



American Rivers

VIA FEDERAL EXPRESS

February 4, 1993

ORIGINAL

OFFICE OF THE SECRETARY
93 FEB -5 AM 10:15
REGULATORY COMMISSION

Honorable Lois Cashell, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street NE
Washington, D.C. 20426

Re: Project No. 2643-001 (Bend Hydroelectric Project)
Application for New License in Deschutes County, WA

Dear Ms. Cashell:

Enclosed for filing with the Commission in the above project are the original and 14 copies of AMERICAN RIVERS, THE PACIFIC RIVERS COUNCIL (FORMERLY THE OREGON RIVERS COUNCIL) AND OREGON TROUT'S MOTION FOR ENVIRONMENTAL IMPACT STATEMENT WITH ATTACHED PROPOSED SCOPE OF WORK, AND COMMENTS, RECOMMENDATIONS AND TERMS AND CONDITIONS. Copies of these documents have been served on all parties listed on the attached certificates of service.

Sincerely,

Katherine P. Ransel

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp Electric Operations)
)
Application for New License) Project No. 2643-001
) (Bend Hydroelectric Project)

MOTION OF AMERICAN RIVERS, THE PACIFIC RIVERS COUNCIL
(FORMERLY THE OREGON RIVERS COUNCIL) AND OREGON TROUT
FOR AN ENVIRONMENTAL IMPACT STATEMENT

Pursuant to 18 C.F.R. §385.212, the above named intervenors (Conservation Intervenors) respectfully request that the Commission prepare a draft environmental impact statement which includes at least those areas of investigation identified in the attached proposed scope of work.

We so move the Commission because this license proceeding constitutes a "major federal action significantly affecting the . . . environment." 42 U.S.C. § 4321. The evidence supporting this motion is known to the Commission and/or has been submitted recently to the Commission in this proceeding, and includes at least the following:

• Five (5) government agencies, three of which are the local popularly elected government bodies in the project area, have intervened in these proceedings, taking issue with the completeness of the license application; the lack of mitigative measures proposed in that application for the damage done by the project to the upper Deschutes River fishery and to recreational opportunities in and around Bend, Oregon; and for the safety and health concerns engendered by the Applicant's project works;

• Collectively, the popularly elected local government agency intervenors represent in excess of 74,000 people in the County of Deschutes, Oregon, according to the 1990 Census;

• In addition, five (5) national, regional and local conservation and fishing groups have also intervened in these proceedings, advocating fish passage at and other mitigation for the many decades that this project has operated, and proposes to continue to operate, without any license conditions for fish passage, minimum instream flows, public recreational and aesthetic concerns and mitigation for the adverse effects of the project on the upper Deschutes fishery; these groups represent several thousand members in the Northwest and tens of thousands of members in the nation, who insist that the time has come due for a fair and balanced use of this public resource and that fish passage, minimum instream flows, and a mitigation trust fund dedicated to restoration of the upper Deschutes River must finally be a cost of the Applicant's doing business on the river;

• Despite 80 years of admitted damage to this public resource by operation of this project for private gain, the Applicant, applying for yet another 30 to 50 year license, proposes absolutely no mitigation for the fishery -- not even protective measures, let alone steps to mitigate past damage or enhance the fishery -- in the face of the Applicant's study showing that in 1990, some 40,000 fish passed through the Bend powerhouse, all of the samples of which were found to be "dead or in poor condition;"¹

• In contrast to its destructive effects on the fishery, the project generates only approximately .6 Mwa of electricity; this amounts to .0000295 of the Northwest's firm energy capability and .000015 of the region's peaking capability;² and

• The Applicant has shown no need for even this minuscule amount of power; indeed, it is the only entity other than the Bonneville Power Administration that has a recallable contract for firm power exports out of the Northwest region (57 average megawatts).³

The National Environmental Policy Act (NEPA)⁴ requires that the Commission engage in a full environmental review of the impacts of federal actions, including their cumulative impacts. In order

¹ Letter of April 24, 1992, from Dean L. Shumway, Director, Division of Project Review, to Mr. Stanley A. deSousa, Director, Hydro Resources, PacifiCorp, at Schedule A, p. 1, item 6.

