

154 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Owyhee Hydro, LLC

Project No. 14648-001

ORDER DENYING REHEARING

(Issued March 17, 2016)

1. On November 25, 2015, Commission staff issued an order (November 25 Order) denying Owyhee Hydro, LLC's (Owyhee Hydro) application for a preliminary permit for the proposed Anderson Ranch Pumped Storage Hydroelectric Project No. 14648 (Anderson Ranch Project).¹ The proposed project would be located at the U.S. Bureau of Reclamation's (Reclamation) Anderson Ranch dam and reservoir, part of Reclamation's Boise Project, on the South Fork of the Boise River near Mountain Home in Elmore County, Idaho. On December 21, 2015, Owyhee Hydro filed a timely request for rehearing of the November 25 Order. This order denies the request for rehearing.

I. Background

2. On November 24, 2014, Owyhee Hydro² filed an application for a preliminary permit to study the feasibility of the proposed Anderson Ranch Project.³ The proposed pumped storage project would utilize Reclamation's existing Anderson Ranch dam and reservoir, as well as the vacant third bay in Reclamation's existing powerhouse at the

¹ *Owyhee Hydro, LLC*, 153 FERC ¶ 62,133 (2015).

² Gridflex Energy, LLC submitted filings on behalf of Owyhee Hydro throughout this proceeding.

³ Owyhee Hydro revised its application and provided a third project design alternative on July 27, 2015.

dam.⁴ Owyhee Hydro also proposed construction of a new upper reservoir, which would be located on lands outside of the Reclamation footprint. The project would have an installed capacity of 80 megawatts (MW).

3. On December 4, 2014, Commission staff sent Reclamation a letter requesting its opinion on whether non-federal hydropower development is authorized at the Anderson Ranch dam. On January 30, 2015, Reclamation responded, stating that hydropower at the Anderson Ranch dam, reservoir, and powerhouse is reserved for federal development. On April 13, 2015, Owyhee Hydro filed comments agreeing with Reclamation's assessment that Reclamation retains jurisdiction for that portion of the proposed project within the Reclamation footprint.⁵

4. On June 8, 2015, Commission staff replied to Reclamation, agreeing that Reclamation has jurisdiction over hydropower development at Anderson Ranch dam and powerhouse, but explaining that the Commission retains jurisdiction for hydropower facilities that would be located outside of the Reclamation development. The letter clarified that an entity seeking to build a pumped storage project, like Owyhee Hydro's Anderson Ranch Project, would therefore need to obtain a lease of power privilege from Reclamation for the use of Reclamation facilities, and also would need a license from the Commission for those portions of the project not under Reclamation's jurisdiction (e.g., the project's proposed upper reservoir, penstocks, transmission line). Staff explained that, "[i]n this case, due to the nature of the pumped storage proposal, without Reclamation's approval to use the facilities under its jurisdiction, Commission licensing of a partial project would be pointless."

5. The Commission issued public notice of Owyhee Hydro's permit application on August 28, 2015. On October 23, 2015, Reclamation filed comments stating that it reserves the right to develop additional hydropower at its dam and powerhouse, and that it will not authorize private development of hydropower (i.e., issue a lease of power privilege) for use of Anderson Ranch powerhouse's third generator bay.

⁴ Owyhee Hydro proposed three design alternatives, all of which would use the Anderson Ranch reservoir as the lower reservoir. In design alternatives A and B, an 80-megawatt (MW) reversible pump turbine/generator would be installed in the vacant third bay. In alternative C, an 80-MW pump would be installed in the vacant bay and a newly constructed powerhouse on the shore of the reservoir upstream of the dam would house an 80-MW turbine/generator.

⁵ Owyhee Hydro originally filed comments on February 24, 2015, disagreeing with Reclamation's jurisdictional determination. Reclamation responded to these comments on March 25, 2015.

6. The November 25 Order denied Owyhee Hydro's preliminary permit application. The order explained that, without Reclamation's approval to use Reclamation facilities, Commission licensing of a partial project (and issuance of a preliminary permit to study such a project) would be pointless.

7. On December 21, 2015, Owyhee Hydro filed a timely request for rehearing, arguing that the Commission erred in its determination of jurisdiction. Owyhee Hydro also contends that, even if the Commission lacks jurisdiction over a portion of the project, the Commission has no reasonable basis to deny a preliminary permit for the portion of the project over which the Commission has jurisdiction. Owyhee Hydro asserts that the denial was premature and not in the public interest.

8. On January 12, 2016, Reclamation filed motions for leave to intervene late and to respond to Owyhee Hydro's request for rehearing insofar as it relates to Reclamation's jurisdiction over hydropower development at Anderson Ranch dam.

