

120 FERC ¶ 62,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of
Pend Oreille County, WA

Docket No. DI07-1-000
Project No. 2225-000

ORDER DENYING PETITION FOR
DECLARATORY ORDER THAT EXISTING LICENSE IS VOID AND
ACCEPTING PETITION THAT LICENSING IS NOT REQUIRED
(Issued July 18, 2007)

1. On October 5, 2006, Public Utility District No. 1 of Pend Oreille County, Washington (Licensee), filed a Petition for Declaratory Order (Petition) requesting the Commission to determine that the existing license for the Sullivan Creek Project, FERC No. 2225 (project), is void. In the alternative, the licensee requests a determination that the license will expire on October 1, 2008, with no further action required by the Commission or the licensee. The Sullivan Creek Project is located on Sullivan Lake, Outlet Creek and Sullivan Creek, a tributary of the Pend Oreille River, near the town of Metaline Falls, Pend Oreille County, Washington. The project occupies lands of the United States within the Colville National Forest. The project is not located on Tribal lands.

BACKGROUND

2. The Sullivan Creek Project was constructed by the Inland Portland Cement Company (Inland) in 1909, and was used to generate power until 1956, when a portion of the project's wood flume collapsed. The licensee purchased the project and its associated water rights from Inland in 1959, and has operated the project reservoirs to benefit hydroelectric generation at downstream projects and to supply domestic water to the town of Metaline Falls. The Federal Power Commission (FPC) originally licensed the project as a storage project benefiting downstream generation projects,¹ with provisions for the licensee to study the feasibility of enlarging the project, including possible rehabilitation of the existing but inoperable flume and powerhouse for purposes of power generation.²

¹ The downstream projects include Boundary, Grand Coulee, Chief Joseph, Wells, Rocky Reach, Rock Island, Wanapum, Priest Rapids, McNary, John Day, The Dalles, and Bonneville.

² See *Public Utility District No. 1 of Pend Oreille County, Washington*, Order Issuing License, 20 FPC 753 (1958); See also Order Modifying Order Issuing License..., 21 FPC 283 (1959).

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3. In 1965, and again in 1994, the licensee sought Commission authorization to re-establish power generating facilities at the project. Both applications were subsequently abandoned for economic reasons. On September 23, 2003, the licensee filed a notice of intent not to file an application for a new license for the project. On October 22, 2003, the Commission published notice of the licensee's intent, and required that any applications for a new license for the project must be filed by September 30, 2006. No applications were filed. On October 5, 2006, the licensee filed its petition for a declaratory order.

PUBLIC NOTICE

4. Notice of the petition was published on October 25, 2006. Protests, Comments, and/or Motions to Intervene were to be filed by November 20, 2006. The following filings were received:³

- a. On October 31, 2006, the Department of Ecology, State of Washington filed a Motion to Intervene.
- b. On November 7, 2006, the Department of Fish and Wildlife, State of Washington, filed a Motion to Intervene.
- c. On November 17, 2006, the Kalispel Tribe of Indians filed a Motion to Intervene and Protest. The comments stated that the licensee had not supplied sufficient information, and the downstream analysis was incomplete and inconclusive.
- d. On November 17, 2006, the U.S. Forest Service, Department of Agriculture, filed a Notice of Intervention and Protest. The comments attached said that the project proposed to reestablish power, and that it occupied federal lands. It also stated that the Commission must consider the total effect of the project's releases on downstream generation, not simply the percentage
- e. On November 20, 2006, American Whitewater filed a Motion to Intervene and Protest. In the comments, it stated that the available records were inadequate for making a determination of the effects of

³ On November 15, 2006, the Licensee filed "Supplemental Information by Licensee Supporting Petition for Declaratory Order that Licensing Not Required..." which included additional information about downstream flow and effects.

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the project's releases, and if the project was determined not to require relicensing, then the Commission should require a decommissioning process.

- f. On November 20, 2006, the Office of Environmental Policy and Compliance U.S. Department of the Interior stated it had no comments.
- g. On November 20, 2006, Seattle City Light filed a Motion to Intervene.

The comments relating to jurisdictional issues will be discussed below.

JURISDICTION

5. Section 4(e) of the Federal Power Act (FPA) authorizes the Commission to issue licenses for hydroelectric "project works necessary or convenient for . . . the development, transmission, and utilization of power. . . ." ⁴ Section 3(12) of the FPA defines "project works" as "the physical structures of a project." ⁵ Section 3(11) of the FPA defines a "project" in pertinent part as a complete unit of improvement or development, consisting of. . . all. . . structures used or useful in connection with said unit or any part thereof and all . . . dams [and] reservoirs, . . . the use and occupancy of which are necessary and appropriate in the maintenance and operation of such unit" ⁶ Thus, the appropriate inquiry is whether the Sullivan Creek Project is part of a "complete unit of improvement or development" that includes the downstream licensed projects.

DISCUSSION

6. The Licensee requests that the Commission confirm that the project is not required to be licensed pursuant to Part 1 of the FPA, because there was no statutory authority to issue the current license. Alternatively, if the Commission determines that the existing license is valid, the Licensee maintains that the current license should be allowed to expire by its own terms on October 1, 2008, with no further action required by the Commission or Licensee.

⁴ 16 U.S.C. §797 (e).

