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110 FERC ¶ 61,200
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc. Project No. 2493-016

# ORDER ON REHEARING AND DISMISSING STAY REQUEST

(Issued March 1, 2005)

1. The Snoqualmie Tribe and Snoqualmie Falls Preservation Project (jointly, the Tribe) and American Whitewater have filed requests for rehearing of the Commission's June 29, 2004, Order issuing a new license to Puget Sound Energy, Inc. (Puget) for its 44.4-megawatt (MW) Snoqualmie Falls Hydroelectric Project No. 2493 (Snoqualmie Project), [1] and for stay of the new license pending a decision on rehearing. The project is located on the Snoqualmie River, in the City of Snoqualmie, King County, Washington.

2. On rehearing, the Tribe argues that the Commission erred by issuing a new license while: (1) failing to consult with the Tribe on a government-to-government basis; (2) adopting flows that violate the Tribe's religious rights and do not balance competing interests under section 10(a) of the Federal Power Act (FPA);[2] and (3) failing to conduct an adequate environmental analysis. American Whitewater argues that the license order did not provide adequate justification for eliminating a pre-existing informal walk-in to the river.

3. With the exception of a correction (inclusion of Puget's contribution to a U.S. Army Corps of Engineers (Corps) project in the calculation of economic benefits for the Snoqualmie Project), the requirement of additional flows at Snoqualmie Falls during May and June, and the inclusion of the Tribe as a consulting party under Article 420, we deny the rehearing requests, as discussed below. This order is in the public interest because it resolves this licensing proceeding.

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[1] 107 FERC ¶ 61,331.

[2] 18 U.S.C. §803(a).

4. The Tribe's stay request, apparently based on its general opposition to the license, did not suggest that it would suffer any specific irreparable harm absent a stay. Since we are now issuing an order on rehearing, the request is dismissed as moot.

**Background**

5. The Snoqualmie Project's facilities are situated around the 268-foot-high Snoqualmie Falls. As relicensed, the project consists of a 195-foot-long inflatable rubber weir dam, located on the Snoqualmie River approximately 150 feet upstream of the Falls,[3] and two generating plants (Plants 1and 2). The project diverts river flows around the Falls through two separate diversion tunnels which lead to the separate powerhouses for the two plants.

6. Plant 1's intake structure, located on the south bank of the river about 300 feet upstream from the Falls, leads to an underground powerhouse with five generating units, and a 450-foot-long tailrace tunnel that returns the flow to the Snoqualmie Falls plunge pool at the base of the Falls. The new license requires a minimum flow of 30 cubic feet per second (cfs) in Plant 1's tailrace to prevent fish stranding and injury.[4]

7. Plant 2's intake structure, located on the river's north bank about 200 feet upstream from the Falls (and about 50 feet upstream from the dam) leads to Plant 2's above-ground powerhouse on the north bank, about 1,550 feet downstream from the Falls. Plant 2 discharges water directly from the powerhouse into the Snoqualmie River.

8. Under the new license, and in accordance with the Clean Water Act certification issued for the project by Washington State, the project must be operated to ensure that the following minimum flows (as measured at the diversion weir) or natural flow, whichever is less, pass over the Falls: May 16 through May 31 – 200 cfs; June – 450 cfs; July and August – 100 cfs on weekends and July 4th[5] -- 100 cfs daytime weekdays and 25 cfs

[3] The dam ranges from two to four feet in height with a crest elevation of 396.5 feet mean sea level (msl), and has a 75-foot wide inflatable rubber weir side-channel spillway with a crest elevation of 397.0 feet msl.

[4] *See* Article 407. The Tribe maintains that the 30 cfs minimum flow is inadequate to mitigate the effects of the project on fisheries. But it submits no argument to support this position.

[5] The licensee is also to make the higher weekend releases on holidays during July and August.

nighttime weekdays; September through May 15 – 100 cfs daytime and 25 cfs nighttime; and on Labor Day weekend – 200 cfs daytime and nighttime.[6] The purpose of the flows is to preserve the aesthetic value of the Falls.

