

23 FERC P 62137 (F.E.R.C.), 1983 WL 39934

**1 Office Director Orders

Joseph M. Keating

Project No. **3189**-003
Order Issuing **License** (Major)
(Issued April 29, 1983)

***63200** Lawrence R. Anderson, Director, Office of Electric Power Regulation.

Joseph M. Keating (Applicant) filed an application on June 1, 1982, for a **license** under Part I of the Federal Power Act (Act) to construct, operate, and maintain the Rock Creek Project No. **3189**.¹ The project would be located on Rock Creek, a tributary to the South Fork American River, near Placerville, in El Dorado County, California, and would affect U.S. lands under the administration of the U.S. Bureau of Land Management.

***63201** Notice of the application has been published, and comments have been received from interested Federal, State, and local agencies. James H. Cosgrove, Ronald L. Johnston and Philip L. Blair (Petitioners) have been granted intervention. Applicant responded to agency comments and Petitioners' intervention by letter dated November 18, 1982. The significant concerns of the intervenor and commenting agencies are discussed below.

Project Description

The proposed run-of-the-river project would consist of: (1) a low concrete diversion structure; (2) an intake structure; (3) a 500-foot-long concrete pipe; (4) a 3,200-foot-long tunnel; (5) three penstocks; (6) a powerhouse with a total installed capacity of 3,000 kW; (7) a transmission line; and (8) appurtenant facilities. A more detailed project description is contained in Ordering Paragraph (B).

Safety and Adequacy and Economic Feasibility

The proposed concrete gravity overflow diversion dam will be 80 feet long and 6 feet high. It will impound 2.7 acrefeet of water. Failure of the dam would not affect downstream life or property. It is concluded that the dam will be safe for normal operation if constructed in accordance with the plans and specifications using sound construction techniques.

The proposed run-of-the-river project is economically feasible with a cost of approximately 86 mills per kilowatt hour of energy.²

Minimum Flows

The California Department of Fish and Game (DFG) recommended that the following minimum flows should be released from the diversion dam: February through June - 20 cfs; July through September - 11 cfs; and October through January - 15 cfs.

The Applicant agreed to release the flows as recommended by DFG for the months of July through January; however, during the remainder of the year the Applicant proposes to release 15 cfs from February through April and 11 cfs for May and June. The flow recommendations of DFG and the Applicant were based on the results of an Instream Flow Methodology (IFG) study conducted by the Applicant.

Staff believes that low standing crop estimates for fishery resources for Rock Creek suggest that factors other than the quantity of available adult habitat, namely, the lack of suitable spawning and rearing habitat and the wide variability in streamflow, are limiting fish production. Based upon available information, it is concluded that the release of the minimum flows on an interim basis as proposed by the Applicant would not adversely impact the fishery resources of Rock Creek.

Therefore, Article 37 requires the Licensee to release the following interim minimum flows from the Rock Creek diversion dam: 11 cfs, May through September, and 15 cfs, October through April. Additionally, Article 38 requires the Licensee to conduct studies to determine a long-term minimum flow for the protection of fishery resources.

****2** The Applicant also proposes to conduct pre- and post-project studies to monitor the fishery of Rock Creek and to identify mitigative and enhancement measures which could be implemented to minimize impacts to the fishery. Such a study would allow for a more detailed assessment of the impacts of the project's operation on fishery resources and a determination of measures, including alternative minimum flow releases, necessary to ensure that adverse impacts to the fishery resources associated with operation of the project would be minimized. Therefore, Article 38 requires the Licensee to conduct studies in cooperation with relevant fish and wildlife agencies, and to determine appropriate minimum flows and other measures necessary to minimize adverse impacts to the fishery of Rock Creek.

Fish Screen

The DFG recommended that the Applicant be required to install a fish screen on the intake structure that would be acceptable to the DFG. The Applicant proposes to install, operate, and maintain a fish screen acceptable to the DFG and the Commission. To ensure the protection of fish populations in the river, Article 43, included in the **license**, requires the Licensee to file functional design drawings of a fish screen for Commission approval.

