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Hopi Tribe to Push for Tribal Consent, Sacred Site Protection Before Dams Are Permitted on Tribal Lands

KYKOTSMOVI, AZ – On February 6, 2024, the Hopi Tribe passed Resolution 010-2024 calling on the Federal Energy Regulatory Commission (FERC) to change its current rules for granting preliminary permits for hydroelectric projects on tribal lands. Currently, the federal agency can approve preliminary permit applications for dam projects on tribal lands without consulting or even notifying tribal nations. With the passage of this resolution, the Hopi Tribe aims to remedy this oversight by pushing for permanent reforms that would mandate government-to-government consultation with affected tribes and consent from any tribe on whose land a project is proposed, before such projects could be given preliminary permits.

“Our Hopi community is simply asking the Federal Energy Regulatory Commission to allow us to be at the table when outside companies want to build projects on our land base, along our waterways, or ancestral spaces that we have been connected to well before the arrival of colonizers,” said Craig Andrews, Vice Chairman of the Hopi Tribe. “We need continued protection of our sacred sites; we need these government agencies to simply reach out to us first for consultation and consent. In addition, we would like them to honor and respect our decisions on the outcome of the consultations.”

The timeliness of Hopi's action is underscored by FERC's recent decision recognizing that its trust responsibility to Tribes demands that FERC do better. On February 15th, FERC denied seven preliminary permits for pumped storage hydro projects across Navajo Nation, citing a lack of consent from Navajo Nation. At the same time, FERC announced “a new policy to not issue preliminary permits for projects... if the Tribe on whose lands the project is to be located opposes the permit,” though FERC’s Commissioners are not legally bound by this policy. Formal amendment of FERC’s rules is still required to ensure that the agency is required to conform to and implement this new policy for preliminary permits.

In recent years, private developers have proposed more than a dozen pumped storage hydroelectric projects on or near tribal lands in the region, including on Black Mesa and on the Little Colorado River, including its tributaries, threatening sacred sites.

“I have serious concerns about what the current FERC process means for the future of our region, and for the future of our tribal communities,” said Timothy Nuvangyaoma, Chairman of

the Hopi Tribe. “The sheer number of hydroelectric developments being proposed around us jeopardizes the natural order of things, and the strong longstanding cultural ties to the confluence in the Grand Canyon and other Hopi ancestral places, all of which supports our entire Hopi way of life. FERC cannot make commitments on behalf of tribes without engaging with us first. The FERC methodology has to change. We all need genuine government-to-government dialogue before anything else can further damage our sacred sites.”

In service of these pumped storage hydroelectric projects, developers have proposed pumping massive amounts of groundwater, and diverting water from the Colorado and San Juan rivers to fill hydropower reservoirs in a region where many people depend on these water sources for their livelihoods.

“The passage of the Hopi Tribal Council Resolution on February 6, 2024, in support of a petition to amend the Federal Energy Regulatory Commission’s existing preliminary permit rules is a vital step to change how the permit application process is conducted on Tribal Lands,” said, Stewart B. Koyiyumptewa, Hopi Tribal Historic Preservation Officer. “The Tribal Council Resolution mandates that FERC consult with tribes and consider additional criteria such as cultural and community impacts in evaluating preliminary permit applications.”

In 2020, FERC accepted a preliminary permit application for a hydroelectric project near the Little Colorado River that threatens the Sipaapuni, the Hopi place of emergence. If built, this project would flood an area known as Big Canyon just upstream of the Little Colorado River, near its confluence with the Colorado River in the Grand Canyon.

“Since ancient times, the Hopi people have had a connection and understanding of mother earth and the resources it provides to all people. This is a sacred bond that Hopi people hold,” said Bill “Bucky” Preston, Cultural Resources Advisor, Walpi Village. “We ask the Federal Energy Regulatory Commission that they invite the Hopi people to sit at the table from the beginning regarding projects that may have the potential to impact our way of life. Let us be the ones to determine if projects will be beneficial or have impacts to our villages. Not the other way around.”

