

132 FERC ¶ 61,224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Public Service Company of Colorado

Project No. 400-054

ORDER CLARIFYING PRIOR ORDER, DENYING REHEARING, AND
DISMISSING MOTION FOR STAY

(Issued September 16, 2010)

1. On May 19, 2010, the Director of the Office of Energy Projects (Director) issued a new license to Public Service Company of Colorado (PSCo),¹ pursuant to sections 4(e) and 15 of the Federal Power Act (FPA),² for the continued operation and maintenance of PSCo's existing 3.5-megawatt (MW) Ames Hydroelectric Project No. 400.³ PSCo requests a stay and rehearing of the License Order, contending it was improper to impose a license condition requiring PSCo to provide a minimum flow release into the bypassed reach of the Lake Fork of the San Miguel River without also offering PSCo an alternative condition to rebuild a deteriorated dam. The Department of Agriculture's Forest Service requests clarification of the order. For the reasons discussed below, we clarify the prior order, deny rehearing, and dismiss the motion for stay.

Background

2. The Ames Hydroelectric Project is located in Colorado, about 6.5 miles southwest of Telluride in San Miguel County along the Lake Fork and Howards Fork of the San Miguel River. When the project went into service in 1891, it was the world's first power plant to generate, transmit, and sell alternating current electricity for commercial purposes. The current powerhouse dates to 1906. Water for power generation originates

¹ PSCo is a wholly-owned subsidiary of Xcel Energy, Inc.

² 16 U.S.C. §§ 797(e) and 808 (2006), respectively.

³ *Public Service Company of Colorado*, 131 FERC ¶ 62,150 (2010) (License Order). The new license took effect on July 1, 2010.

from the Lake Fork and Howards Fork, which merge just downstream of the Ames powerhouse to form the South Fork of the San Miguel River. The project's two water storage reservoirs, Hope Lake and Trout Lake, are located on the Lake Fork. The spring runoff that fills Hope Lake is released into the Lake Fork, and then flows in the Lake Fork's natural channel to Trout Lake. Water from Trout Lake is diverted into a 13,600-foot-long penstock leading to the Ames powerhouse, resulting in a 2.4-mile-long bypassed reach in the Lake Fork downstream of Trout Lake.

3. The Ames Hydroelectric Project occupies about 110 acres in the Uncompahgre National Forest, administered by the Forest Service. Thus, FPA section 4(e) applies, which requires that Commission licenses for projects located within a federal reservation include all conditions that the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of the reservation.

4. During the relicensing proceeding, the Forest Service submitted section 4(e) conditions for the project, including Condition 17, which specified a 5 cubic-feet-per-second (cfs) minimum instream flow to the Lake Fork bypassed reach. After reaching a settlement agreement with PSCo and the State of Colorado, the Forest Service submitted a modified Condition 17, which specified 3 cfs minimum instream flow to the Lake Fork bypassed reach,⁴ unless the Commission requires the licensee to rebuild Priest Lake Dam, a non-project facility.⁵

5. The Commission staff's environmental assessment (EA) found that the effect of rebuilding Priest Lake Dam "would primarily be the creation or enhancement of a lake fishery within the Minnie Gulch watershed, which is a watershed not affected by the project, in lieu of enhancing the river fishery of the Lake Fork bypassed reach, which is

⁴ Prior to the July 1, 2010 effective date of the new license, there was no minimum flow requirement for the Lake Fork bypassed reach. PSCo stores and diverts nearly all flows into the Lake Fork bypassed reach at the Trout Lake Dam. Flows greater than about 1 or 2 cfs in the bypassed reach immediately downstream of Trout Lake dam generally occur only during the high runoff months of May and June.

⁵ Priest Lake Dam, which was located on Minnie Gulch, a tributary to the Lake Fork, has never served a project purpose. When it was functional, Priest Lake Dam created Priest Lake. The dam and lake were located on National Forest system lands, between Trout Lake and the Forest Service's Matterhorn campground, beyond the boundary of the Ames Hydroelectric Project.

affected by the project.”⁶ Accordingly, the EA recommended establishing a minimum instream flow to the Lake Fork bypassed reach to provide aquatic habitat suitable for trout.⁷

6. In the License Order, the Director agreed with the EA that creation of a lake fishery in the Minnie Gulch watershed lacks a clear relationship to the project, because the Minnie Gulch watershed is not affected by the project and the creation of the lake fishery would not benefit Lake Fork bypassed reach aquatic resources. In contrast, minimum flow release to the bypassed reach have a demonstrated relationship to project effects and project purposes and would have benefits to the affected fishery that would justify the annualized cost to provide such releases.⁸

