

106 FERC ¶ 61,307  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PacifiCorp

Project No. 20-026  
Project No. 2401-049  
Project No. 472-025

ORDER ON REHEARING

(Issued March 26, 2004)

1. In this order we grant in major part PacifiCorp's request for rehearing of a number of technical points in the order issuing a new license for the 85.5-megawatt Bear River Hydroelectric Project No. 20, located on the Bear River in Caribou and Franklin Counties, Idaho.<sup>1</sup>

**DISCUSSION**

2. The December 22, 2003 order issuing the new license approved and incorporated into the license, with a few revised and additional terms, those portions of a comprehensive Settlement Agreement (Agreement) that the 16 signatories to the Agreement requested be in the license.<sup>2</sup> The Agreement terms

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<sup>1</sup>105 FERC ¶ 62,207 (2003). The new license was issued for three projects that had previously been licensed separately: the Soda Project No. 20, the Grace-Cove Project No. 2401, and the Oneida Project No. 472, all located on the Bear River.

<sup>2</sup>The Agreement was signed by two Federal Departments, three State agencies, the Shoshone-Bannock Tribes, four special-interest groups, and a number of individuals.

The license order noted (105 FERC ¶ 62,207 at P 331) that the Interior Department's Bureau of Land Management (BLM), which manages about 511 acres of Federal land occupied by the Bear River Project, had filed preliminary

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are reflected in license Articles 402 through 426. In its rehearing request, filed January 20, 2004, PacifiCorp proposed corrections to certain articles and order text. By filing of March 10, 2004, PacifiCorp withdrew portions of its rehearing request.<sup>3</sup> The balance of its request is addressed below.

**A. Articles 204 and 427: Adding Land to the Project**

3. License Article 204 requires PacifiCorp to file, within 90 days of license issuance, proposed Exhibit G drawings showing the project boundary as established in the order, including the additional lands required by Article 420. PacifiCorp points out that it is Article 427, not 420, that requires certain boundary expansions, on behalf of recreational access to the Bear River. It also notes that Article 427 gives the licensee eight months to file proposed Exhibit G drawings, or a different schedule as determined by the Project Implementation Plan required under Article 401. PacifiCorp asks the Commission to correct the reference in Article 204 to the recreational access article and to revise Article 204 to give it eight months to file the Exhibit G drawings. We will do so.

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mandatory conditions under Federal Power Act Section 4(e), but that nothing in the record of the proceeding indicated that these lands are “reservations,” the only kind of Federal land on behalf of which mandatory conditions may be submitted. On February 3, 2003, BLM filed a letter stating that in light of the subsequently filed settlement agreement in this proceeding, which BLM signed, there was no need to mandate any license conditions, and that therefore the Commission should not make any statement about the nature of the BLM lands in this case. We do not express any opinion as to whether these BLM lands constitute reservations for FPA Part I purposes.

<sup>3</sup>PacifiCorp withdrew the portions of its rehearing request that dealt with license Articles 301 through 306 and 403, and a scheduling inconsistency between Articles 418 and 419, stating that its concerns will most appropriately be resolved through filing requests for extensions of time. In addition, on February 9, 2004, PacifiCorp filed a clarification of its rehearing request as it related to Articles 405 and 406. We understand this clarification to moot its rehearing request as to these two articles.

4. PacifiCorp asks that Article 427 be revised to state that the licensee shall add “approximately 40 acres” at the Grace-Cove and Oneida developments, which is the acreage mentioned in paragraph 40 of the relicense order.<sup>4</sup> This revision is not necessary; Article 427 is quite specific with respect to the land to be added.<sup>5</sup>

**B. Article 411: Dam Leakage Measurements**

5. PacifiCorp notes that, while the Agreement, at Section 3.2.1, requires PacifiCorp to measure leakage flows at the project’s Grace, Oneida, and Cove dams, license Article 411 requires leakage measurement at all four project dams, the fourth being Soda. Article 411 is in error in this respect, and we will revise it.<sup>6</sup>

**C. Article 419: Whitewater Boating Flow Releases in Grace Bypass**

6. License Article 419(a) contains, as relevant here, the following requirement:

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<sup>4</sup>The 40-acre estimate is also found in the environmental impact statement prepared in this proceeding (April 2003), at p. 99.

