

135 FERC ¶ 61,155  
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.

City of Tacoma, Washington

Project No. 460-043

ORDER DENYING REHEARING AND DENYING RECONSIDERATION  
OF MOTION FOR LATE INTERVENTION

(Issued May 19, 2011)

1. Pending before us is a request for rehearing, filed on August 13, 2010, by Mr. Gerald Richert, of our July 15, 2010 order on remand and on an offer of settlement, amending the license, authorizing a new powerhouse, and lifting a stay of the license for the 131-megawatt (MW) Cushman Hydroelectric Project No. 460.<sup>1</sup> The project is located on the North Fork of the Skokomish River in Mason County, Washington, and occupies U.S. lands within the Olympic National Forest and the Skokomish Indian Reservation. Also pending is a motion for reconsideration, filed on September 13, 2010, by ranchers in the Skokomish River Valley (Ranchers), of the Commission Secretary's September 8, 2010 notice denying their late motion to intervene and rejecting their request for rehearing of the Commission's July 15, 2010 Order. For the reasons discussed below, we deny rehearing. We also deny Rancher's motion for reconsideration.

**Background**

2. The Cushman Project consists of two dams, two powerhouses, and associated facilities. Both dams are located on the North Fork of the Skokomish River. The first dam (Cushman Dam No. 1), completed in 1926, impounds Lake Cushman, a 9.6-mile-long reservoir that supplies water for generation at a powerhouse with a capacity of 50 MW located about 600 feet downstream of the dam. The second dam (Cushman Dam No. 2), completed in 1930 and located about two miles downstream of the first dam, impounds Lake Kokanee, a much smaller reservoir with a surface area of about 100 acres. Historically, the Cushman Project diverted nearly all of the flow of the North Fork Skokomish River from Lake Kokanee out of the river basin through a 2.5-mile-long

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<sup>1</sup> *City of Tacoma, Washington*, 132 FERC ¶ 61,037 (2010) (July 15, 2010 Order).

tunnel to a second powerhouse with a capacity of 81 MW, located on the shoreline of Hood Canal, which adjoins Puget Sound. Because the water leaving the second powerhouse enters Hood Canal and is not returned to the North Fork Skokomish River, much of the controversy in the relicensing proceeding concerned the amount of flow diverted from the river, its environmental effects, and the appropriate level of minimum flows that should be required to return water to the North Fork.

3. A more detailed procedural history appears in our July 15, 2010 Order and need not be repeated here. Briefly, after a lengthy and contentious relicensing proceeding, the Commission issued a new license for the Cushman Project to the City of Tacoma, Washington (Tacoma) in 1998,<sup>2</sup> but later stayed most of its provisions pending judicial review and further order.<sup>3</sup> As a condition of the stay, Tacoma began releasing a minimum flow of 60 cubic feet per second (cfs) to the North Fork Skokomish River below Cushman Dam No. 2. Multiple parties sought judicial review, but the case was remanded to the Commission in 2000 to allow for completion of formal consultation regarding several species of fish listed as threatened under the Endangered Species Act.<sup>4</sup> After completing consultation and also holding a hearing on possible interim measures, the Commission amended the license in 2004 to include conditions to protect the listed fish, and partially lifted the stay to require that Tacoma design and install a minimum-flow release valve that would allow it to release a minimum flow of 240 cfs or inflow, whichever is less, to benefit the listed fish species.<sup>5</sup>

4. Multiple parties again sought judicial review, and the court stayed the minimum-flow release requirement. On August 22, 2006, the court affirmed the Commission on most issues and did not vacate the license, but remanded the case to require the Commission to include Interior's conditions for the protection of the Skokomish Indian Reservation.<sup>6</sup> After the remand, Tacoma installed the minimum flow release valve and began releasing 240 cfs into the North Fork Skokomish River on March 7, 2008.

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<sup>2</sup> *City of Tacoma, Washington*, 84 FERC ¶ 61,107 (1998), *order on reh'g*, 86 FERC ¶ 61,311 (1999).

<sup>3</sup> 87 FERC ¶ 61,197 (1999).

<sup>4</sup> *City of Tacoma, Washington, et al. v. FERC*, Nos. 99-1143 *et al.* (D.C. Cir. Oct. 30, 2000).

<sup>5</sup> *City of Tacoma, Washington*, 107 FERC ¶ 61,288 (2004), *order on reh'g*, 110 FERC ¶ 61,140 (2005), *reh'g denied*, 110 FERC ¶ 61,239 (2005).

<sup>6</sup> *City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (*Tacoma v. FERC*). The court also vacated its stay, thus reinstating the Commission's requirement that Tacoma release 240 cfs as an interim measure to protect threatened fish species, and

5. Beginning in 2007, Tacoma and the Skokomish Indian Tribe (Tribe) entered into negotiations that ultimately led to a settlement. On January 21, 2009, Tacoma filed the offer of settlement on behalf of itself, the Tribe, and six federal and state resource agencies.<sup>7</sup> The settlement included revised conditions for protection of the Skokomish Indian Reservation, fish passage facilities, and measures for fish and wildlife protection. In conjunction with the settlement, Tacoma also sought authorization to construct a new 3.6-MW powerhouse that would increase the project's authorized capacity to 134.6 MW. In our July 15, 2010 Order, we amended the license to include license articles consistent with the settlement, authorized construction of the new powerhouse, and lifted the stay.

6. On August 13, 2010, a group of individuals collectively referred to as Ranchers jointly filed a late motion to intervene in the proceeding.<sup>8</sup> That same day, Ranchers and Mr. Gerald Richert, an intervenor in the relicensing proceeding, jointly filed a request for rehearing of the July 15, 2010 Order. On August 26, 2010, the Tribe, also an intervenor in the relicensing proceeding, filed an answer in opposition to Ranchers' motion for late intervention. That same day, the Tribe also filed a motion to dismiss both Ranchers' and Mr. Richert's requests for rehearing. On August 30, 2010, Tacoma filed two similar motions, opposing Ranchers' motion for late intervention and seeking dismissal of Ranchers' and Mr. Richert's rehearing requests. On September 3, 2010, Ranchers filed a response to the Tribe's and Tacoma's answers to their late motion to intervene. That same day, Ranchers and Mr. Richert filed an answer to the Tribe's and Tacoma's motions to dismiss their requests for rehearing, and included with their answer a declaration of Mr. Richert in answer to the dismissal motions and in support of his request for rehearing.

7. On September 8, 2010, the Commission's Secretary issued a notice denying Ranchers' late motion to intervene and rejecting their request for rehearing. On September 10, 2010, Tacoma filed a request for leave to file a response and a response to

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leaving the Commission's earlier partial stay in effect.

<sup>7</sup> The following agencies joined in the settlement: U.S. Forest Service (Forest Service), U.S. Department of Commerce's National Marine Fisheries Service (NMFS), U.S. Department of the Interior's (Interior) Fish and Wildlife Service (FWS) and Bureau of Indian Affairs (BIA), Washington Department of Fish and Wildlife (Washington DFW), and Washington Department of Ecology (Washington Ecology).

<sup>8</sup> The following individuals jointly filed a late motion to intervene in the proceeding: Joseph W. and Norma Bourgault, Arvid Haladene and Patricia Johnson, Shawn and Shelloy Johnson, James M. and Joan Hunter, the Hunter Family Farm Limited Partnership, Paul and Luyane Hunter, William O. and Carol Hunter, William O. Jr. and Leslie Hunter, Shirley Richert, Douglas Richert, Arthur Tozier, Maxine Johnson, and Evan Tozier.

Mr. Richert's answer to Tacoma's motion to dismiss his rehearing request. On September 13, 2010, Mr. Richert filed a response to Tacoma's response. That same day, Ranchers filed a motion for reconsideration of the September 8, 2010 notice denying late intervention.

### **Preliminary Matters**

#### **A. Ranchers' Motion for Reconsideration**

8. In their motion for reconsideration of the Secretary's notice denying their motion for late intervention, Ranchers request the Commission to reconsider the denial "in the event Tacoma is successful in barring Gerald Richert from these proceedings."<sup>9</sup> They state that they did not intervene earlier because they relied on Mr. Richert to represent their interests, and they believed up until the issuance of the Commission's July 15, 2010 Order that Mr. Richert was representing ranching interests in the Skokomish Valley. In support, they attach a declaration of Mr. Paul Hunter concerning Ranchers' discussions and meetings with Mr. Richert concerning the heightening groundwater table in the Skokomish River Valley; increased flows; and impacts to hay production, cattle husbandry, and vegetable truck farming. Mr. Hunter states that, until the Commission issued its order "downplaying" Mr. Richert's role, Ranchers "did not see a need to intervene in this matter."<sup>10</sup> Ranchers maintain that, if Mr. Richert is dismissed or if his representation of all ranching interests in the Valley is not recognized, Ranchers should be allowed to intervene in this matter.

9. As discussed below, Mr. Richert is a party to this proceeding. Although we have questioned whether, in light of changed circumstances, he retains sufficient standing to seek rehearing and judicial review, we nevertheless find it appropriate to consider his rehearing request. We therefore deny Ranchers' motion for reconsideration, because the condition on which it was based (dismissal of Mr. Richert's rehearing request) did not occur.

10. In any event, if we were to reconsider the matter we would affirm the denial of late intervention, because our cases make clear that, when intervention is sought after issuance of an order on the merits, as is the case here, the prejudice to other parties and the burden on the Commission of granting late intervention are substantial, and the movants bear a higher burden to show good cause to justify favorable action on the

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<sup>9</sup> Motion for Reconsideration at 1 (filed Sept. 13, 2010).

