

FERC Orders Approving HCP

Wells HCP Specific Order Amending License (2004)

107 FERC ¶ 61,283
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Public Utility District No. 1 of
Douglas County, Washington

Project No. 2149-106

ORDER AMENDING LICENSE

(Issued June 21, 2004)

1. This order approves the application of Public Utility District No. 1 of Douglas County, Washington (Douglas), to amend the license for the Wells Project No. 2149 in order to implement the terms of an Anadromous Fish Settlement and Habitat Conservation Plan (HCP) designed to protect Mid-Columbia River Basin salmonids, in particular threatened and endangered species. The Wells HCP and HCPs for two other Mid-Columbia River licensed projects licensed to P.U.D. No. 1 Chelan County, Washington (Chelan) were approved in a companion order issued today (Master Order).¹ These orders will serve the public interest by putting into place a long-term program to aid in the recovery of the endangered species and help to prevent other salmonids from becoming listed.

Background

2. The long history of the Columbia River anadromous fishery problem and the efforts of many actors to resolve issues specific to the Mid-Columbia River Basin are summarized in the Master Order and need not be repeated here. It suffices to say that there are four major hydroelectric projects comprising five dams on the Mid-Columbia River, all of which are under Commission license. In order from upstream to downstream they are Wells, Chelan's Rocky Reach and Rock Island Projects, and Public

¹ Public Utility District No. 1 of Chelan County, WA, et al., 107 FERC ¶ 61,280 . Separate orders amending the licenses for Chelan's Rocky Reach Project No. 2145 and Rock Island Project No. 943 to implement project-specific HCPs are also being issued today. Public Utility District No. 1 of Chelan County, WA, 107 FERC ¶ 61,281 (Rocky Reach) and ¶ 61,282 (Rock Island).

Utility District No. 2 of Grant County Washington's (Grant) Wanapum-Priest Rapids Project No. 2114 (consisting of Wanapum and Priest Rapids Dams). In the late 1980's, the Commission commenced what has become known as the Mid-Columbia proceeding, in an effort to resolve anadromous fish issues for the licensed Mid-Columbia projects. Project-specific agreements were negotiated for Rock Island and Wells, which are conditions of those licenses. The Rocky Reach license has been amended to authorize installation of permanent downstream fish passage facilities. Grant is currently required to release interim spill flows from Wanapum-Priest Rapids to assist downstream migration.

3. As these events were unfolding, two species of Columbia River salmonids were federally listed as threatened under the Endangered Species Act (ESA).² In the early 1990s, discussion commenced among the licensees, National Marine Fisheries Service within the U.S. Department of Commerce (NOAA Fisheries), U.S. Fish and Wildlife Service (FWS), Indian tribes, and others, with the intention of developing long-term plans for the recovery of the listed salmonids and to prevent further listings (HCPs). HCP Agreements were reached for Wells, Rocky Reach, and Rock Island. Applications for approval of the HCPs and for incidental take permits³ pursuant to ESA section 10 were filed by Chelan with respect to Rocky Reach and Rock Island, and by Douglas with respect to Wells. NOAA Fisheries granted the requested approvals and permits.

4. Chelan and Douglas also filed separate applications with the Commission for approval of the project-specific HCPs and for amendment of the Rocky Reach, Rock Island, and Wells licenses to incorporate those documents into the appropriate licenses as special articles. The applications are opposed by the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Columbia River Intertribal Fish Commission, and American Rivers.

5. The Master Order addresses the objections of these parties and concludes that the HCPs are in the public interest and should be approved. We incorporate that discussion here by reference. Consistent with the Master Order, this order amends the Wells license to incorporate the HCPs.

6. Also, the FWS issued a Biological Opinion pursuant to ESA section 7 regarding the effects of the projects with respect to various federally-listed threatened and

² 42 U.S.C. § 4321 et seq.

³ An incidental take permit exempts the permittee from the prohibition on taking of threatened or endangered species of section 9 of the ESA (16 U.S.C. § 1538).

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endangered species. FWS found that incorporating the HCPs into the licenses is not likely to jeopardize the continued existence of the endangered bull trout, but did find that the operation of the three projects under the HCPs would result in incidental take of bull trout. Its Biological Opinion thus includes an incidental take statement with respect to each project, including Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions for implementing the RPMs. The RPMs and Terms and Conditions for Rocky Reach are attached to this order, which also adds new license articles requiring them to be implemented.

7. Finally, a minor modification is made to require the licensee to prepare a map indicating the areas which might be affected by implementation of the HCP.

The Commission orders:

(A) The application of Public Utility District No. 1 of Douglas County, Washington, for approval of the Wells Project No. 2149 Anadromous Fish Agreement and Habitat Conservation Plan, and for its adoption as an amendment to the project license, is granted.

(B) The following new article is added to the project license:

Article 59. (a) The licensee shall carry out its obligations as set forth in the Anadromous Fish Agreement and Habitat Conservation Plan (HCP Agreement) for the Wells Hydroelectric Project No. 2149 filed with the Commission on November 24, 2003, and as approved by the Commission at 107 FERC ¶ 61,280 and ¶ 61,283. Further, the licensee shall file with the Commission (1) the final annual and comprehensive progress reports developed pursuant to the HCP Agreement; and (2) the final results of all studies and testing pursuant to the HCP Agreement.

(b) Prior to taking any action pursuant to the HCP Agreement that requires a change in the authorized project facilities or operations not specifically identified in the HCP Agreement, the licensee shall file a license amendment application.

(c) The licensee shall file design drawings prior to the implementation of any modification or addition to project works that is necessary to implement the HCP Agreement. The licensee shall file such design drawings for Commission approval at least 90 days prior to the start of construction or modification. The licensee will file as-built drawings with the Commission within 6 months after completion of construction or modification.

(C) Article 60 is added to the project license, to read as follows:

Article 60. The licensee, prior to the commencement of any ground-disturbing activity at the Project site or on non-federal lands pursuant to the Tributary Conservation Plan provisions of the Habitat Conservation Plan Agreement approved by the Commission at 107 FERC ¶ 61,280 and ¶ 61,283, shall consult with the Washington State Historical Preservation Officer (SHPO) and potentially affected Indian tribes about the need for a cultural resources survey. For this purpose, the licensee shall within 90 days prepare and provide to the SHPO and potentially affected Indian tribes a map delineating the Area of Potential Effect as defined in 36 C.F.R. § 800.16(d), and the map shall include potential geographical scope of actions under the Tributary Conservation Plan. If any previously unrecorded archeological or historical sites are discovered during the course of such survey or activity, ground-disturbing activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the licensee shall consult with the SHPO and tribes to develop a mitigation plan for the protection of significant archeological or historical resources. The Commission reserves authority to resolve any disputes between the licensee and the consulted entities.

(D) New Article 61 is added to the Project license, to read as follows:

Article 61. Bull Trout – Reasonable and Prudent Measures and Terms and Conditions. (a) Within six months of the issuance of the order amending license issued at 107 FERC ¶ 61,283 (2004), the licensee shall file for Commission approval a plan to implement the Reasonable and Prudent Measures and associated Terms and Conditions said order. The plan shall include provision for the annual report required by Article 412. The plan shall be prepared in consultation with the U.S. Fish and Wildlife Service, NOAA Fisheries, Washington Department of Fish and Wildlife, and interested Indian tribes.

(b) The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reason's based on project-specific information.

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(c) The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon approval of the plan, the licensee shall implement the plan, including any changes required by the Commission.

(E) New Article 62 is added to the project license, to read as follows:

Article 62. Annual Reports -- Implementation of Reasonable and Prudent Measures. (a) The licensee shall prepare and file with the Commission an annual report describing the impacts of the Reasonable and Prudent Measures and associated Terms and Conditions prescribed by the U.S. Fish and Wildlife Service for the protection of bull trout. The report shall also be submitted to the Central Washington Field Office of the U.S. Fish and Wildlife Service and shall list and describe any adverse effects resulting from project activities on bull trout, including the number and life stages of individuals affected.

(b) Upon locating a dead, injured, or sick endangered or threatened species specimen, the licensee shall initially notify the Central Washington Field Office (Wenatchee, Washington; telephone 509-664-0658) within 48 hours. The licensee shall take care in handling sick or injured specimens to ensure effective treatment and care or the handling of dead specimens to preserve biological material in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured endangered species or preservation of biological materials from a dead animal, the licensee shall carry out instructions provided by the Service to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

(F) New Article 63 is added to the project license, to read as follows:

Article 63. Reservation of Authority – Bull Trout Recovery Plan. Authority is reserved to the Commission to require the licensee to carry out specified measures for the purpose of participating in the development and implementation of a bull trout recovery plan.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

APPENDIX

U.S. FISH AND WILDLIFE SERVICE REASONABLE AND PRUDENT MEASURES AND IMPLEMENTING TERMS AND CONDITIONS REGARDING BULL TROUT

Reasonable and Prudent Measures

RPM 1. The Licensee to develop and implement, in coordination with the U.S. Fish and Wildlife Service (Service), appropriate measures to reduce impediments to up and downstream passage of adult and juvenile bull trout at Wells Dam and its associated reservoir system. Should measures to reduce impediments to up- and downstream passage of bull trout warrant consideration of additional modifications to facilities or operations, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure that these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

RPM 2. The Licensee shall design a monitoring program to (1) detect adverse effects resulting from the proposed action, (2) assess the actual level of incidental take in comparison with the anticipated incidental take level documented in the biological opinion, (3) detect when the level of anticipated incidental take is exceeded, and (4) determine the effectiveness of reasonable and prudent measures and their implementing terms and conditions. Specifically, the program shall be designed to monitor the abundance, distribution, and timing of adult and juvenile bull trout utilizing Rocky Reach Dam and its associated reservoir system. Implementation of this monitoring program shall begin no later than May 1, 2005. If information from the monitoring efforts warrants consideration of additional modifications to facilities or operations for the minimization of project effects on bull trout, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

Terms and Conditions

1. To implement RPM 1, the Licensee shall develop, in coordination with the Service, a prioritized list of monitoring efforts necessary to evaluate the effects of the Project on the up- and downstream passage needs of bull trout at Wells Dam by February 28, 2005. Based on that prioritized list, the Licensee shall initiate studies to evaluate the up- and downstream passage needs for bull trout at Rocky Reach Dam and to assess the Project

impacts on those passage needs. If the information from these studies warrants consideration of modifications to facilities or operations to reduce the take of bull trout, as determined by the Service in consultation with the Commission and the Licensee, then the Service will work with the Commission and the Licensee to ensure that these measures are implemented, as appropriate, or recommend that the Commission reinstate consultation if necessary.

2. To implement RPM 1, the Licensee shall, in coordination with the Service, develop a prioritized list of monitoring efforts necessary to determine the extent of bull trout entrainment through the turbines at Rocky Reach Dam by February 28, 2005. If the studies contained in the prioritized list are determined by the Service, in consultation with the Commission and the Licensee, to be feasible, the Licensee shall be required to assess the extent of bull trout entrainment through the turbines at Rocky Reach Dam. If entrainment is determined to be significant, the Licensee will be required to explore techniques to minimize bull trout entrainment through the turbines.

3. To implement RPM 2, the Licensee shall, in coordination with the Service, develop and implement a comprehensive bull trout monitoring program, that includes the presence of a sufficient number of radio-tagged (or other appropriate tracking technology) bull trout, to enable monitoring of bull trout utilizing Rocky Reach Dam and its associated reservoir system and tracking of the incidental take exemptions stated above.

4. During the interim period between the Commission's issuance of an order amending the Project license to include these RPMs and Terms and Conditions and the implementation of the monitoring plan called for in RPM 2, the Licensee shall implement the following action items; specifically:

1. Extend the fish ladder monitoring period to assess adult bull trout use of existing fishways outside of the traditional migratory timeframes.
2. Continue coordinated telemetry monitoring of radio-tagged bull trout.
3. Compile project operational data linked to timeframes when adult migratory bull trout pass project powerhouses and/or spill gates.
4. Cost share funding with the Service for analysis of genetic samples from fluvial bull trout sampled during the first year of the Mid-Columbia Bull Trout Study.

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5. Participate in a coordinated effort with the Service to increase the informational database for adult bull trout that utilize the Methow/Twisp river system.

If the level of incidental take on which these RMPs and Terms and Conditions is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided.

FERC Orders Approving HCP

Master Order for HCP Approving Anadromous Fish Agreements (2004)

107 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Public Utility District No. 1 of
Chelan County, WA

Project Nos. 2145-057
943-083

Public Utility District No. 1 of
Douglas County, Washington

Project No. 2149-106

ORDER GRANTING INTERVENTIONS; APPROVING ANADROMOUS FISH
AGREEMENTS, SETTLEMENT AGREEMENT, AND APPLICATIONS TO AMEND
LICENSES; AND TERMINATING PROCEEDING

(Issued June 21, 2004)

1. This order grants the applications of Public Utility District No. 1 of Chelan County, Washington (Chelan) and Public Utility District No. 1 of Douglas County, Washington (Douglas) (together, the licensees) for approval of project-specific Anadromous Fish Agreement and Habitat Conservation Plans (HCPs)¹ regarding the operation of Chelan's Rocky Reach Project No. 2145 and Rock Island Project No. 943, and Douglas' Wells Project No. 2149. The Habitat Conservation Plans are intended to foster the recovery of endangered fish species in the Mid-Columbia River Basin. In companion orders issued today, we amend the licenses for the Rocky Reach, Rock Island, and Wells Projects to incorporate therein as special articles the respective project-specific Plans.² These orders

¹ Each Anadromous Fish Agreement and Habitat Conservation Plan is a single, project-specific document.

² Public Utility District No. 1 of Chelan County, WA, 107 FERC ¶ 61, 282 (Rock Island); Public Utility District No. 1 of Chelan County, WA, 107 FERC ¶ 61,281 (Rocky Reach); Public Utility District No. 1 of Douglas County, WA, 107 FERC ¶ 61,283 (Wells).

will serve the public interest by putting into place a long-term program to aid in the recovery of the endangered species and help to prevent other salmonids from becoming listed.

I. Background

A. The Columbia River Anadromous Fishery Issue

2. The Columbia River historically produced the world's largest runs of Chinook salmon and steelhead trout, major runs of coho and sockeye salmon, and small numbers of chum and pink salmon.³ In the 1930s, the U.S. Army Corps of Engineers and others began the construction of a series of major dams planned for the Columbia and Snake Rivers for the purposes of electric power,⁴ flood control, and irrigation.

3. Proceeding downstream from the Canadian-U.S. border, the first two dams on the Columbia River are Grand Coulee and Chief Joseph, both of which are federally owned and operated. The next five dams are the so-called Mid-Columbia Dams, all of which are under Commission license. Proceeding downstream, they are: the 774-megawatt (MW) Wells;⁵ the 1,213-MW Rocky Reach;⁶ the 623-MW Rock Island;⁷ and the two-dam, 1,620-MW Wanapum-Priest Rapids Project No. 2114 (Priest Rapids). Priest Rapids is licensed to Public Utility District No. 2 of Grant County, Washington (Grant). The Mid-

³ The Columbia River is 1,210 miles long, of which 460 miles are in Canada and 740 miles are in the United States. It drains an area of 259,000 square miles, including a great part of Washington and Oregon, substantially all of Idaho, the western portion of Montana, and smaller areas in Wyoming and Utah.

⁴ The Columbia River and its tributaries represent one-third of the hydroelectric potential of the United States.

⁵ The Wells Project was issued an original license in 1962. 28 FERC 128 (1962).

⁶ The Rocky Reach Project was issued an original license in 1957. 18 FPC 33 (1957).

⁷ The Rock Island Project was relicensed in 1989. 46 FERC ¶ 61,033 (1989).

Columbia reservoirs are used to create the necessary hydraulic head for power generation rather than for significant storage.

4. Downstream of the Mid-Columbia dams, the Columbia River is joined by the Snake and Walla Walla Rivers, and turns west toward the ocean. On this stretch of the river, which is called the main stem, are four federal dams: McNary, John Day, The Dalles, and Bonneville.⁸

5. Although most of the dams on the Columbia River were designed with fish passage devices to assist the upstream migration of adult fish returning to spawn, these dams are generally considered to have contributed to a significant decline in the numbers of migratory fish returning annually to the Columbia River drainage system to spawn. Moreover, originally no provisions were made to allow downstream migration of juvenile salmon (smolts) other than by passage over the dams in spills or through the generating turbines during power production. The Columbia River dams are believed to be cumulatively responsible for the mortality of a significant portion of the juvenile anadromous fish that annually migrate from the river system downstream to the ocean.⁹

B. The Commission's Mid-Columbia Proceeding

6. In 1978, the Washington Department of Fish and Wildlife (Washington DFW) filed a complaint against Grant, asserting that the minimum flows being released from Priest Rapids were insufficient to protect salmonid spawning and rearing areas downstream from Priest Rapids (Vernita Bar). Subsequently, various federal and state agencies and Indian tribes petitioned the Commission to require all of the Mid-Columbia projects to

⁸ The location of all of the Columbia River projects is shown on page S-5 of the Environmental Impact Statement (EIS) prepared in this proceeding.

⁹ The reservoirs decrease water velocity, which delays the migrants and may cause them to lose their migrating urge and become residents of the reservoirs. This means that they do not complete their anadromous life cycle, and also that they are exposed to increased predation. Downstream migrants also face hazards if they pass through the turbines, and if they pass downstream via spill they may suffer from elevated levels of oxygen in the blood (gas bubble disease).

provide increased minimum flows and spills at each dam to assist the migration of salmon and steelhead trout.

