**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| California Department of Water Resources – Oroville Facilities | ) ) | Project No. 2100-052 |

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# RESPONSE OF THE STATE WATER CONTRACTORS AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA TO INTERVENTIONS, RECOMMENDATIONS, TERMS AND CONDITIONS, PRESCRIPTIONS, AND SETTLEMENT COMMENTS

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**May 26, 2006**

**TABLE OF CONTENTS**

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Pursuant to Section 4.34(b) of the regulations of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R § 4.34(b), Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f), the Commission's September 12, 2005 Notice of Application, as extended by the January 13, 2006 and April 28, 2006 Letter Orders in the above-referenced proceeding, the State Water Contractors ("SWC")[1] and the Metropolitan Water District of Southern California ("Metropolitan")[2] hereby move to submit their Reply Comments to the interventions, recommendations, terms and conditions, prescriptions and comments filed in the above-referenced docket in response to the January 26, 2005 application

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[1] The SWC is a non-profit, mutual benefit corporation organized under the laws of the State of California, comprised of 27 public agencies holding contracts to purchase water delivered by the State Water Resources Development System, otherwise known as the State Water Project ("SWP"), which is owned and operated by the California Department of Water Resources ("DWR"). SWC's public agency members are the beneficial users of the SWP, which provides water for drinking, commercial, industrial, and agricultural purposes to a population of more than 20 million people and to over 750,000 acres of farmland throughout the San Francisco Bay-Area, the Central Valley of California, and Southern California. The SWC was formed to further the common interest of its members with respect to the operation and administration of the SWP. The SWC represents the interests and views of its members regarding the SWP before state and federal legislative bodies and administrative and regulatory agencies, including the Commission. Individual member agencies of the SWC retain their right to file comments independent of the SWC.

[2] Metropolitan is the largest of the 29 SWP contractors and a member of the SWC. Metropolitan currently delivers supplemental water for domestic and municipal use to more than 17 million people through its 26 member agencies. Metropolitan's service area encompasses nearly 5,200 square miles in Southern California and includes all or portions of six major counties: Los Angeles, Orange, Riverside, Ventura, San Diego, and San Bernardino. Metropolitan has contract rights to approximately 50% of the water delivered from the SWP, which represents a significant portion of the water Metropolitan supplies to its customers. Metropolitan therefore has a substantial interest in the outcome of any and all matters associated with the SWP.

and applicant-prepared preliminary draft environmental assessment ("PDEA") (collectively, as "Application") for a new major license for the Oroville hydroelectric project ("Oroville Project" or "Project") filed by the California Department of Water Resources ("DWR" or "Licensee") and to the comments filed on the March 26, 2006 Settlement Agreement for Licensing of the Oroville Facilities.

## I.
## BACKGROUND

### A. ALTERNATIVE LICENSING PROCESS AND SETTLEMENT AGREEMENT

On March 24, 2006, DWR filed with the Commission a Settlement Agreement for Licensing of the Oroville Facilities ("Settlement"), a comprehensive agreement executed by DWR and 51 other parties, including the SWC and Metropolitan. By its terms, the Settlement resolves all issues that have or could have been raised by the settling parties in connection with the Commission's issuance of a new license for the Project. The Settlement was developed over the course of five years by dedicated individuals working collaboratively in the several work groups and the plenary group, pursuant to the Commission's Alternative Licensing Process ("ALP") for relicensing proceedings, and represents a broad-based, collaborative balance of interests and resources related to the relicensing of the Project, including applicable protection, mitigation, and enhancement ("PM&E") measures, and various substantive and procedural obligations. The Settlement also contains Proposed License Articles that embody those obligations, and which the settling parties request the Commission approve without modification as part of a new 50-year license for the Project. Therefore, the Settlement is an integral a part of the relicensing process, as it contains the terms and conditions proposed to the Commission for approval as part of the new license.

## B. INTERVENTIONS, COMMENTS, AND FINAL RECOMMENDATIONS, TERMS AND CONDITIONS

Many parties filed Motions to Intervene in this proceeding, both prior to the September 12, 2005 Notice, and prior to the filing of the Settlement, though the bulk of parties intervened during the period between the filing of the Settlement and the March 31, 2006 deadline for filing interventions, comments, and protests. Some parties intervened in the relicensing proceeding and filed comments only on the Settlement; some parties filed comments on the Settlement, but did not file formal interventions.[3] The interventions and comments were filed by local, state, and federal government entities, resource agencies, Native American tribes, associations, private companies, and private citizens, and their comments represent a correspondingly wide range of interests and concerns.

Agencies with management authority over resources, including the United States Department of the Interior, the United States Department of Agriculture/United States Forest Service, the United States Department of Commerce/National Oceanographic and Atmospheric Administration/National Marine Fisheries Service, the California Department of Fish and Game, and the California State Water Resources Control Board filed to intervene in the proceeding, and also submitted recommendations to protect, mitigate, and enhance affected resources, including fish and wildlife. Many of these filings included the submittal of recommendations in the form of preliminary terms and conditions, pursuant to Sections 10(a) and 10(j) of the Federal Power Act ("FPA"),[4] and/or fishway prescriptions pursuant to Section 18 of the FPA,[5] and land

[3] SWC intervened in the instant proceeding on February 3, 2006, and filed separate comments in support of the Settlement on April 26, 2006. Metropolitan intervened in the instant proceeding and filed comments in support of the Settlement on March 28, 2006. Those comments are incorporated by reference herein. Certain Individual Member Agencies intervened in this proceeding and filed preliminary comments in support of the Settlement on March 31, 2006.

[4] 16 U.S.C. §§ 803(a), 803(j)(1) (2000).

[5] 16 U.S.C. § 811 (2000).

management measures submitted under Section 4(e) of the FPA.[6] Each of the federal and state agencies support the Settlement, and their respective recommendations, conditions, and prescriptions are consistent therewith.[7]

By Letter Order dated April 28, 2006, the Commission extended to May 26, 2006 the date for comments in reply to the interventions and comments on the licensing proceeding, and to comments on the March 24, 2006 Settlement Agreement. The following Reply Comments respond to interventions and comments filed in the licensing proceeding and to comments filed on the Settlement. The SWC and Metropolitan respond to comments on specific issues in the sections below, considering jurisdictional barriers, the extent to which a response is warranted, and whether or not the Settlement already sets forth the SWC's and Metropolitan's interests in the particular matter.

## II.
## REPLY COMMENTS

### A. SOCIOECONOMIC IMPACTS OF THE PROJECT

#### 1. Butte County Intervention and Comments.

On March 30, 2006, Butte County, California ("Butte County") filed a Motion to Intervene in this proceeding,[8] in which it enumerates, among other things, alleged adverse socioeconomic impacts of the proposed relicensing action on Butte County, and also proposed license articles that would address Butte County's concerns, for consideration by the

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6 16 U.S.C. § 797(e) (2000).

7 The SWRCB, as a regulatory agency, has determined it inappropriate to enter into a settlement when it also must provide certification pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) (2000). The SWRCB participated in the work groups and in the ALP in an advisory capacity, and Arthur G. Baggett, Jr. signed the Settlement as a recommendation to the SWRCB. Mr. Baggett participated in the negotiations initially in his capacity as Chairperson and then Member of the SWRCB.

8 Butte County has filed several pleadings in this proceeding since the January 26, 2005 Application, including an April 21, 2005 initial Motion to Intervene and Motion for Order Requiring Conduct of Socioeconomic Impact Study, to which DWR and SWC responded on May 3, 2005 and May 6, 2005 respectively (and to which Butte County answered), but upon which the Commission has not acted. Butte County also has filed several of its own operational and socioeconomic impact studies, which are discussed at length *infra*.

Commission. In short, Butte County argues that DWR has not mitigated the alleged adverse financial impacts on Butte County that it claims are a result of Project operations, that benefits of the Project are not shared with Butte County, and that thus Butte County is forced to subsidize Project operations.[9] Butte County requests that the Commission deny the Application, or, in the alternative, impose in the license terms and conditions that respond to their allegations of the adverse socioeconomic impacts of the Project on Butte County, with a total cost to the Licensee of approximately $1 billion (2005$).

The SWC and Metropolitan dispute each of Butte County's allegations, as the contentions are without legal basis, are contrary to the Commission's long-standing practices, are based on exaggerated financial data,[10] are largely beyond the Commission's jurisdiction, and/or already have been addressed through the Settlement. The SWC and Metropolitan firmly believe that Butte County has grossly erred in these allegations due to their failure to acknowledge the considerable positive benefits of the project, including, most notably, its 27,500 acre-foot annual water supply contract with DWR;[11] flood control benefits that have (a) provided protection to life and property, (b) saved Butte County inhabitants hundreds of millions of dollars in avoided losses and (c) enabled development of significant amounts of land that was subject to flooding prior to the Project; recreational benefits; and positive current and future economic benefits to the Butte County communities. According to an analysis prepared by DWR, the Project has been, overall, an economic boon to Butte County, with estimated annual benefits to Butte County residents of $24 million a year, far outweighing Butte County's grossly exaggerated claims

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9 *See* Butte County's March 30, 2006 Motion for Leave to Intervene and Comments on Application for New License ("Butte County Comments"), p. 7. See also Butte County's April 26, 2006 Comments in Opposition to and Contest of the California Department of Water Resources' Settlement Agreement for Licensing of the oroville Facilities and Request for Evidentiary Hearing ("Butte County Settlement Comments")

10 All financial figures in Butte County's various pleadings are based on 2005 dollars.

11 *See* "Contract Between the State of California Department of Water Resources and County of Butte for a Water Supply," Table A (Butte County maximum annual amount is 27,500 acre-feet, beginning in Year 23 of its contract (*i.e.*, 1983)).

regarding harmful economic impacts from the Project.[12]

Butte County's proposal has three basic components: (1) a power allocation that would cause DWR to incur at least approximately $350 million (2005$) in power purchase costs/foregone revenue;[13] (2) payments in lieu of taxes that would cost DWR $340 million (2005$); and (3) license conditions regarding law enforcement and public safety, road construction and maintenance, and construction of an emergency operations center all of which would cost DWR $220 million (2005$). The conditions proposed by Butte County are unlawful, unreasonable and counter to the facts. They should be wholly rejected by the Commission.

In its filings, Butte County proposes that the Commission include the following articles in the new license:

- Law Enforcement and Public Safety Plan- Licensee to provide annual payments to the County totaling $4,266,666 in funding for law enforcement, fire and rescue, and health and human services. A one-time payment totaling $2,692,621 for law enforcement/ criminal justice services, system upgrades to communications system, and an additional one-time payment for fire and rescue services.

- Road Construction and Maintenance Plan- Licensee to make a one-time payment to the County of $5,306,136. Within three years of license issuance and every year thereafter payments of $791,351.

- Early Warning Plan- Licensee shall develop for Commission approval a plan regarding communications and coordination before and during emergency events.

- Emergency Operations Center- Licensee to provide to County $2,545,495 to fund construction of a relocated emergency operations center.

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[12] *See* TCW Economics' *Economic and Fiscal Effects of the Oroville Hydroelectric Facilities Operations: A Local Perspective* (May 2006) ("DWR Analysis").

[13] The value of the power allocation can be calculated from the information in Table 6.1-2 of the Preliminary Draft Environmental Assessment ("PDEA"), found at Volume III of the Application, which lists on-peak and off-peak prices that DWR obtained from the California Energy Commission ("CEC"), an independent state agency that focuses on energy issues and provides unbiased assessments of the future value of energy in the California power market. The average price that would apply to a base load resource is $29.79. Multiplying this by the 235 million kWh Butte County has requested yields an annual cost of $7.0 million, and a total cost of $350 million over the life of the license. This figure actually understates the impact of Butte County's demand, since the impact on the project-dependable capacity and the value of ancillary services are not included. A proprietary forecast of energy prices results in an annual value of $11.6 million per year or a total of $580 million over the life of the license. *See* further discussion of the power allocation issue, *infra* at Section II.A.5.

- Payments in Lieu of Taxes ("PILOT") - Within 90-days of license issuance, Licensee shall establish a reserve fund equal to the total amount necessary to provide PILOT over the term of the license. Licensee shall provide Butte County PILOT of $6.8 million per year subject to an annual cost of living adjustment.

- Low-Cost Power Allocation- The Licensee shall provide "235 million kWh of firm power and associated energy for sale to Butte County (or to entities designated by Butte County to receive such power and energy on its behalf)."

- License Implementation- Every ten years the Licensee shall prepare a socioeconomic measures implementation report. Upon review of the report the Commission may initiate a license amendment proceeding on its own motion or in response to a request from Butte County, the City of Oroville and others to "address localized and cumulative impacts."

As explained in detail below, each of these conditions is in direct conflict with Commission precedent and policy and is unsupported by the facts.

**2. Summary of SWC and Metropolitan Response.**

Butte County's filings reflect a fundamental lack of understanding of the purpose of the hydroelectric relicensing process. In its numerous filings alleging baseless allegations of negative socioeconomic impacts from the Project, Butte County attempts to convince the Commission that a key purpose of the relicensing process is to require a licensee (a) to provide significant amounts of funding for non-Project-related enhancements and subsidies to cover costs that are appropriately borne by responsible local governments and/or (b) to provide extremely low-cost electric power generated by the Project to any party that can cobble together an argument, no matter how implausible, that their interests are somehow adversely impacted by a hydroelectric project. This incorrect view flies in the face of decades of Commission precedent and practice. The Commission has explained that "[n]othing in the FPA requires a licensee to make whole every affected interest, or undertake or fund what may be worthwhile proposals for

the general civic and economic improvement of the neighborhood."[14]

Instead, under Section 10(a) of the FPA, the purpose of the relicensing process is the issuance of a license consistent with the "comprehensive development" standard and in the overall public interest. In this case, the Commission's predecessor, the Federal Power Commission, found the Oroville Facilities, a keystone of the California State Water Project, to be in the public interest because of the extraordinary benefits that the Project would provide many of the residents of the State of California,[15] including the citizens of Butte County.[16] The SWC and Metropolitan are confident that the Commission will reach the same conclusion under Section 10(a) in this proceeding, recognizing that the relicensing Settlement submitted to the Commission by DWR preserves the key benefits considered when the original license was issued in 1957 and provides for significant improvements in the environmental performance of the Project that address modifications to law and regulations since 1957, and significant recreational enhancements.[17]

If Butte County's skewed view of the purpose of relicensing ever was put into practice, it would convert the already-difficult relicensing process from an effort to achieve public interest energy, water, flood control, environmental and other benefits into a convoluted *quasi*-tort proceeding with scores of parties advancing frivolous and speculative claims that a hydroelectric

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14 *Holyoke Water Power Company,* 88 FERC ¶ 61,186, at 61,618 (1999).

15 The Commission found that the Project "is best adapted to a comprehensive plan for improving and developing the waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." 17 FPC 262, 265 (1957).

16 Predictably, many individuals and organizations within Butte County supported construction of the Oroville Facilities. The site was identified by the U.S. Army Corps of Engineers ("Corps") as a location for a flood control dam. The local communities approached Metropolitan and asked it to construct a larger multi-purpose reservoir. Metropolitan declined but the State of California accepted, and the Oroville Project was born. *See, e.g.*, Hundley, *The Big Thirst,* 291 (2001) (Butte County residents supported the bonds for the State Water Project by a ratio of 2:1); Charles Randolph, "Events Leading to Construction of Oroville Dam Recalled – Area's Biggest Story of the Century" compiled in "Riverbend Park Development Project – Coordination Report," Vol. 1 of 3, Feather River Recreation and Park District, attached hereto as Exhibit E.

17 SWC and Metropolitan are signatories to the settlement, along with DWR and 50 other parties.

project has somehow caused them economic harm that merits compensation.[18] Clearly, this would be an unproductive exercise that would add years to the already lengthy hydroelectric licensing process. It also would make it very difficult to relicense many hydropower projects without extinguishing any economic value associated with a project, and completely diminishing a major source of clean and renewable energy important to the national interest.

The Commission must deny Butte County's requests for compensation for alleged socioeconomic impacts on the following grounds:

- Butte County's requests are claims for money damages that must be denied by the Commission because it is without authority to award damages.

- Sections 10(a) and 4(e) of the FPA do not support Butte County's claim that it is entitled to compensation for alleged socioeconomic impacts, nor does the National Environmental Policy Act ("NEPA").

- Butte County's request for a power allocation is contrary to the Commission's longstanding policy that a licensee may distribute the power from its project in the manner it deems most appropriate.

- Butte County's request for payment in lieu of taxes ("PILOT") is contrary to the Commission's longstanding policy that a hydropower licensee is not responsible for compensating a local government for the tax impacts of a project.

- If Butte County's other requests for compensation are in some fashion construed by the Commission to be proper requests for mitigation of project impacts, they nevertheless must be denied as counter to Commission precedent and policy.

- Regardless of what legal standard is applied to Butte County's requested license conditions or how they are construed by the Commission they fail on substantial evidence grounds because the Oroville Project has overall been an economic benefit to Butte County, not an economic detriment.

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[18] Analogous potential situations underscore Butte County's meritless and purely speculative "logic": for example, a community that was economically disadvantaged by the *lack* of a power-producing hydroelectric project could be entitled to compensation from a licensee in a neighboring community where various industrial facilities were located because of the availability of low-cost hydropower from the licensee's project. The community without the hydropower project could argue that, but for the existence of the project in the neighboring community, the industrial facilities would have been located in their community, which would have reaped the associated economic benefits. The owners of a marina on a natural lake that was near a FERC-licensed reservoir with extensive marina facilities could argue that they were entitled to compensation from the licensee for their diminished revenue due to boaters using the facilities at the FERC-licensed project reservoir instead of their marina on a natural lake.

The Commission should be aware that Butte County's filing is rife with gross distortions of the applicable facts and precedent. For example, as support for its contention that it is entitled massive payments and/or power allocations from DWR, Butte County's filing makes repeated references to off-license agreements entered into by the New York Power Authority ("NYPA") to provide funding and/or power allocations to local communities in the course of relicensing the St. Lawrence and Niagara Projects.[19] Butte County complains that "[a]lthough DWR is well aware of the Niagara Project and St. Lawrence Project proceedings, orders and settlements, it seeks to ignore them. Such an outcome would be wholly inconsistent with the public interest."[20] Butte County neglects to mention that the "Community Enhancement Fund" and power allocation to local industry and the host community that it refers to were not required as a term of a FERC license. Nor does Butte County acknowledge that in the St. Lawrence proceeding the Commission denied a request for a power allocation to a group of local entities that is similar in many respects to what Butte County is requesting in this proceeding.[21] Therefore, it is Butte County that "seeks to ignore" Commission orders, not DWR, the SWC, or Metropolitan.

The SWC and Metropolitan have conducted a critical assessment of the operational, socioeconomic, and fiscal impacts of the Project on Butte County as alleged in the various studies filed by Butte County.[22] This Critical Assessment, prepared by the respected firm $CH_2$MHill, demonstrates that Butte County's claims are far from conservative, and anything but

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19 Butte County Comments, pp. 55-62.

20 Butte County Comments, p. 61.

21 Presumably, Butte County's counsel is aware of the Commission's holding on the power allocation matter, as she represented the Niagara Power Coalition, the group of local entities that unsuccessfully sought a power allocation in the St. Lawrence relicensing proceeding. Furthermore, it is the Niagara Redevelopment Act (not a Commission-directed license requirement) that requires that 50% of Niagara Project Power be allocated to public bodies and nonprofit cooperatives. *See* 16 U.S.C. §§ 836, 836a (2000). DWR has no such economic development obligation.

