

UNITED STATES OF AMERICA 124 FERC ¶ 62,059  
FEDERAL ENERGY REGULATORY COMMISSION

Symbiotics, LLC

Project No. 11879-001

## ORDER ISSUING ORIGINAL LICENSE (Major Project)

(July 23, 2008)

**INTRODUCTION**

1. On May 20, 2004, Symbiotics, LLC (applicant) filed an application for an original license pursuant to Part I of the Federal Power Act (FPA)<sup>1</sup> for the proposed 3.3-megawatt (MW) Chester Diversion Hydroelectric Project, No. 11879. The proposed project would use the Fremont-Madison Irrigation District's existing Cross Cut Diversion dam (Chester Diversion dam)<sup>2</sup> on the Henry's Fork of the Snake River in Fremont County, Idaho.<sup>3</sup> The proposed project would not occupy any federal lands.

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<sup>1</sup> 16 U.S.C. §§ 791(a) and 825r (2000).

<sup>2</sup> The Chester Diversion dam was constructed in 1938 by the U.S. Department of the Interior, Bureau of Reclamation (Reclamation) as part of its Minidoka Project. Symbiotics' May 2004 application did not include the dam as part of the proposed license. On September 10, 2004, however, Reclamation transferred, by quitclaim deed, the title to the Chester Diversion dam, portions of the Cross Cut irrigation canal, and related tracts of land to the Fremont-Madison Irrigation District. Reclamation did not retain any rights to oversee operations or safety of the dam or the other transferred property. Thus, the ownership, operation, and maintenance of the dam, irrigation canals, and related lands are entirely under non-federal control. Accordingly, as described below, the dam is included as a licensed project work. (*See* staff letter to Reclamation of August 10, 2007 and Reclamation's reply letter filed September 10, 2007.)

<sup>3</sup> The Henry's Fork is a tributary of the Snake River, a navigable waterway which empties into the Columbia River. The applicant plans to sell power to a utility in the area which is connected to the interstate grid. Since the project is located on a stream over which Congress has jurisdiction under the Commerce Clause, affects interstate commerce through its connection to the interstate power grid, and will involve construction post-

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2. As discussed below, I am issuing an original 40-year license for the project.

## **BACKGROUND**

3. Notice of the application was published in the Federal Register on May 12, 2006, setting July 12, 2006, as the deadline for filing comments and motions to intervene. Timely motions to intervene were filed by the State of Idaho (July 10, 2006), The Greater Yellowstone Coalition (July 11, 2006), the Henry's Fork Foundation (July 11, 2006), Idaho Rivers United (July 11, 2006), and Trout Unlimited (July 11, 2006).<sup>4</sup> None of the intervenors oppose the project.

4. On October 13, 2006, the Commission issued public notice that the application was ready for environmental analysis and solicited comments, recommendations, terms and conditions, and prescriptions. In response, comments and recommendations were filed by individuals, resource agencies, and non-governmental organizations.<sup>5</sup>

5. Commission staff issued an Environmental Assessment (EA) for the project on September 28, 2007 (September 2007 EA) and a final EA on April 10, 2008. Comments on the September 2007 EA were received from the following entities: Greater Yellowstone Coalition, Symbiotics, Idaho Rivers United, Henry's Fork Foundation, Trout Unlimited, the Idaho Department of Parks and Recreation (Parks and Recreation), Idaho Department of Fish and Game (Fish and Game), U.S. Fish and Wildlife Service (FWS), U.S. Geological Survey (USGS), Snake River Cutthroats, the U.S. Forest Service (Forest Service), and the U.S. Environmental Protection Agency.

6. Appendix A of the final EA addresses the comments filed on the September 2007 EA. The motions to intervene, comments, and recommendations have been fully considered in determining whether, and under what conditions, to issue this license.

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1935, it is required to be licensed pursuant to section 23(b)(1) of the FPA, 16 U.S.C. § 817(b)(1) (2000).

<sup>4</sup> The motions were timely and unopposed and therefore granted 15 days after they were filed pursuant to 18 C.F.R. § 385.314(c) (1) (2008).

<sup>5</sup> The following entities filed comments: State of Idaho, Idaho Department of Fish and Game, Trout Unlimited, Greater Yellowstone Coalition, Idaho Rivers United, Henry's Fork Foundation, Upper Snake River Fly Fishers, Henry's Fork Anglers, The Snake River Cutthroats, the Forest Service, and sixty-five individuals.

## PROJECT DESCRIPTION

### A. Project Facilities

7. The existing Chester Diversion dam is a concrete structure with a crest length of 355 feet and a structural height of 17 feet. The spillway crest elevation is 5,040.5 feet above mean sea level (msl). There is one radial gate on the south side, which controls the flow into the Cross Cut irrigation canal, and another radial gate on the north side, which controls the flow into the Last Chance irrigation canal. The dam effectively raises the water level 10 feet above the stream bed of the Henry's Fork, increasing the size of the reservoir from about 34 acres to about 55 acres, to provide diversion of waters to the Cross Cut and Last Chance irrigation canals.

8. In addition to the existing reservoir and Chester Diversion dam, the proposed project consists of the following facilities to be constructed: (1) a 38-inch-high inflatable rubber dam bolted to the crest of the existing spillway, that, when inflated, will create a reservoir with a water surface elevation of 5,043.7 feet msl; (2) a 50-foot-wide concrete intake structure on the south side of the existing spillway conveying water to the turbines; (3) a sluiceway/logway adjacent to the intake structure on the south end of the spillway; (4) a 1.5-inch-spaced fish screen across the turbine intake and 0.25-inch-spaced fish screens across the entrances to both irrigation canals; (5) new Cross Cut irrigation canal headworks located approximately 20 feet upstream of the existing control gate structure; (6) new Last Chance irrigation canal headworks; (7) a low-profile powerhouse containing two Kaplan-type turbine generator units with a combined generating capacity of 3.3 MW; (8) a concrete wall, located immediately below the powerhouse, directing flow to the center of the Henry's Fork; (9) a 15-kilovolt (kV) primary transmission line that would extend about 1.4 miles from the powerhouse along the access road right-of-way to connect to an existing substation; and (10) appurtenant facilities. The estimated average annual generation would be 16,800 megawatt-hours (MWh).

9. The project boundary incorporates the existing Chester Diversion dam topped with the rubber dam, Chester Diversion dam reservoir, lands associated with canal headworks, the new powerhouse, parking lot, upstream and downstream boat launches, and the primary transmission line.

### B. Project Operation

10. The applicant proposes to operate the Chester Diversion Project in a run-of-river mode. After irrigation needs are met, up to 3,500 cubic-feet per second (cfs) would be diverted into the proposed powerhouse for generation. Any flows greater than both irrigation and power needs would spill over Chester Diversion dam.

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11. The applicant also proposes to provide a 25-cfs minimum flow through the sluiceway/logway to allow downstream fish passage. There would be no bypassed reach as flows used by the powerhouse would enter the proposed intake structure and then be released back into the Henry's Fork immediately below Chester Diversion dam. A concrete wall, located immediately downstream of the powerhouse, would direct this flow back toward the main channel.

### **SETTLEMENT AGREEMENT**

12. On October 26, 2007, Symbiotics filed a final settlement agreement (Settlement) signed by representatives from Idaho Fish and Game, Idaho Parks and Recreation, FWS, Forest Service, Trout Unlimited, the Henry's Fork Foundation, and the Greater Yellowstone Coalition (collectively, the Settlement Parties). The Settlement is attached to this order in Appendix A, for reference purposes only.

13. In the cover letter transmitting the Settlement to the Commission, the applicant requested that the mitigation measures included in the Settlement (which post-dates the September 2007 EA) be addressed in the final EA and be included in any license order issued for the Chester Diversion Project. The Settlement was evaluated in the final EA issued on April 11, 2008. Accordingly, the Settlement, as described below, represents the proposed action for this project, replacing the applicant's original proposal as identified in the Chester Diversion Project license application.

14. On November 9, 2007, the Commission issued a Notice of Settlement Agreement and Soliciting Comments. The Settlement Parties filed individual letters in support of the Settlement, stating that the applicant's obligations, as set forth in the Settlement, will resolve issues regarding fish, wildlife, recreational, and aesthetic resources associated with the proposed project. The Settlement Parties requested that the Commission include all the terms and conditions included in the Settlement in any license issued for the proposed project.

15. The Snake River Cutthroats filed a letter opposing the agreement. The Snake River Cutthroats originally participated in the settlement negotiations. The group, however, did not sign the final agreement because while it agreed with most of the Settlement measures, it did not agree with size of the turbine fish screens and the lack of mitigation regarding the loss of 1,300 feet of riverine habitat in Henry's Fork. The group stated that the turbine screens should include 1-inch-spacing between the metal bars and that adequate mitigation must be developed to address the loss of riverine habitat.

16. The Settlement incorporates measures required for the protection, mitigation, and enhancement of fish, wildlife, recreation, and aesthetics resources affected by the project, including those stipulated to be included in the project license (section 6 of the

Settlement) and those stipulated to be excluded or “off license” (section 7 of the Settlement) as discussed below. Measures covered by the Settlement include: Fish Screens and Downstream Passage, Transmission Line Avian Protection, Recreation Resource measures, and Upstream Fish Passage (off-license).

### ***Fish Screens and Downstream Passage***

17. The Henry’s Fork maintains a blue-ribbon trout fishery valuable to the local economy and to the ecosystem. The results of the applicant’s studies on fish entering the irrigation canals indicate that entrainment into the Cross Cut and Last Chance irrigation canals results in the loss of thousands of fish every season, due to fatal summertime herbicide treatments and the dewatering of the canal at the end of the irrigation season.<sup>6</sup> Operation of the project would result in fish entrainment into the proposed powerhouse intakes and the redirection of flows around the dam would result in continued or increased entrainment into the Cross Cut and Last Chance irrigation canals.

18. Section 6.2.1 of the Settlement proposes to include a license requirement for the installation of fish screens. The Settlement states that the applicant will install a 1.5-inch-spaced screen across the powerhouse intakes and 0.25-inch-spaced screens across each of the irrigation canals.

19. The September 2007 EA recommended a single, 1-inch-spaced screen covering the powerhouse intakes and the Cross Cut irrigation canal. The final EA, however, recommended a single, 1.5-inch-spaced screen for the powerhouse intakes only, due to the potential for heavy algal coating which could be detrimental to project operation. As mentioned previously, the Snake River Cutthroats did not sign the final agreement because it did not agree with size of the turbine fish screens and the group continues to recommend that the turbine screen spacing should not exceed one inch.<sup>7</sup>

20. The September 2007 EA did not accept the applicant’s proposal for 1.5-inch-spaced screens on the powerhouse intakes because that size spacing would physically prevent entrainment of only the very largest salmonids in the system – a very small proportion of population. After further analysis, however, the final EA concludes that, despite the larger 1.5-inch spacing, this screen should function as a structure eliciting avoidance behavior amongst fish. Furthermore, I note that mortality risks due to entrainment at the powerhouse intakes are reduced by several mechanisms, including

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<sup>6</sup> Final EA, p. 42.

<sup>7</sup> *Id.*, p. 43.

flow characteristics across fish screens that facilitate physical and behavioral avoidance, high survival rates associated with turbine entrainment, and the inclusion of a downstream passage structure, as proposed by Symbiotics. Article 405, therefore, requires the applicant to install a 1.5-inch screen on the powerhouse intakes.

21. The September 2007 EA recommended that the 1-inch-spaced screen covering the powerhouse intakes be constructed to also cover the Cross Cut irrigation canal. After further analysis of the Settlement proposal, the final EA modified the recommendation to include separate 0.25-inch-spaced screens on both the Cross Cut and Last Chance irrigation canals. The smaller spaced screens would physically prevent most fish from entering both the irrigation canals, where fish mortality was found to be very high. The final EA, however, noted that given the smaller screen spacing, the potential for algal coating was still pertinent, but design considerations incorporating an appropriate screen angle and sweeping velocities along the screens, along with proper maintenance, would improve the performance of the 0.25-inch-spaced screens.<sup>8</sup> Article 406, therefore, requires the installation of 0.25-inch-spaced screens at the Cross Cut and Last Chance irrigation canals.

