

186 FERC ¶ 61,120  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Jr., Chairman;  
Allison Clements and Mark C. Christie.

Western Navajo Pumped Storage 1, LLC  
Western Navajo Pumped Storage 2, LLC

Project Nos. 15314-000  
15315-000

ORDER DENYING APPLICATIONS FOR PRELIMINARY PERMIT

(Issued February 15, 2024)

1. On June 12, 2023, Western Navajo Pumped Storage 1, LLC and Western Navajo Pumped Storage 2, LLC (applicants), filed applications for preliminary permits, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the Western Pumped Storage 1 Project No. 15314 and Western Pumped Storage 2 Project No. 15315, respectively.<sup>2</sup> The projects would be located entirely on Navajo Nation land, near the City of Page in Coconino County, Arizona. Because these applications raise similar issues, we are considering them in this single order, and for the reasons discussed below, we deny the permit applications.

**I. Proposal**

**A. Western Pumped Storage 1**

2. The project would consist of: (1) a new 75-foot-high, 8,000-foot-long upper reservoir with a surface area of 110 acres and a water surface elevation of 4,625 feet mean sea level (msl); (2) a new 75-foot-high, 8,200-foot-long lower reservoir with a surface area of 110 acres and a water surface elevation of 4,125 feet msl; (3) a 34-foot-diameter, 400-foot-long vertical power tunnel and a 5,280-foot-long horizontal power tunnel, conveying water from the upper reservoir to the powerhouse; (4) a 120-foot-wide,

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<sup>1</sup> 16 U.S.C. § 797(f).

<sup>2</sup> The applicants named the projects the Western Navajo Pumped Storage 1 Project and the Western Navajo Pumped Storage 2 Project. We note that the proposed projects are not in any way affiliated with the Navajo Nation and the Navajo Nation has had no role in the applicants' pursuit of the projects. To avoid the impression that the Navajo Nation is involved in developing the projects we have omitted "Navajo" from the project names.

600-foot-long, and 100-foot-high powerhouse to be located on the eastern edge of the lower reservoir, with eight reversible pump-turbine units each rated at 49.5 megawatts (MW); (5) eight 12-foot-diameter steel pipes, merging into a proposed penstock; (6) a 34-foot-diameter penstock, conveying water to the upper reservoir during pumping operations; (7) a 3-mile-long, 230-kilovolt (kV) transmission line, extending from a proposed substation near the proposed powerhouse to the former Navajo Generating Station substation; and (8) a new substation, equipped with two 200-megavolt-ampere (MVA) Generator Step-up Units (GSUs). The estimated annual energy production of the project would be approximately 1,156 gigawatt-hours (GWh).

## **B. Western Pumped Storage 2**

3. The project would consist of: (1) a new 75-foot-high, 6,500-foot-long upper reservoir with a surface area of 55 acres and a water surface elevation of 6,475 feet msl; (2) a new 75-foot-high, 6,200-foot-long lower reservoir with a surface area of 55 acres and a water surface elevation of 5,475 feet msl; (3) a 24-foot-diameter, 1,000-foot-long vertical power tunnel and a 4,600-foot-long horizontal power tunnel, conveying the water from the upper reservoir to the powerhouse; (4) a 120-foot-wide, 500-foot-long, and 100-foot-high powerhouse to be located on the eastern edge of the lower reservoir, with four reversible pump turbine units each rated at 99-MW; (5) four 12-foot-diameter steel pipes, merging into a proposed penstock; (6) a 24-foot-diameter penstock, conveying water to the upper reservoir during pumping operations; (7) a 30-mile-long, 230-kV transmission line, extending from a proposed substation near the proposed powerhouse to an existing substation adjacent to Glen Canyon Dam; and (8) a new substation, equipped with two 200-MVA GSUs. The estimated annual energy projection of the project would be approximately 1,156 GWh.

## **II. Notice, Interventions, and Comments**

4. The Commission issued public notice of the permit application for the Western Pumped Storage 1 Project on September 14, 2023, and for the Western Pumped Storage 2 Project on September 21, 2023. The notices established a November 13, 2023, and November 20, 2023, deadline for filing comments, interventions, and competing applications for the Western Pumped Storage 1 Project and Western Pumped Storage 2 Project, respectively. Notices of the applications were published in the *Federal Register* on September 20, 2023,<sup>3</sup> and September 27, 2023, respectively.<sup>4</sup>

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<sup>3</sup> 88 Fed. Reg. 64,906 (2023).

