

148 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pine Creek Mine, LLC

Project No. 12532-005

ORDER DENYING REHEARING

(Issued July 17, 2014)

1. On March 20, 2014, Commission staff issued an order denying Pine Creek Mine LLC's (Pine Creek) application for a two-year extension of its third preliminary permit for the proposed Pine Creek Mine Hydroelectric Project No. 12532 (Pine Creek Project).¹ The proposed project would be located in a mine that lies within the Inyo National Forest in Inyo County, California, partially on lands managed by the U.S. Forest Service (Forest Service). On April 21, 2014, Pine Creek filed a request for rehearing of the order denying its permit extension application. This order denies Pine Creek's request for rehearing.

I. Background

2. Pine Creek has been granted three consecutive preliminary permits to study the proposed Pine Creek Project.² The project would generate power using water that accumulates inside Pine Creek Mine, which has been excavated inside a mountain. Currently, inside a tunnel exiting the mountain at the bottom of the mine, there is a concrete plug that has a pipe running through it to allow accumulated water to flow through the plug and out the tunnel to the ground surface. The water is then discharged into Morgan Creek, an intermittent stream that flows into Pine Creek. The proposed

¹ *Pine Creek Mine, LLC*, 146 FERC ¶ 62,193 (2014) (March 20 Order).

² *Pine Creek Mine, LLC*, 133 FERC ¶ 62,215 (2010); *Pine Creek Mine, LLC*, 110 FERC ¶ 62,226 (2005); and *Pine Creek Development LLC*, 96 FERC ¶ 62,296 (2001). Pine Creek Development LLC and Pine Creek Mine, LLC proposed identical projects and Mr. Lynn Goodfellow owned both companies. Thus, we treat the companies as a single entity and refer to both as Pine Creek throughout this order.

project would include a 1.5-megawatt generating unit that would use the head created by the water flowing through the pipe and would have an average annual generation of 5.6 gigawatt-hours.

3. On September 24, 2001, Pine Creek received its first preliminary permit.³ During the permit term, Pine Creek worked with the Inyo County Planning Department and the Forest Service to modify existing mining requirements governing the site and develop a Surface Mining Reclamation Plan (Reclamation Plan); worked to address water quality and water management issues on the project site; and conducted hydraulic studies on the existing mine plug to determine potential head and flows that could be used in site development. The permit expired on August 31, 2004, and on September 1, 2004, Pine Creek filed an application for a successive permit.

4. On March 8, 2005, Commission staff issued a second preliminary permit to Pine Creek.⁴ During the second permit term, Pine Creek continued activities started under its first permit, and in addition, held its first public meeting presenting the project to interested parties; worked to obtain a Forest Service special use permit; acquired permissions from private land and facilities owners to commence project operations, began evaluating the economics of implementing the hydroelectric project; and prepared a Notice of Intent (NOI) to file an original license application using the Integrated Licensing Process (ILP) and a Pre-Application Document (PAD) for the proposed project. The second permit expired on February 29, 2008. On the same date, Pine Creek filed its NOI and PAD for the proposed project.

5. On March 3, 2008, Pine Creek filed an application for a third preliminary permit for the site.

6. On December 6, 2010, Commission staff issued Pine Creek a third preliminary permit for the project.⁵ During its third permit term, Pine Creek filed a response to comments received on its PAD; filed a revised proposed study plan; retained a consulting firm to conduct a revised Special Status Wildlife Assessment Study; filed a request with the Commission to initiate consultation under § 106 of the National Historic Preservation Act (NHPA); and filed a final biological resources report.

³ *Pine Creek*, 96 FERC ¶ 62,296 (2001).

⁴ *Pine Creek*, 110 FERC ¶ 62,226 (2005).

⁵ *Pine Creek*, 133 FERC ¶ 62,215 (2010).

