

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon Project No. 2030-048

ORDER ON REHEARING

(Issued October 26, 2006)

1. By order issued June 21, 2005, the Commission issued a new license to Portland General Electric Company (PGE) and Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes) for the continued operation of their 366.82-megawatt (MW) Pelton Round Butte Project No. 2030, located on the Deschutes River in Jefferson County, Oregon.¹ The license order also approved a Settlement Agreement between the licensees and numerous stakeholders that contained proposed license articles, most of which were included in the new license.
2. The project occupies tribal lands within the Tribes' Warm Springs Reservation of Oregon, which is under the supervision of the Bureau of Indian Affairs (BIA) of the U.S. Department of the Interior (Interior). The project also occupies federal lands administered by the U.S. Forest Service (Forest Service) of the U.S. Department of Agriculture and Interior's Bureau of Land Management (BLM).
3. Requests for rehearing and clarification of the license order have been filed jointly by the licensees, jointly by American Rivers, Oregon Trout, Trout Unlimited, Native Fish Society, and Water Watch of Oregon (Conservation Groups), and separately by the Tribes, Interior, the Forest Service, the National Marine Fisheries Service of the U.S.

¹ *Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon*, 111 FERC ¶ 61,450 (2005).

Department of Commerce's National Oceanic and Atmospheric Administration (NMFS or NOAA Fisheries), Jefferson County, and the State of Oregon through the Oregon Department of Justice. The rehearing requests all either contain or are accompanied by requests for a technical conference. All of these entities were signatories to the Settlement Agreement.

4. As to some of the issues raised on rehearing, we are granting rehearing and modifying the license as necessary. As to other issues, we are denying rehearing, for the reasons discussed below. We are also denying the requests for a technical conference.

Background

5. The original license was issued to PGE in December 1951 and expired December 31, 2001, after which the project was operated under annual licenses.² In December 1999 PGE and the Tribes filed competing applications for a new license. In June 2001, those entities filed an amendment to combine their applications and become co-applicants for a new license.³

6. Commission staff issued a draft and a final environmental impact statement (EIS) for the joint application on August 29, 2003, and June 7, 2004, respectively. On July 30, 2004, PGE and the Tribes filed the Settlement Agreement, which was signed by the licensees and all of the other entities who were parties to the relicensing proceeding, with one exception not pertinent to these rehearing requests. We issued notice and received comments on the Settlement Agreement before approving it and issuing the new license. Section 3 of the Settlement Agreement expresses the parties' intent that the new license include proposed articles contained in Exhibit A of the Agreement. The issued license included the substance of most of the proposed license articles. We discussed in detail our reasons for modifying or not adopting some of the proposed articles.

7. The parties seeking rehearing (collectively, petitioners) emphasize that the Settlement Agreement was the product of extensive and highly detailed negotiations, and that it represents a comprehensive package of terms that balance numerous interests and options advocated by the various parties. In particular, petitioners state, the Settlement Agreement resolved conflicts among the mandatory conditions developed by various

² See section 15 (a)(1) of the Federal Power Act (FPA), 16 U.S.C. § 808(a)(1) (2000).

³ A more detailed procedural history is set out in the license order, 111 FERC ¶ 61,450 at P 3-9.

agencies under the authority of sections 4(e) and 18 of the Federal Power Act (FPA), section 401 of the Clean Water Act, and various provisions of state law.⁴ The petitioners assert that, by omitting or modifying some of the proposed license articles, the relicense order altered key provisions of the Settlement Agreement in a manner detrimental to the viability of the Settlement Agreement as a whole.

8. The petitioners urge us to adopt the Settlement Agreement on rehearing without material modification or to amend specified provisions of the new license to be consistent with the proposed articles. The petitioners also request clarification of certain statements or provisions of the new license. Finally, the licensees and the Forest Service request that we make certain corrections through issuance of an errata notice.

9. The petitioners request that, prior to acting on the rehearing requests, we schedule a technical conference at which all signatories to the Settlement Agreement may assist in the process of accurately implementing its terms. The petitioners state that a technical conference would enable the signatories to familiarize staff with the relationship between significant provisions and the signatories' overall agreement, would prevent any misinterpretation of the proposed language or misunderstanding of the relationship between articles, and would allow staff to address concerns regarding the implementation of section 10(j) of the FPA.⁵ We will deny the requests for a technical conference, as we

⁴ Section 4(e), 16 U.S.C. § 797(e) (2000), provides that a license within a federal reservation shall be issued only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. Section 18, 16 U.S.C. § 811 (2000), provides that the Commission shall require the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary of Commerce or of the Interior. Section 401 of the Clean Water Act, 33 U.S.C. § 1341 (2000), provides that any applicant for a federal license for an activity that may result in a discharge into the navigable waters must obtain certification (or waiver thereof) from the state in which the discharge would originate, which certification will become a condition of the license.

⁵ Section 10(j), 16 U.S.C. § 803(j) (2000), requires the Commission to include conditions based on recommendations by federal and state fish and wildlife agencies to adequately protect, mitigate damages to, and enhance fish and wildlife, including related spawning grounds and habitat. If the Commission believes that any such recommendation may be inconsistent with the purposes and requirements of Part I of the FPA or other applicable law, the Commission and the agencies must attempt to resolve the inconsistency before the Commission can decide not to adopt the recommendation.

believe the present record is sufficient to inform our disposition of the issues, as set out in the discussion below.⁶ However, we will address the corrections requested by the licensees and the Forest Service in this order.

Discussion

10. The Commission favors settlements in hydropower licensing proceedings, and when settlement parties request that specific settlement provisions be incorporated as license terms we attempt to accommodate those parties to the extent possible. However, we must sometimes refrain from incorporating settlement terms in a license if they require actions beyond the scope of our authority, cannot be supported by a public interest determination, or would otherwise interfere with our enforcement of the license terms. We noted these considerations in our recently-issued Policy Statement on Hydropower Licensing Settlements (Settlement Policy Statement).⁷

11. Several petitioners contend that our failure to include conditions they submitted under sections of the FPA did not conform to applicable statutory or regulatory standards. Specifically, the Forest Service and Interior object to our failure to adopt all of their section 4(e) conditions, and several petitioners consider our failure to adopt some of the proposed articles as an improper rejection of their recommendations under section 10(j). We will address these contentions before discussing the specific areas in which the petitioners, collectively or individually, contend that the license order should not have deviated from the proposed Settlement Agreement articles, or in which the petitioners seek clarification of the order.

A. Statutory Conditioning Standards

Forest Service section 4(e) authority

12. In November 2002, the Forest Service filed 23 preliminary section 4(e) conditions, accompanied by a schedule for filing final conditions within 90 days of the Federal Register notice for the final EIS. According to that schedule, the final

⁶ We also note that, prior to issuance of the license order, Commission staff held a conference with the parties to discuss the settlement.

⁷ *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 at P 3-6 (2006).

section 4(e) conditions were due on September 8, 2004.⁸ On October 4, 2004, the Forest Service filed correspondence in which it indicated that it was not modifying its preliminary conditions but was instead filing three new conditions as final conditions.

13. In our license order, we stated that these conditions were untimely because they were filed after the September 8, 2004, deadline. We noted that typically, when an agency does not file final section 4(e) conditions according to the schedule submitted with its preliminary conditions, we recognize the preliminary conditions as final conditions. However, because, in this case, the preliminary conditions were substantially different from the subsequently filed Settlement Agreement, we did not follow this approach but rather considered the late-filed conditions as recommendations under section 10(a)(1) of the FPA.⁹ We stated that we were including in the license most of the proposed license articles that pertained to project lands and facilities located on federal reservations administered by the Forest Service.¹⁰

14. The Forest Service objects to our treatment of its final section 4(e) conditions. It asserts that, in other proceedings, we have exercised our discretion to accept late-filed conditions or recommendations rather than reviewing them under section 10(a)(1). The Forest Service argues that acceptance of the late-filed conditions would not have disrupted the proceeding, because the conditions were filed less than a month late, we extended the deadline for the filing of conditions by Interior and NOAA Fisheries, and the license was not issued until nearly 9 months after the late filing. Further, the Forest Service asserts that we have no statutory authority to disregard section 4(e) conditions because they are filed late. The Conservation Groups and NMFS also object to our treatment of the Forest Service's section 4(e) conditions.

⁸ Under the Commission's regulations at 18 C.F.R. § 4.34(b) (2006), agencies responsible for mandatory license conditions are to provide those conditions in their initial comments on the application, due within 60 days of a Commission notice that the application is ready for environmental analysis. If ongoing agency proceedings to determine the conditions are not completed by that date, the agency is to submit, by that date, preliminary conditions and a schedule showing the status of the agency proceedings and when the conditions are expected to become final.

⁹ Section 10(a)(1), 16 U.S.C. § 803(a)(1) (2000), provides that any project for which the Commission issues a license shall be best adapted to a comprehensive plan for improving or developing a waterway or waterways for water power and a variety of other public purposes.

¹⁰ 111 FERC ¶61,450 at P 111.

15. In *City of Tacoma v. FERC*,¹¹ the court of appeals ruled that the Commission lacks authority to place a strict time restriction on the submission of section 4(e) conditions, because this conditioning authority is a responsibility that Congress has delegated to other federal agencies. In light of this decision, we recognize that we are required to include the Forest Service's final conditions in the license for this project.

16. Condition 1 requires the licensees to comply fully with all protection, mitigation, and enhancement measures identified in the Settlement Agreement and its appendices and schedules that are on or affect Forest Service lands and resources, and all commitments identified in every plan referenced in the Settlement Agreement and its appendices and schedules that implement activities on or affect Forest Service lands and resources. Condition 2 states that condition 1 is premised on two requirements: the Commission's acceptance and incorporation of the Settlement Agreement and its appendices and schedules, without modification, into license terms, and the licensees' immediate and complete implementation of the Settlement Agreement measures in accordance with the schedule set forth in the Settlement Agreement. Condition 2 provides that, if either of these requirements is not met, the Forest Service reserves its right to supplement or modify the final conditions. Condition 3 reserves the Forest Service's right to add, delete, or revise conditions in the event the licensees, the Forest Service, or other parties withdraw from the Settlement Agreement prior to issuance of a new license.

17. Because the conditions are mandatory, we will modify the license order to include Appendix G,¹² which will comprise these conditions in their entirety.¹³ However, we do not favor conditions as broadly phrased as those submitted by the Forest Service. A general requirement to adopt all of a settlement agreement's measures and commitments that are on or affect Forest Service lands and resources provides little guidance to the Commission and its staff as to which specific provisions of an extensive and complex

¹¹ 2006 U.S. App. LEXIS 21400 (D.C. Cir. 2006).

¹² We will designate this appendix as Appendix G for the sake of clarity in administering the license, because the license order attached Appendices A through F, containing various other agency-filed conditions.

¹³ The Forest states that, while we included some of the settlement provisions that would be required by conditions 1 and 2, we failed to include condition 3 entirely. Appendix G will include all 3 conditions, but since condition 3 concerns only circumstances that might occur before issuance of a license, it is essentially meaningless now that the license has been issued.

settlement agreement must be included in a license and enforced by the Commission. This ambiguity makes it difficult to determine whether such conditions meet the statutory requirements of the FPA¹⁴ and to establish license requirements clearly enough to ensure their implementation and enforcement.

18. In this instance, we are provided some guidance by the Forest Service's rehearing request, which indicates which specific provisions of the Settlement Agreement the Forest Service believes we improperly omitted as a result of not including its section 4(e) conditions. The Forest Service objects to our exclusion of proposed article 5(b), (d), and (e), proposed article 54, and section 6.1.3 of the Settlement Agreement from the license requirements.¹⁵ It also objects to our treatment, in license order paragraph 88, of the Settlement Agreement's provision for agency approvals, which, it states, substantially modified several settlement provisions related to specific Forest Service approval. Recognizing that we must include these settlement provisions in the license, we will address the Forest Service's substantive objections to these modifications or exclusions in the appropriate issue-specific paragraphs below.¹⁶

Interior section 4(e) authority

19. In November 2002, Interior filed 31 preliminary section 4(e) conditions, accompanied by a schedule for filing final conditions within 60 days of the close of the comment period for the draft EIS. According to that schedule, the final section 4(e) conditions were due on March 1, 2004. Interior subsequently requested and received an extension of that deadline to October 1, 2004, to allow for settlement negotiations, and on September 30, 2004, Interior filed final conditions.

¹⁴ These include the comprehensive development /equal consideration standards of FPA section 10(a)(1), as well as the requirement that the Commission's decisions under the FPA be based on substantial evidence. *See* 16 U.S.C. § 313(b) (2000).

¹⁵ For clarity, in this order we will use the lower case in referring to specific proposed articles in the Settlement Agreement and the upper case in referring to specific articles of the new license.

¹⁶ The Forest Service also contends that, considering the final conditions as late-filed, we arbitrarily departed from our standard practice by failing to treat its preliminary conditions as final ones. In light of our acceptance of the Forest Service's final conditions, this argument is now moot.

20. In that filing, Interior stated that the proposed license articles would “satisfy its statutory authorities and responsibilities” under section 4(e) and that the proposed articles would provide the same comprehensive resource protection that it had sought to accomplish through its preliminary conditions. However, Interior explained that it was impractical to segregate those portions of the articles that pertained directly to its section 4(e) authority and to file those conditions separately with the Commission. Interior stated that, instead, it was incorporating the proposed license articles by reference from Exhibit A of the Settlement Agreement and requested that we adopt them, without material modification, in lieu of the preliminary conditions. Interior stated that it would not submit separate modified section 4(e) conditions, with the exception of reservations of its section 4(e) conditioning authority. Under those reservations of authority, the licensees would be required to implement, upon order of the Commission, such additional measures as may be identified by the Secretary of the Interior pursuant to section 4(e) as necessary to ensure the adequate protection and utilization of reservations under the authority of BLM and of the Warm Springs Indian Reservation. We incorporated those reservations of authority as license Articles 441 and 442, respectively.

