156 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Percheron Power, LLC Docket No. EL16-50-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 22, 2016)

1. On March 25, 2016, pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,[1] Percheron Power, LLC (Percheron) filed a petition for declaratory order (Petition), requesting that the Commission find that it retains jurisdiction to authorize small conduit hydroelectric projects of 5 megawatts (MW) or less within the U.S. Bureau of Reclamation's (Reclamation) Columbia Basin Project, or specifically at five incidental features within the Columbia Basin Project. As discussed below, we deny the Petition.

I. Background

2. Under sections 4(e) and 4(f) of the Federal Power Act (FPA),[2] the Commission has the authority to issue preliminary permits and licenses for non-federal hydropower projects located at federal dams and facilities. This jurisdiction is withdrawn if Congress authorizes federal development of hydropower generation at the site, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.[3]

[1] 18 C.F.R. § 385.207(a)(2) (2016).

[2] 16 U.S.C. §§ 797(e) and (f) (2012).

[3] *See, e.g.*, *Richard D. Ely, III*, 87 FERC ¶ 61,176 (1999) (citing *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983)).

3. On August 9, 2013, President Obama signed into law the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act (Small Conduit Act).[4] The Small Conduit Act amended section 9(c) of the Reclamation Project Act of 1939[5] to provide Reclamation with authority to issue leases of power privilege for small (defined as 5 MW or less), non-federal hydropower development projects on Reclamation conduits.[6]

4. As relevant here, the Act provided an exception to this authorization by including the following provision:

> [n]othing in this subsection shall alter or affect any existing preliminary permit, license, or exemption issued by the Federal Energy Regulatory Commission under Part I of the Federal Power Act (16 U.S.C. 792 *et seq.*) or any project for which an application has been filed with the Federal Energy Regulatory Commission as of the date of enactment of the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act.[7]

5. Percheron acknowledges that the stated purpose of the Small Conduit Act was "to authorize all [Reclamation] conduit facilities for hydropower development under Federal Reclamation law,"[8] but argues that the Commission retains jurisdiction over non-federal hydropower development in the Columbia Basin Project[9] pursuant to the exception provided for in the Act.

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[4] Pub. L. No. 113-24, 127 Stat. 498 (Aug. 9, 2013).

[5] 53 Stat. 1187, 1994 (codified at 43 U.S.C. § 485h(c) (2012)).

[6] 43 U.S.C. § 485h(c)(1) (2012). The Small Conduit Act defines "conduit" to include any Reclamation tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. *Id.* § 485h(c)(9) (2012).

[7] *Id.* § 485h(c)(8) (2012).

[8] Petition at 8 (citing S. Rep. No. 113-39, 113th Cong., 1st Sess., at 1 (2013) (Senate Report 113-39)).

[9] The Columbia Basin Project is a Reclamation project located in east central Washington. Principal project features include the Grand Coulee Dam, Roosevelt Lake (the reservoir created by the dam), Grand Coulee Powerplant Complex, and a pump-generating station. Below the Grand Coulee Dam, the Columbia Basin Project consists

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A. Relevant Procedural History

6. On March 26, 2013, Commission staff issued Columbia Basin Hydropower (CBH)[10] six preliminary permits to study the feasibility of proposed hydroelectric projects at six sites on irrigation canals and wasteways in the Columbia Basin Project.[11] All six of CBH's preliminary permit applications were filed as competing applications, as Percheron had previously filed preliminary permit applications for three of the sites and NortHydro, LLC had previously filed preliminary permit applications for the other three sites.[12] Commission staff issued all six of the preliminary permits to CBH based on municipal preference[13] and, accordingly, denied all competing applications.

7. In the orders issuing the permits, Commission staff concluded "there is no indication that the Commission's jurisdiction over non-federal hydropower development elsewhere [other than at the Grand Coulee Dam and Roosevelt Lake][14] within the

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of many other dams, reservoirs, and canals used for irrigation purposes. In total, the Columbia Basin Project includes over 300 miles of main canals, approximately 2,000 miles of lateral canals, and 3,500 miles of drains and wasteways. The Columbia Basin Project currently provides irrigation water to approximately 671,000 acres of land, and has the potential to serve over one million acres.

[10] At the time the permits were issued, CBH was called the Grand Coulee Project Hydroelectric Authority.

[11] *Grand Coulee Project Hydroelectric Authority*, 142 FERC ¶ 62,252 (2013) (PEC 1973 Drop Project No. 14316); 142 FERC ¶ 62,251 (Scooteney Outlet Drop Project No. 14317); 142 FERC ¶ 62,247 (Scooteney Inlet Drop Project No. 14318); 142 FERC ¶ 62,250 (P.E. 16.4 Wasteway Project No. 14349); 142 FERC ¶ 62,249 (P.E. 46A Wasteway Project No. 14351); and 142 FERC ¶ 62,248 (P.E. Scooteney Wasteway Project No. 14352).

