

121 FERC ¶ 61,172  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Garkane Energy Cooperative, Inc.

Project No. 2219-024

ORDER ON REHEARING AND CLARIFICATION

(Issued November 15, 2007)

1. On August 31, 2007, the Director, Office of Energy Projects, issued an order<sup>1</sup> granting a new license, pursuant to Part I of the Federal Power Act (FPA),<sup>2</sup> to Garkane Energy Cooperative, Inc. (Garkane) to continue to operate and maintain the 4.3-megawatt Boulder Creek Hydroelectric Project No. 2219, located on Boulder Creek in Garfield County, Utah. The project occupies 29.6 acres of federal lands administered by the U.S. Department of Agriculture (Agriculture), Forest Service (Forest Service), as part of the Dixie National Forest.
2. On October 1, 2007, Garkane filed a request for clarification or, in the alternative, rehearing of certain findings in the relicense order pertaining to the project's description, the deadline for providing certain streamflow and water temperature data, and the settlement agreement Garkane reached with the Forest Service concerning the Forest Service's mandatory license conditions filed under section 4(e) of the FPA.<sup>3</sup> For the reasons discussed below, the Commission grants in part the requested clarifications, modifies the list of licensed project works, and denies requests for the Commission to approve the settlement agreement in its entirety and to modify the findings on section 4(e) minimum flow conditions.

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<sup>1</sup> 120 FERC ¶ 62,154 (2007).

<sup>2</sup> 16 U.S.C. §§ 791a-825r (2000).

<sup>3</sup> 16 U.S.C. §797(e) (2000).

## **Background**

3. The project includes the East Fork and West Fork dams and reservoirs on, respectively, the East and West Forks of Boulder Creek; a 17,600-foot-long buried pipeline from the West Fork reservoir to the East Fork reservoir; a 4.2-mile-long penstock extending from the East Fork reservoir to the Boulder powerhouse; an additional powerhouse, the Peterson powerhouse, located about 3.5 miles from the East Fork dam; a two-acre re-regulating pond with gates and ditch inlets to divert water to the Boulder Irrigation Company (Irrigation Company); a transmission/communications line extending 4,725 feet from the Peterson powerhouse to a substation; and a 100-foot-long, transmission line extending from the substation to the Boulder powerhouse.

4. Garkane operates the project in a run-of-river mode. Water is collected from the West Fork and conveyed by the buried pipeline to the East Fork reservoir. Water from the reservoir is diverted into the penstock leading to the Boulder powerhouse, and from the powerhouse the water is discharged into the re-regulating pond for irrigation distribution by the Irrigation Company, which has consumptive water rights senior to the non-consumptive water rights of Garkane. The water in the re-regulating pond is taken by the Irrigation Company and returned to its irrigation system via three irrigation ditches. During the irrigation season, the Peterson powerhouse uses a portion of the penstock flows and discharges the flows through a tailrace into an irrigation canal.

5. FPA section 4(e) requires that Commission licenses for projects located within federal reservations (here, the Dixie National Forest) must include all conditions that the secretary of the department under whose supervision the reservation falls (here, Agriculture through the Forest Service) shall deem necessary for the adequate protection and utilization of such reservation. Section 4(e), as amended by the Energy Policy Act of 2005 (EPAct), and Agriculture regulations implementing it, provides that any party to a Commission license proceeding may request that Agriculture (or Interior, as appropriate) conduct a trial-type hearing on "disputed issues of material fact," and may propose alternative conditions to that agency.

6. The Forest Service initially filed 14 section 4(e) conditions on November 28, 2005. Garkane appealed the conditions before the Forest Service<sup>4</sup> and proposed alternatives to several of them, including, as pertinent here, Condition No. 14, which required a fish habitat improvement plan that included a minimum flow requirement. The two negotiated and on April 7, 2006, Garkane filed an offer of settlement, attaching

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<sup>4</sup> See 7 C.F.R. §§ 1.601-1.674 (2006) (Agriculture's regulations that establish appeal procedures).

a settlement agreement in which the Forest Service submitted a revised section 4(e) Condition No. 14 in keeping with the changes to which the Forest Service and Garkane had agreed.<sup>5</sup>

## **Discussion**

### **A. Implementation of Section 4(e) Condition No. 14(1) (Minimum Flows)**

7. During the relicensing proceeding, the Irrigation Company supported the relicensing of the project, but opposed any changes in project water flows or operations out of concern that its water rights for irrigation could be adversely affected.<sup>6</sup> To address this concern, the Forest Service's revised Condition No. 14(1) states, in pertinent part:

