

125 FERC ¶ 61,305
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Utility District No. 1 of Okanogan County,
Washington

Project No. 12804-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued December 18, 2008)

1. By application filed May 17, 2007, as supplemented July 31, 2007, the Public Utility District No. 1 of Okanogan County, Washington (the District), requests a three-year preliminary permit under section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed 42-megawatt Shanker's Bend Hydroelectric Project No. 12804. The proposed project would be located on the Similkameen River in Okanogan County, Washington. A portion of the reservoir would be located in British Columbia, Canada. The project would include 3,095 acres of federal lands.
2. As described below, we will grant the application.

Background

A. Project Description

3. The proposed project would include: (1) construction of a 260-foot-high, 1,200-foot-long dam, impounding an 18,000-acre reservoir with an average depth of 1,289 feet, and gross storage capacity of 1.7-million acre-feet;² (2) construction of a 210-foot-long,

¹ 16 U.S.C. § 797(f) (2006). Three years is the maximum term for a preliminary permit. *See* FPA section 5, 16 U.S.C. § 798 (2006).

² The application, Exhibit 1, notes that through feasibility studies described in Exhibit 2 of the application, the District will analyze a range of project configurations involving dam heights ranging from 90 to 260 feet.

20-inch-diameter penstock; (3) an existing 1,700-foot-long railroad tunnel enlarged to a 20-foot-diameter; (4) a proposed powerhouse containing two generating units with an installed capacity of 42-megawatts; and (5) a proposed 7.5-mile-long, 115-kilovolt transmission line. The enlarged railroad tunnel would be used as a power tunnel that would terminate at the powerhouse. The upstream end of the tunnel would have an intake tower equipped with gates. The downstream end of the tunnel would connect to a surge tank, which would direct flow into the penstock. The penstock would diverge into two branches, one for each turbine generator.

4. The project would be located at river mile 7.3, approximately one mile upstream of the District's proposed Enloe Project No. 12569, which is the subject of a pending license application and is to be located at the existing Enloe Dam. The feasibility of constructing the Shankers Bend Project has been studied by the U.S. Army Corps of Engineers, the International Joint Commission,³ and the District from time to time since 1948.⁴

B. Notice and Comment

5. Public notice of the application was issued on August 14, 2007, establishing October 15, 2007, as the deadline for the filing of comments, motions to intervene, and competing applications.

6. Timely motions to intervene were filed by: (1) Canadian Parks and Wilderness Society, British Columbia Chapter (Canadian Parks); (2) the National Marine Fisheries Service (NMFS); (3) the Center for Environmental Law & Policy (the Environmental Center); (4) the State of Washington, Department of Ecology (Washington Ecology); (5) Washington Department of Fish and Wildlife (Washington DFW); (6) the Washington Department of Natural Resources (Washington DNR); (7) American Rivers; and (8) the U.S. Department of the Interior, Bureau of Land Management (BLM).⁵ Timely comments were filed by the U.S. Department of the Interior, Office of Environmental Policy and Compliance (Interior).

³ The International Joint Commission was established by the Boundary Waters Treaty of 1909 to address matters regarding the use of boundary waters between Canada and the United States.

⁴ See the application, Exhibit 1.

⁵ The motions to intervene were timely and unopposed, and accordingly granted automatically pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c)(1) (2008).

7. Canadian Parks and American Rivers oppose the issuance of the permit.⁶ The District filed an answer (but not in opposition to intervention) to the motions to intervene and timely comments on October 26, 2007.

8. Late comments in opposition to development of the proposed project were filed March 3, 2008, by the Okanagan Nation Alliance (the Alliance), which is composed of seven Indian bands located in British Columbia.