II. Discussion

A. Late Intervention

9. The Commission generally disfavors intervention after issuance of a dispositive order.⁶ However, because the issues addressed by Reclamation concern its jurisdiction, we will grant the late motion to intervene and consider its answer, which addresses the question of its jurisdiction.

B. Jurisdictional Determination

10. Sections 4(e) and 4(f) of the Federal Power Act⁷ authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. This jurisdiction is withdrawn if hydropower generation at the site is authorized for federal development, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction.⁸

⁶ See *Marseilles Land and Water Co.*, 138 FERC ¶ 61,120, at PP 4-6 (2012).

⁷ 16 U.S.C. §§ 797(e) and (f) (2012).

⁸ See *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983).

11. It is not unusual for legislation authorizing federal dam projects to lack clarity with respect to the Commission's licensing jurisdiction.⁹ It was for this reason that in 1992, the two agencies entered into a Memorandum of Understanding (MOU) establishing procedural steps and a set of five rebuttable presumptions (starting with those based on the clearest evidence and working down the levels of clarity) to guide the often difficult analysis of the agencies' respective jurisdictions over hydroelectric development at Reclamation projects.¹⁰ The guidance is grounded in established principles of statutory construction.¹¹

⁹ See, e.g., *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269 (10th Cir. 1986) (proposed non-federal development along canals of Uncompahgre Valley Water System); *Arizona Power Authority and the Colorado River Commission of Nevada*, 39 FERC ¶ 61,115 (1987), *reh'g denied*, 42 FERC ¶ 61,282 (1988) (proposed non-federal development at Reclamation's Hoover Dam).

¹⁰ *Memorandum of Understanding between the Federal Energy Regulatory Commission and the Department of the Interior, Bureau of Reclamation* (November 6, 1992), 58 Fed. Reg. 3269 (January 8, 1993) (MOU), <http://www.ferc.gov/legal/mou/mou-6.pdf>.

¹¹ See *Troup County Board of Commissioners*, 102 FERC ¶ 61,300, at P 10 (2003). For example, the MOU lists (in Exhibit A) categories of legislative evidence in descending order of persuasiveness:

- (1) statutory language;
- (2) materials incorporated by reference into the statute;
- (3) House and Senate documents and reports;
- (4) documents submitted to Congress, such as Feasibility Reports and Definite Plan Reports;
- (5) other legislative history, such as floor debates or hearing transcripts;
- (6) Definite Plan Reports, or supplements thereto, that are issued after the administrative or statutory authorization; and
- (7) any other information.

12. For Reclamation projects or facilities, like Anderson Ranch dam, reservoir, and powerhouse, that were administratively authorized,¹² the MOU states that the two agencies “examine the authorizing feasibility reports that were adopted in accordance with the approval procedures governing at the time to determine appropriate jurisdiction.”¹³ The agencies may also examine Definite Plan Reports that are issued after the administrative authorization, and any other relevant information.¹⁴

13. The Anderson Ranch development of the Boise Project was administratively authorized by the Secretary of the Interior (Secretary) in a letter to the President on June 25, 1940. The Secretary found the project to be feasible and submitted a feasibility report on his findings to Congress on August 12, 1940.¹⁵

14. The feasibility report recommended the construction of a dam, reservoir, and powerhouse.¹⁶ It proposed a powerhouse to be built at the dam, in order to “develop the power possible of generation at the Anderson Ranch Reservoir”¹⁷ The report contemplated a powerhouse with a capacity of 20,000 kilowatt (kW). However, as constructed, the powerhouse included two 13,500-kW generator units, for a total installed capacity of 27,000 kW, and a vacant bay designed to hold an additional 13,500-kW unit.¹⁸ The generators in the powerhouse were modernized in 1986 and the capacity of

¹² The Reclamation Project Act of 1939 (1939 Act), 53 Stat. 1187, 1193-94 (1939) (codified at 43 U.S.C. §§ 485a–485k (2012)), authorizes the Secretary of the Interior (Secretary) to approve construction of a project, after submitting a finding of feasibility to the President and Congress. If the Secretary finds that a project has engineering feasibility and the costs allocated to irrigation, power, and municipal water supply are repayable, “then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary.” 53 Stat. 1187, 1193-1194 (1939).

¹³ See n.11, *supra*.

¹⁴ *Id.*

¹⁵ The feasibility report was submitted as H.R. Doc. No. 76-916 (1940).

¹⁶ H.R. Doc. No. 76-916, at X-XII.

¹⁷ H.R. Doc. No. 76-916, at 4.

¹⁸ See *Bureau of Reclamation Technical Record of Design and Construction, Anderson Ranch Dam and Powerplant*, at 40-41 (1956).

the two units was increased to 20,000 kW each, for a total installed capacity of 40,000 kW. The third generator unit has never been installed, and the third bay remains vacant.