[Garkane] shall not have the [minimum flow] obligations to the extent that a court of competent jurisdiction rules that the releases would impair existing water rights or would require altering, amending, or restricting the senior water rights of the Boulder Irrigation Company. The Parties [including Garkane] will abide by any such rulings by a court of competent jurisdiction.[<sup>7</sup>]

8. Garkane argues that, while the order issuing its new license appropriately included Condition No. 14(1) as a license condition, Paragraph 57 of the order included the following statement that, it contends, conflicts with the condition: "...should Garkane wish to change its minimum flow releases as a result of a court decision, it must first seek an amendment of its license from the Commission." Garkane contends that requiring

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<sup>5</sup> The signatories to the settlement agreement are Garkane, the Forest Service, and the Utah Division of Wildlife Resources. Revised Condition No. 14 is attached as Appendix A to the settlement agreement and is included with the other FPA section 4(e) conditions in Appendix A to the relicense order (some others of which were also revised pursuant to EPAct negotiations and filed by the Forest Service on February 7, 2007).

<sup>6</sup> See Garkane's June 6, 2005 filing, enclosing a May 24, 2005 letter from the Irrigation Company. Since the Irrigation Company was opposed to any instream flow requirement, it did not participate in the settlement discussions. See Garkane's April 7, 2006 offer of settlement filing at 7.

<sup>7</sup> See Appendix A, p. 1, to the settlement agreement, included as Attachment 2 to Garkane's April 7, 2006 filing.

Garkane to continue to provide the instream flows (pending Commission action on an amendment application) would violate Condition No. 14(1).

9. Garkane contends that the quoted statement is inconsistent with Commission precedent and must be deleted or modified to allow Garkane to immediately comply with any relevant court order, as provided in Condition No. 14(1).<sup>8</sup>

10. We must accept, and do accept, Condition No. 14(1) as a license condition. At the same time, pursuant to section 10(a)(1) of the FPA,<sup>9</sup> we have an obligation for implementing any revisions to the licensee's minimum flow requirements in a manner that ensures the project, as modified, would be the best adapted to the comprehensive development of the waterway, taking into account all beneficial uses of the waterway.<sup>10</sup> A court order that would modify the licensed minimum flow requirements of Condition No. 14(1) based on a water rights decision would require a proceeding conducted by this Commission in order for us to fulfill our oversight and enforcement obligations under the FPA. For example, a court order finding that the minimum flow requirement of Condition No. 14(1) would impair existing water rights (thus requiring a halt to those minimum flows) must be implemented with appropriate regard for the Commission's primary jurisdiction under the FPA to address, and possibly mitigate, any resulting adverse impacts to environmental resources.<sup>11</sup> Moreover, while Condition No. 14(1) may

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<sup>8</sup> Garkane cites to *Southern California Edison Co.*, 70 FERC ¶ 61,130 at 61,354, n. 47 (1995) (“[i]f there is a conflict between Commission-imposed license conditions and conditions imposed by the Forest Service under Section 4(e), the Forest Service’s conditions would govern.”); and *Avista Corp.*, 93 FERC ¶ 61,116 at 61,328 (2000) (Commission-drafted articles (or, in this case, findings) added to a license “do not purport to, and indeed cannot, alter or override mandatory conditions, but rather are meant to be complementary to them.”).

<sup>9</sup> 16 U.S.C. § 803(a)(1) (2000).

<sup>10</sup> The Commission’s obligations to ensure that Project No. 2219 meets the best adapted standard of section 10(a)(1) of the FPA continue throughout the term of the project’s license. *See, e.g., S.D. Warren, Co.*, 68 FERC ¶ 61,213 at 62,022 (1994).

<sup>11</sup> *See United States v. Western Pacific Railroad Co. et al.*, 352 U.S. 59, 63-64 (1956), where the Court found that the doctrine of primary jurisdiction:

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

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require Garkane to alter project operations, it cannot do so without first obtaining approval from the Commission, the only agency with the authority to amend the project license. We therefore deny rehearing on this issue.