9. Because the City of Snoqualmie was built within the Snoqualmie River's 100-year flood plain and is subject to frequent flooding, the Corps is developing a project in the area to implement flood control measures. Because the flooding is due in part to backwater created by the Snoqualmie Project, Puget has agreed to participate with the Corps and local entities (City of Snoqualmie, King County, and local businesses) in the Corps' project.

10. The Corps' project entails rock excavation along the right bank (looking downstream), just upstream of the Snoqualmie Project's hydroelectric intake; earth excavation along the left bank, just downstream of the SR 202 bridge; and removal of a partially-failed railroad bridge – all upstream of the project's dam. These activities will occur within the Snoqualmie Project's boundaries, but are not a part of the Snoqualmie Project.

## Discussion

### A. Tribal Consultation

11. The Tribe argues that the Commission failed to consult with it about flows at the Falls on a government-to-government basis as required by the Commission's Policy Statement on Consultation with Indian Tribes in Commission Proceedings (tribal policy),[7] or as required by section 106 of the National Historic Preservation Act (NHPA)[8] and section 800.14(b)(2)(i) of the NHPA's implementing regulations.[9]

12. The Snoqualmie Tribe was an active participant at every stage of the proceeding. It participated in discussions at scoping meetings and submitted written comments. Its comments were addressed in both the draft environmental impact statement (EIS) and the final EIS, issued in November 1994 and September 1996, respectively. We have considered both of those sets of comments. Following a determination by Interior that

[6] 107 FERC at 62,520.

[7] 18 C.F.R. §2.1c (2004).

[8] 16 U.S.C. § 470f.

[9] 18 CFR § 800.14(b)(2)(i) (2004).

the Snoqualmie Tribal Organization is an Indian tribe within the meaning of federal law, effective October 6, 1999,[10] the Snoqualmie Tribe's comments in the proceeding were considered as recommendations filed by a federally-recognized tribe pursuant to sections 10(a)(2)(B) and 10(a)(3) of the FPA.[11]

13. Furthermore, the NHPA consultation and development of the project's programmatic agreement were completed nearly two years before the Snoqualmie Tribe was formally recognized by the federal government.[12] The NHPA's implementing regulations do not provide for consultation with non-federally recognized tribes. Nevertheless, as discussed above, the Snoqualmie Tribe was consulted; that is, its views were sought, discussed, and considered in the NHPA consultation and in development of the programmatic agreement, and it was offered the opportunity to sign the programmatic agreement as a concurring party.[13]

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[10] 107 FERC at 62,514 n.11.

[11] 16 U.S.C. § 803(a)(2)(B) and (a)(3). *See also,* 18 C.F.R. § 4.30(b)(10) (2004). 107 FERC at 62,514 n. 11.

[12] The final signature for the programmatic agreement was dated January 17, 1997. The Tribe's status as a federally recognized tribe became effective on October 6, 1999.

[13] Even if the Snoqualmie Tribe had been federally recognized at the time, its signature on the programmatic agreement would not have been mandatory since the project is not on a reservation. 36 C.F.R. § 800.14(b)(2)(iii) (2004).

The Tribe also requests reopening of NHPA consultation because, at the time of agency signatures on the programmatic agreement, the Corps' flood mitigation project had not yet been approved by the Corps, and the water quality certification (providing for flows different from those recommended in the final EIS) had not yet been issued. Therefore, it maintains, the Washington State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Advisory Council) signed the programmatic agreement based on incomplete information. These are not new circumstances warranting a reopening of NHPA consultation. The concurrences were not conditioned upon the Commission's adoption of the final EIS recommended flows, and neither the SHPO nor the Advisory Council -- the concurring entities -- have requested reopening of consultation based on changed circumstances. Furthermore, a programmatic agreement for the Snoqualmie Project is only required for a Commission action or a foreseeable consequence of a Commission action. In a letter to Puget issued by the Commission's Division of Hydropower Administration Compliance on March 27,

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14. By the time the Tribe requested consultation, all aspects of the proceeding (including discussions, meetings, and filings on threatened and endangered species, cultural resources, and development of the draft and final EIS's) -- save receipt of the Clean Water Act's water quality certification issued by Washington State – had been completed. We see no need to conduct additional consultation here, where the Indian tribe has had an opportunity to participate and be heard, the proceeding is far advanced, and such consultation would cause undue delay, or could constitute an *ex parte* exchange.

