

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

1995 MAR 29  
1995 MAR 29  
FEDERAL ENERGY REGULATORY COMMISSION

The Montana Power Company ) Project Nos. 5-004  
) and 776-000  
Confederated Salish and )  
Kootenai Tribes of the )  
Flathead Reservation )  
  
The Montana Power Company ) Project No. 5-003  
Confederated Salish and )  
Kootenai Tribes of the )  
Flathead Reservation )  
  
v. ) Docket No. EL84-12-000  
The Montana Power Company )

Joint Offer of Settlement

Pursuant to 18 C.F.R. § 385.602, The Montana Power Company ("MPC"), the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes"), the Flathead, Mission, and Jocko Valley Irrigation Districts (jointly, "the Districts"), the Montana Consumer Counsel ("the Consumer Counsel"), and the Secretary of the Interior ("the Secretary") jointly submit this Joint Offer of Settlement in the proceedings referred to above.

I. Introduction

These proceedings concern the Kerr Project, Project No. 5, an existing three-unit hydroelectric project with a capacity of some 180 megawatts located on the Flathead River, a navigable waterway of the United States in northwestern Montana. The Project consists of: (a) a 200-foot-high,

8504020355

FERC - DOCKETED  
MAY 2 1995

381-foot-long concrete arch dam with 14 spillway openings; (b) a 185-foot-long, 30-foot-high concrete gravity section; (c) three power tunnels, each approximately 800 feet in diameter and three miles in length; (d) a powerhouse containing three generating units rated at 60 megawatts each; (e) three 115-kilovolt transmission lines, each approximately 1,500 feet long; (f) a 126,000-acre natural reservoir, Flathead Lake, (g) water rights in the Flathead River,<sup>1</sup> and (h) other appurtenant facilities.

A portion of the Project occupies lands within the Flathead Indian Reservation; those lands, which include the bed and banks of the south half of Flathead Lake,<sup>2</sup> are held in trust by the United States for the benefit of the Tribes. The Flathead Reservation was formed pursuant to the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975. Because of the treaty, applicable federal laws, and the Tribes' status as an Indian tribe, the Tribes currently exercise certain jurisdiction and governmental functions within the boundaries of the Reservation, such as in the regulation of riparian rights of access and wharfage along the shores of the south half of Flathead Lake,<sup>3</sup> hunting, fishing, and recreation

---

<sup>1</sup> See pp. 7-8, *infra*.

<sup>2</sup> See *Confederated Salish and Kootenai Tribes v. Naman*, 665 F.2d 951 (9th Cir.), cert. denied, 103 S. Ct. 314 (1982).

<sup>3</sup> *Id.*

on the Reservation,<sup>4</sup> and other matters. The State's jurisdiction on the Reservation is, in turn, limited in some respects.<sup>5</sup> The Project also occupies certain other lands of the United States.

An initial 50-year license to construct and operate the Kerr Project was issued by the Federal Power Commission to the Rocky Mountain Power Company (a subsidiary of MPC) on May 23, 1930. The license was transferred to MPC in 1938. The dam and first generating unit began commercial operation in 1939, the second unit in 1949, and the third unit in 1954.<sup>6</sup>

Under Article 30 of the initial license and applicable law, MPC was required to pay a specified annual charge to the Tribes for the use and occupancy of their lands. That charge was subject to readjustment to reasonable levels at specified intervals after the commencement of commercial operations. The most recent readjustment in the annual charge, to \$2.6 million effective May 23, 1975, was

---

<sup>4</sup> See *United States v. Pollman*, 364 F. Supp. 995 (D. Mont. 1973).

<sup>5</sup> See, e.g., *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

<sup>6</sup> In 1976 the Federal Power Commission deleted from the license certain transmission lines running from Kerr to Missoula (Rattlesnake) and Anaconda to the south, and from Kerr to Thompson Falls to the west, on the ground that such lines were no longer "primary lines" under Section 3(11) of the Federal Power Act. The Kerr switchyard was also deleted. *Montana Power Co.*, 56 F.P.C. 3290 (1976).

the result of a settlement approved by the Commission in 1978.<sup>7</sup> Prior changes in the annual charge were the results of lengthy agency and court proceedings stretching almost continuously from 1954 to 1972.<sup>8</sup>

Article 26 of the original license provides that the licensee make available to the Flathead Irrigation Project ("the FIP"), an irrigation project operated and subject to administration by the Bureau of Indian Affairs, Department of the Interior, up to 15,000 horsepower at specified rates and for specified purposes during the term of the license (hereinafter referred to as "Bargain Power"). The basis for Article 26 is a matter of dispute among the parties.<sup>9</sup> The irrigation system of the Flathead Irrigation Project serves lands most of which are held by non-Indians, and some of which are held

---

<sup>7</sup> Montana Power Co., 5 FERC ¶ 61,126 (1978). On April 12, 1983, the Tribes complained to the Commission that MPC's payment of the annual charge for 1982 had been untimely. MPC responded on May 12, 1983, and the complaint is now pending before the Commission.

<sup>8</sup> In proceedings beginning in 1954, the Federal Power Commission approved an annual charge of \$63,500 for the third generating unit. Montana Power Co., 22 F.P.C. 502 (1959), rehearing granted, 25 F.P.C. 221 (1961), aff'd, Montana Power Co. v. FPC, 298 F.2d 335 (D.C. Cir. 1962). In response to a petition filed by the Tribes in 1959, and after hearings held in 1965, the FPC readjusted the annual charge for the entire Project to \$950,000, effective as of May 23, 1959. Montana Power Co., Opinion No. 529, 38 F.P.C. 766 (1967), rehearing denied, 39 F.P.C. 321 (1968), stay granted, 39 F.P.C. 458 (1968) aff'd as to jurisdictional issue, 445 F.2d 739 (D.C. Cir. en banc, 1970), cert. denied, 400 U.S. 1013 (1971), aff'd as to merits (other than interest) 459 F.2d 863 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972).

<sup>9</sup> See pp. 7-8, infra.

by Indians, within the Flathead Reservation. Before the issuance of the original license, the Bureau of Indian Affairs of the Department of the Interior assumed responsibility for the Irrigation Project. Article 26, like Article 30, has given rise to extended litigation between the Tribes and the United States.<sup>10</sup>

Article 23 of the initial license authorized MPC to regulate Flathead Lake between elevations 2883 and 2893. A "Memorandum of Understanding" between MPC and the Army Corps of Engineers, dated May 31, 1962, and amended on October 15, 1965, specifies certain elevations that MPC is to seek to attain at given dates in order to accommodate flood control, recreational, and power-production needs.<sup>11</sup> Within the limitations established by the Memorandum of Understanding, MPC has operated the Project in accordance with the Pacific Northwest Coordination Agreement, an agreement among the Government and the owners of various projects on the Columbia River and its tributaries concerning the coordination of project operations. Pursuant to that agreement, MPC pays to the United States, and receives from the operators of various downstream projects, annual coordination payments in

---

<sup>10</sup> Confederated Salish and Kootenai Tribes v. United States, 181 Ct. Cl. 739 (1967), Confederated Salish and Kootenai Tribes v. United States, 417 F.2d 1340, 189 Ct. Cl. 319 (1969), and Confederated Salish and Kootenai Tribes v. United States, 467 F.2d 1315, 199 Ct. Cl. 599 (1972).

<sup>11</sup> The Federal Power Commission approved the agreement in Montana Power Co., 35 F.P.C. 250 (1966).

satisfaction, among other things, of the obligations created by Section 10(f) of the Federal Power Act.<sup>12</sup>

The initial license for Kerr expired by its terms on May 22, 1980. Pending the issuance of a new, long-term license, the Commission has issued an annual license for the Project to MPC for each license year since then.<sup>13</sup> Beginning in 1980, and in each year thereafter, the Tribes have petitioned for readjustment of the annual charge during each annual license period. MPC has opposed such readjustment, and, by order dated June 30, 1983, in Project No. 5-003, the Commission denied each of the Tribes' requests.<sup>14</sup> Appeal of that denial is now pending in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>15</sup>

12. U.S.C. § 10(f). Payments for readjustment are for large benefits conferred by the Hungry Horse Project, operated by the Bureau of Reclamation, on the South Fork of the Flathead River, upstream of Kerr.

13. See Notice of Issuance of Annual License, 45 Fed. Reg. 27814 (1980).

14. Montana Power Co. v. FERC, 725 F.2d 1011 (9th Cir. 1983), rehearing denied, 735 F.2d 1011 (9th Cir. 1984).

15. Montana Power Co. v. FERC, 725 F.2d 1011 (9th Cir. 1983), cert. denied, 469 U.S. 1089 (1984). The appeal is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit.

On June 1, 1976, MPC applied in Project No. 5-004 for renewal of its license. On July 2, 1976, the Tribes filed a competing application (Project No. 2776-000) for the new license. Those applications were amended and supplemented in response to various deficiency letters from the Commission staff.<sup>16</sup> On November 18, 1980, the Commission issued public notice of the applications, and specified a deadline for the filing of competing applications. No other entity applied within the time allowed; nor did any federal agency recommend recapture of the Project under Section 14 of the Federal Power Act.

Intervention was granted by the order of June 30, 1983, to the Districts, representing most owners of irrigable lands served by the FIP. Citing the Act of March 7, 1928, 45 Stat. 212-213, and the Act of May 25, 1948, 62 Stat. 269, the Districts claimed that the Kerr Project uses reserved or appropriated water rights owned by the United States for the

---

(footnote cont'd)

license for a readjustment of the annual charge during its term. Such petition, however, would be conditioned on the settlement not becoming effective and would be intended to be withdrawn as soon as the settlement became effective. The Company intends to oppose such petition if and to the extent that it is not withdrawn.

<sup>16</sup> MPC amended or supplemented its application on October 19, 1978; April 30, June 5, June 29, and July 23, 1979; March 11, April 24, July 7, and September 3, 1980; April 6, 1981; and April 26, 1982. The Tribes supplemented their application on June 11, 1979; and March 6, April 14, April 21, May 14, June 3, June 16, and September 18, 1980.

irrigators' benefit and that, as compensation for such use, the Irrigation Project is entitled to receive a low-cost block of power from the Kerr Project, or equivalent benefits.

The Secretary of the Interior was also granted intervention. The Secretary has trust responsibility for the resources of the Flathead Indian Reservation and responsibility for participating in the licensing process under the Federal Power Act, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, the Bald and Golden Eagle Act, and the Endangered Species Act. Additionally, the Secretary claimed the authority to require a low-cost block of power for the Irrigation Project pursuant to the Act of March 7, 1928, 45 Stat. 212-213. The Tribes and MPC have disputed any claimed entitlement to low-cost power by or on behalf of the Irrigation Project.

Intervention also was granted to the Montana Consumer Counsel (a state agency created to protect the interests of ratepayers in proceedings before regulatory agencies), and comments on the applications were submitted by the Environmental Protection Agency, the Army Corps of Engineers, the Heritage and Conservation Service of the United States Department of the Interior, the Montana Department of Fish and Game (now the Montana Department of Fish, Wildlife and Parks), and the Fish and Wildlife Service of the Interior Department.

By order dated July 20, 1983, the Commission set the competing applications down for hearing. On October 11,



1983, Presiding Judge Birchman directed the Commission staff to submit an assessment of the need for an environmental impact statement on the proposed relicensing. That assessment, filed on November 1, 1983, concluded that no EIS was necessary, since relicensing would not be a major federal action significantly affecting the quality of the human environment.

Pursuant to the schedule established by Judge Birchman, each applicant filed its initial testimony on January 27, 1984; each of the applicants, the Secretary, the Commission staff, the Districts, and the Consumer Counsel submitted rebuttal testimony on or about April 23, 1984; reply testimony by each applicant, the Districts, and the staff was filed on or about June 26, 1984. At the invitation of the Presiding Judge, Bonneville Power Administration ("BPA") submitted testimony on or about July 1, 1984, and August 27, 1984. Further testimony on behalf of the Secretary was filed on August 27, 1984, and the Tribes submitted rebuttal to BPA's testimony on August 31, 1984.<sup>17</sup> Additional rebuttal testimony remained to be filed.

Pursuant to a ruling by the Presiding Judge as to the scope of the matters designated by the Commission for hearing, the Tribes filed, on April 16, 1984, an application in Docket No. EL84-12-COC seeking an order to compel MPC to

---

<sup>17</sup> Each round of testimony was preceded and followed by extensive data requests.

wheel the output of the Kerr Project for the Tribes if they should receive the Kerr license. MPC protested, and by order dated July 25, 1984, the Commission denied the application.<sup>18</sup> The Tribes' request for rehearing, filed August 24, 1984, is now pending before the Commission.

On July 9, 1984, the Presiding Judge toured the Kerr Project and lower Flathead River with representatives of the applicants, the Secretary, and the staff. Public hearings on the competing applications, having previously been the subject of newspaper notice and other publicity, were held on July 9 and 10 at Kalispell, Pablo, and Missoula, Montana. Formal hearings commenced on July 11. Hearing sessions were held at Helena on July 11-13, and at Missoula on July 16-18. At those hearings the parties' testimony and exhibits as to fish, wildlife, and recreational matters were admitted into the record, and, except as waived, cross-examined. Some of the testimony concerning the respective applications, the annual charge, net investment, the amortization reserve maintained under Section 10(d) of the Act, low-cost Irrigation Project power, and other matters was also cross-examined in the Montana phase of the hearings. Cross-examination of the remainder of the filed testimony was scheduled for September in Washington.

Pursuant to an order of the Presiding Judge, the Commission staff prepared a further environmental assessment

---

<sup>18</sup> Confederated Salish and Kootenai Tribes v. Montana Power Co., 28 FERC ¶ 61,141 (1984).

which concluded that continued operation of the Kerr Project by either applicant would not result in additional impacts, and that appropriate mitigative measures would ensure that the future operations of the Project would not significantly affect the environmental resources of the project area. Notice of the staff's assessment appeared in the Federal Register on August 31, 1984,<sup>19</sup> and comments thereon were submitted by the Tribes and the Secretary.

At a prehearing conference on September 6, 1984, the Presiding Judge deferred further cross-examination to allow the parties to pursue settlement (Tr. 1548-49). Various combinations of the parties and staff met in Montana on September 12-13, 19-20, October 3-4, 23-24, and October 31-November 1, and December 7, 1984. The instant Joint Offer of Settlement is the product of those meetings and other discussions among the parties.

## II. Summary of Evidence and Parties' Positions

As indicated by the stipulation of issues adopted by the Presiding Judge on April 10, 1984, and subsequently modified, there are four categories of issues in the relicensing proceeding: issues concerning which application should be granted, issues arising if MPC's application is granted, issues arising if the Tribes' application is granted, and issues arising if either application is granted. The

---

<sup>19</sup> 49 Fed. Reg. 34,570

The Tribes took the position that their proposal would better serve the public interest because, among other things, it would direct Project output to a utility having higher avoided costs than MPC, thus displacing higher-cost generation;<sup>30</sup> because it would further national policy of promoting Indian self-reliance and control over their resources; because it would improve the Tribes' economic condition; and because it would facilitate the development of the "Buffalo Rapids Nos. 2 and 4" hydroelectric sites downstream of Kerr.<sup>31</sup> The Tribes also asserted that licensing the Project to MPC without their consent would violate the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. and Section 10(e) of the Federal Power Act, and would interfere and be inconsistent with the purposes for which the Flathead Reservation was created or acquired. See 16 U.S.C. § 797(e).<sup>32</sup> The Tribes also asserted that, due to the deletion of certain transmission facilities from the Kerr license in 1976, MPC lacked the necessary rights of way across tribal lands to transmit Kerr power to market.