Discussion

A. Authority to Issue the Permit

9. Canadian Parks and American Rivers both argue that the Commission either lacks jurisdiction to grant the proposed permit or as a matter of policy should require proof that the International Joint Commission has approved or agreed in principle to the application. Canadian Parks cites the Boundary Waters Treaty of 1909 (1909 Treaty) between the United States of America and Canada (which as noted created the International Boundary Commission), and specifically Article IV of the 1909 Treaty, which states:

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

10. The issuance of a preliminary permit does not authorize the construction or maintenance of any facilities. Thus, issues regarding the applicability of the 1909 Treaty are premature in this proceeding.⁷

⁶ The Environmental Center's motion is captioned as a "protest," but it only seeks intervention. It does not request denial of the application. NMFS, Washington DNR, and Washington DFW also simply seek intervention in this proceeding, and BLM merely describes the federal lands included in the project that are withdrawn from entry pursuant to section 24 of the FPA, 16 U.S.C. § 814 (2006).

⁷ See, e.g., *City of Seattle, Department of Lighting*, 4 FERC ¶ 61,114 (1978).

11. Canadian Parks further contends that the area of the proposed dam and reservoir in Canada are located on lands whose inundation are prohibited under sections 8 and 9 of the British Columbia Park Act, which it contends is a legal impediment to required Canadian approval of the dam and reservoir. It notes further that certain animal species located in the Canadian portion of the project area are protected under the Canadian Species at Risk Act and the proposed dam and reservoir would breach one or more provisions of this act, and thus present an additional legal bar to the project absent an act of the Canadian Parliament changing the requirements.

12. However, the permit does not allow entry onto any lands, Canadian or American, much less construction or operation of the proposed project. The sole purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project, which here would include investigating the Canadian and American agency approvals that might be necessary for licensing, constructing, and operating the project. Thus, no Canadian lands or animal species would be affected by issuance of the permit.⁸

B. Permit Studies

13. Washington Ecology contends that, if the issue of fish passage at the Enloe Dam has not been resolved, the District will have to investigate under the permit issues including changes in fish habitat, potential introduction of toxins in project waters, and impacts on wetlands, riparian vegetation, and water-related recreation. However, we do not, except in unusual circumstances, condition a preliminary permit on the performance of specified studies, instead requiring that such studies be performed in support of a license application.⁹ Studies of the potential cumulative impacts of the proposed project and the Enloe Project can be performed, if needed, in licensing proceedings.

C. Sufficiency of the Application

14. American Rivers argues that the application should be denied because it lacks information required under the Commission's regulations governing the content of

⁸ American Rivers contends (comments filed October 12, 2007, at 3) that the District intends to use “public funds” to evaluate the project, making the lack of Canadian approval particularly troubling, and that the Commission should act to prevent the use of such public monies for the study of a project that has little chance of being developed. We have no jurisdiction to review, or second guess, the District’s budgetary decisions.

⁹ See *Symbiotics, LLC*, 99 FERC ¶ 61,101, at 61,420 (2002) citing *Continental Lands, Inc.*, 90 FERC ¶ 61,355, at 62,178 (2000).

preliminary permit applications.¹⁰ Specifically, it contends that: the application lacks sufficient information concerning relevant species that are listed under the Endangered Species Act; section 5 of the application fails to support its general allegations of the benefits the project will provide; Exhibit 2 fails to include sufficient information concerning the studies that will be conducted under the permit, and the application fails to supply sufficient information as to how the studies would be financed; the application fails to discuss the proposed purchasers of project power; and the application fails to include adequate maps depicting the site for the proposed transmission line.

15. American Rivers' arguments are without merit. Exhibit 2 of the District's application lists the types of studies it intends to perform during the term of the permit. This list, although generally worded, meets the requirements of section 4.81(c) of the Commission's regulations.¹¹ Moreover, Exhibit 2 includes specific sources of financing for the proposed studies, and in any event, the application is required to specify the expected sources and extent of financing available to the applicant to carry out permit activities "to the extent possible."¹² Similarly, our regulations do not require detailed support for the applicant's assertions that the proposed project will provide public benefits, but rather require that: "Exhibit I must contain a description of the proposed project, specifying *to the extent possible*: ... (6) Any other information demonstrating in what manner the proposed project would develop, conserve, and utilize in the public interest the water resources in the region."¹³

16. Moreover, as noted, since the granting of a preliminary permit merely provides the District with priority for filing a development application during the permit term and does not authorize any project construction or operation or even entry into public or private lands, the issuance of the permit here does not invoke the requirements of the Endangered Species Act.

