

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Nevada Hydro, Inc.

)

Project No. 15261-000

**AMENDMENT TO MOTION TO INTERVENE AND COMMENTS OF
THE PECHANGA BAND OF INDIANS AND MOTION TO DISMISS PRELIMINARY
PERMIT**

Pursuant to Rule 215 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ the Pechanga Band of Indians (“Tribe”), a federally recognized and sovereign Indian Nation,² hereby submits an amendment to the Tribe’s Motion to Intervene and Comments timely filed on June 6, 2022³ in the above-captioned docket.⁴ This amendment is proper as it addresses new factual and material changes to the preliminary permit application for Nevada Hydro, Inc.’s (“Nevada Hydro”) proposed Lake Elsinore Advanced Pumped Storage Project (“Project”). Additionally, pursuant to Rule 212 of the Rules of Practice and Procedure of the Commission,⁵ the Tribe, as an intervenor in this proceeding, submits its Motion to dismiss the Preliminary Permit Application. In support of its amendment and motion, the Tribe states the following:

I. COMMUNICATIONS

All communications, correspondence, and documents related to this filing should be directed to the following persons:

¹ 18 C.F.R. § 385.215.

² See, 84 Fed. Reg. 22 (February 1, 2019).

³ Motion to Intervene and Comments of the Pechanga Band of Indians, Project No. 15261-000 (June 6, 2022). See FERC eLibrary Accession No. 20220606-5099.

⁴ *Nevada Hydro, Inc.*, Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Competing Applications, Project No. 15261-000 (issued April 8, 2022).

⁵ 18 C.F.R. § 385.212.

Michele Fahley
Deputy General Counsel
Pechanga Indian Reservation
P.O. Box 1477
Temecula, CA 92592
mfahley@pechanga-nsn.gov

Douglas Everette
Dentons Bingham Greenebaum LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
douglas.everette@dentons.com

II. BACKGROUND

On February 8, 2022, Nevada Hydro filed a preliminary permit application at the Commission for the proposed Project (“Permit Application”). As described in the Permit Application, the Project would be located almost entirely on federal land administered by the U.S. Department of Agriculture, Forest Service (“Forest Service”), in the Cleveland National Forest. Additionally, the Project would consist of: (1) a new upper reservoir (Decker Canyon) with a gross storage volume of 5,750 acre-feet and a surface area of approximately 70 acres at a normal reservoir surface elevation of 2,790 feet above mean sea level (msl); (2) a 262-foot-high main dam located on the southwest side of the upper reservoir; (3) a water conduit system consisting of a 1,248-foot-long, 25-foot-diameter concrete-lined power shaft and a 8,247-foot-long, 15-foot-diameter power tunnel transitioning to two, 250-foot-long, 12-foot-diameter steel penstocks; (4) an underground powerhouse with two, reversible Francis-type pump-turbine units with a total installed capacity of 500 megawatts; (5) the existing Lake Elsinore, to be used as a lower reservoir, with a surface area of about 3,412 acres at a normal reservoir surface elevation of 1,249 feet above msl; (6) two 2,450-foot-long, 25-foot-wide, and 25-foot-high concrete-lined tailrace tunnels; (7) about 32 miles of 500-kilovolt transmission line connecting the project to an existing transmission line owned by Southern California Edison that is located north of the proposed project and to an existing San Diego Gas and Electric Company transmission line located to the south; and (8) appurtenant facilities. The estimated annual generation of the project would be 1560 gigawatt-hours. Moreover, the plant design assumes a five-day week operation

with 12 hour daily generation and partial pump-back over 12 hours and complete refill of the reservoir occurring over the weekend.

On July 1, 2022, Nevada Hydro filed its Answer to Comments on Preliminary Permit Application (“Answer”).⁶ In its Answer, Nevada Hydro states that it will propose to revise the Project by:

- Constructing new Project primary transmission lines that avoid traversing National Forest lands by interconnecting via urban routes to existing high voltage transmission lines. Includes moving the northern and southern routes to the east to urban routings, avoiding the Cleveland National Forest and the Temescal Valley to align with existing transmission corridors, and rerouting the lines to where underground installation is more practical.
- Reducing the capacity of both the northern and southern transmission lines from 500 kilovolts (“kV”) to 230 kV to facilitate burial of the lines where practical.
- Reducing the discharge and filling time of the upper reservoir to approximately five hours.
- Increasing the installed capacity from 500 megawatts to 1,000 megawatts.
- Adding two (four total) reversible Francis-type pump-turbine units to the underground powerhouse.