21. On rehearing, Interior objects to our omissions and modifications of some of the proposed articles. It reiterates that it was able to reach a settlement in this proceeding only because the proposed articles provided for the adequate protection and utilization of the Warm Springs Reservation and other federal lands under its jurisdiction and for the comprehensive protection of natural and tribal resources that Interior had sought to accomplish through its preliminary section 4(e) conditions. The Tribes assert that the proposed articles were offered by Interior as section 4(e) conditions and were necessary for the protection and utilization of the Warm Springs Reservation. They argue that adoption of those articles is required for the Commission and Interior to meet their trust responsibilities to the Tribes.

22. Any final section 4(e) conditions filed by Interior would be mandatory and would have to be included in the new license. However, Interior did not require, as a section 4(e) condition, the adoption of any or all of the proposed license articles without material modification. The only final section 4(e) conditions that Interior filed were those containing the reservations of authority described above. Our incorporation of those reservations as license articles satisfied our statutory obligation to make the license subject to Interior’s section 4(e) conditions.

23. Interior adds that our modifications of the proposed articles might necessitate exercising the reservations of its section 4(e) authority that are included in license Articles 441 and 442. It also states that its Fish and Wildlife Service (FWS) undertook

section 7 consultation under the Endangered Species Act (ESA)¹⁷ based on the Settlement Agreement and the proposed articles. Interior asserts that our omissions and modifications have caused the action authorized by the license order to be different from the proposed action that FWS considered in its biological opinion, so that consultation might have to be reinitiated.

24. Despite these assertions, Interior does not maintain that exercise of its reservations or reinitiation of ESA consultation are clearly required at this time, and it is possible that these actions will not be required in the future. The reservations of authority that we have incorporated into the license are available as a vehicle for Interior to make future changes needed to protect the reservations it administers. To the extent that Interior objects to specific modifications or omissions of proposed articles, these will be dealt with in the appropriate sections of this order.

Section 10(j)

25. Interior, NMFS, and Oregon state that we amended or omitted several proposed articles that they had sought to have included in the license pursuant to recommendations submitted under section 10(j).¹⁸ These petitioners assert that, contrary to the provisions of section 10(j), we failed to determine that the recommendations were inconsistent with the FPA or other applicable law or to follow the prescribed process for resolving any such inconsistencies.

26. Interior, NMFS, and Oregon Department of Fish and Wildlife (Oregon DFW) each filed initial fish and wildlife recommendations in November 2002, and NMFS and Oregon DFW filed modified recommendations in December 2003. Collectively, these

¹⁷ 16 U.S.C. § 1536 (2000).

¹⁸ Specifically, they cite their recommendations for alternative mitigation under proposed articles 34 and 35 if fish passage proves infeasible (Interior, NMFS, and Oregon), for terrestrial measures to be implemented on lands outside the project boundary under proposed articles 42 and 43 (Interior), for funding services and personnel provided by the Oregon Department of Fish and Wildlife for fish health management and other fisheries projects under proposed articles 36 and 40 (Oregon), for funding for a wildlife staff position at the project under proposed article 42 (Interior), for approvals of actions and plans by Fish Agencies under proposed articles 34, 35, 58, and 60 (Interior, NMFS, and Oregon) and by a Terrestrial Resources Working Group under proposed articles 42 and 43 (Interior and Oregon), and for agency or landowner approval of actions taken under the shoreline management plan under proposed article 50 (Interior).

totaled 110 separate recommendations, which Commission staff analyzed in the June 2004 final EIS. After the Settlement Agreement was reached, all three agencies filed modifications to the previously-filed recommendations, to incorporate various proposed articles into the license.

27. In our license order, we concluded that the Settlement Agreement's proposed articles were generally consistent with the recommendations that staff considered in the EIS. However, we noted that, in the EIS, staff had found certain recommendations to be outside of the scope of section 10(j), because they were not specific measures to protect fish and wildlife.¹⁹ Staff made this finding in respect to, among others, recommendations for developing a fish passage unavoidable loss mitigation plan, funding law enforcement officials at the project, funding Oregon DFW personnel to coordinate that agency's involvement in implementing terrestrial and fisheries license requirements, development and implementation of plans for off-site fish and wildlife habitat, and establishment of funds for such habitat enhancements. Those recommendations concern some of the same basic issues as the recommendations to which the agencies call our attention on rehearing.

28. The provisions of section 10(j) for rejecting fish and wildlife recommendations because of inconsistency with the FPA or other law and for resolving such inconsistency do not apply to recommendations that are outside the scope of the section. That we did not undertake a section 10(j) process for the recommendations singled out by the petitioners on rehearing reflects our treatment of those recommendations as outside the scope of section 10(j). However, in the license order, we made it clear that we were considering under section 10(a)(1) of the FPA those recommendations that were revised to reflect provisions of the Settlement Agreement but that did not fall within the scope of section 10(j).²⁰

29. Under these circumstances, we have satisfied our procedural obligations with respect to the recommendations cited by the agencies. We will address each of these specific recommendations, on a substantive basis, in the next section.

¹⁹ See 111 FERC ¶ 61,450 at P 134.

²⁰ *Id.* at P 135.

B. Specific Exclusions Or Modifications Of Settlement Conditions**Inclusion of roads within the project boundary**

30. The Settlement Agreement contained provisions for licensee contributions to the upgrade and maintenance of non-project Forest Service and county-owned roads. In the license order, we stated that, because the roads support recreation at and access to the project, and because the licensees would be required to take action with respect to these roads throughout the license term, the roads would have to be brought into the project boundary.²¹ The licensees and Jefferson County argue that we erred in requiring expansion of the project boundary to encompass these roads.

31. Proposed article 53 of the Settlement Agreement provided for the licensees to enter into an agreement with the Forest Service under which the licensees would make one-time payments and annual contributions to upgrade and maintain non-project Forest Service roads. The agreement was to provide for a one-time contribution toward specified capital improvements and for annual contributions to maintenance for Forest Service roads FS 11 and 1170. The licensees were to contribute 10 percent of the capital costs and annual maintenance costs for FS 11 and 81 percent of those costs for FS 1170. The capital costs were subject to specified dollar limitations.

32. Proposed article 56 provided for the licensees to enter into an agreement with Jefferson County to “fund road maintenance activities on Jefferson County roads affected by traffic generated by the Project . . . consistent with the term sheet attached as Appendix [D] to the Settlement Agreement.”²² The term sheet in Appendix D identifies one-time and annual payments to be made by the licensees to Jefferson County to be used for “prioritized road projects identified by” the county. It also imposes on the licensees the “non-payment obligations” of being “solely responsible for maintenance and reconstruction (if any) of Dizney Lane and Pelton Dam Road” and for “any future slides on Jordan Road or other roads adjacent to Lake Billy Chinook or Lake Simtustus,” both project reservoirs.

33. Reflecting these Settlement Agreement provisions, Article 431 of the license requires the licensees to file, within one year of license issuance, a plan to provide for

²¹ *Id.* at P 96 and 97.

²² Proposed article 56 mistakenly referred to Appendix E but clearly intended Appendix D, which is entitled “Term Sheet – Road Maintenance Agreement.”

upgrades and maintenance of roads “necessary for project purposes, which may include, but are not limited to, relevant portions of” the Forest Service and county roads mentioned above “and other roads adjacent to the project contemplated by Appendix D of the Settlement Agreement . . . that are required for access to project lands, waters, and facilities.” Article 431 also requires that the plan include provisions to bring into the project boundary any roads on which ongoing maintenance is to be provided under the license.

34. The licensees note that, under FPA section 3(11), a project is to include only lands and interests in lands “the use and occupancy of which are necessary or appropriate in the maintenance and operation” of the unit of development,²³ and that the Commission’s regulations provide for inclusion in the project boundary of “only those lands necessary for operation and maintenance of the project and for other project purposes”²⁴ The licensees argue that the roads in question here do not meet these criteria.

35. The licensees acknowledge our policy of bringing lands into the project boundary when there are to be ongoing actions requiring Commission oversight. However, they argue that this policy should not apply here, because proposed articles 53 and 56 did not impose ongoing actions on the licensees but rather only a funding requirement, with upgrades and ongoing maintenance of the roads to be the sole responsibility of the Forest Service and Jefferson County. Moreover, they point out, the Settlement Agreement does not even require the licensees to fund all of the maintenance costs for the Forest Service roads. The licensees argue that the provision of funding was negotiated as the most efficient way to ensure adequate maintenance of the roads in question, since it avoided the need for the licensees to assume maintenance responsibility directly.

36. The licensees contend that roads should be included within a project boundary only when they are used solely for project purposes. The licensees assert that the county and Forest Service roads in question are multi-purpose roads serving uses other than recreational access. They state that Jordan Road is a multi-purpose county road providing access for all residential, commercial, and recreational users of the wide area south of the project, including users of non-project-related recreation. They also state that Pelton Dam Road and Disney Lane provide the only access for off-project residential and other users, as well as for a substantial area outside of the project boundary, including the area between the project and the City of Madras, and also provide an alternate route around the City. The licensees state that the Forest Service roads serve

²³ 16 U.S.C. § 796(11) (2000).

²⁴ 18 C.F.R. § 4.41(h)(2) (2006).

other users and developments in the project vicinity as well as commercial users of Forest Service lands. The licensees claim that the provision for partial funding of the Forest Service roads was negotiated to reflect the roads' relative project and non-project uses.

37. The licensees acknowledge that a project boundary may be extended to ensure reasonable public access to recreational facilities but contend that such access already exists at this project. In any event, the licensees contend, our inclusion of these roads in the project boundary simply because they provide access to the project does not provide a reasonable or workable test for determining Commission-jurisdictional roads. They argue that, as stated and applied in this case, such a standard would necessarily encompass hundreds of miles of roads leading to a project, make it difficult to draw an appropriate line as to what must be in the boundary, and create confusing and extensive project boundaries with endless radial extensions to capture all roads that might provide access to licensed projects. The licensees note that we have previously held that we do not intend for licensees to be responsible for the overall highway transportation needs of the area.²⁵

38. The licensees state that inclusion in the project of these roads and of additional recreation areas (to be discussed in the following section of this order) will add more than 5,600 acres to the project and will expose the licensees to significant increases in their obligations without increasing the degree of resource protection provided under the license. They object that the inclusion of so many roads in the project boundary will create an enormous administrative burden, particularly in the case of the Forest Service roads. The licensees argue that they will be compelled to incur expenses in connection with obtaining special use permits and payment of annual charges for the additional federal lands, and in connection with compensating landowners for the property interests necessary to manage the additional non-federal lands. In either case, the licensees state, they will incur costs associated with surveying lands to be included in the project boundary, together with the long-term costs of maintenance and operation of these lands. They claim that these expenditures will reduce the funds available for road maintenance and materially modify the economic balance of the Settlement Agreement.

39. Jefferson County states that inclusion of county roads in the project boundary will necessitate the licensees' obtaining an interest in them under standard license Article 5,²⁶

²⁵ *Georgia Power Co.*, 32 FERC ¶ 61,237 at 61,561 (1985).

²⁶ Standard license Article 5 provides that a licensee shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of its project.

but that it cannot voluntarily transfer rights in the roads to the licensees. Therefore, it argues, the licensees will have to obtain their interest in the roads through the eminent domain provisions of FPA section 21,²⁷ an expensive undertaking that will reduce the resources available for road maintenance. Jefferson County adds that it should not be necessary to include such roads in the project boundary since the road maintenance activities contemplated in the Settlement Agreement are to be performed by Jefferson County.

40. Although the Settlement Agreement was submitted after the preparation and issuance of the EIS, the licensees had already proposed to fund project-related road maintenance in respect to the county and Forest Service roads to which the proposed license articles later referred, and staff was also aware that the licensees were engaged in ongoing settlement discussions with Jefferson County for funding of road maintenance. Thus, staff had an opportunity to assess the relationship between the roads in question and public use of the project facilities. We summarized the staff's findings in our license order.²⁸

41. As to the Jefferson County roads, the EIS concluded that the licensees' proposed measures "to fund project-related road maintenance for the Dizney Lane and the Pelton Dam Road would provide continued public access over project lands to project environmental resources." It also concluded that those roads "are essential for public access to project waters."²⁹ The EIS found that the Jordan Road provides all public access to Lake Billy Chinook and receives heavy use by recreationists.³⁰ It concluded that the licensees' proposed assistance to Jefferson County could help ensure that public access to the project is maintained in good condition for the term of the new license.³¹

²⁷ Section 21 of the FPA, 16 U.S.C. § 814 (2000), provides that, if a licensee cannot acquire by contract or pledges the right to use the lands or property of others necessary to the construction, maintenance, or operation of project works, it may acquire that right by exercising the right of eminent domain in federal district court.

²⁸ See 111 FERC ¶ 61,450 at P 96 and 97. We mistakenly cited proposed article 56 as proposed article 54.

²⁹ EIS at 254. The EIS noted that PGE had maintained those roads in good condition during the current license.

³⁰ *Id.* at 249.

³¹ *Id.* at 254.