### **B. Settlement Agreement**

11. The parties to the settlement agreement requested that the Commission approve the agreement without condition or modification.<sup>12</sup> The relicense order found the parties' request "inapposite because the agreement was a resolution of a dispute before the Forest Service under EPAct, and unnecessary since the terms agreed to have been filed here as revised section 4(e) conditions, which are mandatory."<sup>13</sup>

12. On rehearing, Garkane reiterates the request for Commission approval of the settlement. It argues that the above-quoted reasons in the relicense order for denying approval are not a bar to approval; that including the mandatory section 4(e) conditions in the license as provided in the settlement "does not render the rest of the Settlement Agreement moot;" and that the settlement agreement includes not only mandatory license conditions but also rights and responsibilities of the parties that apply throughout the term of the license that could affect compliance with the license, including the requirement to obtain necessary federal and state permits (section 4.3), communications that the parties may make to the Commission (section 4.4), the operation of the Technical Coordination Committee discussed in Condition No. 14(1) (Article V), implementation of the settlement agreement (Article VII), and *force majeure* (Article VIII).

13. Generally, the Commission does not approve settlements in their entirety, but rather includes in licenses those portions of settlements that establish the substantive obligations of the licensee relating to the construction and operation of the project.

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administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

*Compare, e.g., CF Industries, Inc., et al. v. Transcontinental Gas Pipe Line Corporation*, 614 F.2d 33 (4<sup>th</sup> Cir. 1980) (court appeals held in abeyance and issues pertaining to the causes of a gas shortage deferred to the primary jurisdiction of the Commission in a law suit alleging breach of natural gas supply contract by the curtailment of gas deliveries).

<sup>12</sup> See the Explanatory Statement in Support of Offer of Settlement, filed by Garkane with the settlement agreement on April 7, 2006, at 27.

<sup>13</sup> 120 FERC ¶ 62,154, *supra*, at P 16 n.8.

Moreover, with respect to the settlement for the Boulder Creek Project, Commission staff did precisely what the settlement provisions themselves, and the revised section 4(e) conditions submitted by the Forest Service, called for: adopted as conditions of the license the protection, mitigation, and enhancement measures contained in the settlement's Appendix A.<sup>14</sup>

14. We see no reason to “approve” all the provisions of the settlement that establish the various obligations of the signatories with respect to implementation of the settlement provisions. These provisions are, for the most part, either beyond the Commission's jurisdiction to enforce or in conflict with Commission policy. For example, certain sections of the settlement agreement set forth undertakings by the resource agency parties to the agreement and may also include closely related undertakings by Garkane. These matters include permissible actions to seek reopening, review, and amendment of the revised section 4(e) license conditions (section 7.7 of the settlement agreement).

15. Since the Commission can enforce only those matters that fall within its jurisdiction, and for licensed projects, the Commission's authority extends only over the licensee, the Commission typically declines to include in licenses provisions such as dispute resolution provisions that purport to bind parties other than the licensee, on the ground that those provisions are unenforceable.<sup>15</sup> While the Commission has modified its policy, to the extent of requiring licensees to comply with settlement provisions of this

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<sup>14</sup> See, e.g., April 7, 2006 filing, Explanatory Statement (Statement) at 8-9, 11, and 12; Settlement Agreement (Agreement), Sections 1.6., 3.1., and 6.1. While there was one reference in the Statement (at 27) regarding Commission approval of the settlement, the Statement further provides (at 1) that “any conflict between the language in the Agreement and this Statement should be resolved in favor of the Agreement. This Statement should not be used to interpret Agreement terms.”

<sup>15</sup> See the Commission's policy statement in *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 P 15 (2006), citing *Avista Corporation*, 93 FERC ¶ 61,116 (2000). See also *Erie Boulevard Hydropower, L.P.*, in 88 FERC ¶ 61,176 n. 8 (1999), where the Commission found: “...the Commission is in no position ... to approve or accept settlement provisions that deal with matters beyond its jurisdiction.”

kind in certain instances,<sup>16</sup> Garkane requests Commission approval of the entire settlement agreement, not Commission enforcement of parts of it.<sup>17</sup>

16. In addition to the provisions of Garkane's settlement agreement that are beyond the jurisdiction of this Commission to enforce, we find other provisions of settlement agreement place unreasonable limitations on requesting relief from the Commission. For example, section 7.7.1 prohibits the parties from seeking:

to modify or add to the [section 4(e) license Condition No. 14] or other obligations of Garkane or [to] seek to amend the New License except as required by statutes enacted or amended after the date of the final order of the order issuing the New License.

In requesting approval of the settlement agreement, Garkane seeks:

...assurance that the Commission will reject requests or filings submitted by the settling parties that violate the Settlement Agreement, and Commission approval of the Settlement Agreement is the clearest means for accomplishing this legitimate object. In the alternative, Garkane asks the Commission to expressly acknowledge that it will respect the binding Settlement Agreement and will not approve such inconsistent actions.[<sup>18</sup>]

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<sup>16</sup> See *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270, *supra*, P 15, citing *Erie Boulevard Hydropower, LP*, 100 FERC ¶ 61,321 at 62,502 (2002).

