

147 FERC ¶ 61,219  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

H2O Holdings, LLC

Project No. 12714-004

ORDER DENYING REHEARING

(Issued June 19, 2014)

1. On January 31, 2014, Commission staff issued an order denying H2O Holdings, LLC's (H2O Holdings) application for a preliminary permit for the Phantom Canyon/South Slope Pumped Storage Project No. 12714 (South Slope Project).<sup>1</sup> The proposed project would be located on Phantom Creek, near Canon City, in Fremont, Pueblo, and El Paso Counties, Colorado, and would occupy federal land administered by the U.S. Bureau of Land Management. On February 28, 2014, H2O Holdings filed a request for rehearing of the order denying its permit application. This order denies rehearing.

**I. Background**

2. On November 14, 2006,<sup>2</sup> Commission staff issued H2O Providers, LLC (H2O Providers) a three-year preliminary permit to study the feasibility of the South Slope Project, which would consist of upper and lower reservoirs; a reserve reservoir; two above-ground penstocks; two concrete-lined powerhouse silos (each with a 216-MW generating unit) connected to the lower reservoir by a concrete tailrace channel; an approximately 30-mile-long, 230-kilovolt transmission line; a 5.3-mile-long pipeline to provide water to the reserve reservoir from the Lester Atterbury Ditch diversion on the north side of the Arkansas River; and appurtenant facilities. The proposed project would have an average annual generation of 946,000 megawatt-hours, which would be sold to a local utility.

3. On July 17, 2009, H2O Providers filed a Notice of Intent (NOI) to file an application for a license, a pre-application document (PAD), and a request to use the

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<sup>1</sup> *H2O Holdings, LLC*, 146 FERC ¶ 62,086 (2014) (January 31 Order).

<sup>2</sup> *H2O Providers, LLC*, 117 FERC ¶ 62,152 (2006).

traditional licensing process, which Commission staff granted on August 18, 2009. On October 31, 2009, the permit for Project No. 12714 expired.

4. On November 3, 2009, H2O Providers filed an application for a successive permit for the project, which Commission staff issued on May 26, 2010.<sup>3</sup> The order concluded that H2O Providers, under its first preliminary permit, pursued its proposal in good faith and with due diligence. The permit expired on April 30, 2013.

5. On August 14, 2013, H2O Holdings filed an application for a preliminary permit to study the feasibility of the South Slope Project.<sup>4</sup> H2O Holdings' proposed project is in most respects identical to the project proposed by H2O Providers.<sup>5</sup> In its application, H2O Holdings stated that, "[d]uring the spring and early summer of 2013, the business structure of H2O Providers, LLC changed with the addition of a new member of the LLC. The purpose of this change was to increase the economic feasibility of the Project by making some minor modifications...."<sup>6</sup> H2O Holdings also indicated in its application that the proposed project would be wholly located on land owned by Phantom Canyon Ranch Land and Cattle Company, LLC (Land and Cattle Company), which is owned by Mark Morley, the founder and a managing member of H2O Providers.<sup>7</sup> In addition, the permit application states that H2O Holdings "and its related entities have

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<sup>3</sup> *H2O Providers, LLC*, 131 FERC ¶ 62,168 (2010).

<sup>4</sup> Due to a clerical error, H2O Holdings' August 14, 2013 preliminary permit application and its February 28, 2014 request for rehearing were placed in incorrect dockets in the Commission's FERC Online e-Library. These filings were subsequently placed in the correct dockets (August 14, 2013 application is docketed as Project No. 12714-003, and February 28, 2014 request for rehearing is docketed as Project No. 12714-004).

<sup>5</sup> The project proposed by H2O Holdings would eliminate a separate reserve reservoir, and would increase the size of the lower power reservoir to include reserve capacity for non-project use of about 44,600 acre-feet. The lower power reservoir would be retained by four new dams (instead of one). In addition, H2O Holdings' proposed project would include one powerhouse (instead of two powerhouse silos) containing four 110-MW units, and four steel tailraces (instead of one tailrace channel) connecting the units to the lower reservoir.

