

28 FERC 61,398

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman;
Georgiana Sheldon and O. J. Richard III.

Northern States Power Company)	Project Nos. <u>108-000</u> ,
(Wisconsin) and)	108-009,
Lac Courte Oreilles Band of Lake)	8286-000
Superior Chippewa Indians)	

ORDER GRANTING EXEMPTION FOR LICENSING AND
APPROVING OFFER OF SETTLEMENT

(Issued September 28, 1984)

On May 30, 1984, the Settlement Judge, appointed 1/ in accordance with the Commission's Regulations, certified to the Commission an uncontested Settlement Agreement, dated February 1, 1984, among Northern States Power Company (NSP), the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (Band), the Secretary of the Interior, the Secretary of Agriculture, and the Director of the Wisconsin Department of Natural Resources. 2/ The Commission's staff filed comments in support of the Agreement, which provides for a resolution of all issues pending in the proceeding on NSP's application for a new license for the Chippewa Reservoir Project No. 108, located on the Chippewa River in Sawyer County, Wisconsin.

The Judge's May 30 order describes the principal terms of the Agreement, which provides for NSP to convey to the Band approximately 4,500 acres of project lands and to pay the Band \$250,000. In return, the Band will convey to NSP a perpetual flowage easement over the 525.50 acres of tribal land which is now part of Project No. 108, and NSP will be relieved of any further obligations for annual charges under Section 10(e) of the Federal Power Act for the use of the 525.50 acres. The Agreement also authorizes the Band

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- 1/ "Order Directing Appointment of Settlement Judge," Northern States Power Company, 13 FERC ¶ 61,055 (1980). The order provides a brief history of this proceeding.
- 2/ "Certification of Settlement Agreement," Northern States Power Company, 27 FERC ¶ 63,068 (1984).

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to construct and operate at the Chippewa Reservoir Dam generating facilities with a nameplate rating of approximately 3 MW. A Power Sale Contract (Appendix F to the Agreement) obligates NSP to buy the output of these generating facilities for an initial term of 30 years from the commencement of their operation. The term of the contract can be extended for an additional period at the option of the Band. The operation of Project No. 108, including the Band's 3 MW generating facilities and the scheduling of releases of water by NSP through the Band's facilities, is covered by the terms of the Power Sale Contract. The Agreement also requires both the Band and NSP to maintain a buffer strip of a varying width and with certain restrictions on development. The dimensions of the buffer strip and the restrictions are set forth in the Agreement and have been concurred in by the Wisconsin Department of Natural Resources. The Agreement is conditioned upon the issuance to NSP and the Band of an exemption of Project No. 108 from licensing or, alternatively, upon the issuance of separate licenses for the respective project works to be owned and maintained by the Band and by NSP.

In accordance with the terms of the Agreement, the Band and NSP have jointly filed, in Project No. 8286, an application for an exemption of the Chippewa Project from licensing. Notice of that application was published in accordance with Section 408 of the Energy Security Act of 1980 and the Commission's regulations. ^{3/} All comments, protests, and petitions to intervene that were filed have been considered. No agency has any objection relevant to the issuance of the requested exemption.

The Commission's regulations reflect its determination that it is empowered to grant an application for exemption of a project under license. ^{4/} This authority applies equally to a project under annual license. ^{5/} The regulations do however provide that the Commission will not accept an exemption application for only part of

^{3/} The federal and state fish and wildlife agencies with whom consultation is required are parties to the settlement.

^{4/} See 18 C.F.R. § 4.104(a)(1). To the extent necessary to effectuate the Settlement Agreement approved herein, we waive, pursuant to 18 C.F.R. § 4.103(d)(1), any pertinent constraints in Section 4.104(a)(1), including those concerning the identity of the exemption applicant. We find this waiver to be consistent with Section 408 of the Energy Security Act of 1980 and appropriate in light of our approval of the Settlement.

^{5/} An annual license continues the project under the terms and conditions of the original license until the project is relicensed or otherwise disposed of. 16 U.S.C. § 808(a).

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a licensed project. ^{6/} The Agreement in this proceeding contemplates exemption of all of the licensed project and is therefore in accord with the Commission's regulations and policies.

