

**1 FERC - 75 FERC, 31 FERC ¶63,015, The Montana Power Company, Project No. 5-004, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Project No. 2776-000, Federal Energy Regulatory Commission, (Apr. 16, 1985)**

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**The Montana Power Company, Project No. 5-004, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Project No. 2776-000**

**[65,063]**

**[¶63,015]**

**The Montana Power Company, Project No. 5-004**

**Confederated Salish and Kootenai Tribes of the Flathead Reservation, Project No. 2776-000**

**Certification of Uncontested Offer of Settlement**

**(Issued April 16, 1985)**

**Bruce L. Birchman, Presiding Administrative Law Judge.**

On March 29, 1985, the Montana Power Company (MPC), the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes), the Flathead Mission, and Jocko Valley Irrigation Districts (Districts), the Montana Consumer Counsel, and the Secretary of the Interior of the United States Department of the Interior (Secretary) filed a Joint Offer of Settlement in these consolidated competitive relicensing proceedings. Pursuant to my ruling, expedited initial comments were due by April 12, 1985, 10 business days following the filing of the settlement. The only comment which I have received is that of Commission Staff filed on April 12, 1985, which supports the settlement as one that is fair and reasonable and in the public interest. Staff states that the settlement resolves many complex legal and factual issues, requests that the settlement be certified to the Commission for approval, and urges prompt review of the settlement as each day that the new annual charge is not imposed equates to a loss of \$17,534 to the Tribes.

By order dated July 20, 1983, [24 FERC ¶61,088](#), the Commission directed a hearing to determine whether the plans of one applicant are better adapted to conserve and utilize in the public interest the water resources of the region. A prehearing conference was convened on September 7, 1983, which resulted in the adoption of a trial schedule. My order of April 10, 1984, adopted a stipulation of issues which is set forth in the appendix to this certification. My order dated May 16, 1984, reflected the agreement of the Bonneville Power Administration (BPA) to participate and present testimony and evidence of witnesses for the court as concerns certain stipulated issues.

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Under the trial schedule, I held a public non-evidentiary session at Kalispell, Montana on July 9, 1984, an afternoon public session at Pablo, Montana on the Flathead Reservation and an evening public session at Missoula, Montana on July 10, 1984. Transcripts of the record of these public sessions and the views and comments of more than a thousand citizens of the State of Montana, the state legislature, civic organizations, and businesses and corporations having substantial and sincere concerns in these proceedings comprise the multiple volume record of the public sessions. A site visit to and tour of the project works was conducted by this Presiding Judge on July 9, 1984, during which evidence was taken (Vol. 5, Tr. 480-507). Three days of trial commenced at Helena, Montana, on July 11, 1984, and was followed by three days of trial commencing at Missoula, Montana, on July 16, 1984 (Vols. 6-11, Tr. 939-1383).

In light of the Commission action on July 15, 1984, and subsequent order dated July 25, 1984, [28 FERC ¶61,141](#), which denied, without prejudice, the Tribes' application filed on April 16, 1984, for a wheeling order, and also denied consolidation of that application with these proceedings, the trial on July 18, 1984, was recessed briefly to allow the parties to consider certain suggestions of the undersigned, including settlement of the case. Wheeling of project power by MPC and BPA was central to the Tribes evidentiary case. The Tribes' wheeling application was filed at my direction to reflect this fact. Testimony and evidence concerning the feasibility, propriety, and impact of wheeling or other power marketing by BPA was filed by BPA under the trial schedule. Following the recess, the parties agreed to the convening of a prehearing conference on August 5, 1984, at Washington, D.C. to consider the further course of these proceedings (Vol. 11, Tr. 1271-1288). Trial in Montana resumed and concluded on July 18, 1984.

By my order of August 7, 1984, [28 FERC ¶63,026](#), I denied the Tribes' motion for partial summary disposition on the stipulated issue of whether the Flathead Irrigation Project (which is operated by the United States Department of the Interior) had a continuing right to receive low cost or so-called bargain power or other appropriate compensation under a new license. (Article 26 of the original license makes provision for such a sale.) A prehearing conference was held on August 28, 1984, at which time, *inter alia*, the parties advised me that settlement discussions were held subsequent to trial in Montana, and that at this time resumption of the trial at Washington, D.C. was appropriate.

My *Order to Show Cause Why the Tribes' Application Should Not Be Summarily Denied and Issue Certified to the Commission*, dated August 30, 1984, [28 FERC ¶63,065](#), directed oral argument on September 5, 1984, to address the captioned matter. Oral argument was held on September 6, 1984. Upon conclusion, I agreed to defer a ruling in order to facilitate and encourage settlement of the case, particularly in light of the urging of the Tribes' representative, Ms. Teresa Wall, that the Tribes were very committed to the notion of settlement, and that the Tribal Council was serious in this endeavor and desired the opportunity to engage in settlement discussions (Tr. 1532). I suspended the trial schedule and established settlement procedures. Seven prehearing conferences concerning settlement were held between September 25, 1984, and March 13, 1985 (Vols. 15-21, Tr. 1551-1713), and, as noted, this joint offer of settlement was filed on March 29, 1985.

