124 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Utility District No. 1 of	Docket No. DI07-1-002
Pend Oreille County, Washington	Project No. 2225-012

ORDER DENYING REHEARING

(Issued July 18, 2008)

1. On April 21, 2008, Public Utility District No. 1 of Pend Oreille County, Washington (District), licensee for the Sullivan Creek Project No. 2225, filed a request for rehearing of our order of March 20, 2008,[1] which granted in part and denied in part several requests for rehearing of a declaratory order concerning the project's jurisdictional status. In that order, we affirmed the validity of the existing license and found that the entire project is subject to our mandatory licensing jurisdiction. The District contests these findings. For the reasons discussed below, we deny rehearing and clarify certain aspects of our March 20 Order.

Background

2. A detailed procedural history appears in our March 20 Order. Briefly, the Commission issued an original license for the Sullivan Creek Project in 1958. At the time of licensing, some of the project works, which the District's predecessor had operated for power generation for nearly fifty years under a Forest Service permit, were no longer being used to generate power at the site. At the District's request, the Commission licensed the Sullivan Creek Project for operation as a storage project to benefit generation at downstream projects, and included the unused facilities as project facilities for which the District had no immediate plans, but which might be used to restore power generation at the site after a feasibility study. Also at the District's request,

[1] *Public Utility District No. 1 of Pend Oreille County, Washington*, 122 FERC ¶ 61,249 (2008) (March 20 Order).

the Commission removed a requirement that the District obtain a special use authorization from the Forest Service for the unused facilities.

3. During the license term, the District made several attempts to restore generation at the site. In each instance, however, the District abandoned its efforts because the proposals were not economically feasible. In 2003, the District informed the Commission of its intent not to seek a new license for the project. The Commission issued a notice seeking applications from other interested entities, but no such applications were filed.

4. In October 2006, the District filed a petition for a declaratory order, requesting the Commission to determine that the existing license for the Sullivan Creek Project is void and that the project does not require licensing under section 23(b)(1) of the Federal Power Act (FPA).[2] Commission staff issued an order concluding that, although the project did not require licensing as a storage reservoir because its effect on downstream generation was not significant, the current license was valid when issued and should not be declared void.[3] Several parties, including the District and the Forest Service, filed requests for rehearing.

5. On March 20, 2008, we issued an order on rehearing, affirming staff's conclusions concerning the jurisdictional status of the storage reservoir and the validity of the existing license, and finding that the entire Sullivan Creek Project, including the unused generating facilities, is subject to our mandatory licensing jurisdiction. In response, the District filed a second request for rehearing. On May 19, 2008, the Forest Service filed a motion for leave to reply and a reply to the District's rehearing request. On May 21, 2008, American Whitewater filed a letter requesting that, if Commission staff recommends granting the District's rehearing request in whole or in part, the Commission provide an opportunity for other parties to brief new issues of fact and law raised in the District's request for rehearing.[4]

---

[2] 16 U.S.C. § 816(b) (2000).

[3] *Public Utility District No. 1 of Pend Oreille County, Washington*, 120 FERC ¶ 62,045 (2007).

[4] American Whitewater also objected to the District's May 15, 2008 request for an extension of time to provide a schedule for filing a surrender application. That request is still pending.

Preliminary Matters

6. As a general matter, a party may not seek rehearing of an order on rehearing, unless the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.[5] In this case, the matter at issue is whether the Sullivan Creek Project is required to be licensed. Commission staff, focusing on only the storage reservoir, concluded that it is not. Staff further found that the original license was valid when issued and should not be declared void. We affirmed staff's conclusions with regard to the jurisdictional status of the storage reservoir and the validity of the existing license. However, taking into account the additional unused generating facilities at the project site, we found that the complete Sullivan Creek Project is subject to our mandatory licensing jurisdiction. The District's petition for a declaratory order placed all of these matters in issue.

7. Our March 20 Order affirmed staff's findings concerning the jurisdictional status of the storage reservoir and the validity of the original license. Because our order did not change the result, but simply provided further explanation for the findings, rehearing does not lie with respect to those matters. Therefore, to the extent that the District reiterates earlier arguments or raises new arguments concerning them, we dismiss its request for rehearing and address those arguments only where we find that further clarification would be helpful. With regard to our finding that the complete project requires licensing, however, our March 20 Order modified the result of the earlier order and is thus subject to rehearing. Accordingly, we address the District's new arguments concerning the need to license the complete Sullivan Creek Project.

8. Our rules do not allow answers to requests for rehearing, unless otherwise ordered by the decisional authority.[6] In this case, however, the Forest Service manages the land on which the project works are located, and is thus in a position to provide information helpful to the Commission in understanding and resolving the issues.[7] To ensure that the record is as complete as possible, we grant the Forest Service's motion for leave to reply and consider its reply.

---

[5] *California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,248, at P 10 (2007).