<sup>30</sup> Exhibit No. 123 at 5.1-5.8.

<sup>31</sup> Exhibit No. 137 at 40-46. In addition, the Tribes, given their treaty hunting and fishing rights, and their jurisdiction over certain recreation activities (see Exhibit No. 137 at 46-52), asserted that they would operate the Project more responsibly than MPC with respect to fish, wildlife, and recreation.

<sup>32</sup> Exhibit No. 154 at 8-23.

The Tribes took the position that their proposal would better serve the public interest because, among other things, it would direct Project output to a utility having higher avoided costs than MPC, thus displacing higher-cost generation;<sup>30</sup> because it would further national policy of promoting Indian self-reliance and control over their resources; because it would improve the Tribes' economic condition; and because it would facilitate the development of the "Buffalo Rapids Nos. 2 and 4" hydroelectric sites downstream of Kerr.<sup>31</sup> The Tribes also asserted that licensing the Project to MPC without their consent would violate the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. and Section 10(e) of the Federal Power Act, and would interfere and be inconsistent with the purposes for which the Flathead Reservation was created or acquired. See 16 U.S.C. § 797(e).<sup>32</sup> The Tribes also asserted that, due to the deletion of certain transmission facilities from the Kerr license in 1976, MPC lacked the necessary rights of way across tribal lands to transmit Kerr power to market.

---

<sup>30</sup> Exhibit No. 123 at 5.1-5.8.

<sup>31</sup> Exhibit No. 137 at 40-46. In addition, the Tribes, given their treaty hunting and fishing rights, and their jurisdiction over certain recreation activities (see Exhibit No. 137 at 46-52), asserted that they would operate the Project more responsibly than MPC with respect to fish, wildlife, and recreation.

<sup>32</sup> Exhibit No. 154 at 8-23.

Each applicant disputed these and other assertions made by the other.

B. Issues Arising If MPC's Application Were Granted

The main issue arising only if a renewed license were granted to MPC is the amount of the annual charge payable under Section 10(e) of the Act to the Tribes for the use and occupancy of their land. MPC submitted testimony, based both on indexing of the present \$2.6 million annual charge and on the "net benefits" method, that the annual charge should be set at \$3.25 million for 1984, escalating annually with inflation thereafter.<sup>33</sup> The Tribes submitted testimony of one witness in support of a charge of \$47 million, and of another witness supporting a charge of some \$30 million, each as of 1984, and each to escalate thereafter with inflation.<sup>34</sup> Both witnesses based their testimony on "net benefits" analysis. The Secretary submitted testimony also based on "net benefits" calculations advocating an annual charge of some \$30 million,<sup>35</sup> while the Commission staff witness recommended that the annual charge be paid to

---

<sup>33</sup> Exhibit No. 45 at 69; Tr. 561; Exhibit No. 307.

<sup>34</sup> Exhibit No. 123 at 8.1-8.17 and Exhibit No. 156 at 9-23.

<sup>35</sup> Exhibit No. 206 at 41.

the Tribes in-kind, in the form of 47.9 percent of the Project's output.<sup>36</sup>

C. Issues Arising If Tribes' Application Were Granted

The primary issues arising only if the Commission awarded the new license to the Tribes are the price payable to MPC upon transfer of the Project, i.e., "net investment" as defined in Section 3(13) of the Federal Power Act, and "severance damages", as described in Section 14. MPC asserted that the statute's definition of "net investment", as applied to Kerr, includes the original cost of the Project (some \$18.9 million) offset by accumulated depreciation only to the extent (some \$450,000) that there had been revenues in excess of "a fair return on investment", as that term appears in Section 3(13).<sup>37</sup> The Tribes and the Staff advocated subtracting all accumulated depreciation (approximately \$6 million as of the end of 1983), leaving "net investment" of some \$12 million.<sup>38</sup>

The parties also disagreed on the amount of "severance damages" that would be payable. MPC asserted

---

<sup>36</sup> Exhibit No. 272 at 5.

<sup>37</sup> Exhibit No. 72 at 10; Exhibit No. 75 at 2. These figures were as at the end of 1983. It was uncontested that the balance in the amortization reserve for Kerr provided under Section 10(d) of the Federal Power Act was, at the end of 1983, zero. Exhibit No. 72 at 9; Exhibit No. 277.

<sup>38</sup> Exhibit No. 122 at 24-5.

that severance damages properly include the costs of replacing the lost project, and thus calculated the damages for Kerr as at 1984<sup>39</sup> at some \$237 million, less whatever amount was received in the form of "net investment".<sup>40</sup> Witnesses for the staff and the Tribes calculated severance damages as negligible, comprising only certain control, communications, and regulating equipment that would be useless to MPC without Kerr.<sup>41</sup>

D. Issues Arising If Either Application Is Granted

The main issues arising regardless of which application is granted were (1) those relating to fish, wildlife, and environmental concerns, and (2) whether the new license should provide in some form for continuation of "bargain power" sale to the Flathead Irrigation Project, as described above.

1. Fish, Wildlife, and Environmental Issues. The Tribes, MPC, the Montana Department of Fish, Wildlife and Parks and the Department of the Interior are now conducting detailed studies of fish and wildlife, variously at Flathead Lake and downstream of the Project, that are expected to be completed in the spring of 1989.<sup>41</sup>

---

<sup>39</sup> Exhibit No. 3 at 20.

<sup>40</sup> Exhibit No. 78 at 39-40; Exhibit No. 272 at 14.

<sup>41</sup> Exhibit No. 150 at 5-12; Exhibit No. 151 at 5-13.



Those studies will allow the parties to assess the consequences of the current mode of operations, and possible changes therein. MPC proposed that the new license provide for the continuation of the existing method of operation, subject to such changes as may be appropriate upon completion of the studies.<sup>42</sup> The Tribes made essentially the same proposal except that, pending the completion of those studies, the Tribes recommended an instantaneous minimum instream flow of 3,200 cubic feet per second.<sup>43</sup> The Secretary likewise advocated an interim minimum flow of 3,200 cfs, based upon certain "wetted perimeter" studies conducted in 1981.<sup>44</sup> The Commission staff made the same recommendation.<sup>45</sup> Witnesses from the State Department of Fish, Wildlife and Parks supported continuation of the existing regime pending completion of the ongoing studies.<sup>46</sup> Supplemental testimony submitted by the Secretary stated that, pending completion of the ongoing studies, the Commission should simply issue annual licenses, and that any long term license should

---

<sup>42</sup> Exhibit No. 59 at 10.

<sup>43</sup> Exhibit No. 150 at 17-20. The initial license makes no provision for minimum flows. MPC voluntarily seeks to maintain average daily flows of no less than 1,500 cfs. (Tr. 860-61)

<sup>44</sup> Exhibit No. 220 at 9.

<sup>45</sup> Exhibit No. 288 at 6. The Staff's further environmental assessment of August 31, 1984, modified the recommendation to provide for certain exceptions to the 3,200 cfs minimum. Exhibit No. 346.

<sup>46</sup> Exhibit No. 265 at 17; Exhibit No. 268 at 19.

contain appropriate fish and wildlife conditions based upon the result of those studies.<sup>47</sup>

2. "Bargain Power". MPC, without conceding any legal obligation to do so, expressed a willingness to continue to sell power to the Flathead Irrigation Project in the same quantity (i.e., up to 11.2 megawatts during the months of April through October, and up to 7.466 megawatts at all other times) as at present, but stated that the present rate was unreasonably low and would have to be renegotiated.<sup>48</sup> The Tribes took the position that there is no legal requirement that a new license provide for "bargain power"<sup>49</sup> and expressed willingness to sell Kerr power to the Flathead Irrigation Project at a price equal to that at which it would be available to others.<sup>50</sup>

The Districts' position is that, prior to the licensing of Kerr, water rights in the navigable Flathead River for the development of power were owned and controlled by the United States and were reserved or appropriated by the United States for the FIP to assure its viability; that certain contracts, between the Districts and the United

---

<sup>47</sup> Exhibit No. 338 at 15. The Secretary's position is that, under Section 4(e) of the Federal Power Act, and under the Act of March 7, 1928, 45 Stat. 200, 212-13, he may impose this and other conditions, if reasonable, without FERC approval.

<sup>48</sup> Exhibit No. 7 at 28.

<sup>49</sup> See Exhibits No. 168(a)-(c), 178-193, and 204-05.

<sup>50</sup> Exhibit No. 137 at 25-30.

States, and the Acts of March 7, 1928, and May 25, 1948, both supra, require that the Kerr licensee provide to the FIP, or to the irrigators served thereby (most of whom are represented by the Districts), power at cost of generation or equivalent benefits as a quid pro quo for the use of the aforementioned water rights; and that in any event the Secretary, pursuant to authority conferred by the Act of March 7, 1928, supra, or Section 4(e) of the Act, may require the Kerr licensee to provide such low-cost power or equivalent benefits for the FIP or its irrigators. The Districts' testimony included an analysis of the allocation of net benefits of the Kerr Project. It concluded that any new license should therefore provide for low-cost power for the FIP or its irrigators in the amount now provided pursuant to Article 26 of the original license at a rate per kWh not in excess of generation cost (which, based on an assumed continuation of the current \$2.6 million annual charge for use of Tribal lands, the Districts calculated at 2.088 mills per kWh).<sup>51</sup>

The Secretary claimed the authority to require a low-cost block of power under the Act of March 7, 1928. His witness concluded that, if the license were issued to MPC, and the annual charge were set at \$30 million (as another witness for the Secretary recommended) the appropriate rate

---

<sup>51</sup> Exhibit No. 224 at 4-8, 16-18, and Exhibit Nos. 245-247, 249-352; Exhibit No. 254 at 8-20, and Exhibit Nos. 255-264.

for the sale of power by MPC to the Irrigation Project would be seven mills per kilowatt hour.<sup>52</sup> In exercise of the powers that he claims under the Act of March 7, 1928, the Secretary proposed to require such a rate in any license issued by the Commission to MPC.

#### Terms of Settlement

The terms of the proposed settlement are contained in the Stipulation and Agreement attached hereto as Appendix 1 and in the form of joint license attached to that appendix.

#### Summary of Settlement Terms

There follows a brief summary of the Stipulation and Agreement.

Section I of the Stipulation and Agreement provides that a 50-year license, in the form of Attachment A to the Stipulation and Agreement, would issue jointly to MPC and the Tribes. Under that license MPC would hold and operate the Project for the first 30 years of the term, and the Tribes would, upon paying MPC a specified amount (the "Conveyance Price"), hold and operate the Project for the balance of the term and any annual-license term that may thereafter occur.<sup>53</sup> Conveyance of the Project to the Tribes would occur on a date between the 30th and 40th anniversaries

---

<sup>52</sup> Exhibit No. 339 at 22.

<sup>53</sup> Paragraph (C)(1) (citations to "Article" or "Paragraph" below refer to the Joint License).

of the license, which date would be designated one year in advance by the Tribes.<sup>54</sup> The Conveyance Price would include (1) the original cost less accumulated depreciation of the Project, as at the time of the conveyance; (2) the original cost less accumulated depreciation of certain control equipment for which MPC has no comparable use absent Kerr; (3) the replacement cost (to the extent not included in (2)) of certain communication equipment that is part of the Project but that MPC will need to operate its integrated system; and (4) the original cost of flooding rights in certain lands near to, but outside, the Project bounds.<sup>55</sup>

The annual charge payable to the Tribes for the use of their lands while MPC operates the Project would be fixed at \$9 million, payable in advance quarterly.<sup>56</sup> That amount would be adjusted every 12 months to reflect changes in the Consumer Price Index.<sup>57</sup> It would not be subject to adjustment or change other than to reflect changes in the CPI unless MPC were to add a fourth generating unit, or were to add improvements to the existing units entailing 32

---

<sup>54</sup> Id.

<sup>55</sup> Paragraph (C)(2). Paragraph (C)(3) provides for arbitration in certain circumstances if the parties disagree as to the conveyance price. Arbitration is specifically intended as a "bargained for" procedure integral to the settlement. See *Montana Power Co. v. FPC*, 445 F.2d 739, 752 (D.C. Cir. 1970).

<sup>56</sup> Article 39(a).

<sup>57</sup> Id.

megawatts or more of added capacity, or if the Tribes ceased to have the right to acquire the Project, or if the Project reverted to MPC due to the Tribes' failure to pay the full Conveyance Price.<sup>58</sup> In the event of such an addition in generating capacity, a reasonable added annual charge could be imposed with respect thereto.<sup>59</sup>

MPC would undertake, after conveying the Project to the Tribes, to wheel Kerr Project output to points of interconnection with Bonneville Power Administration for a rate established in accordance with the law.<sup>60</sup> It would also undertake to train tribal members to operate the Project, beginning five years before conveyance.<sup>61</sup> The amortization reserve required by Section 10(d) of the Act would be maintained by MPC until it conveys the Project to the Tribes; thereafter it would be maintained by the Tribes.<sup>62</sup>

MPC, while it operates the Project, would sell power to the Flathead Irrigation Project in the present amounts at an initial rate of 12 mills per kilowatt hour, which roughly approximates the cost of generation with an

---

<sup>58</sup> Article 39(b).

<sup>59</sup> Id.

<sup>60</sup> Article 49.

<sup>61</sup> Article 50.

<sup>62</sup> Article 38.

annual charge of \$9 million.<sup>63</sup> In succeeding years, as the annual charge payable to the Tribes fluctuates with inflation, so too will the component (initially 8.5 mills) of the rate charged to the Irrigation Project that is attributable to the annual charge.<sup>64</sup> The issue of whether the Flathead Irrigation Project would receive low-cost power from the Tribes after they assume operation of the Project would be deferred until 15 years after the effective date of the license, at which point that issue would, on petition by any interested person, become ripe for determination before the Commission.<sup>65</sup> If any party wished to claim a larger low-cost block than that made available by MPC to the FIP, such claim would have to be filed within 10 years after the license takes effect, and promptly set for hearing.<sup>66</sup> That requirement is intended to cap the claim to low-cost power during the Tribes' tenure, and to resolve the claim early enough, so as not to impair the Tribes' ability to market the Kerr output.

Pending the completion of ongoing fish and wildlife studies, regulation of the Lake level would continue in accordance with existing practice, as embodied in the initial license and the above-described Memorandum of

---

<sup>63</sup> Article 40(a).

<sup>64</sup> Article 40(a).

<sup>65</sup> Article 40(c).

<sup>66</sup> Id.

