

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of)
Pend Oreille County, Washington,) Docket No. D107-1-000
Sullivan Creek Hydroelectric Project) FERC No. 2225-000
)

**AMERICAN WHITEWATER'S REQUEST FOR REHEARING OF ORDER DENYING
PETITION FOR DECLARATORY ORDER THAT EXISTING LICENSE IS VOID AND
ACCEPTING PETITION THAT LICENSING IS NOT REQUIRED**

Pursuant to 18 C.F.R. § 385.713, American Whitewater (“AW”) hereby requests rehearing of the Director’s “Order Denying Petition and Declaratory Order that Existing License is Void and Accepting Petition that Licensing is Not Required (July 18, 2007), e-Library 20070718-3025.

AW challenges the Order’s conclusions that (1) the Commission does not have jurisdiction over the Project despite the fact that the Project was constructed and continues to be operated and maintained for the purpose of power generation and is located on federal lands; and (2) no further action is required on the part of the Commission or Licensee upon expiration of the existing license in 2008. These findings are inconsistent with the Federal Power Act (“FPA”), and are not supported by substantial evidence as required by the FPA and Administrative Procedures Act (“APA”). We request that the Commission vacate the Order and provide opportunity for further briefing by the parties on disputed issues of fact and law prior to issuing an order on the merits. We also request opportunity to convene a settlement conference with Public Utility District No. 1 of Pend Oreille County, Washington (“Licensee”), FERC Staff, AW and other interested parties to discuss amendment of the Declaratory Order to include appropriate procedural and substantive conditions for project surrender.

I.
PETITIONER

American Whitewater is a national non-profit 501(c)(3) river conservation organization founded in 1954. We have over 6,500 members and 100 local-based affiliate clubs, representing approximately 80,000 whitewater paddlers across the nation. Our mission is to conserve and restore America’s whitewater resources and to enhance opportunities to enjoy them safely. As a conservation-oriented paddling organization, we have an interest in the rivers throughout the Columbia River watershed, which represent a significant recreational resource for our members living throughout the region.

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American Whitewater has more than a decade of history as a stakeholder on the Sullivan Creek Project. We intervened in the proceeding for Licensee's application to amend the existing license in November 1994. We participated in the Recreation Instream Flow Evaluation for Sullivan Creek conducted by the Washington Department of Ecology on October 11-12, 1996. American Whitewater also provided comments on the Draft Environmental Impact Statement. *See e-Library no. 19980923-0299.* Our comments found that the Project was not an economic source of power, and expressed concern regarding project impacts on river recreation, regional fishery issues, and ecological function of the river. These impacts, which include habitat fragmentation, gravel and wood transport, and modification of the natural flow regime are ongoing and must be addressed.

II. **BACKGROUND**

The Sullivan Creek Project was constructed by the Inland Portland Cement Company in 1909, and was used to generate power until 1956, when the Project's wood flume was damaged. The Project is located on Sullivan Lake, Outlet Creek and Sullivan Creek, a tributary of the Pend Oreille River.

Washington State's water quality standards designate Sullivan Creek as a Class AA stream. Designated uses include fish migration, rearing, spawning and harvesting, wildlife habitat, water supply (domestic, industrial, agricultural), recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment), commerce and navigation. State standards require that water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." WAC 173-201A-030. The antidegradation policy requires that, "Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed."

The Project occupies lands of the United States within the Colville National Forest. The Project, as originally constructed, consisted of Sullivan Lake Dam and Reservoir, Sullivan Creek diversion dam and conduit, and Mill Pond Dam and reservoir, conduit, penstock, power plant, and transmission facilities. *See Public Utility District No. 1 of Pend Oreille County, Washington*, 20 F.P.C. 753, 754 (1958).

The Licensee purchased the Project and its associated water rights from Inland in 1959, and has operated the project reservoirs to benefit hydroelectric generation at downstream projects and for water supply to the town of Metaline Falls. The Federal Power Commission ("FPC") issued a 50-year license for the Project effective October 1, 1958. *See id.* The FPC licensed the Project as a storage project benefiting the downstream generation projects, with provisions for the Licensee to study the feasibility of enlarging or rehabilitating the Project for purposes of power generation.

