

UNITED STATES OF AMERICA 104 FERC ¶ 62,059
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp

Project No. 2652-007

ORDER ISSUING NEW LICENSE
(July 25, 2003)

INTRODUCTION

1. On August 30, 2000, PacifiCorp filed an application for a new major license pursuant to Sections 4(e) and 15 of the Federal Power Act (FPA),¹ for the continued operation and maintenance of the 4.15-megawatt (MW) Bigfork Project No. 2652. The project is located on the Swan River in Flathead County, Montana.² The project does not occupy any federal lands.

BACKGROUND

2. The original license for the existing Bigfork Project was issued on September 24, 1976, with an expiration date of August 31, 2002.³ Project operations have continued pursuant to an annual license, pending disposition of PacifiCorp's application for a new license.⁴

3. On February 2, 2001, the Commission issued public notice that the application was accepted for filing and solicited interventions, protests, and additional study requests. American Whitewater Affiliation (American Whitewater); U.S. Department of the Interior (Interior); Bigfork Whitewater Festival; Flathead Whitewater Association;

¹16 U.S.C. §§ 797(e) and 808.

²The Swan River is a navigable waterway of the United States. See PacifiCorp, 79 FERC ¶ 61,130 (1997).

³See Pacific Power and Light Company, 56 FPC 1804. When Pacific Power and Light Company merged with Utah Power and Light Company to form PacifiCorp, the project license was transferred to the new entity. 45 FERC ¶ 62,146 (1988). The Commission subsequently granted a one-year extension to the term of the license to August 31, 2002. See 79 FERC ¶ 61,130 (1997) and Errata Notice 89 FERC ¶ 61,020 (1999).

⁴See Section 15(a)(1) of the FPA, 16 U.S.C. § 808(a)(1).

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Flathead Lakers; Montana Fish, Wildlife and Parks (MFWP); and the Swan River Corridor Committee filed motions to intervene, and raised questions, among other issues, about fish screens, noxious weeds, threatened and endangered species, recreation enhancements, and water quality.

4. Commission staff conducted environmental scoping meetings on March 21 and 22, 2001. After PacifiCorp submitted additional information, the Commission issued a public notice on August 17, 2001, indicating the application was ready for environmental analysis and soliciting comments, recommendations, terms and conditions, and prescriptions. Responses were received from the Swan River Corridor Committee, American Whitewater and Flathead Whitewater Association (jointly), MFWP, Interior, Gary Barker, and Bigfork Whitewater Festival.

5. On April 12, 2002, Commission staff issued a draft environmental assessment (EA) that evaluated the potential impacts of relicensing the Bigfork Project, and recommended issuing a new license. On July 22, 2002, Commission staff issued a final EA that took into account comments received on the draft EA. I have fully considered all comments from interested agencies and individuals in determining whether, and under what conditions, to issue a new license.

PROJECT DESCRIPTION

6. The project has the following existing facilities: (1) a 12-foot-high, 300-foot-long concrete diversion dam with a 235-foot-long spillway; (2) an impoundment with 73 surface acres; (3) a water intake structure and 1-mile-long flow line which includes a 1,500-foot-long concrete flume, a 1,800-foot-long canal with asphalt lining, a 1,800-foot-long pipeline (10-foot-diameter), and a 1,860-foot-long concrete flume and canal that parallels the pipeline; (4) a forebay structure that directs water into three steel penstocks; (5) a brick powerhouse with three turbine/generator units with a total installed capacity of 4.15 MW; (6) a decommissioned fish ladder on the right abutment (north end of the dam); (7) a 400-foot-long overhead transmission line from the powerhouse to the switchyard; (8) switch gear and step-up transformers in the switchyard; and (9) appurtenant facilities.

7. The Bigfork Project operates run-of-river diverting water from the Swan River, creating a 1-mile-long bypassed reach.

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WATER QUALITY CERTIFICATION

8. Under Section 401(a)(1) of the Clean Water Act (CWA),⁵ the Commission may not issue a license for a hydroelectric project unless the state water quality certifying agency has either issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that state certification shall become a condition of any federal license or permit that is issued.⁶ Only a reviewing court may revise or delete these conditions.⁷

9. PacifiCorp requested water quality certification from the Montana Department of Environmental Quality (MDEQ) on August 15, 2000. The MDEQ issued water quality certification on September 5, 2000, consisting of two conditions which are set forth in Appendix A of this order, and incorporated in the license by ordering paragraph (D).

SECTION 18 FISHWAY PRESCRIPTION

10. Section 18 of the FPA, 16 U.S.C. § 811, provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

11. Interior filed a preliminary fishway prescription for the project pursuant to Section 18 of the FPA on October 16, 2001, and invited public comments therein. Pursuant to authority reserved in the preliminary prescription, U.S. Fish and Wildlife Service (FWS) modified one of the conditions in the preliminary prescription in a filing on June 6, 2002. The prescription is set forth in Appendix B of this order, and is incorporated in the license by ordering paragraph (E). To ensure the Commission's ability, under the FPA,

⁵33 U.S.C. § 1341(a)(1).

⁶33 U.S.C. § 1341(d).

⁷The Commission is required to accept all conditions in a water quality certification as conditions of a license, even if it believes that the conditions may be outside the scope of CWA Section 401. American Rivers, et al. v. FERC, 129 F.3d 99 (D.C. Cir. 1997). Nothing in the conditions of the water quality certification shall be viewed as restricting the Commission's ability or the licensee's obligation, under the FPA, to take timely action necessary to protect human life or the environment.

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to monitor compliance with the fishway prescription and to ensure the protection of human life and the environment, Article 405 requires PacifiCorp to construct the fish screens in accordance with Interior's criteria and to file revised Exhibit F drawings, for Commission approval, showing these facilities as built. In addition, Article 406 requires PacifiCorp to file an operation, maintenance, and screen effectiveness monitoring plan to ensure that the fish screens remain operational at all times.

THREATENED AND ENDANGERED SPECIES

12. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA)⁸ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat. The following federally listed threatened or endangered species could occur in the project area: gray wolf, bull trout, Spalding's campion, water howellia, Canada lynx, bald eagle, and grizzly bear.

13. Commission staff prepared a biological assessment (BA) for threatened and endangered species which was contained in staff's draft EA. In the BA, staff concluded that the proposed project, with additional staff-recommended measures: (1) would not affect Spalding's campion and water howellia; (2) is not likely to adversely affect Canada lynx, gray wolf, bald eagle, and grizzly bear; and (3) is likely to adversely affect bull trout. By letter dated April 12, 2002, to the FWS, staff requested concurrence with the above conclusions, requested formal consultation, and asked for FWS's biological opinion (BO).

