

133 FERC ¶ 61,051
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.

Granite County, Montana

Project No. 12107-005

ORDER ON REHEARING

(Issued October 21, 2010)

1. Granite County, Montana has filed a request for rehearing of the Commission staff's July 8, 2010 order issuing the county an original license for the Flint Creek Hydroelectric Project.¹ As discussed below, we grant rehearing in part and are revising a portion of the license based on consideration of Granite County's request.

Background

2. The proposed 2-megawatt Flint Creek Project would be located at the existing Georgetown Lake dam on Flint Creek, in Granite and Deer Lodge counties, near the town of Philipsburg, Montana. The project is proposed to be located at the site of a previous project of the same name – albeit with a different number (Project No. 1473) -- the license for which was surrendered in 2008, as described in the July 8, 2010 order.²

3. The Commission issued Granite County a license for Project No. 1473 in 1992.³ Article 402 of that license required the licensee to make releases from the project dam and maintain levels at Georgetown Lake (the project reservoir) consistent with a 1991 agreement between Granite County and the Montana Department of Fish, Wildlife and Parks (Montana), intended to benefit downstream irrigators, lakeshore homeowners,

¹ *Flint Creek Hydroelectric Project*, 132 FERC ¶ 62,020 (2010). Although the license order is styled “Flint Creek Hydroelectric Project,” that was error, because license orders are properly captioned with the name of the licensee (not the project), as is this order.

² See 132 FERC ¶ 62,020 at P 2.

³ 59 FERC ¶ 62,133 (1992).

recreation, and fish and wildlife resources.⁴ Pursuant to Article 402 of the 1992 license, Granite County was required to: (1) on May 31, have pond elevation of the reservoir at or within one foot of crest at elevation 6429.5; (2) release at least 30 cubic feet per second (cfs) downstream of the powerhouse during irrigation season (May 15 to October 15); (3) if pond elevation was less than crest during the summer, avoid releasing more than 30 cfs; (4) avoid releasing more than 100 cfs to minimize flood damage and avoid releasing less than 10 cfs; (5) avoid drawing the reservoir down more than two feet; (6) minimize lake level fluctuations during the winter and (7) maximize lake levels in general.⁵ Following the 2008 surrender of the project license, Granite County continued to comply with the terms of its agreement with Montana.⁶

4. When it applied for the current license, Granite County proposed operating conditions identical to those in the prior license and the agreement. Montana agreed to this proposal.⁷ In the licensing order, Commission staff concluded that the proposed provisions “would ensure the delivery of irrigation flows to downstream water users, protect the fisheries in Flint Creek, prevent flood damage downstream of the powerhouse, as well as protect water quality, fisheries, riparian wildlife habitat, and recreation resources at Georgetown Lake.”⁸

5. Article 402 of the July 8, 2010 license contains operating conditions similar, but not identical to, those in the previous license and proposed by Granite County. Article 402 provides, in pertinent part, that the licensee shall: (a) release a minimum flow of 30 cfs as measured downstream of the powerhouse during the irrigation season, and 10 cfs at all other times; (b) release no more than 30 cfs as measured downstream of the powerhouse during the summer months if the surface elevation of Georgetown Lake is less than the crest elevation of 6,429.5 feet; (c) release no more than 100 cfs as measured downstream of the powerhouse at all times; (d) maintain surface elevation of Georgetown Lake to within one foot of the crest elevation of 6,429.5 feet by May 31, and within two feet of the crest elevation at all other times; and (e) minimize lake level fluctuations for Georgetown Lake as much as possible during the winter, while maximizing lake levels in general. The operating regime can be temporarily modified if

⁴ 132 FERC ¶ 62,020 at P 8.

⁵ 59 FERC at 63,374-75.

⁶ 132 FERC ¶ 62,020 at P 8.

⁷ See 2007 agreement between Granite County and Montana, appended to Granite County’s August 8, 2008 license application.

⁸ 132 FERC ¶ 62,020 at P 37.

required by operating emergencies beyond the licensee's control or, for short periods, upon agreement among the licensee, Montana, the U.S. Fish and Wildlife Service, and the Forest Service.