22 *See* $CH_2$MHill's *Operational, Socioeconomic, and Fiscal Impacts of the Oroville Facilities:A Critical Assessment of the Analyses Conducted by Butte County* (May 2006) ("Critical Assessment"), attached hereto as Exhibit A.

reasonable. At every turn, Butte County has inflated the costs and deflated or ignored the benefits attributable to the Project in order to paint its "sky-is-falling" economic portrait, when in truth, the Project has provided substantial economic and other benefits to Butte County. Thus, the Critical Assessment addresses the arguments and issues raised in the studies filed by Butte County, and illustrates the incorrect assumptions and flawed analysis upon which those arguments are founded, including, but not limited to: the number of non-residents visiting the Project; the services provided by Butte County that are potentially impacted by the Project and the level of demand for those services; the costs of law enforcement services; the potential payment in lieu of taxes ("PILOT"); the assessed value of land occupied by the Project; the Project's role in regional economic development; and the type and magnitude of benefits accruing to Butte County as a result of the Project. The Critical Assessment considers and then dismantles each of the assumptions and analyses upon which Butte County's arguments are made, providing a reasonable and balanced assessment of the operational and socioeconomic impacts on Butte County as a result of the Project.

In sum, the Commission has consistently and summarily dismissed similar requests for compensation for socioeconomic impacts. It should continue to do so in this proceeding. Any other approach would establish a dangerous precedent that could threaten the long-term viability of the nation's non-federal hydropower resource by unduly burdening licensees with requirements to allocate power to third parties and pay for public services that are rightfully the responsibility of local governments.[23]

[23] *See, e.g.,* March 24, 2006 *Final Environmental Impact Statement for the Lewis River Projects*, Docket Nos. P-2071-000, *et al.* (PacifiCorps), p. 2-55 ("Law enforcement in the project area is the responsibility of county and federal agencies").

### 3. The Conditions Proposed By Butte County Are Claims For Money Damages, And The Commission Is Without Authority To Award Such Damages.

Although Butte County characterizes the license articles it seeks as a request for mitigation for socioeconomic impacts,[24] in reality most of the license conditions it recommends are claims for money damages that the Commission is without authority to award.[25] The federal courts and the Commission consistently have characterized similar claims as requests for "money damages" that it is without authority to adjudicate.[26] "It is well established that the Commission has no authority to adjudicate claims for, or require payment of, damages."[27] This principle of licensing jurisprudence was clearly articulated by the Commission, when it denied a request "to award damages to the Mohawk Community for economic harm" attributable to the St. Lawrence Project because it was "without authority to make such awards."[28]

In another proceeding, *City of Tacoma*, the Skokomish Tribe recommended that the Commission require the city to implement a series of measures as mitigation for alleged "cumulative adverse impacts" of the Cushman Project on the "habitability of the [Skokomish] reservation."[29] The Skokomish Tribe asserted that "by expropriating the North Fork Skokomish River, Tacoma took and otherwise severely damaged the Skokomish people's estate, their natural

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[24] The only exceptions to this are Butte County's proposed conditions regarding an Early Warning Plan and License Implementation, both of which should be denied by the Commission on other grounds.

[25] *See, e.g., City of Tacoma*, 84 FERC ¶ 61,107, at p. 61,562 n.113 (1998), *order on reh'g*, 86 FERC ¶ 61,311, at p. 62,100 (1999); *see also S.C. Pub. Serv. Auth. v. FERC*, 850 F.2d 788 (D.C. Cir. 1988); *City of Tacoma*, 87 FERC ¶ 61,197, at p. 61,735 n.24 (1999).

[26] *See, e.g.*, *Blumstein, et al. v. Calif. Power Exchange*, 107 FERC ¶ 61,262 at P14 (2004) ("the FPA does not permit the Commission to confer awards of damages"); *Indiana Michigan Power Co*., 72 FERC ¶ 61,153, at 61,771-72 (1995), *aff'd Kelley v. Fed. Energy Reg. Comm'n*, 96 F.3d, 1482 (D.C. Cir. 1996); *Ohio Power Co*., 71 FERC ¶ 61,092, at 61,312 (1995); *Pacific Water & Power, Inc. v. State of California*, 51 FERC ¶ 61,080, at 61,180 (1990) ("with respect to Pacific Water's request for money damages against the Resources Agency [of California] and the DWR, we note that this Commission does not have the authority to award money damages"). *See also, Gulf States Utilities v. Alabama Power Co.*, 824 F.2d 1465, 1471 (5th Cir. 1987) (FERC has no authority to order reparations).

[27] *Ohio Power Company*, 71 FERC ¶ 61,092, at 61,313 (1995); *see also City of Tacoma*, 71 FERC ¶ 61,381, at 62,488 (1995).

[28] *New York Power Authority,* 105 FERC ¶ 61,102, at P 147 (2003). This settlement was contested by two parties seeking financial compensation for the Mohawk community for economic damages from the St. Lawrence Project. Therefore, the portions of the order relating to this issue create FERC precedent.

[29] 84 FERC ¶ 61,107, at 61,561 (1998).

capital, and thereby severely degraded the physical, economic, cultural, and spiritual habitability of the reservation."[30] The mitigation measures requested by the Skokomish Tribe included $3.5 million for the purchase of property and an evaluation of measures such as an economic development trust fund, expansion of health care facilities, adult education, expansion and modernization of law enforcement, and scholarships.[31]

The Commission denied the Tribe's claim:

> The conditions that the Skokomish Tribe seeks are, in essence, a request for assessment of damages. However, it is established that the Commission has no authority to adjudicate claims for, or require payment of, damages. We are requiring Tacoma to improve flood protection, and enhance fish and wildlife in the Skokomish River Basin, in many different ways. However, *the broadest possible construction of our powers under Sections 4(e) and 10(a) (1) would not allow us to require Tacoma to grant the Tribe the compensation it requests.*[32]

Similar to the Skokomish Tribe in the *City of Tacoma* proceeding, and to the Mohawk Tribe in the *New York Power Authority* proceeding, Butte County claims that the Oroville Project has had negative impacts on the well-being of Butte County, and requests that the Commission award money damages to Butte County as a remedy to these supposed impacts. Therefore, consistent with *Ohio Power, City of Tacoma, New York Power Authority,* and other applicable precedent, the Commission must construe Butte County's requests as money damage claims and summarily reject such proposed conditions on the grounds that the Commission lacks authority to award damages. The following license articles proposed by Butte County should be rejected: Law Enforcement and Public Safety Plan, Road Construction and Maintenance Plan, Emergency Operations Center, Payment in Lieu of Taxes, and Low-Cost Power Allocation.

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30 *Id.*
31 *See id.*
32 *Id.* at 61,562 (emphasis added) (internal citation omitted).

### 4. Neither The FPA Nor NEPA Support Butte County's Claim That It Is Entitled At Relicensing To Compensation For Alleged Socioeconomic Impacts From The Oroville Project.

Butte County may be aware that its request that the Commission, as a condition of relicensing, require a licensee to provide Butte County with nearly $1 billion in funding as compensation for alleged socioeconomic impacts is wholly unprecedented. Nowhere in its 95-page filing does it cite to a Commission order where such compensation is required of a licensee. Instead, Butte County relies primarily on citations to the general authority of the Commission under Sections 10(a) and 4(e) of the FPA, as well as the National Environmental Policy Act ("NEPA")[33] to support its claims.

#### *a. Butte County's Socioeconomic Claims Fail Under Sections 10(a) and 4(e) of the FPA.*

The Section 10(a)(1) "comprehensive development" standard provides:

> That the project adopted…shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat) and for other beneficial public uses, including irrigation, flood control, water supply and recreational and other purposes…..

Nowhere in the plain text of the comprehensive development standard is there any suggestion that a licensee applying for a new license must provide compensation for alleged socioeconomic impacts as a condition of relicensing. Nor has the Commission or its predecessor agency interpreted or applied the comprehensive development standard in such a manner over its long history. To the contrary, when faced with a similar claim by the Skokomish Tribe, the Commission held that "the broadest possible construction of our powers under Sections 4(e) and

[33] 42 U.S.C. §§ 4371, *et seq*.

10(a)(1) would not allow us to require Tacoma to grant the Tribe the compensation it requests."[34]

Butte County also misconstrues Section 4(e) of the FPA in an attempt to support its claim for compensation for alleged socioeconomic impacts.[35] Section 4(e) provides:

> …for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and the enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Based on this language, Butte County concludes, incorrectly, that "Socioeconomic factors, including local government tax consequences of an application, are an aspect of environmental quality; they are considered part of the human environment…"[36] Simple assertion does not make it so. In fact, Butte County's interpretation is directly counter to the plain language of Section 4(e) of the FPA, as amended by Congress in 1986 as part of the Electric Consumers Protection Act ("ECPA"). At that time, Congress inserted the new "equal consideration standard" into Section 4(e) in order to help assure the issuance of licenses that reflected appropriate consideration of both developmental and environmental values. Congress could have required "equal consideration" of "socioeconomic impacts" of hydroelectric projects as part of the 1986 amendments, but it did not. Thus, contrary to Butte County's conclusory assertions, equal consideration of socioeconomic impacts is not required under the FPA.[37]

*b.* *Butte County's Socioeconomic Claims Fail Under NEPA.*

NEPA also does not support Butte County's requests for compensation for alleged negative socioeconomic impacts. Under Council on Environmental Quality ("CEQ")

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[34] 84 FERC ¶ 61,107 at 61,562 (1998) (internal citation omitted).

[35] Butte County Comments, p. 44.

[36] *Id*.

[37] Congress's inclusion of the phrase "other aspects of environmental quality" in the equal consideration standard does not change this conclusion. Butte County conflates the phrase "environmental quality" to the phrase "human environment" as it is defined by CEQ in its regulations to implement Section 102 of the NEPA. However, if Congress had meant to include the phrase "human environment" that was part of the NEPA statute enacted in 1970 in the 1986 ECPA "equal consideration" amendments it could have done so.

regulations, the socioeconomic effects associated with environmental impacts must be examined.[38] Butte County's requests for studies of socioeconomic impacts involve purely speculative scenarios regarding what Butte County's economic situation hypothetically would be if the Oroville Project did not exist, rather than the economic effects associated with the environmental impacts of proposed modifications to the operations of the Project. The analysis of socioeconomic impacts they believe is necessary is beyond the scope of any NEPA requirement. In any event, the extensive socioeconomic studies conducted by DWR go well beyond what is required under any conceivable interpretation of the NEPA statute. These studies may be utilized by the Commission to satisfy any requirement under NEPA that the Commission consider the socioeconomic impacts of relicensing the Oroville Project.

NEPA is not a substantive statute and therefore it does not impose any requirement on the Commission to act to mitigate adverse socioeconomic impacts alleged by Butte County. In *Robertson v. Methow Valley Citizens Council*,[39] the Court found that NEPA's mandate to agencies is a procedural one: "[I]t is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed – rather than unwise – agency action."[40] The Court of Appeals for the Ninth Circuit had held that an Environmental Impact Statement ("EIS") developed by the Forest Service was inadequate as a matter of law because it failed to provide measures to mitigate for environmental harm that could result from the issuance of a permit to develop a ski resort, and the Forest Service had an affirmative duty to establish such measures before granting the development permit. The Supreme Court reversed: "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation

[38] 40 C.F.R. §§ 1508.8; 1508.14.
[39] 490 U.S. 332 (1989).
[40] *Id*. at 333.

plan."[41] Similarly, to the extent there is an obligation under NEPA to analyze the socioeconomic impacts, including alleged "cumulative impacts" of the relicensing of the Oroville Project, "it does not impose a substantive duty" on FERC "to mitigate" adverse effects.[42]

*c. Butte County's Socioeconomic Claims Improperly Rely on Pre-Project Conditions.*

Butte County's requests for compensation for alleged socioeconomic impacts is also counter to Commission policy because it is an inappropriate effort to obtain mitigation for "pre-project" or "without project" conditions that allegedly would exist if the Oroville Project had never been built. Butte County alleges that the existence of the Project has been a burden on the County and that it should be compensated for the alleged costs they believe would not have occurred but for the existence of the Project.[43]

It is well settled that in the hydroelectric licensing context, under both the FPA and NEPA, the baseline for analysis and for developing license conditions is existing conditions.[44] In fact, FERC specifically has rejected requests for mitigation due to original inundation. For example, when the Lake Chelan Project was relicensed in 1981, the issue of mitigation for pre-project conditions was raised by the Forest Service and the Interior Department. The Forest Service specifically faulted Chelan for not proposing "mitigation for losses due to original

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41 *Id*.

42 Butte County also suggests that FERC Order No. 184 provides support for its contention that, at relicensing, the Commission must both consider and provide mitigation for alleged socioeconomic impacts. To begin with, Order No. 184 discusses regulations specifying the information required pursuant to NEPA to support a license application "for major unconstructed projects," not existing projects such as Oroville that are being relicensed. Moreover, the Commission's current relicensing regulations, which have evolved considerably since Order No. 184 was issued in 1981, contain no express requirement for socioeconomic studies to be conducted at relicensing.

43 Butte County conveniently ignores the fact that its citizens voted 2 to 1 in favor of the project and had the Oroville Project not been built, a single-purpose flood control dam would have been built instead. *See* Randolph and Hundley, *supra* at n. 16.

44 *See American Rivers v. FERC*, 201 F.3d 1186, 1195 (9th Cir. 1999)("*American Rivers II*"); *Conversation Law Foundation v. FERC,* 216 F.3d 41, at 46 (D.C. Cir. 2000).

project construction."[45] FERC held that "mitigation based on pre-project resource levels is unrealistic and unwarranted"[46] and responded to the Forest Service claims:

> The action proposed by the District's application for new license is the continued operation of an existing project. It is not necessary to have a description of pre-project conditions in the application, or to mitigate for any losses that may or may not have occurred.[47]

Similarly, in *Grand River Dam Authority*, FERC rejected a proposed condition to acquire 4,500 acres of hardwood forest to mitigate "pre-project conditions and losses due to original inundation" as "contrary to Commission policies on relicensing."[48] FERC stated further that "[m]itigation should not be required to offset the original loss of natural resources."[49] We do not agree with Butte County's allegations that the existence of the Project has been a net economic burden to the County. However, assuming *arguendo,* even if this were the case (and it most assuredly is not) Butte County's conditions are an improper attempt to recreate "pre-project conditions" and to receive compensation for "original inundation" that must be rejected by the Commission.

*d.* *Butte County's Socioeconomic Claims Are An Impermissible Collateral Attack.*

Stripped to its essentials, Butte County's request for compensation is an impermissible collateral attack on the original license order issued by the Commission in 1957 that found that the Oroville Project was consistent with the comprehensive development standard.[50] Butte County is essentially arguing that the public interest would have been better served if the

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45 *Public Utility District No. 1 of Chelan County Washington* 15 FERC ¶ 62,168, at 63,280 (1981).
46 *Id.*
47 *Id.*
48 59 FERC ¶ 62,073, at 63,221 (1992).
49 *Id.*
50 *Department of Water Resources of the State of California,* 17 FPC 262, 265 (1957) ("The project is best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.")

Oroville Project had never been licensed by the Federal Power Commission and built by DWR because of its baseless claim that the Project is somehow responsible for every social and economic ill that has beset Butte County since its construction. This contention is not credible in light of the tremendous water, power, flood control, recreation, fish and wildlife and other benefits the Project has provided millions of California residents, and will continue to provide under the terms of a new license. Indeed Butte County itself is a customer of the State Water Project for which the Oroville Project is the keystone, and also is a major beneficiary of the flood control and recreational facilities provided by the Oroville Project.

**5. Butte County's Request For A Power Allocation Is Unreasonable and Contrary To The Commission's Longstanding Policy That A Licensee May Distribute The Power From Its Project In The Manner It Deems Most Appropriate**.

The most costly license condition recommended by Butte County is a power allocation of 235 million kWh per year. If this recommendation were implemented, DWR would lose a significant portion of one of the primary purposes of the Project's development, to provide Project power to deliver water through the State Water Project system. The recommendation also would significantly reduce revenue from the sale of electrical energy generated in connection with the operation of the FERC-licensed facilities, revenue that is used to offset the cost of purchasing power to operate other parts of the State Water Project system, another element of the original purpose of the Project. The total cost to DWR of providing the energy associated with such a power allocation would be approximately $350 million over the 50-year term of the license. In addition, the allocation would reduce the Project's project-dependable capacity ("PDC") and the ancillary service value to DWR thereby greatly exacerbating the above costs.

Contrary to Butte County's representations that Commission precedent supports their

receiving an allocation of power, the Commission's longstanding policy is that licensees may distribute project-generated power as they see fit, unless there is an express directive from Congress that power must be allocated to a third party.[51] There is no statutory directive that power from the Oroville Project should be provided Butte County.

Butte County begins by citing language in the order on rehearing in the St. Lawrence Project relicensing proceeding that indicates that the Commission's licensing authority is quite broad and is not "limited to mitigation for the environmental, economic or other effects of a project…"[52] Butte County construes this general statement regarding the breadth of the Commission's authority as support for its contention that it is entitled to a power allocation from DWR, when the statement says no such thing. To the contrary, earlier in the St. Lawrence proceeding the Commission summarily denied a request by a coalition of local governments that the Commission require the licensee to provide them a power allocation.[53] The Commission held that the local government's request for a power allocation, which was very similar to Butte County's in many respects, to be "without merit."

Butte County then raises an order issued by the Commission 45 years ago, which involves very unique circumstances that are not extant in the Oroville proceeding. In *City of Seattle,* the Commission denied a request for rehearing of an order resolving the issue of two competing license applications to build mutually exclusive hydroelectric projects on the Pend Oreille River in Northeastern Washington.[54] The Commission ruled that Seattle's proposed "Boundary Project" better served the public interest than Public Utility District No. 1 of Pend

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51 *See, e.g., Power Authority of the State of New York*, 109 FERC ¶ 61,092, at P 3 (2004) ("It has, however, been the practice of this Commission and the predecessor Federal Power Commission (FPC) since the issuance of licenses began in 1920 to leave the disposition of project power in the hands of the licensee, which is responsible for the construction, operation, and maintenance of the project, unless Congress has made a legislative directive to the contrary").

52 *Power Authority of the State of New York*, 107 FERC 61,256, at 61,092 (2004).

53 *New York Power Authority,* 105 FERC 61,102 (2003).

54 *City of Seattle*, 26 FPC 463 (1961).

