

187 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pumped Hydro Storage LLC

Project No. 15024-000

ORDER DENYING APPLICATION FOR PRELIMINARY PERMIT

(Issued April 25, 2024)

1. On March 12, 2020, Pumped Hydro Storage LLC (Pumped Hydro) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the Big Canyon Pumped Storage Project (Big Canyon Project or project) No. 15024.² The project would be located entirely on Navajo Nation land, in Coconino County, Arizona. For the reasons discussed below, we deny the permit application.

I. Proposal

2. The proposed project would consist of the following new facilities: (1) a 450-foot-long, 200-foot-high concrete arch dam (Upper West Dam), a 1,000-foot-long, 150-foot-high earth filled dam (Middle Dam), and a 10,000-foot-long, 200-foot-high concrete arch dam (Upper East Dam), each of which would impound three separate upper reservoirs with a combine surface area of 400 acres and a total storage capacity of 29,000 acre-feet at a normal maximum operating elevation of 5,390 feet above average mean sea level (msl); (2) a 600-foot-long, 400-foot-high concrete arch dam (Lower Dam) that would impound a lower reservoir with a surface area of 260 acres and a total storage capacity of 44,000 acre-feet at a normal maximum operating elevation of 3,790 feet msl; (3) three 10,000-foot-long, 30-foot-diameter reinforced concrete penstocks; (4) a 1,100-foot-long, 160-foot-wide, 140-foot-high reinforced concrete powerhouse housing nine 400-kilowatt pump-turbine generators; (5) a 1,000-foot-long, 120-foot-

¹ 16 U.S.C. § 797(f).

² In its application, Pumped Hydro named the project the Navajo Nation Big Canyon Pumped Storage Project. We note that the proposed project is not in any way affiliated with the Navajo Nation and that the Navajo Nation has had no role in Pumped Hydro's pursuit of the project. To avoid the impression that the Navajo Nation is involved in developing the project, we have omitted "Navajo Nation" from the project name.

wide, 40-foot-high reinforced concrete tailrace; (6) three water supply wells with a capacity of 700 horsepower each and a 1,800-foot-long, 36-inch-diameter well water supply pipeline; (7) two double circuit 500-kilovolt (kV) electric transmission lines, connecting the project switchyard to the existing 500-kV and 345-kV transmission lines located 14 miles east of the proposed project; and (8) appurtenant facilities. The estimated annual power generation of the Big Canyon Pumped Storage Project would be 7,900 gigawatt-hours.

II. Notice, Interventions, and Comments

3. On June 2, 2020, the Commission issued public notice of the permit application, establishing a deadline of August 3, 2020, for filing comments, interventions, and competing applications. Notice of the application was published in the *Federal Register* on June 9, 2020.³

4. In response to the Notice, the following entities filed timely, unopposed motions to intervene and comments: American Rivers; American Whitewater; Center for Biological Diversity; Grand Canyon Private Boaters Association; River Runners for Wilderness; Save the Worlds Rivers,⁴ Grand Canyon Trust, Living Rivers & Colorado Riverkeeper, National Parks Conservation Association, Sierra Club, Waterkeeper Alliance, Inc., and WildEarth Guardians (together Conservation Coalition); and Southwest Transmission Dependent Utility Group.⁵ The Navajo Nation filed a timely notice of intervention and comments.⁶ The Arizona Game and Fish Department and Hopi Tribe, respectively, filed a late notice of intervention and a motion to intervene and comments, which were granted.⁷ The U.S. Department of the Interior (Interior) filed comments on behalf of the U.S. Fish and Wildlife Service, National Park Service, and Bureau of Indian Affairs. Several tribes, individuals, and entities filed comments and protests, including the

³ 85 Fed. Reg. 35,299 (June 9, 2020).

⁴ In a notice, filed on December 18, 2023, Save the Colorado stated that it changed its name to Save the Worlds Rivers.