15. The Tribe argues that, because it is a sovereign entity, license Article 420 should require the Tribe's approval of the project's aesthetic resources plan, and license Article 422 should require the licensee to consult with the Tribe on any conveyance the licensee makes under that article.

16. The Snoqualmie Tribe's sovereign status does not provide it with authority over licenses issued by the Commission. Under the FPA, the Commission is charged with assessing plans and is required to maintain approval authority over project structures and operations. *City of Tacoma, Washington*, 72 FERC ¶ 61,239 at 62,079 (1995). However, because the Tribe has an interest in the aesthetics of the Falls, it will be added as a party to be consulted under Article 420.

17. Article 422 is a standard land use article that permits a licensee to make certain conveyances or to grant permission for certain uses without prior Commission approval, because the categories of conveyance or use are not deemed significant enough to warrant first holding a proceeding. Where we do not require prior Commission approval, we will not require prior consultation with some other entity under the license.[14]

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2002, it was determined that the Corps' use of the Snoqualmie Project's lands would result in only minor environmental impacts. No rehearing of that letter order was sought. *See* discussion and n. 33, *infra*.

[14] The Tribe also argues that its spiritual and cultural use of the Falls is consistent with purposes of protecting and enhancing the scenic, recreational and other environmental values of the project, and that the use should therefore be added to Article 422 as a use for which the licensee may grant permission without prior Commission approval. The Tribe misreads the article. Consistency with the purpose of protecting and enhancing the project's environmental values is not the test for inclusion of a use in one of Article 422's enumerated categories. Rather, once it is established that a proposed use falls within one of those enumerated categories, consistency with the purpose of protecting and enhancing the project's environmental values constitutes a further limitation on the licensee's exercise of its authority to permit the use without prior

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18. Finally, the Tribe maintains that the Commission has ignored the Tribe's proposed alternative for natural flows over the Falls, its recommendation for project decommissioning, and a management plan for the Falls that it submitted in 1995. These arguments are all without merit. Commission staff addressed all alternative flow regimes, including the flows advocated by the Tribe, in the final EIS.[15] The Tribe has made no proposal concerning project retirement beyond the statement that it was "negotiating with Puget" concerning project retirement. Moreover, its 1995 plan for "improving, developing, or conserving" the Falls, was not a developed, substantive plan for such conservation, but rather a proposal to work with community leaders and public agencies to develop a plan. Should such a plan be developed, in consultation with appropriate entities, including the licensee, it may be filed with the Commission for its consideration.

## B. Flows

### 1. Religious Practice

19. The Tribe renews its argument that the adopted flows violate its religious rights. Specifically, it alleges that *Lyng v. Northwest Indian Cemetery Protective Association* (*Lyng*),[16] on which the Commission relied for its position that the new license does not violate the First Amendment to the Constitution, [17] is distinguishable from this case on its facts. The Tribe states that in *Lyng*, the Forest Service took extensive measures to protect spiritual activity, while here, the Commission has adopted flows falling well below 1,000 cfs at all times of the year, thus allowing for diversion of so much water that the Falls' mists and spray are eliminated for a good portion of the year. It argues that this curtailment of the flows over the Falls -- and thus of the flow-created mists that are central to the Tribe's religious practice -- does not merely interfere with or inhibit the Tribe's ability to practice its religion; it prevents it.

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Commission approval. *See* Article 422(a). To the degree that any particular proposed spiritual or cultural use falls within the established categories enumerated in Article 422, the licensee currently is authorized to grant permission for such use without prior approval.