The Director further explained that the creation of lentic habitat within the Minnie Gulch watershed (a purported benefit of the dam rebuild) would offer no benefits to trout in the bypassed reach, because the dam would block their passage to Priest Lake. He further noted that required recreation measures at Trout Lake will meet current and projected recreation needs without the need for additional lake recreational measures that could be provided by recreating Priest Lake by rebuilding Priest Lake Dam.⁹

7. The Director concluded that rebuilding Priest Lake Dam was unrelated to project purposes, while the release of a 3 cfs, year-round minimum flow to the Lake Fork bypassed reach (as required by revised Forest Service condition 17 if Priest lake Dam were not rebuilt) would have benefits that justified the measure’s developmental costs and “would fulfill the project purpose of enhancing the Lake Fork bypassed reach trout fishery.” He therefore required the 3 cfs bypassed reach minimum flow.¹⁰

⁶ Final EA at 43 (October 22, 2009).

⁷ See final EA at 113-117.

⁸ License Order, 131 FERC ¶ 62,150 at P 50 (footnote omitted).

⁹ *Id.* at P 51-52. The Director also found that stocking cutthroat trout in Priest Lake and releasing them downstream would be unsuccessful because other trout species resident in the area would hybridize with or outcompete cutthroat trout.

¹⁰ License Order, 131 FERC ¶ 62,150 at P 47, 54.

Discussion

8. PSCo filed a timely request for rehearing of the License Order,¹¹ and the Forest Service, while not seeking rehearing, filed a timely request for clarification. Both requests concern Forest Service Condition 17, which reads, in pertinent part, as follows:

Minimum Stream Flow

Within 30 days of the date of license issuance or any USFS termination of the Priest Lake Dam reconstruction option (jointly hereinafter “trigger date,” see “Priest Lake Dam, (3) Good Faith Effort”), the Licensee shall release from the lower valve house at Trout Lake into the bypass reach in the Lake Fork of the San Miguel River as a year-round continuous minimum flow, the lesser of 3 cfs or natural inflow to Trout Lake.

* * *

Priest Lake Dam

(1) In lieu of the Lake Fork San Miguel minimum flow bypass, the Licensee can elect to reconstruct Priest Lake Dam, by providing written notice to the Parties and the Commission within 30 days of license issuance . . . Once reconstructed, and the work accepted by the USFS and the Commission, any ownership of Priest Lake Dam and any associated dam facilities will be immediately transferred to the United States of America. After reconstruction the dam will be owned, operated, and maintained by the USFS.

* * *

(4) The Licensee shall provide, without charge, water not to exceed 2 acre feet per year (2 AF/year) to be released to the South Fork San Miguel River from Trout Lake through either the Ames powerhouse or the lower valve house as needed and required. The quantity of water to be released each year will be determined by the Colorado Division Engineer of Water

¹¹ PSCo, in requesting rehearing, also sought a stay, pending rehearing, of the license condition requiring it to provide a minimum flow to the Lake Fork bypassed reach. Given our action on rehearing herein, PSCo’s motion for stay is dismissed as moot.

Resources in the amount necessary to replace out-of-priority uses by the USFS at its Matterhorn Campground. If the Priest Lake dam reconstruction is completed, the Licensee's obligation to provide the 2 acre feet per year from Trout Lake shall terminate upon acceptance of the transfer of the dam as described in this condition.

(5) However, if FERC does not accept, incorporate as a license requirement and agree to administer the Priest Lake reconstruction measure described above, the Lake Fork San Miguel streamflow requirement in this condition will be implemented within 30 days of license issuance.

9. PSCo maintains the Director erred in interpreting Condition 17 as presenting the Commission with a choice of selecting one of two environmental mitigation measures, explaining that the intent of this condition was to specify "that PSCo would have two options with respect to mitigation and enhancement measures ... the option of dam reconstruction or a bypass flow."¹² PSCo insists its reading of Condition 17 reflects the intent of the December 23, 2009 Offer of Settlement (Settlement Agreement) signed by PSCo, the Forest Service, and the Colorado Department of Natural Resources, and contends the Director did not give adequate weight to the terms of the Settlement Agreement. PSCo states that "[t]he Director, in essence, has created license requirements that directly conflict with the mandatory conditions prescribed by the Forest Service."¹³

10. The Forest Service contends that if the Director believed that the Commission lacked jurisdiction to enforce the administration and reconstruction of Priest Lake Dam, then the Director acted appropriately in declining to incorporate rebuilding Priest Lake Dam as a license requirement. However, the Forest Service adds that if the Director elected to require a minimum flow release without first finding the Commission lacked jurisdiction to oversee the Priest Lake Dam reconstruction, then the Director acted contrary to the intent of the parties to Settlement Agreement.