Understanding with the Corps of Engineers.<sup>67</sup> MPC would, however, undertake a new obligation to maintain minimum flows of 3,200 cubic feet per second, pending completion of the fish and wildlife studies, except that from July 1 through September 15, if the Lake elevation were below 2892.7 feet, outflows could be reduced to the rate of inflows into Flathead Lake (but not less than 2,200 cfs) if that inflow rate were less than 3,200 cfs.<sup>68</sup> Upon completion of the fish and wildlife studies, MPC would, after consultation with specified agencies, submit for Commission approval plans to protect and enhance the fishery and wildlife resources of the Project.<sup>69</sup> Those plans would be subject to change by the Commission after notice and opportunity for hearing.

In addition, without resolving the question of whether Section 4(e) of the Act generally applies to relicensings<sup>70</sup> and without prejudice to the position of the Commission, the Secretary, or any other party on the issue in other cases, the Secretary in this relicensing is expressly

---

<sup>67</sup> Article 43. The language of that article is largely derived from Article 23 of the initial license.

<sup>68</sup> Article 44.

<sup>69</sup> Articles 45 and 46. Under Article 47, MPC would also study, and recommend appropriate plans to mitigate, loss of wildlife habitat, if any, due to erosion at the north end of Flathead Lake resulting from Project operations.

<sup>70</sup> See *Escondido Mutual Water Co. v. La Jolla Band of Indians*, 104 S. Ct. 2105, 2114, n.23 (1984).



granted the authority, within a reasonable time upon completion of the fish and wildlife studies, and after notice and opportunity for hearing, to formulate such fish and wildlife study conditions as he could impose under Section 4(e) upon the issuance of an initial license.<sup>71</sup> The Commission will then, by order, incorporate those conditions in the license.

MPC would also submit further detailed data concerning the downstream recreation improvements described in its testimony.<sup>72</sup> MPC and the Tribes would undertake during their respective tenures to monitor the effect of the Project upon known historical or archeological sites.<sup>73</sup>

In other respects, apart from certain exceptions relating to the special circumstances and status of Indian tribes,<sup>74</sup> the license contains the standard terms and conditions for licenses of projects on navigable waterways and encompassing United States lands. Thus, standard Articles 1-37 of Commission Form L-5 are included in the Joint License, subject to certain limitations designed to preserve the governmental authority and land-owning rights that are currently held by the Tribes.

Under the Act of March 4, 1929, 45 Stat. 1623, 1640, no administrative charges may be applied. The Joint License

---

<sup>71</sup> See Articles 45 and 46.

<sup>72</sup> Article 48.

<sup>73</sup> Article 52.

<sup>74</sup> See p. 2, supra.

accordingly does not provide for any such charges. It does, however, provide for an annual charge in accordance with Commission regulations for the roughly 114 acres of federal lands (other than tribal trust lands) occupied by the Project.

Section II of the Stipulation and Agreement provides that the Tribes will move to dismiss with prejudice their appeal of the Commission order denying their claim to readjusted charges during the annual license period.

Section III of the Stipulation and Agreement provides that the Tribes will grant their consent for MPC to obtain, upon payment of a specified sum, necessary rights of way for certain transmission and switchyard facilities referred to at page 14, supra.

Section IV of the Stipulation and Agreement contains the Tribes' consent to the denial of their request for compulsory wheeling in Docket No. EL84-12-000 (p. 9, supra).

Section V of the Stipulation and Agreement bars any claim by the Tribes against MPC for any charge, payment, fee, or tax, other than the annual charge under the license, with respect to the Project.

Section VI of the Stipulation and Agreement provides for each of the joint licensees to indemnify the other against claims by third persons arising from the indemnitor's operation or maintenance of the Project.

Section VII of the Stipulation and Agreement contains the Tribes' undertaking to dismiss their complaint about MPC's allegedly late payment of the annual charge for 1982. (note 7, supra)

Section VIII of the Stipulation and Agreement provides that the Stipulation and Agreement will become effective 50 days after the Commission has approved it in its entirety and without modification, provided that by then (a) the Commission's order has become final and no longer subject to appeal, (b) the Secretary has issued right-of-way permits for the previously-described transmission and switchyard facilities; (c) MPC has paid for the rights of way; and (d) the Tribes have moved to dismiss their appeal concerning annual charges under annual licenses. Moreover, the 50-day period must have ended within six months after the Stipulation and Agreement is filed with the Commission. Thus, to approve the settlement, the Commission must act within approximately four months of the settlement's filing. The settlement becomes null and void if any of the foregoing conditions is not fulfilled within the specified time and the joint licensees are required to notify the Commission whether or not the conditions have in fact been satisfied. Section VIII also contains the Secretary's consent to issuance of the proposed license.

Section IX of the Stipulation and Agreement provides that the settlement is a negotiated one, limited to the referenced proceedings, and not intended to bind any party as to principle or serve as precedent in any other FERC proceeding.

Section X of the Stipulation and Agreement states that, upon the effectiveness of the Stipulation and Agreement, the above-captioned proceedings shall be terminated.

Section XI of the Stipulation and Agreement provides for execution in counterpart. Section XII provides certain information, and limits the term of the Stipulation and Agreement, to assure compliance with 25 U.S.C. § 81, which specifies certain requirements for contracts with Indian tribes. Section XIII specifies that payment of the Conveyance Price by the Tribes as described above fully discharges any obligation they may have to MPC under Section 15(a) of the Act.

Explanation of How the Settlement Serves  
the Public Interest

As described above, the Kerr Project has been the subject of almost continuous litigation among parties to these proceedings since 1954, fully 30 years. The instant settlement represents a careful balancing of the competing interests of MPC ratepayers, tribal members, and irrigators that fully protects fish, wildlife, and environmental concerns. It holds out the prospect of ending complex, costly litigation that has engendered deep emotions on all sides, and eliminating the likelihood of such litigation in the future.

Compromise has been achieved on each of the main issues described earlier. On the underlying issue of who gets the new license, the parties have agreed to a joint

license arrangement under which, for the first 30 years, MPC's ratepayers will receive part of the benefits of Kerr's relatively low-cost generating capability, with the Tribes' members receiving a part of such benefits through the annual charge. For the last 20 years, the Tribes' members will share such benefits with the ratepayers of the utility with whom the Tribes negotiate a sale of the output; the Tribes also will have the benefit of controlling the resource. MPC, by its undertaking to train tribal members and wheel project output for the Tribes, will facilitate the Tribes' assumption of the operator's role.

The annual charge payable by MPC while it operates the project, \$9 million adjusted annually for inflation, likewise represents a substantial increase over the present charge of \$2.6 million, as well as the \$3.25 million advocated by MPC, but is well below the amount claimed by the Tribes and the Secretary. Similarly, while MPC will receive a considerably increased rate for power sold to the Flathead Irrigation Project, that rate is still far below the rate at which Bonneville Power Administration supplies the rest of the Irrigation Project's needs.

The sequential tenures of 30 years for MPC and 20 years for the Tribes are at the heart of the overall compromise. The 50-year license term that results is plainly within the Commission's statutory authority.<sup>75</sup> While the

---

<sup>75</sup> See 16 U.S.C. § 799.

Commission has adopted a policy of normally limiting license terms to 30 or 40 years unless the applicant proposes, or has undertaken, major development, that policy does not preclude longer terms in "unusual circumstances."<sup>76</sup> Nor does Commission policy require "without deviation" the computation of the new 50-year term from expiration of the old term license, rather than from the effective date of the new one.<sup>77</sup>

It should also be stressed that fish, wildlife, and environmental values are carefully protected by the settlement. Under the terms of the settlement such specific conditions as appear appropriate and reasonable may be adopted upon completion in 1989 of the fish and wildlife studies, now underway in and around the Project. In the interim, a new and more restrictive minimum-flow requirement will go into effect upon issuance of the new license. If the matter were litigated, there is little chance that a minimum flow provision of any sort could become effective for at least two years, i.e., until the Commission had actually issued its decision on the recipient and terms of a new license.<sup>78</sup>

---

<sup>76</sup> The Montana Power Co., Project No. 2301, 56 F.P.C. 2008, 2013 (1976).

<sup>77</sup> Id.

<sup>78</sup> Nothing in Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), pre-

Perhaps most importantly from the standpoint of the public interest, the instant settlement would terminate the lengthy, costly, and acrimonious litigation that would otherwise burden all concerned, the Commission itself, and the courts for many years. The settlement obviates the need to litigate annual charge readjustments for the next 30 years, and defers the next Kerr relicensing proceeding for a

---

(footnote cont'd)

cludes issuance at this time of the term license contemplated by the settlement. In Yakima, the Commission had issued a new license to the incumbent (there were no competing applicants) without requiring the submission of an Exhibit S or seeking in any way to comply with the National Environmental Protection Act; the Commission wholly deferred consideration of fish and wildlife issues until completion of certain studies then underway. In those circumstances, the Ninth Circuit held that issuance of the license could not precede consideration of fish and wildlife issues, and consideration of whether an environmental impact statement was required.

Here, as noted, each applicant submitted an Exhibit S and testimony on fish and wildlife concerns; testimony by the applicants, the Secretary, the Montana Department of Fish, Wildlife and Parks, and the Commission staff addressing the issue of what interim measures were required pending completion of the studies has been filed and cross-examined, and no party has suggested that interim measures other than minimum flow requirements should be adopted; additionally, the benefits of the interim measures are immediately available only through the prompt issuance of a new term license as part of the settlement. Further, the Staff has prepared an environmental assessment, which has been modified and supplemented, explicitly considering whether an EIS need precede the issuance of a new license, and concluding in the negative. Additionally, the instant license, unlike that in Yakima, constitutes a settlement, explicitly not binding the Commission to any principle or policy with respect to future litigation. Yakima in short is a radically different case, and the holding there does not prohibit the settlement proposed here.

full 50 years. The settlement affords stability, relative certainty for planning purposes, and a degree of harmony among the parties, a situation unknown with respect to the Kerr Project for the past quarter century.

For the foregoing reasons the undersigned parties respectfully request that the Commission approve the preferred settlement without modification or delay.<sup>79</sup> Further, the parties waive all rights to file comments on this Joint Offer of Settlement except the right, not later than 10 days

---

<sup>79</sup> A draft Commission order approving the settlement is attached as Appendix 2 hereto.

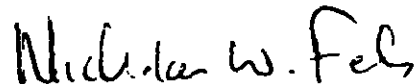


after the filing of any initial comments thereon by Commission staff counsel, to reply to such initial comments.

Respectfully submitted,



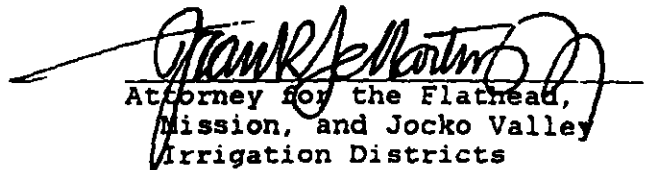
Attorney for the Secretary of  
the Interior



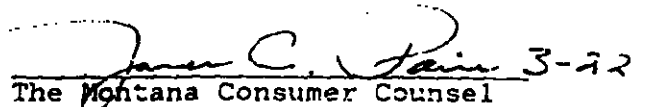
Attorney for The Montana  
Power Company



Attorney for the Confederated  
Salish and Kootenai Tribes of  
the Flathead Reservation



Attorney for the Flathead,  
Mission, and Jocko Valley  
Irrigation Districts



3-22

The Montana Consumer Counsel

APPENDIX 1

APPENDIX 1 TO JOINT  
OFFER OF SETTLEMENT

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

The Montana Power Company	)	Project Nos. 5-004
	)	and 2776-000
Confederated Salish and	)	
Kootenai Tribes of the	)	
Flathead Reservation	)	
The Montana Power Company	)	Project No. 5-003
	)	
Confederated Salish and	)	
Kootenai Tribes of the	)	
Flathead Reservation	)	
	)	
v.	)	Docket No. EL84-12-000
	)	
The Montana Power Company	)	

Stipulation and Agreement

This Stipulation and Agreement is entered into by The Montana Power Company ("MPC"), the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes"), the Flathead, Mission, and Jocko Valley Irrigation Districts (jointly "the Districts"), the Montana Consumer Counsel ("the Consumer Counsel") and the Secretary of the Interior ("the Secretary"), in order to settle the proceedings referred to above. Those proceedings are described more fully in the "Joint Offer of Settlement" submitted to the Federal Energy Regulatory Commission simultaneously herewith, and incorporated herein by reference.

I. Issuance of Joint License

1.1 MPC, the Tribes, the Districts, the Consumer Counsel, and the Secretary agree jointly to propose, and do hereby propose, that the Commission issue a joint 50-year license ("the Joint License") in the form of Attachment A hereto, which is incorporated herein by reference, and under which it is contemplated that MPC will, for the first 30 years of the license term, operate, maintain, and have exclusive right to, and interest in, the Project and that, thereafter, upon payment of a specified sum, the Tribes will operate, maintain, and have exclusive right to, and interest in, the Project for the remainder of the license term, including any immediately following annual license terms. Subject to the terms and conditions of the license, including future agreements or determinations pursuant thereto, the entity operating the Project will be entitled to all of the power produced by it.

II. Dismissal of Appeal Concerning Annual Charges During Annual-License Period

2.1 Subject to the other terms and conditions of this Stipulation and Agreement, the Tribes agree to move, on or before the Effective Date (as defined in Section 8.1 below), to dismiss, with prejudice, the appeal in Confederated Salish and Kootenai Tribes v. FERC, Case No. 83-1980 (D.C. Cir., petition for review filed Sept. 13, 1983), and thereafter to exercise their best efforts to secure such dismissal.

III. Rights of Way Across Indian Lands  
For Project-Related Facilities

3.1(a) Within 15 days after the filing of this Stipulation and Agreement, the Tribes will grant, in writing, and deliver to MPC, their consent, in substantially the form attached hereto as Attachment B, for the Secretary to issue permission pursuant to 25 CFR Part 169 for MPC's "Kerr-Related Facilities" (as hereafter defined), in substantially their present form and without increase in transmission capacity, to use and occupy tribal trust lands and other lands owned by the Tribes for the terms and on the conditions specified in Attachment B, which is incorporated herein by reference. Subject to the other terms and conditions of this Stipulation and Agreement, the Tribes hereby waive any claims to damages for trespass and any other compensation or payment for the use or occupancy of their lands by the Kerr-Related Facilities prior to the effective date of the permission described above, provided that no claims for damages or liability arising out of alleged negligent or other wrongful acts or omissions by MPC in the operation of the Kerr-Related Facilities shall be precluded by such waiver.

(b) The term "Kerr-Related Facilities" shall include: (i) the Kerr-Thompson Falls 100-kV "A" and "B" transmission lines, (ii) the Kerr-Rattlesnake 161-kV "A" transmission line, (iii) MPC's Kerr Project switchyard, (which facilities (i), (ii) and (iii) are more fully described in Montana Power Co., 56 F.P.C. 3290 (1976)), and,

III. Rights of Way Across Indian Lands  
For Project-Related Facilities

3.1(a) Within 15 days after the filing of this Stipulation and Agreement, the Tribes will grant, in writing, and deliver to MPC, their consent, in substantially the form attached hereto as Attachment B, for the Secretary to issue permission pursuant to 25 CFR Part 169 for MPC's "Kerr-Related Facilities" (as hereafter defined), in substantially their present form and without increase in transmission capacity, to use and occupy tribal trust lands and other lands owned by the Tribes for the terms and on the conditions specified in Attachment B, which is incorporated herein by reference. Subject to the other terms and conditions of this Stipulation and Agreement, the Tribes hereby waive any claims to damages for trespass and any other compensation or payment for the use or occupancy of their lands by the Kerr-Related Facilities prior to the effective date of the permission described above, provided that no claims for damages or liability arising out of alleged negligent or other wrongful acts or omissions by MPC in the operation of the Kerr-Related Facilities shall be precluded by such waiver.

