

APPENDIX A
CURRENT LICENSE AND ASSOCIATED MATERIALS

The following items are included after this page:

- 1. ORDER SETTING LAKE LEVELS FOR ELK AND SKEGEMOG LAKES (1973)**
- 2. ORDER ISSUING LICENSE (1981)**
- 3. OFFER OF SETTLEMENT (1999)**
- 4. ORDER APPROVING SETTLEMENT AND AMENDING LICENSE (1999)**

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

In the Matter of the Petition of the
Antrim County Board of Commissioners
for a Determination of the Normal Height
and Level of the Waters of Elk and
Skegemog Lakes Situated in the Counties
of Antrim, Grand Traverse and Kalkaska,
Michigan.

File No. 962

ORDER

At a session of said Court held at the Courthouse in
the Village of Bellaire in Antrim County on the 25th
day of September, 1973.

PRESENT: HONORABLE RAYMOND L. SMITH
CIRCUIT COURT JUDGE

Having read the Petition of the Antrim County Board of
Commissioners for a Determination of the Normal Height and Level
of the Waters of Elk and Skegemog Lakes, and having heard
testimony in support of said Petition, and the Court being
further fully advised in the premises, now, therefore,

On Motion of Robert J. Stephan, Prosecuting Attorney for
Antrim County, Michigan, on behalf of Petitioner,

IT IS ORDERED AND ADJUDGED and this Court by virtue of
the authority therein vested and in pursuance of the statute in
such case made and provided, does ORDER AND ADJUDGE that a level
of 590.80 feet Elk Rapids Dam gauge reading (588.26 feet
International Great Lakes Datum of 1955) shall be maintained from
April 15 of each year or ice break-up on said lakes, whichever
occurs later, until November 1 of each year; on November 1 of
each year said lake level shall be reduced to 590.20 feet Elk
Rapids Dam gauge reading (587.66 International Great Lakes Datum
of 1955) until the following April 15, or ice break-up, whichever
occurs later at which time it shall be increased to the previous
above stated level until further Order of this Court.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Antrim County)

Project No. 3030

ORDER ISSUING LICENSE (MINOR)

(Issued February 9, 1981)

Antrim County filed an application on January 22, 1980, for a license under Part I of the Federal Power Act (Act) for the continued operation and maintenance of the Elk Rapids Project No. 3030. 1/ The project is located on the Elk River a navigable waterway of the United States, in Antrim County, Michigan.

Notice of the application has been published and comments have been received from interested Federal, State, and local agencies. No protests or petitions to intervene have been received, and none of the agencies objected to issuance of the license.

PROJECT HISTORY AND DESCRIPTION

The Consumers Power Company operated the Elk Rapids project from 1950 to 1965, when the facility was shut down, and the generators and related electrical equipment were removed. In 1967, the Elk Rapids project was purchased by Antrim County. The project at the present time is operated only to maintain lake level control.

The project consists of: a 87-foot long and 23.67-foot high concrete and brick integral powerhouse and dam structure containing two units, each rated at 350 kW; an underground, 50-foot long, 4,160-volt transmission line that extends southwest to a substation; a spillway that is located approximately 450 feet southwest of the powerhouse; the 4.16 kV generator leads; and appurtenant facilities.

A more detailed project description is contained in ordering paragraph (B).

FEDERAL ENERGY REGULATORY COMMISSION

DOCKETED

FEB 9 1981

DOCKET SECTION

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, 45 Fed. Reg. 21216 (1980), amending 44 Fed. Reg. 46449 (1979) and 18 C.F.R. 3.5(g) (1979).

SAFETY AND ADEQUACY

All project structures, machinery, and appurtenant facilities were inspected by the Commission's staff and found to be adequately maintained and in good operating condition. In accordance with standard Commission practice, this license includes conditions that require the installation of any necessary safety devices to protect the public in its use of project lands and waters. It is concluded that the project, under the conditions of this license, is safe and adequate.

ENVIRONMENTAL CONSIDERATIONS

The U.S. Corps of Engineers and the Environmental Protection Agency stated in their comments that the environmental report failed to adequately address the potential for fish entrainment (turbine mortality) during plant operation, and recommended that fish entrainment be determined and documented. These comments, however, do not raise any new significant environmental questions. The standard license articles are sufficient safeguards to address fish entrainment should it become a significant problem.

The U.S. Fish and Wildlife Service and the State of Michigan Department of Natural Resources expressed concerns regarding the lack of recreational facilities for this project. Article 23 requires the Licensee to consult with the appropriate Federal, State, and local agencies to determine the need for recreational facilities within the project area.

The U.S. Department of the Interior recommended that the Applicant consult with the State Historic Preservation Officer in regard to listing the project in the National Register of Historic Places as suggested by Antrim County. Article 26 of the license requires the Licensee to consult with the State Historic Preservation Officer on historic or archeological resources that may be affected by this project.

On the basis of an environmental assessment, the Commission's staff found that licensing of the project would not be a major Federal action significantly affecting the quality of the human environment.

OTHER ASPECTS OF COMPREHENSIVE DEVELOPMENT

The project has an average annual generation of 3 million kWh, and utilizes a renewable resource that saves the equivalent of approximately 4,900 barrels of oil or 1,400 tons of coal per year.

It is concluded that, as conditioned in this license Project No. 3030 is sufficiently well adapted to a comprehensive plan for development of Muskegon River Basin for beneficial public uses and that issuance of this license is in the public interest.

LICENSE TERM

In accordance with the Commission's order issuing license for Project No. 2666 ^{2/} the license will be effective the last day of the month in which this order is issued and will terminate 20 years from that day.

EXHIBIT K

The Elk Rapids Project, which is less than 2,000 horsepower, is owned by a municipality and is, therefore, not subject to Federal takeover. The project affects a chain of lakes which cover a surface area of 34,000 acres and a drainage basin of 513 square miles. Applicant has stated that it would be too difficult to show all the lakes and drainage basin area affected by this project on an Exhibit K drawing, and has requested that the requirement to show the project boundary on the Exhibit K drawing be waived.

The Commission's staff has reviewed the Applicant's request and has concluded that a project boundary would be too extensive to show on the Exhibit K drawing. Therefore, pursuant to Section 10(i) of the Federal Power Act, the request to waive the project boundary requirement from inclusion as part of Exhibit K is granted.

EXHIBIT L

Exhibit L is approved and made a part of the license only to the extent it shows the existing and proposed project works. Article 24 requires the Licensee to file "As Built" drawings of the proposed construction upon completion of the work.

It is ordered that:

(A) This license is issued to Antrim County (Licensee) of the Village of Elk Rapids, Michigan, under Part I of the Federal Power Act (Act), for a period effective the last day of the month in which this order is issued and terminating 20 years from that day for the continued operation and maintenance of

^{2/} See Bangor Hydro-Electric Company, Project No. 2666, Order Issuing Major License (Issued March 29, 1979).

the Elk Rapids Project No. 3030, located in Antrim County, Michigan, on the Elk River, a navigable waterway of the United States. 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 Elk Rapids Project No. 3030 consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area. The project area is shown and described by a certain exhibit that form part of the application for license and that is designated and described as:

<u>Exhibit</u>	<u>FERC No.</u>	<u>Showing</u>
K-1	3030-1	Project Area and Location

(2) Project works consisting of: (1) a 87-foot long and 23.5-foot high concrete and brick integral powerhouse and dam structure containing two generating units, each rated at 350 kW; (2) an underground 50-foot long, 4,160-volt transmission line that extends southwest to a substation and the 4.16 kV generator leads; (3) a concrete spillway that is located approximately 450 feet southwest of the powerhouse; and (4) appurtenant facilities.

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

<u>Exhibit</u>	<u>FERC No.</u>	<u>Showing</u>
L-1	2	Project Structures and Equipment
L-2	3	" " " "
L-3	4	" " " "
L-4	5	" " " "

(3) 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, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits K and L, designated in ordering paragraph (B) above, are approved and made a part of the license only to the extent that they show the general location of the project works.

(D) Pursuant to Section 10(i) of the Act, it is in the public interest to waive the following sections of Part I of the Act, and they are excluded from the license:

Sections 4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(E) This license is also subject to Article 1 through 19 set forth in Form L-9 (revised October 1975), entitled "Terms and Conditions of License for Constructed Minor Project Affecting navigable waters of the United States," attached to and made a part of this license. The license is also subject to the following additional articles:

Article 20. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate any barriers, signs, lights, sirens, or other devices that may reasonably be needed to warn the public of fluctuations in flow from the project and to protect the public in its recreational use of project lands and waters.

Article 21. The Licensee shall continue to consult and cooperate with the U.S. Fish and Wildlife Service, the U.S. National Marine Fisheries Service, the U.S. Heritage Conservation and Recreation Service of the Department of the Interior, and other appropriate agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in the project works or operations that may be necessary to protect and enhance those resources and values.

Article 22. The Licensee shall pay the United States the following annual charges, effective the last day of the month in which the license is issued.

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as 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 930 horsepower.

Article 23. The Licensee shall, in consultation with the appropriate Federal, State, and local agencies determine the need, if any, for public recreation facilities in the tailrace area of the project. Licensee shall, within one year, file with the Commission results of consultation and subsequent plans for implementation of any facilities determined necessary from this study.

Article 24. The Licensee shall within 90 days of completion of construction file in accordance with the Commission's Rules and Regulations revised Exhibit L drawings showing the project as built.

Article 25. The Licensee shall commence the construction of the project within one year of the date of issuance of the license, and shall thereafter in good faith and with due diligence prosecute and complete such construction of project works within 3 years of the date of issuance of the license.

Article 26. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the appropriate State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, 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 historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic 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 27. (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.

(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; and (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 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 modifications 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.

(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.

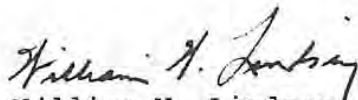
(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions 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.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of their 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 area. The project area may be changed to exclude land conveyed under this article only upon approval of revised Exhibit K drawing (project area map) 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 K drawing would be filed for approval for other purposes.

(E) This order is final unless a petition appealing it to the Commission is filed within 30 days from the date of its issuance, as provided in §1.7(d) of the Commission's regulations, 18 C.F.R. 1.7(d), as amended, 44 Fed. Reg. 46449 (1979). The filing of a petition appealing this order to the Commission or an application for rehearing as provided in §313(a) of the Act does not operate as a stay of the effective date of this license or any other date specified in this order, except as specifically ordered by the Commission. The Licensee's failure to file a petition appealing this order to the Commission shall constitute acceptance of this license. In acknowledgement of acceptance of this license and its terms and conditions, it shall be signed by the Licensee and returned to the Commission within 60 days from the date of this order.

(S E A L)


William W. Lindsay
Director, Office of Electric
Power Regulation

Project No. 3030

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this Order, Antrim County this _____ day of _____, 1980, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____
President

Attest:

Secretary

County of Antrim
Office of the Coordinator/Planner

ORIGINAL

Eric Cline
Associate Planner

Peter Garwood
Coordinator/Planner

Peggy Hamminga
Administrative Secretary

February 24, 1999

Dave Snyder
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

RE: Project No. 3030-012 – Michigan
Elk Rapids Project, Antrim County, Michigan

OFFICE OF THE SECRETARY
99 FEB 26 PM 2:21
FEDERAL ENERGY
REGULATORY COMMISSION

Dear Dave:

Enclosed is the final copy of the Offer of Settlement and the Explanatory Statement for the Elk Rapids Hydroelectric Project.

If you desire you can replace the small map with the large version for Appendix E prior to presenting it to your Commission.

Please give me a call if you should have any questions or concerns.

Thank you.

Sincerely,



Peter Garwood
Coordinator/Planner

PG/ph

Enclosure

FERC DOCKETED

FEB 26 1999

990301.0274.3

Antrim County Building P.O. Box 187
Bellaire, MI 49615



Phone: (616) 533-6265 Fax: (616) 533-8111

E-mail: garwood1@freeway.net
ercline@freeway.net

ORIGINAL

United States of America
Before the Federal Energy Regulatory Commission

re: The County of Antrim
Elk Rapids Hydroelectric Project (FERC No. 3030-012)

FILED
OFFICE OF THE SECRETARY

99 FEB 26 PM 2:21

FEDERAL ENERGY
REGULATORY COMMISSION

OFFER OF SETTLEMENT

1.0 Jurisdiction

1.1 This OFFER OF SETTLEMENT ("SETTLEMENT") is entered into voluntarily by and between the "parties," The County of Antrim ("County"), the licensee applying for an extension to the current Federal Energy Regulatory Commission ("FERC") license for the Elk Rapids Hydroelectric Project No. 3030 (Project), the United States Department of Interior Fish and Wildlife Service ("USFWS"), the Michigan Department of Natural Resources ("MDNR"), and the Michigan Hydro Relicensing Coalition (an organization representing the Anglers of the Au Sable, the Michigan United Conservation Clubs, the Michigan Council of Trout Unlimited and the Great Lakes Council of the Federation of Fly Fishers -- "MHRC") pursuant to FERC rule, 18 CFR Section 385.602. The "Fish and Wildlife Agencies" are defined as USFWS and MDNR. This SETTLEMENT concerns the conditions under which all parties agree an extension of the existing license should be granted. The extension request is for a period ending December 31, 2014.

2.0 Effect of Offer of SETTLEMENT

2.1 This SETTLEMENT is made upon the express understanding that it constitutes a negotiated SETTLEMENT of issues in the above-captioned proceedings, and no party to the SETTLEMENT shall be deemed to have approved, admitted, accepted, agreed to or otherwise consented to any operation, management, valuation or other principle underlying or supposed to underlie any of the matters herein, except as expressly provided herein. Further, the parties agree that this SETTLEMENT shall not be used as a precedent or as an admission with regard to any issue dealt with in the SETTLEMENT.

2.2 For those issues addressed in this SETTLEMENT, the parties agree not to propose, mandate, support or otherwise communicate to FERC any license conditions other than those provided for herein or oppose FERC license articles which incorporate the provisions described in this SETTLEMENT for extension of the current license for operation of the Elk Rapids Hydroelectric Project.

2.3 This SETTLEMENT shall become effective upon issuance by FERC of "final" orders accepting this SETTLEMENT without modification or condition concerning the issues addressed in this SETTLEMENT and issuing orders in accordance with the SETTLEMENT for these issues. If FERC issues orders accepting the SETTLEMENT on the addressed issues with modifications or conditions, this SETTLEMENT shall be considered modified to conform to the terms of those orders unless at least one party indicates to the other party in writing within thirty (30) days after

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the issuance of such orders its objection to the order and its withdrawal from the SETTLEMENT. If the County or any of the Fish and Wildlife Agencies so withdraw, this SETTLEMENT shall cease to have any force or effect except for Paragraph 2.1. If this SETTLEMENT is modified to conform to the terms of FERC orders, as discussed above, it shall become effective once those orders become “final” as of the date rehearing is denied, or if rehearing is not applied for, the date on which the right to seek rehearing expires. The above shall not preclude a party from seeking rehearing on modifications or conditions pursuant to 18 CFR 385.713 within the prescribed time limits. The terms of this Agreement shall continue in effect, subject to the FERC’s reserved authority under the license to require modifications, until the effective date of any FERC order approving surrender of the project under Section 6 of the Federal Power Act.

2.4 In the event that FERC issues orders amending license that do not include all of the conditions of this SETTLEMENT because FERC has determined it lacks jurisdiction over those issues, the parties agree that they will be bound by the conditions of the entire SETTLEMENT. With respect to those conditions over which FERC does not have jurisdiction, the parties agree that the SETTLEMENT shall be enforceable in a court of appropriate jurisdiction.

2.5 The withdrawal of a party other than the County and the Fish and Wildlife Agencies does not terminate the effect of this SETTLEMENT on the other parties.

3.0 Parties Bound

3.1 This SETTLEMENT shall apply to, and be binding on, the parties and their successors and assigns. However, no party shall be bound by any part of this SETTLEMENT except with regard to the above captioned license extension proceedings and then only if the SETTLEMENT is approved and made effective as provided for in paragraph 2.3. Each signatory to this SETTLEMENT certifies that he or she is authorized to execute this SETTLEMENT and legally bind the party he or she represents.

4.0 Powerhouse Operation and Headwater Levels

4.1. The County shall operate the Elk Rapids Hydroelectric Project in a “non-peaking mode”. Non-peaking means that flow through the powerhouse and spillway shall approximately equal inflow to the lake at any given time, as monitored by lake level elevation and flow stability. The headwater elevation shall be in compliance with the order of the Circuit Court for the County of Antrim dated September 25, 1973 in *the Matter of the Petition of the Antrim County Board of Commissioners for a Determination of the Normal Height and Level of the Waters of Elk and Skegemog Lakes situated in the County (sic) of Antrim, Grand Traverse and Kalkaska, Michigan file #962-CZ*, which establishes summer and winter lake levels for Elk and Skegemog lakes, as follows: “the lake level of 590.80 feet Elk Rapids Dam gauge reading being 588.26 feet International Great Lakes Datum of 1955 shall be maintained from April 15 of each year or ice break-up on Elk and Skegemog Lakes, whichever occurs later, until November 1 of each year, on November 1 of each year said lake level shall be reduced to –590.20 feet Elk Rapids Dam gauge reading being 587.66 feet International Great Lakes Datum of 1955 until the following April 15, or ice break-up, whichever occurs later at which time it shall be increased to the previous above stated level, subject to further Order of the Circuit Court for Antrim County”. During time periods when elevation changes are being made to

comply with the court order, that is from summer to winter level and from winter to summer level, the change in daily flow shall not differ greater than 20% of the previous day's flow until the legal lake level is achieved.

4.2 The County shall provide records to validate non-peaking mode of operation to the Fish and Wildlife Agencies on a yearly basis. Records to be provided include hourly generation records, recorded gate openings, verified gate rating curves, and headwater elevations. Gate openings shall be recorded each time a gate is changed. Any deviation from agreed upon mode of operation shall be corrected upon discovery and the resource agencies shall be notified.

5.0 Water Quality

5.1 The County shall operate the Project in such a manner to be in compliance with the Water Quality Standards of the State of Michigan.

6.0 Recreation

6.1 The County shall continue to provide and maintain the existing tailwater access, including the two existing barrier-free platforms, for the purpose of fishing the tailwater for the duration of the extended license period.

7.0 Threatened, Endangered or Sensitive Species

7.1 The USFWS has determined that presently, there are no federally listed species known to occur within the project boundary. The County shall notify the Fish and Wildlife Agencies if any federal or state listed threatened, endangered or sensitive species are found to occur within the project boundary and consult with the resource agencies on the development of a protection plan. The most likely listed species to be found within the project boundary would be the bald eagle. The County shall provide protection for eagles in the event that eagles inhabit the project boundary.

8.0 Project Decommission

8.1 The project shall be decommissioned at the end of the extended license period. The County will cease to operate all equipment and remove the generators, related electrical equipment, turbines, and guide vanes at the Elk Rapids Hydroelectric Project. The actual structure and such equipment required to maintain the lake levels will remain intact and continue to operate as a dam to maintain lake levels, for the water of Elk and Skegemog lakes, pursuant to order of the Circuit Court referenced in 4.1.

8.2 The County shall, in the event that the Elk River Hydroelectric Project generates sufficient income to meet the annual bond payment, establish an Escrow Account and deposit all monies over and above the bond payment into the account for the duration of this SETTLEMENT to be utilized for decommissioning costs. The County shall provide pertinent portions of the annual audit report to the Fish and Wildlife Agencies relating to expenses and revenues generated through the hydroelectric project to document annual loss/profit of this facility.

9.0 Entire Agreement

9.1 This SETTLEMENT constitutes the entire agreement between the parties with respect to the FERC license extension of the Elk Rapids Hydroelectric Project and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties. No supplement, amendment, alteration, modification, waiver or termination of this SETTLEMENT, shall be binding unless executed in writing by the parties.

9.2 This SETTLEMENT shall relieve the County from any future responsibility for funding and liability during the license extension period to fund, either in the form of a monetary payment or in the form of providing labor, materials or equipment related to the study, planning, implementation, installation, maintenance, inspection or operation of activities conducted in connection with fish entrainment and recreation except maintenance of recreation site in 6.1. The MDNR and MHRC also agree not to pursue upstream fish passage and downstream fish passage and protection during the term of the SETTLEMENT. The USFWS reserves the Secretary of Interior's authority pursuant to Section 18 of the Federal Power Act, 16 USC Section 811, to prescribe upstream and downstream fishways after issuance of license extension, and will not invoke this authority or make recommendations pursuant to the Fish and Wildlife Coordination Act for implementing fish passage without consulting MDNR. Nothing contained in this SETTLEMENT shall create or be construed to create any obligation on the part of the Fish and Wildlife Agencies, the State of Michigan or the United States to indemnify the County or any other person for any claims for damages or reimbursement of any kind.

10.0 Governing Law

10.1 This SETTLEMENT shall be governed by and interpreted in accordance with the laws of the State of Michigan and applicable federal statutes, including but not limited to, the Federal Power Act, the Endangered Species Act and the Fish and Wildlife Coordination Act.

11.0 Waiver

11.1 No waiver of any of the provisions of this SETTLEMENT shall be deemed or shall constitute a waiver of any other provisions of this SETTLEMENT, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

12.0 Severability

12.1 If any term or other provision of this SETTLEMENT is invalid, illegal or incapable of being enforced under any rule of law, all other conditions and provisions of this SETTLEMENT shall nevertheless remain in full force and effect.

13.0 Counterparts

13.1 This SETTLEMENT may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This SETTLEMENT shall become binding on the parties after a

duly authorized representative of each party with the power to bind that party executes this SETTLEMENT.

IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of February 19, 1999.

COUNTY OF ANTRIM

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

By *[Signature]*

By _____

Its: Vice-Chair, Board of Commissioners
Date: February 11, 1999

Its: _____
Date: _____

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL

U.S. DEPARTMENT OF INTERIOR-FISH AND WILDLIFE

By _____

By _____

Its: _____
Date: _____

Its: _____
Date: _____

MICHIGAN HYDRO RELICENSING COALITION

By _____

Its: _____
Date: _____

duly authorized representative of each party with the power to bind that party executes this SETTLEMENT.

IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of February 19, 1999.

COUNTY OF ANTRIM

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

By _____

By [Signature]

Its: _____

Its: Director

Date: _____

Date: 2/4/99

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL

U.S. DEPARTMENT OF INTERIOR-FISH AND WILDLIFE

By _____

By _____

Its: _____

Its: _____

Date: _____

Date: _____

MICHIGAN HYDRO RELICENSING COALITION

By _____

Its: _____

Date: _____

duly authorized representative of each party with the power to bind that party executes this SETTLEMENT.

IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of February 19, 1999.

COUNTY OF ANTRIM

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES

By _____

By _____

Its: _____

Its: _____

Date: _____

Date: _____

MICHIGAN DEPARTMENT OF
ATTORNEY GENERAL

U.S. DEPARTMENT OF INTERIOR-
FISH AND WILDLIFE

By Alan Hoffman

By _____

Its: _____

Its: _____

Date: 2/18/99

Date: _____

MICHIGAN HYDRO
RELICENSING COALITION

By _____

Its: _____

Date: _____

duly authorized representative of each party with the power to bind that party executes this SETTLEMENT.

IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of February 19, 1999.

COUNTY OF ANTRIM

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES

By _____

By _____

Its: _____

Its: _____

Date: _____

Date: _____

MICHIGAN DEPARTMENT OF
ATTORNEY GENERAL

U.S. DEPARTMENT OF INTERIOR-
FISH AND WILDLIFE

By _____

By Robert T. Karstky

Its: _____

Its: Acting Field Supervisor

Date: _____

Date: 2/17/99

MICHIGAN HYDRO
RELICENSING COALITION

By _____

Its: _____

Date: _____

OFFER OF SETTLEMENT - ELK RAPIDS HYDROELECTRIC PROJECT

duly authorized representative of each party with the power to bind that party executes this SETTLEMENT.

IN WITNESS WHEREOF, each of the parties has caused this SETTLEMENT to be executed on its behalf by its officers thereunto duly authorized effective as of February 19, 1999.

COUNTY OF ANTRIM

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES

By _____

By _____

Its: _____

Its: _____

Date: _____

Date: _____

MICHIGAN DEPARTMENT OF
ATTORNEY GENERAL

U.S. DEPARTMENT OF INTERIOR-
FISH AND WILDLIFE

By _____

By _____

Its: _____

Its: _____

Date: _____

Date: _____

MICHIGAN HYDRO
RELICENSING COALITION

By James O Schuman

Its: ATTORNEY

Date: 2/15/99

ELK RAPIDS HYDROELECTRIC PROJECT (FERC NO. 3030)⁰¹²
EXPLANATORY STATEMENT

For
SETTLEMENT AGREEMENT

Date: February 19, 1999

BACKGROUND

The Elk Rapids Hydroelectric Project is located on the Elk River close to the mouth and within the Village of Elk Rapids. Antrim County owns this project. The dam was originally constructed in 1916 and operated as a hydroelectric facility until decommissioned in 1965. Antrim County purchased it in 1967 to serve as a lake level control structure.

In 1979 the County received a demonstration grant from the United States Department of Energy (one of a series of small hydro demonstration projects) to reactivate the Elk Rapids Hydroelectric Project. The Federal Energy Regulatory Commission issued an Order Issuing (Minor) License, dated February 9, 1981 with an expiration date of 2001. Reactivation of the dam was completed in September 1983.

LICENSE EXPIRATION

Antrim County (County) contends the term of the license issued in 1981 was in error for a number of reasons. These reasons are outlined in the letter from Antrim County to the FERC, dated April 28, 1997 (Appendix A). In this letter, the County explains that the FERC erroneously relied on two federal actions: The Androscoggin Decision (Public Service Co of NH – FERC No 2288, March 25, 1962) and the Order Issuing License For Bangor Hydro's Medway Project (FERC No 2666, March 29, 1979). The County outlines the differences between these two cases and the Elk Rapids dam: the dam was not in operation at the time of relicensing (1981) and had not been operating for a period of sixteen years prior to licensing (1965-1981) so the County would not "reap a substantial windfall from prolonged delay in filing" (see Medway referenced above); the dam was originally constructed prior to 1935; licenses can be issued for longer than 20 years and generally are given terms sufficiently long for the owner to recoup the majority of the investment; and finally the County relied on advice of the United States Department of Energy that reactivation of the dam was economically favorable (id., also, letter to the Federal Energy Regulatory Commission from Antrim County, dated June 6, 1997 – Appendix B).

Antrim County operates the hydroelectric dam at a deficit (id.). The County is responsible for approximately \$45,000 annually, until the year 2013, for repayment of the construction bond. Revenues generated from the hydroelectric project have been insufficient, by \$1,000 - \$20,000 annually, to meet the annual bond payment (id.). Cost of relicensing this project is not economically feasible given the already large debt load and deficit spending operations. However, given the existing debt, the County needs the revenue generated by the facility to minimize the amount the County must subsidize this facility through the year 2013. The County is requesting that the license for this project be extended to December 31, 2014.

SETTLEMENT

Other parties to this agreement (Michigan Department of Natural Resources – MDNR, United States Fish & Wildlife Service – USFWS, and the Michigan Hydro Relicensing Coalition – MHRC) accept the County’s position that the project is operating at a deficit and the County can not afford to relicense the project nor to decommission it in the year 2001, the expiration of the current license term. The other parties agree to support the County’s request for a license extension through the year 2014 conditional upon certain measures being agreed to and implemented by the County and incorporated as part of a license extension. These measures are outlined in the Settlement Agreement and serve the purpose of eliminating or mitigating for negative effects of the development on the aquatic resources and the public usage of these resources.

Powerhouse Operation and Headwater Levels

One of the conditions of the agreement is that the powerhouse will be operated as a non-peaking facility and that the flows released will generally equal the flows entering the reservoir at any given time. The purpose of this condition is to protect the aquatic resources both in the reservoir and in the tailwater. Compliance with this condition will be determined through the use of headwater elevations and power generation records. Generation records will be the most useful information due to the very large surface area of the impoundment (including two lakes, Elk and Skegemog). A gauging station below the powerhouse is not a practical monitoring tool as lake levels in Lake Michigan can effect the tailwater elevation (during times of high water or seiches).

The dam has been operated in the above-described mode since operations began in 1983. The dam is used as a lake level control structure for Elk and Skegemog lakes. In 1973, an order issued by the Circuit Court for the County of Antrim, dated September 25, 1973 (Appendix C) established summer and winter lake levels as follows:

April 15 (or ice break-up, which ever occurs later) through November 1:

590.80 feet at the Elk Rapids Dam gage (which is 588.26 feet International Great Lake Datum of 1955)

November 1 through April 15 (or ice break-up, which ever occurs later):

590.20 feet at the Elk Rapids Dam gage (which is 587.66 feet International Great Lakes Datum of 1955)

During the time periods when elevation changes are being made to comply with the court order, i.e. from summer to winter level and from winter to summer level, the change in daily flow will be minimized to protect the aquatic resources. This will be accomplished by limiting the change in daily flow to a 20% difference from the previous day’s flow until the legal lake level is reached.

Water Quality

The Settlement Agreement stipulates that the project must be operated in such a manner as to be in compliance with State of Michigan water quality standards. The Surface Water Quality Division, Michigan Department of Environmental Quality (MDEQ) reviewed this language. In a memorandum to the MDNR (Appendix D), MDEQ staff stated they believe the water quality standards will be met by the operations as described in the Settlement. They explained no water

quality problems were known and none were expected at this site given the very high water quality of upstream Elk and Skegemog lakes (which form the reservoir).

Recreation

The reservoir, Elk and Skegemog lakes, have public access sites provided by the State of Michigan and staff of the MDNR Parks & Recreation Division determined no additional access was needed at this time (Gary Ellenwood, Young State Park, personal communication, 1998). There is also an existing barrier free tailwater access site that is owned by the County and operated under a long-term lease to the Village of Elk Rapids. This is a very popular fishing site. It is located close to a community and provides good access to many fish species, including anadromous salmonids during spring and fall. A condition of the Settlement is that the County continues to provide the existing barrier free tailwater access. It does not stipulate how this is accomplished; either through lease to the Village as is currently the case or otherwise, should circumstances change, is acceptable.

Threatened and Endangered Species

No threatened or endangered species are known to occur within the project boundary (Appendix E). However, protection of threatened and endangered species is a high priority of the resource agencies (USFWS and MDNR) and is usually incorporated into new licenses. The agreement stipulates that threatened and endangered species will be protected if found. Bald eagles do occur in the general area and are the most likely species to be found in the future. If they move to project lands, steps will be taken, in consultation with the resource agencies, to protect these birds.

Upstream Fish Passage

The dam prohibits the upstream passage of fish from Lake Michigan into the Chain-of-lakes (Elk, Skegemog, Torch, Clam and Bellaire lakes, Torch, Clam, Grass, and Intermediate rivers and associated tributaries). Passage for many species, such as lake sturgeon and great lakes muskellunge, may be desirable. However, upstream migration of other species, such as the parasitic sea lamprey, is not desirable. The MDNR and MHRC agree not to seek upstream passage during the license extension period. The USFWS reserves the right under authority of Section 18 of the Federal Power Act to prescribe fish passage.

Project Decommissioning

A major condition of this agreement is that at the end of the license extension, the County will seek decommissioning of the project. The dam may remain in place so that the court ordered legal lake levels be maintained. All equipment not necessary to maintaining the lake level will be removed. The extent of turbine entrainment and mortality and the effect on the fish populations is unknown, as no studies have been conducted. The parties agree that no such studies will be required. Rather, this agreement looks to the long-term protection of the fish population, by eliminating turbine entrainment and mortality entirely after the year 2014 through decommissioning of the project.

**County of Antrim
Office of the Coordinator/Planner**

Antrim County Building
(616) 533-6265

P.O. Box 187
Bellaire, Michigan 49615

April 28, 1997

Federal Energy Regulatory Commission
Lois Cashell, Secretary of the Federal Energy Regulatory Commission
Attn: Thomas DeWitt East Branch Chief of Hydro Re-Licensing
888 1st Street NE
Washington, D.C. 20426

COPY

Dear Mrs. Cashell:

I am writing as a follow up to the phone conversation between Mr. Ed Crouse, and Steve Roote, Chairman of the Antrim County Public Works Committee, on April 22, 1997. Enclosed is an accounting of the background of the Elk Rapids Hydro Dam, owned by Antrim County, and a draft of an agreement for consideration by the Federal Regulatory Energy Commission (FERC). The draft agreement embodies many of the points verbally agreed to by James Truchan of the Michigan Department of Natural Resources (MDNR).

Please review the draft agreement and if you find anything in the agreement you have a problem with, please call me as soon as possible. Eventually we would like to present the agreement or something similar to FERC for discussion and hopefully approval.

For your records I would also like to provide you with the background information from which we are basing our request. The following is a quick summary of the history of the Hydro Dam.

- The dam project was originally constructed in 1916 by the Elk Rapids Iron Works and expanded several times until 1930, when it had an installed capacity of 1,845 HP.
- The project was purchased and operated sometime following this by Michigan Public Service, who later sold the project to Consumers Power.
- Consumers decommissioned the power producing equipment in 1965 and subsequently sold the project facilities to Antrim County for lake level management purposes in 1967.
- The project was rebuilt by Antrim County at the urging of the Department of Energy (DOE) [as one of a series of DOE "small hydro demonstration projects" in the late 1970's and early 1980's] and involved facility alterations that would arguably constitute "post 1935 construction" under current FERC regulations.

- By reference in the 1981 license order, the Elk River has been determined to be a "navigable river" at the project site, making the project FERC jurisdictional.
- The license term granted the project when originally licensed by Antrim County in 1981 was for 20 years, expiring 2001.

Since the project is currently operating in the red on an annual basis, it is clear the project will not sustain relicensing from the economic standpoint, and the taxpayers of Antrim County will be left footing the bill for the relicensing process. From our conversations with the Federal and State representatives, as well as professionals from the private sector, we understand the cost of relicensing could be anywhere from \$200,000 to \$1 million.

Antrim County has also pursued the possibility of seeking an exemption from licensing, as it is a very small dam. However, our research tells us the exemption process could be nearly as costly as the licensing process.

Acting in the best financial interest of the residents of Antrim County, we also researched the possibility of shutting down the dam. However, the County would remain responsible for a \$45,000 bond annual payment until the year 2013. Currently, we lose approximately \$1,000 to \$20,000 per year. As you can see, even though the facility is currently operating in the red, the revenues at least allow us to pay a portion of the bond repayment and operating cost.

It has also come to our attention that two official actions of the past, at the Federal level may have great bearing on your decision an extension on the Antrim County Hydro Dam Facility (footnote 2 of the Elk Rapids License Order references these two actions).

- The "Androscoggin Decision" (Public Service Co. of NH - FERC No. 2288, March 25, 1962), and
- The Order Issuing License for Bangor Hydro's Medway Project (FERC No. 2666, March 29, 1979).

The Medway License Order by FERC addressed setting license terms for older projects operating prior to 1935, without licenses. Restating the Androscoggin decision, FERC noted that unregulated projects operating for three or more decades would, "if granted a full fifty year license, reap a substantial windfall from the prolonged delay in filing". The Medway licensing order appears to have set a policy of setting license terms for these types of projects at twenty years from the date of license issue. This appears to be the reasoning used in setting the term for the Elk Rapids Hydro Dam Facility.

We believe a review of the Medway Project and the Elk Rapids Project will reveal several differences between the two projects.

1. Medway had been operating for 17 years prior to the April 1, 1962 effective date of license order (the same date as the Androscoggin decision). This gave Medway a

license term of 37 years - appropriate for a project that had been operated since 1931 without a license. On the other hand the Elk Rapids Hydro Dam Facility received a total of a twenty year license effective February 28, 1981. The project was not in operation at the time the license was issued, and was not rebuilt and brought back on line until September 1983, at a great cost to Antrim County.

2. The Medway license order states on page 61,677 near the top of the first column:

To alleviate the problem the Commission will face in the 1990's, while at the same time limiting as much as practicable the unmerited advantages identified in Androscoggin, this license and licenses for projects on navigable waters with no post-1935 construction will normally be issued for a period ending twenty years from issuance (emphasis added)

3. Licenses are generally given terms long enough to recoup the majority of the licensee's investment under normal circumstances. It appears that the twenty year Elk Rapids license term did not allow this to happen. It is also interesting to note that the power sales contract is extended ten years beyond the license term.
4. The project's status as one of DOE's small-hydro demonstration projects and FERC's encouragement that Antrim bring the project back on line is also a factor that distinguishes the Elk Rapids Project from the Medway Project. In simpler terms, Antrim was convinced by government agencies that this project made sense *from an economic standpoint* at the time they decided to pursue reactivation of the project. Apparently some of these initial economic forecasts have not proven correct.

Given the above reasoning, we believe FERC should review the original basis for the 20 year license given to Antrim County and consider an extension to the current license rather than requiring Antrim County continue the relicensing process.

We appreciate the time you have taken on this very important issue. I will be in touch with you by phone shortly to answer any questions or concerns you may have.

Sincerely,



Peter Garwood, Coordinator/Planner

Cc: Antrim County Board of Commissioners

ANTRIM COUNTY
COMPREHENSIVE ANNUAL FINANCIAL REPORT
YEAR ENDED DECEMBER 31, 1992

ANTRIM COUNTY
 NOTES TO FINANCIAL STATEMENTS (CONTINUED)
 DECEMBER 31, 1992

NOTE J - LONG-TERM DEBT (CONTINUED)

GENERAL LONG-TERM DEBT (CONTINUED)

Annual Debt Service Requirements:

	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>Other</u>	<u>Total</u>
Principal	\$ 649,200	\$ 662,700	\$ 620,500	\$ 556,000	\$ 311,000	\$1,399,000	\$4,198,400
Interest	234,083	190,792	150,861	115,350	91,500	246,425	1,029,011
Totals	\$ 883,283	\$ 853,492	\$ 771,361	\$ 671,350	\$ 402,500	\$1,645,425	\$5,227,411

NOTE K - INTERFUND RECEIVABLES AND PAYABLES

Following is an analysis of the interfund receivables and payables:

<u>Fund Type/Fund</u>	<u>Interfund Receivable</u>	<u>Interfund Fund Type/Fund</u>	<u>Payable</u>
General Fund	\$ 473,992	Enterprise:	
		Elk Rapids Hydro	\$ 36,625
		Internal Service:	
		Tax Payment	300,000
		Special Revenue:	
		Bellaire Dam	66,000
		Parks Grant	37,000
		Victims' Rights	267
		Grass River	4,100
		Meadowview Housing	30,000
			<u>473,992</u>
Special Revenue:		Special Revenue:	
Child Care	10,105	Basic Grant	10,105
Capital Projects:		Special Revenue:	
County Buildings and Structures	18,800	Meadowview Housing	18,800
05 Courthouse	1,625	Capital Projects:	
	<u>20,425</u>	05 Courthouse	1,625
			<u>20,425</u>
Totals	\$ 504,522		\$ 504,522

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 COMPARATIVE BALANCE SHEET
 DECEMBER 31, 1992 AND 1991

	<u>1992</u>	<u>1991</u>
ASSETS		
Cash demand and time deposits	\$ 48,728	\$ 54,262
Interest receivable	-0-	2,822
Due from governmental units	16,405	15,213
Building	25,109	25,109
Plant	748,728	748,728
Accumulated Depreciation	<u>(209,335)</u>	<u>(182,794)</u>
Total Assets	<u>\$ 629,635</u>	<u>\$ 663,340</u>
LIABILITIES AND FUND EQUITY		
Liabilities:		
Accounts payable	\$ 3,251	\$ 8,466
Due to other funds	36,625	36,625
Revenue bonds payable	<u>440,000</u>	<u>450,000</u>
Total Liabilities	<u>479,876</u>	<u>495,091</u>
Fund Equity:		
Contributed Capital	134,850	134,850
Retained Earnings (Deficit)	<u>14,909</u>	<u>33,399</u>
Total Fund Equity	<u>149,759</u>	<u>168,249</u>
Total Liabilities and Fund Equity	<u>\$ 629,635</u>	<u>\$ 663,340</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 STATEMENT OF REVENUES BY SOURCE AND EXPENDITURES BY OBJECT
 YEAR ENDED DECEMBER 31, 1992 AND COMPARISON TO DECEMBER 31, 1991

	<u>1992</u>	<u>1991</u>
Operating Revenue:		
Charges for services	\$ <u>74,696</u>	\$ <u>65,843</u>
Total Operating Revenue	<u>74,696</u>	<u>65,843</u>
Operating Expenses:		
Service charges	35,601	43,606
Depreciation	<u>26,541</u>	<u>26,541</u>
Total Operating Expenses	<u>62,142</u>	<u>70,147</u>
Operating Income (Loss)	<u>12,554</u>	<u>(4,304)</u>
Nonoperating Revenue (Expenses):		
Interest revenue	2,168	4,402
Interest expenses and fiscal charges	<u>(33,212)</u>	<u>(33,887)</u>
Total Nonoperating Revenue (Expenses)	<u>(31,044)</u>	<u>(29,485)</u>
Net Income	(18,490)	(33,789)
Retained Earnings (Deficit) - January 1	<u>33,399</u>	<u>67,188</u>
Retained Earnings (Deficit) - December 31	<u>\$ 14,909</u>	<u>\$ 33,399</u>

See Notes to Financial Statements

ANTRIM COUNTY
ELK RAPIDS HYDROELECTRIC
STATEMENT OF CASH FLOWS
YEAR ENDED DECEMBER 31, 1992 AND COMPARISON TO DECEMBER 31, 1991

	<u>1992</u>	<u>1991</u>
Cash Flows From Operating Activities:		
Cash received from customers	\$ 73,504	\$ 61,862
Cash payments for goods and services	<u>(40,816)</u>	<u>(38,550)</u>
Net Cash Provided (Used) by Operating Activities	<u>32,688</u>	<u>23,312</u>
Cash Flows From Capital and Related Financing Activities:		
Principal paid on bonds	(10,000)	(10,000)
Interest paid on bonds	<u>(33,212)</u>	<u>(33,888)</u>
Net Cash Provided (Used) by Capital and Related Financing Activities	<u>(43,212)</u>	<u>(43,888)</u>
Cash Flows From Investing Activities:		
Interest on investments	<u>4,990</u>	<u>2,956</u>
Net Cash Provided by Investing Activities	<u>4,990</u>	<u>2,956</u>
Net Increase (Decrease) in Cash and Cash Equivalents	(5,534)	(17,620)
Cash and Cash Equivalents - Beginning of Year	<u>54,262</u>	<u>71,882</u>
Cash and Cash Equivalents - End of Year	<u>\$ 48,728</u>	<u>\$ 54,262</u>
Reconciliation of Operating Income to Net Cash Provided (Used) by Operating Activities:		
Operating Income	\$ 12,554	\$ (4,304)
Adjustments to Reconcile Operating Income to Net Cash Provided by Operating Activities:		
Depreciation	26,541	26,541
Change in Assets and Liabilities:		
(Increase) Decrease in Due from governmental units	(1,192)	(3,981)
Increase (Decrease) in Accounts Payable	<u>(5,215)</u>	<u>5,056</u>
Net Cash Provided (Used) by Operating Activities	<u>\$ 32,688</u>	<u>\$ 23,312</u>

See Notes to Financial Statements

ANTRIM COUNTY
COMPREHENSIVE ANNUAL FINANCIAL REPORT
YEAR ENDED DECEMBER 31, 1993

ANTRIM COUNTY
 NOTES TO FINANCIAL STATEMENTS (CONTINUED)
 DECEMBER 31, 1993

NOTE P - SEGMENT INFORMATION

The following Enterprise Funds have been created to provide various services to the general public. Segment information for these funds is summarized as follows:

	<u>Elk Rapids Hydroelectric</u>	<u>Transportation</u>	<u>Medical Care Facility</u>
Operating revenues	\$ 54,019	\$ 202,460	\$ 4,114,747
Depreciation	26,541	167,530	185,533
Operating income (loss)	(2,868)	(518,408)	354,118
Federal, state and local grants	-0-	272,895	260,239
Operating interfund transfers	-0-	60,000	-0-
Net income (loss)	(33,713)	(120,780)	693,100
Current capital contributions (Net)	-0-	316,269	-0-
Property, Plant and Equipment			165,646
Additions	-0-	-0-	55,208
Dispositions	-0-	-0-	2,001,020
Net working capital	8,085	399,689	4,865,097
Total assets	586,801	1,001,996	-0-
Long-term liabilities	430,000	-0-	4,480,097
Total equity	116,046	954,227	

