

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Boise-Kuna Irrigation District, Nampa & Meridian                      Project No. 4656-019  
Irrigation District, New York Irrigation District, Wilder  
Irrigation District, and Big Bend Irrigation District

ORDER DENYING REHEARING

(Issued September 1, 2005)

1. This order denies a request by the Boise-Kuna Irrigation District, Nampa & Meridian Irrigation District, New York Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District (Districts) for rehearing of a May 27, 2005 order denying the Districts' request to stay their license for the Arrowrock Dam Project No. 4656 and to backdate the stay for 120 days to allow additional time to comply with various license articles.<sup>1</sup>

**Background**

2. The background of this order is set forth in detail in the May 27, 2005 Order, and need not be repeated here. In brief, the Districts were issued a license for the project, which would be located at the Bureau of Reclamation's (Reclamation) Arrowrock Dam, in 1989. They received the single extension of time to commence construction permitted by Federal Power Act (FPA) section 13.<sup>2</sup> Congress thereafter authorized the Commission to extend the commencement of construction deadline until March 26, 1999, which it did. The Commission then denied the Districts' request to stay the deadline while they sought additional legislation permitting further extensions. Congress thereafter authorized the Commission to reinstate the license and grant up to three additional two-year extensions. The Districts requested and received those extensions,

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<sup>1</sup> 111 FERC ¶ 61,271 (May 27 Order).

<sup>2</sup> 16 U.S.C. § 806.

making the deadline for commencement of construction March 26, 2005, for a total time allowed to commence construction of sixteen years.

3. On March 25, 2005, the Districts filed a request for a stay of the license, and to backdate the stay for 120 days to allow additional time for them to comply with the license articles containing requirements that must be completed before the commencement of construction. The May 27 Order denied that request and gave notice of probable termination of the license. The Districts timely filed a request for rehearing.

### **Discussion**

4. As discussed in the May 27 Order, in acting on stay requests, the Commission applies the standard test set forth in the Administrative Procedures Act,<sup>3</sup> *i.e.*, the stay will be granted if “justice so requires.” We have granted requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances. We will not grant a request for a stay merely to relieve the licensee of the statutorily-prescribed commencement of construction deadline, or to prevent mandatory termination where, because of the licensee’s own actions or inactions, construction was not commenced prior to the statutory deadline. We have, however, granted requests for stay of the commencement of construction deadline, or the entire license, where commencement of construction cannot commence until necessary actions of other federal or state agencies are completed.<sup>4</sup>

5. The Districts’ stay request cited several actions taken since the order granting the final extension of time in support of their contention that they have diligently pursued the project. They added that they are “poised to begin construction,”<sup>5</sup> with the only impediment being the need to complete consultation on the project pursuant to the Endangered Species Act (ESA)<sup>6</sup> on federally-threatened Columbia River bull trout and bald eagles.

6. We concluded that the Districts were essentially seeking an open-ended stay of the license to relieve them of the commencement of construction deadline while they

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<sup>3</sup> 5 U.S.C. § 705.

<sup>4</sup> See 111 FERC at ¶ 61,271 at P 12.

<sup>5</sup> Rehearing request at 17.

<sup>6</sup> 16 U.S.C. §§ 1531-43.

materially redesign the project, which would require a license amendment application, for which they had not applied, and that the need for ESA consultation is driven in large part by these efforts, rather than the listing of bull trout. We also expressed our skepticism that the ESA consultation could be concluded in the five-month time frame suggested by the U.S. Fish and Wildlife Service (FWS) because FWS' agreement to try to do so was contingent on receipt of additional information about the revised project and its request to the Commission to seek formal consultation based on information not yet provided by the Districts.<sup>7</sup>

7. On rehearing, the Districts insist that the only impediment to commencement of construction is the need to complete ESA consultation, in which case Commission precedent supports the requested extension of time, and that we have misunderstood the factual record, our regulations, and the applicable precedent.

8. The Districts first argue that there is no relationship between their efforts to redesign the project and ESA consultation, allegedly demonstrated by the fact that FWS recommended that the Commission commence formal consultation on bull trout in 2001 and February 2004, before the current project configuration was developed.<sup>8</sup> FWS' 2001 letter signifies nothing in the context of this latest request for more time because it was based on the project as originally licensed.<sup>9</sup> The February 25, 2004 letter, which was sent during the term of the last extension of time, specifically states that consultation is needed because of "several changes proposed to the design that was analyzed in the original license for the project," which FWS characterizes as "substantial," and because "environmental conditions in the project area have changed."<sup>10</sup> Indeed, in an April 29, 2005 letter to the Commission, FWS noted that the Districts had not yet developed "a project description sufficient for our [ESA] section 7(a)(2) analysis" and stated that consultation could not commence until the Districts supplied to the Commission

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<sup>7</sup> 111 FERC ¶ 61,271 at P 15-18.

