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**OBJECTIONS UNDER 36 CFR, SECTION 218 FOR CITY OF BEND
OUTBACK SITE CONVEYANCE ENVIRONMENTAL ASSESSMENT AND
DECISION NOTICE**

This objection is made by: Paul Dewey
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The name of the proposed project is:

City of Bend Outback Site Conveyance No. 67749

The name and title of the responsible official are:

Ms. Holly Jewkes, Forest Supervisor
Deschutes National Forest
Bend-Fort Rock Ranger District

April 7, 2026

The following Objections are to the February 2026 “City of Bend Outback Site Conveyance Environmental Assessment” and “Draft Decision Notice and Finding of No Significant Impact for the City of Bend Outback Site Conveyance Environmental Assessment.” Objector timely submitted comments on September 4, 2025.

At risk here is the dewatering of Tumalo Creek, a critical cold water tributary to the Middle Deschutes. The cold water helps support fish populations and the Creek and Tumalo Falls are important community and tourist attractions.

**First Objection: Inadequate Assessment of Direct, Indirect or
Cumulative Effects of the Reasonably Foreseeable
Action of the Proposed Hydro System**

There is no dispute that the proposed installation of in-conduit hydroelectric generation facilities is a reasonably foreseeable action. The EA states:

“The future development of the site may include an installation of in-conduit hydroelectric generation facilities that would use existing water already being diverted to the Outback Site, discussed in more detail below. The following information is disclosed by the City as a reasonably foreseeable action that is anticipated to occur, if the land is transferred from the FS to the City through the Townsite Act.” (EA 62)

“[I]nitial investments will focus on the resiliency measures of pre-treatment infrastructure and in-conduit hydropower[.] . . . The first phase of future development of the site may occur in the next five years and, therefore, is reasonably foreseeable.”

Following the finding of “reasonably foreseeable,” the EA then concludes that there are no direct, indirect or cumulative impacts.

“The FS finds that there are no direct, indirect, or cumulative impacts from the reasonably foreseeable activities considered for the 48-acre Proposed Expansion Area and that the Proposed Action has many environmental benefits, as described.” (EA 65)

The EA further concludes that there are no direct, indirect or cumulative effects because there are permitting processes in place:

“The FS has considered impacts of reasonably foreseeable future projects at the site, including in-conduit hydropower, and finds that the federal, state, and local permitting processes are in place; therefore, there are no direct, indirect, or cumulative impacts.” (EA 65)

There are no relevant processes identified or adequately explained in what way permitting processes can satisfy “direct, indirect or cumulative impacts.” To justify its claim that there will be no environmental effects or direct, indirect or cumulative effects by the hydropower generation, the EA relies on a City of Bend Municipal Code and a Forest Service Intake SUP allegedly limiting diversion to 18.2 cfs.

“No additional surface water can be diverted for the generation of hydropower beyond what is otherwise authorized. Under City of Bend Municipal Code and its FS Intake SUP (BEN1158), City flows are limited to the maximum of the demand ‘for municipal use,’ up to a maximum rate of 18.2 cfs from the Bridge Creek POD (see City of Bend Municipal Code §14.10.090).” (EA 65)

In response to this assertion, Objector presented detailed analyses showing the impermanence of the allowable rate. Objector identified the direct, indirect or cumulative effects of withdrawals from Tumalo Creek for hydropower, as identified by water law expert, Martha Pagel. She explained how diverted flows can be assumed to increase for hydro. The EA did not explain the environmental impacts of diminished flows on the Creek.

The stated limit of 18.2 cfs is critical to this EA because it affects how environmental effects are assessed. In earlier litigation on the City's diversion system, the plaintiffs argued that the effects of hydro use needed to be assessed in a cumulative effects analysis. The response by the City was to drop its pending hydro application and the Forest Service did not require the analysis since there were no plans for hydro. A cumulative effects assessment of the overall diversion system and hydro use has still not been done.