The jointly filed offer of settlement includes the assent as well as necessary statutory approval of the Secretary of the Interior. The settlement is uncontested.

The principal terms of the settlement are delineated at pages 21-29, and are restated in the draft Order Approving Settlement that comprises Appendix 2 to the joint offer of settlement. The Joint License terms and conditions are set forth in Attachment A to the offer of settlement.

Necessary and appropriate provision is made in Article 44 for an interim minimum outflow of 3,200 cfs pending the completion by October 1, 1989, of ongoing environmental studies for fishery and wildlife mitigation and management plans which are required to be filed by October 1, 1989 and evaluated by FERC under Articles 45, 46, and 47, and for the imposition of fish and wildlife protective conditions by the Secretary of the Interior under Articles 45(b) and 46(b) of the joint license.

Article 50 provides for wheeling by MPC of the project's power for the Tribes during the Tribes ownership and operation of the project works. In a related vein, Item "IV. Denial of Wheeling Request," Appendix 1 to the settlement, reflects the Tribes consent to FERC denial of their pending request for rehearing of the Commission's order of July 25, 1984 [[28 FERC ¶61,141](#)] in Docket No. EL84-12-000.

Article 51 provides for training by MPC of tribal members in the operation and maintenance of the project works commencing in year 25 of the joint license.

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Article 39 provides for payment by MPC to the Tribes of an annual charge of \$9 million as adjusted for inflation, and reflects the agreement of the Secretary of the Interior to this annual charge. Item "II. Dismissal of Appeal concerning Annual Charges During Annual-License Period," Appendix 1 to the settlement, in a related respect, requires the Tribes to seek dismissal, with prejudice, of pending litigation concerning the current annual charge

under interim annual licenses issued to MPC by FERC on and after May 22, 1980, when MPC's original license expired.

Item "III. Rights of Way Across Indian Lands for Project-Related Facilities," Appendix 1 to the settlement, resolves amicably an issue which arose at the prehearing conference on August 28, 1984. This issue required amendment of the adopted stipulation of issue for trial and modification of the then trial schedule to allow for additional testimony and evidence. (See, e.g., Tr. 1410, 1415-36). Similarly, Attachment B of the settlement, contains the Tribes' consent to the grant by the Secretary to MPC of rights-of-way for the use and occupancy of tribal lands in connection with MPC's operation, use, and maintenance of the project works.

Article 38 of the joint license provides for the establishment of an amortization reserve that is required by section 10(d) of the Federal Power Act.

Article 40(c) reserves for adjudication before FERC upon petition by the Tribes, the Secretary, or the Irrigation Districts no later than the 15th anniversary of the joint license, the so-called bargain power issue, viz., "whether, from the time the Project is conveyed by MPC to the Tribes until the expiration of the Joint License, (i) the Tribes must make any part of the output from the Project available to the United States, for and on behalf of FIP [Flathead Irrigation Project] or the Districts, or if so on what terms or conditions, or (ii) the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation." I note that Article 40(a) and (b) makes provision for sale by MPC for and on behalf of the Flathead Irrigation Project or the Districts the sale of so-called bargain power but at a higher rate than under the original license to MPC and the interim annual licenses to MPC.

Paragraph E to the Joint License (Attachment A, p. 11) incorporates the Commission's standard license conditions, with certain exceptions.

The settlement is unique as well as historic. It provides, among other things, for the sharing of a license issued by FERC, with MPC continuing ownership and operation of the project works for the first thirty years, and, upon stipulated and appropriate statutory compensation, for the Tribes to own and operate the project works for the remaining twenty years and subsequent annual terms. Shared ownership and operation reflects the suggestion of the undersigned made early on in these proceedings.

The settlement represents an end to often troubled and bitter relations between MPC and the Tribes upon whose property a substantial portion of the project works lie as concerns the annual charge and readjustment of that annual charge, and more or less ongoing litigation between the Tribes and MPC before the FPC, FERC, and federal courts over the past 30 years. The settlement creates a substantial future role for tribal ownership and operation of an important hydroelectric resource, the training and employment of tribal members in the operation of a vital resource, and the furtherance of tribal independence. It assures needed, adequate, reliable, and low-cost electric service to the citizens of Montana.

I concur in the views of the signatories of the offer of settlement set forth at pps. 29-33 of the settlement, and in the initial comment of FERC Staff that this uncontested settlement is in the public interest. I commend its approval to and by the Commission. I believe that the settlement comports with the Federal Power Act and the National Environmental Policy Act.