<sup>10</sup> Hunter Declaration, ¶ 9 (attached to Ranchers' Motion for Reconsideration).

motion.<sup>11</sup> In this case, Ranchers' "wait-and-see" attitude falls far short of demonstrating good cause that would support a late motion to intervene.<sup>12</sup>

11. Because Ranchers are not a party to the proceeding, they may not seek rehearing of the July 15, 2010 Order under section 313(a) of the Federal Power Act (FPA).<sup>13</sup> Accordingly, their request for rehearing was properly rejected. In addition, because Ranchers did not file a request for rehearing of the notice denying late intervention, but chose instead to file a request for reconsideration, they may not now seek rehearing or judicial review of the denial of late intervention and dismissal of their rehearing request.<sup>14</sup> Nevertheless, as discussed below, we consider the issues they raise in connection with Mr. Richert's request for rehearing.

### **B. Motions to Dismiss Mr. Richert's Rehearing Request**

12. The Tribe and Tacoma request that the Commission dismiss Mr. Richert's rehearing request on the grounds that Mr. Richert is not aggrieved by the July 15, 2010 Order, and therefore lacks standing to seek rehearing or judicial review under section 313 of the FPA. They note that a party is "aggrieved" under the FPA if it can satisfy the traditional constitutional and prudential requirements for standing; "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."<sup>15</sup> They add that, because Mr. Richert sold his property (alternatively referred to

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<sup>11</sup> See *California Water Resources Dept. and the City of Los Angeles*, 120 FERC ¶ 61,057, at n.9, *reh'g denied*, 120 FERC ¶ 61,248 (2007), *aff'd sub nom. California Trout and Friends of the River v. FERC*, 572 F.3d 1003 (9<sup>th</sup> Cir. 2009).

<sup>12</sup> *Crown Landing, LLC*, 117 FERC ¶ 61,209, at P 12 (2006); *Florida Power and Light Co.*, 99 FERC ¶ 61,318, at P 9 (2002).

<sup>13</sup> 16 U.S.C. § 825 (2006).

<sup>14</sup> See sections 313(a) and (b) of the FPA, 16 U.S.C. §§ 825 (a) and (b) (2006). The notice denying Ranchers' motion for late intervention and rejecting their rehearing request clearly states: "This notice constitutes final agency action. Requests for rehearing by the Commission of this denial and rejection must be filed within 30 days of the date of issuance of this notice, pursuant to 18 C.F.R. § 385.713 (2010)." Although Ranchers' motion for reconsideration cites section 385.713, it is captioned a motion for reconsideration and does not contain either a statement of issues or a statement of errors, as required by the rule. Thus, even if construed as a request for rehearing, the filing would have been subject to dismissal for failure to meet the requirements of our rules.

<sup>15</sup> Tacoma's Motion to Dismiss at 4 (filed Aug. 30, 2010), *quoting Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

in this proceeding as Richert Farm, Richert Ranch, and Skokomish Farms, Inc.) in November 2008, he no longer has any legally protected interest that could be injured by the Commission's July 15, 2010 Order. In the alternative, the Tribe argues that, if the Commission finds that Mr. Richert has standing for purposes of this administrative proceeding, it should dismiss the request to rehear all issues relating to flows mandated by the Secretary of the Interior under section 4(e) of the FPA, because the Commission has no authority to reject or modify those conditions. The Tribe would thus have us limit Mr. Richert's participation to only those issues and errors that relate to his request for construction of one or more bridges on his former property.<sup>16</sup> Tacoma makes a similar request, arguing that the Commission should dismiss the request for rehearing of all issues that rely on evidence not already in the record, as well as those that Tacoma maintains are based on unsupported assertions of counsel.<sup>17</sup>

13. Mr. Richert argues that the Commission should reject the motions to dismiss on procedural grounds, because they are in fact answers to his rehearing request and are therefore not permitted under the Commission's rules.<sup>18</sup> Mr. Richert adds that, if the Commission nevertheless entertains the filings, it should find them without merit, because he continues to own two parcels of land in the Skokomish River Valley totaling nearly 77 acres on which he grows trees that he asserts are being harmed by the higher groundwater table, which he attributes to the higher flows required by the license. Specifically, Mr. Richert states that, on one parcel, he has "stands of timber that are being adversely affected by the ever heightening ground water table," and on the other parcel,

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<sup>16</sup> The Tribe requests that we dismiss Mr. Richert's issues 1 through 5 and 9 through 26, leaving only issues 6 through 8 for consideration. *See* Tribe's Motion to Dismiss at 9 (filed Aug. 26, 2010).

<sup>17</sup> Tacoma requests that we dismiss Mr. Richert's issues 2, 4 to 5, 9 to 10, 12 through 18, and 20. *See* Tacoma's Motion to Dismiss at 13 (filed Aug. 30, 2010).

<sup>18</sup> *See* Mr. Richert's Answer to Tacoma's and the Tribe's Motions to Dismiss at 5 (filed Sept. 3, 2010). This is the second document of a three-part filing made on September 3, 2010. We are concerned here with only those parts of the filing that relate to Mr. Richert's standing and his response to the motions to dismiss his request for rehearing; specifically, those arguments in the second document that relate to Mr. Richert's issues (as opposed to those of Ranchers), and the third document, which is a declaration of Mr. Richert in answer to the motions to dismiss and in support of his request for rehearing. Because Ranchers are not a party and did not seek rehearing of the denial of their late motion to intervene or the dismissal of their rehearing request, we need not consider the first document in the filing, which is a response to Tacoma's and the Tribe's answers to Ranchers' motion for late intervention. Similarly, we need not consider those parts of the second document that relate to Ranchers' motion.

the quality of maple wood from trees that he has grown and sold for making musical instruments “has been declining because the trees have ‘red heart’ due to the higher groundwater table.”<sup>19</sup> Mr. Richert also argues that the deference that the Commission must give to Interior’s section 4(e) conditions does not prevent parties from challenging them, and that he has raised concerns regarding the ground water table in numerous filings in this proceeding.

14. We find no basis for rejecting the Tribe’s and Tacoma’s motions to dismiss on procedural grounds. Under Rule 213 of our Rules of Practice and Procedure, an answer may not be made to a request for rehearing unless otherwise ordered by the decisional authority,<sup>20</sup> and a party may not use a motion to dismiss as a means of filing an otherwise prohibited answer to a rehearing request. However, in this case the motions do not seek to respond to the substantive issues on rehearing, but rather raise arguments that challenge Mr. Richert’s standing to seek rehearing and support dismissing or limiting the issues raised in his rehearing request. We therefore deny Mr. Richert’s request to reject the Tribe’s and Tacoma’s motions to dismiss.

15. Contrary to the Tribe’s assertion, a party is not barred from seeking rehearing of Interior’s section 4(e) conditions, notwithstanding the fact that the Commission must include those conditions in the license, without modification.<sup>21</sup> We therefore find no basis for dismissing those parts of Mr. Richert’s rehearing request that concern Interior’s section 4(e) conditions. In addition, although Mr. Richert’s primary interest in this proceeding has been in obtaining a bridge to replace the wet crossing on his former property, he has also raised concerns about flooding in the Skokomish Valley and the effects of rising groundwater levels. For this reason, we find no basis for limiting Mr. Richert’s rehearing request to the matter of bridges, as Tacoma requests.

16. As discussed in the next section, we continue to question whether Mr. Richert has standing to seek rehearing and judicial review. However, in light of his participation in this proceeding since 1993,<sup>22</sup> and to ensure that we have considered all relevant factors

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<sup>19</sup> *Id.* at 5. Although Mr. Richert states (*id.* at 1) that he owns two parcels that equal 84.66 acres (*id.* at 1), this appears to be an error, because the acreages for the two parcels given later in the answer, 36.94 acres and 40 acres (*id.* at 4-5 and Exhibit A to Mr. Richert’s declaration), yield a total of 76.94 acres.

<sup>20</sup> See 18 C.F.R. § 385.213(a) (2010).

<sup>21</sup> See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777-78 (1984); *Tacoma v. FERC*, 460 F.3d at 131.

<sup>22</sup> The Commission granted Mr. Richert’s motion for late intervention by notice issued on August 16, 1993.

that may have a bearing on our decision, we find it appropriate to consider the issues he raises on rehearing. We therefore deny Tacoma's and the Tribe's motions to dismiss Mr. Richert's rehearing request.

### **C. Mr. Richert's Party Status and Standing**

17. As noted, Mr. Richert is a party to this proceeding, having intervened as a potentially affected landowner in 1993. However, under section 313 of the FPA, only a party that has been aggrieved by a Commission order may file a request for rehearing or a petition for judicial review.<sup>23</sup> A party is aggrieved if it can show that it has both constitutional and prudential standing to challenge a Commission order.<sup>24</sup> Specifically, a party must demonstrate that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."<sup>25</sup>

18. In our July 15, 2010 Order, we questioned Mr. Richert's standing to seek rehearing and judicial review in light of the fact that, in 2008, he sold the property for which he had asserted that a bridge was needed to replace his wet crossing. Both Tacoma and Mr. Richert have filed supplemental pleadings, seeking to provide additional information and arguments on the issue of standing.

19. Under Rule 213 of our Rules of Practice and Procedure, an answer may not be made to an answer unless otherwise ordered by the decisional authority.<sup>26</sup> As a result, we would not ordinarily allow Tacoma's September 10, 2010 response to Mr. Richert's answer to Tacoma's motion to dismiss. Similarly, we would not ordinarily allow Mr. Richert's September 13, 2010 response to Tacoma's response. However, both of these filings provide additional facts and arguments regarding Mr. Richert's standing, an issue we raised in our July 15, 2010 Order. Therefore, to ensure that the record on this issue is complete and accurate, we will consider both of these responses.

