

137 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Kahawai Power 4, LLC
Kekaha Ditch Hydro, LLC

Project No. 14105-000
Project No. 14203-000

ORDER DISMISSING PRELIMINARY PERMIT APPLICATIONS

(Issued October 20, 2011)

1. This order dismisses applications by Kahawai Power 4, LLC (Kahawai Power) and Kekaha Ditch Hydro, LLC (Kekaha Ditch Hydro) for preliminary permits to study the feasibility of a hydropower project on the Kekaha Ditch Irrigation System near the town of Waimea, Kauai County, Hawaii.

I. Background

A. Historical Background

2. The Kekaha Ditch Irrigation System is located in the Kekaha region, which is located in the western portion of the island of Kauai and consists of a broad lowland coastal plain below upland mountains.¹ Historically, the Kekaha Sugar Company leased

¹ Kekaha Agriculture Association May 20, 2011 Intervention at 3. The Kekaha Ditch Irrigation System has been in use since 1907 and was initially comprised of 16 miles of ditches, tunnels, flumes, and a siphon in Waimea Canyon and four miles of ditch in the lowland coastal plain area. The ditch was subsequently extended eight miles further in the lowland area. The Kekaha Ditch Irrigation System originates with two intakes on tributaries to the Waimea River (at the 850-foot elevation) in the Waimea Canyon and a third intake on the Waimea River (at the 550-foot elevation). At the 700-foot elevation in Waimea Canyon, the water crosses the Waimea River from west to east through a penstock. The ditch continues seaward on the eastern side of the Waimea Canyon and then again crosses the Waimea River through a 2,190-foot-long, 48-inch diameter steel siphon. Kekaha Agriculture Association Intervention at 5-6.

over 12,000 acres in the region from the State of Hawaii and used the Kekaha Ditch Irrigation System to irrigate its sugar cane fields.² On February 28, 2001, the Kekaha Sugar Company ceased operations and the lands reverted back to the State of Hawaii.³ On September 16, 2003, a state executive order granted management and control over the agricultural land formerly leased to the Kekaha Sugar Company to the Agribusiness Development Corporation (Development Corporation), which is administratively part of Hawaii's Department of Agriculture.⁴

3. On April 1, 2008, the Development Corporation and the Kekaha Agricultural Association (Agricultural Association) entered into a Memorandum of Agreement under which the Development Corporation authorized the Agricultural Association to manage, operate, maintain, and control the agricultural land.⁵ Specifically, the authorization to the Agricultural Association covered (1) the drainage and ravine resources, (2) the road and roadway resources, (3) the electrical power resources, and (4) the irrigation resources, as well as all facilities and equipment accessory to those infrastructures.⁶

4. On April 15, 2010, the Agriculture Association and Pacific Light & Power, the parent company of Kekaha Ditch Hydro, executed a Memorandum of Understanding under which the Agriculture Association granted exclusive rights to Pacific Light & Power to develop long-term renewable power generating systems on the agricultural lands.⁷ Since that time, Kekaha Ditch Hydro has consulted and coordinated with the Agricultural Association in its efforts to pursue development of a 2-megawatt (MW) project (Kekaha Project 2). Specifically, in May 2010, Pacific Light & Power applied to the Development Corporation for authorization to access the property on which the Kekaha Project 2 is to be located and to use the waterways thereon. The application for access was approved at the Development Corporation's September 15, 2010 board

² Agriculture Development Corporation April 9, 2011 Intervention at 3 and Pacific Light & Power May 20, 2011 Comments at 2.

³ Kekaha Agriculture Association Intervention at 4.

⁴ Agriculture Development Corporation Intervention at 3 and Kekaha Agricultural Association Comments at 4. The Development Corporation is also responsible for the Kekaha Ditch Irrigation System, including water rights and the ground beneath the ditch, pursuant to a subsequent state executive order.

⁵ Kekaha Agricultural Association Comments at 5.

⁶ Agriculture Development Corporation Intervention at 4.

⁷ Kekaha Agriculture Association Intervention at 11.

meeting, and the authorization was granted on April 15, 2011.⁸ Subsequently, Kekaha Ditch Hydro began a feasibility study of the Kekaha Project 2 and completed a preliminary project study, including a timeline, required State and local permitting, and a financial model.⁹

5. The commercial operation date for the Kekaha Project 2 is targeted for 2016.¹⁰ Before commencing operation however, Kekaha Ditch Hydro will need to complete the remaining steps in Hawaii's hydropower authorization process. This process includes the requirement to obtain permits that address natural resources, water quality, recreation, historical sites, and project safety.