A central concern about development of hydro on the City's Tumalo/Bridge Creek system is that generation of hydro proceeds will create an incentive to expand diversions that will affect the Creek systems, including flows over Tumalo Falls.

See also the attached five-page, single-spaced letter from the Oregon water law attorney, Martha Pagel, who was also the Director of the Oregon Water Resources Department for eight years. In her letter of May 9, 2013, attached as Exhibit A to Objector's 9/4/25 submittal, she presented a detailed analysis of Oregon water law and of the City's water rights to show why it cannot be assumed that the 18.2 cfs flow will not be increased:

"Despite these proposed limitations [18.2 cfs], the infrastructure is designed for a 100-year use period and the 30-inch pipe is capable of diverting up to the full 36.1 cfs that is currently authorized under the City's surface water rights. Given this background, you have asked whether the EA is deficient in failing to assess the potential impacts of water use to the full extent authorized by the City's water rights." (Ex. A, p. 1, of Objector's 9/4/25 submittal)

Ms. Pagel further wrote:

"In addition, even if the Forest Service were to include a condition in the SUP to limit the City's water withdrawal to 18.2 cfs, such a limitation would be in place only for the term of the SUP or until it is amended and would not appear to be binding on either the City or Forest Service for any subsequent renewal of the SUP or similar land use authorization. Since the proposed new intake structure would otherwise

be capable of diverting twice that amount of water, and the City's water rights would permit such use, it seems necessary for the EA to address that potential use scenario. At a minimum, the EA should examine whether such a contractual limitation would be enforceable in the absence of similar changes to the City's water rights. Unless the City were to take action to voluntarily abandon a portion of its water rights, nothing the City or Forest Service might agree to in the SUP conditions would alter the City's legal authority under its water rights to divert up to the full amount of up to 36.1 cfs during the irrigation season and 21.0 cfs during the non-irrigation season. It seems unlikely the city contemplates, or would be willing to, voluntarily reduce its water rights in this manner. The use of a 30-inch pipe suggests the opposite intent. Similarly, although it is reasonable to assume the Forest Service has authority to condition the size of facilities to be authorized under an SUP, it is unclear whether the Forest Service would have additional authority within the scope of an SUP to limit the use of such facilities once constructed." (Ex. A, p. 2, of Objector's 9/4/25 submittal)

It should be emphasized that what is being sought here is not a Special Use Permit but rather an actual grant of land for hydropower use where the ownership would be exclusively that of the City. The Forest Service would lose any control over that hydropower development use.

Ms. Pagel concluded:

"As described above, the proposal to include a condition in the SUP that would limit the City's water diversion rate to a maximum of 18.2 cfs year-round raises a number of potential legal and operational questions from the standpoint of Oregon water law and the City's water rights that should be further addressed in the EA process. Such a rate limitation would be inconsistent with the City's authorized water use under its state-issued water rights and could call into question the City's ability to obtain final certificates of water rights for its inchoate and unperfected permit rights. The proposal also raises questions about the authority of the Forest Service to include and enforce conditions that would purport to limit use of facilities that were otherwise authorized and constructed to convey substantially higher flows, and the City's proposed technical justification for the 18.2 cfs appears to be inconsistent with prior water management and planning reports." (Ex. A, pp. 5-6, of Objector's 9/4/25 submittal)

In response, all that the EA stated was:

“All reasonably foreseeable uses by the City on the lands proposed to be conveyed, including potential future construction of additional potable water facilities and in-conduit hydropower, are premised on the City’s existing regulations that limit the City’s rate of water intake to 18.2 cfs. Changes to these regulations, including City resolutions and ordinances, are not proposed and are not considered to be reasonably foreseeable and, therefore, are not evaluated as potential indirect effects of the Proposed Action.” (EA 74)

As recently as 2012, though, the City attempted to increase its diversion of Tumalo Creek water to 21 cfs and the Forest Service approved it. When the City withdrew its request to 18.2 cfs, the Forest Service stated that if more was later requested then a new EA could be done. (9/4/25, p. 2, and Ex. B)

There is simply no basis for the EA to claim that changes in the City regulations are not reasonably foreseeable. Because of that, at a minimum there needs to be environmental analyses of impacts due to various amounts of diversions. Rejecting this analysis, the EA states at page 65: “No environmental impact due to in-conduit hydropower construction or operation is anticipated.” The EA does not even mention Ms. Pagel’s thorough analysis, let alone respond to it.

