

141 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cottonwood Hydro, LLC

Docket No. DI11-13-001

ORDER GRANTING REHEARING
AND DISMISSING MOTION FOR STAY

(Issued October 18, 2012)

1. On July 22, 2011, Cottonwood Hydro, LLC, filed a petition for declaratory order seeking a jurisdictional determination regarding the proposed repair and rehabilitation of an existing, unlicensed hydropower project located on Little Cottonwood Creek in Salt Lake County, Utah.

2. On May 3, 2012, Commission staff issued an order finding that Cottonwood Hydro's project is required to be licensed because certain project works are located on federal lands.¹ On June 4, 2012, Cottonwood Hydro filed a request for rehearing and a motion to stay the requirements of the May 3 Order. This order grants Cottonwood Hydro's request for rehearing and finds that a license is not required based on the unique history of the lands involved in this case. This order also dismisses as moot Cottonwood Hydro's stay request.

I. Background

3. Cottonwood Hydro's project consists of two developments (an upper and a lower development). The intake of the upper development diverts water from Little Cottonwood Creek through a 50-foot-wide concrete weir into a 2,002-foot-long, 24- to 28-inch diameter steel penstock that delivers the water to a single-story concrete powerhouse that contains a 261-kilowatt turbine. A tailrace releases the water into the intake for the lower development. The intake for the lower development is a 50-foot-wide weir diverting water through a 5,341-foot-long, 24- to 28-inch diameter steel penstock to a two-story concrete and masonry powerhouse that contains an 850-kilowatt turbine. A tailrace releases the water back into Little Cottonwood Creek. The transmission line associated with the upper development is 75 feet long, and the lower development's transmission line is 200 feet long.

¹ 139 FERC ¶ 62,090 (2012) (May 3 Order).

4. The project's two developments were built in approximately 1914 by Alfred Whitmore, and owned by Whitmore family heirs until the 1980s.² In 1983, the family deeded much of the land surrounding the hydropower developments to a non-profit organization called the Trust for Public Lands (Trust). The Whitmore family heirs did not transfer the land that contained fixtures or equipment related to the project, including dams, flumes, pipelines, access roads, and storage areas.³

5. In 1985, Whitmore family heirs deeded additional lands to the Trust, including the land on which the project's penstocks are located. The Whitmore family heirs retained an easement in these lands, as follows:

[r]eserving unto the Grantors and their respective successors and assigns and each of them a perpetual easement on, over, through, above, under and across all of the foregoing tracts and each of them for: (1) access, ingress and egress for all purposes to and from all other properties of the Grantors or either of them; (2) the operation, repair, maintenance, construction, reconstruction, enlargement, improvement, replacement, existence, and use of presently existing or hereafter constructed pipelines, penstocks, dams, power plants, power lines, power poles, underground power lines and equipment of every kind or nature of the Grantors or either of them located or to be located, at the Grantors' option, on, over, through, above, under or across the easement or any portion thereof or any location served by the easement; (3) all right to cut and remove trees, brush and rocks which reasonably interfere with Grantors' use and enjoyment of this easement; (4) all other rights including, but not limited to, rights of ingress and egress necessary or convenient for full and complete use and enjoyment of easements hereby reserved.⁴

6. Later in 1985, the Trust deeded the lands purchased from the Whitmore family heirs to the United States Department of Agriculture's Forest Service (Forest Service), subject to the easement described above.

7. In 2007, Cottonwood Hydro purchased the hydropower project and lands and interests held by the Whitmore family heirs associated with the hydropower project.

² Cottonwood Hydro's June 4, 2012 request for rehearing (at 1) states that the hydropower developments were built in approximately 1914. Its July 22, 2011 petition for declaratory order (at 4) states that the project was built in 1909. In either case, the hydropower developments pre-date passage of the 1920 Federal Water Power Act.

³ Request for rehearing at 11-12.

⁴ *Id.* 17.

II. Discussion

8. Section 23(b)(1) of the Federal Power Act (FPA) requires licensing of a hydropower project without a valid pre-1920 permit if it: (1) is located on a navigable waterway of the United States; (2) is located on the public lands or reservations of the United States;⁵ (3) utilizes surplus water or water power from a government dam; or (4) is located on a non-navigable stream over which Congress has commerce clause jurisdiction, is constructed or modified after August 26, 1935, and affects the interests of interstate or foreign commerce.⁶

9. Commission staff's May 3 Order found that Cottonwood Hydro's project was required to be licensed because the penstock occupies federal lands, and project works located on any part of the public lands or reservations of the United States are subject to the Commission's mandatory licensing jurisdiction under section 23(b)(1) of the FPA.⁷ The May 3 Order also found that the project does not use surplus water or waterpower from a federal government dam, and that the Little Cottonwood Creek is not a stream over which Congress has commerce clause jurisdiction.⁸ Because the May 3 Order found licensing required on other grounds, it did not address whether Little Cottonwood Creek itself is a navigable water under the FPA. However, even if Little Cottonwood Creek were physically navigable, it would not meet the definition of navigable waters under section 3 of the FPA, which requires a navigable interstate connection.⁹

⁵ Section 3 of the FPA defines "public lands," as "lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws," 16 U.S.C. § 796(1) (2006), and "reservations," as "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose . . . ," 16 U.S.C. § 796(2) (2006).

