

139 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 2 of Grant County,
Washington

Project No. 2114-250

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued May 17, 2012)

1. Public Utility District No. 2 of Grant County, Washington, licensee of the Priest Rapids Project No. 2114, has filed a petition for an order declaring that the Federal Power Act (FPA) preempts state and local authority with respect to fish protection measures that Grant County proposes to implement. As discussed below, we dismiss the petition as premature.

Background

2. The 1,893-megawatt Priest Rapids Project is located on the mid-Columbia River, in Grant, Yakima, Kittitas, Douglas, Benton, and Chelan Counties, Washington. The Commission issued Grant County a new license for the project in 2008.¹

3. One issue considered in the relicensing proceeding was the impact of the project on the Upper Columbia River spring-run Chinook salmon, which is listed as endangered under the Endangered Species Act.² On February 1, 2008, the National Marine Fisheries Service (NMFS) filed with the Commission a biological opinion addressing the impacts of relicensing the Priest Rapids Project on listed species, including spring-run Chinook. The biological opinion included reasonable and prudent measures, along with terms and conditions, to be included in the license. The terms and conditions, which are reproduced in Appendix C to the license, contain two conditions relevant here. Condition 1.26

¹ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ 61,049 (2008).

² *See id.* P 12 and n.11.

requires Grant County to develop a plan to rear and release 600,000 yearling Upper Columbia River spring-run Chinook. Condition 1.27 requires Grant County to implement the White River spring-run Chinook salmon program,³ which “shall include, but is not limited to, the development of rearing (may be outside of the White River Basin) and acclimation (in the White River Basin) facilities.”⁴

4. As part of its compliance with these and other license requirements, Grant County filed on June 28, 2010, a proposed hatchery and genetic management plan for the White River Basin.⁵ The plan did not specify or ask Commission approval of a site for an acclimation facility.

5. On February 7, 2012, Commission staff issued an order modifying and approving the various hatchery and genetic management plans, including that for the White River.⁶ As to acclimation in the White River Basin, the order made only one reference to “White River acclimation sites which are a component of [Grant County’s] overall spring Chinook salmon mitigation obligation for the operation of the project.”⁷

6. On March 21, 2012, Grant County filed a petition for a declaratory order. Grant County stated that it had purchased land on which it could locate the White River acclimation site.⁸ The county explained that it had requested seven permits and variances from Chelan County, Washington, in order to construct the acclimation facility in compliance with local and state law, but a Chelan County hearing examiner had denied all seven permits and variances, based on the conclusion that Chelan County’s shoreline

³ The White River is a tributary to the Wenatchee River, which itself flows into the mid-Columbia. The White River spring-run Chinook salmon program was developed by Grant County and other stakeholders.

⁴ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC at 61,376. An acclimation facility is a pond or other aquatic area in which young salmon can be placed such that they ultimately will be imprinted to return to that area to spawn.

⁵ Grant County also filed similar plans for other basins.

⁶ *Grant County PUD*, 138 FERC ¶ 62,085 (2012). The White River plan was modified only to the extent of adding a requirement that the licensee file annual progress reports, beginning in 2016. *See id.* PP 13-14.

⁷ *Id.* P 4.

⁸ Petition for Declaratory Order at 4.

master program precludes dredging and filling, which would be necessary to develop the acclimation facility, at the proposed site.⁹

7. Grant County argues that the FPA “occupies the field” with respect to activities under its license and asks the Commission to declare that the FPA preempts efforts by Chelan County or the State of Washington to regulate or prohibit the construction of the acclimation facility.¹⁰

8. On April 20, 2012, Chelan County, the Washington State Department of Ecology, and the Washington State Department of Fish and Wildlife all filed answers to Grant County’s petition.¹¹ The three entities made similar arguments, asking the Commission to deny the petition, contending in essence that Chelan County’s state master program is an important part of the state’s efforts to protect its natural resources, and that, after the county completes ongoing revisions to the program, there will be a better chance that the acclimation facility can be approved, thus avoiding any potential conflict.

