

105 FERC ¶ 61,332
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Turlock Irrigation District and
Modesto Irrigation District

Project No. 2299-053

ORDER DEFERRING ACTION ON PETITION
PENDING COMPLETION OF INFORMAL CONSULTATION

(Issued December 22, 2003)

1. On May 2, 2003, the National Marine Fisheries Service (NOAA Fisheries) filed a petition to amend the license for the Don Pedro Project No. 2299 to modify the minimum flow provisions of Article 37 of the license as necessary to protect both steelhead and chinook salmon in the Tuolumne River.¹ NOAA Fisheries also requested that the Commission initiate formal consultation pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) concerning the effects of the project on Central Valley steelhead, a threatened species. Conservation Groups filed a brief in support of the petition.² The licensees, Turlock and Modesto Irrigation Districts, filed a response requesting that the Commission either dismiss the petition as premature or defer consideration of it to allow time to develop additional information. For the reasons discussed below, we defer action on the petition pending completion of informal ESA consultation.

¹The project is located on the Tuolumne River in Tuolumne County, California. On February 1, 1972, the licensees filed a request to delete the word "New" from the New Don Pedro Project name. The Commission approved the request in an unpublished order on February 22, 1973.

²Collectively, Conservation Groups represent the following six entities: California Rivers Restoration Fund, California Trout, Friends of the River, South Yuba River Citizens League, Tuolumne River Preservation Trust, and California Sportfishing Protection Alliance.

BACKGROUND

2. The Commission issued an original license for the 161-megawatt Don Pedro Project in 1964.³ The project is operated to provide irrigation storage, hydroelectric power, flood control storage, recreational benefits, fish and wildlife conservation, and municipal water supply. The license established minimum flow releases for the first 20 years of operation (1971-1991), and reserved the Commission's authority to revise the minimum flow requirements after 20 years. It also required that the Districts study the Tuolumne River fishery during this time, and report the study results to the Commission.

3. In 1992, the Districts filed a request to amend the license to implement proposed changes in minimum flows. In 1996, after a contested license amendment proceeding resulted in a settlement agreement supported by all parties, the Commission amended Articles 37 and 58 of the license to implement major portions of the settlement.⁴ Article 37 required a revised minimum flow regime to benefit fishery resources in the Tuolumne River. Article 58 required the Districts to implement a monitoring plan to identify benefits to the chinook fishery resulting from improved environmental conditions, and to file the results of fisheries monitoring studies with the Commission by April 1, 2005, with intervening annual reports. Before approving the license amendment, the Commission completed formal consultation with FWS pursuant to Section 7 of the ESA on two listed fish species, the Delta Smelt and Sacramento Splittail. The Commission also prepared an Environmental Impact Statement (EIS) that examined the effects of various alternative flow regimes.

4. In 1998, NOAA Fisheries listed the Central Valley steelhead as threatened under the ESA. In letters dated June 9, 2002, and November 19, 2002, NOAA Fisheries requested that the Commission initiate formal consultation to consider the effects of the Don Pedro Project on Central Valley steelhead. On March 6, 2003, the Commission asked the Districts to act as its non-federal representative for purposes of informal ESA consultation. The Districts agreed by letter dated March 31, 2003. Shortly thereafter, NOAA Fisheries filed its petition.

³31 FPC 510 (1964), aff'd sub nom. California v. FPC, 345 F.2d 917 (9th Cir. 1965).

⁴76 FERC ¶ 61,117 (1996).

DISCUSSION

5. NOAA Fisheries argues that current project operations are adversely affecting Central Valley steelhead, and that modifications are therefore necessary to reduce these impacts. NOAA Fisheries asserts that the current flow regime allows summer water temperatures in steelhead habitat to rise to levels that are lethal to steelhead. NOAA Fisheries also argues that, because Central Valley steelhead were listed after the Commission consulted with FWS on the proposed license amendment in 1995, Section 402.16(d) of the ESA regulations requires that the Commission reinitiate formal consultation to address project effects on those species and their habitat.⁵ Conservation Groups make similar arguments in support of the petition.

6. The Districts argue that the petition is both unnecessary and premature. They point out that they have agreed to serve as the Commission's non-federal representative for the purposes of consulting informally with NOAA Fisheries regarding the effects of the Don Pedro Project on Central Valley steelhead. Because the relevant parties are already engaging in ESA consultation, the Districts maintain that the petition is unnecessary. The Districts also maintain that the petition is premature, because it requests that the Commission modify the minimum flow provisions of Article 37 before the parties have had an opportunity to evaluate the relevant data and studies, as well as information on potential effects on steelhead and any need for modifications to the project. They therefore request that we either dismiss the petition without prejudice or defer further consideration of it pending completion of ongoing studies and the informal consultation that is currently underway.⁶

⁵50 C.F.R. § 402.16(d).