11. We do not believe that requiring the minimum flow conflicts with Forest Service Condition 17. PSCo contends that Condition 17 contemplates that the applicant can elect to either provide a minimum flow or rebuild Priest Lake Dam, and gives the Commission no role in this determination. However, subpart (5) of Condition 17 states that "if FERC does not accept, incorporate as a license requirement and agree to administer the Priest Lake reconstruction measure," then "the Lake Fork San Miguel streamflow requirement ... will be implemented." Thus, PSCo's option to elect to reconstruct Priest Lake Dam is

¹² PSCo's Request for Rehearing at 2.

¹³ *Id.*, at 8.

contingent on the Commission's acceptance of the dam reconstruction measure.¹⁴ Had the Forest Service concluded that rebuilding Priest Lake Dam was necessary to ensure the adequate protection and utilization of the Uncompahgre National Forest, it could have made that action mandatory.¹⁵ It did not, but instead provided for an alternative course of action if we did not agree to require rebuilding the dam.¹⁶ Consequently, our determination that the South Fork bypassed reach minimum flow is needed to ensure the

¹⁴ We find no ambiguity in this language that would induce us to seek out additional sources to interpret the intent of the condition. *See, e.g., Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1025 (Fed. Cir. 2006), stating the general principle that "courts do not look beyond the instrument in question to determine the parties' intent if the terms of the instrument are unambiguous" (citations omitted). In any case, as discussed *infra*, we find that the pleadings support our decision.

¹⁵ Had the Forest Service done so, we would have been compelled to adopt the measure as a license condition, because even if the Commission finds that an FPA section 4(e) condition is not needed for project purposes or to protect resources affected by a project, the Commission must nevertheless incorporate all 4(e) conditions as license conditions. *See, e.g., Public Utility District No. 1 of Pend Oreille County, Washington*, 117 FERC ¶ 61,205, at P 28 (2006), observing that "the Commission has no authority to decide whether mandatory conditions are either reasonable or lawful. If the Commission believes that a particular condition is not consistent with the comprehensive development standard of FPA section 10(a)(1), or is not supported by substantial evidence as required by FPA section 313(b), the Commission may express its disagreement with the condition." After stating the grounds for its disagreement with mandatory conditions and issuing the conditioned license, "[i]t is then up to the court of appeals to determine whether the conditions are valid." *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984). Alternatively, when the Commission disagrees with a mandatory condition, rather than issue a conditioned license, the Commission could deny the application. *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67 (D. C. Cir. 2006).

¹⁶ We note that in its Request for Clarification at 3, the Forest Service suggests that it thought the Commission would only decline to permit the dam rebuild option if it thought that overseeing those activities was beyond the Commission's jurisdiction. However, the Forest Service nowhere suggests that the license unlawfully interpreted Condition 17.

comprehensive development of the San Miguel River, while reconstruction of the of the Priest Lake Dam is not, precludes PSCo from electing to forego the bypass flows.¹⁷

12. We also note that even if the Forest Service intended to give PSCo the unconditional choice between rebuilding the dam and releasing the bypass flows, this would not preclude us from requiring the bypass flows, which have been demonstrated to have substantial, project-related benefits. It is only where a measure we impose is inconsistent with a mandatory condition (rather than additive to it) that we are precluded from requiring additional, environmentally beneficial measures.¹⁸

13. Both PSCo and the Forest Service suggest that the License Order fails to give appropriate consideration to the intent of the parties to the Settlement Agreement. In reaching the decision to reject rebuilding Priest Lake Dam in favor of mandating a minimum flow into the South Fork bypassed reach, the Director, as appropriate, acknowledged the views of the parties, but was guided by “the greater public interest, and whether settlement proposals meet the comprehensive development/equal consideration standard” mandated by the Federal Power Act, as specified in our *Policy Statement on Hydropower Licensing Settlements*.¹⁹ In other words, while the Commission carefully considers the merits of settlements, it also must make an independent judgment as to what the public interest requires. We agree with the Director’s determination that the minimum flow requirement will provide benefits related to project impacts and project purposes, in a reasonable balance with developmental resources, while rebuilding Priest Lake Dam would not do so.²⁰

¹⁷ In fact, in the EA, staff contemplated the imposition of more extensive flow requirements (5 cfs for much of the year). However, because staff determined the Forest Service’s 3 cfs minimum flow would be sufficient, we found no need to mandate additional flows. See *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008).

