

109 FERC ¶ 61,208

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of
Chelan County, Washington

Project Nos. 2145-062
and 943-089

Public Utility District No. 1 of
Douglas County, Washington

Project No. 2149-113

ORDER ON REHEARING

(Issued November 23, 2004)

1. On June 21, 2004, the Commission issued a master order and three project-specific companion orders in this proceeding. The orders approve project-specific Anadromous Fish Agreement and Habitat Conservation Plans (HCPs) regarding the operation of the Rocky Reach Project No. 2145 and the Rock Island Project No. 943, which are licensed to Public Utility District No. 1 of Chelan County, Washington (Chelan) and the Wells Project No. 2149, which is licensed to Public Utility District No. 1 of Douglas County, Washington (Douglas).¹

2. A joint request for rehearing was filed by the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes and Bands of the Yakama Nation (Yakama) and the Confederated Tribes of the Umatilla Indian Reservation (together, CRITFC). A joint request for rehearing and clarification was filed by Chelan, Douglas, the National Marine Fisheries Service (NOAA Fisheries), the Washington Department of Fish and Wildlife

¹ *P.U.D. No. 1 of Chelan County, WA*,, 107 FERC ¶ 61,280 (master order); *P.U.D. No. 1 of Chelan County, WA*, 107 FERC ¶ 61,281 (Rocky Reach); *P.U.D. No. 1 of Chelan County, WA*, 107 FERC ¶ 61,282 (Rock Island); *P.U.D. of Douglas County, WA*, 107 FERC ¶ 61,283 (Wells).

(WDFW), and the Confederated Tribes of the Colville Reservation (together, the HCP Parties). In this order, we grant in part and deny in part CRITFC's request for rehearing and grant the HCP Parties' request for clarification and rehearing. This order is in the public interest because it clarifies the role of Indian tribes that declined to execute the HCPs, but have an interest in the management of the HCP plan species and their habitats.

Background

3. The lengthy and complex background to this order is set forth in detail in the master order.² We summarize that order here in order to provide context for the following discussion.

4. The Mid-Columbia River is home to various species of salmon and steelhead trout. Some of these anadromous fish are federally listed as threatened or endangered. These listings are the result in part of the presence of many large hydropower projects on the Columbia River, including the four Mid-Columbia River projects. From upstream to downstream these are the Wells Project No. 2149, the Rocky Reach Project No. 2145; the Rock Island Project No. 943, and the Wanapum-Priest Rapids Project No. 2114.³

5. In 1978, various federal and state agencies and Indian tribes petitioned the Commission to require all of the Mid-Columbia projects to provide increased minimum flows and spills at each dam to assist the migration of salmon and steelhead trout. These actions were consolidated and set for hearing before an administrative law judge. The proceeding became known as the Mid-Columbia proceeding. In due course, interim and longer-term settlement agreements were filed with respect to some of the Mid-Columbia projects. In that context, the Mid-Columbia Coordinating Committee (MCCC) was established to coordinate the activities of all participants in the proceeding.⁴

² Master order, 107 FERC at 62,310-313.

³ Wanapum-Priest Rapids is licensed to Public Utility District No. 2 of Grant County, Washington.

⁴ The MCCC was established in a limited-term settlement agreement that expired in 1985, but continued to function at the direction of the presiding judge. *See P.U.D. No. 1 of Chelan County, WA*, 34 FERC ¶ 63,044 at 65,164 (1986)

6. Other, longer-term settlement agreements were approved in 1987 and 1990 with respect to Rock Island and Wells, respectively. The Rock Island Agreement was incorporated into a new license for that project. The Wells Agreement was incorporated into the Wells license, and the Mid-Columbia proceeding was terminated as to the Wells Project. Various studies related to downstream passage at Rocky Reach Project continued, and the Mid-Columbia Proceeding remained open as it pertains to that project.

7. The Endangered Species Act (ESA)⁵ authorizes NOAA Fisheries and the U.S. Fish and Wildlife Service (FWS) to issue an incidental take permit for listed species, which allows the permittee to conduct an activity that results in an incidental take of listed species. An incidental take permit may be issued in association with an HCP, which is a long-term planning document for minimizing and mitigating impacts of the permitted action.