15. In its January 30, 2015 response to Commission staff, Reclamation stated that, under Presumption 5 of the MOU, the dam, powerhouse, and reservoir were reserved for federal development. Presumption 5 of the MOU states that

[i]f the authorizing statute, as amended, or any other documents incorporated by reference in the statute, specify the number, capacity, or location of powerplants authorized for federal development, then Reclamation is presumed to have jurisdiction for that specified development. Beyond the specified development, the Commission is presumed to have jurisdiction.¹⁹

16. Owyhee Hydro responded that it agreed the Anderson Ranch development was authorized for hydropower, but that “evidence suggests that this authorization was only for [the] 27,000 kilowatts (27 MW) of capacity originally installed, and that a third unit – whose infrastructure is proposed to be used ... [by Owyhee Hydro’s project] -- was never authorized by Congress,” and thus was not reserved for federal development.²⁰

17. Commission staff’s June 8, 2015 letter to Reclamation agreed with Reclamation’s assessment that the Commission’s jurisdiction to authorize non-federal hydropower facilities at Reclamation’s Anderson Ranch development (i.e., the dam, powerhouse, and reservoir) had been withdrawn.²¹

18. On rehearing, Owyhee Hydro alleges that the Commission incorrectly applied Presumption 5 of the MOU, and that the Commission’s jurisdiction over development of hydropower in the vacant third bay in Reclamation’s powerhouse has not been

¹⁹ 58 Fed. Reg. 3269, 3272 (1993).

²⁰ Owyhee Hydro letter filed February 24, 2015, at 1.

²¹ June 8, 2015 letter at 5.

withdrawn.²² Specifically, Owyhee Hydro argues that Reclamation has reached its authorized capacity limit of 27,000 kW, and has not been authorized to develop the power potential of the vacant third bay. It contends that, under Presumption 5, the hydropower potential of the third bay should be considered incremental capacity, “beyond the specified development,” and thus subject to the Commission’s licensing jurisdiction.

19. We are not persuaded by Owyhee Hydro’s arguments. We agree with Reclamation that the United States intended federal development of the full hydroelectric capacity at Anderson Ranch. The feasibility report supports this conclusion. As Reclamation points out in its answer to Owyhee Hydro’s request for rehearing, the report states that the powerhouse was “to develop the power possible of generation at the Anderson Ranch Reservoir”²³ and developing “the potential power of the site”²⁴ would allow for the surplus sales of power, which would make the project economically feasible. The report explains that “[a]ll water released from the flood-control and irrigation space [in the reservoir] can be used for power development up to the capacity of the power plant.”²⁵

20. We do not believe that the development of power potential “up to the capacity of the power plant” was intended to operate as a limit on federal development. Had that

²² Owyhee Hydro cites several instances where the Commission and its staff have applied Presumption 5, but found that Commission jurisdiction over incremental hydropower development had not been withdrawn. Request for Rehearing at 11-13 (citing Commission staff September 22, 2015 jurisdictional letter for McNary Advanced Hydropower Project No. 14697; Commission staff April 10, 2013 jurisdictional letter for Banks Lake Pumped Storage Project No. 14329; and *Richard D. Ely, III*, 87 FERC ¶ 61,176 (1999) (dismissing preliminary permit application). Those cases are distinguishable from the facts here. The Commission has not yet acted on the preliminary permit application for the McNary Project No. 14697, and in the *Ely* case, the Commission concluded that federal development of hydropower at the site had not yet reached its authorized capacity. In Commission staff’s letter for Banks Lake Pumped Storage Project No. 14329, staff applied presumption 5 of the MOU and found that its jurisdiction was withdrawn over Roosevelt Lake because Reclamation was authorized to develop it to its fullest power potential, but not withdrawn over Banks Lake because power development at that feature had not been specifically authorized.

²³ See H.R. Doc. No. 76-916, at 4 (1940).

²⁴ *Id.* at 6.

²⁵ *Id.* at 4 n.1.

been the case, the powerhouse's capacity would have been limited to the 20,000 kW contemplated in the feasibility report. But, by 1946, while construction was underway, the capacity had already been increased to 27,000 kW, and a third bay had been added for a future generator.²⁶ In addition, Reclamation points to the eventual rewinding of the turbines to increase the powerhouse's capacity to 40,000 kW as further evidence of the intent that the full federal development of hydropower was authorized.²⁷

21. Owyhee Hydro argues that Commission staff improperly applied Presumption 5 of the MOU by failing to recognize the presumption's statement that "[b]eyond the specified development, the Commission is presumed to have jurisdiction." We disagree. As explained above, the full hydropower capacity at Anderson Ranch has been reserved for federal development, and as a result there is no capacity increment available for non-federal development through a Commission license.²⁸

C. Denial of Preliminary Permit Application

22. On rehearing, Owyhee Hydro argues that, even if the Commission's jurisdiction determination stands, denial of its preliminary permit application is unreasonable and not in the public interest. The crux of Owyhee Hydro's argument is that Commission staff's denial was a premature and atypical feasibility assessment. Owyhee Hydro notes that in the June 8, 2015 letter, Commission staff noted that the required authorization by Reclamation was not in itself a bar to Commission licensing. Moreover, Owyhee Hydro contends that the use of the powerhouse's third bay is an issue that would best be resolved in a Commission licensing proceeding, and that the Commission has previously issued preliminary permits for projects where there was expressed federal opposition to the proposed project.