B. Applications before the Commission

6. On March 1, 2011, Kahawai Power, a private development company, filed an application with the Commission for a preliminary permit under section 4(f) of the Federal Power Act (FPA)¹¹ to study the feasibility of the proposed 1.5-MW Kekaha Waimea Water Power Project No. 14105 (Kekaha Project 1). The proposed project would use the Kekaha Ditch and would be located at the same site and use the same water resource that Kekaha Ditch Hydro is developing.¹²

7. On March 23, 2011, the Commission issued public notice accepting the Kekaha Project 1 application for filing and soliciting comments, motions to intervene, and

⁸ Pacific Light & Power Intervention at 5. Since that time, PLP has been a non-voting member of the Agriculture Association.

⁹ Pacific Light & Power Intervention at 6.

¹⁰ Pacific Light & Power Intervention at 5.

¹¹ 16 U.S.C. § 797(f) (2006).

¹² The proposed Kekaha Project 1 would have the following facilities: (1) a 30-foot by 8-foot intake structure on the existing Kekaha Ditch; (2) a 2,180-foot-long, 36-inch-diameter steel penstock (sections to be buried); (3) a 40-foot-long by 55-foot-wide powerhouse containing a single 1.5-MW turbine generator with a maximum hydraulic capacity of 50 cubic feet per second, and an adjacent substation; (4) a 35-foot-long, 10-foot-wide tailrace channel that discharges project flows to the Waimea River; (5) a new 610-foot-long, gravel road to access the powerhouse; (6) a 2-mile-long, 69-kilovolt (kV) transmission line interconnecting the project's substation to the existing Kaumakani substation; and (7) appurtenant facilities. The estimated annual generation of the Kekaha Project 1 would be 8.7 gigawatt-hours (GWh).

competing applications.¹³ The County of Kauai, the Development Corporation, Pacific Light & Power, Inc., and the Agriculture Association filed timely motions to intervene.¹⁴ The Department of Hawaiian Home Lands filed a late motion to intervene that was granted by notice issued on September 30, 2011. Comments were filed by Pacific Light & Power, Inc., the Agriculture Association, the Kingdom of Hawaii, and the U.S. Department of the Interior.

8. In its motion to intervene, the Development Corporation stated that it opposes Kahawai Power's application because the priority status afforded to the holder of a preliminary permit could interfere with its decisions on further development and improvement. The Agriculture Association added that if the Commission issues a preliminary permit for the Kekaha Project 1, the Association, as the manager of the Ditch facilities and related lands, would have to expend time and resources addressing a project that it asserts is not compatible or integrated with its current development plans. Further, the Agriculture Association stated that such a preliminary permit would disrupt ongoing initiatives supported not only by the Agriculture Association, but also by Hawaii state government agencies, stakeholders, and local community members. The Agriculture Association cautioned that the achievement of important state policy objectives concerning diversified agriculture and renewable energy may be unnecessarily hampered or delayed by granting a preliminary permit.

9. On May 20, 2011, Kekaha Ditch Hydro filed a competing application with the Commission for a preliminary permit to study the feasibility of the Kekaha Project 2 No. 14203, the same project that Kekaha Ditch Hydro is developing through Hawaii's state hydropower authorization process.¹⁵ On July 22, 2011, the Commission sent a

¹³ Notice reproduced at 76 Fed. Reg. 17,413 (2011).

¹⁴ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules of practice and procedure. 18 C.F.R. § 385.214 (2011).

¹⁵ The proposed Kekaha Project 2 would have the following facilities: (1) an intake structure on the existing Kekaha Ditch with an automated control gate to manage flows and a trash rack; (2) an approximately 900-foot-long, 42-inch-diameter high density polyethylene penstock (likely to be laid above ground); (3) a concrete powerhouse with a 15-foot floor elevation containing a single 2-MW Pelton turbine and generator and an adjacent substation; (4) an approximately 1000-foot-long, 4-inch-diameter high density polyethylene tailrace that discharges water to the Waimea River; (5) a 2-mile-long, 12-kV transmission line, interconnecting with an existing distribution line on Kekaha Agricultural Association property; and (5) appurtenant facilities. The estimated annual generation of the Kekaha Project 2 would be 8.9 GWh.

letter to Kekaha Ditch Hydro requesting additional information. Kekaha Ditch Hydro filed the requested information on August 16, 2011. The Commission did not issue public notice accepting the application for Kekaha Project 2. The Department of Hawaiian Home Lands has, however, filed a motion to intervene.