22. Also, as recommended in the final EA and included in section 6.2.1 of the Settlement, Article 404 provides for a sluiceway/logway that will provide downstream-moving fish an option for safe passage over the dam, further enhancing populations in the project area.

### ***Transmission Line Avian Protection***

23. The proposed 1.4-mile-long, 15-kV above-ground transmission line could cause collision or electrocution injury or mortality to avian species, including trumpeter swans, bald eagles and other raptors, and other bird species.<sup>9</sup> Symbiotics, as part of the Settlement (section 6.2.3), proposes to construct the above-ground power lines fitted with reflective devices that deter birds and protect them from strike mortality.

24. Marking the line to increase its visibility would minimize potential collision hazards. Article 412 requires Symbiotics to develop a plan, after consultation with the resource agencies, to determine the most effective means of marking the line at this particular location, and to include the design of the protective devices, spacing, and maintenance consistent with accepted raptor-protection measures.

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<sup>8</sup> *Id.*, pp. 42-43.

<sup>9</sup> *Id.*, pp. 63-64.

### ***Recreation Resources***

25. The recreation and aesthetic measures outlined in section 6.2.4 of the Settlement provide for a number of improvements, including upgrading existing boat launches; improving and expanding parking; developing an information and education plan; improving and maintaining the existing access road; using aesthetically-pleasing design and materials when constructing buildings; and screening all buildings with vegetation. These measures would provide significant improvements to existing conditions and would improve access to recreational opportunities in the project area. In addition, the Settlement includes a proposal to construct several facilities to meet Americans with Disabilities Act standards, including a fishing platform, restrooms, and an accessible trail connecting the parking area and the platform. Improving access for the disabled at the project would be consistent with the Commission's policy on recreation facilities at licensed projects,<sup>10</sup> under which licensees are expected to consider the needs of the disabled in the design and construction of such facilities. Article 415, therefore, requires Symbiotics to implement the recreation and aesthetic measures outlined in section 6.2.4 of the Settlement, in addition to the staff modifications, as discussed below.

### ***Upstream Fish Passage – Non-license***

26. The applicant originally proposed to construct an upstream fish passage facility (fish ladder) at Chester Diversion dam during initial project construction and section 7 of the Settlement now includes construction of the fish ladder only as an off-license feature.<sup>11</sup> As set forth in section 7 of the Settlement, this facility would be funded by non-governmental organizations and operated by Idaho Fish and Game, which would own the facility for at least five years. According to Idaho Fish and Game, the fish ladder should not be operated until the protocols for its operation are decided.<sup>12</sup>

27. The Settlement Parties support the upstream fish passage proposal; however, as confirmed by Idaho Fish and Game in its comments on the September 2007 EA, the benefits of upstream fish passage are unclear. The existing dam has blocked the upstream passage of fish since its initial construction in 1935, but the Henry's Fork still maintains a blue-ribbon trout fishery. The applicant's baseline studies indicate that the

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<sup>10</sup> See 18 C.F.R. § 2.7 (2008).

<sup>11</sup> See section 7 ("Non-License Terms and Obligations") of the Settlement, filed by applicant on October 26, 2007.

<sup>12</sup> Final EA, p. 107.

river has a good, self-sustaining population of rainbow trout upstream and downstream of the dam.<sup>13</sup> Assuming non-anadromous salmonids of the Henry's Fork in the vicinity of Chester Diversion dam would utilize the upstream fish passage structure, fish passage would allow fish from the lower reach to access the presumably more suitable habitat upstream of the dam; however, this could result in adverse impacts if the upstream habitat were to become overcrowded by fish passing upstream over Chester Diversion dam.<sup>14</sup> Overcrowding could result in redd superimposition and increased competition for other resources, which could ultimately reduce the size or health of the rainbow trout population upstream of Chester Diversion dam.<sup>15</sup> Due to an insufficient biological basis, and a finding that the costs outweigh the expected benefits,<sup>16</sup> I do not include the construction of a fish ladder for upstream fish passage in this license.

28. As noted, the Settlement Parties do not propose that construction of the fish ladder be included as a condition of the license and, in fact, anticipate that it will be constructed only if the non-governmental organizations are able to raise the necessary funds. The construction and operation of any fish ladder during the term of the license, however, could affect project operations and would have impacts on fishery resources, the protection of which is a project purpose. Also, the fish ladder's construction at the dam could affect dam safety. If conditions should change to necessitate future fishway construction, the licensee must seek Commission authorization for the proposed action.

## WATER QUALITY CERTIFICATION

29. Under section 401(a)(1) of the Clean Water Act (CWA),<sup>17</sup> the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued a water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d)

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<sup>13</sup> *Id.*, p. 44

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, p. 108.

<sup>16</sup> *Id.*

<sup>17</sup> 33 U.S.C. § 1341(a)(1) (2000).

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of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.<sup>18</sup>

30. On May 24, 2004, Symbiotics applied to the Idaho Department of Environmental Quality (DEQ) for water quality certification for the Chester Diversion Project. On May 24, 2005, Idaho DEQ issued certification for the project.<sup>19</sup>

31. In the certification, Idaho DEQ states that it reviewed the Chester Diversion Project license application and, provided that the project operates as described in the application, there is reasonable assurance the project will comply with applicable requirements of the CWA and Idaho Water Quality Standards. Idaho DEQ did not attach any terms and conditions to the certification. The Settlement did not change the applicant's proposed measures regarding water quality.<sup>20</sup>

### **SECTION 18 FISHWAY PRESCRIPTION**

32. Section 18 of the FPA<sup>21</sup> provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

33. As part of the Settlement, filed on October 26, 2007, the Secretary of the Interior requested that the Commission reserve authority to prescribe fishways. Consistent with Commission policy, Article 410 of this license reserves to the Commission authority to require fishways that may be prescribed by the Department of the Interior for the Chester Diversion Project.

### **THREATENED AND ENDANGERED SPECIES**

34. Section 7(a)(2) of the Endangered Species Act of 1973,<sup>22</sup> requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of

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<sup>18</sup> 33 U.S.C. § 1341(d) (2000).

<sup>19</sup> Applicant filed the certification on January 6, 2006.

<sup>20</sup> Final EA, pp. 20-37 and 104-105.

<sup>21</sup> 16 U.S.C. § 811 (2000).

<sup>22</sup> 16 U.S.C. § 1536(a) (2000) *et seq.*

federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

35. The project would have no effect on the federally-listed threatened Ute ladies'-tresses (*Spiranthes diluvialis*), the endangered Utah valvata snail (*Valvata utahensis*), or the whooping crane (*Grus americana*), which is considered an experimental population by FWS.<sup>23</sup>

### **NATIONAL HISTORIC PRESERVATION ACT**

36. Under section 106 of the National Historic Preservation Act (NHPA),<sup>24</sup> and its implementing regulations,<sup>25</sup> federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register of Historic Places (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Officer to determine whether and how a proposed action may affect historic properties and to seek ways to avoid or minimize any adverse effects.

37. To satisfy these responsibilities, on April 28, 2008, the Commission executed a Programmatic Agreement (PA) with the Idaho State Historic Preservation Officer and invited Symbiotics and the Shoshone-Bannock Tribes to concur with the stipulations of the PA.<sup>26</sup> The PA requires the licensee finalize and implement a Historic Properties Management Plan (HPMP) for the term of any license issued for this project. Execution of the PA demonstrates the Commission's compliance with section 106 of the NHPA. Article 417 requires the licensee to implement the PA and to file its HPMP with the Commission for approval within one year of license issuance.

38. The proposed Chester Diversion Project would involve ground disturbance, both through an increase in the reservoir elevation (potential erosional effects) and through

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<sup>23</sup> Final EA, p. 66.

<sup>24</sup> 16 U.S.C. § 470 *et seq.* (2000).

<sup>25</sup> 36 C.F.R. Part 800 (2007).

<sup>26</sup> Neither Symbiotics nor the Shoshone-Bannock Tribes responded to the Commission's request for concurrence on the PA.

construction of project facilities and recreational amenities.<sup>27</sup> To ensure that any significant archaeological sites are identified prior to ground-disturbing activities, Article 417 also requires the licensee to complete an archeological field investigation of any portion of the Area of Potential Effect (APE) not covered in the 2002 survey and include the results in the HPMP. The field survey shall be developed and conducted in consultation with the Idaho SHPO and the Shoshone-Bannock Tribes within six months of license issuance. The HPMP, developed as required by the PA and Article 417, would ensure that any adverse effects on historic properties arising from project construction and operations over the term of a new license would be mitigated, lessened, or avoided.

## **RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES**

### **Recommendations Pursuant to Section 10(j) of the FPA**

39. Section 10(j)(1) of the FPA,<sup>28</sup> requires the Commission, when issuing a license, to include conditions based on recommendations by federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,<sup>29</sup> to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

40. In response to the Commission’s Ready for Environmental Analysis notice, dated October 13, 2006, Idaho Fish and Game provided 12 recommendations pursuant to section 10(j). As noted, the applicant filed the Settlement on October 26, 2007, to which Idaho Fish and Game was a signatory. In comments on the September 2007 EA and the Settlement, Idaho Fish and Game indicated full support for the measures included in the Settlement and requested the Commission accept the measures contained in the Settlement. In response to a January 11, 2008, staff letter requesting clarification on Idaho Fish and Game’s section 10(j) measures, the agency filed a letter on February 4, 2008, again reiterating its belief that the measures proposed in the Settlement fully address its concerns regarding fish and wildlife. We now consider all fish and wildlife measures addressed by the Settlement to be Idaho Fish and Game’s revised 10(j) measures. If an original 10(j) measure was not addressed by any measures within the Settlement, we considered this measure to no longer be a section 10(j) recommendation

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<sup>27</sup> Final EA, pp. 77-79, and 115.

<sup>28</sup> 16 U.S.C. §803(j)(1) (2000).

<sup>29</sup> 16 U.S.C. §§ 661 (2000) *et seq.*

by Idaho Fish and Game. As a result, we deem Idaho Fish and Game to have provided two section 10(j) recommendations (contained in section 6.2 of the Settlement).

41. This license includes conditions consistent with the two section 10(j) recommendations. These include recommendations to: (1) screen the powerhouse intake with 1.5-inch mesh screens; screen the entrance of the Cross Cut and Last Chance irrigation canals with 0.25-inch mesh screen; provide a pathway for downstream fish migration; and operate the project to provide sufficient flows for downstream fish migration (Articles 404, 405, and 406); and (2) mark the 15-kV transmission line to reduce avian hazards (Article 412).

### **PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT**

42. In 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act).<sup>30</sup> This act created the Northwest Power Planning Council (now known as the Northwest Power and Conservation Council) and directed it to develop a Columbia River Basin Fish and Wildlife Program (Program). The Program is to protect, mitigate, and enhance fish and wildlife resources affected by the development and operation of hydroelectric projects on the Columbia River and its tributaries, while assuring the Pacific Northwest has adequate, efficient, economical, and reliable power supply.<sup>31</sup> Section 4(h)(11)(A) of the Northwest Power Act<sup>32</sup> provides that federal agencies operating or regulating hydroelectric projects within the Columbia River Basin shall exercise their responsibilities to provide equitable treatment for fish and wildlife resources with other purposes for which the river system is utilized and shall take the Council's Program into account "at each relevant stage of decision-making processes to the fullest extent practicable."

43. To mitigate harm to fish and wildlife resources, the Council has adopted specific provisions to be considered in the licensing or relicensing of non-federal hydropower projects (Appendix B of the Program). Our recommendations, including an erosion control plan (Articles 303 and 401); water quality monitoring (Article 403); sluiceway/logway for downstream migration (Article 404); fish screens (Articles 405 and 406); biological monitoring (Article 408); a habitat enhancement plan (Article 409); and

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<sup>30</sup>16 U.S.C. § 839(b) (2000) *et seq.*

<sup>31</sup>16 U.S.C. § 839(b)(h)(5) (2000).

