

143 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Greybull Valley Irrigation District

Project Nos. 12595-003
12604-003

ORDER DENYING REHEARING

(Issued May 16, 2013)

1. On January 11, 2013, Commission staff issued orders denying Greybull Valley Irrigation District's (Greybull) applications for third preliminary permits for the Upper Sunshine Reservoir Hydroelectric Project No. 12595-002 (Upper Sunshine Project) and the Lower Sunshine Reservoir Hydroelectric Project No. 12604-002 (Lower Sunshine Project). The proposed projects would be located on the Greybull River and Sunshine Creek, near Meeteetse in Park County, Wyoming. On February 11, 2013, Greybull filed a request for rehearing of the orders denying its third permit applications. This order denies Greybull's request for rehearing.

I. Background

2. In May 2005, Greybull filed an application for a preliminary permit to study the proposed 5-megawatt (MW) Upper Sunshine Project, consisting of an existing dam and reservoir, owned and operated by Greybull, and a new 5-MW generating unit to be placed in a new powerhouse. On November 8, 2005, Commission staff issued Greybull its first three-year preliminary permit for the Upper Sunshine Project, which expired on October 31, 2008.¹ On November 3, 2008, Greybull filed for a successive permit for the Upper Sunshine Project. On February 17, 2009, Commission staff issued Greybull a successive three-year preliminary permit, which expired on January 31, 2012.²

¹ *Greybull Valley Irrigation District*, 113 FERC ¶ 62,115 (2005).

² *Greybull Valley Irrigation District*, 126 FERC ¶ 62,125 (2009).

3. In July of 2005, Greybull filed an application for a preliminary permit to study the proposed 5-MW Lower Sunshine Project, consisting of an existing dam and reservoir, owned and operated by Greybull, and two new generating units to be placed in a new powerhouse. On November 8, 2005, Commission staff issued Greybull a three-year preliminary permit for the Lower Sunshine Project, which expired on October 31, 2008.³ On November 3, 2008, Greybull filed for a successive permit for the Lower Sunshine Project. On February 17, 2009, Commission staff issued Greybull a successive three-year preliminary permit, which expired on January 31, 2012.⁴

4. The successive permits for the Upper and Lower Sunshine Projects explained that, during the second permit term, staff expected Greybull to conduct agency consultation and prepare a development (i.e. license or exemption) application. Standard Article 4 of the permits required Greybull to submit progress reports every six months describing the specific nature of Greybull's progress towards preparing development applications during the previous six months.

5. Greybull's progress reports during its second permits were almost identical to those filed during its first permits. They included brief, generalized descriptions of its progress, with little detail about its progress towards filing a preliminary application document (PAD)⁵ or any other development application materials for either project. Furthermore, Greybull did not file a third or fourth progress report for the Upper Sunshine Project. The second permit terms expired without Greybull filing a notice of intent to file a development application (NOI) and PAD, or any other application materials.

6. On February 2, 2012, Greybull filed applications for a third successive permit for each project. On January 11, 2013, Commission staff issued orders denying Greybull's applications for a third preliminary permit for the Upper and Lower Sunshine Projects.⁶ The denial orders explained that Greybull's second preliminary permits were themselves successive permits, which warranted a higher degree of diligence in complying with the

³ *Greybull Valley Irrigation District*, 113 FERC ¶ 62,114 (2005).

⁴ *Greybull Valley Irrigation District*, 126 FERC ¶ 62,124 (2009).

⁵ See 18 C.F.R. § 5.6(d)(1) (2012). The filing of a PAD initiates the Commission's pre-filing license application process.

⁶ *Greybull Valley Irrigation District*, 142 FERC ¶¶ 62,024 and 62,023 (2013), respectively.

terms of the permit and making progress in preparing acceptable development applications. The orders found that although Greybull had six years to prepare adequate development applications for the projects, it failed to do so. The orders further concluded that Greybull had not presented any extraordinary circumstance that prevented it from filing development applications, as required by Commission policy.⁷ Therefore, Commission staff found that Greybull was not diligent under its second permits, particularly under the heightened diligence standard warranted by a request for a third permit.