8. In the mid-1990s, the licensees, NOAA Fisheries, FWS, WDFW, the above-mentioned tribes, and American Rivers entered into negotiations to develop HCPs for the Mid-Columbia projects.

9. In April 2002, project-specific HCPs were executed for Rocky Reach, Rock Island, and Wells.⁶ NOAA Fisheries subsequently issued an Environmental Impact Statement in connection with the HCPs, as well as project-specific Biological Opinions pursuant to section 7 of the ESA. It thereafter issued an incidental take permit for the operation of each project.

10. In 2003, the Chelan and Douglas filed separate applications for approval of the project-specific HCPs and for their incorporation as articles in the applicable licenses. The Rock Island and Wells applications requested that those licenses be amended by replacing the 1987 Rock Island and 1990 Wells Agreements, respectively, with the project-specific HCPs. There was no pre-existing Rocky Reach agreement on anadromous fisheries to be replaced.

⁵ 16 U.S.C. §§ 1531-1543.

⁶ No HCP has been executed for Wanapum-Priest Rapids.

11. The Commission commenced license amendment proceedings, in which it adopted NOAA Fisheries' EIS. In the master order, we approved the HCPs and incorporated them into the relevant licenses. As noted, timely requests for rehearing were filed by CRITFC and the HCP Parties.

12. On October 4, 2004, NOAA Fisheries filed a letter responding to CRITFC's arguments regarding participation by CRITFC in decision-making pursuant to the HCPs.

Discussion

A. NOAA Fisheries' Filing

13. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁷ an answer may not be made to a request for rehearing unless otherwise ordered by the decisional authority. We have allowed such answers where the party seeking rehearing makes new arguments or the answer will assist the Commission in addressing the issues.⁸

14. Here, NOAA Fisheries' response includes a new proposal to provide for consultation with the non-signatory Indian tribes, said to be supported by all of the HCP Parties. This proposal will assist us in addressing issues pertaining to the continuing role of the non-signatory Indian tribes in management of the anadromous fishery. We will therefore accept NOAA Fisheries' filing.

B. CRITFC Concerns

15. The 1987 Rock Island and 1990 Wells Agreements which were replaced by the Rock Island and Wells HCPs provided for certain flows, hatchery programs, and other measures to assist the anadromous fishery. In its protest, Yakama argued that these agreements are contracts and that the consent of all signatories is required in order to remove them from the Rock Island and Wells licenses. It characterized the

⁷ 18 C.F.R. § 385.213(a)(2)(2004).

⁸ See, e.g., *Central Nebraska Public Power and Irrigation District*, 52 FERC ¶ 61,339 at 62,344 (1990); *Southern California Edison Co. and San Diego Gas and Electric Co.*, 49 FERC ¶ 61,091 at 61,357 (1989).

Commission's approval of the HCPs as unilateral termination of the prior agreements, and asked that the HCPs be either rejected or modified to ensure that they provide for Yakama's continued participation in management of the species covered by those plans.

16. We denied both requests. The 1987 Rock Island Agreement provided that any party could, after the year 2000, initiate negotiations or file a petition to modify that agreement's terms and conditions, or to replace it in whole or part. We found that the 1990 Wells Agreement contained a similar provision and, in any event, both licenses contain a reservation of Commission authority at any time during the license term to require alterations to project facilities and operations if warranted by changed circumstances.⁹

17. On rehearing, CRITFC essentially reiterates Yakama's previously-rejected contract arguments. It does not dispute that the agreements and license article provisions permit modification or replacement of the 1987 Rock Island and 1990 Wells agreements, but states that the signatories never contemplated replacement of those agreements with agreements that deny the CRITFC tribes a continuing role in management of Mid-Columbia fisheries.¹⁰

18. The 1987 Rock Island and 1990 Wells Agreements say nothing about the terms of any future modifications or replacement agreements, and CRITFC's position on the signatories' intentions is not shared by the signatories other than Yakama. In any event, when these agreements were incorporated into the licenses as articles, they became subject to this Commission's jurisdiction, and are to be construed in the context of the entire license, including the Commission's reserved authority. We exercise that reserved authority by determining what is in the public interest in light of all relevant considerations. CRITFC's arguments in that regard are considered below.¹¹

⁹ Master order, 107 FERC at 62,316.

