120 FERC ¶ 61,246
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.

Joseph M. Keating Project No. 7267-017

ORDER LIFTING STAY OF CONSTRUCTION DEADLINES,
ISSUING NOTICE OF TERMINATION OF LICENSE,
AND DISMISSING INTERVENTION

(Issued September 20, 2007)

1. In this order, we lift a stay issued in 1996 of the deadlines for commencement and completion of construction of the 990-kilowatt (kW) Tungstar Project No. 7267, which is licensed to Joseph M. Keating, and give notice of termination of the license. The stay was issued to afford Mr. Keating time to address issues regarding water rights for the project, but the prolonged, continuing, and indefinite delay in Mr. Keating's attempts to obtain water rights and other required pre-construction approvals warrant lifting the stay.

Background

2. The Commission issued an original license for the proposed project on July 2, 1992.[1] The project would be located on Morgan Creek and Pine Creek in Inyo County, California, and would occupy lands of the United States within the Inyo National Forest administered by the United States Department of Agriculture's Forest Service.

3. The license authorizes construction of the following facilities: (1) a four-foot-high, 10-foot-long diversion dam and intake structure on Morgan Creek; (2) a 3,500-foot-long penstock from the intake to the project's powerhouse; (3) a powerhouse, which would contain a 990-kW turbine generator; (4) a 4,000-foot-long meandering channel from the project's tailrace, through which water would flow before being returned to Pine

[1] *Joseph M. Keating*, 60 FERC & 61,016 (1992).

Creek; and (5) a 550-foot-long transmission line. The penstock and meandering channel would be located on national forest lands, the dam and powerhouse on private lands.

4. The project dam would be located immediately downstream from a tungsten mine. The project would generate power using high spring flows and water exiting the mine's water treatment facility. The meandering channel would allow suspended mine water flocculants to settle out before the project flows from the mine would be returned to Pine Creek.

5. Under Article 301 of the license, the original deadline for the commencement of project construction was July 1, 1994. By unpublished order issued April 12, 1994, that date was extended for two years to July 1, 1996, the maximum extension of time allowed under the provisions of section 13 of the Federal Power Act (FPA).[2]

6. Article 101 of the license (one of the Forest Service's mandatory license conditions filed under section 4(e) of the FPA[3]) required Mr. Keating to obtain a special use permit for the project from the Forest Service before the start of any ground-breaking activities. The Forest Service issued the permit, effective November 2, 1995. One of the permit conditions states that the permit confers no water rights and that the start of construction is contingent on Mr. Keating holding such rights.

7. On July 1, 1996, the day of the deadline to commence project construction, Mr. Keating filed a request to stay the project license pending a judicial determination of the adequacy of his water rights for the project, in order to satisfy the pre-construction requirement imposed by the Forest Service. As noted, on December 31, 1996, we granted a stay of the Article 301 requirements to commence and complete project construction.[4] We declined to stay any of the other license articles, and we noted that

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[2] 16 U.S.C. § 806 (2000).

[3] 16 U.S.C. §797(e) (2000).

[4] *Joseph M. Keating*, 77 FERC ¶ 61,060 (1996). In 1992, we granted a similar stay of the construction deadlines for Project No. 6188 to allow the licensee (a company affiliated with Mr. Keating) to fulfill pre-construction water rights requirements in a special use permit issued for the same national forest. *See Sierra Hydro, Inc*., 60 FERC ¶ 61,046 (1992). Last year we lifted that stay and terminated the related project license, based on the failure for several years of the licensee to pursue the necessary water rights. *See Sierra Hydro, Inc*., 116 FERC ¶ 61,060 (2006); and Order Denying Request for Extension of Time and Terminating License, issued January 23, 2007, in Project No. 6188 (unpublished).

