

Hydrodynamics, Inc.
Project No. 13531-000
East Rosebud Hydroelectric Project
East Rosebud Creek, MT

AMERICAN WHITEWATER, BEARTOOTH PADDLERS SOCIETY, JACKSON
HOLE KAYAK CLUB, AND RENDEZVOUS RIVER SPORTS
MOTION TO INTERVENE AND COMMENTS

In Response to the
Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments,
Motions to Intervene, and Competing Applications
for the Proposed East Rosebud Creek Hydroelectric Project, FERC Project Number
13531-000

(Submitted on December 21, 2009)

American Whitewater is a national nonprofit organization dedicated to protecting and restoring our nation's whitewater resources while enhancing opportunities to enjoy them safely. American Whitewater has roughly 6,500 members and over 100 affiliate clubs. Beartooth Paddlers Society and Jackson Hole Kayak Club are regional paddling clubs based near the Project. Members of AW, BPS, and JHKC live near, and recreate on East Rosebud Creek, in a reach subject to significant impacts (ie dewatering) from the proposed project. As conservation oriented paddling organizations that enjoy the waters of East Rosebud Creek, we have a direct interest in changes to flows, river access, flow information, land management, and other topics that will arise in the consideration of a hydropower project on the East Rosebud Creek, and that could greatly impact our enjoyment of East Rosebud Creek.

Rendezvous River Sports is a store and outfitting company located in Jackson, Wyoming that specializes in whitewater paddling. Jackson paddlers regularly visit the rivers and streams of south-central Montana, including East Rosebud Creek. Thus, decisions affecting East Rosebud Creek could have direct financial effects on Rendezvous River Sports.

Based on the interests stated above, American Whitewater, Beartooth Paddlers, Jackson Hole Kayak Club, and Rendezvous River Sports hereby request Intervenor status and offer comments on the Preliminary Permit Application in this filing.

MOTION TO INTERVENE

With good cause having been shown, American Whitewater, Beartooth Paddlers Society, Jackson Hole Kayak Club and Rendezvous River Sports hereby respectfully request that we each be permitted to intervene in the above-entitled proceedings and be made parties thereto.

COMMENTS

1. Wild and Scenic River Eligibility

The applicant erroneously claims that no part of the proposed project receives or is proposed to receive special protection under the Wild and Scenic Rivers Act.

Vicinity / Project Map

(showing project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any permanent monuments or objects that can be noted on the maps and recognized in the field). No areas within or in the vicinity of the proposed project boundary receive or are proposed to receive special protection under the National Wild and Scenic River System or the Wilderness Act. . Also indicated are any non-Federal lands and any public lands or reservations of the United States necessary for the purposes of the project. Also showing proposed project boundary and relative locations and physical interrelationships of the principal project features identified in Exhibit 1 including but not limited to any dam, reservoir, water conveyance facilities, powerplant, transmission lines, and other appurtenances

The Forest Service has listed 20 miles of East Rosebud Creek in the Nationwide Rivers Inventory¹ (NRI) and specifically determined that the river reach on which the project is proposed is eligible for designation under the Wild and Scenic Rivers Act. The website for the NRI explains:

The Nationwide Rivers Inventory (NRI) is a listing of more than 3,400 free-flowing river segments in the United States that are believed to possess one or more "outstandingly remarkable" natural or cultural values judged to be of more than local or regional significance. Under a 1979 [Presidential directive](#)², and related [Council on Environmental Quality procedures](#)³, all federal agencies must seek to avoid or mitigate actions that would adversely affect one or more NRI segments.

The NRI lists the potential Outstanding Remarkable Values (ORV's) of East Rosebud Creek as *scenic, recreational, and geological*.

The aforementioned Presidential Directive orders that:

Each federal agency shall, as part of its normal planning and environmental review process, take care to avoid or mitigate adverse

¹ Nationwide Rivers Inventory. National Park Service.
<http://www.nps.gov/ncrc/programs/rtca/nri/index.html>

² MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES. Presidential Directive of President Jimmy Carter. August 2, 1979. <http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#pd>

³ Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory. Council on Environmental Quality.
<http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#ceq>

effects on rivers identified in the Nationwide Inventory. Each Federal agency with responsibility for administering public lands shall, to the extent of the agency's authority, promptly take such steps as are needed to protect and manage the river and the surrounding area in a fashion comparable to rivers already included in the Wild and Scenic Rivers System.⁴

This statement is mirrored elsewhere in Agency directives that require federal agency staff to protect and enhance the Outstanding Remarkable Values of eligible rivers, as though those rivers were already designated as Wild and Scenic. For example, in the Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council: A Compendium of Questions & Answers Relating to Wild & Scenic Rivers, the Council finds as follows:

Question. Once a river segment has been determined eligible and given a tentative (inventoried) classification (wild, scenic and/or recreational), how are its values protected?