7. In 1979, the Commission consolidated these actions and set the matter for hearing, directing the presiding Administrative Law Judge (ALJ) to hold hearings on the matter of a long-term solution to the fish passage issues.¹⁰ This was expected to require years of studies and proceedings. For the near term, the Commission delegated to the ALJ authority to establish interim operating measures for all four projects. Grant sought rehearing. A settlement was later reached and approved regarding interim measures, and the Commission determined that any ALJ decision on a long-term solution for Priest Rapids would, if it was opposed, not go into effect without Commission approval.¹¹

8. The Commission approved a settlement agreement on the Vernita Bar phase of the Mid-Columbia proceeding and terminated that phase in 1988.¹² In 1992, the ALJ issued an initial decision requiring installation of physical bypass systems at Wanapum and Priest Rapids dams, and requiring interim spill requirements until the completion of physical bypass systems.¹³ Exceptions to the initial decision were filed. In 1994, the Commission ordered Grant to release interim spill flows from Priest Rapids to assist the downstream passage of spring and summer migrants.¹⁴ No action was taken on the initial decision, inasmuch as Endangered Species Act (ESA) proceedings soon eclipsed the ALJ proceeding.

9. Longer-term settlement agreements on anadromous fishery issues were approved in 1989 and 1991 with respect to Rock Island and Wells, respectively. Both the Rock Island Agreement and the Wells Agreement call for spill flows, hatchery programs, and other measures to protect and enhance the anadromous fishery. The order approving the Rock

¹⁰ 6 FERC ¶ 61,210.

¹¹ Public Utility District No. 2 of Grant County, WA, 16 FERC ¶ 61,043 (1981).

¹² 45 FERC ¶ 61,401.

¹³ 58 FERC ¶ 63,022.

¹⁴ Public Utility District No. 2 of Grant County, WA, 67 FERC ¶ 61,225.

Island Agreement incorporated that agreement into a new license for Rock Island, which expires in 2029.¹⁵ The order approving the Wells Agreement incorporated that agreement into the Wells license, which expires in 2012, and terminated the Mid-Columbia proceeding as to the Wells Project.¹⁶

10. With respect to Chelan's Rocky Reach Project, studies were continued to determine an appropriate downstream passage method, and the Mid-Columbia Proceeding is still open as it pertains to that project.¹⁷ The Rocky Reach license expires on June 30, 2006, with any new license applications due by June 30, 2004.

C. Proceedings at NOAA Fisheries

11. Section 10(a)(1)(B) of the ESA¹⁸ authorizes the ESA agencies to issue to non-federal entities an incidental take permit (take permit) for species listed as endangered under the ESA. The ESA agencies are the National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service (FWS). The take permit allows a non-federal landowner to conduct an activity that results in an incidental take of listed species. An HCP must accompany an application for a take permit. An HCP is a planning document developed under ESA section 10(a)(2)(A) to ensure that the effects of the permitted action on listed species are adequately minimized and mitigated.¹⁹ The take permit authorizes the take, but not the activity itself. The activity must comply with other applicable laws and regulations, such as holding a hydroelectric license.

¹⁵ Public Utility District No. 1 of Chelan County, WA, 46 FERC ¶ 61,033 (1989).

¹⁶ Public Utility District No. 1 of Douglas County, WA, 54 FERC ¶ 61,056 (1991).

¹⁷ The relevant subdocket is Project No. 2145-000.

¹⁸ 16 U.S.C. § 1539(a).

¹⁹ 16 U.S.C. § 1539(a)(2)(A).

12. The take permit exempts the permittee, when acting in compliance with the HCP, from the prohibition of ESA section 9 on the taking of listed species.²⁰

13. The holder of a take permit also benefits from the certainty provided by the HCP. This is because the ESA agencies have a “no surprises” policy, under which the ESA agencies will not require additional commitments from the permittee beyond those agreed to in the HCP, even if there are unforeseen circumstances. In order for the no-surprises policy to apply, the permittee must be implementing the terms of the HCP, the take permit, and any other associated authorizations in good faith. In the hydropower licensing context, it is desirable for the HCP to become a condition of any license in effect during the term of the take permit, so that the two documents can be integrated. The HCP can be a more efficient means of ESA compliance for license applicants and the Commission than the approach traditionally used in licensing-- Commission consultation with the ESA agencies pursuant to ESA section 7.²¹

14. In 1993, Chelan, Douglas, and Grant entered into discussions with NOAA Fisheries, FWS, and Washington DFW to develop a long-term comprehensive program for managing fish and wildlife that inhabit the Mid-Columbia River Basin. Other entities, including the Confederated Tribes of the Colville Reservation (Colville), Confederated Tribes and Bands of the Yakama Indian Nation (Yakama), Confederated Tribes of the Umatilla Indian Reservation (Umatilla), and American Rivers, subsequently joined the negotiations. The Commission also assigned separated staff to assist the

²⁰ 16 U.S.C. § 1538. Section 9 makes it unlawful to “take” (kill, harm, harass, capture, etc.) listed endangered species. ESA section 11, 16 U.S.C. § 1540, establishes penalties for knowing violations of the act or of permits issued thereunder.

²¹ 16 U.S.C. § 1536. Under the section 7 process, once a hydropower license application is filed, the Commission conducts consultation with the ESA agencies (often the license applicant is appointed as the Commission’s non-federal representative) and issues a Biological Assessment. Thereafter, the ESA agency issues a Biological Opinion with a Reasonable and Prudent Alternative, including Reasonable and Prudent Measures designed to be placed any license the Commission issues to the applicant.

negotiations.²² The scope of the negotiations was later narrowed to the development of an agreement for anadromous salmonids in light of the likelihood that certain species of salmon and steelhead would become listed species under the ESA.²³ Upper Columbia River steelhead and spring-run chinook salmon were subsequently listed under the ESA as endangered.²⁴

15. In July 1998, as amended in May 2002, Chelan and Douglas (together, the licensees) submitted to NOAA Fisheries unexecuted versions of three HCPs, along with applications for incidental take permits.

16. NOAA Fisheries, with the Commission participating as a cooperating agency, issued in November 2000 a Draft Environmental Impact Statement (EIS) on the HCPs. In April 2002, the HCPs were executed by the relevant licensee, NOAA Fisheries, FWS, Washington DFW, and Colville. In December 2002, NOAA Fisheries issued the Final EIS.

17. NOAA Fisheries' consideration of the take permit applications included preparation of project-specific Biological Opinions pursuant to section 7 of the ESA²⁵ for the operation of each project under the terms of the applicable HCP, and six separate Biological Opinions for the operation of Chelan's three and Douglas' three hatchery

²² See Public Utility District No. 2 of Grant County, WA, et al., letter order issued September 8, 1999, in Project No. 2145-000. Separated staff are staff members designated to assist the parties to a proceeding and are "non-decisional" for the purpose of the proceeding; that is, they are take no part in the Commission's consideration of any application filed in the proceeding.

²³ 16 U.S.C. §§ 1531-43.

²⁴ 62 Fed. Reg. 43,973 (August 18, 1997) (steelhead); 64 Fed. Reg. 41,835 (August 22, 1999) (spring-run Chinook). Critical habitat for both species was designated on February 16, 2000, 69 Fed. Reg. 7764.

²⁵ 16 U.S.C. § 1536.

facilities. NOAA Fisheries thereafter issued a take permit for the operation of each project²⁶ and for each hatchery facility.

D. License Amendment Applications

18. On November 24, 2003, the licensees filed separate applications for approval of the project-specific HCPs and for their incorporation as articles in the applicable licenses. The Rock Island and Wells applications request that those licenses be amended by replacing the Rock Island and Wells Agreements, respectively, with the project-specific HCPs. There is no Rocky Reach agreement on anadromous fisheries to be replaced.

19. On December 5, 2003, the Commission issued public notice of the applications and of its intent to adopt NOAA Fisheries' EIS for purposes of its environmental analysis of the amendment applications.²⁷ Timely motions to intervene in all three applications were filed by the Washington Department of Ecology (Ecology); Washington DFW; NOAA Fisheries; Yakama; the Columbia River Inter-Tribal Fish Commission and Umatilla (together, CRITFC);²⁸ U.S. Department of Agriculture (Agriculture); and American Rivers.²⁹ The motions to intervene of CRITFC, Yakama, and American Rivers were accompanied by protests.³⁰

²⁶ Permit Nos. 1391 (Wells), 1392 (Rocky Reach), and 1393 (Rock Island), all issued August 20, 2003.

²⁷ 68 Fed. Reg. 69,393-94 (Dec. 12, 2003). The deadline for interventions was January 9, 2004.

²⁸ CRITFC was created in 1977 by the Nez Perce Tribe, Umatilla, Yakama, and the Confederated Tribes of the Warm Springs Reservation of Oregon for the purpose of establishing a broad general fisheries program to promote the conservation practices of its members.

²⁹ Effective October 15, 2003, 18 C.F.R. § 385.214(a)(2) allows the U.S. Departments of Agriculture, Commerce, and the Interior; the Advisory Council on Historic Preservation; any state fish and wildlife, water quality certification, or water rights agency; and any Indian tribe with authority to issue a water quality certification to intervene in any proceeding by filing a timely notice of intervention instead of a motion to intervene.

20. The City of Entiat, Washington, and Entiat School District No. 127 (Entiat) filed a motion to intervene in the Rocky Reach proceeding. Entiat does not protest that application, but expresses concern about potential impacts to that community and questions the adequacy of the EIS.

21. A late motion to intervene was filed by the U.S. Department of the Interior. Pursuant to Rule 214(d)(1) of our Rules of Practice and Procedure,³¹ we will grant Interior's motion because its late intervention will not delay or disrupt the proceeding or prejudice other parties.

22. Comments supporting the applications were filed by U.S. Senator Patty Murray, U.S. Representatives Norm Dicks and Doc Hastings, and Washington State Governor Gary Locke.

23. Chelan timely filed a consolidated answer to the motions to intervene of CRITC, Umatilla, and Yakama, and separate answers to the motions to intervene of Entiat and American Rivers. Douglas filed an answer to the motions to intervene of CRITFC, Umatilla, Yakama, American Rivers, and Agriculture. With one exception discussed below, the licensees do not oppose intervention by any of these entities, but express disagreement with various statements made in the motions to intervene or protests.³²

³⁰ CRITFC, Umatilla, and Yakama submitted a combined protest, which is referred to as CRITFC protest.

³¹ 18 C.F.R. § 385.214(d)(1).

³² 18 C.F.R. § 385.213(a)(2) prohibits and answer to a protest unless otherwise ordered by the decisional authority. Because Chelan's and Douglas' answers will not delay or disrupt the proceeding and may assist in our consideration of the issues raised by the Indian tribes, American Rivers, and Entiat, we will accept their answers.

24. On February 11, 2004, the Commission held a public technical conference to allow the licensees to present the details of the HCPs to the Commission staff and interested parties.³³ On March 1, 2004, the licensees filed a joint response to certain statements made by CRITFC at the technical conference (Joint Response).

II. Discussion

25. The HCPs have been in development for over ten years. We commend all of the participants in the negotiations for their patience and dedication in developing a plan for operating the Rocky Reach, Rock Island, and Wells Projects in a manner that aids in the recovery of the endangered species and helps to prevent additional listing of Mid-Columbia salmonids. As discussed below, we find that the HCPs are appropriately designed to reach that goal and are in the public interest. We will therefore amend the project licenses to include the HCPs as terms thereof.

A. Agriculture Department's Motion to Intervene

26. Agriculture, of which the U.S. Forest Service is a part, moved to intervene in the Wells proceeding (Project No. 2149) on the basis that the Wells Project would, in the context of implementing the tributary conservation plan for Wells,³⁴ “utilize federal lands within the Okanogan-Wenatchee National Forest,” and could therefore affect “lands and resources of the National Forest System, including the Methow River System and its tributaries . . . administered by the Department.”³⁵

27. Douglas appears to oppose Agriculture's motion to intervene, stating that the Department has “no real property holdings” within the Wells Project boundary, and that were Douglas to undertake any activity on lands or waters administered by the Forest Service, it would first need the Forest Service's authorization.³⁶

³³ 69 Fed. Reg. 2,136 (Jan. 14, 2004).

³⁴ See Wells HCP section 7, and discussion below.

³⁵ Agriculture motion at 2.

³⁶ Douglas answer at 15.

28. Douglas appears to be correct that there are no National Forest lands within the project boundary. Nonetheless, we think the possibility that certain HCP implementation measures may be carried out on National Forest lands gives Agriculture a sufficient interest in the outcome of this proceeding to warrant the grant of its intervention motion.

B. Status of the Mid-Columbia Proceeding

29. On April 23, 2004, the Chief ALJ issued an order to show cause why, in light of the fact that several years had passed without any need for his assistance as ALJ, the Mid-Columbia proceedings before him should not be terminated. Grant responded that it would not object to termination of the proceeding with respect to Priest Rapids because the initial decision is before the Commission. Chelan, citing the HCP agreement and the status of related actions such as ESA consultation, agreed that the proceeding with respect to Rocky Reach should be terminated.

30. NOAA Fisheries responded that the Chief ALJ should retain jurisdiction, because fisheries issues have not been resolved at Priest Rapids, and because it believes the 1994 interim spill provisions are no longer adequate, particularly in light of the addition of affected stocks to the federal endangered species list. It states that the continuing jurisdiction of the Chief ALJ is beneficial to the efforts of Grant and the intervenors to reach a new, long-term settlement agreement. We leave this matter to the Chief ALJ's discretion as to Priest Rapids. Consistent with our decision to approve the Rocky Reach HCP, we will terminate the Mid-Columbia proceeding as to that project.

C. Summary of the HCPs

31. The HCPs are intended to be a comprehensive and long-term management plan for plan species affected by the projects, i.e., Chinook salmon, sockeye salmon, coho salmon, and steelhead.³⁷ The objective of the HCPs is to achieve and maintain for the duration of the HCPs "no net impact" for each plan species. This is to be accomplished by a combination of fish passage measures, hatchery programs, and fish habitat enhancement work along tributary rivers and streams. The HCPs are summarized below. Unless otherwise noted, the discussion pertains to all of the agreements.

³⁷ Sockeye and Coho are not listed. The provisions of the HCP are intended to help ensure that they do not become listed.

32. Section 1 provides for a 50-year HCP term. Section 2 defines circumstances under which parties may withdraw.

33. Section 3 provides for no net impact to be achieved on a specified schedule and maintained for the duration of the HCP Agreement for each plan species.³⁸ “No net impact” has two components: (1) a combined adult and juvenile project survival standard (project survival standard) of at least 91 percent,³⁹ and (2) up to 9 percent compensation for “unavoidable project mortality.”⁴⁰ Of the nine percent compensation, up to seven percent would be provided through the hatchery programs, and up to two percent through the tributary programs.

34. The licensees are responsible for achieving the 91-percent project survival standard through project-specific improvement measures. They will also be responsible for (1) funding the two-percent tributary conservation plan, (2) providing capacity and funding for the seven-percent hatchery compensation plan, and (3) making capacity and funding adjustments to the hatchery compensation plan to reflect and compensate for future increases in run size for each plan species.⁴¹ If the licensee is not able to achieve the

³⁸ No net impact is to be achieved at Rocky Reach and Rock Island by 2013 and at Wells by 2018.

³⁹ This means that 91 percent of each plan species (juvenile and adult combined) survive project effects when migrating through each project. It includes direct, indirect, and, where it can be measured, delayed mortality.

⁴⁰ “Unavoidable project mortality” refers to the assumed 9-percent project-related mortality rate for which compensation is provided. HCP section 13.30.

⁴¹ If the run size increases, the amount paid into the hatchery fund is reduced.

project survival standard at its project, it must consult with the signatories to the HCP through a coordinating committee established to jointly seek a solution, as discussed below.⁴²

35. HCP section 5 (Wells section 4) establishes the passage survival plan for achieving and maintaining the 91-percent project survival standard. Compliance will initially be measured based on juvenile passage survival (the adult survival rate is assumed to be 98-100 percent).⁴³ Because of technological limitations on the accuracy of passage measurements, the standard used for assessing juvenile passage survival will vary with the plan species.

36. The passage survival plan has three implementation phases.⁴⁴ In Phase I, each licensee will implement a juvenile and adult operating plan and criteria intended to meet the “no net impact” standard and a monitoring and evaluation program to determine compliance with the standards. If the coordinating committee determines that the project survival standard has not been achieved for each plan species following the completion of a three-year study, the licensee will proceed to Phase II for that species. Phase II requires a set of project-specific measures to be taken, which will then be evaluated against the project survival standard.⁴⁵ If the Phase II measures fail to achieve the project survival standard for a Plan species, additional measures are to be taken, which are to be selected

⁴² The coordinating committee will oversee all aspects of the standards, methodologies, and implementation of the HCPs by various means, including establishing methods to determine if survival standards are being achieved; determining if the signatories are carrying out their responsibilities; determining if no net impact is achieved; approving study plans and reviewing study results; making adjustments to the passage survival plan; resolving disputes; and adjusting schedules and dates for performance. See Rock Island and Rocky Reach HCP section 4; Wells HCP section 5.

⁴³ It is difficult with available technology to differentiate between hydroelectric project-related adult mortality and natural mortality.

⁴⁴ Rock Island and Wells HCP section 5.3; Wells HCP section 4.2.