Oreille County's ("Pend Oreille PUD") proposed "Z Canyon" Project. It therefore granted the Seattle's license application and denied the application filed by Pend Oreille PUD. Because the grant of a license to Seattle foreclosed any further opportunity by the local PUD to develop hydroelectric resources on the Pend Oreille River within the PUD's service territory, the Commission on equitable grounds ordered Seattle to reserve 48 megawatts of power from the Boundary Project to be used by Pend Oreille PUD to serve its electricity load in the future, to the extent power from the PUD's already constructed Box Canyon Project was inadequate to serve its load.[55]

Butte County claims that the "facts addressed by the City of Seattle are similar to the problems faced by Butte County."[56] Nothing could be further from the truth. Oroville is an existing project, whereas *City of Seattle* concerns two proposed projects, Boundary and Z Canyon. Unlike Pend Oreille PUD, Butte County has not filed a competing license application for a proposed hydroelectric project that could only be built if the Oroville license application is denied.[57] Therefore, *City of Seattle* lends no support to a power allocation claim by Butte County. This was affirmed by the Commission in the order on rehearing in *Power Authority of the State of New York*, where the Commission rejected an argument by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") that the Commission should, based on *City of Seattle*, receive an allocation of power from the St. Lawrence Project on equitable grounds. The Commission concluded:

> In sum, it is the long-term, consistent practice of this Commission and the FPC to allow licensees to determine how best to dispose of the power from licensed projects in the absence of a legislative directive to do otherwise. Exceptions to this practice are

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[55] Neither FERC nor its predecessor agency has made a similar power allocation on equitable grounds since 1961.
[56] Butte County Comments, p. 64
[57] *Department of Water Resources*, 17 FPC 262 (1957) ("No conflicting application is before the Commission. Public notice has been given of the filing of the application for a license.")

exceedingly rare, and the last one was over forty years ago [*City of Seattle*].[58]

Butte County also cites to *Western Massachusetts Electric Company, et al.*, as support for a power allocation to the County.[59] The Commission rejected a similar argument raised in *Power Authority of the State of New York*, stating:

> In *Western Massachusetts Electric Company*, the Commission merely required the four investor-owned utility licensees for a project to make any project capacity in excess of their system needs available for sale on a non-discriminatory basis. Nothing in the order requires the licensees to allocate any of the surplus power to any particular entity.[60]

Butte County's citation to *Yakama Nation v. Public Utility District No. 2 of Grant County, WA*[61] also lend no support for its position. This order relates to the disposition of power from the Priest Rapids Project, which is subject to specific Congressional legislation requiring the allocation of power to neighboring states. Specifically, the Yakama Nation filed a complaint at FERC alleging that Grant County violated Sections 19 and 20 of the FPA when it entered into power sales contracts barring the buyer from filing a competing license application for the Priest Rapids Project. The Commission, *inter alia*, held that Sections 19 and 20 of the FPA did not apply to Grant County because it is a "municipality which the state has expressly granted self-regulatory authority."[62] Similarly, Sections 19 and 20 of the FPA do not apply to DWR, also a government-owned entity.[63] The Commission also rejected MMWEC's reliance on *Yakama* as support for its power allocation claim in the *Power Authority of the State of New York* rehearing order.[64]

Butte County also raises *Pennsylvania Water & Power Co. v. Federal Power*

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58 109 FERC ¶61,092, at P 27 (2004).
59 39 FPC 723, 739 (1968).
60 109 FERC ¶ 61,092, at P 16 (2004).
61 101 FERC ¶ 61,197 (2002).
62 *Id.* at P 18.
63 The State of California has granted DWR self-regulatory authority. *See* Cal. Water Code § 11454(a).
64 109 FERC ¶61,092, at P 15 (2004).

*Commission*,[65] a case that is completely irrelevant to the issue of a power allocation to Butte County. It concerns a dispute between the State of Maryland and others and the Pennsylvania Water & Power Company ("Penn Power") regarding the rates charged for power generated at FPC-licensed hydroelectric projects owned by Penn Power. The Court rejected Penn Power's contention that this power sale was not subject to rate regulation under Part II of the FPA, because the power originated from hydropower projects licensed under Part I of the FPA. In support of this conclusion, the Court referenced a provision of Section 20 of Part I of the FPA, which charges the Commission with protecting electric consumers regarding hydroelectric power sales contracts in interstate commerce when a state regulatory gap exists. This provision of the FPA has never been construed to require the allocation of power from a FERC-licensed hydropower project to a third party.

Butte County also cites *Kootenai Electric Cooperative v. Public Utility District No. 2 of Grant County*,[66] which, on its face, is irrelevant to any Butte County request for a power allocation because it involved a specific Congressional directive under the Flood Control Act that power be allocated to third parties by the licensee of the Priest Rapids Project. There is no legislation or even legislative history directing that such an allocation to Butte County occur.

**6. Butte County's Request For Payment In Lieu Of Taxes Is Contrary To The Commission's Longstanding Policy That A Licensee Is Not Responsible For Compensating A Local Government For The Tax Impacts Of A Project.**

Butte County proposes in a draft license article entitled "Payment in Lieu of Taxes" that the licensee provide Butte County with annual payments of $6.8 million over the term of the license. Assuming that a 50-year license is issued for the Project, the total cost of this license

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[65] 343 U.S. 414, 418 (1952).

[66] 82 FERC ¶ 61,112, *order on reh'g*, 83 FERC ¶ 61,289 (1998), *petition for review denied sub. nom. Kootenai Electric Cooperative v. FERC*, 192 F.3d 144 (D.C. Cir. 1999).

article would be $340 million.[67] Contrary to Butte County's representations that Commission precedent supports a license requirement that DWR make payments in lieu of taxes to Butte County, the Commission has consistently denied such requests.

In *Holyoke Water Power Company,*[68] the Commission addressed the issue of compensation for the tax-related impacts of a hydropower project. The Commission held that the FPA does not require that a project entail no net loss "of affected resources and values, *including the tax revenues of the jurisdictional municipal entity*."[69] Similarly, in *City of Tacoma, Washington*,[70] FERC rejected a request from Lewis County that Tacoma be directed to provide the County compensation for the economic impacts of the Cowlitz Project, in particular tax impacts. Underlying Lewis County's claim was the application of Washington law "which allows a city that constructs a hydroelectric facility in another county to compensate that county for revenue losses or increased financial burden, upon terms mutually agreeable to the city and the county."[71] The Commission denied Lewis County's claim, holding that "the issue must be worked out between Lewis County and Tacoma under state law."[72]

In the absence of any Commission precedent supporting its position that the Commission should order DWR to provide payments in lieu of taxes, Butte County misleadingly cites to a

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67 For ease of discussion, all of the costs associated with the license conditions proposed by Butte County are presented in 2005 dollars unless stated otherwise. However, in its proposed Licenses Articles, Butte County has requested that any future payments or expenditures made by the Licensee to or on behalf of the County "be subject to an annual cost of living adjustment, as specified in Appendix B of the Operational Impacts Report." *See, e.g.,* Butte County Comments, Exhibit A, "Article ### Law Enforcement and Public Safety Plan." Specifically, Butte County asserts that a "conservative approach" would be to apply an annual cost escalator of 4.05% to all such payments and expenditures, which represents the average National Consumer Price Index rate of inflation for the period of 1954 through 2004. *See* Butte County Operations Study, Appendix B, Section B.1. Thus, the cost in actual dollars of the PM&Es proposed by Butte County would be much higher than stated in this Reply.

68 88 FERC ¶ 61,186 (1999).

69 *Id.* at n. 86 (emphasis added).

70 84 FERC ¶ 61,037, *reh'g denied,* 85 FERC ¶ 61,020 (1998).

71 *Id.*

72 *Id.* at 61,142.

long list of cases that it claims supports its position.[73] None of the cases cited by Butte County involve a Commission license requirement requiring compensation/mitigation to a local government, or any other entity, for socioeconomic impacts. Instead, to the extent the cases are cited correctly,[74] each order has a brief clause in its Section 15(a)(3) "actions affecting the public" analysis that mentions that the project pays state and local taxes. For example, the *Dairyland Power Cooperative* order states:

> Dairyland pays taxes annually to state and local governments, and the project provides employment opportunities and attracts those interested in various forms of available recreation. Staff concludes that the various environmental and recreational enhancement measures approved in this license would benefit the public.[75]

That the Commission makes brief reference to the payment of taxes by a licensee in a license order by no means translates into Commission authority to order mitigation and/or compensation for socioeconomic impacts. If this was the case, then, for example, the Commission would be able to order a licensee to create a certain number of new jobs if it took into account the employment impacts of its licensing actions, an absurd result.

It is also worth noting that when the Commission conducts its Section 15(a)(3) "actions affecting the public" analysis of a license to be issued to a tax-exempt governmental entity such as DWR, it makes no mention of tax payments, or the lack thereof, as part of this analysis.[76] Instead, the Commission makes a determination of whether the issuance of the new license would benefit the public. Indeed, it would be contrary to the clear intent of the FPA for the

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[73] In addition, the payment of taxes has been considered as part of the Commission's evaluation of the cost-effectiveness of the license plan and in its evaluation of actions affecting the public. *See e.g. Dairyland Power Cooperative*, 107 FERC ¶ 62,043 (2004); *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 62,0323 (2004) *Southern California Edison Company*, 105 FERC ¶ 62,146 (2003); *Pacific Gas & Electric Company*, 104 FERC ¶ 62,198 (2003); *Upper Peninsula Power Company*, 104 FERC ¶ 62,135 (2003); *Southern California Edison Company*, 104 FERC ¶ 62,0111 (2003); *Southern California Edison Company,* 103 FERC ¶ 62,183 (2003); *Erie Boulevard Hydropower L.P.,* 100 FERC ¶ 61,317 (2002); *Erie Boulevard Hydropower L.P.,* 100 FERC ¶ 61,318 (2002); and *Finch, Pruyn and Company, Inc.*, 97 FERC ¶ 62,170 (2001).

[74] Butte County's citation to the *Florida Power & Light* order is in error.

[75] *Dairyland Power Cooperative*, 107 FERC ¶ 62,043, at P 39 (2004).

[76] *New York Power Authority,* 105 FERC ¶ 61,102, at P 219 (2003).

Commission to view the tax-exempt status of a licensee as a negative factor in its "actions affecting the public" analysis, because the FPA provides for preference to state (tax exempt) entities such as DWR at the original licensing of hydropower projects.[77]

Butte County also argues that, "The inundation by DWR of one property alone - the Big Bend Project, a 70 MW hydropower plant that had previously been owned and operated by Pacific Gas and Electric Company—costs the County approximately $631,151 in annual property tax revenues, totaling approximately $31.6 million over the course of a 50-year license period."[78] In a recent order approving the surrender and decommissioning of a hydroelectric project, the Commission rejected the request that a local government be compensated by the licensee for future tax revenue losses caused by dam removal.[79] Similarly, Butte County is not entitled to compensation due to loss of tax revenue from the Big Bend Dam.

Therefore, the County's request that DWR be ordered to make payments in lieu of taxes must be summarily rejected based on the precedent in *Holyoke Water Power Company*, *City of Tacoma* and *FPL Energy Maine Hydro*. FERC has expressly rejected claims related to lost tax revenue and payments in lieu of taxes that are every similar to those posed by Butte County.

### 7. Butte County's Claims For Payment In Lieu Of Taxes Are Grossly In Excess Of Any Amount It Could Have Expected From The Government.

Even if the Commission were to grant Butte County's request that DWR be ordered to make PILOT payments, Butte County's claims therefor are grossly in excess of any amount Butte County could have expected to receive from the government.

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[77] *See* 16 U.S.C. § 800 (2000) ("In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted ... to conserve and utilize in the public interest the water resources of the region").

[78] Butte County Comments, p. 10.

[79] *FPL Energy Maine Hydro*, *LLC*, 106 FERC ¶ 61,038, at P 58 (2004).

As discussed at length above, the PILOT concept is not applicable to Butte County, and no evidence has been provided by Butte County to support of any mandate on DWR to make such payments. Furthermore, Butte County misperceives and misapplies the methodologies used by the federal government to calculate payments under the PILOT program. Payment calculations under the federal PILOT program are based on a number of factors including the acreage of "entitled" land owned by the Federal government,[80] the population of the local government, and payments made to the local government under other federal programs. There is a ceiling on the payment amount that a local jurisdiction may receive, calculated using population and a dollar per capita factor,[81] and there is no contractual obligation on the part of the federal government to pay this amount. Payments are based on funds that are appropriated annually for this specific purpose and can vary substantially from year to year.[82]

Between 1999 and 2005, the amount of "entitled" land in Butte County changed very little and the influence of population on the payment calculation remained constant. Variation in payments received by Butte County are attributable to pro-ration of the authorized amount based on available funds authorized. Over this same period, Butte County received annual payments of between $27,000 and $156,000 or between $0.18 and $1.04 per acre of entitled lands. Applying each of these pro-ration factors to the DWR lands results in a hypothetical range of annual payments in lieu of property taxes of between $5,260 and $30,410.[83] Butte County requests annual PILOT payments of $6.8 million.[84] Assuming a PILOT program was applicable to Butte County in the first place (which it is not), the method employed by the federal

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80 "Entitled" land is mainly that under the control of the Forest Service, National Park Service, Bureau of Land Management, and that comprising military installations. Payments associated with "entitled" lands are referred to as "6902 payments." *See* Critical Assessment, pp. 15-16.

81 As of 1998, this per capita factor ranged from $110 for jurisdictions with populations between 5,000 and 6,000 to $44 for jurisdictions with populations of 50,000 and over.

82 *See* Critical Assessment, p. 16.

83 *See* Critical Assessment, pp. 16-17.

84 *See* Butte County Comments, Exhibit A, p. 7.

government in its calculation of PILOT would result in payment estimates that are a small fraction of those claimed by the County.

### 8. If Butte County's Other Requested License Conditions Are Incorrectly Construed To Be Proper Requests For Mitigation Of Project Impacts, They Must Be Denied As Counter To Commission Precedent And Policy.

*a. Law Enforcement and Public Safety Plan.*

Butte County proposes in a draft license article entitled "Law Enforcement and Public Safety Plan" that the licensee be required to provide the following funding to Butte County:

- $2,035,416 per year "to fund the provision of law enforcement and criminal justices services with the Project Area."
- $393,267 per year "to fund the provision of fire and rescue services within the Project Area."
- $1,837,983 per year "to fund the provision of health and human services related to the Project."
- $1,032,000 one-time payment within three years of license issuance "to fund one-time improvements to law enforcement/criminal justice services…"
- $351,143 one-time payment within three years of license issuance to "fund systems upgrades to Butte County's communications system…"

Thus, over the course of a 50-year license, the total cost of this proposed article to DWR would be approximately $215 million.[85] Through this draft license article Butte County seeks to shift a significant percentage of the costs of its law enforcement/public safety responsibilities to DWR.[86]

In the 86 years since the enactment of the original FPA in 1920, neither FERC nor its predecessor agency has ever imposed a similar license requirement. To the best of SWC's and Metropolitan's knowledge, FERC never, on its own motion or in response to a request from a local government, has included in a new license a requirement that a licensee provide funding for

[85] *See* discussion of annual costs, *supra*, n. 67.

[86] Butte County's overall law enforcement budget for Police Protection (sheriff and coroner) is $13,700,000, with $11,500,000 of that sum for police protection only.

law enforcement activities. Therefore, consistent with this longstanding interpretation of the Commission's conditioning authority under Section 10(a) of the FPA, Butte County's requests for such funding should be rejected.

The Commission on occasion has issued licenses that contain mandatory conditions requiring modest amounts of licensee funding for one or two federal resource agency law enforcement personnel.[87] The Commission has had no choice but to do this because it is generally barred from modifying or denying a mandatory condition.[88] However, this precedent is not applicable to Butte County's request for law enforcement funding because the County is not a federal agency with mandatory conditioning authority. Moreover, even if this mandatory conditioning precedent is incorrectly construed as somehow applicable to Butte County's request, no mandatory conditioning agency has ever included in a license order a mandatory condition requiring funding for law enforcement services of the magnitude sought by Butte County.[89]

In the past the Commission has approved relicensing settlement agreements that include modest requirements that a licensee provide limited funding of law enforcement personnel. However, this does not support Butte County's claim, because it is well established that the approval of a settlement by the Commission does not have precedential value.[90] In addition, Butte County's requests are not being made in the context of a settlement agreement. The SWC,

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87 *See, e.g., South San Joaquin Irrigation and Oakdale Irrigation District*, 114 FERC ¶ 62,081, at 64,273 (2006) (order issuing new license with Forest Service condition requiring licensee to contribute up to $106,770 (2005) total annual funding for operations, maintenance, visitor information/interpretive services and *patrols*, and requiring Licensee responsibility for "Law Enforcement Officer funding for Level 4 law enforcement activities related to the Project" and Level 2 law enforcement officer to conduct boat patrols).

88 *See, e.g., American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999) ("*American Rivers II*"); *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

89 *See supra* n. 87.

90 Settlement agreements by their nature are unique and circumstance-specific, negotiated by multiple parties with a range of interests, and balancing a socially-, geographically-, economically-, and culturally-specific set of concerns. *See, e.g., Michigan Dept. of Natural Resources v. FERC*, 96 F.3d 1482, 1490 (D.C. Cir. 1996) (neither FERC nor its adversaries may use an uncontested settlement as precedent).

Metropolitan, DWR and the other parties spent a great deal of time responding to Butte County's concerns and attempting to resolve their issues in the context of a comprehensive settlement. However, it was impossible to reach a reasonable accommodation with Butte County because, as demonstrated by Butte County's requests for license articles that would cost DWR close to $1 billion, Butte County's position is extraordinarily unreasonable and unrealistic. Moreover, as is the case with mandatory condition law enforcement provisions, the provisions in Commission-approved settlements relating to law enforcement are not even remotely of the scale of funding sought by Butte County.

In addition, in the course of an ongoing re-examination of Commission policy regarding hydroelectric settlements, the Commission staff has indicated that requirements that a licensee fund law enforcement activities are now counter to Commission settlement policy. For example, in the Final Environmental Impact Statement ("FEIS") issued on March 24, 2006 on the Lewis River Project comprehensive settlement, FERC staff considered a settlement provision that would have required the licensee to provide funding for three law enforcement officers. FERC staff recommended that this condition not be included in the new license because, "[l]aw enforcement in the project area is the responsibility of county and federal agencies."[91]

Similarly, in a Draft Environmental Impact Statement ("DEIS") issued in April 2006 regarding the Baker River Project comprehensive settlement, the Commission considered a proposed license condition that required the licensee, Puget Sound Energy, to provide funding of about $95,000 per year to support implementation of a "Law Enforcement Plan." Under the proposed license article, the Plan "may include provisions for law enforcement presence, other types of public contact personnel presence, enhanced emergency communication and response

[91] *See* March 24, 2006 *Final Environmental Impact Statement for the Lewis River Projects*, Docket Nos. P-2071-000, *et al.* (PacifiCorps), p. 2-55.

procedures, public safety and security, protection measures for facilities, natural resources, recreation resources, and heritage resources within the Project area and Baker Basin generally. The Commission staff responded:

> While enforcement of the requirements of any license would be Puget's responsibility, enforcement of local laws within the project area and the river basin is not a matter of Commission jurisdiction but is the responsibility of local law enforcement agencies. Therefore, we do not recommend including this measure in any license issued for the project.[92]

Therefore, it is clear that Butte County's request for a license condition requiring DWR to provide the County over $2 million a year for law enforcement must be denied by the Commission in accordance with its longstanding precedent under Section 10(a) of the FPA.[93]

Finally, it is clear that the funding requested by Butte County is completely unnecessary because of the extensive funding already provided by DWR and the State for law enforcement purposes associated with the Project. According to DWR, it and the State provide funding for 13 Park Rangers that patrol the Lake Oroville State Recreation Area ("LOSRA") at a cost of about $1 million a year. DWR also contracts with the Butte County Sheriff's Office for water patrol of the Thermalito Afterbay at a cost of about $190,000 annually. In addition, DWR contracts with a private security firm for about $250,000 per year to patrol critical Project infrastructure. The California Highway Patrol ("CHP") is the designated law enforcement entity for all state lands, and routinely patrols the Project, 24 hours a day, year-round. Therefore, counter to the impression given by Butte County's filing that DWR is exclusively relying on the County for law enforcement services, DWR in conjunction with the State is providing over $1 million a year

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[92] *See* April 7, 2006 *Draft Environmental Impact Statement for the Baker River Hydroelectric Project*, Docket No. P-2150-033 (Puget Sound Energy), p. 5-31.