20. Tacoma argues that, because of the location of the two parcels that he still owns, Mr. Richert cannot show that he is aggrieved by the Commission's order. Tacoma points out that one of the parcels is located on the South Fork of the Skokomish River,

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<sup>23</sup> See 16 U.S.C. §§ 825l(a) and (b) (2006).

<sup>24</sup> See *Green Island Power Authority v. FERC*, 577 F.3d 148, 158 (2d Cir. 2009).

<sup>25</sup> *Id.* (citations omitted).

<sup>26</sup> See 18 C.F.R. § 385.213(a) (2010).

approximately one-half mile upstream of the confluence of the South Fork with the North Fork of the Skokomish River. Under the license, flows are required to be released into the North Fork of the Skokomish River, and Tacoma asserts that Mr. Richert fails to allege any facts that would support a causal connection between the increased flows in the North Fork and the alleged harm to this parcel on the South Fork. Tacoma adds that, with regard to the second parcel, which is located on the mainstem of the Skokomish River, Mr. Richert's allegation of harm to the maple trees grown there is unsubstantiated and should be disregarded, because it is a new factual issue raised for the first time on rehearing, without any explanation for the delay.<sup>27</sup>

21. Mr. Richert maintains that Tacoma's arguments are misleading, because they ignore the fact that his two parcels are immediately adjacent to (and on opposite ends of) the Skokomish Farms property, and are treated as part of that property. Mr. Richert adds that his current use of the west parcel he owns, in combination with his use of two Skokomish Farms barns (referred to as Barn 1 and Barn 2) that are located on opposite sides of the North Fork, demonstrates his continued need for a bridge at the location of the former wet crossing on the Skokomish Farms property.<sup>28</sup> Specifically, he asserts that, because the wet crossing is unusable when flows exceed 100 cfs, he is unable to transport hay grown on his west parcel and stored in Barn 1 on the west side of the river to Barn 2 on the east side of the river, where it is offered for sale.<sup>29</sup> Mr. Richert adds that his west parcel is in hay production, and the quality of hay has declined in the past two years, "because of the emergence of wetland plants which are noxious to animals."<sup>30</sup> He also asserts that he has stands of lumber on this parcel that he sells periodically, and that the

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<sup>27</sup> See Tacoma's Response to Mr. Richert's Answer at 3 (filed Sept. 10, 2010).

<sup>28</sup> Both barns are located on the Skokomish Farms property, as is the former wet crossing. See Exhibit A to Mr. Richert's Response to Tacoma's Response (filed Sept. 13, 2010). Although both barns are shown on the map, Mr. Richert states that Barn 1 was recently destroyed in a fire, leaving no place to store hay on the west side of the river. *Id.* at 2, n. 11.

<sup>29</sup> See Mr. Richert's Response to Tacoma's Response at 2 (filed Sept. 13, 2010). Attached to this filing are a declaration of Mr. Richert, a map showing the two parcels in relation to Richert Ranch and the former wet crossing (Exhibit A), and a declaration of Paul Hunter in support of both Mr. Richert's response to Tacoma's filing. Mr. Hunter's declaration was also attached to Ranchers' motion for reconsideration of the denial of their late motion to intervene, and most of it concerns that motion, which we have denied. For this reason, we consider here only item 8 of Mr. Hunter's declaration, which concerns the use of Mr. Richert's South Fork parcel and the inability to use the former wet crossing to transport hay across the North Fork of the Skokomish River.

<sup>30</sup> *Id.* at 3.

“ever heightening water table has adversely affected the timber,” and that “[m]any of the trees are dead or dying because of their saturated roots.”<sup>31</sup> Concerning his east parcel, Mr. Richert asserts that the quality of the wood from the maple trees he grows there has been declining because the trees have “red heart” due to the higher groundwater table. He adds that he recently sold some maple for musical instruments and “because of the condition of the wood, did not receive the amount per board foot that high quality maple usually brings him.”<sup>32</sup> Finally, Mr. Richert states that his east parcel is where the North Fork Skokomish River avulsed (changed course) in 2002, creating a new channel across his land. He concludes that “loss of land, loss of high quality hay and loss of access to store the hay constitute ‘injury in fact.’”<sup>33</sup>

22. With regard to his west parcel, Mr. Richert has not demonstrated any causal connection between the conditions of the license for the Cushman Project and the alleged harm to the trees and hay that he grows there. As noted, the west parcel is located on the South Fork of the Skokomish River, and is above the confluence of the South Fork with the North Fork of the Skokomish River. Accordingly, regardless of what may be occurring with respect to the ground water table on the west parcel, it is clear that these effects could not be caused by increased flows from the Cushman Project, which are released into the North Fork and eventually reach the Skokomish River, but cannot reverse course and flow upstream, against the current, into the South Fork. Quite simply, any changes that the Commission might make to the license for the Cushman Project could not affect conditions on the west parcel.

23. With regard to the connectivity issue (that is, the alleged need for a bridge on the Skokomish Farms property to transport hay from Mr. Richert’s west parcel to Barn 2 on the east side of the river, it is unclear that Mr. Richert can continue to assert a legally protected interest in the use of either the barn or the Skokomish Farms property, which Mr. Richert sold in 2008.<sup>34</sup> Mr. Richert states that he is the property manager of Skokomish Farms and is authorized to represent the interests of the new owners in this proceeding. However, the new owners did not seek to intervene, and Mr. Richert may

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<sup>31</sup> *Id.* at 5.

<sup>32</sup> Answer to Motion to Dismiss at 5 (filed Sept. 3, 2010).

<sup>33</sup> *Id.*

<sup>34</sup> As noted in our July 15, 2010 Order, on February 24, 2009, Mr. Alann Krivor, President and CEO of Skokomish Farms, Inc., informed the Commission that as of November 26, 2008, Land Northwest LLC, an Idaho limited liability corporation, had purchased the issued and outstanding shares of Skokomish Farms, Inc., a corporation formed in 1980 to assume ownership of Richert family holdings, including Richert Ranch. *See Tacoma*, 132 FERC ¶ 61,037 at P 112.

not therefore represent their interests in this proceeding. To the extent that he seeks to represent his own interests in obtaining a bridge on the Skokomish Farms property, his interest is too remote and speculative to support standing, as it is premised on his continued status as property manager, as well as the new owners' continued agreement to allow him to use their property to transport hay from one side of the river to the other, and to store and sell it on their land. Because these circumstances could change, and because Mr. Richert has not shown that his status as property manager gives him any protectable legal rights regarding his use of the property, it does not appear that Mr. Richert can show that any harm as a result of the Commission's decision to remove the bridge requirement is actual, as opposed to hypothetical or speculative.

24. With regard to the east parcel on the main stem of the Skokomish River, Mr. Richert's assertions of harm to the maple trees grown there and the decrease in value of the wood sold are unsubstantiated. He provides no basis to support his claim that the increased flows released from the Cushman Project into the North Fork Skokomish River since March 2008 have caused the groundwater table to rise and adversely affect the trees. Similarly, although Mr. Richert asserts that he was harmed by the avulsion of the North Fork Skokomish River, which took some of his land when it created a new river channel on his property, he makes no attempt to link this event to the Cushman Project. Nor are we able to do so. As discussed in more detail later in this order, the avulsion occurred in 2002 and the Cushman Project did not begin releasing 240 cfs into the North Fork until 2008. As a result, this event could not have been caused by the increased flows.<sup>35</sup> We therefore question Mr. Richert's standing to seek rehearing and judicial review. As explained above, however, we will nevertheless consider the issues he raises on rehearing.

### **Discussion**

25. In our July 15, 2010 Order, we amended the 1998 license for the Cushman Project to include conditions consistent with a comprehensive settlement agreement among Tacoma, the Tribe, and six federal and state resource agencies. These conditions are more specific than those of the 1998 license and differ from them in some respects. For the most part, however, they are not significantly different from the conditions of the

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<sup>35</sup> See Channel Migration and Avulsion Potential Analyses, Skokomish River Valley, Mason County, Washington, at 11 (included as Attachment 1 to Mr. Richert's rehearing request).

1998 license, and would not result in any significant new environmental impacts.<sup>36</sup> They also constitute the revised recommendations, mandatory conditions, and prescriptions of the federal and state resource agencies, and include measures to protect and enhance federally listed threatened and endangered fish species. In issuing the amended license, we found that the proposed amendment of the Cushman Project license, consistent with the settlement agreement and the modifications discussed in our order, would be best adapted to a comprehensive plan for improving or developing the North Fork and main stem Skokomish Rivers for all beneficial public uses, as required by the comprehensive development standard of sections 4(e) and 10(a)(1) of the FPA.

26. Throughout this proceeding, Mr. Richert's primary interest has been in obtaining one or more bridges to replace wet crossings on his property, which he now no longer owns. Although Mr. Richert has raised some concerns about rising groundwater levels, flooding, and the possible effects of increased minimum flows, he has consistently done so in the context of the need for bridges. For example, the 1998 license included provisions for minimum flows, seasonal flows for fish migration, flushing flows to help deepen river channels and transport sediment, and removal of the McTaggart Creek diversion dam. These are all aspects of the order on remand for which Mr. Richert now seeks rehearing. In 1998, however, Mr. Richert did not seek rehearing or judicial review of any of these provisions.<sup>37</sup> Similarly, Mr. Richert did not seek rehearing of the amended license in 2004, after the Commission included conditions of the biological opinions and required that Tacoma release 240 cfs or inflow to benefit the listed fish species,<sup>38</sup> and did not seek rehearing or judicial review in 2005, after the Commission stated on rehearing of the amended license that it would not allow issues involving bridge construction to delay the release of minimum flows.<sup>39</sup>

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<sup>36</sup> Because the conditions proposed in the settlement were within the range of alternatives considered in the final environmental impact statement (EIS) prepared for relicensing the Cushman Project, Commission staff determined that a supplemental EIS would not be required for the settlement agreement. *See Tacoma*, 132 FERC ¶ 61,037 at P 14.

