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Late Intervention in FERC Proceedings: How Late Can a Party Be . . . to the Party?

INTRODUCTION

California Trout v. Federal Energy Regulatory Commission (*CalTrout v. FERC*) originated with CalTrout's and Friends of the River's (FOR) (collectively, petitioners) late motions to intervene in the Pyramid Lake Dam proceeding.[1] The ruling in this case, which affirmed FERC's decision to deny the petitioners' late motions to intervene, will likely lead to environmental groups and other interested parties becoming more diligent in choosing which proceedings in which to intervene, and, ultimately, could lead to a limitation of effective public involvement in FERC proceedings.

I. BACKGROUND

A. FERC Procedural Rules

FERC has the authority under the Federal Power Act (FPA) to grant amendments to dam licenses, following an application by the license owner, public notice, and fulfillment of National Environmental Policy Act (NEPA) requirements.[2] One must be a "party" to the proceeding, by intervening in that proceeding, to challenge a final decision.[3] The FPA also gives FERC authority to develop the intervention procedures.[4]

In deciding whether to grant an untimely motion to intervene, at issue in this case, FERC "may" consider any of the five factors outlined in 18 C.F.R. 385.214(d)(1):

> [W]hether: (i) The movant had good cause for failing to file the motion within the time prescribed; (ii) Any disruption of the proceeding might result from permitting intervention; (iii) The movant's interest is not adequately represented by other parties in the

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1. Cal. Trout v. Fed. Energy Regulatory Comm'n, 572 F.3d 1003, 1007–08 (9th Cir. 2009).
2. *Id.* at 1013.
3. *Id.* (citing 16 U.S.C. § 825l(a) (2006)).
4. *Id.* (citing 16 U.S.C. § 825g(a)).

> proceeding; (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (v) The motion conforms to the [procedural requirements in] paragraph (b) . . . .[5]

Factors (ii), (iii), and (iv) deal with prejudice, factor (i) relates to a showing of good cause, and factor (v) deals with conformance to the intervention procedure.[6] Further, 18 C.F.R. § 385.214(b)(3) states that a late motion to intervene must "show good cause why the time limitation should be waved," but the court interpreted this language as an element that "may" be considered.[7]

B. Case Background

After the arroyo southwestern toad (*Bufo microscaphus californicus*) was listed as endangered under the Federal Endangered Species Act in 1994, concerns arose that the changes in minimum flows from Pyramid Lake Dam, operated by the California Department of Water Resources (DWR), were harming the toad.[8] The original dam license required minimum constant flows out of Pyramid Dam; in the early 1990s, DWR increased outflow at certain times due to increased inflow.[9] The large changes in the flows were thought to adversely affect the eggs and tadpoles "by stranding them on land when water flows suddenly dropped and by washing them away when water flows dramatically increased . . . ."[10] The flow regime at Pyramid Dam was changed in 1995 to sustain the rainbow trout in an upper Middle Piru Creek fishery.[11] The new flow regime was a constant 25 cubic feet per second (cfs) during the toad's breeding months (April to August) and then a reduced flow in winter after the tadpoles left.[12] According to the Fish and Wildlife Service (FWS), this higher flow regime seemed to harm the arroyo toad.[13] The rainbow trout in Middle Piru Creek did, however, benefit from the higher summer flows of the revised flow regime, because trout prefer the lower-temperature habitat of deeper water.[14]

5. *Id.* at 1014 (citing 18 C.F.R. § 385.214(d)(1) (2010)).
6. *See id.* at 1020 (citing 18 C.F.R. § 385.214(d)(1)).
7. *Id.* at 1014 n.8 (citing 18 C.F.R. § 385.215(b)(3)).
8. *See id.* at 1009.
9. *See id.* (noting that minimum flows were five cubic feet per second (cfs) and ten cfs, depending on the season. In the early 1990s, releases were increased to twenty-five cfs at certain times.)
10. *Id.*
11. Opening Brief of Petitioners Cal. Trout, Inc. & Friends of the River at 15, *Cal. Trout*, 572 F.3d 1003 (Nos. 07-73664, 07-74494, 08-71593).
12. *See Cal. Trout,* 572 F.3d at 1009.
13. *See id.* at 1009–10.
14. *See id.* at 1010.