[93] Butte County also refers to a Commission regulation which requires that in the course of satisfying their responsibility to provide recreation facilities, a licensee is responsible to "comply with Federal, State and local regulations….for public safety and to cooperate with law enforcement authorities in the development of additional necessary regulation for such purposes." 18 C.F.R. 2.7(f)(1). This language indicates very clearly that a licensee is to "cooperate" with local law enforcement authorities but is under no obligation to provide funding to such authorities.

in funding relating to law enforcement.[94]

The remaining facets of Butte County's Law Enforcement and Public Safety Plan proposed condition are so far beyond the pale that they do not merit more than cursory discussion. For example, it strains credulity to suggest that a licensee should be responsible for funding a County's health and criminal justice functions, as Butte County suggests. The SWC and Metropolitan are unaware of any instance in which the Commission has required licensee annual funding for fire and rescue services, health and human services, or one-time improvements to law enforcement facilities or a county's communications system along the lines suggested by Butte County. These activities, are, of course, the responsibility of local government, not licensees such as DWR.

*b.* *Road Construction and Maintenance Plan.*

Butte County proposes a draft license article entitled "Road Construction and Maintenance Plan" that would require the licensee to provide the following funding to Butte County:

- $5,306,136 one-time payment to establish a "Butte County Road Construction and Maintenance Fund."
- $791,351 per year within three years of license issuance and every year thereafter.

Thus, over the course of a 50-year license, the total cost of this proposed article to DWR would be approximately $42,499,633 (2005).[95]

Butte County's proposed license article requires that DWR provide funding for "for the construction and maintenance of roadways within the Project's Area of Highest Use, as such is described in the Report on the Operational Impacts of the Oroville Facilities Project on Butte

[94] DWR Analysis, p. 15.
[95] *See* discussion of annual costs, *supra*, n. 67.

County (February 2006)."[96] According to the Butte County Operational Study, "[t]he Area of Highest Use is defined by the arterial and collector roads that lead to the Project Area; in other words, the primary routes (roads) used by Project Visitors to get to the Project."[97]

Butte County's proposed license article is completely counter to Commission precedent regarding the responsibility of a licensee to construct and/or maintain roads and must be rejected by the Commission. As articulated in *Pacific Gas and Electric Company*, FERC's long-standing policy is that a licensee has "the responsibility to maintain all roads used for project purposes within the project boundary."[98] In that case, the Forest Service had recommended that PG&E "prepare a study of transportation system needs within one mile of the Project boundary at Lake Pillsbury…"[99] The Commission denied this request on the grounds that "the planning and development of a transportation system in the general area of Lake Pillsbury, is the responsibility of USFS, which owns the majority of the surrounding public land, and the State and local governments."[100]

Therefore, a licensee cannot be required to construct and maintain "the arterial and collector roads that lead to the Project Area" as sought by Butte County. The fact that a visitor to a Commission-licensed hydroelectric project uses a road *en route* to Project facilities does not somehow convert such a road into a Project facility that a licensee is obligated to construct or maintain. Roads outside a project boundary are the responsibility of the federal government, states and localities, not FERC licensees.[101] Because Butte County fundamentally misunderstands the obligation of a licensee regarding roads, the license article it proposes would

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96 *See* Butte County Comments, Appendix A, p. 4 (referencing Butte County, California's *Report on Operational Impacts of the Oroville Facilities Project on Butte County* (February 2006) ("Butte County Operational Study") filed with the Commission in the instant Docket on February 15, 2006, as amended April 27, 2006).

97 Butte County Operational Study, pp. 29, 64, and 65.

98 *Pacific Gas and Electric Company*, 25 FERC ¶ 61,01 at 61,062 (1983).

99 *Id.*

100 *Id*.

101 *Id.*

require DWR to provide funds for the construction and maintenance of numerous roads that are almost entirely outside the Project boundary.[102]

The cases cited by Butte County in support of its proposed road construction and maintenance license article lend no support whatsoever to its incorrect view that a licensee is responsible for roads outside a project boundary. In fact, to the extent they speak at all to the issue of the obligation of a licensee to construct and maintain roads they support the conclusion that a license has no obligation to construct or maintain roads outside a Project boundary.[103] Furthermore, the Butte County Operational Study to which Butte County's proposed license article refers is fraught with confusing and false statements that undermine Butte County's claims of Project-related fiscal impacts on road maintenance.

The Butte County Operational Study discusses "Road Services to Meet Project Demands" and refers to Exhibit 8 ("Recreational Road Maintenance Plan Cost Estimate"), which provides estimates of costs for 294 miles of road in the Area of Highest Use, but does not describe which roads were used in developing that estimate except to refer to them as "recreational roads" and citing Cherokee Road and Hurleton Road as examples.[104] Butte County provides a map that shows "Area of Highest Use" and identifies highways and major roads in that area, but fails to identify whether all or only some of the roads shown were included in their

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[102] It appears that the vast majority of roads for which Butte County seeks DWR funds are either completely outside the Project boundary or only partly within the boundary. *See* Road Map, attached hereto as Exhibit B.

[103] For example, in *Idaho Power Co.*, 108 FERC ¶ 61,129 (2005), the Commission required in Article 417 that the licensee improve certain roads within the project boundary that provide access to project recreational facilities that also are within the boundary of the C.J. Strike Project. Butte County also characterizes *Upper Peninsula Power Co.,* 72 FERC ¶ 62,188 (1995), as requiring a "licensee to provide for maintenance of roads and to consult with the County Road Commissioner's office." The only reference in any of the license articles in this order to the "County Road Commissioner's office" is a requirement that the licensee consult with the "Baraga and Houghton County Road Commissioner Offices" regarding the possibility of flooding and erosion damage to a road and bridge downstream of the project due to a change in the flow regime. *Id.* at 64,415, 64,425. Therefore, this case is entirely irrelevant and does not stand for the position for which it is cited by Butte County.

[104] Butte County Operational Study, Section 4.4.1.2.

estimates.[105] The calculation of payments due Butte County also exaggerates estimates of non-resident recreational use.[106] Given the exaggeration and lack of specificity, Butte County's analysis regarding roads in the Area of Highest Use should be considered as unsubstantiated and of no value.

Butte County also identifies a separate category of roads "that do not lead anywhere except to the Project Area" and "are not needed by the general population of the County to reach homes, businesses, or any type of structures or functions, nor would they be used if it were not for the Project," ("Asserted Project Roads") and asserts that FERC should order DWR to pay capital and O&M costs to pave and maintain the roads.[107] Eight roads with a length of 30.32 miles are identified as being Asserted Project Roads, and two examples (Oregon Gulch Road and Stringtown Road) are depicted. No evidence has been offered by Butte County to support its contention that these roads are not used by other than Project visitors, and readily-available information suggests that the listed roads are commonly used by the public for non-Project-related purposes.[108] It is also worth noting that duplicate funding for Cherokee Road and Hurleton Road is being requested both under this category as well as the category of Roads in the Area of Highest Use, and this double-counting may be true for all Asserted Project Roads.

Butte County argues for the need to pave all eight Asserted Project Roads by citing problems associated with the roads being unpaved and having been built on soils that contain

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[105] Butte County Operational Study, Section A.3. Many of the roads shown in the "Area of Highest Use" are state highways that are not maintained by Butte County.

[106] *See* discussion *infra*, at Section II.A.9.e.

[107] Butte County Operational Study, p. 44.

[108] Cherokee Road and Oregon Gulch Road, which together constitute more than half of the length of roads listed, serve an area that was developed as part of mineral mining in the area long before the Project was constructed and gets much use by the public. Stringtown Road, which is also one of the longer roads listed, not only serves residential populations but is also a key access road for South Feather Water and Power Agency's maintenance of their South Feather Project Miner's Ranch canal (FERC Project No. P-2088). Nelson Avenue (believed to be improperly identified in Butte County's filings as "Nelson Road") provides access to Highway 70 and the City of Oroville by residential/agricultural properties adjacent to that road and access to Highway 70 by the community of Thermalito. *See* aerial photograph and annotations, attached hereto as Exhibit C.

naturally-occurring asbestos materials, but does not provide evidence of the alleged hazard.[109] Three of the Asserted Project Roads depicted in photographs in Butte County's report (Cherokee Road, Hurleton Road and Stringtown Road) are paved – as is much of the length of roads listed in their report – and do not result in the dust impacts described by Butte County.[110] In any case, these roads are not used exclusively by Project visitors, are substantially outside of the Project area, and any dust impacts should not be attributed to Project operations.

*c.* *Early Warning Plan.*

Butte County proposes a draft license article that would require the licensee to develop and file with the Commission an "Early Warning Plan" describing how the licensee "will communicate and coordinate project operations" with federal, state and local agencies "before and during emergency events."[111] This license article is unnecessary because, the Settlement Agreement includes an "Early Warning Plan" that describes how DWR communicates with the Corps and state and local agencies before and during flood emergency events.[112] In addition, the County's request is duplicative of the ongoing requirement imposed on DWR to develop and file for Commission approval an "emergency action plan" ("EAP") under Part 12 of the Commission's regulations,[113] an element of FERC's dam safety program administered separately from the relicensing process. An EAP must be developed "in consultation and cooperation with appropriate Federal, state and local agencies responsible for public health and safety....."[114] The purpose of an EAP is "to provide early warning" of a project emergency to those who might be affected.[115] An EAP must, among other things, include "detailed plans for notifying potentially

[109] Butte County Operational Study, pp. 45-46.
[110] Butte County Operational Study, pp. 43, 45.
[111] Butte County Comments, p. 93.
[112] *See* Settlement, at A 131.
[113] *See* 18 C.F.R. Part 12, Subpart C.
[114] *Id.* at § 12.20(b)(1).
[115] *Id.* at § 12.20(b)(2).

affected persons, appropriate Federal, state, and local agencies, including public safety and law enforcement bodies…." in the event of an emergency.[116] It also must include "procedures for controlling the flow of water" in the event of an emergency.[117]

*d.* *Emergency Operations Center.*

Butte County proposes in a draft license article entitled "Emergency Operations Center" that the licensee be required to provide, within one-year of license issuance $2,545,495 (2005) to the County for the construction of an Emergency Operations Center ("EOC"). According to Butte County, the County's existing EOC is required by California law "to provide emergency operations, facilities and staff to respond to natural disasters" including "floods, earthquakes, and acts of terrorism/sabotage…"[118] The Commission has never required a licensee to provide funding for an EOC or for similar public safety infrastructure and should not do so in this proceeding. This type of measure to address public safety is a governmental function, not the responsibility of a licensee.

Butte County claims that due to the existence of the Oroville Project, the EOC, which is located downstream of Oroville Dam, is at heightened risk for damage from a flood and must be relocated to higher ground. It is preposterous for Butte County to argue that the EOC or any other facilities located downstream, are faced with increased risk due to the existence of the Oroville Dam. In fact, the exact opposite is the case, because the Dam provides extensive flood control storage that dramatically reduces the downstream flood risk. Consequently, there is simply no basis for a requirement that the licensee provide funding for the relocation of the EOC.

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[116] *Id.* at § 12.22(a)(ii).
[117] *Id.* at § 12.22(a)(iii).
[118] Butte County Comments, p. 26.

Furthermore, in its own socioeconomic impact studies,[119] Butte County characterizes the flood risk as being associated with "[f]ailure or overflow of the Dam" and "[u]ncontrolled flow to the Thermalito Power Canal."[120] To support its "dam failure" allegations, Butte County relies on a map prepared in 2000 that is also included in the new license application.[121] This map was prepared as a hypothetical analysis, and while it indicates that the Butte County EOC would be inundated if Oroville Dam experienced a catastrophic failure when the reservoir was full, the map itself does not come close to supporting the notion that dam failure is a real possibility. Aside from being nothing more than Butte County's rank speculation, catastrophic dam failure is a highly unlikely event that should not be contemplated in making decisions regarding the need to construct a new EOC. It also should be noted that the other dam failure maps published by DWR do not suggest inundation of the EOC as a result of failure of either the Thermalito Forebay, Thermalito Diversion Dam or Thermalito Afterbay Dam.[122]

It is unclear what flow conditions Butte County used to conclude that the EOC is vulnerable to "overflow of the Dam." Overflow of the dam would only occur if inflow to the reservoir exceeded the flow conveyance capacity of the spillway based on the Probable Maximum Flood ("PMF") flows of 720,000 cfs and the 5-foot freeboard in dam design were unavailable.[123] Butte County does not provide any inundation maps that support the assertion that such floods would inundate their EOC. The Corps has published maps showing the extent

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[119] *See* Butte County Operational Study, FMY Associates, Inc.'s *Report on the Socio-Economic Impacts of the Oroville Facilities Project on Butte County, California* (January 2006) ("January 2006 FMY Analysis"), filed with the Commission in the instant Docket on February 15, 2006, and FMY Associates, Inc.'s *Analysis of the Annual Value of Oroville Facilities Power Generation* (March 2006) ("March 2006 FMY Analysis"), filed with the Commission in the instant docket on March 30, 2006 as Exhibit B to the Butte County Comments (collectively as "Butte County Studies"). *See* further discussion of the March 2006 FMY Analysis *infra*, at Section II.A.10.

[120] Butte County Operational Study, p. 50.

[121] Butte County Operational Study, p. 50, and DWR's *SP-E4: Flood Management Study* ("SP-E4") (http://orovillerelicensing.water.ca.gov/wg-reports_engineering.html), Appendix B, p. 9.

[122] SP-E4, Appendix B.

[123] U.S. Army Corps of Engineers' August 1970 *Report On Reservoir Regulation For Flood Control* ("1970 Corps Report"), p. 13.

of flooding that would result from a 500-year flood event that indicate that the Butte County EOC would not be inundated in that event and that Butte County's assertion regarding risk of inundation of the EOC as a result of "overflow of the Dam" is without technical merit.[124]

Butte County asserts that "[d]uring a flood event, excess water from uncontrolled release from the Dam will flow through the [Thermalito Power] canal. Since no flow controls exist on the canal, the EOC faces significant risks in any major flood event."[125] Butte County cites a memorandum written by Stu Edell of the Butte County Department of Public Works to support the above statement but does not submit that memorandum for the record.[126] Butte County also provides unsupported anecdotal descriptions of flood events that occurred in 1997 to support risk of EOC flooding.[127] Contrary to Butte County's claim, the inlet to the Thermalito Power Canal is regulated, and can be closed by lowering three radial gates installed for the very purpose of keeping flood flows from entering the power canal.[128] These facts are supported by the Corps' 500-year flood maps that do not show any flooding of the power canal in such a major flood event. The Commission should give no weight to Butte County's unsupported assertions, and should specifically reject Butte County's assertion that the Project has likely created a high-risk flood hazard for the EOC.

Finally, if Butte County truly believes that the existence of the Oroville Dam has increased flood safety risk due to "catastrophic flooding" that might occur due to the existence of the Dam, the SWC and Metropolitan again suggest that the County request that the Commission's Division of Dam Safety and DWR address this question as part of the ongoing emergency action plan process.

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124 SP-E4, Appendix A.
125 Butte County Operational Study, p. 50 (emphasis added).
126 Butte County Operational Study, p. 50.
127 Butte County Operational Study, p. 51.
128 DWR *Bulletin Number 200* (November 1974), p. 14, attached hereto as Exhibit D.

*e. License Implementation*

Butte County proposes a draft license article entitled "License Implementation" that provides a mechanism for reopening the license every ten years to address socioeconomic impacts.[129] This provision is unnecessary for three reasons. First, Butte County has not demonstrated that the Project has been a socioeconomic detriment to Butte County or is likely to cause such a detriment over the term of the new license. To the contrary, the Project has provided tremendous socioeconomic benefits to Butte County over the term of the original license, and will continue to do so in the future. Second, the Commission does not require a licensee to provide mitigation for adverse socioeconomic impacts such as those alleged by Butte County, so there is no need for a specific reopener for this purpose in any event. Third, to the extent the Commission deems it necessary to reopen the new license to address changing circumstances over the term of the new license, it can do so consistent with its standard reopener provision included in all new licenses and Section 6 of the FPA.[130]

**9. Regardless Of What Legal Standard Is Applied To Butte County's Requested License Conditions Or How They Are Construed By The Commission, They Fail On Substantial Evidence Grounds.**

Under the FPA, all license conditions must be supported by substantial evidence.[131] The conditions posed by Butte County are all based on the same faulty premise that the costs imposed by the Project are in excess of the benefits it obtains. In fact, analysis conducted by DWR, SWC and Metropolitan indicates that the exact opposite is the case. When all of the costs and benefits of the Project to Butte County are taken into account the annual benefits to County residents are over $24 million a year, far in excess of the County's grossly inflated estimate of annual costs of

[129] Butte County Comments, p. 89.
[130] 16 U.S.C. § 799.
[131] *See* 16 U.S.C. § 825*l*; *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 (D.C. Cir. 1996).

about $12 million.[132] Therefore, the fundamental factual assumption that underlies all of Butte County's proposed conditions is false and does not support their conditions.

Butte County's analysis of the socioeconomic impacts of the Oroville Project is grossly inaccurate for a whole host of reasons. Butte County either ignores or underestimates a wide range of positive economic impacts of the Project, including flood control, recreation, employment and water supply contract benefits. In addition, Butte County grossly exaggerates the Project-related costs it incurs through a series of highly unreasonable and inaccurate assumptions regarding such costs.

*a.* *Flood Control Benefits.*

Perhaps the most egregious flaw is the failure of Butte County's analysis to consider the extensive economic benefits to Butte County and its residents from flood control provided by the Oroville Project. The Oroville reservoir has provided significant flood control protection to Butte County and downstream neighboring counties, particularly in 1964, 1986, and 1997, when uncontrolled flows at Oroville would have exceeded 250,000 cfs,[133] 265,000 cfs,[134] and 300,000 cfs,[135] respectively, without the Oroville Dam and Reservoir.

Flood control protection provided by the Oroville Dam supports the economic development of lands and property, including agriculture development of permanent orchards and other crops on protect land. For example, rice production in Butte County has nearly

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132 *See* DWR Analysis, p. 3.

133 *See* U.S. Army Corps of Engineers' August 1970 *Report On Reservoir Regulation For Flood Control* ("1970 Corps Report"), p. 10.

134 *See* Roxane Fridirici & M. L. Shelton, *Natural and Human Factors in Recent Central Valley Floods*, Association of Pacific Coast Geographers Yearbook at 53-69 (Vol. 62, 2000).