Answer. Protective management of federal lands in the river area begins at the time the river segment(s) has been found eligible (except for non-federal lands under Section 5(a) study rivers, in which case the provisions of Sections 7(b), 8(b) and 9(b) of the Act apply). The identified ORVs are afforded adequate protection, subject to valid existing rights. Affording adequate protection requires sound resource management decisions based on National Environmental Policy Act (NEPA) analysis. Protective management may be initiated by the administering agency as soon as eligibility is determined.

Specific management prescriptions for eligible river segments provide protection in the following ways:

Free-flowing Values. The free-flowing characteristics of eligible river segments cannot be modified to allow stream impoundments, diversions, channelization and/or riprapping to the extent authorized under law.

River-related Values. Each segment shall be managed to protect ORVs (subject to valid existing rights) and, to the extent practicable, such values shall be enhanced.

Classification Impacts. Management and development of the eligible river and its corridor should not be modified, subject to valid existing rights, to the degree that its eligibility or tentative classification would be

⁴ MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES. Presidential Directive of President Jimmy Carter. August 2, 1979. <http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#pd>

affected (i.e., its tentative river area classification cannot be changed from wild to scenic, or from scenic to recreational).

The US Forest Service Handbook, Section 1909.12, Chapter 80⁵, reiterates that:

To the extent the Forest Service is authorized by statute, a Responsible Official may authorize site-specific projects and activities on NFS lands within river corridors eligible or suitable only where the project and activities are consistent with all of the following:

1. The free-flowing character of the identified river is not modified by the construction or development of stream impoundments, diversions, or other water resources projects.
2. Outstandingly remarkable values of the identified river area are protected.

More to the point, US Forest Service Handbook, Section 1909.12, Chapter 80, finds that:

A [USFS] Responsible Official may authorize site-specific projects and activities on NFS lands within river corridors eligible or suitable where the project and activities are consistent with the following:

Wild, Scenic, Recreational. Development of hydroelectric power facilities is not allowed on or directly affecting a section 5(a) study river. This provision of section 7(b) of the [Wild and Scenic Rivers] act is interpreted as a prohibition of new hydroelectric facilities within the study boundary. Section 5(d)(1) study rivers found eligible are to be protected pending a suitability determination. Protect section 5(d)(1) study rivers found suitable for inclusion in the National Wild and Scenic Rivers System (National System) for their free-flowing condition, water quality, and outstandingly remarkable values.

Note that East Rosebud Creek is a Section 5(d)(1) river that was found eligible.

For these reasons neither the FERC nor the USFS could ever legally allow this or any hydroelectric project to be built on East Rosebud Creek. Let us be clear – it is illegal to build dams on rivers that are eligible for Wild and Scenic designation. We made this point in similar detail in our comments on a proposal by the applicant to divert water from another Wild and Scenic eligible river, the Madison River (FERC Project Number 13436-000). In response to our comments, and in concert with granting a preliminary permit for a project that could never be legally built, FERC stated:

“...nothing in the Wild and Scenic River Act bars the Commission from issuing a permit for the proposed Quake Lake Hydroelectric Project.”

⁵ This document can be downloaded at: www.fs.fed.us/im/directives/fsh/1909.12/1909.12_80.doc.