(b) The term "Kerr-Related Facilities" shall include: (i) the Kerr-Thompson Falls 100-kV "A" and "B" transmission lines, (ii) the Kerr-Rattlesnake 161-kV "A" transmission line, (iii) MPC's Kerr Project switchyard, (which facilities (i), (ii) and (iii) are more fully described in Montana Power Co., 56 F.P.C. 3290 (1976)), and,

in addition, (iv) an existing underground communication cable running between the Project switchyard and the Project powerhouse, and (v) an access road running from the unnumbered county road that is located in Section 13, Township 22 North, Range 21 West, to the Kerr Project camp and powerhouse.

#### IV. Denial of Wheeling Request

4.1 Subject to the other terms and conditions of this Stipulation and Agreement, the Tribes consent to the denial of their request for rehearing in Docket No. EL84-12-000.

#### V. Payment of Annual Charge

5.1 At the time that it pays the first quarterly installment of the annual charge provided under Article 39 of the Joint License, MPC will also pay to the Tribes, in the manner provided by said Article 39, the annual charge due for the portion of such calendar year preceding the Effective Date. The amount due shall be (a) \$2.6 million, times (b) the number of days in the calendar year prior to the Effective Date, divided by (c) 365.

5.2 Payment of the annual charges for the use of tribal lands provided in the present series of annual licenses (including the payment provided in Section 5.1) and payment of the annual charges provided pursuant to Article 39 of the Joint License shall be in full discharge of MPC's obligations under Section 10(e) of the Federal Power Act ("the Act") and any comparable future provision of federal

law for the use and occupancy of Tribal lands by the Project through the term of the Joint License, and of any annual licenses issued immediately thereafter. Except for the right-of-way payment provided in Attachment B hereto, no other charge, payment, fee, or tax with respect to the Project, the project works, or use of the project lands for project purposes shall be payable by MPC to the Tribes, provided that no claims for damages or liability arising out of alleged negligent or other wrongful acts or omissions by MPC in the operation of the Project shall be precluded by this Section 5.2.

#### VI. Indemnification

6.1 As between the Tribes and MPC, MPC will be solely liable for any injury, damage, or liability of any sort to any third person arising out of the operation or maintenance of the Project under the Joint License before the conveyance of the project works to the Tribes as provided in Paragraph (C) of the Joint License. MPC will indemnify the Tribes and hold them harmless against any claim or liability (including reasonable attorneys' fees) arising out of such operation or maintenance during such period, provided that MPC shall have received prompt written notice of such claim and shall have been afforded the right to select counsel and control the manner in which such claim is defended against or compromised.

6.2 As between the Tribes and MPC, the Tribes will be solely liable for any injury, damage, or liability



of any sort to any third person arising out of the operation or maintenance of the Project after the conveyance of the project works as provided in Paragraph (C) of the Joint License. The Tribes will indemnify MPC and hold it harmless against any claim or liability (including reasonable attorneys' fees) arising out of such operation or maintenance during such period, provided that the Tribes shall have received prompt written notice of such claim and shall have been afforded the right to select counsel and control the manner in which such claim is defended against or compromised. It is expressly understood that nothing in its undertaking to train tribal members under Article 51 of the license or any act or omission in the training program will make MPC liable to any third party for any amount whatsoever.

#### VII. Tribes' Complaint

7.1 Subject to the terms and conditions of this Stipulation and Agreement, the Tribes consent to the denial of their complaint of April 12, 1983, described in n. 7 of the Joint Offer of Settlement.

#### VIII. Effectiveness

8.1 The various provisions of this Stipulation and Agreement, including the Joint License attached as Attachment A, were negotiated as part of the whole and are not severable. Commission approval is sought for this

Stipulation and Agreement as a whole. This Stipulation and Agreement, and the Joint License attached as Attachment A, shall become effective upon, and only upon, a date (the "Effective Date") 50 days after the Commission has entered an order (i) approving the instant Stipulation and Agreement in its entirety and without modification, (ii) issuing a joint license in the form of Attachment A hereto in its entirety and without modification, (iii) denying the Tribes' rehearing request in Docket No. EL84-12-000, and (iv) denying the Tribes' complaint of April 12, 1983, provided, that such order shall, on the Effective Date, be final and no longer subject to judicial review; provided further, that the Effective Date shall have occurred within six months after the filing of this Stipulation and Agreement; and provided further, that on or before such Effective Date all of the following other conditions shall have been fulfilled:

(a) The Tribes shall have moved for dismissal of their petition for review in Confederated Tribes v. FERC, p. 2, supra,

(b) The Secretary shall have issued permits as provided in Section 3.1 supra, and

(c) MPC shall have made payment as provided in Attachment B hereto.

If the Effective Date has not occurred within six months after the filing of this Stipulation and Agreement, or if any other condition in any of the foregoing provisos is not fulfilled within the time specified, this Stipulation and

9.2 The provisions of the instant Stipulation and Agreement are intended to relate only to the specific matters referred to herein and, by agreeing to the instant Stipulation and Agreement, no party waives any claim or right which it may otherwise have with respect to any matters not expressly provided for herein.

9.3 The instant Stipulation and Agreement is made upon the express understanding that it constitutes a negotiated settlement with respect to the above-referenced proceedings. Except as otherwise expressly provided for herein, neither any party nor the Commission Staff shall be deemed by entering into such settlement to have approved, accepted, agreed to, or consented to any principle, construction, or rule of law.

9.4 The instant Stipulation and Agreement was negotiated and entered into at a point in the above-referenced proceedings when only some of the written testimony and exhibits filed therein had been subjected to cross-examination and ruled on as to admissibility, and when additional testimony and exhibits remained to be filed. Each party waives, in connection with this settlement, any right that it would otherwise have to cross-examine testimony and exhibits, to file or have admitted into evidence additional testimony and exhibits, or to object to the admissibility of any evidence, all such waivers being conditioned on the approval of this settlement by the Commission. Each party

also waives any claim in future Commission proceedings that the Commission's approval of this settlement constitutes any finding or determination other than that the settlement as a whole is fair and reasonable and in the public interest, or that such Commission approval constitutes approval of, or precedent regarding, any principle or issue in this proceeding.

9.5 Each party waives any claim that this settlement constitutes a concession by any party, or that approval of the settlement constitutes a finding or conclusion by the Commission, (other than by reason of Articles 40(a) and 40(b) of the Joint License,) (a) that the Commission is authorized or empowered to require the Licensee to sell power to anyone against the Licensee's will; (b) that the Flathead Irrigation Project ("the FIP"), the Districts, or anyone else, is entitled to purchase power from the Licensee of the Kerr Project, or so to purchase power in any particular quantity or at any particular rate; (c) that the rate specified in Article 40(a) of the Joint License is reasonable; or (d) that the FIP, the Districts, or anyone else, is entitled for any period to reserve the exclusive right to sell power within the boundaries of the Reservation. Nothing in the above shall limit the authority reserved to the United States under Section 16 of the Federal Power Act.

9.6 Nothing in Article 15, 20, 45, 46, 47, 48, or 52 of the Joint License shall be construed as constituting recognition by the Tribes of the jurisdiction of the State

of Montana within the boundaries of the Flathead Indian Reservation respecting the matters covered by such articles.

9.7(a) MPC, the Tribes, the Districts, and the Secretary agree that this Stipulation and Agreement and any license issued thereunder by the Commission shall not enlarge, diminish, or be interpreted as a waiver of any authority the Secretary may have under Section 4(e) of the Act to impose conditions with respect to fish, wildlife, and other environmental concerns for the relicensing of the Kerr Project. Further, all parties agree that for the purposes of the instant settlement, and in order to reach an agreement among all the parties, and without resolving the question of whether Section 4(e) applies to this proceeding, the Secretary shall be allowed, within a reasonable time upon completion of ongoing fish and wildlife studies being sponsored or conducted by the Bonneville Power Administration, MPC, the Tribes, and the Bureau of Indian Affairs, to impose such reasonable license conditions with respect to fish, wildlife, and other environmental concerns as the Secretary would be empowered under Section 4(e) to require with respect to an initial license. Such conditions will be imposed in accordance with the procedures developed for the formulation of Section 4(e) conditions, and in any event, again, solely for the purpose of reaching an agreement among the parties to this settlement, for the formulation of these license conditions, such procedures will include notice and opportunity for hearing. Further, all parties agree that,

upon receipt of the Secretary's conditions, the Commission by order shall adopt and include the conditions in their entirety in the license issued pursuant to this Stipulation and Agreement. MPC, the Tribes, and the Districts agree to waive, and do hereby waive, any claim that they might have that imposition of terms and conditions at that time, rather than during the course of the relicensing proceedings, is untimely.

(b) MPC, the Tribes, the Districts, and the Secretary agree that, except to the extent limited by Article 40(c) of the Joint License appended hereto as Attachment A, this Stipulation and Agreement and any license issued thereunder by the Commission shall not enlarge, diminish, or be interpreted as a waiver of such authority as the Secretary or others may have under the Act of March 7, 1928, 45 Stat. 212-213, if and to the extent applicable, with respect to the matters covered by such Article 40(c).

#### X. Termination of Proceedings

10.1 Upon the effectiveness of the instant Stipulation and Agreement, the above-captioned proceedings shall be deemed terminated.

#### XI. Counterparts

11.1 This Stipulation and Agreement may be executed in any number of counterparts, each of which shall be an original, and all of which shall constitute one agreement.

XII. Statutory Compliance

12.1 In satisfaction of 25 U.S.C. § 81, to the extent applicable, the parties further state and agree that,

a) The parties in interest to this Stipulation and Agreement are the parties entering into it. MPC is a Montana corporation, with principal offices at Butte, Montana, primarily engaged in the generation, transmission, and distribution of electricity and natural gas; the Tribes, whose principal office is at Pablo, Montana, are a confederation of American Indian tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., and operating through a Tribal Council organized pursuant to a constitution and by-laws adopted under that Act; the Districts are entities, having their principal office at St. Ignatius, Montana, created under Montana law to perform certain obligations and exercise certain authority on behalf of the owners of irrigable lands served by the FIP; the Montana Consumer Counsel is an agency, created by the Montana state constitution, having its principal office at Helena, Montana, with responsibility for protecting the interests of ratepayers in proceedings before regulatory agencies; and the Secretary, with his principal office in Washington, D.C., is the chief officer of the United States Department of the Interior.

b) This Stipulation and Agreement is made in the State of Montana.

c) It has been approved by the Tribes' Tribal Council pursuant to Article VI of the Tribes' Constitution in order to promote the welfare of the Tribes and their members.


d) All rights and obligations hereunder that have not previously terminated shall, in any event, do so on February 1, 2095.

XIII. Payment on Conveyance of Project

13.1 Payment by the Tribes of the amount provided pursuant to Paragraph (C) of the Joint License shall be in full discharge of any obligation by the Tribes for payments to MPC under Section 15(a) of the Federal Power Act, and under any comparable future provision of federal law, arising out of a conveyance of MPC's interest in the Project as provided in Paragraph (C).

9861 67 371 MAR 29 1985  
Date \_\_\_\_\_

Date \_\_\_\_\_

  
Secretary of the Interior

\_\_\_\_\_  
Chairman of the Board of  
of Directors, The Montana  
Power Company



c) It has been approved by the Tribes' Tribal Council pursuant to Article VI of the Tribes' Constitution in order to promote the welfare of the Tribes and their members.

d) All rights and obligations hereunder that have not previously terminated shall, in any event, do so on February 1, 2095.

XIII. Payment on Conveyance of Project

13.1 Payment by the Tribes of the amount provided pursuant to Paragraph (C) of the Joint License shall be in full discharge of any obligation by the Tribes for payments to MPC under Section 15(a) of the Federal Power Act, and under any comparable future provision of federal law, arising out of a conveyance of MPC's interest in the Project as provided in Paragraph (C).

\_\_\_\_\_  
Date

3/22/85  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Secretary of the Interior

W. P. Schmalzer  
\_\_\_\_\_  
Chairman of the Board of  
of Directors, The Montana  
Power Company

Attest:

John Carl  
Secretary, The Montana  
Power Company

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of the Tribal  
Council, Confederated  
Salish and Kootenai  
Tribes of the Flathead  
Reservation

Attest:

\_\_\_\_\_  
Tribal Executive Secretary,  
Confederated Salish and  
Kootenai Tribes of the  
Flathead Reservation

\_\_\_\_\_  
Date

\_\_\_\_\_  
The Montana Consumer  
Counsel

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Jocko Valley  
Irrigation District

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Mission Irrigation  
District

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Flathead Valley  
Irrigation District

Attest:

Secretary, The Montana  
Power Company

3/22/85  
Date

*Joseph Felman*  
Chairman of the Tribal  
Council, Confederated  
Salish and Kootenai  
Tribes of the Flathead  
Reservation

Attest:

*[Signature]*  
Tribal Executive Secretary,  
Confederated Salish and  
Kootenai Tribes of the  
Flathead Reservation

\_\_\_\_\_  
Date

\_\_\_\_\_  
The Montana Consumer  
Counsel

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Jocko Valley  
Irrigation District

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Mission Irrigation  
District

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman of  
the Flathead Valley  
Irrigation District

Attest:

Secretary, The Montana  
Power Company

Date

Chairman of the Tribal  
Council, Confederated  
Salish and Kootenai  
Tribes of the Flathead  
Reservation

Attest:

Tribal Executive Secretary,  
Confederated Salish and  
Kootenai Tribes of the  
Flathead Reservation

22 March, 1985  
Date

*James C. Paine*  
The Montana Consumer  
Counsel

Date

Chairman of  
the Jocko Valley  
Irrigation District

Date

Chairman of  
the Mission Irrigation  
District

Date

Chairman of  
the Flathead Valley  
Irrigation District

Attest:

Secretary, The Montana  
Power Company

Date

Chairman of the Tribal  
Council, Confederated  
Salish and Kootenai  
Tribes of the Flathead  
Reservation

Attest:

Tribal Executive Secretary,  
Confederated Salish and  
Kootenai Tribes of the  
Flathead Reservation

Date

The Montana Consumer  
Counsel

3-26-85  
Date

Martin Beck  
Chairman of  
the Jocko Valley  
Irrigation District

3-26-85  
Date

Joseph F. Lee  
Chairman of  
the Mission Irrigation  
District

3-26-85  
Date

Charles H. Stepi  
Chairman of  
the Flathead  
Irrigation District

ATTACHMENT A

Attachment A to  
Stipulation and Agreement

JOINT LICENSE

(A) This joint license is issued this \_\_\_ day of \_\_\_\_\_, 1985, to The Montana Power Company of Butte, Montana ("MPC"), and to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana ("the Tribes") under Section 15 of the Federal Power Act ("the Act") and such other statutes as may apply. Subject to satisfaction of the conditions stated in Section 8.1 of the Stipulation and Agreement pursuant to which this license is issued, the license becomes effective on a date (the "Effective Date") 50 days after the date of its issuance and continues for a term of 50 years from the Effective Date. It is for the continued operation and maintenance of the Kerr Project, Project No. 5, located on, and using waters of, the Flathead River, a navigable waterway of the United States, in Lake and Flathead Counties, Montana, and occupying lands of the Flathead Indian Reservation held by the United States in trust for the Tribes. This license is subject to the terms and conditions of the Act, which is incorporated herein by reference as part hereof and subject to such rules and regulations as the Commission has issued or may issue or prescribe under the provisions of the Act, provided that in case of any conflict between Paragraph (C) or Article 39 of this license and any present or future rules and regulations

of the Commission, the provisions of this license shall control.