<sup>32</sup>16 U.S.C § 839(h)(11)(A) (2000).

wildlife habitat improvements (Articles 411 through 413) are consistent with the applicable provisions of the Program. As part of the Program, the Council has designated over 40,000 miles of river in the Pacific Northwest region as not being suitable for hydroelectric development (“protected area”). The project is not located within such a protected area. Further, Article 414 reserves to the Commission the authority to require future alterations in project structures and operations to take into account, to the fullest extent practicable, the applicable provisions of the Program.

## **OTHER ISSUES**

### ***Run-of-River Operation***

44. Symbiotics proposes to operate the project in a run-of-river mode for the protection of fish spawning in the project area, as well as for maintenance of adequate water in the Henry’s Fork. After irrigation needs are met, up to 3,500 cfs would be diverted into the proposed powerhouse for generation. Any flows greater than both irrigation and power needs would spill over Chester dam. Operating the project in a run-of-river mode, as required by Article 402, will provide a natural river-flow situation for fish and aquatic resources downstream from the dam, as well as minimize any effects on water quality.

### ***Sediment Control Measures and Water Quality***

45. The potential exists for some erosion and sedimentation to occur during project construction. Article 401 requires the licensee to file a plan with the Commission that will provide assurance that all reasonable measures are taken to prevent excessive erosion and sedimentation during project construction, operation, and maintenance.

46. The applicant also proposes to monitor water quality before, during, and after project construction. Article 403 requires that, among others, the parameters of turbidity and water temperature are included in any water quality monitoring program. Turbidity monitoring would allow for the detection of unsuitable sediment concentrations caused by any project construction and operational activities. Including temperature as a parameter in a water quality monitoring program would be an inexpensive means to ensure the recognition of any unforeseen project effects on water temperature.

### ***Monitoring Fish Screen Effectiveness***

47. As noted, the Henry’s Fork maintains a blue-ribbon trout fishery valuable to the local economy and to the ecosystem and the results of studies indicates that entrainment into the Cross Cut and Last Chance irrigation canals results in the loss of thousands of fish every season. As discussed in greater detail above (*see* the section entitled “Settlement Agreement”), in addition to screening the irrigation canals and powerhouse

intake, the final EA also recommends a plan to monitor the effectiveness of the installed screens. Article 407, therefore, requires the applicant to develop a plan that includes monitoring effectiveness of the fish screens to ensure they are meeting the objectives for which they were designed.

### ***Habitat Mitigation Plan***

48. The project includes the addition of a 38-inch-high rubber inflatable dam on the crest of Chester Diversion dam, designed to maintain a higher permanent pool. This would result in an increase in the size of the existing Chester Diversion dam reservoir, extending the pool approximately 1,300 feet upstream in the Henry's Fork and an additional 700 feet upstream in the Falls River. Although the Settlement does not include any measures to mitigate for the loss of riverine habitat, both the final EA and the Snake River Cutthroats recommend the development of mitigation measures to address this loss.<sup>33</sup> Article 409, therefore, requires the applicant to prepare a habitat mitigation plan which will serve to provide more specific data regarding the impact of inundation on the Henry's Fork and the Falls River, as well as to mitigate for the loss of riverine habitat in the project area.

### ***Biological Monitoring***

49. Construction, operation, and maintenance of the project may result in unforeseen project effects on salmonid resources. The Settlement states that the proposed fish ladder and other mitigation measures, however, invalidate the need for monitoring. The final EA disagreed with this conclusion and because it did not include a recommendation for upstream fish passage but did recognize the economic and ecological significance of the resident trout population in the project area, long-term monitoring of the trout fishery was recommended.<sup>34</sup> Article 408, therefore, requires that the licensee conduct long-term monitoring for at least 10 years after the start of project operation. Monitoring the resident trout population will ensure the recognition of unforeseen project effects.

### ***Wildlife and Vegetation Protection***

50. Symbiotics proposes measures to protect wildlife and vegetation during the construction period and after the completion of construction. These measures include reseeded disturbed areas; controlling noxious weeds, including reed canary grass; protecting and restoring riparian vegetation, including cottonwoods; and timing of

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<sup>33</sup> Final EA, pp. 45-47, 108.

<sup>34</sup> *Id.*, p. 110.

construction and raising the reservoir levels to protect waterfowl and bald eagle use of the project area. The measures proposed by Symbiotics would protect wildlife and aid in the natural reestablishment of wetlands and riparian habitat.<sup>35</sup>

51. Article 411 requires Symbiotics to implement the proposed restoration measures. Within 3 years of license issuance, Symbiotics must file a report detailing the results of all the recommended measures for the protection of vegetation and wildlife resources and provide specific details for each of the proposed measures, including the results of any revegetation and restoration efforts.

### ***Bald Eagle Protection***

52. Bald eagles nest and winter in the project area. Symbiotics proposes to construct the project between May 16 and the end of February to minimize disturbance to nesting bald eagles. The proposed construction schedule would avoid the prime breeding period, minimizing the effect of construction disturbance on wildlife species.<sup>36</sup> The proposed construction schedule is required by Article 413.

### ***Recreation Resources***

53. As discussed above, the recreation and aesthetic measures outlined in section 6.2.4 of the Settlement provide for Symbiotics to make a number of improvements. These measures would provide significant improvements to the existing boat launches and parking lot and would improve access to recreational opportunities in the project area; therefore, Article 415 requires the applicant to implement these measures. While most of the measures can be implemented as specifically outlined in section 6.2.4 of the Settlement, not all the measures fully address recreation needs. Therefore, as discussed below, some measures included in Article 415 include staff modifications.

54. As outlined in 6.2.4.1 of the Settlement, Symbiotics proposes to improve access and construct a gravel parking area; however, the Settlement does not specify the size of the parking area. Article 415 requires, therefore, that the parking lot be constructed to accommodate 20 cars and trailers and include trash receptacles. Providing parking for 20

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<sup>35</sup> *Id.*, pp. 57-63.

<sup>36</sup> *Id.*, p. 61.

passenger vehicles and trailers would improve boating and vehicular access in the vicinity of Chester Diversion dam.<sup>37</sup>

55. As outlined in section 6.2.4.5 of the Settlement, Symbiotics proposes to develop an Information and Education Plan that will include identifying locations for signs, information boards, maps and brochures, and other materials relating to recreation and aesthetic opportunities in the project area. Currently, no signage or information exists regarding recreational opportunities and access at Chester Diversion dam.<sup>38</sup> Signage could be provided in the form of an informational kiosk, as well as signs and brochures. A centrally located interpretive kiosk at Chester Diversion dam would allow visitors to access information on all recreation opportunities at the project, therefore enhancing visitor experience. Article 415, therefore, requires the applicant to install an informational kiosk at the site of Chester Diversion dam, in addition to developing the Information and Education Plan.

56. As outlined in section 6.2.4.6 of the Settlement, Symbiotics also proposes to develop a temporary Recreation Access Management Plan in order to provide public access to the project during construction. This plan would include a number of measures to identify recreation access locations and alert the public of ongoing construction during this period and would ensure adequate access and public safety during construction of the project.<sup>39</sup> Symbiotic's proposal, however, does not include a timeframe for implementation of the plan. To ensure that the plan is implemented prior to the start of land disturbing activities, Article 416 requires Symbiotics to file a Recreation Access Management Plan for Commission approval within six months of license issuance.

### ***Project Boundary***

57. Symbiotics originally proposed a project boundary enclosing about 39 acres of land, with about 29 acres under water (the reservoir). The remaining 10 acres includes about five acres of undeveloped riparian shrubland, and five acres of pasture land (fallow and disturbed), cultivated fields, undeveloped non-riparian land, and riparian woodland. The proposed project boundary did not include the downstream face of the Chester Diversion dam, nor did it include the entire project reservoir.

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<sup>37</sup> *Id.*, p. 68.

<sup>38</sup> *Id.*, p. 113

<sup>39</sup> *Id.*, p. 69.

58. On October 19, 2007, the Commission issued a letter to Symbiotics, requesting revised exhibit G drawings that included a new project boundary encompassing the complete unit of development, including all of the Chester Diversion dam, as well as the entire reservoir up to the high water mark, within the project boundary. On November 19, 2007, Symbiotics provided revised exhibit G drawings.

59. The current exhibit G, however, does not include all of the existing recreation facilities, nor does it include all of the recreation enhancements required by Article 415, such as the existing parking area, the downstream boat launch, and the proposed restroom facilities and barrier-free trail and hardened accessible surface near the river. Based on staff's analysis in the final EA,<sup>40</sup> I conclude that these facilities are necessary for project purposes and therefore must be brought within the project boundary. Article 203 requires the applicant to file revised exhibit G drawings that include a project boundary that encompasses the existing project recreation facilities in their entirety, including the downstream boat launch, the existing parking area, and the upper bridge across the Cross Cut irrigation canal. In addition, Article 305 of this license requires the licensee to file revised exhibit G drawings after construction of the recreation facilities required by Article 415.

### *Administrative Conditions*

#### Annual Charges

60. The Commission collects annual charges from licensees for administration of the FPA. Article 201 provides for the collection of funds for administration of the FPA.

#### Exhibit F Drawings

61. The Commission requires licensees to file sets of approved project drawings on microfilm and in electronic file format. Article 202 requires the filing of these drawings.

#### Exhibit G Drawings

62. The exhibit G drawings filed on November 19, 2007, do not meet Commission standards because they do not contain all project works necessary for project operation. Article 203 requires the licensee to file for Commission approval revised exhibit G drawings that comply with the Commission's regulations and enclose within the project boundary all principal project works necessary for operation and maintenance of the

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<sup>40</sup> *Id.*, pp. 69-70 and 72.

project, including the downstream boat launch, the existing parking area, and the upper bridge across the Cross Cut irrigation canal.

*Amortization Reserve*

63. The Commission requires that for major licenses, licensees must set up and maintain an amortization reserve account upon license issuance. Article 204 requires the establishment of the account.

*Headwater Benefits*

64. Some projects directly benefit from headwater improvements that were constructed by other licensees, the United States, or permittees. Article 205 requires the licensee to reimburse such entities for these benefits if they were not previously assessed and reimbursed.

*Use and Occupancy of Project Lands and Waters*

65. Requiring a licensee to obtain prior Commission approval for every non-project use or occupancy of project land would be unduly burdensome. Therefore, Article 418 allows the licensee to grant permission, without prior Commission approval, for the use and occupancy of project lands for such minor activities as landscape planting. Such uses must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

*Review of Final Plans and Specifications*

66. Article 301 requires the licensee to start construction of the project works within two years, and complete construction within five years, from the issuance date of the license.

67. Article 302 requires the licensee to submit an Operating Manual prior to completion of construction of the inflatable rubber dam that provides the details on how the project is to be operated in a run-of-river mode, as required by Article 402.

68. Article 303 requires the licensee to provide final contract drawings and specifications prior to the start of construction.

69. Article 304 requires the licensee to review and approve the design of contractor-designed cofferdams and deep excavations and shall make sure construction of cofferdams and deep excavations are consistent with the approved design prior to the start of construction.

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70. Article 305 requires the licensee to provide the Commission with revised drawings of project features as-built.

71. Article 306 requires the licensee to provide the Commission with a project financing plan.

### **STATE AND FEDERAL COMPREHENSIVE PLANS**

72. Section 10(a)(2)(A) of the FPA<sup>41</sup> requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.<sup>42</sup> Under section 10(a)(2)(A), federal and state agencies have filed comprehensive plans that address various resources in Idaho. Staff reviewed the comprehensive plans and determined that eleven are relevant to this project.<sup>43</sup> No conflicts were found.

### **SAFE MANAGEMENT, OPERATION, AND MAINTENANCE OF THE PROJECT**

73. Staff reviewed Symbiotic's preliminary plans to build the project as described in the license application and the Settlement. Staff concludes that the dam and other project works will be safe when constructed, operated, and maintained in accordance with the Commission's standards and the provisions of this original license.