<sup>6</sup> H2O Holdings' August 14 Application at 4.

<sup>7</sup> Affidavit of Mark Morley, Rehearing Request at Exhibit B.

filed pending water cases to develop assured water supplies for the Project.” The “related entities” to which H2O Holdings refers includes the Land and Cattle Company.<sup>8</sup>

6. H2O Holdings’ application in several other places referred to studies done, and money spent, under the prior permits as work that it had undertaken and costs that it, the current permit applicant, had incurred. For example, H2O Holdings’ permit application states: “During the term of the [prior] preliminary permit, Applicant undertook extensive investigations and corresponded with 54 potentially interested parties” and consulted with agencies, and the “estimated costs incurred by Applicant in connection with the Project thus far is \$3.2 [million].”<sup>9</sup>

7. The Commission issued public notice of H2O Holdings’ permit application on September 26, 2013, soliciting comments, motions to intervene, and competing applications.<sup>10</sup> In response, Robert Hutchison, Joseph Wehr, the Bureau of Land Management (BLM), and the Colorado Division of Wildlife (Colorado DOW) filed comments. Additionally, Gwen Minnier together with Paul Sylvania, and Beaver Park Water, Inc. together with Penrose Water District (Beaver Park and Penrose), filed timely motions to intervene<sup>11</sup> and comments. Commenters and intervenors raised concerns about the general efficiency of pumped storage projects, the feasibility of the proposed project, effects on nearby property owners, and potential environmental effects, including effects on aquatic habitat, recreation, and water supply. H2O Holdings filed response comments addressing some of these concerns.

8. On January 31, 2014, Commission staff issued an order denying the preliminary permit application.<sup>12</sup> Commission staff considered H2O Holdings’ August 14 application to be an application for a third preliminary permit for the South Slope site under Project

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<sup>8</sup> See H2O Holdings’ August 14 Application at Exhibit 2, and the Colorado Water Case No. 05CW91 cited therein.

<sup>9</sup> See H2O Holdings’ August 14 Application at Exhibit 2. H2O Holdings lists, as its expenses, money for the original feasibility study, a study of the project’s reservoir storage and hydropower components, and various geotechnical studies, all of which were completed under H2O Providers’ previous two permit terms. The application also states that the studies are available at H2O Holdings’ office. *Id.*

<sup>10</sup> The Commission did not receive any competing applications for the proposed South Slope site.

<sup>11</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission’s regulations. 18 C.F.R. § 385.214 (2013).

<sup>12</sup> January 31 Order, 146 FERC ¶ 62,086.

No. 12714. Based on this determination, Commission staff found that H2O Holdings, in its August 14 application, failed to meet the Commission's standard of an "extraordinary circumstance or factor outside the control of the permittee," used to evaluate applications for a third consecutive preliminary permit to the same applicant for the same site.<sup>13</sup>

9. On February 28, 2014, H2O Holdings filed a timely request for rehearing.<sup>14</sup>

## II. Discussion

### A. H2O Holdings' Permit Application

10. Sections 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.<sup>15</sup> Commission policy is to grant a successive (i.e., second) preliminary permit only if an applicant has pursued the requirements of its prior permit in good faith and with due diligence.<sup>16</sup>

11. In most cases, one preliminary permit term of three years should be enough time to consult with resource agencies and conduct any studies necessary to prepare a development application. The Commission will not issue a second successive preliminary permit (i.e., a third preliminary permit) to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.<sup>17</sup> In the absence of extraordinary circumstances, allowing a site to be reserved

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<sup>13</sup> *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 26 (2012) (*Cascade*).