6. Commission staff explained that the Commission needs to ensure that all minimum flows release and reservoir surface elevations requirements of Article 402 are met, and that Granite County must be able to explain its priorities in operating the project whenever both making required flow releases and maintaining required reservoir elevations are not possible. Consequently, Article 403 of the license requires Granite County to file an operational compliance monitoring plan for Commission approval, within one year of license issuance, proposing how the county would balance the various water use objectives.⁹

7. On August 6, 2010, Granite County filed a request for rehearing, arguing that differences between the language in the prior licenses (and the agreement) and the current license are overly prescriptive, could impair the rights of downstream water users, and could prevent the county from achieving the multiple objectives envisioned by Article 402.

Discussion

8. Granite County asserts that there are only two absolutes in its agreement with Montana: the lake elevation being at or within one foot of crest by May 31, and 30 cfs being released during irrigation season. According to the county, the lake level restriction is necessary for recreation and to protect the lake fishery, while the minimum releases are needed to meet court-ordered water rights requirements.¹⁰ The county contends that other aspects of its agreement were phrased in a non-mandatory way (as by stating that certain conditions "will be avoided" instead of setting strict numerical requirements) to avoid conflicts between certain requirements. For example, the county states, in low water years it cannot keep the lake level within two feet of crest and also release 30 cfs during irrigation season. Similarly, Granite County avers, it cannot release a minimum of 10 cfs at all times and still maintain the lake elevations required by license Article 402(d).¹¹

9. Granite County recognizes, and does not object to, the fact that the operational compliance monitoring plan appears to contemplate the need to balance the various

⁹ *Id.* P 38.

¹⁰ Granite County Request for Rehearing at 6.

¹¹ *Id.* at 7.

requirements of Article 402, but argues that the requirements may conflict on their face, and subject the county to complaints by lake users with competing interests.¹² It explains that providing the flexibility allowed by the agreement would enable it to react to current conditions. For example, under its preferred formulation that releases above 30 cfs “will be avoided” during the summer, the county states that it could release more than 30 cfs in years with high runoff or if there are rainstorms, to avoid damage to lakeowners’ property. It could not do so, it says, if it were limited by Article 402(b)’s prohibition on releasing more than 30 cfs in the summer. Likewise, the county maintains, restricting releases to 100 cfs through the dam could occasionally result in spillway releases in excess of 100 cfs, with consequent damage to the project spillway, downstream flooding, and possible threats to public safety.¹³

10. While Granite County expresses a preference for the Commission to revise Article 402 to incorporate verbatim the provisions of the 2007 agreement,¹⁴ it also recognizes the Commission’s preference for license conditions that impose clear obligations on licensees. Consequently, Granite County proposes that Article 402 be revised as follows, with proposed changes being shown in underlining:

Article 402. *Project Operation.* The licensee shall operate the project to provide the following minimum flow releases from Georgetown Lake into Flint Creek and maintain the following reservoir elevations for Georgetown Lake:

(a) release a minimum flow of 30 cubic feet per second (cfs) as measured downstream of the powerhouse during the irrigation season (May 15 to October 15), and release 10 cfs at all other times subject to inflows to Georgetown Lake being at least 10 cfs and the ability to meet the minimum surface elevations of (d);

(b) release no more than 30 cfs as measured downstream of the powerhouse during the summer months if the surface elevation of Georgetown Lake is less than crest elevation of 6,429.5 feet (U.S. Geological Survey elevations (National Geodetic Vertical Datum 1929) plus 53 feet) subject to the availability of adequate runoff storage, irrigation needs, and avoidance of uncontrolled spillway releases;

¹² *Id.* at 8.

¹³ *Id.* at 10-11.

¹⁴ The agreement was filed as an appendix to the county’s August 8, 2008 license application, and is the same as Article 402 of the 1992 license.

(c) release no more than 100 cfs as measured downstream of the powerhouse at all times subject to avoidance of uncontrolled spillway releases, minimizing downstream flood damage, and protecting public safety;

(d) maintain surface elevation of Georgetown Lake to within 1 foot of the crest elevation of 6,429.5 feet by May 31, and, subject to the ability to satisfy irrigation releases of 30 cfs as required by (a), within 2 feet of crest elevation at all other times; and

(e) minimize lake level fluctuations for Georgetown Lake as much as possible during the winter, while maximizing lake levels in general.