¹⁸ See, e.g., *Avista Corporation*, 127 FERC ¶ 61,265 (2009).

¹⁹ 116 FERC ¶ 61,270, at P 4 (2006).

²⁰ In fact, it is not at all clear that the decision to require the bypass flows is inconsistent with the settling parties understanding of possible outcomes. As PSCo notes in its Request for Rehearing at 6, the Settlement Agreement provided that the bypass flows would be required “[if] FERC 1) does not accept the Priest Lake Dam terms and conditions . . . or 2) accepts the Priest Lake terms and conditions . . . but for whatever reason, chooses not to administer and enforce compliance with these conditions.” This demonstrates that the settling parties contemplated that the Commission might not require

(continued...)

14. In establishing the minimum bypass flow requirement, the Director considered and accepted the statement of the parties to the Settlement Agreement that “3 cfs bypass flow provides suitable habitat to improve trout movement and dispersion in the reach from current levels and improves summer and winter rearing habitat by increasing stream area and depth.”²¹ In rejecting the dam rebuilding requirement, the Director also considered the parties’ assertion “that the rebuilding of Priest Lake Dam would provide at least equivalent benefits to the fishery of the Lake Fork subbasin while allowing greater production of renewable energy at the Ames Project as compared to the bypass flow.”²² However, the Director found that the 3 cfs minimum flow would alleviate the adverse impacts of the project on the aquatic habitat of the Lake Fork bypassed reach, and do so at a reasonable cost. Conversely, Commission staff and the Director reviewed the purported benefits of rebuilding Priest Lake Dam and found that these benefits did not bear a sufficiently close relationship to the project.²³ As explained in the final EA:

[I]t appears the desired benefit would primarily be the creation or enhancement of a lake fishery within the Minnie Gulch watershed, which is a watershed not affected by the project, in lieu of enhancing the river fishery of the Lake Fork bypassed reach, which would be affected by the project. Therefore, we conclude that rebuilding the Priest Lake Dam lacks a clear relationship to the project or project effects, and therefore, the rebuilding of Priest Lake Dam would not fulfill a project purpose for which the Commission could issue a license.²⁴

the dam rebuild. Were the dam rebuild a mandatory condition – leaving the Commission no option but to enforce it – there would have been no reason for this language in the Settlement Agreement or for the option established by Forest Service Condition 17.

²¹ Settlement Agreement, Appendix A: Explanatory Statement, at 2.

²² *Id.*, at 4.

²³ *See, e.g., Virginia Electric Power Company*, 110 FERC ¶ 61,241, at P 11 (2005), with respect to settlement provisions, “[i]t is our strong preference that measures required by a license be clearly tied to the project at issue.” *See also Garkane Energy Cooperative, Inc.*, 120 FERC ¶ 62,154, P 23 (2007) (finding no justification for requiring the applicant to improve or re-establish trout populations, given that “the trout populations to be improved or re-established would be located outside the influence of the project and the nexus of these measures to project effects is undetermined”).

²⁴ Final EA, at 113.

15. As discussed above, the Director elected to reject the dam reconstruction measure because of its lack of relationship to the project, and because of the substantial benefits of requiring the bypass reach flows, a decision we affirm.²⁵

16. PSCo asserts that the Director failed to appreciate the benefits that the dam rebuild would provide within the Lake Fork subbasin and that the rebuild would have greater benefits²⁶ than the provision of the minimum flows.

17. The fact that the rebuild might result in some benefits in the same basin as the project is not relevant here. As discussed above, we look to see whether proposed license requirements deal with project effects or project purposes. There is no showing in the record that the project has any impact on the fishery in the area of the Priest Lake Dam. Moreover, the purposes of a project, such as healthy aquatic habitat, are as a rule tied to the project vicinity, not more remote areas. While we may approve off-site mitigation (that is, measures beyond the immediate vicinity of a project) in limited circumstances, “we have a preference for mitigation or enhancement measures that are located in the vicinity of the project unless this is impractical or unless substantially increased benefits can be realized from adopting off-site measures.”²⁷ As discussed above, the minimum flow will provide direct benefits to the fishery affected by the project, while the dam rebuild will not, and the dam rebuild is not necessary for recreation.²⁸

²⁵ Our endorsement of the minimum flow requirement does not preclude PSCo from undertaking the rebuilding of Priest Lake Dam. *See, e.g., Avista Corporation*, 127 FERC ¶ 61,265 at P 190 (rejecting a proposal that the applicant fund development of a recreation area adjacent to the project, determining that because enhancing non-project recreation areas “does not relate to the purposes or effects of the project . . . we do not include this measure in the license,” and stating that the applicant may nevertheless provide such funding “voluntarily outside the scope of the license”)

²⁶ PSCo’s Request for Rehearing at 11-12.