42. Staff stated that the Forest Service roads in question provide the primary access to Lake Billy Chinook's Metolius River arm, on which are located areas with facilities for recreational access to project lands and waters, including campgrounds, day-use areas, parking areas, boat ramps, and marinas.³² The EIS found that the licensees' contribution to maintaining those roads would provide for continued public access to that part of Lake Billy Chinook and would address some of the effects associated with recreational access to remote areas of that lake.³³

43. As we stated in the license order, we will not require ongoing actions involving Commission oversight over non-project lands without those lands being brought into the project boundary.³⁴ Where a licensee has responsibilities relating to upgrading or maintaining roads that serve a project purpose, inclusion of those roads in the project boundary would be necessary whether the upgrades or maintenance would be conducted by the licensee itself or by another entity using licensee funding.³⁵ Our concern is not extraction of a financial contribution from a licensee but rather the fulfillment of the project purpose for which the financial contribution is intended. Therefore, we would hold the licensee responsible for ensuring that roads serving project purposes are maintained throughout the license term, regardless of any private funding arrangements.³⁶

44. The licensees and Jefferson County raise legitimate concerns about the costs and administrative obstacles involved in including additional roads in the project boundary. However, inclusion of lands within a project boundary results directly from a finding that

³² *Id.* at 253, 248.

³³ *Id.* at 254-55.

³⁴ 111 FERC ¶ 61,450 at P 96.

³⁵ In the present case, the proposed article 56 provision that the licensees assume "non-payment obligations" for county road maintenance would seem to contradict the licensees' contention that the Settlement Agreement imposed on them only a funding obligation.

³⁶ In our recent Settlement Policy Statement, we emphasized that we look to licensees to ensure that project purposes are fulfilled regardless of whether other entities are paid to undertake required measures, and that roads are to be brought into a project boundary if they serve project purposes such that licensees are to undertake ongoing activities with respect to them throughout a license term. 116 FERC ¶ 61,270 at P 23 and 36.

lands, and licensee obligations in respect to those lands, serve project purposes. Conversely, lands should be excluded from a project boundary if they do not serve a project purpose, but in that case any licensee activities with respect to those lands should not be made a requirement of a license.

45. We agree with the licensees that the concept of roads being needed for project access is an elusive one. The extent to which roads may be thought to provide access to a project may not be capable of precise determination in most instances, since even roads located some distance from a project may be used for this purpose. However, we do not think that roads primarily serving other purposes and only incidentally providing access to project facilities can, in most cases, be considered necessary for project purposes. Consequently, licensee funding or performance of maintenance for such roads would not serve a project purpose, provisions requiring such licensee actions should not be made license requirements, and a project boundary should not be expanded to include those roads. While the extent to which roads may be found necessary for project access may vary from case to case, as a general matter the concept of roads being “necessary” for a project must be restricted to roads used solely by a project.³⁷

46. In the present case, the EIS found that the roads in question provide important access to project recreational facilities. However, there is no question that these Forest Service and county roads are used extensively for other purposes as well. If the licensees did not provide funding for these roads, the Forest Service and Jefferson County would no doubt ensure that the roads were improved and maintained so that they could be used for purposes that have nothing to do with this project. Moreover, if the licensees had not proposed to contribute to this road maintenance, staff would have had no reason even to consider the importance of the roads for recreational access, and we would have had no reason to consider whether the roads serve a project purpose necessitating their inclusion in the project boundary. Since the licensees’ obligations to fund road maintenance apply to roads that are not used solely for access to the project, these obligations should not be included as license requirements.

³⁷ As the licensees point out, in a similar context, we include in a project, and within the project boundary, only those transmission lines (“primary transmission lines”) that are used solely to transmit power from licensed projects to load centers. *See, e.g., Pacific Gas and Electric Company*, 85 FERC ¶ 61,411 at 62,559 and n. 13 (1998). We recognize, in that context, a distinction between those lines and a licensee’s interconnected primary transmission system and distribution system, which do not exclusively serve one project.

47. The licensees and Jefferson County do not ask us to remove the funding requirements from the license but only to remove the project boundary requirement. However, as explained above, this is inconsistent with Commission policy. We are being asked to include requirements regarding the roads as part of the project license and yet not to consider the roads to be part of the project. Because we include in licenses only measures required to carry out project purposes, the concept of our exercising jurisdiction over the roads to the extent of requiring our licensees to undertake limited activities with respect to them, while presumably concurring with the parties that the roads are nonetheless not needed for project purposes – or least not sufficiently so to warrant including them in the project boundary – is at best problematic.

48. The dilemma posed here is largely of the settlement parties' making. The parties could have avoided this difficulty through the relatively common practice of crafting side, "off-license" agreements with respect to lands and facilities that they did not view as needing to be part of the project,³⁸ but, for whatever reason, they declined to do so. Thus, we are left in the position of the parties asking us to let them have their cake (imposing license requirements regarding the roads) and eat it, too (not including the roads within the project boundaries or requiring our licensees to accept ongoing responsibility for them). We would strongly prefer that settling parties not put us in the position of having to cut such Gordian knots.³⁹

49. Given our conclusion that the roads at issue primarily serve non-project purposes and thus are not needed as part of the project, we would not of our own volition include the road maintenance funding provisions as license requirements. However, our discretion here is partly limited by the Forest Service's section 4(e) conditions. As previously noted, condition 1 requires compliance with the Settlement Agreement's enhancement measures and commitments that are on or affect Forest Service lands and resources. While it is difficult to identify with certainty the pertinent settlement provisions that would be encompassed by such a broadly phrased condition, we think that it may reasonably be interpreted as requiring the provisions of proposed article 53 for funding the designated Forest Service roads.

³⁸ See, e.g., *City of Seattle, WA*, 75 FERC ¶ 61,319 at 62,014, n.6 (1996).

³⁹ The licensees argue that it is contrary to Commission precedent to include roads in a project boundary when they are not used solely for project purposes and when licensees are required only to fund road maintenance, not to perform it. The orders that the licensees cite for these propositions do not unambiguously support the licensees' position. However, in light of the clarification of our policy on both of these issues here, it is unnecessary to discuss those orders in more detail.

50. Accordingly, we will revise Article 431 to substitute the provisions of proposed article 53 for the existing requirement to file a plan to provide upgrades and maintenance. Proposed article 53 provided for the licensees to enter into an agreement with the Forest Service and specified the extent of the licensees' contributions to capital improvements and maintenance costs. Revised Article 431 will contain these provisions but will also require the licensees to notify us of their execution of the agreement with the Forest Service.⁴⁰

51. Our modification of Article 431 does not alter our opinion that none of the Settlement Agreement's provisions for licensee contributions to road maintenance serves a project purpose. Therefore, we will not require that these Forest Service roads be brought into the project boundary. Further, no mandatory conditions submitted in this proceeding require the inclusion of the Settlement Agreement's county road funding provisions, as set out in proposed article 56. Therefore, revised Article 431 will require neither the filing of a plan for upgrades and maintenance of Jefferson County roads nor the inclusion of those roads in the project boundary.⁴¹ The licensees and Jefferson County are free to pursue this road funding arrangement privately.

Inclusion of recreation areas within the project boundary

52. The license order also noted the Settlement Agreement's provisions for recreation mitigation and enhancement measures at non-project sites. We stated that, because some of these measures would serve the project purpose of recreation, the pertinent recreation areas would have to be brought into the project boundary. Article 424 requires the licensees to bring into the project boundary any lands on which improvements and maintenance would be conducted under the Recreation Resources Implementation Plan (Recreation Plan). Article 425 requires the licensees to bring into the project boundary a trail and roadside parking area at the Balancing Rocks area.

53. The licensees argue that we should not have required the expansion of the project boundary to include recreational areas, particularly the Cove Palisades State Park (Cove Palisades) and Balancing Rocks area, since the licensees' commitment under the

⁴⁰ We of course cannot require the Forest Service itself to enter this agreement.

⁴¹ The licensees suggest that we could address the access situation by excluding the roads but including in the license a reservation of authority under which we could require the licensees to remove any restrictions to project access that might occur in the future and to expand the project boundary accordingly. In view of our discussion here, we will not adopt this suggestion.

Settlement Agreement involves only one-time construction measures with regard to these areas, not ongoing operation and maintenance. As with the inclusion of roads, the licensees cite Commission precedent for excluding such areas from a project boundary under similar circumstances and argue that inclusion of additional federal lands will add to the licensees' costs. They also note that the Commission did not require Cove Palisades to be brought into the project boundary when the original license was issued, despite the fact that PGE was required to construct the park under the terms of that license.

54. Oregon contends that we erred in requiring expansion of the project boundary to include Cove Palisades, since it is not yet clear whether the licensees will be conducting recreation improvements at the park or merely funding them. Moreover, Oregon states, the Cove Palisades improvements are intended to be a one-time project, not a continuing one; the Oregon Parks and Recreation Department (Oregon PRD) would be responsible for any ongoing operation of the improvements.

55. Proposed article 45(e) provided that the licensees should implement the projects identified in Exhibit G to the Settlement Agreement (List of Measures to be Included in the Recreation Resources Implementation Plan) at Cove Palisades. Exhibit G contains an extensive list of projects to be implemented by the licensees within 10 years of license issuance, according to a schedule to be developed in the Recreation Plan. These projects include provision, replacement, and repair of boating facilities, provision of parking, improvements to day-use areas, development of camping areas and trails, and funding of restrooms, parking lot control, and floating debris removal. Proposed article 46(d) provided for the licensees, within one year of license issuance, to close and rehabilitate the road leading into the Balancing Rocks area, develop a trail, and provide a roadside parking area.

56. In our license order, we found that the measures in the proposed articles would enhance public recreation in the project area and that the areas in question would serve the project purpose of recreation.⁴² Article 424(a) provides that the Recreation Plan to be filed by the licensees shall include the measures identified in Exhibit G to the Settlement Agreement,⁴³ and Article 424(e)(v) provides that Cove Palisades lands on which

⁴² 111 FERC at P 94. In addition, the EIS also considered the recreational benefits of these sites outside of the existing project boundary and recommended improving recreational resources there. *See* EIS at 224, 235-237, and 307.

⁴³ This provision contains an exception as to funding a boat moorage feasibility study, to be discussed later in this order.

improvements and funding activities are to occur must be brought into the project boundary. Article 425(e) requires the licensees to close and rehabilitate the road leading to the Balancing Rocks area, develop a trail, and provide a small roadside parking area, and to bring the trail and parking area into the project boundary.

57. Recreational facilities that serve a project purpose must be included in a project boundary, regardless of whether a licensee is required to maintain those facilities itself or just to fund their maintenance. The licensees and Oregon contend that the activities at Cove Palisades and Balancing Rocks are of a one-time nature and argue that we have not required expansion of a project boundary when a licensee's commitment is a one-time obligation, not an ongoing one. Oregon also argues that we have not required expansion of a project boundary where a licensee has only a funding obligation.

58. Although we do not generally require project boundary expansion to include lands on which one-time obligations are to be undertaken,⁴⁴ this policy properly applies where a licensee has no continuing responsibility to maintain the improvements that it has made or funded.⁴⁵ However, where improvements require maintenance if they are to serve a project purpose throughout the term of a license, a licensee cannot fulfill its obligation simply by making or funding the improvements. Here, boating, camping, parking, trail, and other facilities and activities will have to be maintained throughout the license term if they are to continue to fulfill the project purpose of recreation.⁴⁶ Therefore, we will not

⁴⁴ For example, in *Public Utility District No. 1 of Chelan County*, 107 FERC ¶ 61,280 at P 148 (2004), cited by the licensees, we determined that sites on which activities were required to be undertaken under a tributary enhancement program might not need to be included in the project boundary because they might involve small areas or one-time actions. In *Power Authority of the State of New York*, 107 FERC ¶ 61,259 at P 45 (2004), also cited by the licensees, we stated that small areas outside of a project boundary that are needed for such project purposes as a nest platform or a fenced area to protect riparian vegetation, as well as lands on which one-time actions would occur, would not need to be within a project boundary.

⁴⁵ This principle is reflected in our Settlement Policy Statement, 116 FERC ¶ 61,270 at P 33.

⁴⁶ The licensees and Oregon cite *Pacific Gas and Electric Company*, 97 FERC ¶ 61,084 at n. 48 (2001) for the proposition that we have not required an expansion of the project boundary even where one-time measures are to be implemented over time. There, we required a licensee to add spawning gravel to a creek, remove portions of a weir, build spawning channels, and install terraced planting sites, but we did not require inclusion of these lands and facilities in the project boundary because we viewed the required actions

(continued)

delete the requirement that the lands on which these improvements are to occur must be brought into the project boundary.⁴⁷

59. Although the Settlement Agreement does not appear to contemplate continued licensee responsibilities with respect to the recreation areas at issue, we cannot ignore the matter. The parties have apparently determined that these facilities are needed for project purposes (why else include proposed license requirements regarding them?), a matter regarding which Commission staff's EIS and our license order agreed. Given that we can look only to our licensees to ensure that the facilities remain suitable for their intended purposes,⁴⁸ it is appropriate that we both include these areas within the project boundary and require our licensees to retain responsibility for them throughout the license term. This is another example where, if the settling parties did not wish us to exercise jurisdiction over the matters at hand, they should have reached an off-license agreement on the subject. It is unreasonable for them to ask us to agree that the recreation areas are sufficiently necessary for project purposes that we must include license articles imposing requirements concerning them, and nonetheless forego the ability to ensure that these purposes are safeguarded on an ongoing basis.

as "basically one-time requirements." Here, however, the recreation measures cannot be viewed as one-time requirements, because they must be maintained over the course of the license if they are to provide the recreational benefits intended.

Oregon cites *PacifiCorp*, 106 FERC ¶ 61,306 (2004), for the proposition that funding off-site activities does not require expanding the project boundary to include the lands on which they occur. There, however, the funds in question were to be used for protection, mitigation, and enhancement projects throughout the whole river basin, not just for ones near the hydropower project for which the license was being issued.

⁴⁷ We would point out that portions of Palisades at which improvements are to be made are already in the project boundary; only the Crooked River and Deschutes River campgrounds are required to be brought within the project boundary for the first time as the result of the license order. *See* EIS at 307.