[6] 18 C.F.R. § 385.213(a)(2) (2008).

[7] *See, e.g., New York Power Authority*, 105 FERC ¶ 61,102, at P 2 (2003).

9. We dismiss as moot American Whitewater's request that, before granting rehearing in whole or in part, the Commission provide an opportunity to brief new issues of fact and law. As discussed below, we deny the District's rehearing request in its entirely. There is therefore no need for additional briefing.

The Complete Sullivan Creek Project

10. In our March 20 Order, we found that the complete Sullivan Creek Project includes not only Sullivan Lake and Mill Pond (the two storage reservoirs), but also the power facilities that were included in the license for possible future use (a diversion dam and conduit, power conduit, forebay, penstock, powerhouse, and transmission facilities). We found that, because the latter facilities were part of a complete unit of development that had been used for power generation for 46 years, and could again be so used if repaired and returned to service, these physical structures were project works that were constructed, maintained, and operated on U.S. lands for the purposes of developing electric power, and that these structures could not lawfully continue to occupy U.S. lands without either a Commission license under FPA section 23(b)(1) or a special use authorization from the Forest Service.

11. The District takes issue with this conclusion, arguing that the "complete" project cannot require licensing because the facilities other than the reservoirs were not licensed as project works, were not included wit hin the approved project boundary, were included within separate "proposed" boundaries solely for investigation of possible redevelopment, and were not used for power generation during the license term. In making these arguments, the District misunderstands or mischaracterizes the findings in our March 20 Order.

12. Under section 23(b)(1) of the FPA, it is unlawful to construct, operate, or maintain any hydroelectric project works on federal lands for the purpose of developing electric power without a license from the Commission. In addition to the two storage reservoirs, some of the unused generating facilities are located on U.S. lands. It is well settled that, if any part of a hydroelectric project is located on U.S. lands or reservations, the entire project must be licensed.[8]

[8] *See* 122 FERC ¶ 61,249 at P 14 n. 12, and cases there cited. As discussed in our March 20 Order, the complete Sullivan Creek Project as originally constructed and operated includes not only the Sullivan Lake Dam and Reservoir and the Mill Pond Dam and Reservoir, but also the Sullivan Creek diversion dam and conduit, the power conduit

(continued…)

13. The District argues that the discontinued facilities cannot be considered part of the complete Sullivan Creek Project, because they were not listed as licensed project works or included as part of the complete unit of development in the license order. The District maintains that, instead, only the two storage reservoirs and their associated dams were listed as licensed project works, and that the license was issued solely for the purpose of operating the storage reservoirs for generating power at downstream projects (other than the Sullivan Creek Project). The District further asserts that there was never any doubt that an application for a new license or a license amendment would have been required to restore generation at the Sullivan Creek Project. Consequently, the District maintains that the discontinued project works could not be considered part of a complete project that is subject to the Commission's mandatory licensing jurisdiction.

14. As an initial matter, we conclude that the District is estopped from arguing that the generating facilities are not project works that are required to be licensed. As discussed in our March 20 Order, when the District applied in 1957 for a license for the Sullivan Creek Project, it included a descriptive Exhibit K which included the generating facilities within the project boundary. In the 1958 license order, the Commission directed that the exhibit be revised to exclude those facilities, which it characterized as abandoned, "since it does not appear that Applicant has any immediate plans to for [their] use," and indicated that the District needed to obtain authorization from the Forest Service for the continued occupancy by the facilities of United State lands.[9] On rehearing, and before accepting the license, the District asserted that the generating facilities had never been abandoned, and asked that they be included in the license. The District also took issue with the conclusion that it needed to obtain Forest Service authorization to maintain the facilities. The Commission acceded to the District's requests.[10] As we explained in the March 20 Order, the District cannot for some 50 years reap the benefits of having the

---

from Mill Pond to the forebay, the forebay, horseshoe tunnel, steel penstock, powerhouse, and transmission facilities. All three dams, as well as the Sullivan Creek diversion conduit and nearly half of the power conduit, are on U.S. lands administered by the Forest Service. The remainder of the power conduit and the forebay, powerhouse, and transmission facilities are located on lands owned by the District.

[9] *Public Utility District No. 1 of Pend Oreille County, Washington*, 20 FPC 753, 754 (1958).

[10] *See Public Utility District No. 1 of Pend Oreille County, Washington*, 21 FPC 283, 284 (1959).

generating facilities under license (at a minimum, satisfying the District's desire not to be required to obtain Forest Service authorization with respect to them, allowing the District to maintain its water rights for power generation, and enabling it to protect the property from mining claims that might be inconsistent with restoring the project to service)[11] and now assert that they never required licensing.