<sup>4</sup> 88 Fed. Reg. 66,436 (2023).

5. The Navajo Tribal Utility Authority filed a timely, unopposed motion to intervene for the Western Pumped Storage 1 Project, and the Navajo Nation, the Navajo Tribal Utility Authority, and the Center for Biological Diversity filed timely, unopposed motions to intervene for the Western Pumped Storage 2 Project.<sup>5</sup> The Navajo Nation filed a late, unopposed motion to intervene in the Western Pumped Storage 1 Project, which was granted by Secretary's Notice on January 16, 2023. In its motions, the Navajo Nation opposes the applications, stating that the applicants did not meaningfully consult with, or seek the consent of, the Nation and that the projects may impact the lands, rights, and resources of the Navajo Nation.<sup>6</sup>

6. The U.S. Department of Interior's Office of Environmental Policy and Compliance (Interior) filed similar comments in each docket, raising concerns regarding fish and wildlife resources, water supply and quality, potential impacts to federal recreation areas and Tribal land, and cultural resources.<sup>7</sup> Interior recommends that the Pueblo of Zuni Tribe be included in the lists of potentially affected Tribes and requests that the Commission consult with each affected Tribe.<sup>8</sup> Interior notes that it will actively participate in any future license application proceedings to ensure Tribal impacts are addressed and mitigated.<sup>9</sup> In the Western Pumped Storage 1 docket, the White Mountain Apache Tribe filed comments, stating that the proposed project would not affect the Tribe's cultural properties.<sup>10</sup> In the Western Pumped Storage 2 docket, the Living-Rivers Colorado Riverkeeper, Great Basin Water Network, Center for Biological Diversity, Utah Rivers Council, and Glen Canyon Institute, jointly, filed comments in support of the Navajo Nation's intervention and expressing concerns regarding the feasibility of the project, water rights and use, and environmental studies.<sup>11</sup>

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<sup>5</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2023).

<sup>6</sup> *See, e.g.*, Navajo Nation November 20, 2023 Motion to Intervene.

<sup>7</sup> *See, e.g.*, Interior November 13, 2023 Comments.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> White Mountain Apache Tribe November 14, 2023 Filing.

<sup>11</sup> Living-Rivers Colorado Riverkeeper November 20, 2023 Comments.

### III. Discussion

7. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts necessary to develop the materials required by section 9 of the FPA for an application for license. The Commission is not obligated to issue a preliminary permit, so long as it articulates a rational basis for not doing so.<sup>12</sup> As a general rule, the Commission grants preliminary permits, even where issues have been raised about the potential impacts of the proposed project, explaining that the issues could be addressed during any subsequent licensing proceeding.<sup>13</sup> Recently, however, we have denied preliminary permits for projects at federal facilities where the agency that operates the facility indicates that it opposes the project or where a federal land managing agency opposes permit issuance.<sup>14</sup>

8. The Commission recognizes the unique relationship between the United States and Indian Tribes and is committed to assuring that Tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to

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<sup>12</sup> See *Advanced Hydropower, Inc.*, 155 FERC ¶ 61,007, at P 8 (2016) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)). In *Advanced Hydropower*, the Commission noted that it has previously declined to issue preliminary permits for projects at federal facilities after comments received from the relevant federal entities indicated that no purpose would be served in issuing a permit because the federal entity would not approve modifications to its federal facilities. *Id.* P 9.

<sup>13</sup> See *Renewable Energy Aggregators*, 177 FERC ¶ 61,040 (2021) (issuing a permit to study a proposed pumped storage project where the landowner stated it was unlikely to allow the company access); see also *Tomlin Energy LLC*, 169 FERC ¶ 61,037 (2019) (issuing a permit where permitholders in the same watershed raised significant questions regarding the utilization of the same water resource in violation of 18 C.F.R. § 4.33(a)(1)).