⁴⁸ *See, e.g., Virginia Electric Power Company*, 106 FERC ¶ 62,245 at P 44 (2004) (finding that, while settlement provisions require licensee to provide funds to agency for construction and maintenance of facilities, licensee is ultimately responsible for compliance with license conditions).

Substitution of recreation projects

60. As noted above, Article 424, following proposed article 45, requires the licensees to file for Commission approval a Recreation Plan that is to include the measures identified in Exhibit G to the Settlement Agreement. Proposed article 45(e) provided for Oregon PRD to substitute other recreation projects if a project identified in the plan is completed before license issuance or if the licensees and Oregon PRD determine that greater efficiency could be gained by cost sharing some or all of the projects. Oregon objects to the omission of that provision from Article 424. Oregon argues that the ability to substitute projects reflects the practical realities of work scheduling and provides the opportunity to maximize recreational improvements through cost sharing with the licensees.

61. We will not include this project substitution provision. The purpose of the Recreation Plan is to identify those projects that the licensee will be required to undertake. In enforcing compliance with the Recreation Plan, the Commission cannot require the licensees to undertake projects that are not specifically included in it. On the other hand, the Commission will look to the licensees as responsible for undertaking all of the projects included in the plan even if the licensees and Oregon PRD have decided to share the costs of particular projects.

62. The uncertainty that would result from allowing project substitutions as proposed would interfere with the Commission's responsibility to enforce license compliance. We note that the licensees filed the Recreation Plan on June 14, 2006, but it has not yet been approved. If projects identified in Exhibit G have already been completed, the licensees could have included evidence of this completion in filing the plan with the Commission. If, before the plan is approved, the licensees and Oregon PRD wish to add, subtract, or substitute projects, the licensees can request an amendment of Article 424 in conjunction with filing the plan for Commission approval.⁴⁹ After approval of the plan, the licensees can request an amendment of the plan to permit such changes.

Offshore boat moorage

63. Among the measures identified in exhibit G to the Settlement Agreement was funding by the licensees of a study to evaluate the technical feasibility of an offshore boat moorage program at Lake Billy Chinook. If the program was determined to be feasible,

⁴⁹ Since Article 424 requires the licensees to consult with the Recreation Resources Working Group in developing the plan, proposed changes should be subject to that consultation.

the licensees were to fund the installation of up to 50 moorages, provided that the respective land management agencies agreed to develop, implement, and enforce regulations regarding the use of the moorages and to enforce the closure of other areas where boats tie up to the shore. In lieu of requiring the funding of a study, Article 424(a) of the license provides that the Recreation Plan include a provision for the licensees, after consulting with the Recreation Resources Working Group, to file an evaluation of the technical feasibility of implementing the moorage program along with recommendations for installing up to 50 moorages. Oregon objects to our replacement of the provision for installing the moorages with one for recommendations only.

64. We explained in the license order that we cannot require the installation of moorages to be contingent on the actions of other agencies.⁵⁰ Oregon argues that the development and enforcement of moorage regulations by those agencies could be folded into the evaluation of feasibility. While this may be so, it does not follow that this evaluation would permit the Commission to confirm the agreement of the land management agencies to develop, implement, and enforce the regulations regarding the use of moorages and the closure of other boat tie-up areas, which the Settlement Agreement requires as a condition precedent to requiring funding of the moorage installation. In the absence of the agencies' agreement on this matter, any license requirement to fund installation of the moorages would remain objectionably conditional.

65. If the settlement parties had wished to avoid this problem, it would have been advantageous to omit this condition from the settlement by determining in advance that the relevant land management agencies would be willing to exercise these regulatory measures. We will not modify this provision of Article 424.

Exclusion of funding limitations

66. In the license order, we noted that the Settlement Agreement includes specific dollar limitations on obligations placed on the licensees. We stated that a licensee has the obligation to complete measures required by license articles, so that dollar figures agreed to by settlement parties could not be considered absolute limitations. We reserved our authority, in Article 438, to require the licensees to fulfill the requirements of the license notwithstanding the expenditure limitations of the license.

67. The licensees object to our failure to include these funding limitations in the license articles. The licensees argue that the spending limitations in proposed articles 45, 52, and 53 reflected a consensus regarding mitigation needs and the relative level of

⁵⁰ 111 FERC ¶ 61,450 at P 95.

mitigation measures that would most effectively protect project resources, so that this omission of the limitations upsets the careful financial balance established in the Settlement Agreement.⁵¹

68. The licensees state that the limitations were intended to provide guidance as to the scope of their ongoing mitigation obligations. In particular, they state that the limitation in proposed article 45(e) was intended as a mechanism to provide flexibility to Oregon PRD to substitute improvements at Cove Palisades while providing predictability in the budgeting and funding of these improvements. Likewise, they state that the limitation in proposed article 53 regarding the obligation to support maintenance of Forest Service roads was intended partly as a quantification of the licensees' proportionate responsibility and partly as a limit on what the Forest Service could spend and collect from the licensees. The Tribes add that omission of the funding limitations could adversely affect their ability to obtain financing for the costs associated with the new license or to obtain upgrades in their bond rating.

69. In noting our policy on funding limitations, we cited *Virginia Electric Power Co.*⁵² The licensees acknowledge the policy set out there but point out that, in that order, we also stated that we sometimes include funding limitations at settlement parties' request in an effort to revise proposed license articles as little as possible. In *Virginia Electric Power* we included an article, similar to Article 438 here, reserving our right to require the licensees to undertake appropriate and reasonable measures to implement approved plans, notwithstanding the limitations on expenditures that we included in the license. The licensees urge us to follow a similar approach here of including the proposed funding limitations in conjunction with our Article 438 reservation of authority.

70. As we stated recently in our Settlement Policy Statement, we sometimes include in license articles spending caps that parties have agreed to, not to approve the limit but rather to memorialize the intent of the parties.⁵³ Since the intent of our Article 438 reservation is to prevent funding limitations that appear elsewhere in the license articles from being absolute caps on expenditures, it would be reasonable to include the funding limitations that the licensees complain we omitted, to reflect the intention of the

⁵¹ We have already noted proposed article 45 (development of the Recreation Plan) and proposed article 53 (funding upgrades and maintenance for Forest Service roads).

⁵² 110 FERC ¶ 61,241 (2005).

⁵³ 116 FERC ¶ 61,270 at P 21.

settlement parties as to the magnitude of expected future resource commitments. As the licensees point out, we did in fact include such spending limitations in connection with the Integrated Interpretation and Education Plan required by Article 427. However, each of the funding limitation provisions cited by the licensees presents a different situation.

71. Proposed article 52 provided for the licensees to enter into an agreement with the Forest Service for sharing costs and revenues of operating Forest Service-owned recreation facilities at the project. The funding limitations of proposed article 52 specify the percentages of operations and maintenance costs, in excess of revenue, that the licensees should contribute for identified Forest Service campgrounds and facilities. Article 424 of the license provides that the operation and maintenance of named recreation facilities on Forest Service lands “shall be provided for as stipulated in Proposed Article 52 of the Settlement Agreement.” Since this reference to proposed article 52 does not specifically exclude that article’s funding limitations, no modification need be made to Article 424 to preserve them.

72. Because, as discussed earlier, we are revising Article 431 to include the provisions of proposed article 53 for licensee contributions to Forest Service road maintenance, the funding limitations of that proposed article will now be set out in Article 431.

73. As discussed, we are not including in Article 424 the provision for Oregon PRD to substitute unidentified projects at Cove Palisades for Exhibit G projects that it may have completed. Therefore, the sole funding limitation in proposed article 45, which pertains to licensee funding commitments for such substituted projects, also does not apply to the license.

Mitigation as an alternative to fish passage

74. Proposed articles 34 and 35 of the Settlement Agreement contained procedures to address the infeasibility of, respectively, temporary and permanent downstream fish passage facilities. Among their provisions were requirements for the licensees to implement alternative mitigation in the event that fish passage for some or all species would be found to be infeasible at the Round Butte development. In the license order, we stated that we could not make a public interest determination with regard to alternative mitigation measures that had not yet been identified and for which a need and the cost were as yet unknown. Therefore, we did not include those alternative mitigation provisions in Articles 417 and 418, which in other respects contain, in substance, the

provisions of proposed articles 34 and 35, respectively.⁵⁴ We added that future fish passage needs could be addressed through our reservation of authority in the license to require fishways that might be prescribed in the future by the federal fisheries agencies and through standard Article 15, which allows fish and wildlife agencies to petition the Commission to reopen the license to include additional measures for fish and wildlife.

75. Nearly all petitioners object to our failure to include these provisions. Collectively, the petitioners emphasize that the settlement parties recognized the significant possibility that fish passage might be infeasible and agreed on clearly defined alternatives and specific mechanisms to identify and ensure appropriate alternative fish resource mitigation in that event. They state that each proposed article laid out a carefully structured decision process that covered each possible contingency if it appeared that downstream passage was infeasible. The petitioners argue that, by excluding the provisions established to address that situation, we have removed the assurance that, where fish passage is wholly or partly infeasible, the licensees will address project impacts on fishery resources under a range of possible outcomes. They contend that the license creates no substitute means of moving forward but instead requires the licensees to continue to take further action indefinitely to implement costly but ineffective fish passage measures.

76. The licensees argue that proposed articles 34 and 35 were also intended to guide the scale of alternative mitigation, to define or limit the licensees' future financial risk, and to define, to the extent then possible, the expectation of the settlement parties as to what future mitigation measures should be implemented if downstream fish passage were to prove infeasible. Petitioners contend that the reopener provisions that we cited are a poor substitute for the explicit mitigation process set forth in the Settlement Agreement. The Conservation Groups, in particular, object that these reopeners would not be available to non-agency parties. Petitioners urge us to revise Articles 417 and 418 to reinstate the settlement language of proposed articles 34 and 35.

⁵⁴ Both the proposed articles and the license articles contain provisions for the licensees to notify a Fish Committee consisting of other settlement parties if downstream fish passage facilities have not achieved established standards, to submit information to the Fish Committee for an analysis of the feasibility of modifying the existing facilities, and to develop a plan to continue their operations, modify them, and test them if deemed appropriate. The proposed articles and the license articles also each contain provisions for the licensee to develop plans for implementing alternative fish passage methodology if the existing temporary passage facilities are found ineffective.

77. Under the omitted portions of the proposed articles, if the Fish Committee established by the Settlement Agreement⁵⁵ determined, based on information provided by the licensees, that it was currently scientifically and technically infeasible for fish to be collected and passed around the project, the licensees were to develop a non-passage mitigation plan. The plan was to provide alternative mitigation valued at an amount equivalent to the net present value of the cost that would otherwise have been incurred in the operation and maintenance of permanent fish passage facilities over the remaining term of the license, but if this infeasibility determination were made prior to the construction of permanent facilities, the value of the mitigation was also to include the net present value of the cost that would otherwise have been incurred in that construction. If passage were determined to be infeasible only for some fish species, the licensees were to provide alternative mitigation related to those species in an amount equivalent to the net present value of the reduction in the cost of operations and maintenance of the fish passage facilities as a result of this determination.

78. We are not persuaded to include these portions of the proposed articles. Petitioners ask us to require the licensees to provide alternative mitigation in the amounts and under the terms stated above even though the nature of the mitigation measures is not identified. We would be unable, under these circumstances, to fulfill our statutory obligation to determine that the measures would be in the public interest or would even have a nexus to the operation of this project. The terms imposed on the mitigation plan require that the mitigation measures be equivalent in cost to the construction, operation, and maintenance of fish passage facilities. Such an expenditure basis, established without regard to defining the measures themselves, is arbitrary and bears no relation to an evaluation of the public interest. We do not impose on licensees a requirement simply to spend money because fish passage measures have proven ineffective. The public interest is defined not by expenditures but by the achievement of a desired outcome. The licensees are free to agree with the other settlement parties as to the extent of mitigation expenditures, but we would be unwilling to incorporate such a provision as a license requirement without evaluating the measures themselves. We must make the ultimate determination as to what measures are required, perhaps guided, but not bound, by the parties' conclusions.⁵⁶

⁵⁵ The composition and responsibilities of the Fish Committee will be discussed in a later section of this order.

⁵⁶ The Tribes add that eliminating the proposed infeasibility provisions removes the financial certainty as to the cost of the project that is critical to the Tribes in obtaining favorable refinancing terms or an upgraded bond rating. However, the extent of the licensees' financial obligation to mitigate ineffective fish passage must be based not on

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79. Several petitioners argue that elimination of the non-passage provisions on the ground of uncertainty is arbitrary, because Articles 417 and 418 provide for temporary and permanent collection facilities and alternative fish passage facilities, despite the fact that these measures are also uncertain. We do not find the situation analogous. The license provisions for these fish passage measures are predicated on a determination that fish passage at the project is in the public interest, and the provisions only require that the licensees develop and file a plan for such measures. They do not commit the Commission to require expenditures of a particular amount by the licensees, and the measures themselves would be limited to fish passage ones.⁵⁷

80. Petitioners argue that we have not provided for the possibility that downstream passage will be infeasible. NMFS asserts that a license article that sets the stage for future mitigation if certain criteria are met would provide assurances that some kind of mitigation will take place even if the specifics are not now known. We are not foreclosing avenues of addressing this situation but are simply declining to require the licensees to undertake undefined mitigation measures at predetermined costs in the event that such infeasibility of fish passage is demonstrated. Exclusion of the alternative mitigation provisions is not likely to lead to the endless pursuit of a succession of futile fish passage measures, as the petitioners fear. If the fish passage measures required by the license prove ineffective in accordance with the criteria of the Settlement Agreement, we would expect the licensees, with the support of the other settlement parties, to seek a license amendment rather than continue expenditures on ineffective measures. A proceeding to amend the license to substitute specific mitigation measures for ineffective fish passage requirements would provide a sufficient opportunity for participation by all of the settlement parties, including the non-agency parties that do not have the cited reopener provisions available to them.

