

October 1, 2007

Via electronic filing

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: PPL Montana, LLC – Mystic Lake Hydroelectric, Project No. 2301-022

Dear Secretary Bose:

Enclosed for filing in the above-referenced sub-docket, please find Comments of PPL Montana on Environmental Assessment for the Mystic Lake Hydroelectric Project.

Thank you.

Very truly yours,

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP



By
Elizabeth Thomas

ET:klv
Enclosure

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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)	
PPL Montana, LLC)	Project No. 2301-022
)	
Mystic Lake Hydroelectric Project)	
)	
_____)	

**COMMENTS OF PPL MONTANA ON ENVIRONMENTAL ASSESSMENT FOR
THE MYSTIC LAKE HYDROELECTRIC PROJECT**

Pursuant to the Commission’s August 17, 2007 Notice of Availability of Environmental Assessment (“EA”), PPL Montana, LLC submits the following Comments regarding FERC’s Environmental Assessment for the Mystic Lake Hydroelectric Project, P-2301-022. Through these comments PPL Montana demonstrates that construction of the West Rosebud reregulation reservoir was fully authorized prior to establishment of the Absaroka-Beartooth Wilderness, and accordingly the Commission has full authority to issue a license providing for continued operation of that reservoir.

I. Procedural History

On December 15, 2006, PPL Montana filed an application for a New Major License for its Mystic Lake Hydroelectric Project, P-2301. The entire Mystic Project is located on Forest Service land in the Custer National Forest. Three months prior to PPL Montana’s filing for the new license, FERC staff informed PPL Montana that minor overlaps of the Mystic Project boundary with the

Absaroka-Beartooth (“A-B”) Wilderness Area may impact FERC’s ability to relicense the Mystic Project without significant changes to project operations in order to avoid overlap with the A-B Wilderness Area.

The Mystic Lake Project has two reservoirs: Mystic Lake, above the dam and powerhouse; and West Rosebud Lake, below the powerhouse, which provides a re-regulation function to improve downstream flows. Although none of the dams or other structures associated with the Mystic Lake Project is within the boundaries of the A-B Wilderness Area, the upper tip of the Mystic Lake Reservoir (8.2 acres) and the edge of the West Rosebud Lake Re-regulation Reservoir (0.9 acre) encroach on the A-B Wilderness Area. EA at 18.

On May 3, 2007, the U.S. Forest Service submitted its Preliminary Terms, Conditions, and Recommendation for the Mystic Project, which are “subject to modification if it is determined that project operations will change as a result of the final boundary determination for the Absaroka-Beartooth Wilderness.” See May 3, 2007 Forest Service Filing Cover Letter at 1. On June 18, 2007, PPL Montana filed Reply Comments to the Forest Service’s Preliminary Terms, Conditions, and Recommendation, explaining that the caveat in the Forest Service’s Preliminary Terms, Conditions, and Recommendation is unnecessary because the Commission is authorized to relicense the Mystic Project to continue its current reservoir operations without change, regardless of any overlap of the Mystic Project boundary and the A-B Wilderness Area boundary.

On August 17, 2007, FERC issued its Environmental Assessment (“EA”) for the relicensing of the Mystic Lake Hydroelectric Project. The Environmental

Assessment notes that “[p]ortions of the project also occupy the Absaroka-Beartooth Wilderness Area” (EA at vii, 8), but rejected as unreasonable a proposed alternative that would have required PPL Montana to lower the Mystic Lake and West Rosebud Lake reservoirs in order to avoid overlapping the A-B Wilderness boundaries. EA at 18-21. FERC concluded that drawdowns would have negative environmental impacts on fisheries, recreation, and aesthetics, and could lead to significant erosion problems at West Rosebud Lake. EA at 19-20.

