



supplemental information to its preliminary permit application, providing more information about an ongoing cleanup process at the site of its proposed lower reservoir. This order deals with Klickitat PUD's application for a third permit, as well as Clean Power's competing application.

3. The JD Pool Project would consist of the following new facilities: (1) two upper reservoirs; (2) a connection tunnel connecting the two upper reservoirs, allowing them to function as a single storage reservoir; (3) a lower reservoir; (4) double steel and concrete buried penstocks between the upper and lower reservoirs; (5) a powerhouse containing four pump/turbine/generator units with a total installed capacity of 1,200 megawatts (MW); and (6) a 230-kilovolt (kV) transmission line interconnecting with the existing Bonneville Power Administration's (BPA) Harvalum substation.

4. Clean Power's competing preliminary permit application for the Columbia Gorge Project would consist of the following new facilities: (1) an upper reservoir; (2) a lower reservoir; (3) a buried shotcrete/steel penstock between the upper and lower reservoirs; (5) a powerhouse containing up to four pump/turbine/generator units with a total installed capacity of 1,200 MW; and (6) a 230-kV transmission line interconnecting with BPA's Harvalum substation.

5. The lower reservoirs for both projects would be located at the site of the former Columbia Gorge Aluminum smelter. Both projects would be closed-loop pumped storage hydroelectric projects located near the Army Corps of Engineers' John Day Lock and Dam within the Columbia River Basin. Initially, the lower reservoirs for both projects would be filled with water from the Columbia River using an existing submerged pumping station and conveyance pipeline.

## II. Discussion

### A. Extraordinary Circumstances

6. Section 4(f) of the Federal Power Act (FPA) authorizes the Commission to issue preliminary permits to potential development applicants for a period of up to three years.<sup>4</sup> The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive preliminary permit only if it concludes that the applicant has pursued the requirements of its prior preliminary permit in good faith and with due diligence.<sup>5</sup> The Commission

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that "[t]he Commission will not accept extension requests that are filed less than 30 days prior to the termination of the permit."

<sup>4</sup> 16 U.S.C. §§ 797(f) and 798 (2012).

<sup>5</sup> *City of Redding, California*, 33 FERC ¶ 61,019 (1985) (permittee must take  
(continued ...)

rarely issues a third preliminary permit to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.<sup>6</sup>

7. The Commission has held that, in most cases, three years should be enough time to consult with resources agencies and conduct any studies necessary to prepare a development application, and six years should certainly be more than enough time.<sup>7</sup> Allowing a site to be reserved for three preliminary permit terms would constitute site banking.<sup>8</sup>

8. Klickitat PUD claims that responses to the project from the Confederated Tribes and Bands of the Yakama Nation (the Yakama Nation) and the Washington Department of Fish and Wildlife (Washington DFW) required Klickitat PUD to undertake additional studies and project redesign, which prevented Klickitat PUD from filing a development application before the expiration of its second permit. The Yakama Nation had concerns about cultural resources in the area and the Washington DFW had concerns about the project's impact on golden eagles. The Yakama Nation and Klickitat PUD ultimately entered into a contract for the Yakama Nation to complete additional archeological, historical, ethnographic, and traditional cultural property studies. In response to Washington DFW's concerns, Klickitat PUD redesigned the project to avoid active golden eagle nests, which required moving the lower reservoir into a contaminated

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certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

<sup>6</sup> See *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at PP 14-15 (2013); *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999) (issuing a third permit because the applicant had demonstrated that its delay in performing water flow studies necessary to prepare a license application was dependent on resolution of a pending licensing proceeding at the Commission and pending water rights litigation that could impact available flows).

<sup>7</sup> See, e.g., *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012); *Sutton Hydroelectric Company, LLC*, 147 FERC ¶ 61,039, at P 20 (2014).

<sup>8</sup> The essence of the Commission's policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. See *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008). See also *Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (finding that the Commission's conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (affirming application of policy against site banking in permit cases).

portion of the former smelter site. However, neither of these matters constitutes an extraordinary circumstance. The concerns of the Yakama Nation and the Washington DFW could have been addressed previously if Klickitat PUD had not waited until its sixth year of holding a preliminary permit for the site to undertake much of its agency and tribal consultation. It is to be expected that consultation may raise new issues.

9. Klickitat PUD also notes that, as a result of relocating its lower reservoir, the Klickitat PUD Board of Commissioners (the Board) temporarily suspended further work on the development application. The Board wanted to more fully assess and limit the risks and liabilities associated with site contamination and cleanup (as explained below) before deciding whether it would continue to pursue the project. Klickitat PUD's application notes that "[t]he original project was designed in a fashion to avoid [the contaminated] locations and associated potential liabilities," demonstrating that Klickitat PUD was aware of the proximity of its proposed project to various contaminated sites and thus, it was in Klickitat PUD's best interest to address siting concerns early in its permit term.

10. The Board's inability to resolve these issues in time for Klickitat PUD to file an application stems largely from Klickitat PUD's choice to begin much of its consultation late in the term of its second preliminary permit. In addition, the concerns about financial risk and project viability are issues many municipalities, which are governed by similar such Boards, face. This also does not constitute an extraordinary circumstance.