II. Discussion

10. Given that Hawaii's electrical generation and transmission system is not connected to the interstate electric grid, Part I of the FPA applies in a different manner to State of Hawaii inland hydropower projects than to those located in the contiguous United States. Accordingly, as discussed below, many hydropower projects in Hawaii do not require a Commission license, and Hawaii has a long history of authorizing and regulating hydropower projects at the state level.¹⁶ There are no Commission-licensed hydropower projects in Hawaii.

A. The Commission's Hydropower Jurisdiction

11. Under the FPA, the Commission has two types of licensing jurisdiction: mandatory and permissive. Mandatory licensing is governed by section 23(b)(1)¹⁷ of the FPA, which provides that a Commission license is required for a hydroelectric project if it: (1) is located on navigable waters of the United States;¹⁸ (2) occupies lands or reservations of the United States; (3) uses the surplus water or water power from a government dam; or (4) is located on a non-navigable commerce clause stream, affects

¹⁶ Thirteen hydroelectric plants in Hawaii have been identified, with 18 generating units producing a total annual average of 91.6 GWh of electricity. See *Hydroelectric Power in Hawaii- A Reconnaissance Survey*, (February 1981), available at <http://hawaii.gov/dbedt/info/energy/publications/hydro81.pdf>. The Wailuku River Hydroelectric Power Company began producing electricity at an additional site in May of 1993. Department of Business, Economic Development & Tourism, *Use of Hydropower in Hawaii*, <http://hawaii.gov/dbedt/info/energy/renewable/hydro> (last visited Sep. 28, 2011). As of 2009, the average annual production of state-regulated hydropower projects had increased to 112.64 GWh. U.S. Energy Information Administration, *Hawaii Electricity Profile* (Data Release Date: April 2011), available at http://www.eia.gov/cneaf/electricity/st_profiles/hawaii.html.

¹⁷ 16 U.S.C. § 817 (2006).

¹⁸ The definition of "navigable waterway of the United States" is found in section 3(8) of the FPA, 16 U.S.C. § 796(8) (2000). "Navigable waters" means those parts of streams or other bodies of water which are used or suitable for use for the transportation of persons or property in interstate or foreign commerce.

the interests of interstate or foreign commerce (e.g., is connected to the interstate power grid), and has undergone construction or major modification after August 26, 1935.¹⁹

12. Section 23(b)(1) of the FPA provides, in pertinent part:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States . . . , or to utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

13. If the conditions described above are not met, FPA section 4(e)²⁰ nevertheless permits the Commission to license a hydroelectric project in response to a voluntary application if the project is located on a commerce clause water.²¹ Permissive licensing is authorized rather than required, and is governed by section 4(e) of the FPA. Section 4(e) authorizes licensing of hydroelectric projects located on a broader class of commerce clause waters than are specified for projects that would require licensing under

¹⁹ The post-1935 construction requirement stems from the specific language and legislative history of section 23(b)(1). See *Farmington River Power Co. v. FPC*, 455 F.2d 86 (1972).

²⁰ 16 U.S.C. § 797(e) (2006).

²¹ *Swanton Village*, 70 FERC ¶ 61,325, at 61,992-93, 61,995-96 (1995).

section 23(b)(1).²² Thus, it is possible for a voluntary applicant to obtain a license under section 4(e) of the FPA for a project that would not require a license under section 23(b)(1).²³

14. Section 4(e) of the FPA provides, in pertinent part:

The Commission is hereby authorized and empowered-- . . . (e) To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States . . . , or for the purpose of utilizing the surplus water or water power from any Government dam. . . .

15. Unless a proposed hydropower project in Hawaii occupies public lands or reservations of the United States or uses surplus water or water power from a Federal government dam, the determination of whether licensing is required will generally turn on a navigability finding. This is because, although a newly-proposed project in Hawaii will involve post-1935 construction and may be located on a commerce clause waterway, it will not be connected to the interstate transmission grid. Absent a finding that the project would affect the interests of interstate or foreign commerce in some other fashion, i.e., the presence of commercially significant anadromous or diadromous fish,²⁴ the jurisdictional determination will hinge on a navigability finding. In making jurisdictional determinations for projects proposed in Hawaii, the Commission has found that, based on the evidence presented in those cases, there was insufficient evidence of navigability or

²² This broad class of commerce clause waters consists of those that are subject to the jurisdiction of Congress under its authority to regulate interstate and foreign commerce. These include headwaters and “tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally.” *FPC v. Union Electric Co.*, 381 U.S. 90, 97 (1965). They also include other bodies of water that are not conventional streams, such as groundwater. *Swanton Village*, 70 FERC at 61,996.

