

134 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Pine Creek Mine, LLC
Bishop Paiute Tribe
KC LLC

Project No. 12532-003
Project No. 13317-001
Project No. 13689-001

ORDER DENYING REHEARING

(Issued February 17, 2011)

1. On December 6, 2010, Commission staff issued a preliminary permit to Pine Creek Mine, LLC (Pine Creek) for the Pine Creek Mine Hydroelectric Project No. 12532, denied a competing application filed by Bishop Paiute Tribe (Tribe) for Project No. 13317, and dismissed a late-filed competing application from KC LLC (KC) for Project No. 13689.¹ These projects all would be located at a mining site in the Inyo National Forest, in Inyo County, California. On December 27, 2010, and January 5, 2011, respectively, KC and the Tribe filed requests for rehearing. As discussed below, we deny rehearing.

I. Background

2. On March 3, 2008, Pine Creek filed an application for a preliminary permit to study the feasibility of the Pine Creek Mine Hydroelectric Project No. 12532, which would use the flow of water in an existing vertical mine shaft to generate power.² Pine Creek has previously held two consecutive permits for its proposed project.³

¹ *Pine Creek Mine, LLC*, 133 FERC ¶ 62,215 (2010).

² Also on March 3, 2008, KC filed an application for a preliminary permit to study the feasibility of a proposed project (Project No. 13128) that would use the flow of water in the same mine shaft. However, on April 8, 2008, KC withdrew its permit application. Because there was no opposition to the withdrawal and the Commission took no action to disallow it, the withdrawal became effective 15 days later.

³ *Pine Creek Mine, LLC*, 110 FERC ¶ 62,226 (2005); *Pine Creek Development, LLC*, 96 FERC ¶ 62,296 (2001). Prior to the expiration of its most recent permit, Pine Creek filed a Notice of Intent to prepare an original license application using the

(continued...)

3. Water that accumulates in the mine is directed out of the mine through pipes in the mine shaft that convey the water to the surface. The accumulated water is then discharged at the boundary of the mine property into Morgan Creek, an ephemeral stream that flows into Pine Creek. Currently, there is a concrete plug in the mine shaft that has a pipe running through it to allow water to flow through the plug and down the shaft toward the exit to the surface.

4. On September 19, 2008, the Commission issued public notice of Pine Creek's permit application. On November 3, 2008, the Tribe filed a timely competing preliminary permit application proposing to study the feasibility of a project that would use the flow of the water in the mine shaft to generate power. The Tribe's proposal also included studying the feasibility of generating power with the mine water after it exits the mine and before it discharges into Morgan Creek.

5. On March 25, 2010, KC filed a permit application (Project No. 13689) to study the feasibility of a project that proposes to develop two sites, one of which would compete with the Tribe's project by using the mine water after it exits the mine but before discharge to Morgan Creek.⁴

6. The December 6, 2010 order dismissed KC's permit application pursuant to section 4.36(a) of the Commission's regulations because it was filed eighteen months after the November 18, 2008 deadline for filing applications in competition with the Pine Creek permit application.⁵ The December 6, 2010 order also found that neither the Tribe's nor Pine Creek's permit application presented a better adapted plan of development, and therefore issued a preliminary permit to Pine Creek because its application was the first filed.

Commission's pre-filing Integrated Licensing Process (ILP) and Pre-Application Document. On March 31, 2008, Pine Creek was notified that staff would hold its request to begin the ILP in abeyance until such time as it receives a preliminary permit for the site, pursuant to a reasonable staff policy designed to avoid the confusion that could result if an entity filed a permit application for a site that was the subject of an ongoing ILP by an entity that had not obtained a permit.

⁴ KC's application also proposed to develop the water resource at an adjacent site, which is the subject of a pending conduit exemption proceeding (Project No. 13163). The conduit exemption application was filed by Bishop Tungsten Development, LLC (Bishop Tungsten), and proposes to use an existing conduit diversion that captures water flow resulting from mine operations, including part of the discharged mine water. The application was accepted by Commission staff on July 2, 2010.

⁵ 18 C.F.R. § 4.36(a) (2010).

7. The Tribe and KC filed requests for rehearing of staff's issuance of the permit to Pine Creek arguing that the Tribe's permit application presents a better adapted plan of development, the Tribe is better able to carry out its plans, and its application was the first filed. Those entities did not contest the dismissal of KC's permit application.

II. Discussion

8. Section 7(a) of the Federal Power Act (FPA) states that "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."⁶ In accordance with the FPA, the Commission's regulations direct the Commission to select among competing applications according to a specified hierarchy. If the competing applicants are non-municipalities, then the Commission "will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans."⁷ If the plans of the non-municipal applicants "are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application acceptance date."⁸

A. Better Adapted Plan

9. The Tribe and KC argue on rehearing that the Tribe's plan to develop the water resources of the region is better adapted than Pine Creek's proposed plan, and that the Tribe is better able to carry out its plans. However, the Commission has consistently stated that permits are by definition preliminary and speculative, and absent the results of detailed studies to be conducted under a permit, it cannot, except in unusual cases, determine that one applicant's plans are better adapted than another's plans.⁹ Here, the Tribe's permit application did not include any detailed studies or evidence of consultation regarding its project proposal.

10. Nevertheless, the Tribe and KC contend that the Tribe's plan is better adapted than Pine Creek's because the Tribe proposes an alternative that would not include the

⁶ 16 U.S.C. § 800(a) (2006).

⁷ 18 C.F.R. § 4.37(b)(1) (2010).

⁸ 18 C.F.R. § 4.37(b)(2) (2010).