Mr. Keating needed to complete, and to obtain Commission approval and in some cases Forest Service approval for twelve pre-construction plans.[5]

8. The stay order also noted that Mr. Keating had proposed project changes in the number of turbines, the size of the dam and spill gate, the alignment and size of the penstock, and the location of the meandering channel, and that the Director, Division of Dam Safety and Inspections, had advised Mr. Keating that, in light of these project redesigns, he would have to file an application to amend the license before he could commence project construction. The stay order required Mr. Keating to file any license amendment application and the remaining pre-construction license article filings within six months, *i.e.*, by April 21, 1997. The order further required annual reports on the status of his efforts to satisfy the water rights requirement of the project's special use permit.

9. In 1997, Mr. Keating brought an action in federal district court against the United States Department of Agriculture, arguing that his riparian rights conferred upon him the necessary water rights. In 1998, the district court dismissed the suit, based on sovereign immunity,[6] and in 1999 the court of appeals affirmed the dismissal.[7] Although Mr. Keating filed a letter on January 27, 2000, advising the Commission that he would seek a comprehensive stream adjudication to obtain the required water rights, he waited almost two years before doing so. Then, on December 28, 2001, he filed a water rights application with the California State Water Resources Control Board (the Water Board). His application elicited 12 protests, including a protest from the owner of the project's diversion dam site and the upstream tungsten mine.

10. Mr. Keating requested and received numerous extensions of the deadline to file the required pre-construction license article plans and the license amendment application referenced in the 1996 stay order. By letter issued August 26, 2003, Commission staff

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[5] The pre-construction plans addressed wildlife habitat mitigation (Article 107), recreation (Article 108), water quality (Article 109), erosion control (Article 110), construction waste/hazardous substances disposal (Articles 111-113), visual resources (Article 114), final design plans and specifications (Article 302), facilities to be included in the Article 108 recreation plan (Article 401), riparian vegetation requirements for the Article 107 wildlife mitigation plan (Article 403), and fisheries resources (Article 406).

[6] *Keating v. United States Dep't of Agriculture*, United States District Court for the Eastern District of California. D.C. No. CV-97-05634-OWW/SMS.

[7] *Keating v. United States Dep't of Agriculture*, 1999 U.S. App. LEXIS 9636.

reminded Mr. Keating that the extended deadline for filing the plans and amendment application was then November 1, 2003, or 90 days prior to the start of construction, whichever came first. Noting that the stay of the start of construction requirement had been in effect for seven years, staff's letter stated that, in light of Mr. Keating's failure to obtain the necessary water rights after ample opportunity to do so, Mr. Keating should advise staff why staff should not recommend to the Commission to lift the stay of the construction deadlines. Mr. Keating failed to respond or to file any of the pre-construction plans by the November 1, 2003 deadline.

11. Almost seven months later, by letters filed March 8 and 17, 2004, Mr. Keating requested a further extension of the deadlines for filing the pre-construction plans and amendment application and sought clarification as to which of his proposed changes to the project would require an application to amend the license.[8] His proposed changes then included relocating the penstock; installing a steel diversion gate structure on Morgan Creek instead of the proposed stop-log dam; installing a Pine Creek gauging station; constructing parking and support facilities for recreational activities, as requested by the Forest Service; relocating the project's transmission line; expanding the powerhouse and adding a l50-kW turbine generator; and eliminating the meandering channel (a new proposal that was based on the closure of the upstream tungsten mine in 1999).[9]

12. Commission staff responded by letter issued March 25, 2004, stating that, based on staff's preliminary review, the project changes involving relocating the penstock, installing the modified dam structure, installing the gauging station, and eliminating the meandering channel appeared to be of a nature that could be approved with his request for approval of "as-built" (post-construction) exhibits,[10] provided the Forest Service agreed with the changes, but that the remaining changes – constructing recreation-related parking and support facilities, relocating the transmission line, and adding a turbine generator – would require pre-construction license amendments. Staff's letter required Mr. Keating to file a report on the status and the schedule of the Forest Service's

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[8] Mr. Keating's March 8, 2004 filing also included nine revised license exhibit drawings showing various proposed changes to the project.