² Northwest Power Planning Council, 1991 Northwest Conservation and Electric Power Plan, Volume II, Part I at 57.

³ Id. at 61.

⁴ 42 U.S.C. § 4332(2)(C).

to fulfill its responsibilities under NEPA, the Commission must analyze the panoply of alternatives to the proposed action, including no action.

Moreover, in Confederated Tribes and Bands of the Yakima Indian Nation v. Federation Energy Regulatory Commission, 746 F.2d 466, 476 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit made it crystal clear that the decision to relicense a dam is to be evaluated by the Commission under NEPA as if it were a new license. "[T]he decision to relicense is to be based on the same inquiry as original licensing, including a consideration of all relevant harms and benefits to public uses related to the project." The Court went on to note that "[t]he Commission must determine whether any changes in operations are required by 'then existing' law"

Much has happened since the Commission first licensed this project in 1965, including the passage of the Pacific Northwest Electric Power Planning and Conservation Act (NWPAA). That Act, which supplements the Commission's duties under the Federal Power Act, directs the Commission to "protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by . . . projects or facilities in a manner that provides equitable treatment for . . . fish and wildlife." ⁵ Equitable treatment, the Court of Appeals for the Ninth Circuit has instructed, means that the Commission has an obligation to place fish and wildlife concerns on an equal footing with power

⁵ 16 U.S.C. § 839(h)(11)(A)(i).

production.⁶

In addition, in 1986, the Congress amended the Federal Power Act and, among other public interest considerations, directed the Commission to give equal consideration to energy conservation in its license decisions. The Commission must thus determine whether the .6 Mwa proposed to be generated at the Bend Project could, if need be, recaptured in a conservation program rather than be generated at the expense of the Deschutes River fishery. The Federal Power Act now instructs that the Commission:

shall consider . . . the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively⁷

Finally, if the Commission determines to issue a new license, it "shall include conditions for . . . protection, mitigation and enhancement" of fish and wildlife affected by the project.⁸ This means, we submit, that the Applicant's proposal to continue to grind up the 40,000 or so fish that pass through its project each year, and to block passage to upstream spawning and rearing grounds necessary to the restoration of the fishery, cannot prevail.

But first, in order to fulfill its mandate under NEPA, the Northwest Power Act, and the Federal Power Act, the Commission must conduct a full review of the site-specific and cumulative impacts

⁶ Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 473 (9th Cir. 1984); National Wildlife Federation v. FERC, 801 F.2d 1505, 1515 (9th Cir. 1986).

⁷ 16 U.S.C. § 803(a)(2)(C).

⁸ 16 U.S.C. § 803(j)(1) (emphasis added).

of relicensing the Bend Project. This review must also address the cumulative impacts of the numerous dams and diversions in the Deschutes River Basin, as well as the continuing impacts of the Bend Project itself and its role in the cumulative impacts to the Deschutes including the decline of its fishery.

This review must also consider the no-action alternative (including denial of power license with removal of project works, or issuance of non-power license) and the related issue of energy alternatives and conservation.⁹

The City of Bend, the Bend Metropolitan Recreation District and the County of Deschutes, in addition to Conservation Intervenor, have called for a thorough examination of alternatives such as the issuance of a nonpower license. This alternative has not been adequately explored by the Applicant, as these intervenors have previously pointed out. It is incumbent on the Commission, according to the Court of Appeals for the Ninth Circuit, however, fully to explore this option (as well as the removal of project works):

The Commission must also determine whether a non-power license should be issued. Non-power licenses may be issued at the motion of an interested party or on the Commission's own motion. Seemingly, the Commission would determine that a non-power license is necessary if it concluded that power production needs were outweighed by recreational or environmental considerations.¹⁰

⁹ National Wildlife Federation v. FERC, *supra* note 6, 801 F.2d at 1507; LaFlamme v. FERC, 842 F.2d 1063, 1072 (9th Cir. 1988).

¹⁰ Confederated Tribes, *supra* note 6, 746 F.2d at 476.