ANTRIM COUNTY
GENERAL FUND
EXPENDITURES - BUDGET AND ACTUAL (CONTINUED)
YEAR ENDED DECEMBER 31, 1993

	1993		Favorable (Unfavorable)
	<u>Budget</u>	<u>Actual</u>	
Operating Transfers:			
Commission on aging	\$ 20,000	\$ 20,000	\$ -0-
District court	308,367	308,367	-0-
Airport debt	13,500	12,400	1,100
Law library	12,000	12,000	-0-
Building authority	50,000	-0-	50,000
Child care	400,000	400,000	-0-
Transportation	60,000	60,000	-0-
Mental health	80,000	80,000	-0-
Meadowbrook	10,000	-0-	10,000
Social services	24,000	-0-	24,000
Soldiers relief	20,000	20,000	-0-
Jail renovation	30,000	-0-	30,000
House numbering reserve	13,000	13,000	-0-
Radio equipment	42,303	42,303	-0-
Retirement reserve	45,467	45,467	-0-
Fuel tank replacement	21,172	21,172	-0-
Meadowview housing	70,000	70,000	-0-
Grass river	6,100	6,100	-0-
Buildings and structures	7,000	7,000	-0-
E911 reserve	25,000	25,000	-0-
Community corrections	12,000	12,000	-0-
Total Operating Transfers	<u>1,269,909</u>	<u>1,154,809</u>	<u>115,100</u>
Total Expenditures and Operating Transfers	<u>\$ 6,412,313</u>	<u>\$ 5,856,000</u>	<u>\$ 556,313</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 COMPARATIVE BALANCE SHEET
 DECEMBER 31, 1993 AND 1992

	<u>1993</u>	<u>1992</u>
ASSETS		
Cash demand and time deposits	\$ 41,326	\$ 48,728
Due from governmental units	7,514	16,405
Building	25,109	25,109
Plant	748,728	748,728
Accumulated Depreciation	<u>(235,876)</u>	<u>(209,335)</u>
Total Assets	<u>\$ 586,801</u>	<u>\$ 629,635</u>
LIABILITIES AND FUND EQUITY		
Liabilities:		
Accounts payable	\$ 4,130	\$ 3,251
Due to other funds	36,625	36,625
Revenue bonds payable	<u>430,000</u>	<u>440,000</u>
Total Liabilities	<u>470,755</u>	<u>479,876</u>
Fund Equity:		
Contributed Capital	134,850	134,850
Retained Earnings (Deficit)	<u>(18,804)</u>	<u>14,909</u>
Total Fund Equity	<u>116,046</u>	<u>149,759</u>
Total Liabilities and Fund Equity	<u>\$ 586,801</u>	<u>\$ 629,635</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 STATEMENT OF REVENUES BY SOURCE AND EXPENDITURES BY OBJECT
 YEAR ENDED DECEMBER 31, 1993 AND COMPARISON TO DECEMBER 31, 1992

	<u>1993</u>	<u>1992</u>
Operating Revenue:		
Charges for services	\$ 54,019	\$ 74,696
Total Operating Revenue	<u>54,019</u>	<u>74,696</u>
Operating Expenses:		
Service charges	30,346	35,601
Depreciation	<u>26,541</u>	<u>26,541</u>
Total Operating Expenses	<u>56,887</u>	<u>62,142</u>
Operating Income (Loss)	<u>(2,868)</u>	<u>12,554</u>
Nonoperating Revenue (Expenses):		
Interest revenue	1,687	2,168
Interest expenses and fiscal charges	<u>(32,532)</u>	<u>(33,212)</u>
Total Nonoperating Revenue (Expenses)	<u>(30,845)</u>	<u>(31,044)</u>
Net Income	(33,713)	(18,490)
Retained Earnings (Deficit) - January 1	<u>14,909</u>	<u>33,399</u>
Retained Earnings (Deficit) - December 31	<u>\$ (18,804)</u>	<u>\$ 14,909</u>

See Notes to Financial Statements

ANTRIM COUNTY
COMPREHENSIVE ANNUAL FINANCIAL REPORT
YEAR ENDED DECEMBER 31, 1994

ANIRIM COUNTY
GENERAL FUND
EXPENDITURES - BUDGET AND ACTUAL (CONTINUED)
YEAR ENDED DECEMBER 31, 1994

	1994		Favorable (Unfavorable)
	Budget	Actual	
Operating Transfers:			
Commission on aging	\$ 25,000	\$ 25,000	\$ -0-
District court	331,072	331,072	-0-
District debt	12,175	12,175	-0-
Library	13,000	13,000	-0-
Building authority	80,000	21,658	58,342
Child care	325,000	325,000	-0-
Transportation	50,000	50,000	-0-
Mental health	80,000	80,000	-0-
Rapids hydroelectric	18,900	18,900	-0-
Social services	24,500	20,000	4,500
Flood relief	20,000	20,000	-0-
Brook	10,000	-0-	10,000
Numbering reserve	1,046	1,046	-0-
Equipment	42,293	42,293	-0-
Grant reserve	50,000	50,000	-0-
Pollution alleviation	70,000	70,000	-0-
Low income housing	48,000	48,000	-0-
River	2,000	2,000	-0-
Reserve	25,000	25,000	-0-
Community corrections	12,000	12,000	-0-
Total Operating Transfers	<u>1,239,986</u>	<u>1,167,144</u>	<u>72,842</u>
Total Expenditures and Operating Transfers	<u>\$ 6,549,124</u>	<u>\$ 5,864,261</u>	<u>\$ 684,863</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 COMPARATIVE BALANCE SHEET
 DECEMBER 31, 1994 AND 1993

	<u>1994</u>	<u>1993</u>
ASSETS		
Cash demand and time deposits	\$ 56,275	\$ 41,326
Due from governmental units	9,270	7,514
Building	25,109	25,109
Plant	748,728	748,728
Accumulated Depreciation	<u>(262,417)</u>	<u>(235,876)</u>
Total Assets	<u>\$ 576,965</u>	<u>\$ 586,801</u>
LIABILITIES AND FUND EQUITY		
Liabilities:		
Accounts payable	\$ 721	\$ 4,130
Due to other funds	36,625	36,625
Revenue bonds payable	<u>420,000</u>	<u>430,000</u>
Total Liabilities	<u>457,346</u>	<u>470,755</u>
Fund Equity:		
Contributed Capital	134,850	134,850
Retained Earnings (Deficit)	<u>(15,231)</u>	<u>(18,804)</u>
Total Fund Equity	<u>119,619</u>	<u>116,046</u>
Total Liabilities and Fund Equity	<u>\$ 576,965</u>	<u>\$ 586,801</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 STATEMENT OF REVENUES BY SOURCE AND EXPENDITURES BY OBJECT
 YEAR ENDED DECEMBER 31, 1994 AND COMPARISON TO DECEMBER 31, 1993

	<u>1994</u>	<u>1993</u>
Operating Revenue:		
Charges for services	\$ 67,005	\$ 54,019
Total Operating Revenue	<u>67,005</u>	<u>54,019</u>
Operating Expenses:		
Service charges	25,269	30,346
Depreciation	<u>26,541</u>	<u>26,541</u>
Total Operating Expenses	<u>51,810</u>	<u>56,887</u>
Operating Income (Loss)	<u>15,195</u>	<u>(2,868)</u>
Nonoperating Revenue (Expenses):		
Interest revenue	1,326	1,687
Interest expenses	(31,848)	(32,532)
and fiscal charges	<u>18,900</u>	<u>-0-</u>
Operating transfers		
Total Nonoperating Revenue (Expenses)	<u>(11,622)</u>	<u>(30,845)</u>
Net Income	3,573	(33,713)
Retained Earnings (Deficit) - January 1	<u>(18,804)</u>	<u>14,909</u>
Retained Earnings (Deficit) - December 31	<u>\$ (15,231)</u>	<u>\$ (18,804)</u>

See Notes to Financial Statements

ANTRIM COUNTY
COMPREHENSIVE ANNUAL FINANCIAL REPORT
YEAR ENDED DECEMBER 31, 1995

ANTRIM COUNTY
 DETAIL ANALYSIS OF EXPENDITURES - GENERAL FUND (CONTINUED)
 FOR THE FISCAL YEAR ENDED DECEMBER 31, 1995

OTHER (CONTINUED)

CAPITAL OUTLAY:

Probate Court	\$	9,228	
Sheriff		50,705	
District Court		3,200	
Airport		12,353	
Communications		2,044	
Prosecuting Attorney		2,630	
Register of Deeds		742	
Treasurer		2,475	
Cooperative extension		687	
Equalization		6,753	
Jail		1,275	
Animal Control		<u>2,005</u>	<u>\$ 94,097</u>
 Total Expenditures			 4,963,863

OPERATING TRANSFERS

OPERATING TRANSFERS:

Commission on aging		40,000	
District court		324,123	
Airport debt		12,200	
Law library		18,500	
Building authority		69,060	
Child care		610,000	
Transportation		45,000	
Mental health		77,200	
* Elk Rapids Hydro		<u>15,230</u>	
Social services		10,000	
Soldiers relief		26,500	
Dams reserve		10,000	
Children's trust grant		1,500	
Clean lakes grant		527	
Ground pollution alleviation		12,000	
COPS fast		2,800	
Grass River		1,860	
Zero tolerance		36,196	
Community corrections		12,000	
Airport beacon		7,500	
Housing		12,500	
Capital outlay reserve		10,000	
Radio equipment		<u>42,399</u>	<u>1,397,095</u>
 Total Expenditures and Operating Transfers Out			 <u>\$ 6,360,958</u>

See Notes to Financial Statements

ANTRIM COUNTY
ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
COMPARATIVE BALANCE SHEET
DECEMBER 31, 1995 AND 1994

	<u>1995</u>	<u>1994</u>
ASSETS		
Cash demand and time deposits	\$ 27,919	\$ 56,275
Due from governmental units	14,749	9,270
Building	25,109	25,109
Plant	748,728	748,728
Accumulated Depreciation	<u>(288,958)</u>	<u>(262,417)</u>
Total Assets	<u>\$ 527,547</u>	<u>\$ 576,965</u>
LIABILITIES AND FUND EQUITY		
Liabilities:		
Accounts payable	\$ 1,707	\$ 721
Due to other funds	-0-	36,625
Revenue bonds payable	<u>405,000</u>	<u>420,000</u>
Total Liabilities	<u>406,707</u>	<u>457,346</u>
Fund Equity:		
Contributed Capital	134,850	134,850
Retained Earnings (Deficit)	<u>(14,010)</u>	<u>(15,231)</u>
Total Fund Equity	<u>120,840</u>	<u>119,619</u>
Total Liabilities and Fund Equity	<u>\$ 527,547</u>	<u>\$ 576,965</u>

See Notes to Financial Statements

ANTRIM COUNTY
 ELK RAPIDS HYDROELECTRIC ENTERPRISE FUND
 STATEMENT OF REVENUES BY SOURCE AND EXPENDITURES BY OBJECT
 YEAR ENDED DECEMBER 31, 1995 AND COMPARISON TO DECEMBER 31, 1994

	<u>1995</u>	<u>1994</u>
Operating Revenue:		
Charges for services	\$ 65,290	\$ 67,005
Total Operating Revenue	<u>65,290</u>	<u>67,005</u>
Operating Expenses:		
Service charges	23,948	25,269
Depreciation	<u>26,541</u>	<u>26,541</u>
Total Operating Expenses	<u>50,489</u>	<u>51,810</u>
Operating Income (Loss)	<u>14,801</u>	<u>15,195</u>
Nonoperating Revenue (Expenses):		
Interest revenue	2,347	1,326
Interest expenses and fiscal charges	(31,157)	(31,848)
* Operating transfers	<u>15,230</u>	<u>18,900</u>
Total Nonoperating Revenue (Expenses)	<u>(13,580)</u>	<u>(11,622)</u>
Net Income	1,221	3,573
Retained Earnings (Deficit) - January 1	<u>(15,231)</u>	<u>(18,804)</u>
Retained Earnings (Deficit) - December 31	<u>\$ (14,010)</u>	<u>\$ (15,231)</u>

See Notes to Financial Statements

Sample Agreement

This Agreement is between the Federal Energy Regulatory Commission (FERC) and Antrim County (County) regarding the Elk Rapids Hydro Dam Facility (Hydro Dam) entered into on _____, 1997.

The FERC recognizes the Hydro Dam does not support itself economically.

The FERC also understands the cost of relicensing will create an undue hardship on the citizens of the County.

The FERC recognizes the Medway License Order may have been misapplied to the Hydro Dam.

Therefore, the FERC agrees to extend the current license for the Hydro Dam to the year 2014, if

The County agrees to decommission the Hydro by December 31, 2014, and

The County is aware of the need for proper upkeep of the dam to regulate the level of the Elk River Chain of Lakes and therefore agrees to a Perpetual Care Plan for the dam facility after it is decommissioned.

For Antrim County

For the Federal Regulatory Energy
Commission

**County of Antrim
Office of the Coordinator/Planner**

Antrim County Building
(616) 533-6265

P.O. Box 187
Bellaire, Michigan 49615

June 6, 1997

Thomas DeWitt
East Branch Chief of Hydro Re-Licensing
888 First Street NE
Washington DC 20426

RE: Project 3030, Antrim County's Elk Rapids Hydroelectric Project

Dear Mr. DeWitt:

Enclosed you will find a page from a report entitled, "DOE SMALL-SCALE HYDROELECTRIC DEMONSTRATION PROGRAM - REACTIVATION OF THE ELK RAPIDS HYDROELECTIC FACILITY, Final Technical and Construction Cost Report". The report was prepared by Ayres, Lewis, Norris and May, Inc. in April of 1985 for the U.S. Department of Energy (DOE).

I have circled the paragraph that references the fact the Elk Rapids Hydroelectric Facility was very important to the DOE's demonstration program. I can also put you in touch with an individual, who was on the Antrim County Board of Commissioners at that time, who will verify that the DOE was so interested they convinced the County to pursue the project.

I have also enclosed a copy of the draft agreement I read to you over the phone on June 5, 1997. The draft agreement simply states the basic components the County and the State of Michigan would like to see included. Please review these additions to the information I have previously sent to you and get back to me at your earliest convenience.

If you have any questions or need more information please do not hesitate to call me.

Sincerely,



Peter Garwood, Coordinator/Planner

Cc: Steve Roote, Chair - Public Works Committee
Stuart Merillat, Chair - BPW
Harold Myers, Drain Commissioner

P.S. - If you are still looking for a fantastic conference center for your conference this summer the phone number for Shanty Creek is (616) 533-8621 (breath taking views).

EXISTING FACILITY

The facility is comprised of a powerhouse structure 87 ft in length and 48 ft wide, which completely spans the channel. Normal operating head is 10.5 ft. Figure 3 shows a typical cross section and plan view of the dam. Sliding type head gates allow shut-off of water to the individual turbine pits; however, actual flow control through the structure is achieved by operation of the wicket gate mechanisms on the old turbine units. The head gates are operated by a movable winch mechanism which travels on rails over a concrete walkway across the headrace of the dam.

When the plant was taken out of service by Consumers Power Company in 1965, the generators and related electrical equipment were removed. The turbine shafts were disconnected below the generator floor level and the openings were filled with concrete. The turbine units were left in the wheel pits, however, to prevent rotation of the runners, the shafts were welded to the bearing housings and the runner buckets were burned off. The gate casings, guide vanes, and wicket gate operating mechanisms were left in an operational condition so that they could be used to control discharge through the dam.

In 1977 the County initiated steps to restore the facility to operating status. The plan then was to restore two or three of the units, each unit to have an average output of 350 kilowatts. Power developed would be sold to the local utility.

In 1979 the County was awarded a DOE demonstration grant to help defray the costs in redeveloping hydropower at the Elk Rapids facility. This project was a key element in the Department of Energy's demonstration program and was among the first seven such projects to receive funding.

The technical and economic feasibility study of the site was performed by Ayres, Lewis, Norris & May, Inc., (ALNM) of Ann Arbor, Michigan. The results of the study and conceptual design were contained in the County's proposal submitted to DOE, under Program Opportunity Notice ET-78-N-07-1711 dated October 27, 1978.

Sample Agreement

This Agreement is between the Federal Energy Regulatory Commission (FERC) and Antrim County (County) regarding the Elk Rapids Hydro Dam Facility (Hydro Dam) entered into on _____, 1997.

The FERC recognizes the Hydro Dam does not support itself economically.

The FERC also understands the cost of relicensing will create an undue hardship on the citizens of the County.

The FERC recognizes the Medway License Order may have been misapplied to the Hydro Dam.

Therefore, the FERC agrees to extend the current license for the Hydro Dam to the year 2014, if

The County agrees to decommission the Hydro by December 31, 2014, and

The County is aware of the need for proper upkeep of the dam to regulate the level of the Elk River Chain of Lakes and therefore agrees to a Perpetual Care Plan for the dam facility after it is decommissioned.

For Antrim County

For the Federal Regulatory Energy
Commission

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

In the Matter of the Petition of the
Antrim County Board of Commissioners
for a Determination of the Normal Height
and Level of the Waters of Elk and
Skegemog Lakes Situated in the Counties
of Antrim, Grand Traverse and Kalkaska,
Michigan. File No. 962

ORDER

At a session of said Court held at the Courthouse in
the Village of Bellaire in Antrim County on the 25th
day of September, 1973.

PRESENT: HONORABLE RAYMOND L. SMITH
CIRCUIT COURT JUDGE

Having read the Petition of the Antrim County Board of
Commissioners for a Determination of the Normal Height and Level
of the Waters of Elk and Skegemog Lakes, and having heard
testimony in support of said Petition, and the Court being
further fully advised in the premises, now, therefore,

On Motion of Robert J. Stephan, Prosecuting Attorney for
Antrim County, Michigan, on behalf of Petitioner,

IT IS ORDERED AND ADJUDGED and this Court by virtue of
the authority therein vested and in pursuance of the statute in
such case made and provided, does ORDER AND ADJUDGE that a level
of 590.80 feet Elk Rapids Dam gauge reading (588.26 feet
International Great Lakes Datum of 1955) shall be maintained from
April 15 of each year or ice break-up on said lakes, whichever
occurs later, until November 1 of each year; on November 1 of
each year said lake level shall be reduced to 590.20 feet Elk
Rapids Dam gauge reading (587.66 International Great Lakes Datum
of 1955) until the following April 15, or ice break-up, whichever
occurs later at which time it shall be increased to the previous
above stated level until further Order of this Court.

Raymond L. Smith
CIRCUIT COURT JUDGE

STATE OF MICHIGAN



JOHN ENGLER, Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY

"Better Service for a Better Environment"

HOLLISTER BUILDING, PO BOX 30473, LANSING MI 48909-7973

INTERNET: www.deq.state.mi.us

RUSSELL J. HARDING, Director

REPLY TO:

SURFACE WATER QUALITY DIVISION
KNAPPS CENTRE
PO BOX 30273
LANSING MI 48909-7773

May 8, 1998

TO: Jan Fenske, Fisheries Division
Department of Natural Resources

FROM: James Grant, Chief, Great Lakes and Environmental Assessment Section
Surface Water Quality Division

SUBJECT: Antrim County, Elk Rapids Hydropower Project Draft Settlement

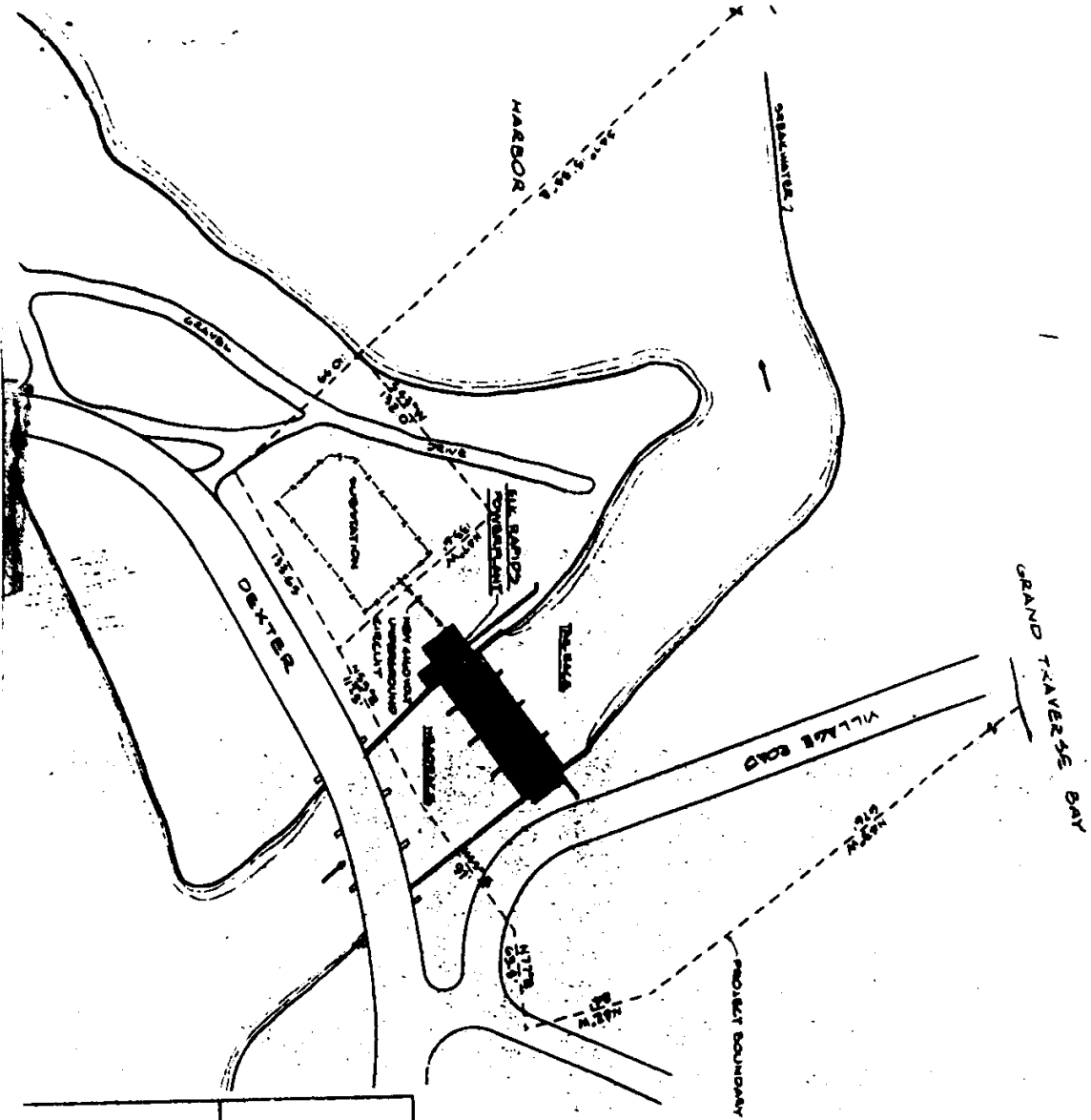
We have reviewed the draft Offer of Settlement (Settlement) between the Department of Natural Resources and Antrim County, dated April 30, 1998, concerning the extension of the Federal Energy Regulatory Commission license for the Elk Rapids Hydropower Project until the year 2014. We do not object to this Settlement and believe that water quality standards will be met at this facility if this Settlement is implemented and the legal lake level is maintained after the year 2014. We are not aware of any water quality problems at this site now and based on the extremely good water quality of Elk Lake and the Elk River none are expected. We do not wish to be a party to this Settlement.

