

BEFORE THE WATER RESOURCES COMMISSION

OF THE

STATE OF OREGON

IN THE MATTER OF THE CONSIDERATION )  
OF PERMIT APPLICATION 68098 FOR )  
THE USE OF WATER FROM MILL CREEK ) FINDINGS OF FACT,  
IN UMATILLA COUNTY FOR ) CONCLUSIONS OF LAW, RULINGS  
HYDROELECTRIC POWER ) ON MOTIONS AND PETITIONS,  
) AND ORDER

PROCEDURAL FINDINGS

The City of Walla Walla, Washington, (City), has submitted Permit Application 68098 for a hydroelectric project in excess of 100 theoretical horsepower.

Party status in the proceedings was granted to the Oregon Department of Fish and Wildlife (ODFW); the Mill Creek Water Community Fund (MCWCF); the Mill Creek Sportsmen's Association (MCSA); and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR).

In a pre-hearing conference call held April 23, 1985, it was announced that the Water Resources Department (WRD), had determined to accept the application under ORS chapter 537. The WRD also announced its determination that ORS 540.610 and 543.710 apply to the application and that ORS 537.810 and 537.835 do not.

A public hearing on the application was held on April 24, 1985. Contested case proceedings were held on May 8 and May 9, 1985.

The evidentiary record in this matter closed on June 20, 1985.

By letter dated January 17, 1986, the Attorney General's office advised the WRD that Permit Application 68098 had been improperly accepted under ORS chapter 537. Further processing of the application must be done under ORS chapter 543.

Elements of the proposed project would be located outside the State of Oregon. The Commission's jurisdiction does not extend to control of impacts from construction or other activities within the State of Washington which do not affect the State of Oregon.

RULINGS ON MOTIONS AND PETITIONS

At the hearing on May 9, 1985, the MCWCF and MCSA filed a motion to dismiss the application. Petitioners argue dismissal under ORS 537.810 since the application involves use of water not specifically authorized by the Legislature. Petitioners further moved that an interim order be entered staying the proceedings. Petitioners argue that evidence of partial abandonment of right by the City should be resolved before a ruling is made on the application.

The application proposes an additional use of the City's municipal water. The City holds a municipal water right granted by court decree and bearing certificate number 13276 with a priority of 1866. No element of the right, including point of diversion, place of use, or amount of use would be altered. Therefore, no aspect of the proposed use requires legislative authorization under ORS 537.810. The motion to dismiss is denied.

Subsequent to filing the motion, petitioners initiated abandonment proceedings against the City. On June 10, 1986, petitioners indicated they were unable to meet the burden of proof and withdrew their cancellation request. The motion to stay the proceedings is moot.

On August 23, 1985, the City filed a petition for declaratory ruling. The City seeks a ruling that its existing municipal water right includes the authority to generate hydroelectric power. On October 25, 1985, the Commission deferred ruling on the petition until it issued an order on the application.

In its petition, the City cites four authorizations for its diversion and use of Mill Creek water. In order, the authorizations are: a 1924 Oregon certificate with a 1920 priority for 28 cubic feet per second (cfs) for municipal, irrigation, and power use; a 1932 Umatilla County Circuit Court decree establishing a priority of 1866 for 28 cfs for municipal use in the City of Walla Walla; a 1933 stipulation between the Attorneys General for Washington and Oregon, construing the City's right to water for municipal and other beneficial purposes to be for 28 cfs with a priority of 1866; and a 1940 Oregon certificate, with an 1866 priority, for 28 cfs for municipal use in the City. None of the rights are additive.

The City places much emphasis on the "other beneficial purposes" language used in the 1933 stipulation. The City contends that hydroelectric power is a beneficial use of water under Oregon law and that use of water for municipal purposes includes the right to generate power.

Under Oregon law, municipal use has not been interpreted to include hydroelectric generation. The Commission has made no exceptions for Oregon municipalities on this issue. It is not compelled to change its position in this case. It is implicit from this order that hydroelectric power is not included as an element of municipal use. The City's petition for a declaratory ruling is denied.

