

# **EXHIBIT 3**

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## DEPARTMENT OF THE INTERIOR

Office of the Secretary

Section 4(e) Conditions for the Kerr Hydroelectric Project;

AGENCY: Department of the Interior.

ACTION: Notice of Availability; Request for Comment.

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**SUMMARY:** The Department of the Interior, in compliance with the terms of the Kerr Hydroelectric Project license, The Montana Power Company, 32 FERC 61,070 (1985), announces the availability of its proposed Section 4(e) conditions for public review and comment. Pursuant to the Federal Power Act, 16 U.S.C. 797(e), the proposed conditions provide for the adequate protection and utilization of the Flathead Indian Reservation and the Fish and wildlife Service administered Flathead Waterfowl Production Area.

**DATES:** Written comments regarding the Secretary's proposed Section 4(e) conditions will be accepted until close of business on or before December 22, 1994. All comments received will be considered in the preparation of the Secretary's final Section 4(e) conditions for the Kerr Hydroelectric Project.

**ADDRESSES:** Comments should be sent to Anne Crichton, Department of the Interior, Office of the Solicitor, 1849 C Street, NW., Mail Stop 6456, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT:

Janice Schneider, Department of the Interior, Office of the Solicitor, 1849 C Street, NW., Mail Stop 6456, Washington, DC 20240, 202-208-6967.

SUPPLEMENTARY INFORMATION: The Kerr Hydroelectric Project ("Project") is located on the Flathead Indian Reservation, and in Flathead and Lake Counties, in northwestern Montana. The Kerr Dam and portions of the project works, including approximately one half of the Project's reservoir, are located within the exterior boundary of the Flathead Indian Reservation. The north half of the Project's reservoir is located in Flathead and Lake Counties. At the north shore of Flathead Lake, a portion of the Project is located within the Flathead Waterfowl Production Area, which is owned and administered by the Fish and Wildlife Service as part of the National Wildlife Refuge System.

On July 17, 1985, as the result of a negotiated settlement, the Federal Energy Regulatory Commission ("Commission") issued a new 50-year operating license for the Kerr Project, jointly to the Montana Power Company and the Confederated Salish and Kootenai Tribes as co-licensees. The Montana Power Company, 32 FERC 61,070 (1985). The specific terms of the license provide, inter alia, that

[T]he Secretary [of the Interior] shall be allowed \* \* \* to impose such reasonable license conditions with respect to fish [and wildlife] and related environmental concerns as the Secretary would be empowered under Section 4(e) [of the Federal Power Act] to require \* \* \*. \1\

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\1\Section 4(e) of the Federal Power Act (FPA) authorizes the Commission to issue licenses for hydroelectric projects "upon any part of the public lands and reservations of the United States." FPA Section 4(e), 16 U.S.C. 797(e) (1988 & Supp. 1992). Such licenses "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." *Id.* (emphasis added). The mandatory language of Section 4(e) requires the Commission to accept, without modification, Secretarial conditions reasonably related to the protection and adequate utilization of the reservation and its purposes, and which are supported by substantial evidence. See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777, n. 18, 778 (1983).

Articles 45(b) and 46(c).

The Kerr Project license requires that the Secretary provide for "notice and opportunity for hearing" in the formulation of the Sec. 4(e) conditions for the Kerr Project. *Id.* Consistent with the terms of the Kerr Project license, the Secretary is providing interested parties with notice and an opportunity to comment on the proposed Section 4(e) conditions.

The proposed conditions for the Flathead Indian Reservation provide for the imposition of a base load operational scenario at the Kerr Project. This operational scenario precludes the use of Kerr Dam as a load regulating or peak power generation facility, and requires minimum flows, certain restrictions on flow fluctuations (ramping rates), and a two year ramping rate study. In addition, the proposed conditions provide for non-operational measures designed to protect and provide for adequate utilization of the Flathead Indian Reservation in conjunction with

operational measures. The non-operational measures include the development of a Fish and Wildlife Implementation Strategy, development of an operational rule curve, habitat acquisition, habitat development, fishery supplementation and reintroduction, development of recreational resources, and the identification and protection of cultural resources on the Flathead Indian Reservation. The proposed conditions for the Flathead WPA provide for the imposition of erosion control on the north shore of Flathead Lake and the upper Flathead River, island restoration, and habitat acquisition and development. The costs of all measures will be borne by the project licensees. The proposed conditions are available for review at the Department of the Interior, 1849 C Street, NW., Washington, DC in room 6443.

Copies of the proposed Section 4(e) conditions are being sent to all individuals, agencies and organizations on the Commission's service list for the Kerr Project, and to those who have otherwise requested to be included on the Secretary's Kerr Project Section 4(e) mailing list. The document will be mailed to all interested parties requesting copies. The Secretary's final conditions will be informed by evidence and comments submitted within 30 days of the date of publication of this notice.

Dated: November 16, 1994.

Willie R. Taylor,

Acting Director, Office of Environmental Policy and Compliance.

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