

155 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Twin Lakes Canal Company

Project No. 12486-008

ORDER DENYING APPLICATION FOR LICENSE

(Issued June 16, 2016)

1. On November 27, 2013, Twin Lakes Canal Company (Twin Lakes) filed an application for an original major license under Part I of the Federal Power Act (FPA) to construct, operate, and maintain the proposed 10-megawatt (MW) Bear River Narrows Project No. 12486, to be located on the Bear River in Franklin County, Idaho. The project would occupy approximately 89 acres of federal land managed by the U. S. Department of the Interior's Bureau of Land Management (BLM). For the reasons discussed below, we deny the license application.

I. Background

2. The Bear River originates in the Uinta Mountains of Utah and flows north into Wyoming and Idaho before turning south and returning to Utah, eventually flowing into the Great Salt Lake. From its headwaters to its mouth, the Bear River extends approximately 500 miles and drains a basin of approximately 7,500 square miles.

3. The Bear River is highly regulated to meet year-round contractual irrigation requirements, to generate hydropower, to enhance recreation, fish, and wildlife, and to provide flood protection. Approximately 500 irrigation organizations, including Twin Lakes, own and operate irrigation systems and water storage and irrigation dams in the Bear River watershed.

4. Four developments with licensed hydropower facilities are located on the Bear River, including the Soda, Grace, and Oneida developments that are part of PacifiCorp's Bear River Project No. 20 (Bear River Project). The Bear River Project was relicensed in 2003 (2003 order) for a term of 30 years.¹ The 2003 order includes, as license

¹ *PacifiCorp*, 105 FERC ¶ 62,207 (2003).

conditions, portions of a settlement agreement that was entered into by PacifiCorp and 15 other relicensing participants.² Consistent with that agreement, the Bear River Project license requires PacifiCorp to implement recreation, land management, and fishery mitigation measures below the project's Oneida development. For example, the new license required PacifiCorp to extend its project boundary roughly 3 miles downstream of the Oneida development to protect and enhance recreational resources in the reach and to improve facilities at BLM's Redpoint Campground,³ to make whitewater flow releases from the Oneida development,⁴ and to implement measures to restore Bonneville Cutthroat Trout (BCT) and its habitat in the Bear River below the Oneida development.⁵

5. Twin Lakes proposes to construct the Bear River Narrows Project dam approximately 5 miles downstream of the Oneida development in the Oneida Narrows Canyon, a scenic canyon with steep cliffs, mountainous terrain, wildlife, and riverine-riparian vegetation. The project would inundate a 4.5-mile stretch of the canyon.

A. Project Description

6. The Bear River Narrows Project would include a new, 690-foot-long, 109-foot-high earthen dam, a 4.5-mile-long reservoir with a surface area of 362 acres and a storage capacity of 12,647 acre-feet of water, and a powerhouse containing two generating units with a total installed capacity of 10 MW. The reservoir would extend from the dam to 0.8 miles downstream of the Oneida development. Twin Lakes plans to fill the reservoir using unallocated water available in the Bear River during the non-agricultural season from October 1 to April 15.

² The signatories to the Bear River Project Settlement Agreement include PacifiCorp, the U.S. Fish and Wildlife Service (FWS), BLM, the National Park Service (NPS), the U.S. Forest Service, Shoshone-Bannock Tribes, Idaho Department of Environmental Quality, Idaho Department of Fish and Game, Idaho Department of Parks and Recreation, Idaho Council of Trout Unlimited, Idaho Rivers United, Greater Yellowstone Coalition, American Whitewater, and other individuals.

³ *PacifiCorp*, 105 FERC ¶ 62,207 at 64,471 (Article 204).

⁴ *Id.* at 64,479 (Article 420).

⁵ See Article 403 (Comprehensive Bonneville Cutthroat Trout Restoration Plan), Article 404 (plan for stocking of native BCT), Article 405 (plan for restoring aquatic and riparian habitat for BCT and other fish and wildlife resources), and Article 406 (plan for acquiring land and water rights) of the Bear River Project license. *PacifiCorp*, 105 FERC ¶ 62,207 at 64,473-75.

7. For about one half of the year, Twin Lakes would operate the project so that outflows match releases made from the Oneida development. Twin Lakes would maintain the new reservoir at a constant water level of 4,734 feet mean sea level (msl). From mid-April through September, Twin Lakes would release water for irrigation and maintain a minimum reservoir level of 4,718 feet msl. During drought conditions, which typically occur in 13 out of 20 years,⁶ Twin Lakes proposes to transfer up to 5,000 acre-feet of water to its irrigation system to distribute to its shareholders. Twin Lakes would release the water from the reservoir downstream into the Bear River and then pump the water into its irrigation system water canal via a new pumping station that would be located 0.8 miles downstream of the proposed powerhouse.