14. By letter dated May 21, 2002,⁹ FWS concurred with Commission staff's findings but said it needed additional information before it could begin formal consultation for bull trout. Staff provided additional information in a June 19, 2002, teleconference call and in a follow-up letter dated July 2, 2002.¹⁰

⁸16 U.S.C. § 1536(a)(2).

⁹This letter was not filed until July 1, 2002, because the letter referenced an inactive project number.

¹⁰The teleconference was held to discuss recommendations made under Section 10(j) of the FPA and the status of formal consultation under the ESA. Commission staff issued notice on May 17, 2002, and a meeting summary on June 28, 2002.

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15. FWS filed a BO on June 2, 2003. In its BO, FWS states that relicensing the project is not likely to jeopardize the continued existence of bull trout (the Columbia River Distinct Population Segment) within the action area. Further, FWS states that no critical habitat has been designated in this area; therefore, none would be affected.

16. FWS included in its BO an incidental take statement with three reasonable and prudent measures and nine terms and conditions to minimize incidental take. Six of FWS's terms and conditions mirror Commission staff's recommended conditions in its final EA: (1) develop a flow monitoring plan (Article 403); (2) develop a Recreation Resource Management Plan (RRMP) (Article 411); (3) develop a plan to stabilize eroding drain channels (Article 409); (4) install fish screens (Article 405); (5) develop an operation, maintenance, and screen effectiveness monitoring plan (Article 406); and (6) keep the existing fish ladder closed until further order from the Commission (Article 407). The remaining three conditions in the incidental take statement address other issues for which we have added the following requirements: (7) develop a water quality monitoring plan (Article 404); (8) notify FWS of any observation of dead or injured bull trout or destruction of bull trout redds (Article 408); and (9) coordinate and submit monitoring reports to FWS (all of the above articles, as appropriate).

RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES AND SECTION 10(J) PROCESS

17. Section 10(j)(1) of the FPA¹¹ requires the Commission, when issuing a license, to include license conditions based upon recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,¹² to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by the project. If the Commission believes that any such recommendation may be inconsistent with the purpose and requirements of Part I of the FPA, or other applicable law, Section 10(j)(2) of the FPA¹³ requires the Commission and the agencies to attempt to resolve such inconsistencies, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If the Commission still does not adopt a recommendation, it must explain how the recommendation is inconsistent with Part I of the FPA or other applicable law and how the conditions imposed by the Commission

¹¹16 U.S.C. § 803(j)(1).

¹²16 U.S.C. § 661 et seq.

¹³16 U.S.C. § 803(j)(2).

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adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources.

18. Interior filed Section 10(j) recommendations for the project on October 16, 2001.¹⁴ This license contains conditions adopting Section 10(j) recommendations requiring PacifiCorp to: (1) maintain a 70-cubic foot per second (cfs) minimum flow in the project's bypassed reach (Article 402); (2) develop a flow monitoring plan (Article 403); (3) develop a plan to stabilize eroding drain channels (Article 409); and (4) install bear-resistant trash receptacles (added to Article 411).

19. Interior also recommended that PacifiCorp develop a water quality monitoring plan to ensure flows in the bypassed reach meet state standards for dissolved oxygen and temperature. By letter dated April 12, 2002, Commission staff made the preliminary finding that this recommendation was inconsistent with the substantial evidence standard of Section 313(b) of the FPA because Interior did not provide evidence that the project is impairing water quality. On June 6, 2002, FWS revised the recommendation and provided additional information in response to staff's preliminary finding. On June 19, 2002, a Section 10(j) meeting was held to resolve the apparent inconsistency; however, the inconsistency was not resolved. Nevertheless, we are requiring a water quality monitoring plan (Article 404) to address terms and conditions in FWS's incidental take statement as noted above. Consequently, any remaining inconsistency is now moot.

OTHER ISSUES

Administrative Conditions

20. The Commission collects annual charges from licensees for administration of the FPA, and to reimburse the United States for the occupancy and use of any federal lands. Article 201 provides for the collection of funds for administration of the FPA.

21. The Commission requires licensees to file sets of approved project drawings on microfilm. Article 202 provides for the filing of these drawings.

22. Some projects directly benefit from headwater improvements constructed by other licensees, the United States, or permittees. Article 203 requires PacifiCorp to reimburse such entities for these benefits if they were not previously assessed and reimbursed.

¹⁴FWS provided an Appendix A with supporting evidence on January 8, 2002.

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23. The Commission requires licensees to set up and maintain an amortization reserve account upon the issuance of a new major license. Article 204 requires such an account.

24. Clearing land for construction and maintenance may result in temporary facilities, brush, refuse, or other material that requires disposal. Article 205 requires PacifiCorp to follow appropriate federal, state, and local statutes and regulations when clearing and disposing of unnecessary materials.

Run-of-River Operation

25. PacifiCorp proposes to continue operating the project run-of-river by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream of the project tailrace, approximate the sum of the inflows to the project reservoir. This method of operation would help protect water quality and fisheries in the Swan River. Article 401 requires the project to be operated run-of-river.

Noxious Weed Control Plan

26. Currently, knapweed is the only noxious weed that is well-established on project lands, but two other invasive species (Canada thistle and common St. John's wort) have also been observed, and the occurrence of 17 other species in Flathead County presents a risk that new infestations may occur. Noxious weeds can degrade native plant communities, outcompete rare species, and reduce the value of wildlife habitat. The MFWP recommends PacifiCorp develop and implement a noxious weed control plan. Without such a plan, knapweed could spread on project lands and possibly to adjacent non-project lands. New invaders would not be detected early and, once established, would be more expensive to eradicate. Article 410 requires a noxious weed control plan.

Recreation Resource Management Plan

27. On November 12, 2002, PacifiCorp filed a Settlement Agreement with various stakeholders which resolves all recreation issues among the signatory parties for relicensing the project. The signatory parties to the Settlement Agreement are: PacifiCorp, National Park Service, MFWP, Bigfork Chamber of Commerce, Bigfork Development Company, American Whitewater, Flathead Whitewater Association, Flathead Lakers, and Bigfork Whitewater Association.¹⁵ Section 3 of the Settlement

¹⁵On November 22, 2002, Commission staff issued a public notice of the
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Agreement requires PacifiCorp to provide: (3.1) an RRMP; (3.2) access to the bypassed reach; (3.3) a minimum flow and other support for the annual Bigfork Whitewater Festival; (3.4) improvements to the Kearney Rapids boat launch; (3.5) improvements to Pacific Park; (3.6) a lease for the Swan River Trail; (3.7) a lease for Sliter Park; (3.8) a boater take out/access area near the powerhouse; (3.9) provisions for others to propose and fund recreation improvements on project lands; (3.10) bathroom facilities along the Swan River Trail; (3.11) a whitewater boating feasibility study for the bypassed reach; (3.12) a right of first refusal to purchase nearby PacifiCorp lands; and (3.13) new trails along the south shore of the bypassed reach. In addition, Section 3.14 of the Settlement Agreement states that the agreement does not prohibit PacifiCorp from granting special use permits for recreation or community programs that do not conflict with the agreement.