15. We are also unclear as to the distinction that the District draws when it admits that the generating facilities are "project facilities," but denies that they are "project works." Although the District used the term "project facilities" in its request for modification of the 1958 license order, it does not appear in the FPA, nor is it a term of art that we use. The generating facilities may not have been in use during the term of the Sullivan Creek license, but, as works that are part of a complete unit of hydropower development and that were built for no other purpose than the generation of electric power, they remain project works that were maintained "for the purpose of developing electric power" within the meaning of FPA section 23(b)(1).[12] The fact that the District never carried out its plans to return the units to service does not detract from their status as project works. Where a license seeks to remove project works from a license, it must seek Commission authorization to do so.[13] The District never sought such authorization.

---

[11] As demonstrated in correspondence accompanying the District's rehearing request, the District was concerned that the Commission's description of the discontinued facilities as abandoned might negatively affect its water rights, which were based on use for power generation, and that a special use authorization from the Forest Service would not preclude mining claims that might be inconsistent with use of the property for power generation, as would a license. *See* letter from V.P. Campbell, District, to J.H. Gutride, FPC (Dec. 12, 1958) (include as Exhibit B to the District's rehearing request). As the Forest Service points out, the District successfully argued in a recent case that it did not abandon its water rights for power generation. *See Public Utility District No. 1 of Pend Oreille County v. State of Washington,* 146 Wash.2d 778, 51 P.3d 744(2002).

[12] Significantly, that section uses the term "developing," rather than "generating" electric power in describing the purpose for which project works may not be maintained without a Commission license. In our view, the District clearly maintained the generating facilities on federal lands for the purpose of developing power.

[13] *See, e.g., Upper Peninsula Power Company*, 110 FERC ¶ 61,141 (2005). Under the District's theory, a licensee could remove from a license facilities that have become inoperable, without first seeking our concurrence that doing so would be in the public

(continued…)

16. Moreover, the District mischaracterizes or misunderstands the basis of our March 20 Order. We did not find that the unused generating facilities were listed in the license as currently operable project works or that the District could use them for power generation immediately, without any further authorization from the Commission. Rather, we found that they were part of a complete unit of development that had been constructed, maintained, and operated on U.S. lands to generate power for over 46 years, and could once again be so used if restored to service.

17. At the time of licensing, the District had the option of either including these facilities in the license with appropriate provisions to reflect their status as project works that might be returned to service, or obtaining a special use authorization for them from the Forest Service. At the District's request, the Commission included the generating facilities in the license, with license articles specifically designed to reflect their special jurisdictional status as project works not currently authorized for immediate use, but which might later be returned to service after a feasibility study. The District, at its own request has reaped the benefits of Commission jurisdiction for 50 years, and cannot now be heard to object to the very regulatory regime that it fought to obtain.

18. The District next argues that the generating facilities were never operated for the purpose of generating power at the Sullivan Creek Project. This is incorrect. The record is clear that these facilities were operated for power generation at the project site for 46 years under a Forest Service permit. What the District apparently means to say is that the District itself never operated the generating facilities for power generation under the license that the Commission issued for Project No. 2225. This is correct, and moreover is entirely consistent with the holding of our March 20 Order. We did not, and need not, find that the District ever operated these facilities as licensed project works in order to conclude that they are part of a complete unit of development that is subject to our mandatory licensing jurisdiction in the unique circumstances presented in this case. Rather, our holding derives from the fact that these facilities were constructed, maintained, and operated by the District's predecessor on federal land for the purpose of generating power at the Sullivan Creek Project, the District acquired them as part of a complete project, and the District requested that they be included in the license so that it

---

interest. We do not allow such actions. *See Southern California Edison Company*, 106 FERC ¶ 61,212 (2004).

could continue to maintain them on federal lands for possible future use as generating facilities without the need to obtain a new Forest Service permit.[14]

Project Boundary Issues

19. The District argues that the discontinued facilities are not included within the approved project boundary for the Sullivan Creek Project. The District maintains that the approved project boundaries for the Sullivan Creek Project are shown by a solid line on the project maps and that this solid line encompasses only the Sullivan Lake dam and reservoir, Outlet Creek, and the Mill Pond dam and reservoir. According to the District, all of the discontinued facilities were included within separate dashed lines which were identified as "proposed project boundaries during investigations,"[15] indicating that these facilities were not included within the project boundary.

