

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Idaho Power Company

Project Nos. 1971-054 and 1971-089

ORDER ON MANDAMUS AND GRANTING PETITION

(Issued August 6, 2004)

1. On June 22, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an order requiring the Commission to respond, within 45 days, to a petition filed by American Rivers and other groups (collectively “American Rivers”),¹ which asked the Commission to consult formally with the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries),² pursuant to the Endangered Species Act (ESA), 16 U.S.C., § 1531 *et seq.*, with respect to the impacts of the Hells Canyon Project No. 1971 on listed salmonid species and their habitat. In this order, we grant the petition.

BACKGROUND

2. In 1955, the Federal Power Commission granted a 50-year license, under Part I of the Federal Power Act, to Idaho Power Company, authorizing the company to construct, operate, and maintain the 1,436.9-megawatt Hells Canyon Project, located on the Snake River in Washington and Adams Counties, Idaho, and Wallowa and Baker Counties, Oregon. *See* 14 F.P.C. 55. The license will expire in 2005.

¹ The groups filing the petition were: American Rivers, Northwest Environmental Defense Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen’s Associations, Trout Unlimited, Institute for Fisheries Resources, Federation of Fly Fishers, and Sierra Club.

² NOAA Fisheries was until recently commonly referred to as the National Marine Fisheries Service. For purpose of clarity, we refer to that agency as “NOAA Fisheries” throughout this order.

3. In the 1990s, NOAA Fisheries listed Snake River sockeye salmon, spring/summer Chinook salmon, and fall Chinook salmon as endangered under the ESA, *see* 56 Fed. Reg. 58,619, 58,622 (Nov. 20, 1991) (sockeye); 59 Fed. Reg. 42,529, 42,531-32, 54840 (Aug. 18 and Nov. 2, 1994) (spring/summer Chinook and fall Chinook), and designated an area including the Hells Canyon reach of the Snake River as critical habitat for these species. *See* 58 Fed. Reg. 68,543, 68,546 (Dec. 28, 1993). In addition, NOAA Fisheries listed the Snake River population of west coast steelhead trout as threatened. *See* 62 Fed. Reg. 43,937, 43,950 (Aug. 18, 1997).
4. On November 21, 1997, American Rivers filed a petition before the Commission, asking the Commission to initiate formal ESA consultation with NOAA Fisheries with respect to the Hells Canyon Project. American Rivers stated that if the Commission did not initiate consultation or deny the petition within 30 days, it would consider the petition denied and file a request for rehearing.
5. On December 30, 1997, American Rivers filed a request for rehearing, asserting that, because the Commission had not acted on its petition, the petition had been denied.
6. On January 22, 1998, the Commission rejected American River's request for rehearing, because no order had been issued from which rehearing could be sought.
7. On October 25, 2002, Commission staff sent a letter to NOAA Fisheries requesting the initiation of formal consultation pursuant to section 7 of the ESA. *See* letter to Robert Lohn (Regional Administrator, NOAA Fisheries) from J. Mark Robinson, Director, Office of Energy Projects. The letter stated:

The recent development of information available to the Commission puts us in the position to effectively carry out this consultation. We will prepare and deliver to you a biological assessment that will evaluate the potential impacts of the project on listed Snake River salmon and steelhead, and include, if necessary, any measures we recommend with respect to those species.
8. By letter dated February 14, 2003, NOAA Fisheries informed the Commission that it was engaged in what it expected to be short-term settlement discussions with Idaho Power in the context of confidential, court-ordered mediation efforts to settle major litigation concerning water rights in the Snake River Basin (the Snake River Basin

Adjudication).³ Because NOAA Fisheries concluded that the settlement discussions could affect ESA matters, including formal consultation regarding the impact of ongoing project operations, it recommended “that efforts to gather information for the formal consultation you request in your letter of October 25, 2002 await some further progress in these discussions.” See letter to J. Mark Robinson from D. Robert Lohn (filed May 22, 2003). Commission staff responded on March 12, 2003, acknowledging the possible relationship between those efforts and asking NOAA Fisheries to file a report within 60 days regarding the progress of the settlement proceedings. Staff stated that in the meantime it would continue to collect and review information relevant to the consultation. See March 12, 2003 letter to D. Robert Lohn from J. Mark Robinson.

9. On May 1, 2003, American Rivers filed a petition in the United States Court of Appeals for the District of Columbia Circuit, asking for a writ of *mandamus* requiring the Commission to respond to its 1997 petition.

