

THIS DOCUMENT CONTAINS
POOR QUALITY PHOTOCOPIESUNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman;
Georgiana Sheldon, J. David Hughes,
A. G. Sousa and Oliver G. Richard III.

Middle Fork Irrigation District) Project No. 4458-002
General Energy Development, Inc.) Project No. 6645-0007

ORDER GRANTING EXEMPTION FROM LICENSING OF A
SMALL HYDROELECTRIC PROJECT OF 5 MEGWATTS OR LESS AND
DENYING A PRELIMINARY PERMIT

(Issued April 6, 1984)

The applicant 1/ filed an application for exemption from all or part of Part I of the Federal Power Act pursuant to 18 C.F.R. Part 4 Subpart K (1980), implementing in part Section 408 of the Energy Security Act ("Act") of 1980, for a project described in the attached public notice. 2/

Notice of the application was published in accordance with Section 408 of the Act and the Commission's regulations and comments were requested from interested federal and state agencies, including the U. S. Fish and Wildlife Service and the state fish and wildlife agency. All comments, protests and motions to intervene that were filed have been considered. No agency has any objection relevant to issuance of this exemption.

Portland General Electric (PGE) and the Columbia River Inter-Tribal Fish Commission (CRITFC) have filed motions to intervene. The CRITFC expressed concern about potential cumulative environmental impacts from proposed hydropower development in the Hood River Basin, with particular emphasis on existing and potential anadromous fisher resources. These concerns, various agency review comments, the transcripts of the public meeting held on this matter in Portland on September 27, 1983, and all other documents filed with the Commission have been examined.

1/ Middle Fork Irrigation District, Project No. 4458, filed February 1, 1983.

2/ Pub. Law 96-294, 94 Stat. 611. Section 408 of the ESA amends inter alia, Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§2705 and 2708).

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This order is consistent with the Commission's decision in Olympus Energy Corporation, Project No. 6617-000, 26 FERC (March 29, 1984), where the Commission indicated that the statutory scheme for exemptions allocates the exclusive responsibility for protecting, as well as analyzing any adverse impacts on, fish and wildlife resources to the fish and wildlife agencies empowered to impose mandatory terms and conditions on exemptions. Thus, the decision on whether to perform an assessment of cumulative environmental impacts on fish and wildlife resources rests with the fish and wildlife agencies. Issuance of an exemption does not interfere with their decision in any case where such agencies have not raised cumulative impact concerns, or where they, or the Commission or its delegate, have included in the exemption an open-ended condition allowing these agencies to add or modify whatever terms they may subsequently determine are necessary and appropriate to mitigate any project impacts, including cumulative, on fish and wildlife resources. Consequently, it is appropriate to grant the exemption application in this case.

The proposed project would be located on a river which is part of the Columbia River Basin. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839 et seq. ("Planning Act"), requires that, in their decision-making process, federal agencies responsible for regulating hydro facilities on the Columbia River or its tributaries provide equitable treatment for fish and wildlife with the other purposes for which such facilities are operated. Section 4(h)(11)(A)(i) of the Planning Act. As explained in Olympus Energy Corporation, supra, Congress has established the need for power from projects that qualify for exemption by declaring in the Energy Security Act, a national policy of reducing America's dependence on imported oil by encouraging small hydroelectric projects. Also, Congress has required the Commission to include in any exemption granted those conditions required by the U.S. Fish and Wildlife Service and the state fish and wildlife agency as necessary for the protection of fish and wildlife resources. Congress has thus built into the exemption program the balancing of energy generation and fish and wildlife resources required by the Planning Act.

The Fish and Wildlife Program, developed pursuant to the Planning Act, requires consolidated review of all proposals for hydroelectric development in a river basin, and requires the assessment of cumulative effects of hydroelectric development on fish and wildlife. Provision 1204 of the Fish and Wildlife Program of the Northwest Power Planning Council. While the program is not binding on it, the Commission must take it into account, "to the

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fullest extent practicable", at each relevant stage of the decision-making process. Section 4(h)(11)(A)(ii) of the Planning Act. As we have noted, assessment and mitigation of environmental impacts, site-specific or cumulative, on fish and wildlife resources of projects proposed for exemptions are within the exclusive purview of the fish and wildlife agencies. Our exemption process accommodates these agencies' decisions on these matters. Therefore, there is no conflict between our action here and the provisions of the Planning Act.