⁹ See, e.g., *BPUS Generation Dev., LLC*, 126 FERC ¶ 61,132, at P 9 (2009); *Wind River Hydro, LLC*, 115 FERC ¶ 61,009 (2006); *Sullivan Island Associates*, 58 FERC ¶ 61,129 (1992).

concrete mine plug, the use of which may not be authorized by the U.S. Forest Service.¹⁰ However, this assertion is purely speculative. Moreover, we have previously found such factors are not relevant considerations at the permit stage.¹¹

11. KC also argues that the Tribe has shown it is better able to carry out its plan of development because the Tribe's application specifies "the resources allocated to the project, and a path to development."¹² To support this contention, KC identifies language in the Tribe's application that states the Tribe will solicit a "turn-key hydropower developer," will seek grant funding available for the development of green energy sources, has budgeted \$250,000 in initial funding, and is currently working with Southern California Edison to complete an electric load study.¹³ However, the Commission has previously determined that factors such as the ability to finance a project, or allegations of superior knowledge of a project area or the utility business are not dispositive at the permit stage, and, in any case, these statements speculate about future events and are not concrete evidence with respect to the Tribe's abilities.¹⁴

12. The Tribe and KC further contend that the Tribe envisions an integrated development of the region by proposing to generate power from the mine water discharge (both in the mine and on the surface before discharge into Morgan Creek), and at further downstream sites that are the subject of competing permit applications.¹⁵ As with the

¹⁰ The subterranean portions of the Pine Creek Mine, which include the mine shaft at issue in this proceeding, are on Inyo National Forest lands, which are managed by the Forest Service.

¹¹ *Akron Hydroelectric Co.*, 76 FERC ¶ 61,251, at 62,299 (1996) (the Commission does not require an applicant for a preliminary permit to demonstrate that it has the financial and legal ability to develop the project); *Robert A. Davis III and Michael P. O'Brien*, 53 FERC ¶ 61,040 (1990) (allegations of technical infeasibility are not dispositive at the permit stage).

¹² KC December 27, 2010 Request for Rehearing at 3.

¹³ *Id.* at 3, 4.

¹⁴ *Eastern States Energy Resources, Inc.*, 22 FERC ¶ 61,185 (1983) (allegations of superior experience and greater ability to finance the project are not relevant at the permit phase); *see Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (1982) (applicant's assertions of closer proximity to, and knowledge of, project site and needs of region are not dispositive at the preliminary permit phase).

¹⁵ Pine Creek and KC have filed permit applications for development of the downstream water resource at several locations.

arguments previously considered, however, these contentions are merely speculative because the Tribe has not filed a permit application for any of these downstream sites. Thus, the assertion that the Tribe's plan is better adapted because it envisions an integrated development of the region is unsupported by the record and cannot stand.

13. Finally, KC and the Tribe state that Pine Creek has spent an "inordinate" amount of time and resources without moving this project forward. KC separately states that it drafted Pine Creek's initial permit application, and that Pine Creek wasted KC's time and resources for over a year with a frivolous lawsuit. The litigation history between Pine Creek and KC is not relevant here. Furthermore, neither KC nor the Tribe have submitted any evidence to refute Commission staff's finding that Pine Creek has diligently pursued development of a license application under its prior permits.

14. Since neither the Tribe's nor Pine Creek's permit application is substantiated by detailed studies or consultations, we are unable to conclude that either applicant's plan is better adapted than the other. Therefore, we deny rehearing on this issue.

B. First-Filed Application

15. KC and the Tribe argue that Pine Creek's application was filed after an application submitted by KC for the same site in Project No. 13128.¹⁶ KC and the Tribe contend that the Tribe resubmitted KC's proposed plan of development from Project No. 13128, and is prepared to proceed as originally intended by KC. In other words, KC and the Tribe are arguing that although KC withdrew its first-filed application, the Tribe's second-filed application should be considered as the first-filed application because it is a "resubmitted" copy of KC's withdrawn application.

16. We have previously stated that we will not reinstate rejected applications because we do not consider it administratively practical.¹⁷ The same considerations apply to withdrawn applications, and therefore we will not reinstate KC's withdrawn application, nor consider the Tribe's permit application as a reinstatement of KC's withdrawn application.¹⁸ Moreover, the Tribe did not ask that its application in Project No. 13317 be considered as a resubmittal of KC's application at the time the Tribe filed its application. This *post hoc* argument is therefore untimely.

¹⁶ KC subsequently withdrew this application.

¹⁷ See *Robert Z. Walker*, 36 FERC ¶ 61,284 (1986).

¹⁸ In any event, a complete substitution of applicants would result in an amended filing date that is later in time than Pine Creek's filing date. See 18 C.F.R. § 4.35(b)(1) (2010).

17. Because we find that the preliminary permit was properly issued to Pine Creek consistent with the Commission's regulations, we deny the Tribe's and KC's request for rehearing.

III. Other Matters

18. In a cover letter accompanying its request for rehearing,¹⁹ KC states that because its permit also competes with the adjacent conduit exemption application, its permit application should have been acted on in that proceeding, and therefore the dismissal of its permit application in the December 6, 2010 order "is a moot point." We disagree. KC's permit application specifically states that its proposal encompasses part of the Tribe's proposal, which in turn competes with Pine Creek's proposal. Moreover, KC did not seek rehearing of the dismissal of its permit application for Project No. 13689.

The Commission orders:

The requests for rehearing filed by KC LLC on December 27, 2010, and by Bishop Paiute Tribe on January 5, 2011, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁹ While we address KC's issue for clarity, an argument that is not made in the body of a request for rehearing as part of the "Statement of Issues" is deemed waived. 18 C.F.R. § 385.713(c) ("Any request for rehearing must . . . include a 'Statement of Issues,' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived.").