

153 FERC ¶ 61,199  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Kevin Drone

Project No. 6142-008

ORDER TERMINATING EXEMPTION BY IMPLIED SURRENDER

(Issued November 19, 2015)

1. This order terminates, by implied surrender, the exemption from licensing for the 240-kilowatt (kW) Dardanelles Creek Hydroelectric Project No. 6142, located on the Dardanelles and Pond Creeks in Placer County, California.

**I. Background**

2. On October 8, 1982, the Commission granted Robert T. Suter an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for the Dardanelles Creek Hydroelectric Project.<sup>1</sup> The project is located on federal lands managed by the U.S. Department of the Interior's Bureau of Land Management (BLM) and Bureau of Reclamation (Reclamation) in Placer County, California. As authorized, the project consists of the following existing facilities: (1) a 5-foot-high by 20-foot-long diversion structure on Dardanelles Creek and a 2-foot-high by 8-foot-long diversion structure on Pond Creek; (2) a 8-inch-diameter, 4,000-foot-long conduit from Dardanelles Creek, and a 2-foot-wide, 2,700-foot-long ditch from Pond Creek; (3) a settling basin, 60 feet long, 30 feet wide, and 8 feet deep; (4) a 6-inch-diameter, 1,660-foot-long penstock; (5) a powerhouse with a single Canyon turbine unit rated at 224 kilowatts (kW), and connected to a Toshiba induction generator rated at 240 kW; and (6) appurtenant facilities. The project has not operated since 2009.

3. The exemption was made subject to standard articles contained in the Commission's regulations.<sup>2</sup> Standard Article 1 provides, in part, that "[i]f any term or

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<sup>1</sup> *Robert T. Suter*, 21 FERC ¶ 62,018 (1982).

<sup>2</sup> *See* 21 FERC ¶ 62,018 (citing 18 C.F.R. § 4.106 (1982)).

condition of the exemption is violated, the Commission may revoke the exemption ... or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.”<sup>3</sup>

4. Standard Article 5 provides that:

[t]his exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal land agencies. The Commission may accept a license application submitted by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.<sup>4</sup>

5. Mr. Suter transferred his interest in the project exemption to Mr. Bradley D. Reeves in 1996. On September 18, 2009, the Commission’s San Francisco Regional Office (SFRO) conducted a dam safety inspection at the project and discovered that the project had ceased generation. On November 30, 2009, Mr. Reeves confirmed that the project was not operating and would continue to be non-operational until there were sufficient flows to justify operation.

6. On September 26, 2011, BLM filed with the Commission a copy of a 5-year license (right-of-way permit) issued to Mr. Reeves. However, on October 17, 2011, Mr. Reeves notified the Commission pursuant to section 4.106(i) of the Commission’s regulations<sup>5</sup> that he had transferred his interest in the project exemption to the Mr. Kevin Drone (exemptee) on September 15, 2011.

7. On October 28, 2011, Commission staff sent a letter to the exemptee, Mr. Drone, directing him to provide, within 60 days of the date of issuance of the letter: (1) transfer documentation proving ownership of the project; (2) documentation showing the rights to use or occupy the federal lands where the project is located; and (3) documentation showing that the project has resumed operation, or a plan and schedule for restoring project operation.

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<sup>3</sup> 18 C.F.R. § 4.106(a) (1982) and (2015).

<sup>4</sup> 18 C.F.R. § 4.106(e) (1982) and (2015).

<sup>5</sup> 18 C.F.R. § 4.106(i) (2015).