8. The proposed reservoir would flood PacifiCorp's three project-recreation areas below its Oneida development and would eliminate the need for releasing whitewater flows below the Oneida dam as required by the Bear River Project license.⁷ The proposed reservoir would also flood PacifiCorp conservation lands within the Bear River Project boundary that are managed to minimize effects on natural resources and protect the shoreline.⁸ Further, the project reservoir would affect PacifiCorp's implementation of the license measures to restore the BCT.⁹

9. Twin Lakes proposes several measures to mitigate the effects of the proposed project reservoir on recreation, wildlife, and fishery resources, including: creating a 100-foot shoreline buffer around the perimeter of the proposed reservoir; enhancing riparian vegetation along the perimeter of its Condie and Winder irrigation storage reservoirs located on Battle Creek, a tributary of the Bear River, in Franklin County, Idaho; releasing a 10-cubic feet per second (cfs) minimum flow from its irrigation system diversion dam on Mink Creek, a tributary of the Bear River;¹⁰ and constructing recreational facilities and enhancing riparian vegetation at the Ben Johnson Family Farm (Johnson Farm), a 538-acre property along the Bear River approximately 12 miles downstream of the proposed dam.

⁶ EIS at 59.

⁷ *PacifiCorp*, 105 FERC ¶ 62,207 at 64,478, 64,480 (Articles 416, 420).

⁸ *Id.* at 64,481-82 (Articles 424, 425).

⁹ *Id.* at 64,472-75 (Articles 403, 404, 405, 406).

¹⁰ Mink Creek enters the Bear River 1.2 miles downstream of the proposed project dam.

B. Procedural History

10. On October 17, 2014, the Commission issued a notice of Twin Lakes' application, establishing, December 16, 2014, as the deadline for filing protests and motions to intervene. The U.S. Forest Service (Forest Service), U.S. Department of the Interior (Interior), Idaho Department of Environmental Quality (Idaho DEQ),¹¹ Idaho Department of Fish and Game (Idaho DFG), Idaho Department of Water Resources (Idaho DWR), and Idaho Water Resources Board (Idaho Water Board) filed notices of intervention.¹² Oneida Narrows Organization, Greater Yellowstone Coalition, Franklin County Fish and Game Association, Yellowstone to Uintas Connection, American Whitewater and Idaho Rivers United, the Johnson Farm, Trout Unlimited, PacifiCorp, Idaho Department of Parks and Recreation, Idaho State Board of Land Commissioners, Bear Lake Watch, and Shoshone-Bannock Tribes filed timely motions to intervene.¹³ Great Salt Lakekeeper, Salt Lake County Fish and Game Association, and American Rivers also filed timely motions to intervene.¹⁴

11. All the intervenors and many commenters oppose the project, arguing that it would adversely affect the natural landscape, vegetation, water quality, BCT, and whitewater boating, tubing, and fishing opportunities, and would be inconsistent with comprehensive plans. PacifiCorp argues that the proposed project would require it to

¹¹ The State of Idaho Agencies filed their notices of intervention and motions to intervene in the same filing. *See* State of Idaho Agencies' December 16, 2014 filing.

¹² Under Rule 214(a) of the Commission's Rules of Practice and Procedure, the Forest Service, Interior, Idaho DEQ, Idaho DFG, Idaho DWR, and Idaho Water Board became parties to the proceeding upon the timely filing of their notices of intervention. 18 C.F.R. § 385.214(a) (2015).

¹³ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2015).

¹⁴ Great Salt Lakekeeper, Salt Lake County Fish and Game Association, and American Rivers filed motions to intervene during the comment period on the draft Environmental Impact Statement (EIS). Under the Commission's regulations, if an entity files a motion to intervene within the comment period for a draft EIS, it will be considered timely. 18 C.F.R. § 380.10(a) (2015). On December 17, 2014, Great Salt Lakekeeper filed a late motion to intervene. Because Great Salt Lakekeeper filed a timely intervention during the draft EIS comment period, we dismiss its December 17, 2014 late motion as moot.

amend its license, which it asserts is barred by section 6 of the FPA.¹⁵ In addition, Interior argues that the project would be inconsistent with the Oneida Narrows Research Natural Area (Oneida Narrows RNA), which BLM designated to protect terrestrial resources.¹⁶ We also received numerous comments from individuals in support of the project, arguing that the project's water storage would help Twin Lakes' irrigation shareholders produce crops during drought conditions.

12. On September 30, 2015, Commission staff issued a draft Environmental Impact Statement (EIS). The draft EIS evaluated the project proposal and three project alternatives – no-action, a staff licensing alternative, and a staff licensing alternative with agencies' mandatory conditions. Commission staff's licensing alternative includes most of Twin Lakes' measures and all but one mandatory condition,¹⁷ and recommends additional mitigation. The draft EIS recommended against licensing the project, because the project would result in significant, unavoidable adverse effects on recreation, BCT, wildlife, and aesthetics, and would eliminate resources set aside in BLM's Oneida Narrows RNA.

13. The Commission received several comments on the draft EIS, which reiterated the project's benefits and adverse effects. On April 27, 2016, Commission staff issued a final EIS that recommended license denial for the reasons described above.¹⁸ References in this order to the EIS are to the final EIS, unless otherwise noted.

¹⁵ Section 6 of the FPA requires that amendments to licenses be mutually agreed upon by the licensee and the Commission. 16 U.S.C. § 799 (2012).

