

February 8, 2007

Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: P-12053

WEST VALLEY PROJECT – COMMENTS ON EXTENSION AND REQUEST
FOR DISMISSAL

Please accept this letter as a request for the Federal Energy Regulatory Commission to dismiss the above entitled application for licensure due to the following reasons:

1. The minimum requirements of 18 CFR Ch 1 4.93(d)(2) and (3) specifically reads: “The applicant **MUST** submit to the Commission, **no later than 90 days** after the issuance of the order denying exemption, additional information that is necessary to conform the exemption application to the relevant regulations for a license application. (3) **IF** all the information timely submitted is found sufficient, together with the application for exemption, to conform to the relevant regulations for a license application, the converted application will be considered *accepted for filing* as of the date the exemption application was accepted for filing.
 - a. On February 5, 2007, Susan Sossbee filed a request for an extension of time to fulfill the minimum requirements of the above statute. We believe this request for an extension is not with good cause due to the following factors:
 1. In respect to this project, Susan Sossbee is historically documented as having an affiliation with Nicholas Josten as of August 1, 2006 (six months prior to the due date of the required information, as revealed in FERC public documents.) Her employer, Barry Swenson, is historically documented as having a financial involvement with this project prior to July of 2005 and had involvement with a prior application for a similar project within the same project boundaries, which was defaulted upon. (West Valley Project filed by the South Fork Irrigation District)
 2. 18 CFR Ch 1 4.93 addresses *minimum standards* for acceptance of an application. At this time Mr. Josten has neither an application for

licensure, nor an exemption from licensure, nor a preliminary permit due to the conversion of the failed request for exemption from licensure. We feel there is no obligation of FERC to grant this extension due to the fact he initially applied for a license and had two years to fulfill the license application requirements prior to his application for exemption from licensure in 2003. Further, we feel the requirements for the mandated studies are the same as required for his application for Exemption from Licensure, which he held from 2003 until 2006, when it was denied.

FERC required eight items for Nicholas Josten to complete within the constraints and deadlines required by 18 CFR Ch 1 4.93 to meet the minimum standards for application. Sossbee's correspondence reflects five of those items have NOT been completed by the statutorily required deadline. One of those items we believe to have been completed through the commission of violations of California State laws and it is believed that one of those items was not completed within the standards set under the State of California CEQA guidelines. Further, her documentation reveals the deficiencies which have not been satisfied include studies which have yet to begin, as to date, some of which are standard to the initial licensing application and application for exemption for licensure. We feel six years is more than adequate time to conduct basic studies.

- a. During the six months of known association with Nicholas Josten and the 90 day period of time from the date of notice from FERC, the only actions initiated by the applicant and Susan Sossbee, in respect to Items 1 and 2, was identifying and contracting an engineer to conduct the studies.
- b. Item 3: Ethnological and Cultural Study. On September 27, 2001, FERC issued a preliminary permit for the above project. This requirement is not only a standard requirement for licensure but also a requirement for his prior application for exemption and a requirement of his past application for licensure. To date, there have been many extensions over the past several years granted to Mr. Josten to fulfill this requirement. In fact, Mr. Josten has been awarded extensions which have almost totaled two years for this one particular study to be conducted.
 1. Mr. Josten in a letter to FERC advised he would finalize the cultural resource inventory field work in March of 2005. This was not finalized and only a "draft study" was forwarded to FERC.
 2. Mr. Josten did not meet and confer with the tribe until July of 2005, at which time he determined he would