¹⁰ CRITFC rehearing request at 6-9.

¹¹ CRITFC also asserts that Douglas violated the 1990 Wells Agreement by discussing with NOAA Fisheries and others the possibility of developing HCPs in the mid-1990s and submitting its application to amend the Wells license in November 2003. That agreement provides that a party may request the other parties to begin negotiations to modify the terms of that agreement "any time after March 1, 2004." CRITFC

(continued...)

19. In the master order we found that it would not be in the public interest to allow the non-signatory tribes to participate in HCP processes unless they are bound by the same rules of participation as the signatories.¹² We did however recognize that these tribes have an important interest in the recovery of the Columbia River fishery, and stated our expectation that, although the Mid-Columbia proceeding was no longer be open as to any of the three projects, the MCCC would continue to function as a forum for coordination and discussion among the interested entities of issues common to the Mid-Columbia River Basin.¹³

20. CRITFC renews its request that the HCPs be modified to provide for the participation by the non-signatory tribes in HCP committee activities and decision-making. First, it reiterates previously-rejected¹⁴ arguments that the government's trust responsibility to the tribes requires the Commission to ensure that the non-signatory tribes have a decision-making role in management of the Columbia River fishery and, further, requires the Commission to reject the HCPs because they do not go far enough toward these tribes' goals of a sustainable, harvestable fishery.¹⁵ CRITFC's rehearing request includes no new facts or argument that would cause us to change our conclusion that our responsibility to fully consider the concerns of Indian tribes, as we have done

rehearing request at 9, *citing* Wells Agreement at 3. Any objections CRITFC might have had to the HCP negotiations were effectively waived by CRITFC's active participation in those negotiations. *See* CRITFC rehearing request at 4 ("The Tribes. . . participated in these discussions since their inception.").

¹² Master order, 107 FERC at 62,327.

¹³ *Id.* Subsequently, on August 18, 2004, the Commission's Chief Administrative Law Judge returned the Mid-Columbia proceeding from the presiding judge to the Commission. 108 FERC ¶ 63,024. That action did not terminate the proceeding. Because, however, the Commission has already terminated the proceeding with regard to Rocky Reach, Rock Island, and Wells, the proceeding is alive only as it pertains to Wanapum-Priest Rapids.

¹⁴ *See* master order, 107 FERC at 62,319-20 and 62,323-25.

¹⁵ CRITFC rehearing request at 14-18.

here, does not require us to reach a specific result. Thus, we are not required to treat the non-signatory tribes as though they are signatories, over the objections of and to the detriment of the signatories, including other Indian tribes. We also see no facts or arguments that cause us to question our conclusions regarding the sufficiency of the HCPs.

21. CRITFC also contends that a decision-making role in implementation of the HCPs for the non-signatory tribes is needed in order to prevent the compromise of their interests in other Columbia River Basin fishery fora. More specifically, it states that the HCPs provide for a reduction in subyearling salmon production in favor of yearling salmon production, and that that is inconsistent with agreements made in the context of the United States-Canada Pacific Salmon Treaty,¹⁶ and *U.S. v. Oregon* processes¹⁷ to provide for production of non-hatchery subyearling summer Chinook salmon in tributary habitat and mitigation for the loss of summer Chinook resulting from the operation of Wells, Rocky Reach, and Rock Island.¹⁸ CRITFC also states that the HCPs do not provide mitigation for the loss of coho salmon resulting from project operations, in contrast to efforts by the Yakama Nation to rebuild that stock. CRITFC adds that reduced production of spring Chinook under the HCPs will undermine the CRITFC tribes' goal of

¹⁶ Treaty Between the Government of the United States and the Government of Canada Concerning Pacific Salmon, entered into force January 28, 1985, amended by exchange of notes and entered into force on June 30, 1999. This treaty was adopted to promote rational management of Pacific salmon stocks through international cooperation.