⁴⁵ E.g., Rock Island HCP section 5.3.2 (measures to be determined by the coordinating committee subject to specified criteria).

according to specified criteria, such as likelihood of success, timing, and cost-effectiveness. The licensee will continue to implement the Phase II measures until the project survival standard is achieved for each Plan species, unless the coordinating committee determines that the standards are impossible to achieve.

37. If the coordinating committee determines, at the end of either Phase I or Phase II, that the project survival standard has been achieved for a plan species, the parties will proceed to Phase III, during which the licensee maintains the project survival standard for that species, and juvenile survival continues to be periodically evaluated as determined by the coordinating committee.

38. Section 6 (Wells section 5) provides for the protection of reservoir habitat and water quality by requiring the licensees, when making land-use or related permit decisions, to consider the cumulative impact of those decisions in order to satisfy the conservation objectives of the HCP, the license, and any applicable law. The licensees also agree to notify and consider the comments of the parties regarding any land-use permit application on project lands.

39. Section 7 establishes the tributary conservation plan, under which each licensee will fund a plan species account for measures for the protection and restoration of plan species habitat.⁴⁶ Each licensee is responsible for funding an account applicable to a designated geographic area.⁴⁷ The projects will be selected by a tributary committee of

⁴⁶ Douglas will make an initial contribution to the plan species account of \$1,982,000 (\$1998) and have the option at the end of the fifth year to make annual payments thereafter of \$176,178 (\$1998) or a lump-sum payment. Wells HCP section 7.4. Chelan would make annual contributions of \$229,800 (Rocky Reach) and \$485,000 (Rock Island) (\$1998), but other signatories may elect to receive any of the annual payments for the first fifteen years in advance. Rocky Reach and Rock Island HCPs section 7.5.

⁴⁷ For instance, projects for which Douglas will provide funding are to be located between the Chief Joseph and Wells tailraces and in the Methow and Okanogan River watersheds. Wells HCP section 7.2. Projects for which Chelan will provide funding are to be located between Chief Joseph tailrace and Rock Island tailraces and the Methow, Okanogan, Entiat, and Wentachee River watersheds. Rock Island and Rocky Reach HCPs section 7.2.

representatives of the signatories in accordance with criteria and priorities set forth in the HCP.⁴⁸ Each licensee will separately fund a tributary assessment program to monitor and evaluate the performance of the chosen projects.

40. Section 8 establishes the hatchery compensation plan, under which the licensees will provide funding and hatchery capacity to compensate for unavoidable project mortality and to meet the seven-percent hatchery compensation level needed to achieve no net impact. The initial estimates of hatchery production capacity will be adjusted periodically, and hatchery production commitments for passage losses will be adjusted periodically based on the juvenile project survival estimates.

41. In section 9 of the HCP, the signatories provide various assurances with respect to regulatory approvals, project licensing, limitations on reopening the licenses, and other matters. These include:

42. If the licensee is in compliance with its incidental take permit, the HCP, and other license provisions relating to the plan species, the parties will not institute any action against the licensee under the ESA, FPA, or other relevant legislation.⁴⁹

43. If the licensee is in compliance with the HCP, the parties will support its new license application(s) with respect to plan species filed with the Commission during the term of the HCP.⁵⁰

⁴⁸ HCP section 7.3.

⁴⁹ Rock Island and Rocky Reach HCP section 9.1.2; Wells HCP section 9.4.2. These sections, which are identical, specify the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.; Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 et seq.; and the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq.

⁵⁰ Rock Island and Rocky Reach HCP section 9.2.1; Wells HCP section 9.5.1.

44. The HCPs will be NOAA Fisheries' and FWS' recommendations for plan species pursuant to FPA sections 10(a), 10(j), and 18, subject to a reservation of authority to prescribe fishways under section 18 if the HCP terminates.⁵¹

45. With certain exceptions, the parties will not invoke any reopener clauses in the project licenses for the purpose of obtaining additional measures for the plan species.⁵²

46. If the licensee is in compliance with the HCP, the parties will not during its term advocate for or support additional or different fish protection measures or changes in project structures or operations other than those set forth in the HCP.⁵³

47. Section 9 reflects the no-surprises policy of NOAA Fisheries and FWS; that is, non-federal landowners with an HCP and take permit are assured that if "unforeseen circumstances" arise, then as long as the permittee is implementing the terms and conditions of the HCP, permit, and any other associated documents in good faith, neither agency will unilaterally require the landowner to commit land, water, or financial resources, or restrict the use of land, water, or other natural resources, beyond the level otherwise agreed to in the HCP.⁵⁴

D. Tribal Issues

48. CRITFC and Yakama assert that numerous aspects of the HCPs and the EIS violate the Commission's trust responsibility to them. They refer to: (1) termination of the Mid-Columbia proceeding and the Wells and Rock Island Agreements; (2) the incorporation of NOAA Fisheries' and FWS' no-surprises policy into the HCPs; (3) lack of provision for recovery of stocks to sustainable, harvestable levels; (4) no guarantee that the

⁵¹ Rock Island and Rocky Reach HCP section 9.2.2; Wells HCP section 9.5.2.

⁵² Rock Island and Rocky Reach HCP section 9.3; Wells HCP section 9.6.

⁵³ Rock Island and Rocky Reach HCP section 9.7; Wells HCP section 9.10.

⁵⁴ See 50 C.F.R. § 222.303(g); and <http://endangered.fws.gov/hcp/nosurpr.htm>.

hatchery component will continue; (5) lack of provisions to protect sturgeon and lamprey; and (6) inadequate consideration in the EIS of alternatives to the HCPs. We consider the merits of these and other assertions below.

49. Also, Yakama states that its interest in this proceeding is to assure that its “Treaty reserved ‘Trust resources’” are protected.⁵⁵ The licensees acknowledge that pursuant to treaty the tribes are entitled to a “fair share” of off-reservation Columbia River basin fisheries in common with other citizens of the State,⁵⁶ but they dispute that this right is subject to any trust responsibility, and disagree that such off-reservation fish constitute “trust resources.”⁵⁷ They add that even if off-reservation fish and Pacific lamprey are trust resources, the tribes are entitled only to the protections afforded by license terms and conditions required by the Commission in fulfillment of its FPA responsibilities.⁵⁸

50. The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. We carry out our responsibilities towards Indian tribes in the context of the FPA and other statutes that establish Commission responsibilities. We recognize the cultural and economic significance to the Tribes of the plan species in these proceedings, and will carry out our responsibilities under the FPA with those considerations in mind.

⁵⁵ In addition to salmonids, Yakama states that its trust resources include Pacific lamprey and sturgeon. Motion to intervene at 4.

⁵⁶ Douglas answer at 5, citing Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho), citing Washington Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979).

⁵⁷ Chelan claims that the term “Indian trust resources” is not defined in the Commission’s tribal consultation policy statement or in any other laws or regulations binding on the Commission in this proceeding. Chelan answer to CRITFC at 5 n. 7.

⁵⁸ Chelan answer to CRITFC at 4-5; Douglas answer at 4-5. They apply the same reasoning to Pacific lamprey.

E. Compliance with the Rock Island and Wells Licenses

51. Yakama states that the 1989 Rock Island and 1991 Wells Agreements⁵⁹ are contracts that require all of the parties thereto to jointly petition the Commission in order to remove those agreements as conditions of the Wells and Rock Island licenses. It characterizes Commission approval of the HCPs as unilateral terminations of these agreement, and asks that the HCPs be modified to ensure that they provide for Yakama's continued participation in management of the plan species.⁶⁰ The licensees respond that both agreements contain reopener provisions that may be invoked by any party after the expiration of a period specified in the project-specific agreement.⁶¹

52. The licensees are correct. The Rock Island Agreement establishes Chelan's obligations for the first thirteen years of the term of the agreement (i.e., 1987-2000). It provides that any party may thereafter initiate negotiations or file a petition to modify the agreement's terms and conditions or to replace the agreement in whole or in part.⁶² The Wells Agreement is similarly subject to modification following March 1, 2004.⁶³ In any event, both licenses contain a reservation of Commission authority at any time during the license term to require alterations to project facilities and operations that may be warranted by changed circumstances.⁶⁴

⁵⁹ These agreements are described above; see "The Commission's Mid-Columbia Proceeding."

⁶⁰ Yakama protest at 3, 7.

⁶¹ Chelan answer to CRITFC at 3-4; Douglas answer at 2-4.

⁶² See 46 FERC at 61,195.

⁶³ See 54 FERC at 61,208.

⁶⁴ See 46 FERC at 61,198 (Rock Island); 54 FERC at 61,210 (Wells).

F. Relationship of Rocky Reach HCP to Relicensing
(Project No. 2145)

53. CRITFC and American Rivers assert that approval of the Rocky Reach HCP will predetermine the terms and scope of the Rocky Reach relicense proceeding (applications for which are due June 30, 2004), because Chelan's application will be composed substantially of the HCP. They further assert that consideration of the HCP at this point would cause duplicative environmental review, ESA section 7 consultation, and Clean Water Act certification. American Rivers adds that this would strain the resources of interested stakeholders as well as agencies. They urge us to delay consideration of the Rocky Reach HCP until it is encompassed within Chelan's application for a new license.⁶⁵

54. Chelan replies that any entity that did not sign the Rocky Reach HCP will be free to make any argument in the relicense proceeding with respect to anadromous fish, since only the parties have agreed to support the HCP on relicensing, nor does the HCP bind the Commission at relicensing. Chelan adds that the timing of action on the relicense applications is uncertain, and that consolidation of the proceedings would delay implementation of the HCP's measures to comply with the ESA. In contrast, it states, going forward with the HCPs now should help expedite relicensing, since the agency parties have agreed that the HCPs will constitute their license recommendations and conditions under FPA sections 10(a), 10(j), and 18.⁶⁶ Finally, Chelan says there would be no duplication, because the standards for review of license amendment applications and new license applications are different.⁶⁷

⁶⁵ CRITFC protest at 8-9; American Rivers protest at 4-5.

⁶⁶ Chelan answer to American Rivers at 5, citing Rocky Reach HCP section 9.2.2 (Wells section 9.5.2).

⁶⁷ Chelan notes various additional factors the Commission must consider with respect to new license applications, as required by FPA section 15(a)(2), 16 U.S.C. § 808(a)(2). See order section F.4 (Technical Analysis) below.

55. The HCPs are designed to aid in the recovery of endangered species, and we find them to be in the public interest. Given that, and the uncertainty as to when the Rocky Reach relicense proceeding will be concluded, we think it appropriate to approve the HCP at this time. Nor does our decision here necessarily dictate the result of the Rocky Reach relicensing with respect to anadromous fish. In the Rocky Reach relicense proceeding, we will examine whether the HCPs should be included in any new license to Chelan (or any competing applicant). Our approval of the Rocky Reach HCP in this proceeding will undoubtedly influence our decision on that issue, but the FPA requires us to fully consider all evidence and arguments presented in the relicense proceeding on this and any other issues,⁶⁸ and we shall do so.

G. Environmental Impact Statement

1. Cooperating Agency Status

56. CRITFC argues that the Commission must recirculate or supplement the EIS, because the Commission was not actually a cooperating agency for NOAA Fisheries' EIS.⁶⁹ CRITFC states that section 1501.6 of the Council on Environmental Quality's (CEQ) regulations requires a cooperating agency to: (1) have jurisdiction over the federal action, (2) have special expertise in the relevant issues, or (3) be requested by the lead agency to serve as a cooperating agency.⁷⁰ CRITFC argues that none of these requirements has been satisfied.⁷¹

⁶⁸ The purpose of relicensing is to examine the public interest with respect to an existing project in light of currently applicable laws and policies. *Confederated Tribes and Bands of the Yakama Indian Nation v. FERC*, 746 F.2d 466, 470-71 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985) (Yakama).

⁶⁹ See 40 C.F.R. § 1506.3(c), which provides:

A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

⁷⁰ 40 C.F.R. § 1501.6.

⁷¹ CRITFC protest at 8.

57. Section 1501.6 states, in relevant part:

Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition, any other Federal agency which has special expertise with respect to any environmental issue which should be addressed in the [environmental impact] statement may be a cooperating agency upon request of the lead agency. Any agency may request the lead agency to designate it a cooperating agency.

58. The Commission has jurisdiction over the federal action because the licensees have filed applications to amend their licenses to include the HCPs as special articles. That the HCPs also require approval by NOAA Fisheries in the context of the incidental take permit applications does not affect this Commission's jurisdiction over the license application. The Commission was moreover identified as cooperating agency in the January 1999 EIS scoping brochure issued by NOAA Fisheries, and in the scoping summary attached to the September 1999 second post-scoping meeting notice. We think this suffices to establish compliance with section 1501.6. Commission staff also participated in the preparation of the EIS by co-facilitating the scoping meetings with NOAA Fisheries, reviewing comments received on the scoping documents and the Draft EIS, reviewing drafts of the Draft and Final EISs, and providing technical support for drafting the EIS and responses to comments on the Draft EIS.

59. Special expertise is a separate basis; the Commission has special expertise in analyzing fishery issues and writing enforceable license articles for the mitigation, protection, and enhancement of fishery resources. More specifically, this proceeding is just one of many in which we have analyzed a project's environmental impacts on, and developed measures benefitting, Pacific Ocean salmonids, including numerous NEPA documents pertaining to the fisheries impacts of license amendment applications for Mid-Columbia projects.⁷²

⁷² E.g., Public Utility District No. 2 of Grant County, WA, 95 FERC ¶ 61,338 (2001) (spill flow requirement variance); Public Utility District No. 1 of Chelan County, WA, 99 FERC ¶ 61,059 (2002) (juvenile fish bypass system), 99 FERC ¶ 61,279 (2002) (installation of new, small turbines); 98 FERC ¶ 61,090 (2001) (installation of piling to support juvenile bypass system); and 96 FERC ¶ 61,300 (2001) (pool raise).

2. Baseline for Environmental Analysis

60. Yakama states that the FPA and the National Environmental Policy Act of 1969 (NEPA)⁷³ require the environmental analysis of an application to be based on pre-project conditions. Yakama asserts that this is inherent in the requirement of section 10(a)(1) for the Commission to give equal consideration to developmental and non-developmental resource values in license proceedings, and in the requirement of section 10(j) that licenses include “adequate and equitable” fish and wildlife protection, mitigation, and enhancement measures. Absent a pre-project baseline, it indicates, NOAA Fisheries and FWS cannot fulfil their responsibilities under FPA sections 10(a), 10(j), and 18.⁷⁴ CRITFC agrees that a pre-project baseline should be used, and adds that NOAA Fisheries’ 2000 Federal Columbia River Power System Biological Opinion (2000 Biological Opinion)⁷⁵ used a “natural river” baseline to measure improvements in the condition of salmonids and to determine adult survival standards.⁷⁶

61. Neither NEPA nor the FPA requires environmental analysis of an application to be based on pre-project conditions. The Commission's practice of using current conditions as the baseline for environmental analysis has been judicially affirmed,⁷⁷ and the Commission recently declined to change its practice in this regard when it amended its

⁷³ 16 U.S.C. § 4321 et seq.

⁷⁴ Although none of the applications is for a new license, to which sections 10(a), 10(j), and 18 clearly apply, Yakama points out that the HCPs are intended to support future new license applications for Wells and Rocky Reach. Yakama protest at 6.

⁷⁵ The 2000 Biological Opinion addresses the operation of the FCRPS and 19 Bureau of Reclamation projects. It defines a Reasonable and Prudent Alternative for the operation of the system intended to improve survival and the likelihood of recovery for endangered Columbia River salmonids.

⁷⁶ CRITFC EIS comments at 9-10; protest at 5.

⁷⁷ *American Rivers v. FERC*, 187 F.3d 1007, reh’g denied, 201 F.3d 1186 (9th Cir. 1999).

license application processing rules.⁷⁸ That NOAA Fisheries may have used a different baseline for analysis in separate proceeding is not sufficient reason for the Commission to change its well-established and judicially affirmed practice.

3. Supplemental EIS

62. Section 102(2)(E) of the NEPA⁷⁹ requires action agencies to analyze proposed federal actions and reasonable alternatives. The range of reasonable alternatives that must be discussed is a matter within an agency's discretion,⁸⁰ and decreases as the environmental impact of the proposed action becomes less substantial.⁸¹ A discussion of environmental alternatives need not be exhaustive, and need only provide sufficient information to permit a reasoned choice of alternatives.⁸²

⁷⁸ See Order No. 2002, 68 Fed. Reg. 51,070 (August 25, 2003), III FERC Stats. & Regs., Regs. Preambles ¶ 31,149 at 51,097 (July 23, 2003).

⁷⁹ 16 U.S.C. § 4332(2)(E).

⁸⁰ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-52 (1976).

⁸¹ See *Olmstead Citizens for a Better Community v. U.S.*, 793 F.2d 201, 208 (8th Cir. 1986).

⁸² See *North Carolina v. FPC*, 533 F.2d 702 (D.C. Cir. 1976).