[12] At one of the sites, FFP Project 85, LLC also filed a competing preliminary permit application.

[13] FPA section 7(a), 16 U.S.C. § 800(a) (2012), requires the Commission to grant a preference to preliminary permits applications by states and municipalities, all else being equal.

[14] Staff noted that, although it was not proposed in any of the six preliminary permit applications, development at the Grand Coulee Dam and Roosevelt Lake was reserved to the federal government. *See, e.g., Grand Coulee Project Hydroelectric Authority*, 142 FERC ¶ 62,252 at P 13 and n.15 (identical language appears in the five other March 2013 orders issuing permits).

Columbia Basin Project has been withdrawn."[15] Staff cited to Reclamation's July 12, 2012 letter, in which Reclamation stated that it did not object to the Commission issuing any of the six permits. In the July 12 letter, Reclamation stipulated that "[b]y recognizing FERC's authority to process and issue preliminary permits in this circumstance, Reclamation does not relinquish any jurisdiction to assert its authority to develop power sites or to lease power privileges in future matters, as may be authorized by applicable law."[16]

8. Of these six preliminary permits, CBH surrendered two and, on December 9, 2015, requested two-year permit term extensions on the other four. On January 15, 2016, Commission staff denied CBH's request for extension of the preliminary permit terms, finding that CBH had failed to demonstrate that it carried out the required activities under its permits with reasonable diligence, and that granting an extension of the terms could constitute site banking (January 15 Order).[17]

9. In the January 15 Order, staff also noted that, because CBH's preliminary permits were issued before the enactment of the Small Conduit Act, the Commission would retain jurisdiction over the projects if CBH chose to file license or exemption applications before the permits expired. However, staff explained that once the permits expired on February 29, 2016, the Commission would no longer have jurisdiction over the development of projects of 5 MWs or less at these sites, and a developer would need to seek a lease of power privilege from Reclamation to develop such projects.

10. On February 16, 2016, CBH sought rehearing of staff's determination that it had failed to pursue the requirements of its permits with reasonable diligence. On April 21, 2016, the Commission denied rehearing.[18] On February 16, 2016, Percheron also filed a request for rehearing of the January 15 Order, specifically contesting staff's interpretation of the Small Conduit Act with respect to the sites; however, as Percheron was not a party to the permit extension proceeding, its rehearing request was rejected.[19]

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[15] *Id.* P 13 (identical language appears in the five other March 2013 orders issuing permits).

[16] Letter from Terrald E. Kent (Regional Power Manager, Reclamation) to Jennifer Hill (Chief, Northwest Branch, Division of Hydropower Licensing) Regarding Project Nos. 14318, 14317, 14316, 14349, 14351, 14352, and 14372, at 2 (filed July 13, 2012).

[17] *Columbia Basin Hydropower*, 154 FERC ¶ 62,030 (2016).

[18] *Columbia Basin Hydropower*, 155 FERC ¶ 61,055 (2016).

[19] *Columbia Basin Hydropower*, 154 FERC ¶ 61,177 (2016).

11. Percheron thereafter filed the Petition.

B. Petition

12. Percheron asks that the Commission find that it retains jurisdiction to authorize non-federal hydropower projects of 5 MW or less at Reclamation conduits in the Columbia Basin Project, or specifically just at the five sites within the Columbia Basin Project for which CBH previously held a preliminary permit.[20]

13. Percheron contends that the term "project" in the Small Conduit Act provision that states that the law does not apply to "any project for which an application has been filed with the Federal Energy Regulatory Commission as of August 9, 2013" refers to any *Reclamation* project. Accordingly, Percheron argues that the exception provides that the Commission retains jurisdiction at all Reclamation projects for which the Commission received a development application as of August 9, 2013.

14. Percheron notes that while the Small Conduit Act does not specifically define "project," the Reclamation Project Act of 1939 defines the term as:

> any reclamation or irrigation project, including incidental features thereof, authorized by the Federal reclamation laws, or constructed by the United States pursuant to said laws, or in connection with which there is a repayment contract executed by the United States, pursuant to said laws, or any project constructed or operated and maintained by the Secretary through the Bureau of Reclamation for the reclamation of arid lands or other purposes.[21]

15. Percheron argues that the Commission should apply the definition from the Reclamation Project Act of 1939 to the exception in the Small Conduit Act. As support for its argument, Percheron points to the testimony included in Senate Report 113-139, in which Lowell Pimley, Deputy Commissioner of Operations for Reclamation, notes, "… the existing 1939 Act has a definitions section. Any definitions that are of general application should be included in the existing definitions section, rather than in

[20] These five sites are the sites of CBH's previous PEC 1973 Drop Project No. 14316; Scooteney Inlet Drop Project No. 14318; Scooteney Outlet Project No. 14317; 16.4 Wasteway Project No. 14349; and 46A Wasteway Project No. 14351. In its Petition, Percheron does not include the site of CBH'sprevious P.E. Scooteney Wasteway Project No. 14352.