7. On November 4, 2013, Pine Creek filed a request for a two-year extension of its third preliminary permit.
8. On November 30, 2013, Pine Creek's third permit expired.
9. On March 20, 2014, Commission staff denied Pine Creek an extension of its third preliminary permit term, stating that the Commission will not authorize the reservation of a site under a preliminary permit for a period longer than six years (two preliminary permit terms) to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.⁶ Staff stated that Pine Creek had failed to demonstrate any extraordinary circumstance or factor outside its control during its third permit term that hindered its progress toward developing a license application, and explained that allowing Pine Creek to reserve the project site for 11 years would constitute site banking.⁷
10. On April 21, 2014, Pine Creek filed a request for rehearing of the March 20 Order, arguing that Commission staff evaluated its request for a permit extension under an incorrect legal standard and erred in its finding that Pine Creek contributed to site banking by holding a permit for the same project site for nine years without filing a development application.
11. On April 25, 2014, KC Pittsfield LLC filed a Rebuttal to Pine Creek's Request for Rehearing, urging the Commission to deny the requested permit extension. On May 2, 2014, the Inyo National Forest filed a letter with the Commission disputing Pine Creek's assertion in its request for rehearing that the development of the Historical Assessment and Resources Study was hindered by Forest Service inaction. Pine Creek filed motions to strike KC Pittsfield's and the Inyo National Forest's filings on May 2 and 15, 2014, respectively.⁸

⁶ *Pine Creek Mine, LLC*, 146 FERC ¶ 62,193 at P 4 (2014).

⁷ *Id.* P 4, n.6 (citing *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012)).

⁸ Our regulations generally prohibit answers to requests for rehearing. *See* 18 C.F.R. § 385.213(a)(2) (2013). Accordingly, we reject KC Pittsfield's and the Forest Service's filings, as well as Pine Creek's responses to these filings.

II. Discussion

12. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.⁹ In 2013, Congress amended the FPA to provide that a preliminary permit term can be extended once for not more than two additional years if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.¹⁰

13. A preliminary permit gives the permittee no right to enter onto the project site or to conduct any land-disturbing activities. It also does not completely shield the permittee against competition. Rather, a permit gives the permittee the right, during the permit term, to have the first priority in applying for a license for the project that is being studied.¹¹ Once the permittee has filed an application, other entities may file competing applications, although, all things being equal, the Commission will favor the permittee.¹²

14. 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 (second) permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence.¹³ Our policy is to grant a third preliminary permit (i.e., a second successive permit) only when the permittee has

⁹ 16 U.S.C. § 797(f) (2012).

¹⁰ The Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. § 798(b)).

¹¹ *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006) (“The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.”).

¹² *See* 18 C.F.R. § 4.37(c) (2013).

¹³ *See, e.g., Greybull Valley Irrigation Dist.*, 143 FERC ¶ 61,131, at P 8 (2013) (citing *City of Redding, Cal.*, 33 FERC ¶ 61,019 (1985) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports)); *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 24 (2012).

demonstrated that an extraordinary circumstance or factor outside of its control was present that warranted a third permit.¹⁴

15. 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, and six years should be more than enough time. In the absence of extraordinary circumstances, allowing a site to be reserved for nine years (i.e., three preliminary permit terms) would violate the Commission's longstanding policy against site banking.¹⁵

A. Extensions of Successive Permits

16. On rehearing, Pine Creek argues that Commission staff erred in its March 20 Order by using the wrong standard to evaluate Pine Creek's request for a two-year extension. Pine Creek claims that instead of the extraordinary circumstances standard, Commission staff should have used the "good faith and reasonable diligence" standard articulated in the 2013 Act.

17. We disagree. The Commission reviews applications for a second permit under a good faith and reasonable diligence standard and applies an extraordinary circumstances test in looking at applications for third permits.¹⁶ Nothing in the 2013 Act suggests that Congress intended the Commission to apply a lower standard to extensions, regardless of how long an entity had previously held a permit. Indeed, such a reading suggests the anomalous result that the Commission would apply an extraordinary circumstances test in issuing a third permit and then be required to revert to a lower standard in reviewing an application to extend that permit. We believe that Congress was only contemplating extensions to initial permits, and adopted the test that the Commission had already established for second permits.¹⁷ Accordingly, we conclude that staff was correct in

¹⁴ See, e.g., *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039, at P 17 (2014); *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at PP 14-15 (2013).