¹⁶ Many of the issues raised were raised during the preliminary permit proceedings for the Bear River Narrows Project and for another contemplated project located at the project site. See *Twin Lakes Canal Co.*, 141 FERC ¶ 62,224 (2012); *Twin Lakes Canal Co.*, 126 FERC ¶ 62,097 (2009); *Twin Lakes Canal Co.*, 110 FERC ¶ 62,097 (2005); *Symbiotics, LLC*, 99 FERC ¶ 61,101 (2002). In the course of those proceedings, Twin Lakes stated that it understood the conflicts surrounding the proposed project and acknowledged that it must address these issues in any license application it would file. *Twin Lakes Canal Co.*, 126 FERC ¶ 62,097 at P 12; *Twin Lakes Canal Co.*, 110 FERC ¶ 62,097 at 64,216.

¹⁷ Commission staff's licensing alternative does not include BLM's condition requiring a law enforcement and emergency services plan. EIS at 28.

¹⁸ We note that Twin Lakes' request for water quality certification under section 401 of the Clean Water Act is pending before the Idaho DEQ.

II. Discussion

14. As discussed below, while we recognize the potential benefits of the Bear River Narrows Project, we conclude, consistent with staff's findings, that the project's unmitigable adverse impacts outweigh its benefits such that we must deny the application.

A. Section 4(e) Consistency Finding

15. Section 4(e) of the FPA provides that the Commission can issue a license for a project located within a federal reservation only if it finds that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.¹⁹ Federal reservations include lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws,²⁰ such as an RNA designated by BLM.²¹

16. In the 1988 Pocatello Resource Management Plan (Pocatello Plan), BLM established the Oneida Narrows RNA to protect the native box elder plant community.²² In Idaho, box elder occurs naturally only in the southeastern corner of the state including on 4 acres of the Oneida Narrows RNA.²³ In the 2012 revised Pocatello Plan, BLM expanded the purpose of the Oneida Narrows RNA to protect nearly pristine plant communities including box elder, bigtooth maple, Rocky mountain juniper, and bunchgrass, and to protect bald eagle and rock squirrel habitats.²⁴

¹⁹ 16 U.S.C. § 797(e) (2012).

²⁰ *Id.* § 796(2).

²¹ An RNA is a land management status and type of Area of Critical Environmental Concern. It reserves the area for uses that are compatible with the designated resource of the area that is to be protected. The Federal Land Policy and Management Act of 1976 authorizes Interior to promulgate regulations that establish Areas of Critical Environmental Concern. *See* 43 U.S.C. § 1701(a)(11) (2012).

²² BLM December 8, 2011 filing at 4.

²³ License Application at E9-19, E9-21.

²⁴ *See* BLM Record of Decision and Pocatello Field Office Approved Resource Management Plan at 155 (2012) (Pocatello Plan), https://eplanning.blm.gov/epl-front-office/projects/nepa/32803/38772/40677/Pocatello_508_ARMP_doc.pdf.

17. The Bear River Narrows Project would occupy 89 acres of the Oneida Narrows RNA, 55 of which would be inundated by the project's dam. The reservoir would eliminate the 4 acres that box elder communities occupy and would flood squirrel burrowing habitat and suitable bald eagle nesting and perching habitat that the RNA set aside. Moreover, the Energy Policy Act of 1992 requires Twin Lakes to obtain a right of way from BLM to occupy its land.²⁵ The Pocatello Plan, however, identifies the Oneida Narrows RNA as an area where rights of way are not allowed.²⁶

18. Thus, the construction and operation of the Bear River Narrows Project would affect BLM's Oneida Narrows RNA in a way that would foreclose attainment of BLM's management goals and objectives for the Oneida Narrows RNA. Consequently, BLM argued, and we find, that the proposed project would interfere and be inconsistent with the designated purpose of the Oneida Narrows RNA.²⁷ This conclusion requires us to deny Twin Lakes' license application for the Bear River Narrows Project.²⁸

B. Balancing of Development and Non-Developmental Purposes

19. Even if we did not find that the project interfered or was inconsistent with the purposes of the Oneida Narrows RNA, we would nonetheless deny the license.

20. Section 4(e) of the FPA requires the Commission, in acting on license applications, to "give equal consideration to the purposes of energy conservation, protection, mitigation of damage to, and enhancement of fish and wildlife including related spawning grounds and habitat), the protection of recreational opportunities, and

²⁵ P.L. No. 102-486, 106 Stat. 2776-3133 (Oct. 24, 1992).

²⁶ Pocatello Plan at 84. Interior also states that BLM would not support amending its plan to accommodate the project. *See* Interior November 30, 2015 filing at 8-9.

²⁷ *See* Interior November 30, 2015 filing at Appendix C.