(B) The Kerr Project, Project No. 5, consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area, enclosed by the project boundary, and used and useful in the project operations. The project area and boundary are shown and described by certain exhibits that form part of the application for license and that are designated and described as:

<u>Exhibit</u>	<u>FERC No. 5-</u>	<u>Showing</u>
J-1	122	General Map Of Project Area
J-2	123	General Map Of Project Area
K-1	124	Detail Map Of Project Area
K-2	125	" "
K-3	126	" "
K-4	127	" "
K-5	128	" "
K-6	129	" "
K-7	130	" "
K-8	131	" "
K-9	132	" "
K-10	133	" "
K-11	134	" "
K-12	135	" "
K-13	136	" "
K-14	137	" "
K-15	138	" "

(2) Project works consisting of: (a) a reservoir with a surface area of approximately 126,000 acres and a storage capacity of 1,219,000 acre feet at power pool elevation of 2893 feet m.s.l.; (b) a 200-foot-high, 381-foot-long concrete arch dam with 14 spillway sections, each 21 feet wide and 27 feet high and a 30-foot high, 185-foot long gravity section extending from the right abutment of the



arch dam; (c) three concrete lined pressure tunnels (penstocks) which are 23.33 feet in diameter, and 765, 785 and 865 feet long, respectively; (d) a steel frame power house, with reinforced concrete walls and roof, containing three generating units rated at 60-MW each; (e) transmission facilities, which consist of the generator leads, three 13.2/100 KV transformer banks, and three 1,500 foot-long, 115 KV transmission lines which extend from the powerhouse to the Kerr switchyard; and (f) appurtenant facilities.

The location, nature, and character of these project works are generally shown and described by the exhibits above and more specifically shown and described by certain other exhibits that also form a part of the applications for license and that are designated and described as:

<u>Exhibit</u>	<u>FERC No. 5-</u>	<u>Showing</u>
L-1	139	General Plan
L-2	140	Dam-Plan & Elevation
L-3	141	Dam-Arch Rings & sections
L-4	142	Dam-Thrust Blocks, Gravity & Dike Sections
L-5	143	Dam-Apron & Protective Works
L-6	144	Dam-Spillway, Plan Elevation & Sections
L-7	145	Dam-Intake & Penstock Tunnels
L-8	146	Powerhouse - Operation Floor Plan
L-9	147	Powerhouse - Sections
L-10	148	Switchyard

Exhibit M consists of two typewritten pages entitled "General Description of Equipment," filed June 1, 1976.

<u>Exhibit</u>	<u>FERC No. 5-</u>	<u>Showing</u>
R-1	149	Recreational Use Plan Map
R-2	150	Recreational Use Plan Map

Exhibit R, filed on June 1, 1976, and supplemented on May 1, 1979, and March 11, 1980, consisting of 15 pages of text, entitled "Recreational Use Plan".

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

(C) (1) From the Effective Date until the Conveyance Date (as hereafter defined), MPC shall control, operate, maintain and have exclusive right to, and interest in, the Project. During that period MPC shall have all of the rights and obligations of the licensee under this license. At any time between the 29th and 39th anniversaries of the Effective Date the Tribes may, in their sole discretion, on at least one year's written notice to MPC, the Secretary of the Interior (the "Secretary"), the Flathhead, Mission, and Jocko Valley Irrigation Districts, (the "Districts"), and the Commission, designate a date for the conveyance of the Project to the Tribes ("the Conveyance Date"), which date shall be no earlier than the 30th anniversary of the Effective Date and no later than the 40th anniversary of the Effective Date. On the Conveyance Date,

upon receipt by MPC from the Tribes of the Estimated Conveyance Price (as hereafter defined) in effect on such date, all of MPC's interest in the Project, free of any mortgages, liens, or encumbrances, shall, without any further action on the part of MPC, the Commission, or any other entity, vest in the Tribes. Thereafter, for the remainder of the term of this license, and any immediately following annual licenses, the Tribes will control, operate, maintain and have exclusive right to, and interest in, the Project, and will have all of the rights and obligations of the licensee under this license, including right to any payment by any successor licensee or by the United States on takeover of the Project. Upon the failure of the Tribes either (a) to designate a Conveyance Date within the time specified above, or (b) having timely designated a Conveyance Date, to pay the Estimated Conveyance Price on or before such date, the Tribes' right to have the Project conveyed to them under this License shall terminate, and MPC shall continue to control, operate, maintain, and have exclusive right to, and interest in, the Project for the remainder of the term of this license and any immediately following annual licenses. Unless the context connotes otherwise, the term "Licensee" shall, as used in this license, refer to MPC with respect to the license term prior to conveyance of the Project, and, with respect to the remainder of the license term, refer to the Tribes.

(2) The term "Conveyance Price" shall mean the sum of (a) the actual original cost of the Project (including any additions and improvements thereto) less accumulated depreciation, as reflected in MPC's FERC accounts (as those accounts are maintained in accordance with routine Commission audit and compliance procedures), as of the Conveyance Date; (b) the original cost, less accumulated depreciation as of the Conveyance Date, of any automatic control equipment located at MPC's dispatch center and not included in (a) that is being used as of the time of conveyance to control the operation of the Project and for which MPC has no other comparable need after the conveyance; (c)(i) the cost to MPC of replacing any communications facilities that are among the project works conveyed to the Tribes, but that are, in addition, used and useful in the operation of MPC's integrated system, minus (ii) the original cost, less accumulated depreciation, of such equipment to the extent included in (a) above; and (d) the original cost of any flooding rights or other interests in realty outside the Project boundary which interests, at the Conveyance Date, are used and useful in the operation of the Project, remain effective at least until the termination of this Joint License, and are assignable to the Tribes.

(3) (a) No later than the 25th anniversary of the Effective Date MPC shall provide the Tribes, the Secretary, and the Commission with a written estimate of the Conveyance Price as of the 30th anniversary of the Effective

Date, together with an explanation of how that estimate was derived. MPC shall provide an updated estimate and explanation on or before the 27th anniversary of the Effective Date. Within 60 days after receipt of that updated estimate the Tribes shall, if they wish to dispute such estimate, so notify MPC, the Commission, and the Secretary in writing. If the Tribes do not give such notice, then such estimate shall, upon expiration of the notice period and until the establishment of a succeeding Estimated Conveyance Price under subparagraph (b), constitute the Estimated Conveyance Price.

If the Tribes do timely give such notice, and if the parties cannot resolve the dispute by negotiation within 60 days from such notice, then a board of arbitration, constituted as hereafter described, shall promptly be convened. The board shall estimate the Conveyance Price, as of the 30th anniversary of the Effective Date, which estimate shall, until the establishing of a succeeding Estimated Conveyance Price under subparagraph (b), constitute the Estimated Conveyance Price. The decision will explain in reasonable detail the basis for the estimate. The board will issue its decision no later than six months after the 28th anniversary of the Effective Date.

(b) If the designation of the Conveyance Date has not occurred by the 31st anniversary of the Effective Date, then MPC, within 30 days after such anniversary, will issue an updated estimate of the Conveyance Price

as of one year and eleven months thereafter, i.e., as of the 33rd anniversary of the Effective Date. Such updated estimate shall be based on the same principles as those underlying the original Estimated Conveyance Price. Such updated estimate shall become the effective Estimated Conveyance Price if, within 60 days after receipt thereof, the Tribes do not give written notice that they dispute such updated estimate. If the Tribes do timely issue such notice, then the procedures for arbitration as provided in subparagraph (a) above shall apply, but the board's estimate shall be based upon the same principles as those underlying the original Estimated Conveyance Price and shall be issued within one year after such notice. Until the updated estimate has been fixed, whether by the failure of the Tribes to give notice, or by the board's decision, the previous Estimated Conveyance Price shall remain in effect. If the Conveyance Date has not been designated by the 34th or 37th anniversary of the Effective Date, the Estimated Conveyance Price shall, in each case, thereupon be updated in the manner provided in this subparagraph (b).

(c) Within 30 days after the conveyance of the Project to the Tribes, MPC shall provide the Tribes, the Secretary, and the Commission with a written statement of the actual Conveyance Price as MPC calculates it, together with an explanation of how that figure was derived. The actual Conveyance Price shall differ from the Estimated Conveyance Price established pursuant to subparagraphs (a)

and (b) above only to reflect events, circumstances, and the passage of time after establishment of the Estimated Conveyance Price. If the Tribes wish to dispute the Conveyance Price as calculated by MPC, they shall, within 60 days of receipt of MPC's statement, so notify MPC, the Secretary, and the Commission in writing. If the two parties cannot resolve the dispute by negotiation within 60 days from such notice, the matter shall then be submitted to a board of arbitration, which shall fix the actual Conveyance Price, taking into account only the Estimated Conveyance price and events, circumstances, and the passage of time between the time at which such Estimated Conveyance Price was fixed and the Conveyance Date.

(d) Within 90 days after the decision of the board of arbitration as to the actual Conveyance Price, or, if the Tribes have not disputed MPC's calculation of such price, within 90 days after the time for giving notice of such dispute has expired, any difference between the Estimated Conveyance Price and the actual Conveyance Price shall be paid by the party owing such difference to the other party. In addition, such party will pay the other party interest on such difference for the period between the Conveyance Date and the date of payment. Such interest shall be at the rate of three percentage points (300 basis points) above the most recent (as of the time of payment) auction rate for U.S. Treasury bills having maturities of 180 days.

(e) Any arbitration proceedings pursuant to this Paragraph (C) shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association ("the AAA"), subject to any additional rules or provisions existing under federal law. The board of arbitration shall consist of one member selected by the Tribes, one member selected by MPC, and a third member selected by the other two members. If the latter cannot agree upon a third member, then such member shall be selected by the AAA. The decision of the board shall be final and binding upon the parties. Any court proceeding arising out of the arbitration proceedings shall, to the extent possible, be brought in federal court.

(4) Payment of the Estimated Conveyance Price and of any difference between that amount and the actual Conveyance Price shall be by cash, by check drawn on the United States Treasury, or by treasurer's check of a bank incorporated or chartered in the United States and having assets in excess of three billion dollars. MPC shall, on the Conveyance Date, provide such documents or other evidence of the conveyance of its interest in the Project as the Tribes may reasonably request.

(5) Payment in accordance with this Paragraph (C) shall fully discharge any obligation by the Tribes for payments to MPC under Section 15(a) of the Act, and under any comparable future provision of federal law, arising out



of conveyance of MPC's interest in the Project as provided in Paragraph (C).

(D) In the event that any amount required to be paid under Paragraph C(3)(d) or under Article 39 of this Joint License, or under Section VI of the Stipulation and Agreement pursuant to which it is issued, shall not be timely paid, the Commission may, upon petition by the party to whom such payment is to be made and after opportunity for hearing, enter such order as may be reasonable and appropriate to make the party to which such payment is due whole, including, in the case of a payment due from MPC, an order accelerating the Conveyance Date and related procedures, and, in the case of a payment due from the Tribes, an order directing reconveyance of the Licensee's interest in the Project to MPC. Nothing in this Paragraph (D) shall limit any powers that the Commission or the courts could otherwise exercise.

(E) This license is also subject to the terms and conditions set forth in Form L-5 (Revised October 1975) entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States" which terms and conditions designated as Articles 1 through 37 are attached hereto and made a part hereof, except as follows:

(1) Except to the extent that emergency shall require for the protection of navigation, life, health or property, Articles 3, 5, 13, 15, 16, 17, 18, 21, 22, and

28, as applied to that portion of Flathead Lake within the boundaries of the Flathead Indian Reservation or to land and water rights owned or regulated by the Tribes, shall not be deemed to diminish or interfere with any ownership or other rights that the Tribes may have, or jurisdiction the Tribes may exercise, pursuant to, by reason of, or deriving directly or indirectly from, the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, or the Tribes' status as an Indian tribe, and in the event of any conflict between any such article and said rights or jurisdiction, the latter shall be deemed controlling.

(2) Nothing in Articles 6 or 36 shall be deemed to require the Tribes to relinquish at the end of the license term any land or water rights other than rights the Tribes acquired by reason of becoming a Project licensee.

(3) The term "lands of the United States", as used in Articles 26, 28, 29, 30, 31, 33, 34, and 36, shall not be deemed to include lands held by the United States in trust for the Tribes or for individual Indians.

(4) Nothing in Article 13 shall be deemed to confer, enlarge, or diminish any right that may otherwise be claimed by the Tribes to compensation for any benefits that are conferred on the FIP, the Districts, or others pursuant to Article 40.

(5) The authority exercised by the Secretary under Articles 45 and 46 shall not be deemed to affect, or

be affected by, any authority the Secretary may exercise under Articles 1-37.

(F) This license is also subject to the following conditions, which are set forth herein as additional articles:

Article 38. Pursuant to Section 10(d) of the 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. One-half of the project surplus earnings, if any, accumulated under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year under the license (or if for the period covered by the initial Project No. 5 license, and the annual licenses issued for the project thereafter, there is a deficiency of project earnings below the rate specified in Article 34 of such initial license), the amount of such deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts thus established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted cost components of long-term debt of the Licensee, preferred stock of the Licensee (if any), and the cost of common equity of the Licensee (if any), as defined below. The annual weighted cost component for each element of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the

rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs 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 four percentage points (400 basis points).

Upon conveyance of the Project to the Tribes, the Tribes will establish an amortization reserve account containing an amount equal to the amount in MPC's amortization reserve account as of that time. The account will thereafter be maintained by the Tribes from year to year, in accordance with annual project earnings and the Tribes' annual specified rate of return calculated as provided above, and MPC will have no further obligation to maintain such an account with respect to the Project. Neither the Conveyance Price payable under Paragraph (C) above, nor any of the costs used to derive said price, shall be reduced or otherwise affected by the amount contained in MPC's amortization reserve account at any time.

Article 39. (a) MPC shall pay, pursuant to Section 10(e) of the Act, an annual charge for the use and occupancy of the Tribes' lands by the Project prior to conveyance of the Project to the Tribes. For the initial license year (i.e., the twelve months beginning with the Effective Date) the annual charge shall be \$9,000,000. The annual charge for each succeeding license year, until the conveyance of the project to the Tribes, shall be \$9,000,000 times "CPI(S)" divided by "CPI(I)", where "CPI(I)" equals the Consumer Price Index (as hereafter defined) for that month (the "Base Month") in which the day 90 days before the Effective Date falls, and "CPI(S)" equals the Consumer Price Index for the the same month (as the Base Month) in such succeeding license year.