On July 11, 1986, the MCSA filed a motion to dismiss Application 68098 and refile under ORS chapter 543. Petitioners argue correctly that the application was improperly filed under ORS chapter 537. Petitioners also correctly argue that the project can only go forward under ORS chapter 543. Petitioners' arguments benefit from the advice of the Attorney General's office to the WRD in a letter dated January 17, 1986.

Petitioners incorrectly fault the City of Walla Walla for filing the wrong kind of application. The WRD, in good faith, determined the application should be filed under ORS chapter 537 and so directed the City. Not until nearly nine months after the proceeding began was the WRD advised it had misfiled the application. The City's mistake on this point was heeding the direction of the permitting authority.

Petitioners assert that if the City files a new or amended application under ORS chapter 543, the record would be reopened. Reopening the record now has added significance. Hydroelectric standards enacted by the 1985 Legislative Assembly in House Bill 2990 would apply. Petitioners contend that further processing of the permit application as a license application, without reopening the record, would prejudice the substantial rights of the MCSA and other parties.

HB 2990 established no new or additional procedural rights for the petitioners. It did set stricter standards for hydroelectric projects for which the record had not closed by October 1, 1985. The record in this matter closed June 20, 1985. Petitioners have no more procedural rights now than they had, and presumably exercised, during the proceedings on the subject application. Further, their procedural rights would have been no more or less had the application been originally filed under ORS chapter 543.

The Commission reviews hydroelectric applications filed under ORS chapter 537 and ORS chapter 543 with one set of standards. While the Commission's authority over projects developed under the separate chapters may differ on some points, its standards for review are identical for each. This has been the case since the standards were adopted in December, 1983.

As filed, the City's application complies with the informational requirements of applications filed under ORS chapter 543. The record has been made on the facts at issue, not on the ORS chapter under which the application was filed. Further processing of the application as a hydroelectric license under ORS chapter 543 will not alter, ease, or bias the decision on the application.

The Commission concurs that the application cannot go forward under ORS chapter 537. The Commission does not agree that processing under ORS chapter 543 demands a new filing, reopening the record, or application of new standards enacted after the fact. The motion is denied.

On September 19, 1986, the City filed a supplemental petition for declaratory ruling. The City sought a ruling that under Oregon law and the federal constitution, the City is not required to obtain an Oregon permit to generate power in Washington with water diverted in Oregon for municipal use in Washington.

On November 7, 1986, the Commission exercised its discretion under ORS 183.410 by declining to rule on the petition.

On November 26, 1986, MCSA and CTUIR filed a joint motion to reopen the record to accept the results of a recently completed Mill Creek instream flow study. MCSA and CTUIR argue that the results of the study are important to this proceeding, the new evidence could affect the outcome of the proceeding, ignoring the new data would be inconsistent with the policy in ORS 543.017 and reopening the record would not delay the applicant.

Review of the proposed project in May 1985, was predicated on then existing standards in OAR Chapter 690, Division 74. The record was made and closed. The flow study in question may have been of value to the contested case hearing. It was not available.

Ignoring the study results now does not preclude a valid decision based on the record developed. There is ample evidence in the record upon which to formulate conditions for protection of fish. A decision absent consideration of the study findings does not imply an outcome adverse to fish life in Mill Creek. Conversely, consideration of the flow study now does not presume a different or better outcome.

Reopening the record is not the sole means of benefiting from the instream flow study. The City and ODFW could stipulate to instream flows based on the study. The Commission can and regularly does condition hydroelectric use on maintenance of instream flows. The Commission, on notice given, can also amend such conditions in the public interest. It has done so in the past.

The policy stated in ORS 543.017 was an element of HB 2990 passed in 1985. It does not apply to this proceeding.

This proceeding was initiated in April 1985. The record closed on June 20, 1985. Parties on both sides of this issue have been repeatedly accommodated through the granting of numerous extension requests. The Commission has need to keep its own agenda moving. The decision to act now need not be predicated on the applicant's status in a federal proceeding on this matter. The motion is denied.