[21] 42 U.S.C. § 485a(c) (2012).

subsection 9(c). Definitions that apply solely to conduit hydropower need to do so explicitly, to avoid misapplication or confusion."[22]

16. As an alternative, Percheron also offers a narrower interpretation of "project." Percheron notes that the term "project" could refer just to certain incidental features, or sites, within Reclamation projects, as opposed to entire Reclamation projects. As support, Percheron notes that the Reclamation Project Act of 1939 definition specifies that a project includes its incidental features. Thus, Percheron claims that, at the least, the Commission retains jurisdiction over particular sites or features of Reclamation projects for which development applications were filed with the Commission before the enactment of the Small Conduit Act.

17. Percheron contends that both of its interpretations are consistent with one of the purposes of the Small Conduit Act, which was to "jumpstart hydropower development on Reclamation conduits by reducing unnecessary and duplicative administrative and regulatory costs . . . ."[23] Under either of Percheron's proffered interpretations, jurisdiction over its proposed projects would remain with the Commission. Thus, Percheron claims that requiring it to pursue development under Reclamation law, with a new set of administrative and regulatory processes, would be contrary to the spirit of the Small Conduit Act, particularly given that Percheron has "expended significant resources investigating and attempting to develop the [Columbia Basin Project] sites under the Commission's processes . . . ."[24]

18. Lastly, Percheron argues that a change in regulatory authority over these sites may also contribute to site banking because it could give development priority to an entity that is unwilling or unable to develop a site.[25] Under the processes set forth in the Small Conduit Act, Reclamation must first offer lease of power privileges to irrigation districts and municipalities.[26] Accordingly, under Reclamation law, CBH would have priority to

[22] Senate Report 113-39, at 10 (testimony of Lowell Pimley).

[23] H. Rep. No. 113-24, 113th Cong., 1st Sess., at 2 (2013) (House Report 113-24).

[24] Petition at 14.

[25] *See Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012).

[26] 43 U.S.C. § 485h(c)(2)(A) (2012).

develop its projects at the contested sites, despite the Commission's previous finding that CBH did not pursue its development applications in good faith and with reasonable diligence during the term of its preliminary permits.[27]

II. Notice and Responsive Pleadings

19. Notice of the Petition was published in the *Federal Register*,[28] with interventions and protests due by April 25, 2016. On May 6, 2016, Reclamation filed a late motion to intervene, which was granted on May 12, 2016. On May 12, 2016, Reclamation filed a motion to re-open and extend the protest and intervention period, which Percheron opposed on May 25, 2016. On June 2, 2016, Reclamation filed a motion for leave to comment and comments in opposition to the Petition. On July 1, 2016, Percheron filed an answer to Reclamation's comments. Because Reclamation's comments and Percheron's answer bear on our jurisdiction, we consider both pleadings here.

20. On May 19, 2016, CBH filed a late motion to intervene and comments in opposition to the Petition. On May 25, 2016, Percheron opposed CBH's late motion to intervene. CBH explains that, relying on the Commission's jurisdictional determination, it initiated the lease of power privilege process, under Reclamation's regulations, to develop four hydropower sites at the Columbia Basin Project, and thus has a direct interest in the outcome of this proceeding.[29] We grant CBH's motion.

A. Comments in Opposition

21. In its comments, Reclamation argues that both the plain language of the Small Conduit Act and its legislative history indicate that Percheron is mistaken and the Commission's jurisdiction over non-federal hydropower development at conduits of the Columbia Basin Project is withdrawn. Specifically, Reclamation contends that Percheron's interpretation of the exception to the Act is incorrect.

22. First, Reclamation argues that the meaning of the term "project" in the exception refers to hydropower development projects, not Reclamation projects. Reclamation contends that the surrounding language in the exception supports this interpretation. The first part of the exception refers to existing preliminary permits, licenses, and exemptions, which the Commission issues for hydropower development projects. In the second part

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[27] *See Columbia Basin Hydropower*, 155 FERC ¶ 61,055 (affirming staff's finding that CBH failed to pursue the requirements of its permits with good faith and reasonable diligence).

[28] 81 Fed. Reg. 19,599 (2016).

[29] 18 C.F.R. § 385.214(c)(2) (2016).

of the exception, the word "project" is qualified by "for which an application has been filed with the Federal Energy Regulatory Commission." Reclamation states that developers do not file applications for Reclamation projects with the Commission, but rather they file applications for hydropower development projects. Thus, Reclamation explains, "project" in the exception refers to those projects that the Commission can act upon (i.e., hydropower development projects).