<sup>8</sup> Rehearing request at 4-5, and Exhibits A (FWS' 2001 letter) and B (FWS' February 25, 2004 letter).

<sup>9</sup> See rehearing request, Exhibit A at 2.

<sup>10</sup> Rehearing request, Exhibit B. The Districts appear to suggest that the February 25, 2004 letter from FWS is irrelevant because the Districts' currently preferred configuration was developed subsequent to that letter. All that we are able to conclude from this is that both the Commission and the FWS continue to wait for the Districts to settle on a final design configuration.

additional information, including “a detailed project description, information about the relationship between the hydroelectric project and Reclamation operations, and potential effects of the action on bull trout and bald eagles.”<sup>11</sup>

9. The Districts next state that a footnote to the May 27 Order erroneously suggests that a rehabilitation project on the outlet works at Arrowrock Dam has not been completed,<sup>12</sup> demonstrating that we were mistaken in concluding that the Districts have not provided sufficient design information to begin ESA consultation.<sup>13</sup> The Districts’ effort to link the former to the latter is a *non sequitur*. The sole purpose of the footnote was to describe the nature of Reclamation’s modifications to Arrowrock Dam. The completion date of Reclamation’s work has nothing to do with whether the District’s redesign proposal for *its* proposed facilities at Arrowrock was sufficiently well developed to permit consultation.<sup>14</sup>

10. The Districts also question our conclusion that it is unlikely ESA consultation could be completed in the time frame tentatively suggested by FWS. In support, they attach to their pleading current versions of project descriptions, operations, and construction sequencing, and project drawings which they state have been provided to FWS for formal consultation. They add that FWS’ March 2005 Biological Opinion contains all the necessary background information on the status of the species in the project area and the operation of Reclamation’s projects.<sup>15</sup> It is for FWS to determine if it has sufficient information for consultation purposes, and the only statements in the

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<sup>11</sup> Letter from Jeffrey L. Foss, Supervisor, Snake River Fish and Wildlife Service Office, to Secretary Magalie Salas, filed April 29, 2005, at 2.

<sup>12</sup> See 111 FERC ¶ 61,271 at P 14 and n. 24.

<sup>13</sup> Rehearing request at 5-6.

<sup>14</sup> The Districts also suggest that FWS’ April 29, 2005 letter is wrong in stating that FWS needs a better description of the redesigned project and its potential impacts, on the ground that the Districts had at that time provided various draft descriptions and drawings to FWS. We are not inclined to second guess FWS’ conclusions in this regard.

<sup>15</sup> Rehearing request, Exhibit F.

record in this regard from FWS indicate that the project information available to it as of April 29, 2005, was insufficient.<sup>16</sup>

11. The Districts next assert that an amendment application is required only if the licensee intends to “[m]ake a change in the plans for a project under license,”<sup>17</sup> and that pre-filing consultation is required for a change in plans that would reduce the project’s authorized capacity only if it would require “the building of a new dam or a substantial alteration to an existing dam.”<sup>18</sup> They contend that their redesign of the project entails no significant changes, so there is no need for them to seek a license amendment before commencement of construction or to consult with any agencies or other entities other than FWS, but need only file “as built” drawings<sup>19</sup> when they have completed construction.<sup>20</sup>

12. The Districts’ selective citations to our regulations are unavailing. Section 4.200 of our rules pertaining to applications for an amendment of license applies to applications, among others, to make a change in “the physical features of the project” or “the plans for the project under the license.”<sup>21</sup> Some changes in project specifications between those authorized and those actually constructed are so minor as not to require prior Commission authorization, and can be accomplished through approval of as-built

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<sup>16</sup> We further note that the new materials purportedly provided to FWS by the Districts were last revised in June 2005, following the May 27 Order. *See* Exhibit F at 1. This makes FWS’ tentative schedule for ESA consultation even less likely to be achieved.

<sup>17</sup> *Citing* 18 C.F.R. § 4.200(b) (2005).

<sup>18</sup> *Citing* 18 C.F.R. § 4.38(a)(6)(v) (2005). The Districts also cite excerpts from section 5.1 of the March 2002, Division of Hydropower Administration and Compliance Handbook which give guidance based on this section of the regulations.

