

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of Lewis County,  
Washington

Project No. 2833-094

ORDER ON REHEARING

(Issued November 16, 2006)

1. On May 31, 2005, as amended June 8, 2006, the Public Utility District No. 1 of Lewis County, Washington (the District) filed a plan for a whitewater boating take-out site for the 70-megawatt Cowlitz Falls Project No. 2833, located in Lewis County, Washington, at the confluence of the Cispus and Cowlitz Rivers. On June 22, 2006, Commission staff issued an order modifying and approving the plan.<sup>1</sup> On July 21, 2006, Washington Recreational River Runners and Michael Deckert (collectively, “River Runners”) filed a request for rehearing of that order. As described below, we are denying rehearing. We are also requiring the District to file revised license exhibits showing an expanded project boundary that includes the take-out site and related facilities.

**Background**

2. The Commission issued the project’s license to the District in 1986.<sup>2</sup> Construction of the project dam 0.5 mile downstream of the confluence of the Cispus and Cowlitz Rivers impounded water on the Cispus River to approximately 1.7 miles above its confluence with the Cowlitz River, which inundated a whitewater raft and kayak take-out

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<sup>1</sup> 115 FERC ¶ 62,305 (2006).

<sup>2</sup> 35 FERC ¶ 61,431 (1986), *reh’g granted*, 36 FERC ¶ 61,238 (1986).

site located on the Cowlitz below its confluence with the Cispus and eliminated whitewater rafting and kayaking in the project area. To mitigate these impacts, the Commission included Article 42 in the license, which states, in pertinent part:

The licensee shall ... construct a boat ramp take-out facility at the head of the reservoir on the Cispus River so that boating use of the river will not be interrupted by project construction or operation. [<sup>3</sup>]

3. The District developed a take-out site on the north shore of the Cispus River near the head of the reservoir. The take-out was the downstream terminus of a 15.5-mile, Class III (beginner to intermediate level) whitewater run that began on the Cispus River upstream at the Forest Road 28 Bridge. However, in early 1996, severe floods partially changed the course of the lower Cispus River and washed out sections of the access road near the take-out, blocking vehicular access to the take-out.

4. In response, the District filed an application to amend its license to provide for the development of an alternative take-out facility, to be located on the opposite side of the project reservoir along the shoreline of the Cowlitz River. The new location would require kayakers and rafters to paddle a mile across the reservoir to an existing day-use area. In 1998, the Commission denied the District's request, concluding that the long paddle across open water would substantially decrease the waterway's value as a recreational resource.<sup>4</sup> The Commission required the District to develop a plan to provide a take-out at an alternative location on the Cispus River to comply with Article 42. The plan was to be developed in consultation with, among others, recreational boating groups and potentially affected landowners and filed for Commission approval within 120 days (*i.e.*, by July 24, 1998). The District requested and received several extensions of time to file the required plan.

5. The District filed its plan on May 31, 2005. The plan considered four sites for the possible location of the take-out. The District recommended using the site on the south shore of the Cispus River near Copper Canyon Creek Bridge, approximately one mile downstream from the previous site. The site is located in a forested area adjacent to timber lands owned by two timber companies.

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<sup>3</sup> 35 FERC ¶ 61,431 at 62,008.

<sup>4</sup> 82 FERC ¶ 61,293 (1998).

6. Under the proposal, the District would develop a take-out area along the shore, rehabilitate an abandoned 1,000-foot-long spur road from the take-out to the 300 Road (a logging road), and establish a permitting system for whitewater boaters using the site. The spur road is on land owned by Port Blakely Timber Company.
7. Vehicles could access the take-out site over the spur road. However, users of the take-out would be required to obtain permits for access to the take-out; sign a waiver of liability of the District, Port Blakely, and Rayonier (another timber company with timber lands in the area); and carry \$1 million in liability insurance for damages caused by them.
8. On July 13, 2005, the Commission issued public notice of the filing. Comments were filed by the U.S. Department of the Interior, the Washington Interagency Committee for Outdoor Recreation, seven whitewater boating groups, and thirty-three individuals. Some of the commenters were concerned with the complexity of a permitting process and the expense of insurance for groups and individuals.
9. In a letter filed September 19, 2005, Port Blakely proposed an alternative whereby whitewater boaters could use the spur road to exit the take-out site and walk to the 300 Road, where a parking area would be provided. Port Blakely stated that this arrangement would: (1) protect its timber assets; (2) provide take-out users “walk-in only” access to the take-out site, similar to the historic, informal use of the site, but with an easier walk;<sup>5</sup> and (3) eliminate the need for a permitting system and liability insurance for individual boaters.
10. In a letter issued May 9, 2006, Commission staff requested comments on Port Blakely's suggested alternative. Boating groups, including River Runners, generally supported the take-out site itself, but contended that the 1,000-foot-long spur road from the take-out site to the 300 Road would be too long to walk for those carrying heavy rafts to their vehicles. In a letter filed June 6, 2006, Port Blakely further clarified its proposal to state that commercial rafters could have vehicular access to the take-out if they obtained a permit annually and carried liability insurance. In a letter filed June 8, 2006, the District modified its proposal to incorporate Port Blakely's proposal.