<sup>5</sup>Article 427 specifies for inclusion in the project boundary the following lands:

At the Grace-Cove development, the expanded boundary shall include PacifiCorp lands on both sides of the bypassed reach upstream of Cove dam and the Grace powerhouse. At the Oneida development, the expanded boundary shall include all PacifiCorp and BLM lands from the existing downstream project boundary, below the powerhouse, to the proposed boater takeout at the cattle guard in Oneida Canyon, on the primary access road side of the Bear River, between the road and the river or 200 feet from the river, whichever is greater.

<sup>6</sup> Section 3.2.1 of the Agreement provides that the leakage flows measured at the Grace, Oneida, and Cove dams will be added to the minimum flow requirements at these respective dams. Both the Agreement and the Commission determined that there is no need to measure leakage from the Soda dam, because there is no environmental need to augment the minimum flow in the bypassed reach below the Soda dam to benefit aquatic resources.

During years 1-3 of the issuance of the new license, . . . when available inflow results in at least 500 cfs [cubic feet per second] spill into the Grace bypassed reach, the licensee shall release additional flow into the bypassed reach . . . such that the total flow in the bypassed reach is up to but does not exceed a total of 900 cfs. . . .

7. PacifiCorp notes that the relicense order, at P 22, describes a different requirement for this time period, namely that “when available inflow is at least 500 cfs,” the licensee will release additional flow for a total flow in the bypass reach of up to 900 cfs. PacifiCorp asks the Commission to clarify that Article 419(a), which reflects the Agreement, is correctly stated, and P 22 is not. We so clarify.<sup>7</sup>

8. PacifiCorp points out that Article 419(b)-(c), which establishes flow releases for whitewater boating in the Grace bypass reach, incorrectly requires the implementation of the ramping rates determined in Article 412. Grace reservoir has no storage capacity and therefore cannot control ramping rates at that dam, and is not referenced in Article 412. We will revise Article 419(b)-(c) to correct this error.

#### **D. Article 421: Forecasting Whitewater Flows**

9. Article 421 requires the licensee, in consultation with the Environmental Coordination Committee (ECC),<sup>8</sup> to develop a plan to annually forecast and announce whitewater boating flows. It provides further that if the licensee and the ECC cannot agree on “a schedule for releasing the whitewater flows stipulated in Article[s] 419 and 420,” the licensee is to file a recommended flow regime for Commission approval. PacifiCorp asks the Commission to remove from the quoted portion of Article 421 the reference to Article 420, for the reason that Article 420 deals with the Oneida dam, which, because of other legal obligations,

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<sup>7</sup>While we understand PacifiCorp’s desire to set the record straight, we also note that what governs is not the discussion preceding a license order’s ordering paragraphs but rather the ordering paragraphs and the articles and other requirements they set forth or incorporate by reference. See, e.g., Avista Corp., 93 FERC ¶ 61,116 at 61,327 (2000); Clifton Power Co. v. FERC, 88 F.3d 1258, 1261-62 (D.C. Cir. 1996).

<sup>8</sup>The ECC is comprised of representatives from each of the Agreement signatories.

is not susceptible to mandatory releases of whitewater boating flows. We will make the correction to Article 421.

**E. Paragraph 19 of Relicense Order: Flow Release Revisions**

10. PacifiCorp seeks modification of paragraph 19 of the relicense order, which describes section 3.2 of the Agreement, to reference additional elements of section 3.2, which establishes minimum flow releases from the project dams. Paragraph 19 states among other things that “the Agreement provides to the ECC the authority to direct changes to the flow regime.” PacifiCorp would add that the ECC can direct such changes only after year 10 of the new license, and that the lost-generation costs to PacifiCorp of implementing changed flows will be offset through decreases in other Agreement funding limits.<sup>9</sup>

11. Paragraph 19 is in a section of the order titled “Settlement Agreement -- Contents,” which in ten paragraphs summarizes the resource measures of the Agreement. The section is not a complete description of the measures, and it does not, as PacifiCorp suggests, “approve” the measures it does describe. Indeed, the order’s next section, “Discussion,” states that, while it is appropriate that the Agreement provides for possible modifications to project structures and operations during the license term, it is the role and responsibility of the Commission, not ECC, to authorize or require any material changes to the project. PacifiCorp does not argue otherwise, and does not seek any revision to license articles on this point.