¹⁷ CRITFC evidently refers here to procedures and processes developed in the context of the Columbia River Fish Management Plan (CRFMP), which was accepted as a partial settlement of the consolidated cases in *U.S. v. Oregon*, Civ. No. 68-513 and *U.S. v. Washington*, Civ. No. 9213. The CRFMP provides a framework for protecting, rebuilding, and enhancing salmon runs and for allocating and planning in-river harvest activities. See generally, *U.S. v. Oregon*, 699 F. Supp. 1456, 1458-60 (D. Or.1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) and *U.S. v. Oregon*, Civ. No. 68-513-MA, Opinion of Feb. 29, 1992, 1991 WL 613238.

¹⁸ CRITFC rehearing request at 12. CRITFC provides no citations or other documentary evidence of the purported agreements.

sustainable, harvestable levels of anadromous fish.¹⁹ Finally, CRITFC contends that the public interest is served by the tribes having a decision-making role on the HCP committees because tribal representatives have technical expertise lacking in federal and state agencies because of their work on salmonid issues throughout the Pacific Northwest and Canada and because they have a unique cultural perspective.²⁰

22. NOAA Fisheries states that the HCP Parties remain opposed to participation by non-signatory parties in the HCP Coordinating Committees, even in a non-voting capacity, but have agreed to invite them to participate in HCP implementation as non-voting members of the Tributary and Hatchery Committees, in the hope that they will gain confidence in the HCP processes and ultimately become signatories. NOAA Fisheries adds that it is an active participant in *U.S. v. Oregon* and Pacific Salmon Treaty proceedings and is mindful of the need for decisions made in the HCP context to be consistent with the management goals of those other fora and the commitments made therein.²¹

23. We remain convinced that the public interest is best served by approving the HCPs and by requiring any entity wishing to have a decisional role in their implementation to be bound by the same rules that apply to entities that have signed them. To decide

¹⁹ *Id.* at 12-13.

²⁰ *Id.* at 13-14.

²¹ NOAA Fisheries response at 2. We infer that this proposal supersedes the HCP Parties' proposal in their rehearing request that, if consultation with non-signatories is needed, the Commission should permit the HCP Parties to provide quarterly briefings on the status of HCP implementation to any interested entities, and that such briefing also be used as a forum for discussion, albeit not decision-making. *See* HCP Parties' rehearing request at 15-16.

The HCP Parties also indicate that NOAA Fisheries is committed to further consultation and coordination with the non-signatory tribes. HCP Parties' rehearing request at 16. We commend NOAA Fisheries for this commitment, which we hope will lead to better understanding and to substantive agreements between the HCP Parties and the non-signatory tribes.

otherwise would unduly favor the non-signatory tribes, who would then have the benefits of participation in the implementation process without accepting the concomitant responsibilities.

24. The Coordinating Committees are the primary means of consultation and coordination between the licensees and the other signatories in connection with the conduct of studies and implementation of the measures set forth in the HCPs to benefit the fishery. They have the authority to oversee all aspects of standards, methodologies, and implementation of these measures. They are also responsible for preparing annual progress reports, ensuring timely circulation of studies and reports prepared pursuant to the agreements, and approval and implementation of the survival standards established in the Passage Survival Plans for each project.²² The Coordinating Committees are also responsible for dispute resolution when the other committees are unable to agree.

25. The Tributary Committees are charged with implementing the Tributary Conservation Plans of the project-specific HCPs by selecting tributary habitat improvement projects and approving project budgets.²³ The Hatchery Committees are responsible for overseeing development of recommendations for implementing the hatchery elements of the HCPs, including improvements, monitoring, and evaluation, as identified in the Hatchery Compensation Plans.²⁴ If the members of either of these committees are unable to agree, the matter is referred to the Coordination Committee.

26. The HCPs are not likely to achieve their goals if some voting participants are bound by the goals, implementation processes and measures, and dispute resolution provisions, while others may prevent action or dispute resolution by opting out whenever they are dissatisfied. For that reason, we will not modify the licenses to require that non-signatories be offered committee memberships. We conclude, however, the HCP Parties' offer of non-voting membership on the Tributary and Hatchery Committees is a reasonable means of ensuring that the views of the CRITFC tribes are heard on these committees and that their expertise and experience continue to be a factor in the decision-

²² *E.g.*, Rocky Reach HCP section 4.

