

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

PacifiCorp

Project No. 2342-018

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued May 18, 2006)

1. This order grants in part the request of PacifiCorp for a declaratory order stating that the Federal Power Act preempts all state and local regulatory authority that Skamania County or Klickitat County, Washington (collectively, the Counties), may attempt to exercise over PacifiCorp's actions in carrying out any order the Commission issues regarding the settlement agreement filed in the surrender proceeding for the Condit Project No. 2342. The Condit Project is located on the White Salmon River in Skamania and Klickitat counties, Washington.

Background

2. The original license for the Condit Project was issued on December 20, 1968,¹ and expired on December 31, 1993. PacifiCorp timely filed an application for a new license and, under section 15(a)(1) of the Federal Power Act (FPA),² project operations have continued pursuant to annual licenses since expiration of the original license.

3. Commission staff issued a Draft Environmental Impact Statement (EIS) in November 1995, and a Final EIS in October 1996, addressing PacifiCorp's relicensing proposal. But because PacifiCorp considered the costs of environmental measures recommended in the EIS, including mandatory fishway prescriptions, to be economically unacceptable, it entered into discussions with other interested parties concerning retiring

¹ 40 FPC 1485.

² 16 U.S.C. § 808(a)(1) (2000).

the project and removing the project dam. Those discussions culminated in the filing, on October 21, 1999, of an application to surrender the project license, along with an associated settlement agreement.³

4. On February 2, 2000, the Commission issued public notice of the surrender and associated settlement agreement. The Counties filed a timely motion to intervene and protest.

5. The Final EIS from the relicense proceeding was incorporated into the surrender proceeding by reference, and draft and final supplemental EISs addressing the surrender proposal were issued in the proceeding in January and June 2002, respectively. Both the relicense and surrender proceedings are pending before the Commission.⁴

6. On October 14, 2005, PacifiCorp filed a petition requesting that the Commission issue a declaratory order stating that the Federal Power Act preempts “all state and local regulatory authority that [the Counties] might attempt to exercise over PacifiCorp’s actions carrying out any Commission order regarding the project’s decommissioning

³ PacifiCorp styled its submission as an amendment and settlement agreement. However, subsequently, in response to a petition by PacifiCorp, the Commission issued a declaratory order determining that the amendment/settlement agreement application constitutes an application to surrender PacifiCorp's existing license with a future effectiveness date, and would be so treated. 97 FERC ¶ 61,348 (2001).

The settlement agreement was signed by PacifiCorp; American Rivers; American Whitewater Affiliation; Columbia Gorge Audubon Society; Columbia Gorge Coalition; Columbia River United; Federation of Fly Fishers; Friends of the Columbia Gorge; Friends of the Earth; The Sierra Club; Rivers Council of Washington; The Mountaineers; Trout Unlimited; Washington Trout; Washington Wilderness Coalition; Columbia River Intertribal Fish Commission; Yakama Nation; U.S. Forest Service; U.S. Department of the Interior; National Marine Fisheries Service; Washington Department of Ecology; Washington Department of Fish and Wildlife; and Friends of the White Salmon River (jointly, signatories), all parties to the relicense proceeding.

⁴ The Washington Department of Ecology has not yet acted on PacifiCorp’s request for water quality certification for the settlement agreement, nor has the National Marine Fisheries Service issued its biological opinion. Both of these actions must occur before the Commission can act on the surrender application.

settlement agreement.”⁵ Specifically, it seeks clarification that such preemption applies to surrender of a license as well as to license issuance. In addition, noting that the Counties oppose the surrender and did not become signatories to the settlement agreement, PacifiCorp argues that a declaratory order removing uncertainty about the counties’ ability to interfere with, delay, and frustrate implementation of any ultimate order in the proceeding – whatever that order may require – is necessary to preserve the viability of the settlement agreement, pending Commission action.⁶

7. The Counties timely filed a reply arguing that the FPA does not preempt all state and local laws that might conceivably relate to the decommissioning and removal of the Condit Project, and requesting that PacifiCorp’s petition be denied. They maintain that the settlement agreement contemplates that PacifiCorp will obtain all applicable federal, state, regional, and local permits associated with its proposal. They suggest that PacifiCorp’s petition is an attempt to renege on that commitment.⁷

⁵ PacifiCorp’s petition at page 1. Specifically, PacifiCorp argues that the regulatory authorities preempted include, but are not limited to: “county environmental ordinances, subdivision review, floodplain permits, zoning shoreline permits, critical areas review, noise ordinances, and road permits.” PacifiCorp notes that by letter dated August 2, 2005, Klickitat County asserted that PacifiCorp will likely need to obtain the following permits or regulatory approvals: (1) shoreline substantial development permit; (2) shoreline conditional use permit; (3) floodplain permit; (4) conditional use permit; (5) demolition permit; (6) road permits; (7) subdivision review; (8) critical areas review; (9) SEPA review; and (9) noise ordinance compliance. *See* petition at pages 11-12.