28. As discussed in Commission staff's EA, the Settlement Agreement would substantially improve recreation resources at the project compared to existing conditions.¹⁶ Article 411 requires PacifiCorp to file an RRMP, for Commission approval, that incorporates the recreation resource measures contained in Section 3 of the Settlement Agreement, except for those measures in Sections 3.6, 3.7, 3.10, and 3.12, described above. These measures provide enhancements at recreation sites that are outside of the project boundary, or in the case of Section 3.12, that would provide for the sale of lands owned by PacifiCorp which are outside of the project boundary.

29. Under Section 3.9 of the RRMP, PacifiCorp would provide a process allowing others to propose and fund non-project recreation improvements on project lands. It should be noted that all such improvements would need prior Commission approval unless an improvement can be approved by PacifiCorp under its delegated authority contained in Article 414 of this license (the standard land use article).

30. Finally, Article 411 requires the RRMP to include several Commission staff-recommended recreation enhancements, not addressed in the Settlement Agreement including: (1) installing bear-resistant trash receptacles and providing information to prevent human-grizzly bear conflicts at recreation facilities; (2) constructing and

¹⁵(...continued)

Settlement Agreement, requesting comments by December 12, 2002. Staff received one comment from the FWS filed December 9, 2002, asking it to clarify the proposed action and provide some additional information to complete formal consultation under the ESA.

¹⁶The EA evaluated an Agreement in Principle which formed the basis for the final Settlement Agreement.

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maintaining a car-top boat access facility for the impoundment; and (3) monitoring water temperatures as part of the whitewater boating feasibility study.

Project Boundary

31. The current project boundary encloses about 130 acres of land. PacifiCorp's Exhibit G,¹⁷ filed as part of its license application, shows the project boundary enclosing about 118 acres of land (12 fewer acres). The Exhibit G shows lands being removed from the project boundary: (1) in the vicinity of the powerhouse, (2) from Pacific Park to the dam, and (3) from around the reservoir. PacifiCorp does not indicate why it proposes such changes.

32. PacifiCorp's proposal to remove lands from the project boundary, as shown on its Exhibit G filed with the license application, does not reflect its more recent plans, contained in the Settlement Agreement, to develop an RRMP and add new trails and other recreation enhancements that generally increase public access. Some proposed recreation enhancements contained in the Settlement Agreement, such as the access road to Pacific Park, the access road from Pacific Park to the dam, and the access road from highway 209 to the forebay, would not be located, or would only be partially located, within the proposed project boundary. In addition, PacifiCorp's Exhibit G does not include the project's 400-foot-long transmission line and the powerhouse access road in the project boundary.

33. PacifiCorp is being directed to file a revised Exhibit G after it files, and receives Commission approval, of the RRMP required by Article 411. This order retains the existing project boundary by approving and renumbering the Exhibit Ks from the previous license (issued September 24, 1976), until such time as the RRMP and a revised Exhibit G are approved. Article 301 requires PacifiCorp to file an application to amend the license with its revised Exhibit G within 90 days of Commission approval of the RRMP.

Programmatic Agreement

34. On July 29, 2002, Commission staff and the Montana State Historic Preservation Officer, with PacifiCorp's concurrence, entered into a Programmatic Agreement for the treatment of cultural resources at the project. Article 412 requires PacifiCorp to

¹⁷On May 30, 2001, PacifiCorp filed a revised Exhibit G which corrects several deficiencies.

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implement the Programmatic Agreement and to file a final Cultural Resources Management Plan for Commission approval.

Pacific Northwest Electric Power Planning and Conservation Act

35. Under Section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act,¹⁸ the Northwest Power Planning Council (NPPC) developed the Columbia River Basin Fish and Wildlife Program (Program) to protect, mitigate, and enhance the fish and wildlife resources associated with development and operation of hydroelectric projects within the Columbia River Basin. Section 4(h) states that responsible federal and state agencies should provide equitable treatment for fish and wildlife resources and take into account, to the fullest extent practicable, the Program adopted under the Pacific Northwest Electric Power Planning and Conservation Act.

36. The Program directs agencies to consult with federal and state fish and wildlife agencies, appropriate Indian Tribes, and the NPPC during the study, design, construction, and operation of any hydroelectric development in the basin. The Commission's regulations require applicants to initiate prefiling consultation with appropriate federal and state fish and wildlife agencies and the Tribes and provide these groups with post-filing opportunities to review and comment on the license application. This consultation process has been completed.

37. Appendix B of the Program states that authorization for hydroelectric projects should include conditions to mitigate the impacts of the project on fish and wildlife resources. The specific provisions of Appendix B, Section 1, that apply to the Bigfork Project call for: (1) specific plans for flows and fish facilities prior to construction; (2) flows and reservoir levels of sufficient quantity and quality to protect spawning, incubation, rearing and migration; and (3) the collection of data needed to monitor and evaluate the results of fish protection efforts.

38. The conditions in this license for run-of-river operation (Article 401); a 70-cfs minimum flow (Article 402); a flow monitoring plan (Article 403); a water quality monitoring plan (Article 404); fish screens (Article 405); an operation, maintenance, and screen effectiveness monitoring plan (Article 406); and stabilized drain channels (Article 409) are consistent with the applicable provisions of the Program listed above.

¹⁸16 U.S.C § 839(b)(h)(11).

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39. Further, this license contains Article 413 which reserves to the Commission the authority to require future alterations in project structures and operations to take into account, to the fullest extent practicable, the applicable provisions of the Program.

STATE AND FEDERAL COMPREHENSIVE PLANS

40. Section 10(a)(2)(A) of the FPA¹⁹ requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.²⁰ Forty-one comprehensive plans are currently on the Commission's list for the state of Montana that address various resources in the state. Of these, the Commission staff identified and reviewed 11 plans that are relevant to this project.²¹ No inconsistencies were found.

¹⁹16 U.S.C. § 803(a)(2)(A).

²⁰Comprehensive plans are defined for this purpose at 18 CFR 2.19 (2003).