### **NEED FOR POWER**

74. The proposed Chester Diversion Project would provide hydroelectric generation to meet part of Idaho's power requirements as well as resource diversity and capacity needs. The project would have an installed capacity of 3.3 MW and generate approximately 16,800 MWh per year.

75. The North American Electric Reliability Council (NERC) annually forecasts electrical supply and demand nationally and regionally for a 10-year period. The Chester

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<sup>41</sup> 16 U.S.C. § 803(a)(2)(A) (2000).

<sup>42</sup> Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2007).

<sup>43</sup> The list of applicable plans can be found in section IX of the final EA for the project.

Diversion Project would be located in the Northwest Power Pool (NWPP)<sup>44</sup> region of the Western Electricity Coordinating Council. According to NERC's 2007 forecast, winter total internal demand for the NWPP region is projected to grow at an annual rate of 1.5 percent, from 2007 through 2016. Annual energy requirements are projected to grow at a rate of 1.7 percent for the U.S.

## PROJECT ECONOMICS

76. In determining whether to issue a new license for an existing hydroelectric project, the Commission considers a number of public interest factors, including the economic benefits of project power. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp.*,<sup>45</sup> the Commission uses current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

77. In applying this analysis to the Chester Diversion Project, we have considered two options: Symbiotics' proposal and the project as licensed herein. As proposed by Symbiotics, the levelized annual cost of operating the Chester Diversion Project is \$1,158,100, or \$69.35/megawatt-hour (MWh). The proposed project would generate an estimated average of 16,700 MWh of energy annually. When we multiply our estimate of average generation by the alternative power cost of \$71.10/MWh,<sup>46</sup> we get a total annual value of the project's power of \$1,187,370 in 2007 dollars. To determine whether the proposed project is currently economically beneficial, staff subtracts the project's cost

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<sup>44</sup> The NWPP area is comprised of all or major portions of the states of Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming; a small portion of northern California; and the Canadian provinces of British Columbia and Alberta.

<sup>45</sup> 72 FERC ¶ 61,027 (1995).

<sup>46</sup> The value of project power cost is based on a February 13, 2008 order issued by the Idaho Public Utilities Commission establishing a levelized avoided cost rate for PacifiCorp of \$71.10/MWh for a project smaller than 10 megawatts coming on-line in 2010, with a 20-year contract.

from the value of the project's power.<sup>47</sup> Therefore, in the first year of operation, the project would cost \$29,270, or \$1.75/MWh, less than the likely alternative cost of power.

78. As licensed herein with the staff measures, the levelized annual cost of operating the project would be about \$1,166,570, or \$69.85/MWh. Based on an estimated average of 16,700 MWh as licensed, the project would produce power valued at \$1,187,370 when multiplied by the \$71.10/MWh value of the project's power. Therefore, in the first year of operation, project power would cost \$20,800, or \$1.25/MWh, less than the likely cost of alternative power.

79. In considering public interest factors, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system (ancillary service benefits). These benefits include their capability to provide an almost instantaneous load-following response to dampen voltage and frequency instability on the transmission system, system-power-factor-correction through condensing operations, and a source of power available to help in quickly putting fossil-fuel based generating stations back on line following a major utility system or regional blackout.

## COMPREHENSIVE DEVELOPMENT

80. Sections 4(e) and 10(a)(1) of the FPA<sup>48</sup> require the Commission to give equal consideration to the power development purposes and to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

81. The final EA for the project contains background information, analysis of impacts, and support for related license articles. I conclude, based on the record of this proceeding, the final EA, and the comments thereon, that licensing the Chester Diversion Project as described in this order would not constitute a major federal action significantly affecting the quality of the human environment. The project will be safe if operated and maintained in accordance with the requirements of this license.

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<sup>47</sup> Details of staff's economic analysis for the project as licensed herein and for various alternatives are included in the final EA issued April 2008.

<sup>48</sup> 16 U.S.C. §§ 797(e) and 803(a)(1) (2000).

82. Based on my independent review and evaluation of the project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the final EA, I have selected the proposed Chester Diversion Project with the staff-recommended measures, and find that it is best adapted to a comprehensive plan for improving or developing the Henry's Fork of the Snake River.

83. I selected this alternative because: (1) issuance of an original license will serve to provide a beneficial, dependable, and an inexpensive source of electric energy; (2) the required environmental measures will protect and enhance fish and wildlife resources, water quality, recreational resources and historic properties; and (3) the 3.3 MW of energy generated from this renewable resource may offset the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable energy resources and reducing atmospheric pollution.

### **LICENSE TERM**

84. Section 6 of the FPA<sup>49</sup> provides that original licenses shall be issued for a period not to exceed 50 years. The Commission's policy is to award a 40-year license term for new projects at existing dams, because proposed development is moderate.<sup>50</sup>

85. This license requires a moderate amount of new construction, including: (1) installing a 38-inch-high inflatable dam; (2) constructing a 50-foot-wide concrete intake structure; (3) constructing a new sluiceway/logway; (4) installing fish screens on the powerhouse intake and both irrigation canals; (5) constructing new Cross Cut irrigation canal headworks; (6) constructing a powerhouse; (7) constructing a concrete wall immediately below the powerhouse; and (8) installing a 1.4-mile-long, 15-kV transmission line. Consequently, a 40-year license term for the Chester Diversion Project is appropriate.

### ***The Director orders:***

(A) This license is issued to Symbiotics, LLC (licensee), for a period of 40 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Chester Diversion Project. This license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

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<sup>49</sup> 16 U.S.C. § 799 (2000).

<sup>50</sup> See *City of Danville, Virginia*, 58 FERC 61,318 at 62,020 (1992).

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands, described in the project description and the project boundary discussion of this order.

(2) Project works consisting of: (a) an existing concrete dam with a crest length of 355 feet and a structural height of 17 feet; (b) a 38-inch-high inflatable rubber dam bolted to the crest of the existing spillway, that, when inflated, creates a reservoir with a water surface elevation of 5,043.7 feet msl; (c) an existing 355-foot-long overflow spillway with a spillway crest elevation is 5,040.5 feet above mean sea level (msl); (d) an existing flow control structure located on the south side of the dam, with a radial gate that controls the flows into the Cross Cut irrigation canal; (e) an existing flow control structure located on the north side of the dam with a radial gate that controls the flows into the Last Chance irrigation canal; (f) a 50-foot-wide concrete intake structure on the south side of the existing spillway conveying water to the turbines; (g) a sluiceway/logway adjacent to the intake structure on the south end of the spillway; (h) a 1.5-inch-spaced fish screen across the turbine and 0.25-inch-spaced fish screens across both irrigation canals to prevent entrainment into the turbine and canal intake structures; (i) new Cross Cut irrigation canal headworks located approximately 20 feet upstream of the existing control gate structure; (j) new Last Chance irrigation canal headworks; (k) a low-profile 50-foot by 50-foot concrete powerhouse containing two Kaplan-type turbine generator units with a combined generating capacity of 3.3 MW; (l) a concrete wall, located immediately below the powerhouse directing flow to the center of the Henry's Fork; (m) a 15-kilovolt primary transmission line that would extend about 1.4-miles from the powerhouse along the access road right-of-way to connect to an existing substation; and (n) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of exhibits A and F shown below:

Exhibit A: The following sections of exhibit A of the license application filed on May 20, 2004:

Section A-1, pages A-1 entitled "General Description", and section A-3, pages A-3 and A-4, entitled "Proposed Facilities".

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Exhibit F: The following sections of exhibit F filed on May 20, 2004:

Exhibit F drawing	FERC No.11879	Description
F-1	1	Proposed Site Plan
F-2	2	Powerhouse
F-3	3	Elevation
F-4	4	Existing Site Plan

(2) All of the structures, fixtures, equipment or facilities used to operate or maintain the project, all portable property that may be employed in connection with the project, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The exhibits A and F described above are approved and made part of the license. The exhibit G drawings filed on November 19, 2007, do not conform to the Commission regulations and are not approved.

(D) This license is subject to the certification submitted by the Idaho Department of Environmental Quality under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1431(a)(1) (2000).

(E) This license also is subject to the articles set forth in Form L-11 (Oct. 1975), entitled "Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce" (see 54 FPC 1799 et seq.), and the following additional articles:

Article 201. Administrative Annual Charges. The licensee shall pay the United States annual charges, effective as of the date of commencement of project construction, and as determined in accordance with the provisions of the Commission's regulations in effect from time to time for the purposes of reimbursing the United States for the cost of administration of Part 1 of the Federal Power Act. The authorized installed capacity for that purpose is 3.3 megawatts.

Article 202. Exhibit Drawings. Within 45 days of the date of issuance of this license, the licensee shall file the approved exhibit drawings in aperture card and electronic file formats.

a) Three sets of the approved exhibit drawings shall be reproduced on silver or gelatin 35mm microfilm. All microfilm shall be mounted on type D (3-1/4" X 7-3/8") aperture cards. Prior to microfilming, the FERC Project-Drawing Number (i.e., P-11879-1 through P-11879-6) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed on the upper right

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corner of each aperture card. Additionally, the Project Number, FERC Exhibit (i.e., F-1, etc.), Drawing Title, and date of this license shall be typed on the upper left corner of each aperture card.

Two of the sets of aperture cards shall be filed with the Secretary of the Commission, ATTN: OEP/DHAC. The third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office.

b) The licensee shall file two separate sets of exhibit drawings in electronic raster format with the Secretary of the Commission, ATTN: OEP/DHAC. A third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office. Exhibit F drawings must be identified as (CEII) material under 18 CFR §388.113(c). Each drawing must be a separate electronic file, and the file name shall include: FERC Project-Drawing Number, FERC Exhibit, Drawing Title, date of this license, and file extension in the following format [P-11879-001, F-1, Description, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

IMAGERY - black & white raster file

FILE TYPE – Tagged Image File Format, (TIFF) CCITT Group 4

RESOLUTION – 300 dpi desired, (200 dpi min)

DRAWING SIZE FORMAT – 24” X 36” (min), 28” X 40” (max)

FILE SIZE – less than 1 MB desired

Article 203. Exhibit G Drawings. Within 90 days of the effective date of the license, the licensee shall file, for Commission approval, revised exhibit G drawings enclosing within the project boundary all principal project works necessary for operation and maintenance of the project, including the downstream boat launch, the existing parking area, and the upper bridge across the Cross Cut irrigation canal. The exhibit G drawings must comply with sections 4.39 and 4.41 of the Commission’s regulations.

Article 204. Amortization Reserve. Pursuant to section 10(d) of the Act, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated after the first 20 years of operations under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus

earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserved account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 205. *Headwater Benefits.* If the licensee's project is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of that term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license. The benefits will be assessed in accordance with Part 11, Subpart B, of the Commission's regulations.

Article 301. *Start of Construction.* The licensee shall commence construction of the project works within two years from the issuance date of the license and shall complete construction of the project within five years from the issuance date of the license.

Article 302. *Operating Manual.* At least 90 days prior to completion of construction of the inflatable rubber dam, an Operating Manual is to be submitted for Commission review and approval providing details on how the project is to be operated in a run-of-river mode as required by Article 402.

Article 303. *Contract Plans and Specifications.* At least 60 days prior to start of construction, the licensee shall submit one copy of its plans and specifications design document to the Commission's Division of Dam Safety and Inspections (D2SI)–Portland Regional Engineer (PRO), and two copies to the Commission (one of these shall be a

courtesy copy to the Director, D2SI). The submittal also must include as part of preconstruction requirements: a Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, and Soil Erosion and Sediment Control Plan. The licensee may not begin construction until the D2SI-PRO Regional Engineer has reviewed and commented on the plans and specifications, determined that all preconstruction requirements have been satisfied, and authorized start of construction.

Article 304. Cofferdam Construction Drawings. Before starting construction, the licensee shall review and approve the design of contractor-designed cofferdams and deep excavations and shall make sure construction of the cofferdams and deep excavations are consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensee shall submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-Portland Regional Engineer (PRO), and two copies to the Commission (one of these shall be a courtesy copy to the Director, D2SI), of the approved cofferdam construction drawings and specifications and the letters of approval.

