

186 FERC ¶ 61,119  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Nature and People First Arizona PHS, LLC

Project No. 15309-000

ORDER DENYING APPLICATION FOR PRELIMINARY PERMIT

(Issued February 15, 2024)

1. On May 2, 2023, Nature and People First Arizona PHS, LLC (NPF Arizona or applicant), filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the Chuska Mountain North Pumped Storage Project No. 15309. The project would be located entirely on Navajo Nation land, in Apache County, Arizona, near the San Juan River, approximately 1.6 miles north of the town of Lukachukai. For the reasons discussed below, we deny the permit application.

**I. Proposal**

2. The project would consist of: (1) a new upper reservoir with a surface area of 4,800 acres and a storage volume of 400,000 acre-feet at a maximum water-surface elevation of 8,810 feet mean sea level (msl); (2) a new lower reservoir with a surface area of 5,400 acres and a storage volume of 400,000 acre-feet at a maximum water-surface elevation of 5,910 msl; (3) a 40-foot wide and 33,000-foot-long conduit, connecting the upper reservoir to the powerhouse; (4) a 60-foot-wide, 1,200-foot-long and 100-foot-high subterranean powerhouse to be located between the upper reservoir and lower reservoir, with twelve pump/turbines each rated at 250 megawatts (MW); (5) twelve 12-foot-wide, 1,000-foot-long powerhouse lower conduits, discharging into the lower reservoir; and (6) approximately 50 miles of 550-kilovolt transmission line. The estimated annual energy production of the project would be approximately 6,570,000 MW-hours.

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<sup>1</sup> 16 U.S.C. § 797(f).

## II. Notice, Interventions, and Comments

3. On July 13, 2023, the Commission issued public notice of the permit application, setting a deadline of September 11, 2023, for filing comments, interventions, and competing applications. Notice of the application was published in the *Federal Register* on July 19, 2023.<sup>2</sup>

4. On September 11, 2023, the Grand Canyon Trust (Trust) and the Navajo Nation filed timely, unopposed motions to intervene.<sup>3</sup> In its motion, the Trust notes that the applicant needs the Navajo Nation permission to access the land for its studies.<sup>4</sup> The Trust also argues that the applicant should have identified a water source for the project and raises concerns regarding water supply, river flows, and agency and Tribal consultation.<sup>5</sup> In its motion, the Navajo Nation opposes the permit application, stating that the project may impact the lands, rights, and resources of the Navajo Nation and that the applicant did not meaningfully consult with, or seek the consent of, the Nation prior to filing the application.<sup>6</sup> On September 12, 2023, the U.S. Department of Interior, Fish and Wildlife Service (FWS) filed comments regarding the water source for the project, endangered species, Tribal interests, and cultural resources.<sup>7</sup>

## III. Discussion

5. 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

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<sup>2</sup> 88 Fed. Reg. 46,150 (2023).

<sup>3</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>4</sup> Trust September 11, 2023 Motion to Intervene at 5.

<sup>5</sup> *Id.* at 5-7.

<sup>6</sup> Navajo Nation September 11, 2023 Motion to Intervene at 1-3.

<sup>7</sup> FWS September 12, 2023 Comments at 2-6.

permit, so long as it articulates a rational basis for not doing so.<sup>8</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>9</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>10</sup>

6. 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.<sup>11</sup> We review this application in light of our trust responsibility to the Tribes.

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<sup>8</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>9</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)) (2023).

<sup>10</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).

<sup>11</sup> *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).

7. The Navajo Nation opposes the application, raising numerous issues, including that NPF Arizona has not sought its consent for use of the land and that the proposed project may adversely impact the Nation's use of the lands, water rights to and use of the San Juan River system, rare and endangered wildlife and plant resources, fish resources in the San Juan River, and cultural resources.<sup>12</sup> The Nation contends that the applicant failed to consult the Nation and appropriate regulatory offices within its government.<sup>13</sup> It also notes that, according to its Biological Resource Land Use Clearance Policies and Procedures, the project would be located in areas designated as Area 1 (high wildlife value) and Area 5 (biological preserves), and that development is generally restricted in these areas.<sup>14</sup>

8. 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>15</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>16</sup> and, accordingly, we are establishing 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.<sup>17</sup> To avoid permit denials,

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<sup>12</sup> Navajo Nation September 11, 2023 Motion to Intervene at 2-3.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 2.

<sup>15</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>16</sup> *See* § 3(2) of FPA, 16 U.S.C. § 796(2).

<sup>17</sup> A denial on this basis is a matter of Commission discretion and is without prejudice. It does not preclude the applicant from working with the Tribe to resolve its concerns and resubmitting its application if it is successful. We encourage NPF Arizona to continue to work with the Navajo Nation if NPF Arizona wishes to pursue the Chuska Mountain North Pumped Storage Project. 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

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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 project would be sited entirely on Navajo Nation land and the Nation opposes issuance of the permit, we deny NPF Arizona's application.<sup>18</sup>

The Commission orders:

(A) Nature and People First Arizona PHS, LLC's May 2, 2023, application for a preliminary permit for the Chuska Mountain North Pumped Storage Project No. 15309, 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. § 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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developers to work closely with Tribes in preparing license applications.

<sup>18</sup> Given this action, we need not address the issues raised by other commenters.

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