

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

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

San Carlos Irrigation and Drainage District

Project No. 12018-001

ORDER DENYING REHEARING

(Issued October 27, 2003)

1. This order affirms that the Commission lacks jurisdiction over non-federal hydroelectric development at the federal Coolidge Dam.

BACKGROUND

2. On April 16, 2003, the Commission's Director of the Division of Hydropower Administration and Compliance (Director) issued an order, 103 FERC ¶ 62,019 (2003), dismissing for lack of jurisdiction an application for preliminary permit filed by San Carlos Irrigation and Drainage District (District) to study the feasibility of rehabilitating and reconstructing the Coolidge Dam powerplant on the Gila River in Arizona. The dam and powerplant are features of the San Carlos Federal Irrigation Project (Irrigation Project), which is managed by the U.S. Department of the Interior (Interior) through its Bureau of Indian Affairs.

3. In response to the public notice of the application, Interior intervened in the proceeding and filed a motion to dismiss the District's application, asserting that Congress had authorized the federal development of the hydropower potential of the Irrigation Project, including Coolidge Dam, and that the Commission therefore has no jurisdiction at the site.¹

4. The Director's April 16, 2003 Order agreed with Interior that hydroelectric generation at the Coolidge Dam was authorized for federal development and accordingly dismissed the District's application. The District filed its request for rehearing, arguing that the jurisdictional determination is in error.

¹ See Interior's filings of August 24 and 30, 2001. The District filed a response on September 10, 2001. Southwest Alternative Generation Enterprises, LLC, and the Gila River Indian Community filed protests in opposition to the application, echoing Interior's position. See comments filed on May 23 and September 4, 2001, respectively.

5. On June 16, 2003, Interior filed an answer to the District's pleading. Rule 213(a)(2) of the Commission's Rule of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2003), prohibits answers to requests for rehearing unless otherwise permitted by the Commission. We find that good cause exists to allow the Interior's answer because it provides information that assists us in the decision-making process.

DISCUSSION

6. The Commission has the authority to issue preliminary permits and licenses for hydroelectric projects located at federal dams, but this jurisdiction is withdrawn if the hydroelectric generation at the site is authorized for federal construction or if Congress otherwise unambiguously indicates that the Commission's jurisdiction over the project is withdrawn.²

7. The Act of June 7, 1924, 43 Stat. 474, 475-476, authorized construction of the San Carlos Irrigation Project, consisting of Coolidge Dam and Reservoir, to provide water for irrigation of lands within the Gila Indian Reservation, and, if sufficient water was available, for irrigation of other lands as well. No hydropower was authorized.

8. The subsequent Act of March 7, 1928 (45 Stat. 200, 210-212), appropriated funds to continue construction of the Irrigation Project, and further provided (Id. at 210-211):

That in addition to the amount herein appropriated the Secretary of the Interior may also incur obligations and enter into contract for development of electrical power at the Coolidge Dam as an incident to the use of the Coolidge Reservoir for irrigation, such contract not exceeding a total of \$350,000 and his action in so doing shall be deemed a contractual obligation of the Federal Government for the payment of the cost thereof.

9. The 1928 Act requires that the power generated at the dam be used “for furnishing power for agency and school purposes and for pumping for irrigation by Indians on the San Carlos Reservation,” while reserving to Interior the authority “to sell

² 101 FERC at p. 64,299, citing Chapman v. Federal Power Commission, 345 U.S. 153 (1953).

surplus power developed at the Coolidge Dam in such manner and upon such terms and for such prices as [it] shall think best.”³

10. Interior constructed the hydropower project in the 1930s and operated it until 1983, when it was damaged by severe flooding. In 1991, Congress, while authorizing Interior to divest the hydropower project’s transmission facilities, required it to retain the generating facilities.⁴

11. The Director’s April 16, 2003 Order concluded that the 1928 Act appears to authorize for federal development the hydropower potential of the San Carlos Irrigation Project, which includes Coolidge Dam and Reservoir, and that the 1991 legislation confirms this conclusion.

12. On rehearing, the District asserts that neither the 1928 Act nor any subsequent legislation unambiguously indicates that the Commission’s jurisdiction has been withdrawn.

