

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Symbiotics, LLC

Project No. 11960-001

ORDER DENYING REHEARING

(Issued August 14, 2006)

1. Symbiotics, LLC (Symbiotics) has filed a request for rehearing of a March 22, 2006 Commission Staff Order dismissing Symbiotics' application for a preliminary permit to study the feasibility of developing the hydroelectric power potential of the U.S. Department of the Interior, Bureau of Reclamation's (Reclamation) Yellowtail Afterbay Dam, on the Bighorn River, in Big Horn County, Montana.¹ The March 22 Order found that the hydropower development of the site of the proposed project is reserved to the United States, and that the Commission therefore lacks jurisdiction to issue a license for a project at the Afterbay Dam. Because we agree with the findings of the March 22 Order, we deny rehearing.

Background

2. The Missouri River Basin Project (later named the Pick-Sloan Missouri Basin project, hereinafter, "Pick-Sloan") was authorized by section 9 of the Flood Control Act of 1944 (1944 Act).² In the 1944 Act, Congress approved Reclamation's comprehensive plan for Pick-Sloan, and authorized construction of the initial stages of the plan, as recommended by Reclamation and the U.S. Army Corps of Engineers.³

¹ *Symbiotics, LLC*, 114 FERC ¶ 62,292 (2006).

² 58 Stat. 887, 891 (1944).

³ The Corps and Reclamation presented separate plans for the development of the Missouri River Basin in House Document 475 and Senate Document 191, respectively. See H.R. Doc. 475, 78th Cong., 2nd Sess. (1944) and S. Doc. 191, 78th Cong., 2d Sess. (1944). Senate Document 247, which reconciled the two plans, adopted the plans set forth in Senate Document 191 for the Yellowstone River Basin. S. Doc. 247, 78th Cong. 2d Sess. (1944).

3. The Yellowtail Unit of the Pick-Sloan project was included in the initial stages authorized for development. This authorization included two dams, reservoirs, and powerplants (Kane and Yellowtail), to be built in lower Big Horn Canyon on the Yellowstone River. Yellowtail Dam would be a “combination power and irrigation diversion dam,” and would “be built of sufficient height to utilize all of the available fall in the lower canyon for power purposes.”⁴ The Kane Dam, reservoir, and powerplant were to be built in the canyon upstream of Yellowtail Dam and reservoir. Reclamation later decided that one high dam at the mouth of the canyon (Yellowtail) with a re-regulating dam about two miles downstream (Afterbay Dam) was more feasible, and that is what was constructed. Although the authorizing language contemplated a 75-megawatt (MW) power plant at Yellowtail Dam, the project as constructed has an installed capacity of 250 MW.

4. On April 17, 2001, Symbiotics filed an application for a preliminary permit to study the feasibility of constructing a 1.0-MW hydroelectric project at the Afterbay Dam. On July 16, 2001, in response to the Commission’s public notice of Symbiotics’ application, the U.S. Department of the Interior (Interior) filed comments objecting to Symbiotics’ application on the ground that the legislation authorizing Pick-Sloan gives Interior the exclusive right to develop hydropower at the site.⁵ The March 22 Order agreed with Interior and accordingly dismissed Symbiotics’ permit application.

Discussion

5. Sections 4(e) and 4(f) of the Federal Power Act⁶ authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. In *Chapman v. FPC (Chapman)*,⁷ the Supreme Court determined that this jurisdiction is withdrawn if federal development of hydropower generation at a site is authorized, or if Congress otherwise unambiguously withdraws the Commission’s jurisdiction over the development of such generation.

6. In 1992, the Commission and Reclamation entered into a Memorandum of Understanding (MOU) which establishes procedures and principles for the resolution of jurisdictional issues regarding proposed non-federal hydroelectric development at

⁴ S. Doc. 191 at 50.

⁵ See letter from Robert F. Stewart (Interior Regional Environmental Officer) to David P. Boergers (Commission Secretary).

⁶ 16 U.S.C. §§ 797(e) and (f) (2000).

⁷ 345 U.S. 153 (1953).

Reclamation projects.⁸ The MOU sets forth certain presumptions regarding the interpretation of legislation and supporting documents that authorizes Reclamation projects,⁹ and represents the Commission's and Reclamation's agreement as to how the two agencies will make the legal determination whether the Commission can authorize non-federal hydropower development at a given Reclamation site. The presumptions are grounded in established principles of statutory construction.¹⁰

7. Presumption 2 of the MOU states:

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, appears to specifically reserve hydropower development exclusively to the United States or to specifically withdraw the Commission's jurisdiction, then Reclamation is presumed to have jurisdiction.

8. The March 22 Order found, referencing Presumption 2, that although the 1944 Act and supporting documents do not specifically mention the Afterbay Dam, they authorize construction of the Yellowtail Unit, of which the Afterbay is a part, and that authorization provided for the development by the United States of all of the available electric generating potential in the lower canyon by the Yellowtail Unit.

9. Symbiotics argues that authorization of Pick-Sloan's Yellowtail Unit did not mention the Afterbay Dam, and therefore could not have authorized the federal development of hydropower at that dam.¹¹ However, as explained in the Director's

⁸ "Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Bureau of Reclamation, Department of the Interior, for Establishment of Processes for the Early Resolution of Issues Related to the Timely Development of Non-Federal Hydroelectric power at Bureau of Reclamation Facilities," November 6, 1992 (public notice issued January 4, 1993, and published in the Federal Register on January 8, 1993, 58 Fed. Reg. 3269).

