

# Public Land & Resources Law Review

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Volume 0 Case Summaries 2018-2019

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## Hoopa Valley Tribe v. FERC

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### Recommended Citation

Rains, Fredrick Aaron (2019) "Hoopa Valley Tribe v. FERC," *Public Land & Resources Law Review*: Vol. 0 , Article 22.  
Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss9/22>

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***Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019)**

**F. Aaron Rains**

In *Hoopa Valley Tribe v. FERC*, the Hoopa Valley Tribe challenged the intentional and continual delay of state water quality certification review of water discharged from a series of dams on the Klamath River in California and Oregon. The Federal Energy Regulatory Commission, the states of Oregon and California, and PacifiCorp, a hydroelectric operator, were implementing an administrative scheme designed to circumvent a one-year temporal requirement for review imposed on states by the Clean Water Act. This scheme allowed PacifiCorp to operate the series of dams for over a decade without proper state water quality certification. The United States Court of Appeals for the District of Columbia Circuit held in favor of the Hoopa Valley Tribe and vacated FERC’s ruling while also holding that Oregon and California had waived their Section 401 water quality certification authority.

I. INTRODUCTION

The Hoopa Valley Tribe (“Hoopa Tribe” or “Hoopa”) petitioned the United States Court of Appeals for the District of Columbia Circuit (“the court”) to review orders issued by the Federal Energy Regulatory Commission (“FERC”) that found California and Oregon (“States”) had not waived their Clean Water Act (“CWA”) Section 401 water quality certification authority (“Section 401 authority”) and that PacifiCorp had properly executed their dam operation relicensing application.<sup>1</sup> The Hoopa Tribe presented three arguments: 1) the States had waived their Section 401 authority by exceeding the one-year statutorily mandated review period; 2) PacifiCorp had not diligently applied for relicensing; and 3) FERC failed in performing its regulatory duty.<sup>2</sup> Holding that the States had waived their Section 401 authority pursuant to the explicit language of Section 401 itself, the court vacated and remanded FERC’s ruling and ordered FERC to “proceed with its review of, and licensing determination for, the Klamath Hydroelectric Project.”<sup>3</sup>

II. FACTUAL BACKGROUND

This case dealt with the licensing and potential decommissioning of a series of dams along the Klamath River in Oregon and California.<sup>4</sup> The original license to operate the dams was issued in 1954 and expired in 2006, and PacifiCorp—the current dam operator—subsequently maintained operation on an annual, interim licensing scheme.<sup>5</sup> Several of

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1. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1100 (D.C. Cir. 2019)  
2. *Id.* at 1100–01.  
3. *Id.* at 1106.  
4. *Id.* at 1101.  
5. *Id.*

the dams on the lower reaches of the Klamath are outdated and do not comply with current environmental standards, thereby preventing CWA compliance and inhibiting long-term operational licensure.<sup>6</sup> To remedy this issue, PacifiCorp determined to decommission those non-compliant dams while keeping the compliant, upper-river dams in operation.<sup>7</sup> PacifiCorp submitted a relicensing application and proposal to FERC and met all of the relicensing requirements, except the state water quality requirement per Section 401 of the CWA.<sup>8</sup>

In 2008, the States, Tribal representatives, farmers, ranchers, conservation groups, fishermen, and PacifiCorp entered into negotiations regarding the dam decommissioning process for the lower dams.<sup>9</sup> In 2010, the negotiations resulted in the Klamath Hydroelectric Settlement Agreement (“KHSA”), which included “a series of interim environmental measures and funding obligations [imposed on PacifiCorp],” and set a potential 2020 decommission date for the non-compliant dams.<sup>10</sup>

Under the KHSA, California, Oregon, and PacifiCorp agreed to circumvent a one-year statutory limit imposed on states by the CWA for review of an entity’s Section 401 compliance by allowing PacifiCorp to repeatedly withdraw and resubmit their 401 water quality requests to continually renew the state period of review.<sup>11</sup> Additionally, the KHSA “explicitly required the abeyance of all state permitting reviews” while the withdrawal and resubmission was occurring.<sup>12</sup> These tactics were designed to prevent the States from waiving their Section 401 certification authority, thus ensuring the vitality of the project.<sup>13</sup>

The KHSA also included various “preconditions for decommissioning,” including securing federal funding for the project, which ultimately never occurred.<sup>14</sup> As a result, the parties amended the KHSA to split the licensing of the lower, non-compliant dams from the upper dams.<sup>15</sup> The amended KHSA was designed to transfer decommissioning-related licensing and liability exposure to a separate entity: the Klamath River Renewal Corporation (“KRRC”).<sup>16</sup>