(b)(i) In the event that, after the Effective Date, the Commission authorizes an addition or additions (A) to the three generating units installed as of the Effective Date, which addition or additions, in the aggregate, are in excess of 32 megawatts, or (B) of one or more new generating units (regardless of capacity), then the Commission shall, upon petition and after opportunity for hearing, fix a reasonable annual charge with respect to, and effective as of the initial commercial operation of, such excess generating capacity or new generating unit (but not with respect to the generating capacity of the first three units installed as of the Effective Date or the first 32 megawatts of capacity added thereto). Such added annual charge may thereafter be readjusted as provided by Section 10(e) of the Act. Nothing in this paragraph shall be deemed to constitute consent by MPC or the Tribes to any such addition of units or capacity.

(b)(ii) Upon the termination of the Tribes' right under Paragraph (C) of this Joint License to acquire MPC's interest in the Project, whether because they have failed to give the requisite notice, or because, having given such notice, they have failed to make the requisite payment, or upon any reconveyance of the Project to MPC pursuant to Paragraph (D) of this license, the Commission may, upon petition filed no earlier than the date on which the Tribes cease to have such right, or on which such reconveyance occurs, and after opportunity for hearing, readjust the annual charge specified in (a) above, as provided by Section 10(e) of the Act, provided that no such readjustment will be effective as of a date prior to the filing of the petition.

(c) The annual charge for each license year prior to the Conveyance Date shall be paid in equal quarterly installments due, respectively, on the first day of each license year, on the date three months after such date, the date six months after such date, and the date nine months after such date. Payment for the quarter in which the Project is to be conveyed to the Tribes shall be prorated in accordance

with the number of days preceding such conveyance. Each payment shall be made so as to be received by the Tribes on the date due at an address or bank depository designated by the Tribes in writing to MPC.

(d) Payment in accordance with (a), (b) and (c) above shall fully discharge MPC's obligations under Section 10(e) of the Act during the term of this license. By their acceptance of this license, the Tribes and MPC expressly waive any right, other than as provided in (a) and (b), to readjustment or modification of the annual charges at any time during said term, and, by his approval of this license, the Secretary expressly agrees to be bound thereby.

(e) "Consumer Price Index" for a month shall mean the "U.S. Consumer Price Index, All Items, All Urban Consumers (CPI-U)," for that month published by the Bureau of Labor Statistics of the United States Department of Labor. (By way of illustration, for August 1984, that index was 313.0 on a 1967 base of 100.0). If the Consumer Price Index ceases to be publicly available, or the method of calculation of such index changes so that it is no longer substantially comparable to the CPI as of the Effective Date, the GNP Deflator published monthly by the U.S. Department of Commerce will be employed in its stead for purposes of this license. If both the Consumer Price Index and the GNP Deflator cease to be available, or, if the method of calculating both has changed substantially since the Effective Date, the Commission shall, upon petition by any interested person, and after opportunity for reply, select a comparable index to measure monthly changes in consumer prices for purposes of adjusting the annual charge in accordance with (a) above.

Article 40. (a) From the Effective Date until such time as MPC conveys the Project to the Tribes, under this license or any amendment thereto, it will make available to the United States, for and on behalf of the FIP or the Districts comprising the same, capacity and energy at the Kerr Project 100 kV bus in the following amounts:

- (i) During all months of the year, up to 7.466 megawatts of capacity at up to 100 percent load factor;
- (ii) During the months of April through October, additional capacity of up to 3.734 megawatts at up to 100 percent load factor.

The rate payable to MPC for energy taken by the United States during the first license year (i.e., from the Effective Date until the date one year after the Effective Date) will be 12 mills per kwh. The rate per kwh in each succeeding license year will be the sum of (a) 3.5 mills and (b) 8.5 mills times "CPI(S)" divided by "CPI(I)", where "CPI(I)" and "CPI(S)" are as defined in Article 39. No demand charge shall be payable with respect to the sale under this Article 40(a).

(b) The United States reserves to itself or the FIP management for the period prior to conveyance of the Project to the Tribes the exclusive right to sell power within the boundaries of the Flathead Indian Reservation to the extent of 7.466 megawatts to be delivered for use and/or sale as provided in Article 40(a) above.

(c) This Joint License does not cover or resolve the questions of whether, from the time the Project is conveyed by MPC to the Tribes until the expiration of the Joint License, (i) the Tribes must make any part of the output from the Project available to the United States, for and on behalf of FIP or the Districts, or if so on what terms or conditions, or (ii) the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation. Such matters are expressly reserved for resolution hereafter by agreement of the parties, with the approval of the Commission, for insertion in this Joint License as a term hereof, or, failing such agreement, by the Commission, as provided below, subject to the authority of the Secretary to the extent provided by applicable law. Upon request of (i) the Tribes, the Secretary, or the Districts, made any time after the fifteenth anniversary of the Effective Date, or (ii) the

Secretary or the Districts made after the ninth but before the tenth anniversary of the Effective Date (or upon any earlier request concurred in by the Tribes, the Secretary, and the Districts), the Commission shall set such matters for hearing within twelve months of the date of the request; provided, that if neither the Secretary nor the Districts make any such request to the Commission prior to such tenth anniversary date, the Secretary and the Districts shall forever be barred from claiming, with respect to the period of this license following the conveyance of the Project to the Tribes, for or on behalf of the United States, FIP, the Districts, or anyone else, a portion of the Project's output greater than that which is required to be made available under Article 40(a) of this license.

Article 41. The Licensee hereby recognizes the right of the United States to pump water from Flathead Lake or from Flathead River above Licensee's dam for all purposes of irrigation on the Flathead Irrigation Project or on lands of the Flathead Reservation whether included in the Irrigation Project or not, but not more than 50,000 acre-feet of water shall be pumped therefrom after July 15 within any one calendar year.

Article 42. The Licensee agrees that all rights acquired in connection with the project covered by this license and the use of water for the development of power shall be held subject to the water rights which may be reasonably necessary for the complete development of the irrigable land and the domestic water supply requirements on the Flathead Reservation in the watershed above the project works. The Licensee further agrees to waive objections to the subtractions of such water, up to a maximum flow of 200 cubic feet per second, as may be authorized under Federal or State law for diversion cut of the watershed above the project works for use on the Reservation.

Article 43. Article 12 above notwithstanding, it is specifically understood that, during the term of this license, the Licensee may regulate Flathead Lake between elevations 2883 and 2893 in such



manner as will make not less than 1,219,000 acre feet of storage capacity available to the Licensee. Unless otherwise ordered by the Commission after notice and opportunity for hearing, and subject to Article 44 below, such regulation shall be in accordance with the Memorandum of Understanding between MPC and the Corps of Engineers dated May 31, 1962, as amended on October 15, 1965, and approved by the Federal Power Commission in Montana Power Co., 35 F.P.C. 250 (1966). It is expressly understood that if and when water is pumped from Flathead Lake or from Flathead River above Licensee's dam after July 15th in any year for purposes of irrigation as provided in Article 41 hereof, the Licensee shall be permitted, in the months of January, February and March of the next succeeding year, to regulate Flathead Lake below the minimum elevation which may be fixed as foresaid, to the extent necessary to enable it to recover the amount of water so pumped for irrigation purposes. Said elevations are in feet above mean sea level as determined by reference to a certain U.S. Geological Survey bench mark, elevation 2910.882 feet, stamped "2900 N", as now located and established at Somers, Flathead County, or to such other bench marks as may be established by the U.S. Geological Survey having the same datum. The Licensee also agrees to perform such channel excavation and other work as may reasonably be required by the Commission after notice and opportunity for hearing for the purpose of flood control to the end that the normal flood levels of Flathead Lake shall not be increased by reason of the installation of the project works, and for the purpose of full utilization of storage and navigation.

Article 44. (a) Pending implementation of the plan described in Article 45, Licensee shall maintain a continuous minimum outflow of 3,200 cubic feet per second (cfs), as measured immediately downstream from the Project powerhouse, provided that at times during the period between July 1 and September 15 when the elevation of Flathead Lake is below 2892.7 feet, the outflow may be reduced below 3,200 cfs to a rate equal to the greater of (i) the average of the past 15 days' deduced inflow into the Lake, or (ii) 2,200 cfs.

(b) The flows provided in paragraph (a) may be temporarily modified for periods of up to two hours if, because of operating emergencies (other than emergencies based on recreational needs) such modification is, in the sole judgment of the licensee, required. The flows provided in paragraph (a) may also be modified for short periods upon mutual agreement of MPC, the Secretary, and the Tribes.

Article 45. (a) MPC shall file, after consultation with the Tribes, the Montana Department of Fish, Wildlife, and Parks, and the Department of the Interior, and by October 1, 1989, a fish resource mitigative and management plan that shall include among other things: (1) the results of (a) fishery studies sponsored by the Bonneville Power Administration and (b) other studies to determine the effects of project operation on the fish resources of Flathead Lake and the lower Flathead River; and (2) for Commission approval, specific measures to protect and enhance the fish resources associated with the Kerr Project on Flathead Lake and the Lower Flathead River, including an implementation schedule and cost estimates. Agency comments on the plan shall be included in the filing. The Commission reserves the right, after notice and opportunity for hearing, either to require appropriate changes in the plan or adopt such plan as filed.

(b) Notwithstanding the adoption of conservation measures pursuant to the preceding provisions of this article, and without resolving the question of whether Section 4(e) of the Act applies to this proceeding, the Secretary shall be allowed, within a reasonable time upon completion of the studies described in Articles 45(a), 46(a), and 47, to impose such reasonable license conditions with respect to fish and related environmental concerns as the Secretary would be empowered under Section 4(e) to require with respect to an initial license. Such conditions will be imposed in accordance with the procedures developed for the formulation of Section 4(e) conditions, and, in any event, for the formulation of these license conditions,

such procedures will include notice and opportunity for hearing. Upon receipt of the Secretary's conditions, the Commission by order shall adopt and include the conditions in their entirety in this license. MPC, the Tribes, and the Districts agree to waive, and do hereby waive, any claim that they might have that imposition of terms and conditions at that time, rather than during the course of the relicensing proceedings, is untimely.

Article 46. (a) MPC shall file, after consultation with the Tribes, the Montana Department of Fish, Wildlife, and Parks, and the Department of the Interior, and by October 1, 1989, a wildlife mitigative and management plan that shall include among other things: (1) the results of (a) studies sponsored by the Bonneville Power Administration being conducted to determine the effect of project operations on the wildlife resources of Flathead Lake and the lower Flathead River, and (b) other studies to determine the effect of project operation on the wildlife resources of Flathead Lake and the lower Flathead River; and (2) for Commission approval, specific measures to protect and enhance the wildlife resources associated with the Kerr Project on Flathead Lake and the lower Flathead River, including an implementation schedule and cost estimates. Agency comments on the plan shall be included in the filing. The Commission reserves the right, after notice and opportunity for hearing, either to require appropriate changes in the plan or to adopt such plan as filed.

(b) Notwithstanding the adoption of conservation measures pursuant to the preceding provisions of this article, and without resolving the question of whether Section 4(e) of the Act applies to this proceeding, the Secretary shall be allowed, within a reasonable time upon completion of the studies described in Articles 45(a), 46(a), and 47, to impose such reasonable license conditions with respect to wildlife and related environmental concerns as the Secretary would be empowered under Section 4(e) to require with respect to an initial

license. Such conditions will be imposed in accordance with the procedures developed for the formulation of Section 4(e) conditions, and, in any event, for the formulation of these license conditions, such ~~procedures will include notice and opportunity for hearing.~~ Upon receipt of the Secretary's conditions, the Commission by order shall adopt and include the conditions in their entirety in this license. MPC, the Tribes and the Districts agree to waive, and do hereby waive, any claim that they might have that imposition of terms and conditions at that time, rather than during the course of the relicensing proceedings, is untimely.

Article 47. MPC shall, after consultation with the Tribes, the Montana Department of Fish, Wildlife, and Parks, the Department of the Interior, and the Commission staff develop a study plan to determine what measures, if any, are necessary and appropriate to mitigate loss, if any, of wildlife habitat on the delta and nearby islands at the head of Flathead Lake due to project operations. The plan shall address, but not be limited to, a determination of: (a) the environmental value of, and need for, the types of habitat being lost, if any, including whether adequate nearby replacement habitat already exists; (b) any project factors contributing to habitat losses, if any; (c) the feasibility of preventing habitat losses and the types and costs of any measures or changes in project operation that would be necessary to prevent such losses; and (d) the availability of nearby lands that could be developed as replacement habitat, the cost of acquiring those lands, and the types and costs of any measures that would be necessary to develop replacement habitat on those lands. The results of the study shall be submitted to the Commission by October 1, 1989, along with the comments from the consulted agencies relating to the results of the study. MPC shall, at the same time, file with the Commission for approval, with copies to the agencies consulted, its recommendation for changes, if any, in project operation or other

measures, including development of replacement habitat, that are necessary to mitigate for loss, if any, of wildlife habitat on the delta and nearby islands at the head of Flathead Lake. Documentation of agency consultation on the recommendations shall be included in the filing. Such recommendations may thereafter be modified or adopted by the Commission after notice and opportunity for hearing.

Article 48. Within one year from the date of issuance of this license Licensee shall, after consultation with the appropriate Federal, state and local agencies, prepare and file with the Commission for approval a report that describes provisions for development of recreational facilities below the dam, including consideration of facilities for the handicapped. Further, the filing shall include a drawing showing the type and location of the facilities to be provided at the Project, a construction schedule, and documentation of consultation with the appropriate agencies. Such recommendation may thereafter be modified or adopted by the Commission after notice and opportunity for hearing.

Article 49. Payments made by the Licensee under Section 13 of the Pacific Northwest Coordination Agreement, dated September 15, 1964, as amended, or under any successor agreement approved by the Commission, shall be deemed fully to discharge Licensee's obligations under Article 11 above, and under Section 10(f) of the Federal Power Act with respect to the Kerr Project.

Article 50. (a) During the time that the Tribes own and operate the Kerr Project under this license MPC will transmit for the Tribes the output of the Project from the Kerr switchyard to any point of interconnection between MPC's system and the Bonneville Power Administration, or to such other points as the Tribes and MPC may hereafter agree upon. After expiration of this license, and of any annual licenses issued immediately thereafter, MPC shall be obligated to perform

such transmission service for the Tribes for so long as the Tribes continue to own and operate the Project (but in no event after February 1, 2095) if and to the extent that MPC has sufficient transmission capacity beyond capacity that it reasonably deems to be required for its own system operations.

(b) Transmission under (a) shall be at rates that are not unduly discriminatory and are otherwise in accordance with law. MPC will be free unilaterally to change such rates from time to time, and the Tribes will be free to oppose such changes in proceedings before any agency having jurisdiction over such rates. The Tribes shall be entitled to refund, with interest in the amount then provided by law, of the portion of any such rates held to be excessive for the entire period such rates were in effect.

