

107 FERC ¶ 61,281
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Public Utility District No. 1 of Chelan

Project No. 2145-057

ORDER AMENDING LICENSE

(Issued June 21, 2004)

1. This order approves the application of Public Utility District No. 1 of Chelan County, Washington (Chelan) to amend the license for the Rocky Reach Project No. 2145 in order to implement the terms of an Anadromous Fish Settlement and Habitat Conservation Plan (HCP) designed to protect Mid-Columbia River Basin salmonids, in particular threatened and endangered species. The Rocky Reach HCP and HCPs for two other Mid-Columbia River licensed projects were approved in a companion order issued today (Master Order).¹ These orders will serve the public interest by putting into place a long-term program to aid in the recovery of the endangered species and help to prevent other salmonids from becoming listed.

I. Background

2. The long history of the Columbia River anadromous fishery problem and the efforts of many actors to resolve issues specific to the Mid-Columbia River Basin are summarized in the Master Order and need not be repeated here. It suffices here to say that there are four major hydroelectric projects comprising five dams on the Mid-Columbia River, all of which are under Commission license. In order from upstream to downstream they are Wells, Rocky Reach, Rock Island, and Public Utility District No. 2 of Grant County Washington's (Grant) Wanapum-Priest Rapids Project No. 2114

¹ Public Utility District No. 1 of Chelan County, WA, et al., 107 FERC ¶ 61,280. Separate orders amending the licenses for the Rock Island Project No. 943 and the Wells Project No. 2149 to implement project-specific HCPs are also being issued today. Public Utility District No. 1 of Chelan County, WA, 107 FERC ¶ 61,282 (Rock Island); Public Utility District No. 1 of Douglas County, WA, 107 FERC ¶ 61,283 (Wells).

(consisting of Wanapum and Priest Rapids Dams). In the late 1980's, the Commission commenced what has become known as the Mid-Columbia proceeding, in an effort to resolve anadromous fish issues for the licensed Mid-Columbia projects. Project-specific agreements were negotiated for the Rock Island and Wells Projects, which are conditions of those licenses. The Rocky Reach license has been amended to authorize installation of permanent downstream fish passage facilities and is subject to other requirements. Grant is currently required to release interim spill flows from Wanapum-Priest Rapids to assist downstream migration.

3. As these events were unfolding, two species of Columbia River salmonids were federally listed as threatened under the Endangered Species Act (ESA).² In the early 1990s, discussion commenced among the licensees, National Marine Fisheries Service within the U.S. Department of Commerce (NOAA Fisheries), U.S. Fish and Wildlife Service (FWS), Indian tribes, and others, with the intention of developing long-term plans for the recovery of the listed salmonids and to prevent further listings (HCPs). HCP Agreements were reached for Wells, Rocky Reach, and Rock Island. Applications for approval of the HCPs and for incidental take permits³ pursuant to ESA section 10 were filed by Chelan with respect to Rocky Reach and Rock Island, and by Douglas with respect to Wells. NOAA Fisheries granted the requested approvals and permits.

4. Chelan and Douglas also filed separate applications with the Commission for approval of the project-specific HCPs and for amendment of the Rocky Reach, Rock Island, and Wells licenses to incorporate those documents into the appropriate licenses as special articles. The applications are opposed by the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Columbia River Intertribal Fish Commission, and American Rivers. Concerns about the Rocky Reach HCP were also expressed by the City of Entiat, Washington, and Entiat School District No. 127.

5. The Master Order addresses the objections of these parties and concludes that the HCPs are in the public interest and should be approved. We incorporate that discussion by reference. Consistent with the Master Order, this order amends the Rocky Reach license to incorporate the HCPs.

² 42 U.S.C. § 4321 et seq.

³ An incidental take permit exempts the permittee from the prohibition on taking of threatened or endangered species of section 9 of the ESA (16 U.S.C. § 1538).

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6. Also, FWS issued a Biological Opinion pursuant to ESA section 7 regarding the effects of the projects with respect to various federally-listed threatened and endangered species. FWS found that incorporating the HCPs into the licenses is not likely to jeopardize the continued existence of the endangered bull trout, but did find that the operation of the three projects under the HCPs would result in incidental take of bull trout. Its Biological Opinion thus includes an incidental take statement with respect to each project, including Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions for implementing the RPMs. The RPMs and Terms and Conditions for Rocky Reach are attached to this order, which also adds new license articles requiring them to be implemented.

