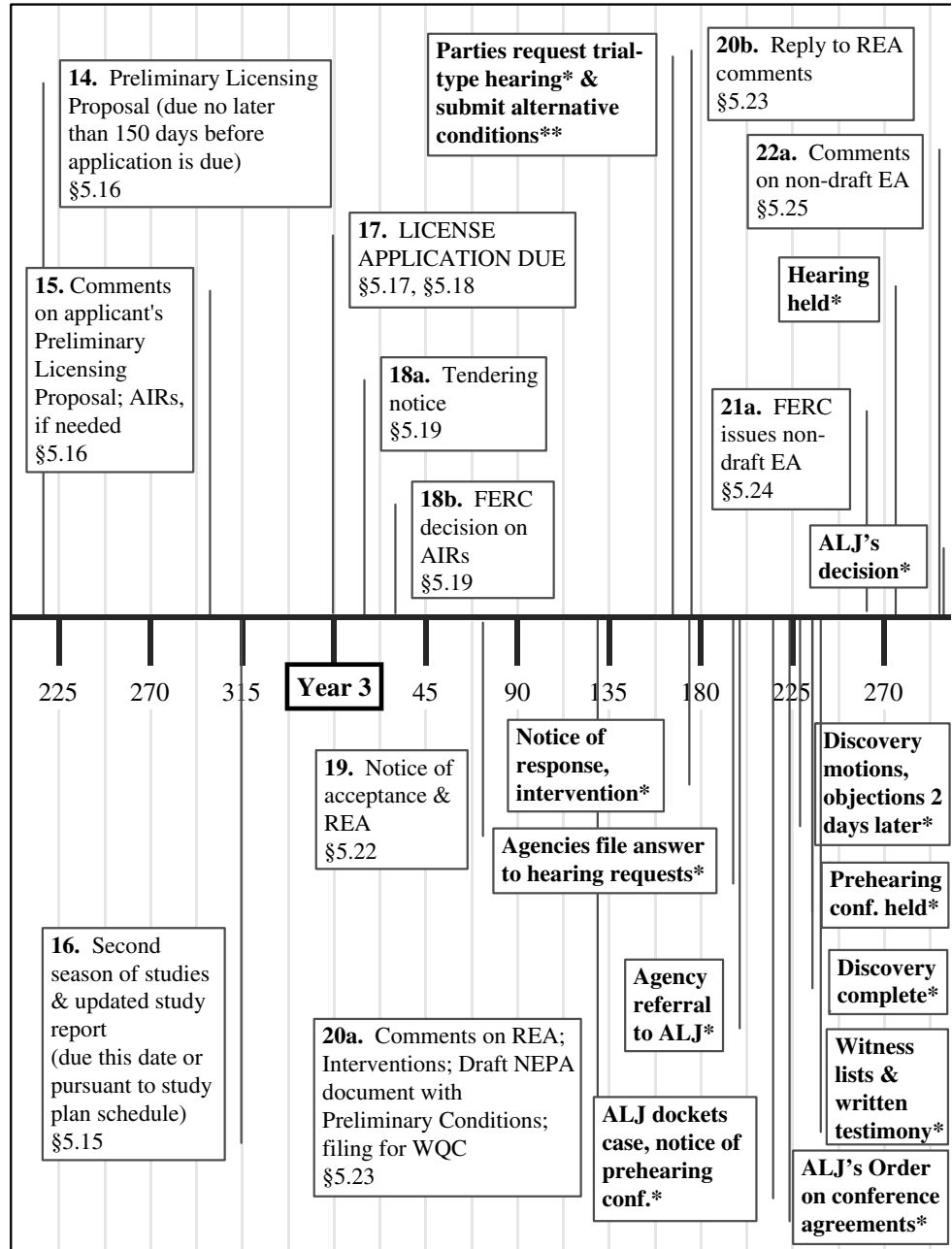


<sup>1</sup> The ILP is found at 18 C.F.R. § 5.1- 5.26.



Timeline by Suzanne M. Piluso, University of Oregon School of Law, Class of 2007

**APPENDIX A:  
TIMELINE INTEGRATING THE ILP WITH THE ALTERNATIVES  
AND HEARING PROCESSES, CONTINUED**



\*Trial-Type Hearing Process  
\*\*Alternative Conditions Process