²³ See *Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988).

²⁴ See, e.g., *United States Department of Commerce v. FERC*, 36 F.3d 893 (9th Cir. 1994) (finding mandatory jurisdiction can be based on project’s commerce clause impact on anadromous fish).

of impacts on commerce to find that proposed hydroelectric projects require a Commission license.²⁵

16. While those projects did not require a Commission license,²⁶ they may have been subject to the Commission's permissive licensing authority under section 4(e). Section 4(e) authorizes the Commission to license hydroelectric projects located on commerce clause waters, i.e., any bodies of water over which Congress has jurisdiction under its authority to regulate commerce. Because most, if not all, of Hawaii's rivers ultimately flow into the ocean, they would be considered commerce clause streams, which are a subset of section 4(e) commerce clause waters. Consequently, most hydropower project developers in Hawaii could seek a voluntary Commission license pursuant to section 4(e).

17. Section 4(f) of the FPA²⁷ authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA,²⁸ which in turn sets forth the material that must accompany an application for license. Section 5 of the FPA²⁹ provides

²⁵ See, e.g., *Kauai Island Utility Coop.*, 117 FERC ¶ 62,073 (2006) (licensing is not required for the Upper and Lower Waiahi Hydroelectric Project because there was insufficient evidence to determine that the South Branch North Fork Wailua River, Waikoko Stream, Waiaka Stream, Iiiliua Stream, and Waiahi Stream, near Lihue, Kauai County, Hawaii, are navigable waters); *Island Power Co.*, 47 FERC ¶ 61,355 (1989) (licensing is not required because, in light of the totality of the record evidence, the Wailua River had not been shown to be a navigable water of the United States at the site of the proposed project); *Island Power Co.*, 42 FERC ¶ 62,129 (1988) (licensing not required because a navigation status report for the Hanalei River found that that river is not navigable at the site of the proposed project) *reh'g denied*, 75 FERC ¶ 61,126 (1996) (licensing is not required because even though the Commission has recognized that a project's effect on anadromous fish could affect interstate commerce, the record here demonstrated no commercial significance of several native Hawaiian species of anadromous fish, shrimp, and snails).

²⁶ Note, however, that offshore marine hydrokinetic projects would require licensing because they are located in navigable waters. See *AquaEnergy Group, Ltd.*, 101 FERC ¶ 62,009 (2002).

²⁷ 16 U.S.C. § 797(f) (2006).

²⁸ 16 U.S.C. § 802 (2006).

²⁹ 16 U.S.C. § 798 (2006).

that each preliminary permit shall be issued for the sole purpose of maintaining priority of application for a license under the terms of the FPA. This means that a preliminary permit holder has first-to-file priority in the event that two or more developers file a license application with the Commission.

18. The Commission's jurisdiction to issue a preliminary permit stems from our jurisdiction to license the proposed project; if we would have jurisdiction to issue a license, we would also have jurisdiction to issue a preliminary permit.³⁰ In the case at hand, neither Kekaha Project 1 nor Kekaha Project 2 is located on lands or reservations of the United States or uses surplus water or water power from a government dam. Nothing in the record indicates that either of the projects is located on navigable waters of the United States, and although the projects would be built after August 26, 1935, and located on a commerce clause stream, we cannot conclude, based on the record, that either project would affect the interests of interstate or foreign commerce. Based on the information available, licensing is not required for Kekaha Project 1 or Kekaha Project 2.

19. Although licensing would not be required for Kekaha Project 1 or Kekaha Project 2, the Commission would be permitted under section 4(e) to issue a license since the Kekaha Ditch draws water from the Waimea River (which flows into the ocean), and is therefore located on a commerce clause waterway. Consequently, the Commission is authorized to issue the preliminary permits sought in this case.

20. Given that the Commission appears to have jurisdiction to issue a license for either of the proposed projects, it is unquestionable that it has authority to issue preliminary permits with respect to those projects.³¹ However, it is within the Commission's sole discretion to decide whether to issue a preliminary permit.³²

³⁰ *Hanalei Power Company*, 53 FERC ¶ 61,167, at 61,619 (1990); *Swanton Village*, 70 FERC ¶ 61,325, at 61,992 (1995).