<sup>17</sup> To support its request for Commission approval of its settlement agreement with non-licensees, Garkane cites *Mirant Zeeland, L.L.C.*, 110 FERC ¶ 61,307 and *Northern Natural Gas Company*, 110 FERC ¶ 61,149 (2005), where the Commission approved settlement agreements prohibiting non-jurisdictional customers from challenging or seeking to modify settled electric and gas rates. It also cites *New York State Electric & Gas Corporation*, 92 FERC ¶ 61,169 at 61,594-96 (2000), where the Commission rejected requests made by non-jurisdictional entities that conflicted with an electric rate moratorium. However, the orders Garkane cites in rate proceedings are not determinative of the issues in this hydroelectric licensing proceeding.

<sup>18</sup> Rehearing at 7-8.

17. However, we find that the quoted provision of section 7.7.1 of the settlement agreement imposes an objectionable bar to seeking relief from this Commission that may be in the public interest. The provision tends improperly to preclude the Commission's investigation of matters that could warrant relief under the Commission's ongoing regulation of Garkane's project and obligation to ensure that the project continues to meet the FPA section 10(a)(1) standard through the term of the license.<sup>19</sup>

18. Accordingly, we deny Garkane's request for relief.

### **C. Deadline for Providing East Fork Monitoring Data (Article 403)**

19. Subparagraph (3) of license Article 403<sup>20</sup> requires Garkane to file with the Commission an Operational and Compliance Monitoring Plan that includes a provision requiring Garkane to submit to state and federal resource agencies, annually, by January 31, its prior 12-month collection of East Fork bypassed reach streamflow and water temperature monitoring data. Garkane requests that we revise Article 403(3) to require the submission of the data by March 31 instead of January 31, to avoid potential difficulties in Garkane's access to its monitoring equipment due to inclement winter weather in the area involved, which is 9,000 feet above sea level and can experience prolonged freezing temperatures and substantial snow fall in January.<sup>21</sup>

20. Garkane's request is reasonable and we will modify the article as requested. Changing the deadline for submission of the streamflow and temperature data as requested will not adversely affect the resource agencies that receive the monitoring data from Garkane and will not conflict with the other requirements of Article 403.

### **D. Description of Licensed Project Works**

21. Garkane states that the list of project works in the Commission staff's Final Environmental Assessment for the relicensing proceeding<sup>22</sup> is more accurate than the list

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<sup>19</sup> See the discussion, *supra*, concerning the Commission's obligations under the comprehensive development requirements of FPA section 10(a)(1).

<sup>20</sup> 120 FERC ¶ 62,154, *supra*, at 64,639.

<sup>21</sup> The Forest Service filed a letter on October 5, 2007, stating that it has no objection to Garkane's requested modification of Article 403(3).

<sup>22</sup> See Final Environmental Assessment for Hydropower License, Boulder Creek Hydroelectric Project No. 2219-020, issued May 4, 2007, at 3-4.



of project works in the relicense order<sup>23</sup> because the relicense order fails to include a 35,000-foot-long distribution/communications line extending from the Peterson powerhouse to East Fork Dam and West Fork dam and a substation connected to the Boulder powerhouse by a 100-foot-long transmission line.

22. We agree. Garkane's license exhibits include the 35,000-foot line within the project boundary connecting Peterson powerhouse to the project's dams, and they show that the line transmits project power and communications from the Peterson powerhouse to the East Fork and West Fork dams to operate project equipment, including, for example, a motorized valve at West Fork Dam.<sup>24</sup> The substation is connected to the noted 100-foot-long transmission line, which transmits project power to the substation where transformers increase the voltage and interconnection into the power grid. While the relicense order's list of project features refers to the substation, it doesn't explicitly include it as a project work. Since the 35,000-foot line and the substation are transmitting project power for project operations they must be included in the license.<sup>25</sup> We are modifying the relicense order accordingly.

#### **E. License Exhibit A (Project Works)**

23. Ordering Paragraph (B)(2) of the relicense order identifies the portions of Garkane's Exhibits A and F that describe project works. For Exhibit A, the relicense order identifies "Pages A-1 through A-4 and A-17 filed on August 18, 2005." Garkane points out that Exhibit A does not include a page A-17, and it asks for clarification that the page A-17 reference was intended to identify Figure A-25, a one-line diagram of the project and its transmission facilities, which is on the last page of Garkane's August 18, 2005 Exhibit A filing.<sup>26</sup> We so clarify and will modify the relicense order accordingly.