7. Finally, a minor modification has been made to the cultural resources article to require preparation of a map indicating the areas which might be affected by implementation of the HCP.

The Commission orders:

(A) The application of Public Utility District No. 1 of Chelan County, Washington, for approval of the Rocky Reach Anadromous Fish Agreement and Habitat Conservation Plan as an offer of settlement, and for its adoption as an amendment to the project license, is granted.

(B) New Article 410 is added to the project license, to read as follows:

Article 410. Habitat Conservation Plan. (a) The licensee shall carry out its obligations as set forth in the Anadromous Fish Agreement and Habitat Conservation Plan (HCP Agreement) for the Rocky Reach Hydroelectric Project No. 2145 filed with the Commission on November 24, 2003, and as approved by the Commission at 107 FERC ¶ 61,280 and ¶ 61,281. Further, the licensee shall file with the Commission (1) the final annual and comprehensive progress reports developed pursuant to the HCP Agreement; and (2) the final results of all studies and testing pursuant to the HCP Agreement.

(b) Prior to taking any action pursuant to the HCP Agreement that requires a change in the authorized project facilities or operations not specifically identified in the HCP Agreement, the licensee shall file a license amendment application.

(c) The licensee shall file design drawings prior to the implementation of any modification or addition to project works that is necessary to implement the HCP Agreement. The licensee shall file such design drawings for Commission approval

at least 90 days prior to the start of construction or modification. The licensee will file as-built drawings with the Commission within 6 months after completion of construction or modification.

(C) New Article 411 is added to the project license, to read as follows:

Article 411. Bull Trout – Reasonable and Prudent Measures and Terms and Conditions. (a) Within six months of the issuance of the order amending license issued at 107 FERC ¶ 61,281 (2004), the licensee shall file for Commission approval a plan to implement the Reasonable and Prudent Measures and associated Terms and Conditions. The plan shall include provision for the annual report required by Article 412. The plan shall be prepared in consultation with the U.S. Fish and Wildlife Service, NOAA Fisheries, Washington Department of Fish and Wildlife, and interested Indian tribes.

(b) The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reason's based on project-specific information.

(c) The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon approval of the plan, the licensee shall implement the plan, including any changes required by the Commission.

(D) New Article 412 is added to the project license, to read as follows:

Article 412. Annual Reports -- Implementation of Reasonable and Prudent Measures. (a) The licensee shall prepare and file with the Commission an annual report describing the impacts of the Reasonable and Prudent Measures and associated Terms and Conditions prescribed by the U.S. Fish and Wildlife Service for the protection of bull trout. The report shall also be submitted to the Central Washington Field Office of the U.S. Fish and Wildlife Service and shall list and describe any adverse effects resulting from project activities on bull trout, including the number and life stages of individuals affected.

(b) Upon locating a dead, injured, or sick endangered or threatened species specimen, the licensee shall initially notify the Central Washington Field Office (Wenatchee, Washington; telephone 509-664-0658) within 48 hours. The licensee shall take care in handling sick or injured specimens to ensure effective treatment and care or the handling of dead specimens to preserve biological material in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured endangered species or preservation of biological materials from a dead animal, the licensee shall carry out instructions provided by the Service to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

(E) New Article 413 is added to the project license, to read as follows:

Article 413. *Reservation of Authority – Bull Trout Recovery Plan.* Authority is reserved to the Commission to require the licensee to carry out specified measures for the purpose of participating in the development and implementation of a bull trout recovery plan.

(F) Article 49 of the project license, added to the Project license at 22 FERC ¶ 62,348 (1983), is modified to read as follows:

Article 49. The licensee, prior to the commencement of any ground-disturbing activity at the Project site or on non-federal lands pursuant to the Tributary Conservation Plan provisions of the Habitat Conservation Plan (HCP) Agreement approved by the Commission at 107 FERC ¶ 61,280 and ¶ 61,281, shall consult with the Washington State Historical Preservation Officer (SHPO) and potentially-affected Indian tribes about the need for a cultural resources survey. For this purpose, the licensee shall within 90 days prepare and provide to the SHPO and potentially affected Indian tribes a map delineating the Area of Potential Effect as defined in 36 C.F.R. § 800.16(d), and the maps shall include the potential geographical scope of actions under the Tributary Conservation Plan. If any previously unrecorded archeological or historical sites are discovered during the course of such survey or activity, ground-disturbing activity in the vicinity shall be