7. On February 11, 2013, Greybull filed a request for rehearing of the January 11 orders.⁸

II. Discussion

8. Section 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential development applicants for a period of up to three years.⁹ The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive permit only if it concludes that an applicant has pursued the requirements of its prior permit in good faith and with due diligence.¹⁰ This policy applies regardless of whether there are competing applications for a site.¹¹

9. In general, at a minimum, pursuing the requirements of a permit with due diligence has meant that a permittee timely filed all progress reports, consulted with resource agencies, and conducted environmental studies agreed upon with the resource agencies. In addition, Commission staff must be able to discern in the content of a

⁷ *Mokelumne River Water and Power Auth.*, 89 FERC ¶ 61,001 (1999) (*Mokelumne*) (third permit issued notwithstanding failure to complete environmental studies because of pending litigation over water rights at an adjacent downstream licensed project that could affect upstream flow requirements).

⁸ Greybull included additional information to supplement the record.

⁹ 16 U.S.C. §§ 797(f) and 798 (2006).

¹⁰ *City of Redding, California*, 33 FERC ¶ 61,019 (1985) (*City of Redding*) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

¹¹ *Id.*

permittee's filings a pattern of progress toward the preparation of a development application.¹² Thus, while there is a minimum bar that a permittee must achieve to be diligent, each application for a successive permit is considered on a case-by-case basis.

10. On rehearing, Greybull argues that it should receive third preliminary permits because it acted in good faith and with due diligence during its prior permits. Greybull contends that it has diligently cooperated with state agencies and local stakeholders, but admits that its progress reports and permit applications were terse and lacked detail. Greybull now, for the first time on rehearing, presents what it says is more detailed information regarding its activities to show that it has diligently pursued development of the projects.

11. After a review of the record, we affirm staff's finding that Greybull did not pursue its development applications in good faith and with due diligence during the term of its second permits to warrant a third preliminary permit. Moreover, Greybull has not shown extraordinary circumstances that warrant third permits. Greybull's progress reports contain no information about preparing a PAD or other development application materials. Greybull's third permit applications were virtually identical to the preliminary permit applications it submitted in 2005 and 2008. They did not contain any updated timeline regarding its plans to prepare and file development applications. Furthermore, the studies proposed in the third permit applications are identical to those it proposed in 2005 and in 2008.

12. The additional information that Greybull submitted with its request for rehearing does not change our conclusion. Much of the information relates to litigation regarding a contract for financing studies it would conduct under its preliminary permit. However, as discussed below, that litigation did not occur until mid-way through the second permit term, and only lasted for seven months. Greybull also submitted copies of a draft

¹² *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 26 (2012) (citing section 4(f) of the FPA, 16 U.S.C. § 797(f) (2006), which states that the purpose of a preliminary permit is to enable applicants for a license to secure the data and to perform the acts required by section 9 of the FPA, 16 U.S.C. § 802 (2006). Section 9 requires license applicants to submit to the Commission such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project (i.e., an acceptable license application). In order for an applicant to submit an acceptable license application, it must have consulted with relevant resource agencies regarding the information the agencies will need in the environmental document, and therefore what studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2012)).

interconnection study agreement and a draft memorandum of understanding between it and a transmission association. It submitted no evidence that these drafts documents were ever finalized. It appears that Greybull is no closer to submitting development applications than it was in 2005.