20. The District's argument reflects an overly simplified view of the "approved project boundary" for the Sullivan Creek Project. In fact, the Commission approved three different types of project boundaries for the project; the project boundary for the storage project, a "restricted" project boundary around portions of Sullivan Lake, and "proposed project boundaries during investigation" encompassing the unused generating facilities. These boundaries are described in the order modifying the license order issued

[14] The District argues that neither the Commission nor the Forest Service has any legitimate interest or authority with respect to facilities that are located on lands owned by the District (the forebay, powerhouse, transmission facilities, and part of the power conduit). This is incorrect. Because these facilities are part of a complete project that is located in part on federal land and thus requires licensing under section 23(b)(1), the District must file a surrender application for the complete project, not merely the parts of the project that are located on federal land. Moreover, if any part of the project is located on forest lands, the Forest Service has the authority to impose mandatory conditions on the entire project during licensing. *See City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

[15] District's request for rehearing at 15.

on March 2, 1959,[16] and the order approving revised Exhibit K maps issued on May 4, 1960.[17]

21. Commission regulations provide that the project boundary must enclose "only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources."[18] Clearly, project purposes include much more that merely the generation of power, and often must accommodate other non-power objectives. In this case, although the Commission licensed the Sullivan Creek Project for operation as a storage project to benefit downstream generation, it also included the generating facilities in the license as project works for which the District had no immediate plans for use, but which might be restored to service after investigation. Accordingly, project purposes included investigating the possibility of returning the generating facilities to service, and the project boundary in these circumstances therefore must encompass the discontinued project works that are the subject of investigation. The fact that these facilities are shown on the maps as enclosed within a broken lines and are designated as "proposed" project boundaries during investigation simply serves to distinguish them from those project works that comprise the storage facilities, and to reflect the project purpose of investigation.

22. Similarly, the restricted project boundary around portions of Sullivan Lake (depicted by shorter dashed lines and described as "present restricted boundaries") was intended to reflect an agreement between the District and the Forest Service to restrict the District's use of federal lands adjoining the reservoir, except for investigative purposes, during the period of investigation of a larger project. The solid "project boundary" line encompasses the entire reservoir, whereas the restricted boundary generally follows a line 10 feet horizontally back from the 23-foot contour, which defines the normal reservoir pool elevation of 2588.66 feet. The "restricted" project boundary is described in article

---

[16] *Public Utility District No. 1 of Pend Oreille County, Washington*, 21 FPC 283 (1959) (order modifying order issuing license and extending time for acceptance of license).

[17] *Public Utility District No. 1 of Pend Oreille County, Washington*, 23 FPC 660 (1960) (order approving revised exhibits and fixing annual charges).

[18] 18 C.F.R. § 4.41(h)(2) (2008); *see also* 18 C.F.R. §§ 4.51(h) and 4.61(h) (2008), both of which reference 18 C.F.R. § 4.41(h) (2008).

25 of the license, and is depicted in part on Exhibit K, sheet 2 of 3.[19] It pertains only to the land adjoining portions of Sullivan Lake, and falls entirely within the solid line that defines the project boundary for the storage project, but encompasses less of the land adjoining the reservoir.

23. Moreover, article 26 of the license expressly provides that, during the period of investigation of an increase in the size of the project, the boundary lines for such investigation shall be the original project boundaries as shown on Exhibit K, Sheets 1, 2, and 3, provided that, within this project boundary, the licensee may not conduct any exploratory or investigative activities which will interfere with existing special use permits and existing public use. As noted, the District initially sought to license the complete Sullivan Creek Project, including the generating facilities, and the project boundaries as initially depicted on the Exhibit K maps encompassed the complete project.[20] Several times during the term of the license, the District sought to restore generation at the site, concluding in each instance that the proposals were not economically feasible. However, the District never sought to file revised exhibits to change the project boundary. Accordingly, the possibility of increasing the size of the project remained open throughout the license term, and the original project boundaries remained in effect.[21]

---

[19] *See* Exhibit D to the District's rehearing request; the same map appears as Exhibit A to the Forest Service's reply. Beginning at point E-8 on Exhibit K, sheet 2 of 3, and continuing through to point E-16 on Exhibit K, sheet 3 of 3 (which neither party filed), the "restricted" boundary follows the solid "project boundary" line, indicating that the Forest Service saw no need to restrict the District's use of this portion of the land adjoining the reservoir during the period of investigation.

[20] Article 26 further provides that, in the event an increase in project size proves infeasible, the project boundaries shown on the map, with the restrictions shown in article 25, shall become the permanent project boundaries. As explained above, however, the feasibility issue has remained open throughout the license term.

[21] As the Forest Service points out, the filing of the District's license application created a power site reservation under section 24 of the FPA, 16 U.S.C. § 818 (2000). Section 24 protects the potential power value of U.S. lands. Reduced to its essentials, it provides that, if U.S. land, by virtue of a permit or license application or because of executive department action, is identified as having value for power purposes, it is reserved from "location, entry, or selection," which essentially means it is deleted from

(continued…)

24. In short, the Commission required and approved different project boundaries to accommodate different project purposes. Contrary to the District's assertion, this does not mean that the generating facilities were not included in the project boundary.

Consistency with the FPA

25. The District argues that our holding that the complete Sullivan Creek Project requires licensing is contrary to the plain language of the FPA. In making this argument, the District misunderstands or misapplies the provisions on which it relies, and ignores the articles specifically included in the license to address them.

