



Inter Tribal Association of Arizona

21 TRIBAL NATIONS

November 10, 2025

Via FERC Docket No. RM26-5-000

Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Ak-Chin Indian
Community

Cocopah Tribe

Colorado River
Indian Tribes

Fort McDowell
Yavapai Nation

Fort Mojave
Indian Tribe

Gila River Indian
Community

Havasupai Tribe

Hopi Tribe

Hualapai Tribe

Kaibab Band of Paiute
Indians

Pascua Yaqui Tribe

Pueblo of Zuni

Quechan Tribe

Salt River Pima-
Maricopa Indian
Community

San Carlos
Apache Tribe

San Juan
Southern Paiute Tribe

Tohono O'odham
Nation

Tonto Apache Tribe

White Mountain
Apache Tribe

Yavapai-Apache
Nation

Yavapai-Prescott
Indian Tribe

Re: *Comments of the Inter Tribal Association of Arizona, Inc. (ITAA) on the FERC Proposed Notice of Proposed Rulemaking Regarding Preliminary Permits for Hydroelectric Power Projects*

To Whom It May Concern:

These comments are submitted by the Inter Tribal Association of Arizona, Inc. (ITAA) regarding the Federal Energy Regulatory Commission (FERC) Proposed Notice of Proposed Rulemaking Regarding Preliminary Permits for Hydroelectric Power Projects (proposed NOPR).¹

ITAA strongly opposes the proposed NOPR and urges FERC to retract the proposal immediately. Among other things, the proposed NOPR is a plain violation of Tribal sovereignty as discussed in detail below. If FERC is not going to retract the proposal, it should immediately stay the proposed NOPR process and initiate appropriate government-to-government Tribal consultation with Indian Tribes regarding the serious implications of this action on Tribal interests, treaty rights, lands, and resources.

ITAA is an inter-tribal consortium of 21 federally recognized Indian Tribes with lands in Arizona, California, Nevada, Utah, and New Mexico. The Member Tribes of ITAA have advocated together since 1952 on issues of common interest and concern here in Arizona, and across Indian Country. ITAA is governed by the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents, and governors.²

¹ Docket No. RM26-5-000

² The comments provided here are intended to address certain overarching concerns of our ITAA Member Tribes relative to the proposed NOPR. These comments are not intended to speak on behalf of any one Member Tribe, but instead address cross-cutting issues that we believe are common to our Member Tribes' interests. FERC should engage in direct government-to-government Tribal consultation with each of our Member Tribes regarding this proposed NOPR, since the proposal will likely have different and specific impacts on the sovereign rights, treaty rights, water, land, and

I. FERC Must Immediately Stay the Proposed NOPR Process and Initiate Tribal Consultation

Under the proposed NOPR, FERC intends to amend Part 4, Chapter I, Title 18 of the Code of Federal Regulations to add a new section 4.85 that will severely limit its own discretionary authority under the Federal Power Act (16 U.S.C. § 797) to reject an application for a preliminary permit for a hydroelectric project (such as dams, water conduits, reservoirs, power houses, transmission lines, or other project works) on public lands or reservations, based upon the express objection of the land manager or governing Tribe that has authority over the proposed project site. Under the proposed NOPR, section 4.85 would provide: “An application for a preliminary permit will not be denied solely on the basis of opposition from a third party.” Proposed NOPR at 8.

FERC issued a Notice Inviting Comments on October 27, 2025, providing only a short two-week comment period closing on November 12, 2025 (the day after a Federal holiday).³ This, despite the fact that DOE is asking for FERC’s “immediate and final action” on this proposed NOPR no later than December 18, 2025.⁴

To our knowledge, neither the Department of Energy (DOE) nor FERC has engaged in any form of Tribal consultation with Indian Tribes on this proposed NOPR. Worse yet, the agencies have chosen to expedite consideration of this rule change even in the absence of Tribal consultation, making it very difficult and likely impossible for many impacted Tribes to provide timely comments on this adverse proposal. This violates the United States’ federal trust responsibility to Tribes and disregards the interest of the public who may also wish to comment on this proposal.

As noted above, the United States Federal Government (which includes DOE and FERC) has a fundamental trust responsibility and legal obligation to engage in direct government-to-government Tribal consultation with each of our Member Tribes on this proposed NOPR. Consultation must occur before this rulemaking progresses any further.