135 *See* DWR's April 2, 1997 letter to Editor of Sacramento Bee regarding flood control operation at Oroville Dam in January 1997 (http://www.publicaffairs.water.ca.gov/newsreleases/1997/Apr.2,97-DNK_Letter_to_Bee.html).

doubled from the pre-dam production.[136]

Before Oroville Dam was built, major floods caused damage in the downstream floodplain. The U.S. Army Corps of Engineers ("Corps") described the downstream pre-Project floodplain as encompassing about "292,000 acres consisting of about 9,000 acres of urban and suburban lands, and 283,000 acres of agricultural land."[137] About 70,000 acres of the pre-Project floodplain were located in Butte County and included the City of Oroville and the communities of Honcut, Biggs and Gridley.[138] The levee system that existed then – and which has not been modified significantly since – was estimated by the Corps to provide 25-year flood protection.[139]

The levee system protecting the floodplain in Butte County provides relief for river flows up to 210,000 cfs.[140] Major flooding that preceded dam construction occurred in 1907 (230,000 cfs) and 1955 (203,000 cfs).[141] While the dam was only partially constructed in 1964, it played a part in protecting the downstream floodplain from inflows to the reservoir estimated at 250,000 cfs.[142]

While the floodplain downstream of Oroville Dam does not enjoy protection in a 500-year flood event, the dam works in concert with the downstream levees to provide significant protection to lands in Butte County that previously experienced flooding as a result of 25-year flood events.[143] The 1997 flood – estimated by the Corps to be a 190-year flood event[144] –

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136 *See* DWR's *Response to Intervention Filed By Western Canal Water District and Joint Water Districts Board – Technical Issues*, filed with DWR's Response on May 26, 2006, at Figure 9.
137 1970 Corps Report, p. 12.
138 1970 Corps Report, Chart 28.
139 1970 Corps Report, p. 13.
140 1970 Corps Report, p. 24.
141 1970 Corps Report, p. 11.
142 1970 Corps Report, p. 10.
143 1970 Corps Report, p. 13.
144 *See* March 19, 1997 testimony before Congress regarding the 1997 Flood Event ("Hearing Transcript"), at http://www.loc.gov/rr/law/floods105-11.pdf, p. 124.

produced flows into Oroville Reservoir in excess of 300,000 cfs.[145] In the absence of Oroville Dam, significant overtopping of the levees would have occurred, and quite possibly would have breached those levees, sending much of the 300,000 cfs into the floodplain behind the levees in 1997, and possibly in 1964 and 1986. Oroville Dam successfully controlled those significant flood flows in 1997 that would have put more than 70,000 acres of urban and farm lands at significant risk if the Project had not been constructed. DWR's director at the time of the 1997 Flood Event noted that, without the dam to control the peak inflow of 300,000 cfs, "this amount of water would have caused tremendous flooding downstream. This record runoff was reduced to a maximum discharge of 160,000 cfs and that only for nine hours."[146]

In addition to avoiding damages in the floodplain behind the levees, the Corps reported that "Following closure of Oroville Dam, a rapid increase in agricultural development occurred in the Feather River floodway."[147] This increased development activity in what was once only protected in 25-year events increased land values and had a direct economic benefit by raising the Butte County tax base. It also will likely ripen into future increased benefits as urban development continues behind levees in Butte County. Butte County also benefits from the avoided need to respond to the more-severe and frequent flood emergencies that would certainly have occurred absent Oroville Dam.

*b.* *Recreation Benefits.*

The Project also provides a wide range of recreational benefits to Butte County residents that are not properly accounted for in Butte County's analysis of the socioeconomic impacts of the Project. Annual recreation use of the Oroville Facilities is estimated at about 1.7 million

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145 *See* DWR letter to Sacramento Bee, *supra*, n. 135.
146 *Id.*
147 1970 Corps Report, p. 24.

recreation days with more than half of these days attributable to residents of Butte County.[148] While it is difficult to quantify with precision the economic value of this benefit to the residents of Butte County, it is undoubtedly large because it allows Butte County residents to avoid traveling to other, more distant recreational facilities. An analysis prepared for DWR concludes that the monetary value of this benefit to Butte County residents is about $9.1 million annually if one assumes savings of $10 per recreation day from avoiding the cost to travel to similar sites (910,000 recreation days x $10 per day).[149]

The recreation benefits to Butte County will also increase substantially under the terms of the Settlement, which includes a $450 million Recreation Management Plan ("RMP") to enhance recreational opportunities. Because over half of the recreation days at the Oroville Facilities are attributable to Butte County residents, this will be a major benefit to Butte County. The Settlement also includes an "off-license" provision to provide up to $61 million from a Supplemental Benefit Fund ("SBF") to support recreation and development activities outside the FERC boundary that will provide region-wide benefits to Butte County.[150] In addition, DWR and the SWC recently contributed over $7 million for the development of the Riverbend Park, one third of which is located in the City of Oroville and two-thirds of which is located in unincorporated Butte County.

*c.* *Employment Benefits.*

Further, DWR is a major employer in Butte County. According to an analysis prepared by DWR:

> State agencies, including DWR, Department of Parks and Recreation, and Department of Fish and Game (DFG), make annual expenditures for the operation

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[148] *See* DWR's *SP-R9: Final Report: Existing Recreation Use* ("SP-R9") (http://orovillerelicensing.water.ca.gov/wg-reports_recreation.html).

[149] *See* DWR Analysis, p. 5.

[150] *See* discussion of the Supplemental Benefit Fund, *infra* at Section III.B.3.e.

> and maintenance (O&M) of the Oroville Facilities. In FY 2002-03, annual payroll and non-payroll expenditures made by these state agencies totaled about $15.4 million. Of this total, $12.3 million was spent within Butte County, including $9.8 million in the Oroville area. Countywide, O&M activities are estimated to support 498 jobs and $15.2 million in earnings (Table 2-2). The largest economic effects generated by O&M expenditures are in the Oroville area, where many of the State employees who operate and maintain the facilities reside. Current O&M expenditures are estimated to generate 319 jobs and $10.6 million in the Oroville area. Existing economic effects in all other areas of Butte County are estimated to be about half the size of those in the Oroville area.[151]

The cost of relicensing is estimated at over $800 million over the proposed 50-year license term, and a large percentage of this money will be spent in Butte County.

*d. Water Supply Contract Benefits.*

Butte County also benefits from the Project as one of the 29 water agencies with long-term water supply contracts from the Project. Butte County is entitled to a firm supply of 27,500 acre-feet that is sufficient to meet the current needs and to support Butte County's growth in the foreseeable future. Currently, Butte County does not make use of about 26,000 acre feet of its contract amount.[152] As an accommodation to Butte County not normally extended to other contractors who do not use their full contract amount, Butte County's payment obligations have been deferred. This deferral saves Butte County $526,000 per year, a cost that is shifted to the other State Water Project contractors.[153]

*e. Butte County Relies on Unreasonable Assumptions About Non-Resident Use Of Butte County Services.*

In addition to ignoring or underestimating the flood control, recreation, employment and water supply contract benefits of the Project to Butte County residents, Butte County also relies on a series of unreasonable assumptions regarding non-resident use of Butte County services in

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[151] *See* DWR Analysis, p. 8.
[152] *See* DWR Analysis, p. 14 (DWR states that Butte County uses "less than 5%" – which equates to less than 1,400 acre-feet per year).
[153] *See* DWR Analysis, pp. 6, 12.

order to come up with its extraordinarily exaggerated conclusions regarding the costs it incurs to provide such services.

In Butte County's February 14, 2006 letter to the Commission, Butte County indicates their staff prepared a technical review of the operating and socioeconomic impacts of the Oroville Project, due to the inadequacy of the reports prepared by DWR.[154] The Commission's previous responses had indicated that the relevant reports prepared by DWR were adequate for the Commission's purposes, *i.e.*, as the basis for their impact assessment pursuant to the requirements of NEPA.[155]

The two reports prepared by Butte County staff and consultants, and submitted to the Commission on February 15, 2006 ("February 15 Reports") use the word "reasonable" to characterize the methods used in their analyses to develop assumptions regarding the numbers of non-resident visitors that might generate demand for Butte County-provided services. Based on their own analysis of these reports, the SWC and Metropolitan have concluded that these assumptions are, in fact, quite unreasonable.[156] In addition, the assumptions relied upon by Butte County to estimate the costs for providing the additional level of service necessary to ensure that non-resident visitors do not adversely impact the current level of service provided by the County to its residents are likewise unreasonable, and result in greatly exaggerated cost estimates.

In generating assumptions regarding the population of non-residents to be served, Butte County uses peak period visitor numbers to calculate annual costs. (Butte County incorrectly bases its calculations on its own definition of "recreation days" – as the use of any facility in a

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[154] These are the same claims made by Butte County in its April 21, 2005 Motion, and responded to by DWR on May 3, 2005, *see supra,* n. 8. The Commission responded in a staff letter dated December 22, 2005, of which Butte County sought rehearing, and for which rehearing was rejected, 115 FERC ¶ 61,093 (2006).

[155] *See* December 22, 2005 Commission staff letter to Butte County, filed in the above-captioned docket.

[156] *See generally,* DWR Analysis, *supra,* n. 12, in which DWR independently concludes that Butte County's assumptions are unreasonable.

day by a visitor – rather than as is defined by the Commission consistent with Form 80 requirements, that is, the use of Project facilities during a 24-hour period constitutes a recreation day.) Then, Butte County makes the assumption that providing services to 5,270 non-resident visitors to an area largely devoid of residential or commercial activities, whose average stay is less than eight hours, is reasonably calculated assuming this population is equivalent to a discrete permanent resident community of 5,270 and estimating alleged increased costs by comparison to cities within Butte County, rather than using the current level of service provided by Butte County. This set of assumptions is unreasonable because 89% of both resident and non-resident visitors stay in the area for less than 8 hours, 61% for less than 5 hours,[157] and because in general and state-wide, cities generate greater demand for services that do the unincorporated areas of counties.[158]

For example, Butte County's estimates of costs to provide law enforcement services to visitors are based on comparisons to five cities within Butte County with an average cost of $258,695 to provide law enforcement services to 1,000 residents. Butte County's actual cost for providing these services to its residents is $53,160 per 1,000 residents. Even if the 5,270 non-resident visitors were, in fact, full-time residents, using Butte County's method, the cost estimate for providing the incremental services for those additional 5,270 persons is 486% higher than the amount currently spent by Butte County to provide those services. This number is further exaggerated by assuming that visitors generate the same demand for Butte County services as do residents, when they do not.[159]

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[157] *See* DWR's SP-R13: Final Recreation Surveys (http://orovillerelicensing.water.ca.gov/wg-reports_recreation.html), pp. 5-4 and 5-5.

[158] For example, the level of service the County currently provides for police protection is the fourth lowest of all California Counties. *See Census of Governments*, Volume 4, No. 3 - Finances of County Governments, at Table 13 – Finances of Individual County Governments by State: 2001-02 (U.S. Census Bureau, 2002) (http://www.census.gov/govs/www/cog2002.html).

[159] Critical Assessment, Section 2.1.3, pp. 11-13.

In addition to grossly exaggerating the demands for services and the costs of providing those services, Butte County includes in its impact analysis proposals to provide services that Butte County currently does not provide. For example, Butte County proposes that DWR should pay the County for 24-hour daily Sheriff patrols to protect the Dam from a terrorist attack, requiring an additional six deputy sheriffs and one sergeant, at an estimated initial cost (hiring, training, and equipping staff) of $490,000 and an annual cost of $689,161. DWR currently is addressing safety of the Oroville Project through the retention of a private security contractor, at a cost of about $250,000 a year. Butte County's services have not been deemed necessary by DWR or the State or the Federal Departments of Homeland Security.

### 10. The "Value of Power" Analyses Relied Upon By Butte County Are Materially Flawed.

Butte County alleges that the Application is deficient because it "provides an inadequate assessment of the Project's power generation value."[160] However, the alternative analyses presented by Butte County to support the value of generation from the Project[161] further demonstrates Butte County's reliance on assumptions and conclusions that are completely unreasonable. The conclusions reached by Butte County's power analyst, FMY Associates, Inc.("FMY"), are based on erroneous assumptions and improper use of data, which demonstrate that FMY does not have a grasp of the fundamentals of the California power market or DWR's role in that market. FMY's assessment ("March 2006 FMY Analysis" or "Analysis") is a vain attempt to inflate the value of Oroville Facilities' generation to serve its client's purposes.

The Commission should dismiss Butte County's posited analyses and rely instead on the

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[160] Butte County Comments, p. 91.

[161] *See* Butte County Comments, Exhibit B: FMY Associates, Inc.'s *Analysis of the Annual Value of Oroville Facilities Power Generation* (March 2006) ("March 2006 FMY Analysis"). *See also* January 2006 FMY Analysis, *supra*, n. 119. Because the March 2006 FMY Analysis refers to the Department of Water Resources and the State Water Project collectively as "DWR-SWP," references to DWR in this section will include references to SWP.

information for assessing the annual value of Oroville Facilities power generation presented by DWR in its Application, wherein DWR summarizes its estimate of the annual value of the Oroville Facilities' generation.[162] The total levelized annual net benefit of the Oroville Facilities generation in the no-action alternative presented by DWR is estimated as $50,446,000, a sum which reflects a total annual gross generation benefit of $104,534,000 less levelized annual costs of $54,088,000. DWR based its valuation on energy market forecasts developed by the California Energy Commission ("CEC"), an independent state agency that focuses on energy issues and provides unbiased assessments of the future value of energy in the California power market.

The March 2006 FMY Analysis concludes in the final paragraph "In summary, through our analysis of several different scenarios, our conclusion is that the annual value of the power generated by the Oroville Facilities is currently in the range of $260.0 million per year. This represents the cost that DWR-SWP would reasonably incur to purchase the power that is currently generated by the Oroville Facilities if such generation were not made available through the operation of the Oroville Facilities."[163]

FMY bases this incorrect conclusion on assuming that in the "most representative case," DWR would purchase replacement power equal to the annual net generation of the Oroville Facilities at Pacific Gas & Electric Company's ("PG&E"), January 2006 Large Industrial Rate, E-20. This assumption is absurd. E-20 is a retail rate charged by PG&E to its large commercial and industrial customers; DWR functions as an independent utility in the California market, not as a customer of another utility. DWR interacts with other utilities within California and neighboring states to purchase and sell power in the wholesale market. FMY's lack of

[162] *See* Application at Volume III, Table 6.4-1.
[163] March 2006 FMY Analysis, p. 4.

understanding of this fundamental issue is further illustrated in its description of Case 6:

> It is arguable that Case 6 is the most representative case in terms of the value of the electricity produced by the Oroville Facilities for this case represents what DWR would have to pay for power to move water throughout the SWP system if the Oroville Facilities were not available. This is the analysis DWR seems to imply in Volume I, Exhibit H, Section 3.3 of the PDEA wherein the costs of alternative sources of power are reviewed.[164]

In the PDEA, DWR has correctly referenced supply options that are available to independent utilities to obtain power through either purchase or self-generation. DWR is not "implying," nor did DWR mention in PDEA Section 3.3 that DWR would look to a retail customer rate as an alternative source of power. This concept was introduced in the March 2006 FMY Analysis and can only be attributed to a complete lack of understanding by FMY that DWR participates directly in the wholesale power market and not as another utility's retail customer.

In the first paragraph of its Analysis, FMY states "FMY Associates, Inc. has prepared an analysis of the annual value of the power generation associated with the Oroville Facilities using two basic methodologies. In the first instance, we have analyzed the value of the energy and ancillary services available from the Oroville Facilities, as if they were sold to the market."[165] Then FMY explains its second approach: "The second methodology used by FMY Associates, Inc. to value the power generation benefits of the Oroville Facilities was to consider the value of the energy DWR avoids having to purchase due to the existence of the Oroville Facilities."[166]

FMY presents a total of seven cases in its analysis. FMY summarizes its analysis based on its first approach, value of the Oroville Facilities' generation if sold to the market.[167] FMY also summarizes its analysis based on its second approach, the value of the energy DWR avoids

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[164] *Id.*, p. 3.
[165] *Id.*, p. 1
[166] *Id.*, p. 2.
[167] *Id.*, p. 1, Table 1.

having to purchase due to the existence of the Oroville Facilities.[168] FMY presents four cases for valuing the Oroville Facilities' generation under the first approach, and three cases for the second approach. The seven cases are summarized in Table 1 below.

FMY only reports the gross annual power benefits in its paper. This is misleading since the gross value does not account for any of the generation costs. The levelized net annual power benefit is more representative of costs, since it accounts for the cost of producing the power and the cost of the pumping energy in pumped-storage generation operation. Case 1 in the March 2006 FMY Analysis is simply the value DWR reports for the No-Action alternative in Table 6.4-1 of the PDEA. DWR also presents the levelized net annual power benefit for this case in Table 6.4-1 (*see* Table 1 below). Therefore, Case 1 is the only valid case presented in the March 2006 FMY Analysis, with the levelized net annual power benefit representing a valid estimate of the value of the Oroville Facilities generation.

**SUMMARY OF FMY ASSESSMENT OF OROVILLE FACILITIES POWER BENEFITS**
**(Table 1)**

| FMY Case | Levelized Net Annual Power Benefit | Gross Annual Power Benefit | SWC and Metropolitan Comments |
|---|---|---|---|
| 1 | **$50,446,000** | $104,534,000 | Valid DWR-SWP estimate. See the No-Action alternative in DWR's PDEA, Table 6.4-1. |
| 2 | FMY did not provide | $111,796,560 | FMY inflated estimate of Capacity and Ancillary services value. |
| 3 | FMY did not provide | $171,054,449 | FMY inflated estimate of energy value. |
| 4 | FMY did not provide | $180,871,200 | FMY inflated estimate of energy value. |
| 5 | FMY did not provide | $196,056,000 | FMY improperly used a PG&E Large Industrial Customer retail rate to inflate the energy value. |
| 6 | FMY did not provide | $259,074,000 | FMY improperly used a PG&E Large Industrial Customer retail rate to inflate the energy value. |
| 7 | FMY did not provide | $186,562,576 | FMY inflated estimate of energy value. |

The levelized costs reported in the PDEA for the no-action alternative do not include any costs of new PM&E measures beyond what is currently being provided or arising from existing

[168] *Id.*, p. 2, Table 2.

legal obligations, or any lost generation impacts of the PM&E measures. In addition, the annual net benefit of $50,446,000 will be reduced significantly by the cost of the PM&E measures required by the new license.

FMY's Case 2 increases the annual value of power benefits to $111,796,560. The increased value seems to be based primarily on FMY's calculation of an increased value for Capacity and Ancillary Services.[169] It appears that FMY used the capacity rating of 762 MW over the entire year in recalculating the Capacity and Ancillary Services value. However, using the full capacity rating of 762 MW is not valid because it incorrectly assumes the Project's full capacity is available 100 percent of the time, when the actual capacity factor is considerably lower. FMY's approach also does not account for scheduled and forced maintenance outages or head derating of the Hyatt capacity due to reservoir storage drawdown.

FMY's Case 3 assumptions also are invalid. FMY reports that it determined an energy value from Table 10-4 of DWR's Bulletin 132-04.[170] The energy value was calculated by "dividing the annual value of energy sold by DWR ($56,019,619.52) by the total MWh sold (1,002,494)." In the Application, DWR points out that "the SWP controls the timing of its pumping load through an extensive computerized network. That control system allows DWR to minimize the cost of power it purchases by maximizing pumping during the off-peak periods when power costs are low – usually at night – and by selling power to other utilities during on-peak periods when power values are high."[171] DWR also explains the many constraints placed on Oroville Facilities operation.[172] Not all of the Oroville Facilities generation is produced in the

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[169] The footnote on page 2 of FMY's analysis states "PDEA Table 6.1-2 includes a value of $25.60/kW-Yr for Capacity and Ancillary Services (based on three years historical data: 1999, 2000 and 2002). At 762 MWs of capacity, this would yield a total value of $19,507,200. In PDEA Table 6.4-1, a total value of Capacity and Ancillary Services of $12,800,000 is presented." March 2006 FMY Analysis, p. 2.