<sup>19</sup> Licenses that authorize construction of facilities include an article requiring the licensee to file for approval detailed depictions of the location and design of facilities required by the license. These are called “as-built” drawings. They are placed in the record and, when approved, become part of the license.

<sup>20</sup> Rehearing request at 8-12.

<sup>21</sup> 18 C.F.R. § 4.200(a) and (b) (2005).

drawings,<sup>22</sup> but this is plainly not such a case. As licensed, the project would be 60-MW, including two 30-MW generating units and two 13-foot-diameter, 180-foot-long penstocks, which would pass through tunnels constructed through the dam. The Districts indicate that they now contemplate a 15-MW project, consisting of two 7.5 MW generating units. There would be no penstock or tunneling through the dam. The generating units would receive water through existing valves downstream of the dam, which are at a lower elevation and different location in the water column than the licensed intakes. Part of the transmission line would also be relocated. These design changes would substantially alter the licensed project.

13. Regarding the need for pre-filing consultation, an application for a “non-capacity related amendment,” which encompasses a reduction in generating capacity,<sup>23</sup> “must contain those exhibits that require revision in light of the nature of the proposed amendments.”<sup>24</sup> An applicant for a non-capacity related amendment is not required to complete the three-stage pre-filing consultation process applicable to capacity-related amendments in section 4.38(a)(6)(v), or to include with its application certain information required for capacity-related amendments. Rather, the applicant must consult with resource agencies and others to the extent the proposed amendment would affect the interests of those entities.<sup>25</sup> Potential amendment applicants are encouraged to consult with Commission staff regarding the extent of consultation required by a proposed non-capacity related amendment. The Districts did so and were informed that an amendment application would be required.

14. The Districts also cite to a prior order in which they were permitted to amend the license for the Lucky Peak Project No. 2832 to reduce the number of generators and increase the project’s generating capacity without filing a preconstruction amendment application<sup>26</sup> and argue that they reasonably relied on that prior experience to guide their

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<sup>22</sup> See, e.g., *City of Orrville, Ohio*, 95 FERC ¶ 61,458 (2001) and cases cited therein (minor changes in turbine design).

<sup>23</sup> A “capacity related amendment” is one which would increase hydraulic capacity by 15 percent or more and generating capacity two megawatts or more. 18 C.F.R. § 4.201(b) (2005).

<sup>24</sup> 18 C.F.R. § 4.201(c)(2005).

<sup>25</sup> See 18 C.F.R. § 4.38(a)(5) (2005).

<sup>26</sup> See *Boise-Kuna Irrigation District*, 56 FERC ¶ 62,061 (1991).

actions in this proceeding.<sup>27</sup> Such reliance is untenable in the face of the staff's advice to the Districts with respect to the proposed changes to this project.

15. The Districts also state in this regard that the Commission staff was aware of their proposed design changes because staff issued a Biological Assessment on September 29, 2004, which concluded that the redesigned project is not likely to affect listed species, yet it did not "insist on" a pre-construction amendment.<sup>28</sup> However, regardless of whether the staff "insisted" on an amendment application, as discussed above, it clearly informed the Districts that such an application would be necessary.

16. Finally, the Districts continue to argue that everything else necessary to commence construction is "in place." Specifically, they state that bond underwriters have reviewed a proposed power purchase and sale agreement and the potential purchaser's finances, and commitments have been received from a construction contractor and a purchaser for the project's power.<sup>29</sup> However, the "power purchase and sale agreement" is nothing more than a letter of intent from a public utility district, dated on the same day the rehearing request was filed, to purchase the project power and to continue negotiations toward the development of a power purchase agreement. The letter of intent includes various conditions with respect to any such agreement regarding board approvals, limitations on project costs, the ESA consultations resulting in a specified minimum generating capability, successful negotiation of an interconnection agreement with Idaho Power Company, and prices for delivered power.<sup>30</sup> This showing does not persuade us that commencement of construction is any closer than it was when the May 27 Order was issued.

17. In conclusion, the Districts have not persuaded us that the May 27 Order was in error as a matter of law or fact, and we will deny rehearing.

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<sup>27</sup> Rehearing request at 11.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.* at 12-13.

<sup>30</sup> *Id.*, Exhibit H.

The Commission orders:

The request for rehearing filed on June 24, 2005, by Boise-Kuna Irrigation District, Nampa & Meridian Irrigation District, New York Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District in this proceeding is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.