²¹(1) Montana Department of Fish, Wildlife, and Parks. 1983. Montana Statewide Comprehensive Outdoor Recreation Plan. Helena, Montana. December 1983. 113 pp. and appendices; (2) Montana Department of Natural Resources and Conservation. 1989. Montana water plan section: Instream flow protection. Helena, Montana. February 1989. 5 pp.; (3) Montana Department of Natural Resources and Conservation. 1990. Montana water plan: Water storage. Helena, Montana. December 1990. 19 pp.; (4) Montana Department of Natural Resources and Conservation. 1990. Montana water plan: Drought management. Helena, Montana. December 1990. 9 pp.; (5) Montana Department of Natural Resources and Conservation. 1992. Montana water plan: Integrated water quality and quantity management. Helena, Montana. November 1992. 17 pp.; (6) Montana Department of Natural Resources and Conservation. 1989. Montana water plan management section. Federal hydropower licensing and State water rights. Helena, Montana. February 1989. 4 pp.; (7) Montana Department of Health and Environmental Sciences. 1990. State of Montana nonpoint source management plan. Helena, Montana. 131 pp. and appendices; (8) Montana State Department of Health and Environmental Services. 1994. Montana 305 (b) Report. Helena, Montana. June 1994. 56 pp.; (9) Northwest Power Planning Council. 1994. Columbia River Basin fish and wildlife program. Portland, Oregon. December 14, 1994. 409 pp. and appendices (revised in 2000); (10) Northwest Power Planning Council. 1988. Protected areas amendments and response to comments. Document 88-22. Portland, Oregon. September 14, 1988. 21 pp.; and (11) Northwest Power Planning Council. 1986. Northwest conservation and electric power plan. Portland, Oregon. February 1987. Two volumes.

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APPLICANT'S PLANS AND CAPABILITIES

41. In accordance with Sections 10(a)(2)(C) and 15(a) of the FPA,²² Commission staff evaluated PacifiCorp's record as a licensee for these areas: (1) consumption efficiency improvement program; (2) compliance history and ability to comply with the new license; (3) safe management, operation, and maintenance of the project; (4) ability to provide efficient and reliable electric service; (5) need for power; (6) transmission services; (7) cost effectiveness of plans; and (8) actions affecting the public. I accept the staff's findings in each of the following areas:

Conservation Efforts

42. Section 10(a)(2)(C) of the FPA requires the Commission to consider the extent of electricity consumption efficiency improvement programs in the case of license applicants primarily engaged in the generation or sale of electric power, like PacifiCorp. Each year, PacifiCorp completes a comprehensive analysis of future load growth and the need for new resources, including customer efficiency programs, to meet its customer demand. Demand side management actions and goals proposed by the most recent report indicates PacifiCorp promotes demand side load management practices for both residential and commercial/industrial customers and has undertaken several programs to improve efficiency and promote energy conservation at its own plants. These programs show that PacifiCorp is making an effort to conserve electricity and has made a satisfactory good faith effort to comply with Section 10(a)(2)(C) of the FPA.

Compliance History and Ability to Comply with the New License

43. I have reviewed PacifiCorp's compliance with the terms and conditions of the existing license. I find that PacifiCorp's overall record of making timely filings and compliance with its license is satisfactory. Therefore, I believe PacifiCorp can satisfy the conditions of a new license.

Safe Management, Operation, and Maintenance of the Project

44. PacifiCorp owns and operates the Bigfork Project. I have reviewed PacifiCorp's management, operation, and maintenance of the project pursuant to the requirements of the Commission's regulations and the associated Engineering Guidelines, as well as all

²²16 U.S.C. §§ 803(a)(2)(C) and 808(a).

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applicable safety requirements such as warning signs and boat barriers. I conclude that the project is being safely managed, operated, and maintained.

Ability to Provide Efficient and Reliable Electric Service

45. Commission staff reviewed PacifiCorp's plans and its ability to operate and maintain the project in a manner most likely to provide efficient and reliable electric service. PacifiCorp has been operating the project in an efficient manner within the constraints of the existing license. I conclude that it would continue to operate the project to provide efficient and reliable electric service in the future.

Need for Power

46. The Bigfork Project is owned and operated by PacifiCorp, a private company supplying electricity to residential, wholesale, commercial, and industrial users. The 4.15-MW Bigfork Project operates run-of-river and contributes to PacifiCorp's baseload electric generating resources. In its most recent resource planning studies,²³ PacifiCorp shows a need for 540 MW of new summer capacity in 2004 and says it is monitoring developments in the western market region to help it decide how to meet this requirement.

47. PacifiCorp sells project power to Flathead Electric Cooperative, Inc. (FEC). FEC has about 50,000 customer accounts in the Flathead Valley of northwestern Montana and along the Montana-Wyoming border near Cooke City, Montana. FEC purchases most of its power from the Bonneville Power Administration (BPA) and from PacifiCorp. In August 2001, FEC signed 5-year, fixed-price contracts with BPA and PacifiCorp to purchase power. During this period, FEC will pay PacifiCorp an average of \$43.12 per megawatt-hour.

48. In addition to PacifiCorp's need for power, Commission staff looked at the regional need for power. The Bigfork Project is located in the Northwest Power Pool (NWPP) area of the Western Electricity Coordinating Council (WECC) region. The NWPP area includes all or major portions of the states of Washington, Oregon, Idaho, Wyoming, Montana, Nevada, and Utah; a small portion of northern California; and the Canadian provinces of British Columbia, and Alberta. For the period 2000 through 2010, WECC anticipates peak demand and annual energy requirements in the NWPP area to grow at respective annual compound rates of 2.0 and 1.8 percent. Resource

²³Resource and Marketing Planning Program 6th Report, PacifiCorp, 2001.

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capacity margins for the winter-peaking area range between 20.9 and 26.7 percent of firm peak demand over this 10-year period, assuming planned additions totaling 66,849 MW are constructed on schedule. Market conditions will play a large role in how much of this capacity is actually built.

49. Commission staff conclude the region has a need for power over the near term and that the Bigfork Project, which supplies a part of the current regional electricity demand, could continue to help meet part of the regional need for power.

50. If licensed, the power from the Bigfork Project would continue to be useful in meeting PacifiCorp's needs as well as meeting a small part of the local and regional need for power. The project displaces fossil-fueled electric power generation that the regional utilities currently use, and thereby conserves nonrenewable fossil fuels and reduces the emission of noxious by-products caused during the combustion of fossil fuels.

Transmission Services

51. PacifiCorp sells project power to FEC at the switchyard located next to the powerhouse. FEC owns the high voltage (34,500 volts) switches, bus and line which are part of its interconnected primary transmission system. The transformers and low-voltage switchgear are part of the project. FEC uses the project energy to serve local load and provide voltage control and system stability for the area. If PacifiCorp does not receive a new license for the project, it would need to replace project generation with other generation resources and FEC would be required to pay the cost of wheeling from other sources.

Cost-Effectiveness of Plans

52. PacifiCorp has no plans to increase project capacity or change project operations. The project's hydraulic capacity of 600 cfs is exceeded by the discharge of the Swan River about 65 percent of the time. For a run-of-river project with little or no storage, I conclude that the project, as proposed by PacifiCorp, and with the modifications included in this license, represents a cost-effective plan for using the Swan River at this location.