<sup>37</sup> Presumably, he chose not to do so because the 1998 license included the requirement that Tacoma fund the design, construction, and maintenance of two bridges on his property.

<sup>38</sup> *City of Tacoma, Washington*, 107 FERC ¶ 61,288 (2004).

<sup>39</sup> *City of Tacoma, Washington*, 110 FERC ¶ 61,140, *reh'g denied*, 110 FERC ¶ 61,239 (2005).

27. Now that Mr. Richert no longer owns the Skokomish Farms property and the July 15, 2010 Order has removed the bridge requirement, Mr. Richert seeks to broaden his participation to encompass the interests and concerns of ranchers throughout the Skokomish River Valley. However, Mr. Richert intervened on his own behalf, and can only represent his own interest in this proceeding. In addition, to the extent that the issues he raises concern matters on which he could have sought rehearing before but did not, those aspects of his current rehearing request may be barred by the doctrine of *res judicata*.

#### **A. The Comprehensive Development Standard**

28. Mr. Richert argues that the Commission failed to balance power and non-power values or the public interest, in violation of sections 10(a) and 4(e) of the FPA. He maintains that the order on remand fails to take into account the impacts to the ranchers and their lands and livelihood of the increased flows and flow regimes adopted in the order. He adds that, after the 240 cfs minimum flow was “illegally introduced into the River,” he produced evidence of the damage it caused in letters dated February 4, 2009, and January 12, 2010, and that the Commission did not take this evidence into consideration in its public interest balancing.<sup>40</sup> He also maintains that ranchers’ properties “are being flooded both overland and through heightening of the groundwater table,” and that the “devaluation and degradation of this property was not analyzed as part of the entire system of the River.”<sup>41</sup>

29. Sections 4(e) and 10(a)(1) of the FPA require the Commission to give equal consideration to the power development purposes and to 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. Any license issued shall be such as in the Commission’s judgment will be best adapted to a comprehensive plan for improving or developing a waterway for all beneficial public uses, including navigation, interstate or foreign commerce, waterpower development, fish and wildlife protection, irrigation, flood control, water supply, recreation, and other purposes. A licensed project must continue to meet this standard throughout the license term.

30. In issuing the 1998 license, the Commission considered and balanced all aspects of the public interest, including power development, protection of fish and wildlife resources and endangered species, tribal and treaty interests, flood control, and recreation. In the order on remand, we reviewed the changes proposed in the settlement agreement and found that, with these changes, the project would continue to meet the

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<sup>40</sup> Request for Rehearing at 22.

<sup>41</sup> *Id.* at 23.

comprehensive development standard. We examined in some detail the concerns that Mr. Richert raised about the possible effect of increased minimum flows on the groundwater table and flooding in the Skokomish Valley. As discussed later in this order, the minimum flows adopted in the order on remand are needed to protect threatened fish species, and will help restore resources important to the Tribe. The amended license takes into account the Cushman Project's role in flood protection and the need to provide flows for channel formation and sediment transport. Mr. Richert's specific arguments concerning these issues are either without merit, or are outweighed by other important public interest factors. Equal consideration does not require equal treatment, and Mr. Richert provides no basis for his assertion that the Commission failed to properly balance all aspects of the public interest in amending the license for the Cushman Project.<sup>42</sup> We therefore deny rehearing of this issue.

### **B. Removal of the Bridge Requirement**

31. Mr. Richert argues that the Commission's removal of the bridge requirement is not supported by substantial evidence. He maintains that the Commission ignored current ranching operations in determining that the two bridges at the Skokomish Farms property were no longer necessary, and ignored that the future uses of the land include farming operations that require access to the entire ranch. He adds that, although Tacoma argued that homes would be included on the Skokomish Farms property, no single family homes

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<sup>42</sup> Mr. Richert argues that the FPA "clearly contemplates that the Commission will obtain the modification of any proposal that constitutes a menace to, and will require licensees to take reasonable measures to protect, life, health and property." Request for rehearing at 23, *quoting South Carolina Public Service Authority v. FERC*, 850 F.2d 788, 792 (D.C. Cir. 1988). In that case, which involved the possibility that a dam could fail during an earthquake, the court held that the FPA does not authorize the Commission to displace existing state tort law by imposing its own rules of liability for damages caused by licensees. The court noted that, instead, the Commission could regulate licensed projects to ensure that they would not pose an unreasonable risk, or could deny a license under FPA section 10(a)(1) if no modification or regulation could ensure an adequate level of safety. In this case, there is no basis in the record to suggest that the Cushman Project would pose an unreasonable risk to life, health, or property, or that the project requires modification to avoid any such risk. In any event, as discussed later in this order in the section on Washington state riparian law, if Mr. Richert can show that Tacoma's operation of the Cushman Project has damaged his property, section 10(c) of the FPA provides that licensees (and not the United States) "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works under the license." 16 U.S.C. § 803(c) (2006). Thus, it is not clear that the requirement to consider all aspects of the public interest in issuing a hydropower license would extend to the protection of Mr. Richert's individual rights in this case.

have been sold during the years that this matter has been pending. He argues that speculative allegations were made based on the Skokomish Farms website which would not be considered evidence and which would never reach a jury. He points out that he submitted a letter dated February 22, 2008, from a fuel supplier stating that deliveries could no longer be made to Richert Ranch, and that his filing of February 4, 2009, made clear that large farming equipment could not travel on the alternative road. He contends that the introduction of 240 cfs in March 2008 has damaged the Skokomish Farms property and that the higher flow regime on the river has created the need for bridges where wet crossings no longer can be used.

32. Contrary to Mr. Richert's assertions, the Commission did not ignore ranching operations and agricultural uses of the Skokomish Farms property. Rather, we considered Mr. Richert's arguments and filings in some detail, but found that the bridges were no longer warranted because of changed circumstances. Specifically, the federal and state resource agencies no longer believed that bridges were necessary to protect aquatic resources and water quality; Mr. Richert and Tacoma had been unable to agree on the design and location of a bridge; it appeared that the simple structure that the Commission had originally envisioned would not meet Washington state requirements, and a bridge meeting those requirements would be prohibitively expensive; and Mr. Richert had sold his property, and his interest as manager of Skokomish Farms was not sufficient to allow him to assert the interests of the new owners. Although our review of the Skokomish Farms website indicated the possibility of future residential use of some parts of the property, it also made clear that much of the property would continue to be used for agricultural purposes. Moreover, the new owner, Land Northwest LLC, provided similar information to the Commission about its plans for the property and argued that most of the land would continue to be used for raising livestock and growing crops.<sup>43</sup> As a result, our consideration of information about possible future residential use was not improper, and including or omitting it would not have influenced our decision. We found that the bridges are not needed to protect water quality and aquatic resources, and would be solely for the benefit of the new owners. Therefore, it would not be appropriate to require that Tacoma provide funding for the design, construction, and maintenance of bridges on the Skokomish Farms property.

33. Mr. Richert takes issue with the Commission's statements in the order on remand that, because of the increased flows, use of the wet crossing would likely diminish, that any use of the wet crossing would need to be in compliance with federal and state law, and that if using the wet crossings is unsafe, Mr. Richert and Skokomish Farms should

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<sup>43</sup> See Letter from Alann Krivor, Skokomish Farms, Inc., to Kimberly Bose, FERC (filed Feb. 24, 2009).

discontinue using them. Mr. Richert argues that these are “assertions, not conclusions and they are disingenuous in the extreme.”<sup>44</sup>

34. Mr. Richert overlooks the fact that we made these statements in connection with our finding that the bridges were not necessary to protect aquatic resources and water quality. Although the bridges were initially recommended for those purposes by the Washington Department of Fish and Wildlife and the U.S. Fish and Wildlife Service, those agencies later reconsidered the matter and determined that the bridges were not needed. We agreed, and responded to Mr. Richert’s arguments that bridges were needed for safety because use of the wet crossings was dangerous. Finding no issue of public safety, we observed that if using the wet crossings is unsafe, Mr. Richert and Skokomish Farms should discontinue using them. We also responded to Mr. Richert’s assertion that bridges were needed because his trucks and equipment might discharge oils and other pollutants into the North Fork Skokomish River. We observed that Mr. Richert and Skokomish Farms are responsible for ensuring that their actions are in compliance with federal and state environmental laws, and concluded that it would not be appropriate to require Tacoma to fund bridges simply to facilitate a private landowner’s compliance with those laws.

35. Mr. Richert also argues that the Commission erred in reversing its earlier determination that the bridges would protect water quality and aquatic resources, because it was based on an assumption of the resource agencies that ranching and farming operations would cease to exist and the wet crossings would not be necessary or their use would diminish. This is incorrect. The Commission initially accepted the agencies’ recommendations, made pursuant to FPA section 10(j), that the bridges were needed to protect aquatic resources and water quality. However, the Commission suggested in its 1999 decision on rehearing of the 1998 license that the bridge requirement might be removed if the agencies found that they were not needed for those purposes. In support of the settlement agreement, the agencies determined that bridges were not needed to protect water quality and aquatic resources based on the proposed flow regime and the anticipated lack of use of the wet crossing. Once the agencies withdrew their section 10(j) recommendations, we agreed that, because of increased flows in the river, use of the wet crossings would likely diminish, and any environmental effects of their continued use would not likely be significant. As a result, we had insufficient justification for continuing the bridge requirement, regardless of whether the property would continue to be used for ranching or agriculture, or some other purpose.

36. Mr. Richert maintains that the Commission erred in finding that an alternative route owned by others is a feasible alternative to the two bridges, based on Tacoma’s bare assertions that access agreements could be obtained. This argument is not correct.