³¹ The Commission may dismiss a permit application where it determines that it lacks jurisdiction over the proposed project. *See, e.g., San Carlos Irrigation and Drainage District*, 105 FERC ¶ 61,134 (2003) (dismissing permit application for project at federal dam site where Commission had no jurisdiction over development of private hydropower).

³² *See Karmargo Corporation v. FERC*, 825 F.2d 1392, 1398 (D.C. Cir. 1988) (stating that the Commission, "under the Federal Power Act, is not obliged to issue permits to anyone who seeks them").

B. The Preliminary Permits at Issue

21. The Commission has historically exercised significant discretion in processing preliminary permit applications. The Commission has issued preliminary permits for terms ranging from 18 months to 3 years, and has at times decided not to issue preliminary permits for an entire class of technologies, i.e., those projects that have a generating capacity under a certain threshold.³³ More recently, the Commission has agreed, in a Memorandum of Understanding with the Department of the Interior, to not issue preliminary permits for hydrokinetic projects located on the Outer Continental Shelf.³⁴ Such decisions are within our authority, so long as we provide adequate justification for them. Examining the facts in the cases before us leads us to conclude that, while the Commission cannot envision every set of facts that may be presented to it, as a general matter we will decline to issue preliminary permits for projects in Hawaii that would be subject to permissive section 4(e) licensing, unless the facts of the particular case present extenuating circumstances that would require the Commission to consider such an application.

22. As explained above, Kahawai Power filed the Kekaha Project 1 preliminary permit application for a site that another developer, Kekaha Ditch Hydro, was already pursuing through Hawaii's state hydropower authorization process. Were we to issue a preliminary permit to Kahawai Power, the company would then have first-to-file priority over Kekaha Ditch Hydro, even though that entity has been working with state authorities to develop a project at the same site. This appears to us to be a type of unwarranted "claim-jumping." Because the issuance of a preliminary permit is within our discretion, we decline to do so here. Moreover, in order to avoid similar situations in the future, we will, as a general matter, decline to issue preliminary permits for projects in Hawaii that would be subject to permissive section 4(e) licensing. This proceeding demonstrates the potential for the Commission's preliminary permitting process to interfere with

³³ The first set of regulations promulgated under the FPA stated that preliminary permits would not be issued "for projects of a power capacity of less than 100 horsepower." Regulation 9, FPC Order No. 9 (February 28, 1921). The capacity of the projects subject to the provision was later changed to 2000 horsepower. *See* FPC Rules and Regulations, Second Revised Issue (1924); FPC and Regulations, Fourth Revised Issue (1931); 18 C.F.R. § 4.80 (1979). This provision was dropped from the Commission's regulations in 1979 following the passage of the Public Utility Regulatory Policies Act of 1978.

³⁴ *Memorandum of Understanding Between the U.S. Department of the Interior and Federal Energy Regulatory Commission*, signed April 9, 2009.

hydropower development that is proceeding in accordance with a legitimate state authorization process.

23. We note that filing a complete preliminary permit application with the Commission is significantly less demanding than the substantial efforts that appear to have taken place here under the state development process. Thus, the potential for a preliminary permit issued by the Commission to interfere with existing development activities at the state level is significant. While we cannot let a state process interfere with our exclusive mandatory jurisdiction, we do not want our preliminary permit program with respect to projects subject to permissive licensing to chill the development efforts of entities pursuing a legitimate state authorization process.

24. Nor do we want to force developers of projects not subject to mandatory licensing to engage in the federal authorization process when they have been successfully pursuing authorization from the state, simply because another entity has filed a preliminary permit application with the Commission for the same hydropower site.

25. As discussed above, we henceforth will, as a general matter, decline to issue preliminary permits for projects in the state of Hawaii that would be subject to permissive section 4(e) licensing. To ensure that the issue of our jurisdiction is properly considered, future applicants seeking a preliminary permit for a project in Hawaii will need to make an initial showing demonstrating why licensing under FPA section 23(b) would be required for the proposed project.

26. Based on our reasoning above, the preliminary permit applications for the Kekaha Project 1 and Kekaha Project 2 are dismissed.

The Commission orders:

(A) The preliminary permit applications filed on March 1, 2011, and May 20, 2011, by Kahawai Power 4, LLC and Kekaha Ditch Hydro, LLC for the Kekaha Waimea Water Power Project No. 14105 and the Kekaha Ditch Hydropower Project No. 14023 are dismissed.

(B) This order constitutes final agency action. Any party to this proceeding may file a request for rehearing of this order within 30 days from the date of its issuance,

as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2011).

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.