

PacifiCorp's exceptions address both legal and factual matters. They are as follows:

A. Legal Matters

In its analysis section, at paragraph 23, pages 24 and 25, the Department makes the following statement of law: "If TLCC were successful in obtaining a FERC license, it would acquire the authority to condemn the lands required to build and operate the project."

Exception: This statement of law is incorrect as applied to PacifiCorp property.

As a matter of law, one FERC licensed project may not interfere with another FERC licensed project without the affected licensee's consent. The Federal Power Act provides as follows:

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, *and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.*

16 U.S.C. §799 (emphasis added).

FERC may not issue a license that "will significantly interfere with operations already licensed, whether the interference will adversely affect the prior licensee's physical plant, its project works, or its supplies of water." *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 89, n.31 (D.C. Cir. 1983). Whether one project alters another is fact-driven. As FERC explained in a recent Rehearing Order, "[t]he degree of encroachment that makes an alteration substantial is a case-specific determination." 114 FERC ¶ 61,152, at 61,508. *See Fall River Mutual Elec. Coop. v. FERC*, 543 F.3d 519 (9th Cir. 2008).

In *Fall River*, FERC informed the applicant that it “cannot, without [existing project owner’s] concurrence, approve a development proposal that would materially affect or modify the licensed project. Without [that] consent [the] application would be precluded by the requirements of FPA Section 6 [§799] and therefore would be subject to rejection under 18 C.F.R. § 4.32(e)(2).” *Id.* at 523.

PacifiCorp’s Bear River Project is FERC approved (Order—Findings ¶116), which comes with condemnation authority. 16 U.S.C. §814.¹ A federal licensee has the right to condemn property it is not able to obtain under applicable state statutes. *First Iowa Hydro. Coop. v. Federal Power Commission*, 328 U.S. 152 (1946). Not only does the Federal Power Act say nothing about a new licensee condemning an existing licensee’s property, such condemnation authority would create an all-consuming exception to section 799, which categorically prohibits new projects that alter existing ones without the existing licensee’s consent.

If a project can be denied because of interference, but that same project can interfere after approval by using eminent domain, then section 799’s prohibition against interference without consent is a nullity. Because section 799 *requires* licensee consent to alteration, not even eminent domain can alter an existing license.

¹ A licensee may exercise the right of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. §814, which provides:

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain

TLCC owns no property in the area of its proposed project and expects to acquire all of it by eminent domain. (Order—Findings ¶36). It was undisputed at the hearing that TLCC's project requires PacifiCorp property. In fact, FERC warned TLCC that the proposed project "could significantly conflict and interfere with the license requirements and approved Settlement Agreement for [PacifiCorp's] Bear River Project." (Order—Findings ¶23).

Under section 799, therefore, FERC cannot approve TLCC's project on the basis that it may condemn existing project property. It is incorrect, therefore, to assume that TLCC would acquire a right to condemn PacifiCorp property.

Because the terms of PacifiCorp's license require environmental restoration and recreation enhancement at Oneida Narrows, licensing TLCC's project will impermissibly alter PacifiCorp's project within the meaning of FPA Section 6. In addition, the proposed alteration of PacifiCorp's project access road is an unacceptable alteration, the impacts of which were described at the hearing.

There is one typo that should be corrected in the Conclusions of law paragraph 2, at page 30. It should read Article XI of the compact, not IX.

B. Factual Matters

The Preliminary Order includes certain factual statements and similarly fact-based evaluation criteria that are incorrect. They are as follows:

Factual Finding	Incorrect Text	Correction
Findings of Fact; paragraph #2	"Federal Energy Regulatory Commission ("FERC") license application documents."	"Federal Energy Regulatory Commission ("FERC") <u>draft</u> license application documents." (to be consistent with citing in Finding of Fact #21.)
Findings of Fact; paragraph #4	"... transports the water under the Bear River and..."	"... transports the water under <u>over</u> the Bear River and..."

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Finding of Fact; paragraph #25	"The following studies were completed:"	The Oneida Narrows Project Water Quality Report is not complete. FERC issued a letter on May 30, 2012, stating that the study does not meet the required goal of predicting project effect on water quality and directed that the model be recalibrated.
Finding of Fact; paragraph #35	"TLCC plans on financing the project through a bond sale, facilitated by the Idaho Water Resource Board ("IWRB")	See Exhibit PC210. IWRB denies any financing and denies that TLCC had even applied for financing. Clare Bosen was cross examined on this point and conceded that there was no bond financing agreement or application.
Finding of Fact; paragraph #36	"TLCC will obtain the lands needed to complete the project through eminent domain after the FERC license is issued."	See legal matters discussion above.
Finding of Fact; paragraph #113	"...is fully accessible to the public because of the public road..."	"...is fully accessible to the public because of access along PacifiCorp's private road..."
Finding of Fact; paragraph #121	"The BCT restoration plan and telemetry study, if completed, were not offered into the administrative record for this contested case.	In compliance with its FERC License, PacifiCorp completed the Bonneville Cutthroat Trout Restoration Plan and Telemetry Study. The studies are posted on PacifiCorp's Bear River Hydroelectric Project License Implementation web page.
Finding of Fact; paragraph #122	"PacifiCorp has granted over \$400,000 for habitat improvements. These funds have been matched with \$1.2 million in federal funds."	Between 2005 and 2009, PacifiCorp granted \$780,000 for habitat improvements. These funds were matched with \$1,716,000 of state and federal funds. The PacifiCorp portion of this funding will continue on a yearly basis through 2033.
Finding of Fact; paragraph #123	"...PacifiCorp has spent \$100,000 on improving the public road in the canyon."	"...PacifiCorp has spent \$100,000 on improving public access along its private road in the canyon."
Evaluation Criteria	Text	Correction
Evaluation Criteria; paragraph #19	"if such interest can be obtained by eminent domain proceedings..."	See legal matters discussion above.
Evaluation Criteria;	"or has the authority to exercise eminent domain	See legal matters discussion above.

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paragraph #20	authority to obtain such access..."	
Evaluation Criteria; paragraph #22	Same as above.	See legal matters discussion above.
Evaluation Criteria; paragraph #23	Same as above.	See legal matters discussion above.
Evaluation Criteria; paragraph #28	"including the testimony regarding the bonding program through the IWRB."	See Exhibit PC210. IWRB denies any financing and denies that TLCC had even applied for financing.
Evaluation Criteria; paragraph #37	"...designated area, such and PacifiCorp."	"... such as PacifiCorp."

August 8, 2012.

MABEY WRIGHT & JAMES, PLLC



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CERTIFICATE OF SERVICE

I certify that on August 8 2012, a copy of the foregoing PacifiCorp's Exceptions to Preliminary Order was filed via Email with the Idaho Department of Water Resources and delivered to the following by:

- Hand Delivery
- U.S. Mail, postage prepaid**
- Federal Express
- Certified Mail, Receipt No. _____, return receipt requested
- Email/Electronic Delivery

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Greater Yellowstone Coalition
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A handwritten signature in black ink, appearing to be "D. Cottle", is written over a horizontal line.