[15] *See* final EIS, sections 2.3.3, 3.9.3.3, 4.1.8.3, 4.1.10.3, 4.2.8.3, 4.2.10.3, and 4.3.10.

[16] 485 U.S. 439 (1998).

[17] *See* discussion at 107 FERC at 62,519.

20. *Lyng* involved a challenge to the Forest Service's construction of a paved road through federal land that included an area used by certain American Indians for religious rituals, and to the Forest Service's adoption of a management plan allowing for timber harvesting in the same area. While noting that the Forest Service had taken some measures to accommodate the Indians' religious practices, the Court also made it clear that that the government's incidental destruction of the ability to practice one's religion does not violate the Free Exercise Clause of the First Amendment.[18] In any event, the

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[18] *See* 485 U.S. at 451-453. The Court distinguished between government action that coerces religious practitioners into acting contrary to their religious beliefs and government action that affects their spiritual development. Specifically, it stated:

> . . . The crucial word in the constitutional test is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Sherbert, supra, at 412 (Douglas, J., concurring).
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> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. . . .
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> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians' ability to practice their religion," . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. . . .
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> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding the Indian respondents from visiting the . . . area would raise a different set of constitutional questions. Whatever the rights the Indians may have to

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new license issued in this proceeding does not eliminate flows, but rather increases the available flows, as compared to the existing conditions under the original license. One of our reasons for doing so was consideration of the Tribe's need for flow-created mists.

### 2. FPA Section 10 Balancing of Competing Interests

21. The Tribe argues that the Commission failed to balance competing interests as required by section 10(a) of the FPA because it required flows over the Falls as specified in the project's water quality certification instead of what the Tribe regards as higher flows recommended by Commission staff in the final EIS.[19] It asserts that, given the sacred nature of the site, something more than the certification flow is necessary,[20] and that the Commission should have found that the staff- recommended flows would strike a better balance than the certification flows. It cites Commissioner Brownell's dissent to the June 29, 2004, Order in support of this position.

22. Under Article 13 of the original license, Puget had been required to discharge only a flat minimum flow of 100 cfs over the Falls during daylight hours.[21] In the relicense proceeding, we examined a number of flow options, with a view to improving aesthetic waterfall characteristics important to the Tribe's spiritual and cultural practices at the Falls, as well as characteristics important to recreationists.[22] We determined that a variety of flows that generally track the seasonal variation in the flow regime of the Falls would best meet the project's aesthetic and recreational purposes while also providing generation benefits. However, we have re-examined the matter on rehearing and conclude that the certification flows do not sufficiently take account of the Tribe's

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the use of the area, however, those rights do not divest the Government of its right to use, what is, after all, its land.

[19] *See* final EIS, section 6.5, Findings and Recommendations.

[20] *See* the Tribe's June 29, 2004 request for rehearing at 39.

[21] *See* 53 FPC 1657, 1667 (1975).

[22] *See* draft EIS, sections 4.1.7, 4.2.7, 4.3.7, and 4.4.7 and final EIS, sections 4.1.8.3, 4.1.7.3, 4.2.8.3, and 4.3.10.

concerns. On balance, adoption of the water quality certification flows with an adjustment to require flows over the Falls of 1,000 cfs (daytime and nighttime),[23] or inflow, if less, throughout the months of May and June is a more appropriate resolution.[24]

23. As previously noted, the Falls are of great religious significance to the Snoqualmie Tribe, and the level of spray and resulting mist produced by water flowing over the Falls[25] is a critical component of their spiritual experience. Typically, May and June are the months during which the level of flows producing the greatest volume of mist naturally occur. While both the flows required by the water quality certification[26] and those recommended in the final EIS[27] track the seasonal variation in flows at the Falls, those recommended in the final EIS would provide a greater threshold for mist during these months. Specifically, while spray is moderately heavy at 450 cfs (the highest flows required by the water quality certification), at 1,000 cfs (the highest flows recommended in the final EIS), heavier spray and mist rise from the canyon,[28] and the waterfall is "explosive and powerful."[29]

24. The cost of the 1,000 cfs minimum flows (daytime and nighttime) throughout May and June decreases the net annual benefit of the Snoqualmie Project by $458,000 and, together with a separate corrected cost ($85,000) added in this order,[30] reduces the total positive net annual benefit of the project, as relicensed, from $10,953,000 to $10,410,000, a fairly small effect on the total net annual benefit. Given the size of the

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[23] The daytime/nighttime requirement tracks the water quality certification's requirement of the same flows, day and night, during May and June.