That certainly appears to be the case here; the Applicant, as it would have been against its financial interests, however, has not done a credible job of exploring those issues. The Court has directed the Commission to do so, however:

Both the consideration of what conditions to attach to a new license and the question involved in determining whether a non-power license is necessary necessitate the information prepared in an environmental impact statement.¹¹

For the foregoing reasons, the undersigned Conservation Intervenor respectfully request the Commission to prepare a draft environmental impact statement investigating at least those issues contained in the attached proposed scope of work.

Dated this 4th day of February, 1993.

Respectfully submitted,
for: AMERICAN RIVERS
THE PACIFIC RIVERS COUNCIL
OREGON TROUT



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¹¹ Id.

facilities, including the dam, reservoir, powerhouse, transmission lines, power substation, land ownership, etc.

3. Operation: Describe the past and proposed operation of the project, including water storage, spill, power production, etc.

4. Safety

a. Dam Safety Studies: Summarize the findings of any previous dam safety analyses and current structural integrity of the dam and related facilities.

b. Threat to Life and Property: Discuss the threat to downstream life and property in the event of dam failure during a Probable Maximum Flood, and control of ice-related flooding.

c. Plans for dredging of sediments within Mirror Pond.

5. Proposed Mitigative Measures: Describe the applicant's proposed mitigation and impacts the applicant does not propose to mitigate. Identify those measures with which the applicant, the state and federal resource agencies, and other federal, state and local government agencies are in disagreement.

a. Fish Communities: Describe fact that applicant's only proposal to mitigate damage to fishery is "target" flow of 100 cfs in bypass reach for a total of \$25,000 to the project's impact on the trout fishery and areas of disagreement with the resources agencies (e.g., federal and state agency recommendations for fish passage facilities vs. PP&L's refusal to propose fish passage; provision of a tailrace barrier; fish agencies' determination that at least 200 cfs. required in bypass reach for survival of trout fishery vs. PP&L's proposal to provide a "target" flow of 100 cfs; ramping rates, gravel replacement program, and the like).

b. Terrestrial Ecology: including habitat protection and manipulation, wildlife and plant species. Discuss for instance the agencies' view that continued operation of the project will perpetuate original impacts on wildlife and habitat and mitigation should be required for the original losses; disagreement between PP&L and the agencies re PP&L's protecting the wetland and adjacent upland upstream from the Colorado Avenue bridge, as well as the Deschutes River Trail near the Colorado Avenue bridge, through acquisition or easement; the fact that water rights not owned by PP&L or any of the state, regional or local agencies control the ecological functioning of the Colorado Avenue wetland, and the like.

~~C.~~ Cultural Resources: including tribal historic and religious sites, fishing impacts to Tribes in the area, and the like.

d. Recreation: including recreational fishing opportunities for resident fish, hiking, camping, boating, opportunities to view wildlife and other aesthetic enjoyment.

B. Alternatives

1. No-action Alternative: The no-action alternative is defined as no issuance of a hydropower license. It involves the issuance of a nonpower license or the removal of project works.

2. Nonpower License: Describe the possibilities for the issuance of a nonpower license, to what entity such a license would be issued, or if to PP&L, then what local, regional or state agency could take over its operation, and discuss the effects of doing so (e.g., environmental benefits in terms of fish survival and production improvements; recreational benefits; elimination of other costs of fish passage and protection devices, all relative to regional benefits of amount of electricity produced at facility and the like).

3. Removal of Project Works: Describe the possibilities for the removal of project works, discuss the effects of removing project works (as above), and the entity responsible for bearing the costs of removal of the project works.

4. Alternative Power Sources/Conservation Measures: Because nonpower alternatives may involve providing power from another source to replace the power generated by the project, discuss the potential and impacts for obtaining power from the Bonneville Power Administration or other sources; for alternative energy sources, from conservation and the like (see need for power, above).

5. Design and Operating Alternatives: These alternatives involve the modification of the existing project or operations to mitigate for damages. A full range of alternatives must be evaluated, including at least the following:

- a. Project flow/spill alternatives for fish and recreation;
- b. Project juvenile bypass alternatives;
- c. Project adult passage alternatives;
- d. Habitat rehabilitation/acquisition alternatives.

