

155 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Willow Creek Hydro, LLC

Project No. 7856-027

ORDER TERMINATING LICENSE BY IMPLIED SURRENDER

(Issued April 21, 2016)

1. This order terminates, by implied surrender, the license for the Potosi Power Company Water Power Project No. 7856 (Potosi Project), located on South Willow Creek and Potosi Creek, in Madison County, Montana. The project occupies 0.3 acres of federal lands within the Beaverhead-Deerlodge National Forest.

I. Background

2. On October 7, 1985, the Commission issued a 50-year license to Potosi Power Company, Inc. for the Potosi Project.¹ The license was transferred to Potosi Generating Station, Inc. in 1990,² and subsequently to Willow Creek Hydro, LLC (Willow Creek Hydro or licensee) in 2002.³ As authorized, the project consists of: (1) a 6-foot-high, 25-foot-long concrete and wood diversion; (2) a 2,300-foot-long, 27-inch-diameter penstock bifurcating at the powerhouse; (3) a powerhouse containing two turbine/generating units with a combined installed capacity of 359 kilowatts; (4) a 2.5-

¹ *Potosi Power Company, Inc.*, 33 FERC ¶ 62,017 (1985).

² *Potosi Power Company, Inc.*, 51 FERC ¶ 62,341 (1990).

³ *Potosi Generating Station, Inc.*, 100 FERC ¶ 61,115 (2002). Willow Creek Hydro formally accepted the license on September 16, 2002. See letter from Scott Curry to the Secretary of the Commission.

mile-long transmission line; and (5) appurtenant facilities.⁴ The project has not operated since the project penstock ruptured on June 16, 1994.

3. Shortly after the 2002 transfer of the project to the licensee, Commission staff requested that the licensee file a plan and schedule to restore project operation.⁵ In response, on October 25, 2002, the licensee filed a plan and schedule to complete repairs by spring 2003, but stated that completion was contingent upon the successful resolution of pending litigation to maintain access to the project.⁶ Commission staff approved the licensee's plan and schedule to restore project operation on November 20, 2002.⁷

4. On March 26, 2003, the licensee filed a progress report stating that the litigation had been resolved and significant progress had been made toward restoring project operation.⁸ The licensee also stated that there would be delays in repairing the penstock, but the project would resume operation in spring 2004. By letter dated April 10, 2003, Commission staff acknowledged and accepted the licensee's revised schedule to restore project operation.⁹

5. Commission staff inspected the project on July 20, 2004, and discovered that the work described in the licensee's March 26, 2003 progress report had in fact not been completed. In a follow-up letter dated November 18, 2004, Commission staff requested a revised plan and schedule to restore project operation.¹⁰ The licensee filed a revised plan and schedule on January 24, 2005, stating that the project would resume operation in the

⁴ *Potosi Generating Station, Inc.*, 59 FERC ¶ 62,121 (1992) (amending license and revising annual charges).

⁵ August 8, 2002 letter from Hossein Ildari to Mr. Scott Curry. The letter stated that the licensee needed to repair the ruptured penstock, the cracked transformer pad, and the cracked turbine scroll case of Unit No. 2, and construct an oil containment system around the project's high voltage transformer.

⁶ Letter from Mr. Scott Curry to the Secretary of the Commission.

⁷ Letter from Harry T. Hall (Portland Regional Engineer) to Mr. Scott Curry.

⁸ Letter from Mr. Scott Curry to the Secretary of the Commission.

⁹ Letter from Harry T. Hall to Mr. Scott Curry. On May 28, 2003, the licensee informed the Commission that Nick Kern was the owner of Willow Creek Hydro and would be responsible for the project as licensee.

¹⁰ Letter from Harry T. Hall to Mr. A. Nicholas Kern.

spring of 2006. Commission staff accepted the revised plan and schedule and requested that the licensee file a progress report by December 1, 2005.¹¹ The licensee did not file a progress report.

