

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Grand River Dam Authority**

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**Project No. 1494-433**

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**ANSWER OF GRAND RIVER DAM AUTHORITY  
TO MOTIONS TO INTERVENE OF CITY OF MIAMI AND  
INTER-TRIBAL COUNCIL, INC. AND MEMBER TRIBES**

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Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”),<sup>1</sup> the Grand River Dam Authority (“GRDA”), licensee of the Pensacola Project, FERC Project No. 1494 (“Project”), hereby answers the motions to intervene filed by the City of Miami, Oklahoma (“Miami”), and the Inter-Tribal Council, Inc. and ITC member tribes (collectively, “ITC”).<sup>2</sup> For the reasons explained below, the objections raised in the motions to intervene to GRDA’s temporary variance regarding license Article 401 lake levels<sup>3</sup> are without merit and not pertinent to this proceeding. Thus, the Commission should move forward expeditiously in approving GRDA’s Application for Non-Capacity Related Amendment of License

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<sup>1</sup> 18 C.F.R. § 385.213 (2016).

<sup>2</sup> Motion of City of Miami, Oklahoma for Leave to Intervene and Protest, Project No. 1494-433 (filed July 22, 2016) (“Miami Motion”); Motion of the Inter-Tribal Council, Inc. and Member Tribes for Leave to Intervene and Protest, Project No. 1494-433 (filed July 22, 2016) (“ITC Motion”). Mr. N. Larry Bork also filed a comment and protest by letter on July 22, 2016 raising many of the same points as the Miami Motion. See Protest of N. Larry Bork, Project No. 1494-433 (filed July 22, 2016) (“Bork Comments”).

<sup>3</sup> Application for Non-Capacity Related Amendment of License, Including Possible Temporary Variance for 2016, Project No. 1494-433 (filed May 6, 2016) (“Application”). GRDA has requested the lake level variance for the remainder of the current license term. However, the Commission’s July 8, 2016 public notice only sought comments on a temporary variance for 2016. Notice Of Application For Amendment Of License And Soliciting Comments, Motions To Intervene, and Protests at 2, Project No. 1494-433 (issued July 8, 2016) (“This notice only seeks comments, motions to intervene, and protests on GRDA’s request for a temporary variance for the period from August 16 through October 31, 2016”).

(“Application”) by August 15, 2016, the date the proposed lake level change would take effect.

## **I. BACKGROUND**

As detailed in its Application, GRDA seeks to change the rule curve requirement under Article 401 for August 15 through October 31, 2016, for purposes of promoting public safety, water quality, and recreational enhancement through a peak public recreation period of the year. This issue has a long history, which is recounted in the Commission’s order approving GRDA’s 2015 temporary variance (“2015 Order”),<sup>4</sup> and which need not be repeated here.

In a nutshell, GRDA is asking for the following changes:

- Maintain the reservoir elevation (as measured immediately upstream of the project dam) at 743 feet from August 16 to September 15, a period when GRDA otherwise would be required to lower it to 741 feet—a gradually increased difference of from zero to two feet over this one-month period;
- Lower the elevation from 743 feet to 742 feet and maintain it at 742 feet from September 16 to October 15, instead of maintaining the elevation at 741 feet—a difference of one foot during this one-month period; and
- Continue to maintain the elevation at 742 feet from October 16 through October 31, a period when GRDA otherwise would be raising it from 741 feet to 742 feet—a gradually diminished difference from one to zero feet during this 15-day period.

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<sup>4</sup> *Grand River Dam Auth.*, 152 FERC ¶ 61,129 (2015).