The above operating regime may be temporarily modified if required by operating emergencies beyond the control of the licensee or for short periods upon mutual agreement among the licensee, Montana Department of Fish, Wildlife and Parks, the U.S. Fish and Wildlife Service, and the Forest Service. If the operations are so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

11. Granite County is correct that the Commission requires license conditions that impose specific requirements. Otherwise, the Commission will neither be able to clearly determine the impacts of proposed conditions and provide a reasonably certain level of environmental protection, nor will it have a clear basis for enforcing the provisions of a license. License requirements are based on the Commission's balancing of the varying public interest factors in each case, in order to meet the requirement of section 10(a)(1) of the Federal Power Act¹⁵ that the Commission issue licenses that are best adapted to the comprehensive improvement or development of affected waterways. We therefore will not revise the license to provide the indefinite language that the county would prefer, but will address, in turn, the specific revisions to Article 402 that the county suggests.

A. Minimum Flows

12. Granite County asks us to retain the portion of section (a) of Article 402 that makes release of a 30 cfs minimum flow during irrigation season an absolute, but would have us revise the section to provide that the 10 cfs flow releases requirement during the rest of the year be required only when inflows to the reservoir equal or exceed 10 cfs and

¹⁵ 16 U.S.C. § 803(a)(1) (2006).

that the non-irrigation season releases be subordinate to maintaining the lake elevation specified in section (d) of Article 402.

13. It appears that Granite County and the parties to the 2007 agreement have placed a top priority on the provision of irrigation flows. Thus, they have requested that the 30 cfs minimum flow be unconditionally released during irrigation season. Given that the record does not show that providing these flows will have a negative impact on the fishery in the lake or downstream or on other public interest considerations, and that the needs of farmers and of the fisheries appear to have been adequately met under a regime including a 30 cfs release during irrigation season, Article 402(a) adopted the provisions of the 2007 agreement with respect to irrigation season releases, and Granite County seeks no change in this aspect of the license.

14. With respect to the 10 cfs minimum flows during non-irrigation season, Granite County suggests that we require the flows only to the extent that inflow to Georgetown Lake is equal to or greater than 10 cfs, and only when consistent with maintaining desired lake levels. As to the first point, it is not unusual for us to allow licensees to release the lesser of targeted minimum flows or inflow, in order to avoid unnecessary reservoir drawdowns. In light of the current health of the fishery below the project, we will revise Article 402 to permit that here.¹⁶

15. We are less willing to make the 10 cfs (or inflow) release wholly secondary to maintaining target lake levels. Perhaps because there was little controversy in this proceeding, the licensee provided us little, if any, evidence regarding the impacts of various flow levels on the fisheries in and below the reservoir.¹⁷ Based on records from the U.S. Geological Survey gauge located downstream of the Georgetown Lake Dam, we have determined that the average annual daily flow in Flint Creek between 1940 and 2009 has been 29.7 cfs.¹⁸ According to the Tennant method for relating instream flow to

¹⁶ Should, over time, the health of the fishery decline substantially, we might have to revisit this provision.

¹⁷ The licensee also provided us no specifics regarding the needs of downstream irrigators, which may or may not equal their water rights and may vary on a daily basis.

¹⁸ See http://waterdata.usgs.gov/nwis/dvstat?referred_module=sw&site_no=12325500&por_1232550_1=66107,00060,1,1940-10-01,2009-10-31&format=html_table&stat_cds=mean_va&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list (accessed 9/19/10).

quality of fish habitat,¹⁹ the 30 cfs minimum flow required by Article 402(a) during irrigation season (May 15 to October 15) would provide optimal downstream fish habitat. Minimum flows of 10 cfs during the rest of the year would provide excellent habitat from October 16 through March 31 and good to fair habitat from April 1 through May 14. (These numbers represent a best case scenario, since flows released during the non-irrigation season may be below 10 cfs if inflows to Georgetown Lake are below 10 cfs). This, on balance year-round, represents a reasonable level of protection to the downstream fishery.