Prior to accepting the license, the Licensee requested that the FPC modify the license so that it did not describe certain of the project works as abandoned, thus requiring a Forest Service permit for the occupancy of National Forest lands by these project works. *See Public Utility*

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District No. 1 of Pend Oreille County, Washington, 21 F.P.C. 284 (1959). The Licensee stated that the project works had not been abandoned and requested that the diversion dam and conduit and the flume section of the power conduit from Mill Pond be included in the license as project works. *See id.* The project boundary was modified to include the lands occupied by the discontinued project works, thus eliminating the need for a Forest Service permit. *See id.* at p. 285.

Over the course of the existing license, the Licensee twice has filed license amendments proposing changes to allow for power generation. Licensee withdrew its 1994 application for license amendment in 2002.

On September 23, 2003, the Licensee filed a notice of intent not to file an application for a new license for the Project. On October 22, 2003, the Commission published notice of the licensee's intent, and required that any applications for a new license for the Project must be filed by September 30, 2006. No applications were filed.

On October 5, 2006, Licensee filed a Petition for Declaratory Order ("Petition") requesting the Commission to determine that the existing license for the Sullivan Creek Project (P-2225) is void. *See* e-Library no. 20061005-5016 (Oct. 5, 2006). In the alternative, the Licensee requested a determination that the license will expire on October 1, 2008, with no further action required by the Commission or the Licensee.

On November 20, 2006, American Whitewater filed a timely, unopposed Motion to Intervene and Protest ("AW Protest") in response to the Petition. *See* e-Library no. 20061121-5081. The U.S. Department of Agriculture, through the U.S. Forest Service ("Forest Service"), also filed a timely, unopposed Notice of Intervention and Protest ("Forest Service Protest") in response to the Petition. *See* e-Library no. 20061117-5106 (Nov. 17, 2006).

On July 18, 2007, the Director of the Division of Hydropower Administration and Compliance ("Director") issued the instant Order. The Director declined to declare the existing license void. However, he found that the Project is not required to be relicensed upon expiration of the existing license in 2008: "The current license will expire by its own terms with no further Commission action on October 1, 2008." Order, Ordering ¶ A.

This request for rehearing follows.

III. **STATEMENT OF ISSUES**

Issue 1. Whether the Commission's Threshold Test for Determining Jurisdiction Over Upstream Storage Facilities is Conclusive for Projects Located on Federal Lands.

We rely on the following legal authorities for this issue:

Supreme Court Cases:

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FPC v. State of Oregon, 349 U.S. 435 (1955)

Circuit Court Cases:

Domtar Maine Corp., Inc. v. F.E.R.C., 347 F.3d 304 (D.C. Cir. 2003)

Escondido Mutual Water Co. v. FERC, 692 F.2d 1223, 1231 (9th Cir. 1982) red's denied, 701 F.2d 826 (1983), rev'd on other grounds, *Escondido Mutual Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984)

Statutes:

16 U.S.C. § 796(11)

16 U.S.C. § 796(12)

16 U.S.C. § 797(e)

16 U.S.C. § 817(1)

Other Authorities:

Chippewa and Flambeau Improvement Company, 95 FERC ¶ 61017 (2001)

PacifiCorp, 98 FERC ¶ 61,117 (2002), *aff'd*, *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071 (9th Cir. 2003)

PUD Utility District No. 1 of Pend Oreille County, WA, 21 F.P.C. 284 (1959)

Issue 2. Whether the Declaratory Order (and specifically, its explicit finding that the Project does not contribute materially to downstream generation at the Boundary, Grand Coulee, Chief Joseph, Wells, Rocky Reach, Rock Island, Wanapum, Priest Rapids, McNary, John Day, The Dalles, and Bonneville Projects, and the implicit finding that the Project does not impact National Forest lands), is Based On Substantial Evidence.

We rely on the following legal authorities for this issue.

Supreme Court Cases:

Burlington Truck Lines v. U.S., 371 U.S. 156 (1962)

Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786 (1993)

FPC v. Texaco, Inc., 417 U.S. 380 (1974)

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Motor Vehicle Manufacturers Association v. State Farm Insurance, 463 U.S. 29 (1983)

Securities & Exchange Commission v. Chenery Corporation 332 U.S. 194 (1947)

Circuit Court Cases:

Columbia Gas Transmission Corporation v. FERC, 628 F.2d 578 (D.C. Cir. 1979)

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2nd. Cir. 1965)

United Steelworkers Of America et al. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980)

Statutes:

5 U.S.C. § 556(d)

5 U.S.C. § 557

5 U.S.C. § 706

16 U.S.C. § 825l

Other Authorities:

Federal Rules of Evidence 702

Issue 3. Whether the Commission May Allow a Valid License to Expire Without Taking Any Action to Transfer Jurisdiction Or Otherwise Assure Orderly Disposition of the Project to Protect the Public Interest in the Occupied Lands and Waters, including the affected National Forest resources.

We rely on the following legal authorities for this issue.

Statutes:

16 U.S.C. § 799

Code of Federal Regulations:

18 C.F.R. § 6.1

18 C.F.R. § 6.2

Other Authorities:

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Central Maine Power Co., 81 FERC ¶ 61,087 (1997)

Southern California Edison Co., 107 FERC ¶ 61067 (2004).

FERC, Hydroelectric Project Handbook for Filings Other Than Licenses and Exemptions (April 2001),” available at http://www.ferc.gov/industries/hydropower/gen-info/handbooks/post_licensing_handbook.pdf

IV.
ARGUMENT

A. The Commission’s Threshold Test Is Not Conclusive for Projects Occupying Federal Lands.

Under Federal Power Act section 4(e), the Commission is authorized:

“To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States...”

16 U.S.C. § 797(e). FPA section 23(b)(1), makes it unlawful for any person,

“for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States ..., except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter.”

16 U.S.C. § 817(1).

Thus, hydroelectric projects located on any part of public lands or reservations of the United States fall under the Commission’s mandatory licensing jurisdiction. *See Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223, 1231 (9th Cir. 1982) red’s denied, 701 F.2d 826 (1983), reversed on other grounds, *Escondido Mutual Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984). The Commission’s authority to issue licenses on public lands and reservations “springs from the Property Clause -- “The Congress shall have Power to dispose of and make all

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needful Rules and Regulations respecting the Territory or other Property belonging to the United States...." *F.P.C. v. State of Oregon*, 349 U.S. 435 (1955) (quoting U.S. Constitution, Art. IV, § 3).

FPA Section 3(12), 16 U.S.C. § 796(12), defines "project works" as the "physical structures of a project." Section 3(11), 16 U.S.C. § 796(11), defines "project" to mean

"complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power there from to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

The Commission has found that there are circumstances where an upstream storage facility has an impact on generation at downstream licensed projects that is discernible, but nonetheless so insignificant that the storage facility cannot be found to be "used and useful" or "necessary or appropriate" for such generation, and therefore not subject to its jurisdiction.

Chippewa and Flambeau Improvement Company, 95 FERC ¶ 61017, 61035 (2001). It uses two separate tests to make this determination: one for the collective impact of all upstream facilities owned by the same entity and a second for the impact of individual facilities. *See Domtar Maine Corp., Inc. v. F.E.R.C.*, 347 F.3d 304, 311-312 (D.C. Cir. 2003). When applying the "collective impact" test the Commission generally declines jurisdiction over all of the facilities when their aggregate average impact falls below a threshold that lies somewhere between 2 and 2.5 percent. *See id.* at 312. When applying the "individual facility" test, the Commission generally declines jurisdiction over an individual facility and excludes its effect on downstream generation from any aggregate calculations if its impact falls below some lower threshold, i.e., 0.1 percent. *See id.*

The Director applied the "collective impact" test to the Project and found

"Energy generation at downstream projects from the Sullivan Creek Project storage represents a very small percentage when compared to the energy generation from total upstream storage...Over a ten-year period the average annual energy contribution to downstream projects from Sullivan Creek storage is 12.3 megawatts, which is about 0.42 percent of the total energy generation from storage. This percentage increase in average annual generation is far below the 2.1 percent increase in average annual generation the Commission also used in finding that the storage projects in the Penobscot River Basin were not jurisdictional."

Order, ¶ 11. On this basis alone the Director found that the Commission's jurisdiction should end upon expiration of the existing license:

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“[T]he project’s effect on downstream power generation is insignificant when compared to the total generation of downstream projects, and this analysis must be considered in the light of the current Petition. The largest contribution of the Sullivan Creek Project to generation at any one project downstream is only 1.1 percent. Therefore, I find that the Sullivan Creek Project is not a part of any complete unit of hydroelectric development. Accordingly, the Sullivan Creek Project is not required to be relicensed, and the Commission’s jurisdiction over the project will cease as of the expiration of the project’s original license, without the need for any further action by the Commission or the Licensee.”

Id., ¶ 12.

The Order does not address the Project’s location on federal lands, an alternative basis for the Commission’s ongoing jurisdiction. *See id.* (“The Commission originally licensed the Sullivan Creek Project based on its location on federal land and its operation to benefit generation at downstream hydroelectric projects.”). In fact, the Order does not address any of the specific circumstances regarding this Project, such as the physical setting or affected resources. On its face, the Order appears to represent a bright-line application of the threshold test; a test which has been upheld as within the Commission’s discretion, but is not codified in the FPA or Code of Federal Regulations.

Neither of the precedents supporting the Commission’s application of the “collective impact” addressed a project’s location on federal lands. The Court in *Domtar Maine* expressly reserved the issue:

“This brings us finally to the Passamaquoddy Tribe’s contention that we should remand the case so that FERC can decide whether Domtar’s upstream facilities occupy “reservations of the United States.” 16 U.S.C. §§ 797(e), 817(1). If they do, then FERC would have an additional basis for requiring that the facilities have licenses, *see id.* § 817(1), as well as several more requirements to satisfy before it could issue a license, *see id.* §§ 797(e), 803(e). But because FERC has already determined that it has jurisdiction over the facilities, nothing would be gained by finding another basis for jurisdiction.”

Domtar Maine, 347 F.3d at 313-314.

Similarly, the precedent cited by Licensee in its Petition, *PacifiCorp*, 98 FERC ¶ 61,117 (2002), *aff’d*, *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071 (9th Cir. 2003), is inapposite. There the Commission found it lacked jurisdiction over an upstream storage facility which was not constructed or operated for power generation, and in fact “ha[d] a significant negative impact on generation” at downstream hydropower facilities. *Id.* at ¶ 61,345. By contrast, this Project was constructed and has been operated and maintained for the past 48 years for the purpose of power generation, thus satisfying the “*sine qua non* for Commission jurisdiction over a reservoir pursuant to [FPA section 23(b)(1)].” *Id.* at ¶ 61,346.

The Project's contribution to power generation and downstream projects and location within the Colville National Forest provides adequate basis for the Commission's licensing jurisdiction under FPA sections 4(e) and 23(b)(1). The Sullivan Creek Project as originally constructed consisted of Sullivan Lake Dam and Reservoir, Sullivan Creek diversion dam and conduit, and Mill Pond Dam and reservoir, conduit, penstock, power plant and transmission facilities. The Commission, at the request of the Licensee, included the diversion dam and conduit and the temporarily discontinued flume section of the power conduit from Mill Pond within the project boundary as project facilities. These are all project works "necessary or convenient" for the "development, transmission, and utilization of power" within the meaning of FPA section 4(e). The Licensee argued that all these facilities, even those not in use, be included in the existing license as project works comprising a complete unit of development for the purposes of producing water power from storage at downstream projects and potentially producing power at the Project:

"Applicant suggests that the diversion dam and conduit and the temporarily discontinued flume section of the power conduit from Mill Pond be included as project facilities for which Applicant has no immediate plans for reactivation except under Articles 30 and 31 of the license, which provide for enlargement of the project if feasible."

PUD Utility District No. 1 of Pend Oreille County, WA, 21 F.P.C. at 284.

As in 1959 when Licensee requested modification of the licensing order, the Sullivan Creek Project remains a hydroelectric generating facility that is located on federal lands. . The Commission's mandatory licensing jurisdiction over the project works stems from their location on federal lands, coupled with their construction, maintenance, and operation for the purposes of hydroelectric generation. Having satisfied the minimum requirements for mandatory jurisdiction, the Commission's application of the "collective impact" test should not apply.

The Commission should vacate the Order as inconsistent with FPA sections 4(e) and 23(b)(1).

B. The Declaratory Order is Not Supported by Substantial Evidence

A final decision must be supported by substantial evidence. *See* 16 U.S.C. 825l(b). As required by FPA section 313(b) and APA sections 556(d), 557 and 706(2), substantial evidence is record evidence which is expressly found to be: (A) reliable and probative for the purpose of supporting a finding and (B) superior to competing evidence with respect to a given finding. *See* Fed. Rules Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993); *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983); *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962). Thus:

"[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a

court be expected to chisel that which must be precise from what the agency has left vague and indecisive.”

Securities & Exchange Commission v. Chenery Corporation 332 U.S. 194 at 196-7 (1947); *see also FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Columbia Gas Transmission Corporation v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979). Similarly:

“We noted in [a prior case] that we do not pretend to have the competence or the jurisdiction to resolve technical controversies in the record, or ... to second-guess an agency decision that falls within a ‘zone of reasonableness.’ Rather, our task is to ‘ensure public accountability,’ by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument.”

United Steelworkers Of America et al. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980) (internal citations omitted).

Further, the Commission’s obligations under the FPA include that of independent investigation:

“In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”

Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965).

1. Licensee Did Not Provide Adequate Evidence on Which to Base the Project’s Contribution to Downstream Generation.

In support of its Petition, Licensee filed “Attachment A,” a chart showing the percentage of energy increases at twelve downstream hydroelectric projects attributable to Sullivan Creek reservoir releases for the past nine years that “data are readily available.” Petition, p. 7. The data provided at Attachment A is incomplete. For example, it provides data going back less than 10 years even though the Project has operated for 48 years. It does not describe any seasonal variation in contribution to downstream generation. On November 15, 2006, Licensee filed supplemental information and an updated Attachment A. *See* e-Library no. 20061115-5105. The supplemental data purports to show the Project’s percentage contribution to generation at Boundary Dam for nine years, instead of three, and provides data for two additional years for the other downstream projects.

The information provided by Licensee appears to be the only data on which the Director’s determination of contribution to downstream generation is based. It does not appear that the Director or other FERC Staff independently verified the data submitted by the Licensee

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or undertook any other independent investigation into the Project’s contribution to downstream generation.

It does not appear that the Director considered the total amount of power generated by the storage water. This inquiry is relevant to any determination of the Project’s significance with regard to power generation. A project’s total contribution power generation may be significant, even though its relative contribution may be small. For example, a contribution of 1% to a downstream project that generates 1000 MW represents a significant amount of energy. All but one of the projects located downstream of the Sullivan Creek Project are located on the Columbia River, one of the largest watersheds and one of the largest producers of hydroelectric power in the nation. *See Forest Service Protest*, p. 16. According to the figures provided by the Licensee, these projects, not including the two projects in Canada which are also downstream of the Sullivan Creek Project, produce between 7200 and 7400 MW of energy annually. Thus, the Project’s overall contribution to energy production is significant even though its percentage contribution appears small.

The Order with respect to the finding of the Project’s contribution to downstream generation should be vacated because it is not supported by substantial evidence.

2. Licensee Did Not Provide Adequate Evidence on Which to Base A Finding that the Project Does Not Impact Federal Lands.

As discussed in more detail in section IV.C, *infra*, the Order appears to terminate the Commission’s jurisdiction upon expiration of the existing license without providing for any substantive or procedural conditions for surrender or other disposition of the Project. The Order does not articulate a legal or factual basis for this decision.

The Petition does not disclose the Licensee’s future plans for operation, maintenance, or discontinuation of the Project. The Petition does not include any information which shows that the Project as operated currently has no impacts on resources within the project boundary, and more specifically on lands within the Colville National Forest. Similarly, the Licensee has not provided any information regarding potential impacts to public resources as a result of discontinuation of operations. On its face, the Order does not state whether the Director considered or performed any independent investigation as to the Licensee’s future plans for the Project, or the potential impacts to public resources as a result of such plans. Thus any finding by the Director that the existing license will terminate in 2008 without any further action on the part of the Commission and/or the Licensee is not based on substantial evidence.

A project’s percentage contribution to downstream generation is not necessarily related directly to its impact on water resources. The Project’s percentage contribution to downstream generation may be small, but its impacts on non-developmental uses of Sullivan Creek are significant. The Order elides this fact. In its Motion to Intervene and Protest, the Forest Service stated that the Project causes or contributes to adverse impacts on beneficial uses of Sullivan Creek and resources within the Colville National Forest:

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“Sullivan Creek has been identified as a priority watershed for bull trout listed under the Endangered Species Act (ESA). The U.S. Fish and Wildlife Service is reviewing westslope cutthroat trout, another native salmonid species, to determine if this species should be listed under the ESA. The Project blocks fish movement, affects water quality by increasing water temperatures in Mill Pond, affects both stream and lake productivity, eliminates bedload transport of spawning/rearing size substrates from replenishing lower Sullivan Creek and inundates important areas of spawning and rearing habitat in both Sullivan and Harvey Creeks. The Project has suppressed the development of aquatic, emergent, and shoreline riparian communities at Sullivan Lake. These aquatic and riparian communities provide food, cover, and nesting sites for waterfowl, land birds, and other wildlife.”

See Forest Service Protest, p. 2; *see also* AW Protest, pp. 7-8. It does not appear that the Director consulted with the Forest Service, Department of Ecology, or any other parties regarding the potential impacts of terminating the Commission’s jurisdiction over the Project on these resources.

The Project’s regulation of instream flows as well as its impoundment of Sullivan Creek behind the dam affects white water recreation. *See* Washington Department of Ecology, *Recreation Instream Flow Evaluation for Sullivan Creek below Mill Pond Dam*, e-Library no. 19961206-0052 (Nov. 22, 1996). Sullivan Creek provides an excellent whitewater experience for experienced boaters. It draws recreationists from Washington and Idaho. *See id.* at p. 8. Part of its attraction is due to Licensee’s drawdown of Sullivan Lake in October, thereby providing reliable, boatable flows in the fall before a winter weather pattern sets in. *See id.* This is a rarity among steep creeks, making Sullivan Creek runnable when other rivers and streams are not. *See id.* It does not appear that the Director consulted with the Department of Ecology, AW, or any other parties regarding the potential impact of terminating the Commission’s jurisdiction over the Project on the designated use of recreational boating.

The Order with respect to the finding that no further action is required by the Commission or Licensee upon expiration of the existing license should be vacated because it is not supported by substantial evidence.

C. The Licensee Must File a Petition for Surrender of License

FPA section 6 provides,

“Licenses under this subchapter shall be issued for a period not exceeding fifty years....Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.”

16 U.S.C. § 799. License surrender may be accomplished only upon agreement between the licensee and Commission as necessary to protect the environment and the public. *See* FERC, Hydroelectric Project Handbook for Filings Other Than Licenses and Exemptions (April 2001),”

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available at http://www.ferc.gov/industries/hydropower/gen-info/handbooks/post_licensing_handbook.pdf. “The surrender review process often can be complex because there are many environmental implications of ending Commission jurisdiction.” *Id.*, p. 6-1.

The Commission’s regulations require a licensee to file an application for license surrender, with a minimum of 30 days for public review. *See* 18 C.F.R. § 6.1.

“Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe, and, if the project works authorized under the license have been constructed in whole or in part, upon such conditions with respect to the disposition of such works as may be determined by the Commission. Where project works have been constructed on lands of the United States the licensee will be required to restore the lands to a condition satisfactory to the Department having supervision over such lands and annual charges will continue until such restoration has been satisfactorily completed.”

See id. at § 6.2 (emphasis added).

With regard to projects located on federal lands, the Commission must assure that termination of its jurisdiction does not result in a regulatory gap:

“The Commission has long held that, at the time project facilities or lands are found to be outside the Commission’s mandatory licensing authority, the Commission can consider the public interest in determining when, and in what manner, to bring the relevant part of a license to an end. Moreover, the Commission has specifically rejected the argument that Commission jurisdiction over transmission lines ends simultaneously with a finding that the lines are no longer primary transmission lines. *Pacific Gas and Electric Co.*, 85 FERC ¶ 61,411 (1988). In that proceeding, on the request of the U.S. Department of Agriculture, we conditioned the exclusion of transmission lines and associated facilities on the receipt of necessary permits for the continued use of Federal lands, in order prevent the creation of a regulatory gap. The Director correctly followed this policy in this proceeding.”

Southern California Edison Co., 107 FERC ¶ 61067, 61,220 (2004).

The Declaratory Order omits any discussion or analysis of the terms or conditions of license surrender: “The current license will expire by its own terms with no further Commission action on October 1, 2008. The Commission will no longer have jurisdiction over the Sullivan Storage Project under Part 1 of the Federal Power Act after that date.” Order, Ordering ¶ A. As stated in Section IV.B.2, *supra*, neither the Petition nor the Order discusses the Licensee’s future plans for the Project. The Order does not address Forest Service’s requests for the Commission to establish appropriate procedures for transfer of jurisdiction to the Forest Service. *See* Forest Service Protest, p. 18. It does not address AW’s request for decommissioning. *See* AW Protest, p. 6.