Article 305. As-built Drawings. Within 90 days of completion of all construction activities authorized by this license, the licensee shall file with the Commission for approval, revised exhibits A, F, and G, as applicable, to describe and show those project facilities as built. A courtesy copy shall be filed with the Commission's D2SI-PRO Regional Engineer, the Director, D2SI, and the Director, DHAC.

Article 306. Project Financing Plan. At least 90 days before starting construction, the licensee shall file with the Commission for approval, three copies of a project financing plan. The plan must show that the licensee has acquired the funds, or commitment for funds, necessary to construct the project in accordance with this license. The licensee shall not start any project construction or ground-disturbing activities, before the project financing plan is approved.

Article 401. Erosion Control Plan. At least 90 days before the start of any land-disturbing or land-clearing activities, the licensee shall file with the Commission, for approval, a plan to control erosion, to control slope instability, and to minimize the quantity of sediment resulting from project construction and operation.

The plan shall be based on actual-site geological, soil, and groundwater conditions and on project design, and shall include, at a minimum, the following four items: (1) a description of the actual site conditions; (2) measures proposed to control erosion, to prevent slope instability, and to minimize the quantity of sediment resulting from project construction and operation; (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures; and (4) a specific implementation

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schedule and details for monitoring and maintenance programs for project construction and operation.

The licensee shall prepare the plan after consultation with the U.S. Fish and Wildlife Service, Idaho Department of Fish and Game, and the Idaho Department of Environmental Quality. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on geological, soil, and groundwater conditions at the site.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 402. Run-of-River Operations. The licensee shall operate the project in a run-of-river mode for the protection of fish spawning in the project area, as well as the maintenance of adequate water in the Henry's Fork. The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream from the project tailrace, approximate the sum of inflows to the project reservoir.

Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee or for short periods upon mutual agreement between the licensee and the Idaho Department of Fish and Game. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 403. Water Quality Monitoring. Within six months of license issuance, the licensee shall file with the Commission for approval, a plan to monitor turbidity, dissolved oxygen (DO) levels, and water temperature of the Henry's Fork downstream of the project.

The monitoring plan shall include a schedule for: (1) implementation of the program, beginning no later than 30 days before the start of any land-clearing or land-disturbing activities at the project site and ceasing no sooner than two years after the

completion of project construction; (2) provisions for modification to project operations or facilities if monitoring indicated the necessity of such measures; (3) consultation with the Idaho Department of Environmental Quality (DEQ), Idaho Department of Fish and Game (Fish and Game), and the U.S. Fish and Wildlife Service (FWS) concerning the results of the monitoring and any recommended provisions; and (4) filing the results, provisions, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the plan after consultation with the Idaho DEQ, Idaho Fish and Game, and the FWS. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission on an annual basis. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 404. Sluiceway/logway. Within six months of license issuance, the licensee shall file with the Commission for approval, detailed design drawings of the sluiceway/logway described in section 6.2. of the Settlement Agreement filed October 26, 2007, together with a schedule to construct/install the facilities before commercial operation of the project. Once constructed, the licensee shall provide a flow of at least 25 cubic-feet per second through the sluiceway/logway to provide safe downstream passage for fish species.

The licensee shall prepare the aforementioned drawings and schedule after consultation with the Idaho Department of Fish and Game, the Idaho Department of Parks and Recreation, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. The licensee shall include with the drawings documentation of consultation, copies of comments and recommendations on the drawings and schedule after they have been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the licensee's facilities. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the drawings and schedule with the Commission. If the licensee does not adopt a

recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 405. Turbine Intake Screen. Within six months of license issuance, the licensee shall file with the Commission for approval, detailed design drawings of the licensee's proposed turbine intake fish screen to reduce the entrainment of resident fish, together with a schedule to construct/install the turbine intake screen before commercial operation of the project.

This filing shall include, but not be limited to: (1) specifications of the size of the screen mesh openings not to exceed 1.5 inches; (2) the maximum intake approach velocity not to exceed 4-feet-per second; and (3) a description of the methods and a schedule for installing the turbine screen.

The licensee shall prepare the aforementioned drawings and schedule after consultation with all Settlement Agreement signatories, including Idaho Department of Fish and Game; the Idaho Department of Parks and Recreation; the U.S. Fish and Wildlife Service; the U.S. Forest Service; Trout Unlimited; the Henry's Fork Foundation; and the Greater Yellowstone Coalition. With the drawings, the licensee shall include documentation of consultation, copies of agency and stakeholder comments and recommendations on the drawings and schedule after they have been prepared and provided to the agencies and stakeholders, and specific descriptions of how the agencies' and stakeholder's comments are accommodated by the licensee's facilities. The licensee shall allow a minimum of 30 days for the agencies and stakeholders to comment and to make recommendations before filing the drawings and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 406. Irrigation Canal Screens. Within six months of license issuance, the licensee shall file with the Commission for approval, detailed design drawings of irrigation canal fish screens, as described in section 6.2 of the Settlement Agreement filed October 26, 2007, to reduce the entrainment of resident fish in both the Last Chance and Cross Cut irrigation canals (irrigation canals), together with a schedule to construct/install the irrigation canal screens before commercial operation of the project.

This filing shall include, but not be limited to: (1) specifications of the size of the screen mesh openings not to exceed 0.25 inches; and (2) a description of the methods and a schedule for installing the screens at the irrigation canals.

The licensee shall prepare the aforementioned drawings and schedule after consultation with the Idaho Department of Fish and Game, the Idaho Department of Parks and Recreation, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. The licensee shall include with the drawings documentation of consultation, copies of agency and stakeholder comments and recommendations on the drawings and schedule after they have been prepared and provided to the agencies and stakeholders, and specific descriptions of how the agencies' and stakeholder's comments are accommodated by the licensee's facilities. The licensee shall allow a minimum of 30 days for the agencies and stakeholders to comment and to make recommendations before filing the drawings and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 407. Monitoring Effectiveness of Fish Screens. Within one year of license issuance, the licensee shall file with the Commission for approval, a plan for post-construction studies to monitor the effectiveness of the project screens to reduce entrainment of fish into the turbine and the irrigation canals.

The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the U.S. Fish and Wildlife Service (FWS) and Idaho Department of Fish and Game (Fish and Game) concerning the results of the monitoring; and (3) filing the results, along with agency comments, and the licensee's response to the comments, with the Commission.

The licensee shall prepare the plan after consultation with the Idaho Fish and Game and FWS. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Project operation shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

If the results of the monitoring indicate that changes in project structures or operations, including alternative flow releases, are necessary to protect fish resources, the Commission may direct the licensee to modify project structures or operations.

Article 408. Biological Monitoring – Trout Population Parameters. Within six months of license issuance, the licensee shall file with the Commission for approval, a plan to monitor parameters of resident salmonid populations, including: (1) population makeup and size structure of resident trout; and (2) presence, abundance, and spatial distribution of cutthroat trout in the project vicinity. The monitoring program shall include annual reporting of results and shall continue for at least 10 years after the start of project operation.

The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the Idaho Department of Fish and Game (Fish and Game) and the U.S. Fish and Wildlife Service (FWS) concerning the results of the monitoring; and (3) filing the results, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the plan after consultation with Idaho Fish and Game and FWS. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Project operation shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 409. Aquatic Habitat Mitigation Plan. Within one year of license issuance, the licensee shall file with the Commission, for approval, an aquatic habitat mitigation plan to mitigate for the impacts of modifying about 1,300 feet of riverine habitat in the Henry's Fork and about 700 feet in the Falls River as a result of the project's construction and operation.

The plan, at a minimum, shall include: (1) quantification of habitat in the Henry's Fork and Falls River that will be modified as a result of raising the water surface level of the Chester Diversion dam reservoir by 38 inches; (2) details of the measures to mitigate for the loss of riverine habitat in the project area; and (3) schedules for habitat mitigation measures and for filing results of the program.

The licensee shall prepare the plan after consultation with Idaho Department of Fish and Game and the U.S. Fish and Wildlife Service. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 410. Reservation of Authority – Fishways. Authority is reserved to the Commission to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of, such fishways as may be prescribed by the Secretary of the Interior pursuant to section 18 of the Federal Power Act.

Article 411. Protection of Vegetation and Wildlife Resources. The licensee shall implement the following measures to minimize the effects of project construction on vegetation and wildlife resources: (a) establish foot and vehicle access routes to protect vegetation from trampling; (b) plant native shrubs totaling 500 square feet to improve the

aesthetics of the powerhouse and associated structures; (c) plant native bunchgrasses totaling 500 square feet to improve the aesthetics of developed areas; (d) re-seed all disturbed areas with a native grass mix; (e) control noxious weeds and introduced grasses in the project area to allow establishment of native plantings; (f) retain all mature cottonwoods when possible; (g) plant three cottonwoods at least 6 feet high for every one cottonwood that is harmed if avoidance is not possible; (h) minimize the duration of construction to curtail disturbance to all wildlife.

The licensee shall complete these restoration measures within one year after completion of project construction.

The licensee shall implement the following measures to protect, minimize, or mitigate the effects of a permanently elevated forebay level on vegetation and wildlife resources: (a) limit vehicle parking and traffic to established areas to minimize disturbance of remaining and re-established riparian vegetation to protect riparian vegetation; (b) exclude grazing from the riparian zone to minimize trampling and allow establishment of new shoots; (c) plant and protect native riparian shrubs along both banks where vehicle traffic and trampling have prevented establishment of vegetation; (d) raise the forebay level following construction after the accustomed high water period of mid-May to protect early nesting waterfowl; (e) provide onsite rehabilitation and plantings to protect riparian vegetation and allow for expansion of the riparian zone in conjunction with elevated water levels; (f) consult with local agencies to determine best management practices when controlling weeds and reed canary grass in proximity to moving water.

Within three years of license issuance, the licensee shall file a report detailing the results of all the recommended measures for the protection of vegetation and wildlife resources and provide specific details for each of the required measures, including the results of any revegetation and restoration efforts.

The licensee shall also monitor the success of revegetation for five years and replant as needed, all disturbed areas, to attain 80 percent survival, and replant cottonwoods to ensure 100 percent survival. Within five years of the completion of construction, the licensee shall file a report outlining the success of the revegetation and any need for additional measures and monitoring. The Commission reserves the right to require additional measures if the results contained within the reports are deemed inadequate.

Article 412. Transmission Line Design. Within six months of license issuance, the licensee shall file for Commission approval a transmission line design plan to protect birds from collision hazards and electrocution. The plan shall provide for the marking of the transmission line and/or overhead groundwire to make it more visible to birds. The

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plan shall include: (a) the design of the marking device; (b) spacing of the markers; and (c) provisions for periodic inspection and monitoring of the devices.

The licensee shall also design the transmission line in accordance with the guidelines set forth in “Suggested Practices for Avian Protection on Power Lines—the state of the art in 2006,” by the Avian Power Line Interaction Committee. The plan shall consider, at a minimum, the following: (1) adequate separation of energized conductors, groundwires, and other metal hardware; (2) adequate insulation; and (3) any other measures necessary to protect raptors from electrocution hazards. The plan shall include detailed design drawings of the transmission line clearly showing phase spacing, configuration, and grounding practices.

The transmission line design plan shall be developed after consultation with the U.S. Fish and Wildlife Service and Idaho Department of Fish and Game. The licensee shall include with the plan an implementation schedule, documentation of consultation, copies of recommendations on the schedule, documentation of consultation, copies of recommendations on the completed plan after it has been prepared and provided to the entities above, and specific descriptions of how the entities’ comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee’s reasons, based on project-specific reasons.

The Commission reserves the right to require changes to the plan. Construction of the transmission line shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval the licensee shall implement the plan, including any changes required by the Commission.

Article 413. *Bald Eagle Construction Timing.* The licensee shall construct the project between May 16 and the end of February to minimize disturbance to nesting bald eagles.

