

133 FERC ¶ 61,141
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.

Bishop Tungsten Development LLC

Project No. 13323-001

ORDER DENYING REHEARING

(Issued November 18 2010)

1. Bishop Tungsten Development LLC (Bishop Tungsten) filed a request for rehearing of Commission staff's July 9, 2010 letter order dismissing Bishop Tungsten's application for an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for the proposed Pine Creek Mine Tailing Lines Small Conduit Hydroelectric Project No. 13323 (Pine Creek Project). This order denies rehearing.

Background

2. Under Part I of the FPA,¹ the Commission issues licenses to non-federal interests authorizing the construction, operation, and maintenance of water power projects on navigable waters of the United States, on public lands or reservations, and on streams subject to the Commission's jurisdiction. Under section 30 of the FPA,² the Commission is authorized to exempt from the licensing requirements of Part I of the FPA any facility (not including a dam of impoundment) that is constructed, operated, or maintained for the generation of electric power, which the Commission determines: (1) is located on non-federal lands and (2) uses the hydroelectric potential of a manmade conduit that is operated primarily for agricultural, municipal, or industrial purposes. The Commission's regulations define the term "non-federal lands" to mean "any lands except lands to which the United States holds fee title."³

¹ 16 U.S.C. §§ 792-823 (2006).

² 16 U.S.C. § 823a (2006).

³ 18 C.F.R. § 4.30(b)(20)(i) (2010).

3. On November 3, 2008, Bishop Tungsten filed an application for a conduit exemption for its proposed 1200-kilowatt Pine Creek Project, to be located on Bishop Tungsten's mine water discharge system near the Town of Bishop, Inyo County, California. Bishop Tungsten proposed to install a turbine generating unit in a conduit that conveys water from its tungsten mine and mill site to the Scheelite Borrow Pit for storage. The proposed hydroelectric facilities would be located on an unpatented mill site. Unpatented mill sites are lands in which the United States holds legal fee title and a private entity has a possessory interest.⁴
4. On July 9, 2010, Commission staff dismissed Bishop Tungsten's application, because the project failed to conform to the requirements of section 30 of the FPA, in that the project would be located on federal lands,⁵ i.e., on an unpatented mill site in which the United States owns fee title.⁶
5. On August 9, 2010, Bishop Tungsten filed a request for rehearing of the dismissal.

Discussion

6. On rehearing, Bishop Tungsten argues that unpatented mill site lands should be regarded as non-federal lands because the United States holds only "legal" fee title to the lands, not "absolute" fee title. Bishop Tungsten notes the distinction between legal and absolute fee title⁷ and alleges that, when the Commission used "fee title" in its definition

⁴ Possessory interests known as "unpatented" claims are distinguished from the greater ownership interest of a "patent," which is an official document issued by the United States attesting that fee title absolute to the land is in the private owner. *See, e.g., Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37 (1963) (*Best*); *Cameron v. United States*, 252 U.S. 450, 459-60, 40 S.Ct. 410, 64 L. Ed. 2d 659 (1920) (*Cameron*); *Kunkes v. United States*, 78 F.3d 1549, 1551 (Fed. Cir. 1996) (*Kunkes*). *See generally* 30 U.S.C. § 29 (2006) (requirements for patenting a mining claim).

⁵ This statutory requirement is reflected in section 4.30(b)(28)(ii) of our regulations, 18 C.F.R. § 4.30(b)(28)(ii) (2010).

⁶ *See United States v. Locke*, 471 U.S. 84, 82 (1985) (*Locke*); *Best*, 371 U.S. at 336; *United States v. Richardson*, 599 F.2d 290, 292-93 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Kasey v. Molybdenum Corporation of America*, 336 F.2d 560, 565 (9th Cir. 1964).

⁷ Fee title absolute is an exclusive title to land, while legal title is a title that evidences apparent ownership but "does not necessarily signify full and complete title or a beneficial interest." Rehearing at 1 (citing Garner, Bryan, ed., *Black's Law Dictionary* (Ninth ed. 2009)).

of non-federal lands, it meant only “absolute” or exclusive title, rather than the lesser right of “legal title.”

7. We disagree. Under our regulations for conduit exemptions, “federal lands” means all lands in which the United States holds fee title. The regulations do not differentiate between types of fee title. Had the Commission meant to make such a distinction, it could have done so, but it did not.

8. Moreover, for purposes of conduit exemptions,⁸ there is no meaningful difference between the two kinds of fee title. Both cases would require an exemptee to obtain, from the federal agency overseeing the land, authorization to construct, operate, and maintain its project. In Bishop Tungsten’s situation, its project would be located on an unpatented mining claim. Although the holder of the unpatented mining claim has a nonexclusive possessory interest in the land for the purpose of mining,⁹ the title to the underlying fee simple estate remains with the United States, which retains paramount rights and interests in the federal lands under the unpatented mining claim and maintains broad authority to regulate and manage the uses of those lands.¹⁰

⁸ One purpose of section 30 of the FPA is to expedite the development of hydroelectric generating facilities using the water power potential of man-made conduits. *See Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act*, Order No. 76, 45 Fed. Reg. 28,085 (April 28, 1980), FERC Stats. & Regs., Regulation Preambles 1977-1981 ¶ 30,146, at 30,998-31,002 (1980). To further this purpose, we require that an applicant have, at the time it files its conduit exemption application, all the property rights necessary to construct and operate its project. 18 C.F.R. § 4.92(a)(3) (2010).

⁹ 30 U.S.C. § 26 (2006). *See, e.g., Best*, 371 U.S. at 335; *Cameron*, 252 U.S. at 464.

¹⁰ Thus, as the owner of an unpatented mining claim, Bishop Tungsten has the right to perform mining activities on the claim, but it does not hold fee title to the land. The unpatented mining claim is subject to regulation by the Secretary of the Interior for any activity other than mining, such as the production of power. *See Locke*, 471 U.S. at 104-05; *Best*, 371 U.S. at 336; *Kunkes*, 78 F.3d at 1553; *Skaw v. United States*, 13 Cl. Ct. 7, 28 (1987), *aff’d*, 847 F.2d 842 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 854, 102 L. Ed. 2d 113, 109 S. Ct. 141 (1988); *Reed v. Morton*, 480 F.2d 634, 642 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064, 94 S.Ct. 571, 38 L. Ed. 2d 469 (1973).

9. For the above reasons, we affirm Commission staff's finding that Bishop Tungsten's Pine Creek Project would be located on federal lands and dismissal of the application.¹¹

The Commission orders:

The request for rehearing by Bishop Tungsten Development LLC filed on August 9, 2010, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹ Bishop Tungsten states that under Commission precedent, privately owned land over which the United States holds an easement or right of way is non-federal land for purposes of conduit exemptions. However, the cases that establish this holding do not support Bishop Tungsten's position because there, the United States did not hold fee title in the land. *See Green Energy Today, LLC*, 123 FERC ¶ 62,203 (2008); and *Shoshone Irrigation District*, 17 FERC ¶ 62,013 (1981).