26. The District correctly points out that, under sections 4(e) and 23(b)(1) of the FPA,[22] the Commission licenses "project works" rather than "projects" as such, and thus must identify with specificity the project works that are authorized for construction and operation under the license.[23] In this case, the operable licensed project works were the Sullivan Lake Dam and reservoir and the Mill Pond dam and reservoir. From this, the District reasons that, because the generating facilities were not listed as licensed project works authorized for immediate use under the license, they could not have any jurisdictional significance.

27. Implicit in this argument is that only operable licensed project works may be included in a license, and that the Commission has no authority under the FPA to include any special license conditions to cover project works that have been damaged and are not

---

the pool of land available for disposition by the government unless and until the Commission gives its consent. *See Clark Gruening*, 61 FERC ¶ 61,226 at 61,834-35 (1992). Pursuant to this section, the Commission issued a notice of land withdrawal on August 5, 1959, removing approximately 519.33 acres from future disposal. *See* Exhibit F to the Forest Service's reply. The withdrawal, which remains in effect, includes all of the U.S. lands on which project works of the complete Sullivan Creek Project are located, as included within the project boundary on the Exhibit K maps as originally filed. Thus, unless the withdrawal is vacated, these lands will continue to remain available for power purposes even after the District has surrendered its license.

[22] 16 U.S.C. §§ 797(e) and 816(b) (2000).

[23] *See* 122 FERC ¶ 61,249 at P 15; *see* also *Public Utility District No. 1 of Pend Oreille County, Washington*. 117 FERC ¶ 61,205 n.56 (2006).

currently being used, but which might be returned to service after a period of investigation. We disagree; we find nothing in those sections to preclude the license provisions that the Commission fashioned in this case at the District's request.[24]

28. The District next points out that, under FPA section 10(c),[25] the licensee must maintain the project works in a condition of repair adequate for efficient operation in the development and transmission of power throughout the license term, and that therefore, the Commission lacks the statutory authority to issue a license that would include inoperable facilities that were once part of a licensed project in order to allow an applicant to study the feasibility of rehabilitating or redeveloping them. Again, we disagree. In a typical case, the District would have been required to restore the generating facilities to service under FPA section 10(c) or face possible enforcement action. However, the District ignores the fact that the 1958 license involved a relatively unique situation in which the Commission allowed the District to include in the license the unused generating facilities as project works for which the District had no immediate plans for reactivation except under articles 30 and 31 of the license. The Commission included the latter articles to make it clear that these facilities (some of which were on federal land) were to be maintained under the license, but could not be used for power generation without further Commission authorization. Thus, these license articles were specifically designed to address the problem that FPA section 10(c) otherwise would have presented for the District. The facts that the Commission did not insist that the District either restore the facilities to use or remove them from the license, and that the

[24] The District asserts that articles 30 and 31 of the license were consistent with the Commission's authority under FPA section 4(g), 16 U.S.C. § 797(g) (2000). That section authorizes the Commission to order an investigation of certain matters pertinent to its jurisdiction, including any occupancy of, or evidenced intention to occupy U.S. lands for the purpose of developing electric power, and "to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region." Section 4(g) does not expand the Commission's jurisdiction over hydroelectric projects, but rather provides the Commission with the authority to assure compliance with its licensing jurisdiction. *See Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Co.,* 59 FERC ¶ 61,067 at 61,276-77 (1992). Thus, it would not provide an independent basis for including project works in a license, so as to avoid the need for a special use authorization to allow their occupancy of federal land.

[25] 16 U.S.C. § 803(c) (2000).

District elected to undertake neither of these actions, do not detract from the jurisdictional status of the facilities.

29. The District further maintains that, under FPA section 13,[26] a licensee must commence construction of the project works within the time fixed in the license, not to exceed two years after issuance, and that only one extension of time to commence construction of up to two years may be granted. The District argues that the generating facilities could not be subject to the Commission's mandatory licensing jurisdiction because, if they were project works, they would be subject to the time limits of FPA section 13. Once again, the District ignores the special jurisdictional status of the unused project works as provided in the license. These facilities were not licensed project works that could be used immediately under the license, but rather were project works that had been used in the past for power generation and might be returned to service after a feasibility study. The Commission included articles 30 and 31 in the license to clarify the special status of these formerly-used project works, as well as to avoid any possible conflict with the provisions of FPA section 13. As with its argument regarding FPA section 10(c), the District seeks to use the latitude afforded it by the Commission to prove that the Commission lacks jurisdiction. These arguments fail.

The Commission's Policy against Site Banking

30. The District argues that our holding that the complete Sullivan Creek Project requires licensing is contrary to the purposes of the FPA and the Commission's policy against site banking. In support, the District reiterates its argument regarding the time limits of FPA section 13, and asserts that the generating facilities could not be included in the license without violating this section and the Commission's policy. We disagree.

31. Site banking occurs when an entity that is unable to develop a proposed project ties up the project site, and thus prevents others from developing it.[27] This is inconsistent with the time limits for development of licensed projects under FPA section 13, which

[26] 16 U.S.C. § 806 (2000).