Article 414. *Columbia River Basin Fish and Wildlife.* The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies, affected Indian Tribes, or the Northwest Power and Conservation Council, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Article 415. Recreation Management Report. Within three years of license issuance, the licensee shall file a report documenting the construction and implementation of the recreation and aesthetic measures outlined in section 6.2.4 of the Settlement Agreement filed October 26, 2007, with the exception of the Recreation Access Management Plan outlined in section 6.2.4.6 (which is addressed in Article 416). The report also shall include documentation of construction of the following measures:

- (1) Expand and improve the parking area between the existing upstream and downstream boat launches to accommodate 20 cars and trailers;
- (2) Install a trash receptacle at each boat launch site;
- (3) Construct and install an informational kiosk at the site of the Chester Diversion dam to include information on recreational opportunities and a map of recreational access points and facilities within the Chester Diversion Project boundary.

In addition, the following existing facilities shall be brought within the Chester Diversion Project boundary and operated and maintained for the term of the license: two boat launches located immediately upstream and downstream of Chester Diversion dam, the associated parking and restroom facilities between the two launches, and the upper bridge across the Cross Cut irrigation canal.

The Commission reserves the authority to require additional measures if the results contained within the report are deemed inadequate for the protection of recreation and aesthetic resources.

Article 416. Recreation Access Management Plan. Within six months of license issuance, the licensee shall file with the Commission for approval, a plan to provide temporary public recreation access during the construction of the project. This plan shall include a description of all access locations and facilities to be provided during construction, how the public will be alerted regarding hazards during construction, public safety measures to be enforced during construction, and an implementation schedule.

The licensee shall prepare the plan after consultation with the Idaho Department of Parks and Recreation. The licensee shall allow a minimum of 30 days for the agency to comment and make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information. The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission

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approval the licensee shall implement the plan, including any changes required by the Commission.

Article 417. Programmatic Agreement and Historic Properties Management Plan. The licensee shall implement the “Programmatic Agreement Among the Federal Energy Regulatory Commission and the Idaho Historic Preservation Officer (SHPO) for Managing Historic Properties that May be Affected by Issuing a License Issuing to Symbiotics, LLC for the Chester Diversion Hydroelectric Project in Fremont County, Idaho (FERC No. P-11879-001),” executed on April 24, 2008 and including but not limited to the Historic Properties Management Plan (HPMP) for the project. Pursuant to the requirements of this Programmatic Agreement (PA), the licensee shall file for the Commission’s approval an HPMP within one year of license issuance. The HPMP shall be developed in consultation with Idaho SHPO and shall include the following items: (1) the results of the completion of an archaeological field investigation of those portions of the Area of Potential Effects (APE) not covered in the 2002 survey, developed and conducted in consultation with the Idaho SHPO and the Shoshone-Bannock Tribes; (2) proposed measures for avoiding, lessening, or mitigating effects to identified resources; (3) principles and procedures for responding to accidental discovery of cultural resources during project operations; (4) documentation of the nature and extent of consultation; and (5) procedures for biennial review, and as necessary, revision of the document, including delineation of the APE. The Commission may require changes to the plan.

The Commission reserves the authority to require changes to the HPMP at any time during the term of the license. If the PA is terminated prior to Commission approval of the HPMP, the licensee shall obtain approval from the Commission and the Idaho SHPO, before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project's APE.

Article 418. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic,

recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 water craft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the impoundment shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project impoundment. No later than January 31 of each year, the licensee shall

file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed. If no conveyance was made during the prior calendar year, the licensee shall so inform the Commission in writing no later than January 31 of each year.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 water craft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved report on recreational resources of an exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked exhibit G map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

- (1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.
- (2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved report on recreational resources of an exhibit E; or, if the project does not have an approved

report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised exhibit G drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(F) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

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(G) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file a request for rehearing shall constitute acceptance of this license.

J. Mark Robinson  
Director  
Office of Energy Projects

Form L-11  
(October, 1975)

**FEDERAL ENERGY REGULATORY COMMISSION  
TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED  
MAJOR PROJECT AFFECTING THE INTERESTS  
OF INTERSTATE OR FOREIGN COMMERCE**

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

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

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

Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting

forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

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

**Article 5.** The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the

retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

**Article 6.** In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a nonpower licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

**Article 7.** The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

**Article 8.** The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the state and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character and locations of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United

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States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

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

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

**Article 11.** Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

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

**Article 13.** On the application of any person, association, corporation, Federal Agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

**Article 14.** In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

**Article 15.** The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

**Article 16.** Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated

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

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

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

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

**Article 20.** The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the

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maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

**Article 21.** If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

**Article 22.** The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

**Article 23.** The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

## Appendix A Settlement Agreement

### Chester Diversion Hydroelectric Project No. 11879 Settlement Agreement

U.S. DEPARTMENT OF ENERGY  
FEDERAL ENERGY REGULATORY COMMISSION  
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#### 1. Parties to the Agreement

- 1.1 This Settlement Agreement ("Agreement") is entered into by and between the following organizations, which shall be referred to collectively as "the Parties": Symbiotics, I.A.C. ("Symbiotics"); Idaho Department of Fish and Game ("IDFG"); Idaho Department of Parks and Recreation ("IDPR"); United States Department of Interior Fish and Wildlife Service ("USFWS"); United States Department of Agriculture Forest Service ("USFS"); Trout Unlimited ("TU"); Henry's Fork Foundation ("HFF"); and Greater Yellowstone Coalition ("GYC").
- 1.2 For purposes of this agreement IDFG, IDPR, USFWS, and USFS shall be referred to collectively as "the Agencies." For purposes of this agreement, TU, HFF, and GYC shall be referred to collectively as "the Conservation Groups."
- 1.3 This Agreement shall apply to and be binding on the Parties and their successors and assigns. Upon completion of a succession or assignment, the initial Party shall no longer be a Party to this Agreement, but shall remain secondarily liable for the performance of the successor or assignee. No change in ownership of the Project or transfer of the existing or amended Project License by Symbiotics shall in any way modify or otherwise affect any other Party's interests, rights, responsibilities, or obligations under this Agreement. Unless prohibited by applicable law, Symbiotics shall provide, in any transaction for a change in ownership of the Project or transfer of the existing or amended Project License, that such new owner or owners shall be bound by and shall assume the rights and obligations of this Agreement upon completion of the change of ownership and approval by the Federal Energy Regulatory Commission ("FERC") of the license transfer or transfers. A transferring or assigning Party shall provide notice to the other Parties at least sixty (60) days prior to completing such transfer or assignment.

#### 2. Definitions

- 2.1 "Project" means the proposed Chester Diversion Hydroelectric Project, for which an Application for Original Major License ("Application") was filed by Symbiotics with the FERC as Project No. 11879-002.

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- 2.2 "License" means the regulatory authorization that would be issued for construction, maintenance and operation of the Project subject to the jurisdiction of FERC pursuant to the Federal Power Act ("FPA").
- 2.3 "License articles" means the terms and conditions included in the License for the operation of the Project.
- 2.4 "Agreement" means the entirety of this agreement, including the Memoranda of Understanding concerning the screening of the Last Chance and Cross Cut irrigation canals between Symbiotics and the Fremont-Madison Irrigation District and Fgin Bench Canal Company, Inc. in Appendix A.
- 2.5 "Final Terms and Conditions" refers, individually and collectively, to any terms, conditions, recommendations, and prescriptions filed with FERC by the Parties in final or modified form after the effective date of this Agreement. Final Terms and Conditions are distinct from any previous terms and conditions which may have been filed by the Parties prior to the effective date of this Agreement.
- 2.6 "PM&E Measures" refers to the measures set forth in Section 6 of this Agreement for the protection and enhancement of fish, wildlife, recreation, and aesthetic resources associated with the Project and to mitigate for any adverse effects of the Project.

#### A. **Recitals**

- 3.1 According to John Randolph, Editor, Ely Fishing Magazine, "The Henry's Fork is the premier dry fly fishing stream in the entire world." The Henry's Fork is one of the most diverse fly fishing rivers in the world, offering opportunities for the advanced fly fisherman, as well as the beginner. Accordingly, Trout Unlimited named the Henry's Fork the number one trout stream in the country. The Henry's Fork is an outstanding and valuable local, regional, and national fisheries and economic resource.
- 3.2 The Parties believe it to be in their mutual interest to protect this remarkable resource and agree that the PM&E Measures set forth in this Agreement will fully protect and mitigate for the impacts of the Project on fish, wildlife, recreation and aesthetic resources on the Henry's Fork.
- 3.3 The Application describes Chester Dam as a 17-foot tall irrigation diversion dam located on the Henry's Fork between Ashton and St. Anthony, Idaho. Under current

conditions, Chester Dam impounds water for a distance of approximately 4,000 feet upstream beginning around the first of April and continuing through July. During low flow conditions (from August through March), the reservoir extends only 1,200 feet (approximately) upstream of the dam.

- 3.4 The headworks of two irrigation canals are associated with Chester Dam. The Cross Cut Canal is located on the south end of the dam and the Last Chance Canal is located on the north side. Currently, all of the water not diverted through the canals flows over the crest of the dam throughout the year. Neither the Cross Cut Canal nor the Last Chance Canal is screened to prevent fish entrainment. The Project, as originally proposed, would likely increase entrainment into the canals and therefore, the Parties conclude that the Cross Cut Canal and Last Chance Canal should be screened.
- 3.5 Currently, water flows over the dam throughout the year and in each month of the year. Fish of all sizes can pass over the dam crest year-round across the entire length of the dam. The proposed Project would reduce the amount and duration of spill over the crest of the dam from 12 months of the year to less than 2 months of the year and, therefore, significantly reduce downstream fish passage. Accordingly, the Parties conclude that downstream fish passage facilities should provide for year-round passage of fish.
- 3.6 To protect against turbine mortality, the Parties believe that turbine screens that protect migrating fish should be designed and constructed for the Project. The Parties also conclude that the Project may be modified to install a 38-inch rubber dam a 36-inch rubber dam to address the loss of head resulting from the installation and operation of the turbine screen.
- 3.7 The Project will inundate an additional 875 x 1,200 feet (approximately) of riverine habitat by raising the level of the pool by 18 inches throughout the year. The area that will be inundated is productive riffle habitat that supports a popular recreational fishing location. The Parties conclude that the PM&E Measures set forth in this Agreement will improve fish survival and thus mitigate for the loss of valuable riverine habitat above the dam.
- 3.8 Approximately 1.2 miles of new power transmission lines will be constructed for the project. One mile of the power line will run parallel and in close proximity to the river downstream of the dam on the south side of the river. Power line strikes are a significant source of mortality for Trumpeter Swans throughout their range.

Accordingly, the Parties conclude that the new power transmission lines should be fitted with reflective devices to protect Trumpeter Swans from power line strikes.

- 3.9 Hydroelectric projects that receive a "Green Power" certification from the Low Impact Hydropower Institute provide the project owner with the ability to charge more for the energy produced. The Parties conclude that implementation of the PM&E Measures and non-license commitments set forth in this Agreement support the issuance of a Green Power certification for the Project. When evaluating the Project's economic viability and the importance of the PM&E Measures agreed to in Section 6, and the non-license agreements set forth in Section 7, FERC should consider the importance of the entire Agreement in obtaining "Green Power" certification for the Project.

#### 4. Purpose of the Agreement

- 4.1 The Parties have entered into this Agreement to resolve all issues regarding fish, wildlife, recreational, and aesthetic resources associated with issuance of a new License for the Project. For this purpose, the Parties agree that this Agreement is fair and reasonable and in the public interest within the meaning of FERC Rule 602 governing offers of settlement. 18 C.F.R. § 385.602(g)(3).
- 4.2 By entering into this Agreement, the Agencies represent that they believe their statutory and other legal obligations are, or can be, met through implementation of this Agreement. Nothing in the Agreement shall be construed to hold any government agency with jurisdiction directly related to the new License from complying with its obligations under applicable laws and regulations or from considering public comments received in any environmental review or regulatory process related to the Project in accordance with this Agreement. This Agreement shall not be interpreted to predetermine the outcome of any National Environmental Policy Act ("NEPA") environmental review or administrative appeal process.
- 4.3 This Agreement establishes no principle or precedent with regard to any issue addressed in this Agreement or with regard to any Party's participation in any other pending or future licensing Agreement. Further, no Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any operation, management, valuation, or other principle underlying any of the matters covered by this Agreement, except as expressly provided in this Agreement. This Agreement shall not be offered in evidence or cited as precedent by any Party to this

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Agreement in any administrative or judicial proceeding, except in a proceeding to establish the existence of or to enforce or implement this Agreement.