Additionally, Nevada Hydro states that it is considering changing the capacity of the upper reservoir by increasing its “dead storage” capacity to enable more water to be purchased and stored.⁷ Nevada Hydro suggests that if the Commission determines that these changes constitute a “material amendment” under its regulations, then instead of requiring the restart of the pre-application process, the Commission should simply reissue a public notice of the materially amended application instead of requiring Nevada to start the pre-application process

⁶ See FERC eLibrary Accession No. 20220701-5363.

⁷ 18 C.F.R. Part 5; See Answer at pp. 4-6, 8.

under the Commission's Integrated Licensing Process ("ILP").⁸ Nevada Hydro also states that the Project will be an important addition to the California Grid.

III. AMENDMENT TO COMMENTS

As discussed above, Nevada Hydro intends to undertake major operational and physical changes to the Project initially described in its Permit Application. For example, Nevada Hydro proposes to supersize the Project by doubling its capacity to 1,000 MWs from 500 MWs and states that the Project will be an important addition to the California grid. The Tribe finds it curious why Nevada Hydro believes that doubling the capacity of the Project is an important addition to the California grid when even the original smaller sized 500 MW project was not needed as a transmission reliability solution. As stated in the Tribe's comments to Scoping Document 1 in Docket No. 14227-003 filed on August 17, 2020:⁹

The California Independent System Operator Corporation (CAISO) has concluded that (i) the Project is not needed as a potential transmission reliability solution, (ii) is not an economic transmission project, and (iii) even if Nevada Hydro's alleged capacity benefits were to be considered, the Project would still have a benefit-to-cost ratio far below 1.0 in the transmission planning process.^[FN 24] In sum, the transmission component of the Project would not even result in positive economic benefits to CAISO ratepayers.

^[FN 24] Answer of the California Independent System Operator Corporation to Complaint, Docket No. EL 19-81-000 at pp. 3-4.

The Commission should require Nevada Hydro to provide its support and analysis of the material adverse effects that the intended additional 500 MW injection may cause to the grid. Nevada Hydro also should be required to provide evidence that the impacts have been studied in

⁸ *Id.* at pp. 7, 9.

⁹ *See* FERC eLibrary Accession No. 20200817-5228.

consultation with CAISO and the local interconnecting transmission owner(s) before proceeding with such a relatively large redesign of the Project.

In addition to increasing the capacity of the Project, Nevada Hydro proposes relocating, and in some instances, undergrounding the Project's transmission facilities, and reducing the discharge and filling time of the upper reservoir to approximately five hours from the approximately 12 hours under the original configuration.¹⁰ Nevada Hydro also hints that it may increase the size of the planned upper reservoir. Other than stating the obvious, that even alone a 500 MW increase in the generation output of the Project may constitute a material amendment to a proposed plan of development under section 4.35 of the Commission's regulations,¹¹ the changes described in Nevada Hydro's Answer, whether individually or cumulatively, appear to constitute "material amendments" requiring the Commission to solicit new motions to intervene and comments.¹²

Nevertheless, as discussed below, in light of the new information brought to light in the Answer, the Tribe respectfully requests that the Commission dismiss the Permit Application and require Nevada Hydro to start the pre-application process under the Commission's ILP.

IV. MOTION TO DISMISS PRELIMINARY PERMIT AND REQUEST FOR THE COMMISSION REQUIRE NEVADA HYDRO TO USE THE INTEGRATED LICENSING PROCESS

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Commission,¹³ the Tribe, as an intervenor in this proceeding,¹⁴ respectfully requests that the Commission dismiss

¹⁰ Such changes appear to effect the flow regime of the Project.

¹¹ 18 C.F.R. § 4.35.

¹² Nevada Hydro would therefore be required to provide project maps, drawings, and plan details sufficient for interested parties to make informed comments about the revised Project.

¹³ 18 C.F.R. § 385.212.

¹⁴ No party, including Nevada Hydro, has objected to the Tribe's Motion to Intervene in this proceeding. See Answer at p. 1.

Nevada Hydro's Preliminary Permit Application. Should Nevada Hydro wish to reinitiate the preliminary permit process for this Project, the Commission should require the use of the Commission's ILP.