#### **F. Section 4(e) Condition No. 4 (Annual Consultation)**

24. Condition No. 4 of the section 4(e) conditions in Appendix A to Garkane's license requires Garkane, each year during the 60 days preceding the anniversary date of the license (August 31), to consult with the Forest Service with regard to measures needed to

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<sup>23</sup> See Ordering Paragraph (B)(2), 120 FERC ¶ 62,154, *supra*, at 64,634-35.

<sup>24</sup> See, e.g., Exhibits F-35, West Fork Dam Valve House, and G-3, Project Area and Boundary Details.

<sup>25</sup> See, e.g., *Public Service Company of New Hampshire*, 119 FERC ¶ 61,170 at P 21 and n. 11 (2007).

<sup>26</sup> Rehearing at 10 and n. 15.

ensure protection and development of the natural resource values of the project area. As requested by the Forest Service and Garkane, we will change the consultation period to 60 days preceding the anniversary date (June 29) of the license issued to Garkane for the Lower Boulder Creek Project No. 10502, which, like Project No. 2219, is located on Boulder Creek within the Dixie National Forest.<sup>27</sup> This will enable Garkane to coordinate consultation for both projects.

The Commission orders:

(A) The request for clarification or, in the alternative, rehearing, filed October 1, 2007, by Garkane Energy Cooperative, Inc., is granted to the extent set forth in this order and is denied in all other respects.

(B) Article 403 (3) of the order issuing a new license for Project No. 2219, issued August 31, 2007 (120 FERC ¶ 62,154 at 64,639 (2007)), is modified to read as follows:

(3) a provision to submit to the U.S. Fish and Wildlife Service (FWS), the Utah Division of Wildlife Resources (Utah DWR), and the U.S. Forest Service (Forest Service) by March 31 of each license year, the prior year's East Fork bypassed reach streamflow and water temperature monitoring data.

(C) The first sentence of Condition No. 4 set forth in the Appendix A of the order issuing a new license for Project No. 2219 (120 FERC ¶ 62,154 at 64,646 (2007)) is modified to read as follows:

Each year during the 60 days preceding the anniversary date of the license issued on June 29, 1990, for Project No. 10502, the Licensee shall consult with the USDA Forest Service with regard to measures needed to ensure protection and development of the natural resource values of the project area.

(D) The list of project works in ordering paragraph B(2) of the order issuing a new license for Project No. 2219 (120 FERC ¶ 62,154 at 64,645-46 (2007)) is modified, to read as follows:

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<sup>27</sup> See Forest Service filing of October 5, 2007; and Garkane filing of October 24, 2007.

(2) Project works consisting of: (a) a 20-foot-high, 30-foot-long earth-filled diversion dam on the West Fork of Boulder Creek, creating the 2-acre West Fork reservoir; (b) a buried 27-inch-diameter, 17,600-foot-long concrete pipeline from the West Fork reservoir to the East Fork reservoir; (c) a 25-foot-high, 127-foot-long earth-filled dam on the East Fork of Boulder Creek, creating the 3.8-acre East Fork reservoir; (d) approximately 4.2 miles of 31.5- to 34-inch-diameter steel penstock extending from the East Fork reservoir to the Boulder powerhouse; (e) the Boulder powerhouse, containing three impulse turbines connected to three 1,400-kilowatt (kW) generators; (f) an additional powerhouse, the Peterson powerhouse, located about 3.5 miles from the East Fork dam, and containing one turbine connected to a 100-kW generator; (g) a 12.47/7.2-kV transmission/communications line about 4,725 feet long, extending from the Peterson powerhouse to the substation at the Boulder powerhouse; (h) a 7.2-kV distribution/communications line about 35,000 feet long extending from the Peterson powerhouse to East Fork Dam and on to West Fork dam; (i) a 2-acre re-regulating pond with gates and ditch inlets to divert water to the Boulder Irrigation Company (BIC); (j) a substation connected by a 100-foot-long, 2.4-kilovolt (kV) transmission line to the Boulder powerhouse; and (k) appurtenant facilities.

(E) The description of Exhibit A in Ordering Paragraph B(2) of the order issuing new license for Project No. 2219 (120 FERC ¶ 62,154 at 64,635 (2007)) is modified to read as follows: “Exhibit A: Pages A-1 through A-4 and Figure A-25 (Elemental One Line Diagram) filed on August 18, 2005.”

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.