[27] *Mount Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 8 (2006). In that case, we applied this policy to deny a preliminary permit to an entity that had failed to commence construction of the project after having exclusive development rights for approximately 20 years, during 13 of which it held a license. *See also Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985).

reflect Congressional intent that water power resources be used in the best possible manner and at the earliest possible time. The essence of our policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it.

32. The District argues that, if the generating facilities were licensed project works, the clear import of our finding "is that the District has had the exclusive right under the license to restore the discontinued facilities to service at any time during the 50-year license term."[28] The District adds that this cannot be the case, because the District applied for authorization to redevelop power at the site, and the Commission accepted and processed its applications, thus demonstrating that the Commission did not consider the generating facilities to be licensed project works. Again, the District misconstrues our holding. We did not find that the generating facilities were operating licensed project works or that the license authorized the District to use them for power generation immediately, without the need for further Commission authorization. Given the prohibition in FPA section 6[29] on our altering licenses without the licensee's consent, we do not believe that we could have unilaterally transferred the District's facilities to another entity, nor can we imagine that the District would have idly allowed that to occur. In any event, if another entity had sought to redevelop power at the site, we would have been required to evaluate the proposal to determine whether it would interfere with the licensed project, or could coexist with it.[30]

33. At the time of licensing, the Sullivan Creek Project site was already being used to benefit generation at downstream projects, and the Commission licensed it for that

---

[28] District's request for rehearing at 20.

[29] 16 U.S.C. § 799 (2000)

[30] The District also argues that our holding implies that, under section 4.33(a)(2) of the Commission's regulations, the Commission could not accept a preliminary permit for the generating facilities because it would interfere with a licensed project in a manner that FPA section 6 would preclude, absent the District's consent. Our practice is to grant a preliminary permit to develop additional capacity at an existing project unless it is clear at the permit application stage that the development proposed would cause impermissible alterations of an existing license under FPA section 6. *See Kamargo Corporation*, 53 FERC ¶ 61,411, at p. 62,439 (1990). Thus, absent a specific proposal for review, we would be unable to determine whether such a permit application could be accepted.

purpose. Therefore, the site was already being used for hydroelectric generation. In these circumstances, we do not consider it significant for application of our policy against site banking that the license included additional facilities that might one day be returned to service after investigation. In our view, site banking would be an issue only if these facilities were included in the license as project works that the District was required to reconstruct immediately, and then failed to do so.

Consistency with Commission Precedent

34. The District argues that our March 20 Order is not consistent with Commission precedent. In that order, we relied on our decision in *Southern California Edison Company* [31] to find that "physical structures such as dams, flumes, canals, forebays, runnels, penstocks, and powerhouses do not lose their status as 'project works' under the FPA during temporary periods of non-generation, even if they have become damaged and are rendered inoperable."[32] The District asserts that this reliance is misplaced, because the facts in that case are distinguishable. Specifically, the District argues that in that case, the project works at issue were expressly authorized as licensed project works and had been used to generate power under the license until they were damaged in a series of natural events, after which the licensee decided not to seek a new license for the project. In contrast, the District argues that the generating facilities in this case were never included as licensed project works and were never used for power generation during the license term; thus, they were never "project works" and the more than 50-year period during which they were not used for generation could not be regarded as "temporary."

35. In our view, the District places too much emphasis on these distinctions. While it is true that the generating facilities were not listed as licensed project works in the license for the Sullivan Creek Project, the fact remains that they were used for power generation for more than 46 years, and the District specifically requested that the Commission include them in the project license as facilities that might once again prove useful for power generation. The District needed either a Commission license or a special use authorization to continue to maintain these facilities on U.S. lands without their constituting a trespass. The District preferred that they be included in the license, and we

[31] *Southern California Edison Co*., 106 FERC ¶61,212, at P 6 (2004).

[32] March 20 Order, 122 FERC ¶ 61,249 at P 17.

are unable to ignore their jurisdictional significance now that the license is about to expire.[33]

Need for an Orderly Transfer of Jurisdiction

36. The District takes issue with our conclusion in the March 20 Order that, even in the absence of a finding of mandatory jurisdiction over the complete project, the Commission has sufficient authority under the FPA to provide for an orderly transfer of jurisdiction over project facilities on federal lands. The District maintains that, in the transmission-line cases in which we have maintained jurisdiction over project facilities that occupy federal lands, the licenses were valid when issued because the lines fit the definition of primary transmission lines, but later no longer fit the definition because of a change in use that caused them to no longer be primary. Here, the District argues, there was never any valid jurisdictional basis that could serve as the foundation for the extension of the Commission's authority on a temporary basis to regulate the disposition of the facilities.