[24] To the extent that a certification condition and a license requirement differ, the more stringent provision may govern. Noah Corporation, 57 FERC ¶ 61, 170 (1991).

[25] Waterfall spray is created when the free-falling water strikes the surface of the plunge pool. *See* final EIS, section 3.9.2.

[26] 100 cfs (daytime) and 25 cfs (nighttime) from May1-15; 200 cfs (day and night) from May 16-31; and 450 cfs (day and night) in June.

[27] 1,000 cfs (daytime) and 25 cfs (nighttime) in May and June.

[28] *See* final EIS, section 3.9.3.3, Table 3-9.

[29] *See* final EIS at xix.

[30] *See* discussion of economic benefits, *infra*.

project (54.4 MW), the relatively small effect on net annual benefit, and the importance of the mist at this site to the Snoqualmie Tribe, raising the flows to ensure 1,000 cfs throughout the months of May and June appropriately balances competing interests.

### C. Adequacy of the Final EIS

25. The Tribe argues that the Commission failed to comply with the National Environmental Policy Act 1969 (NEPA)[31] because it did not: (1) include an environmental analysis of the Corps' flood mitigation project in the final EIS; (2) sufficiently consider decommissioning of the project's dam in the final EIS; (3) update the final EIS's economic analysis; and (4) prepare a supplemental EIS addressing new circumstances arising since issuance of the final EIS in 1996. These arguments are without merit.

#### 1. Analysis of the Corps Project in the Snoqualmie EIS

26. Because the City of Snoqualmie was built within the Snoqualmie River's 100-year flood plain and is subject to frequent flooding, the Corps has, pursuant to section 205 of the 1948 Flood Control Act, 33 U.S.C. §§ 701a and 701c, undertaken a project to implement flood control measures. As noted, *supra*, the Corps project is located in the river within the Snoqualmie Project's boundaries.

27. The Tribe maintains that completion of the Corps project is necessary to meet the requirements of a license provision and therefore that the Snoqualmie Project and the Corps project are actions connected, cumulative, or similar in a manner so as to require a single, comprehensive EIS to address both projects.[32] However, completion of the Corps project is not a condition of the Snoqualmie Project's new license. Nor is the Corps

[31] 42 U.S.C. § 4321 *et seq.*

[32] The Tribe cites *Earth Island Institute v. United States Forest Service*, 351 F.3d 1291, 1304 (9th Cir. 2003)(*Earth Island*), and *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002)(*Native Ecosystems*) for this proposition. *Earth Island*, and *Native Ecosystems* are distinguishable. Each involved not only multiple actions of the same nature (timber sales) but actions by one agency (the U.S. Forest Service) – and even in those instances, the court found that the actions were not sufficiently connected, cumulative, or similar to require one NEPA review document for the distinct actions.

action a Commission action, or a reasonably foreseeable consequence of a Commission action. Therefore, the Corps must conduct its own NEPA analysis for its proposed action. A combined analysis of both actions is not required.[33]

28. The Tribe also maintains that the Commission neglected, in its single-project EIS, to analyze the cumulative impacts of the hydroelectric project together with past, present and reasonably foreseeable future actions, including the Corps project. However, not only did the final EIS include the Corps project in its analysis of cumulative impacts,[34] the license requires corrective action by the licensee.[35]

### 2. Analysis of the Decommissioning Alternative

29. The Tribe argues that the final EIS analysis of the project decomissioning should have addressed ways to achieve decommissioning apart from license denial. Specifically, it states that the Commission ignored the Tribe's development of a draft vision plan for a "Spirit of the Falls" Sanctuary Park, as well as its negotiations with Puget to find a federal agency, such as the Bureau of Indian Affairs, that could take over the project and/or co-manage it with the Tribe. However, the Tribe never submitted a fully developed vision plan for analysis. Nor has it suggested that its negotiations for federal project management or co-management ever bore fruit. No U.S. government agency has at any time suggested that it wanted to take over the project.