There are several reasons why the Commission must dismiss Nevada Hydro's Permit Application. In the Answer, Nevada Hydro states that it intends to make operational and functional material changes to the original Project and admits that it has previously chosen to submit what now appears to have been a placeholder preliminary permit.¹⁵ One might ask whether Mr. Hunter knew or should have known that the Project was being evaluated for major operational and functional revisions at the time his Verified Statement was executed.¹⁶ Nevertheless, the fundamental purpose of the Commission's action in its December 9, 2021 letter order was to dismiss Nevada Hydro's license application without prejudice to resubmitting the application "with all requested information."¹⁷ The Commission offered this procedural process to allow Nevada Hydro to complete the studies and submit the information necessary for the U.S. Forest Service to consider the proposed project under the National Environmental Policy Act, the National Historic Preservation Act, and the Federal Land Policy and Management Act for the issuance of a Special Use authorization or amendments to the 2005 Cleveland National Forest Land Management Plan. This is in stark contrast to what Nevada Hydro now intends - using the Commission procedural process offering as an opening for Nevada Hydro to double the capacity of the project and make other operational and functional changes, including effecting the flow

¹⁵ See Answer at p. 4 ("The Project description in the permit application is essentially the same as Project No. 14227 given Nevada Hydro's need to file quickly.")

¹⁶ GridBright, Inc. appears to have been retained to conduct a study of alternative transmission line routes and configurations on or before the date Nevada Hydro submitted its Rehearing Request to the Commission on January 7, 2022. Nevada Hydro also consulted with other experts. See Answer at pp. 6, 8.

¹⁷ Letter from Vince Yearick, Director, FERC Division of Hydropower Licensing, to Rexford Wait, Nevada Hydro Company, Inc., Project No. 14227-003 (issued Dec. 9, 2021).

regime of the Project and undergrounding transmission facilities without reinitiating the pre-application process under the Commission's ILP.

The ILP is an important and vital tool in the Commission's decision-making process for determining whether to accept a license application and for ultimately determining how the proposed project may effect Tribal interests and resources, the environment, and other potential project effects. It is for these reasons the ILP requires applicants to provide information to stakeholders and the Commission so these entities can understand the proposed project, identify any Tribal cultural and environmental issues, identify any information needs or studies, including Tribal consultation, and provide meaningful comments and recommendations on the proposed project and its potential effects on resources.

Given all of the proposed changes to the Project as set out in the Answer and the general nature of the description of those changes, particularly the relocation of the transmission facilities and their undergrounding and the effect on the water flow regimes, including Lake Elsinore which is a sacred site to the Tribe, without the use of the ILP, the Tribe is blindfolded as to how to participate in this proceeding, how to identify the manner in which its cultural resources may be affected, and whether mitigation of adverse project effects is even possible. Indeed, based on the limited information in the Answer, it appears that the Area of Potential Effects for the Project may change, including the frequency and the rate of change of the height of the water in Lake Elsinore. Also, placing transmission facilities underground, as contemplated by Nevada Hydro in its Answer, have never been previously addressed or studied.

The Tribe also wishes to point out that the policies of the prior Administration under which the licensing process for the previous version of the Project was conducted has changed. Importantly, in November 2021, several agencies, including the Department of Energy under which the Commission serves as an independent agency, executed a Memorandum of

Understanding affirming their “commitment to improve the protection of, and access to, Indigenous sacred sites” and to “demonstrate their commitment through early consideration of the protection and access to Indigenous sacred sites in agency decision-making and regulatory processes” that may result in regulatory and policy outcomes.¹⁸ The MOU also adds a commitment to incorporate Indigenous knowledge when assessing the impacts of federal actions on sacred sites and provides clear direction on developing best practices for collaborative stewardship and co-management when working with Tribal Nations and the Native Hawaiian Community. The MOU also requires each agency to hold consultations with Tribal Nations and the Native Hawaiian community when a proposed action may affect a sacred site.

