

Project No. 14227-003  
Lake Elsinore Advanced  
Pumped Storage Project

October 15, 2019

## VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE  
Washington DC 20426

### Re: Comments on HPMP-Workplan Submission

Dear Secretary Bose:

On August 21, 2019, the Federal Energy Regulatory Commission (Commission) staff issued a letter granting the request for an extension time to the Pechanga Band of Luiseño Indians, a federally recognized and sovereign Indian Nation (Tribe) and the Nevada Hydro Company, Inc. (Nevada Hydro) to submit a revised Historic Properties Management Plan (HPMP-Workplan) for the Lake Elsinore Advanced Pumped Storage Project, FERC Project No. 14227 (the Project) by October 15, 2019.

While the Tribe is providing additional information to Nevada Hydro<sup>1</sup> in the form of a redlined HPMP-Workplan, the Tribe is doing so under protest. The Tribe cannot agree to this management plan for cultural resources and historic properties as the document fails to fully identify and evaluate resources that may be affected, nor does the HPMP-Workplan contain an appropriate and comprehensive plan to do so. The HPMP-Workplan is virtually devoid of meaningful process and procedures for the evaluation of historic properties and is missing the crucial integration of tribal consultation into the HPMP-Workplan at all junctures related to the identification and evaluation of historic properties, as well as the incorporation of tribal knowledge into these processes.

## COMMENTS

The HPMP-Workplan is not the proper vehicle for identifying and evaluating historic properties, nor for assessing the adverse effects thereto by the Project. In its current form, the HPMP-Workplan does not comply with the requirements of the Advisory Council on Historic Preservation

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<sup>1</sup> The Tribe is concurrently providing a copy of this cover letter and its comments on the HPMP-Workplan to Nevada Hydro. On October 15, 2019, the Tribe and Nevada Hydro jointly requested that the Commission staff grant their joint request for an additional 30-day extension of time for submission of the revised HPMP-Workplan.

(AChP) and the Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002 (Guidelines).

Specifically, Nevada Hydro's HPMP-Workplan should include the following items, as identified in the Guidelines: (1) a description of each discovered property, indicating whether it is listed on or eligible to be listed on the National Register; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of the nature and extent of consultation; and (5) a schedule for implementing mitigation and conducting additional studies.

As the actual consultation on the specifics of the historic properties and the documentation and assessments have not yet occurred, it is simply impossible for this HPMP-Workplan to contain the above elements. Many of the Tribe's comments in the HPMP-Workplan identify areas in which tribal consultation and other procedural steps must be determined. The document as it currently stands has little to no procedural certainty for either tribes or the applicant.

The Tribe has informed both the Commission and Nevada Hydro that the HPMP-Workplan is not appropriate at this stage of the proceeding and has been lacking in myriad respects since the first draft was proffered to the Tribe for review in late summer of 2018. It is our understanding that a final HPMP will be completed once these consultation steps, ethnographic work, additional archaeological surveys and other related work has occurred; however, this document is still not workable as an HPMP-Workplan designed to achieve a completed final product. It is difficult, if not impossible, to see how this HPMP-Workplan can be used to prepare a final HPMP that will comply with federal law and protects the numerous historic properties to be affected by this Project.

To be workable, this kind of document must include meaningful descriptions of the process and procedures respecting the identification and evaluation of historic properties, the consultation process with culturally affiliated tribes, how adverse effects would be determined and avoided or minimized, and, for example, details such as timelines for archaeological and ethnographic studies and other necessary documentation methods. Nevada Hydro proposes woefully inadequate timelines with respect to completing studies, likely because the applicant and their consultant are simply not qualified or experienced in how studies related to Traditional Cultural Properties are completed, nor the amount of work that is required by affiliated tribal communities to provide the necessary information related to such studies. The intrinsic value of Traditional Cultural Properties lie with the communities that hold such value, thus it is impossible to prepare an HPMP without proper tribal consultation and expertise because there is no alternative source from which those values can be understood. The HPMP as drafted and as used for this Project completely fails to incorporate the tribes in the process, which means that an accurate record of the historic properties and effects thereto cannot be completed under the current trajectory as ordered by the Commission. Further, it is Nevada Hydro's obligation to include the relevant information in the HPMP-Workplan in an organized and logical manner, and which will meet the requirements of federal law, including compliance with the Section 106 tribal consultation mandate. Unfortunately, this document falls far short of that obligation.

The Tribe asserts that it is inappropriate, and likely a violation of federal law, for the Commission to continue with the license application review process absent a written document that can be agreed upon by Tribes, consulting parties, and other interested parties regarding historic properties that includes, at a minimum, the following additional items:

- 1) Clearly defined identification and evaluation processes.
  - a. A specific step by step process for how historic properties will be identified and evaluated, how information will be gathered, where the information will be located (*i.e.*, in a confidential appendix), who has responsibility preparing the written materials, and specifically how the tribal consultation process will be incorporated, including but not limited to, time frames, tribal approval of the descriptions and information, confidentiality and specific use terms of the information, and conclusions; and
  - b. A specific process for analyzing the adverse effects to the historic properties and how tribal consultation will be factored into this process, including but not limited to, the incorporation and use of tribal information and cultural values into the adverse effects analysis and conclusions, alternatives assessments, and tribal approval of the analysis and identified adverse effects.
- 2) Clearly defined tribal consultation process agreed upon by the Tribe and FERC (and Nevada Hydro as appropriate).
  - a. The consultation process may be set out in the HPMP-Workplan and/or another document such as an associated Programmatic Agreement. The consultation process must be clearly stated and utilized in the drafting and finalization of all plans that address historic properties.
  - b. The Applicant may not simply rely on the NHPA statute without specifically iterating timelines, expectations, confidentiality, use and ownership of information, and agreements concerning goals of the consultation.

