

Stewart B. Koyiyumptewa, Kykotsmovi, AZ.
November 9, 2025

Federal Energy Regulatory Commission Secretary Debbie-Anne Reese
888 First Street
NE Washington, DC 20426

Re: Comments Opposing Proposed Rule to Remove Tribal Non-Opposition
Requirement for Preliminary Permits Docket No. RM26-5

Dear Chairwoman Swett and Commissioners:

On behalf of the Hopi Tribe, we respectfully submit these comments in strong opposition to the Department of Energy's proposed rule under Section 403 of the Department of Energy Organization Act, which seeks to direct the Federal Energy Regulatory Commission (FERC) to eliminate its current 2024 precedent of declining to issue preliminary hydropower permits on Tribal lands when the affected Tribal Nation objects. The existing requirement is a lawful and necessary affirmation of Tribal sovereignty and the federal trust responsibility, grounded in long-standing federal law, administrative precedent, and the government-to-government relationship between the United States and Tribal Nations. Reversing this rule would undermine these foundational principles and erode the integrity and effectiveness of the Commission's decision-making authority.

The Federal Power Act authorizes the Commission to issue preliminary permits, however it does not require such issuance in any particular case. As the Commission has correctly noted, it "is not obligated to issue a preliminary permit, so long as it articulates a rational basis for not doing so." (See FERC Order, ¶12). The purpose of a preliminary permit is to allow developers to conduct studies and prepare materials for a potential hydropower license. Consistent with this purpose, the Commission retains full discretion to deny a preliminary permit when doing so would conflict with other federal obligations, including those arising from its trust relationship with Tribal Nations.

The Commission's current policy was clearly articulated in its 2024 orders denying preliminary permits for the Black Mesa pumped storage project proposals. In those decisions, the Commission recognized that declining to issue the permits was necessary "in light of our trust responsibility to the Tribes." (See FERC Order, ¶13). The Commission further affirmed:

"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." (Id.)

This acknowledgment is consistent with decades of federal law and policy directing agencies to protect Tribal lands, resources, and self-governance authority unless a Tribal Nation voluntarily consents to activities affecting those interests.

The factual record supporting the Commission's 2024 determinations was substantial and well-developed. Each proposed Black Mesa pumped storage facility was to be situated entirely within Navajo Nation territory, and the Navajo Nation expressly opposed each of the aforementioned applications. The Navajo Nation's objections included:

"The absence of required Tribal consent or authorization for project activities;

"Lack of necessary clearances for biological field investigations;

"Risks to reserved and appropriative water rights in the Colorado and San Juan River systems;

"Potential impacts to culturally significant plant and wildlife species; and

"Likely disturbance of landscapes with deep cultural, ceremonial, and spiritual significance. (See FERC Order, ¶14.)

Given these conditions, the Commission's denials were both prudent and legally justified. The current rule ensures that development cannot proceed on Tribal lands without meaningful consultation and engagement with the sovereign Tribal government and demonstrates that the Commission's approach is neither arbitrary nor speculative, but is an appropriate, fact-based exercise of statutory discretion.

Further, the existing requirement appropriately encourages project proponents to engage early and collaboratively with Tribal governments. As stated by the Commission, “To avoid permit denials, potential applicants should work closely with Tribal stakeholders prior to filing applications to ensure that Tribes are fully informed about proposed projects on their lands and to determine whether they are willing to consider project development.” (See FERC Order, ¶15.) This approach does not impede development, but rather supports responsible planning, reduced conflict, and legally sound outcomes.

Therefore, removing this existing requirement would have the opposite effect. It would encourage speculative applications with no feasible path forward, increase disputes and litigation, and undermine public confidence in the federal government’s respect for Tribal sovereignty and lawful consultation obligations. Contrary to its stated purpose, the Department of Energy’s proposed rule would introduce delays, inefficiency, and uncertainty into hydropower development processes.

For these reasons, the Hopi Tribe urges the Commission to reject the Department of Energy’s proposed rule and uphold the 2024 requirement, as this requirement:

“Aligns with the Commission’s statutory discretion under the Federal Power Act;

“Upholds the federal trust responsibility and government-to-government obligations;

“Protects Tribal sovereignty and the rights of Tribal Nations; and

“Promotes efficient, collaborative, and responsible hydropower development. We thank the Commission for its continued attention to the protection of Tribal rights, lands, waters, and cultural resources. We stand ready to engage directly in further consultation consistent with the trust relationship.

Sincerely,

Stewart B. Koyiyumptewa
Tribal Historic Preservation Officer (THPO)
The Hopi Tribe
P.O. Box 123
Kykotsmovi, Arizona 86039

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