⁶ PacifiCorp argues that the threat of county jurisdiction over the implementation of the settlement agreement, and the unknown costs that might entail, impairs PacifiCorp’s ability to commit to implement the terms of the settlement agreement should the Commission approve it.

⁷ Subsequently, on December 20, 2005, PacifiCorp filed a motion for leave to reply to the Counties’ reply, and on February 13, 2006, the Counties filed a motion for leave to file an answer to PacifiCorp’s reply to the Counties’ reply. Answers to answers are not permitted, unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2005). We will not accept the answers filed by PacifiCorp and the Counties on December 20, 2005, and February 13, 2006.

Discussion

8. It is well-established that the FPA preempts all state and local law concerning hydroelectric licensing apart from those adjudicating proprietary water rights.⁸ Furthermore, since the determination of whether a license should be surrendered is an action taken pursuant to the FPA, and the Commission retains jurisdiction over the project until the license surrender is accepted and becomes effective, federal preemption applies to a license surrender.

9. However, federal preemption does not necessarily mean that the Commission will not elect to require PacifiCorp to comply with those of the Counties' requirements that the Commission concludes will not interfere with the company's ability to carry out the Commission's orders. It only establishes that it is within the Commission's sole discretion to determine the extent to which such compliance will be required.⁹ That is, the Counties may be permitted to exert regulatory authority to the degree that the Commission allows. We prefer for our licensees to be good citizens of the communities in which projects are located, and thus to comply with state and local requirements, where possible. However, to the extent that state or local regulations make compliance with our orders impossible or unduly difficult, we will conclude that such regulations are pre-empted.

⁸ See *California v. FERC*, 495 U.S. 490 (1990); and *Sayles Hydro Association v. State Water Resources Control Board*, 985 F.2d 451 (9th Cir. 1993). Federal law may preempt state law in several ways: (1) if Congress indicates in express terms that a federal statute preempts state law; (2) by inference when Congress occupies the field by enacting legislation so comprehensive that it leaves no room for supplemental state regulation; (3) where a federal interest is so strong that the federal system is assumed to preclude enforcement of state laws on the same subject; (4) to the extent there is an actual conflict between federal and state law (where Congress has not displaced state regulation in a certain area), making compliance with both a physical impossibility; and (5) in situations in which state law poses an obstacle to the accomplishments of congressional objectives. See *Wisconsin Valley Improvement Company v. Wisconsin Department of Natural Resources*, 910 F. Supp. 1375 (W.D. Wisc. 1995). In *California* and *Sayles*, *supra*, the courts took the view that, except for proprietary water rights, the Federal Power Act has occupied the field.

⁹ As the Counties note, the Commission has, in some dam removal cases, required licensees to obtain all local permits. See *Arizona Public Service Co.*, 109 FERC ¶ 61,036 (2004), and *Wisconsin Electric Power Co.*, 94 FERC ¶ 61,038 (2001).

10. Those general propositions aside, we cannot, at this stage of the proceeding, state with certainty what local requirements may be included in, or precluded by, our future orders. Under the settlement agreement, PacifiCorp proposed, under certain conditions, to comply with state and local ordinances, and the Counties have noted particular local ordinances which they maintain should apply.¹⁰ To determine in a declaratory order which, if any, local requirements we will or will not require the licensee to fulfill would be to prejudge issues that may come before us in the future. Therefore, to the degree that PacifiCorp is seeking assurance that the Commission's order will not require compliance with any of the Counties' ordinances, we cannot do so here.

The Commission orders:

(A) PacifiCorp's request for a declaratory order in Project No. 2342, is granted to the extent discussed herein.

(B) PacifiCorp's December 20, 2005, motion to file a reply to the reply of Skamania and Klickitat County in this proceeding is denied.

(C) The February 13, 2006, motion of Skamania and Klickitat Counties to file an answer to PacifiCorp's reply to their reply in this proceeding is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁰ See n. 5, *supra*.