23. Reclamation also contends that Percheron's interpretation is inconsistent with the purpose and supporting legislative history of the Small Conduit Act. Reclamation explains that, under Percheron's interpretation of the exception, the Commission would retain jurisdiction over small conduit hydropower development "in virtually every Reclamation project."[30] Reclamation emphasizes that this would be contrary to one of Congress' clearly stated purposes of the Small Conduit Act, which was to ensure "that the Bureau of Reclamation, not the Federal Energy Regulatory Commission, is responsible for authorizing conduit hydropower development on Reclamation-owned facilities through its Lease of Power Privilege program."[31]

24. Moreover, Reclamation argues that the testimony of Lowell Pimley, when viewed in its entirety, does not actually support Percheron's interpretation. While Pimley did proffer that definitions of general applicability should be included in the existing definitions section of the Reclamation Project Act of 1939 and that definitions meant to apply only to conduit hydropower should do so explicitly, he did so in the context of discussing a different section of the Small Conduit Act.[32] However, as to the exception, Pimley stated, "[t]his language allows for *existing and pending FERC licenses* to remain within FERC's jurisdiction, rather than be redirected into Reclamation's [Leases of Power Privilege] process."[33] Thus, Reclamation asserts, Pimley's interpretation of the

[30] Reclamation Comments at 13. Reclamation states that a partial list of the Reclamation projects where the Commission would retain jurisdiction over small conduit hydropower development under Percheron's interpretation includes: the Boise and Minidoka Projects in Idaho; the Sun River Project in Montana; the Salt River and Yuma Projects in Arizona; the Uncompahgre and Smith Fork Projects in Colorado; the Truckee and Washoe Projects in Nevada; the Umatilla, Baker, Deschutes, Crooked River, and Tualatin Projects in Oregon; the Pick-Sloan Project in the Missouri River Basin; the Yakima Project in Washington; the Orland, Solano, and Friant Division Projects in California; the Rio Grande Project in New Mexico and Texas; the San Juan-Chama and Carlsbad Projects in New Mexico; and the Central Utah and Scofield Projects in Utah. *Id.* at 13-15.

[31] Senate Report 113-39, at 2.

[32] *Id.* at 10 (discussing the proposed definition of "transferred work").

[33] *Id.* (emphasis added).

exception is clearly not consistent with that of Percheron or with the definition of "project" provided in the Reclamation Project Act of 1939.

25. Lastly, Reclamation responds to Percheron's alternative interpretation of "project," which is that "project" refers to particular sites within Reclamation projects. Reclamation contends that there is no support in the text for the inference that "project" actually refers to "site," and that such an interpretation "writ[es] into the statute a word that Congress itself did not see fit to include."[34]

26. CBH also argues that the exception to the Small Conduit Act is narrower than the interpretation proffered by Percheron. Like Reclamation, CBH argues that the term "project" was not meant to refer to Reclamation projects.

27. CBH also argues that Percheron's interpretation that the exception has no temporal limitation is incorrect. CBH contends that "or any project for which an application has been filed with the Federal Energy Regulatory Commission as of the date of enactment of the [Small Conduit Act]," refers to those development projects that had *pending* applications with the Commission as of August 9, 2013. CBH contends that without such a temporal limitation, the Commission would retain jurisdiction in perpetuity over projects for which applications were once filed, even if those applications were filed decades ago, as well as for projects for which the Commission previously rejected or denied applications. As support, CBH points out that Senate Report 113-139 explains that the exception ensures that the Small Conduit Act would not "alter or affect any existing permit, license, or exemption issued by FERC under Part I of the Federal Power Act or *any projects with a pending application at FERC as of the date of enactment of this Act*."[35]

B. Percheron's Answer

28. In its answer to Reclamation's comments, Percheron reiterates its claim that "project" refers to Reclamation projects. However, Percheron also expands upon its alternative assertion that "project" refers to incidental features, or particular sites, of Reclamation projects. Percheron argues that its alternative interpretation is consistent with plain language and legislative history of the Small Conduit Act, as well as the historical practice of the Commission and Reclamation.

29. Percheron concedes that, while developers do not file applications with the Commission for entire Reclamation projects, they do file applications for incidental features, or sites, of Reclamation projects. Percheron notes that in determining

[34] Reclamation Comments at 21.