13. Greybull also argues that the Commission should not use a heightened standard of diligence when evaluating its third permit applications because Greybull was unaware of such a heightened standard. Greybull asserts that the Commission only recently created the standard in *Cascade Creek*.¹³ Thus, Greybull contends that, because it filed its third permit applications before the Commission issued *Cascade Creek*, it should not be held to that stricter standard of review.¹⁴

14. We disagree. First, as discussed above, Greybull did not meet the good faith and due diligence standard that applies to second permits, let alone show extraordinary circumstances. Moreover, *Cascade Creek* did not establish a new concept of heightened due diligence. Rather it provided a clearer articulation of the Commission's policy with respect to third consecutive permit applications that it addressed over 20 years ago in *Mokelumne*.¹⁵ Commission staff reviews successive permit applications on a case-by-case basis. It is rare for the Commission to issue a third consecutive permit to the same applicant for the same site, unless, as was the case in *Mokelumne*, some extraordinary circumstance or factor outside the control of the permittee is present. Greybull's successive permits explained that, because the permits would be Greybull's second, the

¹³ 140 FERC ¶ 61,221.

¹⁴ We do not accept Greybull's argument that the language in a successive permit, which states that "a successive permit can warrant a greater standard of Commission oversight," does not indicate a heightened due diligence standard for a third permit. Greybull's second permits clearly set out the Commission's expectations: "It is expected that during this permit term, agency consultation will be conducted and a license application will be prepared" 126 FERC ¶¶ 62,124 at P 5 and 62,125 at P 5.

¹⁵ *Mokelumne*, 89 FERC ¶ 61,001. In that case, the Commission also explained that, although it would grant the applicant in *Mokelumne* a third permit, given the unique circumstances presented, it is well within the Commission's discretion to deny successive permits where it concludes that the timing of the removal of an external, potentially long-term preclusion of permit studies, is speculative and likely years off.

diligence standard would be heightened and Greybull would be expected to conduct agency consultation and prepare a development application.¹⁶

15. Its second permits expired with Greybull having done minimal agency consultation and having failed to file a PAD or development application. In most cases, three years should be enough time to consult with resource agencies and conduct requested studies to prepare development application materials, and six years should certainly be more than enough time. Allowing a site to be reserved for up to nine years (i.e., three full permit terms), absent some showing of extraordinary circumstances, would be to allow site banking.¹⁷ Thus, it was entirely reasonable for Commission staff to review whether Greybull was diligent in satisfying the terms of its second permits and the progress it made in preparing its development application materials during the permits' term against an even higher standard than would apply to a second permit. To receive a third permit, applicants must demonstrate an extraordinary circumstance or factor that explains why it has yet to file a development application.

16. Greybull admits that its progress reports and preliminary permit applications lacked important details, but contends that factors outside its control constitute extraordinary circumstances and submits information with its rehearing request to support its position. In particular, Greybull alleges that the litigation over financing for the projects, as well as general economic hardship cause by the "Great Recession" of 2008, constitute extraordinary circumstances.¹⁸

17. We find that Greybull's arguments on rehearing do not rise to the level of extraordinary circumstances outside of the permittee's control that would justify a third permit. The litigation issues arose in August 2010, over a year into Greybull's second preliminary permits and over four years after it should have started to study the project

¹⁶ 142 FERC ¶¶ 62,023 at PP 5-6 and 62,024 at PP 5-6.

¹⁷ The essence of our policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (2006) (affirming application of policy against site banking in permit cases). See also *Idaho Power Co. v. FERC*, 767 F.2d 1359 (9th Cir. 1985) (finding Commission conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA).

¹⁸ Request for Rehearing at 22.

sites for development. After the litigation concluded, Greybull did not, in the remaining time left on its permits, make progress towards development applications. To the contrary, the economic hardship argument presented by Greybull indicates that, rather than needing the time to prepare acceptable development applications, it is currently unable to develop the sites, but wants to maintain priority to develop them in the future.¹⁹

18. Greybull argues, in the alternative, that the Commission should apply “a more relaxed due diligence standard” to Greybull than it would to a private entity because Greybull is a municipality.²⁰ Greybull assumes that, since section 7(a) of the Federal Power Act (FPA) creates a statutory preference in hydroelectric permitting and licensing proceedings for municipalities over other applicants, it should not be held to the same diligence standards as other hydroelectric permittees and permit applicants.