### 3. Analysis of Economic Benefits

30. The Tribe maintains that the Commission's analysis of the project's economic benefits was inadequate because the Commission's comparison of the costs and benefits of the project with those of project retirement[36] did not include the cost of the Corps' flood mitigation project as a cost of relicensing. As discussed, *supra*, the Corps' project is not a part of the Snoqualmie Project. However, because the Snoqualmie Project's

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[33] To the degree that the Corps project may use project lands, that use was evaluated in a letter order issued March 27, 2002, where it was determined that potential impacts were minor, and the licensee could therefore permit the Corps' use of lands within the project boundaries without prior Commission approval. No rehearing of that order was requested.

[34] *See* final EIS, sections 2.3.5, 4.2.14, and 6.1.12.

[35] *See* license Article 308.

[36] The Tribe references the discussion in paragraphs 76-78 of the order.

backwater contributes somewhat to the flooding which the Corps' separate project addresses, Puget agreed to contribute to the Corps' project in lieu of performing its own mitigation, and such contribution has been made a requirement of its new license.[37] Consequently, Puget's contribution to the Corps' project should have been included in the cost analysis. Including this cost decreases the net annual benefit of the Snoqualmie Project by $85,000 annually; and, together with the $458,000 cost of additional flows, discussed *supra*, reduces the total positive net annual benefit of the project, as relicensed, from $10,953,000 to$10,410,000, a relatively small effect on the total net annual benefit.

31. The Tribe maintains that the 1996 final EIS should have been updated to include the most recent estimates of the cost of power, need for power, and alternate technologies available to replace the project's power. However, the relicense order relied on updated data obtained after issuance of the final EIS. The cost of power referenced in the relicense order (49.8 mills/kWh) was filed by Puget on December 9, 2003, and was based upon Puget's April 2003 least-cost plan and its August 2003 least-cost plan update. The need for power referenced in the relicense order was an update based upon the Western Electricity Coordinating Council's September 2002, 10-Year Coordinated Plan Summary for 2000 – 2011. Finally, as an alternative to project power, the relicense order used the simple cycle combustion turbine -- the most rapidly growing form of fossil-fueled generation -- as the technology most likely to replace generation lost if the project were retired. Thus, the Commission relied on the best currently available information in acting on the license application, and there was no need to update the final EIS.

32. Finally, the Tribe argues generally that the final EIS should have provided an incremental investment analysis considering actual power costs rather than average costs, but it does not identify how our particular analysis falls short. Nor does it explain what sort of incremental analysis should have been done.[38]

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[37] *See* Article 308, 107 FERC at 62,528.

[38] The Tribe also argues that the final EIS should have been revised to place economic values on non-power factors. However, the FPA does not require the Commission to place a dollar value on non-power benefits. *CLF et al. v. FERC et al.*, 216 F.3d 41 (D.C. Cir., June 23, 2000), *citing State of California v. FERC*, 966 F.3d 1541, 1550 (9th Cir. 1992).

### 4. Supplemental EIS

33. The Tribe argues that two new fish species (Puget Sound Chinook and bull trout) were listed as endangered subsequent to preparation of the 1996 final EIS, and that the effects of ramping on these species should have been evaluated before issuance of the license. The Tribe also argues that issuance of the water quality certification constituted a new circumstance necessitating development of a supplemental EIS to determine the effects of project flows on endangered species.