While this may be technically true, we must point out that the Presidential Directive (especially), USFS Policies, and the Wild and Scenic Rivers Act as referenced above, in concert, guarantee that no hydroelectric project can ever legally be built on East Rosebud Creek. The US Forest Service (USFS) must comply with the Presidential Directive and in addition must issue prescriptions to maintain the free-flowing nature of the river, prevent diversions, and protect the Outstanding Remarkable Values of the river. Moreover, the USFS has Section 4(e) mandatory conditioning authority⁶ which they must use in this case to issue the above prescriptions, since the Presidential Directive is clear the agency must act “to the extent of the agency's authority.” While the USFS cannot prevent FERC from licensing the project in some form (or issuing a preliminary permit), they *must* however actively prevent the dam building, creation of an impoundment, and flow diversion that the project relies upon for power generation. As such, the USFS must actively oppose this project during any subsequent licensing process, in order to protect the public interest in East Rosebud Creek as a potential Wild and Scenic River.

FERC failed to address the Presidential Directive in the response to our Madison River comments. We ask that FERC consider this directive on this project.

We ask that FERC consider the public burden of granting a preliminary permit for a legally impossible project. The applicant claims the studies will cost \$500,000, dozens of members of the public and multiple organizations have already filed comments, the US Forest Service will have to be intimately involved with permitting studies and opposing the project, the National Park Service will have to be consulted, and FERC itself is taking up valuable staff time working on this proposed project. We humbly suggest that FERC should prevent this massive waste of taxpayer money, private money, and personal time by denying this futile permit request. Granting such a permit would cause unneeded hardship on many individuals and organizations that will have to fight a project that has no chance of being built.

As a basis for the past decision to grant a preliminary permit for the project on the Madison FERC listed 20-30 year old examples of other places where FERC issued permits on rivers protected under the Wild and Scenic Rivers Act and more to the point the Presidential Directive. We suggest that just because it has been done in the past does not mean it was – or is today – the right thing to do. We ask that FERC act responsibly and deny this preliminary permit since any hydropower project on East Rosebud Creek would be illegal.

2. Whitewater Boating

East Rosebud Creek, from East Rosebud Lake to Sand Dunes Campground is a regionally important whitewater boating resource. It offers paddlers a desirable 6-mile long Class IV and V section of nearly continuous whitewater. Many paddlers choose to paddle only the upstream 3 miles where the best rapids are found. The American Whitewater National

⁶ section 4(e), 16 U.S.C. 797

Rivers Database page for East Rosebud Creek can be found at:
<http://www.americanwhitewater.org/content/River/detail/id/1019/>.

The proposed project would create a new dam, reservoir, and 2.2 mile diversion on East Rosebud Creek. These features will each damage virtually all of the best whitewater on East Rosebud Creek. Each of these project elements would have significant impacts on the paddling resources. The diversion in particular would remove an unknown quantity of water from the best part of the whitewater run, thereby eliminating and/or impacting recreational opportunities during portions of the year.

3. Aesthetics

East Rosebud has a potential Outstanding Remarkable Value of scenery under the Wild and Scenic Rivers Act. The proposed project would create a dam, reservoir, pipe, penstock, powerhouse, and transmission lines in the Wild and Scenic corridor. In addition the proposed project would divert significant water out of an otherwise impressive whitewater stream. All of these impacts would detract from the scenery of the river.

4. River Ecology

The proposed project would divert significant flows from at least 2.2 miles of East Rosebud Creek, thereby significantly impacting the in-stream and riparian ecology. It would include a dam that would fragment aquatic habitat and potentially trap sediment. It would include a reservoir which would inundate terrestrial land and change aquatic communities. All told this project is high impact on an otherwise virtually pristine creek.

CONCLUSIONS:

The proposed project would have significant negative impacts on recreational, aesthetic, and ecological values, as well as the free flowing nature, of East Rosebud Creek. These impacts, if allowed to occur, would violate directives and policies governing the management of a river found eligible for designation under the Wild and Scenic Rivers Act – most importantly the presidential directive cited above. The United States Forest Service must, and has the authority to, issue mandatory conditions preventing these impacts from occurring. It is illegal to build any hydropower project on East Rosebud Creek, ever. For these reasons, it would not be responsible of FERC to issue preliminary permit for this project. We ask that FERC reject this application for a preliminary permit, because licensing this project is legally impossible, and therefore the preliminary permit would not be in the public interest.

Thank you for considering these comments.

Sincerely,

A handwritten signature in dark ink, appearing to be "K. R. Allen", written in a cursive style.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of December 2009, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.



Carla R. Miner
Stewardship Assistant
American Whitewater

Service List for P-13531-000 Hydrodynamics Inc.

Contacts marked ** must be postal served

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