²⁸ The Commission has previously denied a license application because the proposed project would be inconsistent or interfere with the section 4(e) reservation in which it would occupy. *See, e.g., Rainsong Co.*, 78 FERC ¶ 61,352 (*Rainsong*), *reh'g denied*, 79 FERC ¶ 61,338 (1997). Because we find that the license application would be inconsistent with the purposes for which the reservation was created, we are not required to balance the developmental and non-developmental values of the project under sections 4(e) and 10(a) of the FPA to deny the license application. *See Rainsong*, 78 FERC ¶ 61,352 at 62,484.

the preservation of other aspects of environmental quality.”²⁹ In adding this language to section 4(e) in 1986, Congress expressed the view in its Conference Report that:

[T]here are instances in which careful and thoughtful consideration of the impact of a proposed project would and should lead to the conclusion that an original license ought not to be issued If nonpower values cannot be adequately protected, [the Commission] should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license³⁰

1. Recreation and Aesthetic Resources

21. Recreationists visit Oneida Narrows Canyon for hiking, camping, wildlife viewing, and river-based trout fishing. The Class I and II whitewater rapids on the Bear River in the Oneida Narrows reach also attract whitewater kayaking, canoeing, and tubing enthusiasts.³¹ Many novice kayakers and canoers use the reach because its rapids are easier for beginners to navigate. Twin Lakes estimates that the project area attracts 55,559 recreation-days per year, of which about 26,000 (47 percent) are for angling and 21,000 (38 percent) for whitewater boating or tubing.³²

²⁹ 16 U.S.C. § 797 (2012). In addition, section 10(a)(1) of the FPA requires that any license issued by the Commission must be “best adapted to a comprehensive plan for improving or developing a waterway or waterways” 16 U.S.C. § 803(a) (2012).

³⁰ See *Rainsong*, 78 FERC ¶ 61,352 at 62,485-86 (citing to Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 21-22 (1986)).

³¹ See American Whitewater's website, which sets forth the International Scale of River Difficulty, American version: [http:// www.americanwhitewater.org/archive/safety/safety.html](http://www.americanwhitewater.org/archive/safety/safety.html). Whitewater (either an individual rapid, or the entire river) is classed in six categories from Class I (the easiest and safest) to Class VI (the most difficult and most dangerous). The Classes reflect both the technical difficulty and the danger associated with a rapid. Class I rapids are characterized by fast-moving water with riffles and small waves, and few obstructions. Class II rapids are straightforward rapids with wide, clear channels that are evident without scouting, and may require occasional maneuvering.

³² A “recreation day” is defined as a visit by a person to a project development for recreational purposes during any portion of a 24-hour period.

22. As noted above, the project area contains three formal project recreational facilities of PacifiCorp's Bear River Project: a river access site immediately downstream of the Oneida development; BLM's Redpoint Campground, located about 2 miles downstream of the Oneida development; and a boater take-out located about 4.5 miles downstream of the Oneida development.³³ In addition, many informal parking areas and pullouts are located along Oneida Narrows Road, which runs alongside the Bear River. Recreationists also benefit from the whitewater flows that PacifiCorp releases at the Oneida development pursuant to its license.³⁴

23. The proposed project would flood 100 vertical feet of the canyon, permanently changing the canyon from a narrow river valley surrounded by steep mountains and cliffs to a reservoir landscape, and inundating the three formal recreational facilities and numerous informal recreational access sites. Without a free-flowing stretch below the Oneida dam, PacifiCorp's whitewater flow releases at the Oneida development would no longer serve a purpose.

24. Twin Lakes proposes several measures to replace the existing recreational facilities and mitigate recreational impacts, including constructing a new boater put-in immediately below the proposed dam; constructing a 4.1-acre, multi-use recreation facility with a campground, day-use area, boat ramp, and hiking trail on the east side of the proposed reservoir; enhancing fishing opportunities in Mink Creek by maintaining a minimum flow of 10 cfs downstream of its diversion dam; providing angling opportunities at the proposed reservoir; and constructing a parking area and hiking trail at the Johnson Farm site for angling and other river-based recreation.

25. Commission staff's licensing alternative would modify Twin Lakes' proposal by requiring Twin Lakes to release 20 cfs from its Mink Creek diversion dam. Further, Commission staff's licensing alternative does not include the Johnson Farm site. Staff concluded that mitigation at the Johnson Farm site would be infeasible as the site may overlap with the southern portion of the Bear River Massacre Site National Historic Landmark, which marks the massacre of a Shoshone winter encampment in 1863, the largest nineteenth century massacre of native peoples.³⁵ While acquiring the Johnson Farm might conserve the site's culturally important resources, if portions of the landmark site could not be disturbed, large areas of the Johnson Farm would be off limits for the proposed mitigation.

³³ *PacifiCorp*, 105 FERC ¶ 62,207 at 64,478 (Article 416).

³⁴ *Id.* at 64,480 (Article 420).

³⁵ EIS at 256-57.

