

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gustavus Electric Company

Project Nos. 11659-002 and 003

ORDER DENYING MOTION TO AMEND RECORD
AND ESTABLISH PROCEDURAL SCHEDULE

(Issued May 9, 2005)

1. In this order, the Commission denies a motion by several intervenors¹ to amend the record in this proceeding, in which we issued an original license to Gustavus Electric Company (Gustavus) for the Falls Creek Hydroelectric Project No. 11659, and to establish a procedural schedule for action on the intervenors' request for rehearing of the license order. This order serves the public interest by bringing this lengthy proceeding to a close.
2. The license order was issued on October 29, 2004.² The deadline for filing requests for rehearing was November 29, 2004. The intervenors timely filed a request for rehearing. The intervenors filed their motion to amend the record on March 21, 2005. On March 24, 2005, the Commission issued an order denying rehearing of the license order.
3. The intervenors contend that the record should be amended to correct a factual error in the license order regarding the amount of land contained in two allotments of land made to Native Alaskans under the Alaska Native Allotment Act of 1906,³ and so

¹ The intervenors are Sierra Club, the Wilderness Society, American Rivers, Hoonah Indian Association, Glacier Bay's Bear Track Inn, Thomas L. Mills, Sr., Patrick G. Mills, Sophie McKinley, and Diane McKinley.

² 109 FERC ¶ 61,105 (2004).

³ 34 Stat. 197, as amended, 42 Stat. 415 and 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970).

that the Commission may consider the information contained in a book published subsequent to filing of the intervenors' rehearing request.

4. The license order states that there are two Native Allotments in the project area, the George Allotment of approximately 12 acres, and the Mills Allotment of approximately 39 acres.⁴ The intervenors state that these allotments are in fact 160-acre tracts, and that the acreages cited in the license order refer to the number of acres of each tract that were logged in 1974. They also note that the Environmental Impact Statement (EIS) prepared in this proceeding correctly states the size of the allotments.

5. The intervenors contend that the error in the licensing order may have contributed to an alleged trespass on the Mills Allotment by staff of the U.S. Department of the Interior's Bureau of Land Management (BLM) and Gustavus. They state that BLM staff have completed survey work in the area in the past six months, and Thomas L. Mills, an allottee and one of the intervenors, alleges that BLM staff cleared vegetation and left survey markers on the Mills Allotment.⁵

6. The intervenors are correct that the order misstated the size of the allotments and, by this order, we correct that error. The error is inconsequential, however, because none of the conclusions in the order or the requirements of the license depend on the size of the allotments. The intervenors point out, moreover, that the EIS correctly identifies the size of the allotments.

7. On the issue of trespass, the license confers no authority on the licensee (or any other entity) to enter onto the allotments without permission from the allottees. Moreover, the allotments are not within, and are unlikely to abut, the project boundary. Thus, any trespass that may have occurred on the allotments was not authorized by the Commission and did not result from the misstatement of the allotment's sizes. The allottees may wish to address concerns with regard to possible trespass by BLM or another federal agency to appropriate authorities at the Department of the Interior, and to refer questions concerning trespass by private citizens to local law enforcement authorities.

8. The intervenors further state that the Commission should revisit the license order after reviewing "Meet Lydia: A Native Girl from Southeast Alaska."⁶ They state that

⁴ 109 FERC ¶ 61,105 at P 59.

⁵ Motion at 3 and Attachment 1.

⁶ Belarde-Lewis, Miranda, National Museum of the American Indian (2004).

this book describes the history, ceremonies, festivals, stories, and traditions of the Huna Tlingit tribe and culture, as experienced by the daughter of Thomas L. Mills, and bears on the adequacy of license Article 419, which pertains to cultural resources.⁷

9. We see no need to reopen the record to include the referenced book. First, although the book itself appears to have been published in December 2004, after we issued the license order, the information contained in the book regarding Huna Tlingit culture is not new, but rather is newly presented in the context of a book about the daughter of one of the intervenors. This information therefore has previously been known by the intervenors, and thus could have been, and, at least in part, was submitted for the record before the license was issued or before the deadline for rehearing requests.⁸ As discussed in the order on rehearing, consultation regarding potential impacts of the project on Hoonah Tlingit culture was ongoing for several years before the license was issued, such that cultural resource and tribal issues were well-explored and considered in the licensing process.⁹ Moreover, the Commission and the National Park Service found, and the Alaska State Historic Preservation Officer concurred, that the project would have no effect on any historic or cultural properties eligible for the *National Register of Historic Places*.¹⁰

10. The intervenors also do not explain how the information included in the book brings into question the adequacy of Article 419, which imposes three requirements on Gustavus:

- Consult with the Alaska State Historic Preservation Officer (SHPO) and the Hoonah Indian Association (HIA) before commencing any land-disturbing activities not already specifically authorized by the license;

⁷ 109 FERC ¶ 61,105 at 61,475-76.

⁸ The intervenors' November 29, 2004 request for rehearing of the license order includes a copy of an article from a 2003 issue of *Smithsonian* magazine describing Ms. Belarde-Lewis' May 2003 trip to Alaska to meet the Mills family and conduct interviews and take photographs for the book. Rehearing request at 28 and Exh. 9.

⁹ 109 FERC ¶ 61,331 at P 16 (2004).

¹⁰ *Gustavus Electric Company*, Notice of Determinations and of Proposed License Terms and Conditions, 108 FERC ¶ 61,198 at P 28-29 (2004); 109 FERC ¶ 61,105 at P 82-83.

- If any previously unidentified archeological site or historical site is discovered during construction of the project, cease all land-clearing or disturbing activity and consult with the SHPO and the HIA; and
- If the project site is ever designated as a historic property pursuant to the National Historic Preservation Act,¹¹ prepare an Historic Resources Management Plan.

We believe these requirements continue to be appropriate.

11. Finally, the intervenors ask the Commission to establish a schedule for acting on the requests for rehearing . Because we have issued the order on rehearing, this request is moot.

12. In conclusion, the intervenors have not established a sufficient reason for the Commission to amend the record of this proceeding. Their motion will therefore be denied.

The Commission orders:

The intervenors' requests for the Commission to establish a procedural schedule for action on their request for rehearing, and to amend the record to as set forth in their motion filed March 21, 2005, are denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹¹ 16 U.S.C. 470-470w-6.