Tribal consultation is necessary to meet the United States’ trust responsibilities to Indian Tribes. It is also required by numerous executive orders and policies, including: Presidential Memorandum of April 29, 1994 titled “Government-to-Government Relations with Native American Tribal Governments” (requiring proper consultation with Indian tribes to the greatest extent practicable prior to taking any actions that affect such tribes); Executive Order 13175 (November 6, 2000) (requiring all agencies, bureaus, and offices within the Federal Government to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications); Memorandum for the Heads of Executive Departments and Agencies on

resources of each Tribe depending on its geography, topography, and the nature of the proposed hydroelectric project.

³ [Accession No. 20251027-3055](#) (October 27, 2025), Docket No. RM26-5-000

⁴ [Letter from Sec. of Energy to FERC](#), October 23, 2025.

Government-to-Government Relationship with Tribal Governments (September 23, 2004); Sec. 106 of the NHPA, 16 U.S.C. § 470(f); Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (November 5, 2009) (supplementing Executive Order No. 13175); see *also* Presidential Memo titled Tribal Consultation and Strengthening Nation-to-Nation Relationships Memorandum for the Heads of Executive Departments and Agencies (January 26, 2021); and Uniform Standards for Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies (November 30, 2022).

Indeed, the DOE's own Tribal Consultation Policy, DOE P 144.1 (Oct. 7, 2024), acknowledges that the agency has "legal obligations to respect and protect Tribal self-determination and inherent sovereignty" and directs that Tribal consultation should occur "in the earliest stages and throughout the decision-making process to ensure robust, interactive, pre-decisional, informative, and transparent consultation." (Emphasis added).

The FERC Tribal Consultation Policy, (18 CFR Part 2, 68 FR 46455, July 23, 2003, amended by 84 FR 56941, Oct. 24, 2019), also provides: "The Commission acknowledges that, as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes." 18 CFR Part 2, §2.1c(b). Under this policy, "[t]he Commission will seek to engage tribes in high-level meetings to discuss general matters of importance, such as those that uniquely affect the tribes." 18 CFR Part 2, §2.1c(f).

However, no such high-level meetings (or indeed, no outreach of any kind) appears to have occurred here. This is a plain violation of the trust responsibility and FERC's own legal obligations for tribal consultation. It must be remedied immediately before any further action is taken on the proposed NOPR.

II. This Proposed NOPR Violates Basic Principles of Tribal Sovereignty

As DOE and FERC acknowledge in their consultation policies, Indian Tribes are distinct sovereign governments with the right and authority to govern their own people, land, and resources within their reservation boundaries. However, under the proposed NOPR, an applicant would be issued a preliminary permit to study the feasibility of developing a hydroelectric project on Tribal lands, even over the express objection of the governing Indian Tribe. This is an anathema to Tribal sovereignty.

Tribal sovereignty is an inherent recognized right that cannot be disregarded or eaten away at by FERC or DOE under a vague pretense "[f]or America to continue dominating global energy markets" (see DOE Letter Oct. 23, 2025) or for any other reason. Nothing in the proposed NOPR acknowledges the existence of the Tribal sovereignty or treaty rights, let alone considers how the proposal can be reconciled with Tribal self-governance and the varied systems of land management found on Indian reservations across the United States. In short, the proposed NOPR is an affront to the basic tenets of Tribal sovereignty held by our 21 Member Tribes and Indian Country as a whole. For this reason alone, the proposed NOPR should be retracted.

Tribes exercise their sovereign authorities in many ways, including to protect and enhance the health, safety, and welfare of their Tribal citizens. Tribes also have sovereign authority to establish their own forms of government, including under treaties with the United States or through their own Tribal constitutions approved under the Indian Reorganization Act of 1934.⁵ Tribes make and enforce Tribal laws in exercise of Tribal priorities and manage and protect their own resources within their reservation lands. This includes the inherent right of Indian Tribes to control their own borders and the right to exclude persons from entering or remaining on their reservation land (including the right to exclude non-Tribal members with a preliminary permit from FERC). Most Tribes also restrict or regulate development on Tribal lands and enact laws to expressly protect important Tribal resources, such as certain animals, plants, and places of cultural or religious importance. This proposed NOPR undermines each of these sovereign rights.