**5. Effective Date, Duration of the Agreement, and Actions Upon Execution of the Agreement**

- 5.1 This Agreement shall take effect upon signature of all Parties and shall remain in effect for the term of the new License and for any annual licenses issued subsequent thereto.
- 5.2 Symbionics agree to: a) within 30 days of the effective date of this Agreement, file an offer of settlement with FERC pursuant to Rule 602 (18 CFR § 385.602) requesting that FERC accept and incorporate without material modification as License articles in the new License all of the PM&E Measures set forth in Section 6; b) request that FERC refrain from including in the new License inconsistent articles, except as may be necessary to enable FERC to ascertain and monitor Symbionics' compliance with the new License and its rules and regulations under the FPA and other federal and state laws; c) submit a statement in support of the Agreement to FERC as part of its response to comments on the Environmental Assessment and Application; d) ensure that any supplemental information, comments or responses to comments filed by it with FERC in the context of the licensing process are consistent with this Agreement; and e) actively support, in all relevant regulatory proceedings, incorporation of the PM&E Measures into the FERC License and incorporation of consistent terms into other applicable permits, as appropriate.
- 5.3 The Agencies, individually and collectively, agree to: a) submit a statement in support of the Agreement to FERC as part of the offer of settlement requesting that FERC accept and incorporate without material modification as License articles in the new License the PM&E Measures set forth in Section 6; b) request that FERC refrain from including in the new License inconsistent articles, except as may be necessary to enable FERC to ascertain and monitor Symbionics' compliance with the new License and its rules and regulations under the FPA and other federal and state laws; c) submit statements in support of the Agreement to FERC as part of their comments on the Environmental Assessment and Application; d) ensure that the individual agency's complete and final recommendations, terms, conditions, and/or prescriptions pursuant to Sections 4(e), 10(a), 10(j), and 18 of the FPA, to the extent those sections are applicable to each individual agency, shall be consistent with the

Agreement and shall supersede any inconsistent prior filings in this proceeding; e) ensure that any supplemental information, comments or responses to comments filed by them with FERC in the context of the licensing process are consistent with this Agreement; and f) actively support, in all relevant regulatory proceedings, incorporation of the PM&E Measures into the FERC License and incorporation of consistent terms into other applicable permits, as appropriate.

- 5.4 The Conservation Groups, individually and collectively, agree to: a) submit a statement in support of the Agreement to FERC as part of the offer of settlement requesting that FERC accept and incorporate without material modification as License articles in the new License the PM&E Measures set forth in Section 5; b) request that FERC refrain from including in the new License inconsistent articles, except as may be necessary to enable FERC to ascertain and monitor Symbiotex's compliance with the new License and its rules and regulations under the FPA and other federal and state laws; c) submit statements in support of the Agreement to FERC as part of their comments on the Environmental Assessment and Application; d) ensure that any supplemental information, comments or responses to comments filed with FERC in the context of the licensing process are consistent with this Agreement; and e) actively support, in all relevant regulatory proceedings, incorporation of the PM&E Measures into the FERC License and incorporation of consistent terms into other applicable permits, as appropriate.

#### **6. Obligations of Symbiotex: Protection, Mitigation and Enhancement Measures**

- 6.1 The Parties agree that the PM&Es set forth in this Section 6 fully describe Symbiotex's obligations for the protection, mitigation, and enhancement of fish, wildlife, recreation and aesthetic resources affected by the Project and should be included in the new License.
- 6.2 Upon issuance of a new License, Symbiotex agrees to implement the following PM&E Measures:
- 6.2.1 **Provide for reduced entrainment and year-round downstream fish migration.** Symbiotex will: 1) screen the Crosseut and Last Chance Canals according to the National Oceanic and Atmospheric Administration's snagging criteria, which includes 1/2-inch screen openings and construct a downstream bypass facility that returns screened fish to the river; 2) construct the Project in such a manner as to

provide a pathway for downstream fish migration; and 3) operate the Project to provide continuous and sufficient bypass flows for downstream fish migration.

- 6.2.2 Reduce turbine mortality. Symbiotics will construct a 1½ inch turbine screen on the hydroelectric project, with a maximum 4-feet-per-second approach velocity.
- 6.2.3 Reduce Trumpeter Swan injury and mortality. Symbiotics will construct above-ground power lines fitted with reflective devices that protect Trumpeter Swans from strike mortality.
- 6.2.4 Implement PM&Es that address recreation and aesthetic resources. Symbiotics, in consultation with the Parties, will:
  - 6.2.4.1 Construct boat ramps with concrete logs upstream and downstream of the dam in approximately their current location and construct gravel parking areas.
  - 6.2.4.2 Provide improved access to the project area to ensure safe use by passenger vehicles and vehicles with trailers at the upper bridge across the Cross-Cut Canal.
  - 6.2.4.3 Use aesthetically pleasing design for buildings, constructed of a material and design to blend with the natural environment, including vegetative screening.
  - 6.2.4.4 Build ADA restrooms with hardened surface in ADA parking and a fishing platform.
  - 6.2.4.5 Develop an Information and Education Plan that identifies locations for maps, signs, information boards, brochures, and other materials informing the public about opportunities for recreation and aesthetic use in and adjacent to the Project area.
  - 6.2.4.6 Provide public access during construction and develop a temporary recreation access management plan.

## 7. Non-License Terms and Obligations

- 7.1 In addition to the PM&E Measures, which the Parties are requesting that FERC include in the new License, Symbiotics agrees to design and construct an upstream fish passage facility (fishway or upstream fishway) at the Project, paid for with

funding provided or obtained by the Conservation Groups as set forth in Section 7.2 below.

- 7.2 The Conservation Groups agree to obtain the necessary funds for the design and construction of an upstream fishway at the Project and the Parties agree that IDFG will assume ownership of the fish ladder during the first 5 years of operation, as provided in Section 7.2.3. below.
- 7.2.1 The Conservation Groups agree to provide all of the funds necessary for Symbiotics to design, engineer, and construct the upstream fishway as provided in Section 7.1 above. Symbiotics will provide to the Conservation Groups a design, engineering, and construction schedule and implementation plan for the upstream fishway that describes 1) the design and engineering phase and associated costs, and 2) the construction phase and associated costs, as soon as reasonably available. Upon the placement by the Conservation Groups in an escrow account mutually established by Symbiotics and the Conservation Groups of sufficient funds to fully pay for the design and engineering phase, Symbiotics will commence the design and engineering of the fishway; upon the placement in escrow by the Conservation Groups of sufficient funds to fully pay for the construction of the fishway, Symbiotics shall commence and complete construction of the fishway. Funding for each stage will be provided in a timely manner, so that construction of the upstream fishway will be completed no later than 2 years after the Project is operational. Funds will be dispersed from the escrow account to Symbiotics to pay for the phase of implementation for which they were deposited, only with the approval of both Symbiotics and the Conservation Groups, which approval shall not be unreasonably withheld. Alternatively, the Conservation Groups may establish, with sufficient funds for each phase described herein, an irrevocable letter of credit in Symbiotics' favor granting Symbiotics authority to draw upon the irrevocable letter of credit for the purpose of designing, engineering, and constructing the fishway. In no event will modifications in the timing of construction of the fishway delay construction of the Project in its entirety or increase the cost of construction of the Project. In no event will Symbiotics or the Agencies be obligated to fund the design, engineering, or construction of an upstream fishway at the Project.
- 7.2.2 The Parties agree that, in the event the Conservation Groups do not provide the funds for the construction of an upstream fishway by no later than 2 years after the Project is operational, Symbiotics may, at its discretion, replace the 1% mit

screen required by Section 6.6 of this Agreement with a 4-inch trash rack. The Parties agree that replacement of the 1½ inch screen with a 4-inch trash rack will serve as Symbiotics' and the Agencies' sole and exclusive remedy in the event the Conservation Groups are unable to secure adequate funding for the construction of the fishway as provided in Sections 7.2 and 7.2.1. In no event will the Conservation Groups be liable to Symbiotics or the Agencies to provide the funds described in Sections 7.2 and 7.2.1.

- 7.2.3 The Parties agree that IDFG will own the upstream fishway for the initial 5 years of its operation. IDFG agrees to evaluate the effectiveness and impact of the upstream fishway during the 5-year period of ownership, in consultation with the Parties. At the end of the 5-year period of operation, IDFG, in consultation with the Parties, will determine whether the upstream fishway is structurally sound, effective, and beneficial for fish resources in the Henry's Fork; if so, Symbiotics agrees to assume ownership of the fishway. If it is determined that the upstream fishway is not structurally sound, effective, or beneficial for fish resources in the Henry's Fork, the Parties will meet to determine how to proceed. In no event will Symbiotics be required to implement measures other than those set forth in this Agreement. The Parties also agree that any measures taken in response to a determination that the fishway is not effective or beneficial to fish resources will not adversely impact the Project or Project operations.
- 7.2.4 The fishway will be designed and constructed to standards acceptable to engineers employed by the Agencies, Conservation Groups, and Symbiotics.
- 7.2.5 Symbiotics, the Agencies, and Conservation Groups must unanimously agree that design, engineering and construction costs proposed to be funded under this Section 7 are required solely for the design and construction of the upstream fishway. IDFG agrees to apply for and acquire any governmental permits and approvals necessary for the construction, operation, and maintenance of the fishway.
- 7.2.6 Symbiotics will use its best efforts to reduce the costs of the fishway by integrating its construction into the construction of the downstream fish bypass associated with the screening of the Cross Cut Canal.
- 7.2.7 When the Project and upstream fishway have been constructed and are operational, Symbiotics agrees to inspect the fishway on a daily basis and

perform dry-to-dry maintenance, including removing debris and clearing blockages, and, if any operational problems or defects in the fishway are observed, will notify IDFG within a 24-hour period. Symbiotics agrees to provide IDFG with reasonable access to the Project for inspection and evaluation of the fishway.

- 7.2.8 During the 5-year period of IDFG ownership, IDFG agrees to maintain, repair and/or replace any portion of the fishway as necessary to ensure the fishway's continued operation. Upon assuming ownership of the fishway, Symbiotics agrees to maintain, repair, and/or replace any portion of the fishway as necessary to ensure the fishway's continued operation during the term of the License, and for any annual licenses subsequent thereto, in addition to performing dry-to-dry maintenance.

#### **8. Obligations of Agencies and Conservation Groups**

- 8.1 The Agencies agree to provide technical assistance to Symbiotics and the other Parties for the implementation of the terms of this Agreement.
- 8.2 The Agencies and Conservation Groups agree to support designation of the Project as a "Green Power" Project in accordance with the Low Impact Hydropower Institute standards.
- 8.3 The Agencies and Conservation Groups agree to support the installation of a 38-inch rubber dam instead of a 36-inch rubber dam to offset head losses through the turbine screen created by increased approach velocities in their final recommendations, terms, conditions, and prescriptions and comments on the Environmental Assessment and Application.

#### **9. Obligations of the Parties: Actions in Support of License Issuance**

- 9.1 The Parties have entered into this Agreement with the express intent that FERC approve the Agreement as an offer of settlement and issues a License that incorporates the PM&E Measures set forth in this Agreement. The Parties agree that if FERC incorporates into the License the PM&E Measures set forth in this Agreement without modification, except as may be necessary to enable FERC to ascertain and monitor compliance with the new License and its rules and regulations under the FPA and other federal and state laws, they will not seek rehearing of the

FERC order or support, in any way, a request for rehearing by any non-Party to this Agreement.

