

141 FERC ¶ 61,226  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Utah Independent Power, Inc.

Project No. 14354-001

ORDER DENYING REHEARING

(Issued December 20, 2012)

1. On October 24, 2012, Canyonlands Watershed Council, Grand Canyon Trust, and Living Rivers-Colorado Riverkeeper (collectively, petitioners) filed a joint request for rehearing of Commission staff's September 24, 2012 order issuing a preliminary permit to Utah Independent Power, Inc. (Independent Power) to study the feasibility of the Long Canyon Pumped Storage Project No. 14354.<sup>1</sup> The project would be located near the town of Moab, Grand County, Utah, and it would use water from the Colorado River. For the reasons discussed below, we deny the request for rehearing.

**Background**

2. On January 23, 2012, Independent Power filed an application for a preliminary permit to study the feasibility of the proposed pumped storage project. The project would consist of the following new facilities: (1) a 160-foot-high by 6,750-foot-long dam creating an upper reservoir; (2) a 200-foot-high by 730-foot-long dam creating a lower reservoir with a total storage capacity of 5,530 acre feet; (3) two 8,510-foot-long by 16-foot-wide penstocks; (4) an underground powerhouse; (5) two tailraces; (6) a 36-foot diameter access tunnel; (7) three pump-turbines with a total installed capacity of roughly 800 megawatts; and (8) two 40-mile-long transmission lines. The estimated annual generation would be 1,077 gigawatt-hours.

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<sup>1</sup> *Utah Independent Power, Inc.*, 140 FERC ¶ 62,222 (2012).

3. The proposed project would occupy lands of the United States managed by the U.S. Department of the Interior's (Interior) Bureau of Land Management (BLM) under its Moab Resource Management Plan (BLM Resource Plan),<sup>2</sup> which provides a framework for managing these public lands and allocating resources for multiple uses, including, but not limited to, recreation, grazing, vegetation, fish and wildlife, cultural resources, and fire management.

4. On March 23, 2012, the Commission's Secretary issued public notice of Independent Power's application. Petitioners filed a motion to intervene and comments in the proceeding. Petitioners argued, among other things, that the BLM Resource Plan does not identify the lands the project would occupy as available for disposal by BLM through sale or exchange, and therefore Commission staff should deny the preliminary permit because Independent Power would never be able to obtain a license.

5. On September 24, 2012, Commission staff issued a preliminary permit to Independent Power. Commission staff explained in the order that allegations regarding inconsistency of the proposed project with the BLM Resource Plan are premature because the permit does not authorize Independent Power to undertake construction of the proposed project. Rather, a permit enables Independent Power to study the feasibility of such a project.

6. On October, 24, 2012, petitioners filed a request for rehearing.

### **Discussion**

7. Section 4.32(e) of the Commission's regulations states that the Commission will not accept a preliminary permit application for a project that is precluded by law, i.e. if there is a permanent legal bar to issuing a license for the project.<sup>3</sup>

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<sup>2</sup> To assist in the management of public lands, the Federal Land Policy and Management Act requires BLM to "develop, maintain, and when appropriate, revise land-use plans . . . for the use of the public lands." 43 U.S.C. 1712(a) (2006). Once established, BLM must "manage the public lands . . . in accordance with the land use plans developed . . . ." 43 U.S.C. 1732(a) (2006). However, BLM's regulations provide that these plans may be amended, when appropriate. *See* 43 C.F.R. § 1610.5-5 (2011).

<sup>3</sup> 18 C.F.R. § 4.32(e)(2) (2012). *See, e.g., Symbiotics, LLC*, 110 FERC ¶ 61,235 (2005) (dismissing preliminary permit application because licensing of proposed project barred by the Wild and Scenic Rivers Act); *see generally, Town of Summersville, W. Va. V. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing permanent legal barriers and the Wild and Scenic Rivers Act).

8. On rehearing, petitioners claim that Independent Power's preliminary permit application should be denied because there is a legal bar that would prevent the Commission from issuing a license for the project and because no license will result from the preliminary permit. Citing to Interior's comments on the permit application,<sup>4</sup> they argue that the BLM Resource Plan prevents issuance of a license for the project because it: (1) prohibits surface-disturbing activities for the lands the project would occupy; (2) categorizes the lands the project would occupy as an Area of Critical Environmental Concern, which means that these lands require special attention by BLM to protect irreparable damage to their important resources<sup>5</sup> and are not currently available for disposal by BLM through sale or exchange;<sup>6</sup> and (3) prohibits the issuance of a right-of-way for the project's proposed transmission lines.<sup>7</sup> Further, petitioners note that Interior's comment letter stated that the "project proposed for Long Canyon would not be in conformance with the [BLM Resource Plan]."<sup>8</sup>

9. The purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable development application. We find no basis for concluding that Independent Power's preliminary permit for a project is precluded by law or that Independent Power may not eventually receive a license. No federal law bars development of Independent Power's proposed project. The proposed project's apparent inconsistency with the BLM Resource Plan, although clearly relevant

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<sup>4</sup> See May 22, 2012 letter from Robert F. Stewart (Interior) to Kimberly D. Bose (Commission Secretary) (Interior's May 22, 2012 letter).

<sup>5</sup> See Federal Land Policy and Management Act, 43 U.S.C. § 1702(a) (2006).

<sup>6</sup> See Interior's May 22, 2012 letter.

<sup>7</sup> Petitioners also argue that certain feasibility studies to be done during Independent Power's preliminary permit cannot occur under the BLM Resource Plan. However, Interior stated that Independent Power's feasibility studies will not require formal authorization because they fall under the casual use provisions of BLM's right-of-way regulations. See Interior's May 22, 2012 letter. Further, as explained in the September 24 order issuing a permit to Independent Power, permittees are not required to have obtained all access rights to a project site as a condition of receiving a permit. They must however obtain all necessary authorizations and comply with applicable laws and regulations to conduct any field studies.

<sup>8</sup> Request for Rehearing at 2.

in a license application proceeding, does not constitute a permanent legal bar, and it does not foreclose Independent Power from potentially receiving a license.<sup>9</sup> Independent Power's proposed project may currently conflict with BLM's Resource Plan, but project proposals at the permit stage are fluid and any eventual application for license submitted by Independent Power may differ in important aspects from the proposal set forth in its permit application.

10. For the above reasons, we affirm the issuance of a preliminary permit to Independent Power.

The Commission orders:

The joint request for rehearing filed jointly by Canyonlands Watershed Council, Grand Canyon Trust, and Living Rivers-Colorado Riverkeeper in this proceeding on October 24, 2012, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>9</sup> As we have noted, the BLM may amend its Resource Plan, and in any event, a permit does not authorize construction (or even site access) and does not constitute a guarantee that the project will be licensed. *See Akron Hydroelectric Co.*, 76 FERC ¶ 61,251, at 62,299 (1996) (citing *Eagle Mountain Energy Co.*, 62 FERC ¶ 61,066 (1993), *aff'd sub nom. Mine Reclamation Corp. v. FERC*, 30 F.3d 1519 (D.C. Cir. 1994)).