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In exceptions filed January 22, 1987, MCSA argues that the record in this case should be reopened to allow evidence of minimum stream flows. MCSA contends such evidence is necessary to meet the requirement that findings be made on statewide land use goals. The argument is treated as a motion for the Commission to reconsider its denial of MCSA's earlier motion to reopen the record on other grounds. The motion for reconsideration is denied for the following reasons.

The Commission is not required to make goal findings in this case because the decision is not one which has any impact on land use goals. The application seeks a license to use water appropriated under a long vested municipal use permit for the purpose of hydroelectric production.

The proposed generator for the project will be located in Washington State and, therefore, is beyond Oregon's land use regulations. Though a new pipeline for transport of water will be constructed, the pipeline is not subject to these proceedings. It is part of the City's municipal water transport system and no new permit or license from the Commission is required for its construction. This leaves the appropriation of the water itself as the only element of the Commission's decision arguably subject to the goals.

The proposed order limits appropriation of water from Mill Creek for hydroelectric purposes to that necessary for municipal uses under the City's existing right. Therefore, the land use impact of the proposed order is nil because it does not change in any way the amount of water already subject to appropriation by the City.

A determination of compliance with statewide planning goals should not be required if the proposed action allows no substantial modification or intensification of existing activity or permits. Cf OAR 660-31-040 (determination of compliance with statewide planning goals) is not required if

the proposed permit is a renewal of an existing permit except when the proposed permit would allow a substantial modification or intensification of the permitted activity). In this case the granting of a hydroelectric license to the City causes no substantial modification or intensification of the City's existing use of water from Mill Creek for municipal purposes. Therefore, the Commission declines to reopen the record to allow evidence of instream flow studies or to make findings with respect to statewide planning goals.

#### FINDINGS OF FACT

The City of Walla Walla, Washington, obtains its municipal water from Mill Creek within the State of Oregon. The City's water right has a priority date of 1866 and permits the diversion of up to 28 cfs for municipal use in the City. The right was established by decree of the Circuit Court of Umatilla County in 1932. Certificate 13276 was issued for the right by the Oregon State Engineer in 1940.

Mill Creek arises in Washington, flows south into Oregon, then north into Washington and its confluence with the Walla Walla River. The City has been diverting water from Mill Creek since 1906 and from its current diversion in Oregon since 1922. The City's original Mill Creek diversion was located at Kooskooskie, Washington. Kooskooskie is just over the Washington line and about 4.5 miles downstream from the current diversion.

The City maintains the oldest right on Mill Creek. The diversion facility is the upper limit of development on the stream. There are several small junior water rights totalling less than one cfs on Mill Creek downstream from the City's diversion. These rights are in Oregon. Water rights on Mill Creek in Washington are unknown. Several small tributaries add to flow in Mill Creek below the City's diversion. The Mill Creek watershed is closed to most human access above the City's diversion and remains in its natural state.

The City's diversion structure consists of a low dam spanning the creek. A fish ladder is built into the south abutment of the dam. The ladder is not maintained and is largely inoperative. The intake facilities are on the north end of the dam. A trash rack prevents large debris from entering the pipeline. A manually operated valve controls flow into the line.

The City's water is conveyed in a buried pipeline 14.5 miles from the diversion to twin storage reservoirs on the eastern city limits. The lower ten miles of pipe from Kooskooskie date to 1906 and are in need of replacement from age, stress, and leaks. The upper 4.5 miles, from the diversion to Kooskooskie, date to 1922 and are precariously entrenched in the embankment between Mill Creek and the adjacent county road. Potential erosion and slide activity along the road embankment threaten the structural integrity of the upper line.

For safety and efficiency reasons related to its municipal water supply, the City is replacing and relocating all 14.5 miles of pipeline. In the process, the City seeks to develop the approximately 1260 feet of head between the intake and the City reservoirs for hydroelectric purposes. All hydroelectric facilities would be located on City property within the State of Washington. The proposed project would have a capacity of nearly 1800 kilowatts and would

produce in excess of 15 million kilowatt hours of electricity annually. The total project is estimated to cost about \$20 million.