The CRITFC argues that the issuance of the exemption and construction of the project would interfere with treaty-protected fishing rights. As found in Olympus Energy Corp., supra, in exemption proceedings it is the exclusive responsibility of the fish and wildlife agencies to evaluate impacts on fish and wildlife resources and to submit terms and conditions to minimize or eliminate impacts to these resources. To the extent that any treaty fishing rights would be affected by an exemption, it is for the U.S. Fish and Wildlife Service to either submit terms and conditions to avoid the impacts or state that the exemption cannot be issued because of unavoidable impacts.

Environmental Considerations

Standard Article 2, included in this exemption, requires compliance with any terms and conditions that federal or state fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. The terms and conditions referred to in Article 2 are contained in any letters of comment by these agencies which have been forwarded to the Applicant in conjunction with this exemption.

Federal and state fish and wildlife agencies have set terms and conditions to protect fish and wildlife resources of the project area. Should the applicant contest any terms or conditions that were proposed by federal or state agencies in their letters of comment as being outside the scope of Article 2, the Commission shall determine whether the disputed terms or conditions are outside the scope of Article 2.

Based on the terms and conditions required by federal and state fish and wildlife agencies, the environmental information in the application for exemption, other public comments, and staff's independent analysis, it is concluded that the issuance of the exemption as conditioned is not a major federal action significantly affecting the quality of the human environment.

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Competing Applications

Project No. 4458 would consist of existing facilities owned the District, with developments on Clear, Eliot, and Coe Branches of the Middle Fork Hood River and West Evans Creek that would consist of the following: (1) an existing 110-foot-high dam on Clear Branch, and two existing dams on West Evans Creek, 16 feet high and 15 feet high; (2) an existing reservoir on Clear Branch with a surface area of 80 acres and a storage capacity of 3,540 acre-feet at a surface elevation of 2,976 feet (msl); (3) 2 existing sediment basins on West Evans Creek; (4) 3 existing penstocks totaling 27,462 feet in length; (5) an existing 10-foot high 90-foot-long diversion structure on Eliot Branch; (6) 2 existing trapezoidal canals totaling 14,784 feet in length on Coe and Eliot Branches respectively; (7) a 10 foot-high, 90-foot-long diversion structure on Coe Branch; (8) 4 penstocks totaling 24,720 feet in length; (9) 3 powerhouses with a combined rated capacity of 3,250 kW; and (10) a 2.3-mile-long transmission line tying into an existing District line. Flows from Powerhouse No. 3 would discharge into Rogers Creek. The District estimates the combined average annual energy output would be 22.72 million kWh annually.

General Energy Development, Inc.'s (GED) application for preliminary permit, Project No. 6645 proposed two 6-foot-high, 35-foot-long diversion structures; two pipelines, 8,980 feet long and 4,330 feet long, connecting to a 1,750 foot-long penstock; a surge tank; and a powerhouse with a total installed capacity of 2,750 kW. GED estimates that its project would produce an average of 16,101,000 kWh annually. Staff has reviewed both proposals.

Preliminary permit applications are usually speculative in nature and rarely offer substantiated information. Accepted exemption applications are fully developed proposals which are to be put into effect soon after issuance. The Commission's regulations reflect this rebuttable presumption by indicating preference for exemption applications [18 C.F.R. §4.104(e)(1982)]. See also Order No. 106 (Final Rule on 5 Megawatt Exemption), FERC Stat. & Reg. (CCH) ¶30,204 at 31,363 (November 7, 1980). Absent a substantiated showing by the permit applicant that its proposal is superior to that of the exemption proposal, the exemption will be preferred pursuant to Commission regulations. No such showing has been made in this proceeding. The competing permit application is therefore being denied.

Each exemption application is reviewed to determine whether the proposal makes adequate use of the water resources at the site, taking into account other considerations such as environmental constraints. The Commission may require modifications to a

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proposal if it determines them to be necessary to make the development compatible with the public interest, and may reject an application upon finding that it is inconsistent with the public interest [18 C.F.R. §4.104(b)(1982)].

The Commission orders:

(A) General Energy Development, Inc.'s application for preliminary permit for Project No. 6645 is hereby denied.