In late 2016, PacifiCorp applied to FERC for an amended license, which would create a new, separate license exclusively for the lower dams and facilitate transfer of lower-dam management to KRRC.<sup>17</sup> After review, FERC issued a new license for the lower dams, effectively separating them from the upper dams, but it did not approve transfer of the new license to

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6. *Id.*  
 7. *Id.*  
 8. *Id.*  
 9. *Id.*  
 10. *Id.*  
 11. *Id.*  
 12. *Id.*  
 13. *Id.* at 1102.  
 14. *Id.*  
 15. *Id.*  
 16. *Id.*  
 17. *Id.*

KRRC.<sup>18</sup> As a result, PacifiCorp still held both the upper and lower dam licenses.<sup>19</sup>

### III. PROCEDURAL HISTORY

In 2012, the Hoopa Tribe, whose reservation lies along the lower reaches of the Klamath and were *not* party to the negotiations of the KSHA or amended KHSA, petitioned FERC to declare that “California and Oregon had waived their 401 certification authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project.”<sup>20</sup> In June 2014, FERC denied Hoopa’s petition, and Hoopa subsequently requested a rehearing which was also denied.<sup>21</sup> In late 2014, Hoopa petitioned the District Court for the District of Columbia to review FERC’s orders.<sup>22</sup> In light of the amended KHSA, the court held Hoopa’s petition in abeyance for several years pending the supposed forthcoming decommission of the lower dams.<sup>23</sup> By May 2018, the decommissioning still had not occurred, and the court removed Hoopa’s case from abeyance and reviewed FERC’s orders.<sup>24</sup>

### III. ANALYSIS

The court reviewed FERC’s order under the Administrative Procedures Act which “empowers the court to reverse any decision that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>25</sup> Notably, the court did not give FERC’s interpretation or conclusions regarding Section 401 of the CWA any agency deference as it was “not the agency charged with administering the CWA.”<sup>26</sup>

#### A. Sovereign Immunity

As *amicus curiae*, the state of Oregon challenged the court’s jurisdiction by asserting that California and Oregon had exercised their sovereign immunity rights under the Eleventh Amendment by refusing to intervene in the review process.<sup>27</sup> Additionally, Oregon asserted that it was an “indispensable party” because the review was, in part, an analysis of whether Oregon and California had waived their Section 401 authority.<sup>28</sup>

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18. *Id.*

19. *Id.*

20. *Id.* at 1102

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (citing *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 742, 344 U.S. App. D.C. 371 (Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)).

26. *Id.*

27. *Id.*

28. *Id.* at 1102–03.

Under this rationale, Oregon moved to dismiss the case, basing its argument on Fed. R. Civ. P. 19.<sup>29</sup>

The court held that Fed. R. Civ. P. 19 does not control the issue in question and that Oregon and California were not indispensable parties to the case.<sup>30</sup> Instead, the court determined that as an appellate review of an agency action, Fed. R. Civ. P. 15 “only requires the respondent federal agency” to be party to a petition for review.<sup>31</sup>

Addressing Oregon’s sovereign immunity argument generally, the court stated, “Oregon’s position is incompatible with the precepts of federalism and this Court’s prior precedent.”<sup>32</sup> Hoopa specifically challenged a federal agency’s orders regarding application of the CWA, a federal statute.<sup>33</sup> Thus, the court held that as a federal court of appeal it had proper jurisdiction over the matter.<sup>34</sup>

#### B. Waiver Under Section 401

Hoopa sought relief under three theories: 1) the States had waived their Section 401 authority, 2) PacifiCorp failed to properly execute its relicensing application, and 3) FERC failed to perform its regulatory duty.<sup>35</sup> The court narrowed these arguments into a single issue: whether the States waived their Section 401 authority by allowing PacifiCorp to repeatedly withdraw and submit their request for Section 401 water quality certification to avoid exceeding the one-year deadline.<sup>36</sup>

The court held that the “temporal element” of Section 401 is explicit in stating: “[if the state] ... fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year).”<sup>37</sup> Specifically, the court focused on the “act on a request” language, observing that FERC used this language to allow the States to treat each new request that PacifiCorp made individually, thus restarting the clock on the one-year statutory maximum and, in turn, allowing the States to retain their Section 401 authority.<sup>38</sup> In doing so, the court found that FERC had acted arbitrarily and capriciously by determining that the States had not ‘failed to act’ pursuant to Section 401.<sup>39</sup>

Additionally, the court found that PacifiCorp never intended to submit an entirely new application for Section 401 certification to the States, and that the “withdrawal-and-resubmission” arrangement made under the KHSA was designed to “circumvent congressionally granted

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29. *Id.* at 1103.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (citing *City of Tacoma v. FERC*, 460 F.3d 53, 373 U.S. App. D.C. 117 (D.C. Cir. 2006)).