63. The EIS considered three alternatives: (1) no action, (2) anadromous fish conservation measures adopted pursuant to ESA section 7 consultation; and (3) the preferred alternative, HCPs.⁸³ Alternatives considered but eliminated from detailed study included dam removal, additional spill flows, and issuance of non-power licenses.⁸⁴

64. CRITFC also objects to the Commission adopting NOAA Fisheries' environmental analysis of the HCPs, because NOAA Fisheries' incidental take permits have a 50-year term, but the licenses to which the HCPs will be added have remaining terms of less than 50 years.⁸⁵ This distinction is of no significance. The EIS assumes that the HCPs not only will be in the existing licenses for the remainder of their terms, but also will be included as conditions of any new licenses issued for these projects. This is entirely appropriate, since the HCPs are designed for no net impact to be attained over a period of several years, and then maintained for the remainder of the take permits' 50-year terms. For instance, no net impact is to be achieved at Rocky Reach by 2013, which is likely to be within the term of any new license issued for that project. Therefore, even if the Commission were to conduct a completely separate analysis of the HCPs, it would still have to assume that the HCPs will be included in any new license. That is not to say that the Commission is bound to include the HCPs in any new licenses for these projects, but only that the analysis of the HCPs' environmental impacts can only be done if they are assumed to be in place.

65. CRITFC also argues that the Commission should conduct an ecosystem based EIS that includes an examination of the operations of all hydroelectric projects on the Mid-Columbia River, from the Grand Coulee Dam upstream of these licensees' projects to McNary Dam downstream, and should as well include the operations of the Federal

⁸³ Alternative 2, conservation measures, is based on the ESA section 7 process; that is, the Commission would provide NOAA Fisheries with a biological assessment describing project impacts and any proposed protection measures. NOAA Fisheries would then determine if the proposed action is likely to jeopardize the continued existence of the listed species or result in the destruction or modification of their critical habitat. Depending on its conclusions, NOAA Fisheries could recommend additional protection measures for the listed species.

⁸⁴ See EIS at pp. 2-69 to 2-73.

⁸⁵ CRITFC protest at 8.

Columbia River Power System.⁸⁶ We disagree. The proposed federal action that the EIS addresses is limited in scope: the implementation of the HCPs for Wells, Rocky Reach, and Rock Island. The licensees have no control over the upstream or downstream projects, and nothing done in the context of the HCPs will affect how those projects are operated. The HCPs will contribute to the rebuilding of tributary habitat production capacity and basic production and numerical abundance of the plan species, which can only contribute to the overall improvement of the Columbia River Anadromous Fishery.

66. CRITFC and Yakama contend that neither action alternative provides the protection necessary to meet the species recovery goal of the ESA or the tribes' own goal of sustainable, harvestable populations.⁸⁷ They state that NOAA Fisheries' findings in the Qualitative Analysis Review⁸⁸ show that the HCPs will fall short of what is needed for survival and recovery under the ESA, and that therefore it is unreasonable not to

⁸⁶ CRITFC protest at 4, 6.

⁸⁷ CRITFC EIS comments at 4-7, Yakama protest at 4. Yakama cites NOAA Fisheries' salmon recovery policy, which includes as goals the restoration of salmon populations to the point where they can be delisted and allow for the meaningful exercise of tribal fishing rights. Yakama protest at 4. CRITFC indicates that its objective is to have naturally-reproducing stocks supplemented by hatchery production until restoration measures result in a harvestable surplus of naturally-reproducing fish. In contrast, it states, NOAA Fisheries contemplates separate stocks of naturally-reproducing and hatchery fish, with tribal harvest directed to the hatchery stocks. CRITFC EIS comments at 4-5.

⁸⁸ NOAA Fisheries' Qualitative Analysis Review developed population models for Upper Columbia River spring-run Chinook salmon and steelhead. It modeled a range of alternative future survival improvements for Upper Columbia River stocks, including improvements that could be expected from implementing the HCP measures. The Qualitative Analysis Review is discussed in detail in EIS Chapter 5. See EIS at 5-7 to 5-20.

consider at least one alternative that will meet that standard.⁸⁹ They state that such an alternative could include survival improvements through changes to operation of the Federal Columbia River Power System, egg-to-smolt survival increases from habitat improvements, or increases in ocean survival.

67. The licensees respond that the Qualitative Analysis Review was a draft that was never finalized, and that used data ending in 1994. The updated model used for the EIS included 1995 and 1996 data, and the latter analysis shows that the HCP measures should ensure against extinction.⁹⁰

68. Such actions as improvements to the the Federal Columbia River Power System or unspecified actions to increase ocean survival are not reasonable alternatives to the HCPs. First, such broad-brush suggestions are too vague to allow credible analysis. Moreover, we have no authority over the operations of the Federal System, or control over human activities that might affect ocean survival, such as harvest. In any event, to the extent such actions are taken by other non-jurisdictional entities, we view them as complementary, rather than as alternatives to, the HCPs.

69. CRITFC and Yakama⁹¹ state that because neither action alternative includes full consideration of such measures as sluiceways, reservoir drawdown, or increased spill, they do not meet the requirement of ESA section 10(a)(2)(B)(ii) for HCPs “to the maximum extent practicable, minimize and mitigate the impacts of [a permitted] taking.”⁹² CRITFC states that the EIS explains that such measures are not included in the

⁸⁹ See CRITFC EIS comments at 10, citing the EIS at C-5 and C-39 to the effect that the HCPs alone will not recover the listed species. CRITFC evidently believes that HCP measures such as habitat improvements will be insufficient because the direct and delayed impacts of the entire Columbia River basin hydroelectric system explain the majority of impacts to salmon stocks. See CRITFC EIS comments at 7.

⁹⁰ Joint response at 2.

⁹¹ CRITFC EIS comments at 6-7; Yakama protest at 9-10.

⁹² 16 U.S.C. § 1539(a)(2)(B)(ii).

HCPs because none of them would alone lead to species recovery, and asserts that an alternative should have been developed using a combination of such actions.⁹³

70. The EIS explains that elements of these measures have been included in the two action alternatives where appropriate, and describes the negative aspects of these measures that make them less effective than the HCPs. For instance, spill is the primary measure to pass juvenile fish at Rock Island, currently and under the HCP, and is also a component of the Wells bypass system, but it has not been effective at Rocky Reach. Seasonal reservoir drawdown was not given full consideration, because although it has been found to correlate with increased migration rates for sockeye and steelhead, that correlation does not hold for chinook and coho salmon, and there is no consistent relationship between flows and survival for most species.⁹⁴

71. Yakama and CRITFC state that the EIS should also contain an alternative based on the assumption that no net impact is not achieved, in which case the Commission should require compensation for the resulting loss of fish and for fish losses between implementation of the HCPs and the scheduled achievement of no net impact in 2013.⁹⁵ CRITFC considers this a reasonable alternative, because failure of any of the three HCP components (dam-passage improvements, habitat improvements, and long-term hatchery production programs) will result in failure of the entire effort.⁹⁶

72. We think it unreasonable to develop a hypothetical alternative that assumes the HCPs will fail. Moreover, the possibility that no net impact will not be met on schedule is specifically provided for in HCP section 5, which contemplates additional measures to be undertaken if the survival standards are not met. Any alternative we developed along these lines would be redundant. Compensation for fish losses is addressed below.

⁹³ Citing the EIS at pp. 2-69 to 2-73.

⁹⁴ See EIS at pp. 2-69 to 2-72.

⁹⁵ Yakama protest at 5; CRITFC EIS comments at 14.

⁹⁶ CRITFC EIS comments at 7.

73. Finally, CRITFC and Yakama attack the no-action alternative on the ground that it fails to correctly represent the actions that may be taken to protect the plan species under the settlement agreements currently in place or the existing coordinating committees.⁹⁷ CRITFC states that the Rocky Reach permanent juvenile fish passage system, which was approved in 2002,⁹⁸ should be considered part of the existing baseline instead of part of the HCP alternative. Yakama contends that the no-action alternative should include discussion of the agency statutory authorities at relicensing, particularly relative to Rocky Reach, and more fully discuss the Mid-Columbia settlement agreements and the work of the existing coordinating committees.⁹⁹ Failure to include these elements in the no-action alternative, asserts Yakama, causes the EIS to inadequately consider Yakama's interests.¹⁰⁰

74. We conclude that the no-action alternative is appropriately described in the EIS.¹⁰¹ Although the Rocky Reach permanent juvenile fish bypass system was approved in April 2002 prior to issuance of the Final EIS in December 2002, construction was not completed until March 30, 2003, so its existence cannot reasonably be said to reflect existing conditions when the environmental analysis was prepared.

75. Nor do we agree that the future exercise of agency conditioning authorities at relicensing can be included in a description of existing environmental conditions. These authorities are not exercised until the relicense applications have been filed, accepted, and found ready for environmental analysis. We cannot say when that will occur, even for Rocky Reach, let alone predict how this Commission or NOAA Fisheries might exercise

⁹⁷ Yakama protest at 16; CRITFC protest at 16.

⁹⁸ 99 FERC ¶ 61,059, reh'g denied, 100 FERC ¶ 61,216 (2002).

⁹⁹ Yakama protest at 16-17.

¹⁰⁰ CRITFC EIS comments at 13.

¹⁰¹ See EIS at p. S-4 and pp. 2-31 to 2-38.

its authorities. Finally, the EIS describes in adequate detail the existing and planned measures for anadromous fish under the existing licenses, as amended in the context of the Mid-Columbia proceeding.¹⁰²

4. Technical Analysis

76. An EIS must contain “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences.”¹⁰³ This standard has been characterized as requiring the action agency to take a “hard look” at the proposed action and reasonable alternatives.”¹⁰⁴ CRITFC and Yakama assert that the EIS fails to meet this requirement in various respects.

77. In addition to a general coordinating committee, each HCP establishes committees for tributary conservation and hatchery compensation programs. Membership on these committees is limited to the parties. CRITFC asserts that additional environmental analysis is required, because the EIS was premised on the assumption that Umatilla and Yakama would be parties to the agreements and members of the committees. CRITFC contends that their absence from these committees will result in different environmental impacts than those identified in the EIS, because Umatilla and Yakama are co-resource managers who play a leading role in the recovery of the Columbia River anadromous fisheries.¹⁰⁵ Yakama similarly states that the EIS must analyze the effects of terminating the Mid-Columbia proceeding and thereby excluding Yakama for the next 50 years from the role it currently plays in resolving anadromous fishery issues.¹⁰⁶

¹⁰² See EIS at pp. 2-31 to 2-38.

¹⁰³ PP&L Montana, LLP, 97 FERC ¶ 61,060 (2001), citing Columbia Land Basin Protection Assn. v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981), quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).

¹⁰⁴ See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1990).

¹⁰⁵ CRITFC EIS comments at 4, 13.

¹⁰⁶ Yakama protest at 8.

78. It is possible that the details of specific actions taken to meet the no-net-impact goal would be different if Umatilla and Yakama were on the various committees, but the numerical standards would remain the same. More important, an alternative must be reasonably well articulated in order for it to be analyzed. CRITFC and Yakama cannot explain how the HCPs would be differently administered or how management of the Columbia River's anadromous fishery would change, were they represented on the various committees, since they cannot speak to what differently-constituted committees might decide.¹⁰⁷

79. CRITFC argues that the EIS lacks sufficient quantitative detail on how listed species would be affected by the HCPs or other alternatives. It notes that the EIS mentions the Qualitative Analysis Review but does not incorporate the Review's analysis into the comparison of alternatives, making it impossible to tell how each of the alternatives compares with the others in terms of survival and rebuilding.¹⁰⁸

80. We think it is unreasonable to expect the EIS to include predictive quantitative data at the level of detail CRITFC appears to expect. The HCPs are based on the premise that a combination of measures, some of which are yet to be determined, will be taken in order to meet the applicable standards, and that their effectiveness will be measured. If the measures initially selected do not cause the standards to be met, other measures as yet undetermined will be taken until the standards are met or are determined to be impossible to meet. Under these circumstances, the appropriate focus is not on producing detailed future population estimates, but on whether the approach to the problem is sound. We think the HCP approach is likely to be successful, because it does not depend on a single component, all the components are likely to have beneficial effects, and it requires the parties to meet the numerical standards unless it is determined that they are impossible to meet.

¹⁰⁷ The decision of CRITFC and Yakama not to participate in the HCPs for these three projects has no bearing on their participation in fisheries management efforts at Priest Rapids or for the Federal System.

¹⁰⁸ CRITFC EIS comments at 5-6.

81. CRITFC contends that the EIS is too focused on whether the HCPs meet ESA standards, and includes no clear analysis of whether they satisfy other applicable legal standards.¹⁰⁹ CRITFC mentions in general tribal treaty fishing rights, no net impacts, the relicensing standards of the FPA, the Fish and Wildlife Coordination Act,¹¹⁰ Pacific Northwest Electric Power Planning and Conservation Act,¹¹¹ Magnuson-Stevens Act,¹¹² and Title 77 of the Regulatory Code of Washington.¹¹³

82. Although an environmental analysis includes identification of laws and policies that apply to the proposed action and alternatives,¹¹⁴ its purpose is not to determine if applicable legal requirements have been satisfied, but to compare the environmental impacts of a recommended action with reasonable alternatives. The EIS does that.

¹⁰⁹ CRITFC EIS comments at 6, 9, 10, 11-13. CRITFC also suggests that the Commission should determine if the HCP satisfies NOAA Fisheries' "obligations under sections 18, 10(a), 10(j) of the [FPA]." CRITFC EIS comments at 9. We see no inconsistency between the HCPs and these sections of the FPA.

¹¹⁰ 16 U.S.C. § 661 et seq.

¹¹¹ 16 U.S.C. § 839 et seq.

¹¹² 16 U.S.C. §§ 1801-1883.

¹¹³ Revised Code of Washington, Title 77.

¹¹⁴ See EIS section 4.13.

Whether the HCPs satisfy applicable legal requirements is a matter for NOAA Fisheries and the Commission to determine in the context of orders acting on the applications before them. We consider these matters at appropriate places in this order.¹¹⁵

83. American Rivers asserts that because the HCPs have 50-year terms and are intended to address substantially all of the anadromous fish issues at the projects, and because the parties assert that the agreements will meet the legal obligations of the signatory agencies for purposes of future relicensing proceedings,¹¹⁶ the Commission must evaluate the license amendment applications pursuant to the same standards that would apply to an application for a new license, i.e., must consider all aspects of the public interest affected by the applications and give equal consideration to power development and non-power resources. American Rivers states that the EIS fails in this regard because it addresses only those aspects of the public interest related to anadromous fish.¹¹⁷

84. Chelan responds that the standard for Commission review of these applications is different from the standard applicable to relicensing, because a license amendment application is subject only to the public interest standard of FPA section 10(a)(1), while a

¹¹⁵ See, e.g., section VII (Magnuson-Stevens Act). CRITFC does not explain what provisions of the Northwest Power Act it believes apply to the HCPs, or what role the Commission might have in that regard.

Title 77 RCW includes broad-ranging provisions in 24 chapters pertaining to all aspects of fish and game regulation in Washington State. Rocky Reach and Rock Island HCP section 9.5 (Wells 9.8) provides that if the licensee is in compliance with the HCP, ITP, and its license, Washington DFW will not request additional measures under Title 77 RCW. Because the FPA preempts state laws with respect to licensed projects other than state regulations enacted pursuant to federal legislation such as the Clean Water Act, a licensee may voluntarily comply with state laws only so long as such compliance does not interfere with its compliance with the federal license. See *California v. FERC*, 495 U.S. 490 (1990).

¹¹⁶ Citing Rocky Reach and Rock Island HCP section 9.2.2; Wells HCP section 9.5.2.

¹¹⁷ American Rivers protest at 3.

relicense application is subject, in addition to section 10(a)(1), to FPA section 15¹¹⁸ and to potential agency recommendations pursuant to FPA section 10(j) and mandatory conditions pursuant to FPA sections 4(e)¹¹⁹ and 18.¹²⁰

85. Although every change to a license is an amendment, not all amendments trigger the full panoply of rights and procedures applicable to a license application proceeding, such as sections 10(j), 18, and 4(e). Amendments that do trigger these sections are called “licensing amendments.” A licensing amendment authorizes a significant new project work, such as a new turbine/generator, an increase in the height of the project dam, or the like.¹²¹ Non-licensing amendments make minor modifications to project lands, waters, or operations that implicate only limited aspects of the overall public interest with respect to the project.¹²²

¹¹⁸ 16 U.S.C. § 808.

¹¹⁹ 16 U.S.C. § 797(e).

¹²⁰ 16 U.S.C. § 811.

¹²¹ See e.g., PUD No. 1 of Chelan County, 55 FPC 2050, 2053 (1976) (increase in installed capacity); Fieldcrest Mills, Inc., 37 FERC ¶ 61,264 at 61,762 n.6 (1986) (installed capacity quintupled; new forebay, powerhouse and tailrace); Adirondack Hydro Development Corp., 50 FERC ¶ 61,100 at 61,318-20 (1990) (substantial capacity increase, dam raised, reservoir surface increased, new powerhouse, twelve turbines small turbines replaced by one large turbine). See also Allegheny Hydro No. 8, L.P., 49 FERC ¶ 61,277 (1989); Nevada Irrigation District, 46 FERC ¶ 61,146 at 61,467 (1987); Cordova Electric Cooperative, Inc., 91 FERC 61,243 (2000) (all adding a new transmission line).

¹²² See, e.g., Virginia Electric and Power Co., 72 FERC ¶ 61,075 (1995), reh’g denied, 72 FERC ¶ 61,283 (1995) (diversion of small portion of river flow from project reservoir to municipal water supply pipeline); Carolina Power & Light Co., 94 FERC ¶ 61,203 (2001) (replacement of existing water intake and pumping station to increase withdrawal capacity for municipal and industrial water supply).