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

⁶ Timely notices of intervention are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. *Id.* § 385.214(a)(2).

⁷ *See* April 3, 2024 Notice Granting Late Interventions.

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Center for Biological Diversity and the Grand Canyon Trust which filed comments from members and other members of the public.

5. In its initial comments, the Navajo Nation stated that the proposed project would have an adverse impact on the Nation's land use, water rights to the Little Colorado River, fish and wildlife, and cultural resources. Other commenters raised concerns regarding the applicant's fitness for a preliminary permit; the application's completeness; and the proposed project's impacts on the environment, Tribal resources, recreation, scenery, existing federal projects, and the Grand Canyon National Park.

6. On February 20, 2024, following the establishment of a new policy that the Commission 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,⁸ the Commission issued a Supplemental Notice to give stakeholders until March 21, 2024, to provide additional comments on the proposed project. Individuals, organizations, and the Coppermine Chapter of the Navajo Nation filed comments opposing the project. Additionally, the Navajo Nation filed comments, reiterating its concerns and stating that, to the extent its original comments were not clear, it opposes the permit application. Pumped Hydro filed comments requesting that the Commission not apply the new preliminary permit policy to its proposed Big Canyon Project because the application was filed in 2020, several years before the new policy took effect.

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 development 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.⁹ As a general rule, the Commission grants preliminary permits, even where issues have

⁸ *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,117 (2024); *Nature & People First N.M. PHS, LLC*, 186 FERC ¶ 61,118 (2024); *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,119 (2024); *W. Navajo Pumped Storage 1, LLC*, 186 FERC ¶ 61,120 (2024).

⁹ 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.

been raised about the potential impacts of the proposed project, explaining that the issues could be addressed during any subsequent licensing proceeding.¹⁰

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 adversely affect Indian Tribes or Indian trust resources.¹¹ We review this application in light of our trust responsibility to the Tribes.

9. The proposed project would be located entirely on Navajo Nation land which is held in trust for the Navajo Nation by the Bureau of Indian Affairs.¹² Generally, commenters, including several Tribes, raise concerns related to the project's location on Tribal land and its impacts on Tribal and cultural resources.¹³ Interior also notes that the proposed project would affect several Tribes with connections to the project area.¹⁴

¹⁰ 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) (2023)).

¹¹ *Pol'y Statement on Consultation with Indian Tribes in Comm'n Procs.*, Order No. 635, 104 FERC ¶ 61,108 (2003). The policy statement is codified at 18 C.F.R. § 2.1c (2023).

¹² Interior notes that Pumped Hydro Storage failed to identify the Navajo Nation Reservation as federal land in its application and requests that future filings correct this error. Interior July 31, 2020 Comments at 7.

¹³ See, e.g., Navajo Nation March 12, 2024 Supplemental Comments; Hopi Tribe August 10, 2020 Motion to Intervene at 2-3; Hualapai Tribe August 3, 2020 Comments; Conservation Coalition August 3, 2020 Motion to Intervene at 47-57; Navajo Nation July 30, 2020 Notice of Intervention; American Whitewater July 28, 2020 Motion to Intervene and Comments.

¹⁴ Interior July 31, 2020 Comments at 5-6 (identifying the Navajo Nation, the Havasupai Tribe, the Hopi Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Las Vegas Tribe of Paiute Indians, the Moapa Band of Paiute Indians, the Paiute Indian Tribe of Utah, the San Juan Southern Paiute Tribe, the Yavapai-Apache Nation, and the Pueblo of Zuni). Interior notes that while the project area is on land the Federal government holds in trust for the Navajo Nation, all the listed Tribes have historical and

The Navajo Nation, the Hopi Tribe, the Hualapai Tribe, and several commenters assert that the Commission should have initiated consultation with affected Tribes as part of its consideration of Pumped Hydro Storage's permit application, and they request that the applicant consult with affected Tribes.¹⁵