If you have any questions, please contact John Suppnick at 517-335-4192.

jg:js:yg

A handwritten signature in black ink, appearing to read "Grant", written over the typed name "James Grant" in the "FROM" field.

cc: Gerald Saalfeld/FERC File



THIS DRAWING IS PART OF THE APPLICATION FOR LICENSE
 MADE BY UNDERWRITERS TRUST CO. OF MICH. APRIL, 1980
 BEFORE COUNTY CLERK
 DONALD W. LYNCH REGISTERED AGENT

LOCATION MAP
ELK RAPIDS, MICHIGAN
HYDROELECTRIC FACILITY
 APRIL 1980
 SCALE AS SHOWN
 ARRES, LEWIS, MORRIS & MAY, INC.

EXHIBIT K TO FERC SHORT-FORM LICENSE (LH000)
PROJECT LANDS AND BOUNDARIES

88 FERC ¶ 62,158

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

County of Antrim, Michigan

Project No. 3030-012

ORDER APPROVING SETTLEMENT AND
AMENDING LICENSE

(Issued August 19, 1999)

The Elk Rapids Hydroelectric Project No. 3030, located on the Elk River within the Village of Elk Rapids, Michigan, is under a 20-year license expiring at the end of February 2001. The licensee, the County of Antrim, Michigan (Antrim), state and federal resource agencies, and a non-governmental organization have filed a settlement agreement that asks the Commission to extend the license term by nearly 14 years, to December 31, 2014, at which time the settlement provides that the hydropower equipment will be decommissioned, with the dam and related works remaining intact and the reservoir maintaining state-prescribed lake levels.¹ Subject to the discussion in this order, we approve the settlement and amend the license to extend its term.

BACKGROUND

The Elk Rapids dam was built in 1916 and was operated for hydroelectric power until 1965, when the generators and related electrical equipment were removed. In 1967 Antrim bought the project to control the reservoir level. In 1980 Antrim filed for a hydroelectric license, which the Commission issued in 1981 for a term expiring on February 28, 2001.² Antrim brought the project back on line in September 1983.

On May 2, 1997, Antrim filed a request for a 14-year extension of the license term, in order to recoup more of its investment in the project.³ While that request was

¹Settlement, para. 8.1.

²14 FERC ¶ 62,130.

³Relicense applications must be filed least 24 months prior to the expiration of the existing license. Antrim requested a waiver of this deadline, in light of its pending application to extend the license term. The deadline was extended by six months, until

(continued...)

998200224-3

FERC - DOCKETED
AUG 19 1999

Project No. 3030-012

-2-

pending, the settlement agreement was filed.⁴ The parties to the settlement are Antrim, the U.S. Fish and Wildlife Service (FWS), Michigan Department of Natural Resources, and Michigan Hydro Relicensing Coalition.

Under the settlement, the other parties support Antrim's request for an extended license term, and Antrim agrees to operate the project in a run-of-river mode, adhere to specified lake levels, comply with Michigan water quality standards,⁵ and seek decommissioning of the project generating works at the end of the extended term. The other parties agree not to recommend, during the extended license term, additional license conditions with respect to fish entrainment and most recreational matters. However, FWS reserves Interior's Federal Power Act (FPA) Section 18⁶ fishway prescription authority.

Notice of filing of the offer of settlement was issued on March 12, 1999. No comments were received.

DISCUSSION

We find reasonable and in the public interest the proposal that the license term be extended, in light of the addition of specified environmental mitigation and enhancement measures. Also, Paragraph 2.4 appropriately recognizes that the Commission may conclude that certain of the settlement terms are beyond our jurisdiction, in which case the parties agree that those terms shall be enforceable in a court of appropriate jurisdiction.⁷

³(...continued)

August 23, 1999, by unreported order of the Director, Division of Licensing and Compliance.

⁴The settlement agreement was filed on February 26, 1999.

⁵The state did not issue water quality certification for the 1981 license application.

⁶16 U.S.C. § 811.

⁷The licensee may proceed under these settlement provisions as private agreements among the parties (that may be enforced through private remedies independent of the Commission) insofar as they do not conflict with the license articles or interfere with the exercise of the Commission's statutory authority. See, e.g., Consumers Power Company, 68 FERC ¶ 61,077 (1994) at pp. 61,372, 61,374; City of Seattle, 71 FERC ¶ 61,159

(continued...)

Project No. 3030-012

-3-

However, we are unable to agree, in 1999, that the Elk Rapids Project should be decommissioned in 2014: there is at this time simply no record evidence to support such a decision.⁸ This does not however prevent Antrim from applying to surrender the project license and decommission the facility at some point closer to 2014, at which time the appropriate environmental reviews can occur and a complete evidentiary record can be developed.

We conclude that, as modified by this order, the Settlement is fair and reasonable, in the public interest, and supported by the record of this proceeding. As so modified, the Settlement is approved.

The Director orders:

(A) Paragraph A of the existing license for the Elk Rapids Hydroelectric Project No. 3030 is revised as follows:

This license is issued to Antrim County (Licensee) of the Village of Elk Rapids, Michigan, under Part I of the Federal Power Act (FPA), for a period effective the last day of the month in which this order is issued and terminating on December 31, 2014, for the continued operation and maintenance of the Elk Rapids Project No. 3030, located in Antrim County, Michigan, on the Elk River, a navigable waterway of the United States. 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.

⁷(...continued)
(1995).

⁸Even unconstested settlements must be based on substantial evidence. Moreover, "in viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding." *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 226 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960).

Para. 2.3 of the Settlement states that if the Commission issues orders "accepting the Settlement with modifications or conditions," the Settlement will automatically be modified to conform to the terms of the orders unless at least one party objects. Thus, the parties understood that the Commission may adopt those provisions of the Settlement it finds appropriate and modify or reject those which the Commission believes conflict with the public interest.

Project No. 3030-012

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- (B) Subject to the modifications discussed in this order, the Offer of Settlement, is accepted.
- (C) The licensee shall operate the Elk Rapids Hydroelectric Project in a "non- peaking mode" as per paragraph 4.1 of the modified Offer of Settlement.
- (D) The licensee shall maintain the headwater elevation in accordance with the provisions of paragraph 4.1 of the modified Offer of Settlement
- (E) The licensee shall provide records to validate non-peaking mode of operation to the Fish and Wildlife Agencies on a yearly basis as described in paragraph 4.2 of the modified Offer of Settlement.
- (F) The licensee shall operate the Elk Rapids Hydroelectric Project in such a manner to be in compliance with the Water Quality Standards of the State of Michigan as per paragraph 5.1 of the modified Offer of Settlement.
- (G) The licensee shall continue to provide and maintain the existing tailwater access, including the two existing barrier-free platforms, for the purpose of fishing the tailwater for the duration of the extended license period as per paragraph 6.1 of the modified Offer of Settlement.
- (H) The licensee shall notify the Fish and Wildlife Agencies if any federal or state listed threatened, endangered or sensitive species are found to occur within the project boundary and consult with the resource agencies on the development of a protection plan as per paragraph 7.1 of the modified Offer of Settlement.
- (I) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.



J. Mark Robinson
Director
Division of Licensing and Compliance

APPENDIX B

1. OPINION OF COUNSEL ON WATER RIGHTS, FLOW RIGHTS AND PROJECT BOUNDARY

The opinion and its exhibits follows this page.

LAW OFFICES OF
OLSON, BZDOK & HOWARD
A Professional Corporation

James M. Olson *
Christopher M. Bzdok
Scott W. Howard
Jeffrey L. Jocks
Ross A. Hammersley
William Rastetter, Of Counsel ◦
Michael H. Dettmer, Of Counsel

420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044
Facsimile: (231) 946-4807
www.envlaw.com

* Admitted in Colorado
◦ Admitted in Indiana

December 10, 2009

Mr. Jack White, Chairman
Antrim County Board of Commissioners
P.O. Box 520
Bellaire, MI 49619

Mr. William Stockhausen
Elk Rapids Hydroelectric Power, LLC
218 West Dunlop Street
Northville, MI 48167

RE: Opinion of Counsel on Water Rights, Flowage Rights, and Project
Boundary; Antrim County Application for Renewal of Water Power
License (Minor), Federal Energy Regulatory Commission, Project
No. 3030
Our File No. 5731.01

Dear Mr. White, Members of the County Commission and Mr. Stockhausen:

This letter represents the legal opinion of the law firm Olson, Bzdok & Howard with respect to Applicant Antrim County's water and flowage rights and the project boundary for the operation and maintenance of the hydroelectric power project located in the Elk River, a navigable water way of the United States, within Antrim County, Michigan. For the reasons stated below it is our opinion that Antrim County, as owner and operator, owns and holds fee title ownership and rights to locate, maintain, and operate the dam and hydroelectric power project, and the riparian, water, and flowage rights to maintain the dam and operate the power project within the "project boundary" as defined by the regulations, guidelines, and orders of the Federal Energy Regulatory Commission (FERC).¹

As set forth more fully below, the first portion of this opinion will begin with a detailed summary of the status of the Elk Rapids hydroelectric dam facility and the current agreement between Elk Rapids Hydroelectric Power, LLC and Antrim County, and then move into an Executive Summary. This summary will then be followed by a history of the dam and additional factual background information relating to the dam site, its structures, and the impoundment, including a look at the relevant court order from 1973 setting the present lake level as well as the licensing history and the proposed application. The next section will summarize the history of title and conveyances from the title search by the Antrim County Abstractor, certified to September 18, 2009. Then the next section of the opinion will be a detailed legal analysis of two primary elements of the application process: (1) the definition and determination of a "project boundary" within the context of a general FERC hydroelectric facility licensure application and a recommendation as to the project boundary that would apply to the instant application; and (2) an investigation into the property, water, and flowage rights of the applicants, a definition of, and the rights and responsibilities with respect to, the "impoundment" shoreline and the riparian landowners surrounding it under Michigan law. The final section will state our conclusion regarding the opinions on water rights, flowage

¹ Policy Statement on Hydropower Licensing Settlements, 71 Fed. Reg. 56525 (Sept. 27, 2006).

rights, water level, project work and project boundary, showing ownership and control of property, riparian, water rights, and flowage rights necessary for the project purposes.

I. STATUS AND BACKGROUND

The Federal Energy Regulatory Commission (“FERC”) entered an Order Issuing License (Minor) to Antrim County to operate and maintain the Elk Rapids Hydroelectric Power Project No. 3030 (“Elk Rapids Power Project”) on February 9, 1981.

In 1980, Antrim County applied for a license to recommission the hydro power dam. On February 9, 1981, the FERC issued an order issuing the license to operate the dam for the generation of electrical energy as in the public interest and for the protection of waters, scenic and environmental values, and public recreational use.² The license was issued for a term of 20 years. On August 19, 1999, the FERC issued an order extending the license to December 31, 2014.³

As described in Section II, below, concerning the history of the Elk Rapids Dam and power facility, the dam and powerhouse was first established by Elk Rapids Iron Company in the late nineteenth century⁴ at a water level close to the currently licensed project, then transferred to the Elk Rapids Electric Company which owned and operated the facility until 1927, when it consolidated the property and hydro plant with other companies and formed the Michigan Public Service Company. Michigan Public Service Company owned and operated the facility until 1950, when it conveyed the property and all water rights to Consumers Power Company. Consumers owned and operated the facility until 1965, when it was shut down. In 1967, Consumer’s conveyed the property and facility, and all water and flowage rights, to Antrim County.

II. PROJECT SETTING

The dam facility is located on the short channel of the Elk River between Elk Lake and the Edward C. Grace Memorial Harbor, a municipal marina owned and operated by the Village of Elk Rapids. The dam is an earth embankment dam with a 1-foot nominal head. The marina outlets into Lake Michigan approximately 500 feet from the dam. The river drains approximately 513 square miles, consisting of a chain of navigable lakes and rivers. When the dam was constructed in the late

² Ex 1.

³ Ex 2

⁴ Title records and historical evidence shows that the first dam on the property was constructed in the late 1850s for a saw mill by Wadsworth and Associates, who later transferred their interest to Dexter and Noble. In 1862 Dexter and Noble obtained approval from the County under the Michigan Constitution to rebuild the dam. Dexter and Noble transferred the property to Elk Rapids Iron Company in 1875 for water power, and to supply the Village of Elk Rapids with water. Elk Rapids Iron converted the dam to a hydroelectric facility in 1914. Section III, *infra*; see also Ex 3, Title History, Elk Rapids Dam and Hydro Plant, pp. 1-2 (John P. Riley for Consumers Power Company, Title Abstract certified to 1940).

nineteenth century, the water level rose approximately 3 feet and flooded and increased the area of Elk River, Elk Lake, and Skegemog Lake. As a result, the impounded or flooded area established by the placement and continuation of the dam at approximately the 10 foot level since the late 1800s includes Elk River, Elk Lake, and Lake Skegemog.⁵ The normal water level at the dam has been established at 10.2 to 10.8 feet since the 1973 Antrim County Circuit Court order issued under the Inland Lake Level Act.⁶

Water from the upper chain of lakes flows into Lake Skegemog via the Torch River. The amount of storage of water in the chain of lakes and rivers and the underlying layers of clay provide a constant groundwater level, and an expansive plateau up the spine of northern Michigan supplies a constant supply of groundwater to the chain of lakes and rivers.

The Elk River dam and the water level of Elk Lake and Skegemog Lake have been established at a 10 to 11 feet water level since the late 1800s. The dam has been owned and/or maintained continuously for more than 117 years – from 1892 to the present. The dam has been operated to generate electricity by water power since approximately 1914 to the present.⁷

The dam is operated based on a “run of the river”⁸ mode, which means that the flows that run the turbines is equal to the natural runoff and groundwater discharge that enters the chain of lakes and streams. Because of this, there is no additional affect on upstream levels or downstream discharge and flows except those due to natural fluctuations.

III. HISTORY OF OWNERSHIP AND CONTROL OF ELK RAPIDS DAM AND HYDROELECTRIC POWER FACILITY

The Elk Rapids dam property is located in the Village of Elk Rapids on the north channel of the Elk River in the Northwest quarter (¼) of Section 21, T29N, R9W, Antrim County, Michigan. The ownership of the property is derived from a U.S. Patent, June 15, 1854. A number of conveyances consolidated title in Wadsworth and Dexter, who appear to have built a dam to operate

⁵ Elk Lake and Skegemog Lake function as one hydrological unit. See Section 3.2.2 Impoundment, Pre-Application Document for Elk Rapids Hydroelectric Project, FERC Project No. 3030, Antrim County (December 21, 2009).

⁶ MCL 324.30701 *et seq.* Section V, B *infra*.

⁷ The dam was dormant from 1965 until 1967 when Consumers conveyed the facility to Antrim County. However, as described above, the dam and water level remained unchanged and the dam was recommissioned and has been operated to generate electricity from 1981 to the present (28 years).

⁸ Addendum A, substitute page 1.7, Environmental Report on the Reactivation of the Hydroelectric Facility, Elk Rapids, Michigan (Dec. 13, 1979).

a sawmill.⁹ They, with a number of additional transfers of interests to provide title, conveyed to Noble, who, controlling title, conveyed by warranty deed to Elk Rapids Iron Co. in 1892.

In 1892, Elk Rapids Iron Co. conveyed an easement for water supply, grist mill, and water power to Elk Rapids Water Supply Co. The easement was released by the Water Supply Co. to Elk Rapids Iron in 1921. In 1922, the Iron Company conveyed rights to operate its water power facility to Elk Rapids Electric Company, "reserving all water power and water power rights developed by the Iron Company on the river or by its natural flow."

In 1925, the Iron Company conveyed the property, with no reservations, by warranty deed to the Electric Company, including "all water power rights and interests of every kind and nature whether legal of (sic) equitable belonging to the Elk Rapids Iron Company" and the "water power developed by the natural flow of the Elk River or by the dams."¹⁰ This deed also conveyed all water power and flowage rights previously reserved.

In 1927, the Electric Company entered into a Joint Agreement of Consolidation, consolidating the hydro power facility and property into the Michigan Public Service Company for the purpose of generating and selling electricity.

In 1950, the Michigan Public Service Company conveyed all of its property and hydro facilities to Consumers Power Company, including "all rights, interests and estates conveyed by Elk Rapids Iron Company to Elk Electric Company," and "the rights and easements to overflow, percolate, saturate, wash away or on (sic) any way affect the land upstream or downstream along and adjoining to Elk River, acquired either by grant, prescription or otherwise."

In 1967, Consumers Power Company conveyed by warranty deed the property and hydro power facility to Antrim County, "including all flowage rights, water power rights, and riparian rights, whatever the same may be lawfully be, comprehend and include, any manner appertaining to and belonging to the land and also the fee simple title to the bed (adjacent) of the Elk River."¹¹ The deed also conveyed all rights to the dam across the river and the "rights and easements to overflow, percolate, saturate, wash anyway or in any way affect the land upstream or downstream along and adjoining the Elk River as now owned by Consumers Power Company acquired either by grant, prescription, or otherwise, in connection with the operation of the Elk Rapids Dam."

On October 13, 1971, the Antrim County Board of Commissioners filed a petition to determine and establish the normal lake level for Elk Lake and Skegemog Lake pursuant to the

⁹ Ex 4, Plat Map, Elk Rapids Township; Title History, Ex 3, *infra*, n. 5; *see also*, Abstract of Title, County of Antrim, Township of Elk Rapids (July 16, 1982) (Maintained in the files of Antrim County Abstract Office; copy in files of Olson, Bzdok & Howard, P.C.).

¹⁰ Ex 5.

¹¹ Ex 6.

Inland Lake Level Act (“ILLA”), MCL 324.3070, *et seq.*¹² The petition was sought to protect the public health, safety, and welfare, conservation of natural resources, and protection of the values of properties around the lake as a result of the creation of a normal level. On September 25, 1973, the Circuit Court entered an order establishing the normal level at 590.80 feet at the Elk Rapids dam gauge from April 15 to November 1 each year, and 590.2 feet from November 1 to April 15 each year or to ice break up which ever occurs later.¹³

IV. PROJECT BOUNDARY

Definition

According to a recent Federal Energy Regulatory Commission (FERC) Policy Statement, “[p]roject boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that the license identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out project purposes.”¹⁴ Pursuant to the provisions of the Federal Power Act (“FPA”), Congress has empowered the FERC “[t]o issue licenses ... for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other **project works** necessary or convenient for the ... development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce....”¹⁵

The term “project works” is defined in §796(12) of the FPA as “the physical structures of a project,” while the term “project” is further defined as a “complete unit of improvement or development” that consists of the following:

[A] power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, **and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the**

¹² Ex 7, Petition, Oct. 13, 1971, *In re Petition of Antrim County Board of Commissioners*, Antrim County Cir. Ct., File No. 962.

¹³ *Id.* Ex 8, Order, September 25, 1973.

¹⁴ *Id.*

¹⁵ 16 U.S.C. §797(e) (2005).

use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.¹⁶

Therefore, along with the physical dam structures themselves, the water rights and the interests in land necessary for the maintenance and operation of the “complete unit” are considered part of the “project,” and are therefore within the scope of the licensing power of the FERC.

As a result of the foregoing, Elk Rapids Hydroelectric Power, LLC must be able to show that it has sufficient level of ownership and control over water and flowage rights with respect to the Elk Lake and Skegemog Lake impoundment and its shoreline in order to maintain and operate the facility. As discussed below, it is our opinion that the historical lake level as set by the state Inland Lakes & Streams statute, the water rights held by the dam owner under Michigan statutory and common law, the prescriptive rights held by Elk Rapids Hydroelectric Power, LLC with respect to the impoundment and the operation of Part 307, the Inland Lake Level Act, MCL 324.30701, all combine to provide the necessary level of control sufficient to make such a showing to the satisfaction of the FERC’s permitting authorities.

Requirements of Applicant / Licensee

The FERC has stated that “a determination under the [FPA] as to what lands are required for project purposes and what type of property ownership by a licensee is acceptable is case-specific.”¹⁷ In reaching such a determination, Part 1 of the FPA sets forth a multi-faceted and comprehensive application process under which each licensee/applicant is responsible for the submission of an array of documents, such as those required in Section 802, wherein the FPA requires applicants to submit “[s]uch maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project.” Furthermore, when the application is approved, all of these documents “shall be made a part of the license.”¹⁸

This documentation is required at the initial licensing stage because the FERC’s regulatory authority to both administer and enforce the terms of the license extends only over the licensee and those property rights and interests held by the licensee.¹⁹ Therefore, from the FERC’s perspective, it is seeking these documents in order to ensure that the licensee’s rights as included therein are sufficient to enable the Commission to protect the public interest(s) affected by the project through its regulatory authority as exerted over the licensee. This extensive documentation is also required of applicants seeking to merely re-license a previously existing and operating licensed facility, such as the Elk Rapids Hydroelectric Power facility, due to the long term nature of the license which would be issued.

¹⁶ 16 U.S.C. §796(11) (2005).

¹⁷ Order on Clarification, 125 FERC 61,193, at ¶ 5 (Nov. 20, 2008).

¹⁸ 16 U.S.C. §802(a)(1) (2005).

¹⁹ See Policy Statement, *supra* note 1.

Although Article 5 of the FERC's Standard License requires the licensee to "acquire and retain all interests in non-Federal lands and other property necessary or appropriate to carry out the project purposes," the interests that must be held by the licensee are **not** required to be 100% fee simple title.²⁰ In fact, the licensee's property interests may vary from "fee simple to perpetual or renewable leases, easements, and rights-of-way," and "can be owned by someone other than the licensee, **so long as the licensee holds the necessary property interests (e.g. flowage easements) and permits ... to carry out licensed project purposes.**"

Therefore, as set forth in the next section, Antrim County should be able to demonstrate to the FERC's permitting authorities that it has the rights to a statutorily established lake level and specific flowage rights in the waters passing through the dam by prescription, that could satisfy the FERC that the licensees hold the necessary property interests in order to enable it to carry out the licensed project purposes.