10. On June 22, 2004, the D.C. Circuit issued an opinion granting American Rivers’ request for a writ of *mandamus*. The court concluded that the Commission had not responded in a timely fashion to American Rivers’ petition, and ordered the Commission to issue a judicially reviewable response to the petition within 45 days of the date of issue of the court’s order, or by August 6, 2004. *In re: American Rivers and Idaho Rivers United*, 2004 U.S. App LEXIS 12452.

DISCUSSION

11. We regret the lack of clarity that may have resulted from our failure to directly answer American Rivers’ petition. Notwithstanding that failure, the Commission has, during the pendency of this petition, attempted to consult with NOAA Fisheries and to develop the information necessary to determine the impacts of the Hells Canyon Project

³ These court-ordered negotiations among NOAA Fisheries, Fish and Wildlife Service, the Bureau of Reclamation, the State of Idaho, the Nez Perce Tribe, and Idaho Power, which began in mid-1998 and continued until spring 2004, were subject to a protective order that barred disclosure to any third parties, including the Commission. As a result of these proceedings, NOAA Fisheries and Idaho Power were privy to information that they considered themselves unable to share with the Commission, and expressed reluctance to attempt to definitively resolve the ESA issues separately from the Snake River Basin Adjudication.

on listed species and what, if any, measures are necessary to ameliorate such impacts.⁴ Therefore, we grant the petition, and confirm our intent to continue to move forward to deal with these important issues. To that end, Commission staff, pursuant to our direction, sent a letter to NOAA Fisheries on July 7, 2004, stating, “we would like to resume formal consultation with [NOAA Fisheries]” and “would like to . . . discuss further steps in the consultation process including the contents of a biological assessment [and] measures that can be implemented on an interim basis. . . .” *See* letter to D. Robert Lohn from J. Mark Robinson.

The Commission orders:

The petition filed on November 21, 1997, by American Rivers, Northwest Environmental Defense Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen’s Associations, Trout Unlimited, Institute for Fisheries Resources, Federation of Fly Fishers, and Sierra Club, is granted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴ Attached to this order is an appendix listing other public records not otherwise cited in this order documenting the Commission’s actions on this matter over a six-year period.

APPENDIX

Filing-Date/Issuance-Date Chronology of Documents in FERC Public Record of Idaho Power Company's Hells Canyon Project No. 1971 ("Project") Regarding Species Listed Under Endangered Species Act ("ESA")

[“Petitioners” are American Rivers, Northwest Environmental Defense Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen’s Associations, Trout Unlimited, Institute for Fisheries Resources, Federation of Fly Fishers, and Sierra Club.]

- March 25, 1997: Petitioners file March 20, 1997 notice to FERC and Departments of Energy and Commerce of intent to sue for violations of ESA respecting ongoing Project impacts on endangered Snake River salmon.
- May 13, 1997: letter from FERC Chair Elizabeth A. Moler to Petitioners in response to March 20 notice, describing ongoing multi-party discussions of Snake River issues among FERC staff, NOAA Fisheries, U.S. Army Corps of Engineers, Bonneville Power Administration (BPA), and Idaho Power.
- May 13, 1997: letter from FERC Chair Moler to Idaho Power asking it to file a response to Petitioners’ notice.
- May 20, 1997: NOAA Fisheries files letter to FERC Chair Moler, recommending that FERC consult formally regarding Project impacts on listed species.
- June 27, 1997: Idaho Power files response to Chair Moler’s May 13, 1997 letter.
- October 21, 1997: NOAA Fisheries files letter to FERC Chairman James J. Hoecker asking that FERC consult informally by preparing a biological assessment to evaluate Project impacts on listed salmon and their critical habitat.
- December 4, 1997: letter from FERC staff to Idaho Power, asking it to meet with NOAA Fisheries to discuss Project impacts on listed species and identify actions FERC should take to fulfill its ESA responsibilities.
- January 8, 1998: letter from Commission staff to NOAA Fisheries, scheduling a January 22, 1998 meeting to discuss ESA issues, including procedural options and establishment of technical working group to develop information necessary to assess Project impacts on listed species.
- February 6, 1998: letter from FERC staff to Idaho Power initiating process developed at January 22, 1998 meeting for addressing Project effects on listed species; designating Idaho Power as FERC’s non-federal representative for consultation with NOAA Fisheries on Hells Canyon interim operations; and