37. The District's argument is flawed in two respects. First, as we have found, the Sullivan Creek Project license was valid when issued, because it was consistent with the Commission's interpretation of its jurisdiction at the time of licensing. The Commission licensed the project as a storage project to benefit generation at downstream projects. The Sullivan Creek Project had a real and calculable effect on downstream generation, as

[33] The District also reiterates its argument that this case is similar to *Central Maine*, in which a storage reservoir that was not required to be licensed was not required to file a surrender application. *Central Maine Power Co.*, 81 FERC ¶ 61,087 (1997). The District takes issue with our statement in the March 20 Order that *Central Maine* is distinguishable because of the location of the Sullivan Creek Project on federal lands. *Public Utility District No. 1 of Pend Oreille County*, 122 FERC ¶ 61,249, at P 21 and n. 19 (2008). The District argues that the fact that a project is located on federal lands does not matter if the project does not meet the requirements of FPA section 23(b), citing *Georgia Pacific Corp.*, 91 FERC ¶61,047 at p. 61,172 n. 25 (2000)(storage reservoirs that are not necessary or appropriate with respect to downstream projects means that the reservoirs are not being maintained for the purpose of generating electricity so that section 23(b)(1) does not apply, regardless of the reservoirs' location on federal lands). In making this argument, the District considers only the storage reservoir, and ignores the additional generating facilities on federal land that make the complete Sullivan Creek Project subject to our mandatory licensing jurisdiction under section 23(b)(1) of the FPA.

established by the fact that the downstream projects received headwater benefits from the project and made payments to the District for those benefits. The fact that the Commission later adopted a percentage test for assessing the significance of a storage reservoir's effects on downstream generation that would define those benefits as insufficiently substantial is irrelevant. A license that was valid when issued, consistent with the Commission's understanding of its jurisdiction at the time, will not be declared void *ab initio*, even if the Commission subsequently adopts a different interpretation of its licensing authority.[34] Thus, as we affirmed in our March 20 Order, the Sullivan Creek Project license was valid when issued, and should not now be declared void.

38. Second, even if the Commission had lacked authority to issue the Sullivan Creek Project license at the outset, the Commission has long held that the FPA affords us sufficient authority to provide for the orderly transfer of jurisdiction over project facilities on federal lands.[35] At least in cases where project works have already been constructed, the Commission has declined to apply a finding of no jurisdiction retroactively, so as to

[34] *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 63-65 (D.C. Cir. 2006) (affirming validity of minor part license issued under narrow interpretation of licensing authority that the Commission later repudiated).

[35] *City of Phoenix, Arizona*, 59 FPC 1061, 1069-71 (1977). That case involved a license issued for a transmission line on federal lands that was not a primary line, and thus was never subject to the Commission's licensing jurisdiction. The Commission held that the license must be terminated, but in a manner that would avoid any disruption of service to those dependent on the line for their power needs. Among other things, the Commission relied on section 309 of the FPA, 16 U.S.C. § 825*h* (2002), which provides, in pertinent part, that the "Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." The administrative judge had proposed issuing annual license extensions until the Bureau of Indian Affairs could approve a right-of-way, but a subsequent settlement agreement provided for the necessary approval, and the Commission accepted the settlement and ordered that a copy of the easements be filed with the Commission, after which the license could be either surrendered or allowed to expire.

void a license.[36] In this case, where the discontinued project works are on federal lands and the District specifically asked that they be included in the license so that it would not be required to obtain a special use authorization from the Forest Service, we think it is entirely appropriate to retain jurisdiction over these facilities through the required issuance of annual licenses until the requisite permit can be obtained.

License Surrender

39. The District argues that, "[i]rrespective of whether the Sullivan Creek Project is subject to the Commission's licensing jurisdiction, the Commission does not have the authority to order the District to file an application for surrender and impose any conditions regarding the disposition of the Project that have not been agreed to by the District."[37] As the District correctly points out, section 6 of the FPA provides that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."[38] The District maintains that, as a result, the Commission may not compel a surrender proceeding and impose unilateral conditions on the disposition of project facilities. The District further asserts that, to the extent that the Commission's regulations or its decommissioning policy statement suggest otherwise, they are also inconsistent with FPA section 6.

40. As we have seen, the Sullivan Creek Project is subject to the Commission's mandatory licensing jurisdiction under section 23(b) (1) of the FPA. As a result, as we held in the *Southern California Edison*[39] case, FPA section 15(a) (1) requires the Commission to issue, and the District to accept, an annual license for the project, which

---

[36] *See Colorado Hydro-Power Corporation,* 41 FERC ¶ 61,321 at 61,850 (1987) (affirming order rescinding license where project construction had been neither started nor completed, but stating that the Commission has the authority to refuse to apply finding of no jurisdiction retroactively to completed projects or projects under construction); *Eagle Power*, 28 FERC ¶ 61,061 at 61,114 (1984) (declining to apply court finding of no jurisdiction retroactively to void exemptions for projects already under construction).