I am certifying to the Commission pursuant to Rule 602 of the Commission's Rules of Practice the Joint Offer of Settlement filed on March 29, 1985; a letter dated April 3, 1985, which includes an executed consent to Grant of Right of Way in the form required by Attachment B to the settlement; Staff's initial comment in support of the settlement; the record in this proceeding which consists of Tr. Volumes 1-21, Tr. 1-1713, and Exhibits 1-346, with the exceptions next noted. Exhibit 307 was identified but was not admitted in evidence. Exhibits 148, 149, and 315 were struck by the undersigned. Exhibits 194, 201-203, and 324 were withdrawn by their sponsors. Exhibit 121 is certified under seal in light of my *Order Regarding Confidentiality of Certain Data and Evidence* dated March 23, 1984. Please note that Exhibits 224A, 245-247A, and 249A supercede their primary numbers. In accordance with Item "IX. Reservations," section 9.4, Appendix 1 to the settlement, I have admitted in evidence the following exhibits upon which cross-examination was waived by the parties for the purpose of consideration of this settlement:

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Exhibits 322, 326, 327 (Joint Board representing the Districts), Exhibits 297-306, and 340-343 (BPA); Exhibits 271-296, 344-346 (FERC Staff); and Exhibits 206-219, and 338-339 (Secretary).

I also am certifying three items by Reference, Items A-C by Reference which consist of the applicants' competing applications and a court decision reported at 640 Pac. 2nd 889 (1982). Last, there is certified the following unnumbered volumes of the public sessions: an unnumbered volume styled "Public Correspondence"; an unnumbered volume styled "Public Meeting" at Kalispell, Montana on July 9, 1984, and three unnumbered volumes styled and containing "Petitions and Letters Received at Public Session" at Kalispell, Montana; an unnumbered volume styled "Public Meeting" at Pablo, Montana, on July 10, 1984; an unnumbered volume styled "Petitions and Letters Received at Public Session" at Pablo, Montana; an unnumbered volume styled "Public Meeting" held at Missoula, Montana, on July 10, 1984; and an unnumbered volume styled "Petitions and Letters Received at Public Session" at Missoula, Montana.

As noted at page 28 of the Joint Offer of Settlement, pursuant to Item VIII, Appendix 1 to the settlement, to approve the settlement the Commission must act within approximately four months of the settlement's filing, or by the conclusion of July 1985. Given the circumstance that the settlement is uncontested, there is no need to defer certification pending the expiration of the period for reply comments.

### Appendix

Order Confirming and Revising <sup>1</sup> Adoption of Stipulation of Issues  
(April 10, 1984)

This order confirms my adoption at the prehearing conference held on March 29, 1984, of the following stipulation of issues:



*A. Issues Concerning Which Application Should be Granted.*

1. What economic impact would grant of each proposal have on consumers? ("Merwin" issues)
  - (a) What short-term impact would each have?
  - (b) What long-term impact would each have?
  - (c) Can the Tribes legally sell Kerr output for resale at rates exceeding the cost of production?
2. Which proposal would better serve current or future energy needs?
3. What economic impact would grant of each proposal have on the Tribes?
4. What economic impact would grant of each proposal have on the Flathead Irrigation Project and its water and power users?
5. What economic impact would grant of each proposal have on local taxing jurisdictions?
6. Which proposal would more efficiently use the Kerr Project facilities in terms of:
  - (a) The amount of transmission required?
  - (b) Use with other generation for peaking?
  - (c) Integration with load?
  - (d) Coordination with other parties to the Pacific Northwest Coordination Agreement?
7. (a) What are, or will be, the applicants' respective financial qualifications to carry out their proposals?  
(b) What are, or will be, the applicants' respective technical qualifications to carry out their proposals?
8. (a) What is the economic feasibility of:
  - (i) upgrading of the three units at Kerr;
  - (ii) a fourth unit at Kerr; and

(iii) new units at the Buffalo Rapids sites?

(b) Which proposal, if either, would better promote further hydroelectric development of the Flathead River with respect to (a)(i), (a)(ii), or (a)(iii)?

9. Which proposal, if either, is better suited to carrying out the intent of the Congress with respect to the Irrigation Project?

10. (a) Will the wheeling needed under the Tribes' proposal be available on:

(i) Montana Power Company lines?

(ii) Bonneville Power Administration lines?

(iii) The Pacific Intertie?

(b) Can and should FERC compel (any such) <sup>2</sup> wheeling by MPC <sup>2</sup>, assuming an appropriate application is filed and consolidated with this proceeding?

(c) Is BPA obligated as a matter of law to perform the necessary wheeling for the Tribes?