[9] An order of the Director of the Inyo County Planning Department was issued and filed with the Commission on July 25, 2007. Operations at the mine had ceased in 1999 and were recently resumed. The July 25 Order required all mining activities to cease.

[10] In fact, we believe that these extensive changes to the project would indeed require a pre-construction amendment application.

approval of pre-construction license article plans within 15 days (by April 8, 2004), and a status report on the water rights application within 30 days (by April 24, 2004).

13. On April 29, 2004, Mr. Keating responded, estimating that he would file the required plans with the Forest Service no later than May 30, 2004, and that the Forest Service would act on the plans by July 1, 2004. In addition, Mr. Keating stated that he would amend his water rights application to eliminate the meandering channel. Mr. Keating submitted the pre-construction plans to the Forest Service on May 7, 2004.

14. On February 28, 2006, Mr. Keating filed a "status report" that included pre-construction plans (with the notable exception of those related to the meandering channel) for Commission approval. Mr. Keating included a Forest Service letter dated August 24, 2004, in which the Forest Service approved the plans "as written" (although it noted inconsistencies between the construction drawings Mr. Keating had submitted to the Forest Service and the Article 108 recreation plan). The Forest Service subsequently clarified its approvals, stating that: ". . .with the proposal to eliminate the meandering channel, and your subsequent pending FERC license amendment, Forest Service approval is not required on several of the articles at this time."[11] Therefore, it appears that the Forest Service's approvals of certain pre-construction plans are contingent upon Commission approval of a license amendment to implement the proposed changes to the project, including elimination of the meandering channel, that the Forest Service believes is pending before the Commission, but which in fact Mr. Keating has not yet filed.[12]

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[11] *See* letter from Forest Service to Mr. Keating, dated October 6, 2004, and placed in the record by Commission staff on August 2, 2007. Specifically, the Forest Service stated that approvals of the wildlife habitat mitigation plan under Article 107 and the water quality study under Article 109 are not applicable, because, as to the former, "[w]ork on this plan is deferred pending FERC approval of license amendment," and, as to the latter, "[t]his Article is no longer required due to changed conditions, pending FERC consideration of elimination of the meandering channel, and cessation of mining operations." Letter at 2.

[12] Mr. Keating's February 28, 2006 filing did not include the wildlife habitat mitigation plan required under Article 107 or the water quality study plan required under Article 109, which required Forest Service approval, and the fisheries resources plan under required Article 406, which required consultation with, but not approval by, the Forest Service. He asserted that he and the Forest Service agreed that the plans applied to development of the meandering channel, which he proposed to remove from his license, and therefore were not required. However, since Mr. Keating must comply with the requirements of the named license articles as long as they are in effect, the appropriate

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15. In his February 28, 2006 filing, Mr. Keating stated that the required pre-construction license filings had been delayed by his pending water rights application, as amended to eliminate the meandering channel; that letters issued by the Water Board in December 2005 (which he attached to his filing) had rejected protests to his water rights application, to the extent that the protests sought denial of the application based on adverse environmental impacts (in contrast to protection of proprietary water rights); and that he was negotiating for purchase of the lands at the project's water diversion site with the owner of the lands, which, as noted, protested Mr. Keating's water rights application.

16. At Mr. Keating's request, on April 23, 2007, Commission staff conducted a teleconference with Mr. Keating and a representative of the Forest Service concerning his proposed license amendment. Staff reiterated the preliminary staff conclusions about the project changes that required a pre-construction license amendment, and asked why Mr. Keating had not yet filed an appropriate amendment application. He replied that his priority was to obtain the required water rights.[13]

Procedural Matters

17. On August 21, 2007, Pine Creek Mine, LLC; Avocet Tungsten, Inc.; and Bishop Tungsten Development LLC (collectively, Pine Creek) filed a pleading asking the Commission to lift the stay and terminate the license. The filing also included a motion to intervene.[14] However, because there was no proceeding pending at the time that Pine

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way to alter the requirements of those license articles was for Mr. Keating to file an application to amend his license to delete those articles (along with the meandering channel), prior to the start of construction. Also, as noted, Mr. Keating has not addressed the Forest Service's comments about the inconsistencies between the recreation plan submitted under Article 108 and the construction drawings he submitted to the Forest Service.