Actions Affecting the Public

53. This license contains environmental protection, mitigation, and enhancement measures requiring the project to be operated run-of-river with a 70-cfs minimum flow to help protect aquatic habitat in the bypassed reach; fish screens on the project's intake to minimize fish entrainment; stabilized drain channels to reduce soil erosion and turbidity

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in the Swan River; a plan for controlling noxious weeds; extensive recreation enhancements; and a Programmatic Agreement to protect historic and archaeological resources.

COMPREHENSIVE DEVELOPMENT

54. Sections 4(e) and 10(a)(1) of the FPA,²⁴ require the Commission, in acting on applications for license, to give equal consideration to all the power and development purposes and to the purposes of energy conservation; the protection, mitigation of damage to, and enhancement of fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment, is best adapted to a comprehensive plan for improving or developing a waterway for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

55. In the EA, Commission staff analyzed the following three alternatives for the Bigfork Project: (1) the project as proposed by PacifiCorp; (2) the project as proposed by PacifiCorp with staff-recommended enhancement measures; and (3) the no-action alternative. Based on the staff's independent review and evaluation of the environmental and economic effects of the alternatives, I select PacifiCorp's proposal with staff-recommended enhancement measures and Interior's Section 18 fishway prescription, as discussed herein, as the preferred alternative.

56. In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission considers a number of public interest factors, including the economic benefit of the project power.

57. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in Mead Corporation, Publishing Paper Division,²⁵ the Commission employs an analysis that uses current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefit and the costs of a project, and reasonable alternatives to the project power.

²⁴16 U.S.C. §§ 797(e) and 803(a)(1).

²⁵72 FERC ¶ 61,027 (1995).

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The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

58. Based on current economic conditions, without future escalation or inflation, the Bigfork Project, if licensed as proposed by PacifiCorp, would produce an average of about 28,350 megawatthours (MWh) of energy, annually, at a cost of about \$885,930 (about \$31 mills/kilowatthour (kWh)) or about \$336,520 (\$12 mills/kWh) less than the current cost of an equivalent amount of energy using alternative power sources.²⁶ If licensed in accordance with the conditions adopted herein, the project would provide the same amount of energy at an annual cost of about \$912,100 (about \$32 mills/kWh) or about \$310,350 (\$11 mills/kWh) less than the current cost of alternative power sources.²⁷ Under the no-action alternative, the project would provide the same amount of energy at an annual cost of \$751,930 (about \$27 mills/kWh) or about \$470,520 (about \$17 mills/kWh) less than the current cost of an equivalent amount of energy using alternative power sources.

59. Based on Commission staff's review and evaluation of the project as proposed by PacifiCorp, and with the additional enhancement measures I am adopting, I conclude that operating the project in the manner required by this license will protect and enhance fish and wildlife resources, water quality, recreational resources, and cultural resources. The electricity generated from the Bigfork Project will be beneficial, because it will continue to reduce the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable energy resources and reducing atmospheric pollution. I therefore find that the Bigfork Project, with the required environmental enhancement measures, is best adapted to a comprehensive plan for the use, conservation, and development of the waterway for beneficial public purposes.

LICENSE TERM

60. Section 15(e) of the FPA²⁸ specifies that any license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years, nor more than 50 years from the date on which the license is issued. Commission policy is to grant 30-year license terms for projects with little or no redevelopment, new

²⁶Commission staff's estimate of energy benefits is based on a fixed rate price of 43.12 mills/kWh established by a 5-year contract between PacifiCorp and FEC.

²⁷As licensed, the project's annual cost is \$4,610 higher than described in the FEA due to FWS's water quality monitoring plan contained in its incidental take statement.

²⁸16 U.S.C. § 808(e).

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construction, or new environmental mitigation and enhancement requirements; 40-year terms for projects with a moderate amount thereof; and 50-year terms for projects with extensive amounts thereof.

61. It is also the Commission's policy to coordinate the expiration dates of licenses in the same river basin to the maximum extent possible, to maximize future consideration of cumulative impacts.²⁹ The Bigfork Project is located on the last mile of the Swan River, just upstream of the Commission's Kerr Project No. 5, which has a license expiration date of September 4, 2035. The Bigfork Project would need a license term of just over 32 years (expiring September 4, 2035), in order to coordinate the expiration dates of these two projects.

62. However, this license requires PacifiCorp to implement many measures to protect fish and enhance recreation at the project including installing fish screens on the project intake, constructing a pedestrian bridge over the power canal, releasing flows for whitewater boating, and improving recreation facilities at Pacific Park and the Kearney Rapids Boat Launch. The total annualized cost of all required enhancements is over \$160,000. By comparison, the annual net benefit of the project is \$310,350. We consider the required expenditures in this license to be significant relative to the project's annual net benefit. Further, PacifiCorp reached a Settlement Agreement with most of the interested parties in which a 50-year license term was recommended. No party objects to such a term. Consequently, in light of the expenditures required in this license, and the Settlement Agreement for the project, this license shall be for a term of 50 years, effective the first day of the month in which this license is issued.

SUMMARY OF FINDINGS

63. The EA contains background information, analysis of impacts, support for related license articles, and the basis for a finding of no significant impact on the environment. The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if operated and maintained in accordance with the requirements of this license.

64. Based upon a review of the agency and public comments filed on the project, and Commission staff's independent analysis pursuant to Sections 4(e), 10(a)(1), and 10(a)(2)

²⁹Policy Statement on Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts, 59 Fed. Reg. 66,714 (Dec. 28, 1994), FERC Stats. and Regs., Reg. Preambles ¶ 31,010 at 31,219.

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of the FPA, I conclude that issuing a license for the Bigfork Project, with the required environmental measures and other special license conditions, will be best adapted to the comprehensive development of the Swan River for beneficial public uses.

The Director orders:

(A) This license is issued to PacifiCorp for a period of 50 years, effective the first day of the month in which this license is issued. This license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interest in those lands, enclosed by the project boundary shown by Exhibit K approved September 24, 1976, with the revised exhibit reference designations shown below:

<u>Old Exhibit</u>	<u>Old FPC Drawing</u>	<u>Description</u>	<u>New Exhibit</u>	<u>New FERC Drawing</u>
<u>No. 2652-</u>			<u>No. 2652-</u>	
K-1	8	Project Boundary	G-1	1001
K-2	9	Project Boundary	G-2	1002
K-3	10	Project Boundary	G-3	1003

(2) Project works consisting of:

(1) a 12-foot-high, 300-foot-long concrete diversion dam with a 235-foot-long spillway; (2) an impoundment with 73 surface acres; (3) a water intake structure and 1-mile-long flow line which includes a 1,500-foot-long concrete flume, a 1,800-foot-long canal with asphalt lining, a 1,800-foot-long pipeline (10-foot-diameter), and a 1,860-foot-long concrete flume and canal that parallels the pipeline; (4) a forebay structure that directs water into three steel penstocks; (5) a brick powerhouse with three turbine/generator units with a total installed capacity of 4.15 MW; (6) a decommissioned fish ladder on the right abutment (north end of the dam); (7) a 400-foot-long overhead transmission line from the powerhouse to the switchyard; (8) switch gear and step-up transformers in the switchyard; and (9) appurtenant facilities.

