

UNITED STATES OF AMERICA
THE FEDERAL ENERGY REGULATORY COMMISSION

Kinetic Power, LLC

Project No. 15034-000

NOTICE OF INTERVENTION BY THE NAVAJO NATION

The Navajo Nation, an Indian tribe with authority to issue a water quality certification pursuant to the Clean Water Act and the Safe Drinking Water Act, provides notice of its intervention in this proceeding pursuant to 18 C.F.R. § 385.214(a)(2).

On September 17, 2020, the Federal Energy Regulatory Commission (“FERC”) accepted for filing an application for a preliminary permit (“Application”) by Kinetic Power LLC (“Applicant”), pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of Beclabito Hydroelectric Energy Storage Center Project to be located about 20 miles west Shiprock, New Mexico. The proposed project (“Project”) would be located entirely on lands owned by the Navajo Nation and all activities occurring on such lands are subject to the territorial jurisdiction of the Navajo Nation pursuant to Title 7 of the Navajo Nation Code, Section 254.

The September 21, 2020 notice by FERC recognizes that the “preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners’ express permission.” The proposed Project would be located entirely on Navajo Nation land, and the Nation has not authorized the permit holder to enter upon the lands of the Navajo Nation or to use its waters.

INTERESTS OF THE NAVAJO NATION

Pursuant to 18 C.F.R § 385.214(b)(2), the Navajo Nation is a federally recognized Indian tribe with sovereign authority within its territorial jurisdiction which includes the Project area in this application. The Navajo Nation takes notice of several references in the Application to “coordination” with the Navajo Nation. Of particular concern is the statement at 24 that the “Applicant will comply with applicable state and local guidelines and regulations and coordinate site activities with the Navajo Nation.” The Navajo Nation is a sovereign Indian nation and state laws and regulations generally do not apply. By this notice, the Applicant is advised that compliance with all Navajo Nation laws and regulations is mandatory, and mere “coordination” with the Navajo Nation is insufficient. If the Applicant feels it necessary to coordinate with authorities other than the Navajo

Nation, the Applicant is free to do so; however, state and local laws and regulations, other than those of the Navajo Nation are generally inapplicable.

Generally, the Project would impact the land, water, wildlife, and cultural resources of the Navajo Nation. The Nation's interests include, but are not limited to the following.

A. Land Resources

Construction and operation of the Project would impact the use of Navajo lands by the Navajo Nation and its members. The use and disposition of the lands of the Navajo Nation is subject to 16 Navajo Nation Code, Chapter 7. Those land users with customary use rights where the Project would be located are entitled to compensation for the use of their lands pursuant to 16 Navajo Nation Code, Chapter 13. At this point in the project planning process, the Applicant has not sought the consent of the Navajo Nation, the local chapters, or the individuals with customary use rights where the Project would be located for the use of the lands associated with the Project facilities.

B. Water Resources

The Project would require an initial fill of up to 38,300 acre-feet of water as a "one time use" and an estimated annual use of 2,635 acre-feet to replenish evaporative losses. Application at 20. The source of this water would be the San Juan River. *Id.* The San Juan River is fully appropriated, and the Applicant would need to acquire water from existing water users in the San Juan River Basin and transfer the water use to a new location and change the purpose of use. The transfer and change cannot adversely affect existing water users, including the Navajo Nation, the largest and most senior water user in the San Juan River Basin. The rights of the Navajo Nation to use water in the San Juan River Basin in New Mexico are legally recognized in the *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation*, Nov. 1, 2013 (11th Dist. Ct., New Mexico).

Of particular concern to the Navajo Nation is the suggestion at page 21 of the Application concerning "acquiring idle water rights" for the Project. The Navajo Nation opposes and will challenge all changes in the places and purposes of use of water in the San Juan River Basin that are derived from the water rights of non-Indian water users that have not been recently beneficially used, as such rights should be subject to abandonment or forfeiture. The Nation also opposes and will challenge any proposed new applications for water contracts from Navajo Reservoir that are made without the consent of the Navajo Nation, even if such contracts are short-term in duration.

The use of water resources on the Navajo Nation is subject to the Navajo Nation Water Code, 22 Navajo Nation Code, Chapter 11. All uses of water by the Project must

be permitted and subject to an assessment for the water used pursuant to 22 Navajo Nation Code §§ 1306 and 1304, respectively. The implementation of the Code requires consideration of how a proposed water use affects “entities presently using water, or [] threaten[s] degradation of other economic, cultural, religious, historic, aesthetic, natural or environmental values.” 22 Navajo Nation Code § 1501(B).

C. Fish & Wildlife Resources

The Project will certainly impact the fish and wildlife resources of the Navajo Nation. The Application acknowledges potential impacts on the endangered Colorado pikeminnow and razorback sucker, listed as endangered species by the U.S. Fish and Wildlife Service. The Navajo Nation is a cooperating partner in the San Juan River Recovery Implementation Program and is committed to the protection and recovery of these and other endangered species. However, the Navajo Nation maintains its own Navajo Endangered Species List which is more extensive than the federal list and requires protection of species of special cultural significance to the Navajo Nation. Full compliance with the Navajo Nation’s Fish and Wildlife laws and regulations is mandatory.

D. Cultural Resources

The Navajo Nation Heritage and Historic Preservation Department within the Division of Natural Resources is the Navajo Nation's agency responsible for the protection, preservation and management planning for the Navajo Nation's cultural resources. 16 Navajo Nation Code § 1004. The Application, at page 24, pledges to coordinate with coordinate with “the State Historic Preservation Office and Tribal Historic Preservation Officers.” Again, the Nation reiterates that the state historic preservation offices have no regulatory role on the Navajo Nation and that strict compliance with the Nation’s laws and regulations, including those laws and regulations affecting cultural resources is required as a matter of law and is not a matter of mere “coordination.”

POSITION OF THE NAVAJO NATION

The Navajo Nation is uniquely affected by the application because the proposed Project would be located entirely on Navajo Nation land and would utilize the land, water, and other natural resources of the Navajo Nation. Accordingly, the Navajo Nation’s interests would be directly affected by the outcome of this proceeding. Intervention is necessary so that the Nation can fully protect its interests. The Navajo Nation also requests meaningful government-to-government consultation with the Federal Energy Regulatory Commission before any formal action is taken pursuant to the disposition of the application.

Respectfully submitted this 16th day of November, 2020.

NAVAJO NATION DEPARTMENT OF JUSTICE



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CERTIFICATE OF SERVICE

On this 16th day of November, 2020, the undersigned caused copies of the foregoing NOTICE OF INTERVENTION BY THE NAVAJO NATION were upon each person designated on the official service list compiled by the Secretary in this proceeding.



Stanley M. Pollack

Document Content(s)

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