6. On August 20, 2007, Commission staff inspected the project and found that no repairs had been made and the project had not resumed operation. At the inspection, Commission staff requested that the licensee file a plan and schedule to restore project operation. On March 7, 2008, the licensee¹² filed a proposed plan and schedule, which Commission staff approved by letter dated July 1, 2008.¹³

7. On June 1, 2010, the licensee submitted a progress report, stating that substantial progress had been made but further rehabilitation was halted due to the death of the owner of Willow Creek Hydro in April 2009.¹⁴ The progress report also noted that the project was for sale.¹⁵ Commission staff inspected the project on August 24, 2010, and issued a follow-up letter on September 28, 2010, acknowledging the licensee's progress report and requesting a revised plan and schedule within 60 days.¹⁶ The licensee did not file a revised plan and schedule.

8. By letter dated September 25, 2012, Commission staff directed the licensee to file within 45 days either an updated plan and schedule to restore project operation, a plan and schedule to transfer the project license to an entity that would restore the project, or

¹¹ March 21, 2005 Letter from Harry T. Hall to Mr. A. Nicholas Kern.

¹² On June 18, 2007, Willow Creek Hydro filed a letter stating that Mr. A. Nicholas Kern and Christine Kern are no longer members and have disassociated with Willow Creek Hydro. The letter stated that Roellen Gin Company, Inc. became the managing member of Willow Creek Hydro on January 25, 2007, with Ms. Jane Joslin serving as President.

¹³ See July 1, 2008 Letter from Patrick J. Regan (Portland Regional Engineer) to Ms. Jane Joslin.

¹⁴ See September 28, 2010 letter from Patrick J. Regan to Mr. Darrin Brooks, the on-site manager of the project.

¹⁵ Pursuant to section 8 of the Federal Power Act, 16 U.S.C. § 801 (2012), Commission approval is required prior to the transfer of a license. Under standard license article 5, any transfer of project property rights requires prior Commission approval. See *Linweave, Inc.* 23 FERC ¶ 61,391, at 61,830 (1983).

¹⁶ *Id.*

an application to surrender the license.¹⁷ On November 6, 2012, the licensee filed an updated plan and schedule, stating that a potential buyer was interested in purchasing and rehabilitating the project and planned on closing the sale by January 2013. The licensee estimated that work to restore the project would resume in April 2013. Commission staff acknowledged the licensee's attempt to transfer the project license and requested that the licensee file a transfer application and updated plan and schedule for restoring project operation, by January 11, 2013.¹⁸

9. On January 31, 2013, the licensee filed a request for a six-month extension of time, stating that the potential buyer had backed out of the contract and negotiations with a new buyer were ongoing.¹⁹ By letter dated February 1, 2013, Commission staff granted the requested extension of time.²⁰ The licensee did not file a transfer application or a revised plan and schedule within six months.

10. On June 19, 2013, Commission staff inspected the project finding it generally unchanged from the August 24, 2010 inspection. The powerhouse was clean but still not operable and no structural deficiencies were noted at the diversion structure.

11. By letter dated December 9, 2013, Commission staff requested that the licensee file information within 30 days to show cause as to why the Commission should not initiate proceedings to terminate the project license by implied surrender.²¹ On February 6, 2014, the licensee filed a revised plan and schedule, stating that the project would no longer be sold and the licensee would complete project restoration.²² The licensee stated that it would resume restoration of the project shortly and planned to complete the restoration by the fall of 2014.²³

¹⁷ Letter from Charles K. Cover to Mr. Darrin Brooks.

¹⁸ November 27, 2012 letter from Charles K. Cover to Mr. Darrin Brooks.

¹⁹ Letter from Jane Joslin to Commission Staff.

²⁰ Letter from Charles K. Cover to Ms. Jane Joslin and Mr. Darrin Brooks.

²¹ Letter from Charles K. Cover to Ms. Jane Joslin and Mr. Darrin Brooks.

²² Willow Creek Hydro, LLC February 6, 2014 filing.

²³ *Id.*

12. On March 6, 2014, Commission staff acknowledged the licensee's revised plan and schedule and requested that the licensee file biannual progress reports on January 1 and June 1 of each year.²⁴ The licensee did not file the first progress report, due on June 1, 2014. By letter dated November 12, 2014, Commission staff requested that the licensee file the overdue progress report within 15 days, stating that failure to do so would result in Commission action to terminate the project license by implied surrender.²⁵ The licensee did not file a response.