Streamflow Measurement

The DFG recommended that the Applicant install a stream gage recorder immediately downstream of the diversion structure to provide for a continuous record of streamflow releases, and that the data obtained from the gage be submitted to the DFG on an annual basis. Applicant has agreed to locate the stream gage at the first available and acceptable location below the diversion structure and has agreed to submit appropriate flow records to the DFG. Standard Article 8 requires the Licensee to install a gage and to ***63202** maintain flow records in accordance with requirements set forth by the Commission.

Modifications of Project Facilities and Operation

DFG recommended that a fish ladder, if determined necessary, be installed at the diversion structure. Also, DFG requested that provisions be included in the **license** to allow for modification of project facilities and operations if unforeseen damages occur to fish and wildlife. Standard Articles 12 and 15, included in this **license**, provide for changes in project facilities and operations should the need arise.

Recreational Resources

No existing public recreational facilities exist within the project area. Some camping associated primarily with placer mines occurs in the vicinity of the proposed powerhouse. However, the project area has been posted against trespass for many years, and no appreciable recreational uses have occurred in the project area.

The Applicant, in its Report on Recreational Resources, proposes to: (1) provide for picnicking facilities in the vicinity of the powerhouse, including two picnic tables and fire rings; (2) provide an 8-vehicle parking area; (3) allow access for swimming in the area around the Rock Creek Bridge; (4) permit pedestrian access below the proposed diversion structure; and (5) provide fish stocking on Rock Creek and the South Fork American River to encourage a recreational fishery. The agencies had no comment on the Applicant's proposals.

****3** The proposed recreation plan would provide for the public recreational needs of the project area in the immediate future; therefore, the recreation plan will be approved.

Cultural Resources

Two historic sites, an abandoned mine and the abandoned American River Powerhouse, are located within the project area. The California State Historic Preservation Officer (SHPO) indicated by letter of May 12, 1982, that the remains of the American River Powerhouse are not eligible for listing in the *National Register of Historic Places*, and that project

development would have no effect on significant cultural resources. The Applicant concurs with the conclusions of the SHPO.

Although cultural resources are not expected to be impacted by construction and operation of the project, cultural resources are known to exist in the immediate vicinity of the project. Therefore, in accordance with recent Commission practice, Article 39 requires the Licensee to ensure cultural resources protection.

Report on Fish, Wildlife, and Botanical Resources

The Applicant's Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, includes measures for the protection and enhancement of the project's fish and wildlife resources. The report specifically provides for measures that were recommended by the DFG for inclusion in the **license**, including: (1) limiting the rate at which water is diverted from the stream (less than 30 percent of streamflow per hour) to prevent fish stranding; (2) installation of fish screens; (3) the removal of sand and sediment from the impoundment area; (4) raptor-proofing of transmission lines; (5) adequate disposal and stabilization of excavated materials; (6) revegetation of denuded project lands with native species valuable to wildlife; and (7) permitting access to the project for fish and wildlife agencies to ensure proper incorporation and operation of fish and wildlife protective measures. The Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, will be approved and made part of the **license**.

No Federally-listed threatened or endangered species would be affected by the proposed action.

Environmental Impacts

Construction activities would result in minor, short-term increases in noise, dust, exhaust emissions and sedimentation and erosion from disturbance of streambed and land surfaces.

Construction and operation of the proposed project would involve the loss of up to 2 acres of vegetation for the duration of the project. An approximately 4,750-foot-long segment of Rock Creek would receive reduced flows, but mitigative measures have been proposed that would protect the aquatic environment.

The California Regional Water Quality Control Board stated that water quality would be adequately protected during construction, operation, and maintenance of the proposed project; thus, water quality certification for the project was waived.

On the basis of the record, and Staff's independent analysis, it is concluded that the issuance of a **license** for the project would not constitute a major Federal action significantly affecting the quality of the human environment.