8. On November 7, 2011, Reclamation filed with the Commission a copy of a November 1, 2011 letter directing the exemptee to apply for approval to own, operate, and maintain a hydroelectric project located on Reclamation lands.
9. On December 12, 2011, the exemptee responded to staff's October 28, 2011 letter, requesting a 60-day extension to submit documentation showing the rights to use or occupy the federal lands where the project is located. The exemptee did not provide transfer documentation proving his ownership of the project or explain the project's operational status.
10. On December 19, 2011, Commission staff granted the exemptee an extension of time until February 28, 2012, to provide the previously-requested information. The exemptee did not respond by the February 28 deadline.
11. On March 6, 2012, the exemptee filed a letter with the Commission stating that he declined to accept transfer of the project exemption until such time as Mr. Reeves would resolve certain outstanding liabilities at the project—the exemptee stated that Pacific Gas & Electric (PG&E) would be entitled to withhold \$10,700.98 in future payment for electric generation at the project due to Mr. Reeves's failure to fulfill electric export estimates from March 18 – May 31, 2011. The exemptee stated further that if Mr. Reeves resolved the issues with PG&E, he would take the necessary steps to obtain the rights to use or occupy the pertinent federal lands and would provide a plan and schedule for restoring project operation.
12. On March 28, 2012, Mr. Reeves responded to the exemptee's March 6, 2012 letter, stating that under the terms of the asset purchase agreement between himself and the exemptee, the exemptee accepted full ownership of the project, including all obligations under the "scheduled contracts" identified in "Exhibit B" to the agreement. On April 9, 2012, Mr. Reeves filed with the Commission a copy of the asset transfer agreement between himself and the exemptee.
13. On October 23, 2012, BLM filed with the Commission copies of two letter orders, dated April 10 and October 17, 2012, directing Mr. Reeves to show cause why his right-of-way permit for the project lands should not be terminated and terminating his right-of-way permit, respectively, for failure to pay the rental fees owed to BLM for the period from January 1 – December 31, 2012. In its October 17 letter order, BLM ordered Mr. Reeves to remove all hydroelectric facility equipment from public lands within 30 days (i.e., by November 16, 2012), and stated that failure to discontinue all use of the pertinent public lands would constitute a trespass. On January 17, 2013, the BLM notified Mr. Reeves that it had instituted a trespass proceeding against him for unauthorized use of the public lands where the project is located (a copy of BLM's January 17 Notice was filed with the Commission on January 23, 2015).

14. On January 8, 2013, in response to BLM's October 23, 2012 filing, Mr. Drone filed a letter with the Commission asserting that Mr. Reeves's attempt to transfer the project exemption was ineffective under Part 4.106(i) of the Commission's regulations<sup>6</sup> because Mr. Reeves failed to transfer the exempted project's right-of-way permit needed to operate the project on federal lands. On November 25, 2013, the exemptee filed a second letter with the Commission, suggesting that the Commission should require Mr. Reeves to file a petition to surrender the project exemption, so that the exemptee could then seek a new license or exemption for the project.

15. On April 16, 2015, the Commission issued a public notice stating its intent to terminate the project exemption by implied surrender. The notice established May 16, 2015, as the deadline for filing comments, protests, and motions to intervene.

16. On May 11, 2015, the Department of the Interior (Interior) filed a motion to intervene on behalf of BLM and Reclamation. On May 7 and 11, 2015, respectively, BLM and Reclamation filed comments on the Commission's notice of intent to terminate. In their comments, the agencies outline the history of their efforts to secure Mr. Reeves's compliance with his right-of-way permit, including instituting a trespass proceeding against Mr. Reeves for unauthorized use of the public lands where the project is located. The agencies contend that it is not in Interior's interest for the Commission to terminate the project exemption, but that the Commission should instead assist BLM's and Reclamation's efforts to pursue legal action against the project's owner.

17. Neither Mr. Reeves nor the exemptee responded to the notice of intent.<sup>7</sup>

## **II. Discussion**

18. The doctrine of implied surrender is typically invoked where, as here, the entity responsible for the project has, by action or inaction, clearly indicated its intent to abandon the project, but has not filed a surrender application (e.g., the exemptee has physically abandoned the project property, dissolved its corporate or other legal entity, or

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<sup>6</sup> 18 C.F.R. § 4.106(i) (2015).

<sup>7</sup> Commission staff has spoken with Mr. Drone's agent, who confirmed receipt of the notice of intent. Additionally, Commission staff sent a copy of the notice of intent to Mr. Drone by both certified and standard mail on September 14, 2015, requesting any comments by October 14, 2015. Mr. Drone has not filed a response.

has failed for several years to operate or maintain the project with no indication of doing so in the reasonably foreseeable future).<sup>8</sup>

19. As explained above, this project has remained out of service for six years. Mr. Reeves allowed the project to cease generation in 2009, and then transferred his interest in the project to Mr. Drone in 2011. Mr. Drone initially showed interest in operating the project, but has since sought to walk away from the project exemption, arguing that he “declines” to accept the exemption, or, alternatively, that Mr. Reeves’s attempt to transfer the exemption was ineffective because he failed to transfer the rights necessary to use or occupy the federal lands where the project is located.