Instead, the EA seems to confirm her assessments by making an argument that presumes taking more water than 18.2 cfs as a purpose of this project.

“The City has outlined several needs (EA, Chapter 1) to continue to provide water under the existing and future conditions, which included continued population growth.” (EA 75) (emphasis added)

“The purpose and need of this project is to respond to the City’s application to acquire a 48-acre parcel of NFS land to accommodate future population growth and infrastructure needs.” (EA 77) (emphasis added)

Second Objection: Mitigating Effects Not Adequate

Though the EA claimed there are no direct, indirect or cumulative effects, it then assumed that those effects here can be mitigated. The EA cited “the mitigating effects of the applicable State and local laws, zoning ordinances, covenants, and standards. (FSH 5509.11 – Title Claims, Sales and Grants Handbook, §22.32).” (EA 64)

The EA errs in failing to identify what mitigating effects it actually considered and what specific provisions of federal, state and local laws, zoning ordinances, covenants, and standards it relied upon. The EA instead states in conclusory findings:

“The FS has considered impacts of reasonably foreseeable future projects at the site, such as in-conduit hydropower, and finds that the federal, state, and local permitting processes will be sufficient to address any negligible impacts as described below.” (EA 62-63)

“Future development at the Outback Site would be subject to the Deschutes County zoning regulations for the Outback Site, and the City’s own construction standards found in its Standards and Specifications. To install a hydroelectric project in or on a conduit delivery system, the City would have to apply to the Oregon Water Resources Department (OWRD) and submit a Notice of Intent to Construct a Qualifying Conduit Hydropower Facility to the Federal Energy Regulatory Commission (FERC).” (EA 63)

“The City’s Standards and Specifications apply to all City projects (see City of Bend Municipal Code 3.10.010). . . . These and other regulations including the County Code will apply to the City’s future development of the site, and the FS finds these regulations are sufficient to prevent indirect effects from the reasonably foreseeable future development.” (EA 64)

“If the City decides to pursue hydropower generation on the 48-acre Proposed Expansion Area, the state water rights permitting process and the Deschutes County zoning ordinances are intended to analyze and mitigate environmental impacts, if any. OWRD is responsible for ensuring that the City complies with state water rights law. The intake SUP from the FS requires compliance with all applicable federal, state, and local environmental laws and regulations as described above.” (EA 65)

Those findings are without basis. The Bend In-conduit Hydropower Feasibility Study Report (Jacobs 2024), at page 30, acknowledged that such administrative review does not necessarily mean a meaningful environmental review. Notably, the all-important FERC authority provides that the project would be exempted from federal requirements for preparing an EIS or EA, and “no federal resource agency consultation is required.” Likewise, no meaningful local or state review has been identified. The former Director of OWRD obviously saw no mitigation available from OWRD and addressed in detail in her letter the options for both the City and OWRD.

Unidentified general City and County development standards do not constitute meaningful environmental mitigation for dewatering the Creek. Even the EA acknowledges that the City and County standards apply to all City and County projects.

The mere existence of agencies which regulate various codes does not constitute “mitigation.” Specific code provisions must be identified which actually mitigate.

Third Objection: Mitigation Needed by Monitoring Flows and With Tumalo Irrigation District

In order for the EA to show that monitoring of water flows on Tumalo Creek could constitute a mitigation provision, Objector suggested that water flows over Tumalo Falls and from the Headwater Springs to the Falls could provide necessary information for management of the Creek. (9/4/25, p. 6)

The EA, however, rejected the Objector’s suggestion as beyond the scope of the project. The EA stated:

“The project is proposing land conveyance for development of additional above and belowground infrastructure . . . the City has not proposed and has not requested the FS consider or analyze a change to water diversion allocations. Therefore, monitoring water flows is out of scope of the project. This comment was not accompanied by evidence or documentation that the acquisition of this land would impact flows of Tumalo Creek.

