

UNITED STATES OF AMERICA 157 FERC ¶ 62,217
FEDERAL ENERGY REGULATORY COMMISSION

Ochoco Irrigation District
Prineville Energy Storage, LLC

Project Nos. 14791-000
14453-001

ORDER ISSUING PRELIMINARY PERMIT,
DENYING APPLICATION, AND
GRANTING PRIORITY TO FILE LICENSE APPLICATION

(December 22, 2016)

1. On July 1, 2016, Ochoco Irrigation District (Ochoco) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Bowman Dam Hydroelectric Project No. 14791 (Bowman Dam Project) to be located at the U.S. Bureau of Reclamation's (Reclamation) Prineville Reservoir and Arthur R. Bowman Dam (Bowman Dam) on the Crooked River near Prineville in Crook County, Oregon. Ochoco claims municipal preference pursuant to Section 7(a) of the FPA.² On the same day, Prineville Energy Storage, LLC (Prineville) filed an application for a successive preliminary permit to study the feasibility of the proposed Prineville Pumped Storage Project No. 14453 (Prineville Project), which would also be located at Reclamation's Prineville Reservoir.

I. Project Proposals

2. Ochoco's proposed Bowman Dam Project would operate in a run-of-release mode within the constraints of the Reclamations' operating procedures. The project would use Reclamation's existing intake structure at the Bowman Dam and Prineville Reservoir. The project would consist of the following new facilities: (1) a 10-foot-diameter, 310-foot-long steel pipe inserted into Reclamation's existing intake tunnel; (2) a valve chamber; (3) a 9-foot-diameter, 108.44-foot-long steel penstock; (4) a powerhouse constructed on the bank adjacent to Reclamation's existing spillway containing two Francis turbine/generator units for a total capacity of 4 megawatts (MW); (5) a tailrace; and (6) an approximately 15-mile-long, 24.5-kilovolt (kV) transmission line interconnecting to the existing Central Electric Cooperative facilities. The average annual generation of the project is estimated to be 17.6 megawatt-hours (MWh). The project would occupy one acre of federal land administered by Reclamation.

¹ 16 U.S.C. § 797(f) (2012).

² 16 U.S.C. § 800(a) (2012).

3. Prineville's proposed project would be a pumped storage project that uses Reclamation's Prineville Reservoir as the lower reservoir. The project would consist of the following new facilities: (1) a 40-foot-high, 7,700-foot-long concrete-faced rockfill embankment creating a 64-acre upper reservoir; (2) a 15-foot-diameter, 1,400-foot-long low pressure tunnel; (3) two 11-foot-diameter, 1,880-foot-long high pressure conduits; (4) a powerhouse located 365 feet west of the Prineville Reservoir with two reversible pump turbine units for a total capacity of 200 MW; (5) a 600-foot-long, 13-foot-wide tailrace connecting with the Prineville Reservoir; and (6) a 15.6- to 16.2-mile-long, 115-kV transmission line interconnecting with the existing Ponderosa substation. The average annual generation of the project is estimated to be 525,600 MWh. The project would be located almost entirely on about 720 acres of federal lands administered by Reclamation.

II. Background

4. On July 19, 2013, Commission staff issued a preliminary permit to Prineville, which expired on June 30, 2016.³

5. On July 1, 2016, both Ochoco and Prineville submitted applications for preliminary permits that would utilize the Prineville Reservoir. Both applicants argued that the two proposals would not be in conflict with each other. However, as discussed further below, because both proposals would utilize the Prineville Reservoir, Commission staff issued a public notice of competing permit applications for Ochoco and Prineville's proposals on September 2, 2016. Oregon Department of Fish and Wildlife, Oregon Water Resources Department, and Oregon Department of Environmental Quality filed timely notice of interventions in both proceedings on September 14, 2016, October 25, 2016, and November 1, 2016, respectively.⁴ WaterWatch of Oregon, Trout Unlimited, and American Whitewater filed timely motions to intervene in both proceedings; and Ochoco, North Unit Irrigation District, and City of Prineville, collectively, filed a timely motion to intervene in the Prineville Project proceeding.⁵

6. On September 2, 2016, Ochoco filed a request for the Commission to reconsider its Notice of Competing Preliminary Permit Applications and instead issue separate notices for noncompeting projects. On October 31, 2016, Ochoco filed comments, again

³ *Prineville Energy Storage, LLC*, 144 FERC ¶ 62,055 (2013).

⁴ A timely notice of intervention filed by a state fish and wildlife agency is granted by operation of Rule 214(a)(2). 18 C.F.R. § 385.214(a)(2) (2016).