III. AFFECTED ENVIRONMENT

A. Existing Project

1. Land Features and Use: Describe the major land features and uses in the Deschutes River Basin.

2. Water Quantity and Quality

3. Surface Water: Describe the hydrology and water quality of the Deschutes River basin. Compare and contrast natural flows and water quality versus project flows and water quality. Include a discussion of project water rights and the relation to other water rights and uses in the Deschutes Basin. Describe in detail the ODFW's Deschutes River Mitigation and Enhancement Program, the Deschutes River Conservation Study, the ODFW Fish Protection Facility Program and subbasin planning to improve aquatic conditions and fish production in the Deschutes River and the relationship of these programs to the project and water quality and quantity in the Deschutes River Basin.

4. Ground Water: Describe ground water resources in the upper Deschutes River basin.

5. Fish Communities: Describe the fish communities of the upper Deschutes River basin. Compare pre-project versus current adult run sizes, hatchery and natural, for the species listed below.

- a. bull trout
- b. rainbow trout
- c. brown trout
- d. kokanee salmon
- e. tui chub
- f. stickleback
- g. whitefish
- h. coho salmon

6. Terrestrial Ecology

a. Botanical Resources: Describe the existing plant communities within the project area and those that existed pre-project.

b. Wildlife Resources: Describe the existing habitat and associated wildlife communities within the upper Deschutes River basin, including duck, geese, swans, mink, otter, beaver, osprey and eagle.

7. Threatened and Endangered Species

a. Botanical Resources: Describe threatened and/or endangered plant species, including U.S. Fish and Wildlife Service Category 2 species, occurring in the project area.

b. Wildlife Resources: Discuss the occurrence of threatened and/or endangered species in the Deschutes River Basin (e.g., bald eagle and osprey).

c. Fisheries Resources: Discuss the impact of a listing of bull trout under the Endangered Species Act (a petition for listing in the state of Oregon, among other places in the Northwest, is pending). One, if not the healthiest wild run, of bull trout is found in the Metolius Basin, a tributary of the Deschutes downstream from the Bend project. Recovery of the bull trout may be dependent on supplementation of this wild stock and passage to the upper Deschutes Basin past the Bend project.

8. Socioeconomic Factors

a. Project Ownership and Electric Power Sales: Identify the current ownership of the project, any agreements with regard to future ownership, project power sales arrangements, project power sales price, etc. Detail all project owner firm and non firm power sales out of the Northwest region, including amount of power, timing of power sales, contracting parties, length and other relevant terms (e.g., whether or not recallable).

b. Legislation, Court Orders, and plans affecting Deschutes River Basin Fisheries: Describe any legislation, court orders, regional and subregional plans (in progress and draft, as well as in final) affecting fisheries management of the Deschutes River Basin, including, but not limited to, the Pacific Northwest Electric Power Planning and Conservation Act of 1980, the Electric Consumer Protection Act of 1986, the Pacific Salmon Treaty Act of 1985, the Salmon and Steelhead Conservation Act of 1980, the Deschutes River Mitigation and Enhancement Program, the Deschutes River Study (April, 1986); the ODFW Fish Protection Facility Program, and the Deschutes River Subbasin Plan.

c. Affected Indian Tribes: Describe appropriate socioeconomic conditions of the Paiute Tribe, the Warm Springs Tribe, the Yakima Tribe (e.g., unemployment rate, per capita income, household income compared to averages for Deschutes County, Oregon and Bend, Oregon).

d. Recreational Resources: Describe existing opportunities in the Deschutes River basin generally and in the project area in particular for recreational fishing, camping, hiking, wildlife observations, and the like. Contrast pre-

project opportunities. Including a discussion of the historical, current and future projection of visitor use.

e. Cultural Resources

(1) Regional Prehistory, History, and Ethnography: Describe the regional prehistory, history and ethnography, including Tribal religious practices and beliefs.