11. What legal preferences or veto rights apply?

(a)(i) Do the Tribes have a veto power over grant of the new license under the Federal Power Act or the Indian Reorganization Act?

(ii) Does the Secretary have a veto over grant of the new license under the Federal Power Act?

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(b) Does the Secretary or do the Flathead, Mission, and Jocko Valley Irrigation Districts on behalf of Irrigation Project water and power users, have the power under the Act of March 7, 1928, 45 Stat. 200, 212-13 to require satisfactory terms and conditions for the relicensing of the reserved or appropriated water and power rights claimed by or on behalf of the Irrigation Project?

(c)(i) Does the Federal Power Act confer a preference upon MPC, as the incumbent, as a matter of law?

(ii) Should the Commission, in any event, favor incumbents, as a matter of policy, all other things being equal?

(d) Should the Commission as a matter of policy favor Indian tribes with respect to projects on Indian reservations?

(e) On what assumptions regarding relicensing was the original license granted to MPC, and are those assumptions relevant here?

12. For purposes of Section 4(e) of the Federal Power Act, will the grant of a license to MPC interfere with or be inconsistent with the purpose for which the Flathead Reservation was created?

13. Will the Tribes be able to market Kerr Project output?

14. What other factors, if any, are relevant to the determination of which proposal is granted?

*B. Issues Arising if MPC's Application is Granted.*

1. What annual charge should be payable to the Tribes?

(a) What method (*i.e.*, indexing, "net benefits," "profitability," etc.) should be used?

(b) How should that method be applied?

(c) Is the annual charge subject to the Tribes' approval under Section 10(e) of the Federal Power Act?

*C. Issues Arising If Tribes' Application is Granted.*

1. (a) Do severance damages include the costs to the incumbent of replacing the output of the project, or merely the costs of facilities rendered useless?

(b) Given the answer to (a), what is the amount applicable in the present case?

2. What is MPC's "net investment" in Kerr?
3. What amount, if any, is properly contained in MPC's amortization reserve under Section 10(d)?

*D. Issues Arising If Either Application is Granted.*

1. What operating parameters, if any, should the license provide as to lake level regulation?
    - (a) What are the pertinent flood-control needs?
    - (b) What are the pertinent effects on power production?
    - (c) What are the pertinent recreation needs?
    - (d) What are the pertinent considerations as to Kokanee salmon, Canada geese, and other species of fish or wildlife?
    - (e) What are the pertinent irrigation needs?
    - (f) Should any parameters in the license be made only on an interim basis, subject to the outcome of studies now in progress?
  2. What provision for maintaining suitable flows, if any, should the license contain?
    - (a) What are the pertinent impacts on salmon and other fish and wildlife?
    - (b) What are the pertinent effects on power production?
    - (c) What are the pertinent effects on flood control?
    - (d) What are the pertinent irrigation needs?
    - (e) Should any such provision be made on an interim basis, subject to the outcome of studies now in progress?
  3. Are additional facilities for recreation needed?
  4. (a) Whether the Irrigation Project or its water and power users should continue to receive low-cost power in an amount and at rates comparable to Article 26 of the original license (and the current operating agreement between MPC and the Irrigation Project):
    - (i) in accordance with a finding of the Secretary of the Interior pursuant to the Act of March 7, 1928, 45 Stat. 200, 212-13, concerning satisfactory terms and conditions for relicensing of the reserved or appropriated water rights claimed by or on behalf of the Irrigation Project?
    - (ii) in the absence of such a finding (if the Secretary declines to make or for any reason does not make such a finding)?
  - (b) If not, whether and what other appropriate compensation can and should be provided to the Irrigation Project or its water and power users for the continued use of the water power rights claimed by or on behalf of the Irrigation Project?
- [65,068]**
- (c) Whether any party is precluded from asserting or objecting to any matter relating to a claim to continued receipt of low cost power by the Irrigation Project or its water and power users or to other appropriate compensation because of the doctrines of *res judicata* or collateral estoppel in light of the decisions in *Confederated Salish and Kootenai Tribes v. United States*, 181 Ct. Cl. 739 (1967), *Confederated Salish and Kootenai Tribes v. United States*, 417 F.2d 1340 (Ct. Cl. 1969), and *Confederated Salish and Kootenai Tribes v. United States*, 467 F.2d 1315 (Ct. Cl. 1972).
5. What other terms and conditions, if any, satisfactory to the Secretary of the Interior should the license be subject to by reason of Section 4(e) of the Federal Power Act or the Act of March 7, 1928, 45 Stat. 200, 212-13?
  6. What should be the effective date and duration of the new license?

-- Footnotes --

<sup>1</sup> See Issue 10(b).

<sup>2</sup> For clarity, I have restated this issue to reflect the only noted compelled wheeling which may be the subject of an application in the near future. (Tr. 265, 274, 278).