(B) Middle Fork Irrigation District Hydroelectric Project No. 4458 as described and designated in Middle Fork Irrigation District's application filed on February 1, 1983, is exempted from all of the requirements of Part I of the Federal Power Act including licensing, subject to the standard articles in §4.106 of the Commission's regulations attached hereto as Form E-2, 18 C.F.R. §4.106 45 Fed. Reg. 76115 (November 18, 1980), and the following special Articles.

Article 6. Any exempted small hydroelectric power project that utilizes a dam which is more than 33 feet in height above streambed, as defined in 18 CFR 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 CFR Part 222, is subject to the following provisions of 18 CFR Part 12:

- (i) Section 12.4(b)(1)(i) and (ii), (2)(i), (iii)(A) and (iv), and (v);
- (ii) Section 12.4(c);
- (iii) Section 12.5;
- (iv) Subpart C; and
- (v) Subpart D.

For the purposes of applying these provisions of 18 CFR Part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

Article 7. The construction, operation, and maintenance of the exempt project may be reviewed by the Commission and subjected to further requirements for consistency with the terms and conditions to the regional fish and wildlife program developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

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(C) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Federal Power Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically ordered by the Commission. Failure to file an application for rehearing shall constitute acceptance of this order.

By the Commission. Commissioner Sousa concurred with a separate statement to be issued later.

(S E A L)

Lois D. Cashell
Lois D. Cashell,
Acting Secretary.

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 Project No.: 6645-000

ATTACHMENT (A)

P-4458-002
 UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

Notice of Application Filed with the Commission

(August 22, 1983)

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

- a. Type of Application: Exemption (New or Less)
- b. Project No: 4458-002
- c. Date Filed: February 1, 1983
- d. Applicant: Middle Fork Irrigation District
- e. Name of Project: Middle Fork Irrigation District Hydroelectric
- f. Location: On Clear, Elliot, and Cox Branches of the Middle Fork Road River and West Bruns Creek, in Hood River County, Oregon.
- g. Filled pursuant to: Energy Security Act, 1980 (16 U.S.C. §§ 2705-2706 as amended)
- h. Contact Person: Mr. David E. Nick, P.E., Michener Associates, Inc., P.O. Box 2176, Tri-Cities, Washington 99383
- i. Comment Date: 08/3/83
- j. Competing Application Project No. 6645-000 Date Filed: 8/27/82 Notice issued March 11, 1983

k. Description of Project: The proposed project, consisting of existing facilities owned by the Middle Fork Irrigation District (District) with developments on Clear, Elliot, and Cox Branches of the Middle Fork Road River and West Bruns Creek would consist of: (1) an existing 110-foot-high dam on Clear Branch, and 2 existing dams on West Bruns Creek, 14-foot-high and 15-foot-high; (2) an existing reservoir on Clear Branch with a surface area of 80 acres and a storage capacity of 3,546 acre-feet at a surface elevation of 2,976 feet (eal); (3) 3 existing sediment basins on West Bruns Creek; (4) 3 existing penstocks totaling 27,443 feet in length; (5) an existing 10-foot-high, 90-foot-long diversion structure on Elliot Branch; (6) 2 existing unspecialized weirs totaling 14,704 feet in length on Cox and Elliot Branches respectively; (7) a 10-foot-high, 10-foot-long diversion structure on Cox Branch; (8) 4 penstocks totaling 24,728 feet in length; (9) 3 penstocks with a combined rated capacity of 3,258 kw; and (10) a 2.3-mile-long transmission line tying into an existing district line. Flows from structures No. 3 will discharge into Rogers Creek. The combined estimated average annual energy output would be 22.72 million kWh.

Purpose of Exemption - In exemption, if issued, gives the Exemptee priority of control, development, and operation of the project under the terms of the exemption from licensing, and protects the Exemptee from permit or license applicants that would seek to take or develop the project.

l. Purpose of Project: Project power will be sold to Pacific Power and Light Company

