

152 FERC ¶ 62,054

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

KC Pittsfield LLC	Project Nos. 14566-000
KC LLC	14567-000
Trinity Star LLC	14600-000

ORDER DISMISSING PRELIMINARY PERMIT APPLICATIONS

(Issued July 23, 2015)

1. KC Pittsfield LLC (KC Pittsfield), KC LLC, and Trinity Star LLC (Trinity Star) have filed nearly identical preliminary permit applications to study the feasibility of the proposed 1.2-megawatt (MW) Pine Creek Mine Plug Project, which would be located within the Inyo National Forest in Inyo County, California, partially on lands managed by the U.S. Forest Service (Forest Service). For the reasons described below, the applications are being dismissed.

I. Background

2. On December 2, 2013, KC Pittsfield and KC LLC filed identical preliminary permit applications, docketed Project Nos. 14566 and 14567, for the proposed Pine Creek Mine Plug Project. The applications identified Kelly Sackheim as the principal of both KC Pittsfield and KC LLC.¹

3. The proposed Pine Creek Mine Plug Project would generate power using water that accumulates inside Pine Creek Mine, an inactive mine which once produced tungsten ore. A tunnel exits the mine at the base of Mount Tom. Inside the tunnel a plug with a pipe running through it allows accumulated mine water to flow through the plug and out the tunnel to the surface. The water is then discharged into Morgan Creek, an intermittent stream that flows into Pine Creek. The proposed project would include an approximately 1.2 MW generating unit that would use the head created by the water flowing through the pipe and would have an average annual generation of 5.4 gigawatt-hours.

¹ Ms. Sackheim has submitted competing permit applications for other sites as well. See *Trinity Star LLC*, 150 FERC ¶ 62,074 (2015); *KC LLC et al.*, 149 FERC ¶ 62,179 (2014); *Fall River Valley Community Services Dist.*, 143 FERC ¶ 61,047 (2013).

4. On January 30, 2014, Commission staff issued a letter to Ms. Sackheim, requesting that she indicate which of the two applications she wished to pursue. In a letter filed with the Commission on February 13, 2014, she declined to do so.
5. On March 10, 2014, Trinity Star filed an application for a preliminary permit to study the feasibility of the Pine Creek Mine Plug Project, docketed Project No. 14600. The Trinity Star application is nearly identical to KC Pittsfield and KC LLC's applications described above.²
6. On March 26, 2014, Ms. Sackheim, in her capacity as principal of KC Pittsfield, filed, in the Project No. 14566 docket, a document titled "Initial Consultation Document" for a 10-MW exemption for the so-called "Combined Project," with a project boundary that would encompass: (1) the Pine Creek Mine Plug Project; (2) a downstream site known as the Morgan Creek site, for which KC LLC had previously held a preliminary permit (Morgan Creek Project),³ and (3) Bishop Tungsten LLC's (Bishop Tungsten) downstream Pine Creek Mine Water Discharge Systems 1 and 2 Hydroelectric Project No. 13163, which operates under a conduit exemption issued by the Commission in 2011.⁴ The Initial Consultation Document indicates that Ms. Sackheim wishes to develop both the Pine Creek Mine Plug and the Morgan Creek sites as part of the Combined Project, but does not indicate whether the proposed project would connect to or bypass Project No. 13163, which lies downstream of the Pine Creek Mine Plug site and upstream of the Morgan Creek site.⁵

² In a letter filed July 26, 2014, Ms. Sackheim acknowledged that she had an interest in, and was closely involved with Trinity Star's March 10 preliminary permit application.

³ *KC LLC et al.*, 149 FERC ¶ 62,179 (2014); *KC LLC*, 134 FERC ¶ 62,195 (2011). The Morgan Creek Project would capture flows at the discharge from the upstream Exempted Project No. 13163 and divert water to a pressurized penstock that would deliver water to the proposed powerhouse before discharging it to a tailrace that would return water to the natural channel. KC LLC's preliminary permit for the Morgan Creek Project expired on February 28, 2014 and on December 9, 2014 Commission staff rejected KC LLC's request for a two-year extension of its preliminary permit, and denied two additional applications submitted by Ms. Sackheim for the same project.

⁴ *Bishop Tungsten Development, LLC*, 134 FERC ¶ 62,191 (2011). Bishop Tungsten's Project No. 13163 collects groundwater as it exits the mine and transfers it through a 940-foot-long steel pipe into two powerhouses, through a surge tank and then into either a settling pond or Morgan Creek, depending on mining operations.

⁵ The upstream Pine Creek Mine Plug site is owned by Pine Creek Mine LLC and
(continued ...)