The proposed project would make use of the city's existing diversion structure. All 4.5 miles of the pipeline in Oregon would be relocated to a more secure position. However, it would still be within the county road right-of-way adjacent to Mill Creek. The entire length of pipe in Oregon would be buried. Except for some improvements at the diversion, all construction work in Oregon would be required even without the hydroelectric element.

The City's municipal water right is for 28 cfs. The City proposes to use municipal water for power development before distributing the water to city customers. This proposal has raised a number of questions about the City's municipal use of water, practice of diversion, quantity of diversion, impacts on instream values, and authority to proceed with the project.

Central to all other issues is the quantity of diversion. The City and project opponents disagree on how much water is currently being diverted at the City's intake.

Intake operations are manually controlled in casual fashion. No records of diversions are maintained. No regular measurements are made at the diversion works. A number of estimates, calculations and measurements of pipe flow and streamflow, upstream and downstream from the diversion, have been made in recent years. The results vary by method of determination.

Concurrent streamflow measurements upstream and downstream from the diversion have been made by the U.S. Forest Service. The measurements were made at several points in time from 1976 to 1985. These measurements suggest diversion amounts ranging from 18.26 cfs to 27.22 cfs. These are not measurements of the exact amount of water flowing in the pipe. The measurements also include any water that is tributary to the stream between the two metering points.

In 1981, the Pitometer Associates Engineers made a single measurement of instantaneous water velocity at one location in the upper pipeline. Through calculation, the velocity measurement translated to a pipe flow of 27.85 cfs. This measurement establishes the upper pipeline capacity to be at least about 28 cfs. A one time measurement however, is not sufficient to establish the City's diversion practice over the long term.

At Kooskooskie, water from the upper pipeline discharges into a weir box. The water can be measured at the weir before it enters the lower pipeline. The weir box is capable of returning part or all of the flow to Mill Creek. Normally, all water is transferred to the lower pipeline. Therefore, under normal operation, water measured at the weir reflects flow in the upper pipeline.

An operator lives at the site of the Kooskooskie weir box. The current operator has managed the facility for 19 years. The operator reports variations in water flowing over the weir crest from 9.5 inches to 12 inches. By calculation, this translates to an average of from 22 to 31 cfs. About 11.5 inches of water flowing over the weir are necessary to equal the City's

water right of 28 cfs. Flows below 9.5 inches at the weir are inadequate to serve domestic taps off the lower pipeline. The operator indicates a goal of maintaining 10.5 inches of water over the weir at all times. This converts to an average of 25.3 cfs. This has been the operator's goal for 19 years.

The foregoing evidence demonstrates that the City's normal diversion is about 25.3 cfs. Flows of 28 cfs and higher have been observed but are not the operational norm.

An MCSA expert witness testified that the Kooskooskie weir is a non-standard weir and would not yield accurate flow measurements. The witness had no firsthand knowledge or experience with the Kooskooskie wier. The City's expert witness testified weir perturbations had been evaluated and measurements adjusted to offset irregularities. The City's witnesses had firsthand knowledge of the Kooskooskie weir and were more convincing on this matter.

The amount of diversion does not reflect municipal water use. The long term operational goal has been to maintain constant flow over the weir at about 10.5 inches or 25.3 cfs year round. This is done to maintain service to domestic taps off the pipeline. This practice results in water deliveries to the twin reservoirs excess to the City's municipal use.

Excess water reaching the twin reservoirs is returned to Mill Creek via a pipeline and ditch. This manner of discharge from the City's reservoirs is common. It has occurred every year, and all during the year, since at least 1939. This discharge flow varies with the season. In the summer it is less and in the winter the conveyance ditch sometimes overflows.

As now practiced, the amount of the City's diversion has not caused any problem for instream values. The creek has never been observed or reported to be dry due to the City's diversion. ODFW expressed no concerns with the amount of water the City currently takes from Mill Creek.

Optimum operation of the proposed hydroelectric project would require diversion of 28 cfs. The City contends optimum operation of the project is consistent with its diversion practices of the past 63 years, at least during summer months. The City has stated that incrementally greater flows than it normally diverts would be necessary to run the project optimally in winter months.

Opponents contest the City's claim that it diverts 28 cfs during summer months. Opponents argue that optimum project operation would increase customary diversions, reduce streamflows, and adversely affect instream values.