[35] Senate Report 113-139 at 4.

jurisdiction over non-federal hydropower development on Reclamation projects, the Commission and Reclamation confer about jurisdiction at particular "sites" and not for particular development projects.[36]

30. Percheron insists that even if neither of its proffered interpretations of "project" are persuasive and "project" actually refers to a hydropower development project, the Commission nonetheless retains jurisdiction over the five small conduit hydropower projects previously proposed, and for which Percheron and NortHydro filed applications because no temporal limitation was intended for the exception. Percheron claims this is evidenced by the fact that the word "pending" was not included in the final version of the Small Conduit Act, despite Congress' use of this word in the accompanying legislative reports. Moreover, Percheron suggests that if a temporal limitation were read into the exception and the exception only applied to applications that were pending at the time of the enactment, the Commission would have no authority to act on future applications to extend existing preliminary permit terms, renew existing licenses, or grant licenses to existing preliminary permit holders.

III. Discussion

31. To guide determinations of whether the Commission or Reclamation has authority over non-federal hydropower development at Reclamation projects, the two agencies entered into a Memorandum of Understanding (MOU) in 1992.[37] This MOU establishes procedural steps and a set of five rebuttable presumptions to employ in these jurisdictional analyses. In applying the presumptions, the MOU directs that the Commission and Reclamation to consider, in descending order of persuasiveness:

> (1) statutory language; (2) materials incorporated by reference into the statute; (3) House and Senate documents and reports; (4) documents submitted to Congress, such as Feasibility Reports and Definite Plan Reports; (5) other legislative history, such as floor debates or hearing

[36] Percheron cites to an exchange of letters between the Commission and Reclamation concerning jurisdiction over seven sites in the Columbia Basin Project, including the five sites related to its Petition. *See* Petition at Exhibit A and B (discussing whether a non-federal project under the jurisdiction of the Commission can be authorized at seven "sites" in the Columbia Basin Project).

[37] *Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Department of Interior, Bureau of Reclamation* (Nov. 6, 1992), 58 Fed. Reg. 3269 (Jan. 8, 1993).

> transcripts; (6) Definite Plan Reports, or supplements thereto, that are issued after the administrative or statutory authorization; and (7) any other information.[38]

32. Presumption 2 of the MOU states that "[i]f the authorizing statute, as amended, or any documents incorporated by reference in the statute, appear 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."[39]

33. Percheron does not argue that, in the absence of the exception, the Commission would retain jurisdiction over small conduit hydropower development at the Columbia Basin Project, or at particular sites within the Columbia Basin Project. Rather, all of Percheron's arguments are grounded in the assumption that the Commission retains jurisdiction only over that which is covered by the exception. We agree. Such a reading is consistent with the MOU,[40] as well as the purpose of the Act and the legislative history.[41] Thus, Percheron's argument is solely about the scope of the exception to the Small Conduit Act's withdrawal of the Commission's jurisdiction.

34. The clearest reading of the exception to the Small Conduit Act is that, with respect to small conduit hydropower development, the Commission only retains jurisdiction over development projects that at the time of the enactment had an existing Commission-issued preliminary permit, exemption, or license, or had a pending application with the Commission. This interpretation is consistent with the accompanying text in the statute, the purpose of the act, and the legislative history.

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[38] *Id.* at 3271 (Exhibit A).

[39] *Id.*

[40] Pursuant to Presumption 2 of the MOU, where it appears authority was exclusively provided to Reclamation, the Commission has no jurisdiction. *See* House Report 113-24 at 5 ("This authorization will allow [Reclamation] to pursue hydropower development on conduits under its *exclusive jurisdiction* and within the framework of federal reclamation law.") (emphasis added).

[41] *See id.*; *id.*, at 7 ("[The Small Conduit Act] would clarify that the jurisdiction over small hydropower development by private entities on all bureau irrigation canals and conduits lies *solely with the bureau*.") (emphasis added); Senate Report 113-39 at 2 ("Section 2 of [the Small Conduit Act] clarifies that the Bureau of Reclamation, *not the Federal Energy Regulatory Commission*, is responsible for authorizing conduit hydropower development on Reclamation-owned facilities . . . .") (emphasis added).

A. "Project" Refers to a Hydropower Development Project

35. First, we find that the term "project" in the exception refers to hydropower development project and not to the statutory definition from the Reclamation Project Act of 1939. While statutory definitions typically control the meaning of the words they define, such a meaning will not be applied if it creates "obvious incongruities in the language"[42] or "would defeat the purpose of the legislation."[43] In determining whether a statutory definition was intended, it is appropriate to look to the legislative history.[44] Here, it seems clear that Congress did not intend for the Reclamation Project Act of 1939 definition of "project" to apply to the Small Conduit Act.

36. To apply the Reclamation Project Act of 1939 definition would mean that the Commission retains jurisdiction for small conduit hydropower development over entire Reclamation projects, which often consist of hundreds or thousands of miles of canals and waterways. And because Percheron also argues that an application need not have been pending when the Small Conduit Act was enacted, the Commission would retain jurisdiction over all Reclamation projects for which applications for development within that project were *ever* filed with the Commission. Thus, just a few of the many Reclamation projects the Commission would retain jurisdiction over under Percheron's interpretation are: the Boise Project in Idaho, which consists of 721 miles of canals, 1,323 miles of laterals, and 649 miles of drains;[45] the Yakima Project in Washington, which consists of 416 miles of canals, 1,698 miles of laterals, and 144 miles of drains;[46]

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[42] *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 201 (1949); *see also Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949) ("[W]e have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended consequences.").