Law enforcement on project waters

81. Proposed article 3 required the licensees to enter into an agreement with Jefferson County to fund land-based and marine law enforcement officers for law enforcement on project lands and waters. The licensees note that license Article 404, which requires the

an abstract dollar amount but on the nature and degree of reasonable mitigation found to be in the public interest.

⁵⁷ The licensees refer to the expenditure provisions that we have excluded as a cost cap. However, the provisions do not simply impose a limitation on the licensees' mitigation expenditures; they require licensee expenditures equivalent to the costs of constructing, operating, and maintaining downstream fish passage facilities.

licensees to file an Enforcement Plan, does not require an agreement with Jefferson County and appears to confine the scope of enforcement efforts to relevant provisions of the Terrestrial Resources Management Plan (Terrestrial Plan) required by Article 422. The licensees ask us to clarify Article 404 to eliminate any suggestion that law enforcement funded by the licensees is confined to the land, which the licensees suggest we do by adding a reference to the Recreation Plan in the article. Jefferson County, as well, urges us to ensure that the licensees can ensure compliance with the Recreation Plan and have authority to enforce activities on project waters.

82. Although proposed article 3 required funding of both land-based and marine law enforcement personnel, it provided specifically that the responsibilities of the land-based enforcement officer were to include compliance with relevant provisions of the Terrestrial Plan, including seasonal and permanent road closures, all-terrain vehicle use, eagle nest sites and winter range area protection, dispersed camping, shooting ordinances, wildlife harassment, and coordination with Oregon State Police and Coordinated Enforcement Programs. In reflection of this specific reference to terrestrial issues, Article 404 of the license requires the licensees to file an Enforcement Plan to indicate how they would enforce relevant provisions of the Terrestrial Plan, including all of these specific items. In contrast, proposed article 3 made no mention of compliance with the Recreation Plan or of any other project water issues or measures for which the funding of county enforcement personnel was intended.

83. We are concerned with protecting resources and uses at the project, not with funding enforcement personnel as such, since the responsibility for enforcing any measures to protect resources rests with the licensees, whether they enforce these measures themselves or delegate enforcement responsibilities to county law enforcement personnel.⁵⁸ For this reason, Article 404 provides that the licensees may accomplish enforcement through agreement with Jefferson County but does not require the licensees to do so. Article 404 reflects, rather, the substantive resource protection provisions of proposed article 3, relating to compliance with the Terrestrial Plan. As proposed article 3 did not contain comparable provisions relating to enforcement on project waters, Article 404 was appropriately silent on this matter. To amend Article 404 to include a reference to the Recreation Plan would go beyond the intent of the Settlement Agreement, which does not mention the Recreation Plan in this context. Moreover, the Recreation Plan is not restricted to matters concerning project waters.

⁵⁸ We discussed this issue in the Settlement Policy Statement, 116 FERC ¶ 61,270 at P 23-24.

84. Although we will not include a reference to enforcement on project waters or to the Recreation Plan in Article 404, this does not mean that the licensees cannot provide for enforcement on project waters through funding Jefferson County law enforcement personnel. The concern of the petitioners that the licensees would be restricted in enforcing compliance on project waters or in funding that enforcement by county personnel is misplaced. Nevertheless, there is a distinction between compliance with requirements of the license and compliance with local law. Nothing in Article 404 or elsewhere in the license either prevents or requires an agreement between the licensees and Jefferson County for any type of enforcement, whether on project lands or waters. However, the Commission will look to the licensees to ensure compliance with all license requirements on project lands and waters, regardless of whether the licensees fund Jefferson County personnel to carry out enforcement measures. On the other hand, the enforcement on project lands and waters of laws unrelated to project uses or purposes is not a matter of Commission jurisdiction and is properly left to the licensees to arrange with Jefferson County, through a funding agreement if desired. The license, in its present form, preserves this approach.

Filing of special use authorization

85. Article 406 requires the licensees, within six months of a license amendment authorizing use of lands of the Forest Service or BLM, to obtain and file with the Commission a special use authorization from the Forest Service or BLM, as applicable. The licensees ask us to modify Article 406 to require simply that the licensees file for a special use authorization within that period and to file the authorization with the Commission upon receipt, since the licensees would have no control over the applicable agency's issuance of the authorization.

86. Article 406 tracks proposed article 5, which provided that, within six months of an amendment authorizing use of additional Forest Service or BLM lands, "the Licensees shall obtain a special use authorization from the USFS or BLM, as applicable, for occupancy and use of any lands added to the Project boundary and file it with the Commission." Although we attempted to reflect the Settlement Agreement in this matter, the licensees' argument is valid, and we will amend Article 406 as requested.

Reporting of stage change limits

87. Proposed article 9 required the licensees to operate the project within specified stage change limits, to monitor compliance with those requirements, and to provide documentation of certain measured stage changes at the U.S. Geological Service (USGS)

Madras gage.⁵⁹ The Project Operating Plan, Exhibit C to the Settlement Agreement, required the licensees to file copies of all project operation compliance reports with the Commission and the Coordinating Committee established pursuant to the Settlement Agreement. The licensees, the Conservation Groups, and Oregon note that Article 409 requires that the stage change limit compliance reporting be made only to the Commission and a specific list of agencies. They request that we reinstate the complete reporting requirements that had been proposed, since the Coordinating Committee was a critical part of the Settlement Agreement.

88. Section 4.2 of the Settlement Agreement provides that, within 60 days of issuance of the new license, the licensees shall convene a Coordinating Committee that will address issues related to the implementation of the Settlement Agreement. Although the Settlement Agreement does not actually specify the composition of the Coordinating Committee, section 4.2 provides that each settlement party may designate a representative to it, implying that the committee consists of all of the settlement parties. We will modify Article 409 to substitute the Coordinating Committee for the agencies we listed.

Tribal Resources Integrated Management Plan

89. Proposed article 7 provided that the licensees not commence implementation of habitat- or ground-disturbing activities on the Warm Springs Reservation before complying with the requirements of the Tribal Integrated Resources Management Plan (Tribal Plan). In the license order, we noted that the Tribes had filed this plan too late in the proceeding for us to determine its full relevance to project activities. Article 408 of the license requires the licensees to file an explanation of the relevance of the Tribal Plan with regard to project-related or ground-disturbing activities on tribal reservation lands and reserves the Commission's authority to require the licensees to comply with that plan.

90. The licensees and Interior object to this language as implying that compliance with the Tribal Plan is not required. The Tribes and Interior explain that the Tribal Council adopted the Tribal Plan under its authority to regulate activities within the boundary of the Warm Springs Reservation and that the licensees must comply with the plan. Interior

⁵⁹ The provision limits the rate at which the licensees can make changes to the stage (or depth) of flow in the river downstream of River Mill dam. Because the limits are placed on the rate of stage change, each stage change limit is expressed in units of either feet per hour or feet per day. Stage change limits are also referred to as ramping rates.

adds that the Commission has no authority to determine the force and effect of the Tribal Plan on reservation lands. The Tribes argue that we would violate our trust responsibilities to them if we did not require compliance with the Tribal Plan. Interior states that incorporating the proposed language would ensure that the new license is implemented consistently with applicable laws and that tribal trust resources are not adversely affected by activities of the licensees on reservation lands. Interior argues that we should require the licensees to comply with pertinent provisions of the Tribal Plan.

91. On September 15, 2005, the licensee submitted the filing required by Article 408, and by letter of January 17, 2006, Commission staff notified the licensees that the filing was consistent with the requirements of that article. This is not the end of the matter, however, since the rehearing requests raise the issue of whether the licensees should be required to comply with the Tribal Plan.

92. In their separate rehearing request, the Tribes argue that we should consider the comments of the Tribal government, not of the joint licensees, with regard to what portions of tribal law apply to the project, to ensure that the project's effects on tribal concerns and interests are considered. To that end, the Tribes attempt to estimate, in a table included in their rehearing request, the relevance of project activities to various "issues" in respect to forested and non-forested lands of the reservation.⁶⁰ However, the Tribes add that, while the entire Tribal Plan applies to the project's covered activities generally, it is impossible to identify which Tribal Plan provisions will in fact be applicable to a particular project activity except on a case-specific level. The licensees' September 2005 filing consists of essentially the same material as the Tribes include in their rehearing request.

93. Although the September 2005 filing fulfilled the Article 408 requirement for submission of an explanation, the information provided in both that filing and in the Tribes' rehearing request is too general to help us formulate license requirements for compliance with specific elements of the Tribal Plan. Moreover, the Tribes' qualification in its rehearing request suggests that it may in fact not be possible to formulate such specific license requirements. These factors support the conclusion we reach now, that compliance with elements of the Tribal Plan should not be made a requirement of this license.

⁶⁰ The term "issues" is used by the Tribes and includes, among other things, riparian areas, aquatic resources, wildlife, management zones, cultural resources, timber, economic development, biological diversity, threatened and endangered species, fire management, transportation, recreation, energy, and visual quality. The Tribal list of issues in the Tribal Plan differs for forested and non-forested lands.

94. That the Tribes have adopted this plan pursuant to their authority over activities on their reservation does not compel the Commission to require compliance with it in its entirety and regardless of its content. State and local governments similarly promulgate laws and ordinances that apply to lands and waters within a project boundary. Although we prefer that our licensees be good citizens of the communities in which projects are located and that they comply with state and local requirements where possible,⁶¹ we do not generally include license articles requiring compliance with all state and local laws, many of which would have no relation to project operations. Except to the extent that we can determine that project activities would affect specific tribal resources, compliance with the Tribal Plan is a matter between the Tribes, in their governing capacity, and the licensees.

95. For these reasons, we will not require compliance with the Tribal Plan. We do not mean to imply, by this omission, that the licensees need not ensure consistency of their actions with elements of the Tribal Plan. Our expectation that our licensees will comply with local requirements would extend here to compliance with the Tribal Plan, to the extent that the project is located on the Warm Springs Reservation. However, to the extent that compliance with the Tribal Plan is not inconsistent with the terms of the license, compliance with the Plan is a matter for the Tribes and the licensees to address. Consistent with this position, we will delete from Article 408 the provision reserving our authority to require the licensees to comply with applicable portions of the plan.⁶²

⁶¹ See *PacifiCorp*, 115 FERC ¶ 61,194 at P 9 (2006).

⁶² The licensees argue that treating compliance with the plan as not mandatory would conflict with our obligation to include section 4(e) conditions submitted by Interior as necessary for the adequate protection and utilization of the reservation. We do not agree, since, as noted earlier, Interior's section 4(e) conditions consisted simply of reservations of authority to require measures to protect the reservations under its jurisdiction in the future. The Tribes contend that the Tribal Plan should be considered a comprehensive plan for improving, developing, or conserving a waterway and that, as such, we would be obligated to ensure that the project is best adapted to and consistent with it. Section 10(a)(2) provides that the Commission shall consider the extent to which a project is consistent with a comprehensive plan prepared by an agency established pursuant to federal law that has the authority to prepare such a plan or the state in which the facility is or will be located. Since the Tribes do not fall under either of these categories, section 10(a)(2) does not apply to the Tribal Plan. See *Tribal Comprehensive Plans and Federal Power Act Section 10(a)(2)(A)*, 114 FERC ¶ 61,049 (2006). Moreover, section 10(a)(2) requires only that we consider consistency with a filed comprehensive plan, not that we ensure such consistency.

Consistency of Recreation Resources Management Plan with laws, plans, and objectives

96. Proposed article 45 required the Recreation Plan to be consistent with existing laws and plans and with the effective management of recreation resources in the project area in a manner consistent with agency and Tribal objectives. The licensees and Interior object to our exclusion of these consistency provisions from Article 424 of the license. The Tribes add that ensuring consistency with tribal policy is necessary to prevent the degradation of tribal and treaty resources resulting from access to, and recreational opportunities on, tribal lands.

97. Inclusion of this consistency provision as a license requirement would entail its enforcement by the Commission. Because we could not be aware of, let alone interpret, all relevant agency and Tribal objectives, it would not be possible for us to enforce such a requirement. As we stated above, we do not require licensees to comply with all relevant laws of jurisdictions in which project lands or facilities are located. As noted, the licensees have already submitted the Recreation Plan. Consultation with the Tribes and relevant agencies in connection with development of the Recreation Plan should have ensured compliance of the plan with these objectives.

Terrestrial Resources Management Plan

98. Proposed articles 42 and 43 and Settlement Agreement Exhibit E identified specific measures to be undertaken by the licensees pursuant to the Terrestrial Plan, which, as noted above, we required in Article 422 of the license. The licensees and Interior complain that Article 422 requires implementation of these terrestrial measures only to the extent that they apply to lands within the project boundary, and that Article 423 similarly applies this limitation to implementation of terrestrial resource interim measures. The petitioners argue that this limitation ignores measures applicable to project resources, such as wildlife monitoring and weed management, that cannot be confined to project boundaries. The licensees argue that this limitation implies that we do not believe the Terrestrial Plan should be implemented as agreed by the parties beyond the project boundary where necessary and appropriate. Interior adds that this limitation fails to recognize that mitigation for continued project operation must sometimes occur outside of project boundaries if it cannot occur on project lands. The petitioners request us to revise these articles to eliminate any restriction of the Terrestrial Plan's implementation to lands within the project boundary.