7. On March 27, 2014, Ms. Sackheim filed, in her capacity as principal of KC LLC, an identical Initial Consultation Document under Project No. 14567. Also on March 27, 2014, Trinity Star filed an identical document under Project No. 14600. In that application, Trinity Star listed Ms. Sackheim as an agent for its proposed project.⁶

8. On July 16, 2014, Commission staff sent Ms. Sackheim a letter, indicating that if she intended the Initial Consultation Documents to be final exemption applications, they would likely be found to be patently deficient.⁷ The letter requested that Ms. Sackheim indicate her intent with regard to the Combined Project, and identify a single entity as applicant. In a July 26, 2014 response, Ms. Sackheim stated that she intended to pursue a license, rather than an exemption, for the Combined Project under Project No. 14566, with KC Pittsfield LLC as the applicant. However, she has not subsequently filed a draft license application or other information about the Combined Project.

9. On April 28, 2015, Commission staff sent Ms. Sackheim another letter, again requesting that she clarify her intent with respect to the preliminary permit applications and Initial Consultation Documents. On May 5, 2015, she responded, stating that she would now like to pursue a preliminary permit for the Combined Project. Ms. Sackheim stated that “development is not financially viable without support procuring authorization to utilize the real property within the project boundary...” and suggested that the Commission grant an access easement or require Bishop Tungsten to reconfigure its project to accommodate the Combined Project proposal.

II. Discussion

10. Ms. Sackheim’s filings indicate that at various times, she intended to pursue: a preliminary permit at the Pine Creek Mine Plug site only; a 10-MW exemption for the Combined Project; a license for the Combined Project; and a preliminary permit for the Combined Project. Although Commission staff requested on three separate occasions that she select one project to pursue at the Pine Creek Mine site, Ms. Sackheim has

is located partially on Forest Service land. The site of the Exempted Project No. 13163 is owned by Bishop Tungsten and does not occupy Forest Service land. The downstream Morgan Creek site is located entirely within the Inyo National Forest.

⁶ Trinity Star’s March 27, 2014 Application at 1.

⁷ 18 C.F.R. § 4.32(e)(2) (2014). These filings failed to comply with the Commission’s regulations for exemption applications. Pursuant to section 4.31(c), an applicant must provide proof of real property interests in the non-Federal lands necessary to develop and operate the project or an option to obtain those interests. 18 C.F.R. § 4.31(c)(2014).

repeatedly declined to do so. In fact, based on Ms. Sackheim's May 5, 2015 letter, it appears that she no longer intends to pursue any of the three preliminary permits currently pending before the Commission and instead wishes to pursue the Combined Project.⁸ Therefore, KC Pittsfield's, KC LLC's, and Trinity Star's competing preliminary permit applications for the Pine Creek Mine Plug Project are dismissed.

11. On the matter of the combined project, Ms. Sackheim has stated that the Combined Project can only move forward if the Commission either grants an easement across Bishop Tungsten's patented mining claims or requires Bishop Tungsten to alter its project configuration.

12. Setting aside the question of whether the Commission can or should require the alteration of an existing exempted project to accommodate a new proposed project, the Commission's regulations provide that "any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected."⁹ Ms. Sackheim's proposed Combined Project, which she acknowledges will not move forward unless the Commission either grants an easement across patented

⁸ To the extent that Ms. Sackheim intended to amend the earlier preliminary permit applications for the Pine Creek Mine Plug site to include the downstream sites as well, she did not file a proper amendment request. Under section 4.35(f)(2) of the Commission's regulations, "a material amendment to plans of development proposed in an application for a preliminary permit means a change in the installed capacity or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project; or a change in the number of discrete units of development to be included within the project boundary...." 18 C.F.R. § 4.35(f)(1)(i) and (ii) (2014). When promulgating the regulation addressing amendments, the Commission explained that material amendments to permit applications are changes that are sufficiently substantial to warrant treating the proposal as a new application, with a new opportunity to file comments, motions to intervene, and competing applications. *See Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Project*, Order No. 183, 46 Fed. Reg. 55,245, at 55,249 (Nov. 9, 1981), FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,305, at 31,723 (1981). Expanding the proposed project boundary to include two additional downstream developments would certainly constitute a material amendment.

⁹ 18 C.F.R. § 4.32(j) (2014). *See Fall River*, 143 FERC ¶ 61,047 (2013); *see also Thermalito*, 133 FERC ¶ 61,053 (2010); *Skokomish Indian Tribe*, 71 FERC ¶ 61,023 (1995), *reh'g denied*, 72 FERC ¶ 61,268 (1995), *aff'd*, *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997).

mining claims or requires Bishop Tungsten to alter its project configuration, clearly is barred by this regulation.

The Director orders:

(A) KC Pittsfield's December 2, 2013 preliminary permit application for the Pine Creek Mine Plug Project No. 14566 is dismissed.

(B) KC LLC's December 2, 2013 preliminary permit application for the Pine Creek Mine Plug Project No. 14567 is dismissed.

(C) Trinity Star's March 10, 2014 preliminary permit application for the Pine Creek Mine Plug Project No. 14600 is dismissed.

(D) This order is issued under authority delegated to the director and constitutes final agency action. Any party may file a request for rehearing of this order by the Commission within 30 days of the date of issuance of this order pursuant to section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and section 385.714 of the Commission's regulations, 18 C.F.R. § 385.713 (2014).

Vince Yearick
Director
Division of Hydropower Licensing