²³ *E.g.*, *id.*, section 7.

²⁴ *E.g.*, *id.*, section 8.

making processes of the various committees. Given the CRITFC tribes' decision not to become party to the settlement, we do not believe that requiring the HCP Parties to extend the tribes additional authority would be in the public interest.

C. Pre-HCP Coordinating Committees

27. In the master order we stated that, although the Mid-Columbia proceeding was terminated with respect to the three projects with HCPs, the MCCC continued to exist and that we expected it to continue to function as a forum for coordination and discussion among interested entities of issues common to the Mid-Columbia River basin.²⁵ The HCP Parties state on rehearing that it is time to abolish the Wells and Rock Island Coordinating Committees and the MCCC, which served as the decision-making forum for Rocky Reach prior to the Rocky Reach HCP.²⁶ They state that the HCP Coordinating Committees have superseded all of these pre-HCP committees for collaborative decision-making for Wells, Rocky Reach, and Rock Island, and that using these pre-HCP committees for coordination and consultation now is likely to create misunderstandings and disputes about applicable processes and decisional authority, and thereby interfere with the workings of the HCP Coordinating Committees.²⁷ We agree. For that reason, and because we are requiring Chelan and Douglas to offer the non-signatory tribes non-voting membership on the Tributary and Hatchery Committees, we will terminate the obligations of Chelan and Douglas to participate in the MCCC, to the extent it may still be functioning, with respect to these three projects. *See* Ordering Paragraph (C).

D. Clarification and Corrections

28. CRITFC and the HCP Parties note that neither the master order nor the companion orders explicitly remove the 1987 Rock Island and 1990 Wells Settlement Agreements from those licenses.²⁸ It was our intention to do so, and we give explicit effect to that intention in Ordering Paragraphs (A) and (B), respectively.

²⁵ Master order, 107 FERC at 62,327.

²⁶ HCP Parties' rehearing request at 11-16.

²⁷ *See P.U.D. No. 1 of Chelan County, WA*, 34 FERC ¶ 63,044 at 65,164 (1986).

²⁸ CRITFC rehearing request at 9; HCP Parties at 3-8.

29. The HCP Parties also request that we remove from the Rock Island license Articles 401 and 402, which were added in order to implement the 1987 Rock Island Settlement Agreement. Ordering paragraph (B) does so.

30. Finally, the U.S. Fish and Wildlife Service's Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions regarding bull trout, which were appended to the project-specific orders, were also inadvertently appended to the master order. Ordering Paragraph (D) below deletes the appendix.²⁹

The Commission orders:

(A) Ordering Paragraph (A) of the order at 54 FERC ¶ 61,056 at 61,210 (1991) approving and making part of the license for the Wells Project No. 2149 the 1990 Wells Settlement Agreement, is hereby removed from the Wells Project license.

(B) Ordering Paragraph (F) of the order at 46 FERC ¶ 61,033 at 61,208 (1989) approving and making part of the license for the Rock Island Project No. 943 the 1987 Rock Island Settlement Agreement, and license articles 401 and 402 implementing said settlement agreement (46 FERC at 61,208), are hereby removed from the Rock Island Project license.

(C) Public Utility District No. 1 of Chelan County, Washington, and Public Utility District No. 1 of Douglas County, Washington, are no longer required to participate in processes of the Mid-Columbia Coordinating Committee as those processes pertain to the Rocky Reach Project No. 2145, Rock Island Project No. 943, and Wells Project No. 2149.

(D) The order issued June 21, 2004 in this proceeding, 107 FERC ¶ 61,280, is amended by deletion of the appendix thereto.

²⁹ The Wells and Rock Island orders attach the RPMs and Terms and Conditions applicable to those projects, but incorrectly state in the text that the Rocky Reach RPMs and Terms and Conditions are attached. The text should be read to refer to the appropriate Wells and Rock Island RPMs and Terms and Conditions, respectively.

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(E) The request for rehearing of CRITFC and the request for rehearing and clarification filed by the HCP Parties, both filed on July, 21, 2004, are hereby granted or denied to the extent discussed herein, and are otherwise denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.