99. The record does not demonstrate that mitigation for the effects of continued project operation on terrestrial resources must extend beyond the existing boundaries of this project. It should not be a licensee's responsibility under its license to assume broad resource management responsibilities, such as monitoring of wildlife and weed

management, on extensive and undefined lands that are not needed for project purposes, where the responsibilities lack a nexus to project effects. The settlement parties are free to provide outside of the license for the licensees to undertake these responsibilities on non-project lands.⁶³

Fish emergency clause

100. Proposed article 12(d) included a “fish emergency clause” to cover occurrences of extremely low flow or poor river conditions. The proposed article provided for the licensees to consult with the Fish Committee regarding temporary deviation from flow requirements. Article 412 of the license retained this clause but added a 30-day comment period with the Fish Committee prior to filing a plan with the Commission. The licensees, the Conservation Groups, and Oregon urge elimination of this consultation period. These petitioners explain that the proposed article included accelerated consultation with the Fish Committee to ensure that pressing resource needs in these flow situations could be addressed quickly, and that the 30-day comment period would be an obstacle to speedy consensus on determining, obtaining Commission approval for, and implementing necessary modifications.

101. Because the settlement parties agreed to proposed article 12(d) without the guarantee of a fixed period in which they could comment on temporary deviations from the flow requirement, we have no reason to believe that any settlement party would object to elimination of the 30-day comment period, and we will remove this requirement from Article 412.

Operation of Round Butte Hatchery

102. Before issuance of the new license, the licensees funded operation by Oregon DFW of the Round Butte Hatchery, a project facility located within the project boundary. Proposed article 37(a) included provisions for the development of an agreement between the licensees and Oregon DFW to continue this arrangement. The licensees complain that, although Article 420(a) requires the licensees to enter into an agreement with Oregon DFW for operation of the hatchery, Article 420(b) substitutes a requirement to develop a hatchery operations plan for the proposed article 37(b) requirement that the

⁶³ The licensees note that we have not always insisted that a project boundary reflect the geographic extent of a licensee’s responsibilities, but the authority they cite involves facilities, such as nesting platforms, that are too geographically small and isolated to be encompassed in a project boundary or one-time actions rather than ongoing actions such as would be involved here.

licensees fund the hatchery operations. The licensees argue that our approach creates an ambiguous situation, in that the intended purpose and contents of the Article 420(b) plan are unclear, as is the plan's relation to the agreement that the licensees are attempting to complete with Oregon DFW. The licensees recommend that we revise Article 420 to delete the requirement for a plan and adopt the funding structure of proposed article 37. Oregon asks us to clarify what the Article 420 plan for hatchery operations would add to the hatchery agreement and why the plan would not duplicate the annual work plans with which Article 420(b) requires hatchery operations to be consistent.⁶⁴

103. In most respects, Article 420 tracks the language of proposed article 37. The language of Article 420(a) preserves the proposed article's requirement for the licensees to enter into an agreement with Oregon DFW for the hatchery's operations, but Article 420(f) also includes a provision, which was not in the proposed article, that the licensees will remain responsible for the all of the measures specified in Article 420 if an agreement with Oregon DFW is not reached. This reflects the fact that the hatchery is a project work and that we would hold the licensees responsible, under their license, for its operations, regardless of whether they delegated those responsibilities to Oregon DFW.⁶⁵

104. We did not include the funding requirement in Article 420(b), because we are concerned only with ensuring that the measures related to the hatchery operations are performed. Funding arrangements between the licensees and Oregon DFW can be concluded privately, without being subject to Commission enforcement. Strictly speaking, even execution of the proposed hatchery agreement could be considered unnecessary for Commission purposes, since the licensees would ultimately have to be held responsible for the hatchery operations. In any event, on September 26, 2006, Commission staff approved the hatchery agreement pursuant to Article 420(a).⁶⁶

105. We acknowledge that the settlement parties did not propose development of a plan for hatchery operations and that the plan required by Article 420(b) may not serve a purpose in light of the requirements for a hatchery agreement and for annual work plans.

⁶⁴ The annual work plans, referred to in proposed article 37 and included as condition 16 in the Appendix C and D fishway prescriptions made part of the license, provide for the licensees to document actions to be implemented, develop studies, and propose strategies for the coming year consistent with the Fish Passage Plan.

⁶⁵ See the Settlement Policy Statement, 116 FERC ¶ 61,270 at P 23.

⁶⁶ *Portland General Electric and Confederated Tribes of the Warm Springs Reservation of Oregon*, 116 FERC ¶ 62,234 (2006).

Apart from the substitution of the operations plan for the funding requirement, the substantive provisions of Article 420(b) reflect the provisions of proposed article 37(b), in that both set out the policies and objectives that are to be met by the hatchery operations.⁶⁷ Requiring consistency of the hatchery operations with these policies and objectives should be sufficient to ensure that the hatchery is operated in accordance with the intent of the Settlement Agreement without also requiring an operations plan. Therefore, we will modify Article 420(b) to eliminate the requirement for a hatchery operations plan and simply require the licensees to ensure that hatchery operations are consistent with the specified policies and objectives. Article 420(b) and (f) will also require the licensees themselves to conduct the hatchery operations consistent with the criteria in the event that operations under the hatchery agreement with Oregon DFW should terminate.⁶⁸

Fish health management program and related fisheries projects

106. Proposed article 36 provided for the development by the licensees and Oregon DFW of a plan for a fish health management program. Article 419 of the license requires the licensees to file such a plan for Commission approval. The licensees and Oregon complain that Article 419 requires consultation with the Fish Committee and Fish Agencies on fish health management rather than only with Oregon DFW, as

⁶⁷ Both articles specify that the hatchery operations are to be consistent with the required annual work plan, the fish management policies and directives of Oregon DFW and the Tribes, any Hatchery Genetics Management Plan developed by Oregon DFW and NOAA Fisheries, and the priority objective of restoring and recovering wild stocks in the Deschutes River basin.

⁶⁸ The licensees note that Article 420 also provides that if hatchery supplementation for reestablishment of sockeye is deemed appropriate in the future, or if changes to hatchery operations are required in the future, the licensees should file a plan to undertake those measures or provide funding to Oregon DFW to undertake them. The licensees ask that, if funding to undertake hatchery-related activities on behalf of the licensees is unacceptable to us, Article 420 should be clarified to remove any ambiguity on this point. As we stated above, we do not object to the licensees funding hatchery activities by Oregon DFW, but such funding should not be a license requirement involving Commission enforcement. Unlike the funding provision that we omitted from proposed article 37(b), the plans contemplated in connection with these future changes do not require the licensees to provide funding but only to explain how the licensees would undertake the necessary measures, which could encompass funding actions by Oregon DFW.

contemplated by the proposed article. The licensees and Oregon state that all of the settlement parties recognized Oregon DFW as the only entity with the necessary fish health expertise and the personnel to implement the plan's provisions. We see no need for the licensees to consult with the Fish Committee and Fish Agencies if the settlement parties were willing to defer to Oregon DFW on this matter, and we will require consultation only with Oregon DFW.

107. Proposed article 36 provided that the program would include funding of services and personnel to be provided by Oregon DFW. The licensees and Oregon complain that Article 419 does not contain these funding provisions. The licensees state that funding Oregon DFW to undertake specific fish health management activities on behalf of the licensees is consistent with the long-standing practice of funding Oregon DFW to undertake hatchery operations at the project. Oregon also complains that we failed to include provisions of proposed article 40 for funding Oregon DFW staff positions to support the agency's involvement in other fisheries and terrestrial projects conducted under the license. Oregon objects to our replacement of the proposed article 40 provisions with a requirement in Article 401(d) that the licensees include agency coordination provisions specified by the proposed article, a requirement that Oregon argues will create confusion as to the scope of the licensees' actual funding obligations under the Settlement Agreement. Oregon asks us to clarify the licensees' obligations under Articles 401(d) and 419 to state clearly the licensees' obligations under the Settlement Agreement.

108. In Article 419, we specified the substantive provisions that the fish health management program should include, as set out in proposed article 36: provisions for fish health services and supplies associated with the production of salmon and steelhead eggs and fry at Round Butte Hatchery, for diagnosis of disease in mortalities at fish facilities, for monitoring of disease agents in wild fish populations, and for fish pathogen procedures for trap-and-haul volitional passage programs. However, the licensees have the responsibility, under their license, for implementing this program. It is not a matter of Commission concern whether the licensees fulfill their obligations through actions of their own or through funding actions by other entities. As discussed above, we are also not requiring the licensees to fund Oregon DFW operation of the hatchery. The licensees and Oregon DFW are free to enter into an agreement, such as is contemplated by proposed article 36, for licensee funding of the services and personnel that the proposed article specifies would be provided by Oregon DFW, but we will not require the licensees to include funding in the health management program or to enter a such a funding agreement, since we are concerned only that the required actions be performed.

109. Proposed article 40 provided for the licensees to fund an Oregon DFW fisheries biologist during the interim and final fish passage phases, to assist in coordinating Oregon DFW's involvement in fisheries and terrestrial projects conducted under the

license. Proposed article 40 also required the licensees to fund part of the cost of an Oregon DFW facilities engineer through the time of construction of the permanent downstream fish facility at Round Butte Dam and in connection with possible construction of upstream fish passage facilities. Again, our concern is that the licensees comply with the license's fish passage requirements, not that they fund other entities' involvement in connection with those requirements. Therefore, it is appropriate to omit the funding requirements of proposed article 40 but to require in Article 401(d) that the licensees include the coordination provisions of proposed article 40 in connection with the licensees' obligations under the Fish Passage Plan required by Interior's and Commerce's fishway prescriptions. The intent of this reference was to ensure that the licensees coordinate the involvement of Oregon DFW in the fish passage process, as contemplated by proposed article 40, even though the provisions for funding that coordination are not being included in the license.

Funding of wildlife staff position

110. Proposed article 42, which concerned development of the Terrestrial Plan, included a provision for the licensees to continue to fund and employ an individual to hold a specially designated wildlife staff position at the project. Article 422 of the license contains most of the provisions of proposed article 42 except for the provisions for funding and employing wildlife staff. The licensees and Interior object to this omission.

111. Our interest is only in ensuring that the licensees develop and implement the Terrestrial Plan. The licensees are free to assign a wildlife staff person to the project as a means of assisting the fulfillment of their obligations under the plan, but this is a matter between the licensees and the other settlement parties. We will not amend Article 422 to include this provision.

Consultation/planning requirement for interim terrestrial measures

112. The licensees note that Article 423 of the license added a consultation/planning requirement for interim terrestrial measures that was not included in proposed article 43 of the Settlement Agreement. The licensees argue that the addition of this requirement may interfere with their ability to complete these measures within one year of license issuance, as Article 423 requires, since the measures may not be undertaken until the Commission approves the plan. The licensees ask us to substitute an abbreviated consultation and approval process.

113. On December 2, 2005, Commission staff approved the terrestrial interim resource implementation plan.⁶⁹ Since the consultation required by Article 423 would have occurred before the plan was filed with the Commission, the request to eliminate the consultation requirement is moot.

Inclusion of Trout Creek land in project boundary

114. The licensees state that they own 3,000 acres of land in the Trout Creek area that they intended to be included in the project boundary but had failed to include in their Exhibit G drawings submitted in June 2001. The licensees, Interior, the Conservation Groups, and Oregon note that this inconsistency in the application material has caused a discrepancy between ordering paragraph (C), which refers to 10,797 acres of project lands, and Exhibit G, which shows only 7,797 acres. These petitioners propose that this error be corrected with the filing of the Exhibit G drawings required by Article 203 of the license. We agree that the discrepancy should be corrected by including these lands in the Exhibit G drawings.

Consultation in lieu of approval

115. In the license order, we noted that the Settlement Agreement included provisions for plans to be approved by various settlement parties before being filed with the Commission. In keeping with established Commission policy, we stated that the requirement for an entity's prior approval of plans submitted to the Commission is substantially satisfied by license requirements to consult with the entity prior to submission and explain how it has accommodated the entity's concerns. Accordingly, in various license articles we substituted this consultation requirement for the approval authority contemplated by provisions of the Settlement Agreement.⁷⁰ A number of petitioners object to this substitution.

116. The Settlement Agreement provided for a Fish Committee and an interagency group of Fish Agencies to review and approve certain expert panels, plans, designs, and licensee actions. Article 402 of the new license requires the licensees to establish a Fish Committee, to consist of the licensees and, to the extent of their interests in participating, the Tribes, a representative of the Conservation Groups, and specified state and federal

⁶⁹ *Portland General Electric Company*, 113 FERC ¶ 62,168 (2005).

⁷⁰ 111 FERC ¶ 61,450 at P 88.

agencies.⁷¹ Article 402, in accordance with the Settlement Agreement, also provides that NMFS, FWS, Oregon DFW, and the Tribes' Branch of Natural Resources are considered the Fish Agencies.

117. The Tribes, Interior, Oregon, and NMFS object to our exclusion from several license articles of a requirement to obtain approvals of plans from the Fish Agencies, as contemplated by the Settlement Agreement.⁷² These petitioners argue that our substitution in these articles of a requirement to consult with the Fish Agencies, explain how the Fish Agencies' concerns were addressed, and submit the Fish Agencies' comments to the Commission does not have the same effect as the approval requirement contained in the proposed articles that our license articles adapted.⁷³

118. The Tribes add that approval authority is the only way they can control the impact to the fishery resource and protect their treaty rights with regard to fish. Interior and NMFS add that the proposed approval process, unlike the consultation requirement, provides some assurance that the licensees will implement plans, designs, and other actions in a way that meets the agencies' resource objectives and statutory responsibilities. NMFS contends that the approval provisions of the proposed articles should not be objectionable because they do not purport to remove the Commission's own authority to approve or modify the plans. NMFS adds that it based its issuance of a biological opinion on the assumption that it would have approval authority over the relevant plans, and that our failure to include such approval authority might require reinitiating consultation under the ESA.