One portion of the settlement requires clarification. Article III, paragraph 3, provides that the implementation of Article II, paragraphs 1-4, relieves NSP of any obligation, whether past, present or future, to pay any further annual charges, pursuant to 16 U.S.C. § 803(e), for the use of the 525.50 acres of tribal land for project purposes. This could be interpreted as relieving NSP of its obligation to pay annual charges that have accrued to date at the project but which have not yet been paid. However, since such charges must be paid to the United States, see 16 U.S.C. § 803(e), the only "payment" that could be construed as satisfying this obligation is NSP's conveyance to the United States (under Article II, paragraph 1) of certain lands above elevation 1315 msl. There is some question about whether such conveyances could satisfy Section 10(e) annual charge payment obligations; the statute appears to contemplate payment in money rather than real property. More importantly, Section 17 requires that the proceeds from any Indian reservation be "placed to the credit of the Indians of [the] reservation." This would not occur here, since the United States would continue to own the property, albeit in trust for the Indians. The annual charges in question cannot be waived by the Commission. See 16 U.S.C. § 803(i).

In view of this statutory dilemma, which was presumably known to the parties to the settlement when it was executed, the amount of annual charges in question (approximately \$1,000 for 1984), and the overall purposes of the settlement, we do not interpret Article III, paragraph 3 as applying to annual charges that have accrued but have not been paid. Rather, the settlement's extinguishment of NSP's obligation to pay any "further annual charges" for the land should be interpreted as relieving NSP of any obligation, whether past, present or future, to pay annual charges accruing after the date of this settlement. Interpreted in this manner, the settlement needs modification only to reflect the fact that such annual charges must be paid for so long as the license is in effect. Since by this order we are terminating the license for this project and are exempting the project from the licensing provisions of the Federal Power Act, including Section 10(e), no annual charges will accrue after the date of this order.

^{6/} 18 C.F.R. § 4.103(c). See also Regulations Preambles (1977-1981), ¶ 30,204 at 31,365 (1980).

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Accordingly, because we find that the Settlement Agreement is fair and reasonable and in the public interest, and because we find that the project qualifies for exemption under our regulations, we shall approve the Settlement Agreement and issue the requested exemption. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. 7/

The Commission orders:

(A) The Settlement Agreement, which includes the Appendices thereto, dated February 1, 1984, by and among NSP, the Band, the Secretary of the Interior, the Secretary of Agriculture, and the Wisconsin Department of Natural Resources, is approved in its entirety on the terms and conditions stated therein.

(B) Chippewa Reservoir Project No. 8286, as described and designated in the Joint Application of NSP and the Band filed on May 4, 1984, is exempted from all of the requirements of Part I of the Federal Power Act, including licensing, subject to the standard articles in Section 4.106 of the Commission's Regulations attached hereto as Form E-2, 18 C.F.R. § 4.106, and in addition subject to the following article:

Article 6: Any exempted small hydroelectric power project that utilizes a dam which is more than 33 feet in height above streambed, as defined in 18 C.F.R. § 12.31(c), impounds more than 2,000 acre-feet of water, or has a significant high hazard potential, as defined in 33 C.F.R. Part 222, is subject to the following provisions of 18 C.F.R. Part 12:

- (i) Section 12.4(b)(1)(i) and (ii), (2)(i), (iii)(A) and (B), (iv), and (v);
- (ii) Section 12.4(c);
- (iii) Section 12.5;
- (iv) Subpart C; and
- (v) Subpart D.

7/ See 18 C.F.R. § 385.602(c)(iv) (1984).

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For the purposes of applying these provisions of 18 C.F.R. Part 12, the exempted project is deemed to be a licensed project development, and the owner of the exempted project is deemed to be a licensee.

(C) The proceeding on NSP's application for a new license for Project No. 108 is terminated.

By the Commission.

(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

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By the Commission.

(S E A L)

Kenneth F. Plumb

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Secretary.

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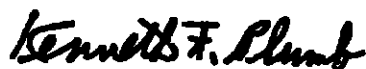
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(S E A L)



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§ 4.106 Standard terms and conditions of exemption from licensing.

Any exemption from licensing granted under this subpart for a small hydroelectric power project is subject to the following standard terms and conditions:

(a) Article 1. The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

(b) Article 2. The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that any Federal or state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

(c) Article 3. The Commission may accept a license application by any qualified license applicant and revoke this exemption if actual construction or development of any proposed generating facilities has not begun within 18 months, or been completed within four years, from the date on which this exemption was granted. If an exemption is revoked, the Commission will not accept a subsequent application for exemption within two years of the revocation.

(d) Article 4. This exemption is subject to the navigation servitude of the United States if the project is located on navigable waters of the United States.

(e) Article 5. This exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or or occupy any Federal lands for those purposes must be obtained from the administering Federal land agencies. The Commission may accept a license application by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

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