⁵ 16 U.S.C. §796 (12).

⁶ 16 U.S.C. §796 (11).

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7. There are two issues to consider: (1) whether the existing license should be declared void, and (2) whether the project requires relicensing in 2008. As discussed below, we conclude that the project is not required to be relicensed. However, the existing license was valid when issued, consistent with the Commission's understanding of its jurisdiction at the time, and should not be declared void.

8. The Commission initially determined that licensing was appropriate because the original license was for the purpose of generating power at the project, and the project was located on federal lands. Although the Licensee did not ultimately reestablish power at the site, it took action throughout the license term to attempt to protect its right to do so. Initially, the Licensee requested that the Commission include the damaged flume and powerhouse in the license, not as licensed project works for which generation was authorized, but rather as project facilities for which the Licensee had no immediate plans for reactivation except under Articles 30 and 31 of the license. Later, the Licensee twice sought to develop power at the site, including pursuing litigation to challenge the terms of the state's water quality certification for the Licensee's 1994 application to amend the license.⁷ As noted, the Licensee has operated the project to provide power generation benefits to downstream projects throughout the term of the license, and has received headwater benefits payments for that operation. The Licensee has operated under the license and received its benefits for more than 48 years, and did not seek to challenge the Commission's jurisdiction to issue the license until very recently. Under these circumstances, it would not be appropriate to declare the license void.

9. The Licensee further argues that the project does not require relicensing because it has an insignificant effect on downstream generation.

10. As noted, the Sullivan Creek Project was originally licensed as a project work, because it benefited generation at downstream licensed hydroelectric projects. At the time, the Commission did not quantify the effect on downstream generation to determine whether or not it was significant. More recently, the Commission has determined that effects below a two percent threshold are not sufficiently substantial to require that a storage reservoir be licensed.⁸ The pertinent inquiry, therefore, is whether the effect of the Sullivan Creek Reservoir

⁷ See *Public Utility District No. 1 of Pend Oreille County v. State of Washington*, 146 Wash.2d 778, 51 ¶¶ 3d 744 (2002).

⁸ See *e.g., Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003); *See also Chippewa & Flambeau Improvement Co.*, 95 FERC ¶ 61,017 (1998).

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is sufficiently large that it would be considered “used and useful” in connection with the “complete unit of improvement or development” of a licensed project or any part ‘of such a unit thereof,” or “necessary and appropriate in the maintenance and operation” of such a unit.

11. Energy generation at downstream projects from the Sullivan Creek Project storage represents a very small percentage when compared to the energy generation from total upstream storage as shown in Table 1.⁹ The figures cited in the “From Total Storage” column include not only Sullivan Creek storage but also the storage from the reservoirs of the nine downstream projects. Over a ten-year period the average annual energy contribution to downstream projects from Sullivan Creek storage is 12.3 megawatts, which is about 0.42 percent of the total energy generation from storage. This percentage increase in average annual generation is far below the 2.1 percent increase in average annual generation the Commission also used in finding that the storage projects in the Penobscot River Basin were not jurisdictional.¹⁰

Table 1.

Contract Year	Storage Energy Generation, MW		% Sullivan Storage Contribution
	From Total Storage	From Sullivan Creek Storage	
1996-97	3964.0	17.1	0.43
1997-98	2981.8	15.8	0.53
1998-99	3121.6	14.6	0.47
1999-00	3441.6	16.0	0.46
2000-01	2787.5	12.6	0.45
2001-02	2722.1	3.3	0.12
2002-03	3095.9	16.5	0.53
2003-04	2427.1	10.2	0.42
2004-05	2143.0	9.9	0.46
2005-06	1963.4	7.2	0.37
Average	2864.8	12.3	0.42

12. The Commission originally licensed the Sullivan Creek Project based on its location on federal land and its operation to benefit generation at downstream

⁹ Pacific Northwest Coordination Agreement—Computation of Payments for Coordinated Storage Release from Upstream Reservoirs: Contract Years 1996-1997 through 2005-2006.

¹⁰ See Matagamon Lake Association/State Department of Conservation, Docket No. UL01-2-000, 94 FERC ¶ 62,195 (2001).

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hydroelectric projects. The Licensee has operated the project under that license for more than 48 years, and it would not be appropriate to declare the license void. However, the project's effect on downstream power generation is insignificant when compared to the total generation of downstream projects, and this analysis must be considered in the light of the current Petition. The largest contribution of the Sullivan Creek Project to generation at any one project downstream is only 1.1 percent. Therefore, I find that the Sullivan Creek Project is not a part of any complete unit of hydroelectric development. Accordingly, the Sullivan Creek Project is not required to be relicensed, and the Commission's jurisdiction over the project will cease as of the expiration of the project's original license, without the need for any further action by the Commission or the Licensee.

The Director orders:

(A) Public Utility District No. 1 of Pend Oreille County, Washington's Petition for Declaratory Order, filed on October 5, 2006, requesting a finding that the existing license is void is denied. The current license will expire by its own terms with no further Commission action on October 1, 2008. The Commission will no longer have jurisdiction over the Sullivan Storage Project under Part I of the Federal Power Act after that date. This order is issued without prejudice to any future determination, upon new or additional evidence, that licensing is required.

(B) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. §385.713

Joseph D. Morgan
Director
Division Hydropower
Administration and Compliance