V. THE IMPOUNDMENT AND ASSOCIATED RIPARIAN, WATER RIGHTS, AND FLOWAGE RIGHTS

Under Michigan statutory law, such as the Dam Safety Act, MCL 324.51301 *et seq.*, a "dam" is defined to include an "impoundment." Whether a lake is formed by natural barriers or morphology or a dam, it is a lake under Michigan law, and the owners of property on the lake have riparian rights subject to rights of others and the rights of use by the public if the lake is navigable. Where the lake has been formed by a dam, raising the level of a river or lake system, the increased size is the result of the impoundment. In such case, the basic riparian and public use principles are the same collectively, and as between land owners, the public, and the owner of the dam. Therefore, in this case, the impounded area is equivalent to the current size of Elk Lake and Lake Skegemog.

However that does not pose a problem for Antrim County, because, for the reasons stated below, the County owns and holds long established prescriptive rights in the flowage or flowage rights of Elk River, Elk Lake, and Lake Skegemog and their shorelines. Under Michigan common law, the flowage or increased size of a lake is the same as the size or area of the impoundment – Elk River, Elk Lake, and Lake Skegemog.

A. Dams and Riparian Rights, Water Power, Flowage Rights, and Public Rights

Riparian land in Michigan is a parcel which includes a part of or is bounded by a natural watercourse, and includes the adjacent bottomland to the center of a lake or thread of a stream. *Heeringa v Petroelje*, 279 Mich App 444; 760 NW2d 538 (2008), *Monroe Carp Pond Co. v River Raisin Paper Company*, 240 Mich 279, 287; 215 NW 325 (1927). A riparian landowner has the right of enjoyment of the natural flow of a stream with no interference imposed by artificial means. *Koopman v Blodgett*, 70 Mich 610, 616; 38 NW 649 (1888), *Kennedy v Niles Water Supply Co.*, 173

²⁰ See Order on Clarification, *supra* note 4, at ¶ 7 ("Standard Article 5 does not require that all lands within the project boundary be held in fee.")

Mich 474; 139 NW 241 (1913). Michigan has adopted a “reasonable use rule” in determining conflicting rights between riparian owners’ use of lake or stream water. *Thompson v Enz*, 370 Mich 667; 154 NW2d 473, 484 (1967), *Hoover v Crane*, 362 Mich 36, 40-41; 106 NW2d 563 (1960), *Dumont v Kellogg*, 29 Mich 420, 425 (1874). This means that for disputes between riparian users (as opposed to non riparian users or parcels), the courts consider a number of factors, such as whether the use is natural or traditional as opposed to artificial or commercial, the size of the lake or stream, the extent of injury and benefits to the conflicting riparian owners, the extent of public interest relative to commercial purpose or gain. *People v Hulbert*, 131 Mich 156, 170; 91 NW 211 (1902), *Thompson v Enz*, *supra* (natural or traditional uses for necessities are preferred over commercial uses). A riparian owner is liable for significant or unreasonable harm. *Kernen v Homestead Development*, 232 Mich App 503, 591 NW2d 369 (1998).

Dams for sawmills, grist mills, or other commercial purposes dependent on water power are considered reasonable uses. *Goodrich v McMillan*, 217 Mich 630; 187 NW 368 (1922); *Dumont v Kellogg*, *supra*, 29 Mich at 425. If the harm is merely incidental to a reasonable use, such as a mill, the dam is proper and reasonable. *Id.*, *see also Dumont v Kellogg*, *supra*. The ownership of a dam does not impose a duty on the dam owner to maintain the water at an artificial level created by the operation of the dam, *Goodrich*, *supra*, and the lowering of the level of a lake does not create any liability on the dam owner, *Drainage Board v Homer*, 351 Mich 73; 87 NW2d 72 (1952), unless the riparian owner claiming unreasonable use against the dam owner can show an independent open, continuous, and adverse prescriptive right to maintain the artificial level. *Stidham v Alogonquin Lake Ass’n*, 133 Mich App 94; 348 NW2d 46 (1984). Further, where the riparian dam owner overflows the lands of others, increasing the size of a stream or a lake in an open, continuous, and adverse manner to the upstream riparian owners, for a period of more than 15 years, the dam owner acquires the flowage and overflow or flooding rights over the upstream riparians by prescriptive rights. *Goodrich*, *supra*. Moreover, the upstream and downstream owners do not acquire reciprocal right to require that the water level created by the dam must remain at the same level. *Goodrich*, *Drainage Board*, *Stidham*, *supra*.

The prescriptive right to maintain the water level at a dam or the water power created by the dam gives rise to water or flowage rights against upstream riparian owners. *See also*, *Drainage Board*, and *Goodrich* (1600 acre lake established by dam for 70 years), *supra*. The conveyance of riparian property and a dam with established artificial water levels and flowage rights transfers all rights to the subsequent riparian owner of the dam property, *Id.*, *Stidham*, *supra*, and the new owner of the dam property has the right to alter the level. *Drainage Board*, *supra*.

While generally the upstream or downstream owners have no right to insist that the dam owner maintain the water level, they may do so where they can show their own open, continuous, and adverse use of the water established by the artificial level of the dam also constitutes a prescriptive right. It is not reciprocal, as noted above, and must be separate and distinct with notice to the dam owner that such use of the lake would be adverse and estop or prevent the dam owner from altering the specific water level. *Stidham*, 133 Mich App at 99 (*dicta*). Moreover, a lake and river system increased in size by the continuous operation of a dam that is formed out of a natural river and lake system, can be subject to the claims of other riparians who have purchased property and made investments in the property for use and enjoyment of the navigable lake and streams to the

extent that all riparians are estopped from altering the lake based on the new and open, uninterrupted adverse use.

Finally, the water of a navigable lake and river under Michigan law is owned by the state, in so far as water is capable of ownership, and held in public trust for the benefit of the public for public access, navigation, boating, fishing, swimming, and other forms of recreation. *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1926), *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926), MCL 324.30101 *et seq.* (Lakes and Streams Act protects the public trust in Michigan lakes and streams; the Federal Clean Water Act [Rivers and Harbors Act] protects navigable waters of the US from obstruction. 33 U.S.C. §403 1899)). Moreover, the Inland Lake Level Act, discussed in Section C. below, provides for the establishment of lake levels for the protection of natural resources, public use and recreation, and the public interest associated with the lakes and streams created by authorized dams or impoundments.

Antrim County acquired ownership of the Elk River Hydroelectric Dam and related facilities by warranty deed from Consumers Power Company in 1967, including “all flowage rights, water power rights, and riparian rights, whatever the same may be lawfully be, comprehend and include, in any manner appertaining to and belonging to the land.” In addition, the County acquired all “rights and easements to overflow, percolate, saturate, or in any way affect the land upstream or downstream along and adjoining the Elk River as now owned by Consumers Power Company acquired either by grant, prescription, or otherwise.” Consumers Power acquired the identical riparian, water power, flowage, and prescriptive rights in connection with the dam and its operation from Michigan Public Service Company in 1950. The Service Company acquired these same rights from Elk Rapids Electric Company in 1927, and the Electric Service acquired the dam property by warranty deed from Elk Rapids Iron Company, including “all water power rights and interests of every kind and nature whether legal of (sic) equitable belonging to the Elk Rapids Iron Company” and the “water power developed by the natural flow of the Elk River or by the dams.” The Iron Company acquired the dam property in 1892 with the waterhead maintained at or near the same level now established in 1973 Antrim County Circuit Court.

There is a chain of title with the continuous conveyance of the dam and all riparian, water power, flowage, and prescriptive rights for 117 years. And, the evidence of title and other documents show that the first dam was established and operated in the late 1850s, so there has been a transfer of title with dam and maintenance of the water level of Elk Lake and Skegemog Lake for almost 150 years. Accordingly, Antrim County has title and prescriptive rights to the dam, water level, water power, and flowage rights to all riparian land overflowed by the dam and now defined by Elk Lake and Skegemog Lake. This right includes the right to flow based on the unimpeded flow to the dam for more than 117 years.²¹

²¹ Plaintiff’s use of waters of stream in its natural flow for more than 50 years established prescriptive rights against upper stream owner who sought to place a dam in the stream and diminish the flow to plaintiffs mill. *Preston v Clark*, 238 Mich 632; 214 NW 226 (1927).

Further, hundreds of riparian landowners and members of the public have openly and continuously used and enjoyed Elk Lake and Skegemog Lake at the water level established by the current or similar dam operation for more than 117 years. Accordingly, arguably, there are substantial public interests in maintaining the dam and level of the lakes for swimming, boating, navigation, fishing, recreation, education, and tourism.

Therefore, Antrim County owns title to and controls the dam, water levels, and all flowage rights upstream to the extent of Elk Lake and Skegemog Lake, and downstream through the Elk River channel the 500 feet or so to Lake Michigan. In addition, based on the history of title and continuous operation of the dam, including 100 years' operation with water power to produce electricity, the County owns a prescriptive right in the water power or flow necessary to produce such electricity to the extent of these lakes, and the drainage and flow of the rivers and lakes above Skegemog Lake.

B. Established Dam and Water Level by Statute and Operation of Law

The Michigan Inland Lake Level Act ("ILLA"), MCL 324.30701 *et seq.*, authorizes a county board of commissioners to petition the county circuit court to determine and set the normal water level of an inland lake. MCL 324.30702(1). The purpose of the ILLA is to determine and maintain an inland lake level for protection of the public welfare and benefit, natural resources, and property values. *Lenawee County v Abraham*, 93 Mich App 774; 287 NW2d 371 (1979). On the filing of the petition, the court is required to schedule and give notice of a hearing in newspapers and written notice to all affected local governments and the state; the failure to receive notice properly mailed does not constitute a jurisdictional defect that would invalidate the proceedings. MCL 324.30707(1), (2). The court must consider evidence and studies related to past lake levels, surveys, hydrology, downstream flow, upstream drainage, riparian rights, and other circumstances.

Once a petition is filed, notice given, hearing held, and determination of normal lake level issued as a court order, separate or other claims, including constitutional claims of due process and takings, by other riparians or interested parties affected by the determination are barred by res judicata and equitable estoppel to attack the lake level or file separate actions against the owner and operator of the dam. *Zerfas v Bills*, 326 Mich 657; 40 NW2d 763 (1950). Only the county has the authority to file a civil action to determine lake levels. *Yee v Shiawassee County Board*, 251 Mich App 379, 651 NW2d 656 (2002). There is no private cause of action under ILLA for riparians or others who are dissatisfied with the county's exercise of authority. *In re Van Ettan Lake*, 149 Mich App 517; 526, 386 NW2d 572 (1986); *Wortelboer v Benzie County*, 212 Mich App 208; 537 NW2d 603 (1995). Moreover, as noted in Section C, above, upstream riparian owners have no cause of action to complain as to the lake level under the common law where the dam owner has prescriptive rights based on open, continuous, and uninterrupted location and operation of the dam.

The only remedy is for riparians on the lake or downstream to petition the court to exercise continuing jurisdiction over a matter already the subject of a court order based on a petition by a

county. *Anson v Barry County*, 210 Mich App 322; 533 NW2d 19 (1995); *Yee, supra*; *Wortelboer, supra*.

VI. Opinion on Ownership and Control of Water Power and Flowage Rights

Based on the foregoing, my opinions on riparian, water rights, flowage, water level, and the rights to the dam are as follows:

A. Riparian, Dam or Impoundment Property Rights Based on Title

Antrim County is the owner of the property and dam with title and or control and ownership of all water rights necessary to operate the dam for the generation of hydroelectricity. The impounded water area consists of Elk River, Elk Lake and Skegemog Lake. Based on the long established water level and operation and maintenance of the dam and title history conveying water rights at least 84 years, and the broad conveyance of water rights for 117 years, Antrim County has title and ownership of the dam, riparian water rights, water power, flowage, and water level (waterhead) rights in and appurtenant to the dam and property and the impounded overflowed area formed by Elk Lake and Skegemog Lake. Under Michigan's 40-Year Marketable Record Title Statute, MCL 565.101,²² Antrim County, as current and successor owner by these record title conveyances, has marketable title and ownership of water and flowage rights necessary to operate and maintain the dam for water power and production of electricity.

B. Flowage Rights and Water Power Based on Prescription

In addition, Antrim County owns and controls the water rights, including water power, water level (waterhead), and flowage rights necessary to operate the dam based on prescriptive rights and equitable estoppel. Such water rights extend to the impounded area formed by Elk Lake and Skegemog Lake. Moreover, the water power or flow of water required to operate the dam likely extends to the entire chain-of-lakes above Skegemog Lake.

C. Water Rights Based on Statute and Operation of Law

The Michigan Inland Lake Level Act ("ILLA"), MCL 324.31501 *et seq.*, and the case law in Michigan holds that on the petitioning and notice to set a dam level, and the setting of the level by the circuit court, the level becomes fixed and any riparians not objecting are barred from subsequent actions to assert riparian rights, such as lack of flowage rights, based on the doctrine of *res judicata*.

²² Copy attached as Ex 9.

Once the normal level was set in 1973, it cannot be changed except through exercise of the circuit court's continuing jurisdiction. There would have to be substantial reasons for departing from the established lake level, and it would have to take into account the riparian and prescriptive water power and water level (water head) rights of Antrim County and the hydroelectric dam. There is an overwhelming public interest in the electricity, navigation and public trust uses, riparian property uses, property values, and economic benefits to property owners, the public, and local governments and their citizens surrounding the current longstanding water level of Elk Lake and Skegemog Lake.²³ In short, the 1973 lake level was set with petition, notice, and a proceeding and order without objection. Therefore, any claims to remove or change level based on riparian rights are barred by res judicata and estoppel because the water level (and by implication flowage rights) have been finally determined by the 1973 court order and operation of law under the ILLA.

Conclusion

Based on the foregoing, Antrim County holds all of the water-rights, rights-of-way, dams, impounded water and flowage rights, lands, or interests in lands and their use and occupancy necessary or appropriate in the maintenance and operation of the dam and established level and flow for the generation of hydroelectricity. In addition, these property, easement, flowage and water and prescriptive rights extend to the project boundary and area of "project works" as those terms are defined and applied by the law, regulations, guidelines and rulings or orders of the Federal Energy Regulatory Commission. 16 U.S.C. §797(e) (2005); Policy Statement on Hydropower Licensing Settlements, 71 Fed. Reg. 56525 (Sept. 27, 2006).²⁴

Respectfully submitted,


James M. Olson

JMO:djs

Enc: Appendix of Applicants in Support of Opinion Letter

²³ Moreover, there are long-term prescriptive rights that could be asserted to prevent any upstream diversion or impoundment that would materially diminish the flow required for the dam, which would include the entire chain-of-lakes drainage area. Section V, A., *supra*.

²⁴ Sections IV, V, *supra*.

**APPENDIX OF APPLICANTS IN SUPPORT OF OPINION LETTER
ON PROPERTY, WATER RIGHTS AND PROJECT BOUNDARY**

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| Ex 6 | February 1, 1967 – Warranty Deed |
| Ex 7 | October 13, 1971 – Petition, <i>In re Petition of Antrim County Board of Commissioners</i> , Antrim County Circuit Court File No. 962 |
| Ex 8 | September 25, 1973, – Order, <i>In re Petition of Antrim County Board of Commissioners</i> , Antrim County Circuit Court File No. 962 |
| Ex 9 | MCL 565.101 – Marketable Record Title Statute |

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Antrim County)

Project No. 3030

ORDER ISSUING LICENSE (MINOR)
(Issued February 9, 1981)

Antrim County filed an application on January 22, 1980, for a license under Part I of the Federal Power Act (Act) for the continued operation and maintenance of the Elk Rapids Project No. 3030. ^{1/} The project is located on the Elk River a navigable waterway of the United States, in Antrim County, Michigan.

Notice of the application has been published and comments have been received from interested Federal, State, and local agencies. No protests or petitions to intervene have been received, and none of the agencies objected to issuance of the license.

PROJECT HISTORY AND DESCRIPTION

The Consumers Power Company operated the Elk Rapids project from 1950 to 1965, when the facility was shut down, and the generators and related electrical equipment were removed. In 1967, the Elk Rapids project was purchased by Antrim County. The project at the present time is operated only to maintain lake level control.

The project consists of: a 87-foot long and 23.67-foot high concrete and brick integral powerhouse and dam structure containing two units, each rated at 350 kW; an underground, 50-foot long, 4,150-volt transmission line that extends southwest to a substation; a spillway that is located approximately 450 feet southwest of the powerhouse; the 4.16 KV generator leads; and appurtenant facilities.

A more detailed project description is contained in the Federal Energy Regulatory Commission's Order No. 3030, paragraph (B).

FEDERAL ENERGY REGULATORY COMMISSION

DOCKETED

FEB 9 1981

DOCKET SECTION

^{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, 45 Fed. Reg. 21216 (1980), amending 44 Fed. Reg. 46449 (1979) and 18 C.F.R. 3.5(g) (1979).

DC-A-1
EXHIBIT 1

SAFETY AND ADEQUACY

All project structures, machinery, and appurtenant facilities were inspected by the Commission's staff and found to be adequately maintained and in good operating condition. In accordance with standard Commission practice, this license includes conditions that require the installation of any necessary safety devices to protect the public in its use of project lands and waters. It is concluded that the project, under the conditions of this license, is safe and adequate.

ENVIRONMENTAL CONSIDERATIONS

The U.S. Corps of Engineers and the Environmental Protection Agency stated in their comments that the environmental report failed to adequately address the potential for fish entrainment (turbine mortality) during plant operation, and recommended that fish entrainment be determined and documented. These comments, however, do not raise any new significant environmental questions. The standard license articles are sufficient safeguards to address fish entrainment should it become a significant problem.

The U.S. Fish and Wildlife Service and the State of Michigan Department of Natural Resources expressed concerns regarding the lack of recreational facilities for this project. Article 23 requires the Licensee to consult with the appropriate Federal, State, and local agencies to determine the need for recreational facilities within the project area.

The U.S. Department of the Interior recommended that the Applicant consult with the State Historic Preservation Officer in regard to listing the project in the National Register of Historic Places as suggested by Antrim County. Article 26 of the license requires the Licensee to consult with the State Historic Preservation Officer on historic or archeological resources that may be affected by this project.

On the basis of an environmental assessment, the Commission's staff found that licensing of the project would not be a major Federal action significantly affecting the quality of the human environment.

OTHER ASPECTS OF COMPREHENSIVE DEVELOPMENT

The project has an average annual generation of 3 million kWh, and utilizes a renewable resource that saves the equivalent of approximately 4,900 barrels of oil or 1,400 tons of coal per year.

It is concluded that, as conditioned in this license Project No. 3030 is sufficiently well adapted to a comprehensive plan for development of Muskegon River Basin for beneficial public uses and that issuance of this license is in the public interest.

LICENSE TERM

In accordance with the Commission's order issuing license for Project No. 2666 2/ the license will be effective the last day of the month in which this order is issued and will terminate 20 years from that day.

EXHIBIT K

The Elk Rapids Project, which is less than 2,000 horsepower, is owned by a municipality and is, therefore, not subject to Federal takeover. The project affects a chain of lakes which cover a surface area of 34,000 acres and a drainage basin of 513 square miles. Applicant has stated that it would be too difficult to show all the lakes and drainage basin area affected by this project on an Exhibit K drawing, and has requested that the requirement to show the project boundary on the Exhibit K drawing be waived.

The Commission's staff has reviewed the Applicant's request and has concluded that a project boundary would be too extensive to show on the Exhibit K drawing. Therefore, pursuant to Section 10(i) of the Federal Power Act, the request to waive the project boundary requirement from inclusion as part of Exhibit K is granted.

EXHIBIT L

Exhibit L is approved and made a part of the license only to the extent it shows the existing and proposed project works. Article 24 requires the Licensee to file "As Built" drawings of the proposed construction upon completion of the work.

It is ordered that:

(A) This license is issued to Antrim County (Licensee) of the Village of Elk Rapids, Michigan, under Part I of the Federal Power Act (Act), for a period effective the last day of the month in which this order is issued and terminating 20 years from that day for the continued operation and maintenance of

2/ See Bangor Hydro-Electric Company, Project No. 2666, Order Issuing Major License (Issued March 29, 1979).

the Elk Rapids Project No. 3030, located in Antrim County, Michigan, on the Elk River, a navigable waterway of the United States. 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 Elk Rapids Project No. 3030 consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area. The project area is shown and described by a certain exhibit that form part of the application for license and that is designated and described as:

<u>Exhibit</u>	<u>FERC No.</u>	<u>Showing</u>
K-1	3030-1	Project Area and Location

(2) Project works consisting of: (1) a 87-foot long and 23.5-foot high concrete and brick integral powerhouse and dam structure containing two generating units, each rated at 350 kW; (2) an underground 50-foot long, 4,160-volt transmission line that extends southwest to a substation and the 4.16 kV generator leads; (3) a concrete spillway that is located approximately 450 feet southwest of the powerhouse; and (4) appurtenant facilities.

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

<u>Exhibit</u>	<u>FERC No.</u>	<u>Showing</u>
L-1	2	Project Structures and Equipment
L-2	3	" " " "
L-3	4	" " " "
L-4	5	" " " "

(3) 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, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits K and L, designated in ordering paragraph (B) above, are approved and made a part of the license only to the extent that they show the general location of the project works.

(D) Pursuant to Section 10(i) of the Act, it is in the public interest to waive the following sections of Part I of the Act, and they are excluded from the license:

Sections 4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(E) This license is also subject to Article 1 through 19 set forth in Form L-9 (revised October 1975), entitled "Terms and Conditions of License for Constructed Minor Project Affecting navigable waters of the United States," attached to and made a part of this license. The license is also subject to the following additional articles:

Article 20. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate any barriers, signs, lights, sirens, or other devices that may reasonably be needed to warn the public of fluctuations in flow from the project and to protect the public in its recreational use of project lands and waters.

Article 21. The Licensee shall continue to consult and cooperate with the U.S. Fish and Wildlife Service, the U.S. National Marine Fisheries Service, the U.S. Heritage Conservation and Recreation Service of the Department of the Interior, and other appropriate agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in the project works or operations that may be necessary to protect and enhance those resources and values.