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<sup>44</sup> Request for Rehearing at 25.

Although we considered Tacoma's arguments concerning the alternative route, we also considered Mr. Richert's arguments that use of this route was not feasible, and access might not be provided. We made no findings concerning the feasibility of using this alternate route. Instead, we found that although bridges might facilitate farming on the western side of the Skokomish Farms property, this would not provide a sufficient basis for including a provision in the license to require that they be built.

### **C. Increased Flows in the North Fork Skokomish River**

37. Mr. Richert argues that the flow regimes required in the amended license for the Cushman Project will adversely affect the river corridor and surrounding properties by heightening the groundwater table and increasing the risk of flooding in the Skokomish River Valley. He maintains that these flows are not supported by substantial evidence, and that there have been "no projections of impacts, no studies, and no ordered mitigation measures" to protect the ranchers' properties.<sup>45</sup> Mr. Richert argues that the Commission erred in accepting these flows "without any evaluation of the impacts to the way of life of the Ranchers and the imminent destruction of their lands, livelihood and their ranching heritage by the adopted flow regimes."<sup>46</sup> He also maintains that the Commission erred in accepting that these flows "would not adversely affect the river corridor, surrounding properties and heighten the groundwater table."<sup>47</sup>

38. In the order on remand, we found that the increased minimum flows released into the North Fork from the Cushman Project are not expected to change the surrounding groundwater level in any significant way.<sup>48</sup> We also found that the measures included in the amended license are expected to reduce sediment in the mainstem Skokomish River and, over time, decrease the frequency of flood events and their associated effects.<sup>49</sup>

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<sup>45</sup> Request for Rehearing at 3.

<sup>46</sup> *Id.* at 4-5.

<sup>47</sup> *Id.* at 5. Many of Mr. Richert's contentions concerning these flows are unsupported assertions included in the "Statement of Errors" and "Statement of Issues" sections of his rehearing request, but not further developed in the "Argument" section. As a result, he has failed to properly raise these issues. Moreover, it is difficult to understand and respond to his arguments.

<sup>48</sup> See *Tacoma*, 132 FERC ¶ 61,037 at P 132-143. In the proceeding on interim conditions, the settlement judge found no basis to support the claim that increasing North Fork flows to 240 cfs would raise the water table on the Skokomish Farms property. See *Tacoma*, 105 FERC ¶ 63,049 at 65,251 (2003).

<sup>49</sup> See *Tacoma*, 132 FERC ¶ 61,037 at P 134-143.

Moreover, as discussed in more detail below, Mr. Richert's argument ignores the fact that these flows are not significantly different from those required in the 1998 license, as amended in 2004 to include conditions of the biological opinions. In addition, they are within the range of flows that were included in Interior's section 4(e) conditions filed in 1997. As a result, the record in support of the 1998 license, as amended, including the extensive administrative record in support of Interior's section 4(e) conditions,<sup>50</sup> is sufficient to support the revised flow regimes that we approved in our July 15, 2010 Order.

39. Article 407 of the amended license includes three types of flows. Component 1 flows are instantaneous minimum flows released from an annual water budget, and are composed of minimum base flows and seasonally adjusted flows to enhance aquatic habitat and fish spawning in the North Fork Skokomish River. Component 2 flows are periods of increased flows to simulate large storms or natural floods on the North Fork, on a somewhat smaller scale than would otherwise naturally occur, to promote channel formation in the lower North Fork. Component 3 flows are flushing flows designed to transport sediment in the mainstem Skokomish River during natural high flow events.

40. The 1998 license required Tacoma to release a continuous minimum flow of 240 cfs or inflow, whichever is less. Component 1 flows in the amended license are now in two parts, based on an annual water budget of 160,000 acre feet. Tacoma must release the first 115,835 acre-feet of the annual water budget as an instantaneous minimum flow that varies from 100 cfs to 180 cfs, depending on the month. Tacoma must release the remaining 44,165 acre-feet according to a schedule to be determined each year in consultation with the Fisheries and Habitat Committee established pursuant to the settlement agreement and Article 432 of the license.<sup>51</sup> If the Committee is unable to reach consensus regarding these flows, Tacoma must release them according to a

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<sup>50</sup> See, e.g., Letter from Willie R. Taylor, Interior, to Lois Cashell, FERC, transmitting Interior's final section 4(e) conditions, with references and attachments (filed Aug. 4, 1997). See also Interior's filing of May 11, 1998, transmitting scientific, technical, and other materials used in developing its section 4(e) conditions.

<sup>51</sup> Appendix 3 of the settlement agreement provides that the Fisheries and Habitat Committee shall be comprised of the following members: Tacoma, NMFS, FWS, BIA, Forest Service, Washington DFW, Washington Ecology, and the Tribe. It also sets forth provisions for committee meetings, deliberations, and dispute resolution. Article 432 of the license requires Tacoma to establish and convene the committee for the purpose of consulting with the licensee as provide in specific license articles and Appendix 3 of the settlement agreement. It also provides that, in addition to the entities identified in the settlement agreement, Tacoma shall invite the National Park Service to participate on the committee.

schedule for default minimum flow releases that, when added to the other scheduled minimum flows, yields a total instantaneous flow release that ranges from 200 cfs to 240 cfs. Thus, these flows are anticipated to be at or below the 240 cfs minimum flow required in the 1998 license and are supported not only by the analysis in the final EIS but also the record of the 2003 hearing on interim measures to protect threatened fish species, as well as the administrative record in support of Interior's section 4(e) conditions.

41. Similarly, the requirements of the 1998 license provided the framework for the release and study of the effectiveness of Component 2 and 3 flows in Article 407 of the amended license, as well as Tacoma's participation in regional efforts to enhance the channel conveyance capacity of the mainstem Skokomish River in Article 403 of the amended license. The 1998 license required both a plan to enhance the channel conveyance capacity of the mainstem Skokomish River (in Article 403) and a study of the effectiveness of the new flow releases down the North Fork, including flushing flows, in maintaining an enlarged mainstem channel conveyance capacity (in Article 404). In its order on rehearing of the 1998 license, the Commission recognized that the mainstem had "become increasingly susceptible to overflowing its banks due to aggradation—the decline in a river's carrying capacity due to the deposition of sediment."<sup>52</sup> The Commission found that the aggradation in the mainstem was chiefly attributable to the South Fork, and the two Cushman Project dams had "served to prevent the North Fork from contributing to the flood waters," but concluded that "greater net flood control benefits would have been obtained absent the project's diversion of North Fork flows, since the undiverted flows would have contributed to the flushing of sediment deposits in the mainstem."<sup>53</sup> The Commission therefore determined that Tacoma should "provide some measure of assistance in the efforts to reduce or eliminate flooding along the mainstem."<sup>54</sup>

42. To that end, Article 403 of the 1998 license required Tacoma to develop and file a plan, in consultation with Mason County, pertinent agencies, and the Tribe, to identify measures needed to enhance the channel conveyance capacity of the mainstem Skokomish River to reduce the risks of flooding, and to provide measures for implementing the plan, including the licensee's level of contribution to the enhancement measures. Among other things, the plan was to include the release of up to 25,000 acre-feet of water per year, to achieve mainstem flows of 2,500 cfs for five continuous days or some other approved rate each year for five years. In response to Interior's argument that mainstem flows of at least 5,000 cfs would be needed, even if only for two or three days a

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<sup>52</sup> *City of Tacoma, Washington*, 86 FERC ¶ 61,311 at 62,088 (1999).

<sup>53</sup> *Id.* at 62,090.

<sup>54</sup> *Id.*

year, the Commission clarified that the plan could provide for flushing flows of 5,000 cfs per day for fewer than five days.<sup>55</sup>

43. In the amended license, Article 407 includes Component 2 flows for channel formation and supporting aquatic habitat in the North Fork that simulate freshets, and Component 3 flows for sediment transport in the mainstem Skokomish River that are intended to support the mainstem's natural capacity to move sediments downstream following significant weather events. These flows are all within the range of flows originally specified for the plan required in Article 403 of the 1998 license. Specifically, Component 2 flows are 500, 750, or 1,000 cfs, and are triggered whenever daily average flow at the North Fork Staircase Rapids gauge exceeds 3,000, 4,000, or 5,000 cfs, respectively. Component 3 flows are up to 2,200 cfs for 48 consecutive hours whenever the daily average flow at the Skokomish River Potlatch gauge exceeds 9,800 cfs, or 15 percent above flood stage, whichever is greater, between October 1 and February 15 of each year. The purpose of these flows is to improve sediment transport in the mainstem by extending the duration of high mainstem flow events at slightly less than bank-full capacity. These requirements are similar to the plan and study required in the 1998 license, and use flows within the range of flows originally contemplated for channel formation and sediment transport. As a result, they are supported by the record of the relicensing proceeding, including the administrative record in support of Interior's section 4(e) conditions. Mr. Richert's argument that the flow regimes required in Article 407 of the amended license are not supported by substantial evidence is not correct.

44. As noted, Article 403 of the 1998 license also required Tacoma to support measures to enhance the mainstem channel conveyance capacity. Amended Article 403 continues this obligation, but ties it to the licensee's share of funding the Army Corps of Engineers' Skokomish River Basin Ecosystem Restoration and Flood Damage Reduction General Investigation (General Investigation). In addition, if Congress does not appropriate sufficient funds to implement measures needed to address the mainstem channel restoration through the General Investigation, Tacoma is required to develop a mainstem channel restoration plan to identify, prioritize, and implement appropriate measures. Thus, this amended article is also supported by the existing record of the relicensing proceeding, and represents a reasonable approach to addressing the issues pertaining to flooding and channel conveyance capacity. Mr. Richert's argument to the contrary is without merit.