(2) Site Inventory and Evaluation: Describe any historic and/or religious structures, sites or candidate sites within the project area, including tribal villages and religious sites inundated by the reservoirs.

9. Alternatives: Describe the existing environmental impacts associated with each of the alternatives listed below.

a. No-action Alternatives (non-power license and removal of project works, including alternative power sources).

b. Design and Operating Alternatives.

IV. ENVIRONMENTAL IMPACTS

A. Proposed Project

1. Land Features and Use: Describe the impacts to existing land features and use from the applicant's proposed project.

2. Water Quantity and Quality: Describe the impacts to existing water quantity and quality from the applicant's proposed projects.

3. Fish Communities

a. Downstream Migration of Fish: Describe the applicant's refusal to provide downstream mitigation and the impacts to the fishery, both historically and in the future.

b. Upstream Migration of Fish: Describe the applicant's refusal to provide upstream mitigation and the impacts to the fishery, both historically and in the future.

c. Instream Flow: Describe applicant's proposed "target" flow for the bypass reach; its biological/technical basis; and its impacts on the fishery;

d. Gravel Replacement Program: Describe the applicant's refusal to adopt a gravel replacement program and the impacts to the fishery;

e. Tailrace Barrier: as above;

f. Ramping Rates: as above.

4. Terrestrial Ecology

a. Botanical Resources: Describe and discuss alternatives for mitigation of impacts to botanical resources. Describe the applicant's proposed mitigation for impacts to botanical resources and the impacts/benefits that would be realized from the mitigation in relation to the alternatives identified.

b. Wildlife Resources: Describe and discuss alternatives for wildlife habitat restoration using the habitat valuation procedures (HEP). Describe on-project as well as off-project alternatives to meet mitigation obligations determined by the HEP analysis.

5. Threatened and Endangered Species: Describe and discuss alternatives for mitigation of impacts to threatened and endangered species. Describe the applicant's proposed mitigation for impacts to threatened and endangered species and the impacts/benefits that would be realized from that mitigation in relation to the alternatives identified.

6. Socioeconomic Factors

a. Economic Benefits of the Proposed Action: Compare and contrast the estimated value of sport and commercial fisheries in the project did not exist to the anticipated value of sport and commercial fisheries after the applicant's mitigation is realized.

b. Economic Costs of the Proposed Action: Estimate the costs of implementing the applicant's proposed mitigation. Include a comparison of the value to the recreational fishing and tourism industries from the proposed project to the value if the project did not exist. Also include a discussion of the applicant's project revenues/economic benefits since construction of the project and its expected revenues/economic benefits over the term of any new license.

7. Recreational Resources: Describe the applicant's proposed mitigation for impacts to recreation and the impacts/benefits that will be realized from that mitigation. Include an evaluation of opportunities in the Deschutes Rivers Basin for recreational fishing, camping, hiking, wildlife observations, and the like. Contrast pre-project opportunities for the same.

8. Cultural Resources: Describe the applicant's proposed mitigation to cultural resources and the impacts/benefits that will be realized from that mitigation.

B. Alternatives

1. No-action Alternative

a. Discuss the full impacts/benefits that would result from the grant of a non-power license.

b. Discuss the full impacts/benefits that would result from removal of the project works.

c. For both, discuss whether there is a need for the acquisition of alternative power and if so, the impacts/benefits (see II(B)(2), above).

2. Operating and Structural (Design) Alternatives

a. Downstream Migration of Fish: Describe and discuss alternatives for passing juvenile fish past each project, including shutdown, spill, conventional screens, and combinations of bypass, shutdown and spill. Include the impacts/benefits of each alternative.

b. Upstream Migration of Fish: Describe and discuss alternatives at each dam for passing adult fish upstream including ladders, trap and haul facilities, and combinations of those methods. Include the impacts/benefits of each alternative.

c. Other Operating/Structural Alternatives: Describe and discuss minimum instream flow alternatives; ramping rate alternatives; tailrace barrier construction. Include the impacts/benefits of each alternative.

d. Habitat Rehabilitation: Describe and discuss alternatives for habitat rehabilitation below the dam, including gravel supplementation, reintroduction of woody debris, off-channel ponds, and the like. Include the impacts/benefits of each.