- 9.2 If the new License issued by FERC, either initially or following conclusion of appeals, incorporates fewer than all of the PM&E Measures included in this Agreement or modifies them in such manner that they are less protective of the fish, wildlife, recreation, and aesthetic resources associated with the Project, the Parties agree that they shall be bound by the entire Agreement including the PM&E Measures set forth in Section 6 and the upstream fishway facility commitments set forth in Section 7, and that the Parties shall be entitled to enforce the entire Agreement in any state or federal court with jurisdiction.
- 9.3 In the event that FERC issues a License that modifies, conditions, or adds to any of the PM&E Measures set forth in this Agreement in a manner that substantially increases the cost of License compliance, except as may be necessary to enable FERC to ascertain and monitor compliance with the new License and its rules and regulations under the FPA and other federal and state laws, the Parties agree to convene a conference call or meeting within 30 days of receiving FERC's order to discuss the objectionable modifications and seek consensus on a course of action. At the request of Symbiotics, the Parties will participate with Symbiotics in a request for rehearing to advocate that FERC modify the License so that it is consistent with this Agreement.
- 9.4 The USFWS reserves its authority pursuant to Section 18 of the FPA. This agreement shall not limit the ability of the USFWS to assert its authority under any statute other than the FPA. In the event that the USFWS includes a reservation of authority in any conditions, recommendations or prescriptions that it may submit to FERC, the inclusion of such reservation shall not be considered materially inconsistent with this Agreement, provided that in exercising such reserved authority, the USFWS shall comply with applicable requirements of Section 33 of the FPA.

#### **10. Modification of License or Permit Terms and Amendment of Agreement**

- 10.1 The Parties agree that this Agreement may be amended by unanimous written consent of the Parties. Any Party may request all other Parties to commence negotiations for a period of up to 90 days to amend the terms and conditions of this Agreement in whole or in part. Any such amendment that renders the Agreement

inconsistent with terms and conditions of the new License or other regulatory approvals then in effect shall be subject to approval by FERC or other permitting agency, except that the Parties may agree to implement on an interim basis, pending approval, any amendment not requiring prior regulatory approval.

- 10.2 The Parties agree not to invoke any re-opener clause or reservation of authority in the new License or in any other regulatory approval or permit required for the Project in order to request the imposition by FERC or any other agency of additional or modified PM&E Measures unless and until the amendment process described above has been undertaken.
- 10.3 In the event that FERC or other regulatory agency having jurisdiction over the Project initiates any proceeding, other than the licensing proceeding itself, either on its own motion or at the request of a non-Party, that may have the effect of changing, conditioning, or modifying any provision contained herein or of imposing additional measures for fish passage, fish survival, fish habitat, wildlife, or recreational and aesthetic resources, the Parties shall meet and confer on the need to participate jointly in the proceeding in support of the Agreement or to amend the Agreement.

#### **11. Resolving Disputes Among the Parties**

- 11.1 In the event that any dispute arises among the Parties as to the interpretation of and/or compliance by any Party with the obligations of this Agreement and the License, the Parties agree to engage in good faith negotiations for a period of at least 90 days in an effort to resolve the dispute. During the 90-day period, any Party may request the services of a professional mediator to assist in resolving the dispute, with such mediator to be selected by the disputing Parties. The Party requesting such services shall cover the costs, unless there is an agreement among the disputing parties to share costs. In the event that resolution cannot be reached within the 90-day negotiating period, the dispute may be referred to FERC pursuant to FERC's then-applicable Rules of Practice and Procedure (18 CFR Part 385). If a dispute is referred to FERC, the Parties shall make use of such resources for alternative dispute resolution as may be available at FERC.
- 11.2 No Party shall seek relief in any other forum for noncompliance with this Agreement unless and until the requirements of the above-described dispute resolution process shall have been met. If dispute resolution is not successful, any Party may seek judicial, administrative or other enforcement of the terms of this Agreement, which

terms shall be specifically enforceable under all applicable federal or state laws governing agreements of this type.

- 11.3 This Section 11 shall not apply to disputes regarding FERC's incorporation of the PM&E Measures described in Section 9 of this Agreement.

## 12. Notice and Communication

- 12.1 All written notices to be given pursuant to this Agreement shall be mailed by first class mail, or overnight express service, postage prepaid, to each Party at the addresses listed below or such subsequent address as a Party shall identify. Notices shall be deemed to be given 5 business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.
- 12.2 For purposes of implementing this Agreement, the Parties agree that the following individuals shall be designated to be the primary contact persons and all written notices shall be posted to these individuals at the addresses listed below. Notification of changes in the contact persons must be made in writing and delivered to all other contact persons:

For Symbiosis: Brent L. Smith, Chief Operating Officer, Northwest Power Services, Inc., P.O. Box 535, Rigby, Idaho 83442; e-mail: [bsmith@nwpservices.com](mailto:bsmith@nwpservices.com); phone 208-745-0834

For IDFG: Cindy Robertson, Program Coordinator, Natural Resources Policy Bureau, Idaho Department of Fish and Game, P.O. Box 25, Boise, Idaho 83707; e-mail: [crebertson@idfg.idaho.gov](mailto:crebertson@idfg.idaho.gov); phone: 208-287-2714; facsimile: 208-334-2114.

For IDPR: Mary Lucashick, Water Recreation Analyst, Idaho Department of Parks and Recreation, 5657 Warm Springs Avenue, Boise, Idaho 83716; e-mail: [mlucashick@idpr.idaho.gov](mailto:mlucashick@idpr.idaho.gov); phone: 208-514-2482; facsimile: 208-334-5232.

For USFWS: Damien Miller, Field Office Supervisor, 4425 Burley Dr., Suite A, Chubbuck, ID 83202; e-mail: [damiemiller@fws.gov](mailto:damiemiller@fws.gov); phone: 208-237-6975 ext 31; facsimile: 208-237-8213

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For USFS: Lou W. Mabey, Ashton-Island Park and Teton Basin Ranger Districts, Fisheries Biologist, C-T NF, 1405 Hollipark Dr., Idaho Falls, Idaho 83401; e-mail: [lmabey@fs.fed.us](mailto:lmabey@fs.fed.us); phone: 208-557-5784; cell: 208-313-7808.

For Trout Unlimited: Kimberley T. Goodman, Director, Idaho Water Project, Trout Unlimited, 151 North Ridge, Suite 120, Idaho Falls, Idaho 83402; phone: 208-582-0891 ext. 712; e-mail [kgoodman@tu.org](mailto:kgoodman@tu.org); [www.tu.org/wwp\\_id](http://www.tu.org/wwp_id).

For Henry's Fork Foundation: Jim De Rita, Conservation Director, Henry's Fork Foundation, P.O. Box 550, Ashton, ID 83420; e-mail [jiderito@henrysfork.org](mailto:jiderito@henrysfork.org); phone 208-652-3567; fax 208-652-3568.

For Greater Yellowstone Coalition: Scott Christensen, Private Lands Stewardship Director, Greater Yellowstone Coalition, P.O. Box 1874, Bozeman, MT 59721; e-mail [schristensen@greateryellowstone.org](mailto:schristensen@greateryellowstone.org); phone: 406-586-1593, facsimile: 406-556-2839.

- 12.3 Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Agreement need not be in writing and may be made by telephone, electronic mail or facsimile

### 13. Miscellaneous Provisions

- 13.1 Availability of Funds. Implementation of this Agreement for a Party that is a federal agency is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Agencies that are federal agencies shall not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of each such agency affirmatively acts to commit such expenditures, as evidenced in writing. Implementation of this Agreement by Agencies that are state agencies is subject to the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of Idaho. The Parties acknowledge that the Agencies that are state agencies shall not be required under this Agreement to expend any

appropriated funds unless and until an authorized official of each such agency affirmatively acts to commit such expenditures, as evidenced in writing.

- 13.2 No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law.
- 13.3 Failure to Perform Due to Force Majeure. No Party shall be liable to any other Party for breach of this Agreement as a result of a failure to perform or for delay in performance of any provision of this Agreement if such performance is delayed or prevented by force majeure. The term "force majeure" means any cause reasonably beyond the affected Party's control, whether unforeseen, foreseen, unforeseeable, or unforeseeable, and without the fault or negligence of the affected Party. Force majeure may include, but is not limited to, natural events, labor or civil disruption, breakdown or failure of Project works resulting from events beyond Synthetics' control, orders of any court or agency having jurisdiction of the Party's actions, or delay in issuance of any required permit. Increased cost for the performance of any PMA&B Measures or change in market conditions for the sale of electricity shall not be deemed to constitute force majeure, provided that Synthetics shall not be obligated to perform measures in excess of the commitments specified in this Agreement. The Party whose performance is affected by force majeure shall notify the other Parties in writing within seven days after becoming aware of any event that such affected Party contends constitutes force majeure. Such notice shall identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of the measures. The affected Party shall make all reasonable efforts to promptly resume performance of this Agreement and, when able, to resume performance of its obligations and give the other Parties written notice to that effect.
- 13.4 Governing Law. The License and any other terms of this Agreement over which a federal or state agency has jurisdiction shall be governed, construed, and enforced in accordance with the statutory and regulatory authorities of such agency. This Agreement shall otherwise be governed and construed under the laws of the state of Idaho ("the State"). By executing this Agreement, or federal agency is consenting to

the jurisdiction of a state court unless such jurisdiction otherwise exists. By executing this Agreement, no state agency or officer is consenting to the jurisdiction of a federal court unless such jurisdiction otherwise exists nor shall this Agreement be construed as a waiver of the State's immunity to suit under the Eleventh Amendment of the United States Constitution. All activities undertaken pursuant to this Agreement shall be in compliance with all applicable law.

- 13.5 Attorney Fees. If any action is brought by any Party to enforce the provisions of this Agreement, the prevailing Party, in such action, shall be entitled to reasonable attorney fees and court costs as determined by the court.
- 13.6 Costs of Participation. Except as provided above, all Parties are to bear their own costs of participating in the Agreement.
- 13.7 Elected Officials Not To Benefit. No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.
- 13.8 No Partnership. Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make any Party the agent for, or partner of, any other Party.
- 13.9 Reference to Statutes and Regulations. Any reference in this Agreement to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation as amended or succeeded subsequent to this Agreement.
- 13.10 Paragraph Titles for Convenience Only. The titles for the paragraphs of this Agreement are used only for convenience of reference and organization and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties. Reference to a given section of this Agreement shall be deemed to include all subsections of that section.

#### 14. Execution of the Agreement

- 14.1 Signatory Authority. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such party.

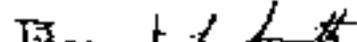
Project No. 11879-001

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14.2 Signing in Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original document as if all the signatory Parties to all of the counterparts had signed the same document. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature, and may be attached to another counterpart of this Agreement identical in form having attached to it one or more signature pages.

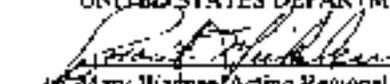
This Agreement is effective as of the day that the last Party executes the Agreement.

SYMBIOTICS, I.L.C.

  
Brent L. Smith, Chief Operating Officer

10-25-07  
Date Signed

UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE

  
Mary Wagner, Acting Regional Forester  
Intermountain Region, USDA Forest Service

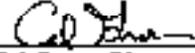
10/23/07  
Date Signed

UNITED STATES DEPARTMENT OF INTERIOR FISH AND WILDLIFE SERVICE

  
Jeff Ford, Field Supervisor  
Snake River Fish and Wildlife Office

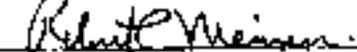
10/23/07  
Date Signed

IDAHO DEPARTMENT OF FISH AND GAME

  
Cal Groen, Director

10/23/07  
Date Signed

IDAHO DEPARTMENT OF PARKS AND RECREATION

  
Robert L. Meinen, Director

10/23/07  
Date Signed

TROUT UNLIMITED

  
Kimberly J. Goodman, Director  
Idaho Water Project

10/24/07  
Date Signed

Project No. 11879-001

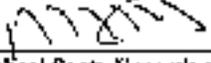
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HENRY'S FORK FOUNDATION

  
Stephen D. Trahan, Executive Director

24 OCT 07  
Date Signed

GREATER YELLOWSTONE COALITION

  
Michael Scott, Executive Director

10/25/07  
Date Signed

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