⁵ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2016).

arguing for the same reasons that the projects should not be considered competing, but that if they were, Commission staff should issue Ochoco a permit for its Bowman Dam Project because Ochoco is entitled to municipal preference and because Prineville failed to pursue activities under its previous permit term with due diligence.

III. Preliminary Matters

7. Under sections 4(e) and 4(f) of the FPA,⁶ the Commission has authority to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. The Commission's jurisdiction is withdrawn if federal development of hydropower generation at the site is authorized, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.⁷

8. The Bowman Dam and Prineville Reservoir are features of Reclamation's Crooked River Project. The Crooked River Federal Reclamation Project Act authorized the construction, operation, and maintenance of the Crooked River Project for "the purpose of furnishing water for the irrigation of arid and semiarid lands...and for other beneficial purposes."⁸ The statute does not reserve the development of hydropower to the United States, nor does it withdraw the Commission's jurisdiction to authorize projects. In fact, the statute makes no mention of the development of hydropower.

9. Where, as here, the authorizing statute for a Reclamation project does not mention hydropower development as a project purpose, then the Commission is presumed to have jurisdiction.⁹ The presumption can be overcome by other evidence, but none has been presented.¹⁰ Thus, the Commission is authorized to issue preliminary permits and licenses for non-federal hydropower development at the Crooked River Project.

⁶ 16 U.S.C. §§ 797(e) and (f) (2012).

⁷ See *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983).

⁸ Crooked River Federal Reclamation Project Act, Pub. L. No. 84-992, 70 Stat. 1058-59 (1956).

⁹ Presumption 1 of the 1992 Memorandum of Understanding entered into by the Commission and Reclamation to guide determinations of whether the Commission has authority to license proposed non-federal hydropower development at individual Reclamation projects. 58 Fed. Reg. 3269, at 3271 (1993).

¹⁰ In the proceeding for Prineville's previous preliminary permit, Reclamation stated that it has no established plans to develop hydropower at the Prineville Reservoir (*continued ...*)

IV. Discussion

A. **Competing Applications and Municipal Preference**

10. Ochoco and Prineville contend that their projects are not competing projects because the projects would not conflict with each other. A competing preliminary permit application is one “that would develop, conserve, and utilize, in whole or in part, the same or mutually exclusive water resources” as another project for which a preliminary permit or development application has been filed.¹¹ Here, both projects would use the same water resource, the Prineville Reservoir, and are therefore competing projects. Moreover, during Prineville’s previous preliminary permit term, Commission staff rejected a preliminary permit application for the Crooked River Hydroelectric Project No. 14656, a proposal similar to Ochoco’s Bowman Dam Project proposal, because staff concluded the project would develop the same water resource as Prineville’s project.¹²

11. While Ochoco and Prineville claim that, as currently proposed, the two proposals are not mutually exclusive and would not be in conflict, staff is not persuaded by this argument. As the Commission has previously explained:

the development that is eventually proposed under a license application may differ in important respects from the development originally proposed in a permit application. It is for that very reason that we do not issue more than one permit for the development of the same water resource. A permittee must have the flexibility to propose for licensing the most comprehensive development of the water resource identified in its permit application.¹³

site. April 5, 2013 letter from Allison O’Brien, Reclamation, to Kimberly Bose, FERC, regarding Project No. 14453. On May 19, 2015, Reclamation confirmed it has no plans to develop power at the site and acknowledged that Bowman Dam is not authorized for federal development. May 19, 2015 letter from Terrald E. Kent, Reclamation, to Jennifer Hill, FERC, regarding Project No. 14656. Reclamation has filed no comments to the contrary in the current proceedings. On October 31, 2016, Reclamation stated it has no comments on either the Bowman Dam Project or the Prineville Project at this time.

¹¹ 18 C.F.R. § 4.30(b)(1)(ii) (2016).

¹² July 23, 2015 letter from Vince Yearick, FERC, to Arya Behbehani, Portland General Electric Co., regarding Project No. 14656.

¹³ *Grand Coulee Project Hydroelectric Authority*, 135 FERC ¶ 61,046, at P 9 (2011) (citing *Ashuelot Hydro Partners, Ltd.*, 30 FERC ¶ 61,048 (1985)).