The record supports the City's claim it diverts 28 cfs. In addition to the Pitometer study and weir measurements showing diversions of 28 cfs, the City has a master water meter at the discharge from the twin reservoir to the municipal distribution system which also supports the claim. City meter records for 1981 through 1984 show the City has consumed in excess of 28 cfs, or 18 million gallons per day, in some summer months. Peak use usually occurs in June, July, or August. The City also uses ground water in its municipal system. Ground water is used only as a supplemental source when municipal needs exceed the City's 28 cfs Mill Creek right or available flow.

A hydrologic analysis was performed by R.W. Beck and Associates for streamflows at the diversion. The analysis showed average summer streamflows exceed 28 cfs in all months. The analysis also showed that flows bypassing the diversion were as little as two or three cfs in some low flow months.

The flow analysis and previous evidence demonstrates there is sufficient summer streamflow and pipe capacity to accommodate a 28 cfs diversion. In fact, the City has metered consumption exceeding 28 cfs during times of peak use. The City's own evidence, however, does not support its claim of a 28 cfs diversion throughout all summer months, each summer.

Mill Creek supports a run of about 200 wild summer steelhead. Steelhead production in Mill Creek has been limited by low summer and fall flows, high water temperatures, unscreened intakes and passage barriers. These adverse conditions are most prevalent in the Washington portion of the stream. No evidence suggests the City's works and diversions are principally at fault.

Rainbow and dolly varden trout are found in good numbers above the City's diversion. Resident trout are naturally produced and also stocked below the diversion.

The City's intake is not equipped with a fish screen. Fish do get drawn into the pipeline. The fish ladder is inadequate and needs modification. It is currently inoperative. An operative ladder would open the undisturbed upper Mill Creek watershed to summer steelhead.

Increased diversions from Mill Creek could have significant adverse impacts to fish habitat and populations in Mill Creek. Instream flow studies on the Walla Walla River have shown that flow reductions would result in reduced fish production. Findings of the Walla Walla flow study can be applied to the Mill Creek situation. On this basis, it is expected that reductions in Mill Creek flow in October, November and June, would be potentially adverse to fish production.

ODFW recommends that the fish ladder be improved, that screens be installed at the intake and that intake regulation be improved. ODFW also recommends that an instream flow study be performed on Mill Creek. ODFW believes continual project diversion of 28 cfs would adversely impact fish. Without the study, ODFW lacks the data to determine the extent of adverse impact.

Mill Creek provides aesthetic and recreation values to the public and to private landowners along its banks. Stream-side property owners believe the project would reduce historic flow levels and diminish the scenic, aesthetic, and monetary value of their property. Maintenance of the established flow regime or the imposition of instream flows would avert undesirable flow reductions. The pipeline would be buried and disturbed soils revegetated. Aesthetic values would not be altered. Impacts from the project would be no different than from the existing facilities.

Current recreation activities in the area include fishing, hunting and picnicking. Recreation opportunities and access in and along Mill Creek would not be changed or reduced by the proposed project. Improvements to the fish ladder would open additional habitat to summer steelhead. Increased steelhead production could enhance fishing opportunities. The Oregon Parks and Recreation Division has indicated it has no concern about the project.



The Mill Creek watershed is used by wildlife such as elk, deer and bear. There are no known listed or proposed threatened or endangered wildlife species in the area. Impacts on wildlife during construction would be minimal. Burying the pipeline would avert post construction impacts on wildlife.

Construction activities would cause some temporary turbidity and siltation in Mill Creek. Precautions taken by the City would minimize this impact. The Oregon Department of Environmental Quality (DEQ) has waived water quality certification requirements for the project.

No known archeological, cultural or historic sites are located in the project area in Oregon.

The proposed project would be financed through a grant from the State of Washington and revenue bonds sold by the City. The Washington Department of Social and Health Services has granted about \$4.7 million to the City to help replace its municipal water system. The City sold \$15 million of water and sewer revenue bonds in 1984 to finance the balance of the cost. Overall, revenues from the hydroelectric project would reduce the costs to Walla Walla citizens of the municipal water system improvements. Projected savings amount to \$14 million over the 25 year life of the bonds.

