

186 FERC ¶ 61,117
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 Nos. 15233-000
15234-000
15235-000

ORDER DENYING APPLICATIONS FOR PRELIMINARY PERMIT

(Issued February 15, 2024)

1. On October 5, 2021, Nature and People First Arizona PHS, LLC (NPF Arizona or applicant) filed applications for preliminary permits, pursuant to section 4(f) of the Federal Power Act (FPA),¹ proposing to study the feasibility of Black Mesa Pumped Storage Project North (Black Mesa North), Black Mesa Pumped Storage Project East (Black Mesa East), and Black Mesa Pumped Storage Project South (Black Mesa South) each of which is proposed to be located entirely on Navajo Nation land in Navajo County and Apache County, Arizona. Because these applications raise similar issues, we are considering them in this single order and, for the reasons discussed below, we deny them.

I. Proposal

A. Black Mesa North

2. The 2,250-megawatt (MW) closed-loop Black Mesa North Project would be located three miles southwest of Kayenta entirely on Navajo Nation land in northeastern Arizona.

3. The proposed project facilities are: (1) an upper reservoir with a surface area of 3,300 acres and a total storage capacity of 100,000 acre-feet at a normal maximum operating elevation of 7,910 feet average mean sea level (msl); (2) a lower reservoir west with a surface area of 1,200 acres and a total storage capacity of 39,000 acre-feet at a normal maximum operating elevation of 5,960 feet msl; (3) a lower reservoir middle with a surface area of 420 acres and a total storage capacity of 15,000 acre-feet at a normal maximum operating elevation of 5,960 feet msl; (4) a lower reservoir south with a surface area of 1,300 acres and a total storage capacity of 46,000 acre-feet at a normal

¹ 16 U.S.C. § 797(f).

maximum operating elevation of 5,960 feet msl; (5) a 6,800-foot-long, 23-foot-diameter concrete-lined tunnel and 1,800-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir west to a powerhouse; (6) a 9,400-foot-long, 23-foot-diameter concrete-lined tunnel and 2,100-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir middle to a powerhouse; (7) a 6,750-foot-long, 23-foot-diameter concrete-lined tunnel and 2,500-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir south to a powerhouse; (8) three 320-foot-long, 60-foot-wide and 100-foot-high underground powerhouses containing three turbine-generator units each with a total rated capacity of 2,250 megawatts; (9) an 80-mile-long, 230-kilovolt (kV) transmission line connecting the powerhouses to either the existing Powell substation,² the existing Glen Canyon substation,³ or the existing Navajo Generating Station substation;⁴ and (10) appurtenant facilities. The project would generate an estimated 4,927.5 gigawatt-hours (GWh) annually.

B. Black Mesa East

4. The 1,500-MW closed-loop Black Mesa East Project would be located 12 miles southwest of Kayenta entirely on Navajo Nation land in northeastern Arizona.

The proposed project facilities are: (1) an upper reservoir west with a surface area of 2,700 acres and a total storage capacity of 55,000 acre-feet at a normal maximum operating elevation of 7,510 feet msl; (2) an upper reservoir east with a surface area of 1,300 acres and a total storage capacity of 45,000 acre-feet at a normal maximum operating elevation of 7,510 feet msl; (3) a lower reservoir with a surface area of 2,800 acres and a total storage capacity of 100,000 acre-feet at a normal maximum operating elevation of 5,810 feet msl; (4) a 15,500-foot-long, 23-foot-diameter concrete-lined tunnel and 2,000-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir west to a powerhouse; (5) a 9,100-foot-long, 23-foot-diameter concrete-lined tunnel and three 2,400-foot-long, 18-foot-diameter concrete-lined draft tube tunnel penstocks

² The Powell substation is owned by the Western Area Power Administration.

³ The Glen Canyon substation is part of the Bureau of Reclamation's Glen Canyon Project.

⁴ The Navajo Generating Station substation is part of the Salt River Project, owned by the Salt River Project Agricultural Improvement and Power District, Arizona Public Service, NV Energy, and Tucson Electric Power.

connecting the upper and lower reservoir east to a powerhouse; (6) two 320-foot-long, 60-foot-wide and 100-foot-high new underground powerhouses containing three turbine-generator units each with a total rated capacity of 1,500 megawatts; (7) a 110-mile-long, 230-kilovolt (kV) transmission line connecting the powerhouses to the existing Shiprock substation;⁵ and (8) appurtenant facilities. The project would generate an estimated 3,285 GWh annually.

C. Black Mesa South

5. The 2,250-MW closed-loop Black Mesa South Project would be located 20 miles southwest of Kayenta entirely on Navajo Nation land in Northeastern Arizona.