Article 22. The Licensee shall pay the United States the following annual charges, effective the last day of the month in which the license is issued.

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as 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 930 horsepower.

Article 23. The Licensee shall, in consultation with the appropriate Federal, State, and local agencies determine the need, if any, for public recreation facilities in the tailrace area of the project. Licensee shall, within one year, file with the Commission results of consultation and subsequent plans for implementation of any facilities determined necessary from this study.

Article 24. The Licensee shall within 90 days of completion of construction file in accordance with the Commission's Rules and Regulations revised Exhibit L drawings showing the project as built.

Article 25. The Licensee shall commence the construction of the project within one year of the date of issuance of the license, and shall thereafter in good faith and with due diligence prosecute and complete such construction of project works within 3 years of the date of issuance of the license.

Article 26. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the appropriate State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, 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 historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic 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 27. (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.

(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; and (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 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 modifications 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.

(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.

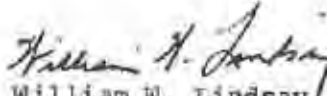
(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions 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.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of their 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 area. The project area may be changed to exclude land conveyed under this article only upon approval of revised Exhibit K drawing (project area map) 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 K drawing would be filed for approval for other purposes.

(E) This order is final unless a petition appealing it to the Commission is filed within 30 days from the date of its issuance, as provided in §1.7(d) of the Commission's regulations, 18 C.F.R. 1.7(d), as amended, 44 Fed. Reg. 46449 (1979). The filing of a petition appealing this order to the Commission or an application for rehearing as provided in §313(a) of the Act does not operate as a stay of the effective date of this license or any other date specified in this order, except as specifically ordered by the Commission. The Licensee's failure to file a petition appealing this order to the Commission shall constitute acceptance of this license. In acknowledgement of acceptance of this license and its terms and conditions, it shall be signed by the Licensee and returned to the Commission within 60 days from the date of this order.

(S E A L)


William W. Lindsay
Director, Office of Electric
Power Regulation

Project No. 3030

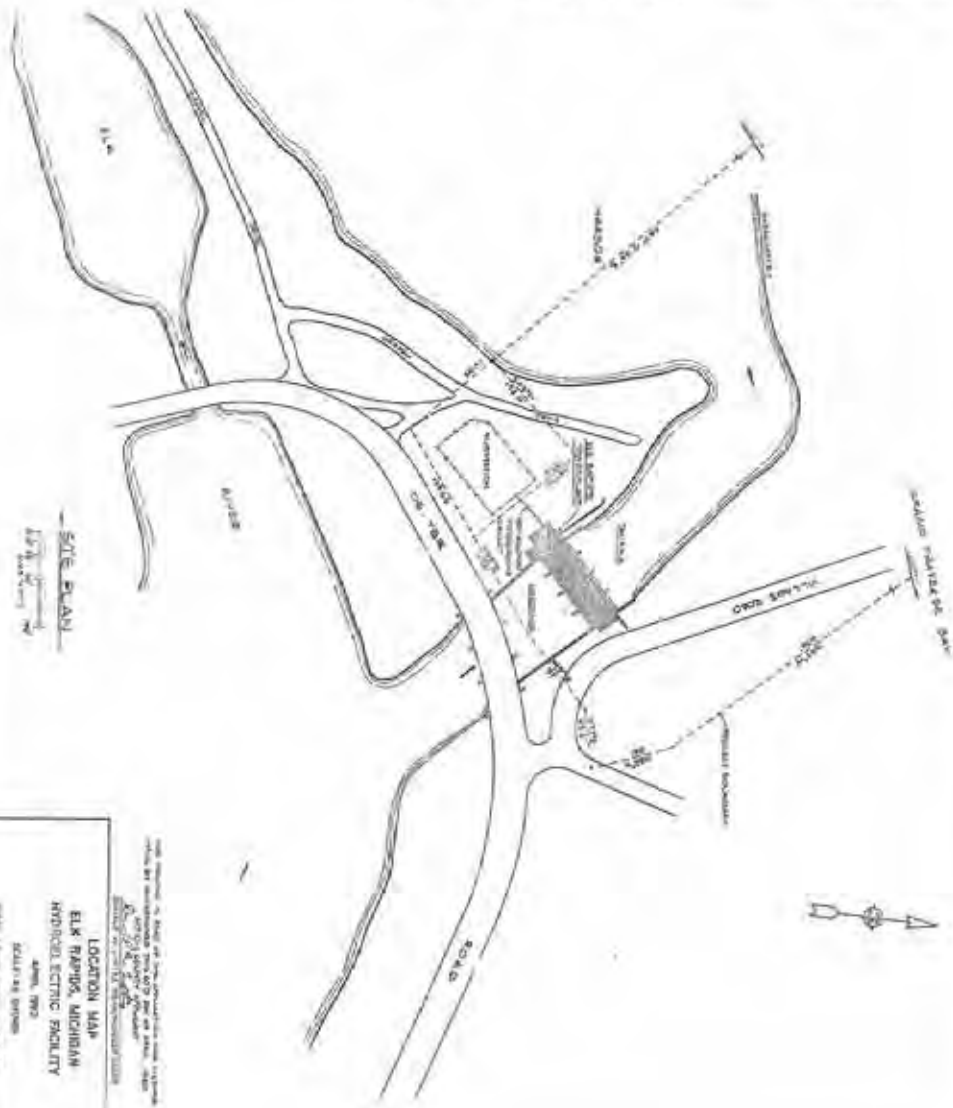
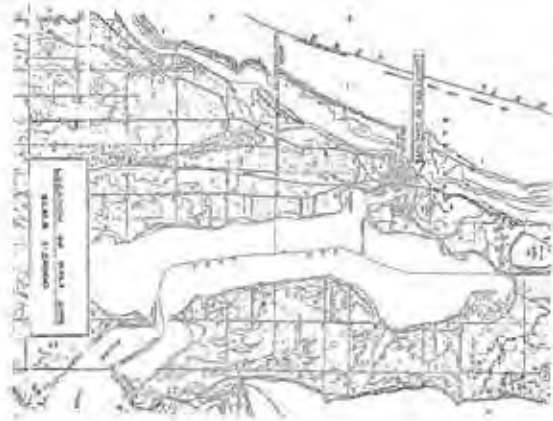
IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this Order, Antrim County this _____ day of _____, 1980, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____
President

Attest:

Secretary

Appendix A: Exhibits K and L



SITE PLAN
 1/1" = 100'

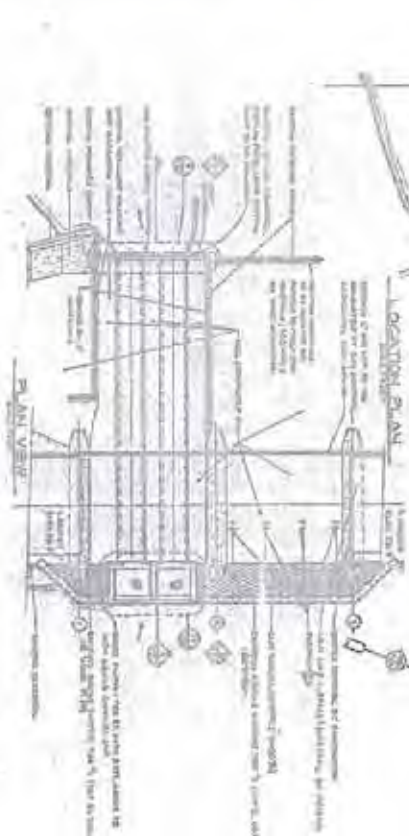
Scale of map is as shown.



<p>THIS MAP IS A PART OF THE PROJECT AND IS NOT TO BE SEPARATED FROM THE PROJECT DOCUMENTS.</p> <p>DATE: 1/15/70</p> <p>BY: [Signature]</p> <p>PROJECT: ELK RAPIDS HYDROELECTRIC FACILITY</p>	<p>LOCATION MAP</p> <p>ELK RAPIDS, MICHIGAN</p> <p>HYDROELECTRIC FACILITY</p> <p>APRIL, 1970</p> <p>SCALE AS SHOWN</p> <p>FIELD, LEWIS, GIBSON & SAWYER, INC.</p>
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PROJECT LANDS AND BOUNDARIES

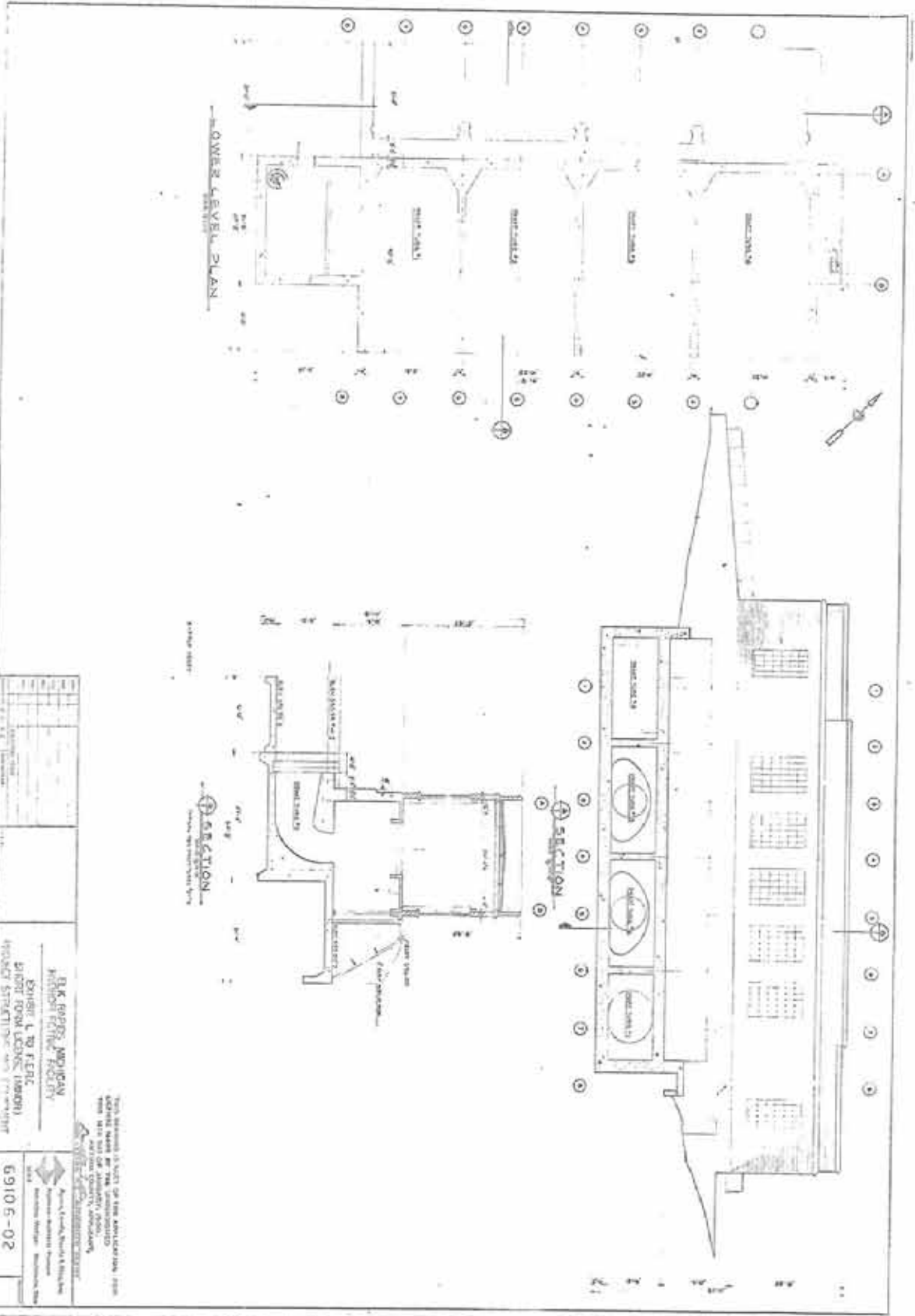
EXHIBITS KFL



- NOTES
1. SEE PLAN SHEET FOR BUILDING FOOTPRINT.
 2. CONSTRUCTION OF THIS STRUCTURE IS TO BE IN ACCORDANCE WITH THE SPECIFICATIONS FOR CONSTRUCTION OF TEMPORARY STRUCTURES.
 3. FOUNDATION SHALL BE CONSTRUCTED IN ACCORDANCE WITH THE SPECIFICATIONS FOR FOUNDATION.
 4. ROOF SHALL BE CONSTRUCTED IN ACCORDANCE WITH THE SPECIFICATIONS FOR ROOF.

SUE RIVERS CONSULTING ENGINEERING FIRM, INC. 1001 N. W. 2nd St. MIAMI, FL 33136		PROJECT NO. 98-101-C
DRAWING NO. 98-101-C-101		SHEET NO. 101 OF 101
69106-01C		

PREPARED BY: SUE RIVERS
 CHECKED BY: SUE RIVERS
 DATE: 01/28/01



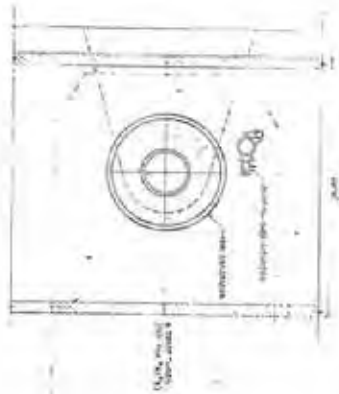
NO.	REVISION	DATE

B.K. PAPPAS ARCHITECT
 ARCHITECT FIRM
 10101 101ST AVE. N.E.
 BELLEVUE, WA 98004

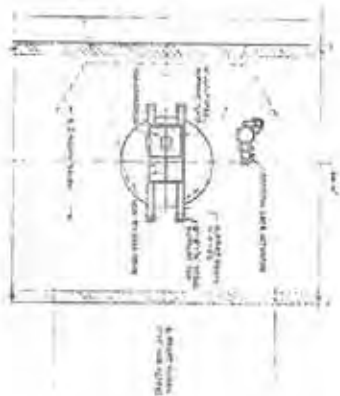
69106-02

THIS DRAWING IS PART OF THE APPLICATION FOR
 A PERMIT UNDER THE NATIONAL BUILDING
 CODE ACT OF 1990, AS AMENDED.

FOR MORE INFORMATION, CONTACT THE
 CITY OF SEASIDE, CALIFORNIA



EASTERN PLAN 413



EASTERN PLAN 412



SECTION 413
 SECTION THROUGH FIELD AND SUPPORT RODS

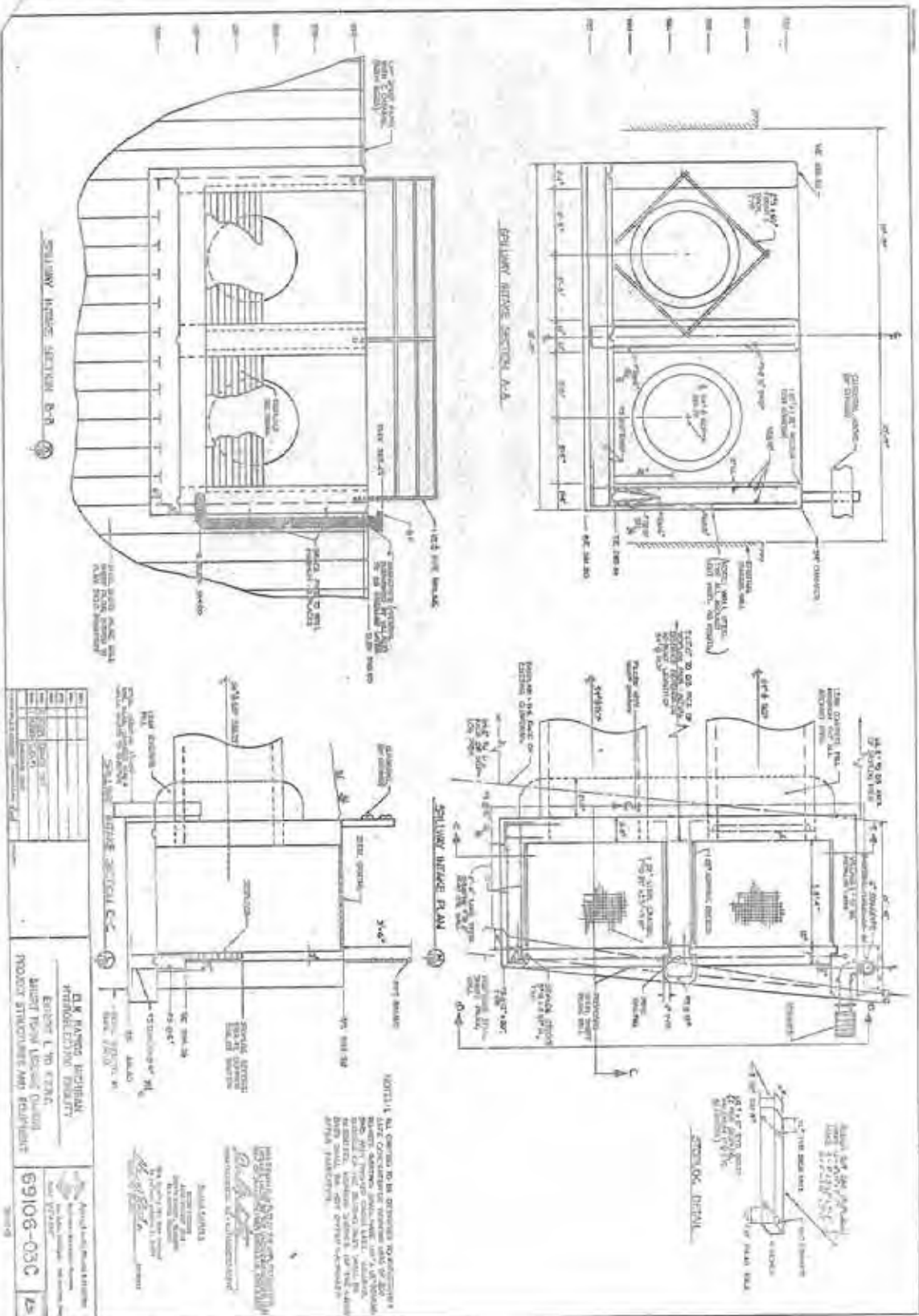


SECTION 412
 SECTION THROUGH FIELD AND SUPPORT RODS

THIS DRAWING IS PART OF THE SPECIFICATIONS FOR
 THE EASTERN PLAN OF THE UNIVERSITY OF
 CALIFORNIA, BERKELEY, CALIFORNIA

W. D. BROWN, ARCHITECT
 ARCHITECTURAL RECORD
 EXHIBIT 1 TO SPECIFICATIONS FOR
 PROJECT STRUCTURES AND EQUIPMENT

69106-03



D. K. RAYNES ARCHITECT ARCHITECTURAL FIRM 1000 17th Street, N.W. WASHINGTON, D.C. 20036	
PROJECT STRUCTURE AND EQUIPMENT	
69106-03C	

STEEL DOOR DETAIL

SECTION A-A

SECTION B-B

ENTRANCE PLAN

NOTES:

1. ALL DIMENSIONS TO BE DIMENSIONS TO FACE UNLESS OTHERWISE NOTED.
2. ALL DIMENSIONS TO BE DIMENSIONS TO FACE UNLESS OTHERWISE NOTED.
3. ALL DIMENSIONS TO BE DIMENSIONS TO FACE UNLESS OTHERWISE NOTED.
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10. ALL DIMENSIONS TO BE DIMENSIONS TO FACE UNLESS OTHERWISE NOTED.

UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

County of Antrim, Michigan

Project No. 3030-012

ORDER APPROVING SETTLEMENT AND
 AMENDING LICENSE

(Issued August 19, 1999)

The Elk Rapids Hydroelectric Project No. 3030, located on the Elk River within the Village of Elk Rapids, Michigan, is under a 20-year license expiring at the end of February 2001. The licensee, the County of Antrim, Michigan (Antrim), state and federal resource agencies, and a non-governmental organization have filed a settlement agreement that asks the Commission to extend the license term by nearly 14 years, to December 31, 2014, at which time the settlement provides that the hydropower equipment will be decommissioned, with the dam and related works remaining intact and the reservoir maintaining state-prescribed lake levels.¹ Subject to the discussion in this order, we approve the settlement and amend the license to extend its term.

BACKGROUND

The Elk Rapids dam was built in 1916 and was operated for hydroelectric power until 1965, when the generators and related electrical equipment were removed. In 1967 Antrim bought the project to control the reservoir level. In 1980 Antrim filed for a hydroelectric license, which the Commission issued in 1981 for a term expiring on February 28, 2001.² Antrim brought the project back on line in September 1983.

On May 2, 1997, Antrim filed a request for a 14-year extension of the license term, in order to recoup more of its investment in the project.³ While that request was

¹Settlement, para. 8.1.

²14 FERC ¶ 62,130.

³Relicense applications must be filed least 24 months prior to the expiration of the existing license. Antrim requested a waiver of this deadline, in light of its pending application to extend the license term. The deadline was extended by six months, until
 (continued...)

998200224-3

EXHIBIT

2

FERC - DOCKETED

AUG 19 1999

pending, the settlement agreement was filed.⁴ The parties to the settlement are Antrim, the U.S. Fish and Wildlife Service (FWS), Michigan Department of Natural Resources, and Michigan Hydro Relicensing Coalition.

Under the settlement, the other parties support Antrim's request for an extended license term, and Antrim agrees to operate the project in a run-of-river mode, adhere to specified lake levels, comply with Michigan water quality standards,⁵ and seek decommissioning of the project generating works at the end of the extended term. The other parties agree not to recommend, during the extended license term, additional license conditions with respect to fish entrainment and most recreational matters. However, FWS reserves Interior's Federal Power Act (FPA) Section 18⁶ fishway prescription authority.

Notice of filing of the offer of settlement was issued on March 12, 1999. No comments were received.

DISCUSSION

We find reasonable and in the public interest the proposal that the license term be extended, in light of the addition of specified environmental mitigation and enhancement measures. Also, Paragraph 2.4 appropriately recognizes that the Commission may conclude that certain of the settlement terms are beyond our jurisdiction, in which case the parties agree that those terms shall be enforceable in a court of appropriate jurisdiction.⁷

³(...continued)

August 23, 1999, by unreported order of the Director, Division of Licensing and Compliance.

⁴The settlement agreement was filed on February 26, 1999.

⁵The state did not issue water quality certification for the 1981 license application.

⁶16 U.S.C. § 811.