[170] *Id.*, p. 2.

[171] Application, Exhibit H, Section 1.4.

[172] Application, Exhibit H, Section 1.3.

on-peak periods. Energy generated at the Oroville Facilities during off-peak periods would be used primarily to serve load and not sold into the energy market. FMY's approach does not account for Oroville Facilities off-peak generation used to serve SWP pumping loads.

In Case 4, FMY relies on an estimate of market energy value that FMY developed for use in Section IV, Estimates of Financial Impacts from FMY's "Socio-Economic Impacts of the Oroville Facilities Project on Butte County, California January 2006" report. FMY's development of the market value of energy in its report is at best a superficial exercise. The technical merits of FMY's approach pale in comparison to the rigorous development of market price estimates developed by the CEC. DWR has relied on the forecast from the CEC in developing its estimate of the value of power generated at the Oroville Facilities. This estimate is repeated in the FMY Analysis as Case 1.

FMY attempts to report the value of the Oroville Facilities generation based on considering "the value of energy DWR avoids having to purchase due to the existence of the Oroville Facilities."[173] FMY goes on to state that "[i]n our opinion, this is the most proper approach in valuing the energy generated by the Oroville Facilities."[174] The value of Oroville Facilities generation is exactly what DWR captured in their assessment that is reported in Table 6.4-1 of the PDEA, and repeated as Case 1 in the FMY Analysis. The market value of the energy is a valid and often-used measure for valuing the generation of a power facility.

As discussed above, FMY's Cases 5 and 6 are based on power values from a PG&E rate schedule for large industrial and commercial retail customers. This approach is totally inappropriate and points to FMY's lack of understanding of the workings of the power industry. In Case 7, FMY again uses a superficial argument to increase the calculated value of energy

[173] March 2006 FMY Analysis, p. 2.
[174] *Id.*

from the project. The Commission should look past these diversionary tactics and rely on the findings in Case 1. Case 1 reports DWR's assessment of the energy value of the Oroville Facilities based on independent CEC-derived energy market costs.

FMY then introduces "another approach to analyzing the value of the Oroville Facilities."[175] In the discussion of this approach, FMY confuses the value of generation from the Oroville Facilities with the cost of alternatives sources of power. DWR reports on the cost of alternative power sources in its Application.[176] The alternative supply costs reported by DWR[177] were taken directly from the CEC's August 2003 report "Comparative Cost of California Central Station Electricity Generation Technologies."[178] It is interesting that FMY accepts the CEC assessment when the CEC assessment appears to support FMY's arguments, but has also gone through extensive efforts to artificially inflate energy market prices above CEC-derived energy market values when the use of CEC information works against FMY's arguments.

The Commission should note the subtle difference between the value of Oroville Facilities generation and the cost of alternative supply sources. Without the Oroville Facilities generation, DWR would look to sources of power with distinctly different generating patterns than the Oroville Facilities. The generation pattern of the Oroville Facilities is significantly constrained by physical, hydrologic, environmental, flood control and other demands on this multipurpose project. If the Oroville Facilities were not available, DWR would move to obtain sources of power that directly supported the SWP pumping needs, rather attempting to produce a generation pattern that mimics the generation pattern of the Oroville Facilities. The market-based derivation of the value of Oroville Facilities generation which is repeated as Case 1 in the

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175 *Id*., p. 3.
176 Application, Exhibit H, Section 3.3.
177 Application, Exhibit H, Table H.3.3-1.
178 CEC Staff Report, Publication No. 100-03-001 (August 2003), pp. 3, 11.

March 2006 FMY Analysis is a valid approach for assessing the value of Oroville Facilities generation.

In summary, the Commission must dismiss FMY's attempt to inflate the value of Oroville Facilities generation. DWR has supplied the Commission a valid assessment of the value of the Oroville Facilities generation based on future energy values derived by the CEC. FMY has attempted to provide justification for inflating the value of Oroville Facilities generation. Rather than accomplishing this goal, FMY has demonstrated a lack of understanding and knowledge of DWR and the power market in general. The Commission must also look past FMY's attempt to focus solely on the gross benefits of Oroville Facilities generation and instead look to the net benefits of the facilities, as DWR did in its summary of estimates of annual benefits and costs in its Application.[179]

## B. FLOOD CONTROL AND DAM SAFETY

### 1. Intervenors' Comments.

On October 17, 2005, Friends of the River, Sierra Club, and the South Yuba River Citizens League ("FOR") filed a joint motion to intervene in this proceeding, requesting the Commission to require DWR to "armor or otherwise construct the ungated spillway and to make any other needed modifications so that the licensee can safely and confidently conduct required surcharge operations consistent with the Corps of Engineers Oroville Dam Reservoir Regulation Manual," and to direct DWR to work directly with the Corps and other interested parties to improve the plan of floodwater management operations at the Project.[180] On March 15, 2006, County of Plumas and Plumas County Flood Control & Water Conservation District ("Plumas County") filed a motion to intervene in this proceeding, also requesting that the Commission

[179] PDEA, Table 6.4-1.

[180] *See* Motion to Intervene of Friends of the River, Sierra Club, South Yuba River Citizens League ("FOR Comments"), pp. 9-10.

address issues of flood control and levee improvements, among other things.[181] On March 22, 2006, the County of Sutter, the City of Yuba City, and Levee District No. 1 of Sutter County ("Sutter County/Yuba City") filed a motion to intervene in this proceeding, requesting that the Commission in the licensing order direct DWR to make a formal request to the Corps to develop a revised operational plan to establish flood-control management on the Feather River system that accounts for the absence of Marysville Dam, and full regulation of the Yuba River, to direct DWR to investigate the adequacy and integrity of Oroville Dam's ungated auxiliary spillway and the adequacy and integrity of the levees on the Feather River, and to correct any deficiencies found therein.[182] On March 31, 2006, American Rivers, American Whitewater, and the Chico Paddleheads ("American Rivers") filed a motion to intervene in this proceeding, supporting the PM&E measures included in the Settlement but citing Friends' Comments and the Sutter County/Yuba City Comments regarding the current flood control-related operations and facilities at the Project as proposals the Commission must address.[183] Butte County also contended that it received little benefit from the Project's current flood controls.

**2. Intervenors' Flood Control Arguments Are Misdirected and Unsupported.**

*a. Relationship Of Flood Operations To Downstream Levees.*

Sutter County/Yuba City implies that failure of the levees in the Marysville area downstream of Oroville Dam in 1997 ("1997 Flood Event") was due to Oroville Dam

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[181] *See* Motion to Intervene on Application for New License by County of Plumas and Plumas County Flood Control & Water Conservation District ("Plumas County Comments"), p. 1. Plumas County also requested the Commission address in the license a plan for adequate cold water reserves, fish passage, and the potential effects of climate change on water supply and flood control.

[182] *See* Motion to Intervene of the County of Sutter, the City of Yuba City, and Levee District No. 1 of Sutter County ("Sutter County/Yuba City Comments"), as amended March 24, 2006, pp. 9-10.

[183] *See* Motion to Intervene of American Rivers, American Whitewater, and the Chico Paddleheads ("American Rivers' Comments"), p. 4.

operations.[184] FOR makes similar implications.[185] On March 19, 1997, testimony was given in hearings before Congress regarding the 1997 Flood Event that asserted that the levee was known to be in poor condition, was scheduled for rehabilitation in 1998, and that lack of structural integrity was the primary cause for levee failure in that instance.[186] DWR also reported that flood waters were about four feet below the crest of the levees in the Marysville area when the levee broke in 1997, suggesting that quantity of flow in the river was not the principal cause of levee failure.[187] Sutter County/Yuba City implies that the non-flood releases of water from Oroville Dam cannot be constrained within the natural river banks, and that the licensee should bear some responsibility for maintenance of those levees, but has not entered any evidence into the record to support this assertion.[188] A DWR study reports that "bankfull" discharge for the high-flow reach of the river is 26,000 cfs – well over the releases during non-flood periods.[189]

Sutter County/Yuba City asks the Commission to direct DWR to request that the Corps revise the operations plan and set criteria for that plan "to establish flood-control management on the Feather River system that accounts for the absence of Marysville Dam and full regulation of the Yuba River *without the necessity for surcharge operations of or at Project 2100-52 above the gated spillway.*"[190] FOR claims that use of the emergency spillway under the current operations plan poses a risk to downstream levees, but requests that future operation include "*required surcharge operations consistent with the Corps of Engineers Oroville Dam Reservoir*

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184 Sutter County/Yuba City comments, p. 7.
185 FOR Comments, pp. 15, 22.
186 *See* Hearing Transcript, at http://www.loc.gov/rr/law/floods105-11.pdf, pp. 47-8.
187 *See* DWR letter to Sacramento Bee, *supra,* n. 135.
188 Sutter County/Yuba City Comments, p. 7.
189 *See* DWR's *SP-G2: Effects of Project Operations on Geomorphic Processes Downstream of Oroville Dam – Task 5 - Dam Effects on Channel Hydraulics and Geomorphology and Task 8 -Summary and Conclusions* (July 2004), p. 6-4; and DWR's *Initial Information Package* (January 2001), p. ES-10.
190 Sutter County/Yuba City Comments, p. 9 (emphasis added).

*Regulation Manual*"[191] – a request that is directly counter to Sutter County/Yuba City's views. Both Sutter County/Yuba City and FOR request that the review be undertaken immediately and not await issuance of a new license, and FOR requests that FERC establish a deadline for the licensee to complete a review that the Corps is charged by Congress to conduct.[192]

In 1970, the Corps had stated that "Complete protection on the Yuba River is not possible without the authorized Marysville Reservoir,"[193] suggesting that re-operation or reconfiguration of Oroville Dam cannot be expected to compensate for failure to construct Marysville Dam, as Sutter County/Yuba City requests. There are apparent differences of opinion between Sutter and FOR with respect to spillway operations. There will likely be conflicts between other beneficial uses of the reservoir such as access to cold water for anadromous fish, access to the reservoir for recreation, power generation, and water supply. The SWC and Metropolitan urge that any review of the flood operations for Oroville Dam be considered through established Corps processes for addressing regional changes in flood management. Further, the Commission should reject Sutter County/Yuba City's transparent attempt to shift their responsibility for levee maintenance costs to DWR.

*b.* *Dam Safety Reviews Occur Routinely.*

Sutter County/Yuba City asks that FERC order a review of emergency spillway integrity in the face of potential large flood events similar to recent historic floods.[194] In the same filing, Sutter County/Yuba City acknowledges that use of the emergency spillway does not pose a risk to dam safety, and that their concern is related to flood operations and damage from erosion resulting from emergency spillway flows, but Sutter County/Yuba City have not offered any

[191] FOR Comments, p. 8 (emphasis added).
[192] *See, e.g.,* Flood Control Act of 1944.
[193] 1970 Corps Report, p. 3.
[194] Sutter County/Yuba City Comments, p. 9.

evidence to cast doubt on the integrity of the hillside downstream of the emergency spillway.[195] FOR makes a similar request, but alleges that flows over the emergency spillway do pose a risk to dam safety.[196] FOR also questions the adequacy of the emergency spillway but fails to identify how the design fails to meet any of the three FERC criteria cited.[197]

FOR draws a comparison between the impacts experienced in New Orleans as a result of Hurricane Katrina in 2005 and the potential for flood impacts downstream of Oroville Dam in the event that the dam fails.[198] Butte County also asserts that the project has created a risk of flooding in the event of dam failure.[199] Neither FOR nor Butte County have offered any evidence to support speculation that dam failure is likely to occur.

The emergency spillway was designed to safely convey the Probable Maximum Flood ("PMF"),[200] and DWR has reviewed and confirmed the efficacy of the PMF hydrologic analysis for Oroville Reservoir.[201] Oroville Dam is inspected annually by the Commission's San Francisco regional office under current regulations and dam safety requirements, under the required five-year Independent Engineer inspection and review, and under the Commission's Part 12 follow-up requirements that licensees address any observed problems. Licensees are required to address any identified safety-related issues within strictly imposed schedules. Structural integrity of the spillway is reviewed annually by the Commission, and at five-year increments by the Part 12 Independent Engineer under the current and new licenses. Any review of required permanent changes to the emergency spillway that might be prompted by future operations decisions would be addressed by the Commission, the Part 12 Independent Engineer

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195 Sutter County/Yuba City Comments, p. 6.
196 FOR Comments, pp. 9, 14.
197 FOR Comments, pp. 21, 19.
198 FOR Comments, p. 18.
199 Butte County Operational Study, pp. 49-50.
200 1970 Corps Report, p. 13.
201 *See* SP-E4, *supra,* n. 121, at p. 12-1.

inspection, and also by the Corps under its role in flood event operations discussed above.

*c.* *Yuba County Water Agency Memo.*

FOR cites an August 2002 Yuba County Water Agency ("YCWA") *Technical Memorandum on Controlled Surcharge of Lake Oroville For Additional Flood Control*[202] as the basis for many of their assertions regarding Oroville Dam flood operations, but the cited memo is nowhere to be found in the record in this proceeding. The Commission should either seek to have the YCWA memo included in the record or to consider the information as anecdotal and without technical merit.

*d.* *"Issue Sheet" References Are Unsupported.*

FOR recounts the history of flood operations in 1997 and attributes those statements to DWR in the reference to "*Oroville Facilities Relicensing, Engineering and Operations Work Group — Issue Sheet Development*, revised May 21, 2001. (EE56)".[203] It should be understood that issues listed in "issue sheets" developed as part of the Alternative Licensing Process ("ALP") for the Oroville Project were the Licensee's efforts to capture in writing descriptions of issues raised by individual ALP participants, and suggested for analysis in work group discussions and during the scoping process. Statements made in the issue sheets should not be construed to be factual or to reflect the beliefs of other parties to the relicensing process.

*e.* *Effects Of Climate Change On Flooding.*

Plumas County cites the possibility that climate change will have an effect on the potential for increased flood frequency and flows.[204] FOR cites the potential implications of

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202 FOR Comments, pp. 8, 9, 13, 15.

203 FOR Comments, p. 14. *See* Issue Sheet EE56 at DWR's *Final Scoping Document* (September 2002) (http://orovillerelicensing.water.ca.gov/nepa_final_scoping_doc.html), Appendix B, p. B-11.

204 Plumas County Comments, p. 2.

hydrologic uncertainties for safety of the gated spillway.[205] While a consensus has developed in the scientific community that climate change is likely occurring due to increased emission of greenhouse gases from the combustion of fossil fuels and other factors, most experts agree that a great deal of uncertainty exists regarding the global extent, scope, and timing of future climate change effects. As a consequence, there is even more uncertainty regarding climate change effects within a particular region or river basin. Therefore, analysis of river basin effects would be wholly speculative and would not provide useful information at this time. Should major changes in Feather River basin hydrology occur in the future due to climate change, these issues can be analyzed and addressed at that time under FERC's ongoing regulatory role, including its authority to reopen a license.

*f. Flood-Related Damage Is A Matter Of State Law.*

Finally, in the event that the Commission considers the various intervenors' allegations that DWR should be responsible for potential flood-related damage, the Commission must leave this matter to the state courts. In *South Carolina Public Service Authority*, the U.S. Court of Appeals for the D.C. Circuit held that, while the "agency authorized to regulate in the interest of safety has interpreted that authority to support a compensation scheme," the liability of licensees "for damages caused by their projects is a matter left by Congress to state law."[206] The Idaho U.S. District Court cited *South Carolina Public Service Authority* in *Nez Perce Tribe v. Idaho Power Co.*, noting that the legislative history of Section 10 of the FPA is representative of Congress' determination not to impinge on states' jurisdiction, and that Congress did not intend for the determination of licensee liability for property damages to be made in federal court:

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[205] FOR Comments, p. 21.

[206] *South Carolina Pub. Serv. Auth. v. Fed. Energy Reg. Comm'n*, 850 F.2d 788, 792, 795 (D.C. Cir. 1988).

"Instead, Congress intended that such a determination would 'remain under the jurisdiction of the States," and would be decided exclusively by state courts applying state tort law."[207]

## C. WATER TEMPERATURE AND IRRIGATION

### 1. Irrigation Districts' Motion to Intervene.

On February 13, 2006, the Western Canal Water District, Richvale Irrigation District, Butte Water District, Biggs-West Gridley Water District, and Sutter Extension Water District (collectively as "Irrigation Districts") filed a joint motion to intervene in this proceeding in opposition to the Application. The Irrigation Districts request that the Commission direct DWR to study, propose, and implement in a single plan the operational and structural means to meet both the cold-water fishery objectives of the Settlement and to restore the Irrigation Districts' water supply as near as possible to pre-Project temperatures.[208] Alternatively, the Irrigation Districts request that the Commission require DWR to conduct a study of this issue prior to relicensing or include in the new license a requirement that such a study occur.[209]

The Commission must deny the Irrigation Districts' requests on the following grounds:

- The requests involve the resolution of the ostensible water rights claims of the Irrigation Districts under state water law and therefore are not subject to FERC jurisdiction pursuant to the requirements of Section 27 of the FPA, 16 U.S.C. § 821 (2000).

- The requests involve the resolution of contract rights of the Irrigation Districts under state contract law and therefore are not subject to FERC jurisdiction.

- The requests are a claim for money damages that must be denied by the Commission because the Commission is without authority to award damages.

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[207] *Nez Perce Tribe v. Idaho Power Co*., 847 F. Supp. 791, 798 (D. Idaho 1993).

[208] *See* Motion to Intervene of Western Canal Water District, Richvale Irrigation District, Butte Water District, Biggs-West Gridley Water District, Sutter Extension Water District ("Irrigation Districts' Comments"), p. 4.

[209] Irrigation Districts' Comments, pp. 14-15.

- The request that a study of the issues raised by the Irrigation Districts be required prior to relicensing is an improper late-filed study request that must be denied.

- If the requests are somehow construed by the Commission to be proper requests for mitigation they must be denied as counter to the public interest under Section 10(a) of the FPA.

- Regardless of what legal standard is applied to the Irrigation Districts' requests or how they are construed by the Commission they fail on substantial evidence grounds, in that (a) the Irrigation Districts' studies to date are not conclusive regarding cold water impacts from the project (b) the Irrigation Districts have not produced a credible study that proves they have suffered significant impacts from cold water or that whatever impacts may have resulted can be extrapolated to be district-wide impacts, (c) water temperatures have been mandated colder by Federal (USFWS and NMFS) and State agencies (CDFG) for the protection of more sensitive beneficial uses that are entitled to priority, and (d) the record indicates that even in the event a solution were sought, there is no practical physical modification currently known that would provide the Irrigation Districts with water temperatures within the range they are requesting.

### 2. The Irrigation Districts' Requests Involve The Adjudication Of Ostensible Water Rights Under State Water Law, And Are Not Subject To FERC Jurisdiction.