[43] *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 412 (1983).

[44] *Id.* at 410 (referring to the House and Senate Reports, as well as the section-by-section analysis of the bill, to confirm that the statutory definition was not intended); *Lawson*, 336 U.S. at 201-02 (stating that "[w]e must look to the explanation of the congressional intent" to determine whether a statutory definition was intended).

[45] *Boise Project—Project Data*, Bureau of Reclamation, U.S. Department of Interior, http://www.usbr.gov/projects/Project.jsp?proj_Name=Boise%20Project &pageType=ProjectDataPage (last updated Jan. 3, 2013). The Arrowrock Dam Project No. 4656, licensed in 1989, is located at Reclamation's Arrowrock Dam and Reservoir in the Boise Project. *See Boise-Kuna Irrigation District*, 46 FERC ¶ 61,385 (1989).

[46] *Yakima Project—Project Data*, Bureau of Reclamation, U.S. Department of Interior, http://www.usbr.gov/projects/Project.jsp?proj_Name=Yakima%20Project &pageType=ProjectDataPage (last updated Jan. 3, 2013). The Taneum Chute

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and the Columbia Basin Project in Washington, which consists of over 300 miles of main canals, approximately 2,000 miles of lateral canals, and 3,500 miles of drains and wasteways. A review of the legislative history makes it clear that such a sweeping exception to the Act was not intended.

37. In the House and Senate reports accompanying the Small Conduit Act, there is no discussion of the Commission retaining jurisdiction over such extensive Reclamation facilities. Rather, the discussion is to the contrary. Both reports explain that the Small Conduit Act clarifies that jurisdiction over small conduit hydropower on "*all* bureau irrigation canals and conduits lies *solely* with [Reclamation]."[47] The Senate Report also notes that the Small Conduit Act "clarifies that the Bureau of Reclamation, *not the Federal Energy Regulatory Commission*, is responsible for authorizing conduit hydropower development on Reclamation-owned facilities . . . ."[48] Moreover, the House and Senate reports emphasize the thousands of miles and hundreds of sites that would be authorized under Reclamation law pursuant to the Act.[49] However, under Percheron's interpretation much of this potential development that Congress intended to authorize to Reclamation would actually remain with the Commission.[50] For all of these reasons, it seems clear Congress did not intend for "project" to refer to the Reclamation Project Act of 1939 definition.

Hydroelectric Project No. 10625, licensed in 1995, was to be located at Reclamation's South Branch Canal in the Yakima Project. *See Kittitas Reclamation District*, 73 FERC ¶ 62,107 (1995). The license was terminated in 2000 because construction was never commenced. *Kittitas Reclamation District*, 91 FERC ¶ 62,021 (2000).

[47] House Report 113-24 at 7 (emphasis added); Senate Report 113-139 at 4 (emphasis added).

[48] Senate Report 113-139 at 2 (emphasis added).

[49] *See* House Report 113-24 at 3 ("hydropower development would be explicitly authorized at almost 47,000 miles of Reclamation's conduits"); Senate Report 113-139, at 1-2 (noting the potential generating capacity at 373 of Reclamation's existing canals and conduits). Both reports cite to Reclamation's "Site Inventory and Hydropower Energy Assessment of Reclamation Owned Conduits" (Mar. 2012), available at https://www.usbr.gov/power/CanalReport/FinalReportMarch2012.pdf.

[50] Under Percheron's interpretation, thousands of the 47,000 miles of Reclamation conduits and many of the 373 sites would actually remain under the Commission's jurisdiction.

38. Considering that "a word is known by the company that it keeps"[51] and should not be ascribed "a meaning so broad that it is inconsistent with its accompanying words,"[52] we also look to the surrounding language in the exception, which provides additional support for concluding that the term "project" is meant to refer to hydropower development projects. The first part of the exception refers to existing preliminary permits, exemptions, and licenses, all of which the Commission issues for particular hydropower development projects. Thus, this part of the exception clarifies that the Commission will retain jurisdiction over those development projects for which it has already issued a permit, exemption, or license. The second part of the exception then reads: "or any project for which an application has been filed with the Federal Energy Regulatory Commission." Notably, applications that are filed with the Commission are applications for hydropower development projects – these applications may be for projects that are located at a particular site within a Reclamation project, but the applications are not for Reclamation projects. When read with the first part of the exception, the second part of the exception clarifies that the Commission will also retain jurisdiction over those development projects that did not yet have a permit, exemption or license, but had applied to receive one as of August 9, 2013.