16. Granite County asserts that the May 31 target elevation requirement “ensures that high lake levels will be available going into the summer [which] is important for the lake recreation season which benefits from a full lake. . . . Maintaining lake levels is important to the lake fishery because dissolved oxygen levels adequate for salmonids often only occur within the top one meter of Georgetown Lake during the winter.”²⁰

17. First, as noted, we have essentially no evidence in the record demonstrating the interplay between requiring a 10 cfs minimum flow and maintaining lake levels. We have ameliorated the impact of the minimum flow on lake levels by limiting required releases to the lesser of 10 cfs or inflow during non-irrigation season. However, it is unclear to what extent, if any, the required flows would prevent lake levels from being within one foot of the crest elevation of 6,429.5 feet by May 31, and, if that target was not reached, whether this would be attributable to the irrigation releases, to the fishery releases, or to other factors.²¹ If we were to conclude that minimum flows were having

¹⁹ See Tennant, D.L. 1976, Instream Flow Regimens for Fish, Wildlife, Recreation, and Related Environmental Resources, *in* Instream Flow Needs. Volume II: Boise, ID, Proceedings of the Symposium and Specialty Conference on Instream Flow Needs, May 3-6, American Fisheries Society, pp. 359-373.

²⁰ Request for Rehearing at 6, (citing Environmental Assessment for Hydropower License, Flint Creek Hydroelectric Project at 15 (filed December 2, 2009)).

²¹ The records from the U.S. Geological Survey gauge below the project (*see supra* n.18) show that flows, on average, will exceed 10 cfs at least 70 percent of the time. It thus appears that there generally should be sufficient flow available, over-and-above the 10 cfs, to re-fill the lake to a specified target elevation, without cutting off flow to Flint Creek. As Granite County points out (Request for Rehearing at 6-7), this may not be the case during dry years. However, given that the county cites to only eight instances of significantly dry years from 1941-2004, we conclude that infrequent dry periods do not justify the relief the county seeks. We note that many licensees have worked with other stakeholders to develop drought management protocols to deal with dry conditions and, Granite County is free to do the same.

an effect on lake levels that needed to be addressed, it is not necessarily the case that we would curtail only the fishery releases. We would also have to decide if the appropriate remedy was to cut back on irrigation releases.

18. Moreover, Granite County has not supported its assertions regarding harm caused by failure to meet target lake levels. While the county states that full lake levels benefit the lake recreation season, it does not explain what resources are at issue (fishing, boating, camping, etc.), nor does it provide any quantification of the impacts of particular lake levels on these resources. Levels six inches below target might have a negligible impact on some or all of these resources, while levels one foot below the target could have significant impacts, but the county has given us no information on which to base conclusions on these matters. As to the impact on the winter fishery, while the record does support the assertion that adequate dissolved oxygen conditions for salmonids may be present only in the top one meter of the lake, the county has not shown that these conditions will only occur at certain lake elevations.²²

19. We cannot conclude based on the record that requiring a 10 cfs or inflow minimum flow during non-irrigation season will harm the lake fishery or recreation. At the same time, the Tennant method suggests that a 10 cfs flow downstream will result in habitat ranging from optimal to good to fair and that levels below 10 cfs may well have negative impacts on the downstream fishery. Therefore, we will not, as Granite County suggests, revise Article 402 to effectively make maintaining lake levels a higher priority than releasing flows to protect the downstream fishery. In fact, given that the 2007 agreement specifies that Granite County is to avoid releasing less than 10 cfs, our requirement is more consistent with the agreement than is Granite County's proposal.

20. We nonetheless recognize the significance of balancing the needs of resources in and below the lake. Therefore, when Granite County files its operational compliance monitoring plan – which is to be developed in consultation with the Forest Service, the U.S. Fish and Wildlife Service, and Montana – it should explain, among other things, how it proposes to balance lake level and minimum flow needs, with evidence regarding the environmental impacts of actions it proposes to take. To the extent that Granite County, after consultation with the resource agencies, wishes to amend Article 402, it may seek to do so.

²² In other words, all else being equal – and nothing in the record suggests to the contrary – the top one meter of the lake should be equally suitable for salmonids whether the lake elevation is, for example, 6,429.5 feet or 6,426.5 feet.