45. Mr. Richert argues that the Commission simply accepted the flow regimes set out in Article 407 without any analysis of the flooding and erosion that will occur due to the increased flows. He maintains that this is contrary to the Commission's settlement policy, which states that it would not be sufficient to ask the Commission to set a

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<sup>55</sup> *Id.* at 62,089-90.

particular minimum instream flow simply because the parties have compromised on that number, but rather that the parties would need to provide a scientific explanation, supported by facts on the record, of how the flows would meet the needs of affected resources and are consistent with the comprehensive development of the waterway. He adds that there has been no groundwater monitoring or modeling of the effects of the proposed flows.

46. As discussed above, the flows proposed in the settlement agreement and included in the amended license are similar to those included in the 1998 license, and are supported by the record in the relicensing proceeding. The fact that the parties to the settlement agreed to these flows does not call into question the evidentiary basis in support of them. In addition, the Commission is not required to conduct groundwater monitoring or prepare detailed flow modeling studies before it may prescribe minimum flows and other conditions that will be included in a hydropower license. As long as the conditions are supported by substantial evidence, the Commission may impose them, and can require post-licensing monitoring and studies of their effectiveness, if appropriate.

47. Mr. Richert argues that there is no scientific basis, such as flowage modeling, to prove that the “mimicking” (channel formation) flows will provide any hydrologic or morphological benefits. He further maintains that there is no scientific basis, such as sediment transport modeling, to prove that the “flushing” (sediment transport) flows “will indeed move sediment, reduce the aggradation in the mainstem and do so within a time frame that is reasonably beneficial during the term of the license.”<sup>56</sup> He contends that there is no basis for the statement in the final EIS that: “Increasing the length of time that near flood flows occur could help maintain and enhance the mainstem’s conveyance capacity.”<sup>57</sup> In support, he claims that the only quantitative assessment of this assertion is referenced in a footnote in the final EIS, which states that a 1996 study by Simons & Associates found that very large flows of around 200,000 cfs would be required to reverse aggradation under current sediment loads and channel conditions.<sup>58</sup>

48. Mr. Richert overlooks the fact that elsewhere in the final EIS, Commission staff cited that same study in support of its finding that under Alternative 2 (ceasing out-of-basin diversions), “sediment transport capacity would be increased, suggesting that the channel would deepen and substrates coarsen.”<sup>59</sup> Under this alternative, the average flow in the North Fork downstream of Cushman Dam No. 2 would increase to about 2,900 cfs,

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<sup>56</sup> Request for Rehearing at 26.

<sup>57</sup> Final EIS at 4-6.

<sup>58</sup> *Id.* at 4-6, n. 2.

<sup>59</sup> Final EIS at 4-4.

and flows would be curtailed when mainstem flow reaches or exceeds 5,000 cfs. The EIS states: “Simons & Associates (1996) estimates that this alternative would about double existing bedload sediment transport rates.”<sup>60</sup> In addition, Interior filed information in 1997 (after publication of the EIS) in support of its final section 4(e) conditions, indicating that increased flow releases from the Cushman Project of approximately 2,950 cfs would be effective in modifying the bankfull flow capacity of the North Fork, and that the long term average bedload sediment transport in the mainstem could be increased to 44,000 tons per year if the mainstem bankfull limitation on maximum releases to the North Fork is increased to 13,000 cfs.<sup>61</sup> As noted, Interior’s revised section 4(e) conditions filed in support of the settlement agreement are similar, and the record in support of the earlier conditions also supports the revised conditions.

49. Moreover, Mr. Richert’s argument is contrary to fundamental principles of river system dynamics and the relationship between discharge or flow and bedload movement. As discharge increases, so does the sediment transport rate.<sup>62</sup> Bedload begins to move when discharge is higher than the mean annual flow, and bedload transport typically becomes significant at flows approaching bankfull stage.<sup>63</sup> Large flood events are known to result in significant erosion and changes to a river’s course. However, the more modest flow regimes that are equivalent to near bankfull conditions transport the greatest quantity of sediment material over time.<sup>64</sup> This is due to the higher frequency of

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<sup>60</sup> *Id.*

<sup>61</sup> See Technical Memorandum from Stetson Engineers re: Hydraulic Analysis Relating to 4(e) Condition on Mainstem Flooding at 4, 6 (June 27, 1997), included as an attachment to Interior’s section 4(e) conditions (filed Aug. 4, 1997).

<sup>62</sup> See Rosgen, D., *Applied River Morphology* at 2-3 (Wildland Hydrology, Pagosa Springs, CO, 1996) (“Rosgen (1996)”); Leopold, L., *A View of the River* at 127, 203 (Harvard University Press, Cambridge, MA, 1994) (“Leopold (1994)”); Leopold, L., M.G. Wolman, and J.P. Miller, *Fluvial Processes in Geomorphology* at 80 (W.H. Freeman Co., San Francisco, CA, 1964 (“Leopold *et al.* (1964)”).

<sup>63</sup> Bankfull stage is associated with the flow that just fills the channel to the top of its banks and at a point where the water begins to overflow onto a floodplain (Rosgen (1996) at 2-3). It “corresponds to the discharge at which channel maintenance is most effective, that is, the discharge at which moving sediment, forming or removing bars, forming or changing bends and meanders, and generally doing work that results in the average morphologic characteristics of channels.” *Id.*, citing Dunne, T. and L.B. Leopold, *Water in Environmental Planning* (W.H. Freeman and Co., San Francisco, CA, 1978).

<sup>64</sup> See Rosgen (1996) at 2-3, Leopold (1994) at 127.

occurrence of these events. The bankfull discharge is associated with a temporary high flow, which, on average, has a recurrence interval of 1.5 years.<sup>65</sup>

50. In the final EIS, Commission staff indicated that overbank flows and flooding can occur, depending on location on the mainstem Skokomish River, at flows of 4,650 cfs or more.<sup>66</sup> Upstream of the U.S. 101 bridge, at approximately river mile (RM) 5, the river can contain flows between 8,000 to 9,000 cfs without flooding.<sup>67</sup> The estimated flood discharge for the Skokomish River at the U.S. Geological Survey (USGS) Gage at the U.S. 101 bridge (USGS Gage No. 12061500), with a recurrence interval of 1.5 years (the bankfull discharge) is about 11,000 cfs.<sup>68</sup> In comparison, the mean annual flows for the mainstem and South Fork Skokomish Rivers are 1,220 and 737 cfs, respectively.<sup>69</sup> Therefore, based on the basic principles of river hydrology described above, sediment transport in the upper mainstem Skokomish River is expected to occur at flows greater than about 1,200 cfs, with the most effective flows in the range of 10,000 to 11,000 cfs.<sup>70</sup>

51. Based on historical flow records, flows at the Staircase Rapids gage are expected to exceed the Component 2 flow thresholds less than 3 percent of the time, mostly during the November through February time frame. Similarly, based on historical flow records, flows at the mainstem Skokomish River gage exceed the Component 3 threshold about 1 percent of the time, again mostly during November through February. This percentage is

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<sup>65</sup> See Rosgen (1996) at 2-3.

<sup>66</sup> See Final EIS at 3-12.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3-13. At the U.S. 101 bridge gage, the peak discharge with a recurrence interval of 1 year is 6,619 cfs, and the peak discharge with a recurrence interval of 2 years is 15,579 cfs. Data obtained from the USGS website for the gage at that location indicates that the peak discharge with a recurrence interval of 2 years is 17,300 cfs. See [http://streamstatsags.cr.usgs.gov/gisimg/Reports/FlowStatsReport544161\\_201153122117.htm?cmd+ComputeFlows](http://streamstatsags.cr.usgs.gov/gisimg/Reports/FlowStatsReport544161_201153122117.htm?cmd+ComputeFlows) (accessed May 2, 2011).

<sup>69</sup> See <http://nwis.waterdata.usgs.gov/wa/nwis> (accessed May 2, 2011). The period of record for this gage, located just north of the U.S. 101 bridge on the mainstem Skokomish River, is 1943 through 2009. The period of record for USGS Gage No. 12060500, located on the South Fork just upstream of its confluence with the North Fork, is 1931 to 2010.

<sup>70</sup> The annual peak discharge recorded at the U.S. 101 bridge gage (No. 12061500) is typically in excess of 10,000 cfs, but is generally less than 25,000 cfs. See <http://nwis.waterdata.usgs.gov/wa/nwis/> (accessed May 2, 2011).

expected to increase with the additional flows provided by Component 2 flow releases under the amended license. Together, the Component 2 and 3 flows are designed to replicate high flow events in the North Fork watershed, and to supplement the high flows into the mainstem from the South Fork. These additional flows from the North Fork are expected to provide the balance of flows needed to achieve bankfull or near bankfull conditions on the mainstem Skokomish River on a more consistent basis, which will help move sediment from the system.

52. The issues of flow and sediment transport are not new, and mechanisms to address them are being used elsewhere in California and the Pacific Northwest.<sup>71</sup> The basic approach is to increase the amount, duration, and frequency of regulated hydropower releases to help move sediment deposits. Although there is no absolute guarantee that the flows required in Article 407 will move sufficient quantities of excess sediment from the system and ultimately enhance the channel conveyance capacity of the mainstem, flow manipulation has been used elsewhere with some success, and the flow regimes required in the amended license are based on sound science. In addition, the license includes provisions for addressing flows in the North Fork and mainstem Skokomish Rivers on an ongoing basis. If it appears that adjustments may be needed during the license term, the Commission can use its reserved authority to consider them.<sup>72</sup>

53. Mr. Richert argues that the National Environmental Policy Act (NEPA) requires the Commission to take a “hard look” at the reasonably foreseeable impacts of the license terms and conditions, and that “no such analysis has occurred here with regard to

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<sup>71</sup> See, e.g., the Upper American River Project No. 2101, Chili Bar Project No. 2155, and the Big Creek 1 & 2 Project No. 2175.