26. The inundation of the Oneida Narrows Canyon would unavoidably alter the types of recreational opportunities available. Whitewater recreation and tubing would be eliminated, and the nearest similar Class I and II rapids are approximately 120 miles away.³⁶ River-based trout fishing opportunities would diminish. The riverine trout fishery would be replaced by a reservoir fishery dominated by species that favor slow-moving waters. Common carp and suckers currently dominate the lower gradient slower moving waters of the Bear River downstream of the proposed dam site and in the vicinity of the Johnson Farm site. Although a 20-cfs minimum flow from Twin Lakes' diversion dam into Mink Creek would improve trout habitat in the creek, the creek could support only a few anglers.³⁷

27. Moreover, the reservoir recreation and fishing opportunities that the project would provide are not unique to the region. There are nine reservoirs with public access for camping, picnicking, fishing, and boating within the county, and 70 percent of local recreationists favor retaining the free-flowing nature of the Oneida Narrows reach.³⁸

2. Terrestrial Resources

28. Deciduous and evergreen forests, wetlands, grasslands, and multiple riparian vegetation types occur in the Oneida Narrows Canyon. Such features, especially the riparian vegetation along the Bear River, provide habitat for a variety of wildlife species, including 48 state-designated sensitive wildlife species (i.e., northern leopard frog, bats, wild turkey, bald eagle, rock squirrel, mule deer, elk, trumpeter swan, etc.). Many of the sensitive species use the riparian vegetation for multiple functions, such as foraging, fawning, burrowing, cover, roosting, perching, accessing water, and migration corridors. Riparian vegetation and wildlife diversity are rare along the Bear River floodplain from the Bear River Project's upstream Soda development to the Great Salt Lake, which is otherwise dominated by agriculture.

29. BLM and PacifiCorp manage contiguous conservation lands surrounding the Oneida Narrows on both sides of the Bear River. BLM manages 617 acres and PacifiCorp manages 663 acres of land within and outside the Bear River Project boundary.³⁹ PacifiCorp manages its land within the Bear River Project boundary

³⁶ *Id.* at 215, 328.

³⁷ *Id.* at 225.

³⁸ Twin Lakes' December 1, 2015 filing at Appendix A, November 16, 2015 Letter from John Keith to Claire Bosen.

³⁹ PacifiCorp June 30, 2015 Updated Oneida Site Plan for Lands Managed for Conservation and Public Access at Bear River Project No. 20 at 14.

pursuant to a Land Management Plan and shoreline buffer zone plan required by its project license.⁴⁰ Twin Lakes proposes a project boundary for the Bear River Narrows Project that would overlap with 89 acres of the BLM conservation land and 350 acres of the PacifiCorp conservation land.

30. The proposed project would eliminate 162 acres of riparian and wetland vegetation and 305 acres of conservation land (55 acres of BLM land and 250 acres of PacifiCorp land), which preserve riverine and wetland habitat.⁴¹ To replace the lost habitat, Twin Lakes proposes to create 95 acres of riparian and wetland habitat and enhance 75 acres of existing marsh and riparian habitat at the Johnson Farm site; to create a 100-foot-wide shoreline buffer around the perimeter of the proposed reservoir that would conserve approximately 15 acres of riparian habitat; and to enhance 49 acres of riparian habitat at its Condie and Winder storage reservoirs. Twin Lakes also states that releasing a 10-cfs minimum flow at its Mink Creek diversion dam would benefit 42 acres of habitat.⁴²

31. Commission staff's licensing alternative would modify Twin Lakes' proposal to extend the shoreline to 300 feet wide to provide suitable habitat and habitat connectivity for rock squirrel, bats, wild turkey, and mule deer. The 300-foot-wide shoreline buffer, however, would only provide 0.6 acres of additional riparian habitat.⁴³ Commission staff's licensing alternative does not adopt Twin Lakes' proposed mitigation at the Johnson Farm site because, as noted above, Twin Lakes may be precluded from excavating the lands to create or enhance habitat that could be on or near the Bear River Massacre Site.⁴⁴ Further, while Commission staff agrees that a minimum flow in Mink Creek would likely increase the health of the riparian vegetation along the creek, staff

⁴⁰ See *PacifiCorp*, 105 FERC ¶ 62,207 at 64,481-82 (Articles 424 and 425).

⁴¹ EIS at 172, 177, 238.

⁴² License Application at E9-22.

⁴³ EIS at 197, Table 3-37.

⁴⁴ Commission staff did not have sufficient information to assess the value of the habitat that Twin Lakes proposed to create at the Family Farm site because Twin Lakes did not receive permission to access the site for detailed data collection.

found that the minimum flow would do little, if anything, to offset the project's effect on riparian areas along the Bear River.⁴⁵ Thus, under the staff licensing alternative, Twin Lakes would only replace approximately 65 of the 162 lost riparian and wetland habitat acres.

32. The loss of riparian vegetation would significantly reduce wildlife diversity in the project area. Less mobile species, such as amphibians, would perish by the filling of the reservoir or because of their inability to migrate to suitable habitat. Mobile species would be forced to move to suboptimal habitat or to habitats where the species are likely at their carrying capacity.

33. Further, the habitat created or enhanced would not be of equivalent value to the habitat lost. The mitigation measures would not replace the migratory and habitat connectivity functions that the project area provides. Instead, the proposed reservoir would be too wide for some mammals to access habitat across the Bear River, and the mitigation sites, including the Johnson Farm site and Mink Creek, would be isolated habitat islands in a matrix of agricultural land.