***63203** *Other Aspects of Comprehensive Development*

****4** Power from the project will be sold to the Pacific Gas and Electric Company to offset oil-fueled power generation. The powerplant will operate at a 26.6 percent plant factor and will utilize approximately 72 percent of the total available flow. The project is not in conflict with any river basin development plan for the South Fork American River.

It is concluded that, subject to the terms and conditions of this **license**, the Rock Creek Project is best adapted to a comprehensive plan for development of the South Fork American River Basin for beneficial public uses.

Mining Claims

James H. Cosgrove, Ronald L. Johnston, and Philip L. Blair (Petitioners) stated that their mining claims in the area would be adversely impacted if the powerhouse access road is limited to authorized personnel only and if they are denied access. Applicant responded stating that the mining claims were not valid; however, Applicant has agreed that all valid claim owners would be considered authorized personnel and would be granted access. The Bureau of Land Management has also stated that all mining claimants are guaranteed access through the Rock Creek Project right-of-way.

It is ordered that:

(A) This **license** is issued to Joseph M. Keating under Part I of the Federal Power Act (Act) for a period of 50 years, effective the first day of the month in which this order is issued, for the construction, operation, and maintenance of the Rock Creek Project No. **3189**, located on Rock Creek in El Dorado County, California, and occupying lands of the United States under the administration of the Bureau of Land Management. This **license** is subject to the terms and conditions of the Act, which is incorporated by reference as part of this **license**, and subject to the regulations the Commission issues under the provisions of the Act.

(B) The Rock Creek Project No. **3189** consists of:

(i) All lands, to the extent of the Licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form part of the application for **license** and that are designated and described as:

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(ii) Project works consisting of:

(1) a 6-foot-high, 80-foot-long concrete and rock overflow diversion structure at elevation 1,265 feet with 3-foot-high flashboards, and impounding; (2) a 0.36-acre power forebay reservoir with a usable capacity of 5.2 acre-feet; (3) a 500-foot-long, 72-inch-diameter concrete pipe; (4) a 3,200-foot-long, 9-foot-diameter unlined horseshoe tunnel; (5) three 400-foot-long steel penstocks, (two 36-inch-diameter penstocks and one 30-inch-diameter penstock); (6) a concrete block powerhouse at elevation 1,052 feet containing three mobile crossflow generating units, two rated at 1,125 kW each and one rated at 750 kW for a total of 3,000 kW; (7) three 100-foot-long, 4.16-kV generator leads; (8) a ³⁰⁰⁰/₃₇₅₀ kVA 4.1⁶/_{12.0} kV transformer; (9) a 75-foot-long, 12-kV transmission line; and (10) appurtenant facilities.

The location, nature, and character of these project works are generally shown and described by the exhibits cited above and more specifically shown and described by certain other exhibits and reports that also form a part of the application for **license** and that are designated and described as:

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****5 Exhibit A** - Section D entitled "Powerhouse and Transmission Line," on pages **A-3** and **A-4**, filed June 1, 1982.

Exhibit E

The *Report on Fish, Wildlife, and Botanical Resources*, filed June 1, 1982, and revised November 18, 1982, (specifically pages 3 through 7 of the revisions, paragraphs d through 1 and n).

The *Report on Recreational Resources*, filed June 1, 1982, consisting of: one page of text, numbered E-38 (specifically Section 9.5 entitled "Proposed Measures or Facilities," Items No. 1 through 5).

***63204** (iii) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the project, located within or outside the project boundary, as approved or acquiesced in by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibit A (Section D), Exhibit F, Exhibit G, the Report on Fish, Wildlife, and Botanical Resources, and the Report on Recreational Resources of Exhibit E, designated in Ordering Paragraph (B) above, are approved and made a part of the **license**.