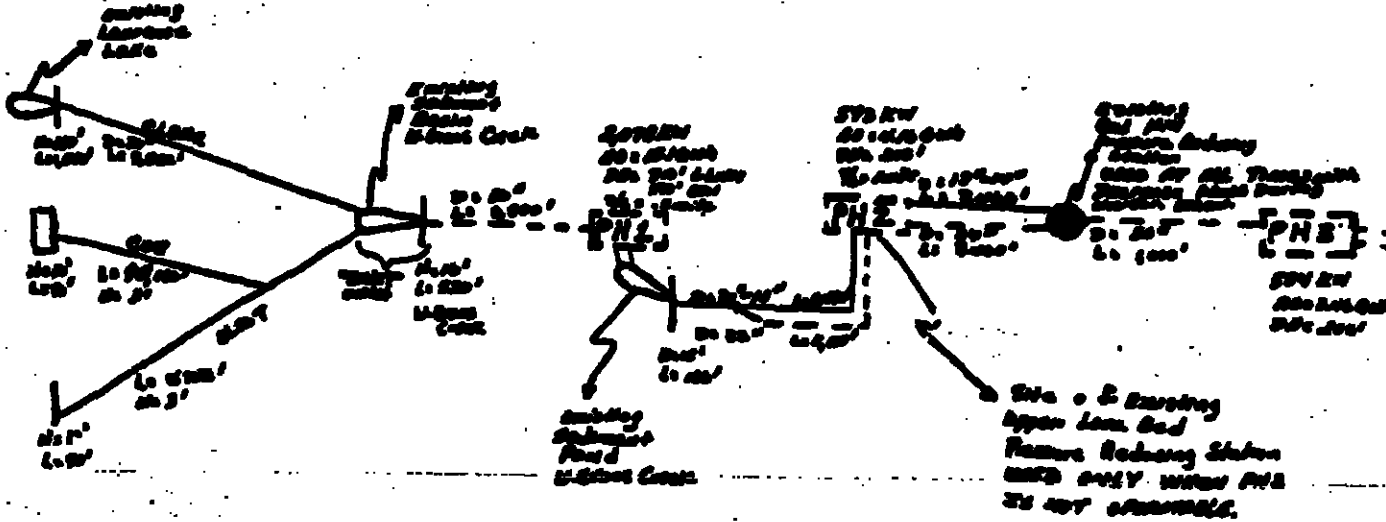
m. This notice also consists of the following standard paragraphs: A2, A9, B, C and D1a

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ATTACHMENT (A)

Middle East Tapped District
P. 4455-002

FERC NO. 4455-002



AFTER PHS DISCUSSIONS
 WITH BUREAU ASKED
 PHS AND OTHER USE
 OF NOTES.

Legend:
 — Existing
 - - - Proposed
 > Remain or settlement point

Agency Comments - The U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State Fish and Game agencies are requested, for the purpose set forth in section 404 of the Energy Security Act of 1980, to file within 60 days from the date of issuance of this notice appropriate terms and conditions to protect any fish and wildlife resources or to otherwise carry out the provisions of the Fish and Wildlife Coordination Act. General comments concerning the project and its resources are requested, however, specific terms and conditions to be included as a condition of exemption must be clearly identified in the agency letter. If an agency does not file terms and conditions within this time period, that agency will be presumed to have none. Other Federal, State, and local agencies are requested to provide any comments they may have in accordance with their duties and responsibilities. No other formal requests for comments will be made. Comments should be confined to substantive issues relevant to the granting of an exemption. If an agency does not file comments within 60 days from the date of issuance of this notice, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kenneth F. Plumb
 Secretary

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Attachment
E-2 Form

§ 4.106 Standard terms and conditions of exemption from 1

Any exemption from licensing granted under this subpart a small hydroelectric power project is subject to the following standard terms and conditions:

(a) Article 1. The Commission reserves the right to investigations under sections 4(g), 306, 307, and 311 of the Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption and issue a suitable order under section 4(g) of the Federal Power Act or take appropriate action for enforcement, forfeiture, or suspension under Part III of the Federal Power Act.

(b) Article 2. The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that any Federal or state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish and wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act, as specified in Exhibit A of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

(c) Article 3. The Commission may accept a license application by any qualified license applicant and revoke this exemption if actual construction or development of any proposed generating facilities has not begun within 18 months, or been completed within four years, from the date on which this exemption was granted. If an exemption is revoked, the Commission will not accept a new

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Attachment
E-2 Form

(d) Article 4. This exemption is subject to the navigable servitude of the United States if the project is located on navigable waters of the United States.

(e) Article 5. This exemption does not confer any right to use or occupy any Federal lands that may be necessary for development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal land agencies. The Commission will not accept a license application by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

Document Content(s)

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