More recently, the Biden Administration has similarly announced its commitment to initiating Tribal consultation earlier in the process for federal undertakings. According to the Biden-Harris Permitting Action Plan, which sets standards for federal permitting and environmental reviews for infrastructure projects funded through the bipartisan Infrastructure Act:¹⁹

Proactive, early, and ongoing engagement with the public, including disadvantaged, underserved, or overburdened communities, and State, Tribal, local, and territorial partners is fundamental to delivering timely projects that serve the needs and priorities of communities across the country. As part of a robust engagement strategy, which will help inform agencies’ decision-making, agencies will:

- Consult with affected Tribal Nations as early as possible, in a sustained manner, and in a fashion that respects the Nation-to-Nation relationship;
- Proactively partner and coordinate with relevant State, territorial, and local governments as early as possible and in a sustained manner; and

¹⁸ *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites* (“MOU”), available at <https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf>.

¹⁹ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021).

- Review and update policies, procedures, and staffing to ensure that the public, including disadvantaged communities, has a meaningful opportunity to participate in decision-making.²⁰

The *Átáaxum* (known as the Luiseño, a colonized term for our People) have inhabited the Project area since time immemorial.²¹ The Tribe, along with five (5) other federally-recognized *Átáaxum* Tribes, have cultural and religious ties to the territory where the Project is located.²² This cultural affiliation is supported by a substantial archaeological record, which dates back to more than 10,000 years ago, geological data, tribal ethnographic accounts, oral history, songs, and indigenous language.²³ Lake Elsinore, known to the *Átáaxum* as *Páayaxchi Móomat*, the “inland sea” in the Tribe’s language, is the primary basin of water created in the beginning by Earth Mother (*Tamáayawut*) and Earth Father (*Túukumit*) to feed, bathe, and heal the *Káamalam* (First People of the World). *Páayaxchi* is one of the most culturally and religiously significant places for the *Átáaxum*, and is a sacred site to the Tribe. The proposed Project will potentially impact at least 20 traditional cultural properties (historic properties under Federal law), including Lake Elsinore.

Given Nevada Hydro’s track record of failing to engage in meaningful Section 106 Tribal government-to-government consultation²⁴ and the change in directives under the Biden Administration for prioritizing early consideration of the protection and access to Indigenous sacred sites in agency decision-making and regulatory processes, the Tribe respectfully requests

²⁰ Available at <https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf>.

²¹ According to the Tribe’s oral tradition, the world was created in the Temecula Valley at *‘Éxva Teméeku*.

²² The five other Bands are: the Soboba Band of Luiseño Indians; Rincon Band of Luiseño Indians; Pauma Band of Luiseño Mission Indians; La Jolla Band of Luiseño Indians; and Pala Band of Mission Indians.

²³ All established forms of evidence to establish cultural affiliation in federal law pursuant to 43 C.F.R. § 10.14.

²⁴ The Tribe has filed several comments in the Docket No. P-14227 proceeding and in this proceeding regarding its concerns with FERC’s delegation of Section 106 consultation to Nevada Hydro and Nevada Hydro’s failure and lack of expertise to properly conduct tribal consultation.

that the Commission dismiss Nevada Hydro's Preliminary Permit Application. However, should Nevada Hydro wish to reinitiate the preliminary permit process for this Project, the Commission should require the use of the Commission's ILP process to restart the pre-application process. The ILP is hardly an "enormous waste of resources" to the Commission and interested stakeholders as characterized by Nevada Hydro in its Answer.²⁵

V. CONCLUSION

For all of the aforementioned reasons, the Tribe respectfully requests that the Commission accept the amendment to the Tribe's Motion to Intervene and Comments and grant its motion to dismiss Nevada Hydro's Preliminary Permit Application. Should Nevada Hydro wish to reinitiate the preliminary permit process for this Project, then the Commission should require the use of its ILP and require Nevada Hydro to engage in meaningful Section 106 Tribal consultation.

Respectfully Submitted,

/s/ Steve Bodmer
Steve Bodmer
General Counsel
Pechanga Indian Reservation
P.O. Box 1477
Temecula, CA 92592

/s/ Douglas W. Everette
Douglas W. Everette
Dentons Bingham Greenebaum LLP
2700 Market Tower, 10 West Market Street
Indianapolis, IN, 46204
Telephone: (317) 968-5377
Email: douglas.everette@dentons.com

Counsel for the Pechanga Band of Indians

Dated: July 15, 2022

²⁵ Answer at p. 8.

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 15th day of July, 2022.

/s/ Douglas W. Everette
Douglas W. Everette
Dentons Bingham Greenebaum LLP
2700 Market Tower, 10 West Market Street
Indianapolis, IN, 46204
Telephone: (317) 968-5377
Email: douglas.everette@dentons.com