⁷The licensee may proceed under these settlement provisions as private agreements among the parties (that may be enforced through private remedies independent of the Commission) insofar as they do not conflict with the license articles or interfere with the exercise of the Commission's statutory authority. See, e.g., Consumers Power Company, 68 FERC ¶ 61,077 (1994) at pp. 61,372, 61,374; City of Seattle, 71 FERC ¶ 61,159

(continued...)

However, we are unable to agree, in 1999, that the Elk Rapids Project should be decommissioned in 2014; there is at this time simply no record evidence to support such a decision.⁷ This does not however prevent Antrim from applying to surrender the project license and decommission the facility at some point closer to 2014, at which time the appropriate environmental reviews can occur and a complete evidentiary record can be developed.

We conclude that, as modified by this order, the Settlement is fair and reasonable, in the public interest, and supported by the record of this proceeding. As so modified, the Settlement is approved.

The Director orders:

(A) Paragraph A of the existing license for the Elk Rapids Hydroelectric Project No. 3030 is revised as follows:

This license is issued to Antrim County (Licensee) of the Village of Elk Rapids, Michigan, under Part I of the Federal Power Act (FPA), for a period effective the last day of the month in which this order is issued and terminating on December 31, 2014, for the continued operation and maintenance of the Elk Rapids Project No. 3030, located in Antrim County, Michigan, on the Elk River, a navigable waterway of the United States. 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.

⁷(...continued)
(1995).

⁸Even unconstested settlements must be based on substantial evidence. Moreover, "in viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding." *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 226 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960).

Para. 2.3 of the Settlement states that if the Commission issues orders "accepting the Settlement with modifications or conditions," the Settlement will automatically be modified to conform to the terms of the orders unless at least one party objects. Thus, the parties understood that the Commission may adopt those provisions of the Settlement it finds appropriate and modify or reject those which the Commission believes conflict with the public interest.

- (B) Subject to the modifications discussed in this order, the Offer of Settlement, is accepted.
- (C) The licensee shall operate the Elk Rapids Hydroelectric Project in a "non-peaking mode" as per paragraph 4.1 of the modified Offer of Settlement.
- (D) The licensee shall maintain the headwater elevation in accordance with the provisions of paragraph 4.1 of the modified Offer of Settlement.
- (E) The licensee shall provide records to validate non-peaking mode of operation to the Fish and Wildlife Agencies on a yearly basis as described in paragraph 4.2 of the modified Offer of Settlement.
- (F) The licensee shall operate the Elk Rapids Hydroelectric Project in such a manner to be in compliance with the Water Quality Standards of the State of Michigan as per paragraph 5.1 of the modified Offer of Settlement.
- (G) The licensee shall continue to provide and maintain the existing tailwater access, including the two existing barrier-free platforms, for the purpose of fishing the tailwater for the duration of the extended license period as per paragraph 6.1 of the modified Offer of Settlement.
- (H) The licensee shall notify the Fish and Wildlife Agencies if any federal or state listed threatened, endangered or sensitive species are found to occur within the project boundary and consult with the resource agencies on the development of a protection plan as per paragraph 7.1 of the modified Offer of Settlement.
- (I) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.



J. Mark Robinson
Director
Division of Licensing and Compliance

ELK RAPIDS DAM AND HYDRO PLANT
Title Report

History

The original dam was built in the year 1857 by A. S. Madaworth and Associates. The permit to build the dam was issued by the Board of Supervisors as provided in the Michigan Constitution. The dam was needed in order to operate a new sawmill.

Madaworth and Associates transferred their rights in the dam shortly after it was built to a partnership composed of Wirt Dexter and Henry H. Noble. In 1862 Dexter and Noble filed a petition with the Board of Supervisors for permission to construct a new dam "a little above the site of the old dam." Permission was granted October 13, 1862, however, from the available records it is believed that they rebuilt the original dam. Rebuilding was necessary in order to develop sufficient water power to supply the Village of Elk Rapids with service. In 1875, the rights held by the copartnership of Dexter and Noble were transferred to the Elk Rapids Iron Company.

The Elk Rapids Iron Company and the Dexter and Noble Land Company (the Dexter and Noble Land Company was a corporation organized under the laws of the State of Michigan; had its principal office in the Village of Elk Rapids, Michigan, and were the owners of extensive properties in Elk Rapids Township) sold their interest in the dam and power plant to the Elk Electric Company in 1910.

In 1927, the Elk Electric Company, along with several other corporations, consolidated and formed the Michigan Public Service Company. Consumers Power Company purchased the Michigan Public Service Company in the year 1936, thereby acquiring the Elk Rapids Dam and Hydro Plant.

Among the various needs of the village was the need for a water supply for sewage purposes. This resulted in several agreements, not always reached peacefully, with the various owners of the dam. At one time the Village of Elk Rapids threatened legal action in the nature of an injunction to compel the owners of the dam to release enough water down the wasteway to take care of sewage. However, the owners of the dam cooperated with the village to the best of their ability. Eventually the village built a disposal plant and the owners of the dam entered into an agreement with the village to furnish water in order to operate the plant.

"Since the original dam was built it has maintained an 11-foot head whenever possible. In 1880 or thereabouts, the State of Michigan declared that the Elk River, together with the lakes and connecting streams, was a state waterway and appropriated a large amount of state lands for the purpose of dredging the channel between the lakes, and creating a continuous waterway. These channels were dug and the waterway maintained on the basis of the 11-foot head created by the dam."

"In 1912 the United States Secretary of War issued an order declaring the Elk River and all lakes and connecting streams to be navigable waters. In 1916, the Elk Rapids Iron Company sought permission to rebuild parts of the dam on two different occasions from the War Department of United States. They were advised that they could not grant them permission because the dam had been built illegally in the first place. However they sanctioned the changes by the following: I have, however, been given authority by the Secretary of War (E.D. 99446/1), to inform you that as your work affords reasonable facilities for navigation, no objections will be imposed by the War Department at this time to continued maintenance of your work. This authorization will have the same value to you as a permit from the department. Your plans will now be on file with this authority. In 1923 a second order to the same effect was issued." During the summer of 1926 a large amount of water was run through the plant; "the head was pulled approximately 18 inches." At that time the United States Engineer's Office and the United States Attorney's Office at Grand Rapids, Michigan served notice on the company controlling the dam, that the War Department would insist that the level be maintained at 11 feet and, if necessary, it was again stated that the government would take the matter to court in order to maintain this 11-foot head.

From the correspondence available it is found that the United States Attorney's Office and the Engineer's Office both were advised verbally and by letter, that while the company controlling the dam intended to cooperate as much as possible in keeping the head at 11 feet, in the interest of good business and economy, the company would not guarantee it and the company under no circumstances admitted the authority of the United States Government to regulate the level of the pond created by the dam. The attorneys for the company informed the government agencies that although the company had a right to flow lands and maintain the water at a height of 11 feet, there was no corresponding duty to do so. It was also stated that there was no lock in the dam and it was impossible for boats to enter from Grand Traverse Bay and there was absolutely no navigation in the river prior to the building of the dam except for the booming of logs.

Title Opinion

I have made a careful examination of all the records and correspondence available in the files of the Land and Right of Way Department relative to the Elk Rapids Dam and Hydro Plant properties in Elk Rapids, Michigan. The abstracts covering the property were certified to the year 1940. A further check of the title was made at the Abstract Office in the Village of Bellaire, Antrim County. Based upon these examinations, I have found the rights, interests and obligations of the Consumers Power Company relative to said property to be as follows:

Property Owned In Fee

PARCEL "A"

A parcel of land described as commencing five hundred forty-four and seventy-five hundredths (544.75) feet North, thirty-seven degrees (37°) East of the Meander Post on the North side of the Elk River on the section line between Sections twenty and twenty-one (20 and 21) in Township twenty-nine (29) North, Range nine (9) West, said Meander Post being marked by an iron pipe driven into the ground on the shore of Grand Traverse Bay; thence South forty-five degrees (45°) East

one hundred seventy and four-tenths (170.4) feet; thence North fifty-five degrees (55°) East one hundred seventeen and three-tenths (117.3) feet; thence North forty-five degrees (45°) East ninety-seven (97) feet; thence North seventy-seven degrees (77°) East sixty-three and five-tenths (63.5) feet; thence North twenty-two degrees (22°), thirty (30) minutes West eighty-four (84) feet; thence North forty-three degrees (43°) West six hundred seventy-six (676) feet to the shore of Grand Traverse Bay; thence Westerly and Southerly along the shore of said bay to the place of beginning.

(Colored in Blue - See Exhibit "A")

PARCEL "B"

All that part of Government Lot No. 4 under the United States Re-Survey of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, said Lot 4 being that part of the South one-half (1/2) of the Northwest one-quarter (1/4) of said section lying and being North of Elk River and described as follows: Commencing at the Meander corner on the section line between Sections twenty and twenty-one (20 and 21) on the shore of Grand Traverse Bay and marked by a railroad iron post; thence running Northeasterly along the shore of said Grand Traverse Bay five hundred two (502) feet to the Northwest corner of a parcel of land heretofore on January 4, 1922, conveyed by Elk Rapids Iron Company to Elk Electric Company; thence running South forty-five degrees (45°) East one hundred seventy and four-tenths (170.4) feet; thence running North fifty-five degrees (55°) East one hundred seventeen and three-tenths (117.3) feet; thence running North forty-five degrees (45°) East ninety-seven (97) feet across bridge; thence running South forty-three degrees (43°) East twenty-six (26) feet; thence running South seventy degrees (70°) East three hundred twenty-five (325) feet; thence running South seventy-nine degrees (79°) and thirty (30) minutes East fifty (50) feet; thence running South eighty-two degrees (82°) East fifty (50) feet; thence running South eighty-four degrees (84°) thirty (30) minutes East fifty (50) feet; thence running North eighty-five degrees (85°) East fifty (50) feet; thence running North seventy-four degrees (74°) East fifty (50) feet; thence running North sixty-four degrees (64°) thirty (30) minutes East fifty (50) feet; thence running North sixty-two degrees (62°) East ninety-five (95) feet along the South line of highway to the West line of right of way of the Pere Marquette Railroad; thence running South thirty (30) feet to the shore of Elk River; thence running Westerly along the shore of Elk River six hundred thirty-four (634) feet; thence running South forty-seven degrees (47°) West across bay or race one hundred thirteen (113) feet; thence Southerly along shore of race or bay ninety-six (96) feet to the shore of the main stream of

Elk River; thence running westerly along the shore of Elk River three hundred (300) feet; thence running South seventy-one degrees (71°) West across and of bridge twenty-six (26) feet; thence running South fifty-two degrees (52°) West sixty-three (63) feet to the Water Works property of the Village of Elk Rapids; thence running North forty degrees (40°) West along the East side of the said Water Works property and which last mentioned line is parallel to the East side of the Water Supply Powerhouse and ten (10) feet distant therefrom seventy-one (71) feet to the Northeast corner of the Water Works property; thence running South fifty degrees (50°) West along North side of Water Works property thirty-six (36) feet to Northwest corner of said Water Works property; thence running South forty degrees (40°) East to the shore of Elk River; thence running Southwesterly along the shore of said Elk River two hundred twenty-four (224) feet more or less to the Meander Corner or Post on the North side of said Elk River on the section line between Sections twenty and twenty-one (20 and 21); thence running North on said section line fifty-one and five-tenths (51.5) feet to the place of beginning. Including all drainage rights, water-power rights, and riparian rights whatever the same may lawfully be, comprehend and include in any manner appertaining to and belonging to said above-described land, and also the fee simple absolute to the bed of Elk River adjacent and appurtenant to the above-described land so far as the same may be adjacent and appurtenant. Also including herein all right, title, and interest of said first party in and to the dam, chute, spillway, raceway and tailrace that may be appurtenant to, belong to, or in anywise appertain to the above-described land with the full right to make any and all alterations, improvements, alterations, repairs and changes to or in the same. Excepting and reserving therefrom a parcel of land described as: Commencing at the Meander Corner on the section line between Sections twenty and twenty-one (20 and 21) on the shore of Grand Traverse Bay and marked by a railroad iron post; thence running Northeastly along the shore of said Grand Traverse Bay five hundred two (502) feet; thence running South forty-five degrees (45°) East one hundred seventy and four-tenths (170.4) feet; thence running North fifty-five degrees (55°) East one hundred seventeen and three-tenths (117.3) feet; thence running South forty-five degrees (45°) East twenty-six (26) feet to the Southeast corner of US-31 Highway bridge; thence running South fifty-two degrees (52°) and forty (40) minutes West along Southeastly line of said highway seventy-five (75) feet to an iron stake for a place of beginning; thence South fifty-two degrees (52°) and forty (40) minutes West along Southeastly line of said highway seventy-two (72) feet; thence South forty-six degrees (46°) and forty-five (45) minutes West along said highway one hundred fourteen (114) feet; thence South twenty-five degrees (25°) and forty-five (45) minutes West along said highway

eighty-four (84) feet to the Northeasterly corner of highway bridge; thence Northeasterly along the shore of Elk River two hundred fifty-nine and five-tenths (259.5) feet to an iron stake; thence North thirty-six degrees (36°) and twenty (20) minutes West one hundred fifty-eight (158) feet to the place of beginning.

(Colored in Red - See Exhibit "A")

PARCEL "C"

All that part of Lot 6 of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, more particularly described as follows: Commencing at a point at the North line of Noble Street of H. H. Noble's Addition to the Village of Elk Rapids, which is twenty-two and one-half (22-1/2) feet North nineteen degrees (19°) West from the Northwest corner of Lot 13 of H. H. Noble's Addition to the Village of Elk Rapids; thence running North nineteen (19°) degrees West two hundred forty-one and six-tenths (241.6) feet, more or less to the shore of Elk River; thence continuing North nineteen degrees (19°) West along the Easterly side of the dam across Elk River to the North shore of Elk River, being at the North end of the bridge across said river on said dam, the same point being also on the Southerly line of land herein described as Parcel "B" above; thence running South seventy-one degrees (71°) West twenty-six (26) feet; thence running South fifty-two degrees (52°) West sixty-three (63) feet; thence running South fifty degrees (50°) West along the Southerly side of said Water Works property thirty-six (36) feet to the Southwest corner of said Water Works property; thence running South to the South shore of Elk River; thence running Northwesterly along the South shore of Elk River to a point which is ten (10) feet West of the base of Masonry Dam; thence running South nineteen degrees (19°) East parallel to the base of said Masonry Dam and ten (10) feet distant therefrom to the North line of Noble Street of H. H. Noble's Addition to the Village of Elk Rapids; thence running North seventy-six degrees (76°) West to the place of beginning.

(Colored in Yellow - See Exhibit "A")

Excepting therefrom a parcel of land released to the Township of Elk Rapids, Michigan by Warranty Deed dated December 30, 1892 and recorded in the Registers Office, Antrim County in Liber 25 on Page 341 described as follows:

This instrument is intended for a release and does release forever to the said Township for public travel and the construction and maintenance of a highway and bridges thereon of a strip of land for such right of way thirty-five (35) feet in width the center line commencing on the North line of Noble Street in H. H. Noble's Addition to Elk Rapids

17-1/2 feet east of the front of masonry dam thence north and east in front of the store of party of the first part to join the line of the Traverse City and Emmet State road near the North end of the Bridge mentioned in the field notes of the survey of said State road. Also to continue from this last mentioned point Easterly a strip sixty-six (66) feet in width, through the furnace yard to the plat of J. E. Rankins Addition to East Elk Rapids on Ames Street all of which is particularly defined on map accompanying this instrument (which is made a part hereof) and on file in the office of the Township Clerk of said Township of Elk Rapids.

For the said party of the second part to do all things properly connected with such highway, but not to interfere with or interrupt the ownership and use of any water power or water rights, existing on said premises.

The above parcels of land are also subject to the following agreements, easements and leases.

1. A sewer easement dated April 17, 1953 and running to the Village of Elk Rapids, Michigan, is as follows:

The right of way hereby conveyed and released is for the sole and only purpose of locating and establishing in, on, under, through and across said above-described premises, a six inch sewage force main and a fifteen inch outfall sewer main, the respective center lines of said sewer mains being described as follows, to wit:

SIX INCH SEWAGE FORCE MAIN

Commencing at a point on the Northerly side of the Pumping Station of the Village of Elk Rapids which is located Northeastly of the intersection of the Northerly line of Noble Street with the Westerly line of Cedar Street as now laid out in the Village of Elk Rapids, running thence North thirteen (13) degrees fifty-three (53) minutes East three hundred and sixty-five feet; thence North fifty-seven (57) degrees twenty-three (23) minutes East two hundred and twenty-four feet; thence North thirty (30) degrees, forty-five (45) minutes East two hundred and sixty-five (265) feet; thence North fifty-six (56) degrees, fourteen (14) minutes East two hundred and twelve (212) feet; thence North thirty-two (32) degrees, twenty (20) minutes East fifty-eight (58) feet to the Westerly line of the thirty-three (33) foot roadway deeded to the Village of Elk Rapids by Deed dated June 4, 1925 and recorded August 20, 1925 in Liber 67 of Deeds, Page 312, Antrim County.

FIFTEEN INCH OUTFALL SEWER MAIN

Commencing at the Meander Corner on the Section Line between Sections twenty (20) and twenty-one (21), Township twenty-nine (29) North, Range Nine (9) West, on the shore of Grand Traverse Bay and marked by a railroad iron post; thence running Northeasterly along the shore of Grand Traverse Bay five hundred two (502) feet to an iron post on the shore of Grand Traverse Bay, said iron post being North thirty-seven (37) degrees East five hundred forty-four and seventy-five hundredths (544.75) feet from the Meander Post on the North shore of Elk River on said Section Line; thence South forty-five (45) degrees East one hundred seventy and four tenths (170.4) feet to the Center Line of U. S. Highway thirty-one (31); thence South fifty-three (53) degrees, two (2) minutes West two hundred sixty and five tenths (260.5) feet to a point on the North line of a twenty-two (22) foot right of way of a private roadway; thence North thirty (30) degrees forty-five (45) minutes East, two hundred sixty-five (265) feet; thence North fifty-six (56) degrees fourteen (14) minutes East two hundred twelve (212) feet; thence North twenty (20) degrees fifty-six (56) minutes West eighty-eight (88) feet along the Easterly bank of the Elk Rapids Hydro Plant tailrace for a point of beginning; thence North fifty-six (56) degrees fourteen (14) minutes East fifty (50) feet more or less to the Westerly line of a thirty-three (33) foot roadway deeded to the Village of Elk Rapids and recorded in Liber 67 of Deeds, Page 312, Antrim County.

(See Exhibit "C")

2. An easement for a walkway and breakwater dated September 30, 1955, running to the Village of Elk Rapids, Michigan, across part of Parcel "A". The pertinent part of said easement is as follows:

The right of way hereby conveyed and released is for the sole and only purpose of locating and establishing the said breakwater and the said walkway over and across said above-described premises.

The center line of said breakwater being along a line, which said line is a continuation of the center line of the walkway hereinafter described as said center line is extended South seventy-five degrees West (S 75° W) into Grand Traverse Bay.

The route and course of said walkway being described as follows:

Said walkway to be thirty-three (33) feet wide, being sixteen and one-half (16-1/2) feet on each side of a center line described as follows: To find the place of beginning of said center line commence North thirty-seven degrees East (N 37° E)

five hundred forty-four and seventy-five hundredths (544.75) feet from the Meander Post on the North side of Elk River on the section line between Sections twenty (20) and twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, said Meander Post being marked by a railroad iron being driven into the ground, thence South forty-five degrees East (S 45° E) one hundred seventy and four-tenths (170.4) feet, thence North fifty-five degrees East (N 55° E) one hundred seventeen and three-tenths (117.3) feet, thence North forty-five degrees East (N 45° E) ninety-seven (97) feet to the Northwest corner of the bridge, which said bridge is a part of old U. S. Highway 31 and crosses the head race leading from said Elk River to first party's Elk Rapids Hydro Plant, running thence North forty-five degrees East (N 45° E) along the Northwesterly line of said bridge as extended to the point of intersection of said line with the Southwesterly line of the road deeded to the Village of Elk Rapids on June 4, 1925, running thence Northwesterly along the Southwesterly line of said road a distance of three hundred sixty-six (366) feet seven (7) inches, said distance being measured at right angles to said Northwesterly line of said bridge as extended, to the place of beginning of said center line, running thence South seventy-five degrees West (S 75° W) to the water's edge of Grand Traverse Bay.

(See Exhibit "B")

3. A lease dated October 22, 1954 running to the Village of Elk Rapids, Michigan, for a boat landing, is as follows:

The said Lessor, in consideration of the rents and covenants herein specified, does hereby LET AND LEASE to the said Lessee the following described premises situated and being in the Village of Elk Rapids, County of Antrim and State of Michigan, to wit:

All that part of Government Lot Four (4) of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, described as commencing on the Northeastly bank of the tailrace of Lessor's Elk Rapids Hydroelectric Generating Plant two hundred fifty (250) feet Northwesterly from the most northerly corner of the highway (US-31) bridge across the headrace of Lessor's said Elk Rapids Hydroelectric Generating Plant, thence Northwesterly along the bank of said tailrace one hundred (100) feet, thence Northeast approximately seventy (70) feet at right angles to the public road deeded to the Village of Elk Rapids by Quitclaim Deed dated June 4, 1925 and recorded in Liber 67 of Deeds at Page 312, thence Southeastly along the Southwesterly line of said public road one hundred (100) feet, thence Southwest at right angles to said public road approximately seventy (70) feet to the place of beginning.

(See Exhibit "B")

4. A lease dated February 21, 1951 running to Frank Sobory of Elk Rapids, Michigan, for driveway purposes. The land covered by said lease is as follows:

A parcel of land described as commencing at the Northwest corner of the intersection of Noble Street and U. S. Trunk Line Highway 31, thence Northerly one hundred five (105) feet, thence West ten (10) feet, thence Southerly one hundred five (105) feet, thence East ten (10) feet to the place of beginning.