10. The Navajo Nation opposes the application, raising numerous issues, including that Pumped Hydro has not sought the consent of the Nation, local community, or individuals with customary use rights for the use of the lands, and that the proposed project may adversely impact the Nation and its members' use of the lands.¹⁶ The Nation also claims historic, appropriative, and reserved water rights to the water in the Little Colorado River, which Pumped Hydro would need for the proposed project.¹⁷ The Navajo Nation contends that the project may impact its water rights to and use of the river and notes that the water is subject to ongoing adjudication.¹⁸ It also emphasizes that the Little Colorado River and surrounding features hold significant cultural and historical value.¹⁹ Further, the Navajo Nation states that it has designated the Little Colorado River as a Biological Preserve, thereby restricting all development not compatible with the management goals for the area, and cites potential impacts on rare and culturally important plant, fish, and wildlife species.²⁰

cultural ties to the area. *Id.* at 5.

¹⁵ *See, e.g.*, Navajo Nation March 12, 2024 Supplemental Comments; Save the Confluence March 18, 2024 Supplemental Comments; Hopi Tribe August 10, 2020 Motion to Intervene at 3; Hualapai Tribe August 3, 2020 Comments; Navajo Nation July 30, 2020 Notice of Intervention at 4; Center for Biological Diversity July 30, 2020 Motion to Intervene at 7; River Runners for Wilderness June 4, 2020 Comments at 1.

¹⁶ Navajo Nation July 30, 2020 Comments at 2.

¹⁷ Navajo Nation March 12, 2024 Supplemental Comments; Navajo Nation July 30, 2020 Comments at 2.

¹⁸ *Id.*

¹⁹ Navajo Nation March 12, 2024 Supplemental Comments; Navajo Nation July 30, 2020 Notice of Intervention at 3.

²⁰ Navajo Nation March 12, 2024 Supplemental Comments; Navajo Nation July 30, 2020 Notice of Intervention at 3-4.

11. As noted above, we recently established a new policy that the Commission will not issue preliminary permits for projects proposing to use Tribal lands²¹ if the Tribe on whose lands the project is to be located opposes the permit.²² We explained that this policy is consistent with how we have recently treated permit applications opposed by federal land managers or similarly affected federal agencies, as well as our trust responsibility to Tribes.²³

12. Pumped Hydro argues that the new preliminary permit policy should not apply to the Big Canyon Project because the permit application was filed before the new policy was established. Pumped Hydro also contends that gaining Tribal approval is difficult at the permit stage and that the issuance of a preliminary permit allows for more resources to begin consultation with the Navajo Nation. We are not persuaded by Pumped Hydro's arguments. We are applying the new permit policy to all pending and new permit applications and have already applied it to applications filed years before we established the new policy.²⁴ Pumped Hydro provides no support for its assertions that gaining Tribal approval at the permit stage is particularly difficult and that issuance of a permit, which is simply a placeholding action, would provide any additional resources to a developer.²⁵

13. Here, because the proposed project would be located entirely on Navajo Nation land and the Nation has stated that it opposes issuance of the permit, we deny the application.²⁶ 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.²⁷

²¹ See § 3(2) of FPA, 16 U.S.C. § 796(2).

²² *Supra* note 8.

²³ See, e.g., *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,117 at P 15.

²⁴ See *id.* (applying the new permit policy to applications filed in 2021).

²⁵ 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.

²⁶ Given this action, we need not address the issues raised by other commenters.

²⁷ A denial on this basis is a matter of Commission discretion and is without

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prejudice. It does not preclude the applicant from working with a Tribe to resolve its concerns and resubmitting its application if it is successful. We encourage Pumped Hydro to work with the Navajo Nation if Pumped Hydro wishes to pursue the Big Canyon Project.

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The Commission orders:

(A) Pumped Hydro Storage LLC's March 12, 2020 application for a preliminary permit for the Big Canyon Pumped Storage Project No. 15024, is denied.

(B) 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. § 825*l*, 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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