There is nothing that prohibits such monitoring and it is directly relevant to water availability.

The EA concludes that there is no “evidence or documentation that the acquisition of this land would impact flows of Tumalo Creek.” To the contrary, what is involved here is use and operation of a hydropower facility which involves flows of water, not just land acquisition.

Another mitigation measure Objector recommended (9/4/25, p. 6) was for the City to implement City Council Resolution No. 2867 which called for a Tumalo Creek restoration subgroup to work with Tumalo Irrigation District (TID) on getting greater flows in the Creek. The response of the EA was to say TID was operating under its own Special Use Permit (SUP) and adjusting flows is outside the scope of this project. (EA 74-75) Not only does TID not have a Forest Service SUP, but where a central issue here is flows in Tumalo Creek it is hard to imagine a more appropriate mitigation measure than additional flows in the Creek.

Fourth Objection: Environmental Effects Analysis Not Considered

The environmental analyses done here was allegedly premised on the current allowable diversion rate of 18.2 cfs. As I pointed out in my letter of September 4, 2025, the City is actually currently diverting less water than the proposed maximum rate of 18.2 cfs during the year. Calculations of gallons of water currently diverted show a potential substantial increase in consumption of gallons of water. There has been no analysis of the environmental impacts of the amount of consumption of water taken under flow rates at 18.2 cfs or at greater flow rates. See Exhibit D and pages 4-5 of my letter of September 4, 2025, to which the EA did not respond.

Fifth Objection: Land Not Adjacent to or Contiguous to Community

36 CFS §254.20 requires that the proposed parcel to be conveyed be “adjacent to or contiguous to an established community.” The 1/19/26 Townsite Act Compliance memo (submitted after comments closed) contends the Proposed Action meets this requirement because the parcel “is located adjacent to land owned by the City.” (Memo, p. 4) Being located next to an isolated City-owned parcel over a mile away from the City limits (see the map at page 2 of the memo) does not meet the Act’s location requirement. The memo at page 5 also contends that the parcel “is adjacent to the community of Bend.” That is not correct, as the map shows.

Sixth Objection: Inadequate Range of Alternatives

There are several alternatives not considered by the EA or Decision Notice. They include doing a Special Use Permit rather than a land conveyance. The SUP has been used in the past at the Outback site and is used for diversions upstream. The Forest Service needs to be a player with influence over the City’s attempt to increase water use on the Creek. (9/4/25, p. 7)

Seventh Objection: Inappropriate Determination of Need

What is being objected to here is not needed roads or settlement ponds, or a project for piping to provide drinking water. It is instead a speculative means for the City of Bend to generate revenues. A city’s desire to take away federal lands so that it can make money on it for itself is not consistent under the Townsite Act. (9/4/25, pp. 5-6)

Whether there are suitable private or other lands is one of the criteria for applying the Townsite Act. The EA and DN must make a finding (explaining, not just concluding) that other lands are not available.

The EA also seems to find that a need may be the furtherance of the City's policy on reducing use of carbon fuels. Such a general policy like that, though, does not seem to be the kind of "need" anticipated under the Townsite Act. Virtually any project could have some component of a reduced carbon footprint.

That "need" also pales in comparison to the overwhelming and well-known need for adequate flows in the creeks and over the Falls during this period of climate change when natural systems are beginning to fail. The EA does not examine these competing "needs" or even mention natural flows.

Remedies

Additional possible remedies for this appeal, besides withdrawal of the hydro element of the proposed conveyance, is for the City and Forest Service to identify ways in which it could be guaranteed that the City and/or Forest Service would devise a way not to exceed 18.2 cfs. Probably the best remedy is for the City, TID and Forest Service to come up with a comprehensive plan for protection of Tumalo Creek flows.