Moreover, Principal 3 of the Guidelines states that “[t]he HPMP should be based on sufficient studies to predict the likely effects of Project activities on historic properties, and should provide for the conduct of additional studies that may be needed.” The Commission’s decision to allow Nevada Hydro to conduct cultural resource and visual effects studies until after the Project is licensed makes it impossible to include the required and relevant information in the HPMP-Workplan regarding how many historic properties will be affected, the actual adverse effects to such properties, and the resolution of such effects. By maintaining this trajectory, the HPMP is essentially a useless procedural step imposed at the wrong point of the FERC process. As stated in the Tribe’s Motion to Intervene and Protest submitted in this Docket on September 23, 2019:

[t]he Commission must “provide[] the Indian tribe ... a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural

importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." This has not happened yet. As noted above, the current FERC process is incompatible with the early consultation requirements of the NHPA because the Commission will decide whether to issue a license to Nevada Hydro without compliance with the requirements of Section 106 – namely the identification and evaluation of historic properties, and assessment of adverse effects thereto.

Furthermore, the Section 106 “reasonable and good faith effort” standard of the National Historic Preservation Act (16 U.S.C. § 470 *et seq.*) requires completion of these types of studies, particularly where, as here, the record indicates that there are multiple TCPs within the project footprint and the Area of Potential Effects (Advisory Council on Historic Preservation, *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review* Guidance Document at 1). For these reasons, the Commission must reverse course and require Nevada Hydro to conduct studies for historic properties, cultural resources, and visual effects now, and require the HPMP-Workplan to incorporate the foregoing items at a minimum. Avoidance of a process for credibly identifying and addressing the likely effects of Project activities eviscerates this licensing process and any subsequent license issuance will violate the NHPA and will fail to comply with the Commission's obligations under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Under Section 106 and its implementing regulations (36 C.F.R. Part 800), the Commission must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register (defined as historic properties) and afford the ACHP a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Officer (SHPO) to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

As stated in the USDA Forest Service comments of October 8, 2019, not only does Nevada Hydro's license application not have “basic information about project scope, feasibility, project safety and operation, and project alternatives,” but consultation on cultural resources is incomplete – so much so that even the SHPO “has largely declined to review TNHC's work products until a number of deficiencies are addressed.”

Related to the procedural and content issues of the HPMP-Workplan is the fact that the Commission has delegated portions of its tribal consultation obligations to Nevada Hydro. The Tribe asserts that many of the issues encountered thus far may have been avoided if such delegation either had not occurred or was clearly spelled out in terms of scope and agreed to by the Pechanga Tribe in a written agreement. In fact, the ACHP recommends that when a federal agency decides to delegate some of its Section 106 requirements to applicants, an agreement be entered into between the agency and the Indian tribe(s) to avoid confusion. See the ACHP's *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act*.

Further, the Commission cannot simply delegate its government-to-government consultation obligations because it has a trust responsibility to federally recognized tribes as described in the Commission's *Policy Statement on Consultation with Indian Tribes in Commission Proceedings* (18 C.F.R. § 2.1c). However, the Commission is authorized under Section 106 and the ACHP's implementing regulations to delegate components of its Section 106 obligations to other parties. Nevertheless, the Commission remains ultimately responsible for Section 106 compliance. 36 CFR § 800.2(a)(3) states in relevant part:

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

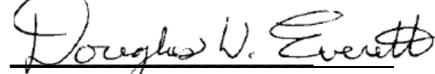
The Tribe understands that the Commission remains the responsible party for the fulfillment of tribal consultation obligations. Unfortunately, the Commission's delegation of the preparation of the HPMP, which necessarily includes tribal consultation, to Nevada Hydro and in turn, to an unqualified third party consultant has possibly been misunderstood and has definitely taken a course that is inappropriate, unjustified, and contrary to the regulations. The Commission is in danger of failing to fulfil its trust responsibility to federally recognized tribes through this delegation. In light of the foregoing, the Tribe further respectfully requests that the Commission assume its Section 106 consultation responsibilities, and limit the scope of this contractor in accordance with the regulations.

Additionally, while delegation of certain functions to Nevada Hydro, *e.g.*, information collection and other non-government-to-government functions, may be allowed under Section 106 and the ACHP's implementing regulations to assist the Commission, this delegation as currently organized is not working in this licensing proceeding. The third party draft of the HPMP-Workplan is an example of that failure as are the deficiencies identified by the Forest Service and the SHPO.

In conclusion, the HPMP-Workplan does not include the requisite tribal consultation process, it fails to incorporate meaningful tribal participation for the identification, evaluation, and adverse effects analysis of historic properties, and has prevented the SHPO from fully engaging in this proceeding. The continued delegation without severe correction by the Commission will result in violation of the Section 106 process, a faulty HPMP, and produce flawed information upon which the Commission will base its decision concerning license issuance. Therefore, in addition to the corrective actions identified herein, the Tribe requests more direct and substantial consultation

with the Commission and the Commission's Tribal Liaison, Elizabeth Molloy, as provided for in 18 C.F.R. § 2.1c.

Respectfully submitted,



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