⁶The Districts also request that we await the outcome of their legal challenge to the listing of Central Valley steelhead based on the Alsea decision. Modesto Irrigation District, et al. v. Donald L. Evans, et al., Case No. CIV-F-02-6553 OWW DSLB (U.S. District Court for the Eastern District of California, filed December 11, 2002). The Districts contend that this listing violates the ESA because it includes only naturally spawned populations of Central Valley steelhead and excludes hatchery populations of the non-anadromous form of steelhead (rainbow trout). In Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001), the court found that NOAA Fisheries' decision to list only naturally spawned populations of coho salmon and not hatchery populations was arbitrary and capricious and violated the ESA. We do not regard this as providing a sufficient basis for deferring consideration of project effects on listed species. If a decision is issued that affects the validity of the listing, we will determine what action may be appropriate at that time.

7. We believe it is appropriate to defer consideration of the petition pending completion of informal discussions and the development of additional information. When it appears that ongoing operation of a hydroelectric project may have adverse effects on endangered or threatened species, a necessary first step is to determine whether and how the project may be affecting the species, and what changes may be needed to the project or its operation to address any adverse effects. To assist in developing this information, our staff's usual course of action is to direct that the licensee consult informally with FWS or NOAA Fisheries, as appropriate, as well as other interested entities, to examine project effects and any proposed changes. Often, the licensee agrees to serve as the Commission's non-federal representative for purposes of informal ESA consultation and preparation of a draft biological assessment or biological evaluation, and the participants are able to reach agreement on what changes, if any, are needed to benefit listed species. If changes are considered necessary or desirable, the Commission can either institute a reopener proceeding to require them, or can entertain a voluntary amendment application from the licensee. Depending on what changes are proposed, formal ESA consultation may be required. This process generally works well, and ensures that if formal consultation is initiated, it is based on adequate information about a specific proposal to amend the license.⁷

8. NOAA Fisheries and Conservation Groups argue that the Commission's reservation of authority to require changes in minimum flows is sufficient to constitute "ongoing agency action" that requires us to initiate formal consultation immediately, before investigating the facts and determining what changes, if any, may be needed to benefit listed species. We disagree. Until we exercise our reserved authority, either to institute a reopener proceeding or to consider an application for a license amendment, there is no pending proposal for federal agency action that could provide a basis for initiating formal consultation under Section 7(a)(2) of the ESA. The monitoring studies and reports that the licensee is undertaking pursuant to Article 58 of the license are private, not federal, action and have no effect on listed species. Moreover, in view of the statutory and regulatory time limits for completing formal consultation, it is far more efficient to defer formal consultation until after informal discussions among the participants have yielded sufficient information to determine what effects may be occurring and to support a specific proposal to modify project structures or operations, if

⁷See, e.g., Puget Sound Energy, Inc., 95 FERC ¶ 61,015 (2001), reh'g dismissed, 95 FERC ¶ 61,319 (2002), petition for review dismissed sub nom. Washington Trout v. FERC, 60 Fed. Appx. 693 (No. 01-71307, 9th Cir. Mar. 5, 2003); Phelps Dodge Morenci, Inc., 94 FERC ¶61,202 (2001).

needed.⁸ Accordingly, we will defer action on the petition pending completion of informal consultation.

9. As noted, the Districts have agreed to serve as the Commission's non-federal representative for purposes of informal ESA consultation. Additional filings by NOAA Fisheries, the Districts, and Conservation Groups indicate that the parties are meeting and are working together to determine what information is needed and how to obtain it. Among other things, the parties are considering an agreement that would implement a plan to study and protect steelhead in a collaborative manner.⁹

The Commission orders:

Action on the petition filed in this proceeding on May 2, 2003, by the National Marine Fisheries Service is deferred pending completion of informal consultation on the effects of the Don Pedro Project on steelhead in the Tuolumne River.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁸Under both the ESA and its implementing regulations, formal consultation must be completed within 90 days, unless the consulting parties agree to an extension. Extensions of more than 60 days require the consent of the license applicant. FWS or NOAA Fisheries must then issue a biological opinion "promptly" after completion of consultation, defined in the regulations as within 45 days. See 16 U.S.C. § 1536(b) and 50 C.F.R. § 402.13(e).

⁹See letter from Joseph R. Blum, NOAA Fisheries, to the Commission Secretary dated September 2, 2003 (filed October 1, 2003); Letter from Richard Roos-Collins, Natural Heritage Institute, to George Taylor, FERC (filed November 12, 2003); Letter from Walter Ward and Robert Nees, Districts, to Commission Secretary dated November 18, 2003 (filed November 26, 2003); Letter from Richard Roos-Collins, Natural Heritage Institute, to J. Mark Robinson, FERC (filed December 2, 2003); Districts' response to additional information request (filed December 3, 2003). As these filings make clear, the parties disagree on some fundamental facts, but are working to obtain the necessary information.