17. Finally, in response to staff's June 27, 2007 letter, the District filed, on July 31, 2007, a supplement to Exhibit 3 of the application with revised project boundary maps.

¹⁰ 18 C.F.R. § 4.81 (2008).

¹¹ See 18 C.F.R. § 4.81(c) (2008). Also, see *Don L. Hansen*, 120 FERC ¶ 61,069, at P 12 (2007) (*Hansen*); and *McKay Hydro, LLC*, 105 FERC ¶ 61,045, at P 11 (2003) (study plans in permit applications are typically "sketchy").

¹² See 18 C.F.R. § 4.81(c)(4)(ii) (2008).

¹³ See 18 C.F.R. § 4.81(b)(6) (2008) (emphasis in original). Thus, our regulations clearly contemplate that full, detailed information may not be available when a permit application is filed. See *Hansen*, 120 FERC ¶ 61,069, at P 12 (2007).

These maps include labels for pertinent project features, including the proposed dam, reservoir, transmission line, intake tower, and powerhouse. They meet the requirements of section 4.81(d) of our regulations.¹⁴

D. Arguments Related to Canadian Tribal Lands

18. The Alliance and one of its members, the Lower Similkameen Indian Band, each hold title to certain lands that would be included within those lands inundated by the proposed reservoir. The Alliance objects to the issuance of the permit, arguing that the proposal for a 260-foot-high dam would create an 18,000-acre reservoir, which would flood tribal lands in British Columbia. Any arguments concerning the impacts of the construction, operation, and maintenance of the project are premature here, and would be considered at the licensing stage. In any case, any issues concerning authorizations needed to inundate lands in Canada are beyond our jurisdiction and can only be addressed by Canadian authorities.¹⁵

Permit Information

19. The purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable development application. The permit confers no authority on the permittee to undertake construction of the proposed project or any part thereof,¹⁶ or to occupy or use lands or other property of the United States or of any other entity or individual.

20. If, during the course of the permittee's investigation into the feasibility of the proposal, the permittee decides to prepare a development application, it must first prepare a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's Regulations.¹⁷ Pursuant to Part 5 of the Commission's

¹⁴ 18 C.F.R. § 4.81(d) (2008).

¹⁵ See *Lake Ontario Land Development v. Federal Power Commission*, 212 F.2d 227 (D.C. Cir. 1954) (Commission could license U.S. portion of project works straddling U.S.-Canada border). The District states that it intends to take the necessary actions at the appropriate time to ensure the applicable authorizations are received for project facilities located in Canada. Application, Exhibit 1 n.2.

¹⁶ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment.

¹⁷ 18 C.F.R. §§ 5.5 and 5.6 (2008).

regulations, the permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Pursuant to Section 5.3, such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹⁸ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

21. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold any of these proprietary rights necessary for project purposes during the term of an issued license, they must be included as joint applicants in any application for a license. In such an instance, where parties other than the permittee are added as joint applicants for a license, the joint application will not be eligible for any permit-based priority.¹⁹

The Commission orders:

(A) In Project No. 12804-000, a preliminary permit is issued to Public Utility District No. 1 of Okanogan County, Washington, for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit in Project No. 12804 is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard Form P-1.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ 18 C.F.R. § 5.3 (2008).

¹⁹ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised February 2007)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if said project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the Permittee undertakes, the Permittee shall at all time exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. All test sites shall be restored as closely as possible to their original condition and to the satisfaction of the Commission's authorized representative or, where federal lands are affected, to the satisfaction of the agency administering such lands.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the Permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the Permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. At the close of each six-month period from the effective date of this permit, the permittee shall file four copies of a progress report with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; and shall serve a copy on the interveners in this proceeding. The report shall describe, for that report period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 CFR §§ 4.38 and 5 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission therefor.