- finalize the culture study in September of 2005.
3. March 24, 2006, Mr. Josten submitted a letter requesting an extension of time to conduct required cultural studies. FERC again granted him an extension to April 7, 2006.
 4. On April 12, 2006, FERC granted Mr. Josten yet another extension to July 14, 2006 to complete the studies.
 5. On June 23, 2006, Mr. Josten requested yet another extension to prepare the Cultural studies. On July 3, 2006, FERC granted him an extension until August 14, 2006.
 6. On August 1, 2006, FERC documented a telephone call with Susan Sossbee, during which time those studies were discussed, thus historically documenting Sossbee's constructive notice the studies were required.
 7. Ms. Sossbee's confirmed contact with Dr. Tilley to conduct this work was on January 22, 2007, merely two and one half weeks prior to the due date.
 8. On February 5, 2007 Ms. Sossbee has requested another six and one half months extension of time for these same studies to be conducted. To date, the applicants have been granted almost two years in extensions to complete these studies.
- c. Item 4. An "aerial study of vegetation" was conducted by Ecosciences. We believe this study does not meet minimum requirements of the California Native Plant Society in identifying plant species within the entire project area. <http://www.cnps.org/cnps/archive/documentation.php>
- d. Item 5. Ms. Sossbee did not furnish photographs of the waterflows of the river at 5 cfs and 7.5 cfs. as required. Further, despite contact with Ms. Sossbee discussing prior notification of intent to enter privately owned lands to photograph to fulfill these obligations, Ms. Sossbee has never contacted private landowners to acquire permission to fulfill this obligation despite contact initiated by landowners, despite landowners contact with her.
- e. Item 6. This item has not been conducted to date. The only actions that have been conducted during the ninety day period of time was a contractor was identified and a contract established.
- f. Item 7. This was presented to FERC in February of 2007 and simply consisted of a few photographs and

simulations of how the project would appear aesthetically, if an application were granted.

- g. Item 8. This was presented to FERC on Jan. 17, 2007 and included photocopied documents dated 2004. These documents reveal that the License Applicant contracted with a third party to enter private lands, without notification to Landowners or permission from landowners to commit such entry to with the intent to conduct the vegetation and a water flow study, in which the results may be adverse to the property holders and would be used in formal U.S. Government administrative processes, procedures and hearings.

We believe this to be in violation of the Federal Power Act as well as in violation of FERC policies, in which the FERC hydroelectric guide reads that state or local trespass and access laws prevail until a certificate is issued by the Commission. We also believe this to be in violation of California State law.

On or about May 28, 2003 "No Trespassing Signs" were posted on the Bruzzone property, with a notation at the bottom, advising public access may be approved with permission of the owner, with our names and telephone number written below. Within a quarter mile stretch of road, four signs were posted, in compliance with California State law. .

Signs were also posted by the Weisers at the entrance to their land, as well. In May of 2003, our property had a structure upon it and was occupied, as was the Weiser property.

During the summer those studies were taken both properties were occupied and a structure was upon the property. The landowners were not alerted to the trespass until the past month when the documents were provided to FERC by the applicant.

We believe this to be in violation of Penal Code 602 and believe that a taking per se was committed when the action occurred. As well, we believe any item "taken" during that trespass should not be admitted as evidence for any purpose and request both the water study and the flora study submitted by Mr. Josten not be considered. Further, we

believe that the Civil Rights and right to due process for the Bruzzones and the Weissers were violated as they are intervenors in this matter and should have been notified as to the existence of the project *directly by the Applicant* as well as given the opportunity to grant or deny access to their property for studies that could be adverse to them..

We believe there is not good cause to grant a further extension as requested by Ms. Sossbee, appointed an agent by Josten in December and who is known involved in this project with him, since August of 2007.

We believe this especially true with the affiliation of her employer known to exist prior to June of 2005 and who has held responsibility for the financing of the studies required.

We believe the efforts to date in order to comply with the 90 day requirement of 18 CFR Ch 1 4.93 have consisted of the photocopying and submission of some documents from a 2004 study, the taking a few photographs of the reservoir and an "aerial study" assessing the vegetation within the project area. We believe if in a ninety day period of time, all that could be accomplished are these minimal efforts there are no assurances future time constraints would be met.

Further, we feel there have been no good faith efforts to begin the actual studies as well as believe an almost two year extension granted by FERC to conduct the cultural studies, with no results to date is an indication of lack of good faith. It should be noted that contact with the contractor for this study was made almost a year ago, with no progress. We believe the information provided is not sufficient to conform to the regulations for a license application and the matter should immediately be dismissed.

2. Ms. Sossbee announced in her February 5, 2007 request to FERC: "There have been internal changes and I am now the primary applicant in this project."