<sup>14</sup> On April 1, 2014, Beaver Park and Penrose jointly filed a motion to strike portions of H2O Holdings' request for rehearing, arguing that H2O Holdings impermissibly added four new exhibits to the record at the rehearing stage. On April 9, 2014, H2O Holdings filed a motion for leave to respond to the motion to strike. While Beaver Park and Penrose's motion was properly filed, we find that it is appropriate to review the new information raised by H2O Holdings, as it provides clarification regarding its corporate structure, and is therefore pertinent to the issue on which staff based its decision in the January 31 Order. We therefore deny Beaver Park and Penrose's motion to strike, and dismiss as moot H2O Holdings' motion for leave to respond.

<sup>15</sup> 16 U.S.C. §§ 797(f) and 798 (2012).

<sup>16</sup> See *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999); *Burke Dam Hydro Associates*, 47 FERC ¶ 61,449 (1989); *City of Redding, California*, 33 FERC ¶ 61,019 (1985).

<sup>17</sup> *Cascade*, 140 FERC ¶ 61,221, at P 27 (citations omitted).

for nine years (i.e., three preliminary permit terms) would violate the Commission's longstanding policy against site banking.<sup>18</sup>

12. In denying H2O Holdings' permit application, the January 31 Order stated that,

H2O Providers changed business structure and formed H2O Holdings for the purpose of adding a new member to the company. Because H2O Holdings is an outgrowth of H2O Providers, is managed by essentially the same members of H2O Providers, and proposes essentially the same project as proposed by H2O Providers, we view H2O Holdings instant application as its third permit application for the site.<sup>19</sup>

The order found that H2O Holdings failed to meet the heightened standard of due diligence and good faith during the term of its previous preliminary permits, and failed to show that any extraordinary circumstances or factors outside its control prevented it from filing a development application within the term of the second permit.<sup>20</sup>

13. On rehearing, H2O Holdings states that Commission staff incorrectly concluded that it was the same entity as H2O Providers. Rather, H2O Holdings contends that it and H2O Providers are separate and distinct legal entities, and that H2O Holdings' August 14 application should be considered an application for an initial preliminary permit, rather than a third permit by H2O Providers. In support of its request for rehearing, H2O Holdings maintains that it "exists today as a separate legal entity, managed by distinctly different persons than those that were involved in the prior permit."<sup>21</sup>

14. In order to show that it is a separate legal entity from H2O Providers, H2O Holdings submitted affidavits showing that Mark Morley formed H2O Providers in 2006, and was its sole member until July 15, 2009, when James Morley, Darwin Faaborg, and Joy Focht were added as managing members.<sup>22</sup> Mr. Morley formed H2O Holdings in 2009 (before H2O Providers filed its successive (second) permit application), and its

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<sup>18</sup> The essence of the Commission's 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. *See id.*

<sup>19</sup> January 31 Order, 146 FERC ¶ 62,086 at n.1.

<sup>20</sup> *Id.* P 8 (2014).

<sup>21</sup> Rehearing Request at 4.

<sup>22</sup> *See* Affidavit of Mark Morley, Rehearing Request at Exhibit B.

managing members at that time consisted of Mark Morley, James Morley, and Joy Focht.<sup>23</sup> Twelve days before H2O Holdings filed its August 2013 permit application, its membership changed to consist of Joy Focht and new equity members Power House Partners, LLC (Sam Houston) and ASI Contractors, Inc. (John Bowen).<sup>24</sup> As of that date, Mark and James Morley were no longer members of H2O Holdings.<sup>25</sup>

15. We find that H2O Holdings and H2O Providers are so closely connected that they are essentially the same entity for the purposes of seeking a third preliminary permit, and affirm staff's finding in the January 31 order that H2O Holdings' August 14 application constitutes an application for a second successive preliminary permit.

16. As described above, a review of H2O Holdings' August 2013 permit application shows that H2O Holdings referred to itself as "applicant," while discussing actions taken and money spent under the previous permits, which it now claims were held by the "separate legal entity" of H2O Providers, and actions that it would take and money it would spend, should the Commission grant a preliminary permit to H2O Holdings. These references demonstrate that H2O Holdings and H2O Providers are closely related with respect to development of the South Slope Project.