“We have every right to offer our voice in FERC’s preliminary application process, especially for projects being built on our lands. We have every right to be heard,” said Philton Talahytewa Sr., Hopi Tribal Council Representative from the Village of Upper Moenkopi. “Petitioning FERC to change the way they include the Hopi Tribe gives us an opportunity to have a voice.”

Next steps for the Hopi Tribe include speaking with other tribes as potential co-signers of the petition to FERC, and with FERC directly before a formal petition is submitted.

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Background

As the evolving mega-drought crisis continues across the world, especially here in the Southwest region of the United States, the Department of the Interior recently announced urgent action to improve and protect the long-term sustainability of the Colorado River System, including commitments for continued engagement with impacted states and tribal communities.

However, for many tribal communities, including the Hopi Tribe, indigenous voices have been largely ignored or barely included in the preliminary conversations or discussions when new large construction projects on or near tribal lands are being proposed, especially, along the Colorado River or along the Little Colorado River where new hydropower projects are being developed. In its commitment to influence the current policy for the Federal Energy Regulatory Commission (FERC) process and to increase tribal discretion and consent for hydropower projects proposed on tribal lands, the Hopi Tribe recently passed a resolution to petition for a rulemaking change to the FERC preliminary permitting process.

In 1920, the United States Congress passed the Federal Water Power Act, which gave the Federal Power Commission (FPC), the Federal Energy Regulatory Commission's predecessor, its original authority to license and regulate non-federal hydropower projects. As Congress expanded the regulatory authority of the FPC, the Federal Water Power Act ultimately became Part I of the Federal Power Act (FPA). Part I of the FPA has been amended by subsequent statutes including the Electric Consumers Protection Act of 1986, the Energy Policy Act of 1992, the Hydropower Regulatory Efficiency Act of 2013, and the America's Water Infrastructure Act of 2018.

The Federal Energy Regulatory Commission (FERC) relies on these authorities to carry out its hydropower responsibilities, including: the issuance of preliminary permits; determinations regarding qualifying conduit facilities; the issuance of licenses for the construction and operation of new projects; the issuance of relicenses for existing projects; the investigation and assessment of headwater benefits; and the oversight of all ongoing project operations, including dam safety and security inspections, public safety, and environmental monitoring.

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing developmental and non-developmental (including environmental) interests, several other statutes affect hydropower regulation. These include, but are not limited to, NEPA, the Clean Water Act, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, and the National Historic Preservation Act.

Through all of these statutes, authorities and acts of the United States government, none of them explicitly say in their policy that they will reach out to tribal communities first for consultation before developing on or near Indigenous lands. In 2003, the modified key policy acknowledged FERC's trust responsibility to tribes and its promise to work on a "government to government" basis with them. However, despite the amendments to incorporate treaty rights into FERC's decision-making processes, and despite the interventions, tensions between FERC

and tribes continue over the persistent lack of consultation and omission of government-to-government discussions regarding proposed hydropower projects.

The Federal Energy Regulatory Commission conducts civil administrative inspections of certain natural gas and hydroelectric facilities through its Office of Energy Projects (OEP), and their four divisions are responsible for regulating private energy companies and again they too do not currently require inclusion of tribal consultation with projects on or near tribal lands.

Just before the peak of the COVID-19 Pandemic, the Federal Energy Regulatory Commission accepted a preliminary permit application from a Phoenix-based business entity called Pumped Hydro Storage, LLC for its Big Canyon Pumped Storage Project, a string of four huge dams near the Little Colorado River, along with reservoirs and a power-generation facility. The permit application did not allow construction, but it offers Pumped Hydro priority in receiving a license to build near Hopi sacred sites.

The mission of the Office of Energy Projects is to facilitate potential benefits to the nation through the review of natural gas and hydropower infrastructure proposals and minimize risks to the public associated with FERC jurisdictional energy infrastructure. The Hopi Tribe will be putting forth a petition to FERC that highlights the importance of including the Hopi Tribe's perspective on construction projects on ancestral lands.