⁹ *Id.*, Exhibit A.

¹⁰ *See Troop County Board of Commissioners*, 102 FERC ¶ 61,300 at P 10 (2003).

¹¹ Rehearing request at 5 and 10-12. This argument implies that the Afterbay Dam itself was not authorized. However, we presume that Reclamation would not have constructed these facilities without authorization.

Order, it is not unusual for the final design details of such projects to differ from the general plans that formed the basis of the authorization.¹²

10. Symbiotics also asserts that Senate Document 191 unambiguously states that the Commission's jurisdiction with respect to the Yellowtail Afterbay was not withdrawn.¹³ The language it cites, however, consists of two sentences taken out of context from a paragraph in a staff report to the Commissioner of Reclamation.¹⁴ The Missouri River Basin project plan covered seven states and included hundreds of major engineering works and thousands of structures. The paragraph to which Symbiotics cites recognizes that the projects whose primary functions are flood control and navigation should be constructed and operated by the U.S. Army Corps of Engineers, and projects whose primary functions are irrigation, restoration of surface and groundwater, and power are to be constructed by Reclamation. Section 9 of the 1944 Act provided for such a division of responsibility. The paragraph also recognized that to the extent the projects could serve other public functions, the agency with jurisdiction over the particular function should be

¹² *Symbiotics, LLC*, 114 FERC ¶ 62,292 at P 10-11.

¹³ Rehearing request at 6.

¹⁴ S. Doc. 191 at 10-16. The full paragraph (numbered 7, at p. 11) reads as follows:

The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.* In like manner, agencies with jurisdiction over other functions should be recognized. The Bureau of Reclamation should construct and operate all power-transmission facilities, and should have the responsibility for the disposal of all power generated. [portion quoted by Symbiotics italicized).

recognized. It should not be read as conferring any jurisdiction. In any event, this general language does not override the project-specific language authorizing Reclamation to fully develop the hydroelectric capacity of the lower canyon.

11. Symbiotics also cites to the Summary Foreword in Senate Document 191 as evidence of retained jurisdiction by the Commission. The cited text states that the present and future plans of state and federal agencies should be coordinated so as avoid waste, conflict, and duplication of effort and promote coherent agency action.¹⁵ Again, this is broad language that applies to the comprehensive development of the Missouri River Basin proposed in Senate Document 191: it does not address agency jurisdiction, either in general, or with regard to specific facilities.

12. Symbiotics next cites to *Chapman* as support for its argument that the Afterbay Dam (and therefore power at the dam) were not authorized by the 1944 Act.¹⁶ In *Chapman*, the Court concluded that where, as here, a statute “approves” a comprehensive plan for development of a river basin and “authorizes” the initial stages of the plan for construction, it is only those specified initial stages, not the entire plan, that are authorized for federal development. Symbiotics’ argument, however, is based on its assertion, refuted herein, that the Yellowtail Unit authorization specified construction of Yellowtail and Kane dams, reservoirs, and powerplants, but did not include the Afterbay Dam.

13. Finally, Symbiotics contends that, even if the Afterbay Dam was included in the Yellowtail Unit authorization, MOU Presumption 5 applies to reserve our jurisdiction. The Presumption states:

If the authorizing statute, as amended, or any documents incorporated by reference in the statute, specify the number, capacity, or location of powerplants authorized for federal development, then Reclamation is

¹⁵ The paragraph cited by Symbiotics states:

Present and future plans of State agencies and of various Government agencies, such as the Indian Service, the Fish and Wildlife Service, . . . and the Federal Power Commission should be coordinated, in order avoid the waste incident to conflicting plans and duplication of effort, and in order to gain the advantage of large-scale, coherent works and operations.

Request for rehearing at 6, citing S. Doc. 191 at 18.

¹⁶ Rehearing request at 8-10.

presumed to have jurisdiction for that specified development. Beyond the specified development, the Commission is presumed to have jurisdiction.

14. Symbiotics argues that since Senate Document 191 provides for the dam at Yellowtail Reservoir to have a 75-MW power plant, which was “to utilize all of the available fall in the lower canyon for power purposes,”¹⁷ and the Afterbay Dam is located two miles downstream from the mouth of the canyon, Reclamation must be presumed to have jurisdiction only with respect to the Yellowtail Reservoir dam, and the Commission retains jurisdiction to license hydroelectric development at the Afterbay Dam.¹⁸

15. If the Yellowtail Dam and Afterbay Dam were completely separate facilities or authorized as separate Pick-Sloan units, this argument might have some force. However, both dams are operated in coordination as part of the Yellowtail Unit, so we think it is reasonable to read the broad authorization to develop all of the available fall in the lower canyon for power purposes as applying to the entire Yellowtail Unit. Furthermore, the examples in the MOU of situations to which Presumption 5 applies specify approximate generating capacities but do not include the broader authorization of Yellowtail to develop the full hydropower potential of the canyon.¹⁹ Under these circumstances, we do not think that Presumption 5 applies.

16. For the reasons set forth above, we will deny Symbiotics’ request for rehearing. If Symbiotics wishes to develop hydropower at the Afterbay, it must seek a lease of power privilege from Reclamation.

The Commission orders:

The April 7, 2006 request for rehearing filed by Symbiotics, LLC is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁷ S. Doc. 191 at 50.

¹⁸ Rehearing request at 13.

¹⁹ We note that, although Senate Document 191 contemplated a 75-MW powerplant at Yellowtail Dam, a 250-MW powerplant was actually constructed, lending further support to our finding that the full federal development of power was authorized.