The project works generally described above are more specifically shown and described by the following exhibits that also form a part of the application for license and that are designed and described as:

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Exhibit A:

Pages A-1 through A-5 of Exhibit A, filed August 30, 2000.

Exhibit F:

Revised and filed by PacifiCorp on May 30, 2001, in response to the Commission's January 31, 2001, request for additional information:

<u>Exhibit F-</u>	<u>FERC Drawing</u>	<u>Showing</u>
<u>No. 2652-</u>		
1	1004	Diversion Dam - Plan, Section and Elevation
2	1005	Forebay and Powerhouse Plan
3	1006	Conduit Sections and Profile
4	1007	Powerhouse Sections

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The exhibits A, F, and G as designated in ordering paragraph (B) above are approved and made part of the license.

(D) This license is subject to the conditions submitted by the Montana Department of Environmental Quality under Section 401 of the Clean Water Act, as those conditions are set forth in Appendix A to this order.

(E) This license is subject to the conditions submitted by the U.S. Department of the Interior on October 16, 2001, as revised by the U.S. Fish and Wildlife Service on June 6, 2002, under Section 18 of the FPA, as those conditions are set forth in Appendix B to this order.

(F) This license is subject to the articles set forth in Form L-3 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States." 54 FPC 1792, 1799 (1975). The license is also subject to the following additional articles:

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Article 201. The licensee shall pay the United States an annual charge, effective as of the first day of the month in which this license is issued for the purpose of reimbursing the United States for the Commission's administrative costs, pursuant to Part I of the Federal Power Act, as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 4,150 kilowatts.

Article 202. Within 45 days from the date of this license, the licensee shall file three original sets of aperture cards of the approved exhibit F and G drawings. The drawings must be reproduced on silver or gelatin 35 mm microfilm. All microfilm must be mounted on type D (3-1/4" x 7-3/8") aperture cards.

Prior to microfilming, the FERC Drawing Number (2652-1001 through 2652-1007) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number must be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (e.g., F-1 and G-1, etc.), Drawing Title, and date of this license must be typed on the upper left corner of each aperture card.

Two sets of the aperture cards shall be filed with the Secretary of the Commission, ATTN: OEP/Division of Hydropower Administration and Compliance. The third set of aperture cards shall be filed with the Commission's Portland Regional Office.

Article 203. If the licensee's project was directly benefitted by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of the term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license.

Article 204. Pursuant to Section 10(d) of the Federal Power Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. The licensee shall set aside in a project amortization reserve account at the end of each fiscal year one-half of the project surplus earnings, if any, in excess of the specified rate of return per annum on the net investment.

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To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the licensee shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The licensee shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The licensee shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on current capital ratios developed from an average of 13 monthly balances of amounts properly included in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus 4 percentage points (400 basis points).

Article 205. The licensee shall clear and keep clear to an adequate width all lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result from maintenance, operation, or alteration of the project works. All clearing of lands and disposal of unnecessary material shall be done with due diligence to the satisfaction of the authorized representative of the Commission and in accordance with appropriate federal, state, and local statutes and regulations.

Article 301. The licensee shall file, for Commission approval, a revised Exhibit G and narrative statement as an application to amend its license within 90 days of Commission approval of the Recreation Resource Management Plan required by Article 411. The revised Exhibit G shall show all project works including recreation enhancements, access roads, the project's transmission line and any other lands necessary for project purposes in the project boundary. The licensee shall also consider the need for a 200 foot buffer zone around the project's reservoir. The narrative statement shall explain any changes to the proposed project boundary and how the proposed project boundary includes all lands necessary for project purposes.

Article 401. The licensee shall operate the project in a run-of-river mode for the protection and enhancement of water quality and aquatic resources in the Swan River. The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows,

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as measured immediately downstream of the project tailrace, approximate the sum of the inflows to the project reservoir.

Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and Montana Fish, Wildlife, and Parks. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each incident, and shall provide the reason for the modified flow.

Article 402. The licensee shall release from the project dam into the Swan River a year-round minimum flow of 70 cubic feet per second, or inflow to the project reservoir, whichever is less, through an existing calibrated weir in the dam's crest for the protection and enhancement of water quality and aquatic resources in the Swan River.

The minimum flow may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and Montana Fish, Wildlife, and Parks. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each incident, and shall provide the reason for the modified flow.

Article 403. Within 6 months from the date of this license, the licensee shall file, for Commission approval, a flow monitoring plan. The plan shall contain measures to monitor reservoir elevations and flows in order to document compliance with the river-of-river mode of operation required by Article 401, the minimum flow required by Article 402, any required whitewater flows, and for any other flow monitoring purposes.

The plan shall include, at a minimum:

(1) specific measures to monitor and record water levels in the project impoundment for the purpose of documenting compliance with the run-of-river mode of operation;

(2) the location of a staff gage in the bypassed reach near the proposed whitewater boating put-in site for the purpose of documenting compliance with the required minimum flow and any whitewater flows;

(3) the method for determining the stage discharge relationship of the staff gage;

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(4) the method for removing debris, ice, or other obstructions from the notch in the dam's crest to ensure compliance with the required minimum flow including the frequency and method for documenting such inspections. The licensee shall also include a description of how its method of removing debris, ice, or other obstructions from the notch protects the wetland immediately downstream of the north side of the dam;

(5) any additional measures necessary for documenting run-of-river operation, minimum flows, and any whitewater flows required by Article 411;

(6) a schedule for installing all flow measuring devices; and

(7) procedures for reporting any non-compliance with run-of-river operation, minimum flows, and any whitewater flows required by Article 411 to the Commission and procedures for providing these same data to Montana Fish, Wildlife, and Parks (MFWP), U.S. Fish and Wildlife Service (FWS) and the Commission when requested.

