

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Sierra Hydro, Inc.

Project No. 6188-018

ORDER LIFTING STAY OF CONSTRUCTION DEADLINES AND
ISSUING NOTICE OF PROBABLE TERMINATION OF LICENSE

(Issued July 20, 2006)

1. In this order, we lift a stay issued in 1991 of the deadlines for commencement and completion of construction of the Tinemaha and Red Mountain Creeks Project No. 6188, which is licensed to Sierra Hydro, Inc. (Sierra), and give notice of probable termination of the license. The stay was issued to afford the licensee time to address issues regarding water rights for the project, but the licensee has not pursued such rights for several years.

Background

2. The Commission issued an original license for the 950-kilowatt project in 1988.¹ The project would occupy lands administered by the United States Forest Service (Forest Service) in the Inyo National Forest in California. The original deadline for the commencement of project construction was January 20, 1990. That date was extended by the Commission to January 20, 1992, the statutory deadline for commencement of construction pursuant to Federal Power Act (FPA) section 13.²

3. The Forest Service's mandatory conditions issued pursuant to section 4(e) of the Federal Power Act,³ require Sierra to obtain a special use authorization (SUA) from the

¹ The license was issued to Camille E. Held and others. 42 FERC ¶ 61,032 (1988). It was thereafter transferred to Sierra Hydro. 56 FERC ¶ 62,229 (1991).

² 16 U.S.C. § 806 (2000).

³ 16 U.S.C. § 797(e) (2000).

Forest Service before any land-disturbing activity may occur. The Forest Service issued an SUA in 1992, one of the conditions of which is that it confers no water rights and the start of construction is contingent on Sierra holding such rights.⁴ Sierra appealed the terms of the SUA in this regard. It subsequently filed a suit in state court, which was removed to federal district court, claiming that the United States' reserved federal riparian water rights are sufficient for purposes of satisfying the Forest Service's SUA requirements.⁵

4. The Commission, in order to maintain the *status quo* while Sierra pursued its administrative and judicial appeals, issued, and twice extended, a stay of the deadlines for commencement and completion of project construction.⁶ The final such order extended the stay "until Sierra has completed its administrative and . . . judicial appeal of its special use authorization," and required Sierra to file a status report every 90 days.⁷

5. The federal district court rejected Sierra's claim, and its appeal to the Ninth Circuit Court of Appeals was dismissed in 1999.⁸ Sierra's President, Joseph M. Keating, thereafter applied to the California State Water Resources Control Board (Water Board) for a stream adjudication to establish his water rights. His application, however, pertains not to Project No. 6188, but only to the unconstructed Tungstar Project No. 7267, which is licensed to Mr. Keating.⁹ By letter filed January 27, 2000, Mr. Keating requested an extension of the stay of the construction deadlines for Project No. 6188 and for

⁴ *Sierra Hydro, Inc.*, 57 FERC ¶ 61,354 at 62,152 (1991).

⁵ *Joseph M. Keating v. U.S. Department of Agriculture* (E.D. Cal., Case No. CCV-F-97-5634-OWW-SMS).

⁶ *Sierra Hydro, Inc.*, 57 FERC ¶ 61,354 (1991), 59 FERC ¶ 61,133 (1992), and 60 FERC ¶ 61,046 (1992).

⁷ *Sierra Hydro, Inc.*, 60 FERC ¶ 61,646 (1992).

⁸ *Joseph M. Keating v. U.S. Department of Agriculture*, 1999 U.S. App. LEXIS 9636 (Ninth Cir. 1999).

⁹ Letter to the Director, Office of Hydropower Licensing, from Joseph M. Keating, President, Sierra Hydro, filed January 27, 2000. *See also* letter to Mr. Keating from Kathryn Gaffney, State Water Resources Control Board, dated February 19, 2003 and filed with the Commission on March 10, 2003.

Tungstar.¹⁰ The Commission responded to this request as to Tungstar,¹¹ but not as to Project No. 6188 because, although the request referenced Project No. 6188, the text of the letter and the attached documentation related only to Tungstar. However, because the stay was not lifted, it has remained in place.

6. Thereafter, Mr. Keating filed status reports pertaining to his efforts to construct the Tungstar project, but did not discuss Project No. 6188.¹² In August 2003, Commission staff requested Mr. Keating to explain any steps taken since 2000 to secure water rights for Project No. 6188.¹³ In December 2003, Mr. Keating replied that he and the Forest Service had agreed to defer any further action with regard to Project No. 6188 until finalization of their efforts regarding construction of Tungstar.¹⁴ Mr. Keating has filed no further reports regarding Project No. 6188.

Discussion

7. While we are willing to make reasonable accommodations to afford licensees the time need to resolve issues with other agencies, we will not hold licenses in abeyance indefinitely. The record indicates that Mr. Keating has made no effort in the seven years since dismissal of his appeal by the U.S. Court of Appeals to acquire water rights for Project No. 6188. In light of that, Mr. Keating's expressed lack of any intent to apply for such rights for the indefinite future, and the purpose of FPA section 13 to require prompt development of licensed projects, we will lift the stay of the deadlines for commencement

¹⁰ *Id.* The deadline for commencement of construction for Tungstar had previously been stayed "pending further order of the Commission." *Joseph M Keating*, 77 FERC ¶ 61,060 at 61,226 (1996). The stay pertaining to Tungstar continues in effect.

¹¹ *Joseph M. Keating*, Order Granting Extension of Time, issued April 17, 2000 (unpublished).

¹² Letter to the Commission Secretary from Mr. Eskelson, filed August 26, 2002.

¹³ Letter to Mr. Keating from Joseph D. Morgan, Director, Division of Hydropower Compliance and Administration, issued August 26, 2003.

¹⁴ Letter to Mr. Morgan from Mr. Keating, filed December 22, 2003.

and completion of construction and give notice of probable termination of the license for Project No. 6188.¹⁵

The Commission orders:

(A) The stay of the deadlines for commencement and completion of the construction for the Tinemaha and Red Mountain Creeks Project No. 6188, effective August 4, 1991, is lifted, effective upon issuance of this order.

(B) This order constitutes notice of the probable termination of the license for the Tinemaha and Red Mountain Creek Projects No. 6188 after 169 days from the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁵ Our regulations permit the license to be terminated after 90 days from the date of the notice of probable termination. *See* 18 C.F.R. § 6.3 (2005). The stay order, however, affords Sierra 169 days from the lifting of that order to commence construction (August 4 – January 20). To preserve Sierra's expectations in this regard, we will defer termination of the license until after 169 days from the issuance of this order.