Beginning November 1, 2016, GRDA would maintain a target elevation of 742 feet, as provided under Article 401. In its 2015 Order, the Commission approved these precise changes for 2015, finding that the proposed rule curve variance would result in minimal incremental changes to upstream and downstream water levels in the Grand/Neosho River basin.<sup>5</sup>

In addition to the temporary lake level changes for 2016, GRDA is requesting approval of a Storm Adaptive Management Plan (“SAMP”) and Drought Adaptive Management Plan (“DAMP”). These plans will allow GRDA, working with federal and state resource agencies and local governments, to adapt as needed to unusual hydrological conditions during the temporary variance period.<sup>6</sup> The SAMP and DAMP are modeled after the storm adaptive management and drought management plans approved by the Commission in its 2015 Order.<sup>7</sup> Based on GRDA’s successful experience in adaptively managing the Project during storm events last year,<sup>8</sup> as well as consultation with agencies and stakeholders in the preparation of the Application, the SAMP and DAMP have enhanced provisions related to protection and mitigation measures, particularly with respect to rising reservoir levels and cultural resources.

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<sup>5</sup> *Id.* at PP 28-33.

<sup>6</sup> Should the Commission approve a permanent amendment to Article 401 as requested in the Application, the SAMP and DAMP would apply throughout the year, and not only during the August 15 through October 31 period.

<sup>7</sup> *Grand River Dam Auth.*, 152 FERC ¶ 61,129 at pp. 61,640-41 (Ordering Paragraphs (B) and (C)).

<sup>8</sup> GRDA’s successful implementation of an adaptive management strategy during the 2015 variance period, as well as during significant rainfall events in December 2015, are detailed in the Environmental Report supporting the Application. *See* Application, App. 4 at 13.

GRDA received a Clean Water Act section 401 certification for the proposed temporary variance, with conditions, from the Oklahoma Department of Environmental Quality on June 30, 2016.<sup>9</sup>

## **II. ARGUMENT**

### **A. The Scope of This Proceeding is Limited to the Impacts of the Temporary Variance.**

Miami in its intervention seeks to derail GRDA's temporary variance request by raising a number of issues that are outside the scope of this limited proceeding. First, Miami claims that modeling studies by Tetra Tech have proven that floods in the vicinity of Miami have increased in elevation and duration due to the existence and operations of the Project.<sup>10</sup> Miami asks the Commission to set aside its conclusions from the 2015 Order, accept Tetra Tech's analysis, and deny the variance.<sup>11</sup> Miami argues that approving the variance would result in incremental upstream flooding which it asserts will only exacerbate the existing flooding caused by the Project.<sup>12</sup> At the same time, Miami requests that the Commission defer any action pertaining to lake levels until the impending relicensing proceeding, during which the Commission can direct GRDA to undertake comprehensive flood routing studies, and can ultimately determine how the Project should best be operated.<sup>13</sup>

GRDA agrees with Miami that the question of whether the Project's current operations contribute to upstream flooding is more appropriately reserved for relicensing.

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<sup>9</sup> Letter from Daniel S. Sullivan, GRDA, to Kimberly D. Bose, Att. A, Project No. 1494-433 (filed July 7, 2016).

<sup>10</sup> Miami Motion at 5-8; *see also* Bork Comments at 2.

<sup>11</sup> Miami Motion at 8-11; *see also* Bork Comments at 4.

<sup>12</sup> Miami Motion at 17; *see also* Bork Comments at 2.

<sup>13</sup> Miami Motion at 4.

GRDA certainly disagrees that the Tetra Tech studies are in any way conclusive on this issue, as detailed in the June 2016 Mead and Hunt report.<sup>14</sup> Moreover, the historical record and even the Tetra Tech studies themselves demonstrate that significant flooding occurred at the confluence of the Grand and Neosho Rivers long before the Project was ever constructed, and that factors completely beyond GRDA's control have contributed to flooding upstream of Grand Lake.<sup>15</sup>

More fundamentally, the sole issue before the Commission in this proceeding is *whether the effects of GRDA's proposed temporary variance are significant*. On this pivotal point, the Commission's 2015 analysis and all parties are in agreement—there are no significant adverse effects. The Dennis model, FERC's model, and Tetra Tech's model all conclude that granting the variance would produce, at most, an incremental increase of less than 0.2 feet elevation in the vicinity of Miami. In responding to the Commission's additional information request on this point, GRDA has demonstrated—using Miami's own Tetra Tech model—that there is no increased threat to human life or property as a result of implementing the proposed rule curve change.<sup>16</sup> The claims of an increased threat to life and property by both Miami and ITC<sup>17</sup> ignore the fact that for significant periods of each year, the Project *already* is authorized under the existing rule

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<sup>14</sup> Response to Additional Information Request Nos. 1 & 2, App. A – Review of Tetra Tech's Hydraulic Modeling for the Pensacola Project, Project No. 1494-433 (filed June 30, 2016) (“June 30 Response”).