[13] *See* the Commission staff's "Telephone Conversation Record" summarizing the meeting, filed April 24, 2007.

[14] Pine Creek Mine, LLC, holds a preliminary permit in Project No. 12532 (110 FERC ¶ 62,226 (2005)) to study developing a hydropower project at the upstream tungsten mine site. Bishop Tungsten Development LLC owns the mine, and Avocet Tungsten, Inc., operates it. The proposed dam for Project No. 7267 is located on mine property.

Creek filed its motion, its intervention request is dismissed. We will however consider the information in Pine Creek's filing in deciding whether to lift the stay.[15]

Discussion

18. Section 13 of the FPA provides that, if project construction does not begin by the deadline specified in the license, the Commission is required to terminate the license, after notice to the licensee. The Commission grants a stay of the commencement of construction deadline only in narrowly prescribed circumstances, including, as pertinent here, where a post-license authorization required by another agency to commence construction has not yet been obtained, for reasons beyond the control of the licensee.[16] However, while we are willing to make reasonable accommodations to afford licensees the time needed to resolve such issues with other agencies, we will not hold licenses in abeyance indefinitely.[17] Moreover, the Commission has found that there may be predicates to project construction which, although beyond a licensee's control, may require unreasonable delay in starting construction, and regarding which it is unreasonably speculative to conclude that they will ultimately be resolved. Such circumstances do not warrant granting a stay of the commencement of construction deadline,[18] and here do not warrant maintaining such stay.

19. In the eleven years since issuing the stay, the Commission has been patient in allowing Mr. Keating time to fulfill his special use permit requirement to obtain water

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[15] Responses to Pine Creek's motion were due September 5, 2007. *See* 18 C.F.R. § 385.213(d)(1) (2007). On September 7, 2007, Mr. Keating asked for an extension of the deadline until September 28, 2007, to respond to Pine Creek's motion but gave no reasons why he needed the extra time. We therefore deny the request, but note that we are in any event dismissing the motion to intervene.

[16] *See* the 1996 stay order, 77 FERC ¶ 61,060, *supra*, at 61,225, and the orders cited there.

[17] *See* the order lifting stay of the construction deadlines for Project No. 6188 in *Sierra Hydro, Inc*., 116 FERC ¶ 61,060, *supra*, at P 7 (2006).

[18] *See East Bench Irrigation District*, 59 FERC ¶ 61,277 n. 16 (1992), *citing as analogous City of Redding, California*, 56 FERC ¶ 61,146 (1991), where the Commission affirmed rejection of a license application for a project that depended on alteration of a U.S. Bureau of Reclamation dam that in turn depended on the resolution of several other matters, with no assurances as to the timing or outcome of such resolution.

rights, to file a license amendment application, and to complete all pre-construction license requirements. Yet, resolution of Mr. Keating's water rights application depends on still-unresolved requirements of the Water Board that could require additional prolonged proceedings. In his latest report on the status of his water rights application, filed April 23, 2007, Mr. Keating attached: (1) his April 6 and 7, 2007 emails to the Water Board requesting a response to a Forest Service representative's question of whether Mr. Keating is required to obtain a "point of discharge" permit for his water rights application; and (2) a March 29, 2007 letter from Mr. Keating's attorney to the Water Board asking whether Mr. Keating must first gain access to the project's diversion site before the Water Board will issue Mr. Keating a water rights permit.[19]

20. In a July 30, 2007 letter from the Water Board to Mr. Keating, which was filed with the Commission by Pine Creek, the Water Board informed Mr. Keating that he had "not made an attempt to acquire the necessary property rights that would allow access to the point of diversion [and] [p]rior to a hearing before the State Water Board, [he] must provide information demonstrating that [he has] the ability, and [is] actively pursuing obtaining the [diversion point] property."[20] As noted, Mr. Keating has stated that he is currently negotiating to obtain title to the diversion site from its owner, which has protested his water rights application. The ongoing failure to obtain these property rights would further delay Mr. Keating's obtaining necessary water rights and commencing project construction.[21]