The licensee shall prepare the plan after consultation with MFWP, FWS, U.S. Geological Survey, and American Whitewater Affiliation. The licensee shall include with the plan documentation of agency and non-governmental entity consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the consulted entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted entities to comment and to make recommendations before filing the plan for Commission approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons based on site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 404. Within 6 months from the date of this license, the licensee shall file, for Commission approval, a water quality monitoring plan. The plan shall contain measures to monitor dissolved oxygen (DO) and temperature in the bypassed reach during July, August, and September for three consecutive years to determine if these water quality parameters meet state standards. The plan shall also contain criteria for determining whether further monitoring is necessary and provisions for filing annual monitoring reports with Montana Fish, Wildlife, and Parks (MFWP), U.S. Fish and Wildlife Service (FWS) and the Commission. In its final monitoring report, the licensee shall summarize all monitoring data to determine whether DO and temperature state

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standards are being met in the bypassed reach. The final monitoring report shall be filed for Commission approval.

The licensee shall prepare the plan after consultation with MFWP and FWS. The licensee shall include with the plan documentation of agency consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the consulted entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted entities to comment and to make recommendations before filing the plan for Commission approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons based on site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

If the results of monitoring indicate that changes in project structures or operations, including alternative flow releases, are necessary to protect fish resources, the Commission may direct the licensee to modify project structures or operations.

Article 405. Within 1 year from the date of this license, the licensee shall screen the canal intake to prevent entrainment or impingement of subadult (less than 3.5 inches) bull trout consistent with the licensee's Conceptual Fish Screen Design filed with the Commission on July 24, 2001, and with criteria prescribed by Interior contained in Appendix B of this order and incorporated by ordering paragraph (E). Within 90 days of completing construction of the fish screens, the licensee shall file a revised Exhibit F, for Commission approval, showing these facilities as built.

Article 406. Within 1 year from the date of this license, the licensee shall file, for Commission approval, an operation, maintenance, and screen effectiveness monitoring plan. The plan shall contain measures to ensure that the fish screens remain operational at all times and meet the design criteria in the licensee's Conceptual Fish Screen Design filed with the Commission on July 24, 2001, and the criteria prescribed by Interior contained in Appendix B of this order and incorporated in ordering paragraph (E).

The plan shall include, at a minimum:

- (1) a description of the screen maintenance procedures including: (a) how the

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screens would be cleaned; (b) any measures needed to minimize fish entrainment including the quick replacement of damaged screen panels and having replacement screen panels on site when individual panels are removed for cleaning, replacement, or other purposes; (c) an estimate of how long it would take to remove and replace a screen panel that needs to be cleaned or replaced because of damage; and (d) procedures for removing debris from the log boom that would be installed upstream of the screens and procedures for disposing of removed debris;

(2) procedures for daily inspection of the screens including recording screen condition, amount and type of debris or ice accumulations, presence or absence of dead fish, and follow-up actions;

(3) procedures for periodically measuring water velocities just upstream of the screens, the equipment that would be used to measure water velocities, and a description of the measuring locations and operating scenarios (i.e., units operating during specific seasons) under which water velocity measurements would be taken;

(4) a description of fish recovery activities that would be performed when the power canal is dewatered, including: (a) how the canal would be dewatered; (b) the expected frequency of canal dewatering and fish recovery efforts providing a schedule if possible; (c) the methods and expected locations of fish collection activities; (d) how the size, species, and condition of fish collected would be documented and reported; (e) how fish collected would be returned to the Swan River or Flathead Lake, if alive, or disposed of, if dead; (f) minimization measures intended to reduce effects to bull trout from changes in bypass flow or dewatering the canal; and (g) provisions to notify Montana Fish, Wildlife, and Parks (MFWP) and U.S. Fish and Wildlife Service (FWS) at least 45 days prior to dewatering the canal if possible;

(5) specific criteria that defines under what circumstances the licensee shall install automatic trash rakes and the expected length of the initial period during which manual cleaning would be evaluated;

(6) a provision to install, operate, and maintain automatic trash rakes, after consultation with MFWP and FWS, within a specified period of time should the criteria identified in item (5) be triggered; and

(7) procedures for documenting the above operation, maintenance, and screen effectiveness monitoring efforts and for filing periodic monitoring reports with the MFWP, FWS, and the Commission.

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The licensee shall prepare the plan after consultation with MFWP and FWS. The licensee shall include with the plan documentation of agency consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 407. The licensee shall keep the existing fish ladder closed until further order from the Commission. The fish ladder shall be maintained to prevent upstream fish movement. The licensee shall consult with Montana Fish, Wildlife, and Parks and U.S. Fish and Wildlife Service and file an application to amend the license, for Commission approval, should the licensee wish to reopen the fish ladder.

Article 408. The licensee shall notify the U.S. Fish and Wildlife Service (Montana Field Office) and the Commission within 24 hours of any observation of dead or injured bull trout, or any observation of the destruction of bull trout redds, providing the date, time, and location of the observation as well as the possible cause of injury, death, or destruction of redds.

Article 409. Within 6 months from the date of this license, the licensee shall file, for Commission approval, a plan to stabilize eroded drain channels formerly used to dewater the power canal. The plan shall contain measures to minimize any sediment from these eroded channels which may enter the bypassed reach during natural runoff events.

The plan shall include, at a minimum:

(1) a map showing the location of all eroded drain channels requiring stabilization;

(2) site specific erosion control measures needed to stabilize eroded drain channels shown in item (1); and

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- (3) a schedule for implementing all specific erosion control measures.

The licensee shall prepare the plan after consultation with Montana Fish, Wildlife, and Parks, U.S. Fish and Wildlife Service, and Montana Department of Environmental Quality. The licensee shall include with the plan documentation of agency consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 410. Within 1 year from the date of this license, the licensee shall file, for Commission approval, a noxious weed control plan. The plan shall contain measures to control upland, wetland, and aquatic noxious weeds, including knapweed, Canada thistle, common St. John's wort, and other nuisance weeds that may occur on project lands and in project waters.

The plan shall include, at a minimum:

- (1) specific goals and objectives;
- (2) measures to promote public education and awareness of the threat of noxious weeds;
- (3) methods for the prevention and early detection of noxious weed infestations including how frequent project lands and waters would be inspected;
- (4) methods for controlling noxious weed infestations along with an evaluation of the costs and benefits of various treatment methods (mechanical, biological, and chemical);
- (5) methods for evaluating the effectiveness of implemented noxious weed control measures;

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(6) a schedule for all actions contained in the plan and for filing noxious weed monitoring reports with the Commission; and

(7) a schedule for periodically reviewing the plan to incorporate new data or changes in weed management practices.