<sup>14</sup> See *FreedomWorks, LLC*, 167 FERC ¶ 62,026 (2019) (denying a permit application when the U.S. Forest Service stated it was unlikely to grant the applicant a special use permit to access the Monongahela National Forest); *Advanced Hydropower, Inc.*, 160 FERC ¶ 62,213, at P 6 (2017) (denying a permit application because the U.S. Army Corps of Engineers opposed the issuance of a permit); *Owyhee Hydro, LLC*, 153 FERC ¶ 62,133 (2015) (denying a permit application when the U.S. Bureau of Reclamation stated that it would not authorize private development of its Anderson Ranch dam).

adversely affect Indian Tribes or Indian trust resources.<sup>15</sup> We review these applications in light of our trust responsibility to the Tribes.

9. The Navajo Nation opposes the applications raising numerous issues, including that the applicants have not sought its consent for use of the land and that the proposed projects may adversely impact the Nation's use of cultural resources, water rights to and the use of the Colorado River system, rare and endangered wildlife and plant resources, and fish resources.<sup>16</sup> It argues that it is unclear whether the applicants consulted the Nation and the appropriate Tribal offices for wildlife resources, land- and water-use permitting, cultural resources, and other environmental clearances.<sup>17</sup> The Nation notes that the proposed projects are located in areas designated as a highly sensitive and that development is generally restricted in these areas.<sup>18</sup> The Nation states that the applicants have not requested to obtain rare species information from the Navajo Heritage Program and that Biological Evaluations are required for the proposed projects.<sup>19</sup>

10. In the past, we applied the general policy of granting permits even where issues were raised about potential project impacts without a distinction for projects on Tribal lands opposed by Tribes.<sup>20</sup> As noted, we have recently revised this policy when permits have been opposed by federal land managers or similarly affected federal agencies. We believe that our trust responsibility to Tribes counsels a similar policy in cases involving Tribal lands<sup>21</sup> and, accordingly, we are establishing a new policy that the Commission

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<sup>15</sup> *Pol'y Statement on Consultation with Indian Tribes in Commission Procs.*, Order No. 635, 104 FERC ¶ 61,108 (2003). The policy statement is codified at 18 C.F.R. § 2.1c (2023).

<sup>16</sup> *See, e.g.*, Navajo Nation November 20, 2023 Comments at 2.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *See Navajo Energy Storage Station LLC*, 174 FERC ¶ 61,106 (2021) (issuing a permit despite the Navajo Nation's opposition and assertion that the Commission failed to initiate government-to-government consultation); *see also Pumped Hydro Storage LLC*, 171 FERC ¶ 61,137, at PP 18, 22 (2020) (issuing a permit despite Tribal opposition and emphasizing that the stated concerns would be addressed if a license application were developed).

<sup>21</sup> *See* § 3(2) of FPA, 16 U.S.C. § 796(2).

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will not issue preliminary permits for projects proposing to use Tribal lands if the Tribe on whose lands the project is to be located opposes the permit.<sup>22</sup> To avoid permit denials, potential applicants should work closely with Tribal stakeholders prior to filing applications to ensure that Tribes are fully informed about proposed projects on their lands and to determine whether they are willing to consider the project development. Here, because the proposed projects would be sited entirely on Navajo Nation land and the Nation opposes issuance of the permits, we deny the permit applications.<sup>23</sup>

The Commission orders:

(A) Western Navajo Pumped Storage 1, LLC's June 12, 2023, application for a preliminary permit for the Western Pumped Storage 1 Project No. 15314, is denied.

(B) Western Navajo Pumped Storage 2, LLC's June 12, 2023, application for a preliminary permit for the Western Pumped Storage 2 Project No. 15315, is denied.

(C) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l, and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2023).

By the Commission.

( S E A L )

Debbie-Anne A. Reese,  
Acting Secretary.

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<sup>22</sup> A denial on this basis is a matter of Commission discretion and is without prejudice. It does not preclude the applicants from working with the Tribe to resolve its concerns and resubmitting their applications if they are successful. We encourage the applicants to continue to work with the Navajo Nation if they wish to pursue the Western Pumped Storage projects. A denial of a preliminary permit also does not preclude an applicant from developing and filing a license application with the Commission to be considered in full. As with permit applications, we encourage developers to work closely with Tribes in preparing license applications.

<sup>23</sup> Given this action, we need not address the issues raised by other commenters.

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