<sup>15</sup> Application, App. 4 – Environmental Report at 11-12; *id.*, App. 6, Dennis Report §§ 4.3.3, 4.4.3 (finding that several bridges in the vicinity of Miami constrict streamflow); Miami Motion, Attachment C – Hydraulic Analysis of the Effects of Pensacola Dam on Neosho River Flooding in the Vicinity of Miami, Oklahoma (pointing to factors such as increased growth of trees and other vegetation in the riparian as likely preventing lateral flows of water beyond the channel in areas downstream of Miami); Application by Grand River Dam Authority for Temporary Variance under Article 401, Att. B – Floodplain Analysis of the Neosho River Associated with Proposed Rule Curve Modifications for Grand Lake O' the Cherokees, Project No. 1494-031 (filed May 29, 2015) (“2015 Application”).

<sup>16</sup> June 30 Response, App. B – Upstream Inundation and Hazard Analysis – Summary Report at 1.

<sup>17</sup> Miami Motion at 13; ITC Motion at 4; Bork Comments at 3.

curve to operate at 744 feet—an elevation that is a foot higher than anything GRDA is requesting in the Application.

Further, Miami and ITC have failed to demonstrate that the proposed measures proposed by GRDA—the SAMP and DAMP—would not protect against or mitigate unexpected hydrological conditions. Quite to the contrary, the record demonstrates that these plans are an effective means for GRDA, the U.S. Army Corps of Engineers, Miami, and other interested parties to work together to develop strategies for preparing for potential storms in the Grand/Neosho basin, as well as identifying and implementing strategies for protecting against or reducing the effects of such storms in areas upstream of Grand Lake.<sup>18</sup> Upon approval of the variance by the Commission, GRDA would implement the SAMP and DAMP during the approved variance period.

Second, Miami asserts that the Tetra Tech studies show Project-related flooding of over 12,900 acres which are not subject to easements, and that “[t]he Commission has no right to grant a license allowing any increase in unauthorized flooding.”<sup>19</sup> The Commission’s 2015 Order aptly rejected this argument as misplaced. The question of damages for unauthorized property encroachment is a matter of state law and not within the Commission’s jurisdiction.<sup>20</sup> Indeed, state court actions are currently pending, in which Miami and certain property owners are pursuing these claims.<sup>21</sup> In any case, the incremental encroachment claimed by Miami, even if true, is less than one percent.<sup>22</sup>

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<sup>18</sup> Application, App. 4 at 13.

<sup>19</sup> Miami Motion at 4-5.

<sup>20</sup> *Grand River Dam Auth.*, 152 FERC ¶ 61,129 at P 77 & nn. 52-53 (2015).

<sup>21</sup> *Asbell, et al. v. GRDA*, Case CJ-01-381; *City of Miami, et al. v. GRDA*, Case CJ-08-619.

<sup>22</sup> Miami Motion at 4 (increase of 102 acres over 12,900 acres equals approximately .0079).

**B. Federal Power Act Provisions Relating to Tribal Lands Are Not Triggered by the Proposed Temporary Variance.**

Based on a completely unsupported allegation that “[t]he Project has been flooding tribally owned and federal trust lands for decades,”<sup>23</sup> the ITC argues that the Commission has a duty to investigate the Project’s unauthorized use and occupancy of tribal trust lands before it can act on the temporary variance.<sup>24</sup> If the Commission finds such unauthorized use and occupancy, the ITC alleges a license amendment would be required, triggering various Federal Power Act (“FPA”) provisions related to tribal interests.<sup>25</sup>

First, GRDA unequivocally attests that it is unaware of any Project-induced flooding of tribally owned or tribal trust lands. GRDA does not question that some tribally owned and tribal trust lands are subject to flooding, just as other areas in the vicinity of Miami are subject to flooding, but that does not mean Project operations are causing the flooding.