B. Reservoir Surface Elevations

21. Section (d) of Article 402 requires Granite County to maintain a reservoir surface elevation at Georgetown Lake within one foot of the lake's crest elevation of 6,429.5 feet by May 31 of each year and a level within two feet of crest elevation at all other times. The county seeks no change in the portion of the section that requires the May 31 level, but asks us to revise the second portion of the section to make the requirement that it maintain the lake elevation within two feet of crest for the rest of the year subject to the ability to satisfy irrigation releases of 30 cfs during irrigation season. It appears reasonable to allow the required modification, since irrigation is a project purpose and the record contains no evidence that irrigation releases, which take place from late spring to early fall, will adversely affect aquatic resources in the lake. As noted above, maintaining lake elevations is most important for the lake fishery during the winter. However, as discussed above, the record also shows that the historic 10 cfs minimum flow is needed to support the healthy fishery below the lake. Therefore, we will revise section (d) to make the surface elevation requirement – other than the May 31 target elevation -- subject to compliance with both the 30 cfs minimum flow release during irrigation season and the 10 cfs (or inflow) release during the remainder of the year. Granite County has the option of addressing this issue in its operational compliance monitoring plan.

C. Flood Control

22. Granite County suggests revising section (b) of Article 402 to specify that the restriction on releasing more than 30 cfs when lake levels are below the target level is “subject to the availability of adequate runoff storage, irrigation needs, and avoidance of uncontrolled spillway releases.”²³ The county would similarly revise section (c) of Article 402 to provide that the restriction on releasing more than 100 cfs maximum releases is “subject to avoidance of uncontrolled spillway releases, minimizing downstream flood damage, and protecting public safety.” As discussed above, Granite County explains that it may occasionally want to release higher levels of flows than specified in Article 402 in order to provide flood control. The county's explanation is reasonable, and flood control is indeed a project purpose. However, we do not believe that Granite County should have unfettered control over flood control releases. Article 402 provides that the project's operating regime may be temporarily modified if required by operating emergencies beyond the control of the licensee or for short periods upon mutual agreement among the licensee, and the state and federal resource agencies. This will allow the county to take immediate action in case of emergency, while providing that resource needs will be given due consideration, through the requirement

²³ It is not clear why Granite County references irrigation needs, since the 30 cfs minimum flow requirement allows the county to meet those needs.

for the agencies' agreement in non-emergency situations. Accordingly, we will not revise section (b) and (c) of Article 402. However, Granite County may suggest further modification of the maximum flow provisions, should it so choose, in its operational compliance monitoring plan.

The Commission orders:

(A) The request for rehearing filed on August 6, 2010 by Granite County, Montana is granted to the extent set forth herein and is otherwise denied.

(B) Article 402 of the license for the Flint Project No. 12107 is revised to read as follows:

Article 402. *Project Operation.* The licensee shall operate the project to provide the following minimum flow releases from Georgetown Lake into Flint Creek and maintain the following reservoir elevations for Georgetown Lake:

(a) release a minimum flow of 30 cubic feet per second (cfs) as measured downstream of the powerhouse during the irrigation season (May 15 to October 15) and release the lesser of 10 cfs or inflows to Georgetown Lake at all other times;

(b) release no more than 30 cfs as measured downstream of the powerhouse during the summer months if the surface elevation of Georgetown Lake is less than crest elevation of 6,429.5 feet (U.S. Geological Survey elevations (National Geodetic Vertical Datum 1929) plus 53 feet);

(c) release no more than 100 cfs as measured downstream of the powerhouse at all times;

(d) maintain surface elevation of Georgetown Lake to within 1 foot of the crest elevation of 6,429.5 feet by May 31, and, subject to the ability to satisfy the minimum flow requirements set forth in section (a) of this article, within 2 feet of crest elevation at all other times; and

(e) minimize lake level fluctuations for Georgetown Lake as much as possible during the winter, while maximizing lake levels in general.

The above operating regime may be temporarily modified if required by operating emergencies beyond the control of the licensee or for short periods upon mutual agreement among the licensee; Montana Department of Fish, Wildlife and Parks, the U.S. Fish and Wildlife Service, and the Forest Service. If the operations are so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.