It is our belief that neither Nick Josten, Ms. Sossbee or any other person can appoint any individual as a "primary applicant" for licensure without going through the proper procedures of FERC for transfer of the license application and have serious doubts as to whether or not license application transfer is legal under Federal Code or the spirit of Federal statute. It is noted that a preliminary permit application was filed by Mr. Josten and granted by FERC in 2001. This preliminary permit application had conditions upon it that it was nontransferable.

"The named permittee is the only party entitled to the priority of 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 a license application 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 of 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. See City of Fayetteville, 16 FERC 61,209 (1981)”

“The Director Orders: (A) A preliminary permit is issued for this project to Nicholas E. Josten 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 I-4, set forth in the attached standard form P-I. (C) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. 385.713.

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

Article 3 specifically reads: “...of 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 Commissions Rules and Regulations then in effect.

Article 4 specifically reads that he is required to submit quarterly reports that include: “where studies required include access to land not owned by the Permittee, the status of the Permittee’s efforts to obtain permission therefore.”

It should be noted Mr. Josten has filed as a “sole applicant” for both the initial licensure application and the following exemption from licensure. Landowners and the public previously expressed concern there may be blind “conflicting interests” of persons involved as principals and questioned whether or not there were co-applicants during Scoping Hearings held in Likely, California in July of 2006. They were assured there would be notification in the event of “co-applicants.” Specifically:

On page 68 of the Scoping Document, it was made it quite clear landowners had a “need to know” the identities of principals of the West Valley Project. FERC and Mr. Josten made it quite clear

the sole applicant was Nicholas Josten.

FERC also made it clear if there were any partners in the project, the applicant would need to file that information with FERC. (Page 69)

On page 71, Leslie Murray asked if Josten were required to disclose principal relationships, to which FERC representative Susan O'Brien advised, "If Nick Josten acquires partners while this application is being filed, or after the exemption is being granted or if its granted, FERC is going to notice it and let people know this is going on. If it's during this process of getting an exemption, he would have to let us know that he acquired a partner..."

On Page 73, Susan O'Brien again expressed, "From my point of view, he's the sole applicant." Mr. Mitchnick added, "The only time it would be a FERC issue is if that party was to become a co-applicant, co-exemptee for the project. At that point they would have to go through the FERC process to change the exemptee for the project.

Further, this was discussed on pages 33 through pages 40. Nick Josten stated in hearings he was the sole applicant.

At no time, during the entire process from 2001, to the present date, has Nicholas Josten filed anything with FERC regarding partners or other principals involved as Co License Applicants though he was present at the hearing and knew of this requirement. As well, Mr. Swenson's employee and representative, Jay Younger was present and essentially noticed as to the requirement. We believe this to be a violation of FERC policies and procedures. We further believe in the event of absence of any FERC policy guidelines due to the license conversation from an exemption from licensing, the conditions of the original preliminary permit should be enforced as the precedent as they established the original terms for acceptance of an application for licensure.

As Josten has not fulfilled his requirements to provide FERC with a complete application within statutorily mandated deadlines, in compliance with federal law, we ask that the above requirement be interpreted within the "spirit and intent of the law," in compliance with general FERC licensure application requirements and the license application not be transferred to a third party.

We contend that Susan Sossbee's statement "There has been an internal change..." not only validates the formalized blind interests in this project which were not formally revealed to FERC or to the public, through the FERC process, but serves as notice to FERC that Mr. Josten is no longer involved in the project as the "sole applicant" or even the primary applicant. We believe it indicates there

has been a longstanding formal interest in the project by Barry Swenson Builders, which through their financing of the project studies makes it virtually impossible for them to not be aware of the timelines required.

Contact was attempted with Ms. Sossbee in December of 2006. She did not return the telephone call until weeks later. She was specifically asked what her role in the project was and stated she was "helping Nicholas Josten with conducting studies." She was asked what Mr. Swenson's role in the project was and she stated she "did not know." She was advised that prior to taking photographs of the river, as required by FERC under conditions of five cubic feet per second and seven and one half cubic feet per second, we requested prior notification and desired to have our experts present. The threat of eminent domain was discussed, which she minimized, stating she had been through it before and alluded it was no big deal. She agreed to call back with the information and failed to do so, as of this date. Telephone calls were made in 2004 to Mr. Swenson, Mr. Case Swenson, and Leanne Woodward, with no response except for a returned call from Case Swenson promising to call back. Email correspondence with Case Swenson occurred, with him promising to get back to us in 2004 with the needed information, with no response. This coupled with the other events documented to FERC in April of 2006 within our Motion to Dismiss displays a pattern of Mr. Swenson, his representatives and the South Fork Irrigation District attempting to withhold information from landowners. Further, it indicates a lack of due diligence in the requirements of FERC and the State of California with the notification to landowners for access to properties for studies.