On March 17, 2005, the DWR filed an application with FERC to amend its license for Pyramid Dam in order to abolish the minimum flow requirements and establish a "natural flow regime" in the Middle Piru Creek.[15] DWR included with its application an Environmental Impact Report (EIR), prepared pursuant to the California Environmental Quality Act (CEQA).[16] The EIR discussed potential impacts to trout in the area downstream of Pyramid Dam.[17]

FERC gave public notice of the application on June 8, 2005, and set July 8, 2005 as the deadline for submitting comments and making motions.[18] The petitioners failed to move to intervene by that date, even though CalTrout submitted comments on three separate dates in 2005, both prior to and during the comment and motion period.[19] FERC released the draft Environmental Assessment (EA) pursuant to NEPA for the license amendment on March 1, 2007.[20] CalTrout then filed a motion to intervene twenty-one months late and almost one and a half months after the release of the draft EA (on April 13, 2007), while the FOR filed a motion to intervene twenty-three months late and almost two and a half months after the release of the draft EA (on June 11, 2007).[21] FERC rejected both motions to intervene, two CalTrout requests for rehearing, and one FOR request for rehearing.[22] CalTrout and FOR then petitioned the Ninth Circuit to review FERC's decision under the "arbitrary and capricious" standard of the Administrative Procedures Act.[23]

II. OPINION

A. Good Cause

The petitioners attempted to show good cause for the late intervention in several ways.[24] First, petitioners claimed that the release of new information after the intervention deadline constituted good cause to intervene in the proceeding.[25] The information included: (1) the National Marine Fisheries Service rule that the Middle Piru Creek is not

15. *Id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.* (Cal Trout's comments were dated March 26, April 15, and July 8, 2005).
20. *Id.* at 1012.
21. *See id.*
22. *See id.*
23. *Id.*
24. *See id.* at 1015–18.
25. *See id.* at 1017–18.

critical steelhead trout habitat; (2) a report showing rainbow trout in that portion of the creek were related to steelhead trout; and (3) a report showing the arroyo toad population in that portion of the creek benefited from large summer flows.[26]

The court found that this new information did not "divulge . . . a new issue with the license amendment," but just better supported the petitioners' position.[27] In addition, even assuming that there was good cause because of the new information, the petitioners still did not intervene until April and June of 2007, while the latest of the three pieces of information was published in November of 2006.[28]

FERC has a rule that "automatically" allows late intervention in the case of an EIS when the motion for intervention "is filed within the comment period for a draft [EIS]" [29]; however, FERC does not have such a rule for late interventions when an EA is issued. The petitioners claimed that the different standard for EAs violated NEPA's public involvement requirements.[30] The court pointed out, however, that the public involvement requirements for an EA under NEPA are "not substantial," and the requirements for an EA are to "provide the public with sufficient environmental information . . . to weigh in with their views"[31] and to allow public comments on draft EAs.[32] These actions do not require intervention.[33]

The petitioners also argued that the "unexpected" preparation of an EA instead of an EIS violated NEPA, constituting good cause.[34] The court rejected this argument, noting the "petitioners have put the cart before the horse—they essentially argue that because they are about to be denied the benefits of intervention they should be deemed as having good cause to intervene."[35]

The court concluded that FERC's decision that the new information did not constitute good cause for late intervention was not arbitrary or capricious.[36]

26. *See id.* at 1018.
27. *Id.*
28. *See id.* at 1012, 1020.
29. *Id.* at 1016.
30. *See id.* at 1016–17; 18 C.F.R. 380.10(a)(1)(i) (2010); Cameron LNG, LLC, 118 F.E.R.C. P. 61,019 (2007).
31. *Cal. Trout,* 572 F.3d at 1017 (citing Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F. 3d 938, 952 (9th Cir. 2008)).
32. *See id.*
33. *See id.*
34. *Id.* at 1016.
35. *Id.*
36. *See id.* at 1020.

B. Prejudice to Other Parties

Petitioners also claimed FERC acted arbitrarily and capriciously in deciding that late intervention would prejudice existing parties.[37] Among other reasons to support this assertion, petitioners noted that the "only other party" in the FERC proceeding was DWR, and "no other party" contested the petitioners' motions.[38] The court recognized that FERC's analysis of prejudice did "not comprehensively address any of the three factors constituting 'prejudice.'"[39] The court held, however, that good cause is the most important element for late motions to intervene "because it is mentioned twice in the Commission's regulation."[40] Thus, "[a] finding that a movant has failed to show good cause is a sufficient basis for denying late intervention."[41] Then, FERC "may" also "consider *any* other factor, including prejudice."[42] FERC was not required to examine potential prejudice of other parties because it determined the petitioners did not have good cause.[43]

C. Consistency with Precedent

Additionally, the court found that FERC acted consistently with its precedent of not allowing late intervention without good cause, distinguishing the cases cited by petitioners from the facts here.[44] This precedent, the court said, constituted a "clear policy" of rejecting late intervention when moving parties are aware of potential effects to their interests and "sat on their rights."[45]

III. DISSENT

The dissent saw FERC's good cause requirements for late intervention as too stringent, noting that FERC "routinely" grants late intervention in cases where it would not result in prejudice.[46] The dissent noted that the majority opinion did "not dispute that [p]etitioners satisfy all three prejudice factors."[47] Thus, the issue in this case was whether

37. *See id.*
38. *Id.*
39. *Id.* at 1020–21.
40. *Id.* at 1021.
41. *Id.* at 1022.
42. *Id.* (emphasis added).
43. *See id.*
44. *See id.* at 1023–24 (petitioners cited Cameron LNG, LLC, 118 F.E.R.C. P. 61,019 (2007); Colombia Gas Transmission Corp., 113 F.E.R.C. P. 61,118 (2005); Pub. Util. Dist. No. 1, 63 F.E.R.C. P. 61,337 (1993)).
45. *Id.* at 1024.
46. *Id.* at 1026 (Gould, J., dissenting).
47. *Id.*

good cause must be shown, and, if so, whether the petitioners had good cause.