13. We agree that the 1928 Act does not unambiguously demonstrate that the Commission’s licensing authority has been withdrawn. Nor is it unusual for legislation authorizing federal dam projects to lack clarity with respect to the Commission’s licensing jurisdiction.⁵ It was for this reason that in 1992 the Commission Chairman and the Department of the Interior’s Assistant Secretary for Water and Science (Reclamation) signed a memorandum of understanding (MOU) establishing procedural steps and a set of rebuttable presumptions to guide the often difficult analysis of the agencies’ respective jurisdictions over hydroelectric development at Reclamation dams. 58 Fed. Reg. 3269 (January 8, 1993). As we have said, this guidance is grounded in established

³ The 1928 Act, 45 Stat. at 211, and the Act of June 22, 1936, 49 Stat. 1822-23, provide for the disposition of net revenues from Interior's sale of the project's power.

⁴ San Carlos Indian Irrigation Project Divestiture Act of 1991, 105 Stat. 1722.

⁵ See, e.g., Uncompahgre Valley Water Users Association v. F.E.R.C., 785 F.2d 269 (10th Cir. 1986) (proposed non-federal development of hydropower along canals of Uncompahgre Valley Water System); and Troup County Board of Commissioners, 102 FERC ¶ 61,300 (2003) (proposed non-federal development at U.S. Army Corps of Engineers’ West Point Dam).

principles of statutory construction and is thus eminently transferable to legislation authorizing similar kinds of projects. See Troup County Board of Commissioners, 102 FERC ¶ 61,300 (2003).

14. Appendix A of the MOU lists a series of rebuttable presumptions, starting with those based on the clearest evidence and working down the levels of clarity.⁶ The second and fourth presumptions state:

PRESUMPTION 2. If the authorizing statute, as amended, or any documents incorporated by reference in the statute, appear to specifically reserve hydropower development exclusively to the United States or to specifically withdraw the Commission's jurisdiction, then Reclamation is presumed to have jurisdiction.

PRESUMPTION 4. If the authorizing statute, as amended, or any documents incorporated by reference in the statute, specifically authorizes Reclamation to construct, operate, or maintain hydroelectric facilities or powerplants, then Reclamation is presumed to have jurisdiction even though the authorizing statute does not specifically withdraw the Commission's authority over all hydropower development within the project.

15. Applying the above guidance, the Director determined that Presumption 2 matches the language in the 1928 Act. While we agree that such a conclusion is reasonable, we think that Presumption 4 is a close match also. The District has not presented, nor are we aware of, any evidence, to rebut the consequent determination that, under either

⁶ The MOU provides that these presumptions may be challenged by proffering evidence from any source. Evidence, in descending order of persuasiveness, may include: (1) statutory language; (2) materials incorporated by reference into the statute; (3) House and Senate documents and reports; (4) documents submitted to Congress, such as Feasibility Reports and Definite Plan Reports; (5) other legislative history, such as floor debates or hearing transcripts; (6) Definite Plan Reports, or supplements thereto, that are issued after the administrative or statutory authorization; and (7) any other information.

presumption, the Commission's jurisdiction is deemed withdrawn for the entire Irrigation Project.⁷

16. The District also argues that the statute is an appropriations act and that Congress cannot legislate through the appropriations process. However, Congress can, and does, legislate through appropriations acts simply by including substantive provisions in those acts. See, e.g., Robertson v. Seattle Audubon Society, 503 U.S. 529, 440 (1992), and cases cited therein. As Interior explains, “[w]hile an appropriation alone may not constitute a Congressional grant of authority, the 1928 Act clearly included more than an appropriation. The 1928 Act contains an express provision that the Secretary ‘may also incur obligations and enter into contract for development of electrical power at Coolidge Dam.’”⁸

17. Because, as noted above, we believe that the withdrawal of our licensing jurisdiction applies to the entire Irrigation Project, we cannot, as the District requests, issue a preliminary permit for any incremental capacity that may be available. The District must seek such authorization from Interior.

The Commission orders:

The San Carlos Irrigation and Drainage District's May 16, 2003 request for rehearing in this proceeding is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁷ The District makes several unsuccessful attempts to either compare or to contrast the language of the 1928 Act with language from other authorizations where it has been determined that the Commission has retained its licensing jurisdiction or that its jurisdiction has been deemed withdrawn. See Rehearing Request at 10-12 and 15-18. See Interior's Answer at 5-6 and 9-10 for a detailed rebuttal of these arguments.

⁸ Interior's Answer at 7. As explained by Interior, it was common practice in the late nineteenth and early twentieth centuries for Congress to include in appropriations acts substantive legislation regarding Indian affairs and irrigation projects, such as the one here, that serve Indian lands. Id.