86. The HCP applications are not licensing amendments. They are clearly limited in scope, and have negligible impact on other aspects of the projects that may be part of the relicensing analysis, such as irrigation, flood control, water supply, and recreation. Chelan is also correct that the HCPs have negligible or tangential bearing on various subjects required to be considered on relicensing by FPA section 15(a)(2), such as project safety, need for power, and existing and planned transmission services.

87. CRITFC also states that the EIS is deficient because it does not recognize that the wealth of the river has been transferred from tribal to non-tribal citizens, and that Indian tribes have higher rates of poverty and mortality from the loss of salmon than do non-tribal citizens.¹²³ The history of the river system's use and development over the last century is far too broad a topic for the limited purposes of analyzing applications to add an HCP to each of three project licenses, nor does the Commission have the authority to cure the adverse effects cited by CRITFC. However, since we conclude that the HCPs are likely to be an important element in the recovery of listed Columbia River salmonids, the grant of the amendment applications can only be beneficial for Native Americans and others.

88. CRITFC also believes that the cumulative impacts analysis is inadequate because it does not treat the HCPs as precedent for future Columbia River hydropower management at other dams, such as Wanapum and Priest Rapids, and examine the effects on salmon if the HCPs were applied to the operation of those dams.¹²⁴ We cannot assume that an HCP will be developed for Priest Rapids, much less speculate about what specific provisions such an agreement would contain. If a Priest Rapids HCP is developed, it will be subject to the same legal and policy requirements that apply to the HCPs under consideration here.

89. Cumulative impacts are the environmental consequences resulting from the incremental effects of the action alternative when added to other past, present, and reasonably foreseeable future actions, regardless of the entity that undertakes or undertook those actions.¹²⁵ Yakama asserts that the EIS cumulative impacts analysis is

¹²³ CRITFC protest at 7.

¹²⁴ CRITFC EIS comments at 8.

¹²⁵ See 40 C.F.R. § 1508.7.

deficient because it does not consider factors contributing to the decline of the listed species throughout the entire life history of each species, including effects beyond the geographic scope of the analysis. It adds that the EIS should have considered the impacts of the Federal Columbia River Power System operations and all five of the Mid-Columbia dams, and that NOAA Fisheries' Qualitative Analysis Review model appears to assume that operational requirements at the federal dams are unenforceable, which would undercut the effectiveness of the HCP measures.¹²⁶

90. There is no dispute that the Columbia River salmonid fishery has been negatively affected by federal and non-federal dams and a host of other factors, but there is no need in this proceeding to revisit that entire history. The EIS includes a discussion of other federal, regional, state, and tribal programs for salmonid recovery that address the factors which have contributed to the existing state of the fishery.¹²⁷ We conclude that the EIS appropriately addresses this issue.

91. CRITFC objects to the fact that the HCPs do not provide for compensation for losses to listed species if the projects fail to meet the no-net-impact standard on schedule, and states that this is an "exemption" not contemplated by the ESA or FPA, the environmental impacts of which must be examined.¹²⁸ It is of course possible that one or more of the projects will fail to achieve no net impact for any listed species on schedule. It is not possible, however, to analyze the environmental impacts of such an event without making many assumptions about the degree of non-compliance and the specific implementation measures to be determined by the committees in order to achieve no net impact. Any such assumptions on our part would amount to no more than speculation.

92. Finally, CRITFC states that the EIS does not analyze the effect of the HCP alternative on tribal water rights. In this connection, it appears to assert that the tribes have a right to spill water in order to provide fish passage.¹²⁹ Chelan replies that the

¹²⁶ Yakama protest at 15.

¹²⁷ See EIS section 5.

¹²⁸ CRITFC EIS comments at 9.

¹²⁹ CRITFC protest at 7.

Tribes have treaty rights to take fish at their usual and accustomed fishing places, but no right to spill at any of the projects by treaty or otherwise.¹³⁰ Although the 1855 Treaty with the Yakama¹³¹ and court cases cited by CRITFC establish that the treaty tribes have the right to continue traditional fishing practices¹³² and to an equitable share of the Columbia River fish,¹³³ CRITFC has not shown that there is a tribal right to spills, or to any other specific measure to ensure the continued existence of a harvestable fishery.

H. Merits of the HCPs

1. Term of the HCPs

93. Yakama contends that the 50-year term of the HCPs is too long and is not contemplated by ESA section 10. If long-term permits are lawful, Yakama contends that the incidental take permits should have project-specific time frames for achieving no net impact, and ESA protection for several generations of salmon thereafter.¹³⁴

94. ESA section 10 places no limit on the term of a take permit or HCP, and Yakama does not explain why the project-specific no-net-impact schedules are not appropriate.¹³⁵ Nor do we understand Yakama's argument that the take permits should provide ESA protection for several generations of salmon. As discussed above, the HCPs require the

¹³⁰ Chelan answer to CRITFC at 8.

¹³¹ 12 Stat. 951, Art. 3 (June 9, 1855).

¹³² *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

¹³³ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674-89 (1973).

¹³⁴ Yakama protest at 3.

¹³⁵ As noted above, Rocky Reach and Rock Island are to achieve no net impact by 2013, and Wells by 2018.

licensees, once they have achieved no net impact, to maintain that status for the remaining term of the ICPs, which is another 40 years or so. This clearly includes several generations of salmon.

2. Scope of the Plans

95. CRITFC states that the HCPs should be disapproved because they do not address anadromous fish survival and recovery from an ecosystem and life-history perspective, but merely measure juvenile fish survival from one point to another point. They add that the HCPs should holistically address water quality standards, fish passage, and restoration of critical habitat.¹³⁶

96. The licensees respond that an ecosystem approach was deemed by the HCP negotiators to be too complex; the HCPs meet the criteria of the ESA regulations for take permits by conserving fish habitat; and the HCPs are intended to help meet the goals of recovery and a self-sustaining harvestable population by meeting the no-net-impact standard.¹³⁷ They state that the HCPs acknowledge the importance of water quality objectives and provide that the parties will work together to address water quality problems.¹³⁸

97. We do not find the HCPs deficient in this regard. The passage-survival standards, tributary enhancement and hatchery compensation plans, and reservoir habitat and water quality provisions will be implemented under the guidance of the committees, which will have representation from each party. We are confident that these parties, working together, will implement the HCPs in a manner that makes a significant contribution to the recovery of the listed species and to keeping the non-listed species from becoming listed.

¹³⁶ CRITFC protest at 4-5.

¹³⁷ Chelan answer to CRITFC at 9; Douglas answer at 9.

¹³⁸ Chelan answer to CRITFC at 9, citing Rocky Reach HCP section 6.3; Douglas answer at 9-10, citing Wells HCP section 5.3. Chelan adds that when it constructed the permanent juvenile bypass facility at Rocky Reach, it obtained water quality certification from Ecology. Chelan answer to CRITFC at 9-10.

3. Delayed Mortality

98. CRITFC also complains that the HCPs fail to address project-related mortality that occurs beyond the project boundaries (delayed mortality).¹³⁹ Chelan disputes this, stating that the survival standards in each HCP include measurement of delayed mortality.¹⁴⁰ The licensees add that survival studies conducted at the projects from 1998-2003 in connection with the HCPs rely on recapture information at federal dams hundreds of miles downstream, and that the HCP parties agree that the survival standards include any delayed mortality resulting from passage at the projects.¹⁴¹ We find no deficiency in this regard.

4. Water Quality

99. CRITFC also faults the HCPs for not addressing elevated levels of dissolved oxygen and resulting delayed mortality from gas-bubble disease caused by spillage from turbine shutdowns or uncontrolled high flows, and increased predation on downstream migrants due to the loss of natural turbidity. It adds that the HCPs should include structural remedies, such as the introduction into fishways of cooler water from lower reservoir depths, to address elevated water temperatures compared to historical (*i.e.*, pre-project) levels.¹⁴² Chelan responds that temperature and dissolved gas issues are being addressed elsewhere, and that because these projects operate in a run-of-river mode they do not have the temperature stratification that would make a structural resolution of temperature issues possible.¹⁴³

¹³⁹ CRITFC protest at 4.

¹⁴⁰ Citing HCP section 13. See, e.g., Wells HCP section 13.14.

¹⁴¹ Joint response at 4-5.

¹⁴² CRITFC protest at 5.

¹⁴³ Chelan answer to CRITFC at 12.

100. It is not necessary to provide specific measures in the HCPs for water quality. The licensees are voluntarily complying with the Washington state water quality standards for temperature and dissolved oxygen¹⁴⁴ in the context of the federal fish passage programs for the Columbia River. The projects are located reaches of the river that Ecology has determined are water-quality impaired in that DO and water temperature sometimes exceed the state standards. Ecology has however granted approval to spill, thereby allowing slight exceedances of the dissolved oxygen standard, and is developing total maximum daily loads for the specific water-quality parameters that exceed the standards.¹⁴⁵ The EIS also finds that the Mid-Columbia projects have very rapid flushing rates that limit the potential warming that can occur due to their operation, and that water temperatures are not significantly warmed by the projects.¹⁴⁶

5. No Net Impact

101. CRITFC and Yakama state that the no-net-impact concept is flawed because the measurement and protection measures provided in the HCPs require the protection of only 95 percent of the run for each plan species, instead of the 100 percent assumed in the Draft EIS.¹⁴⁷ They assert that failure to provide full protection for the beginning and end portions of each run could select against important genetic diversity and fitness necessary for species recovery.¹⁴⁸ CRITFC adds that there is no provision for replacement of fish lost during the portion of the run to which the standard does not apply,¹⁴⁹ or for fish lost between now and when it is determined if the Rocky Reach permanent juvenile bypass

¹⁴⁴ Washington Administrative Code Chapter 173-201A.

¹⁴⁵ EIS section 3.3.2, in particular discussion at pp. 3-113 to 3-115.

¹⁴⁶ EIS at p. 3-116.

¹⁴⁷ This means that the standard will only apply 95 percent of the time that the run is occurring. In essence, the standard does not apply during the first and last several days of the run.

¹⁴⁸ CRITFC protest at 7.

¹⁴⁹ Yakama protest at 4; CRITFC EIS comments at 10.

system will enable that project to attain the survival standards. Douglas responds that the HCP negotiators agreed that it was impractical to try to encompass 100 percent of the run.¹⁵⁰

102. We agree that it is impractical to try to encompass 100 percent of the run, because that would require spill to occur throughout the year, as salmonids are in the system year-round. Since 95 percent of the run of all downstream migrants can be encompassed in the April-through-September period, it makes sense to concentrate efforts during this period. It should be noted as well that the vast majority of the remaining five percent of fish are not lost, but rather navigate over the dams or through the turbines without the safety measures provided for in the HCPs. The mortality rate for such fish is about eight percent.

103. CRITFC adds that there is no evidence that the tributary compensation plan will result in a two-percent increase in smolt production to compensate for project-related mortality. It states that two percent is a negotiated figure intended to cover the gap between the seven-percent hatchery mitigation figure and the 91-percent survival standard.¹⁵¹ The licensees respond that it was understood by all parties to the negotiations that a two-percent increase in smolt production cannot be measured, and that the habitat improvement projects funded with the assistance of the tributary committee will also benefit other species, such as bull trout and Pacific lamprey.¹⁵²

104. The fact that the two-percent figure was negotiated does not make it unreasonable. Smolt production in the tributaries is not something that can be measured with precision. It is however logical to assume that improving the tributary habitat will have a beneficial effect on salmonid production. In any event, the habitat enhancements are being relied upon to compensate for the loss of only two percent of the plan species, so the ultimate success of the HCP will depend only slightly on the effectiveness of this measure.

¹⁵⁰ Douglas answer at 12.

¹⁵¹ CRITFC EIS comments at 10.

¹⁵² Joint answer at 6-7.

105. Yakama and CRITFC state that the seven-percent hatchery mitigation component is uncertain, because NOAA Fisheries is not prohibited from closing the hatchery program;¹⁵³ hatchery fish used for testing may have a higher mortality rate than other hatchery fish; and there is no provision for compensation for fish lost between the beginning of additional hatchery production under the HCP and the ultimate determination of whether this measure is having the intended effect, or that other measures will be as effective as hatcheries.¹⁵⁴

106. The HCPs do not provide for discontinuation of the hatchery program. Rather, they include a monitoring and evaluation plan for the hatchery program that is updated every five years and includes a program review.¹⁵⁵ This could result in changes to hatchery production levels every ten years, based on specific indicia.¹⁵⁶ Any such changes evidently must comply with the 7-percent hatchery compensation requirement, unless NOAA Fisheries proposes hatchery policy changes that would preclude the 7-percent level from being achieved. Any proposed changes that would have that effect must be submitted to the Hatchery Committee, be subject to the dispute resolution provisions, and be consistent with the principle of no net impact.¹⁵⁷ Under these conditions, we see no need to modify the HCPs to guarantee that the hatchery program will never be modified or discontinued. Finally, ESA section 10 does not require compensation for every fish lost as a result of project operations. So long as the projects are operated under the terms of the HCPs as approved in the take permits, incidental mortality is a permissible take.

¹⁵³ The hatchery programs are subject to periodic review and modification beginning in 2013. HCP section 8.

¹⁵⁴ Yakama protest at 4, 10; CRITFC EIS comments at 13.

¹⁵⁵ See, e.g., Rocky Reach HCP sections 8.5 and 8.6.

¹⁵⁶ See, e.g., Rocky Reach HCP section 8.4.3, which provides for adjustments based on changes in average adult returns, adult-to-smolt survival rates, and smolt-to-adult survival rates from hatchery production facilities.

¹⁵⁷ See, e.g., Rocky Reach HCP section 8.8.

107. The HCP nine-percent mitigation component assumes a two-percent loss of adult fish due to project operations. Yakama and CRITFC state that this figure is speculative, because there are no quantitative measurements of actual adult losses, the 2000 Biological Opinion indicates that adult passage mortality may be as high as four percent, and the HCPs have no passage standards (e.g., for passage time,¹⁵⁸ fallback rates,¹⁵⁹ and downstream kelt¹⁶⁰ passage).¹⁶¹ Yakama states that these unmeasured and unknowable losses may skew the no-net-impact calculation, and that therefore the EIS should discuss, and the HCPs include, measures and passage standards to increase adult passage survival.

108. The licensees reply that the two-percent standard applies only to hydroelectric project effects, and that there is natural mortality unrelated to project effects, for which the licensees are not, and should not be, held responsible. They state that adult passage standards are not needed, since the HCP has survival standards.¹⁶²

109. It is possible that the adult mortality rates, whether project-induced or natural, exceed the assumed two percent. However, the weight of the available data appears to favor that figure.¹⁶³ What is important is that meeting the no-net-impact standard should ensure recovery of the plan species, and if the standard is not timely met, Phase II of the implementation plans provides for the licensees to undertake additional measures in order to meet that standard.

¹⁵⁸ Passage time refers to the time required for fish to migrate either upstream or downstream.

¹⁵⁹ Fallback occurs when adult fish migrating upstream fall back through the project instead of continuing upstream past the dam.

¹⁶⁰ A “kelt” is an adult steelhead that has survived spawning and is actively migrating downstream in order to return to the ocean.

¹⁶¹ Yakama protest at 11; Yakama July 29 letter at 12; CRITFC protest at 6; CRITFC EIS comments at 8.

¹⁶² Chelan answer to CRITFC at 11; Douglas answer at 11.

¹⁶³ EIS at p. 2-51.

6. Committee Membership

110. CRITFC also appears to object to the inclusion of the licensees on the tributary and habitat committees, on the ground they the licensees' interests are not those of the tribes. CRITFC also asserts that NOAA Fisheries cannot represent the tribes' interests, because it has not adopted the tribal goal of a sustainable, harvestable fishery.¹⁶⁴ We understand that the interests and goals of the licensees and the federal and state agencies are not necessarily those of the tribes. If the tribes choose to sign the HCPs, they can be assured of a voice on the committees that will implement the HCPs.

7. Dispute Resolution

111. HCP section 11 establishes a two-stage dispute resolution regime. In the first stage, disputes are referred to the tributary or hatchery committee or, if neither is applicable, the coordinating committee. If a dispute is not resolved by the coordinating committee, it is referred to the policy committee. Unresolved disputes originating with the tributary or hatchery committee must be referred to the coordinating committee before they may be referred to the policy committee. The tributary, hatchery, and coordinating committees are to act within 20 days. The policy committee must act by unanimous vote, and does not appear to have a clear time limit for final action on the dispute. Section 11 provides that if a dispute is not resolved, then "any Party may pursue and other right they might otherwise have."¹⁶⁵

112. Yakama asserts that the dispute resolution mechanism is not workable or enforceable, because it relies entirely on consensus and provides no avenue for judicial relief where consensus is not achievable. It states that this will lead to decision by paralysis, or the use of inaction during critical periods as a means of forcing concessions from unwilling participants.¹⁶⁶ CRITFC adds that the delays built into section 11 will

¹⁶⁴ CRITFC EIS comments at 4-5.

¹⁶⁵ HCP section 11.1.3.