The dissent concluded that FERC's "consistent standard" "does not require any substantial showing of good cause when there is no evidence of prejudice or disruption."[48] The dissent stated that the "good cause" requirement would be satisfied by release of new information that increases the relative importance of the proceeding to the public; however, this good cause was not necessary because FERC has a "usual policy of dispensing with the good cause requirement when, as here, there was no risk of prejudice or disruption to other parties."[49] The dissent also averred that petitioners should have been allowed to intervene because they had good cause—although it was not necessary in this case—and there would be no chance for prejudice or disruption of the proceeding.[50]

Additionally, the dissent noted that by denying late intervention in this case, petitioners' environmental concerns would be unrepresented.[51] The dissent stated that FERC violated NEPA by preparing an EA that only parties to the proceeding could challenge and where only the dam operators and FERC were parties to the proceeding.[52]

IV. DISCUSSION

CalTrout v. FERC is a case of two extremes: the majority rule suggests that parties decide to intervene on an "inkling" that their rights or interests might be affected,[53] while the dissent suggests that intervention should be allowed as long as there is a hint of good cause and lack of prejudice or delay.

The standards set out by the majority essentially mean that any person or organization that thinks it may want to challenge a FERC decision in the future should intervene in the proceeding.[54] While this is a stringent standard, it is not an impossible one. The petitioners were aware that the project could have impacts on trout in Middle Piru Creek.[55] Under the majority rule, the petitioners should have taken this knowledge as a reason to intervene.[56]

48. *Id.* at 1028.
49. *Id.* at 1027, 1029.
50. *See id.* at 1029.
51. *See id.* at 1026.
52. *See id*.
53. *See* Petition for Rehearing and Rehearing En Banc at 18–19, *Cal. Trout*, 572 F.3d 1003 (Nos. 07-73664, 07-74494, 08-71593).
54. *See id.* at 19.
55. *See id.* at 15; *see Cal. Trout*, 572 F.3d at 1018–19.
56. *See* Petition for Rehearing, *supra* note 53, at 18–19.

The petitioners and dissent argue that potential parties should be able to intervene without a "substantial showing of good cause" as long as it would not prejudice parties or delay the proceeding.[57] In a sense, the standard suggested by the petitioners creates a second intervention deadline that would potentially undermine having a deadline in the first place. Under this rule, a potential party could consciously wait for the intervention deadline to pass and continue to do nothing for as long as it is apparent to them that their intervention would not prejudice or delay the proceeding. This standard prompts one to ask why FERC would set an intervention deadline in its procedural rules to begin with if there is a later de facto deadline. It does not seem logical that FERC would impose a thirty-day intervention deadline, only to have it be eradicated later by a softer rule.

The dissent's standard may be too lax for the reasons discussed above, while the majority rule seems overly restrictive because it compels potential parties to guess at which proceedings to intervene in.[58] This result could prove unproductive and would lead to inefficiencies in the proceedings. Parties might become involved in proceedings that they ultimately do not care about, and other parties could miss out on proceedings that they find out later they *do* care about. For many potentially interested environmental groups, it would be unfeasible and inefficient to intervene in every proceeding in which they might eventually want to be a party.[59] Even though the majority's rule complies with NEPA statutory requirements, the rule puts members of the public into a difficult position in FERC proceedings.[60]

CONCLUSION

Although the court's rule regarding intervention is workable, it is not ideal. It will force concerned organizations and individuals to decide when to intervene without knowing whether intervention would be useful. The strict late intervention rule, coupled with the FERC requirement that only parties can challenge its decisions, may obstruct effective public participation in FERC proceedings. Liberal public participation in FERC proceedings is vital to environmental interests and

57. *See Cal. Trout*, 572 F.3d at 1028 (Gould, J., dissenting); *see* Petition for Rehearing, *supra* note 53, at 18.

58. *Cal. Trout*, 572 F.3d at 1028.

59. *See id.*

60. *See id.* at 1016–17 (majority opinion) (noting that the petitioners, should they disagree with the decision to release an EA rather than an EIS, should challenge the decision to prepare an EA, even though they would only be allowed to challenge it if they had intervened).

procedural limitations on public participation that extend as deeply as the majority's rule may hamper the furtherance of those interests.[61]

Kristi Black

61. *See id.* at 1026 (Gould, J., dissenting).

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.