- asking Idaho Power prepare a biological assessment of Project impacts on listed species and critical habitat.
- February 6, 1998 letter from FERC staff to NOAA Fisheries, summarizing results of January 22, 1998 meeting.
 - April 21, 1998: letter from Idaho Power to FERC staff, proposing delivery to FERC of draft biological assessment by November 1998, and FERC review and referral to NOAA Fisheries by December 1998.
 - May 29, 1998: letter (dated May 26) from NOAA Fisheries to FERC, confirming schedule in April 21, 1998 letter and stating its intent to conclude formal consultation and issue draft biological opinion by April 1, 1999.
 - July 20, 1998: letter from FERC staff to Idaho Power confirming July 22, 1998 meeting among Idaho Power, FERC staff, and NOAA Fisheries.
 - November 9, 1998: letter from FERC staff to Idaho Power, confirming November 12, 1998 meeting among Idaho Power, FERC staff, and NOAA Fisheries to discuss Idaho Power's October 1998 draft biological assessment.
 - November 20, 1998: letter from FERC staff to Idaho Power, attaching summary of July 20 [should be July 22], 1998 meeting.
 - November 27, 1998: letter (dated November 20) from NOAA Fisheries to FERC specifying additional information needed from Idaho Power for draft biological assessment.
 - November 27, 1998: letter (dated November 24) from Idaho Power to FERC, responding to November 27, 1998 filing.
 - January 5, 1999: letter (dated January 4) from Idaho Power to FERC, enclosing additional information for draft biological assessment.
 - January 19, 1999: letter (dated January 18) from Idaho Power to FERC, enclosing additional information for draft biological assessment.
 - February 19, 1999: letter from FERC staff to NOAA Fisheries, submitting biological assessment.
 - March 31, 1999: letter (dated March 24) from NOAA Fisheries to FERC staff, stating that formal consultation under ESA section 7(a)(2) of ESA was necessary, and that it had sufficient information to prepare a biological opinion, which it expected to give FERC by August 4, 1999.
 - May 2, 2000: letter (dated April 28) from FERC staff to NOAA Fisheries, requesting confirmation that FERC and Idaho Power could review and comment on draft biological opinion.
 - May 31, 2001: letter (dated May 30) from NOAA Fisheries to FERC staff, stating that formal ESA consultation with FERC was terminated, due to FERC staff comments, on draft biological opinion, that consultation was not formal.
 - June 7, 2001: letter from FERC staff to NOAA Fisheries, responding to May 31, 2001 filing and asking for certain information.

- June 7, 2001: letter from FERC staff to Idaho Power, asking for certain information.
- June 12, 2001: letter to FERC staff from Idaho Power, responding to June 7, 2001 letter.
- June 15, 2001: letter from FERC staff to NOAA Fisheries and Idaho Power, convening meeting to discuss NOAA Fisheries' May 31, 2001 filing.
- June 15, 2001: letter from FERC staff to Pacific Environmental Advocacy Center, responding to Petitioners' April 19, 2001 notice of intent to sue for ESA violations.
- July 16, 2001: letter (dated July 10) from NOAA Fisheries to FERC staff , documenting Project operations planned for summer of 2001.
- February 7, 2002: letter from FERC staff to NOAA Fisheries, requesting meeting to discuss ongoing ESA consultation on Project.
- May 15, 2002: letter from FERC staff to NOAA Fisheries, summarizing meeting.
- September 5, 2002: letter (dated August 28) from American Rivers to FERC staff and the Departments of Energy and Commerce, giving notice of its intent to file suit against the Commission under the ESA for alleged illegal taking of endangered and threatened salmon and steelhead as a result of the operation of the Project.
- October 25, 2002: letter from Idaho Power to FERC staff, responding to American Rivers' September 5, 2002 filing.
- December 3, 2002: letter (dated December 2) from Idaho Power to FERC staff, responding to October 25, 2002 letter from FERC staff to NOAA Fisheries.
- January 7, 2003: letter (dated December 4) from NOAA Fisheries to FERC staff, acknowledging receipt of October 25, 2002 letter and enclosing information on listed species.
- August 8, 2003: letter from FERC staff to NOAA Fisheries, expressing intent to initiate formal consultation on Project's interim operations and requesting status report on progress of court-ordered negotiations on a related matter.
- November 11, 2003: letter (dated November 5, 2003) to FERC staff from NOAA Fisheries, responding to August 28, 2003 letter to NOAA Fisheries from FERC staff.