¹⁶⁶ Yakama protest at 4-5.

prevent NOAA Fisheries from timely exercising its authorities and the Commission from using reopener clauses as oversight.¹⁶⁷

113. We interpret the statement in section 11.1.3 that “any Party may pursue any other right they might otherwise have” in the event of an unresolved dispute to include resort to the standard fish and wildlife reopener clause in each license.¹⁶⁸ In this regard, the HCPs state¹⁶⁹ that the parties may not invoke the reopener provisions “for the purposes of obtaining additional measures or changes in project structures or operations for Plan Species. . .,” except under limited circumstances specified in the HCPs.¹⁷⁰ We interpret this to mean that the reopener provisions may be invoked for the purpose of resolving disputes pertaining to implementation of measures provided for in the HCPs, as opposed to measures not contemplated by these agreements.¹⁷¹

114. Also, the Commission may on its own motion use its reserved authority to reopen a license to address concerns about the implementation of the HCPs. Moreover, the agreement in HCP section 9 not to institute any action under the ESA, FPA, or other

¹⁶⁷ CRITFC EIS comments at 9. CRITFC also states that the EIS should have examined the environmental impacts of delays caused by section 11’s mechanisms. Id. We are not able to determine the environmental impacts of hypothetical future disputes.

¹⁶⁸ Standard-form fish and wildlife reopener articles are incorporated by reference in all the licenses. See Rock Island license, ordering paragraph (E), 46 FERC ¶ 61,033 at 61,208; Rocky Reach license, ordering paragraph (B), 18 FPC 33, 35; and Wells license, Article 41, 28 FPC 128, 134.

¹⁶⁹ Rocky Reach and Rock Island HCPs section 9.3; Wells HCP section 9.6.

¹⁷⁰ The HCPs reserve the rights of NOAA Fisheries and FWS to use section 18 if an HCP is terminated, or to request the inclusion in the license of plan species protection measures contained in a competing license application. Rocky Reach and Rock Island HCPs section 9.3; Wells HCP sections 9.5.2 and 9.5.3.

¹⁷¹ See Rocky Reach and Rock Island HCP section 9.7; Wells HCP section 9.10. We express no opinion on how these provisions might affect the exercise by NOAA Fisheries of its authorities under the ESA.

legislation applies only so long as the licensee is in compliance with the take permit, HCP, and Commission license.¹⁷² No party is restrained from making an allegation of non-compliance. Finally, these provisions are binding only on the parties, and so will have no effect on Yakama and Umatilla if they decline to execute the HCPs.

115. Finally, we think Yakama and CRITFC are unduly concerned that the HCPs will continue in place unchanged even if they fail to achieve their purpose. The HCPs provide that any party may withdraw if no net impact is not achieved on schedule; is achieved but not maintained; or is achieved and maintained, but the plan species are not rebuilding, and the project is a significant factor in the failure to rebuild.¹⁷³ A party that withdraws from the HCP is free to invoke any applicable reopener clause.

8. No-Surprises Policy

116. In a related vein, CRITFC and Yakama object to the no-surprises concept incorporated into the section 9 of the HCPs, on the ground that they rob the Commission of its ability to use reopener provisions to ensure compliance with the license.¹⁷⁴ As noted above, the Commission is not precluded from exercising its authority under any reopener clause.

9. Sturgeon and Pacific Lamprey

117. CRITFC states that the HCPs violate the Commission's trust responsibility because they do not cover sturgeon or lamprey,¹⁷⁵ and that passage facilities provided for

¹⁷² Rocky Reach and Rock Island HCPs section 9.1.2; Wells HCP section 9.4.2.

¹⁷³ HCP section 2.1.

¹⁷⁴. CRITFC EIS comments at 9; Yakama protest at 7.

¹⁷⁵ CRITFC protest at 5. A petition to have Pacific lamprey listed as threatened or endangered was filed with the FWS by numerous environmental organizations on January 28, 2003. FWS has not yet acted on the petition.

under the HCPs, such as turbine intake screens, may select against sturgeon or lamprey.¹⁷⁶

118. As noted, the licensees dispute CRITFC's assertion that off-reservation sturgeon and lamprey are trust resources. They add that the Mid-Columbia proceeding is in any event not concerned with those species, and that the appropriate forum for issues pertaining to those species is future relicense proceedings.¹⁷⁷

119. Whether or not sturgeon or Pacific lamprey are "trust resources," the purpose of the HCPs is to ensure compliance with the ESA regarding federally-listed salmonids and to prevent other Mid-Columbia salmonids with similar habitat and passage characteristics from becoming listed. The only indication that project operations may affect either sturgeon or Pacific lamprey is a non-specific citation to a single study which CRITFC states shows evidence of lamprey impingement on turbine screens.¹⁷⁸ The licensees respond that project impacts to lamprey are minimal, because the juvenile bypass system at Wells does not use turbine intake screens and cannot impinge lamprey; there are no intake screens at Rock Island; and test results at Rocky Reach indicate that lamprey travel at extreme depths, while the turbine screens (which are currently placed on only two of the eleven turbines) have a short depth designed to guide fish using the upper section of the turbine intakes.¹⁷⁹ Moreover, the EIS acknowledges that turbine intake screens may impinge juvenile lamprey, but notes that the tributary habitat projects are expected to benefit lamprey spawning and rearing.¹⁸⁰ Under these circumstances, we see no need for the HCPs to address these species. CRITFC may raise issues pertaining to lamprey and sturgeon in relicense proceedings.

¹⁷⁶ Yakama motion to intervene at 4; CRITFC motion to intervene at 5..

¹⁷⁷ Chelan answer to CRITFC at 8; Douglas answer at 8-9.

¹⁷⁸ CRITFC motion to intervene at 5 n.3.

¹⁷⁹ Joint response at 6.

¹⁸⁰ EIS at 4-49.

10. Mid-Columbia Coordinating Committee

120. The Mid-Columbia Coordinating Committee (MCCC) was formed in the Commission's Mid-Columbia proceeding (discussed above) to manage studies and interim protection for all the Mid-Columbia projects. Yakama charges that approval of the HCP would constitute a refusal to let Yakama participate in the MCCC, and alleges that NOAA Fisheries and FWS have refused to allow Yakama to participate in that body for almost a year. Yakama also objects to termination of the Mid-Columbia proceeding with respect to Rocky Reach, on the ground that its participation in the MCCC is necessary for protection of its treaty rights.¹⁸¹

121. The licensees dispute that they have precluded Yakama from participating in the MCCC. They add that since the Wells and Rock Island Agreements were approved and those projects were excluded from the Mid-Columbia proceeding, the requirements of those agreements have been administered by the Wells and Rock Island coordinating committees. Yakama, they state, is a party to both agreements, and accordingly is a member of both committees.¹⁸²

122. Chelan states that the HCP Coordinating Committee (HCPCC) decided in early 2003 that issues related to early implementation of the HCPs (i.e., voluntary implementation prior to receipt of all necessary approvals) and spill at its projects would be handled by the HCPCC, and that any decisions by the HCPCC would be taken to the MCCC and Rock Island committees for discussion. It states that CRITFC has participated in such meetings. Douglas adds that Yakama has not been excluded from,

¹⁸¹ Yakama protest at 7-8. Yakama also alleges that its exclusion from the HCP Committees unless it executes the HCPs violates Secretarial Order No. 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This order, which was issued jointly by the Secretaries of Commerce and the Interior on June 5, 1997, as amended, clarifies the responsibilities of the component agencies, bureaus, and offices when they take action that affects tribal interests. Section 2 states that the order is "for guidance within the Departments only." Because Order No. 3206 does not apply to this agency, we express no opinion regarding Yakama's allegations.

¹⁸² Chelan answer to CRITFC at 6-7; Douglas answer at 5-7.

and has been attending, meetings of the Wells coordinating committee.¹⁸³ Douglas adds that Yakama is not entitled to attend HCPCC meetings, because it has not signed the HCP, and that in any event the Wells HCP provides that it will only be implemented upon approval by the Commission. Until then, all decisions concerning the fishery and Wells will continue to be made under the auspices of the Wells committee.¹⁸⁴

123. We conclude from the licensees' responses that they have not attempted to exclude CRITFC or Yakama from participating in the various Mid-Columbia River fisheries committees established pursuant to Commission license requirements. As to the MCCC, we note that the Mid-Columbia proceeding has already been terminated with respect to Wells and Rock Island, but that the MCCC has continued to exist and to meet with participation of these licensees. With the approval of the Rocky Reach HCP, we will also terminate the Mid-Columbia proceeding as to that license. Thus, the Mid-Columbia proceeding will remain open only for Grant's Priest Rapids Project. We nevertheless expect the MCCC to continue to function as a forum for coordination and discussion among the interested entities of issues common to the Mid-Columbia River Basin.

124. CRITFC states that the trust responsibility requires tribal input into the management of trust resources, and that the HCPs violate that responsibility by preventing the tribes from co-managing the plan species unless they sign the HCPs.¹⁸⁵ As noted above, the Commission carries out its responsibilities under the FPA and other statutes with full recognition of tribal treaty and statutory rights. We agree that tribal participation in the management of the Columbia River fishery is consistent with those rights, but we also conclude that it would not be in the public interest to allow the tribes to participate in the HCPs unless they are bound by the same rules of participation as all other signatories.

¹⁸³ Douglas states that during the past two years Yakama has attended twelve, and CRITFC three, Wells coordinating committee meetings.

¹⁸⁴ Douglas answer at 5-7.

¹⁸⁵ CRITFC EIS comments at 13.

11. Release from Claims

125. Finally, HCP section 9 provides that the parties release the licensees from all claims concerning project impacts on the plan species, except for the obligations with respect to fish hatcheries.¹⁸⁶ Yakama urges us to strike this provision on the ground that it is inappropriate in the context of the ESA or FPA, or not permitted by NEPA, the ESA, and the FPA.¹⁸⁷

126. Nothing in the FPA or, to our knowledge, NEPA or the ESA bars a settling party from agreeing to release any claims it may have, in consideration for another party's acceptance of a settlement agreement's terms. Such provisions are quite common, because they enable the parties to a settlement agreement to resolve the matters in dispute with a high degree of certainty. An entity that is not willing to provide such a release need not execute the settlement agreement and may pursue its interests in any other forums available to it.

12. City of Entiat's Concerns

127. When Rocky Reach was constructed in the 1950s, the filling reservoir inundated the downtown core of the Entiat and surrounding waterfront areas, forcing relocation to upland areas of that city's commercial and industrial sector and causing the loss of local agricultural lands. In addition, Chelan obtained waterfront land in the immediate vicinity of the city. Entiat states that these actions resulted in the loss of taxable property, and that the city has never fully recovered from these and other effects of the original flooding and town relocation.

128. Entiat is concerned that the HCP Agreement could cause further erosion of the city's and school district's tax revenues. This could occur because of the acquisition of riparian lands located in the Entiat River Valley¹⁸⁸ or along the Rocky Reach reservoir,

¹⁸⁶ Rocky Reach and Rock Island HCPs section 9.1; Wells HCP section 9.4.1.

¹⁸⁷ Yakama protest at 8-9.

¹⁸⁸ The Entiat River flows southeast from the Cascade Mountains to its confluence with the Rocky Reach reservoir a few miles above the project dam.

which lands would either be removed from the local tax base or would have their taxing status changed as a result of their use for wildlife habitat. Entiat also fears that unspecified measures in the HCP could create an influx of jobs and population in local communities, placing additional demands on local government and the school district.¹⁸⁹ Entiat states that the EIS inadequately analyzed the potential impacts of the HCP Agreements on local governments and communities, and on Entiat in particular. It requests that the Commission supplement the EIS to address these asserted deficiencies.

129. Chelan replies that Entiat's concerns about additional erosion to its tax base or demands on municipal services are highly speculative. It notes that the tributary conservation plan covers a very large area, from Chief Joseph Dam to the Rock Island tailrace, of which the area within Entiat is a very small portion. It adds that although the plan contemplates the purchase of interests in lands, it also contemplates many other measures that are likely to have no impact on property rights or tax base.¹⁹⁰ Chelan also asserts that the measures under consideration, including in-stream structures and revegetation, noxious weed control, and restoration of stream channel geomorphology, are not large-scale and are unlikely to cause any appreciable influx of jobs or people.

130. The Commission's consideration under FPA section 10(a)(1) of all public interest uses of a waterway encompass the socio-economic consequences of a project. It is possible that at these projects some land could be removed from the local tax base, for instance if title to the land were transferred to a governmental agency. However, whether that will ever happen, and if so, to what extent, is purely speculative at this point. We therefore do not find socio-economic mitigation measures warranted at this time.

III. Commission Consultation Under ESA Section 7(a)

131. Section 7(a) of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally-listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat.

¹⁸⁹ Entiat comments at 1-3.

¹⁹⁰ These could include in-stream structures and revegetation, noxious weed control, and restoration of stream channel geomorphology.

132. Federally-listed aquatic species that inhabit the Mid-Columbia River Basin include the endangered evolutionarily significant units of Upper Columbia River steelhead and spring-run chinook salmon.¹⁹¹ By letter to NOAA Fisheries of December 9, 2003, the Commission requested formal consultation pursuant to ESA section 7 regarding all three amendment applications. NOAA Fisheries' final Biological Opinions for the Wells, Rocky Reach, and Rock Island applications were filed on March 8, 2004. The Biological Opinions find that incorporating the HCPs into the licenses is not likely to jeopardize the continued existence of the federally endangered salmonids or their critical habitat.¹⁹²

133. Federally listed species under the jurisdiction of the FWS that inhabit the Mid-Columbia River Basin include the threatened bull trout, bald eagle, and grizzly bear, and the endangered Ute ladies'-tresses. By letter to FWS of December 9, 2003, the Commission requested formal consultation pursuant to ESA section 7 regarding all three projects. On January 16, 2004, the Commission amended its request to include formal conferencing¹⁹³ on the effects of the proposed actions on areas of proposed critical habitat for bull trout.¹⁹⁴ FWS' final Biological Opinion for the Wells, Rocky Reach, and Rock Island applications was filed on May 13, 2004. It concurs with the Commission that incorporating the HCPs into the licenses is not likely to jeopardize the continued existence or critical habitat of the bull trout or of the federally-listed terrestrial species.

¹⁹¹ See n. 24, above.

¹⁹² Yakama asserts that ESA section 7 and NOAA Fisheries' HCP Handbook bar a federally-licensed project from receiving a take permit pursuant to ESA section 10, and that NOAA Fisheries must instead prepare an incidental take statement for such projects. Yakama protest at 17. Whether NOAA Fisheries' issuance of the take permits complies with the ESA is a matter for a reviewing court rather than this Commission.

¹⁹³ Conferencing is similar to consultation, except that it applies to the effects of a proposal on critical habitat.

¹⁹⁴ FWS designated proposed critical habitat for bull trout in 2002. 67 Fed. Reg. 71,277 (November 29, 2002).

134. Its non-jeopardy opinion notwithstanding, FWS' Biological Opinion finds that operation of the Projects' turbines, juvenile bypass facilities, adult fishways, and spillways results in incidental take of bull trout. Its Biological Opinion thus contains an Incidental Take Statement for each of the Projects, setting forth Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions for the implementation of the RPMs.¹⁹⁵ The RPMs and Terms and Conditions are attached to each of the project-specific orders, and appropriate license articles are also added.¹⁹⁶

135. ESA section 7(a)(1)¹⁹⁷ directs federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. USFWS' Biological Opinion includes three conservation recommendations regarding bull trout, which are the same for all three Projects. These are discussed below.

¹⁹⁵ USFWS also finds that whether there is incidental take from the implementation of the tributary habitat and hatchery compensation plans cannot be determined until the specific measures are developed, and that separate ESA section 7 consultation will be required when those measures are developed. See, e.g., Biological Opinion, at 95.

¹⁹⁶ See Rocky Reach Article 411, Rock Island Article 414, and Wells Article 61. The Incidental Take Statement also purports to require the Commission to prepare and submit to FWS detailed annual reports on the implementation of the RPMs and Terms and Conditions, including the impact of implementing these measures on bull trout. See, e.g., FWS Biological Opinion at 90. As the RPMs and Terms and Conditions become terms of the license, which governs only the actions of the licensee, we think FWS has exceeded its authority. In any event, we have included in each of the licenses an article requiring the licensee's plans to implement the RPMs and Terms and Conditions to include a provision for the requested annual reports. See, e.g., new Rocky Reach Article 412.

¹⁹⁷ 16 U.S.C. § 1536(a)(1).

1. Develop the monitoring plans called for in the Terms and Conditions through a collaborative process with the FWS, NOAA Fisheries, Washington Department of Fish and Wildlife, relevant Indian tribes, or any other entities these entities deem appropriate.

The new articles requiring the licensee to comply with the RPMs and Terms and Conditions is consistent with this recommendation.

2. Continued participation by the licensee in the development and implementation (when completed) of a bull trout recovery plan.

We have not adopted this recommendation in the form recommended by FWS. Although we believe the licensees should participate in the development and implementation of a bull trout recovery plan, the recommendation as framed by FWS is unduly vague. We are therefore reserving authority to require the licensees to participate in the development and implementation of such a plan and will exercise that authority by imposing specific requirements in order to resolve and disputes between FWS and the licensees regarding specific measures the licensees are requested to take.

3. Continued monitoring by the Licensee of total dissolved gas (TDG) and investment in facility improvements to keep TDG levels at or below 110%, or other applicable state water quality standards.

As noted above, the licensees are voluntarily monitoring and complying with the Washington State Water Quality Standards for temperature and dissolved oxygen in the context of the federal fish passage programs for the Columbia River. This recommendation is therefore superfluous and will not be adopted.