34. The effects of ramping on both the Chinook and bull trout were addressed in the Biological Assessment (BA) issued by Commission staff on November 2, 2001. The ramping rates required by the license were those that the BA recommended to protect listed species during the periods when Puget changes flows over the Falls. It was concluded that, with the BA's recommended measures, including those for ramping rates, the project is not likely to adversely affect Chinook or bull trout. Both the U.S. Fish and Wildlife Service (FWS) and NOAA Fisheries concurred in the BA's determination.[39]

35. Furthermore, fish are not affected by flows over the Falls.[40] Therefore, the water quality certification's change in flows required over the Falls is not a new circumstance necessitating renewed consultation pursuant to the Endangered Species Act.

### D. Other Issues

36. The Tribe states that the project's 40-year license term is inappropriate, given the project's negative effects on the Tribe's cultural and spiritual well-being. However, the Tribe does not provide any evidence to show how the length of the license term by itself has any particular impact on it. Moreover, we determined the term consistent with our policy, which provides that, where, as here, the license requires moderate expenditures for environmental mitigation and enhancement measures, we will set the term at 40 years.

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[39] The FWS and NOAA Fisheries determinations were filed on January 15, 2002, and March 5, 2003, respectively.

[40] *See* BA at 19 and final EIS at 4-13. Even if no water flowed over the Falls, aquatic resources would be protected by the license's required minimum flow of 300 cfs between the Snoqualmie Falls plunge pool and Plant 2. The 300 cfs flow backs up into the plunge pool at the Falls' base, thereby protecting the plunge pool's aquatic habitat.

37. The Tribe also asserts that the license is inconsistent with Washington State's public trust doctrine. However, we act under the FPA, which preempts state law,[41] so that any obligations that may be imposed by Washington law on Washington entities do not apply to our issuance of a license.

38. The Tribe argues that fishery plans required under license Article 401 are actually studies that should have been required before license issuance. The final EIS thoroughly examined fishery issues,[42] and the Tribe has made no arguments demonstrating why any particular studies should have been conducted before license issuance.

39. Finally, the Tribe maintains that the 30-cfs minimum required in Plant 1's tailrace to prevent fish stranding and injury is inadequate for this purpose. This too was addressed in the final EIS,[43] and the Tribe submits no argument to support its position.

**E. American Whitewater – River Access for Kayakers**

40. On rehearing, American Whitewater argues that environmental review was required prior to elimination of the gap in a boardwalk running behind the project's Plant No. 2,[44] and that the relicense order did not provide adequate justification for eliminating this informal public access to the Falls and the river.

41. Elimination of the boardwalk gap was not a condition of the new license. The elimination had already been required in June 2001, under the original license, by the Commission's Regional Director, based on safety concerns.[45] If American Whitewater

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[41] *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946).

[42] *See* final EIS, sections 3.5, 4.1.4.

[43] *See* final EIS, section 4.1.4.2.

[44] The wooden boardwalk runs behind the project's Plant No. 2 to an observation platform from which the public can view the Falls. During the original license term, the boardwalk contained a gap where it ended for about 20 feet before picking up again. The gap was frequently used as an informal access point from which to leave the marked trail to reach the Falls and the river.

[45] *See* Letter dated June 12, 2001, to Puget Sound Energy, Inc. from the Regional Director, Portland Regional Office, directing that the gap be spanned with a section of boardwalk, and closed in with high railings and chain-link fencing to prevent further use.

felt that the Regional Director's decision was not supported by a sufficient environmental basis, its recourse was to request rehearing of the Regional Director's letter order. Renewal of the argument in the relicense proceeding constitutes a collateral attack on the Regional Director's determination. In any event, as noted above and in the relicense order,[46] the informal walk-in to the river was eliminated as a safety measure, and the Regional Director set out environmental bases for the requirement.[47] Also, for recreational purposes, the new license provides for an access point immediately downstream of Plant 2 which will not compromise safety at the project.[48]

The Commission orders:

(A) The relicense order issued on June 29, 2004, in this proceeding, is revised to include Puget's contribution to a United States Corps of Engineers project in the calculation of economic benefits for the project as discussed in the order on rehearing.