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halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the licensee shall consult with the SHPO and tribes to develop a mitigation plan for the protection of significant archeological or historical resources. The Commission reserves authority to resolve any disagreements between the licensee and the consulted entities.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

APPENDIX

U.S. FISH AND WILDLIFE SERVICE REASONABLE AND PRUDENT MEASURES AND IMPLEMENTING TERMS AND CONDITIONS REGARDING BULL TROUT

Reasonable and Prudent Measures

RPM 1. The Licensee to develop and implement, in coordination with the U.S. Fish and Wildlife Service (Service), appropriate measures to reduce impediments to up and downstream passage of adult and juvenile bull trout at Rocky Reach Dam and its associated reservoir system. Should measures to reduce impediments to up- and downstream passage of bull trout warrant consideration of additional modifications to facilities or operations, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure that these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

RPM 2. The Licensee shall design a monitoring program to (1) detect adverse effects resulting from the proposed action, (2) assess the actual level of incidental take in comparison with the anticipated incidental take level documented in the biological opinion, (3) detect when the level of anticipated incidental take is exceeded, and (4) determine the effectiveness of reasonable and prudent measures and their implementing terms and conditions. Specifically, the program shall be designed to monitor the abundance, distribution, and timing of adult and juvenile bull trout utilizing Rocky Reach Dam and its associated reservoir system. Implementation of this monitoring program shall begin no later than May 1, 2005. If information from the monitoring efforts warrants consideration of additional modifications to facilities or operations for the minimization of project effects on bull trout, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

Terms and Conditions

1. To implement RPM 1, the Licensee shall develop, in coordination with the Service, a prioritized list of monitoring efforts necessary to evaluate the effects of the Project on the up- and downstream passage needs of bull trout at Rocky Reach Dam by February 28, 2005. Based on that prioritized list, the Licensee shall initiate studies to evaluate the up- and downstream passage needs for bull trout at Rocky Reach Dam and to assess the

Project impacts on those passage needs. If the information from these studies warrants consideration of modifications to facilities or operations to reduce the take of bull trout, as determined by the Service in consultation with the Commission and the Licensee, then the Service will work with the Commission and the Licensee to ensure that these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

2. To implement RPM 1, the Licensee shall, in coordination with the Service, develop a prioritized list of monitoring efforts necessary to determine the extent of bull trout entrainment through the turbines at Rocky Reach Dam by February 28, 2005. If the studies contained in the prioritized list are determined by the Service, in consultation with the Commission and the Licensee, to be feasible, the Licensee shall be required to assess the extent of bull trout entrainment through the turbines at Rocky Reach Dam. If entrainment is determined to be significant, the Licensee will be required to explore techniques to minimize bull trout entrainment through the turbines.
3. To implement RPM 2, the Licensee shall, in coordination with the Service, develop and implement a comprehensive bull trout monitoring program, that includes the presence of a sufficient number of radio-tagged (or other appropriate tracking technology) bull trout, to enable monitoring of bull trout utilizing Rocky Reach Dam and its associated reservoir system and tracking of the incidental take exemptions stated above.
4. During the interim period between the Commission's issuance of an order amending the Project license to include these RPMs and Terms and Conditions and the implementation of the monitoring plan called for in RPM 2, the Licensee shall implement the following action items; specifically:
 1. Continue assessment of the Rocky Reach juvenile bypass system on migratory bull trout and juvenile bull trout where feasible.
 2. Extend fish ladder monitoring period to assess adult bull trout utilization of existing fishways outside the traditional migratory timeframes.
 3. Continue coordinated telemetry monitoring of radio-tagged bull trout.
 4. Compile project operational data linked to timeframes when adult migratory bull trout pass project powerhouses and/or spill gates.

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5. Cost share funding with the Service for analysis of genetic samples from fluvial bull trout sampled during the first year of the Mid-Columbia Bull Trout Study.

6. Participate in a coordinated effort with the Service to increase the informational database for adult bull trout that utilize the Methow/Twisp river system.

If the level of incidental take on which these RMPs and Terms and Conditions is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided.