
Baker River Project License Implementation

Baker River Interim Coordinating Committee

September 21, 2006
9:00 am - 3:00 pm

PSE Bellevue – Summit Conference Room

FINAL MEETING NOTES

PRESENT

Larry Tornberg, Cary Feldmann, Lynda Kupfer and Connie Freeland (PSE); Mark Killgore (Louis Berger); Stan Walsh (SRSC); Brock Applegate, Rich Johnson and Gary Sprague (WDFW); Patrick Goldsworthy (NCCC); Alice Kelly (WA DOE); Bob Nelson (RMEF); Steve Fransen (NOAA); Arn Thoreen (Skagit Fisheries); Torey Nelson (Skagit Co. Public Works); Jeff Dillon (USACE); Rod Mace and Walt Dortch – by phone (USFS); Bob Helton – by phone (Citizen); Lyn Wiltse, facilitator and Jamie Riche, note taker (PDSA Consulting, Inc).

QUOTABLE QUOTE

The Optimistic Pessimist, by Cary Feldmann: “The only thing you can be if you’re a pessimist is pleased because it is either exactly as you predicted or it is better.”

NEXT MEETING DATE

BRICC Meeting: November 16, 9 a.m. – 3 p.m., location TBD

TODAY’S AGENDA TOPICS

FERC: settlement ruling

Review FEIS

Decision re: supplemental comments on FEIS

Flood control legislation

Updates on ongoing projects

NEW ACTION ITEMS

- Cary – Attach brief description of Cushman decision to these notes.
- Connie – Send flood control language agreed to by settlement parties and the legislation language to the call participants.
- Lyn – By the end of the day, send notes of this meeting to Connie to distribute to all.

WELCOME

Lyn welcomed the group and reviewed the agenda for the day. Connie shared the new “Baker River Basin Recreation Guide” brochure to universally positive reviews.

We also welcomed first-time attendees: Torey Nelson (Skagit Co. Public Works); Jeff Dillon (USACE); and Linda Kupfer, who just joined PSE this week as the Compliance Tracking Coordinator.

BREAKING NEWS: FERC SETTLEMENT RULING

Breaking news: FERC issued a policy guidance document regarding settlement agreements just this morning. Walt shared some of the background and walked us through the highlights of this ruling. FERC has been inconsistent in its treatment of settlement agreements in the past. This new guidance document should be helpful in giving us an outline for our responses. Walt believes we can apply all six of FERC’s new guiding principles to our settlement to reasonably and fairly push for adoption of the Settlement Agreement as presented.

He commented that the response to the Portland General Electric Clackamas DEIS was masterfully done and suggests we all read this prior to formulating our own response to the Baker FEIS.

He also suggests that we work to present a unified regional response and will outline some of the themes that would be helpful as we prepare our response to the FEIS. Ex: Suggesting to FERC that supporting intact Settlement Agreements would be an ideal way for them to meet their obligations to the public.

The Circuit Court ruling relating to the Cushman Project may also have implications for us. Steve and others familiar with the ruling walked us through the highlights. In short, the court confirmed that mandatory 4(e) conditions are in fact mandatory – not at FERC’s discretion. Furthermore, the court stated that since FERC doesn’t impose deadlines on itself, it doesn’t have the authority to impose deadlines on other federal agencies. Therefore, FERC doesn’t have authority to impose a time limit on 4(e) conditions. The court also reasserted the Escondido case regarding 4(e) conditions, which had been undermined over time. At this time, the folks at the table believe there aren’t moves underway to appeal this decision.

FEIS REVIEW

Cary commented that PSE was fairly encouraged by FERC’s response as he hadn’t expected the FERC to move very far from their position expressed in the DEIS (see his “optimistic pessimist” quote at the top of these notes). Mark Killgore of Louis Berger noted that the original gap between the Settlement Agreement and DEIS, which was about \$1M per year, has been cut roughly in half in the FEIS. He also noted that there was a lot of progress in the recreation section. The big gaps which remain tend to be in the biological / natural resource areas.

Mark reminded us that although there isn’t an official comment period on the FEIS as there is on a DEIS, there is still an opportunity to influence the Commission because their order does not have to follow the staff suggestions in the FEIS. So, any comments the Commission receives on the FEIS before they issue the license order could influence that order. If we feel we need to, we could also petition for a re-hearing after they issue the final order.

Mark then walked us through the DEIS/FEIS Comparison Matrix prepared by Louis Berger:

Article 101: Fish Propagation

FERC's concern is that their only authority is over the licensee (PSE), so their view is that their mandates must be relative to PSE rather than other agencies. We discussed the strategy of addressing differences between the FEIS and our Agreement through our implementation plans. We agreed that PSE could continue to contract with the agencies for the hatchery manager (all are happy with how it's working with Kevin of WDFW).

Article 109: Large Woody Debris

FERC allowed for the storage of large woody debris outside the project boundary, but PSE must then bring any outside storage location into the project boundary. This adds an administrative burden to PSE, but is doable.

Article 110: Shoreline Erosion

This might be an example where Cushman could be helpful (mandated 4(e) conditions).

Recreation: Mark noted several small victories in these articles, with quite a few DEIS "no's" becoming "yeses" in the FEIS.

Article 302: Aesthetics Management

Identifying additional camping sites so they change from "unspecified" to "specified" *might* allow FERC to accept the articles as presented.

Articles 303 (Baker Lake Resort Redevelopment Plan) & 304 (Baker Reservoir Recreation Water Safety Plan):

PSE believes they can do everything required by articles 303 & 304.

Article 305: Lower Baker Developed Recreation

PSE will notify FERC that the Lake Shannon access road issue has not been resolved yet.

Article 309: Bayview Campground Rehabilitation Funding

Under the Settlement, the campgrounds such as Bayview Campground will continue to be operated and maintained by the USFS. However, the FERC FEIS language states that PSE will operate and maintain these facilities and expand the project boundary to enclose the sites. This suggests that fees for such facilities would no longer go to the USFS to offset costs incurred in the operations as they are project features. And in light of the boundary adjustments for which fees (estimated by the FERC at \$22K per year) would be paid to the Federal government, none of this money would go to the USFS either.

We noted that the language here is confusing. FERC staff recommends that PSE not consult or contract with USFS, but should rather "maintain and operate" the facilities. PSE and USFS plan to talk more about this. Mark suggested that this may also be a section where the Baker FEIS and the Cushman decision crossed like ships in the night; Cushman may help us here.

Article 318: Law Enforcement

Mark noted that FERC has been consistent in their opposition to building any law enforcement into their licenses. FERC has stated that – even if there is a nexus to the project in terms of increased public use

(and therefore increased criminality) – they believe law enforcement is the responsibility of local jurisdictions and not within their (FERC’s) authority. Cary noted that there may be some creative solutions here. PSE will integrate them into their response to FERC.

Article 401: Water Quality

Alice noted that the state needs to review the FEIS and make a SEPA recommendation so that the Town of Concrete can issue their Shoreline Permit. Ecology can then issue the 401.

Article 503: Elk Habitat

Patrick wants to confirm that the wording here is strong enough to ensure we can accomplish our goals. Others feel this is the case and we are not at risk.

Article 505: Aquatic Riparian Habitat Protection, Restoration and Enhancement Plan

Despite our convincing comments, there was no movement here. We’re going to need to address this through other conditions. Ecology has indicated this has been incorporated in their draft 401; they feel pretty confident about putting this condition in the 401.

Article 516: Mountain Goats

This was a “no” to “yes” victory. Cary noted there is some ambiguity in terms of actual implementation. PSE and USFS need to button up on targeted areas and timelines within the implementation plans.

Article 517: Grizzly Bear Road Management

FERC’s take is that PSE is responsible for the work, not just responsible for writing the checks, but PSE can contract with USFS.

Article 603: Adaptive Management

FERC says the article itself is too vague, but PSE can “request an amendment of any license condition whenever circumstances warrant.”

HOW DO WE RESPOND?

- Rod shared that the USFS will file final 4(e) terms and conditions the first week in November.
- Steve announced that NMFS’ timeline for issuing its BO is January 31, 2007.

Cary shared that he believes PSE is planning to respond; Stan and some others around the table are also likely to respond. Although there is no formal timeline, sooner is better than later. Most are planning to respond within a 30-day window. We also agreed that succinct responses are more likely to be read and carefully considered by FERC in such a way to possibly influence the license order before it is issued.

After some discussion, we agreed that it made sense to consider responding regarding the following:

- 505 (riparian habitat)
- 602 (funding)
- 318 (perhaps tie to homeland security)
- 101 (jurisdictional standpoint)

FLOOD CONTROL

Stan reminded the group of the conference call to discuss concerns with the initial draft flood control legislation Congressman Larson introduced. The group developed language for the Corps that everyone could live with. Stan noted that what actually got introduced to Congress was actually much closer to the first draft than to the language the Settlement parties collaboratively drafted. Connie will send out the version that came out in the legislation along with the language the Settlement parties agreed to during the conference call. Stan is concerned that this legislation may conflict with and override our flow article. We will work together to safeguard what is in our agreement.

PROGRESS REPORTS

ARG – Aquatics Resource Group

This team has been meeting quarterly; Fish Passage Technical Working Group has been meeting more often. Highlights from pre-license activities in this area are:

- **FSC:** Cary reported that the contractor and fabricator have been hired for the FSC and final design work is nearly complete. Assembly will be on the shoreline. Work is proceeding according to schedule.
- **Upstream Passage:** The Value Engineering session yielded a few different options to consider, some of which offer some moderate cost savings. Cary was pleased to announce that due to a compressed timeline, it looks like we will be up and running two years ahead of schedule! The settlement calls for construction to begin by June of 2007. We expect to be fully operational by June of 2008!
- **Hatchery:** The Value Engineering session questioned the number of ponds required to hold adult Chinook. The group will take a PDSA approach to determining the number and size of ponds. Other than that, they are going forward with original design/layout.

Elk & TRIG – Terrestrial Resources Implementation Group

The Elk teamlet continues to look for appropriate lands for elk habitat and is working toward a creative land acquisition / swap arrangement with a large landowner. The larger TRIG is looking at getting together again in mid October.

RRG – Recreation Resource Group

The group is meeting approximately quarterly. Pam Garland, the new team leader, has been working with the Forest Service on related issues.

CRAG – Cultural Resources Advisory Group

Connie noted that PSE has hired Jessie's replacement. She starts October 2. The next CRAG meeting will be mid to late October. The Programmatic Agreement (PA) to implement the Historic Properties Management Plan (as noted in Article 201) is being circulated for signatures. The PA has been signed by FERC; it goes into effect when the State Historic Preservation Officer signs it. Other parties are concurring and do not have to sign the PA for it to go into effect.

MEETING EVALUATION

What Went Well

- Nice participation by all
- Arn's facilitation was excellent
- Great food / facilities
- Louis Berger's table greatly facilitated FEIS review – Thanks to Rob Mohn, et al!
- Phone acoustics were good (as reported by Bob Helton)
- Got out early!

What to Do Differently

- Double-booked room issues
- Try to arrange for better traffic!

NEXT BRICC MEETING

November 16, 9 a.m. – 3 p.m. (Location TBD)

AGENDA TOPICS, NEXT MEETING

- Welcome, Review Notes, Agenda
- Timeline Update
- Project Update: FSC, Hatchery, Elk Lands, Permitting Processes, etc.
- Next Steps
- Set Next Meeting Date and Agenda; Evaluate Meeting

ENERGY AND UTILITIES GROUP E-NEWS — AUGUST 28, 2006

Court of Appeals' Hydropower Decision May Influence FERC Relicensing Process

On August 22, the D.C. Circuit Court of Appeals released a decision in the City of Tacoma's Cushman Dam relicensing litigation that may have broad impacts on the Federal Energy Regulatory Commission's ("FERC's") hydropower relicensing process. In *City of Tacoma v. FERC*, No. 05-1054, Tacoma and the Skokomish Tribe sought judicial review of several provisions of FERC's 1998 Cushman Dam license. The Cushman Dam project includes a portion of the Skokomish Tribe's reservation lands.

An aspect of the decision that will grab headlines is the holding that FERC can effectively shut a project down through imposition of expensive license conditions. Tacoma had contended the license condition that requires a 240 cfs minimum flow into the North Fork of the Skokomish River would make the Cushman project uneconomic. "[W]e find persuasive FERC's argument that Congress implicitly extended to FERC the power to shut down projects either directly, by denying a new license, or indirectly, by imposing reasonable and necessary conditions that cause the licensee to reject the new license." The court did not resolve, however, whether such conditions would force a licensee into costly decommissioning proceedings at FERC or whether a licensee could simply abandon a project under those circumstances. That fight was left for another day.

Several other sections of the decision may impact the substance and timing of FERC's relicensing process for many hydropower projects around the country that are in the midst of relicensing.

The decision addressed the extent of the authority of federal agencies such as the Forest Service and Department of Interior to condition FERC hydropower licenses under Section 4(e) of the Federal Power Act ("FPA"). The Court held that the agencies may "impose license conditions based on the indirect effects a project has on [federal lands] . . . provided that at least 'some' or 'any' part of the licensed facilities is on [federal] land." In the case of Cushman, only the project's access road and a transmission line are located on tribal reservation land held in trust by the federal government. Nevertheless, the D.C. Circuit held that "the Secretary of Interior is not limited in this proceeding to mitigating the impact the access road and the transmission line will have on the reservation. Instead, he may impose license conditions that are designed to mitigate the effect of the project on the Skokomish River to the extent doing so is reasonably related to protecting the reservation and the Tribe."

The decision also calls into question FERC's ability to enforce deadlines on other federal agencies in the relicensing process, including perhaps the strict timelines of FERC's new Integrated Licensing Process ("ILP"). During the Cushman relicensing, the Department of Interior filed its proposed FPA Section 4(e) license conditions with FERC after expiration of the 60-day timeframe set by FERC regulations. The D.C. Circuit held that FERC erred by rejecting Interior's conditions as untimely. "FERC exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated to other federal agencies [in the FPA]. . . . FERC has no authority to impose a short 60-day limitation unilaterally, thereby effectively stripping Interior of its statutorily delegated authority."

Another part of the decision relates to FERC's compliance with the Endangered Species Act ("ESA"). The decision confirms the importance of biological opinions issued pursuant to the ESA by the National

Marine Fisheries Service and U.S. Fish and Wildlife Service, reiterating that FERC ignores the findings of these opinions at its peril. However, the Court also suggests that FERC possesses an obligation to ensure that biological opinions contain the best available information prior to their wholesale adoption in a FERC license. The decision similarly suggests that FERC must ensure state compliance with the statutory requirements of Clean Water Act ("CWA") prior to FERC acting on state-issued 401 certification conditions.

Questions raised by the opinion regarding the scope of agency conditioning authority, the validity of deadlines in relicensing, the scope of environmental analysis, and a licensee's obligations upon receipt of license conditions that make a project uneconomic will likely be addressed not only on remand of the Cushman license, but in many other licensing proceedings and court decisions for months and years to come.



August 30, 2006

Our Hydropower Team is an interdisciplinary group of attorneys who regularly represent hydropower clients on a wide range of licensing, energy, and environmental matters.

Hydro News does not address all requirements that may apply to any particular hydropower development, and should not be acted upon without specific legal advice developed on a facility-specific basis.

If you have any questions about any of these developments, please contact Matt Manahan at mmanahan@pierceatwood.com or 207-791-1189, or Sarah Verville at sverville@pierceatwood.com or 207-791-1371.

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Milestone Court Decision in 30-Year Relicensing Proceeding Could Make Relicensing More Onerous

The United States Court of Appeals for the D.C. Circuit last week upheld FERC's 1998 relicensing of the City of Tacoma, Washington's Cushman Project. In so doing, the court denied the majority of Tacoma's challenges to FERC's license. The court's decision results from a controversial licensing proceeding that began over 30 years ago - and isn't over yet.

The court addressed a number of significant licensing issues, including the timeliness of the Department of Interior's conditions issued pursuant to Section 4(e) of the Federal Power Act, the extent to which Section 4(e) conditions apply beyond a reservation, FERC's role in determining whether a state properly issued a water quality certification under Section 401 of the Clean Water Act, whether FERC may issue an uneconomic license, and the standard of review under the Endangered Species Act.

Mandatory Conditions - Two Victories for Federal Agencies and Tribes

Because Interior did not submit its Section 4(e) conditions until two years after the date requested by FERC, FERC did not include the 4(e) conditions in Tacoma's new license. In response to a challenge by the Skokomish Indian Tribe, the court held that, under the FPA, the conditioning agencies, not FERC, determine how and when to exercise their authority. While the court encouraged Interior and FERC to cooperate and coordinate their efforts, the court concluded that there is no obligation to do so, and Interior is not required to submit its mandatory conditions in the timeframe required by FERC's rules. Because the statutory framework under Section 18 of the FPA for fishway prescriptions is similar to that under Section 4(e), the court's holding that FERC may not dictate deadlines under Section 4(e) also would apply to Section 18 fishway prescriptions.