119. Article 402 also requires the licensees to establish a Terrestrial Resources Working Group, to consist of the licensees, and, to the extent of their interest in participating, the Tribes and most of the federal and state agencies included in the Fish Committee. The Tribes, Interior, and Oregon object to our substitution of a consultation

⁷¹ The agencies are NMFS (referred to as NOAA Fisheries), the Forest Service, Interior's FWS, BIA, and BLM, and Oregon DFW and Department of Environmental Quality.

⁷² Collectively, the petitioners mention Articles 417 and 418 (plans for continued operation, modification, and testing of downstream fish passage facilities, alternative temporary downstream fish passage, and reinstatement of downstream fish passage based on new feasibility information), 433 (plan for resampling bed material size in connection with a gravel study), and 435 (plan for a Trout Creek habitat enforcement project).

⁷³ These were proposed articles 34, 35, 58, and 60.

requirement for a proposed requirement for approvals by this working group in respect to the Article 422 Terrestrial Plan and Article 423 terrestrial resource interim measures. These petitioners make arguments similar to their Fish Agency approval arguments regarding inadequacy of consultation to ensure protection of resources.

120. Finally, as noted earlier, the Forest Service objects to our substitution of the consultation requirement in respect to several license articles corresponding to settlement provisions that required Forest Service approval. The Forest Service states that our modification of the Settlement Agreement in this regard affects license Articles 402, 404, 406, 417 through 419, 421, 422, 424, 426, 428 through 431, 435, and 440. In fact, the articles cited generally do not require consultation with the Forest Service alone but with committees or groups that include the Forest Service: the Fish Committee (Articles 402, 417 through 419, 421, 435, and 440), the Terrestrial Resources Working Group (Articles 402, 422, and 440), the Recreation Resources Working Group (Articles 402, 424, 426, 430), and the Shoreline Management Working Group (Articles 402, 428, and 429).⁷⁴ Article 431 requires consultation specifically with the Forest Service, and Article 404 does not require consultation with the Forest Service at all but only with Jefferson County. Article 406 does not involve plans but rather activities on Forest Service lands and will be discussed in a separate section of this order.

121. The Commission has final approval authority over plans required to be filed pursuant to a license. It has been our policy to refrain from giving agencies or other entities approval authority over plans before they are submitted for Commission approval. While permitting this prior approval would not preclude the Commission's own subsequent approval action, it would complicate the process of developing and filing required plans, because failure to obtain the approval of all of the designated entities could prevent licensees from filing plans in a timely fashion or, in the worst case, at all.

122. Although we recognize that consultation is not the same as approval, the consultation provisions of these articles should be sufficient to ensure that the licensees have considered all of the applicable interests, standards, and policies of the specified committees and groups before filing any of the relevant plans. This is especially so considering that Article 402 preserves the right of any member of the committees and groups to invoke dispute resolution pursuant to section 7.5 of the Settlement Agreement if consensus is not reached as to any study, operating or implementation plan, report, or facility design, and provides that the licensees may not file any of those documents until

⁷⁴ In establishing each of these committees, Article 402 of the license provides that the committees are to include the Forest Service and the other listed entities "to the extent of their interests in participating."

the dispute resolution process has been completed. In any event, to the extent that a plan filed for Commission approval has failed to satisfy the pertinent committee or group, the licensees would risk the possibility that Commission staff, considering the unaccommodated concerns, will require modification of the plan before it can be approved.

123. Nevertheless, the Forest Service states that its section 4(e) conditions require inclusion of its approval authority in the license articles that it has cited. It is not possible in the abstract to determine to what extent the plans required by these articles would affect Forest Service lands and resources, as opposed to non-Forest Service lands and resources, to which the Forest Service conditions would not apply. To ensure that these articles conform to the Forest Service's conditions, we will address this problem by adding license Article 444, which will provide that, notwithstanding the consultation language in these articles, approval of the Forest Service is necessary to the extent that the specified plans or reports would affect Forest Service lands and resources.⁷⁵

124. Interior and Oregon contend that our omission of approval authority in the individual license articles involving the Fish Committee is inconsistent with our requirement in Article 402 itself that the licensees allow the Fish Agencies a minimum of 30 days to provide their approval before submitting a study, plan, report, or facility design to the Commission, where such approval is required. But Article 402(a)(2), where this requirement is found, actually applies “[w]here consultation with the Fish Committee and approval by the appropriate Fish Agencies pursuant to their respective statutory authorities is required.” This reference was intended for those instances in which approval authority of the Fish Agencies is included in the mandatory fishway prescriptions on which the license is conditioned. The Commission would have no discretion to disregard this approval authority since the prescriptions are mandatory. However, because this language does not correctly convey our intention, we will modify Article 402 to clarify the reference.

Consultation in respect to fishway prescriptions

125. Interior and NMFS ask us to confirm that their section 18 fishway prescription authority is not intended to be affected by our position that the consultation provisions included in the license are an adequate substitute for the approval provisions of the

⁷⁵ We will not apply this article to Article 404, in which the Forest Service has no role, Article 419, in which we are now requiring consultation on fish health management only with ODFW, or Article 431, in which we have replaced the requirement for a road maintenance plan with the requirement to execute an agreement with the Forest Service.

proposed articles. These agencies ask us to clarify that the licensees must comply with the express language of ordering paragraphs (H) and (I), which make the license subject to their respective fishway prescriptions, contained in Appendices C and D of the license.

126. Section 18 requires us to condition the license on construction and operation of such fishways as Interior and Commerce prescribe. Although plans for fishways must still be submitted to the Commission for final approval, the language of section 18 makes it clear that those fishways must meet the approval of Interior and Commerce. We did not provide, in the license, for consultation as a substitution for this agency approval.

Environmental analysis funding and approvals on BLM and Forest Service lands

127. Article 406 of the license, addressing activities on Forest Service and BLM lands, generally reflects the language of proposed article 5. In Article 406(b), we substituted a requirement that the licensees receive comments, rather than written approval, from the Forest Service or BLM before making changes in the location of project features or facilities on lands of those agencies. In Article 406(d), we made a similar substitution in respect to plans for habitat- or ground-disturbing activities on BLM or Forest Service lands. The Forest Service and Interior ask us to restore the language of the proposed article, emphasizing that their approvals are necessary to ensure that the license is implemented consistently with their resource goals and objectives and that the consultation provisions of Article 406 are not an adequate substitute for those approvals. The Forest Service indicates that our modifications of these provisions of proposed article 5 are in conflict with its section 4(e) conditions.

128. If the licensees were to propose to alter project features or conduct ground- or habitat-disturbing activities that are not now authorized by the license, they would have to seek a license amendment. The licensees would have to consult with BLM and the Forest Service, and the agencies would have sufficient opportunity to protect their interests at that time. The approval authority requested should therefore not be necessary. However, because the Forest Service's condition 1 requires this measure to the extent that it affects Forest Service lands, we will modify Article 406 to substitute approval authority for consultation. For clarity in administering the license, we will make this change as to both the Forest Service and BLM.

129. Proposed article 5(e) provided for the licensees to fund or conduct any environmental analysis deemed necessary by BLM or the Forest Service for site-specific activities or plans on the lands administered by those agencies. This was to include funding for agency review and agency specialists involved in scoping, site-specific resource analysis, and cumulative effects analysis sufficient to meet the requirements of agency regulations under applicable environmental laws. We did not include this

provision in Article 406, and the Forest Service and Interior urge us to do so now. The petitioners state that the licensees will not be able to carry out activities on those lands until environmental analyses are complete, so that failure to complete those analyses in a timely manner could interfere with timely completion of required projects. The Forest Service, again, indicates that this omission conflicts with its section 4(e) conditions.

130. Because the Forest Service indicates that the provision is necessary to protect Forest Service lands and resources pursuant to its section 4(e) conditions, we will revise Article 406 to include it in respect to those lands and resources. However, we do not support inclusion in a license of a requirement for licensees to fund or conduct environmental analyses that other agencies are obligated to undertake. Therefore, we will not extend this provision to BLM. We would point out that the agencies' costs of conducting these environmental analyses would normally be subject to FPA section 10(e)(1),⁷⁶ which requires the Commission to collect from licensees through annual charges the "reasonable and necessary" costs incurred by federal agencies in carrying out their responsibilities with respect to the Commission's hydropower program. Each year the Forest Service and other federal agencies submit their prior year's costs to us, and we allocate the eligible costs that are determined to be reasonable among the licensees pursuant to formulae set forth in the Commission's regulations.⁷⁷ To the extent that the Forest Service recovers from the licensees any costs that would otherwise be submitted for recovery pursuant to section 10(e)(1) and our implementing policies and regulations, such costs may not be recovered through annual charges.

Shoreline Erosion Plan

131. Following the provisions of proposed article 50, Article 429 of the license requires the licensees to file a Shoreline Erosion Plan to monitor and control erosion at the project. Article 429 requires the licensees, within three years of license issuance, to begin rehabilitation at specified erosion sites. Interior asks us to amend Article 429 to include dispersed sites along the east side of the Island Research Natural Area, which were included in proposed article 50. Interior claims that the proposed provision would be consistent with the Commission staff's support in the EIS for the development of a shoreline erosion plan for this area. These sites, which are within the project boundary, were inadvertently omitted from Article 429, and we will amend the article to include them.

⁷⁶ 16 U.S.C. § 803(e)(1).

⁷⁷ See 18 C.F.R. § 11.1 (2006).

132. Proposed article 50 provided that all actions conducted under the Shoreline Erosion Plan must be approved by the landowner or agency with management authority over the lands in question and must be consistent with and permitted under existing laws and plans. Interior and Oregon object to our exclusion of this provision from Article 429.

133. The project occupies PGE-owned lands, county lands, and Oregon state park lands, as well as Forest Service lands, BLM lands, and lands within the Warm Springs Reservation. Article 429, like proposed article 50, provides for the licensees to consult with the Shoreline Management Working Group, established pursuant to Article 402, in preparing the Shoreline Erosion Plan. Further, Article 429, like proposed article 50, provides that all actions conducted under the plan shall be developed and implemented in consultation with the Shoreline Management Working Group. BLM, BIA, the Forest Service, the Tribes, Oregon DFW and PRD, and Jefferson County are members of this group. Land management agencies would thus have the opportunity to ensure consistency with their land management interests in the development and implementation of the plan.

134. Oregon contends that, apart from condemnation of property interests, the FPA does not authorize us to exempt licensees from having to obtain permission to undertake activities on a landowner's property. Licensees are required to obtain the property interests necessary to carry out all project purposes, including shoreline erosion control. To the extent that erosion control activities would be undertaken on federal or state lands and would require obtaining approvals that federal or state agencies have the legal authority to issue, our exclusion of the landowner approval provision does not invalidate that authority. To the extent that such activities would be undertaken on private lands, the licensees may obtain the necessary property interests through the exercise of eminent domain if a voluntary transfer of those interests is not possible. We would not restrict the ability of licensees to carry out activities needed to accomplish a project purpose by requiring landowner approvals that are not otherwise required by law and that relate to lands over which the licensees must obtain and retain necessary property interests. For these reasons, we will not include the requested approval language.

Funding of measures at Haystack Reservoir and Lower River Recreation Sites

135. Proposed articles 54 and 55 provide for funding of recreation mitigation or enhancement measures at, respectively, the Forest Service-managed Haystack Reservoir and BLM-managed lower Deschutes Wild and Scenic River sites. In our license order, we noted that the final EIS did not recommend funding of recreational measures at these non-project sites, because the measures would not address project-related effects on

recreation resources. We also concluded that sufficient recreation would be provided at the project through the other measures required in the license.⁷⁸

136. Proposed article 54 would have required the licensees to make three payments, totaling \$45,000, over 50 years to the Forest Service for infrastructure maintenance or improvements to Haystack Reservoir. The Forest Service argues that we should have required these payments, because overcrowding at the project's Lake Billy Chinook causes displaced visitors to use the facilities at Haystack Reservoir, a trend that is expected to continue well into the next 50 years. Similarly, Interior asks us to incorporate proposed article 55, on the ground that construction of the project forced certain recreational uses of the Deschutes, Metolius, and Crooked Rivers to move from inundated areas to BLM lands along the Lower Deschutes River, resulting in substantial management needs and costs for BLM. Interior views these as ongoing and continuing impacts of project operations, which impacts proposed article 55 was intended to address.

137. Neither the FPA nor NEPA requires mitigation for every possible effect of a project. The nexus between the operation of this project and these conditions on Forest Service and BLM lands is tenuous and uncertain. It is not necessary to require licensee payments in compensation for any possible effect that the project may be alleged to have had on lands that are not in the vicinity of the project. However, because the Forest Service identifies the Haystack Reservoir payment provision as required by its section 4(e) conditions, we will add to the license a new Article 445, which will require the licensee to make these payments as provided for under proposed article 54. Since we do not believe that any measures relating to Haystack Reservoir serve a project purpose, we will not require inclusion in the project boundary of any of the Haystack Reservoir lands on which the funded measures would occur.

Water quality certification conditions and license amendment

138. In Article 401(c), we noted that certain of the mandatory conditions included in appendices to the license contemplate unspecified long-term changes to project operations or facilities for the purpose of mitigating environmental effects. We stated that those changes could not be implemented without prior Commission authorization granted after the filing of an application to amend the license. Oregon notes that condition G.11 and D.5 of the water quality certifications issued by, respectively, Oregon DEQ and the Tribes' Water Control Board are among the conditions we listed in the table in Article 401(c). Oregon argues that condition G.11 requires only that the licensees perform studies and monitoring of sediment transport and spawning gravel and that

⁷⁸ 111 FERC at P 94 and n. 24.

condition D.5 requires only studies of fish counts, spawning data, and gravels. Oregon contends that we should remove these conditions from the table, since neither condition contains any self-executing requirement for changes to project operations or facilities.

