

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Boise-Kuna Irrigation District, Nampa &
Meridian Irrigation District, New York
Irrigation District, Wilder Irrigation District,
and Big Bend Irrigation District

Project No. 4656-018

ORDER DENYING REQUEST FOR STAY OF LICENSE

(Issued May 27, 2005)

1. The Boise-Kuna Irrigation District, Nampa & Meridian Irrigation District, New York Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District (Districts) have filed a request to stay their license for the Arrowrock Dam Project No. 4656 and to backdate the stay for 120 days to allow additional time to comply with various license articles. For the reasons discussed below, we will deny the stay request and give notice of probable termination of the license. This order will serve the public interest by reinforcing the need for our licensees to timely develop licensed projects.

Background

2. On March 27, 1989, the Commission issued a license to the Districts for the proposed 60-megawatt (MW) Arrowrock Dam Project No. 4656, to be located on the South Fork of the Boise River, in Elmore and Ada Counties, Idaho.¹ The project would be located at the U.S. Bureau of Reclamation's (Reclamation) existing Arrowrock Dam and Reservoir, and the project's tailrace would discharge into the U.S. Army Corps of Engineers' Lucky Peak Lake Reservoir.

¹ 46 FERC ¶ 61,385.

3. Section 13 of the Federal Power Act (FPA)² states that a licensee must commence the construction of project works within the time fixed in the license, which shall not be more than two years from the date thereof, and that the Commission may extend the deadline for the commencement of project construction once, for no longer than two additional years. Article 301 of the license required the Districts to begin construction within two years (by March 26, 1991) and to complete construction within four years from the issuance date of the license (by March 26, 1993).³

4. In 1990, the Districts requested two-year extensions of the time to commence and complete construction. They also requested extensions of time to comply with license Articles 101-110, 112-115, 117, and 304, which required the completion of various pre-construction activities. The Commission granted the requests, bringing the deadline for commencement of construction to March 26, 1993.⁴

5. Section 1704(c) of the Energy Policy Act of 1992⁵ authorized the Commission to extend the deadline for commencement of construction of the Arrowrock Dam Project until March 26, 1999, if such extension would be consistent with the good faith, due diligence, and public interest requirements of FPA section 13 and the Commission's regulations. In response to a request from the Districts, the Commission extended the deadline for the commencement of construction until that date.⁶ Thereafter, in June 1998, the U.S. Fish and Wildlife Service (FWS) listed the Columbia River bull trout as threatened⁷ pursuant to the Endangered Species Act (ESA).⁸

² 16 U.S.C. § 806.

³ 46 FERC ¶ 61,385 at 62,210.

⁴ See January 9, 1991 Order by the Director, Division of Project Compliance and Administration (Division Director) (unpublished).

⁵ Pub. L. No. 102-486.

⁶ See March 22, 1993 Order by the Division Director (unpublished). In addition, the order extended the deadline for the completion of construction to March 26, 2001, as well as the deadlines for compliance with the pre-construction activity articles listed above.

⁷ 63 Fed. Reg. 31,647 (June 8, 1998).

⁸ 16 U.S.C. §§ 1531-43.

6. Shortly before the 1999 deadline, the Districts filed with the Commission a request to stay the commencement of construction and license compliance deadlines while they sought from Congress legislation permitting further extensions of the commencement of construction deadline. The Commission denied that request, explaining that such stays are granted only in narrowly-circumscribed circumstances, which do not include instances where licensees are seeking extension legislation. It noted that any legislation subsequently enacted could require the Commission to reinstate the license and extend the construction deadline.⁹ The Commission thereafter issued an order noting probable termination of the license for failure to meet the commencement of construction deadline.¹⁰

7. In October 2002, Congress enacted Public Law (Pub. L.) No. 106-343, which provided in pertinent part for the Commission, upon the District's request, to reinstate the license, if necessary and, in accordance with the standards of FPA section 13, to further extend the deadline for commencement of construction for three consecutive two-year periods, to take effect on the date of the expiration of the last extension issued prior to the enactment of Pub. L. 106-343 (*i.e.*, as of March 26, 1999).

8. The Districts then filed a request for two 2-year extensions of the construction and compliance deadlines, pursuant to Pub. L. No. 106-343. The Commission granted the request, extending the commencement of construction deadline to March 26, 2003.¹¹ The Districts thereafter filed a final request pursuant to Pub. L. No. 106-343 to extend the commencement of construction deadline for two years until March 26, 2005, which the Commission granted, making the new final deadline for commencement of construction March 26, 2005.¹²

9. On March 25, 2005, the Districts filed a request for a stay of the license, and to backdate the stay for 120 days to allow additional time for them to comply with the license articles containing requirements that must be completed before the commencement of construction.