It is a fundamental principle of the FPA that the Commission does not have jurisdiction over water rights under state water law. Section 27 of the FPA states:

> …nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[210]

As a consequence "the Commission lacks the authority to adjudicate water rights[.]"[211]

Although the Irrigation Districts purport to be requesting mitigation under the "comprehensive development" standard of Section 10(a) of the FPA, at its core their request seeks adjudication by the Commission of their rights to water of a certain quality. The Irrigation

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[210] 16 U.S.C. § 821 (2000).
[211] *City of Tacoma*, 110 FERC 61,239, at 61,883 (2005).

Districts' own motion to intervene strongly supports this conclusion through its extensive discussion and repeated references to the water they diverted historically.[212]

In addition to being directly counter to the clear strictures of Section 27 of the FPA, an attempt by the Commission to resolve the water right issues raised by the Irrigation Districts would set a dangerous precedent in support of Commission adjudication of state water rights. Indeed, the SWC and Metropolitan are surprised that irrigation districts would advocate this type of federal interference in a state water rights matter. Such a precedent would further complicate an already exceedingly complex California water regulatory climate in a manner that would be counter to the common interests of the Irrigation Districts, the SWC, and Metropolitan.

### 3. The Irrigation Districts' Requests Involve Resolution Of The Contract Rights of the Irrigation Districts Under State Contract Law And Therefore Are Not Subject To FERC Jurisdiction.

When the Oroville Project was constructed, the Irrigation Districts apparently were concerned that there might be an adverse impact on their water rights and on the temperature of the water they divert for rice farming. As a result, the Irrigation Districts entered into contracts with DWR that provided that construction of the dam and related facilities would not waive whatever rights the Irrigation Districts might have for water of a certain temperature.[213] However, these "Diversion Agreements" did not toll any statute of limitations or otherwise preserve any rights. Nevertheless, it is apparent the Irrigation Districts believe there is some right preserved by these agreements.[214] As such, these agreements raise issues under California contract law and should be resolved, if at all, in state court.

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[212] *See* Irrigation Districts' Comments, pp. 5-8.

[213] *See* citations to 1969 DWR-Joint Water Districts agreement, 1986 DWR-Western Canal WD agreement, Irrigation Districts' Comments, p. 10, n. 11.

[214] *See* Irrigation Districts' Comments, pp. 5-8.

The Commission has a long-standing policy of not involving itself in private contractual matters, even where its jurisdiction might be implicated. In *Arkansas Louisiana Gas Co. v. Hall*, the Commission noted that whether it should assert jurisdiction over contractual issues otherwise litigable in state courts depends on three factors:

> Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[215]

Because the diversion agreements are contracts litigable in state courts, are agreements regarding rights related to the quality of water, a subject of state jurisdiction and upon which the Commission has no greater expertise, and because Commission jurisdiction is not necessary either for uniformity of interpretation (they are unique and circumstance-specific) or important to the regulatory responsibilities of the Commission, the diversion agreements are not properly before the Commission in the relicensing proceeding.

The issue of water temperature and alleged damages to rice production was resolved under the original license for the Project, and by contract in the Diversion Agreements between the Irrigation Districts and DWR. The temperature/rice productivity issue should be resolved in the same manner at relicensing. It was not an issue for the Commission's predecessor to resolve under Section 10(a) at original licensing nor is it a Section 10(a) issue at relicensing.[216]

#### 4. The Irrigation Districts' Requests Are A Claim For Money Damages That The Commission Is Without Authority To Award.

As discussed at length in the SWC's and Metropolitan's reply to issues raised by Butte County, **"**[i]t is well established that the Commission has no authority to adjudicate claims for, or

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[215] 7 FERC ¶ 61,175, at 61,322 (1979).

[216] However, if the ultimate resolution of this issue leads to a settlement or state court decision requiring that the licensee apply to the Commission to amend its license in order to implement a modification to the Project, then FERC's jurisdiction would be implicated.

require payment of, damages."[217] Notwithstanding the Irrigation Districts' efforts to cast their claim as a request for mitigation, it is clearly a request for damages that is not subject to Commission jurisdiction. The Irrigation Districts' own 1969 and 1987 water diversion contracts with DWR, which they cite in their filing, dictate this conclusion. The 1969 contract provides:

> This Agreement does not relieve State or its officers, agents or employees from *liability to or from damages* to Districts or third parties arising…from *injurie*s to crops or production of corps due to reduction in temperature of water available to Districts…Nothing in this Agreement shall be construed as an *admission* by State that a reduction in the temperature of water available to Districts will in fact cause *injur*y to crops or production of crops.[218]

Similarly, the 1987 contract states, "Nothing contained herein shall relieve the State from, or impose upon Western, any *liability* for the quality or temperature of water released by State from the Oroville-Thermalito Project or delivered to Western hereunder."[219]

The use of the terms "liability," "damages," "admission," and "injury" in the contracts clearly indicates that the mutual expectation of the Districts and DWR was that this issue would be resolved as a matter of state law with no role whatsoever for FERC's predecessor, the Federal Power Commission. (The SWC does not concede any liability to the rice farmers in a state court proceeding.) Consistent with the applicable law, the Irrigation Districts and DWR did not draft this contract to provide that the Commission's predecessor agency was responsible for prescribing "mitigation" pursuant to Section 10(a) of the FPA.

Perhaps understanding that their remedy lies in what they term a "contract damages case" the Irrigation Districts argue that it is not desirable for their concerns regarding alleged water temperature to be resolved under state law because of the complications associated with

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[217] *See* discussion *supra,* at Section II.A.3.

[218] Irrigation Districts' Comments, p. 10, n. 11 (emphasis added) (citing Article 6, "Agreement of Diversion of Water from the Feather River," dated May 27, 1969).

[219] *Id.* (emphasis added) (citing Article 4(c), "Agreement of Diversion of Water from the Feather River," dated January 17, 1967).

litigation.[220] The Commission should pay no heed to this argument. That the Irrigation Districts prefer this issue to be addressed by the Commission does not give the Commission authority to adjudicate either damages claims or water rights under state law. If such reasoning had any legal import, then the Commission's jurisdiction would expand based on the mere fact that a party desires a remedy from the Commission, an absurd and unlawful result.

DWR, the SWC, and Metropolitan all have offered to work with the Irrigation Districts to try to resolve this issue through a negotiated settlement. Extensive discussions already have occurred and could be continued. DWR, the SWC, and Metropolitan have been attempting to work with the Irrigation Districts to reach a negotiated solution that is in the mutual interests of all parties.

**5. The Irrigation Districts' Request That A Study Be Required Prior To Relicensing Is An Improper Late-Filed Study Request.**

The Irrigation Districts' filing requests that "before the Commission acts on DWR's relicense application, the Commission require DWR to complete the process of evaluating proposed physical and operational solutions to the temperature issue…."[221] This request for an additional study must be denied because the Commission's rules provide that a request for an additional study must be filed within 60-days after an application is filed.[222] In addition, in an Alternative Licensing Process ("ALP") such as the process used in this proceeding, "additional requests for studies may be made to the Commission after the filing of an application only for good cause shown."[223] DWR filed its Application on January 26, 2005, and the Irrigation Districts' study request was not filed until over a year later, on February 13, 2006. In addition,

[220] Irrigation Districts' Comments, p. 14.
[221] Irrigation Districts Comments, p. 15.
[222] 18 C.F.R. § 4.32(b)(7).
[223] 18 C.F.R. § 4.34(i)(6)(v).

the Irrigation Districts mention no "good cause" for the late filing of their request. Accordingly, the Commission should reject the Irrigation Districts' study request as improper and untimely.[224]

### 6. If The Irrigation Districts' Requests Are Somehow Construed By The Commission To Be Proper Requests For Mitigation, They Must Be Denied As Counter To The Public Interest Under Section 10(a) Of The FPA.

The Irrigation Districts claim that the Commission's obligations under the Section 10(a)(1) "comprehensive development/public interest mandate" can be "fulfilled in this proceeding by requiring DWR to study, propose, and implement, in one plan, the operational and structural means both to meet the cold-water fishery objectives of the settlement and to restore the Districts' water supply as near as possible to pre-Project temperatures."[225] In fact, the comprehensive development/public interest standard dictates the exact opposite result.

The comprehensive relicensing settlement filed by DWR on March 24, 2006, with the support of 51 other parties, including SWC and Metropolitan, appropriately balances all of the relevant factors to be considered under the comprehensive development standard, including irrigation interests. One of the core provisions of the Settlement is a series of measures to provide colder water for the benefit of salmonids. In addition to helping to satisfy Section 10(a) of the FPA, these provisions are integral to the Oroville Project achieving full compliance with landmark environmental statutes such as the Clean Water Act[226] and the Endangered Species Act.[227]

The Irrigation Districts apparently do not seek a direct reversal of the cold water provisions of the Settlement. However, if their requests were granted by the Commission, it is certain that they would greatly complicate and increase the costs of the already-challenging task

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[224] The Irrigation Districts also did not avail themselves of the opportunity under the Commission's ALP rules to request a study during the pre-filing process, which they participated in. 18 C.F.R. § 4.34(i)(6)(vii).
[225] Irrigation Districts' Comments, p. 4 (emphasis in original).
[226] 33 U.S.C. §§ 1251, *et seq.* ("CWA")
[227] 7 U.S.C. § 136; 16 U.S.C. §§ 460, *et seq.* ("ESA").

of achieving the important cold water goals mandated by the provisions of the Settlement. Therefore, it would be fundamentally counter to the public interest for the Commission to disrupt the water temperature centerpiece of the Settlement by overlaying it with a requirement that the licensee warm the same water that it is otherwise directed to cool for the benefit of aquatic species.

It also would be counter to the public interest for the Commission to require the DWR to remedy, at great cost, an alleged problem that arises in connection with efforts to comply with the mandates under the FPA, CWA and ESA to provide colder water for the benefit of salmon and steelhead. It is simply unfair to require a licensee to solve an alleged water temperature problem that has occurred due to requirements of the regulatory agencies as part of the relicensing process.

Moreover, the Commission is without authority under Section 10(a) to grant the Irrigation Districts' requests because the nature and cost of the "mitigation" they seek is completely unknown. To date, no reliable study has demonstrated whether or to what extent the temperature of water from the Thermalito Afterbay has an adverse impact to the rice production of these particular rice growers, whether compared to pre-Project, current, or future conditions.[228] In addition, if there were an adverse impact, the Irrigation Districts have not demonstrated any reasonable, practicable, or implementable means for increasing the temperature of the water used by the Irrigation Districts. Certainly, no reference to any specific practical solution to the alleged problem is made in the Irrigation Districts' filing. It is likely that measures to increase water temperature would involve very costly structural and/or operational modifications to the Project that would adversely impact other key interests that the Commission

[228] *See* DWR's "Response to Intervention filed by Western Canal Water District and Joint Water Districts Board – Technical Issues," May 2006, filed as an exhibit to DWR's responsive brief filed May 26, 2006.

is charged with balancing under Section 10(a), including the generation of power, fish and wildlife, flood control and water supply. Based on presently available information, it is also likely that no practical solution will increase water temperatures to the levels sought by the Irrigation Districts. Therefore, it is simply impossible for the Commission to conclude that the requests sought by the Irrigation Districts are consistent with the public interest requirements of Section 10(a).

In conclusion, the Commission should reject the Irrigation Districts' request to mitigate for alleged water temperature damage because this is a matter that is not jurisdictional to the Commission, it involves an improper late-filed study request, is not in the public interest pursuant to Section 10(a) of the FPA, and is not supported by substantial evidence.

## D. CULTURAL RESOURCE AND TRIBAL RESOURCE PROTECTION

### 1. Intervenors' Comments.

Various parties filed motions to intervene and comments on protection of cultural resources and Native American tribal resources within the Project boundaries and in the surrounding communities. On June 8, 2005, Enterprise Rancheria ("Enterprise") filed a motion to intervene, which set forth its interest in the relicensing as a number of allegations of past harms committed upon the Enterprise Rancheria, but did not request any specific relief.[229] On February 8, 2006, the Berry Creek Rancheria ("Berry Creek") filed a motion to intervene and comments, requesting protection of cultural resources in the Foreman Creek area by restricting recreational use and public access, but indicating that it had no objection to the use of the same

[229] *See* Motion of the Enterprise Rancheria to Intervene ("Enterprise Rancheria Comments"), pp. 4-5. *See also* separately-filed Settlement comments of Enterprise Rancheria (May 2, 2006).

area for water supply and generation purposes.[230] Berry Creek also requested the Commission grant it a cultural resource protection easement so that Berry Creek might restrict public access to the Foreman Creek area, and requested the Commission require DWR to pay for the costs Berry Creek incurs in restoring and reburying artifacts and remains and for guarding the Foreman Creek area.[231] On March 30, 2006, the Mooretown Rancheria ("Mooretown") filed a motion to intervene, setting forth its interest in the proceeding, and requesting that the Commission's orders "address the issues raised by or relating to Indian Tribes," especially substantive protection of cultural resource in the Foreman Creek area.[232] Also on March 30, 2006, the Mechoopda Indian Tribe of Chico Rancheria ("Mechoopda") filed a motion to intervene, requesting protection of tribal cultural resources, and noting the Memorandum of Understanding ("MOU") proposed by DWR for implementation of a plan to repatriate remains held by the Department of Parks and Recreation ("DPR"), and Mechoopda's request to participate in the establishment of a curation facility, and on the Project's ecological and recreation advisory committees without the requirement that they be signatories to the Settlement.[233] And on March 31, 2006, the Kon Kow Valley Band of Maidu ("Kon Kow") filed a motion to intervene in the proceeding, providing generic support for the Application and the Settlement.[234]

**2. The Negotiated Settlement Responds To The Intervenors' Concerns.**

The SWC and Metropolitan believe that the negotiated Settlement responds to the various concerns raised by the intervenors who provided comments on protection of tribal and cultural

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230 *See* Motion to Intervene and Comments of Berry Creek Rancheria of Maidu Indians of California ("Berry Creek Comments"), p. 5. *See also* separately-filed Settlement comments of Berry Creek and Mooretown Rancherias (April 26, 2006).

231 Berry Creek Comments, pp. 6, 10-14.

232 Motion of the Mooretown Rancheria to Intervene ("Mooretown Comments"), p. 4. *See also* separately-filed Settlement comments of Berry Creek and Mooretown Rancherias (April 26, 2006).

233 *See* Motion to Intervene and Comments of the Mechoopda Indian Tribe ("Mechoopda Comments"), pp. 5-6.

234 *See* Motion to Intervene of Kon Kow Valley Band of Maidu, p. 2.

resources in or near the Project boundaries, whether those comments were filed prior to or in response to the execution and filing of the Settlement itself. The Settlement contains a Historic Properties Management Plan ("HPMP") as required by Section 106 of the National Historic Preservation Act,[235] which addresses the management of a diverse array of cultural and historic resources included in the Project area and establishes a Cultural Resources Consultation Group, which was developed with input from the U.S. Forest Service, the Bureau of Land Management, the Department of Parks and Recreation, and the local Maidu Tribes, and which will be submitted to the State Office of Historic Preservation for approval upon finalization. The Settlement also recognizes the presence of cultural resources at Foreman Creek, and provides that DWR will develop a plan to improve and redirect recreation usage to protect those resources. The SWC and Metropolitan support the preservation of tribal and cultural resources and the participation of the local Tribes, and believes that the Settlement takes a reasonable approach to meeting those goals.

## E. RECREATION AND TRAIL USE

### 1. Intervenors' Comments.

Various parties filed motions to intervene and comments on recreation and trail usage within the Project boundaries and in the surrounding communities. Most of these intervenors filed comments favorable to the Settlement. Some opposed the provisions in the Recreation Management Plan regarding trail use. Intervenors include equestrian interests,[236] cyclists and

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[235] 16 U.S.C. §§ 470 *et seq*., regulations at 26 C.F.R. Part 800.

[236] *See* Interventions and Comments of Action Coalition of Equestrians, Back Country Horsemen of California, California Equestrian Trails and Lands Coalition, Chico Equestrian Ass'n, Equestrian Trail Riders, Equestrian Trails, Inc., Golden Feather Riders, Inc., Oroville Pageant Riders, Paradise Horsemen's Ass'n, Concerned Individuals (March 31, 2006); California State Horsemen's Ass'n (March 31, 2006); California State Horsemen's Ass'n – Region 2 (March 31, 2006). *See also* the separately-filed Settlement comments of the same parties.

mountain bikers,[237] anglers,[238] government entities,[239] and private citizens,[240] all with varying interests and levels of involvement in the relicensing process. Many individuals, organizations, and other government and non-government entities filed comments only on the Settlement, without formally intervening in the proceeding.[241]

### 2. The Negotiated Settlement Adequately Responds To The Intervenors' Concerns.

The SWC and Metropolitan believe that the negotiated Settlement responds to the various concerns raised by the intervenors who provided comments on recreation and trail use in or near the Project boundaries, whether those comments were filed prior to or in response to the execution and filing of the Settlement itself. The Settlement contains a negotiated and detailed Recreation Management Plan ("RMP")[242] that includes PM&E measures to improve recreational resources associated with the Project, and the establishment of a Recreation Advisory Committee ("RAC") including local governments, local interest groups, relevant state agencies and DWR, among others, to advise DWR on implementation of the RMP. The SWC and Metropolitan

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237 *See* Interventions and Comments of International Mountain Bicycling Ass'n (March 30, 2006); Lake Oroville Bicyclist Organization/Lyle Wright (February 21, 2006 and March 31, 2006). *See also* the separately-filed Settlement comments of the Lake Oroville Bicyclist Organization (April 15, 2006, April 26, 2006).

238 *See* Interventions and Comments of Anglers' Committee, Baiocchi Family, Butte Sailing Club, Butte County Taxpayers for Fair Government, Butte County Taxpayers Ass'n, Lake Oroville Fish Enhancement Committee (December 16, 2005, as amended January 3, 2006). *See also* the separately-filed Settlement comments of the above parties (April 17, 2006).

239 *See* Intervention and Comments of U.S. Department of the Interior (March 29, 2006).

240 *See* Interventions and Comments of Ronald E. Davis (March 31, 2006), Michael J. Kelley (November 11, 2005), George Weir, Vicki Hittson-Weir, Pathfinder Quarter Horses (March 31, 2006). *See also* the separately-filed Settlement comments of George Weir and Vicki Hittson-Weir (April 2, 2006).

241 *See, e.g.,* Settlement comments of: California State Senator Sam Aanestad (March 22, 2006); City of Oroville (March 30, 2006, April 19, 2006, and Motion to Intervene Out of Time filed May 1, 2006); Oroville Economic Development Corp. (March 30, 2006); Oroville Redevelopment Agency (March 30, 2006); Cathy Hodges (March 31, 2006, April 26, 2006); Town of Paradise (April 25, 2006); Sutter County (April 24, 2006); California State Water Resources Control Board (April 26, 2006, comments withdrawn May 4, 2006); Butte County (April 26, 2006); D.C. Jones (April 26, 2006); Patrick Porgans (April 26, 2006); Feather River Recreation and Park District (May 11, 2006).

242 *See* Settlement Agreement Recreation Management Plan ("RMP"), filed in the instant docket on March 28, 2006.

support the improvement of recreational resources associated with the Project, and believe that the Settlement takes a reasonable approach to meeting those goals.

