

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tribal Comprehensive Plans and
Federal Power Act Section 10(a)(2)(A)

Docket No. EL06-41-000

ORDER ON CLARIFICATION

(Issued January 20, 2006)

1. In this order, the Commission grants clarification with respect to a staff letter accepting as a comprehensive plan pursuant to section 10(a)(2)(A)¹ of the Federal Power Act (FPA) an anadromous fish restoration plan prepared by four Indian tribes. We clarify that, although the plan does not qualify as a federal or state comprehensive plan as defined in the FPA, it will receive full consideration in hydroelectric licensing proceedings to which it applies.

Background

2. On December 17, 2003, the Nez Perce tribe submitted to the Commission a copy of “Wy-Kan-Ush-Mi Wa-Kish-Wit: Spirit of the Salmon,” for consideration in ongoing Commission proceedings.² The Tribe requested that the document, which it stated was developed by itself, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Bands and Tribes of the Yakama Indian Nation as a restoration plan for anadromous fish in the Columbia River Basin, be considered as a comprehensive plan pursuant to section 10(a)(2)(A).

3. By letter issued June 29, 2004, the Commission staff accepted the Spirit of the Salmon as a comprehensive plan under section 10(a)(2)(A).³

¹ 16 U.S.C. § 803(a)(2)(A) (2000).

² See letter from Rick Eichstaedt (Nez Perce staff attorney) to Magalie R. Salas (Secretary of the Commission) (filed December 23, 2003).

³ See letter from Edward A. Abrams (Commission staff) to Rick Eichstaedt.

4. On July 29, 2004, Idaho Power Company and Public Utility District No. 1 of Chelan County, Washington filed separate objections to the designation of the Spirit of the Salmon plan as a comprehensive plan, asserting that it did not fit within the FPA's definition of that term.⁴

5. On August 30, 2004, the tribes and Columbia River Intertribal Fish Commission (CRITFC), which had assisted the tribes in preparing the plan, jointly filed an answer to Idaho Power's pleading. They asserted that the Commission could consider the Spirit of the Salmon plan as a comprehensive plan under the FPA and the Commission's Tribal Policy Statement.⁵

Discussion

6. FPA section 10(a)(2)(A) provides that, in order to ensure that any licensed project will be best adapted to a comprehensive plan for the waterway on which the project will be located, the Commission shall consider:

The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

- (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
- (ii) the State in which the facility is or will be located.⁶

The Spirit of the Salmon plan was not prepared by a federal or state agency. Thus, it does not meet FPA section 10(a)(2)(A)'s statutory definition of "comprehensive plan," and the Commission is not required to consider the extent to which proposed projects are consistent with it. However, FPA section 10(a)(2)(B) provides that the Commission shall also consider "[t]he recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is

⁴ Idaho Power Company is the licensee for the Hells Canyon Project No. 1971, and Chelan County is the licensee for the Rocky Reach Project No. 2145, both of which are located within the scope of the Spirit of the Salmon plan.

⁵ See 18 C.F.R. § 2.1c (2005).

⁶ The Commission's regulations echo FPA section 10(a)(2)(A). See 18 C.F.R. § 2.19 (2005).

located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.” Pursuant to this provision, we will consider the Spirit of the Salmon plan in any licensing proceeding to which it applies.

The Commission orders:

“Wy-Kan-Ush-Mi Wa-Kish-Wit: Spirit of the Salmon” will not be considered a comprehensive plan under section 10(a)(2)(A) of the Federal Power Act, but will be considered under FPA section 10(a)(2)(B) in any licensing proceeding to which it applies.

By the Commission. Commissioner Brownell concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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BROWNELL, Commissioner, concurring:

I fully support the finding and rationale of the order. I would also point out that the Commission's Tribal Policy Statement provides that "[i]n evaluating a proposed hydroelectric project, the Commission will consider any comprehensive plans prepared by Indian tribes or inter-tribal organizations for improving, developing, or conserving a waterway or waterways affected by a proposed project."⁷ Therefore, our Tribal Policy Statement provides an additional basis for us to treat the Spirit of the Salmon as a comprehensive plan.

For these reasons, I concur with today's order.

Nora Mead Brownell
Commissioner

⁷ See 18 C.F.R. § 2.1c(k) (2004).