The licensee shall prepare the plan after consultation with Montana Fish, Wildlife, and Parks, U.S. Fish and Wildlife Service, and the Flathead County Weed Control District. The licensee shall include with the plan documentation of agency consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 411. Within 1 year from the date of this license, the licensee shall file, for Commission approval, a Recreation Resource Management Plan (RRMP) which includes measures identified in the licensee's Settlement Agreement filed November 12, 2002 (SA), as outlined below. The RRMP shall contain specific provisions for: (a) access to the bypassed reach (3.2); (b) a minimum flow and other support for the annual Bigfork Whitewater Festival (3.3); (c) improvements to the Kearney Rapids boat launch (3.4); (d) improvements to Pacific Park (3.5); (e) a boater take out/access area near the powerhouse (3.8); (f) provisions for others to propose and fund recreation improvements on project lands (3.9); (g) a whitewater boating feasibility study for the bypassed reach (3.11); and (h) new trails along the south shore of the bypassed reach (3.13). Nothing in the RRMP shall prohibit PacifiCorp from granting special use permits for recreation or community programs that do not conflict with the SA (3.14).

The RRMP shall also contain specific provisions to implement the following additional recreation resource measures:

(1) a car-top boat access facility for the impoundment adjacent to the parking area for the proposed south shore access trail or the reasons why such a facility is not warranted;

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(2) bear-resistant trash receptacles, to be emptied at least twice a week from May through October, at all recreation facilities within the project boundary;

(3) an educational pamphlet developed in consultation with the Montana Fish, Wildlife, and Parks (MFWP) and U.S. Fish and Wildlife Service (FWS) on the importance of using bear-resistant trash receptacles and steps to avoid human-grizzly bear conflicts at all recreation facilities within the project boundary;

(4) detailed designs for each individual recreation facility and a map showing the location of all recreation facilities including: (a) restrooms, (b) picnic tables, (c) parking areas, (d) safety fencing, (e) informational and safety signs, and (f) site-specific erosion control plans where ground disturbance is proposed;

(5) a narrative statement on how the needs of the disabled were considered in the planning and design of each recreation facility; and

(6) a schedule for filing recreation monitoring reports with the Settlement Agreement signatory parties, FWS, and the Commission. The Settlement Agreement signatory parties include: National Park Service, MFWP, Bigfork Chamber of Commerce, Bigfork Development Company, American Whitewater, Flathead Whitewater Association, Flathead Lakers, and Bigfork Whitewater Association.

The RRMP shall also contain the following specific provisions needed to implement a whitewater boating feasibility study:

(7) the minimum and optimal boating flows, optimal whitewater release days (most likely either Wednesday, Saturday, or Sunday), and the methodology for determining the above;

(8) a study (including the methodology) to determine any effects of whitewater flows on: (a) water temperatures in the bypassed reach (coordinated with the water quality monitoring plan required by Article 404); and (b) fish stranding in the bypassed reach;

(9) an evaluation of the physical ability of the project to ramp flows, and the energy and revenue forgone under different flow release regimes; and

(10) a schedule for submitting a report documenting the results of the whitewater boating feasibility study to the Settlement Agreement signatory parties and FWS for

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review and comment and a schedule for filing a final report for Commission approval. The final report shall recommend final whitewater flows and release days.

The licensee shall prepare the RRMP in consultation with the Settlement Agreement signatory parties and FWS. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Settlement Agreement signatory parties and FWS, and specific descriptions of how the comments of the consulted entities are accommodated by the plan. The licensee shall allow a minimum of 30 days for the Settlement Agreement signatory parties and FWS to comment and to make recommendations prior to filing the plan with the Commission for approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 412. The licensee shall implement the "Programmatic Agreement Among the Federal Energy Regulatory Commission and the Montana State Historic Preservation Officer for Managing Historic Properties that may be Affected by a License Issuing to PacifiCorp for the Operation of the Bigfork Hydroelectric Project in Flathead County, Montana - FERC No. P-2652" (Programmatic Agreement), executed July 29, 2002, including but not limited to the draft Cultural Resources Management Plan (CRMP) attached to the Programmatic Agreement. Within one year from the date of this license, the licensee shall file a final CRMP for Commission approval in accordance with the Programmatic Agreement. In the event the Programmatic Agreement is terminated, the licensee shall implement the provisions of its approved CRMP. The Commission reserves the authority to require changes to the CRMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the CRMP, the licensee shall obtain approval from the Commission and the Montana State Historic Preservation Officer before engaging in any ground-disturbing activities or taking any other action that may affect historic properties within the project's area of potential effect.

In addition to those tasks identified in the Programmatic Agreement, the final CRMP shall also contain the following specific provisions requiring the licensee to:

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- (1) reevaluate historic properties and the CRMP every 10 years using a cultural resource professional;
- (2) evaluate the prehistoric fishing camp and two portions of an unidentified trail listed in Table 14 of the Commission's Final Environmental Assessment issued July 22, 2002, for inclusion on the National Register of Historic Places;
- (3) publicize the historic values of the project to the extent possible while safeguarding sensitive location information; and
- (4) ensure increased recreation resulting from the project's Recreation Resource Management Plan (required by Article 411) does not adversely affect historic properties.

Article 413. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal and state fish and wildlife agencies, affected Indian Tribes, and the Northwest Power Planning Council, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Article 414. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee also shall have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and water for which the licensee may grant permission without prior Commission approval are: (1) landscape

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plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed construction; (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site; and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structure within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69 kilovolts or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that

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discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner

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that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee shall not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(G) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(H) This order is final unless a request for rehearing is filed within 30 days of its issuance, as provided in Section 313 of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

J. Mark Robinson
Director
Office of Energy Projects

APPENDIX A

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY WATER QUALITY CERTIFICATE CONDITIONS

- (1) A minimum flow of 70 cubic feet per second (cfs) must be maintained in the Swan River below the Bigfork hydroelectric dam.
- (2) Fish screens must be installed on the intake diversion canal and they must be maintained for the life of the Project.

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR SECTION 18 FISHWAY PRESCRIPTION

1. The licensee shall screen the intake canal in a manner that will meet criteria established by the USFWS to prevent entrainment or impingement of subadult (>3.5 inches) bull trout within 1 year of issuance of license. The required criteria require screening that will have an approach velocity of 0.8 feet-per-second with a woven wire screen mesh opening of $\frac{1}{4}$ inch. In coordination with the USFWS and Montana Department of Fish, Wildlife, and Parks (MDFWP), the licensee also shall develop and implement a screening effectiveness monitoring plan, screen maintenance plan, and standard operating procedure guidelines prior to issuance of license. Those guidelines shall include, but are not limited to, procedures for ensuring that screens remain free of large accumulations of ice and remain fully functional during the operation of the project. Additionally, the licensee in cooperation with the USFWS and MDFWP shall develop criteria to determine under what circumstances the applicant shall install automatic trash rakes. Those criteria will be contained within the screening effectiveness monitoring plan. Should those criteria be triggered, the licensee shall install, operate, and maintain automatic trash rakes that are acceptable to USFWS and MDFWP. Criteria will be established within 1 year after license issuance.
2. The licensee shall keep the existing fish ladder closed unless requested to open it by USFWS and MDFWP.