[37] District's request for rehearing at 28.

[38] 16 U.S.C. §799 (2000).

[39] *Southern California Edison Co.,* 106 FERC ¶ 61,212 at P 33 (2004).

may be surrendered under section 6 only upon mutual agreement between the licensee and the Commission. The annual license provision of section 15(a) (1) must be read as a means of preserving the "option of making a careful, deliberate judgment concerning disposition of a project at the end of an initial license term."[40] This is reflected in section 16.18 of our regulations, which provides that annual licenses will be issued to allow not only for the continued operation of a project while the Commission reviews any application for a new license, non-power license, or surrender, but also for the orderly transfer or removal of the project.[41] Similarly, our decommissioning policy statement expressly rejects the notion that section 6 gives the licensee a veto over what the terms of surrender are to be.[42]

41. In the recent *City of Tacoma*[43] case, the court reviewed our decommissioning policy and found that "Congress implicitly extended to FERC the power to shut down projects either directly, by denying a new license, or indirectly, by imposing reasonable and necessary condition that cause the licensee to reject the new license." In this case, the District sought to reestablish generating facilities at the project site and abandoned its efforts after it appeared that the license terms would render the project uneconomic. Thus, the District has made it clear that it no longer has any interest in developing power at the Sullivan Creek Project, and we find it difficult to understand how a surrender application in these circumstances could be regarded as unilaterally "compelled." In any event, when all of the relevant statutory provisions are considered, the FPA clearly requires that the Commission and the District must mutually agree on the terms of a license surrender for the Sullivan Creek Project.[44]

---

[40] *Lac Court Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission,* 510 F.2d 198, 206 (D.C. Cir. 1975).

[41] *See* 18 C.F.R. § 16.18 (2008); *see also* 18 C.F.R. § 16.26 (2008), which requires that if an existing licensee files a notice of intent to file a new license application and no one else files a new application, the existing licensee must apply to surrender the license.

[42] *See Project Decommissioning at Relicensing; Policy Statement* (Dec. 14, 1994), 18 C.F.R. Part 2, 60 Fed. Reg. 339 (Jan. 4, 1995), *FERC Stats. And Regs., Regs. Preambles Jan. 1991-June 1996* ¶ 31,011 at pp. 31,230-31.

[43] *City of Tacoma, Washington, v. FERC,* 460 F.3d 53, 84 (D.C. Cir. 2006).

[44] *See Southern California Edison Co.,* 106 FERC ¶ 61,212 at P 33 (2004).

42. Moreover, the District's concerns are premature. The Commission's practice is to require that a licensee file a proposed schedule for license surrender, and to propose in its surrender application the manner in which it intends to dispose of project facilities and restore the project site. The Commission then reviews the application, and may require additional measures as necessary or appropriate. The District has no basis for assuming that the surrender process, which has not yet begun, will in any way violate section 6 of the FPA. [45]

43. The District also argues that a surrender proceeding is unnecessary and duplicative, because the Forest Service has ample authority under the Federal Land Policy and Management Act and other laws to grant or deny a special use authorization to the District to authorize the unused project facilities to continue to occupy federal lands. The Forest Service disagrees, contending that its process is not duplicative, and cannot act as a substitute for a Commission surrender proceeding. In our view, the two processes are not duplicative, and can easily accommodate one another. Specifically, the Commission can require as part of the surrender process that the District obtain the necessary authorization from the Forest Service, and can make the surrender effective after that authorization is obtained.[46]

---

[45] If the licensee, by action or inaction, has clearly indicated its intent to abandon the project, but has not filed a surrender application, the Commission may invoke the doctrine of implied surrender to terminate a license. *See, e.g., Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Corporation*, 89 FERC ¶ 61,194 (1999).

[46] The District further maintains that the Commission's concern about the possibility of a trespass on federal land is unwarranted, because the Forest Service can authorize the temporary occupancy of national forest lands while it processes the District's application for a special use authorization and conducts its NEPA review for the development of appropriate conditions. In support, the District cites the Forest Service's regulations at 36 C.F.R. § 251.50 (2007). Significantly, the Forest Service disagrees, stating that the Sullivan Creek Project would not meet the criteria for a temporary authorization, because it would likely expire before a permanent authorization could be granted, the project works on federal lands are not temporary facilities, the project has numerous environmental impacts, and the project's two high hazard dams would not present a minimal risk to the government. *See* Forest Service's reply at 3-5.

The Commission orders:

(A) The request for rehearing filed on April 21, 2008, by the Public Utility District no. 1 of Pend Oreille County, Washington, in this proceeding is denied.

(B) The motion for leave to reply and reply filed on May 19, 2008, by the U.S. Department of Agriculture, Forest Service, in this proceeding is granted.

(C) The request for an opportunity to brief new issues of fact and law filed on May 21, 2008, by American Whitewater in this proceeding is dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.