C. Cumulative Impacts

1. Fishery Resources: Discuss the cumulative impacts to the Deschutes River fishery from the past operation of the project and cumulative impacts that would result from relicensing the project.

2. Terrestrial Resources: Discuss the cumulative impacts to terrestrial resources in the Deschutes River Basin from the past operation of the project and the cumulative impact

that would result from relicensing the proposed project.

3. Socioeconomic Factors

a. Use of Benefit-Cost Analysis in Fishery Mitigation: Discuss the institutional and economic issues involved in determining appropriate mitigation and compensation including the difficulty in placing a monetary value on fishing as a recreation or as a way of life.

b. Discuss the cumulative impacts of lost fishing opportunities from past operation of the project and the cumulative impacts if the project were relicensed.

4. Cultural Resources: Discuss the cumulative impacts to tribal and religious sites from the past operation of the project and the continuing impact to tribal historical and religious sites that would result from relicensing the project.

D. Comparison of Alternatives: Compare and contrast the impacts and benefits of each of the topics below for each alternative: no-action, both non-power license and removal of project works; and design and operating alternatives.

1. Land Features and Use
2. Water Quality and Quantity
3. Fish Communities
4. Terrestrial Ecology
5. Threatened and Endangered Species
6. Socioeconomic Factors
7. Recreational Resources
8. Cultural Resources

E. Relationship to Laws and Policies: Discuss the proposed action and alternatives considered in relation to the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Electric Consumers Protection Act, the Northwest Power Planning and Conservation Act, the Endangered Species Act, the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the American Indian Religious Freedom Act, the National Historic Preservation Act, the Archeological and Historic Preservation Act, and all other applicable federal and state laws and policies, including treaties.

F. Unavoidable Adverse Impacts

1. Proposed Project: Discuss the continuation of adverse impacts or the creation of new adverse impacts that would result from the operating of the projects as proposed by the application.

2. No-action Alternatives

a. Discuss the unavoidable adverse impacts that would result from the grant of a non-power license.

b. Discuss the unavoidable adverse impacts that would result from the removal of project works.

c. If applicable, discuss for each the unavoidable adverse impacts that would result from obtaining alternative power.

3. Design and Operating Alternatives: Discuss the unavoidable adverse impacts that would result from operation of the project with various design and operational alternatives described above.

G. Irreversible and Irrecoverable Commitment of Resources

1. Proposed Project: Identify resources that would be irreversibly or irretrievably lost by licensing of the proposed project.

2. No-action Alternatives: Identify resources that would be irreversibly or irretrievably lost by either granting a non-power license or removing project works.

3. Design and Operating Alternatives: Identify resources that would be irreversibly or irretrievably lost by each of the design and operating alternatives.

V. CONCLUSIONS

A. Significant Environmental Impacts: Summarize the significant environmental impacts identified for each of the alternatives below.

1. Proposed Project
2. No-Action Alternatives
3. Design and Operating Alternatives

B. Recommended Action: Discuss the recommended action and the justification for that decision.

C. Recommended and Ongoing Studies: Discuss recommended and ongoing studies.

D. Recommended Mitigation: Discuss the recommended mitigation and the justification for that mitigation.

E. Unmitigable Impacts: Identify the unmitigable impacts associated with the recommended action and mitigation, and discuss why those impacts are acceptable.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp Electric Operations)
)
) Project No.: 2643-001
) (Bend Hydroelectric Project)
Application for New License)
)
_____)

CERTIFICATE OF SERVICE

I, Katherine P. Ransel, hereby certify, under penalty of perjury, that on February 5, 1993, a copy of the foregoing MOTION OF AMERICAN RIVERS, THE PACIFIC RIVERS COUNCIL (FORMERLY THE OREGON RIVERS COUNCIL) AND OREGON TROUT FOR AN ENVIRONMENTAL IMPACT STATEMENT, AND ATTACHED PROPOSED SCOPE OF WORK was mailed to the following parties and/or counsel for parties in the above captioned matter:

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