34. Many of the sensitive species that the project would affect, such as mule deer, prefer mature habitat. Commission staff estimates that it would take 30 to 50 years to develop riparian vegetation that would provide adequate habitat around the proposed reservoir and the Condie and Winder storage reservoirs.⁴⁶ Developing riparian vegetation may not be successful at the mitigation sites, especially with the 16-foot fluctuations of the proposed reservoir and withdrawals at the Condie and Winder storage reservoirs. Moreover, the mitigation sites outside the proposed reservoir may not recruit the affected sensitive species. The Condie and Winder storage reservoirs, as well as the Johnson Farm and Mink Creek sites, are not adjacent to the habitat affected by the project. To access those sites, displaced wildlife would have to traverse agricultural and inhospitable, arid lands.

3. Aquatic Resources

35. Bonneville Cutthroat Trout (BCT) is an important game fish and is native to the Bear River system. Over the nineteenth and twentieth centuries, impacts from hydropower development, irrigation, and land use practices in the Bear River watershed fragmented and degraded BCT habitat causing BCT populations to decline. In the last

⁴⁵ EIS at 178.

⁴⁶ *Id.* at 179.

three decades, agency management and restoration activities have helped the species increase and remain widely distributed over a large geographic region. While BCT is not a federally-listed species, BCT is a species of special concern to the State of Idaho.⁴⁷

36. The Oneida Narrows Reach and Mink Creek – both characterized by runs, riffles, and pools – provide suitable habitat for all life stages of BCT (i.e., spawning, fry, juvenile, and adult). Although the BCT population is low in the Bear River downstream of the Oneida development,⁴⁸ BCT use the Oneida Narrows reach for adult and juvenile rearing habitat and to access downstream tributaries, such as Mink Creek, for spawning.

37. Because BCT depend on free-flowing riverine habitat, the proposed project reservoir would adversely affect BCT habitat in the Bear River. Intervenors assert that the reservoir would eliminate nearly half of the BCT habitat in the Bear River below the Oneida development.⁴⁹ In the EIS, staff found that the proposed reservoir would not provide any suitable BCT habitat for spawning, fry, or juvenile lifestages.⁵⁰ Further, surveys from 1973 to 2009 collected a total of six BCT from the Bear River Project's Oneida reservoir.⁵¹ Since the proposed reservoir would be similar to the Oneida reservoir, the small number of BCT in the Oneida reservoir strongly suggests that the proposed reservoir would have minimal, if any, value as BCT habitat.

38. Twin Lakes proposes to mitigate the loss of BCT habitat in the Bear River by releasing a 10-cfs minimum flow at its Mink Creek diversion. As noted above, the Commission staff's licensing alternative would require Twin Lakes to release 20 cfs. The 20-cfs minimum flow would create additional habitat for all BCT lifestages in Mink Creek, especially during the summer when Twin Lakes' irrigation withdrawals reduce flows. The additional habitat created, however, would not replace the total habitat lost in

⁴⁷ In 2008, the FWS found that listing the BCT was not warranted. Interior states FWS' finding is in part due to federal and state agencies' ongoing restoration and enhancement activities. *See* Interior December 15, 2014 filing at 8.

⁴⁸ Surveys collected a total of 12 BCT within ten miles below the Oneida development from the fall of 2008 through fall of 2009. *See* EIS at Table 3-12.

⁴⁹ *See, e.g.*, State of Idaho Agencies' December 16, 2014 filing at 36.

⁵⁰ EIS at 128.

⁵¹ *Id.* at 77.

the Bear River. The amount of habitat gained in Mink Creek, based on estimated acreage, would equal approximately 5 percent of the adult habitat, 75 percent of the spawning habitat, 14 percent of the juvenile habitat, and 15 percent of the fry habitat that would be lost in the Bear River due to the proposed project.⁵²

39. The inundation of the project area would also affect the ongoing restoration efforts implemented by federal and state agencies, and PacifiCorp. The federal and state agencies responsible for managing natural resources of the Bear River have developed several management, conservation, and restoration plans to help conserve and ensure long-term viability of BCT, which we discuss in the next section below.

40. PacifiCorp also implements several license measures to restore BCT and its habitat in the Bear River, including below the Oneida development.⁵³ Over the license term, PacifiCorp will develop and implement BCT enhancement and restoration projects in tributary and mainstem habitat in its Bear River Project area. In anticipation of stocking BCT below the Oneida development, PacifiCorp has invested in conservation easements, fish screens, and passage structures.⁵⁴ Further, PacifiCorp had planned to begin collecting in 2015 wild BCT below the Oneida development to begin developing the broodstock.⁵⁵ As the proposed project would adversely affect all stages of BCT habitat, the proposed project would likely affect PacifiCorp's efforts.

4. Comprehensive Plans

41. Section 10(a)(2)(A) of the FPA requires the Commission to consider the extent to which a proposed project is consistent with any comprehensive plan for developing or conserving a waterway prepared pursuant to federal law by an agency authorized to prepare such a plan, or by the state in which the project facilities will be located.⁵⁶ Under

⁵² *Id.* at 129, Table 3-28.

⁵³ *See* Bear River Project license Article 403 (Comprehensive Bonneville Cutthroat Trout Restoration Plan), Article 404 (plan for stocking of native BCT), Article 405 (plan for restoring aquatic and riparian habitat for BCT and other fish and wildlife resources), and Article 406 (plan for acquiring land and water rights). *PacifiCorp*, 105 FERC ¶ 62,207 at 64,472-75.