23. The Commission is not required to grant a preliminary permit application, so long as it articulates a rational basis for not doing so.²⁹ We agree that the jurisdiction

²⁶ See Reclamation's January 12, 2016 Answer at 8 n. 14.

²⁷ Reclamation's January 12, 2016 Answer at 8. Development of capacity beyond the amount initially proposed supports a finding that full federal development of power was authorized. See *Symbiotics, LLC*, 116 FERC ¶ 61,146, at 61,655 n.19 (2006).

²⁸ The result would be the same if we applied Presumption 4 of the MOU to the facts in this case. Under that presumption, the authorization for Reclamation to construct and operate a powerplant at Anderson Ranch presumes Reclamation jurisdiction over the entire project.

²⁹ See *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)).

determination in this case is not a bar to the Commission issuing a preliminary permit or license for the project.³⁰ We disagree, however, that denial of Owyhee Hydro's permit application constitutes a premature feasibility assessment of its project. As support for its argument, Owyhee Hydro cites to cases where the Commission issued preliminary permits despite expressed concerns from federal entities. However, in those cases, federal entities raised concerns about water availability for non-federal development,³¹ the protection of cultural and natural resources,³² or concerns about environmental impacts associated with construction and operation.³³ Those sorts of concerns are indeed feasibility concerns, and are often addressed through further study during the preliminary permit term. None of these cases involve a proposal, like the one here, to use a federal powerhouse or other federal facility where the relevant federal agency stated that the proposed use by a non-federal entity was "unacceptable" and would not be permitted.

24. Contrary to Owyhee Hydro's claim, Commission staff's denial here was not unprecedented. In *Symphony Hydro LLC*,³⁴ Commission staff denied a preliminary permit application to study the feasibility of a project at the U.S. Army Corps of Engineers' (Corps) Upper St. Anthony Falls Lock and Dam because staff concluded "no purpose would be served in issuing a preliminary permit," given the Corps' comments about how the project "would preclude or seriously interfere with its use of the lock for

³⁰ See, e.g., *Natural Energy Resources Co.*, 59 FERC ¶ 61,374, at 62,429 n.2 (1992).

³¹ See Owyhee Hydro's Request for Rehearing at 26 (citing *Utah Associated Municipal Power Systems*, 80 FERC ¶ 61,244, at 61,904 n.3 (1997) ("Bonneville argues that a permit should not have been issued because there is no water available for the proposed project.")).

³² See Owyhee Hydro's Request for Rehearing at 26-28 (citing U.S. Bureau of Reclamation's Motion to Dismiss filed in Docket 11872-000 on May 17, 2001). In that case, Reclamation opposed the permit, claiming that the site was reserved for federal development. In the order issuing the permit, Commission staff agreed that the Commission lacked jurisdiction within the Reclamation project and issued a preliminary permit for the portion of the proposed project that was outside of Reclamation's project. *Gentry Resources Corp.*, 106 FERC ¶ 62,042, at 64,082-83 (2004).

³³ Owyhee Hydro's Request for Rehearing at 28-29 (citing *Utah Independent Power*, 141 FERC ¶ 61,226 (2012)). In that case, the Commission found no basis for concluding that the permittee could not design a project that could eventually receive a license. 141 FERC at 62,141.

³⁴ 150 FERC ¶ 62,092 (2015).

navigation and would therefore be incompatible with the statutorily authorized purpose of the facility.”³⁵

25. Owyhee Hydro further argues that it should be given the additional time that comes with a preliminary permit term to work through the issues raised by Reclamation. However, as noted above, Reclamation has clearly expressed that the use of its powerhouse, which is reserved for federal development, is unacceptable. In any event, Owyhee Hydro does not need a preliminary permit in order to pursue a resolution with Reclamation.³⁶

The Commission orders:

(A) The motions for leave to intervene late and to respond, filed by U.S. Bureau of Reclamation on January 12, 2016, are granted.

(B) Owyhee Hydro, LLC’s request for rehearing, filed on December 21, 2015, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁵ *Id.* at 64,165.

³⁶ Owyhee Hydro argues that denial of its preliminary permit application was not in the public interest because its proposal would offer greater public benefit than Reclamation’s proposed development of the third bay. However, as explained above, the vacant third bay is reserved for federal development, and thus, the Commission has no jurisdiction to determine its best use.