

135 FERC ¶ 62,157
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Kahawai Power 2, LLC

Project No. 13879-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(May 20, 2011)

1. On November 16, 2010, Kahawai Power 2, LLC, filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the Makaweli River Water Power Project No. 13879-000, located in Kauai County, in the state of Hawaii.

I. Project Proposal

2. The proposed project would consist of: (1) a proposed 6-foot-high, 40-foot-long reinforced concrete weir and intake structure on the Kahana Stream that would maintain a normal surface elevation of 2,200 feet above mean sea level (msl); (2) a proposed 8-foot-high, 40-foot-long reinforced concrete weir and intake structure on the Mokuone Stream that would maintain a normal surface elevation of 2,200 feet msl; (3) a new 31,000-foot-long steel penstock; (4) a proposed 1,500-foot-long, 48-inch-diameter, underground tunnel to convey water from the Mokuone diversion to the Mokuone feeder penstock; (5) a new 1,750-foot-long, 36-inch-diameter steel feeder penstock to collect additional flows from the Mokuone diversion; (6) a proposed 70-foot-long, 40-foot-wide, reinforced concrete powerhouse containing two generating units with a total capacity of 6.6 megawatts and an average annual generating capacity of 23,900 megawatt-hours; (7) a proposed 90-foot-long, 15-foot-wide tailrace; (8) a 4.25-mile-long, 69 kilovolt transmission line; and (9) a new gravel roadway approximately 1 mile in length.

II. Background

3. The Commission issued a public notice for the project on November 29, 2010, establishing January 28, 2011, as the deadline for filing comments, motions to intervene, and competing applications.² Timely motions to intervene were filed by the County of

¹ 16 U.S.C. § 707(f) (2006).

² On February 8, 2011, the Commission extended the comment period for Lihue County and Kapaa County until April 9, 2011.

Kauai and Gay & Robinson, Inc.³ Comments were filed by the U.S. Department of the Interior, the Hawaii Office of Hawaiian Affairs, the Hawaii Department of Land and Natural Resources, Gay & Robinson, Inc., Bruce B. Robinson, and Robinson Family Partners.

II. Discussion

4. Several commenters expressed concern that construction and operation of the proposed project may adversely affect the environment, fish and wildlife, aesthetic resources, recreational interests, water quality, natural resources, and traditional Hawaiian rights in the Makaweli River. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

5. Robinson Family Partners owns some of the lands on which the proposed project would be developed. Robinson Family Partners, Mr. Robinson, and Gay and Robinson, Inc. (lessee of Robinson Family Partners' land) object to development of the proposed project and urge the Commission to deny the permit. They question the viability of the proposed project, and state that allowing the project to move forward would cause significant adverse affects to their family lands and impede development of their own hydroelectric project. As noted above, concerns regarding the impact of constructing and operating the proposed project are premature at the preliminary permit stage since a permit does not authorize any access or land-disturbing activities. With respect to the concern that this permit may impede development of its own hydroelectric project, we note that none of the Robinson entities filed a competing permit application.

6. The Hawaii Department of Land and Natural Resources states that the it should be consulted regarding development of the proposed project because it is partially located on lands within the Hawaii Forest Reserve System. Likewise, the Hawaii Office of Hawaiian Affairs requests that it be consulted regarding the development of the proposed project. Interior requests that if a preliminary permit is issued that the permittee be required to include a feasibility study to determine the potential impacts the project would have on Mawaweli River. It is the responsibility of the permittee to undertake the appropriate consultations and obtain the necessary authorizations to conduct permit studies in a manner consistent with applicable laws and regulations. The Commission

³ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2010)

has not sought to place all relevant study requirements in preliminary permits.⁴ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.⁵ Further, permit conditions have been framed to ensure that the permittee does not tie up a site without pursuing in good faith a study of the project's feasibility.⁶

III. Permit Information

7. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA,⁷ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁸ Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.⁹

⁴ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

⁵ See 18 C.F.R. § 4.38 (2010).

⁶ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁷ 16 U.S.C. 802 (2006).

⁸ See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) (“The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.”).

⁹ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. See, e.g., *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); see also *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

8. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.¹⁰ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹¹ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

9. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.¹²

The Director orders:

(A) A preliminary permit is issued for the Makaweli River Water Power Project No. 13879 to Kahawai Power, LLC for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) This order 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

¹⁰ 18 C.F.R. §§ 5.5 and 5.6 (2010).

¹¹ See 18 C.F.R. § 5.3 (2010).

¹² See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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313(a) of the Federal Power Act, 16 U.S.C § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2010).

Timothy J. Welch, Chief
West Branch
Division of Hydropower Licensing

FEDERAL ENERGY REGULATORY COMMISSION**TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the 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 application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

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