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Contrary to Licensee's argument, the Commission's decision in *Central Maine Power Co.*, 81 FERC ¶ 61,087 (1997), is not controlling because it did not involve a project located on federal lands. As discussed in Section IV.A, *supra*, the Licensee specifically requested that the facilities located within the Colville National Forest be included in the license, thereby divesting the Forest Service of primary permitting authority. It cannot be heard to argue now that the FPA, specifically surrender requirements, do not apply to the Project. As stated in Section IV.B.2, the Project has impacts on beneficial uses of Sullivan Creek and on resources within Colville National Forest which must be mitigated before Licensee's obligations under the FPA can be terminated.

Further, the licensee in *Central Maine* had presented the Commission with a plan for transfer of the project: "The licensees instead proposed to transfer the project to the Town of Forks Plantation, which would operate the project for recreational and environmental purposes. The project would be regulated by the State of Maine, which supports the transfer." *Id.* at ¶¶ 61,343-61,344. Here the Licensee has provided no such plan for orderly transfer of the Project. Indeed, here the Licensee has not even informed the Commission or any other party, including the Forest Service, of its plans for future operation and maintenance of the Project.

Prior to terminating its jurisdiction the Commission must establish a proceeding for surrender, or establish other appropriate procedures for the Licensee to remove the Project from federal land and restore the land to the satisfaction of the Forest Service, or for the Licensee to acquire a special use authorization from the Forest Service detailing the conditions under which the Licensee may continue to occupy and use the federal lands.

V. REQUEST FOR FURTHER PROCEDURES

We request that the Commission propose conclusions of law and fact as the basis for further briefing by the parties. The Commission issued a Declaratory Order to decommission the Project which did not address any of the legal or factual issues raised by American Whitewater, the U.S. Forest Service, or other parties. Rather than proceed directly from the Declaratory Order to an Order on Rehearing, the Commission should provide opportunity for further briefing by the parties on disputed issues in order to assure a more reasoned final decision.

We request the opportunity to convene a settlement conference including the Licensee, FERC Staff, Forest Service, Department of Ecology, American Whitewater, and Kalispel Tribe of Indians to explore the amendment of the Declaratory Order to include appropriate procedural and substantive conditions for project surrender.

Please add the following representatives to the official service list for this proceeding:

Richard Roos-Collins
Julie Gantenbein
NATURAL HERITAGE INSTITUTE

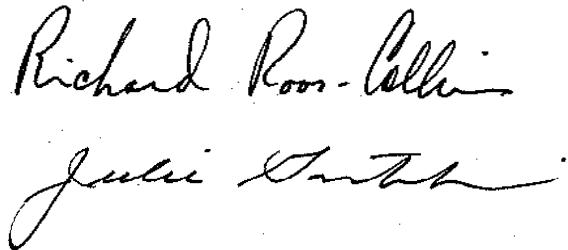
*American Whitewater's Request for Rehearing
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VI.
CONCLUSION

We request that the Commission grant this request for rehearing and further procedures.

Dated: August 17, 2007

The image shows two handwritten signatures. The top signature is "Richard Roos-Collins" and the bottom signature is "Julie Gantenbein". Both signatures are in cursive and are placed side-by-side.

Richard Roos-Collins
Julie Gantenbein
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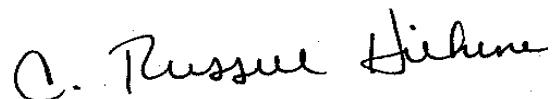
Attorneys for AMERICAN WHITEWATER

CERTIFICATION OF SERVICE

Pend Utility District No. 1 of Pend Oreille County, Washington, Sullivan Creek Project (P-2225-000) (Docket No. DI07-1-000)

I, C. Russell Hilkene, declare that I today served the attached "AMERICAN WHITEWATER'S REQUEST FOR REHEARING OF ORDER DENYING PETITION FOR DECLARATORY ORDER THAT EXISTING LICENSE IS VOID AND ACCEPTING PETITION THAT LICENSING IS NOT REQUIRED," by electronic mail, or if no electronic mail address is provided, first-class mail, to each person on the official service lists compiled by the Secretary in this proceeding.

Dated: August 17, 2007



By:

C. Russell Hilkene
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