Discussion

9. The courts have made clear that Congress, in passing the FPA, established “a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so”¹² The FPA “occupies the field,” such that conflicting or duplicative state regulation is improper.¹³

10. At the same time, we have explained that preemption does not mean that we may not require licensees to comply with local requirements that do not conflict with a licensee’s ability to carry out the Commission’s orders.¹⁴ “We prefer for our licensees to be good citizens of the communities in which projects are located, and thus to comply with state and local requirements, where possible.”¹⁵ Nevertheless, we will conclude that

⁹ *Id.* at 6-7.

¹⁰ *Id.* at 9-13.

¹¹ Chelan County also filed a motion to intervene.

¹² *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).

¹³ *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993). *See also California v. FERC*, 495 U.S. 490 (1990).

¹⁴ *PacifiCorp*, 115 FERC ¶ 61,194, at P 9 (2006).

¹⁵ *Id.*

such requirements are preempted where they make compliance with our orders impossible or unduly difficult.¹⁶

11. The initial question here is whether Chelan County's actions conflict with a Commission order. We conclude that they do not, because we have not considered or authorized construction of the acclimation facility.

12. Grant County asserts that its June 28, 2010 filing "included numerous references to the fact that an acclimation facility would be constructed and that it would be located on the 'McComas property [the proposed site] Therefore, plans for construction of the [facility] on this particular site became a requirement of the New License under the approved [hatchery and genetic management plan]."¹⁷

13. We disagree. In the June 28, 2010 filing, while Grant County did discuss the acclimation facility and the McComas site in general terms, it did not provide any details regarding the facility and did not ask the Commission to approve its location at the McComas site. Instead, the licensee speaks of the acclimation facility in indefinite terms.¹⁸

14. Consistent with the application, Commission staff's February 7, 2012 order generally approved Grant County's White River hatchery and genetic management plan, but did not authorize the design or placement of the acclimation facility or identify any related environmental impacts or mitigation measures. Accordingly, the Commission has not authorized the licensee to construct an acclimation facility at any particular site, and any actions that Chelan County has taken to date thus do not conflict with any Commission order or other requirements.

15. Before the question of federal preemption is ripe, Grant County must file an amendment application, setting forth details regarding the nature and placement of the

¹⁶ *Id.*

¹⁷ Petition for Declaratory Order at 6.

¹⁸ See, e.g., *White River Habitat and Genetic Management Plan* at 2 (stating that "a release location for the White River has been identified for acclimation"); *id.* at 9 (noting that "[s]ite evaluations are being conducted and conceptual designs are being developed for a long-term acclimation facility" at the McComas site); *id.* (explaining that a feasibility trial is planned for the McComas site and that "[f]acilities for . . . acclimation/release have not yet been finalized"); *id.* at 57 (stating that "[a]n over-winter acclimation site is being evaluated at the McComas property"); *id.* (discussing issues that may arise "[i]f an over-winter acclimation facility is developed . . .").

acclimation facility,¹⁹ and the Commission must act on it. The Commission will do so only after it analyzes any technical and environmental issues that are raised.²⁰ Should the Commission authorize Grant County to construct an acclimation facility at the McComas site, and should Chelan County thereafter assert that Grant County must obtain local approvals before implementing our order, we may need to resolve the issues Grant County raises here. We have not yet reached that point, however. Accordingly, Grant County's petition for declaratory order is premature and we dismiss it.²¹

The Commission orders:

The petition for declaratory order filed on March 21, 2012, by Public Utility District No. 2 of Grant County, Washington is dismissed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁹ It is our understanding that Commission staff met with Grant County before the county filed its petition, and told the county that it needed to file an amendment application before the Commission could consider approving the acclimation facility.

²⁰ In fact, Grant County appears to recognize that its proposed activities may impact ESA-listed species and their critical habitat, which would require consultation before Commission authorization (*see White River Habitat and Genetic Management Plan* at 48, noting that "impacts to the critical habitat due to proposed program actions are being evaluated Potential impacts may result from water withdrawals for acclimation site operation, pond discharges entering receiving waters, and construction of facilities.").

²¹ Chelan County's prior actions on Grant County's permit and variance applications notwithstanding, it is not inevitable that there will be a conflict between state and local regulations and our actions. For example, it may be that the County will conclude that a Commission order approving the facility with appropriate mitigation measures satisfies its concerns, or the Commission could require Grant County to obtain local permits and waivers. It is to be hoped that, in the course of consultation and other discussions during the amendment process, Grant County and Chelan County will be able to resolve their differences.