Second, as with private property, the proper forum for any trespass or damage claim would not be the Commission but the courts.<sup>26</sup>

Third, the ITC provides no legal basis for its assertion that the Commission has a free-ranging duty to investigate the Project’s use and occupancy of tribal trust lands in the absence of any evidence of such occupancy. Again, the ITC provides absolutely no

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<sup>23</sup> ITC Motion at 3.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 5-8.

<sup>26</sup> See *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994) (“*Box Canyon*”) (cited in ITC Motion at 5 n.13); see also *Grand River Dam Auth.*, 152 FERC ¶ 61,129 at P 77 & nn. 52-53 (2015).

evidence that the Project occupies tribal trust lands through flooding induced by Project operations.<sup>27</sup>

Fourth, this proceeding concerns a non-capacity related, temporary variance to licensed lake levels. Even if it were a permanent amendment, it would not be the type of license amendment that triggers FPA sections 4(e), 10(a), or 10(e).<sup>28</sup>

In sum, the ITC's claims regarding the Project's unauthorized use and occupancy of tribally owned and tribal trust lands are an attempt to sidetrack the Commission from the issue at hand, and should be rejected.

**C. GRDA Has Complied with Section 106 of the National Historic Preservation Act.**

The ITC alleges that GRDA has failed to consult as required by section 106 of the National Historic Preservation Act ("NHPA").<sup>29</sup> The ITC acknowledges that it and its members have been involved in the license amendment proceeding, including an opportunity to comment on a draft application,<sup>30</sup> and its members participated in a day-long government-to-government meeting with the Commission on August 3, 2016.<sup>31</sup> Regardless, ITC claims without explanation that none of these satisfy the statute or implementing regulations.<sup>32</sup> The ITC further complains the GRDA has not prepared a

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<sup>27</sup> This distinguishes the present case from *Box Canyon*. There, the federal courts had found that the utility's construction and operation of the project resulted in trespass on Indian reservation land. Subsequent FERC proceedings to amend the license and revise the project boundary were based on the federal courts' prior rulings. *Pub. Util. Dist. No. 1 of Pend Oreille Cty., Wash.*, 77 FERC ¶ 61,146 (1996).

<sup>28</sup> See *Chugach Elec. Ass'n, Inc.*, 89 FERC ¶ 61,053 at p. 61,165 n.23 (1999), *reh'g denied*, 90 FERC ¶ 61,144 (2000); *Sacramento Mun. Util. Dist.*, 92 FERC ¶ 62,187 (2000).

<sup>29</sup> ITC Motion at 9.

<sup>30</sup> *Id.*

<sup>31</sup> Notice of Tribal Consultation Meeting, Project No. 1494-433 (issued July 8, 2016).

<sup>32</sup> ITC Motion at 9.



Historic Properties Management Plan (“HPMP”), as recommended by the State Historic Preservation Officer (“SHPO”).<sup>33</sup>

The ITC is incorrect that FERC has not consulted with its member tribes on the issues presented in this limited variance request. Member tribes have had ample opportunities over many years to directly raise concerns with the Commission over cultural resources. In 2015, for example, ITC’s members were provided an opportunity to review and comment on a draft variance request and to otherwise participate in the Commission’s formal approval process, including the opportunity to raise any questions or concerns related to historic properties.<sup>34</sup> Several tribes did so.<sup>35</sup> Prior to 2015, moreover, ITC members had opportunities to participate in and formally raise concerns in prior variance requests—and at least one of its member tribes did participate in these prior proceedings.<sup>36</sup>

With regard to the instant variance request, in addition to the government-to-government meeting, ITC member tribes participated in the December 2015 technical conference with GRDA, FERC and other interested parties in Tulsa, Oklahoma, to discuss modeling needs related to the rule curve issue. Moreover, GRDA circulated the draft application to member tribes and received comments only from the Modoc Tribe.<sup>37</sup>

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<sup>33</sup> *Id.* at 9-10.

