

142 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Power Site Reservation Fees Group	Docket No. EL13-24-000
Public Utility District No. 2 of Grant County, Washington	Project Nos. 2114-256
Public Utility District No. 1 of Chelan County, Washington	2145-115
Public Utility District No. 1 of Snohomish County, Washington	2157-209
Sabine River Authority of Texas	2305-040
Alaska Electric Light and Power Company	2307-063
City and Borough of Sitka, Alaska	2818-024
Southeast Alaska Power Agency	2911-036
Southeast Alaska Power Agency	3015-013
Alaska Energy Authority	14241-003

DECLARATORY ORDER

(Issued March 21, 2013)

1. A number of licensees of hydropower projects (collectively, the Power Site Reservation Fees Group)¹ have filed a petition asking the Commission to declare that it will not assess annual land use charges with respect to lands owned by the licensees but still subject to a power site reservation under section 24 of the Federal Power Act (FPA).² As discussed below, we grant the petition.

¹ The Power Site Reservation Fees Group includes: Alaska Electric Light and Power Company; Alaska Energy Authority; City and Borough of Sitka, Alaska; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 2 of Grant County, Washington; Sabine Water Authority of Texas; Sabine River Authority, State of Louisiana; and Southeast Alaska Power Agency.

² 16 U.S.C. § 818 (2006).

2. Section 10(e)(1) of the FPA requires licensees to pay to the United States reasonable annual charges, as set by the Commission, for, among other things, the use, occupancy, and enjoyment, of federal lands.³

3. FPA section 24 provides that federal lands included in any proposed project are reserved from disposal unless the Commission or Congress directs otherwise. If the Commission determines that the power development value of such lands (known as power sites) will not be destroyed by disposal, the lands may be disposed of under the public land laws. In such cases, however, the United States must include in any contract regarding the lands a reservation of the right of the United States or its permittees or licensees to enter and use the lands for any hydropower purpose determined by the Commission. These reservations are generally known as power site reservations.⁴

4. The Commission's practice has been to "assess[] the same annual charge for lands in which the United States retains a Section 24 interest only as for lands to which the United States holds the full fee title. The charges are the same because the right for which the licensee is reimbursing the United States in the same: the right to use the land for power purposes."⁵ Thus, even where the United States has sold or transferred lands to a licensee, the Commission has continued to assess annual charges for use of those lands, because of the retention by the United States of a power site reservation. Accordingly, some projects include formerly federal lands that are now owned by licensees and as to which the Commission assesses annual land use charges.

³ See 16 U.S.C. § 803(e)(1) (2006).

⁴ In other words, if an applicant has proposed to construct a hydropower project on U.S. lands, the Commission could later determine that the power development value of those lands will not be destroyed if the lands are transferred to a member of the public. The United States could then transfer the lands, subject to a power site reservation. If, however, the Commission later decided that the lands were needed for hydropower purposes, the owner would have to let a licensee so use the lands, subject to the payment of damages. So, for example, the Commission could agree to the transfer of lands subject to a power site reservation to a member of the public, who subsequently planted crops there. If the Commission later determined that part or all of those lands were needed for recreation or environmental purposes related to a hydropower project, the owner would have to allow the licensee to use the lands as required by the Commission, and the licensee would have to pay damages to the owner for the loss of the crops.

⁵ *Public Utility District No. 2 of Grant County, Washington, et al.*, 15 FERC ¶ 61,239, at 61,549 (1981). See also *Petersburg Municipal Power and Light*, 82 FERC ¶ 61,031, at 61,124 (1998); *Montana Power Company*, 67 FERC ¶ 61,296, at 62,025-26 (1994).

5. The Power Site Reservation Fees Group argues that section 10(e)(1) authorizes only the collection of charges for the use of federal lands, and contends that lands of which the United State has disposed, subject to a power site reservation, are not federal lands. It further alleges that a licensee's right to enter lands subject to a power site reservation is conferred by section 24, not by a Commission license, and so should not be subject to annual land use charges.

6. We do not agree. Nothing in section 24 requires us to treat a clear federal interest in land – a power site reservation – as though it has no meaning. A power site reservation clearly is an exercisable and valuable interest in land: the United States or a licensee may enter such lands, without the need for the owner's consent. Moreover, an entity becomes a licensee only if and when the Commission issues it a license. Absent a license, there is no authority to use reserved lands for hydropower purposes. Thus, we see nothing unlawful in our prior practice of assessing annual charges for lands subject to a power reservation.

7. The Power Site Reservation Fees Group makes a more compelling equitable argument. The group argues that licensees have given valuable consideration to obtain fee ownership of federal lands, and have done so for the development of hydropower, the very purpose for which the power site reservation was created. We agree. Accordingly, we grant the petition and will no longer assess annual charges with respect to former federal lands included within the boundaries of hydropower projects as to which a section 24 reservation obtains.⁶

8. The Power Site Reservation Fees Group asks the Commission to establish procedures for licensees whose projects occupy sold or transferred federal lands subject to a power site reservation to timely submit the information necessary to document the extent of such lands within the boundaries of their projects. We see no need for special procedures. Licensees can submit this information whenever they see fit. They may wish to consult with Commission staff before doing so, to ensure that the material they provide is appropriate.

The Commission orders:

The petition for declaratory order filed by the Power Site Reservation Fees Group on November 21, 2012 is granted, as discussed herein.

By the Commission.

Kimberly D. Bose,
Secretary.

⁶ This action will not remove power site reservations, only annual charges related to them.