39. Percheron's alternative interpretation of "project," which is that project refers to incidental features, or sites, of larger Reclamation projects, is supported by neither the text nor the legislative history. Contrary to Percheron's reading, the definition reads: "any reclamation or irrigation project, *including* incidental features thereof . . . ."[53] It does not read: "any reclamation or irrigation project, *or* the incidental features thereof." Thus, the term "project" appears to refer to an *entire* Reclamation project. The wording of the definition does not support Percheron's supposition that the same term can also be applied to the individual components that make up the whole.

B. The Exception Only Applies to Applications that were Pending as of August 9, 2013

40. Second, we find that that the second part of the exception refers to small conduit hydropower development projects that had *pending* applications with the Commission as of August 9, 2013. This interpretation is consistent with the text of the statute, the purpose of the Act, and the legislative history.

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[51] *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995).

[52] *Id.*

[53] 42 U.S.C. § 485a(c) (2012) (emphasis added).

41. In interpreting a statute, language should be "construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[54] Percheron's interpretation of the exception would render the first part of the exception mere surplusage and redundant to the second part of the exception. As explained above, under our interpretation, the first part of the exception ensures that projects with existing permits, licenses, and exemptions remain under the jurisdiction of the Commission; and the second part of the exception adds that projects with pending applications, as of August 9, 2013, are also to remain under the jurisdiction of the Commission. Under this interpretation, the two parts of the exception, which are separated by an "or," each refer to a distinct set of projects that will remain under the jurisdiction of the Commission.

42. However, under Percheron's interpretation, the second part of the exception covers any project for which an application has ever been filed with the Commission. Accordingly, under this interpretation, the second part of the exception would include those projects for which applications had previously been filed and already acted on by the Commission prior to enactment of the Small Conduit Act. Notably, those projects with existing preliminary permits, exemptions, and licenses would thus fall under this second part of the exception. Under Percheron's interpretation, the first part of the exception offers nothing distinct from the second part, but rather is wholly included in the second part of the exception, rendering it superfluous and unnecessary.

43. Moreover, our interpretation, unlike Percheron's, is consistent with the legislative history of the Small Conduit Act. Indeed, in the Section-by-Section Analysis portion of Senate Report 113-39, Congress explains that the exception is intended to assure that "nothing in [the Small Conduit Act] shall alter or affect any existing permit, license, or exemption issued by FERC . . . or any project with a *pending* application at FERC as of the date of enactment of this Act."[55]

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[54] *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[55] Senate Report 113-139 at 4 (emphasis added). In its answer, Percheron characterizes this portion of the report as being an alternate version of the bill that was not ultimately adopted. Percheron's Answer at 5. However, the Section-by-Section Analysis was not intended to provide a competing or alternate version of the bill, but rather, as the name suggests, to provide an explanation of the language in the version that was ultimately adopted.

44. In addition, we find that our interpretation is most consistent with the general purpose of a savings clause,[56] or exception, like the one included in the Small Conduit Act. Savings clauses are generally used "in a repealing act to preserve rights and claims that would otherwise be lost."[57] As explained further below, Percheron, like other developers whose applications had already been denied, had no right or claim to pursue development of its projects with the Commission at the time the Small Conduit Act was enacted. Any tenable right or claim was extinguished when Percheron's preliminary permit applications were denied in March of 2013, more than five months before the

Small Conduit Act was enacted. This temporal limit on the exception ensures that the savings clause does not frustrate the overall purpose of the Act,[58] which was to give Reclamation jurisdiction over all small conduit hydropower development.[59]

45. However, Percheron contends that our interpretation of the exception is inconsistent with the purpose of a savings clause, arguing that, under our interpretation, the Commission would lack authority to extend preliminary permit terms, renew licenses to original licensees, or grant licenses to existing preliminary permit holders. However, Percheron is mistaken: our authority to do each of these is found in the first part of the exception, which states "[n]othing in [the Small Conduit Act] shall alter or affect any existing preliminary permit, license, or exemption issued by the Federal Energy Regulatory Commission . . . ."

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[56] A savings clause is "[a] statutory provision exempting from coverage something that would otherwise be included." *Saving Clause*, Black's Law Dictionary (10th ed. 2014).

[57] *Id.*

[58] A savings clause should not be read in such a way that would frustrate the broader purpose of the act to which that clause applies. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873-74 (2000) ("The Court has thus refused to read general "saving" provisions to tolerate actual conflict . . . in "frustration-of-purpose" cases." (citations omitted)).