⁵⁴ PacifiCorp November 30, 2015 filing at 10.

⁵⁵ *Id.*

⁵⁶ 16 U.S.C. § 803(a)(2) (2012). Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2015).

section 10(a)(2)(A), federal and state agencies filed 14 comprehensive plans that address various resources in Idaho. In the draft and final EIS, Commission staff concluded that the construction, operation, and maintenance of the Bear River Narrows Project would be inconsistent with eight of those comprehensive plans.⁵⁷

42. Idaho DFG prepared and implements six of those plans including: (1) *Idaho Fisheries Management Plan* to sustain Idaho's fish and wildlife and their habitats, and to meet demand for fish and wildlife recreation; (2) *Idaho Comprehensive Wildlife Conservation Strategy* to sustain Idaho's fish and wildlife, and their habitat; (3) *Pacific Northwest Rivers Study* to assess the significance of river segments for a variety of values for fisheries, wildlife, cultural, natural features, and recreation; (4) *Management Plan for the Conservation of Bonneville Cutthroat Trout in Idaho* to ensure the long-term viability and persistence of BCT within its historical range in Idaho and at levels capable of providing angling opportunities; (5) *Idaho Mule Deer Management Plan 2008-2017* to improve key winter, summer, and transitional habitats for mule deer populations that meet or exceed statewide objectives, and to maintain, improve, and manage access to hunting areas; and (6) *Idaho Elk Management Plan 2014-2024* to maintain elk populations at their current levels. As we discuss above, the proposed project would inundate the free-flowing reach of the Bear River through the Oneida Narrows Canyon, unavoidably affecting fish and wildlife and their habitats, recreational whitewater, tubing, and fishing opportunities, and the natural landscape. Because it is unlikely that the effects on these resources could be adequately mitigated, we agree that the proposed project would be inconsistent with these six plans.

43. The Northwest Power and Conservation Council (Northwest Council) prepared the remaining two comprehensive plans. Those plans are the *Protected Areas Amendments and Response to Comments* and *The Sixth Northwest Conservation and Electric Power Plan*. The Northwest Council prepared the *Protected Areas Amendments and Response to Comments* to formally amend its Columbia River Basin Fish and Wildlife Program to allow it to designate protected critical fish and wildlife habitat. The area of the proposed project, from the confluence of Mink Creek with the Bear River to the Oneida development, is protected for wildlife. Thus, because the project would be located within a designated protected area, and there are not sufficient mitigative measures to resolve the conflict, the project would be inconsistent with the *Protected Areas Amendment and Response to Comments*.

⁵⁷ EIS at 382. We note that a proposed project's inconsistency with a comprehensive plan is not a bar to issuance of a license for the project. *See San Bernardino Valley Audubon Society v. FERC*, 242 F. App'x. 462, 465 (9th Cir. 2007) (unpublished) (finding that no case could be found holding that the Commission must ensure consistency with section 10(a)(2) plans).

44. *The Sixth Northwest Conservation and Electric Power Plan* requires that the obligations of the Columbia River Basin Fish and Wildlife Program be fulfilled. Because the project would be inconsistent with Columbia River Basin Fish and Wildlife Program, the project would also be inconsistent with *The Sixth Northwest Conservation and Electric Power Plan*.

45. In addition, as discussed above, the proposed project would be inconsistent with BLM's Pocatello Plan, which guides resource management of the federal land in the project area. Although BLM's Pocatello Plan is not listed as a comprehensive plan under section 10(a)(2)(A) of the FPA, we nevertheless consider such a plan as part of our comprehensive evaluation of the proposed project.

46. The Pocatello Plan designated Oneida Narrows as a Special Recreation Management Area to be managed and maintained for river and water recreation. Since the project would inundate the free-flowing stretch flowing through the Oneida Narrows, the project would be inconsistent with BLM's management goal. The Pocatello Plan also states that BLM will maintain the scenic qualities of the land resources and uses. BLM has designated the project location as a Visual Resource Management Class II, the objective of which is to retain the existing landscape. A new reservoir in Oneida Narrows would not meet the definition of Class II because it would not retain the existing riverine landscape and would substantially change the form, line, color, and texture of the existing conditions.⁵⁸

47. Further, BLM identified a 2.4-mile section of the Bear River in the Oneida Narrows within the proposed project boundary as eligible for designation as a Wild and Scenic River based on its recreation, geologic, and wildlife values. While BLM did not recommend that Congress include the 2.4-mile section in the National Wild and Scenic Rivers system, BLM continues to manage this land through the Pocatello Plan to protect the recreational and wildlife values that established its eligibility for the system.⁵⁹ Construction and operation of the project would have adverse effects on the section's existing recreation, fishery, and wildlife resources that could not be mitigated, and thus would be inconsistent with BLM's management goals.

5. The Need for Power

48. Weighing in favor of licensing the proposed project is that it would be located in the Northwest Power Pool subregion of the North American Electric Reliability Corporation's (NERC) Western Electricity Coordination Council region. According to

⁵⁸ EIS at 251.

⁵⁹ *Id.* at 236.