12. In its comments, Ochoco cites to *McGinnis, Inc.* as support for its argument that the Commission should issue both permits. However, *McGinnis* is not persuasive. In that case, the Commission issued a preliminary permit for a project that had an overlapping project boundary with an existing preliminary permit, but that would not use the same water resource as the existing permit. As the Commission aptly noted, “[t]he Commission has issued permits to applicants whose project boundaries overlap, where it appeared that the projects would not necessarily be mutually exclusive. The dispositive consideration is not a permit application’s project boundary, which, along with the location of facilities may change, *but rather a project’s proposed use of the same water resource as another project.*”¹⁴

13. For these reasons, Commission staff finds that Ochoco and Prineville are competing applicants. Staff has found no basis for concluding that either applicant’s plan is superior to the other.¹⁵ Where one of the competing applicants is a municipality, and the plans of the municipality are at least as well adapted to develop, conserve, or utilize in the public interest the water resources of the region, the Commission favors the municipality.¹⁶ Because Ochoco is a municipality claiming preference under section 7(a) of the FPA, the preliminary permit is issued to Ochoco for the Bowman Dam Project.

B. Due Diligence Standard

14. Even if Ochoco did not file a permit application, Commission staff would still not issue Prineville a successive preliminary permit because Prineville failed to pursue activities under its initial permit term with due diligence.

15. Sections 4(f) and 5 of the FPA authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.¹⁷ The FPA does not specify how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive preliminary permit only if it concludes that the applicant has pursued the requirements of its prior preliminary permit term in good faith and with due diligence.¹⁸

¹⁴ *McGinnis, Inc.*, 133 FERC ¶ 61,143 at P 10 (2010) (emphasis added).

¹⁵ Neither applicant has presented a plan based on detailed studies or the results of agency consultation.

¹⁶ 16 U.S.C. § 800(a) (2012); 18 C.F.R. § 4.37(b)(3) (2016).

¹⁷ 16 U.S.C. §§ 797(f) and 798(a) (2012).

¹⁸ *City of Redding, California*, 33 FERC ¶ 61,019 (1985) (stating permittee must (continued ...))

16. In general, pursuing the requirements of a permit with due diligence has meant that, at a minimum, a permittee timely filed progress reports, consulted with resource agencies, and conducted environmental studies, such that Commission staff is able to discern from the permittee's actions a pattern of progress toward the preparation of a development application.¹⁹

17. Prineville's progress reports indicate that, over the three-year permit term, Prineville made very little progress toward the filing of a development application. The information provided in each of the progress reports is very similar, with each noting an ongoing evaluation of the engineering and economic feasibility of the project. Nothing in the progress reports or successive permit application suggests that Prineville is preparing a development application for the project or that Prineville performed any studies during the permit term.

18. The essence of the Commission's 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.²⁰ Because Prineville failed to demonstrate that it carried out the required activities under its permit with due diligence, a successive preliminary permit is not warranted and would contribute to site banking.

V. Permit Information

19. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the

take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

¹⁹ Section 4(f) of the FPA, 16 U.S.C. § 797(f) (2012), states that the purpose of a preliminary permit is to enable applicants for a license to secure the data and to perform the acts required by section 9 of the FPA, 16 U.S.C. § 802 (2012). Section 9 requires license applicants to submit to the Commission such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project (i.e., an acceptable license application). In order for an applicant to submit an acceptable license application, it must have consulted with relevant resource agencies regarding the information the agencies will need in the environmental document, and therefore, what studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2016).

²⁰ See *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (2006) (affirming application of policy against site banking in permit cases).

data and perform the acts required by section 9 of the FPA,²¹ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.²² Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.²³

20. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.²⁴ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.²⁵ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

21. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-month period from the effective date of this permit. A

²¹ 16 U.S.C. § 802 (2012).

²² See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006) (“The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.”).

²³ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. See, e.g., *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 6 (2003); see also *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

²⁴ 18 C.F.R. §§ 5.5 and 5.6 (2016).

²⁵ 18 C.F.R. § 5.3 (2016).

progress report must describe the nature and timing of what the permittee has done under the pre-filing requirements of section 4.38 and Part 5 of the Commission's regulations for the specific reporting period. A permit may be cancelled if a permittee fails to file a timely progress report or if the report does not demonstrate that progress is being made by the permittee. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

22. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.²⁶

The Director orders:

(A) A preliminary permit is issued to the Ochoco Irrigation District for the Bowman Dam Hydroelectric Project No. 14791, for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) The successive preliminary permit application filed by Prineville Energy Storage, LLC for the Prineville Pumped Storage Project No. 14453-001 is denied.

(C) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(D) The Permittee shall coordinate the studies and its plans for access to the site during the term of this permit with Reclamation to ensure that the feasibility studies will

²⁶ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

result in a plan of development consistent with the authorized purposes of the federal project.

(E) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2016).

Vince Yearick
Director
Division of Hydropower Licensing

Form P-1 (Revised April 2011)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.