<sup>72</sup> We note that, under Article 407, Tacoma may delay the release of Component 2 flows by up to 7 days after the initial exceedance at the Staircase Rapids gage if necessary to avoid flood impacts. On January 10, 2011, Tacoma filed its Operational and Flow Monitoring Plan (required under Article 406 of the amended license). Commission staff is reviewing the plan. Among other things, Tacoma’s plan suggests (at 9) that Component 2 flow releases may require longer than 7 days’ delay to avoid flood impacts, and also indicates (at 19) that Tacoma and Interior’s BIA did not reach agreement regarding Component 3 flows and changes in the National Weather Service’s definition of flood stage and the USGS definition of what constitutes bankfull flow. See Letter from Patrick McCarty, Tacoma, to Kimberly Bose, FERC, attaching Tacoma’s plan (filed Jan. 10, 2011). If additional procedures are needed to address and resolve these issues, the Commission can provide for them in a post-licensing proceeding.

ranching interests.”<sup>73</sup> As an example, he cites a case in which the flow of the Black River was regulated to ensure that levels would be lower during the agricultural season than during the non-agricultural season, and asserts that in this case, “the Commission has been blind to, and failed to provide for, any similar accommodations” in its order for him or the ranchers.<sup>74</sup>

54. Contrary to Mr. Richert’s assertion, the final EIS recognizes that some lands in the Skokomish River basin are managed for agricultural use.<sup>75</sup> It also examines the impacts to such agricultural use of Tacoma’s relicensing proposal and several alternatives.<sup>76</sup> Before filing his rehearing request, Mr. Richert never raised the issue of whether it might be appropriate to consider altering minimum flows during the growing season to accommodate agriculture. It is too late to do so now. In any event, there is no basis for Mr. Richert’s assertion that the EIS ignored agricultural interests.<sup>77</sup>

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<sup>73</sup> Request for Rehearing at 27. He also maintains, without elaboration, that there is no substantial evidence that it is proper to release flows of 180 cfs during the spring planting season in March, April, and May, 170 cfs in June, 100 cfs in July and August, and 170 cfs in September for the duration of the license. *Id.* at 13. Because Mr. Richert did not develop this argument, we find it difficult to address. In any event, these flows are supported by the record and are consistent with Interior’s revised section 4(e) conditions, the revised biological opinions of FWS and NMFS, and the conditions of Washington Ecology’s water quality certification for the new powerhouse.

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g.*, Final EIS at 3-36, 3-42 to 3-45.

<sup>76</sup> *Id.* at 4-101, 4-104, 4-105, and 4-107. Among other things, the EIS states that, with respect to the Skokomish Farms property, Tacoma’s proposal “increasing the minimum flow to 100 cfs would require bridge construction or drastic alterations in farm practices.” *Id.* at 4-1-1. It also states that the alternative of ceasing out-of-basin diversions “could disrupt existing land uses such as ranching, farming, and residences in the area.” *Id.* at 4-1-4.

<sup>77</sup> Mr. Richert also maintains that the flow regimes in Article 407 are not supported by substantial evidence because the information relied on in the EIS is more than 30 years old. In support, he cites a 1988 study referenced in EIS that he asserts had no cited references more recent than 1985. *See* Request for Rehearing at 9, 27. This is incorrect; the EIS was issued in 1996 (15 years ago), and the 1985 reference date itself is not more than 26 years old. In any event, Mr. Richert overlooks the substantial evidence in support of these flows that Interior filed (in 1997 and 1998) in connection with its section 4(e) conditions. *See* note 45, *supra*.

55. Mr. Richert argues that a hearing is required to determine whether the flows for channel formation and sediment transport will accomplish the hydrologic and morphologic benefits accepted in the order on remand. He maintains that these “are not legal or policy issues but clearly factual issues upon which the Commission should grant a hearing.”<sup>78</sup> This argument ignores the fact that the Commission uses notice-and-comment procedures to conduct its hydropower licensing and amendment proceedings,<sup>79</sup> and an evidentiary hearing is not required unless there are genuine issues of material fact in dispute.<sup>80</sup> Moreover, the proponent bears the burden of tendering evidence suggesting the need for an adjudicatory hearing on particular material questions of fact, and mere assertions of error or inadequacies and other criticisms of the Commission’s decision-making process will not suffice.<sup>81</sup> In this case, the record supports these flows, and Mr. Richert has not demonstrated that there is any need for a trial-type hearing.

#### **D. The Risk of Avulsion**

56. Mr. Richert argues that in 2002, the North Fork Skokomish River avulsed; that is, the river left its channel and started a new channel on the Richert Ranch property. He maintains that, because of decades of aggradation (the build-up of gravel) in the river, the entire Skokomish River Valley is at serious risk of avulsion. He states that this concern prompted Mason County to impose a moratorium on building in the Skokomish River Valley and to commission an avulsion study, which resulted in a 2007 GeoEngineers

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<sup>78</sup> Request for Rehearing at 28.

<sup>79</sup> See 18 C.F.R. §§ 4.34(a) and (b) (2010).

<sup>80</sup> See *Sierra Ass’n for Environment v. FERC*, 744 F.2d 661, 663 (9<sup>th</sup> Cir. 1984).

<sup>81</sup> *Id.* at 663-64. In that regard, Mr. Richert also asserts that a factual hearing is required to address the effects of flows resulting from removal of the McTaggart Creek diversion dam. Request for Rehearing at 13. This was a requirement of the 1998 license, and Tacoma completed the work on October 15, 2009. As discussed in the order on remand, our review suggested that removal of the diversion dam would not appreciably affect the total amount of flow that McTaggart Creek adds to the lower North Fork of the Skokomish River. See *Tacoma*, 132 FERC ¶ 61,037 at P 130. Mr. Richert provides an attachment to his rehearing request, suggesting that the Skokomish Farms property experienced high storm flows in 2009 and that the McTaggart Creek basin contributed up to 22 percent of these flows (see Attachment 3). However, he provides no argument or evidence to show that there is any genuine material fact in dispute that would require a hearing regarding these flows.

report that Mr. Richert included with his rehearing request.<sup>82</sup> He maintains that the risk of avulsion was not addressed in the final EIS, and argues that the Commission should grant rehearing pursuant to section 385.713(c)(3) of its rules, because the 2007 GeoEngineers study was never provided to the Commission.

57. There is some uncertainty regarding when this avulsion actually took place on the Skokomish Farms property. Although Mr. Richert states that it occurred in 2002, the only reference to an avulsion on the North Fork in the GeoEngineers report states that it occurred in 2004.<sup>83</sup> A letter from Mr. Richert's counsel dated January 12, 2010, states that the North Fork changed course "approximately four years ago."<sup>84</sup> Regardless of when the avulsion occurred, it is clear that it could not have been caused by increased flows in the North Fork from the Cushman Project, because Tacoma did not begin releasing 240 cfs until March of 2008. Rather, the letter states that the avulsion occurred during a "heavy flood"<sup>85</sup> and the report states that it was "apparently initiated by LWD [large woody debris] that floated into the North Fork from the South Fork during a high flow event" that lodged on the streambed and "deflected North Fork flow through a breach in the left bank levee."<sup>86</sup>

58. The final EIS was completed in 1996, and the license order was issued in 1998. The GeoEngineers study was not completed until 2007, and the Commission did not consider it in the July 15, 2010 order on remand because no party sought to introduce it until Mr. Richert attached it to his rehearing request. Section 385.713(c)(3) does not

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<sup>82</sup> See *Channel Migration and Avulsion Potential Analyses, Skokomish River Valley, Mason County, Washington*, prepared by GeoEngineers, Inc. (Feb. 9, 2007) ("GeoEngineers Report"), included as Attachment 2 to Mr. Richert's Rehearing Request.

<sup>83</sup> *Id.* at 11.

<sup>84</sup> See Letter from Karen A. Willie to Kimberly D. Bose, FERC, at 4 (filed Jan. 13, 2010).

<sup>85</sup> *Id.*

<sup>86</sup> See GeoEngineers Report at 11. Concerning this avulsion, Mr. Richert also asserts, without elaboration, that "the mainstem has been going dry from the old mouth to the new mouth for the last eight years," and that "[d]uring the King Salmon runs, the fish cannot reach the South Fork at all." Request for rehearing at 3. This argument is unsupported and does not appear plausible. Although the avulsion created a new confluence of the North Fork with the mainstem, the South Fork would still flow into the mainstem. During conditions of low flow, fish passage in the mainstem might be impeded. As discussed above, however, this effect could not be attributed to the Cushman Project.

require the Commission to grant rehearing in these circumstances. Rather, it simply provides that a party must set forth the matters relied upon in support of its rehearing request, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order. In this case, Mr. Richert could have (and should have) provided this study much earlier, which would have allowed the Commission to consider it in its July 15, 2010 Order. Parties may not wait until an order on the merits is issued before seeking to introduce new issues and evidence in a proceeding.<sup>87</sup>

59. Mr. Richert argues that the final EIS is deficient, because it did not discuss avulsion or stream channel braiding and “its dire consequences for the floodplain’s population and infrastructure.”<sup>88</sup> In fact, the final EIS addressed the risk of avulsion in connection with an alternative that would have required Tacoma to cease all out-of-basin diversions, as had been recommended at the time by the Tribe and some federal and state resource agencies.<sup>89</sup> Among other things, the EIS found that the “initial response in the confined portion of the lower North Fork would be channel deepening, braiding, and substrate coarsening as the higher flows created new channels within the riparian corridor to convey the increased flow.”<sup>90</sup> Creating new channels is exactly what avulsion is. The EIS also stated: “Unconfined portions of the lower North Fork within the alluvial valley near the mainstem could adjust to the increased flows by reclaiming old meander channels (most likely) or by cutting a new channel (less likely) to increase the meander length to accommodate the higher dominant discharge. This effect would move a large quantity of alluvial sediments and soils and could disrupt existing land uses in the area.”<sup>91</sup> The EIS expressly acknowledged that the increased flows associated with this alternative could disrupt “existing land uses such as ranching, farming, and residences in

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<sup>87</sup> See, e.g., *McCallum Enterprises I, L.P.*, 126 FERC ¶ 61,127, at P 20 (2009).