17. Joy Focht's role as a managing member of both H2O Providers and H2O Holdings also indicates that the two entities are closely related. Focht became a managing member of both H2O Providers and H2O Holdings on July 15, 2009,<sup>26</sup> and served in that role when H2O Providers filed its NOI and PAD on July 17, 2009, as well as its successive permit application on November 3, 2009. In addition, Focht was a managing member of H2O Holdings at the time it filed its permit application on August 14, 2013.<sup>27</sup> Further, the fact that the proposed project would be constructed on lands held by Mark Morley's

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<sup>23</sup> The membership consisted of Floating Boats, LLC (James Morley); Morley Companies Family Investments, LLLP (Mark Morley); and FF Investments, LLC (Joy Focht). Rehearing Request at 3.

<sup>24</sup> See Affidavit of Sam Houston, rehearing request at Exhibit D. Mr. Houston, managing partner of Power House Partners, LLC, states that he "had no involvement with or management of H2O Providers at any time," and that prior to August 2013 he "had no involvement with or membership in H2O Holdings."

<sup>25</sup> See affidavits of Joy Focht and Sam Houston, rehearing request at Exhibits C and D.

<sup>26</sup> See Rehearing Request at Exhibit B, affidavits of Mark Morley and Joy Focht.

<sup>27</sup> Rehearing Request at Exhibits B and C.

company (to which H2O Holdings refers as a “related entity”) indicates that he is still involved with the project.

18. H2O Holdings also points to its January 9, 2014 response to Beaver Park and Penrose’s motion to intervene, in which it used the phrase, “applicant and its predecessor,” to illustrate that it and H2O Providers are separate entities. H2O Holdings stated that “a ‘predecessor’ is defined as an entity or person ‘who precedes another’ in an office, position, or endeavor,” and argues that its use of the term in describing its relationship with H2O Providers is indicative of the fact that the two are, in fact, separate entities. How H2O Holdings characterizes its relationship to H2O Providers in a particular pleading does not overcome the evidence cited above.

### **B. No Extraordinary Circumstances**

19. In the event the Commission considers H2O Holdings’ August 14 application as an application for a third permit, H2O Holdings argues that the recent recession that impacted the United States economy beginning in 2008 constitutes an “extraordinary circumstance” that warrants issuance of a third preliminary permit.<sup>28</sup>

20. We disagree. Changes in the economy as a whole do not rise to the level of extraordinary circumstances. To the contrary, these are issues that developers encounter in the normal course of a project’s development. The sole purpose of a preliminary permit, after all, is to maintain priority of a license application while the permittee investigates the feasibility of a proposed project. It would be contrary to our policy against site banking to issue a series of permits while an applicant waits for optimal economic circumstances.<sup>29</sup>

### **III. Conclusion**

21. For the reasons discussed above, we find that H2O Providers and H2O Holdings, while separate legal entities, are so closely connected that H2O Holdings’ August 14 application constitutes an application for a third preliminary permit for the South Slope Project. We also find that H2O Holdings has failed to demonstrate extraordinary circumstances or factors outside its control that would warrant a third permit. Therefore, we deny H2O Holdings’ request for rehearing. We note, however, that the absence of a preliminary permit in no way prevents H2O Holdings from continuing to develop the South Slope Project, since holding a permit is not a prerequisite to filing a license application.

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<sup>28</sup> Rehearing Request at 4-5.

<sup>29</sup> *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039 (2014).

The Commission orders:

(A) H2O Holdings LLC's request for rehearing, filed on February 28, 2014, in this proceeding, is denied.

(B) Beaver Park Water, Inc. and Penrose Water District's April 1, 2014 Joint Motion to Strike is denied.

(C) H2O Holdings' April 9, 2014 Motion for Leave to Respond is dismissed as moot.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.