### **B. Ongoing Site Cleanup Activity**

11. Even if Klickitat PUD was able to show an extraordinary circumstance or factor beyond its control, Commission staff would still not grant a preliminary permit for the site. In their applications, both Klickitat PUD and Clean Power explain that the proposed lower reservoir site for their projects is currently undergoing a cleanup process due to decades of contamination from the former operation of the Columbia Gorge Aluminum smelter.<sup>9</sup> The site has been subject to various requirements of the Resource Conservation and Recovery Act,<sup>10</sup> and regulations implemented thereunder, since 1980. Smelter operations contaminated the soil and groundwater at the site with fluoride, polycyclic aromatic hydrocarbons, cyanide, and polychlorinated biphenyls.<sup>11</sup>

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<sup>9</sup> In its two previous preliminary permit applications, Klickitat PUD proposed a different site for the lower reservoir and made no mention of the proximity of the project to the contaminated site.

<sup>10</sup> 42 U.S.C. §§ 6901 *et seq.* (2012).

<sup>11</sup> *Columbia Gorge Aluminum*, Department of Ecology, State of Washington; <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=11797> (last visited Nov. 20, 2015).

12. In March 2014, the National Smelter Company and the Lockheed Martin Corporation, who have both been deemed responsible parties, entered into an Agreed Order (No. DE 10483) with the State of Washington's Department of Ecology (Washington DOE) concerning the assessment and cleanup of the site pursuant to Washington's Model Toxic Control Act.<sup>12</sup> The Agreed Order stipulates the assessment of contamination and the schedule of events necessary to identify and develop cleanup remedies. According to the Agreed Order, there are several investigations and studies that National Smelter Company and Lockheed Martin Corporation need to conduct at the site before the companies can develop a cleanup plan. Once the cleanup plan is finalized, it still must be implemented.

13. In its supplemental filing to its permit application, Klickitat PUD provides an estimated timeline for cleanup completion at the site, which is based on informal conversations with Washington DOE. Klickitat PUD states that Washington DOE staff indicated in a telephone call that "[staff] *believed* that remedial activities other than long term monitoring would be completed by 2019."<sup>13</sup> In addition, Klickitat PUD indicates that remediation work for the area immediately underlying its proposed reservoir is anticipated to be complete in 2016.<sup>14</sup>

14. The Commission has previously held that it is not prudent to issue permits for contaminated sites undergoing an indefinite cleanup process.<sup>15</sup> While Klickitat PUD has provided an estimate for cleanup completion, this timeline is speculative and still subject to change – particularly given that investigations at the site are not yet complete. In addition, Klickitat PUD's proposed reservoir location and its proposed project study area are both drawn in such a way that they come very close to, but do not overlap, other contaminated sites. It is quite possible that after further study the lower reservoir location would need to be moved again, perhaps to an area with more extensive investigation and cleanup remaining.

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<sup>12</sup> See Agreed Order, attached to Klickitat PUD's Preliminary Permit Application (filed November 3, 2015).

<sup>13</sup> Klickitat PUD's Supplemental Information to Preliminary Permit Application at 8 (filed December 1, 2015) (emphasis added).

<sup>14</sup> *Id.* Clean Power does not provide any information about the timing of cleanup and how that relates to its proposed Columbia Gorge Project in its application. However, the map provided in its application indicates that its lower reservoir overlays roughly the same area as the lower reservoir for the JD Pool Project.

<sup>15</sup> See *Green Energy Storage Corp.*, 150 FERC ¶ 61,042 (2015).

15. A Final Remedial Investigation Phase 2 Work Plan (Work Plan) was approved by Washington DOE on August 31, 2015. The Work Plan notes that the JD Pool Project is directly in the area being investigated.<sup>16</sup> It goes on to explain that a Remedial Investigation/Feasibility Study, which is anticipated to be completed by the end of 2017, “will consider potential exposure risks and cleanup requirements within the context of future industrial uses [in the area].”<sup>17</sup> The Work Plan does not give any timeline for when cleanup is expected to be complete. Given the speculative nature of the cleanup timeline provided by Klickitat PUD and the uncertainty regarding the site’s future suitability for development, Commission staff finds that it is not prudent to issue a preliminary permit for the site at this time and both applications are dismissed.<sup>18</sup>

16. The applicants are free to continue to develop license applications as the cleanup process continues. The Commission may consider development applications for the site in the future, however any such applications would need to thoroughly address all issues related to developing the project at a previously contaminated site, including how the applicant plans to excavate closed landfills and ensure any required monitoring.

The Director orders:

(A) The preliminary permit applications submitted by Public Utility District No. 1 of Klickitat County, Washington and Clean Power Development, LLC on November 3, 2015, for Project Nos. 13333-004 and 14729-000, respectively, are dismissed.

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<sup>16</sup> TETRA TECH, INC. ET AL., FINAL REMEDIAL INVESTIGATION WORK PLAN, VOLUME 2: PHASE 2 WORK PLAN 2-6 (2015), *available at* <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=11797>.

<sup>17</sup> *Id.*

<sup>18</sup> To the extent that Klickitat PUD’s supplemental filing asks us to assume that the ongoing cleanup activities pose no hindrance to pursuing a license application at this time, we are left questioning whether Klickitat PUD has been diligent in pursuing its yet un-filed license application despite having had the past six years to prepare it.

Project Nos. 13333-004 and 14729-000

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(B) This order is issued under authority delegated to the Director and constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

Vince Yearick  
Director  
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