A small portion of the Cushman project (a transmission line and access road) is located on Tribal reservation land. In issuing its license, FERC concluded that Interior's authority to impose Section 4(e) conditions was limited to mitigating the impacts that the transmission line and access road have on the reservation, and did not include mitigating the greater impacts that the project's dams and water diversion structures have on the reservation. The court rejected FERC's interpretation, and stated that "so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including *utilization* of the reservation in a manner consistent with its original purpose."

The court remanded the license proceeding to FERC to include Interior's Section 4(e) conditions in their entirety and to assess, based on the inclusion of such conditions in the license, whether and under what conditions FERC should issue a new license.

Section 401 of the Clean Water Act - One Victory for Licensees

The Tribe also argued that the Washington Department of Ecology's license was invalidly issued and that in issuing the license FERC violated its obligations under the Clean Water

Act. While the court confirmed that the a state's application of water quality standards in a Section 401 proceeding is a matter of state law, the court held that FERC has an obligation "to confirm, at least facially, that the state has complied with [Section 401's] public notice requirements." FERC must obtain "some minimal confirmation of such compliance, at least in a case where compliance has been called into question." The court stated that FERC should seek confirmation from Ecology that it complied with state law notice requirements when it issued its water quality certification, or, if it didn't, that Ecology has done so in response to the court's decision.

The court's decision gives support to licensees who have challenged the validity of water quality certifications on procedural grounds. To date, FERC has declined to rule on such issues, refusing to look behind the facial validity of the certifications. The *Cushman* decision requires FERC to make some inquiry into whether a certification was validly issued, particularly where a licensing participant has questioned the certification's validity.

Uneconomic Licenses - One Victory for FERC

For over a decade, licensees have objected to FERC's assertion that it may issue uneconomic licenses. Now, for the first time, a federal court of appeals has addressed the issue and -- unfortunately -- found in FERC's favor. While a different federal court of appeals could come to a different conclusion, the court's decision provides discouraging precedent for licensees that seek to challenge an uneconomic license.

In issuing the new license for the Cushman Project, FERC acknowledged that the Project as licensed would result in net benefits of negative \$2.06 million per year. Tacoma challenged FERC's ability to issue an uneconomic license, contending that the license amounts to a *de facto* decommissioning of the Project, in violation of Sections 14 and 15 of the FPA. Tacoma argued that an uneconomic license is an unreasonable license, in violation of the requirement in Section 15 to issue new licenses on "reasonable terms." The court rejected Tacoma's argument and held that the obligation to give "equal consideration" to nonpower values implies that, in some cases, environmental concerns will prevail and that reasonable terms can be terms that have the effect of shutting down a project.

The court punted on whether and in what circumstances FERC may impose decommissioning obligations or costs on a former licensee. The Court also declined to address whether FERC should have given consideration to the environmental impact shutting down the project would have.

Endangered Species Act - Another Victory for the Agencies

Tacoma also argued that FERC acted arbitrarily and capriciously in relying on flawed biological opinions (BiOps) issued by Interior. The court rejected Tacoma's challenge to the BiOps, stating that because Tacoma did not assert new information that called into question the factual conclusions of the BiOps, FERC was justified in relying on them.

The court also rejected Tacoma's argument that the BiOps were unsupported by the evidence because, among other things, they were based on inferences; actual species behavior was not verified at the project. The court concluded "that a BiOp is not fatally flawed when it relies, as the BiOps do here, on inferences drawn from observations of the same (or similar species), in close geographic proximity, adapting to analogous facilities and conditions." In coming to this conclusion, the court appeared to rely on the fact that the listed species are present in the general project area, even though the agencies could not document activity of the species in every segment of the project. As the court stated, the agencies have a very low bar to meet.

What's Next?

As noted above, the court has remanded the license to FERC for further consideration based on its conclusion that the entirety of Interior's Section 4(e) conditions must be included in the new license. If FERC issues a new license that is uneconomic, Tacoma will have to decide whether to operate an uneconomic project or to shut it down. If FERC determines that, under Section 4(e), it cannot issue a new license, then FERC will have to decide to what extent it must assess the environmental impacts of such a decision. It also is possible that Tacoma will seek review of the court's decision in the U.S. Supreme Court, but it is unlikely the U.S. Supreme Court will agree to accept the case. In any event, it seems likely that the Cushman proceeding will continue to be controversial for several more years, and that it could result in further calls for Congressional reforms to address the delays in the licensing process. Stay tuned.

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