

FERC Issues Declaratory Order that Ends Practice of Assessing Charges for Use of Non-Federal Lands Subject to Power Site Reservation

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Reversing over 30 years of precedent, the Federal Energy Regulatory Commission (FERC) on March 21, 2013 granted a petition for declaratory order and announced that it will no longer assess annual charges for non-federal lands at licensed hydropower projects that are subject to a federal “power site reservation” established under Section 24 of the Federal Power Act (FPA). FERC’s ruling will result in significant reductions in federal land use annual charges for numerous hydropower projects, particularly in Alaska and other locations in the West. Van Ness Feldman represented the coalition of hydropower licensees that filed the petition for declaratory order with FERC.

Under Section 10(e)(1) of the FPA, FERC collects several categories of annual charges from hydropower project licensees, including fees for the “use, enjoyment, and occupancy” of federal lands. In the early 1980s, FERC started including in these annual charges fees for lands that had passed from federal ownership, but that were subject to a power site reservation. FERC reasoned that a power site reservation, which reserves the right of the United States or its licensees to enter and use the lands for hydropower power development, is a federal property right. On that basis, FERC assessed the same annual charge for these non-federal lands as lands held by the United States in fee. Although several hydropower licensees over the years urged FERC to change its policy, which inequitably assessed an annual charge on lands owned by the licensee, until its March 21 declaratory order FERC resisted these efforts.

In its March 21 declaratory order, FERC maintained its view that a power site reservation established under FPA Section 24 is a federal property right and that its long-standing practice of assessing annual charges for licensees’ use of lands subject to such a reservation is not unlawful. FERC was persuaded, however, by the coalition’s argument that assessing a fee for the use of lands that hydropower licensees have acquired for purposes of hydropower development is inequitable. FERC observed 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.”

As a result of FERC’s March 21 declaratory order, hydropower licensees whose projects occupy non-federal lands subject to a federal power site reservation have the opportunity to reduce their annual charges bills from FERC. To take advantage of this opportunity, licensees must provide information to FERC documenting the extent of non-federal lands subject to the power site reservation at their projects, and should consider providing this information in the form of a license amendment application that proposes to formally reduce the federal acre figure listed in the license for purposes of annual charges. This approach would help ensure FERC’s accurate calculation of federal land use fees for the remaining license term.



FOR ADDITIONAL INFORMATION

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