⁹ 87 FERC ¶ 61,138.

¹⁰ See May 19, 1999 Order by the Division Director (unpublished).

¹¹ See August 16, 2001 Order by the Division Director (unpublished). The order extended the completion of construction deadline to March 26, 2005, and the deadline for compliance with the pre-construction license articles until the earlier of December 24, 2002, or 90 days before the commencement of construction activity.

¹² 106 FERC ¶ 61,089.

10. On March 30, 2005, Kan We Help (KWH), a local advocacy group in Lassen County, California, filed objections to the Districts' request for a stay. KWH disputes the Districts' assertions that they have pursued construction of the project with due diligence. KWH, which is concerned with Lassen Municipal Utility District's (Lassen) potential involvement in the project as a purchaser of power or co-owner, had previously opposed prior requests for extensions of time pursuant to Pub. L. No. 106-343.

11. On April 29, 2005, FWS filed a letter supporting the Districts' stay request. FWS states that granting the stay will provide time to complete ESA consultation on the effects of the project on bull trout and federally-threatened bald eagles, and to determine what actions are necessary for project construction and operation in light of that consultation.

Discussion

12. In acting on stay requests, the Commission applies the standard test set forth in the Administrative Procedures Act,¹³ *i.e.*, the stay will be granted if "justice so requires."¹⁴ We have granted requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.¹⁵ We will not grant a request for a stay merely to relieve the licensee of the statutorily-prescribed commencement of construction deadline,¹⁶ or to prevent mandatory termination where, because of the licensee's own actions or inactions, construction was not commenced prior to the statutory deadline.¹⁷ We have, however, granted requests for stay of the commencement of construction deadline, or the entire license, where commencement of construction cannot commence until necessary actions of other federal or state agencies are completed.¹⁸

¹³ 5 U.S.C. § 705.

¹⁴ *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094 at 61,343 (1992).

¹⁵ *See, e.g., East Bench Irrigation District*, 59 FERC ¶ 61,277 at 62,005-06 (1992) (*East Bench*).

¹⁶ *See John C. Simmons*, 52 FERC ¶ 61,315 at 62,265 (1990).

¹⁷ *See Utilities Commission and City of Vanceburg, KY*, 42 FERC ¶ 61,169 at 61,602-03 (1988).

¹⁸ *See East Bench* (license for project at Reclamation dam required approval of project plans and specifications by Reclamation, which would not provide such approval pending completion of a study of the existing dam structure); *Western Hydro Electric*,
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13. The Districts assert they have pursued the project with due diligence, and have taken various actions following the January 29, 2004 order granting the final extension of time: (1) issued new and supplemental requests for proposals for a smaller project; (2) selected an engineering firm as the project developer; (3) developed plans, specifications, and a feasibility study for a modified project; (4) remitted money to Reclamation to fund Reclamation's consultation with them on project design;¹⁹ (5) exchanged drafts of a power sales agreement with the Eugene Water and Electric Board (EWEB) and scheduled a future meeting with EWEB for August 2005;²⁰ and (6) as the Commission's non-federal representative for ESA consultation, provided FWS with additional information, including revised project drawings and specifications.²¹ They also state that Idaho Power Company completed a system interconnection study in September 2004, the results of which are reflected in revised project plans.²²

14. The Districts further assert that they are "poised to begin construction,"²³ with the only impediment being the need to complete ESA consultation on the project. They state that FWS declined to consult until it completed a Biological Opinion on the operation of federal dams in the upper Snake River Basin, including certain actions at Arrowrock Dam.²⁴

Inc., 67 FERC ¶ 61,201 (1994) (*Western Hydro*) and *E.R. Jacobson*, 68 FERC ¶ 61,054 (1994) (*Jacobson*) (issuance of necessary federal permits delayed pending completion of ESA consultations).

¹⁹ Request at 7-9.

²⁰ Request at 9-10.

²¹ Request at 11.

²² They state in this regard that EWEB has negotiated with Idaho Power on wheeling project power across Idaho Power's system. Request at 11-12.

²³ Request at 17.