The SWC and Metropolitan recognize the passionate conflict between the supporters of single-use trails and the supporters of multi-use trails, and recognize the need for flexibility in implementing the trail use plan as directed by the Commission. The Settlement sets forth a multi-use trail plan, and respected organizations and many individuals commenting on the Settlement have provided comments in favor of such plan.[243] However, in recognition of the need for flexibility and in order to accommodate many possible trail use interests, the RMP contains adaptive management provisions designed so that interested parties will be able to revisit the trails issue on a regular and ongoing basis.[244]

Specifically, the RMP states that "DWR acknowledges that conditions will change over time and that monitoring is an appropriate and necessary strategy to help manage project-related recreation resources in the future"[245] and that "[i]t is likely that unforeseen recreation needs, changes in visitor preferences and attitudes, new recreation technologies, or other resource issues will arise over the course of the new license term. As a result, the RMP may be updated and/or revised."[246] The RMP also indicates that "revisions may be based on results from monitoring and coordination meeting with other recreation providers in the project area."[247] Furthermore, the RMP specifically states that, among other responsibilities, the RAC is created to recommend modifications to the RMP over time throughout the term of the license.[248]

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243 *See, e.g.*, Comments of International Mountain Bicycling Ass'n; Lake Oroville Bicyclist Organization/Lyle Wright; California State Horsemen's Ass'n; California State Horsemen's Ass'n – Region 2.

244 The RMP also recognizes safety concerns associated with multi-use trails, and affirms that DWR will comply with state and local public health and safety codes and regulations for appropriate trail use. *See* RMP, Appendix D, pp. D-7, D-17.

245 RMP, p. 2-2.

246 RMP, p. 7-23

247 RMP, p. 2-6.

248 RMP, p. 4-17.

## III.
## THE SETTLEMENT AND THE PROPOSED LICENSE ARTICLES

### A. COMMENTS ON THE SETTLEMENT

Numerous government entities, organizations, and individuals filed comments on the Settlement, both in conjunction with timely and procedurally-correct interventions in the proceeding and/or comments on the Application itself, and as discrete comments on the Settlement alone.[249] To the extent that the issues raised in the comments in support of or in opposition to the Settlement are not addressed above, the SWC and Metropolitan hereby restate that they believe that the negotiated Settlement is a comprehensive agreement addressing all issues that could be raised in connection with the Oroville Project relicensing. The Settlement represents a broad-based, collaborative balance of interests and resources related to the relicensing of the Project, including applicable PM&Es, and the various substantive and procedural obligations embodied in the Proposed License Articles. The SWC and Metropolitan believe the Settlement responds to the various concerns raised by the intervenors who provided comments.

### B. THE SETTLEMENT

#### 1. The Adaptive Nature Of The Settlement Is A Reasonable Approach To Managing Diverse Interests Over The Life Of The License.

The Settlement reached in this proceeding is the product of the ALP negotiations that have been conducted over the past two years, and which comprehensively addresses resource areas under the Commission's jurisdiction as well as various non-FERC jurisdictional matters. The Settlement as a whole is a flexible agreement containing many adaptive management

[249] Those that filed timely and procedurally-proper Motions to Intervene are considered by the Commission to be parties to the proceeding, unless otherwise indicated, pursuant to Rule 214 of the Commission's rules of practice and procedure. See 18 C.F.R. § 385.214 (3) (2005) ("Any person seeking to intervene to become a party ... must file a motion to intervene").

provisions that allow parties to revisit certain aspects of the agreement at a later date, to assess the results and, if necessary, to rework its component parts to meet future needs, including obtaining any necessary approvals from FERC. The parties should be commended for recognizing that flexibility is key to an agreement that will withstand the term of the license, and will not become brittle and easily broken. The Commission should recognize the foresight it took to develop such an adaptive agreement, and accept the proposed license provisions as set forth in the Settlement without material modification.

### 2. The Request For A 50-Year License Term Is Reasonable And In The Public Interest.

All of the cost estimates set forth in the Settlement assume that the Commission will grant a 50-year term to the license. The Commission's general policy is to relate the length of the new license term for a project to the amount of redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures that are authorized or required under the license.[250] The Commission has found that in certain instances, licenses of longer duration "encourage license applicants (1) to be better environmental stewards, and (2) to propose more balanced and comprehensive development of our river basins."[251] Furthermore, a longer-term license increases the likelihood that a project will be financially feasible, by allowing the licensee more time to recover the cost of its investment.[252]

Since the beginning of 2003, the Commission has issued 16 licenses for 50-year terms. In several of these orders, the Commission determined that a 50-year license term was warranted

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250 *See, e.g., Pacific Gas and Electric Company*, 114 FERC ¶ 62,216, at PP 28-29 (2006) (granting license for 39 years and 10 months to project with moderate measures and to coincide with expiration of related license).

251 *Consumers Power Co.,* 68 FERC ¶ 61,077, at 61,383-84 (1994).

252 *See, e.g., South Carolina Electric & Gas Co.*, 109 FERC ¶ 61,099, at n. 10 (2004). *See also Great Lakes Hydro American, LLC*, 109 FERC ¶ 62,230, P 91 (2004) (50-year license term granted where extensive environmental measures required, and the "annual cost of the environmental measures would be reduced if amortized over 50 years"); *PacifiCorp*, 104 FERC ¶ 62,059, at P62 (2003) (granting 50-year license due in part to significant expenditures relative to the project's annual net benefit).

because the license term was an important aspect of a carefully negotiated settlement.[253] As proposed in the Settlement, DWR has agreed to jurisdictional PM&Es estimated to be $775 million, as well as thorough and ongoing adaptive management processes requiring DWR and other resource agencies to revisit the biological conditions, recreation and cultural management plans, and water quality standards that already meet or exceed the Commission's requirements. A 50-year license term, with the option to revisit adaptive management plans on an ongoing basis, provides both the stability and the flexibility required for a large project with extensive and concurrent obligations such as the Oroville facility.

### 3. The PM&Es Set Forth In The Settlement Are Reasonable.

#### *a.* *Environmental Measures.*

PM&Es in Lake Oroville include warm and cold water fisheries. The Settlement supports an active bass fishery, including bass fishing tournaments. In addition, shoreline fishery habitat enhancements to benefit the warm water fishery will be created using large woody debris and other measures. An active cold water stocking program will be continued consistent with recent historical practice once the most recent incidence of disease outbreak is managed. This will involve planting approximately 170,000 salmon per year, which past experience has shown to be optimal.

Fishery habitat in the Low Flow Channel ("LFC") and the High Flow Channel ("HFC")

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[253] *See, e.g., Madison Paper Industries, Inc*., 104 FERC ¶ 62,061, at P 56 (2003) (50-year license term granted where license term recommended in settlement represents the stakeholders' recognition of extensive measures incorporated therein); *Portland General Electric Co., Confederated Tribes of Warms Springs Reservation of Ore*., 111 FERC ¶ 61,450, at P 167 (2005) (50-year license term granted because "the term of license was likely an important element in the negotiations that led to the Settlement Agreement"); *PacifiCorp*, 104 FERC ¶ 62,059, at P62 (2003) (granting 50-year license due in part to settlement recommending 50-year term).

will be enhanced through increased flows, improved temperature management,[254] the likely construction of a temperature control device at Oroville Dam, enhanced spawning habitat[255] through the augmentation of spawning gravel, large woody debris for shade and predator protection, reduction of predators, creation of side-channels for spawning and rearing, installation of a weir to separate spring run Chinook salmon from fall run Chinook salmon,[256] improvements in hatchery management, and other actions. In addition, actions will be taken to reconnect the river with the riparian corridors through terrestrial recontouring, flood flows, and other actions.

In the Thermalito Afterbay, PM&E measures will focus on water fowl and terrestrial species. PM&Es include creation of brood ponds for nesting waterfowl, including protected migratory species, upland habitats to provide foraging and nesting habitats, and other actions to protect terrestrial species. In the Oroville Wildlife Area ("OWA"), measures will be taken to protect vernal pools, enhance riparian and floodplain habitat, and provide habitat for ducks. The riparian and floodplain improvement program is a long-term program designed specifically to take advantage of commercial gravel extraction leases operating within the OWA, and is not an immediate fix for current habitat conditions.

The above measures will be managed through an overarching plan known as the Lower Feather River Habitat Improvement Plan. This Plan will be adaptively managed in order to address fish and wildlife needs over the life of the license. Every five years the plan will be

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[254] Continued operation of the Project consistent with current operations is expected to result in acceptable water temperatures to supply spring-run Chinook salmon immigrating and holding – and the Settlement was designed to *improve* flow and water temperature conditions, and to *enhance* and *expand* suitable habitat (as opposed to mitigating "poor" conditions). Certain studies directed in the Settlement are designed to research potential facilities modifications and to develop temperature target criteria accordingly.

[255] Approximately 38% of the Chinook salmon spawn in the HFC and the remainder in the LFC.

[256] Protection of spring-run Chinook salmon genetics is a major priority of the Settlement, as evidenced by commitments to develop a hatchery and genetics management plan for each anadromous fish species managed by the hatchery. Since 2003, DWR and the California Department of Fish and Game have altered operations at the fish hatchery to identify and separately spawn spring-run and fall-run Chinook salmon.

reviewed in consultation with the resource agencies including Department of Fish and Game, the Water Board, FWS, and NMFS. An Ecological Committee will be formed, comprised of the resource agencies, DWR, SWC, and others to address resource needs and adaptive management proposals, and to resolve disputes over resource requirements on a routine basis. The adaptive management approach is essential to address changing ecological conditions and evolving scientific understanding of the resource needs of protected species. The current PM&Es reflect a conservative approach to fish and wildlife management, with uncertainties resolved in favor of the environment. While it is not possible to quantify at this time, it is likely that some additional effort will be needed to respond to adaptive management requirements.

*b.* *Recreational Measures.*

Recreational needs will be addressed through the RMP, which was developed based upon a Recreation Needs Analysis Study ("Needs Analysis") conducted as part of the relicensing process and extensive further enhancements negotiated during the ALP. Recreation needs were identified by activity types, including camping; day use/picnicking; swimming; interpretation and education; non-motorized trail use including hiking, walking, mountain biking, and equestrian; fishing (boat and bank); and general use of open space including hunting, wildlife observation, photography, and birding. Recreation needs for each of these activity types were identified considering various analysis factors including recreation supply, demand, capacity, suitability and operations and maintenance. Capacity thresholds were developed to define needs, and needs were projected forward in 10-year increments through 2050. Provision has been made to meet the requirements of the Americans With Disabilities Act ("ADA"). The agreed-to recreational measures exceed those identified by the Needs Analysis and include construction of additional campgrounds; floating campsites; the extension of existing boat ramps; new boat

launch facilities; enhanced marinas; more aggressive management of concession contracts in order to promote development; improved boating access to the Thermalito Afterbay; increased public safety patrolling of the Oroville Wildlife Area; swimming enhancements; and improved trails for hiking, biking, equestrians, and the physically challenged. The recreation monitoring plan is sensible in that it allows for adjustments and enhancements in response to future needs based on established capacity thresholds, and does not seek to second-guess needs beyond a reasonable planning horizon.

*c.* *Cultural Resources.*

Cultural resource protection will focus principally on Native American tribal issues. The HPMP will be developed to address recovery of historic data, protection of burial and other sensitive sites, repatriation of sacred remains and development of a curation facility, a public education program, and access to lands for native plantings.

*d.* *Water Quality.*

Within six months following license issuance, DWR will begin preparation of a draft initial Comprehensive Water Quality Monitoring Program ("Program") to track potential changes in water quality associated with the Project, and collect data necessary to develop a water quality trend assessment through the life of the FERC license. The Program will include components to sample water chemistry, fish tissue bioaccumulation, recreation site pathogens and petroleum product concentrations, water temperatures, bioassays, and aquatic macroinvertebrate monitoring.

In each of the first five years of the initial Program, DWR will collect, analyze and compile the water quality data into annual reports. Following completion of all data collected through the fifth year, DWR will compile a summary report of the initial Program. A 45-day

notice will accompany the report, inviting all recipients to attend a water quality meeting, scheduled by DWR, to discuss the finding of the 5-year data set. After consultation, DWR will submit recommendations for a final Program to the Chief of the Division of Water Rights, California State Water Resources Control Board, for review and approval prior to DWR's filing of the Program with the Commission. Water quality data will be analyzed and compiled by DWR into five-year reports and distributed to the Ecological Committee, and any other entity upon request.

Within six months of Commission approval of the final Program, DWR will begin implementation of the Water Chemistry Monitoring Plan component of the Program, including the following:

- Monitoring between 15 and 20 locations four times each year (seasonally) for in-situ physical parameters, including water temperature, dissolved oxygen, pH, specific conductivity, and turbidity. Monitoring at Lake Oroville, the Diversion Pool at Oroville Dam, and one site within the Thermalito Afterbay will include vertical profiles for temperature, DO, pH, and specific conductivity collected at one meter intervals from surface to substrate.

  Monitoring at these 15 to 20 locations two times each year (spring and fall), for nutrients necessary for determining water quality.
- Monitoring between 18 and 22 locations four times each year (seasonally), for metals necessary for determining water quality. The developed marinas (Bidwell and Lime Saddle) will be included in the locations, along with sites to be specified in Lake Oroville, the Diversion Pool, Thermalito Forebay, Thermalito Afterbay, the Low Flow Channel, Mile Long Pond, and the Feather River at the southern boundary of the Project. Additional monitoring will occur at both marinas one time each month during the recreation season (June-September) and one time after the first three significant storm events.
- Monitoring between 15 and 20 locations two times each year (spring and fall), for minerals and alkalinity necessary for determining water quality.
- Monitoring 2 locations, two times each year, for phytoplankton and zooplankton. The monitoring sites are Lake Oroville and Thermalito Afterbay.
- Bioaccumulation Monitoring Plan: Collection of resident fish species from 7 locations within project waters, one time every five years and analyze tissue for metals and organic compounds.

- Pathogens Monitoring Plan: DWR will conduct bacteriological monitoring at 12 to 16 locations within project waters each summer season. Near-shore water samples will be collected five times within a 30-day period at each location from June 15 through September 15. Potential sampling locations will include developed beach areas, marinas, and boat launch areas along with high-use dispersed beach and shoreline locations in all waters affected by project operations. The list of bacteriological sampling locations will always include North Forebay Cove and South Forebay Swim Area, in addition to sampling at 10-14 annually rotating stations. Additionally, at the North Forebay Beach area, individual screening samples will be collected seasonally, four times throughout the year.
- Petroleum Products: DWR will monitor 6 locations for petroleum products in project waters (Bidwell Marina, Lime Saddle Marina, Foreman Creek Boat-in Campground, Spillway Boat Ramp/Day Use Area, Oroville Dam, and Monument Hill). Petroleum products will be sampled one time each month from June through September and once after the first three significant storm events. Field sampling methods will include both surface and bottom samples at each location.
- Soil Erosion: DWR will inspect trails between May 1 and May 15 and following summer recreation season to identify soil erosion and potential subsidence into reservoirs or flowing waterways.
- Water Temperature: DWR will site 4 permanent continuous temperature monitoring devices, one each at the following locations: (1) Feather River Hatchery aeration tower, (2) Robinson's Riffle, (3) Thermalito Afterbay Outlet, and (4) the Feather River adjacent to the most southern FERC Project 2100 boundary. The permanent temperature gages will be capable of providing real-time data to the hatchery operators and to the public via an internet-based medium such as DWR's California Data Exchange Center. The four permanent gages will remain operational throughout the life of the license.
- Public Education Regarding Risks of Fish Consumption: DWR will post notices at all boat ramps and any other locations specified by the Office of Environmental Health Hazard Assessment within the Project boundary notifying the public about health issues associated with consuming fish taken from within Project waters.

The Water Board representatives participated in an advisory capacity during the settlement process, and the water quality requirements contained in the Settlement are those recommended by the Water Board representatives, as well as other recommendations made by other stakeholders.

*e. Non-FERC Jurisdictional Agreements.*

Implementation of the Supplemental Benefits Fund ("SBF") will benefit the entire community, and all communities and other interests will be entitled to propose projects for

funding by the SBF and will benefit from projects developed through the SBF. The SBF may be used for regional activities related to the Feather River and Lake Oroville, provided they are outside of the FERC Project boundary. Any project proposed within the FERC Project boundary will be subject to approval by DWR and the Commission. The monies from the SBF will be distributed through a steering committee comprised of local public entities.

In order to avoid a contested proceeding involving fish passage to the upper Feather River, and to provide a more economical and biologically sound program, DWR, PG&E, SWC, American Rivers, and the resource agencies have agreed to a Habitat Expansion Agreement ("HEA") that requires DWR and PG&E to develop habitat in the Sacramento River basin sufficient to support 2000-3000 spring-run salmon. This habitat also will be suitable for steelhead. DWR and PG&E have agreed to provide at least $15 million to develop this program, with a right to withdraw from the program under very limited circumstances. The HEA is a non-jurisdictional part of the license because the areas where this habitat will be developed are outside of the Project boundaries. The HEA has not yet been finalized, is agreed to conceptually,[257] and is expected to be completed shortly. In the event of withdrawal by either DWR or PG&E, the Section 18 reservations by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service may be triggered.

DWR also agreed to commence certain studies prior to issuance of the Commission license in order to speed efforts to address various high priority environmental improvements. Since the Commission did not order that such studies be conducted prior to issuance of the new license, these agreements were included in the non-jurisdictional portion of the settlement.

[257] The HEA was specifically developed to address the needs of the licensees in the Feather River watershed, and the regulatory agencies responsible for protection of salmonid fisheries throughout the Feather River watershed have all agreed to the HEA in draft form.

## C. THE COMMISSION ENCOURAGES NEGOTIATED SETTLEMENTS

Despite any conflicting interests presented by the various Intervenors and Commenters in this relicensing proceeding, the Commission should issue the license to DWR based on the Proposed License Articles set forth in the Settlement, which represent the long-negotiated and ultimate resolution of case-specific and delicately balanced concerns on the local, regional, state and federal levels. The Commission has a strong preference for settlement of any conflicting issues in hydropower licensing proceedings,[258] and has broad latitude to approve an offer of settlement if the settlement "appears to be fair and reasonable and in the public interest."[259]

The Commission now will review the proposed provisions, and will determine whether or not the Settlement – which represents the goals reached through negotiation of many diverse interests and concerns – is consistent with the Commission's responsibility to issue licenses that comply with the comprehensive development standard of Section 10(a) of the FPA. The Settlement Parties have achieved an agreement that the SWC and Metropolitan believe will withstand criticism, will burnish when praised, and ultimately, will become the basis for the next half-century of water, power, fish and wildlife, recreation, flood control, and other facets of life at the Oroville Facilities.

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[258] *See, e.g., Avista Corp.*, 93 FERC ¶ 61,116, at 61,328 (2000) ("The Commission strongly encourages settlements in hydropower licensing proceedings").

[259] *See* 18 C.F.R. § 385.602(g)(3) (2005).

## IV.
## CONCLUSION

WHEREFORE, the State Water Contractors and the Metropolitan Water District of Southern California respectfully request that the Commission reject all comments, recommendations, and proposed license conditions beyond those included in the Settlement, and issue a new license for the Oroville Project for a 50-year license term, and incorporating without material modification the proposed license articles as set forth in the Settlement.

Respectfully submitted,

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ATTORNEYS FOR
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

May 26, 2006

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument is being served upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at San Francisco, California, this 26th day of May, 2006.

*/s/ Thomas M. Berliner*
Thomas M. Berliner

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