(See Exhibit "B")

5. Three one-year leases dated October 6, 1952 running to B. E. Guild of Elk Rapids, Michigan. These leases are renewable on a year-to-year basis until terminated and they cover the following parcels of land:

A part of Government Lot Number four (4), under United States Re-Survey of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, said Lot Number four (4) being also known as that part of the South one-half (1/2) of the Northwest one-quarter (1/4) of said Section, lying North of Elk River, said parcel of land being described as commencing at the meander corner on the West line of said Section twenty-one (21) on the shore of Grand Traverse Bay as marked by railroad iron post, running thence Northeasterly along the shore of said Grand Traverse Bay five hundred two (502) feet, thence South forty-five (45°) degrees East one hundred seventy and four tenths (170.4) feet, thence North fifty-five (55°) degrees East one hundred seventeen and three tenths (117.3) feet, thence South forty-five (45°) degrees East twenty-six (26) feet to the Southeast corner of the U. S. 31 highway bridge for the place of beginning of this description, running thence South fifty-two (52°) degrees forty (40') minutes West along the Southeasterly line of said highway U. S. 31 seventy-five (75) feet, thence South thirty-six (36°) degrees twenty (20') minutes East one hundred fifty-eight (158) feet more or less to the shore of Elk River, thence Northeasterly along the shore of said Elk River forty and five tenths (40.5) feet more or less, thence Northwesterly along the head race of Consumers Power Company's hydro plant one hundred sixty-three (163) feet more or less to the place of beginning.

A part of Government Lot Number four (4), under United States Re-Survey of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, said Lot Number four (4) being also known as that part of the South one-half (1/2) of the Northwest one-quarter (1/4) of said Section, lying North of the Elk River, said parcel of land being described as follows: Commencing at the meander corner on the West line

of said Section twenty-one (21) on the shore of Grand Traverse Bay as marked by railroad iron post, running thence Northeast-erly along the shore of said Grand Traverse Bay five hundred two (502) feet, thence South forty-five degrees (45°) East twenty-three and seventy-five hundredths (23.75) feet, thence South seven degrees thirty minutes (7° 30') West approximately two hundred twenty-three (223) feet to the North side of the roadway reserved by the Elk Rapids Iron Company, thence South-westerly along the Northward side of said Elk Rapids Iron Company right of way three hundred fifty (350) feet more or less to the West line of Section twenty-one (21), thence North on said Section line to the place of beginning.

A part of Government Lot Number four (4), under United States Es-urvey of Section twenty-one (21), Township twenty-nine (29) North, Range nine (9) West, said Lot Number four (4) being also known as that part of the South one-half (1/2) of the Northeast one-quarter (1/4) of said Section, lying North of the Elk River, said parcel of land being described as follows: Commencing at the meander corner on the West line of said Section twenty-one (21) on the shore of Grand Traverse Bay as marked by railroad iron post, running thence North-esterly along the shore of said Grand Traverse Bay five hundred two (502) feet, thence South forty-five degrees (45°) East one hundred seventy and four tenths (170.4) feet, thence North fifty-five degrees (55°) East one hundred seventeen and three tenths (117.3) feet, thence North forty-five degrees (45°) East ninety-seven (97) feet across bridge, thence South forty-three degrees (43°) East twenty-six (26) feet, thence South seventy degrees (70°) East three hundred twenty-five (325) feet for the place of beginning of this description, running thence South seventy-nine degrees thirty minutes (79° 30') East fifty (50) feet, thence South eighty-two degrees (82°) East fifty (50) feet, thence South eighty-four degrees thirty minutes (84° 30') East fifty (50) feet, thence North eighty-five degrees (85°) East fifty (50) feet, thence North seventy-four degrees (74°) East fifty (50) feet, thence North sixty-four degrees thirty minutes (64° 30') East fifty (50) feet, thence North sixty-two degrees (62°) East ninety-five (95) feet along the South line of highway U. S. 31 to the West line of the Chesapeake & Ohio Railway right of way, thence South thirty (30) feet to the shore of Elk River, thence West-erly along shore of Elk River four hundred twenty (420) feet more or less, thence Northerly fifty (50) feet more or less to the place of beginning, excepting therefrom such Westerly portion of this description as may have been released to the State of Michigan for the relocation of U. S. 31 across the Elk River.

(See Exhibit "B")

The Company's properties are also subject to the rights of the village as set forth in the following instrument:

Warranty Deed dated April 8, 1921, recorded May 19, 1921 in Liber 67 of Deeds on Page 67 conveys a right of way across part of Lot 4, 1, 2 and 6 of Section 21, Township 29 North, Range 9 West, for water pipe or water main, commencing at meander post on West line of Section 21, Township 29 North, Range 9 West on the North shore of Elk River, said meander post being evidenced by an iron monument near the shore of Grand Traverse Bay, on said section line. Thence run North 71 degrees East 212 feet to the Southwest corner of the old grist mill foundation which point is also 236 feet distant from said meander post; thence run South 5 degrees East 33 feet to a point herein called "Station M" and being the angle of the said water main one side of which runs to the East side and the other to the West side of said Village of Elk Rapids; thence run North 45 degrees 30 minutes 36 feet to the East line of a parcel of land this day conveyed by the Elk Rapids Iron Company to said Village of Elk Rapids for supply powerhouse, for place of beginning of the right of way. Thence run North 45 degrees 30 minutes East 395 feet, more or less, to angle of water main; thence angle left 70 degrees and run North 1/4 degrees 30 minutes West 232 feet, more or less, to angle of water main; thence angle right 90 degrees and run North 45 degrees 30 minutes East 319 feet, more or less, to angle of water main. Thence angle right 41 degrees 30 minutes and run North 87 degrees East 123 feet, more or less, to angle of water main, thence angle right 19 degrees 30 minutes and run South 73 degrees 30 minutes East 309 feet, more or less, to angle of water main, thence angle right 10 degrees and run South 63 degrees 30 minutes East 70 feet to a point on the East side of the Pere Marquette Railroad right of way which is 1,131 and 75/100 feet West and 38 feet North of the Southwest corner of Lot 1 of Section 21, Township 29 North, Range 9 West called "Station N." Thence run South 54 degrees East 11 feet; thence 40 degrees East parallel with the sidetrack of said Pere Marquette Railroad running from the main line of said railroad southerly across said part of said Lot 1, 229 feet; thence South 51 degrees East parallel with said last-mentioned sidetrack 207 feet to a point in said Grand Traverse and Emmet State Road 13 feet South of the North line of said State Road; thence East 459.5 feet along said Grand Traverse and Emmet State Road to a point which is 349.75 feet West and 75 feet North of the Southeast corner of said Lot 1; thence South 5 degrees East 75 feet to the South line of said Lot 1; thence continuing on said last-mentioned course 189 feet into Lot 2 to a lateral connection hereafter called "Lateral Connection A;" thence continuing on said course South 5 degrees East 15 feet; thence South 19 degrees East 212 feet; thence South 70 degrees West 213 feet to terminus. Also commencing at the "Lateral Connection A" above mentioned, run South 67 degrees 30 minutes East 348.5 feet to North and South quarter line of said Section 21, the same being also the East line of said Lot 2 on the West end of Anna Street in the Plat of Reskin's Addition to the Village of East Elk Rapids, according to the plat thereof as recorded in the Office of the Register of Deeds of Antrim County. Also including in said above-described right of way a further right of way to each fire hydrant and other connection along said said right of way sufficient

width to dig up, excavate, alter and repair the same with full right of access thereto at all times.

Also commencing at the aforesaid "Station M" thence run South 48 degrees East 95 feet, more or less, over and across the bed of Elk River to the Northerly terminus of a strip of land designated as Water Main Reserve 10 feet wide on the Plat of E. H. Noble's Addition to the Village of Elk Rapids.

Second, the right, privilege and easement of laying, maintaining and keeping one or more water mains along the bed of Elk River adjacent to the following described lands, Lots 1, 2, 3, 4, 5 and 7 of Section 21, Township 29 North, Range 9 West.

Also the certain rights, privileges and easements pertaining to water mains and right of way for same only, that were reserved to said Elk Rapids Iron Company in a certain deed to Lake Superior Iron and Chemical Company dated May 1, 1907 and recorded in Liber 41, Pages 362 and 368 inclusive, subject to the rights of the United States and State of Michigan to control the bed of Elk River.

Third, the right, privilege and easement of constructing and maintaining one or more cribs for water intake supply in or on the bed of Elk River adjacent to Lots 6 and 7 of said Section 21, with right of access thereto at all times and the right to keep, lay and maintain such water pipe mains in and on the bed of Elk River as may be necessary or desirable to connect said cribs with the mains of the said Village water supply system, subject to rights of the State and United States.

Fourth, all other rights of way and privileges and easements pertaining to water mains which were reserved to said Elk Rapids Iron Company in said deed to said Lake Superior Iron and Chemical Company and all such are hereby conveyed to said Village of Elk Rapids.

From observations made on the ground, there is at the present time an 8 inch water main crossing the Company's land. (Approximate location shown in blue on Exhibit "C.")

Flowage Rights Owned By Company

The flowage rights now owned by Consumers Power Company are rights acquired by prescription, for the most part, and cover a vast amount of territory. They are all the flowage rights made necessary by the maintenance of the dam with its 11-foot head. They cover lands on the "Elk River, Elk Lake, "The Narrows" so called, Round Lake, Torch River, Rapid River, Torch Lake, Clem River, Clem Lake, Grass River and Grass Lake, situated in the counties of Antrim, Grand Traverse and

Kalkaska, and pertaining to or appurtenant to any of the upland upon sections ten (10), eleven (11), fourteen (14), fifteen (15), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-six (26), twenty-eight (28), thirty-three (33), and thirty-five (35), being in Township twenty-nine (29) north of range nine (9) west, in the townships of Elk Rapids and Milton in the county of Antrim; Sections twelve (12), thirteen (13), and twenty-four (24), being in township thirty-one (31) north of range nine (9) west, in the township of Torch Lake, County of Antrim; state of Michigan;

Sections six (6), seven (7) and eighteen (18), being in township twenty-eight (28) north of range eight (8) west, in the township of Milton, county of Antrim; state of Michigan;

Sections four (4), six (6), seven (7), nine (9), sixteen (16), eighteen (18), nineteen (19), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-three (33); also Sections one (1), two (2), three (3), ten (10), eleven (11), twelve (12), thirteen (13), and fourteen (14), all being in township twenty-nine north of range eight west, in the Townships of Milton and Helena, in the County of Antrim; state of Michigan;

Sections five (5), six (6), seven (7), eight (8), seventeen (17), eighteen (18), nineteen (19), twenty-one (21), twenty-eight (28), thirty (30), thirty-one (31), thirty-three (33); also sections twenty-two (22), twenty-three (23), twenty-five (25), twenty-six (26), twenty-seven (27), and thirty-five (35), being in township thirty (30) north of range eight (8) west, in the townships of Milton and Forest Hill in the County of Antrim; state of Michigan;

Sections six (6), seven (7), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-nine (29), thirty (30), thirty-one (31) and thirty-two (32), being in township thirty-one north of range eight (8) west, in the townships of Central Lake and Torch Lake, in the county of Antrim; state of Michigan;

Sections six (6) and seven (7) being in township twenty-nine (29) north of range seven (7) west, in the township of Custer in the county of Antrim; state of Michigan;

Sections three (3), four (4), ten (10), thirteen (13), fourteen (14), fifteen (15), twenty-two (22), twenty-three (23), twenty-six (26), and twenty-seven (27), being in township twenty-eight (28) north of range nine (9) west, in the township of Whitewater, Grand Traverse County, state of Michigan;

Sections four (4), five (5), six (6), seven (7), eighteen (18), nineteen (19), twenty (20), twenty-eight (28), and thirty (30), being in township twenty-eight (28), north of range eight (8), west in the township of Clearwater, Kalkaska County, state of Michigan;"

Tax Information

The Company tax records show the Elk Rapids Hydro Plant property was assessed in 1957 as follows:

Parcel "A" (See Exhibit "A" - Parcel colored in blue)
Valuation \$60,000.00; Total tax for 1957 was \$1,333.20.

Parcels "B" and "C" (See Exhibit "A" - Parcels colored in red and yellow) Valuation \$65,000.00; Total tax for 1957 was \$1,444.30.

The total tax valuation in the year 1957 for the development of the fee land, dam, hydro and powerhouse amounted to \$125,000.00 and the tax paid amounted to \$2,777.50.

Original Cost

The Plant Accounting Department has supplied the following original cost figures on the property:

<u>Acct.</u>	<u>Title</u>	<u>Original Cost</u>	<u>Estimated Accrued Depreciation</u>	<u>Original Cost Less Depreciation</u>
<u>Hydro Production Plant</u>				
320	Land and Land Rights	\$ 1,503.37	-	\$ 1,503.37
321	Structures and Improvements	39,545.39	43,712.04	24,762.71
322	Reservoirs, Dams and Waterways	79,762.20	46,074.50	24,331.26
323	Water Wheels, Turbines and Generators	64,730.73	21,923.59	42,312.14
324	Accessory Electric Equipment	51,751.55	6,311.04	44,370.31
325	Misc Power Plant Equipment	293.47	17.59	235.03
	Total Hydro Production Plant	\$236,582.31	\$ 87,474.26	\$149,278.05
<u>Distribution Plant</u>				
351	Structures and Improvements	\$ 2,173.30	\$ 209.67	\$ 1,963.63
354	Station Equipment	62,279.63	22,825.05	39,394.57
	Total Distribution Plant	\$ 64,452.93	\$ 23,104.73	\$ 41,348.20
	Grand Total	\$301,005.24	\$110,578.99	\$190,426.25

GENERAL OBSERVATIONS

The Elk Rapids Dam and Hydro Plant on the Elk River are located at Elk Rapids, Michigan. The dam is an earth embankment dam with a 10-foot nominal head. (The respective owners of said dam have maintained the head at 11 feet 95% of the time since the dam was built.) The dam has a spillway with three timber lift gates (3 feet wide by 8 inches thick by 6 feet high) between concrete piers.

The hydro plant has a capacity of 1650 hp, 1050 kw produced by four turbines, one Leffel vertical turbine, 270 hp, and three Leffel vertical turbines, 460 hp; four generators, one Electric Machinery Company generator 2300 v, 150 kw; one General Electric generator, 2300 v, 300 kw and two Westinghouse generators, 2300 v, 300 kw.

In front of the power plant, crossing the headrace and formerly part of Highway US-31, is a cantilever iron bridge. This bridge was built by the Joliet Bridge and Iron Company in 1913. It is 26 feet wide; 17-1/2 feet in width for automobile traffic and the balance for providing a walk for pedestrians, including a guardrail protecting the pedestrians from automobile traffic and providing protection from the edge of the bridge. A search of the village records from 1900 through 1924 and the minutes of the meeting of the Board of Supervisors for the County of Antrim disclosed that (1) November 8, 1913 the Village of Elk Rapids paid to the Joliet Bridge and Iron Company the sum of Eighteen Dollars (\$18.00) for stone that had been placed on the ground at the ends of the bridge; (2) September 12, 1914 the Village paid to L. C. Manross the sum of Two Hundred Fifty Dollars (\$250.00) for dredging the tailrace below the Elk River Iron Company's sawmill.

Mrs. Holmes, the Village Clerk of Elk Rapids, (she worked for the Consumers Power Company for some time prior to her reaching the retirement age and she has always been a resident of Elk Rapids, Michigan) stated that both bridges, the one crossing the dam and the one crossing the race are state owned and maintained. She is positive too, of her own knowledge, that the village never paid anything for the upkeep of the bridges.

Since 1860 or thereabouts the one issue not settled is whether or not the Elk River and all lakes and connecting streams are navigable waters. The State of Michigan; the War Department of the United States; and the United States Engineering Office all claim that they are navigable waters. The successive owners of the dam claim that they are not navigable waters, but have complied with all requests to maintain an 11-foot head at said dam. There has never been a court determination of this issue, but one predecessor owner having submitted to the authority of the United States Army, it is quite probable that should a court be asked to decide, their decision would be, navigable.

DISCUSSION OF THE LAW

The discussion of the law found in the reports entitled "Chappel Dam and Power Plant and Properties" dated June 16, 1958 and "Alverno Dam and Hydro Plant and Properties" dated September 2, 1958, can be summed up by the three following rules:

1. An owner below the dam from whose land water is diverted for the prescriptive period by the erection of a dam acquires a reciprocal easement to be free from that servitude.

2. Owners of lands which are flooded for the prescriptive period by the erection of the dam acquire no reciprocal easement to have the flooding continued for their benefit.

3. The State of Michigan follows the majority rule, that is: "That the owners of a dam have no duty to maintain the same for the benefit of other landowners."

However, in addition to these rules, because of the possible navigability of these waters, and because of the numerous lakes in the vicinity, and because of the fact that there is a bridge across the headrace, we must consider Act 194 of the Public Acts of 1939, "The Control of Inland Lake Levels," and the Federal Statute No. 246 entitled "An Act to Regulate the Construction of Dams Across Navigable Waters," and Section 254.27 C.L. 1948 "Bridge Over Race."

Since the dredging of the channels between the lakes by the State of Michigan, the maintenance of the dam at an eleven foot head is an absolute necessity in order to keep the lake levels up. The pertinent part of Act 194, Public Acts of 1939 is as follows:

"An Act to provide for the determination and maintenance of the normal height and level of the waters in inland lakes of this state, for the protection of the public health, safety and welfare and the conservation of the natural resources of this state; to authorize the building and maintenance of dams and embankments to accomplish such purposes; to authorize the acquisition of lands and other property by gifts, grant, purchase or condemnation proceedings; to authorize the raising of money by taxation and by special assessment for the purposes of this Act; to prescribe the duties and powers of the Boards of Supervisors, the Conservation Commission of Michigan and County Drain Commissioners with reference hereto; and to repeal certain Acts and parts of certain Acts."

Section I

(a) "The normal water level of any inland lake is defined to be such a level as, considering the height above sea level established by government surveys; the water line as distinguished by old surveys; testimony of old inhabitants; the extent to which drainage and other artificial causes have increased the natural ground water table of the areas; the extent to which the natural causes have either decreased or increased the natural ground water table, and all other pertinent surrounding facts and circumstances, would provide the most benefit to the public and best protect the public health, welfare and safety and which will best preserve the natural resources of this state."

(b) "A public inland lake is defined to be such an inland lake as is available and accessible to the general public for navigation, fishing, hunting and other lawful purposes and such as is reasonably capable of supporting a beneficial public interest." (C.L. 1948, Section 281.101 - MSA 11.221)

Section II

"The Board of Supervisors of any county in which the whole or any part of the waters of any inland lake is situated and/or the State Conservation Commission may for the protection of the public health, welfare and safety and the conservation of the natural resources of this state determine and cause to be determined the normal height and level of the waters in such inland lake and construct and maintain sufficient dams or embankments upon and along the shores and across and through any such lake to keep and maintain the water in such lake at its normal height and level." (C.L. 1948, Section 281.102 - MSA 11.222)

"Acquisition of property; construction and maintenance of dams or embankments. Sec. 4. The Board of Supervisors of any county in which the whole or any portion of the waters of any inland lake are situated may acquire in the name of the county, by gift, grant, purchase or by condemnation proceedings any existing dam which may affect the level of the waters in such lake and any or all sites for dams or embankments or other lands, easements, property or interests therein or appertaining thereto, needful or convenient in order to carry out the purposes of this act, and may proceed, as hereinafter provided, to cause

to be constructed and maintained any dam or embankment that may be determined by said board to be necessary for the purpose of maintaining the normal height and level of the waters of any such lake, as provided in Section 2 hereof: (Provided, That such dam or embankment may be constructed and maintained in a county next adjoining the county in which such lake or part thereof is located.)" (C.L. 1948, Section 281.104 - NSA 11.224)

(There are eighteen more paragraphs in this Act and they deal for the most part in setting up rules and regulations for the enforcement of the Act.)

If it can be said that the Elk River is a part of the navigable waters of the United States, then it is subject to Act No. 246 USCA, which is an Act to regulate the construction of dams across navigable waters.

A few of the rules found in court decisions of the United States are as follows:

1. All rivers which are found to be of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they float a market, or which are capable of use for the floating of vessels, boats, rafts, logs, or which are subject to the free and unobstructed navigation of the public, independent of usage or of legislation.

2. All waters navigable for pleasure boating must be regarded as navigable waters.

3. The navigable waters of the United States are such as are navigable in fact and which by themselves or in connection with other waters form a continuous channel for the commerce with foreign countries or among states.

4. A navigable river in this country is one which is used or is susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the mode by which trade is conducted upon it whether steamer, sailing vessels, or flatboats, nor upon the difficulties attending navigation, but upon the fact that whether the river in its natural state is such that it affords a channel for useful commerce.

The section of law governing bridges that are built across headraces, is as follows:

"It shall be the duty of all owners and occupiers or possessors of mill or other waterworks where race or

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racess appertaining to the same may cross a public highway, to keep and maintain a good and sufficient bridge or bridges over same, except where mills have been erected and races dug previous to the formation of said highway." (C.L. 1948, Section 254.27 - MSA 9.1197)

RIGHTS AND LIABILITIES OF THE COMPANY

(a) The original dam was built in 1862, (See Page 1). The Elk Rapids Iron Company deeded to the Township of Elk Rapids the land necessary to build a road (M-17) which later became Highway US-31. The present bridge over the race was constructed in 1913, therefore, as the race was in existence before the necessity of the bridge, the owners of the dam are not liable for its original cost or the maintenance thereof.

(b) The State of Michigan appropriated a large amount of state lands, and the channel between several lakes was deepened and widened on the basis of an eleven-foot head being maintained at the Elk Rapids Dam (See last paragraph, Page 1). Round Lake, Torch Lake, Clam Lake, Grass Lake and Elk Lake being inland lakes, their levels would be controlled by Act 194, PA 1939, (See Pages 16, 17 and 18). This Act gives the power to the Board of Supervisors or the Conservation Commission to take over the dam by condemnation if necessary.

(c) If we hold that the Elk River is a navigable river, and it was conceded to be one by the Elk Rapids Iron Company in 1916, (Page 2, Paragraph 1), before any changes are made in the dam itself or the race, permission must be obtained from the Secretary of War of the United States through the District United States Engineer's Office.

RECOMMENDATIONS

If the Company at some future time decides that it is no longer necessary to maintain the hydro plant at Elk Rapids; because of the rights and liabilities discussed above and because of the agreements with the Village of Elk Rapids (See Pages 6, 7 and 8) it is respectfully suggested that the hydro plant be dismantled; that the Village of Elk Rapids authorities be contacted as they might be interested in purchasing the Company's properties in the Village of Elk Rapids. It must be kept in mind that any conveyance of this property should be made by Quitclaim Deed reserving all necessary easements for transmission lines. Consideration should also be given to including in the instrument a clause providing that the land would revert to Consumers Power Company if it is ever used for the propulsion of machinery or the generation of electricity by the use of water power. It would also be necessary to secure a release from the trust indenture of all property sold.

JFR/mlh

John P. Riley