²⁴ Reclamation proposes to rehabilitate the existing Arrowrock dam outlet works, replace ten valves on the upstream side of the dam, install a new control house and other structures, modify the trash racks, and add a bubbler system to maintain an ice-free area around the bulkhead gates. On March 31, 2005, FWS issued its Biological Opinion. The Biological Opinion concluded that operation of Reclamation's projects is not likely to jeopardize the continued existence of, among others, bull trout and bald eagles.

15. Our review of the record leads us to conclude that the Districts are essentially seeking an open-ended stay of the license to relieve them of the commencement of construction deadline. In fact, while they assert that they are diligently pursuing development of the licensed Arrowrock Dam Project, their filing demonstrates that they now are investigating the construction of a substantially different project. The project as licensed would include two 30-MW generating units and two 13-foot-diameter, 180-foot-long penstocks, which would gather water near the crest of the dam. The penstocks would pass through tunnels constructed through the dam. The District's pleading, however, indicates that they are now proposing to develop a 15-MW project, consisting of two 7.5 MW generating units. Instead of installing tunnels through the dam and new outlet works, the project currently contemplated would receive water from the existing outlet works, which lead to valves downstream of the dam, and which are at a lower elevation and different location in the water column. The Districts would also evidently eliminate about ten miles of transmission line from the project as licensed. This is not the project we have licensed.

16. The proposed modifications here, as we understand them, would constitute a material amendment of the license; that is, a significant change in the project facilities or operations. A license amendment application is therefore required to allow the Districts to construct the significantly revised project, but no such application has been filed.²⁵

17. We have granted a stay to permit the completion of other federal or state permitting or consultation requirements only in cases where the permitting or consultation involved the project as licensed.²⁶ Here, the need for ESA consultation is driven not simply by the seven-year-old ESA-listing of bull trout, but rather in great part by the Districts' post-license, and as yet unapproved, reconfigurations of the project proposal.²⁷

²⁵ See e.g., *City of Summersville, W. VA.*, 77 FERC ¶ 61,046 (1996), *City of Hamilton, Ohio*, 62 FERC ¶ 61,061 (1993), and *Allegheny Hydro No. 8, L.P.*, 49 FERC ¶ 61,277 (1989), 40 FERC ¶ 61,144 (1987) (changes in length or location of, additions to, transmission lines); *PUD No. 1 of Chelan County*, 55 FPC 2050, 2053 (1976) (increase in installed capacity); *Fieldcrest Mills, Inc.*, 37 FERC ¶ 61,264, n.6 (1986) (major capacity increase, new forebay, powerhouse and tailrace); *Adirondack Hydro Development Corp.*, 50 FERC ¶ 61,100 at 61,318-20 (1990) (capacity increase, higher dam, increased reservoir area).

²⁶ *East Bench; Western Hydro; Jacobson.*

²⁷ See February 25, 2004 letter to the Commission from Jeffrey L. Foss, Supervisor, Snake River Fish and Wildlife Office, FWS, filed February 26, 2004 (requesting initiation of formal consultation in light of, among other things, changes to
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18. We are also skeptical that ESA consultation can be completed in the time frame suggested by FWS. FWS states that it agreed to try to complete ESA consultation on the project by mid-August 2005, but states that its agreement is tentative because it has not yet received a project description sufficient to generate and document information about the potential effects of the action on bull trout and bald eagles.²⁸ FWS also requests us to provide it with a written request for formal consultation, based on information yet to be provided by the Districts, including a detailed description of the modified project, its relationship to Reclamation's operations, and potential effects on listed species.²⁹

19. Based on the foregoing, we deny the Districts' stay request. Moreover, because the Districts have failed to timely commence construction, we are issuing notice of the probable termination of the project license.

The Commission orders:

(A) The request for stay filed by the above-captioned irrigation district licensees of the Arrowrock Dam Hydroelectric Project is denied.

(B) This order constitutes notice of the probable termination of the license for Project No. 4656 after 30 days from the date of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

project design and changes in environmental conditions in the 15 years since the license was issued).

²⁸ On September 29, 2004, Commission staff provided FWS with a Biological Assessment of the modified project proposal, which finds that the modified project will not, or is not likely to, affect any listed species found at or near the project. FWS declined to concur with this finding, and recommended that the Districts continue to refine their proposal with respect to project facilities and operating criteria. Letter from Jeffery Foss, Supervisor, Snake River Fish and Wildlife Office, filed December 22, 2004.

²⁹ FWS April 29, 2005 letter at 2.