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<sup>5</sup> Port Blakely noted that, ever since the project was constructed, and access to the District's first proposed take-out was blocked, rafters and kayakers have been using the proposed take-out site, walking over the unimproved spur road to the 300 Road.

11. Staff's June 22, 2006 Order approved the plan, finding that the 1,000-foot walk-out over the spur road provides reasonable access to the take-out. The order found that while the walk-out is not considered a short distance by most take-out users, such a distance for a boat portage is not extraordinary, and that the spur road does not cross over hilly or difficult terrain. Staff's order required the licensee to implement the proposed plan as soon as practicable, but no later than March 1, 2007.

### **Discussion**

12. On rehearing, River Runners argues that the walk-out is unreasonably long and steep and that vehicular access to the take-out should instead be allowed. River Runners objects to the June 22<sup>nd</sup> Order's description of the walk-out as being 1,000 feet long and not crossing over hilly or difficult terrain. It states instead that the walk-out is at least 1,200 feet long and has a steep slope that grading will not alleviate. According to River Runners, the spur road rises about 60 feet from the take-out to the 300 Road, a distance it contends is equivalent to climbing to the top of a six-story building.

13. We do not agree with River Runners' characterization of the spur road as "steep." In a letter filed on August 9, 2006, the District states that it has taken more accurate length and elevation measurements and determined that the distance and change in elevation from the waters' edge at the take-out to the 300 Road are 1,285 feet and 55 feet, respectively.<sup>6</sup> This relatively small change in elevation over a distance of more than 1,200 feet (*i.e.* about a five percent grade) creates a gentle slope, not a steep hill.

14. The June 22<sup>nd</sup> Order assumed a length of about 1,000 feet, while more accurate measurements indicate that the spur road is 1,285 feet long. However, the District states that the gate on the spur road that blocks vehicles will be moved 100 to 200 feet closer to the take-out, in order to shorten the walk somewhat.<sup>7</sup> We do not believe that such a walk

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<sup>6</sup> See the District's August 9, 2006 letter at 2 and its attached "Copper Canyon Construction Map." The District's letter summarizes its consultations with agencies and boater groups in finalizing the revised plan, as required by staff's June 22<sup>nd</sup> Order. To the extent that the August 9 letter responds to contentions raised on rehearing, and in light of the fact that the letter informs our decision on rehearing, we waive the prohibition against filing replies to rehearing requests in 18 C.F.R. § 385.213(a)(2) (2006).

<sup>7</sup> A "loop" driveway will be provided from the 300 Road to the gate on the spur road. The parking area will be located on the opposite side of the 300 Road. See August 9, 2006 letter from the District.

is unreasonably long, and that it reflects an appropriate balance of the goals of providing a take-out for the public's use, while at the same time keeping vehicle use to a minimum so as to reduce the risk of fires or other damage (vandalism, theft, and garbage dumping) to the surrounding area.<sup>8</sup>

15. River Runners argues that because rafters, unlike kayakers, must make several trips to carry all the rafting equipment from the river to the parking area, access for them will be unreasonable. As the June 22<sup>nd</sup> Order recognized,<sup>9</sup> while not all individual kayakers and rafters may be able to use the take-out on their own, they should be able to hire commercial rafters, who will also be using the site.<sup>10</sup>

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<sup>8</sup> Indeed, portages of similar length and terrain are found at other licensed projects. For example, the Ninety-Nine Islands Project No. 2331 has a 3,000-foot portage (*see* Recreation Enhancement Plan filed December 16, 1996, and the order modifying and approving the plan at 78 FERC ¶ 62,119 (1997)); the Upper Project No. 2640 has a 2,400-foot portage (*see* Recreation Plan and Supplement filed June 27 and December 4, 2003, respectively, and the order modifying and approving the plan at 106 FERC ¶ 62,200 (2004)); and the Yadkin-Pee Dee River Project No. 2206 (Blewett Falls Development) has about a 3,000-foot portage (*see* Application for License (Exhibit E7 Recreational Resources) filed April 26, 2006).

<sup>9</sup> 115 FERC ¶ 62,305 at p. 64,999-228.

<sup>10</sup> *See* 18 C.F.R. § 2.7(d) (2006), which provides, in pertinent part, that the Commission expects the licensee “[t]o encourage ... private interests, such as operators of user-fee facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.”