IV. Essential Fish Habitat

136. Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act¹⁹⁸ requires federal agencies to consult with the Secretary of Commerce (Secretary) regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat identified under that act. The Secretary may recommend measures for the protection of Essential Fish Habitat. Section 305(b)(4)(B)¹⁹⁹ of that act requires an agency, within 30 days after receiving recommended measures from NOAA Fisheries or a Regional Fishery Management Council, to describe the measures proposed by the agency for avoiding, mitigating, or offsetting the effects of the agency's action on the Essential Fish Habitat. If the agency does not agree with the Secretary's recommended measures, it must explain its reasons for not following the recommendations.

137. In the same March 8, 2004 letters in which it provided its final Biological Opinions on the license amendment applications, NOAA Fisheries also determined that the Essential Fish Habitat consultation and requirements in its Biological Opinions on the take permit applications apply to the license amendment application proceedings.

V. FPA Section 18 Fishway Prescriptions

138. Section 18 of the FPA²⁰⁰ states that the Commission shall require construction, maintenance, and operation by a licensee of "such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." The HCPs state that NOAA Fisheries and FWS reserve authority to prescribe fishways pursuant to section 18 if an HCP is terminated.²⁰¹

¹⁹⁸ 16 U.S.C. § 1855(b)(2).

¹⁹⁹ 16 U.S.C. § 1855(b)(4)(B).

²⁰⁰ 16 U.S.C. § 811.

²⁰¹ Rocky Reach and Rock Island HCP section 9.2.2; Wells HCP section 9.5.2.

139. Yakama asserts that the EIS is deficient because it does not discuss whether the HCPs fulfill “the obligations of [NOAA Fisheries] under its FPA [section 18] conditioning authority.”²⁰² As discussed above, the purpose of an EIS is to analyze proposed actions and reasonable alternatives, not to determine whether the action agency has complied with its statutory mandates. In any event, NOAA Fisheries’ decision not to prescribe fishways is not a matter reviewable by this Commission.

VI. Water Quality Certification

140. Under section 401(a)(1) of the Clean Water Act (CWA),²⁰³ a state or tribal water quality certification agency must issue or waive certification of any proposed action requiring a federal agency license or permit that “may result in any discharge into . . . navigable waters.” American Rivers asserts that the instant license amendment applications trigger the requirement that the licensees obtain water quality certification. Douglas and Chelan respond that no certification is required, because the HCPs do not involve any activities that would result in a “discharge” within the meaning of CWA section 401(a)(1), and that discussion of water quality certification is premature, since no specific measures have been established that Ecology could review for compliance with state standards.²⁰⁴

141. The licensees are not required to apply for water quality certification for these amendments. The only identified component of the HCPs that results in any change in discharge is the installation of the Rocky Reach permanent fish bypass facility, for which Chelan has already obtained certification and Commission authorization.²⁰⁵ We note as well that Ecology was a participant in the HCP negotiations, has intervened in this proceeding, and has not suggested that certification is required in order to implement the HCPs.

²⁰² July 29 letter at 7.

²⁰³ 33 U.S.C. § 1341(a)(1).

²⁰⁴ Chelan answer to American Rivers at 8; Douglas answer at 14-15.

²⁰⁵ See Public Utility District No. 1 of Chelan County, WA, 99 FERC ¶ 61,059, reh’g denied, 100 FERC ¶ 61,216 (2002).

142. It is possible that measures could be developed for Phase II implementation which would involve modifications to project operations and could cause discharges not currently authorized under the licenses. Should such modifications be needed, a license amendment application would be required, and the issue of certification would be revisited at that time.

VII. Cultural Resources

143. Section 106 of the National Historic Preservation Act (NHPA)²⁰⁶ requires the Commission to take into account the effects of its actions on historic properties and to afford the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment.

144. By letter to the Washington State Historic Preservation Officer (SHPO) and Colville, Umatilla, and Yakama dated March 4, 2004, the Commission staff determined that the Area of Potential Effect for the HCPs includes all lands from 1,000 feet downstream of the Rock Island project tailrace upstream to the tailrace of Chief Joseph Dam. The letter concludes that any modifications to project structures and operations under the HCPs will have no effect on any properties listed on the National Register of Historic Places or eligible therefore.

145. Concerning the tributary habitat enhancement program, the March 4 letter concludes that existing license articles will require consultation with the SHPO before any tributary enhancement work is done within the project boundaries of the Rocky Reach and Rock Island Projects.²⁰⁷ The Wells license has no comparable articles, but

²⁰⁶ 16 U.S.C. § 470f.

²⁰⁷ Article 409 of the Rock Island license requires Chelan to develop a Cultural Resources Management Plan (CRMP) in consultation with the SHPO, Advisory Council, and Colville. 46 FERC ¶ 61,033 at 61,210. The CRMP was approved in 1990. 53 FERC ¶ 62,255.

Article 410 of the Rock Island license requires Chelan to stop work if it discovers any previously unidentified sites during land-disturbing activities and, if any are found, to file for approval a CRMP with respect to the sites. 46 FERC at 61,210.

(continued)

staff recommends that any order approving the Wells HCP should require inclusion of a license article similar to those in Rock Island and Rocky Reach and requiring consultation with Colville, because there are reservation lands located within the project boundary. The March 4 letter also states that any HCP-related work outside of the project boundaries would not be subject to the Commission's jurisdiction.

146. Responses to the March 4 letter were due by April 4, 2004. Colville concurred with the no-effect finding, subject to the stipulation that the Cultural Resource Management Plans²⁰⁸ are reviewed and updated in consultation with the Colville Tribal Historic Preservation Officer, and are administered consistent with applicable laws and regulations. The SHPO stated that it concurred, subject to the understanding that consideration of cultural resources during habitat enhancement activities outside the project boundaries will be addressed by the responsible federal agency or agencies, and requested that a map be prepared showing the Areas of Potential Effect for the three projects. In light of the following discussion concerning the relationship between potential effects of the tributary enhancement program, we will require the licensees to provide Area of Potential Effect maps that delineate the potential extent of tributary enhancement measures that could affect cultural resources.

147. The March 4 letter suggests that consultation is not required for actions in the tributary enhancement program outside of existing project boundaries. However, an order issued recently in another proceeding²⁰⁹ clarifies the relationship between a licensee's responsibilities and the project boundary. The project boundary indicates that the lands within are used for project purposes. This helps to reduce ambiguity for purposes of license administration and compliance by clarifying the geographical scope of the licensee's responsibilities under its license (and the Commission's regulatory

Article 49 of the Rocky Reach license requires Chelan to consult with the SHPO before any construction at the project to determine the need for cultural resources surveys. 22 FERC ¶ 62,348 at 63,510.

²⁰⁸ A CRMP has been approved for Rock Island. The licensees have voluntarily executed memoranda of agreement with the SHPO for Rocky Reach and Wells, but these have not been incorporated into the existing licenses.

²⁰⁹ Power Authority of the State of New York, 107 FERC ¶ 61,259 (2004).

responsibilities), but it does not define those responsibilities and does not always fully indicate the geographic extent of those responsibilities. Small areas outside of the project boundary needed for project purposes and requirements to carry out one-time actions outside of the project boundary may not require the locations where the acts are to be performed to be included within the existing project boundary.

148. The activities to be carried out under the tributary enhancement programs outside of the project boundaries are requirements of the licenses, and therefore are subject to the consultation requirements of NHPA section 106. These sites may not, however, need to be included within the project boundary, because they may involve small areas or one-time actions.

149. We conclude that the Rock Island and Rocky Reach licenses require only minor changes to ensure that any actions outside of the project boundaries and on non-federal lands pursuant to the tributary enhancement programs are in compliance with the NHPA. The Wells license should also be modified to include a requirement to consult with respect to any ground-disturbing activities that may occur within the project boundary or outside of the project boundary on non-federal lands pursuant to the tributary enhancement program. For any such activities that occur on lands administered by another federal agency, it is appropriate for that agency to conduct any necessary consultation under the NHPA. We are also requiring the licensees to develop maps of the Areas of Potential Effect which indicate the off-site areas in which tributary enhancements may be located. The companion orders issued today make the necessary changes.

VIII. License Articles

150. Finally, we note that the parties' applications include draft license articles approving their applications.²¹⁰ We have used these recommended articles as a model, but have made one noteworthy change. The HCP Agreements provide in Phase II for unspecified "additional tools" to be employed if the standards are not being met. General criteria for the selection of such additional tools are set forth, but there are no apparent limits on what these tools might be.²¹¹ Such additional tools may include changes to

²¹⁰ See, e.g., Rocky Reach application, section V, p. 26.

²¹¹ See, e.g., Rocky Reach HCP Agreement, section 5.3.2.

project facilities and operations that are not currently authorized, and we do not intend, by approving the HCP Agreements, to give the licensees a general authorization to make any changes to project facilities or operations not specifically identified in those agreements. We have therefore included in each companion order a requirement to apply for an amendment to the project license for any such changes in facilities or operations.

151. In conclusion, we find that the HCPs are in the public interest, because they will put into place a program likely to assist in the recovery of the endangered salmonids and to help prevent other salmonids from becoming listed. We will therefore include them in the Wells, Rocky Reach, and Rock Island licenses as special articles.

The Commission orders:

(A) The U.S. Department of the Interior's late motion to intervene, filed January 16, 2004, in Project Nos. 2145-57, 943-083, and 2149-106, is granted.

(B) The U.S. Department of Agriculture's January 9, 2004 motion to intervene in Project No. 2149 is granted.

(C) The Application for Approval of the Wells Anadromous Fish Agreement and Habitat Conservation Plan and Adoption as an Amendment of License, filed on November 24, 2003, by Public Utility District No. 1 of Douglas County, Washington, in Project No. 2149-106, is approved, as discussed in this order and as implemented in the companion order issued today in Public Utility District No. 1 of Douglas County, WA, 107 FERC ¶ 21,283.

(D) The Application for Approval of the Rock Island Anadromous Fish Agreement and Habitat Conservation Plan and Adoption as an Amendment of License, filed on November 24, 2003, by Public Utility District No. 1 of Chelan County, Washington, in Project No. 943-083, is approved, as discussed in this order and implemented in the companion order issued in Public Utility District No. 1 of Chelan County, WA, 107 FERC ¶ 61,282.

(E) The "Application for Approval of the Rocky Reach Anadromous Fish Agreement and Habitat Conservation Plan as an Offer of Settlement and Adoption as an Amendment of License," filed on November 24, 2003, by Public Utility District No. 1 of Chelan County, Washington, in Project No. 2145-057 is approved, as discussed in this order and implemented in the companion order issued in Public Utility District No. 1 of Douglas County, WA, 107 FERC ¶ 61,281.

Project No. 2145-057, et al.

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(F) The Mid-Columbia Proceeding is terminated insofar as it pertains to Rocky Reach Project No. 2145.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

**U.S. FISH AND WILDLIFE SERVICE
REASONABLE AND PRUDENT MEASURES
AND IMPLEMENTING TERMS AND CONDITIONS
REGARDING BULL TROUT**

Reasonable and Prudent Measures

RPM 1. The Licensee to develop and implement, in coordination with the U.S. Fish and Wildlife Service (Service), appropriate measures to reduce impediments to up and downstream passage of adult and juvenile bull trout at Rocky Reach Dam and its associated reservoir system. Should measures to reduce impediments to up- and downstream passage of bull trout warrant consideration of additional modifications to facilities or operations, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure that these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

RPM 2. The Licensee shall design a monitoring program to (1) detect adverse effects resulting from the proposed action, (2) assess the actual level of incidental take in comparison with the anticipated incidental take level documented in the biological opinion, (3) detect when the level of anticipated incidental take is exceeded, and (4) determine the effectiveness of reasonable and prudent measures and their implementing terms and conditions. Specifically, the program shall be designed to monitor the abundance, distribution, and timing of adult and juvenile bull trout utilizing Rocky Reach Dam and its associated reservoir system. Implementation of this monitoring program shall begin no later than May 1, 2005. If information from the monitoring efforts warrants consideration of additional modifications to facilities or operations for the minimization of project effects on bull trout, as determined by the Service in consultation with the Commission and the Licensee, the Service will work with the Commission and the Licensee to insure these measures are implemented, as appropriate, or recommend that the Commission reinitiate consultation if necessary.

Terms and Conditions

1. To implement RPM 1, the Licensee shall develop, in coordination with the Service, a prioritized list of monitoring efforts necessary to evaluate the effects of the Project on the up- and downstream passage needs of bull trout at Rocky Reach Dam by February 28, 2005. Based on that prioritized list, the Licensee shall initiate studies to evaluate the up- and downstream passage needs for bull trout at Rocky Reach Dam and to assess the Project impacts on those passage needs. If the information from these studies warrants consideration of modifications to facilities or operations to reduce the take of bull trout, as determined by the Service in consultation with the Commission and the Licensee, then

the Service will work with the Commission and the Licensee to ensure that these measures are implemented, as appropriate, or recommend that the Commission reinstitute consultation if necessary.

2. To implement RPM 1, the Licensee shall, in coordination with the Service, develop a prioritized list of monitoring efforts necessary to determine the extent of bull trout entrainment through the turbines at Rocky Reach Dam by February 28, 2005. If the studies contained in the prioritized list are determined by the Service, in consultation with the Commission and the Licensee, to be feasible, the Licensee shall be required to assess the extent of bull trout entrainment through the turbines at Rocky Reach Dam. If entrainment is determined to be significant, the Licensee will be required to explore techniques to minimize bull trout entrainment through the turbines.

3. To implement RPM 2, the Licensee shall, in coordination with the Service, develop and implement a comprehensive bull trout monitoring program, that includes the presence of a sufficient number of radio-tagged (or other appropriate tracking technology) bull trout, to enable monitoring of bull trout utilizing Rocky Reach Dam and its associated reservoir system and tracking of the incidental take exemptions stated above.

4. During the interim period between the Commission' issuance of an order amending the Project license to include these RPMs and Terms and Conditions and the implementation of the monitoring plan called for in RPM 2, the Licensee shall implement the following action items; specifically:

1. Continue assessment of the Rocky Reach juvenile bypass system on migratory bull trout and juvenile bull trout where feasible.
2. Extend fish ladder monitoring period to assess adult bull trout utilization of existing fishways outside the traditional migratory timeframes.
3. Continue coordinated telemetry monitoring of radio-tagged bull trout.
4. Compile project operational data linked to timeframes when adult migratory bull trout pass project powerhouses and/or spill gates.
5. Cost share funding with the Service for analysis of genetic samples from fluvial bull trout sampled during the first year of the Mid-Columbia Bull Trout Study.

6. Participate in a coordinated effort with the Service to increase the informational database for adult bull trout that utilize the Methow/Twisp river system.

If the level of incidental take on which these RMPs and Terms and Conditions is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided.

FERC Orders Approving HCP

Order on Rehearing for Wells HCP (2004)

109 FERC ¶ 61,208

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeene G. Kelly.

Public Utility District No. 1 of
Chelan County, Washington

Project Nos. 2145-062
and 943-089

Public Utility District No. 1 of
Douglas County, Washington

Project No. 2149-113

ORDER ON REHEARING

(Issued November 23, 2004)

1. On June 21, 2004, the Commission issued a master order and three project-specific companion orders in this proceeding. The orders approve project-specific Anadromous Fish Agreement and Habitat Conservation Plans (HCPs) regarding the operation of the Rocky Reach Project No. 2145 and the Rock Island Project No. 943, which are licensed to Public Utility District No. 1 of Chelan County, Washington (Chelan) and the Wells Project No. 2149, which is licensed to Public Utility District No. 1 of Douglas County, Washington (Douglas).¹

2. A joint request for rehearing was filed by the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes and Bands of the Yakama Nation (Yakama) and the Confederated Tribes of the Umatilla Indian Reservation (together, CRITFC). A joint request for rehearing and clarification was filed by Chelan, Douglas, the National Marine Fisheries Service (NOAA Fisheries), the Washington Department of Fish and Wildlife

¹ *P.U.D. No. 1 of Chelan County, WA*, 107 FERC ¶ 61,280 (master order); *P.U.D. No. 1 of Chelan County, WA*, 107 FERC ¶ 61,281 (Rocky Reach); *P.U.D. No. 1 of Chelan County, WA*, 107 FERC ¶ 61,282 (Rock Island); *P.U.D. of Douglas County, WA*, 107 FERC ¶ 61,283 (Wells).

(WDFW), and the Confederated Tribes of the Colville Reservation (together, the HCP Parties). In this order, we grant in part and deny in part CRITFC's request for rehearing and grant the HCP Parties' request for clarification and rehearing. This order is in the public interest because it clarifies the role of Indian tribes that declined to execute the HCPs, but have an interest in the management of the HCP plan species and their habitats.

Background

3. The lengthy and complex background to this order is set forth in detail in the master order.² We summarize that order here in order to provide context for the following discussion.

4. The Mid-Columbia River is home to various species of salmon and steelhead trout. Some of these anadromous fish are federally listed as threatened or endangered. These listings are the result in part of the presence of many large hydropower projects on the Columbia River, including the four Mid-Columbia River projects. From upstream to downstream these are the Wells Project No. 2149, the Rocky Reach Project No. 2145; the Rock Island Project No. 943, and the Wanapum-Priest Rapids Project No. 2114.³

5. In 1978, various federal and state agencies and Indian tribes petitioned the Commission to require all of the Mid-Columbia projects to provide increased minimum flows and spills at each dam to assist the migration of salmon and steelhead trout. These actions were consolidated and set for hearing before an administrative law judge. The proceeding became known as the Mid-Columbia proceeding. In due course, interim and longer-term settlement agreements were filed with respect to some of the Mid-Columbia projects. In that context, the Mid-Columbia Coordinating Committee (MCCC) was established to coordinate the activities of all participants in the proceeding.⁴

² Master order, 107 FERC at 62,310-313.