139. Each of the conditions identified by Oregon provides that the licensees are to use the results of studies to determine if additional mitigation measures are necessary to improve habitat quality or quantity. Oregon is correct that the conditions are not self-executing; however, they still contemplate possible changes that would require amending the license. Article 401(c) does not require any automatic action by the licensees; it simply identifies conditions that may lead to future changes requiring a license amendment. Therefore, the reference to these two conditions in Article 401(c) would result in no harm, but it would have the benefit of putting the licensees on notice that they may not undertake future mitigation measures contemplated by the conditions without seeking to amend the license. For this reason, we will retain the reference.

Forest Service reservation of authority

140. The Forest Service objects to our failure to include section 6.1.3 of the Settlement Agreement in the new license. More specifically, the Forest Service, citing this section and its preliminary conditions 1 and 2, argues that the license should include a reservation of its authority.⁷⁹ Section 6.1.3 provides that each governmental party to the Settlement Agreement reserves its authority pursuant to the FPA, and that, in the event that any governmental party includes a reservation of authority under any statute in its modified or final conditions, recommendations, or prescriptions, and the reservation of authority is included as a condition of the new license, the inclusion of such reservation shall not be considered materially inconsistent with the Settlement Agreement.

141. Section 6.1.3 of the Settlement Agreement primarily concerns the settlement parties' rights as to each other and, in particular, reflects the parties' understanding that any reservation included in the license at the request of an agency will not be considered inconsistent with the Settlement Agreement. Section 6.1.3 assumes that individual agencies may include reservations in their final or modified conditions and does not, in itself, constitute a request for a reservation of post-licensing conditioning authority by each individual agency that is party to the agreement. The Forest Service justifies the

⁷⁹ Preliminary condition 1 reserved the Forest Service's authority to modify the preliminary conditions in order to provide final terms or conditions that would be consistent with the terms of any settlement agreement that might be filed. Preliminary condition 2 reserved the Forest Service's authority to modify its section 4(e) conditions if the term of the new license exceeded 30 years.

need for a reservation of its authority in part by explaining that it is in the public interest to make necessary changes to conform the preliminary section 4(e) conditions to the Settlement Agreement to minimize inconsistency. Because we are now including the Forest Service's final section 4(e) conditions as license requirements, its preliminary conditions are moot.

142. The Forest Service also argues that a reservation of its authority is in the public interest because it will permit the Forest Service to ensure long-term protection of the reservation in the event that the license term exceeds 30 years. The Forest Service states, for the first time on rehearing, that the license should be revised to include the following reservation "in accordance with Settlement Agreement 6.1.3:"

The licensees shall implement, upon order of the Commission, such additional measures as may be identified by the Forest Service on behalf of the Secretary of Agriculture pursuant to the authority provided in section 4(e) of the Federal Power Act, as necessary to ensure the adequate protection and utilization of the public land reservations under the authority of the Department of Agriculture, Forest Service.

143. Although the Forest Service has not previously sought the inclusion of this particular reservation, its rehearing request indicates that it regards omission of the reservation as inconsistent with its section 4(e) conditions. On that basis, we will include it in the license, in a new Article 446.

Request for errata notice

144. The licensees and the Forest Service ask that we issue an errata notice to address several items in the license order that require correction. We will instead address those items here.

145. The licensees and the Forest Service each note that a reference in Article 402(e) to "USFWS/BLM (one representative collectively)" should read "USFS/BLM (one representative collectively)."⁸⁰ We agree that the present designation is incorrect and will make the requested change. These petitioners also request that "dispersed sites on the east side of Island RNA" should be added to the list of erosion sites at which the licensees must commence rehabilitation under Article 429(2). As we noted earlier in our discussion of the Shoreline Erosion Plan, the omission of these sites was inadvertent, and Article 429 will be modified to include them.

⁸⁰ Interior also notes the need for this correction in its rehearing request.

146. The licensees state that the license order, at P 140, refers to a proposal to replace an existing intake tower at the Reregulating Dam. The licensees state that this reference should instead be to the Round Butte Dam. We confirm that the proposal refers to the Round Butte Dam.

147. Article 433(c) requires the licensees to submit annual monitoring results of a gravel study to a three-member expert review panel. The licensees note that Article 433(d) requires the licensees to “request that the expert review panel believes” one of three specified alternatives should be pursued with respect to further study or gravel augmentation. The licensees request us to require instead that the licensees be required to obtain verification from the expert panel as to its belief about the three alternatives. We will modify Article 433(d) to substitute “determine whether” for “believes” in the phrase above.

The Commission orders:

(A) Article 402(a)(2) of the license, third sentence, is modified to read as follows:

Where consultation with the Fish Committee and approval by the appropriate Fish Agencies is required by the fishway prescriptions attached as Appendices C and D to this license order, the licensees shall allow the Fish Agencies a minimum of 30 days to provide such approval prior to submitting the final study, operating or implementation plan, report, or facility design with the Commission.

(B) Article 402(e) of the license is modified to substitute “USFS/BLM (one representative collectively)” for “USFWS/BLM (one representative collectively).”

(C) Article 406(a), sentence 2, of the license is modified to read as follows:

Within six months of such a license amendment, the licensees shall request a special use authorization from the USFS or BLM, as applicable, for occupancy and use of any lands added to the project boundary by the license amendment and file such authorization with the Commission upon receipt.

(D) Article 406(b), sentence 1, of the license, is modified to read as follows:

The licensees shall not make changes in the location of any constructed project features or facilities located on National Forest System (NFS) or BLM lands, or make any departure from the requirements of any approved

exhibits authorizing use of occupancy of NFS or BLM lands filed with the Commission and authorized by the new license as issued and amended, before receiving comments from the USFS or BLM and approval from the USFS or BLM and from the Commission.

(E) Article 406(d), sentence 1, of the license, is modified to read as follows:

The licensees shall prepare site-specific plans for approval by USFS or BLM and by the Commission for habitat-disturbing and ground-disturbing activities on NFS or BLM lands required by the license, including activities contained within resource management plans required by the license that shall be prepared subsequent to license issuance.

(F) Article 406 is amended by adding a new subsection (e), as follows:

(e) The licensees shall conduct or fund any environmental analysis deemed necessary by the USFS for site-specific activities or plans. This shall include, but not be limited to, funding for agency review and agency specialists involved in scoping, site-specific resource analysis, and cumulative effects analysis sufficient to meet the requirements of agency regulations under NEPA or other environmental laws in existence at the time the process is initiated.

(G) Article 408, paragraph 2, of the license is deleted.

(H) Article 409(b) of the license is modified to read as follows:

(b) To monitor compliance with this requirement, the licensees shall record the time and control signal value for all stage change instructions at the Reregulating development and shall report any stage change control signals that are greater than the stage change limitations identified above to the Coordinating Committee established pursuant to section 4.2 of the Settlement Agreement and to the Commission. In addition, the licensees shall provide written documentation to the Coordinating Committee and the Commission of all measured stage changes at the U.S. Geological Survey Madras gage that deviate more than 0.15 ft. from the control set-point value.

(I) Article 412(d) of the license, fourth sentence, requiring a minimum 30-day comment period, is deleted.

(J) Article 419 of the license, third paragraph, is replaced with the following:

The licensees shall prepare the plan in consultation with ODFW. The licensees shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to ODFW, and specific descriptions of how ODFW's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

(K) Article 420(b) of the license is replaced with the following:

(b) *Hatchery Operations*: The licensees shall ensure operation of the Round Butte hatchery, as specified in Section 8 of Appendix B of the Settlement Agreement, during the term of the license, which hatchery operations shall be consistent with: (1) the annual work plan developed under Condition 16 of Appendices C and D; (2) then-in-existence fish management policies and directives of ODFW and the Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR); (3) any Hatchery Genetics Management Plan or other directive developed between ODFW and the National Marine Fisheries Service (NOAA Fisheries) pursuant to the Endangered Species Act (ESA); and (4) the priority objective of restoring and recovering wild stocks in the Deschutes River basin. To ensure consistency with the Fish Passage Plan, the licensees shall consult with the Fish Committee established by Article 402 regarding hatchery operations.

(L) Article 420(f) of the license is modified to read as follows:

(f) In the event that the Hatchery Agreement specified under item (a) of this article is terminated or otherwise becomes without effect, the licensees shall remain responsible for completing items (b) through (f) of this article. The Commission reserves the right to require additional measures consistent with the terms of this article or modifications to this article in the event the agreement is terminated or otherwise becomes without effect.

(M) Article 429 of the license is modified by replacing subparagraphs (i) and (j) of paragraph (2) with the following:

- (i) Bureau of Land Management Beach east of the Three Rivers Marina;
 - (j) shoreline and access road at Monty Campground; and
 - (k) dispersed sites on the east side of the Island Research Natural Area.
- (N) Article 431 of the license is modified to read as follows:

Article 431. Project-Related Road Maintenance. Pursuant to section 4(e) of the Federal Power Act, within one year of license issuance, the licensees shall enter into an agreement with the U.S. Forest Service (USFS) governing upgrades to and maintenance of USFS Roads FS 11 and FS 1170. The agreement shall provide for:

- (a) a one-time contribution, within five years of license issuance, toward specified capital improvements for USFS Roads FS 11 and FS 1170. For USFS Road 11, the licensees' contribution shall be 10 percent of total capital costs (up to \$81,200); for USFS Road 1170, the licensees' contribution shall be 81 percent of total capital costs (up to \$ 361,000). The agreement may also provide that such contribution may be made in cash or in kind.
- (b) annual contributions, in cash or in kind, of 10 percent of the annual maintenance costs of USFS Road 11 and 81 percent of the annual maintenance costs of USFS Road FS 1170.

The licensees shall notify the Commission of their execution of this agreement within 30 days of its execution.

- (O) Article 433(d), first sentence, of the license is modified to read as follows:

The licensees shall request that the expert review panel determine whether: (1) the gravel study should be continued; (2) the licensees should implement a long-term gravel augmentation program; or (3) no further study or augmentation is needed.

- (P) The license is modified by adding new Article 444, to read as follows:

Article 444. Approval authority. Pursuant to section 4(e) of the Federal Power Act, notwithstanding requirements in Articles 402, 417, 418, 421, 422, 424, 426, 428 through 430, 435, and 440 that the licensees consult, in

the preparation of plans or reports, with designated committees or groups of which the U.S. Forest Service is a member, approval by the Forest Service of the specified plans or reports is required, to the extent that the plans or reports would affect Forest Service lands or resources.

(Q) The license is modified by adding new Article 445, to read as follows:

Article 445. Haystack Reservoir Payments. Pursuant to section 4(e) of the Federal Power Act, within one year of license issuance, the licensees shall enter into an agreement with the U.S. Forest Service (USFS) that requires contribution of three payments to the USFS for infrastructure maintenance or improvements at Haystack Reservoir. These payments shall be distributed as follows: \$10,000 in the fifth year after license issuance, \$15,000 in the twentieth year after license issuance, and \$15,000 in the fortieth year after license issuance. These payments are specified in 2004 dollars and are not subject to escalation.

(R) The license is modified by adding new Article 446, to read as follows:

Article 446. Reservation of Authority - Forest Service. Pursuant to section 4(e) of the Federal Power Act, the licensees shall implement, upon order of the Commission, such additional measures as may be identified by the Forest Service on behalf of the Secretary of Agriculture pursuant to the authority provided in section 4(e) of the Federal Power Act, as necessary to ensure the adequate protection and utilization of the public land reservations under the authority of the Department of Agriculture, Forest Service.

(S) This license is subject to the conditions submitted by the U.S. Forest Service under section 4(e) of the FPA, as set forth in Appendix G to this order.

(T) The requests for rehearing of the Commission's June 21, 2005 order issuing a new license in this proceeding filed jointly by Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation, jointly by American Rivers, Oregon Trout, Trout Unlimited, Native Fish Society, and Water Watch of Oregon, and separately by the Confederated Tribes of the Warm Springs Reservation, the U.S. Department of the Interior, the U.S. Forest Service, the National Marine Fisheries Service of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, Jefferson County, and the State of Oregon are denied except as granted above.

(U) The requests for a technical conference filed by the parties specified in the previous ordering paragraph are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

APPENDIX G

DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE
FINAL CONDITIONS, PRESCRIPTIONS, AND RECOMMENDATIONS
PURSUANT TO SECTIONS 4(e) AND 10(a) OF THE FEDERAL POWER ACT
FOR THE
PELTON ROUND BUTTE HYDROELECTRIC PROJECT

Condition No. 1 - Compliance with the Settlement Agreement

The Licensee shall completely and fully comply with all provisions of the July 13, 2004, Pelton Round Butte Hydroelectric Project Settlement Agreement relating to:

1. All protection, mitigation and enhancement measures identified in the Settlement Agreement, Appendices, and Schedules which are on or affect National Forest System lands and resources.
2. All commitments identified in each and every plan referenced in the Settlement Agreement, Appendices and Schedules which implement activities on or affecting National Forest System lands and resources.

Condition No. 2 - Acceptance and Implementation of the Settlement Agreement

The above Condition is premised on two requirements:

1. The Commission's acceptance and Incorporation of the Settlement Agreement, Appendices and Schedules, without modification, into license terms; and
2. The Licensee's immediate and complete implementation of the PM&E measures in accordance with the Schedules contained in the July 13, 2004, Settlement Agreement.

In the event either of these requirements is not met, the USDA Forest Service reserves its right to supplement or modify these terms and conditions at a later time.

Condition No. 3 - Reservation For Change In the Event of A Party Withdrawal

The USDA Forest Service reserves the authority to add to, delete from, or modify the draft terms and conditions contained herein in the event that the Licensee, the USDA

Forest Service or other Parties withdraw from the Settlement Agreement under the procedures identified in Section 7.4.6 of the Settlement Agreement filed with the Commission on August 2, 2004, prior to the Commission's issuance of a new license for the Project.