Article 51. (a) Subject to the other terms and conditions of this license, MPC will undertake at its cost to train individual tribal members to assume the operation and maintenance of the Kerr Project beginning 30 years after the Effective Date. Such training will begin 25 years after the Effective Date. Personnel for a total of eleven positions will be trained, such positions to be selected by the Tribes from among the following job titles:

- 1 - Accounting Department Personnel
- 1 - Plant Superintendent/Engineer
- 1 - Operating Supervisor
- 1 - Maintenance Supervisor
- 1 - Scheduler/Dispatcher
- 5 - Dispatchers/Operators
- 2 - Mechanics
- 2 - Maintenance Electricians

provided, that if the Tribes' proposed method of operating the Project requires fewer than eleven positions, MPC's obligation to train will be reduced to such lesser number. The individuals to be trained will be selected and paid during training solely by the Tribes. The training provided will be sufficient to enable

the trainees to operate and maintain the Project in substantially the same manner, and within the substantially same standards, as MPC's employees. In the event that, in MPC's view, an individual selected by the Tribes is unwilling or unable satisfactorily to complete the training program, MPC will notify the Tribes, who may (but shall not be required to) remove and replace the trainee with another trainee, provided that in no event will MPC be required to provide training to more than two individuals for the same position.

(b) In the event that, after commencement of the training program, a vacancy occurs in any position at MPC which primarily involves the operation of the Kerr Project and is comparable to a position for which MPC is providing training to tribal members hereunder, MPC shall offer the position to a tribal member who has received sufficient training from MPC to qualify for the position. Any such individuals shall be employed by MPC subject to the same terms and conditions, and shall be entitled to the same rights and benefits, as are other MPC employees filling comparable positions, but MPC shall not be required to retain any such individuals as employees of MPC beyond the Conveyance Date.

Article 52. Licensee shall, in consultation with the Montana State Historic Preservation Officer (SHPO), the Salish Cultural Committee, and the Kootenai Cultural Committee, (the latter two bodies having been created by resolution of the Tribes' Tribal Council) develop a cultural resources management plan to periodically monitor known archeological and historical sites affected by the Project operation as reflected in Exhibit V to MPC's license application. The cultural resources management plan should contain procedures that would be implemented in the event any site is affected by project operation. The plan shall be filed with the Commission within one year of the issuance of this license, and contain a copy of a letter from the SHPO accepting the plan. If any known sites should become affected by project operation, the Licensee shall

implement reasonable measures to protect such sites. The Licensee shall make available funds in a reasonable amount for any such work as required.

If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works by or on the behalf of the Licensee, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites in light of the criteria set forth in 36 C.F.R. § 60.4 (1984), and the Licensee shall consult with the SHPO, the Salish Cultural Committee, and the Kootenai Cultural Committee to develop a mitigation plan for the protection of significant archeological or historical resources as determined by such criteria. If the Licensee and the SHPO cannot agree on the amount of money to be expended or archeological or historical work related to the project, the Commission reserves the right after notice and opportunity for hearing to require the Licensee to conduct, at its own expense, any such work found necessary.



FEDERAL ENERGY REGULATORY COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR CONSTRUCTED  
MAJOR PROJECT AFFECTING NAVIGABLE WATERS  
AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease

by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such

determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such

reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensees shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: Provided, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall clear and keep clear to an adequate width 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 results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses on lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the appropriate agency of the United States having supervisory jurisdiction.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, et seq.), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: Provided, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: Provided further, That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.





Attachment B to  
Stipulation and Agreement

CONSENT TO GRANT OF RIGHT OF WAY

Pursuant to 25 C.F.R. Part 169, the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes") hereby consent to the grant by the Secretary of the Interior (or his duly authorized representative) to The Montana Power Company ("the Company") of certain rights of way across lands owned by the Tribes, or by the United States in trust for the Tribes, for facilities, and on terms, more fully described below.

This consent constitutes one element of a settlement between the Company and the Tribes, among others, of certain litigation before the Federal Energy Regulatory Commission ("the FERC") and the courts concerning the Kerr Hydroelectric Project, FERC Project No. 5. Under that settlement, which is subject to approval by the FERC, it is contemplated that the FERC will issue a 50-year joint license for the Kerr Project to the Company and the Tribes, pursuant to which the Company will own and operate the Project for the first 30 years; thereafter, upon payment of a specified sum, the Tribes will own and operate the Project for the remainder of the license term, and, pending further relicensing or takeover, any annual licenses issued under the Federal Power Act thereafter.

I.

The rights of way consented to hereby are for the use and occupancy of tribal lands (as described below) by, and for the operation, use, and maintenance of the facilities listed in (A) and (B) below, in substantially their present form, and without alteration that would increase transmission capacity:

(A) (1) the Kerr-Thompson Falls 100-kV "A" and "B" transmission lines; (2) the Kerr-Rattlesnake 161-kV "A" transmission line; (3) the Kerr switchyard; and (4) the underground communications cable running between the Kerr switchyard and the Kerr powerhouse.

(B) the access road running from the unnumbered county road that is located in Section 13, Township 22 North, Range 21 West, to the Kerr Project camp and powerhouse.

Such use and occupancy shall include access for operation, maintenance, construction, and repair, to the facilities described in clause (A) above by existing roads and trails.

II.

The respective tribal lands referred to in Paragraph I, and the length and width of the rights-of-way hereby consented to in such lands, are as follows:

KERR-RATTLESNAKE 161 KV "A" LINE

<u>TRIBAL LAND DESCRIPTION</u>				<u>ALLOT-</u>	<u>TRIBES'</u>	<u>APPROXIMATE</u>
<u>PARCEL</u>	<u>SEC.</u>	<u>TOWNSHIP</u>	<u>RANGE</u>	<u>MENT</u>	<u>UNDIVIDED</u>	<u>LENGTH ALONG</u>
				<u>NUMBER</u>	<u>INTEREST</u>	<u>CENTERLINE OF</u>
						<u>80 FT. WIDE</u>
						<u>R/W IN FEET</u>
SE $\frac{1}{4}$ SE $\frac{1}{4}$ (Lot 8)	11	22N	21W		100%	1019
SW $\frac{1}{4}$ SW $\frac{1}{4}$ (Lot 3)	12				100%	71
SE $\frac{1}{4}$ NW $\frac{1}{4}$	13				100%	1230
NW $\frac{1}{4}$ SE $\frac{1}{4}$	13				100%	307
E $\frac{1}{2}$ SE $\frac{1}{4}$	8	19N	20W		100%	2629
NE $\frac{1}{4}$ SE $\frac{1}{4}$	17				100%	1306
SE $\frac{1}{4}$ NW $\frac{1}{4}$	27	18N	20W	403	99.2% (729/735)	535
NE $\frac{1}{4}$ SW $\frac{1}{4}$	27			404	99.2% (729/735)	1365
SE $\frac{1}{4}$ SW $\frac{1}{4}$	27			406	99.2% (729/735)	1365
NE $\frac{1}{4}$ NW $\frac{1}{4}$	34			405	99.2% (729/735)	1388
NW $\frac{1}{4}$ NE $\frac{1}{4}$	23	17N	20W	1399	65.7% (23/35)	430
SW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$	23			1401	54.3% (19/35)	2730
E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$	26			574	76.0% (1094/1440)	1369
Part of Lot 4	2	16N	20W		100%	836
S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ ,	11			1500A	100%	790
S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$	11				100%	
SW $\frac{1}{4}$ SW $\frac{1}{4}$	24				100%	
N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	25				100%	1372
E $\frac{1}{2}$ SW $\frac{1}{4}$	25				100%	
NE $\frac{1}{4}$ NW $\frac{1}{4}$	36				100%	5417
						1073
W $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ ,	1	15N	20W		100%	5312
E $\frac{1}{2}$ SE $\frac{1}{4}$	1					
E $\frac{1}{2}$ NE $\frac{1}{4}$	12				100%	2714
E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$	12				100%	1328
E $\frac{1}{2}$ NE $\frac{1}{4}$	13				100%	2643
E $\frac{1}{2}$ NE $\frac{1}{4}$	24				100%	2665
NE $\frac{1}{4}$ SE $\frac{1}{4}$	24				100%	1322*
SE $\frac{1}{4}$ SE $\frac{1}{4}$	24				100%	1323
W $\frac{1}{2}$ W $\frac{1}{2}$	31	15N	19W		100%	4010
NE $\frac{1}{4}$ NE $\frac{1}{4}$ (Lot 5)	1	14N	20W		100%	1340

\* Perpetual R/W Easement Prior to Tribes' Acquisition.

KERR-THOMPSON FALLS 100 KV "A" & "B" LINES

<u>PARCEL</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>APPROXIMATE LENGTH ALONG CENTERLINE OF 80 FT. WIDE R/W IN FEET</u>	
				<u>"A" LINE</u>	<u>"B" LINE</u>
S $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{2}$ SW $\frac{1}{4}$ , Lots 9 & 4	11	22N	21W	4650	4783
Lots 1 & 2	10			1460	1466
E $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$	16			5879*	5879
NW $\frac{1}{2}$ NW $\frac{1}{4}$ , Lot 3	20			2344	2152
NE $\frac{1}{2}$ NE $\frac{1}{4}$ , Lots 3, 4, 5 & 8	19			5876	5876
NE $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{2}$ SE $\frac{1}{4}$ , Lot 1	24	22N	22W	2933	2925
SW $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$	27			4225*	4225*
NW $\frac{1}{2}$ NW $\frac{1}{4}$	34			1399*	1207
N $\frac{1}{2}$ NE $\frac{1}{4}$	33			1628*	1820*
SW $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , NW $\frac{1}{2}$ SW $\frac{1}{4}$	33			4160*	3969
NE $\frac{1}{2}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$	32			5749*	5753
SE $\frac{1}{2}$ SE $\frac{1}{4}$	31			0*	204
SE $\frac{1}{2}$ SE $\frac{1}{4}$	13	21N	24W	-	0*
N $\frac{1}{2}$ NE $\frac{1}{4}$	24			2833*	2927*
N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{2}$ NW $\frac{1}{4}$	28			2759	2772
SW $\frac{1}{2}$ SE $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$	29			4806	4987
NW $\frac{1}{2}$ NW $\frac{1}{4}$	32			1021	850
NW $\frac{1}{2}$ SW $\frac{1}{4}$ , NE $\frac{1}{2}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$	31			5803	5694
NW $\frac{1}{2}$ SW $\frac{1}{4}$ , Lots 3 & 4	2	20N	25W	3040	3159
NW $\frac{1}{2}$ SW $\frac{1}{4}$ , Lots 4, 5 & 6	3			5310	5310
Lot 4	4			1460	1490

\* Perpetual R/W Easement Prior to Tribes' Acquisition.

KERR SWITCHYARD

TRIBAL LAND DESCRIPTION

<u>PARCEL</u>	<u>SEC.</u>	<u>TOWNSHIP</u>	<u>RANGE</u>	<u>AREA</u>
N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$	11	22N	21W	210' x 410' (Approx. 1.98 acres)

KERR SWITCHYARD-POWERHOUSE COMMUNICATION CABLE

TRIBAL LAND DESCRIPTION

<u>PARCEL</u>	<u>SEC.</u>	<u>TOWNSHIP</u>	<u>RANGE</u>	<u>APPROX. LENGTH IN FEET (Underground)</u>
NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$	11	22N	21W )	1700
N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$	12		)	

KERR CAMP AND POWERHOUSE ACCESS ROAD

TRIBAL LAND DESCRIPTION

<u>PARCEL</u>	<u>SEC.</u>	<u>TOWNSHIP</u>	<u>RANGE</u>	<u>APPROX. LENGTH OF 60 FT WIDE R/W IN FEET</u>
NW $\frac{1}{4}$ SE $\frac{1}{4}$	13	22N	21W	1300
SE $\frac{1}{4}$ NW $\frac{1}{4}$	13			1500
S $\frac{1}{4}$ SE $\frac{1}{4}$	11			4930
N $\frac{1}{2}$ SE $\frac{1}{4}$	11			630
SE $\frac{1}{4}$ SW $\frac{1}{4}$	11			1640
SW $\frac{1}{4}$ SW $\frac{1}{4}$	12			1300

III.

The term of the rights-of-way hereby consented to shall be as follows:

(a) with respect to the facilities listed in Paragraph I(A) above, commencing on the effective date of the joint license for the Kerr Project issued pursuant to

the settlement described above and continuing for 50 years;  
and

(b) with respect to the road described in Paragraph I(B), commencing on the effective date of such joint license and continuing for so long as the Company owns and operates the Kerr Project pursuant to the joint license or any annual licenses issued upon expiration thereof.

IV.

This consent is limited to a grant of rights-of-way the effectiveness of which is conditioned upon the occurrence of both of the following events:

(a) That a joint license for the Kerr Project be issued and become effective pursuant to the terms of the settlement described above; and

(b) That the Company shall have paid the Tribes as consideration for such rights-of-way the sum of \$53,400 prior to the effectiveness of such joint license.

In the event of the failure of either condition, this consent shall become null and void and no right-of-way shall be issued pursuant thereto and any payment made for such right-of-way will be refunded forthwith.

v.

No consent shall be deemed given hereby other than for rights-of-way fully conforming to the terms described in Paragraphs I through IV above.

\_\_\_\_\_  
Date Chairman of the Tribal Council

\_\_\_\_\_  
Date Tribal Executive Secretary



APPENDIX 2

APPENDIX 2 TO JOINT  
OFFER OF SETTLEMENT

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

The Montana Power Company	)	Project (Nos. 5-004	CONFIDENTIAL
	)	and 2776-000	
Confederated Salish and	)		
Kootenai Tribes of the	)		
Flathead Reservation	)		
The Montana Power Company	)	Project No. 5-003	
	)		
Confederated Salish and	)		
Kootenai Tribes of the	)		
Flathead Reservation	)		
	)		
v.	)	Docket No. EL84-12-000	
	)		
The Montana Power Company	)		

Order Approving Settlement  
( 1985)

On \_\_\_\_\_, 1985, The Montana Power Company ("MPC"), the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes"), the Flathead, Mission, and Jocko Valley Irrigation Districts (jointly, "the Districts"), the Montana Consumer Counsel ("the Consumer Counsel"), and the Secretary of the Interior ("the Secretary") filed with the Commission a proposed settlement in the proceedings referred to above. For the reasons set forth in this order, the settlement appears fair and reasonable and in the public interest, and is therefore approved.

I. Introduction

These proceedings concern the Kerr Project, Project No. 5, an existing three-unit hydroelectric project

with a capacity of some 180 megawatts located on the Flathead River, a navigable waterway of the United States in northwestern Montana. A portion of the Project occupies lands within the Flathead Indian Reservation; those lands are held in trust by the United States for the benefit of the Tribes.