20. We disagree. First, despite Mr. Drone’s request to “decline” the project exemption, he owns the project facilities, and Commission approval is not needed to transfer ownership of an exempted project or the exemption instrument that runs with the project.<sup>9</sup> Once Mr. Drone obtained the project facilities, he became the exemptee. Second, Mr. Reeves was not obligated to transfer with ownership of the exempted project the rights to use or occupy the federal lands where the project is located because such rights are not conferred by the Commission’s exemption from licensing. As stated by Standard Article 5 of the project exemption, “this exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project.”<sup>10</sup> Rather, Standard Article 5 requires the exemptee to obtain such rights from the “administering Federal land use agencies.”<sup>11</sup> Thus, Mr. Drone is in violation of the conditions of the exemption by virtue of his refusal to obtain the appropriate rights from BLM and Reclamation.

21. BLM and Reclamation maintain that the Commission should not terminate the exemption, but rather should facilitate their efforts to remove Mr. Reeves or Mr. Drone from the federal lands where the project is located and restore the site by removing the project facilities.

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<sup>8</sup> *River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013); *James B. Boyd and Janet B. Boyd*, 138 FERC ¶ 61,085, at 16 (2012) (citing *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (2008), *reh’g denied*, 125 FERC ¶ 61,195 (2008), *aff’d*, *Lichoulas v. FERC*, 606 F.3d 769 (D.C. Cir. 2010)).

<sup>9</sup> *See Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 98 FERC ¶ 61,272, at 62,075 (2002).

<sup>10</sup> *See* 18 C.F.R. § 4.106(e) (1982) and (2015).

<sup>11</sup> *Id.*

22. No purpose would be served by delaying our termination of this exemption. Mr. Reeves transferred the project exemption to Mr. Drone in 2011. Thus, Mr. Reeves is no longer subject to the Commission's jurisdiction. Further, our termination of this exemption from licensing will not relieve Mr. Reeves of any obligations he incurred to BLM and Reclamation under the five-year right-of-way permit. In fact, as described above, BLM has already instituted a trespass proceeding against Mr. Reeves for unauthorized use of these lands. Next, although Mr. Drone is the project exemptee, the project exemption does not confer any right to use or occupy the federal lands where the project is located. Thus, BLM and Reclamation, not the Commission, have the authority to pursue Mr. Drone for any alleged unauthorized use or occupation of these lands, and our termination of this exemption from licensing will not relieve Mr. Drone from any liability that he has incurred. Finally, we believe that our termination of this exemption will simplify BLM's and Reclamation's efforts to pursue legal action against Mr. Reeves or Mr. Drone, by eliminating any question as to the Commission's jurisdiction over the project facilities. Consequently, we decline to withhold terminating this exemption from licensing.

23. In sum, the project is owned by an unwilling exemptee who has clearly expressed his unwillingness to operate the project under the current exemption. This long-term failure to maintain the project and obtain the necessary land use rights in accordance with the specifications set forth in the exemption demonstrates the exemptee's intent to abandon the project. We deem this sufficient to support implied surrender of the exemption.

24. Terminating this exemption by implied surrender will not authorize any action or alter the current condition of the project or surrounding environment. Rather, this is in the nature of an administrative action designed to terminate an authorization for an exemption that is, for all practical purposes, no longer in effect. That being the case, there is no effect on the environment and an environmental analysis is not required.<sup>12</sup>

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<sup>12</sup> See 18 C.F.R. § 380.4(a)(1) (2015). See, e.g., *James B. Boyd and Janet A. Boyd*, 136 FERC ¶ 62,119 (2011), *order denying reh'g*, 138 FERC ¶ 61,085, at P 31 (2012) (finding that under 18 C.F.R. § 380.4(a)(1), environmental analysis was not necessary for the implied surrender of a license where all project facilities were left in place and such termination would not authorize any action or alter the current condition of the project or surrounding environment); e.g., *Watervliet Paper Co.*, 35 FERC ¶ 61,030 (1986) (finding that license surrender that left all project features in place was not a major federal action significantly affecting the quality of the environment).

The Commission orders:

(A) The exemption for the Dardanelles Creek Hydroelectric Project No. 6142 is terminated by implied surrender, effective November 19, 2015. No preliminary permit or development applications for this site may be submitted until December 21, 2015.

(B) This order constitutes final agency action. Any party 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 FPA, 16 U.S.C. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2015). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.