19. We disagree. Section 7(a) of the FPA only directs the Commission to give a filing preference to applications for preliminary permits or licenses by states and municipalities.²¹ The municipal preference provision of the FPA does not exempt municipalities from pursuing its proposed project with due diligence.²² There is no category of permittee that is excused from complying with the Commission’s permit program requirements, which are contained in the terms and conditions of the

¹⁹ Greybull also discusses the integrated nature of the Upper Sunshine and Lower Sunshine reservoirs, but this argument is not relevant to the issues on rehearing.

²⁰ Request for Rehearing at 10.

²¹ Under section 4.37(b)(3) of the regulations, 18 C.F.R. § 4.37(b)(3) (2012), if one of two applicants is a municipality or a state, and the other is not, and the plans of the municipality or state are at least as well adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will favor the municipality or state.

²² See *Modesto Irrigation District*, 20 FERC ¶ 61,088 (1982) (finding that the FPA does not exempt municipalities from the Commission’s threshold filing requirements); *Commonwealth of Pennsylvania and Susquehanna River Basin Commission*, 18 FERC ¶ 61,107 (1982) (finding that there is no category of applicant, including municipalities, that are “excused from complying, as a threshold matter, with the Commission’s permit program filing requirements, strict compliance with which we have repeatedly stressed”); *Miller Pulp and Paper Co.*, 18 FERC ¶ 61,096 (1982) (finding that the preference accorded municipalities is not an absolute one and the burden rests with the applicant to show that it meets all of the Commission’s requirements).

preliminary permit. Greybull would not be entitled to such special treatment over other permittees. In any event, Greybull has not claimed municipal preference in any of its preliminary permit applications,²³ so its arguments about being entitled to special treatment as a municipality are moot.²⁴

20. To allow Greybull nine years of exclusive rights to develop the projects in question would amount to site banking, contrary to Commission policy.²⁵ We note, however, that the fact that we denied the permits does not prevent Greybull from continuing to develop its projects or to file development applications, unless and until we were to issue a permit to another entity.

21. For the above reasons, we deny Greybull's request for rehearing and affirm Commission staff's denial of the preliminary permit applications for the Upper and Lower Sunshine Projects.

²³ Section 4.81(a)(4) of the Commission Regulations requires an applicant for preliminary permit to state whether it is a municipality and, if so, to state whether or not it is claiming the preference given to the applications of municipalities under section 7(a) of the FPA, and to submit copies of the state or local laws evidencing it is authorized under such laws to engage in the business of developing, transmitting, utilizing, or distributing power. 18 C.F.R. § 4.81(a)(4) (2012). Greybull has not claimed municipal preference, nor has it submitted copies of Wyoming state law to show that it is authorized to engage in the business of developing, transmitting, utilizing or distributing power. Rather its permit applications state that Greybull is an existing public corporation, not a municipality claiming municipal preference. Greybull knows that it must claim municipal preference when filing permit applications because it failed to do so in 2001 when competing against another entity for the Lower Sunshine site, which consequently led to Greybull not getting the permit. *See Symbiotics, LLC*, 99 FERC ¶ 62,157 (2002).

²⁴ In addition, we do not accept Greybull's contention that, as owner and operator of the Upper and Lower Sunshine Reservoirs, it is best situated to develop the projects and therefore asks the Commission to overlook the delay in filing development applications. *See, e.g., Renaissance Ketchikan Group, LLC*, 127 FERC ¶ 61,161, at P 4 (2009); and *Sullivan Island Assoc.*, 58 FERC ¶ 61,129 (1992). In fact, as owner and operator of the dams, reservoirs, and powerhouses, we would expect Greybull to be able to prepare and file development applications for the projects relatively quickly and not need more than the seven years it has already had to do so.

²⁵ *See* n.17, *supra*.

The Commission orders:

Greybull Valley Irrigation District's request for rehearing, filed on February 11, 2013, in Project Nos. 12595-003 and 12604-003 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.