An initial 50-year license to construct and operate the Kerr Project was issued by the Federal Power Commission to the Rocky Mountain Power Company (a subsidiary of MPC) on May 23, 1930. The license was transferred to MPC in 1938. The dam and first generating unit began commercial operation in 1939, the second unit in 1949, and the third unit in 1954.<sup>1</sup>

Under Article 30 of the initial license and applicable law, MPC was required to pay a specified annual charge to the Tribes for the use and occupancy of their lands. That charge was subject to readjustment to reasonable levels at specified intervals after the commencement of commercial operations. The most recent readjustment in the annual charge, to \$2.6 million effective May 23, 1975, was

---

<sup>1</sup> In 1976 the Federal Power Commission deleted from the license certain transmission lines running from Kerr to Missoula (Rattlesnake) and Anaconda to the south, and from Kerr to Thompson Falls to the west, on the ground that such lines were no longer "primary lines" under Section 3(11) of the Federal Power Act. The Kerr switchyard was also deleted. Montana Power Co., 56 F.P.C. 3290 (1976).

the result of a settlement approved by the Commission in 1978.<sup>2</sup>

Article 26 of the original license provided that the licensee make available to the Flathead Irrigation Project, which is managed by the Bureau of Indian Affairs of the Department of the Interior, up to 15,000 horsepower (11.2 megawatts) at specified rates and for specified purposes. The irrigation system of the Flathead Irrigation Project serves lands, most of which are held by non-Indians, and some of which are held by Indians, within the Flathead Reservation.

Article 23 of the initial license authorized MPC to regulate Flathead Lake between elevations 2883 and 2893. A "Memorandum of Understanding" between MPC and the Army Corps of Engineers, dated May 31, 1962, and amended on October 15, 1965, specifies certain elevations that MPC is to seek to attain at given dates in order to accommodate flood control, recreational, and power-production needs.<sup>3</sup> Within the limitations established by the Memorandum of Understanding, MPC has operated the Project in accordance with the Pacific Northwest Coordination Agreement, an agreement among the Government and the owners of various

---

<sup>2</sup> Montana Power Co., 5 FERC ¶ 61,126 (1978). On April 12, 1983, the Tribes complained to the Commission that MPC's payment of the annual charge for 1982 had been untimely. MPC responded on May 12, 1983, and the complaint is now pending before the Commission.

<sup>3</sup> The Federal Power Commission approved the agreement in Montana Power Co., 35 F.P.C. 250 (1966).

projects on the Columbia River and its tributaries concerning the coordination of project operations. Pursuant to that agreement, MPC pays to the United States, and receives from the operators of various downstream projects, annual coordination payments in satisfaction, among other things, of the obligations created by Section 10(f) of the Federal Power Act.<sup>4</sup>

The initial license for Kerr expired by its terms on May 22, 1980. Pending the issuance of a new, long-term license, the Commission has issued an annual license for the Project to MPC for each license year since then.<sup>5</sup> Beginning in 1980, and in each year thereafter, the Tribes have petitioned for readjustment of the annual charge during each annual license period. MPC has opposed such readjustment, and, by order dated June 30, 1983 in Project No. 5-003, the Commission denied each of the Tribes' requests.<sup>6</sup> Appeal of that denial is now pending in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>7</sup>

---

<sup>4</sup> 16 U.S.C. § 803(f). Payments to the Government are for storage benefits conferred by the Hungry Horse Project, operated by the Bureau of Reclamation, in the South Fork of the Flathead River, upstream of Kerr.

<sup>5</sup> See Notice of Issuance of Annual License, 45 Fed. Reg. 27,814 (1980).

<sup>6</sup> Montana Power Co., 23 FERC ¶ 61,464 (1983), rehearing denied, 24 FERC ¶ 61,240 (1983).

<sup>7</sup> Confederated Salish and Kootenai Tribes v. FERC, Case No. 83-1980 (D.C. Cir., petition for review filed September 13, 1983). By order dated October 24, 1984, the court, having been advised of the instant settlement, stayed further proceedings pending Commission action on the settlement.

On June 1, 1976, MPC applied in Project No. 5-004 for renewal of its license. On July 2, 1976, the Tribes filed a competing application (Project No. 2776-000) for the new license. On November 18, 1980, the Commission issued public notice of the applications, and specified a deadline for the filing of competing applications. No other entity applied within the time allowed; nor did any federal agency recommend recapture of the Project under Section 14 of the Federal Power Act.

Intervention was granted to the Districts (representing most owners of irrigable lands served by the Flathead Irrigation Project), the Secretary of the Interior, and to the Montana Consumer Counsel (a state agency created to protect the interests of ratepayers in proceedings before regulatory agencies). Comments on the applications were submitted by the Environmental Protection Agency, the Army Corps of Engineers, the Heritage and Conservation Service of the United States Department of the Interior, the Montana Department of Fish and Game (now the Montana Department of Fish, Wildlife and Parks), and the Fish and Wildlife Service of the Interior Department.

By order dated July 20, 1983, the Commission set the competing applications down for hearing. On October 11, 1983, Presiding Judge Birchman directed the Commission staff to submit an assessment of the need for an environmental impact statement on the proposed relicensing. That assessment, filed on November 1, 1983, and revised on August 31,

1984, concluded that no EIS was necessary, since relicensing would not be a major federal action significantly affecting the quality of the human environment.

Pursuant to a ruling by the Presiding Judge as to the scope of the matters designated by the Commission for hearing, the Tribes filed, on April 16, 1984, an application in Docket No. EL84-12-000 seeking an order to compel MPC to wheel the output of the Kerr Project for the Tribes if they should receive the Kerr license. MPC protested, and by order dated July 25, 1984, the Commission denied the application.<sup>\*</sup> The Tribes' request for rehearing, filed August 24, 1984, is now pending before the Commission.

Hearing sessions in the relicensing proceeding were held at Helena, Montana on July 11-13, and at Missoula on July 16-18. At a prehearing conference on September 6, 1984, however the Presiding Judge deferred further cross-examination to allow the parties to pursue settlement (Tr. 1548-49). Subsequent discussions gave rise to the settlement proposal now before us, in which all parties have joined, and in which the Commission staff concurs.

## II. Terms of Settlement

The terms of the proposed settlement are contained in a Stipulation and Agreement to which is attached a proposed Joint License. The main provisions may be briefly summarized as follows:

---

<sup>\*</sup> Confederated Salish and Kootenai Tribes v. Montana Power Co., 28 FERC ¶ 61,141 (1984).

A 50-year license would issue jointly to MPC and the Tribes. Under that license MPC would hold and operate the Project for the first 30 years of the term, and the Tribes would, upon paying MPC a specified amount (the original cost less depreciation of the Project, with certain adjustments and additions), hold and operate the Project for the balance of the term and any annual-license term thereafter. Conveyance of the Project to the Tribes would occur on a date between the 30th and 40th anniversaries of the license, which date would be designated one year in advance by the Tribes.

The annual charge payable to the Tribes for the use of their lands while MPC owns the Project would be fixed at \$9 million, payable in advance quarterly. That amount would be adjusted every 12 months to reflect changes in the Consumer Price Index. It would not be subject to adjustment or change other than to reflect changes in the CPI unless MPC makes certain expansions of the Project's generating capacity or if the Tribes cease to have the right to acquire the Project, or if the Project reverts to MPC due to the Tribes' failure to pay the full conveyance price.

MPC would undertake, after conveying the Project to the Tribes, to wheel Kerr Project output to points of interconnection with Bonneville Power Administration for a non-discriminatory rate. It would also undertake to train tribal members to operate the Project, beginning five years before conveyance.



MPC, while it owns the Project, would sell power to the Flathead Irrigation Project in the present amounts at an initial rate of 12 mills per kilowatt hour, which roughly approximates the cost of generation with an annual charge of \$9 million. In succeeding years, as the annual charge payable to the Tribes escalates with inflation, so too will the component (initially 8.5 mills) of the rate charged to the Irrigation Project that is attributable to the annual charge. The issue of whether the Flathead Irrigation Project would receive low cost power from the Tribes after they assume operation of the Project would be deferred until 15 years after the effective date of the license, at which point that issue would, on petition by any interested person, become ripe for adjudication by the Commission. If any party wished to claim a larger low-cost block than that made available by MPC to the FIP, such claim would have to be filed within 10 years after the license takes effect, and promptly set for hearing. These requirements are intended to assure that any claim to low-cost power during the Tribes' tenure is resolved soon enough to avoid impeding the Tribes' efforts to market the Project output.

MPC would maintain interim minimum flows of 3,200 cubic feet per second, pending completion of extensive ongoing fish and wildlife studies, subject to certain exceptions. Upon completion of the fish and wildlife studies, MPC would, after consultation with specified agencies, submit plans to protect and enhance the fishery and wildlife resources of

the Project. Those plans would be subject to change after notice and opportunity for hearing. In other respects, subject to further Commission orders after notice and opportunity for hearing, and to fish and wildlife conditions that, upon completion in the previously-described studies, the Secretary may impose, the Project would continue to be operated as at present, i.e., in accordance with the PNCA, and with the 1962 Memorandum of Understanding with the Corps of Engineers, as amended in 1965.

The Stipulation and Agreement also provides that the Tribes will move to dismiss their appeal of the Commission order denying their claim to readjusted charges during the annual license period, grant their consent for MPC to obtain, upon payment of a specified sum, necessary rights of way for certain transmission and switchyard facilities, and consent to the denial of their request for compulsory wheeling in Docket No. EL84-12-000.

By executing the Stipulation and Agreement, the Secretary has given all approvals and consent necessary to implementation of the settlement, and to the Tribes' being bound by the terms thereof.

### III. Discussion

The settlement balances the competing interests of MPC ratepayers, tribal members, and irrigators while protecting fish, wildlife, and environmental values. We therefore approve it.

On the underlying issue of who gets the new license, the parties have agreed to a joint license arrangement under

which, for the first 30 years, MPC's ratepayers will receive part of the benefits of Kerr's relatively low cost generating capability, with the Tribes' members receiving a part of such benefits through the annual charge. For the last 20 years, the Tribes' members will share such benefits with the ratepayers of the utility with whom the Tribes negotiate a sale of the output; the Tribes also will have the benefit of controlling the resource. MPC, by its undertaking to train tribal members and wheel project output for the Tribes, will facilitate the Tribes' assumption of the operator's role.

The annual charge payable by MPC while it operates the project, \$9 million adjusted annually for inflation, likewise represents a substantial increase over the present charge of \$2.6 million, as well as the \$3.25 million advocated by MPC, but is well below the amounts claimed by the Tribes (\$47 million) and the Secretary (\$30 million). Similarly, while MPC will receive a considerably increased rate for power sold to the Flathead Irrigation Project, that rate is still far below the rate at which Bonneville Power Administration supplies the rest of the Irrigation Project's needs.

With respect to recreation, MPC will install and improve certain facilities downstream of the powerhouse to improve access to the lower Flathead River. MPC submitted testimony suggesting that further recreational use of Flathead Lake is of questionable desirability for environmental reasons. No other party (or the staff) asserted the

need for additional recreational facilities beyond those proposed, or for recreation conditions in the license other than those provided by the settlement.

Finally, fish, wildlife, and environmental values are protected and promoted by the settlement. Under the terms of the settlement such specific conditions as appear appropriate and reasonable may be adopted upon completion in 1989 of the extensive fish and wildlife studies now underway in the Project area. In the interim, a new and more restrictive minimum flow requirement will go into effect upon issuance of the new license. If the matter were litigated, there is little chance that a minimum flow provision of any sort could become effective for at least two years, i.e., until the Commission had actually issued its decision on the recipient and terms of a new license.

For the foregoing reasons, the Commission approves the settlement proffered by the parties. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission finds:

(1) The Kerr Project, FERC Project No. 5, as constituted under the license, affects lands of the United States, and is located on a navigable waterway of the United States.

(2) The Applicant, Montana Power Company, is a corporation organized under the laws of the State of Montana.

The Applicant Confederated Salish and Kootenai Tribes of the Flathead Reservation are an Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. Each Applicant has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the applications was given. Three requests to intervene were granted. A Joint Offer of Settlement filed March \_\_, 1985 by the Applicants and all of the intervenors is now before the Commission.

(4) The project will not affect a Government dam, nor will the issuance of a license therefor, as herein provided, adversely affect the development of any water resources for public purposes that should be undertaken by the United States.

(5) Subject to the terms and conditions herein-after imposed, the project is best adapted to a comprehensive plan for improving or developing the waterways involved for the benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

(6) The Secretary has found satisfactory, and approved the terms of, the proposed Joint License.

(7) Pursuant to the Act of March 4, 1929, 45 Stat. 1623, 1640, no administrative charges under 18 C.F.R. Part 11 are applicable to licensees of the Kerr Project.

(8) The amount of the annual charge for the use of 114.6 acres of United States lands should be computed from time to time pursuant to the Commission's regulations.

(9) The term of the license hereinafter authorized is reasonable.

(10) The plans of project structures, insofar as the interests of navigation are concerned, have been approved by the U.S. Department of the Army, Corps of Engineers.

(11) The Applicants have the necessary financial capabilities to construct and operate the project.

(12) The Joint License will not interfere or be inconsistent with the purpose for which the Flathead Indian Reservation was created.

(13) There exists a need for a revised fish and wildlife plan for the project to be submitted after completion of certain studies ongoing within and around the project bounds.

(14) There exists a need for a supplemental recreation plan for the project reflecting certain added facilities proposed by the Applicants.

(15) The Exhibits designated and described in Paragraph (B) below substantially conform to the Commission's Rules and Regulations and should be approved to the extent noted in the ordering paragraphs of this license.

(16) No recommendation for federal takeover has been received.

(17) Takeover of the Kerr Project is unwarranted, and it is in the public interest to issue a new license to the Applicants subject to the terms and conditions herein-after imposed.

(18) This action does not require the preparation of an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq.  
The Commission orders:

I. The Stipulation and Agreement is hereby approved in its entirety and without modification.

II. The Tribes' rehearing request in Docket No. EL84-12-000 is hereby denied, such denial being conditioned on the Joint License becoming effective in accordance with its terms.

III. The Tribes' complaint of April 12, 1983, is hereby denied, such denial being conditioned on the Joint License becoming effective in accordance with its terms.

IV. Within 50 days after the date of the issuance of this order, the joint licensees shall jointly notify the Commission in writing of whether the conditions specified in the Stipulation and Agreement have been satisfied and whether the Joint License can become effective in accordance with its terms.

V. [See Attachment A to the Stipulation and Agreement submitted herewith]

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of March, 1985, caused the foregoing document to be served by hand or by first-class U.S. mail upon the following in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure:

Honorable Bruce L. Birchman  
Presiding Administrative Law Judge  
Federal Energy Regulatory Commission  
825 North Capitol Street, N.E.  
Room 2312  
Washington, D.C. 20426

Richard L. Miles, Esquire  
Office of the General Counsel  
Federal Energy Regulatory Commission  
825 North Capitol Street, N.E.  
Room 8720  
Washington, D.C. 20426

Anne Crichton, Esquire  
Office of the Solicitor  
Room 6446  
U.S. Department of the Interior  
Washington, D.C. 20240

James C. Paine, Esquire  
Montana Consumer Counsel  
34 West 6th Street  
Helena, Montana 59601

Frank J. Martin, Jr., Esquire  
Sutherland, Asbill & Brennan  
1666 K Street, N.W.  
Washington, D.C. 20006

Foster De Reitzes, Esquire  
Heron, Burchette, Ruckert &  
Rothwell  
1025 Thomas Jefferson Street, N.W.  
Suite 700  
Washington, D.C. 20007

*Nicholas W. Fels*  
\_\_\_\_\_  
Nicholas W. Fels