River Runners contends (rehearing at 5) that the June 22<sup>nd</sup> Order is unclear regarding whether the walk-out-access meets the requirements of the Americans with Disability Act (ADA), and it further contends that the order ignores the fact that wheeled portage carriers, which the order recommends, are almost never used by whitewater boaters due to size and weight of the equipment or the fact that wheeled handcart systems do not exist for rafts. However, staff's order recommended use of wheeled portage carriers for kayakers and canoeists, not for rafters. 115 FERC ¶ 62,305 at p. 64,999-228. Moreover, a licensee's obligation to comply with the ADA exists independent of its project license, and the Commission has no statutory role in implementing or enforcing the ADA as it applies to its licensees. *See Northern States Power Company*, 78 FERC ¶ 61,363 at 62,510 (1997).

16. River Runners contends that, despite the whitewater community's knowledge of the take-out site, there is now virtually no use of the site by rafters and that kayaker use is minimal. River Runners argues that this current lack of use of the walk-out shows that its length and grade will continue to be a barrier to rafters' use of the take-out.<sup>11</sup>

17. That the current take-out at the site is underused is understandable, given the lack of an established parking area and the site's present unimproved condition. After the site is developed, there is a reasonable expectation that the site will experience increased use. The District submitted informal estimates provided by the U.S. Forest Service of boating use of the six whitewater runs on the Cispus River showing that up to 800 individuals (many repeat visitors) took whitewater excursions in 2004, and the District noted that there is at least one commercial rafting company providing whitewater trips on the Cispus. Based on this information, the District expects use of the take-out, following its development, to grow to 200 individuals a year.<sup>12</sup>

18. River Runners contends the record shows that if the District itself would agree to obtain liability insurance in lieu of individuals, then Port Blakely would not have objected to vehicular use of the spur road. The question of insurance is not dispositive. Rather, as is the case here, it is but one factor that we may consider in our determination of whether, or under what conditions, to require a licensee to provide public access to project lands or waters.<sup>13</sup> We have concluded that the walk-in will provide reasonable access to the take-out. There is thus no reason to require the District to provide insurance in support of vehicular access (even assuming that the insurance issue is the only bar to such access).

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<sup>11</sup> See n.5, *supra*.

<sup>12</sup> See the attachment to the District's May 31, 2005 filing entitled "Projected Use of New Site."

<sup>13</sup> See *The Charter Township of Van Buren, Michigan, et al.*, 44 FERC ¶ 61,048 at 61,137 n.9 (1988).

19. For the above reasons, we deny River Runners' request for rehearing.<sup>14</sup>

20. One final matter requires discussion. The approved project boundary for Project No. 2833 includes the area of the proposed take-out site and approximately 400 feet upland from the river's edge at the take-out.<sup>15</sup> The project boundary must include all lands and facilities comprising the project's take-out site and access to the take-out that serve project purposes.<sup>16</sup> Therefore, when the District files documentation of its completion of the proposed take-out improvements, as required by staff's June 22<sup>nd</sup> Order,<sup>17</sup> the District must also file revised exhibits that include the spur road and parking area within the project boundary.

The Commission orders:

(A) The request for rehearing filed July 21, 2006, by Washington Recreational River Runners and Michael Deckert is denied.

(B) Ordering Paragraph (C) of the June 22, 2006 Order issued in this proceeding is modified to require the Public Utility District No. 1 of Lewis County, Washington, to include with the documents required to be filed by Ordering Paragraph (C) a revised exhibit K-1 drawing showing the recreation facilities described in this order enclosed within the project boundary, in accordance with sections 4.39 and 4.41 of the Commission's regulations (18 C.F.R. §§ 4.39 and 4.41 (2006)). In addition, the licensee

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<sup>14</sup> Finally, River Runners requests that, if we decline to reverse the June 22<sup>nd</sup> Order we instead delete the order's findings that the walk-out is a reasonable measure and that Port Blakely rejected vehicular access to the take-out for individual users without insurance. It contends that these findings are prejudicial to the discussions with the licensee for finalizing the take-out plan required by the June 22<sup>nd</sup> Order. However, as described in this order, these findings are supported by the record and are part of the basis for concluding that the proposed revised plan provides reasonable public access to the take-out site. There are no proper grounds for deleting these findings from the June 22<sup>nd</sup> Order, as River Runners requests.

<sup>15</sup> See "Revised Exhibit K-1, 1999 Project Boundary Map" attached to the District's May 31, 2005 filing.

<sup>16</sup> See *Portland General Electric Company, et al.*, 117 FERC ¶ 61,112 P 57-59 (2006).

<sup>17</sup> 115 FERC ¶ 62,305 at p. 64,999-230, Ordering Paragraph (C).

shall include in its filing a project boundary GIS data file for the entire project in accordance with section 4.41(h) of the Commission's regulations, 18 C.F.R. § 4.41(h) (2006).

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.