³ Wanapum-Priest Rapids is licensed to Public Utility District No. 2 of Grant County, Washington.

⁴ The MCCC was established in a limited-term settlement agreement that expired in 1985, but continued to function at the direction of the presiding judge. *See P.U.D. No. 1 of Chelan County, WA*, 34 FERC ¶ 63,044 at 65,164 (1986)

6. Other, longer-term settlement agreements were approved in 1987 and 1990 with respect to Rock Island and Wells, respectively. The Rock Island Agreement was incorporated into a new license for that project. The Wells Agreement was incorporated into the Wells license, and the Mid-Columbia proceeding was terminated as to the Wells Project. Various studies related to downstream passage at Rocky Reach Project continued, and the Mid-Columbia Proceeding remained open as it pertains to that project.

7. The Endangered Species Act (ESA)⁵ authorizes NOAA Fisheries and the U.S. Fish and Wildlife Service (FWS) to issue an incidental take permit for listed species, which allows the permittee to conduct an activity that results in an incidental take of listed species. An incidental take permit may be issued in association with an HCP, which is a long-term planning document for minimizing and mitigating impacts of the permitted action.

8. In the mid-1990s, the licensees, NOAA Fisheries, FWS, WDFW, the above-mentioned tribes, and American Rivers entered into negotiations to develop HCPs for the Mid-Columbia projects.

9. In April 2002, project-specific HCPs were executed for Rocky Reach, Rock Island, and Wells.⁶ NOAA Fisheries subsequently issued an Environmental Impact Statement in connection with the HCPs, as well as project-specific Biological Opinions pursuant to section 7 of the ESA. It thereafter issued an incidental take permit for the operation of each project.

10. In 2003, the Chelan and Douglas filed separate applications for approval of the project-specific HCPs and for their incorporation as articles in the applicable licenses. The Rock Island and Wells applications requested that those licenses be amended by replacing the 1987 Rock Island and 1990 Wells Agreements, respectively, with the project-specific HCPs. There was no pre-existing Rocky Reach agreement on anadromous fisheries to be replaced.

⁵ 16 U.S.C. §§ 1531-1543.

⁶ No HCP has been executed for Wanapum-Priest Rapids.

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11. The Commission commenced license amendment proceedings, in which it adopted NOAA Fisheries' EIS. In the master order, we approved the HCPs and incorporated them into the relevant licenses. As noted, timely requests for rehearing were filed by CRITFC and the HCP Parties.

12. On October 4, 2004, NOAA Fisheries filed a letter responding to CRITFC's arguments regarding participation by CRITFC in decision-making pursuant to the HCPs.

Discussion

A. NOAA Fisheries' Filing

13. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁷ an answer may not be made to a request for rehearing unless otherwise ordered by the decisional authority. We have allowed such answers where the party seeking rehearing makes new arguments or the answer will assist the Commission in addressing the issues.⁸

14. Here, NOAA Fisheries' response includes a new proposal to provide for consultation with the non-signatory Indian tribes, said to be supported by all of the HCP Parties. This proposal will assist us in addressing issues pertaining to the continuing role of the non-signatory Indian tribes in management of the anadromous fishery. We will therefore accept NOAA Fisheries' filing.

B. CRITFC Concerns

15. The 1987 Rock Island and 1990 Wells Agreements which were replaced by the Rock Island and Wells HCPs provided for certain flows, hatchery programs, and other measures to assist the anadromous fishery. In its protest, Yakama argued that these agreements are contracts and that the consent of all signatories is required in order to remove them from the Rock Island and Wells licenses. It characterized the

⁷ 18 C.F.R. § 385.213(a)(2)(2004).

⁸ See, e.g., *Central Nebraska Public Power and Irrigation District*, 52 FERC ¶ 61,339 at 62,344 (1990); *Southern California Edison Co. and San Diego Gas and Electric Co.*, 49 FERC ¶ 61,091 at 61,357 (1989).

Commission's approval of the HCPs as unilateral termination of the prior agreements, and asked that the HCPs be either rejected or modified to ensure that they provide for Yakama's continued participation in management of the species covered by those plans.

16. We denied both requests. The 1987 Rock Island Agreement provided that any party could, after the year 2000, initiate negotiations or file a petition to modify that agreement's terms and conditions, or to replace it in whole or part. We found that the 1990 Wells Agreement contained a similar provision and, in any event, both licenses contain a reservation of Commission authority at any time during the license term to require alterations to project facilities and operations if warranted by changed circumstances.⁹

17. On rehearing, CRITFC essentially reiterates Yakama's previously-rejected contract arguments. It does not dispute that the agreements and license article provisions permit modification or replacement of the 1987 Rock Island and 1990 Wells agreements, but states that the signatories never contemplated replacement of those agreements with agreements that deny the CRITFC tribes a continuing role in management of Mid-Columbia fisheries.¹⁰

18. The 1987 Rock Island and 1990 Wells Agreements say nothing about the terms of any future modifications or replacement agreements, and CRITFC's position on the signatories' intentions is not shared by the signatories other than Yakama. In any event, when these agreements were incorporated into the licenses as articles, they became subject to this Commission's jurisdiction, and are to be construed in the context of the entire license, including the Commission's reserved authority. We exercise that reserved authority by determining what is in the public interest in light of all relevant considerations. CRITFC's arguments in that regard are considered below.¹¹

⁹ Master order, 107 FERC at 62,316.

¹⁰ CRITFC rehearing request at 6-9.

¹¹ CRITFC also asserts that Douglas violated the 1990 Wells Agreement by discussing with NOAA Fisheries and others the possibility of developing HCPs in the mid-1990s and submitting its application to amend the Wells license in November 2003. That agreement provides that a party may request the other parties to begin negotiations to modify the terms of that agreement "any time after March 1, 2004." CRITFC

(continued...)

19. In the master order we found that it would not be in the public interest to allow the non-signatory tribes to participate in HCP processes unless they are bound by the same rules of participation as the signatories.¹² We did however recognize that these tribes have an important interest in the recovery of the Columbia River fishery, and stated our expectation that, although the Mid-Columbia proceeding was no longer be open as to any of the three projects, the MCCC would continue to function as a forum for coordination and discussion among the interested entities of issues common to the Mid-Columbia River Basin.¹³

20. CRITFC renews its request that the HCPs be modified to provide for the participation by the non-signatory tribes in HCP committee activities and decision-making. First, it reiterates previously-rejected¹⁴ arguments that the government's trust responsibility to the tribes requires the Commission to ensure that the non-signatory tribes have a decision-making role in management of the Columbia River fishery and, further, requires the Commission to reject the HCPs because they do not go far enough toward these tribes' goals of a sustainable, harvestable fishery.¹⁵ CRITFC's rehearing request includes no new facts or argument that would cause us to change our conclusion that our responsibility to fully consider the concerns of Indian tribes, as we have done

rehearing request at 9, *citing* Wells Agreement at 3. Any objections CRITFC might have had to the HCP negotiations were effectively waived by CRITFC's active participation in those negotiations. *See* CRITFC rehearing request at 4 ("The Tribes. . . participated in these discussions since their inception.").

¹² Master order, 107 FERC at 62,327.

¹³ *Id.* Subsequently, on August 18, 2004, the Commission's Chief Administrative Law Judge returned the Mid-Columbia proceeding from the presiding judge to the Commission. 108 FERC ¶ 63,024. That action did not terminate the proceeding. Because, however, the Commission has already terminated the proceeding with regard to Rocky Reach, Rock Island, and Wells, the proceeding is alive only as it pertains to Wanapum-Priest Rapids.

¹⁴ *See* master order, 107 FERC at 62,319-20 and 62,323-25.

¹⁵ CRITFC rehearing request at 14-18.

here, does not require us to reach a specific result. Thus, we are not required to treat the non-signatory tribes as though they are signatories, over the objections of and to the detriment of the signatories, including other Indian tribes. We also see no facts or arguments that cause us to question our conclusions regarding the sufficiency of the HCPs.

21. CRITFC also contends that a decision-making role in implementation of the HCPs for the non-signatory tribes is needed in order to prevent the compromise of their interests in other Columbia River Basin fishery fora. More specifically, it states that the HCPs provide for a reduction in subyearling salmon production in favor of yearling salmon production, and that that is inconsistent with agreements made in the context of the United States-Canada Pacific Salmon Treaty,¹⁶ and *U.S. v. Oregon* processes¹⁷ to provide for production of non-hatchery subyearling summer Chinook salmon in tributary habitat and mitigation for the loss of summer Chinook resulting from the operation of Wells, Rocky Reach, and Rock Island.¹⁸ CRITFC also states that the HCPs do not provide mitigation for the loss of coho salmon resulting from project operations, in contrast to efforts by the Yakama Nation to rebuild that stock. CRITFC adds that reduced production of spring Chinook under the HCPs will undermine the CRITFC tribes' goal of

¹⁶ Treaty Between the Government of the United States and the Government of Canada Concerning Pacific Salmon, entered into force January 28, 1985, amended by exchange of notes and entered into force on June 30, 1999. This treaty was adopted to promote rational management of Pacific salmon stocks through international cooperation.

¹⁷ CRITFC evidently refers here to procedures and processes developed in the context of the Columbia River Fish Management Plan (CRFMP), which was accepted as a partial settlement of the consolidated cases in *U.S. v. Oregon*, Civ. No. 68-513 and *U.S. v. Washington*, Civ. No. 9213. The CRFMP provides a framework for protecting, rebuilding, and enhancing salmon runs and for allocating and planning in-river harvest activities. *See generally*, *U.S. v. Oregon*, 699 F. Supp. 1456, 1458-60 (D. Or.1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) and *U.S. v. Oregon*, Civ. No. 68-513-MA, Opinion of Feb. 29, 1992, 1991 WL 613238.

¹⁸ CRITFC rehearing request at 12. CRITFC provides no citations or other documentary evidence of the purported agreements.

sustainable, harvestable levels of anadromous fish.¹⁹ Finally, CRITFC contends that the public interest is served by the tribes having a decision-making role on the HCP committees because tribal representatives have technical expertise lacking in federal and state agencies because of their work on salmonid issues throughout the Pacific Northwest and Canada and because they have a unique cultural perspective.²⁰

22. NOAA Fisheries states that the HCP Parties remain opposed to participation by non-signatory parties in the HCP Coordinating Committees, even in a non-voting capacity, but have agreed to invite them to participate in HCP implementation as non-voting members of the Tributary and Hatchery Committees, in the hope that they will gain confidence in the HCP processes and ultimately become signatories. NOAA Fisheries adds that it is an active participant in *U.S. v. Oregon* and Pacific Salmon Treaty proceedings and is mindful of the need for decisions made in the HCP context to be consistent with the management goals of those other fora and the commitments made therein.²¹

23. We remain convinced that the public interest is best served by approving the HCPs and by requiring any entity wishing to have a decisional role in their implementation to be bound by the same rules that apply to entities that have signed them. To decide

¹⁹ *Id.* at 12-13.

²⁰ *Id.* at 13-14.

²¹ NOAA Fisheries response at 2. We infer that this proposal supersedes the HCP Parties' proposal in their rehearing request that, if consultation with non-signatories is needed, the Commission should permit the HCP Parties to provide quarterly briefings on the status of HCP implementation to any interested entities, and that such briefing also be used as a forum for discussion, albeit not decision-making. *See* HCP Parties' rehearing request at 15-16.

The HCP Parties also indicate that NOAA Fisheries is committed to further consultation and coordination with the non-signatory tribes. HCP Parties' rehearing request at 16. We commend NOAA Fisheries for this commitment, which we hope will lead to better understanding and to substantive agreements between the HCP Parties and the non-signatory tribes.

otherwise would unduly favor the non-signatory tribes, who would then have the benefits of participation in the implementation process without accepting the concomitant responsibilities.

24. The Coordinating Committees are the primary means of consultation and coordination between the licensees and the other signatories in connection with the conduct of studies and implementation of the measures set forth in the HCPs to benefit the fishery. They have the authority to oversee all aspects of standards, methodologies, and implementation of these measures. They are also responsible for preparing annual progress reports, ensuring timely circulation of studies and reports prepared pursuant to the agreements, and approval and implementation of the survival standards established in the Passage Survival Plans for each project.²² The Coordinating Committees are also responsible for dispute resolution when the other committees are unable to agree.

25. The Tributary Committees are charged with implementing the Tributary Conservation Plans of the project-specific HCPs by selecting tributary habitat improvement projects and approving project budgets.²³ The Hatchery Committees are responsible for overseeing development of recommendations for implementing the hatchery elements of the HCPs, including improvements, monitoring, and evaluation, as identified in the Hatchery Compensation Plans.²⁴ If the members of either of these committees are unable to agree, the matter is referred to the Coordination Committee.

26. The HCPs are not likely to achieve their goals if some voting participants are bound by the goals, implementation processes and measures, and dispute resolution provisions, while others may prevent action or dispute resolution by opting out whenever they are dissatisfied. For that reason, we will not modify the licenses to require that non-signatories be offered committee memberships. We conclude, however, the HCP Parties' offer of non-voting membership on the Tributary and Hatchery Committees is a reasonable means of ensuring that the views of the CRITFC tribes are heard on these committees and that their expertise and experience continue to be a factor in the decision-

²² *E.g.*, Rocky Reach HCP section 4.

²³ *E.g.*, *id.*, section 7.

²⁴ *E.g.*, *id.*, section 8.

making processes of the various committees. Given the CRITFC tribes' decision not to become party to the settlement, we do not believe that requiring the HCP Parties to extend the tribes additional authority would be in the public interest.

C. Pre-HCP Coordinating Committees

27. In the master order we stated that, although the Mid-Columbia proceeding was terminated with respect to the three projects with HCPs, the MCCC continued to exist and that we expected it to continue to function as a forum for coordination and discussion among interested entities of issues common to the Mid-Columbia River basin.²⁵ The HCP Parties state on rehearing that it is time to abolish the Wells and Rock Island Coordinating Committees and the MCCC, which served as the decision-making forum for Rocky Reach prior to the Rocky Reach HCP.²⁶ They state that the HCP Coordinating Committees have superseded all of these pre-HCP committees for collaborative decision-making for Wells, Rocky Reach, and Rock Island, and that using these pre-HCP committees for coordination and consultation now is likely to create misunderstandings and disputes about applicable processes and decisional authority, and thereby interfere with the workings of the HCP Coordinating Committees.²⁷ We agree. For that reason, and because we are requiring Chelan and Douglas to offer the non-signatory tribes non-voting membership on the Tributary and Hatchery Committees, we will terminate the obligations of Chelan and Douglas to participate in the MCCC, to the extent it may still be functioning, with respect to these three projects. *See* Ordering Paragraph (C).

D. Clarification and Corrections

28. CRITFC and the HCP Parties note that neither the master order nor the companion orders explicitly remove the 1987 Rock Island and 1990 Wells Settlement Agreements from those licenses.²⁸ It was our intention to do so, and we give explicit effect to that intention in Ordering Paragraphs (A) and (B), respectively.

²⁵ Master order, 107 FERC at 62,327.

²⁶ HCP Parties' rehearing request at 11-16.

²⁷ *See P.U.D. No. 1 of Chelan County, WA*, 34 FERC ¶ 63,044 at 65,164 (1986).

²⁸ CRITFC rehearing request at 9; HCP Parties at 3-8.

29. The HCP Parties also request that we remove from the Rock Island license Articles 401 and 402, which were added in order to implement the 1987 Rock Island Settlement Agreement. Ordering paragraph (B) does so.

30. Finally, the U.S. Fish and Wildlife Service's Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions regarding bull trout, which were appended to the project-specific orders, were also inadvertently appended to the master order. Ordering Paragraph (D) below deletes the appendix.²⁹

The Commission orders:

(A) Ordering Paragraph (A) of the order at 54 FERC ¶ 61,056 at 61,210 (1991) approving and making part of the license for the Wells Project No. 2149 the 1990 Wells Settlement Agreement, is hereby removed from the Wells Project license.

(B) Ordering Paragraph (F) of the order at 46 FERC ¶ 61,033 at 61,208 (1989) approving and making part of the license for the Rock Island Project No. 943 the 1987 Rock Island Settlement Agreement, and license articles 401 and 402 implementing said settlement agreement (46 FERC at 61,208), are hereby removed from the Rock Island Project license.

(C) Public Utility District No. 1 of Chelan County, Washington, and Public Utility District No. 1 of Douglas County, Washington, are no longer required to participate in processes of the Mid-Columbia Coordinating Committee as those processes pertain to the Rocky Reach Project No. 2145, Rock Island Project No. 943, and Wells Project No. 2149.

(D) The order issued June 21, 2004 in this proceeding, 107 FERC ¶ 61,280, is amended by deletion of the appendix thereto.

²⁹ The Wells and Rock Island orders attach the RPMs and Terms and Conditions applicable to those projects, but incorrectly state in the text that the Rocky Reach RPMs and Terms and Conditions are attached. The text should be read to refer to the appropriate Wells and Rock Island RPMs and Terms and Conditions, respectively.

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(E) The request for rehearing of CRITFC and the request for rehearing and clarification filed by the HCP Parties, both filed on July, 21, 2004, are hereby granted or denied to the extent discussed herein, and are otherwise denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.