On September 28, 2007, the Forest Service submitted its comments on FERC’s EA (“FS EA Comments”). The Forest Service appears to be concerned that because construction of the West Rosebud Lake reservoir was not completed until after Congress authorized the A-B Wilderness Area, presidential or congressional authorization may be necessary:

Through the re-licensing efforts it was determined that a portion of the main Mystic Lake reservoir and a portion of the West Rosebud Lake is within the A-B Wilderness. Construction of the West Rosebud re-regulation dam which created West Rosebud Lake was completed after A-B Wilderness designation. According to the Wilderness Act, Presidential approval for that project must be obtained or the wilderness boundary must be modified. During the review of the A-B Wilderness files it was obvious that the intent was to exclude the Mystic Lake Project from the A-B Wilderness at the time of the designation. We understand that you have received a letter from the Montana Delegation in support of the project, even though a portion is within the A-B Wilderness. However, your [EA] does not include any of this information. We suggest you include a discussion why Presidential approval or boundary adjustment was not pursued.

FS EA Comments at 1-2 (emphasis added).

II. PPL Montana's Comments

As explained in PPL Montana's June 18, 2007 Reply Comments to the Forest Service's Preliminary Terms, Conditions, and Recommendation, FERC has the authority to relicense current operations at the Mystic Lake project without congressional or presidential authorization. The Forest Service contends that the EA should explain why Presidential approval or a boundary adjustment is not required. FS EA Comments at 2. Rather than repeat the analysis in its June 18, 2007 Reply Comments to the Forest Service's Preliminary Terms, Conditions, and Recommendation, PPL Montana refers the Commission to that analysis, which explains why FERC may license the Mystic Lake Project even with the minor reservoir overlaps.

PPL Montana files these additional comments to address the question of whether the fact that construction of the West Rosebud Lake reservoir was not completed until after Congress authorized the A-B Wilderness Area somehow undermines the conclusion that presidential and congressional authorization are not required for FERC to relicense the Mystic Lake project with the existing boundary overlaps. See FS EA Comments at 1 ("Construction of the West Rosebud re-regulation dam which created West Rosebud Lake was completed after A-B Wilderness designation."). In short, the answer is no because the authorization for that reservoir pre-dates creation of the Wilderness.

A. Project History

PPL Montana provides the following history of the Mystic Lake Project in order to clarify when FERC authorized various aspects of the Mystic Lake

Project, including the West Rosebud Lake reservoir, and when Congress authorized the A-B Wilderness Area:

1920s: The Montana Power Company built the Mystic Lake Project.

1962: The Federal Power Commission licensed the Project for the first time.

Montana Power Co., 28 F.P.C. 586 (1962). The Project did not include the West Rosebud Lake re-regulating reservoir.

October 5, 1976: FERC relicensed the Project. *Montana Power Co.*, 56 F.P.C.

2008 (1976). The 1976 license expires on December 31, 2009. It authorized the construction of the West Rosebud Lake re-regulating reservoir.

March 27, 1978: Congress created the A-B Wilderness Area, a combination of

more than 900,000 acres from the Custer and Gallatin National Forests. P.L. 95-249, 92 Stat. 162 (March 27, 1978).

October 1978: The Montana Power Company completed construction of the

dam that created the West Rosebud Lake re-regulating reservoir, as authorized by FERC's October 1976 relicensing order.

November 1982: The Forest Service adopted the Absaroka-Beartooth

Wilderness Management Plan that concluded that the Project was consistent with the A-B Wilderness Area. Absaroka-Beartooth Wilderness Management Plan, U.S. Dep't of Agric. (Nov. 1982), at 158-59 in Appendix II to the 1986 Custer National Forest Management Plan ("The existing dam and reservoir at Glacier Lake under permit held by the State of Montana, **and that portion of the Mystic Lake hydroelectric project**

under permit to Montana Power Company, are consistent with the Wilderness Act direction and will be retained and continued." (emphasis added)).

B. Congress Should Be Presumed to Have Acted in 1978 with Knowledge of FERC's 1976 Authorization of the West Rosebud Lake Reservoir

The Forest Service's September 28, 2007 comments on FERC's EA suggest that because the West Rosebud Lake reservoir was not constructed until after Congress authorized the A-B Wilderness Area, presidential or congressional authorization may be necessary in order for FERC to relicense the project at current reservoir levels. FS EA Comments at 1. PPL Montana believes that this conclusion is inaccurate, as Congress must be presumed to have acted in 1978 with knowledge of FERC's 1976 authorization of the West Rosebud Lake Reservoir. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Accord, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("[w]e assume that Congress is aware of existing law when it passes legislation" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990))).