21. In addition, Mr. Keating's proposed license amendment to add, among other things, an additional turbine generator would require reanalyzing the project's impact on minimum flows and fishery resources in Pine Creek, which was a contentious issue in the

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[19] Also, while Mr. Keating has informed the Water Board about his proposal to delete the meandering channel from the license (*see* the Water Board's filing of March 28, 2006), it is unclear whether Mr. Keating has informed the Water Board about his other planned changes to the project, such as the addition of a turbine generator and the reconfiguration of the dam. It is not clear whether those changes would further delay a decision on his water rights application.

[20] *See* Exhibit F of Pine Creek's August 21, 2007 filing.

[21] Standard license Article 5 of the license required Mr. Keating to obtain, within five years of the 1992 issuance of his license, all project property necessary to construct, operate, and maintain his project, including of course rights to the project's dam site.

licensing proceeding.[22] Consequently, Mr. Keating's decision to delay until final action on his water rights application the filing of his pre-construction license amendment application is not only inconsistent with the 1996 stay order, which required Mr. Keating to expeditiously file his amendment application along with his pre-construction license article plans, but also has ensured further substantial delay in commencing project construction.[23]

22. In short, 15 years after the issuance of his license and 11 years after the stay of the deadline to commence construction of his project, Mr. Keating's ability to commence construction is still dependent upon approval of his now six-year-old state water rights application, his yet-to-be-filed pre-construction license amendment application, and Forest Service approval of certain pre-construction plans. There is no reasonable assurance that Mr. Keating will be able to commence project construction anytime in the foreseeable future. Consequently, and in light of the purpose of FPA section 13 to provide for prompt development of licensed projects, we are lifting the stay of the deadlines for commencing and completing project construction.

23. As noted, Mr. Keating filed his 1996 stay request on the day of the deadline to commence project construction.[24] This order lifting stay is effective immediately, leaving no time in which Mr. Keating can commence project construction. Therefore, pursuant to section 6.3 of the regulations, we hereby give notice that the license for the Tungstar Project No. 7267 will be terminated 90 days from the date of this order.[25]

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[22] *See* the discussion of the minimum flow recommendations of the California Department of Fish and Game in the order issuing the license for Project No. 7267, 60 FERC ¶ 61,016, *supra*, at 61,063-64.

[23] Moreover, Mr. Keating still needs Forest Service approval of some pre-construction plans. *See* the discussion, *supra*, of Mr. Keating's failure to obtain unconditional Forest Service approval of the recreation plan required under Article 108 and the plans pertaining to the meandering channel in Articles 107, 109, and 406.

[24] *See* the 1996 stay order, 77 FERC ¶ 61,060, *supra*, at 61,225. There, we noted that Mr. Keating requested that the stay be backdated so as to allow sufficient time for him to mobilize resources for ground-disturbing activity, once the stay is lifted. The stay order did not specifically address this request, but simply granted the stay pending further order of the Commission.

[25] 18 C.F.R. § 6.3 (2007).

The Commission orders:

(A) The motion to intervene, filed August 21, 2007, by Pine Creek Mine, LLC, Avocet Tungsten, Inc., and Bishop Tungsten Development LLC is dismissed.

(B) The request, filed September 7, 2007, by Mr. Joseph M. Keating for an extension of time until September 28, 2007, to file a reply to the motion to intervene described in Ordering Paragraph A above is denied.

(C) The stay issued October 21, 1996, of the deadlines for commencement and completion of construction for the Tungstar Project No. 7267 is lifted, effective upon the issuance of this order.

(D) This order constitutes notice of the termination of the license for the Tungstar Project No. 7267 ninety days from the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.