⁶ 16 U.S.C. § 817 (2006).

⁷ May 3 Order, 139 FERC ¶ 62,090 at P 5.

⁸ For purposes of FPA section 23(b)(1), commerce clause streams are the headwaters and tributaries of navigable waters of the United States. *See FPC v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965). Little Cottonwood Creek is a tributary of the Jordan River, which is a tributary of the Great Salt Lake, which is not a navigable water of the United States because it lacks a navigable interstate connection.

⁹ 16 U.S.C. § 796(8) (2006). Little Cottonwood Creek is located entirely within the State of Utah, and is itself a small tributary of the Great Salt Lake, which lacks a navigable interstate connection.

10. On rehearing, Cottonwood Hydro contends that *Town of Estes Park (Estes Park)*,¹⁰ which the May 3 Order cited as precedent for its finding, is not dispositive because the federal government acquired the lands underlying the project's penstock from the Whitmore family heirs (through the Trust) subject to the rights reserved in the easement. Cottonwood Hydro points out that the discussion of FPA section 23(b)(1) and the status of the federal lands in *Estes Park* is dicta because the case was decided on other grounds.¹¹ Cottonwood Hydro asserts that when an existing hydroelectric project becomes jurisdictional only because of a subsequent acquisition of land by the federal government, and the same document that creates an interest in the federal government also reserves to the project owner the continuing, broad operational easements set forth in this case, the purpose of those easements would be materially impaired if Commission jurisdiction attached upon conveyance of those lands to the federal government.

11. We agree with Cottonwood Hydro that licensing is not required and grant rehearing. The apt precedent for Cottonwood Hydro's circumstance is *Central Vermont Public Service Corporation (Central Vermont)*.¹² In *Central Vermont*, the Commission found that a project located on Forest Service lands was not located on federal lands for FPA purposes (i.e., the "public lands" or "reservations" of the United States) because Central Vermont's predecessor-in-interest had obtained the necessary fee ownerships, easements, and rights-of-way for the project prior to the Forest Service's acquisition of the lands.¹³ The Commission found that the project's dams and reservoirs were not located on federal lands, but instead were located on private inholdings.¹⁴ Likewise, the Commission concluded that the project's penstocks and transmission lines were located

¹⁰ *Town of Estes Park, Colorado*, 75 FERC ¶ 61,245, at 61,802 (1996) (explaining in dicta that if the federal government holds fee title to certain lands, those lands qualify as lands owned by the United States for FPA purposes, even if someone else has a continuing right to use them pursuant to an easement).

¹¹ The lands transferred from private to federal ownership in *Estes Park* were lands being added to Rocky Mountain National Park. Congress had passed legislation in 1926 explicitly stating that the provisions of the FPA did not apply to any lands being added to Rocky Mountain National Park. 16 U.S.C. § 197 (2006). Therefore, the Commission had no jurisdiction over lands that were subject to such a transfer, and it was on this basis that the Commission eschewed jurisdiction over the hydropower facility in *Estes Park*. 75 FERC ¶ 61,245 at 61,802.

¹² 54 FERC ¶ 61,132 (1991).

¹³ *Id.* 61,433. Even though the Commission found that Central Vermont's project was not located on federal lands, the project was required to be licensed because there had been post-1935 construction.

¹⁴ *Id.* 61,434.

on easements and rights-of-way that were created prior to the United States taking title to the land and that gave all rights needed, and therefore were not located on federal lands for FPA purposes.¹⁵

12. As in *Central Vermont*, the Cottonwood Hydro project's intakes, powerhouses, and tailraces are located on private lands, and the project's penstocks are located on easements that were created prior to the United States acquiring the lands from the Trust. Therefore, consistent with *Central Vermont*, we find that Cottonwood Hydro's project does not occupy lands of the United States, and licensing is not required on this basis. Because we grant rehearing, Cottonwood Hydro's request to stay the May 3 Order finding licensing required is moot.

The Commission orders:

- (A) Cottonwood Hydro, LLC's request for rehearing is granted.
- (B) The motion for a stay of the May 3, 2012 Order is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁵ *Id.* We note that even if the *Estes Park* decision had not turned on the special Congressional legislation barring applicability of the FPA to Rocky Mountain National Park, the easement at issue in *Estes Park* granted much lesser rights than the easements at issue in this case and *Central Vermont*. In *Estes Park*, the easement interest would revert to the owner of the land, which had become the U.S. Department of the Interior, "as soon as the [hydropower] use thereof shall be abandoned and discontinued." *Estes Park*, 75 FERC ¶ 61,245 at 61,801.