13. On April 29, 2015, Commission staff issued a public notice stating the Commission's intent to terminate the project license by implied surrender. The notice established May 29, 2015, as the deadline for filing comments, protests, and motions to intervene. On May 27, 2015, the licensee filed comments stating that it was in negotiation with an engineering firm that would be handling the majority of the work required to restore project operation.²⁶ The licensee stated that it would provide a more detailed plan and schedule for project restoration within a week. On May 29, 2015, Pingora Energy, LLC, the engineering firm in negotiations with the licensee, filed what it termed a protest with the Commission, requesting that the Commission provide the licensee 60 days to file a plan and schedule to complete project restoration. The licensee did not file a plan and schedule within 60 days.

14. On October 21, 2015, Commission staff issued a letter to the licensee stating that the Commission would proceed with the license termination unless the licensee filed a detailed plan and schedule or progress report within 15 days.²⁷ On November 6, 2015, the licensee filed a progress report stating that negotiations with the engineering firm to restore the project had been unsuccessful and that the licensee would file an update in early February 2016.²⁸ The licensee has not filed any update.

II. Discussion

15. 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 licensee has

²⁴ Letter from Charles K. Cover to Ms. Jane Joslin and Mr. Darrin Brooks.

²⁵ Letter from Charles K. Cover to Ms. Jane Joslin and Mr. Darrin Brooks.

²⁶ Darrin L. Brooks Comment.

²⁷ Letter from Ashish Desai to Mr. Darrin Brooks.

²⁸ Darrin L. Brooks Comment.

physically abandoned the project property, dissolved its corporate or other legal entity, or has failed for several years to operate or maintain the project with no indication of doing so in the reasonably foreseeable future).²⁹

16. Article 24 of the license for the Potosi Project provides, in relevant part, that:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful order of the Commission mailed to the record address of the Licensee or its agents, the Commission will deem it to be the intent of the Licensee to surrender the license.³⁰

17. Here, the licensee's inaction has made it clear that it does not intend or is unable to resume operation of the project. The project has not operated for over 21 years, and Willow Creek Hydro has not made the necessary repairs since it acquired the project license in 2002. Furthermore, the licensee has repeatedly failed to respond to correspondence from Commission staff in a timely manner. The licensee's long-term failure to maintain the project in accordance with the specifications set forth in the license and its lack of substantial progress toward restoring project operation demonstrates the implied intent to surrender the project license.

18. The Potosi Project is a small-scale hydroelectric facility classified as having a low downstream hazard potential. The dam is only six feet high and impounds less than one acre-foot of water. Further, there is little or no development immediately downstream. Therefore, failure or improper operation of the dam would not be expected to cause loss of human life or economic or environmental harm.

19. With the termination of this license, the Commission's jurisdiction and authority over the dam will end. Commission staff contacted the state of Montana's dam safety office to notify it that the dam would pass to the state for jurisdictional purposes. However, because of the dam's low downstream hazard potential and minimal storage volume, the state of Montana said the dam would not typically be regulated in accordance

²⁹ *River Bounty, Inc.*, 142 FERC ¶ 61,126 (2013); *James B. Boyd and Janet B. Boyd*, 138 FERC ¶ 61,085, at P 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)).

³⁰ *Potosi Power Company, Inc.*, 33 FERC ¶ 62,017 at ordering para. (E) (citing form L-17, Terms and Conditions of License for Unconstructed Minor Project Affecting Lands of the United States, 54 FPC 1896 (1975)).

with state regulations. Nevertheless, Montana dam safety authorities acknowledged that they would have oversight of this structure in the event of any complaints or other issues.

20. Terminating this license will not authorize any construction activity or alter the current condition of the project or surrounding environment. Rather, this is an administrative action designed to terminate the project license such that the licensee will no longer have the authority to generate power.³¹ Accordingly, there will be no effect on the environment and an environmental analysis is not required.³²

The Commission orders:

(A) The license for the Potosi Power Company Water Power Project No. 7856 is terminated by implied surrender, effective at the close of business on the issuance date of this order. No applications for this site may be submitted until May 23, 2016.

(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 Federal Power Act, 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 licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

Kimberly D. Bose,
Secretary.

³¹ Our termination of this license will not relieve the licensee of any obligations owed to the Forest Service for use of National Forest lands. *See Kevin Drone*, 153 FERC ¶ 61,199, at PP 21-22 (2015).

³² *See* 18 C.F.R. § 380.4(a)(1) (2014). *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 (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); *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).