Power generated by the project would be sold to Pacific Power and Light Company (PP&L). The City has negotiated a power sales agreement with PP&L dated July 11, 1984. The term of the contract is 25 years. The firm energy price per kilowatt hour of electricity would range from 2.10 to 14.57 cents over the life of the contract.

There are no existing or proposed hydroelectric projects in the Mill Creek watershed or Walla Walla River subbasin. The proposed hydroelectric project would be an adjunct to a municipal water supply system with a 63-year history of existence. No evidence suggests the project would contribute to cumulative impacts with other hydroelectric projects in the vicinity.

Power development is an allowed use of water in the Umatilla Basin water resources program.

#### OFFICIAL NOTICE

The Water Resources Commission has taken official notice of the provisions of the Umatilla Basin program and the records of the Water Resources Department pertaining to the use of the waters of Mill Creek, in the Walla Walla subbasin.

#### ULTIMATE FINDINGS

The proposed project complies with the standards for consideration of applications involving hydroelectric projects for OAR 690-74-045, Water Resources; OAR 690-74-055, Wildlife; OAR 690-74-060, Land Resources; OAR 690-74-065, Economics; and OAR 690-74-070, Need for Power.

The City's intake is operated to maintain a constant diversion of about 25.3 cfs. Diversions of 28 cfs, and greater, occur during one or more summer months each year. Power development based strictly on the established

diversion practice would comply with the standards for Fish Resources, OAR 690-74-050. Hydroelectric diversion greater than 25.3 cfs, and up to 28 cfs, in non-summer months would meet the fish resources standard when remaining instream flows are known to be adequate for fish needs.

#### CONCLUSION OF LAW

The proposed project would not impair or be detrimental to the public interest.

#### ORDER

The Water Resources Commission hereby orders that:

1. Permit Application 68098, related proceedings and the record developed under ORS chapter 537, be and hereby is designated as Hydroelectric License Application HE 523 pursuant to ORS chapter 543;
2. Permit Application 68098 be of no further force or effect;
3. Hydroelectric Application HE 523 be and hereby is approved with the following conditions:
  - (a) At no time shall diversion of water at the City's Mill Creek, Oregon intake exceed 25.3 cfs or the amount, up to 28 cfs, the City can beneficially use for normal municipal purposes, whichever is more. When diversions exceed 25.3 cfs, discharge of water at the City's twin reservoirs back to Mill Creek or other receiving body, shall be construed as evidence of violation of this condition.
  - (b) Intake screening and fish passage facilities at the diversion works shall be designed to ODFW specifications and shall be fully operational at the time the project commences generation.
  - (c) The City shall install and maintain such gaging equipment as is necessary to provide full-time, continuous records of project diversions and of streamflow below the project intake. The gaging equipment shall be accessible to the district watermaster or other WRD officials at all times. The nature and siting of such gaging equipment shall be approved by the Water Resources Director prior to installation.
  - (d) The City shall modify the intake facility so that it is self-regulated and/or remotely controlled.
  - (e) Upon receiving evidence of an agreement between the City and ODFW stipulating to instream flows for aquatic life, the Water Resources Commission may, at its discretion, alter condition (a) to allow increased diversions year round for power generation up to the City's 28 cfs water right.
  - (f) If, after the project begins operating, the Department of Fish and Wildlife determines that the fish screens and/or ladder are ineffective, the applicant shall work with ODFW to accomplish the necessary improvements. The applicant shall promptly notify the Water

Resources Director of such a determination by ODFW and shall provide the director with evidence of such cooperation and that satisfactory improvements have been made. The Water Resources Director reserves the right to curtail or suspend project operations if such evidence is not presented.

Dated March 13, 1987.

OREGON WATER RESOURCES COMMISSION

William H. Young  
William H. Young, Director  
Oregon Water Resources Department

APPEALS AND JUDICIAL REVIEW

You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service (date of mailing) of this order. Judicial review is pursuant to the provisions of ORS 536.075 and 183.482.

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