**F. Paragraph 29 of Relicense Order: Compliance Schedule**

12. PacifiCorp notes that, while paragraph 29 of the relicense order states that Article 401 requires it to file a proposed license implementation schedule within four months of license issuance, Article 401 requires the proposed schedule within six months of license issuance. We hereby clarify that the correct due date is six months after license issuance.

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<sup>9</sup>Agreement section 3.2.2 states: “No sooner than the tenth anniversary of the New Licenses becoming final, the ECC may prescribe increases in minimum flows.” The Agreement’s Appendix A, containing proposed license articles, states, at proposed Article 7, fifth paragraph: “After the tenth anniversary of the license becoming final, the Licensee, at the direction of the ECC, may implement increases in minimum flows.”

The Commission orders:

The new license issued on December 22, 2003, for the Bear River Project No. 20, 105 FERC ¶ 62,207, is amended as set forth below.

(A) Article 204 is revised to read as follows:

Article 204. Within eight months of the date of the issuance of this order, the licensee shall file for Commission approval Exhibit G drawings, prepared in accordance with 18 C.F.R. §§ 4.39 and 4.51(h), that show the project boundary as established in this order, including the additional lands required by Article 427. The FERC Exhibit Label and the FERC Drawing Title of each aperture card must be labeled to reflect the new numbering (combining all four developments), according to Ordering Paragraph B in this license. The licensee shall file six copies with the Commission, one copy to the Portland Regional Director, and one copy to the Director Division of Hydropower Administration and Compliance, Office of Energy Projects.

(B) Article 411, first paragraph, is revised to read as follows:

The licensee, in consultation with the ECC, shall develop a plan to measure the leakage from the Grace, Oneida and Cove dams. The plan shall be filed with the Commission for approval within six months after the issuance of the license, or on an alternative schedule as determined by the Project Implementation Plan required under Article 401.

(C) Article 419 is revised as follows:

(1) Article 419(b) is revised to read as follows:

(b) During years 4 - 6 after issuance of the new license, or on an alternative schedule as determined by the Project Implementation Plan required under Article 401, the licensee shall release flows into the Grace bypassed reach of between 700 and 1,500 cfs, if available as inflow (scheduled releases). Such flows will total no more than 96 hours of foregone generation at 1,050 cfs in any year, during specified time periods between April 1 and July 15. Such flows will be provided, if available, in 16 separate releases of six hours in length on weekend days. The Grace development will not operate during such releases unless available inflow is greater than the

scheduled whitewater boating flow, and then the development will operate with that portion of the inflow that exceeds the scheduled whitewater boating flows.

(2) Article 419(c), first paragraph, is revised to read as follows:

(c) During year 7 and subsequently after issuance of the new license, or on an alternative schedule as determined by the Project Implementation Plan required under Article 401, the licensee shall release whitewater boating flows between 700 and 1,500 cfs for 96 hours per year between April 1 and July 15 each year, if available as inflow, unless monitoring results (required under Article 407) show significant adverse effects on ecological attributes in Black Canyon. For the purposes of this section, "significant adverse effect" is defined as a measured change that materially degrades ecological attributes, including, without limitation, water quality, native fish and macroinvertebrate habitat, and riparian habitat, to the extent that the ability to achieve the management objectives of the final BCT Restoration Plan, the RCAS, and the CTMAPP is impaired. In no event shall the licensee be obligated to provide more than 96 hours of scheduled whitewater boating flows in any given year at an average of 1,050 cfs.

(D) Article 421, second paragraph, is revised as follows:

The plan shall include provisions for: (1) forecasting the availability of inflow for whitewater boating flows on or about March 1 of each year after the issuance of the license, or on an alternative schedule as determined by the Project Implementation Plan required under Article 401, consistent with the obligations stated in section 5.10 and Appendix C of the August 28, 2002 Settlement Agreement; (2) announcing the initial water year forecast; (3) consulting with American Whitewater on the distribution of whitewater releases; (4) consulting with the ECC in developing a mutually agreeable flow regime and filing a report with the Commission detailing the schedule. If the forecast is such that flows may be conducive to whitewater boating flows for a total of more than 96 hours, then the ECC will recommend the days upon which such flows will be released. In the event the licensee and the ECC cannot mutually agree on a schedule for releasing the whitewater

flows stipulated in Article 419, the licensee shall, no later than March 20 of each year, file for Commission approval recommendations for a flow regime.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Magalie R. Salas,  
Secretary.