We believe the transfer of "primary applicant" as noticed by Ms. Sossbee constitutes an abandonment of the project by Mr. Josten and his inability to continue to act as the "sole applicant."

It should be noted Ms. Sossbee's employer, Barry Swenson, of Barry Swenson Builders, dba Green Valley Corporation, filed as a California Corporation with the California State Secretary of State, and his family have held a long termed majority interest in the South Fork Irrigation District which previously held an exemption for licensure for a similar plant, within the same project area for well over ten years, immediately prior to the initial filing of Mr. Josten. They failed to act upon that license, allowing it to lapse after the ten year period of time FERC granted the license. It is our understanding this was due to infeasibility of the project.

This matter was discussed in the scoping hearings where testimony was given as to his involvement in the project. Page 33 of the Scoping hearings is witness testimony that Mr. Swenson was funding the project, totally unsecured. Pages 37, 38, 39 and page 40 delineates the South Fork Irrigation District and Mr. Swenson's involvement in the project, during the initial term when it was conditioned there would no co-applicants allowed. We believe the statements made in this hearing served as notice to Mr. Josten of his requirements to inform

the FERC of any change in applicant status. In light of these statements and the current events as well as Mr. Swenson's involvement, coupled with the South Fork Irrigation District's holding of the license for ten years prior, we contend the South Fork Irrigation District, a quasi government agency, under the State of California as a special district, has engaged in a taking of the private properties along the river and which are within the project area.

Further, in light of the ten plus year history of this project being pursued by the South Fork Irrigation District and subsequently abandoned and then pursued under separate application for an additional six years by majority members of the South Fork Irrigation District with participation of the South Fork Irrigation District, we feel if the FERC were to grant an extension, to include yet another six months requested by Ms. Sossbee, it would result in a "taking" of private properties by the Federal Energy Regulatory Commission as there has been a resulting long termed denial of landowners' total enjoyment and use of the benefits of their private property. This would especially be true if an extra six months was granted to total two and one half years of extensions granted to conduct a cultural study, in light of the already granted two years of time to complete this requirement.

It should also be noted that the Commission on August 1, 2003 set a deadline for Commission Decision by August of 2004. This deadline was extended on several occasions, finally set for September of 2006. On that date, FERC declined Mr. Josten's application for exemption.

The revelation of new events, the request for yet another extension, as well as the notice of trespass upon private properties to conduct studies which could be adverse to landowners has been distressing especially in light of FERC and the principals in this matter tying up private lands for almost sixteen years in their quest to build a hydroelectric plant which has proven in the past to be infeasible.

In the past, we believe FERC has attempted to act judiciously and in compromise with the Applicant in his failures to produce studies and information necessary for complete, thorough and fair assessment of the project. We believe the Applicant and his veiled associates have conducted a breach of good faith, especially in light of the extensive considerations afforded the Applicant, at landowner and private property owner's cost. This is especially in light of the two years of previously granted time of extension to conduct his studies.

We urge FERC to recognize the seriousness of this request and the severe effect it has upon the private landholders as well as the community, especially in light of the sixteen plus years, FERC has had control over the use of private properties as a result of the first application, which was allowed to lapse, and the second application which has recently been revealed to involve the parties involved in the first application, for over sixteen years!

We respectfully request FERC not allow another extension due to lack of good cause and due to a breach of good faith. We encourage FERC to act in a swift and firm manner to deny this application as it failed to meet the timelessness as delineated within federal statute.

Sincerely,

Stephen and Linda Bruzzone
Address on File

Submission Contents

Comments of Stephen and Linda Bruzzone

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