[59] *See* House Report 113-24 at 5 ("This authorization will allow [Reclamation] to pursue hydropower development on conduits under its *exclusive jurisdiction* and within the framework of federal reclamation law.") (emphasis added); Senate Report 113-39 at 2 ("Section 2 of [the Small Conduit Act] clarifies that the Bureau of Reclamation, *not the Federal Energy Regulatory Commission*, is responsible for authorizing conduit hydropower development on Reclamation-owned facilities . . . .") (emphasis added). We note under Percheron's interpretation, the Commission would retain jurisdiction over projects that the Commission denied decades ago.

46. In essence, the exception assures that those projects for which the Commission had already granted authority to develop or granted priority to file development applications (in the case of preliminary permit holders) would remain under the Commission's jurisdiction for the lifetime of those projects. Thus, a license would remain under the Commission's jurisdiction for the life of that licensed project, including for any future amendments or relicensing proceedings that may occur. Similarly, a project with a preliminary permit at the time of the enactment would also remain under the Commission's jurisdiction for the duration of the permit term, as well as for any extensions of that term, and for any licensing or exemption proceeding that may follow that permit term as long as a license or exemption application is filed before the permit expires. There would be no purpose in the Commission retaining jurisdiction over a preliminary permit if that permit holder could not also apply for a license or exemption with the Commission prior to their permit expiring.[60] Our interpretation protects those rights and privileges that the Commission explicitly bestowed prior to enactment of the Small Conduit Act, while staying consistent with the text and greater purpose of the Act.

C. Inefficiency and Unfairness

47. Percheron also argues that if the Commission does not retain jurisdiction over the Columbia Basin Project, or even at just the five particular sites, it would be fundamentally unfair to Percheron and would be inconsistent with one of the goals of the Small Conduit Act, which was to reduce duplicative administrative costs and bureaucratic obstacles.[61] Percheron contends that it has "expended significant resources investigating and attempting to develop the Columbia Basin Project sites under the Commission's processes,"[62] and that it would be unduly burdensome to pursue development under "an entirely new bureaucratic process."[63] In its Petition, Percheron lists the various activities, studies, and consultations it has performed to support development of the sites.

48. However, Percheron engaged in all of these activities of its own accord and at its own risk, with no assurance from the Commission that it would be able or likely to proceed with eventual development of its projects with the Commission. Moreover, Percheron should have been aware of the Commission's interpretation of the Small

[60] In fact, it would likely be to the permittee's detriment for the Commission to retain jurisdiction over these permits if future development proceedings would have to be with Reclamation.

[61] *See* House Report 113-24 at 2.

[62] Petition at 14.

[63] Percheron's Answer at 11.

Conduit Act, as Commission staff denied three preliminary permit applications in 2014 upon a finding that the Commission lacked jurisdiction to authorize the proposed projects pursuant to the Small Conduit Act.[64] All of these denials were for development projects at particular features within Reclamation projects where the Commission had previously issued permits, licenses, or exemptions.[65]

49. Lastly, Percheron's arguments regarding unfair treatment and site banking are unpersuasive. First, the Small Conduit Act very clearly specifies that a lease of power privilege must first be offered to "an irrigation district or water users association" that operates or receives water from the applicable conduit.[66] Reclamation has been directed by Congress to award lease of power privileges according to this preference, and the Commission has no authority to interfere with that process. Second, the possibility of site banking does not entitle the Commission to find jurisdiction where it does not exist.

IV. Conclusion

50. For all of the reasons discussed above, we find that the Small Conduit Act withdrew the Commission's jurisdiction to authorize new, small conduit hydroelectric projects of 5 MW or less within Reclamation's Columbia Basin Project, including at five incidental features within the Columbia Basin Project.[67] Accordingly, the Commission denies the Petition.

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[64] *See, e.g.*, *Turnbull Hydro, LLC*, 147 FERC ¶ 62,060 (2014). Percheron notes that in 2013, Commission staff denied a preliminary permit application in *Ted P. Sorenson*, 145 FERC ¶ 62,023 (2013), on the grounds that the Commission lacked jurisdiction despite the fact that the application was filed before August 9, 2013. While staff's denial in *Sorenson* may have been precipitous, it does not change our analysis here or our finding that the Commission currently lacks jurisdiction over small conduit hydropower development in the Columbia Basin Project.

[65] *See id.* (proposed project would have been located on the Greenfields Main Canal in Reclamation's Sun River Irrigation Project). Commission staff had previously issued preliminary permits, licenses, and exemptions for projects on the Greenfields Main Canal. *See, e.g.*, *Hydrodynamics, Inc.*, 128 FERC ¶ 62,086 (2009).

[66] 43 U.S.C. § 485h(c)(2)(A) (2012).

[67] *See* n.20, *supra*.

The Commission orders:

(A) Percheron's petition for declaratory order, filed on March 25, 2016, is denied.

(B) Columbia Basin Hydropower's late motion to intervene, filed on May 19, 2016, is granted.

(C) Reclamation's motion for leave to comment, filed on June 2, 2016, is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.