

174 FERC ¶ 62,023

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Kinetic Power, LLC

Project No.15034-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(January 12, 2021)

1. On June 1, 2020, the Kinetic Power LLC, filed an application for a preliminary permit, and amended on June 25, 2020, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Beclabito Hydroelectric Energy Storage Center Project No. 15034 (Beclabito Project) to be located about 20 miles west of Shiprock, New Mexico.

I. Project Proposal

2. The proposed project would consist of: (1) a 1,333-foot-long, 542-foot-high earthen rock fill dam (Upper Reservoir) with a surface area of 392 acres, and a total storage capacity of 35,043 acre-feet at a normal maximum operating elevation of 8,970 feet average mean sea level (msl); (2) a 1,134-foot-long, 166-foot-high earthen rock fill dam (Lower Reservoir) with a surface area of 534 acres, and a total storage capacity of 36,209 acre-feet at a normal maximum operating elevation of 5,656 feet average msl; (3) two 300-foot-long by 23-foot-diameter penstocks shafts, two 2,841-foot-long penstock vertical shafts, six 250-foot-long draft tubes and one 15,880-foot-long by 16-foot-diameter horizontal headrace tunnel; (4) a 300-foot-long, 75-foot-wide, 160-foot-high reinforced concrete powerhouse housing six 250-megawatt fixed turbines generators and up to two 150-megawatt turbines with variable speed machines; (5) four 24,788-foot-long low pressure tailrace tunnels; (6) a 59,664-foot-long water source pipeline that connects the water pumping station located on the San Juan River to the lower reservoir for initial fill and the make-up water; (7) two new double circuit 500-kilovolt (kV) electric transmission lines that connect the project switchyard to the existing 500-kV transmission lines; and (8) appurtenant facilities. The estimated annual power generation at the Beclabito Energy Storage Center Project would be 2,628 Gigawatt-hours. There are no federal or state lands associated with the project.

¹ 16 U.S.C. § 797(f).

II. Background

3. The Commission issued public notice of Beclabito's permit application on September 17, 2020. Comments were filed by the U.S. Department of the Interior (Interior)² on November 10, 2020. Navajo Nation filed a timely notice of intervention on November 16, 2020.³

III. Discussion

A. Tribal Consultation

4. The Navajo Nation requests meaningful government-to-government consultation with the Commission before any formal action is taken pursuant to the disposition of the application.

5. Because permits do not authorize construction and operation of a project and the development of a license application is not guaranteed, it is premature to initiate government-to-government consultation with affected tribes at this time. Should Beclabito Project begin the process of developing a license application, the Commission will engage with Navajo Nation and will assure that Navajo Nation concerns and interests are considered.

B. Consultation and Study Requirements under the Permit

6. FWS recommends that Kinetic Power LLC coordinate with the San Juan River Basin Recovery Implementation Program (Program)⁴ and use the Program's hydrologic model during the study period referenced in the permit application.

7. The Commission has not sought to place all relevant study requirements in preliminary permits.⁵ Rather, the studies to be undertaken by a permittee are shaped by

² The Department of Interior filed comments on behalf of the U.S. Fish and Wildlife Service (FWS) and the Bureau of Reclamation.

³ A timely notice of intervention filed by Navajo Nation is granted by operation of Rule 214(a)(2).

⁴ The San Juan River Basin Recovery Implementation Program is a recovery effort for two endangered fish (Colorado Pikeminnow, *Ptychocheilus lucius*; and Razorback Sucker, *Xyrauchen texanus*).

⁵ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.⁶ Further, permit conditions have been framed to ensure that the permittee does not tie up a site without pursuing in good faith a study of the project's feasibility.⁷

C. Water Rights and Compliance with Applicable Laws and Regulations

8. Bureau of Reclamation requests that Kinetic Power LLC acknowledge that they will be required to apply for and obtain water rights to augment their depletions to the San Juan River so as not to affect flows for the Program. Bureau of Reclamation also notes that Kinetic Power LLC will need to comply with all applicable environmental laws and regulations and conduct the appropriate level of analysis required by the National Environmental Policy Act.

9. A permit does not authorize a permittee to undertake construction of the proposed project and, therefore, issues concerning water rights are premature at the permit stage. The purpose of a preliminary permit is to secure the permit holder's priority for hydropower development while they study the feasibility of the project. Should Kinetic Power LLC file a license application, water rights can be addressed in the licensing process. A permit applicant is not required to have obtained all access rights to a project site as a condition of receiving a preliminary permit, and a preliminary permit does not grant a right of entry onto any lands. A permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

IV. Permit Information

10. 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 required by section 9 of the FPA,⁸ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁹ Because a permit is issued only to allow

⁶ See 18 C.F.R. § 4.38 (2020).

⁷ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁸ 16 U.S.C. § 802.

⁹ See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006)

the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.¹⁰

11. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each 12-month period from the effective date of this permit. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

12. During the course of the permit, the Commission expects that the permittee will carry out prefilming consultation and study development leading to the possible development of a license application. The prefilming process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.¹¹ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹² Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

13. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the

("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

¹⁰ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

¹¹ 18 C.F.R. §§ 5.5 and 5.6.

¹² *See* 18 C.F.R. § 5.3.

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named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.¹³

The Director orders:

(A) A preliminary permit is issued for the Beclabito Hydroelectric Energy Storage Center Project No. 15034 to Kinetic Power LLC, for a period effective the first day of the month in which this permit is issued, and ending either 48 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) 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.

Timothy Konnert, Chief
West Branch
Division of Hydropower Licensing

¹³ See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised October 2018)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. No later than the last day of each 12-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Document Content(s)

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