Furthermore, PPL Montana notes that FERC's 1976 authorization of the West Rosebud Lake Reservoir was based on the environmental benefits that would result from the creation of the reservoir. See *Montana Power Co.*, 58 F.P.C. 2008, 2014 (Oct. 5, 1976) ("Resulting beneficial effects from construction

of the re-regulating reservoir include (1) an increase in the dependable capacity of the project, (2) a uniform minimum stream flow of 20 cfs downstream from the reregulating dam (except when natural inflow is less than 20 cfs or when maintenance of facilities prevents such a release), and (3) less ice formation in West Rosebud Creek and West Rosebud Reservoir, thereby enhancing the winter habitat for trout.”). As a result, PPL Montana believes that FERC can infer that Congress did not intend to disturb the environmental benefits obtained by the authorization of the West Rosebud Lake reservoir in 1976 when it authorized the A-B Wilderness Area in 1978.

C. Congress Could Not Disturb the Vested Rights of Montana Power Company When it Passed the 1978 A-B Wilderness Area Legislation

PPL Montana’s conclusion that congressional or presidential authorization is not required even though the West Rosebud Lake reservoir was constructed after the passage of the 1978 A-B Wilderness Area legislation is bolstered by the fact that Congress could not disturb vested rights.

Section 3 of the 1978 A-B Wilderness Area legislation incorporated by reference all of the provisions of the 1964 Wilderness Act. P.L. 95-249, 92 Stat. 162 (March 27, 1978) (“The Absaroka-Beartooth Wilderness shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act governing the areas designated by the Act as wilderness areas, . . .”). The 1964 Wilderness Act provides that “Except as specifically provided for in this chapter, **and subject to existing private rights**, there shall be no commercial enterprise and no permanent road within any wilderness area

designated by this chapter ...[.]” 16 U.S.C. § 1133(c). PPL Montana obtained the right and obligation to build the West Rosebud Lake reservoir in October 1976 when FERC relicensed the Mystic Lake Project with the addition of the West Rosebud Lake reservoir. See *Montana Power Co.*, 56 F.P.C. 2008 (Oct. 5, 1976). As a result, the 1978 authorization of the A-B Wilderness Area was subject to the 1976 right to construct and operate the West Rosebud Lake reservoir.

D. FERC May Conclude that Both the Mystic Lake and West Rosebud Lake Reservoirs are Consistent with the A-B Wilderness Area and that Congressional or Presidential Authorization of the Boundary Overlap is Unnecessary.

FERC authorized the West Rosebud Lake re-regulation dam and reservoir on October 5, 1976, approximately a year and a half prior to the passage of the A-B Wilderness legislation. See *Montana Power Co.*, 56 F.P.C. 2008 (Oct. 5, 1976); P.L. 95-249, 92 Stat. 162 (March 27, 1978). Under Section 4(e), FERC has the authority to license a project in a wilderness area so long as it concludes that the project does not interfere with and is not inconsistent with the federal reservation and so long as it includes the Section 4(e) conditions provided by the federal agency responsible for the reservation. 16 U.S.C. § 797(e).

Congressional authorization of a wilderness area that overlaps a pre-existing FERC project provides prima facie evidence that Congress has already determined that the FERC project does not "interfere" and is not "inconsistent with the purpose for which such [federal] reservation was created or acquired."

Id. FERC relicensed the Mystic Lake Project in 1976, including the construction of the West Rosebud Lake dam and reservoir. The fact that the dam and

reservoir were not constructed until a few months after the passage of the 1978 A-B Wilderness Area legislation does not change this analysis of FERC's authority to conclude that the Mystic Lake Project does not "interfere" with and is not "inconsistent" with the purposes of the A-B Wilderness Area.

III. Conclusion

PPL Montana concludes that the Commission has the authority to relicense the Mystic Project without any changes to project operations to account for the overlap between the FERC project boundary and the A-B Wilderness Area, even where the West Rosebud Lake Reservoir was constructed after the passage of the A-B Wilderness Act.

DATED this 1st day of October, 2007.

KIRKPATRICK & LOCKHART
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading this 1st day of October, 2007 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Margaret V. Dorr
Margaret V. Dorr

Dated at Washington, D.C., this 1st day of October, 2007