6. The proposed project facilities are: (1) an upper reservoir with a surface area of 8,200 acres and a total storage capacity of 250,000 acre-feet at a normal maximum operating elevation of 7,610 feet average msl; (2) a lower reservoir with a surface area of 14,500 acres and a total storage capacity of 250,000 acre-feet at a normal maximum operating elevation of 5,810 feet msl; (3) a 13,700-foot-long, 23-foot-diameter concrete-lined tunnel and three, 3,800-foot-long, 18-foot-diameter concrete-lined draft tube tunnel penstocks connecting the upper and lower reservoir north to the powerhouse; (4) a 15,400-foot-long, 23-foot-diameter concrete-lined tunnel and 2,700-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir middle to the powerhouse; (5) a 17,500-foot-long, 23-foot-diameter concrete-lined tunnel and 4,700-foot-long with three 18-foot-diameter concrete-lined draft tube tunnel penstock connecting the upper and lower reservoir south to the powerhouse; (6) three 320-foot-long, 60-foot-wide and 100-foot-high new underground powerhouses containing three turbine-generator units each with a total rated capacity of 2,250 megawatts; (7) a 110-mile-long, 230-kilovolt (kV) transmission line connecting the powerhouses to the existing San Juan substation;⁶ and (8) appurtenant facilities. The project would generate an estimated 4,027.5 GWh annually.

⁵ The Shiprock substation is owned by the Western Area Power Administration.

⁶ The San Juan Substation is part of the San Juan Generating Station, owned by Public Service Company of New Mexico, Tucson Electric Power and the Farmington Electric Utility System.

II. Notice, Interventions, and Comments

7. On November 1, 2022, the Commission issued public notice of the permit applications, establishing a deadline of January 3, 2023, for filing comments, interventions, and competing applications. Notice of the applications was published in the *Federal Register* on November 7, 2022⁷ and November 8, 2022.⁸

8. In each of the three dockets, the Navajo Nation; the Grand Canyon Trust; Tó Nizhóní Ání, Diné Citizens Against Ruining our Environment (Diné Citizens) together with the Center for Biological Diversity; American Rivers; and the Navajo Tribal Utility Authority filed timely, unopposed motions to intervene.⁹ All intervenors except for the Navajo Tribal Utility Authority filed comments in opposition to the permits. Separately, the Center for Biological Diversity submitted form comments to which over 5,783 individuals signed, urging the Commission to deny the applications. Troy Honahnie filed comments in all three dockets in opposition to issuance of permits. Wayne Williams filed comments in support of the Black Mesa North permit. LiDonnavi Rayne Nelson Whitney filed comments discussing the potential costs and benefits of the Black Mesa North Project. The National Park Service filed comments on the Black Mesa South permit, noting that the proposed Black Mesa South Project boundary would potentially impact the Old Spanish National Historic Trail.

9. Commenters provide a broad array of arguments against the applications. The Navajo Nation, which opposes the permit application, emphasizes that the projects may impact its water rights, natural resources, rare and endangered species, and cultural resources.¹⁰ It states that the applicant “failed to make necessary contact with the appropriate regulatory groups.”¹¹ The Navajo Nation claims historic, appropriative, and reserved water rights to the sources of the water that would be used for the projects,

⁷ The notice for Black Mesa North was published at 87 Fed. Reg. 67,032 (Nov. 7, 2022). The notice for Black Mesa East was published at 87 Fed. Reg. 67,035 (Nov. 7, 2022).

⁸ The notice for Black Mesa South was published at 87 Fed. Reg. 67,467 (Nov. 8, 2022).

⁹ 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). The intervenors filed substantively identical motions and comments in each of the three captioned dockets.

¹⁰ Navajo Nation December 30, 2022 Motion to Intervene and Comments at 1-2.

¹¹ *Id.* at 1.

and that it is a party to the ongoing adjudication of those waters in Arizona.¹² It further notes that the applicant has not obtained rare species information from the Navajo Natural Heritage Program, and highlights the projects' potential impacts on significant cultural resources and sensitive wildlife areas.¹³

10. The Navajo Tribal Utility Authority states that, while it has not yet formed a position with regard to the proposed project, it recognizes the potential benefits of responsible energy development.¹⁴ Grand Canyon Trust notes the applicant's failure to include the Hopi Tribe among the list of potential affected entities.¹⁵ American Rivers argues that the projects should be viewed as an integrated project rather than three separate projects.¹⁶ American Rivers raises further concerns about the adequacy of the applicant's efforts to provide notice to affected Tribes and other interested communities.¹⁷ Tó Nizhóní Ání, Diné Citizens Against Ruining our Environment, and the Center for Biological Diversity argue the applications are incomplete, misleading, and infeasible.¹⁸ Troy Honahnie, a member of the Hopi Tribe's Isngyam Clan, states that the Hopi Tribe claim cultural affiliation to archaeological sites located on Black Mesa, and that any development of the sites would result in significant adverse impacts to their aboriginal rights.¹⁹

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ Navajo Tribal Utility Authority January 3, 2023 Motion to Intervene and Comments at 5.