²⁷ *Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270 at P 16.

²⁸ PSCo refers to alleged benefits in the “Lake Fork subbasin,” of which Minnie Gulch is a part (Request for Rehearing at 11), but does not define or make clear the relevance of that area. The fact that Minnie Gulch is located in the same subbasin as the project does not mean that the project impacts the Minnie Gulch area or that measures put in place there will ameliorate project effects or serve project purposes. Indeed, the facts here indicate to the contrary.

18. PSCo claims the minimum flow requirement will “seriously undermine the economic viability of the Project,” contending that requiring the Lake Fork bypass flows will reduce annual project output by 1,900 megawatt hours, or 15 percent.²⁹ As discussed in the License Order, the 3 cfs minimum flow will fully protect aquatic resources in the bypassed reach from October through March, but will fully protect those resources in only half of the bypassed reach during the remainder of the year.³⁰ Thus, our requirement of the 3 cfs minimum flow will provide a reasonable quantum of protection for aquatic resources in the bypassed reach, while in turn imposing some financial burden on the licensee. Accordingly, we reiterate the license order’s finding that the minimum flow requirement “on balance provides for the better comprehensive use of the Lake Fork subbasin waters for both aquatic resource enhancement in the Lake Fork bypassed reach and electricity generation.”³¹

19. Finally, the Forest Service asks the Commission to clarify that, unless and until Priest Lake Dam is reconstructed, under Condition 17(4), PSCo remains obliged to provide, without charge, water not to exceed 2 acre feet per year (AFY) to be released to

²⁹ See PSCo’s Request for Rehearing at 10. We calculate that the 3 cfs flow requirement actually will result in a reduction in annual project output of 1,380 megawatt hours, or 11 percent, but do not find that difference significant here. Moreover, PSCo’s general assertion gives us no basis to determine that the alleged economic impact is untoward.

³⁰ License Order, 131 FERC ¶ 62,150 at P 46 (citing to the final EA).

³¹ *Id.*, at P 47. In assessing the public interest, in accordance with FPA sections 4(e) and 10(a)(1), we must give equal consideration to: power development purposes; the purposes of energy conservation; the protection, mitigation of, damage to, and enhancement of fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. Note also that the project, as previously operated (i.e., the no-action alternative considered in the final EA), produced energy at a cost that was more than the cost of currently available alternative generation, which will continue to be the case if the project is operated under the conditions of its new license. In view of this, the License Order commented that “it is the applicant who must decide whether to accept this license and any financial risk that it entails.” License Order, 131 FERC ¶ 62,150 at P 106. See also *Mead Corporation, Publishing Paper Division*, 72 FERC ¶ 61,027 (1995), explaining that the Commission’s economic analysis does not determine whether a proposed project will be a financially prudent or reasonable undertaking; thus, the Commission defers to the applicant’s assessment of the long-term financial viability of a project.

the South Fork San Miguel River from Trout Lake through either the Ames powerhouse or the lower valve house as needed. We so clarify. Forest Service Condition 17(4) directs the licensee to provide 2 AFY, to be released to the South Fork San Miguel River from Trout Lake through either the Ames powerhouse or the lower valve house, as needed and required, as determined by the Colorado Division Engineer of Water Resources, unless and until Priest Lake Dam is rebuilt. This release requirement is a condition of the license even though, as the license order explained, we do not believe it serves a project purpose.³²

The Commission orders:

- (A) PSCo's request for rehearing is denied.
- (B) PSCo's motion for stay is dismissed as moot.
- (C) The Forest Service's request for clarification is granted in part and denied in part.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³² See License Order, 131 FERC ¶ 62,150, at P 54. The Forest Service asks that we "amend" the license order "to state that until Priest Lake Dam is reconstructed and acceptance of the transfer of the dam to the [Forest Service] is completed, PSCo has an obligation to provide the 2 AFY from Trout Lake," but if the dam is not reconstructed, PSCo's "obligation to release 2 AFY from Trout Lake continues." PSCo's Request for Clarification at 5. We see no need to amend the license in this manner, since under the mandatory Condition 17(4) as it currently stands, PSCo will remain obliged, barring rebuilding Priest Lake Dam, to release up to 2 AFY from Trout Lake for the full 40-year term of the license. We note this 2-AFY release should benefit the Matterhorn Campground and Matterhorn Guard Station; we further note neither of these facilities is a project facility and neither has any demonstrated relationship to project effects or purposes.