35. *Id.*

36. *Id.*

37. *Id.* (quoting 33 U.S.C. § 1341(a)(1)).

38. *Id.* at 1104.

39. *Id.*

authority over the licensing, conditioning and developing of a hydroelectric project.”<sup>40</sup> Further, the court noted that it had repeatedly found that Congress intended Section 401 “to prevent a State from indefinitely delaying a federal licensing proceeding”—however, it acknowledged that it had never addressed a case with the exact factual scenario presented here.<sup>41</sup>

In a supplemental brief, FERC argued that the Second Circuit had suggested that “in light of various practical difficulties . . . a state could ‘request that the applicant withdraw and resubmit the application.’”<sup>42</sup> The court found that the Second Circuit’s *dicta* was not central to their holding in that case, and was made only to “rebut state agency fears” that the one-year review period could result in error during the review process.<sup>43</sup> The court noted that PacifiCorp’s Section 401 request to the States had been “complete and ready for review for more than a decade,” and such state agency fears were not applicable to current case.<sup>44</sup> Therefore, the court found there was no legal basis for an exception to the one-year review period and held that California and Oregon had waived their Section 401 statutory authority over the project.<sup>45</sup>

### C. Futility

FERC argued that if the States had waived their Section 401 authority, FERC would be required to deny PacifiCorp’s license, and in turn PacifiCorp would be required to file a decommissioning plan for all of the Klamath dams.<sup>46</sup> The decommissioning of the dams would result in a “discharge into navigable waters” which would trigger Section 401 and require water quality certification from the States.<sup>47</sup> Thus, the States not timely reviewing PacifiCorp’s request for water quality certification would necessitate the States perform a water quality review so that the dams could be decommissioned.<sup>48</sup> FERC argued that this was a futile, circular sequence of events, and that it would result in delays not in the public interest.<sup>49</sup>

The court acknowledged FERC’s concerns of further delay but held that they did not “trump express statutory directives.”<sup>50</sup> Additionally, the court noted that, had FERC found that the States had waived their

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40. *Id.*

41. *Id.* at 1104–05 (quoting *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972–73, 395 U.S. App. D.C. 425 (D.C. Cir. 2011); *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701–02 (D.C. Cir. 2017)).

42. *Id.* at 1105 (citing *New York State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450, 455–56 (2d Cir. 2018)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

Section 401 authority when the one-year maximum had run over a decade ago, decommissioning would likely already be underway.<sup>51</sup> Further, the court addressed FERC's prominent, and asserted role in "protecting the public interest in hydropower projects" by participating in discussion regarding proposed settlements resulting from the development and decommission of hydroelectric projects.<sup>52</sup> The court noted that FERC had neglected this role by underrepresenting the interests of Hoopa during the negotiation of both the KHSA and the amended KHSA, and in any related settlement agreements.<sup>53</sup> Therefore, the court disagreed that finding a waiver of state authority would be futile, as it would ultimately allow Hoopa and FERC to become party to the negotiations and discussions regarding the Klamath River dams.<sup>54</sup>

#### IV. CONCLUSION

The court's holding in this case is a victory for the Hoopa Tribe and other traditionally underrepresented groups nationwide. Indigenous peoples have a place at the negotiating table when federal projects affect reservation land and specifically, that FERC's role in protecting the public interest is an important part of the process. The court's holding also reinforces the power of explicit, statutory language used in congressional acts, and highlights the necessity for clear and consistent language that directly expresses the intent of congress. Additionally, the court exposes a willingness of the state, federal, and private entities involved to exploit perceived loopholes in federal statutes, namely the CWA. Finally, this holding highlights the effectiveness of the legal system by illustrating the process of administratively and legally challenging agency rulings and orders that are perceived to be unjust.

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51. *Id.*

52. *Id.* at 1105 (citing Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, 116 FERC ¶ 61270, 62086 (Sept. 1, 2006); U.S. Dep't of Interior v. FERC, 952 F.2d 538, 540, 293 U.S. App. D.C. 182 (D.C. Cir. 1992)).

53. *Id.*

54. *Id.* at 1106