¹⁵ Grand Canyon Trust December 30, 2022 Motion to Intervene and Comments at 5.

¹⁶ American Rivers December 30, 2022 Motion to Intervene and Comments at 4-6.

¹⁷ *Id.* at 7.

¹⁸ Tó Nizhóní Ání, Diné Citizens Against Ruining our Environment and Center for Biological Diversity Motion to Intervene at 8. They further argue: the applications lack sufficient information for the Commission or public to understand what is actually being proposed; the applications ignore environmental justice concerns; the projects' transmission information is inaccurate; the discussion of water resources fails to include sufficient detail about the source of the proposed fill for the projects and fails to accurately account for evaporative losses; and the applications fail to account for potential impacts to endangered species and cultural resources.

¹⁹ Troy Honahnie January 3, 2023 Comments at 1.

11. On January 13, 2023, the applicant filed an answer to the comments. NPF Arizona states that it has been consulting with the Navajo Nation for the past three years and also coordinating with the Navajo Tribal Utility Authority.²⁰ NPF Arizona asserts that it has: presented to the Nation Council's Natural Resources and Development Committee; met with representatives from the Nation's Environmental Protection, Economic Development and Natural Resources agencies; confirmed with the Nation Department of Water Resources that there is potentially water available for pumped hydro storage projects; and received resolutions from Chilchinbeto Chapter to support land withdrawal and a lease between a project and the Nation. The applicant acknowledges the need for further consultation with the Navajo Nation, which it states it would conduct under a preliminary permit. NPF Arizona also states that the Navajo Tribal Utility Authority took no position on the permit applications and generally noted the potential benefits of an "environmentally, economically, and culturally responsible energy development on and around Navajo land."²¹

III. Discussion

12. 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.²² 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.²³ Recently, however, we have

²⁰ Nature and People First Arizona PHS, LLC January 13, 2023 Answer at 2.

²¹ Navajo Tribal Utility Authority January 3, 2023 Motion to Intervene and Comments at 5.

²² 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.

²³ 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).

denied preliminary permits for projects at federal facilities where the agency that operates the facility indicates that it opposes the proposed project or where a federal land managing agency opposes permit issuance.²⁴

13. 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.²⁵ We review these applications in light of our trust responsibility to the Tribes.

14. Each of the three proposed Black Mesa projects is located entirely on Navajo Nation land²⁶ and the Navajo Nation opposes the applications,²⁷ raising numerous issues, including that NPF Arizona has not sought its consent for use of the land of the Navajo Nation or procured the required clearances and permits for preliminary biological investigations of the project.²⁸ The Nation also claims historic, appropriative, and reserved water rights to the water NPF Arizona would need for the project in the Colorado and San Juan River systems.²⁹ Further, the Nation cites potential impacts on rare and culturally important

²⁴ 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).

²⁵ *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).

²⁶ Application at 2.

²⁷ Navajo Nation December 30, 2022 Motion to Intervene and Comments at 2-3.

²⁸ *Id.* at 1-2.

²⁹ *Id.*

plant and wildlife species.³⁰ Finally, the Navajo Nation states that there are areas with significant cultural value in the area of the proposed project that would be impacted by the proposed project.³¹

15. 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.³² 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 lands³³ 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.³⁴ To avoid permit denials, potential applicants should work closely with Tribal stakeholders prior to filing

³⁰ *Id.* at 2.

³¹ *Id.* at 2. The Navajo Nation also requests government-to-government consultation regarding the applications. Because we are denying the applications, we need not address this request.

³² 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).

³³ See § 3(2) of FPA, 16 U.S.C. § 796(2).

³⁴ 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 applications if it is successful. We encourage NPF Arizona to continue to work with the Navajo Nation if NPF Arizona wishes to pursue the Black Mesa 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.

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 are sited entirely on Navajo Nation land and the Tribe has stated that it opposes issuance of the permits, we deny the three applications.³⁵

The Commission orders:

(A) Nature and People First Arizona PHS, LLC's October 5, 2021 application for preliminary permit for the Black Mesa Pumped Storage Project North, Project No. 15233, is denied.

(B) Nature and People First Arizona PHS, LLC's October 5, 2021 application for preliminary permit for the Black Mesa Pumped Storage Project East, Project No. 15234, is denied.

(C) Nature and People First Arizona PHS, LLC's October 5, 2021 application for preliminary permit for the Black Mesa Pumped Storage Project South, Project No. 15235, is denied.

(D) 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.

³⁵ Given this action, we need not address the issues raised by other commenters.