<sup>34</sup> See 2015 Application, Att. E (listing all entities that received a copy of the draft application for comment, including all ITC member tribes); Request for Expedited Approval of Temporary Variance from Article 401 (Rule Curve), App. E at 4-5, Project No. 1494-432 (filed July 30, 2015).

<sup>35</sup> 2015 Application at 6-7 (summarizing comments from the Caddo Nation and the United Keetoowah Band of Cherokee Indians); Letter from Chief Bill G. Follis, Modoc Tribe of Oklahoma, to Daniel S. Sullivan, GRDA, Project No. 1494-000 (filed June 17, 2015); Letter from Chairman John L. Berrey, Quapaw Tribe of Oklahoma, to Chairman Norman Bay, FERC, Project No. 1494-000 (filed July 21, 2015).

<sup>36</sup> See Letter from Daniel S. Sullivan, GRDA, to Kimberly D. Bose, FERC, Att. J, Project No. 1494-408 (filed July 24, 2012) (comment received from the Wyandotte Nation); Request for Variance of Article 401 (Rule Curve), Project No. 1494-416 (Mar. 20, 2013) (same).

<sup>37</sup> See Application, App. 17 – Comment Response Matrix and Record of Consultation at 1-2.

Thus, there can be no serious dispute that ITC and its members have had multiple opportunities over the years to raise concerns related to cultural resources. Yet, this is the first time the ITC or any of its members has asserted that cultural resources would be affected by the variance. Other than general claims, the ITC Motion fails to identify any historic property that has been or would be affected by the variance.

In addition, GRDA consulted with the SHPO, received the SHPO's comments on the draft application, and worked closely with the SHPO in developing the substantial measures in SAMP and DAMP to ensure that effects to cultural resources will be addressed.<sup>38</sup> These measures:

- Require GRDA to include SHPO and the Oklahoma Archaeological Survey in the notices and invitations to participate in the teleconferences required under both plans;
- Require GRDA to consult with the SHPO to develop a site-specific plan to address adverse effects to any historic property due to any measures taken under the SAMP or DAMP to address high water or drought conditions at the Project, such as measures to protect the site against rising water levels, restrict public access to sensitive areas, install fences or warning signs, and increase the presence of law enforcement in sensitive areas and at public access points; and
- Establish detailed protocols for the unanticipated discovery of human remains or burial sites during periods in which the SAMP or DAMP is triggered.<sup>39</sup>

In light of the detailed requirements of the SAMP and DAMP, there is no requirement for GRDA to have developed an HPMP for purposes of this temporary variance – and the

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<sup>38</sup> See *id.*

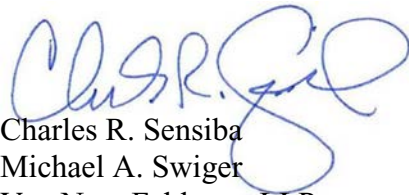
SAMP and DAMP's provisions for protection of cultural resources serve the same purpose as an HPMP would, in any case. In the event consultation is needed as provided in the DAMP or SAMP, the HPMP currently in place for GRDA's Markham Ferry Project will provide a framework for SHPO and GRDA to address any effects to historic properties.

Again, the federal "undertaking" at hand is only a temporary variance to lake levels, with levels remaining within normal operating parameters. The record is clear that the variance will have minimal, if any, effects. Precautions are in place to ensure that any unanticipated effects on cultural resources from flood or drought conditions will be mitigated. No further consultation under section 106 is required.

### III. CONCLUSION

WHEREFORE, for the foregoing reasons, GRDA respectfully requests that the Commission expeditiously approve GRDA's temporary variance request for 2016, no later than August 15, 2016.

Respectfully submitted,



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<sup>39</sup> See *id.*, Apps. 2, 3.

**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 8th day of August, 2016.

/s/ Mealear Tauch  
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