<sup>88</sup> Request for Rehearing at 29. Mr. Richert also states that Tacoma identified the possibility of avulsion more than ten years ago, but then ignored it. In support, Mr. Richert includes statements and citations that appear to have been taken from a request for rehearing that Tacoma filed in 2004. Both the rehearing request and the referenced 1997 Report of Simons & Associates came after the November 1996 publication of the final EIS. Although Mr. Richert also includes citations to some earlier documents from 1994, he makes no specific arguments regarding them. As a result, we are unable to address this argument.

<sup>89</sup> See Final EIS at 2-1, 2-11.

<sup>90</sup> *Id.* at 4-3.

<sup>91</sup> *Id.* at 4-4.

the area.”<sup>92</sup> Thus, Mr. Richert’s argument that the EIS did not address avulsion or stream channel braiding and their consequences is incorrect.

60. In any event, our review of the GeoEngineers report suggests that, although the lower Skokomish River is well known for its sensitivity to flooding throughout the Skokomish Valley, and portions of the North Fork, South Fork, and mainstem Skokomish Rivers are at risk of avulsion, the Cushman Project’s diversion of flows out of the North Fork is only one of a number of factors that have contributed to this risk. Specifically, the report mentions logging, road building, clearing of land for agriculture and livestock, and modifications of the shape and form of the Skokomish River, including dredging and realignment of the main channel, as well as the construction of dams, numerous dikes, and revetments. Thus, taking this report into account would not change our conclusions in this case, because it suggests that the risk of avulsion would likely continue to be present in these areas of the Skokomish River basin, even if flows from the Cushman Project were not increased.<sup>93</sup> Moreover, as discussed above, the Component 2 and 3 flows added to the license for channel formation in the North Fork and sediment transport in the mainstem Skokomish River are designed to move sediment out of the mouth of the North Fork and better contain South Fork flooding, which should help reduce the risk of avulsion. We therefore deny rehearing of this issue.

#### **E. Adaptive Management**

61. Mr. Richert argues that the Commission’s use of “adaptive management”<sup>94</sup> for the management of flows to improve sediment transport in the mainstem (Component 3 flows), as provided in Article 407 of the license, is “completely at odds with its definition” because the “program described to evaluate effectiveness and improve management over time bears no relation to its established meaning.”<sup>95</sup> He adds that “there is no reason to expect that the ‘management’ so proposed will achieve any of its purported outcomes,”<sup>96</sup> as they are intended to provide a basis to evaluate whether

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<sup>92</sup> *Id.* at 4-104.

<sup>93</sup> This is one reason why measures are needed to reverse aggradation (or sediment accumulation) in the river system. As discussed earlier, Tacoma’s participation in the Army Corps of Engineers’ General Investigation is an important component of the overall strategy to address this concern.

<sup>94</sup> Adaptive management is a process in which stakeholders can jointly adjust operational and mitigation measures during the term of a hydropower license, within parameters analyzed and approved by the Commission.

<sup>95</sup> Request for Rehearing at 32.

<sup>96</sup> *Id.*

changes are necessary to improve sediment transport, but any changes to the quantity of the flow release are limited to no more than a five percent increase in each five-year evaluation period, starting in year eleven.

62. Mr. Richert maintains that adaptive management requires the application of scientific principles, such as hypothesis testing, and that scientifically credible information can only be obtained if the monitoring is designed with clear hypotheses about the effects of management prescriptions that can be tested. He argues that appropriate goals and targets “should be outcomes of the effort, not a precondition; and the approach must explicitly tie stated hypotheses to the key ecological questions.”<sup>97</sup> In essence, it appears that Mr. Richert objects to the approach of monitoring “status and trends followed by responding to imposed benchmarks and goals,” rather than relying on “scientific methods to demonstrate results.”<sup>98</sup>

63. In Commission practice, adaptive management is often used as a means of making adjustments to measures required during the license term, based on information obtained from ongoing monitoring or other post-license studies. This use of adaptive management is appropriate, as long as the Commission retains its role and responsibility to give prior approval, through appropriate license amendments, for all material changes to the project and the license.<sup>99</sup> If the suggested changes are within parameters considered in the licensing proceeding and determined to be appropriate, it does not pose a problem to allow a committee to make minor modifications, with notification to the Commission.<sup>100</sup> This is the approach taken in the settlement agreement and included in Article 407 of the amended license with respect to the sediment transport flows. Contrary to Mr. Richert’s suggestion, there is nothing improper in this approach. We therefore deny rehearing of this issue.

#### **F. Washington State Riparian Law**

64. Mr. Richert argues that our order on remand violates Washington state riparian law. He maintains that the Commission erred in relying on only one line of Washington cases concerning artificial conditions on waterways, such as dams, in finding that downstream owners have no riparian rights. He argues that, under a second line of

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<sup>97</sup> *Id.* at 33.

<sup>98</sup> *Id.* at 33-34.

<sup>99</sup> *See Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act, policy statement on hydropower licensing settlements*, 116 FERC ¶ 61,270, at P 39 (2006).

<sup>100</sup> *Id.*

Washington cases, the 70 year old regime of the stream would be deemed “natural” and introducing the flow regimes in Article 407 is illegal and creates strict liability.

65. We need not consider this second line of Washington cases, because this is a matter for the Washington state courts, not the Commission. In our July 15, 2010 Order, we stated that, based on our review of the cases Tacoma had cited, it appeared that Skokomish Farms would not have a right to expect continued low flows in the river that would preserve the use of its wet crossing. However, we found it unnecessary to decide these matters of state law, because standard article 5 of Tacoma’s license requires the licensee to have or obtain all rights needed for operating the project. We noted that, as a result, if Tacoma did not already possess these rights, it would be required to obtain them, and could use the federal power of eminent domain to do so, if necessary, under section 21 of the FPA.<sup>101</sup>

66. Contrary to Mr. Richert’s assertion, the fact that the increased minimum flows required in Tacoma’s license might possibly lead to a finding that Tacoma can be held liable for damages under Washington state law does not mean that these flows should be considered unlawful. Under the FPA, the Commission has the authority to prescribe minimum flow releases from a hydroelectric project to protect fish and wildlife resources, and any inconsistent state minimum flow requirements are preempted.<sup>102</sup> Therefore, these flow requirements are valid as a matter of federal law, and any state laws concerning possible damages are not relevant to our determination of what license conditions are needed under the FPA.

67. In any event, the Commission has no authority to assess damages under the FPA. Section 10(c) of the FPA provides that licensees, and not the United States, shall be liable for all damages occasioned to the property of others by the construction, maintenance, and operation of their projects. However, this provision does not create a federal private right of action, but rather merely preserves existing state laws governing liability for damages caused by licensees.<sup>103</sup> The possibility that a licensee might be liable for

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<sup>101</sup> See 16 U.S.C. § 814 (2006).

<sup>102</sup> See *California v. FERC*, 495 U.S. 490 (1990); cf. *Pub. Util. Dist. No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994) (states can require minimum flows or other conditions to maintain designated uses of the waterway as a condition of water quality certifications issued under section 401(a)(1) of the Clean Water Act). In that regard, we note that the flows required by Article 407 of the license are also required as a condition of Washington Ecology’s water quality certification for the new powerhouse. See *Tacoma*, 132 FERC ¶ 61,037, ordering paragraph (H) and Appendix C.

<sup>103</sup> See *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 519 (9<sup>th</sup> Cir. 2005).

damages under state law does not affect the Commission's responsibility to determine what license conditions are needed to provide for the comprehensive development of the waterway in the public interest.

68. Mr. Richert also argues that the Commission erred in accepting Tacoma's "bare assertion" that it had an easement for the additional flows in 2008 and for the current heightening of the groundwater table under the 1920 case of *Tacoma v. Funk*, because that case involved the removal of flows and the lowering of the groundwater table.<sup>104</sup> Contrary to Mr. Richert's argument, we did not accept Tacoma's assertion regarding this issue. Rather, as noted earlier, we determined that there was no need for us to decide this issue, because if Tacoma does not already have sufficient rights to release the required minimum flows, it is required to obtain them under standard article 5 of its license. In addition, the adequacy of Tacoma's rights under *Tacoma v. Funk* is a matter of state law, because section 27 of the FPA provides that nothing in the FPA shall be construed as affecting or interfering with state laws concerning water rights (that is, those relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder).<sup>105</sup> We therefore deny rehearing of this issue.

The Commission orders:

(A) The Request for Rehearing filed by Mr. Gerald Richert on August 13, 2010, in this proceeding is denied.

(B) The Motion for Reconsideration filed by Ranchers of Skokomish Valley on September 13, 2010, in this proceeding is denied.

(C) The Motions to Dismiss Mr. Richert's Request for Rehearing, filed by the Skokomish Indian Tribe on August 26, 2010, and by the City of Tacoma, Washington, on August 30, 2010, in this proceeding are denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>104</sup> Request for Rehearing at 12, *citing Tacoma v. Funk*, No. 1651 (Sup. Ct. Mason County, Oct. 8, 1921).

<sup>105</sup> *See* 16 U.S.C. § 821 (2006).