¹⁵ 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.*

¹⁶ *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039 at P 17.

¹⁷ It seems more likely that Congress intended to limit permits to a maximum of an initial three-year permit and one two-year extension than that it meant to prevent the Commission from applying stricter standards after longer periods.

applying an extraordinary circumstances standard in reviewing Pine Creek's application to extend its third permit.

18. Pine Creek maintains that Commission staff also erred in its finding that granting an extension of Pine Creek's third preliminary permit would constitute site banking, because it spent its third permit term making substantial progress towards completing its permit requirements. We disagree. 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.¹⁸ Pine Creek has held permits for the proposed project site for nine years, and has not yet filed a license application. As discussed below, we find that there are no extraordinary circumstances that justify such a delay. To give Pine Creek another two years of priority with respect to the project site would indeed violate our policy against site banking.

B. No Extraordinary Circumstances

19. Pine Creek contends that the March 20 Order failed to recognize that Pine Creek's progress in developing the project was delayed by extraordinary circumstances beyond its control. During its first two permit terms, Pine Creek explains, it was involved in ongoing litigation, first with Inyo County over proposed amendments to the Reclamation Plan for the mine, and later with a former Pine Creek consultant who allegedly used confidential information obtained during the course of her employment to file an application for a preliminary permit in competition with Pine Creek. Pine Creek states that its involvement in these matters diverted the company's time and financial resources away from conducting studies and other activities required under the preliminary permits.

20. Pine Creek's claim that delays caused by litigation during its first two permit terms constituted "extraordinary circumstances" that prevented it from taking steps toward filing a license application within its third permit term is unpersuasive. The litigation concluded prior to Pine Creek's receipt of its third permit, and consequently is not an extraordinary circumstance warranting an extension of the third permit term. In any case, the mere existence of litigation, in the absence of injunctive relief or other judicial action that actually precludes a permittee from developing a project, is not likely to amount to an extraordinary circumstance.

¹⁸ See *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012); see also *Idaho Power Co. v. FERC*, 767 F.3d 1359, 1363 (9th Cir. 1985) (finding that the Commission's conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA).

21. Pine Creek also claims that, during its third permit term, the Forest Service failed to consult in a timely manner with the State Historic Preservation Officer (SHPO) under Section 106 of the National Historic Preservation Act.¹⁹ In its request for rehearing, Pine Creek maintains that these delays constituted extraordinary circumstances beyond Pine Creek's control, requiring a two-year extension of its permit term.

22. The completion of consultation on historic preservation matters is not a prerequisite to filing a license application. Accordingly, while any issues between Pine Creek and the Forest Service may be regrettable, they do not constitute extraordinary circumstances.²⁰

C. Conclusion

23. For the above reasons, we deny Pine Creek's request for rehearing. We note, however, that holding a preliminary permit is not a prerequisite to pursuing a development application, so that Pine Creek remains free to pursue development of the Pine Creek Mine Hydroelectric Project and to file a license application.

The Commission orders:

(A) Pine Creek Mine's request for rehearing, filed on April 21, 2014, is denied.

¹⁹ 16 U.S.C. § 470 *et seq.* (2012).

²⁰ Pine Creek also asserts that the March 20 Order undermines the Commission's goal "to develop water resources using the best possible manner and at the earliest possible time" because Pine Creek Mine is willing and able to develop the project. Pine Creek's claim is unpersuasive. Indeed, the case which Pine Creek cites in support of this proposition, demonstrates the Commission's well-established precedent against site banking. *Electric Plant Board of the City of Augusta, Kentucky*, 115 FERC ¶ 61,198, at P 10 (2006) (stating that "the time limitations in section 13 [of the FPA], prohibiting delays by licensees in constructing projects, and other provisions of the Act indicate a Congressional intent that water power resources be utilized in the best possible manner and at the earliest possible time").

(B) KC Pittsfield's April 25, 2014 answer and the Inyo National Forest's May 2, 2014 answer are rejected.

(C) Pine Creek's May 2 and May 15, 2014 motions to strike are rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.