(B) The Snoqualmie Tribe is added as a party to be consulted under Article 420 of the license.

(C) Article 421 of the license is revised to read as follows:

> Article 421. Minimum Flows over Snoqualmie Falls. In addition to the minimum aesthetic flows required by Appendix A, Condition II.A, the licensee shall:
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> (1) during Labor Day Weekend of each license year, release a minimum flow over the Falls of 200 cubic feet per second (cfs) or inflow, if less, commencing one hour before sunrise on the Saturday of Labor Day Weekend and extending to one hour after sunset on Labor Day; and

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[46] *Id*.

[47] The Regional Director noted that visitors used the gap to leave the marked trail, climb down the slope and hike upstream along the boulder-strewn river bed to gain closer access to the Falls and river. Since the overflow spillway chute for the penstock forebay for Plant 2 discharges through a notch, then down a near vertical rock slope, onto a large boulder field and back to the river, visitors who leave the boardwalk to venture out onto rocks at the base of the overflow chute could be put at risk. Regional Director's letter, at 1-2.

[48] *See* 107 FERC at 62,520 n.46, and Article 417, *Id*. at 62,62,534.

(2) during May and June of each license year, release a minimum flow over the Falls during both daytime and nighttime to 1,000 cfs, or inflow, if less.

(D) The operational compliance monitoring plan to be filed under Article 405 of the license shall, in addition to the requirements of Article 405(3), include a description of how the project will be operated to maintain compliance with the requirements of Article 421.

(E) The requests for rehearing filed by the Snoqualmie Tribe and Snoqualmie Falls Preservation Project, and by American Whitewater on July 29, 2004, are granted to the extent discussed above, and are otherwise denied.

(F) The request for stay filed by the Snoqualmie Tribe is dismissed.

By the Commission. Commission Kelliher dissenting in part with a separate statement attached.

( S E A L )

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc. Project No. 2493-016

(Issued March 1, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

In the June 29, 2004 order in this proceeding, the Commission issued a new license for the Snoqualmie Falls Hydroelectric Project. A significant issue in the relicensing process was the appropriate minimum flows that should be established for Snoqualmie Falls. As noted in paragraph 23 of the instant order, the original license for the project had required the licensee to discharge a flat minimum flow of 100 cubic feet per second (cfs) over the Snoqualmie Falls during daylight hours. In the relicensing proceeding, the Snoqualmie Tribe and the Snoqualmie Falls Preservation Project asserted that "any project diversion of water compromises the sacred quality of the Falls, that only totally natural flows will truly support their traditional religious practices, and that project 'decommissioning' is mandated by the FPA." [49]

The June 29, 2004 Order determined that "a variety of flows that generally track the seasonal variation in the flow regime of Snoqualmie Falls will best meet the project's aesthetic and recreational purposes while also providing generation benefits." [50] The order further determined that the flow regime established by the Washington State Department of Ecology in its Clean Water Act section 401 water quality certification (certification flows) for the project met those criteria, except for the flows that it established for Labor Day weekend. The June 29, 2004 Order revised the certification flows to require a minimum flow release of 200 cfs day and night for that weekend.

In the instant order, the Commission has revisited this issue and concluded that the certification flows are inappropriate for May and June of each year. This order increases the flows for May 1-15 from 100 cfs daytime and 25 cfs nighttime to 1,000 cfs at all times; it increases the flows for May 16-31 from 200 cfs at all times to 1,000 cfs at all times; and it increases the June flows from 450 cfs at all times to 1,000 cfs at all times. As noted in the instant order at paragraph 25, "[t]he cost of the 1,000 cfs minimum flows (daytime and nighttime) throughout May and June decreases the net annual benefit of the Snoqualmie Project by $458,000 . . . ." I see nothing here that warrants rebalancing these

[49] *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 at P 33 (2004) (footnotes omitted).

[50] *Id.* at P 47.

interests as considered by the Commission in its June 29, 2004 relicensing order. For that reason, I respectfully dissent in part.

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Joseph T. Kelliher