

186 FERC ¶ 61,118
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 New Mexico PHS, LLC

Project No. 15293-001

ORDER DENYING APPLICATION FOR PRELIMINARY PERMIT

(Issued February 15, 2024)

1. On July 12, 2023, Nature and People First New Mexico PHS, LLC (NPF New Mexico or applicant), 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 Chuska Mountain Pumped Storage Project No. 15293.² The project would be located entirely on Navajo Nation land, in San Juan and McKinley Counties, New Mexico, near the San Juan River, and approximately 5.6 miles west of the town of Two Grey Hills. For the reasons discussed below, we deny the permit application.

I. Proposal

2. The project would consist of three new upper reservoirs, including: (1) Upper Reservoir North with a surface area of 15,800 acres and a storage volume of 500,000 acre-feet at a maximum water surface elevation of 8,810 above mean sea level (msl); (2) Upper Reservoir Center with a surface area of 7,400 acres and a storage volume of 235,000 acre-feet at a maximum water surface elevation of 8,810 feet msl; and (3) Upper Reservoir South with a surface area of 16,300 acres and a storage volume of 510,000 acre-feet at a maximum water surface elevation of 8,810 feet msl.

¹ 16 U.S.C. § 797(f).

² NPF New Mexico submitted a previous version of its application in docket number P-15293-000 on December 9, 2022. On April 20, 2023, Commission staff informed NPF New Mexico of deficiencies in its application. NPF New Mexico failed to correct its deficiencies by the deadline, and Commission staff rejected the application as deficient on June 29, 2023. On July 12, 2023, NPF New Mexico submitted a revised application, responding to the deficiencies, in docket number P-15293-001.

3. The project would also consist of four new lower reservoirs, including: (1) Lower Reservoir North 1 with a surface area of 9,000 acres and a storage volume of 385,000 acre-feet at a maximum water surface elevation of 6,010 feet msl; (2) Lower Reservoir North 2 with a surface area of 2,700 acres and a storage volume of 115,000 acre-feet at a maximum water surface elevation of 6,010 feet msl; (3) Lower Reservoir Center with a surface area of 2,900 acres and a storage volume of 235,000 acre-feet at a maximum water surface elevation of 6,010 feet msl; and (4) Lower Reservoir South with a surface area of 3,200 acres and a storage volume of 510,000 acre-feet at a maximum water surface elevation of 6,010 feet msl.

4. Additional proposed project facilities include: (1) a 30-foot-wide and 39,800-foot-long concrete-lined power conduit tunnel to North Powerhouse 1; (2) a 60-foot-wide, 700-foot-long, and 100-foot-high subterranean North Powerhouse 1 with seven pump/turbines each rated at 250 megawatts (MW); (3) seven 12-foot-wide and 1,000-foot-long concrete-lined North Powerhouse 1 conduit tunnels discharging into Lower Reservoir North 1; (4) a 30-foot-wide and 19,800-foot-long concrete-lined power conduit to North Powerhouse 2; (5) a 60-foot-wide, 700-foot-long, and 100-foot-high subterranean North Powerhouse 2 with seven pump/turbines each rated at 250 MW; (6) seven 12-foot-wide and 1,000-foot-long concrete-lined North Powerhouse 2 conduit tunnels discharging into Lower Reservoir North 2; (7) a 30-foot-wide and 43,300-foot-long concrete-lined tunnel power conduit to the Center Powerhouse; (8) a 60-foot-wide, 700-foot-long, and 100-foot-high subterranean Center Powerhouse with seven pump/turbines each rated at 250 MW; (9) seven 12-foot-wide and 1,000-foot-long concrete-lined Center Powerhouse conduit tunnels discharging into Lower Reservoir Center; (10) a 45-foot-wide and 30,300-foot-long concrete-lined tunnel to the South Powerhouse; (11) a 60-foot-wide, 1,400-foot-long, and 100-foot-high subterranean South Powerhouse with 15 pump/turbines each rated at 250 MW; and (12) fifteen 12-foot-wide, 1,000-foot-long concrete-lined tunnels discharging into Lower Reservoir South. The powerhouses would be located between the three upper reservoirs and the four lower reservoirs.

5. NPF New Mexico also proposes approximately 100 miles of 345-kilovolt transmission lines for interconnection to the existing Shiprock, San Juan, and Four Corners substations. The estimated annual energy production of the project would be approximately 19,710,000 MW-hours.

II. Notice, Interventions, and Comments

6. On October 31, 2023, the Commission issued public notice of the permit application, setting a deadline of January 2, 2024,³ for filing comments, interventions,

³ The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is

and competing applications. Notice of the application was published in the *Federal Register* on November 6, 2023.⁴

7. The Navajo Tribal Utility Authority and the Navajo Nation filed timely, unopposed motions to intervene.⁵ In its motion, the Navajo Nation opposes the permit application, stating that the applicant did not meaningfully consult with, or seek the consent of, the Nation and that the project may impact the lands, rights, and resources of the Navajo Nation.⁶ On December 29, 2023, the U.S. Department of Interior (Interior) filed comments, raising concerns regarding water supply, fish and wildlife resources, Tribal interests and land, and cultural resources.⁷ Interior lists several Tribes that may have an interest in the proposed project and requests that the Commission consult with each potentially affected Tribe.⁸ Interior notes that it will actively participate in any future license application proceeding to ensure Tribal impacts are addressed and mitigated.⁹

closed for business, the filing deadline does not end until the close of business on the next business day. 18 C.F.R. § 385.2007(a)(2) (2023). Because the 60-day deadline fell on a Saturday (i.e., December 30, 2023), the filing deadline was extended until the close of business on Tuesday, January 2, 2024.

⁴ 88 Fed. Reg. 76,197 (2023).

⁵ 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).

⁶ See Navajo Nation December 21, 2023 Motion to Intervene.

⁷ See Interior December 29, 2023 Comments.

⁸ *Id.* at 4.

⁹ *Id.* at 5.

III. Discussion

8. 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.¹⁰ 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.¹¹ 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.¹²

9. 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

¹⁰ 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.

¹¹ 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 permit holders 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).

¹² 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.¹³ We review this application in light of our trust responsibility to the Tribes.

10. The Navajo Nation opposes the application, raising numerous issues, including that the applicant has not sought its consent for use of the land and that the proposed project may adversely impact the Nation's use cultural resources, water rights to and use of the San Juan River system, rare and endangered wildlife and plant resources, and fish resources.¹⁴ It argues that it is unclear whether the applicant consulted the Nation and the appropriate Tribal offices for wildlife resources, land- and water-use permitting, cultural resources, and other environmental clearances.¹⁵ The Navajo Nation states that the applicant has not requested to obtain rare species information from the Navajo Heritage Program and that a Biological Evaluation is required for the proposed project.¹⁶

11. 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.¹⁷ 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 lands¹⁸ 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.¹⁹ To avoid permit denials,

¹³ *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).

¹⁴ Navajo Nation December 21, 2023 Comments at 2.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 2.

¹⁷ *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).

¹⁸ *See* § 3(2) of FPA, 16 U.S.C. § 796(2).

¹⁹ 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 New

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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 New Mexico's permit application.²⁰

The Commission orders:

(A) Nature and People First New Mexico PHS, LLC's July 12, 2023, application for a preliminary permit for the Chuska Mountain Pumped Storage Project No. 15293, 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.

Mexico to continue to work with the Navajo Nation if NPF New Mexico wishes to pursue the Chuska Mountain 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 developers to work closely with Tribes in preparing license applications.

²⁰ Given this action, we need not address the issues raised by other commenters.

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