NERC's 2014 forecast, from 2015 through 2024 annual net internal demand requirements for the subregion will grow at a rate of 1.36 percent and 10,415 MW of additional capacity will be brought online.⁶⁰ The power from the proposed project would help meet the need for power in the project area as additional coal-fired facilities are retired. If built, the proposed project would displace generation from non-renewable sources, and thereby avoid some power plant emissions.

6. Socioeconomic Effects

49. Agriculture is an important industry in Franklin County, Idaho, making up the largest portion of the county's employment in 2013. Twin Lakes has 230 shareholders that manage crop production on 18,000 irrigated acres, about 36 percent of the total irrigated acres in the county. Twin Lakes' shareholders contract for the annual delivery of 32,000 acre-feet of water. Water shortages, however, regularly affect deliveries and, consequently, farm production, occurring during 13 of the 21 years from 1990 through 2010, with shortages ranging from 3,200 acre-feet to 19,200 acre-feet per year.⁶¹

50. To mitigate the economic impact of water shortages, Twin Lakes proposes to annually draw up to 5,000 acre-feet from the proposed reservoir to distribute to its shareholders.⁶² Twin Lakes' proposal, however, would provide minimal benefit. In the EIS, Commission staff estimated that Twin Lake's proposed withdrawal would have resulted in an average annual withdrawal of 3,110 acre-feet during the period from 1990 through 2010, which would have allowed Twin Lakes' shareholders to collectively produce agriculture for a total profit of \$131,005.⁶³ In comparison, in 2013, the shareholders' total farm production yielded \$38.8 million in revenue.⁶⁴

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 59.

⁶² Several commenters and intervenors argue that we should deny the license application because the Idaho Water Board denied Twin Lakes' application for its necessary water rights. However, that fact is not a bar to issuance of a license for the project. *See Marseilles Hydro Power, LLC*, 107 FERC ¶ 61,066 (2004).

⁶³ EIS at 285.

⁶⁴ *Id.* at 281.

51. Twin Lakes' shareholders assert that the canal system loses more than 50 percent of diverted water from seepage and evaporation.⁶⁵ Twin Lakes' proposes to use revenue from power sales to fund improvements to its irrigation delivery system, including replacing 42 miles of its canal with pipeline. The company estimates that its planned improvements would cost \$48 million over a 10-year period.⁶⁶ However, Commission staff found, and we agree, that the revenues from the potential power sales would contribute only approximately \$7 million in the first 10 years, \$41 million less than Twin Lakes' estimated cost for the improvements.⁶⁷

7. Summary of Balancing Developmental and Non-Developmental Values

52. The Commission takes seriously its responsibility to weigh carefully both the power and development values of a proposed project and the nondevelopmental values, such as to protect fish and wildlife and recreational opportunities a project would affect. In this instance, after weighing the potential power, irrigation, and other benefits of the proposed project against its unmitigable impacts on fish, wildlife, aesthetics, and recreation, we conclude that the project would not be best adapted to a comprehensive plan for improving or developing the Bear River for beneficial public uses.⁶⁸

⁶⁵ Transcript of the October 29, 2015 Agency and Public Meeting on the Draft EIS at 33.

⁶⁶ License Application at E12-9.

⁶⁷ EIS at 285, n.73.

⁶⁸ The Commission has previously denied license applications because the proposed projects' effects on fishery, wildlife, aesthetic, and recreational resources would not be best adapted to the other beneficial uses of the waterway. *See, e.g., Bangor Hydro-Electric Co.*, 83 FERC ¶ 61,039 (1998) (denied proposal to construct a dam because the dam would adversely affect fishery resources and wetlands); *City of Idaho Falls, Idaho*, 80 FERC ¶ 61,342 (1997) (denied license application because project would adversely affect fishery and wildlife resources); *Thomas Hohman*, 71 FERC ¶ 61,355 (1995) (denied license application because the project would adversely affect aesthetic and recreational resources); *B & C Energy, Inc.*, 69 FERC ¶ 61,177 (1994), *reh'g denied*, 73 FERC ¶ 61,042 (1995) (denied license application because the project would adversely affect aesthetic resources and be inconsistent with several federal and state comprehensive plans); *Northern Lights, Inc.*, 39 FERC ¶ 61,352 (1987) (affirmed the denial of a license application because project would adversely affect aesthetic resources and would interfere with Indian religious practice).

III. Conclusion

53. As discussed above, we deny Twin Lakes' license application for the Bear River Narrows Project because we find that the project's irremediable adverse effects would be inconsistent and would interfere with the purpose of BLM's Oneida Narrows RNA, and because the project would not be best adapted to a comprehensive plan for improving or developing the Bear River.⁶⁹

The Commission orders:

(A) The license for the Bear River Narrows Hydroelectric Project No. 12486, applied for by Twin Lakes Canal Company on November 27, 2013, is denied.

(B) Great Salt Lakekeeper's motion to intervene filed on December 17, 2014, is dismissed as moot.

(C) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁹ Since we deny Twin Lakes' license application because the proposed project would not meet the requirements of sections 4(e) and 10(a) of the FPA, we do not evaluate PacifiCorp's argument that section 6 would prohibit licensing Twin Lakes' project absent PacifiCorp's consent.

Document Content(s)

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