(D) This **license** is also subject to the terms and conditions set forth in Form L-2 (revised October, 1975), entitled "Terms and Conditions of **License** for Unconstructed Major Project Affecting Lands of the United States," designated as Articles 1 through 32, attached to (reported at 54 FPC 1808) and made a part of this **license**. The **license** is also subject to the following additional articles:

Article 33. The Licensee shall file with the Commission's Regional Engineer and the Director, Office of Electric Power Regulation, one copy each of the contract drawings and specifications for pertinent features of the project such as water retention structures, powerhouse and water conveyance structures, at least 60 days prior to start of construction. The Director, Office of Electric Power Regulation, may require changes in the plans and specifications to ensure a safe and adequate project.

Article 34. Licensee shall file for approval as-built Exhibits A, F, and G within one year of completion of construction describing the project as constructed.

Article 35. Licensee shall commence construction of the project within 2 years of the issuance date of this **license** and complete construction within 4 years of the **license** issuance date.

Article 36. The Licensee shall review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction and shall ensure that construction of cofferdams and deep excavations are consistent with the approved design. At least 30 days prior to start of construction of the cofferdam, the Licensee shall file with the Commission's Regional Engineer and Director, Office of Electric Power Regulation, one copy of the approved cofferdam construction drawings and specifications and a copy of the letter of approval.

****6** *Article 37.* Licensee shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule or the inflow to the reservoir, whichever is less: May through September - 11 cubic feet per second (cfs) and October through April - 15 cfs. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, for studies required by Article 38, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the California Department of Fish and Game.

Article 38. The Licensee shall, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of the fishery resources in Rock Creek between the dam and the powerhouse. Further, Licensee shall, within 1 year from the date of issuance of this **license**, file a report of its findings and, for Commission approval, recommendations for a minimum flow release and for other fishery protection and enhancement measures needed in Rock Creek between the dam and powerhouse. Agency letters of comment on the report and recommendations shall be included in this filing.

Article 39. The Licensee shall, prior to the commencement of any future construction at the project, consult with the California State Historic Preservation Officer (SHPO) about the need for any cultural resource survey and salvage work. The Licensee shall make available funds in a reasonable amount for any such work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historical resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 40. The Licensee shall pay the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as ***63205** determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 4,000 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of approximately 11.61 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

****7** *Article 41.* 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 new 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 operation 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 reserve 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 42. (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 other 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 uses 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, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

****8** (b) The types 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 watercraft 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. 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 uses 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 ***63206** 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 reservoir 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 and roads for which 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 reservoir. 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.

****9** (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 certificates 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 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or 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 the edge of the project reservoir at normal maximum 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 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, 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 or K 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 paragraphs (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 Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (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.

****10** (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 ***63207** 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 or K 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 or K drawings would be filed for approval for other purposes.

Article 43. Licensee shall, within 6 months following the issuance of this **license**, file for Commission approval, functional design drawings of a fish screen for the intake of the Rock Creek Project, prepared in consultation with the U.S. Fish and

Wildlife Service and the California Department of Fish and Game. Agency comments on the proposed fish screen design shall be included in the filing. Within 6 months after completion of construction of the screen, Licensee shall file as-built drawings with the Commission.

(E) The Licensee's failure to file a petition appealing this order to the Commission shall constitute acceptance of this **license**. In acknowledgment of acceptance of this **license**, the **license** shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

Federal Energy Regulatory Commission

Footnotes

- ¹ Authority to act on this matter is delegated to the Director, Office of Electric Power Regulation, under §375.308 of the Commission's regulations, 18 C.F.R. §375.308 (1982), *FERC Statutes and Regulations* P 30,238. This order may be appealed to the Commission by any party within 30 days of its issuance pursuant to Rule 1902, 18 C.F.R. 385.1902, *FERC Statutes and Regulations* P 29,052, 47 Fed. Reg. 19014 (1982). Filing an appeal and final Commission action on that appeal are prerequisites for filing an application for rehearing as provided in Section 313(a) of the Act. Filing an appeal does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically directed by the Commission.
- ² The proposed project, with its average annual energy generation of 7,000 MWh, will utilize a renewable resource that will save approximately 9,900 barrels of oil or 3,200 tons of coal per year.

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