The development of hydroelectric projects on Tribal lands can deplete or disrupt the ability of Tribes to beneficially use their federal reserved water rights, which are held by the United States on their behalf. See *Winters v. United States*, 207 U.S. 564 (1908). These water rights, which are prior, perfected, and vested property rights, were impliedly reserved by the United States upon the establishment of each Tribe's reservation and these rights are intended to meet the purpose of the reservation as a permanent home and abiding place for the Tribe. *Winters*, 207 U.S. at 575. The development of a hydroelectric project on Tribal lands without Tribal consent could unlawfully affect a taking of Tribal water rights and, in almost every instance, it is likely to be contrary to the permanent Tribal homeland purpose of the reservation. Yet, the proposed NOPR wholly fails to explain how these important Tribal authorities and property rights will be honored and respected. Indeed, FERC's own consultation policy states:

The Commission recognizes the unique relationship between the United States and Indian tribes and Alaska Native Claims Settlement Act (ANCSA) Corporations as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum, departments and agencies of the Executive Branch have been urged to consult with federally-recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.

18 CFR §2.1c(a). (Emphasis added).

⁵ Moreover, Section 4 of the Indian Reorganization Act expressly restricts the sale or transfer of restricted Indian lands to non-tribal members, including those that might seek a preliminary permit from FERC under the instant proposed NOPR.

Given the importance of Tribal sovereign interests, Tribes have intervened in FERC proceedings when their resources or Tribal lands are threatened. For example, the Navajo Nation intervened in FERC permit application proceedings in opposition to projects proposed by outside entities within their lands, reminding FERC of their sovereign authority. See *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,117 (2024) (the Navajo Nation stating that the applicant had not sought the Nation’s consent for use of the land, or obtained the required clearances and permits for preliminary project review, and that the project would impact areas of significant cultural value on the reservation); *Nature & People First N.M. PHS, LLC*, 186 FERC ¶ 61,118 (2024) (the Navajo Nation stating that the permittee had not requested to obtain rare species information from the Navajo Heritage Program, that a tribal Biological Evaluation is necessary, and that the applicant had not consulted with Tribal offices for wildlife resources, land and water permitting, or cultural and environmental resources); *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,119 (2024) (the Navajo Nation stating that the project would be located in a high wildlife value area and biological preserve where development is generally restricted, and that the applicant failed to consult the Nation and its appropriate regulatory agencies); *Western Navajo Pumped Storage 1, LLC*, 186 FERC ¶ 61,120 (2024) (the Navajo Nation stating that the proposed projects are located in areas designated by the Nation as highly sensitive, and that the applicant had not consulted with Tribal offices for wildlife resources, land and water permitting, or cultural and environmental resources).

Due to this assertion of the Navajo Nation’s sovereign authority and interests, FERC appropriately denied the applications for a preliminary permit in each of these cases.

III. The Proposed NOPR is a Reversal of FERC’s Own February 15, 2024 Written Policy to Deny Preliminary Permits For Projects Proposing to Use Tribal Lands if the Application is Opposed by the Governing Tribe

While FERC has a mixed history when deciding whether to issue preliminary permits for hydroelectric projects on Tribal lands, it recently clarified its position in favor of Tribal sovereignty in a written policy issued on February 20, 2024 (February 2024 Policy). In this Policy, which acknowledges FERC’s discretion to deny preliminary permits on Tribal lands when the preliminary permit is opposed by the governing Tribe,⁶ FERC clarified: “**On February 15, 2024, the Commission established a new policy that it will not issue preliminary permits for projects proposing to use Tribal lands if the Tribe on whose lands the project is to be located opposes the permit.**” See Supplemental Notice Soliciting Comments, February 20, 2024, Project P-15024-000, citing four decisions issued February 15, 2024 in support. [Accession No. 20240220-3054](#) (Emphasis added).

⁶ As noted above, while FERC is authorized and empowered to issue licenses for hydroelectric projects on public lands and reservations under the Federal Power Act, 16 U.S.C. § 797(e), it is not required to do so, including in instances when the license is opposed by the federal land manager or Indian Tribe with authority over the lands that are the subject of the preliminary permit. The proposed NOPR, however, would unlawfully limit FERC’s discretion under the Federal Power Act at the preliminary permit stage, mandating that “[a]n application for a preliminary permit will not be denied solely on the basis of the opposition of a third party.”

The foundation and purpose of the February 2024 Policy are further explained by FERC in four decisions issued February 15, 2024. For example, *Nature & People First N.M. PHS, LLC* stated:

9. 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. We review this application in light of our trust responsibility to the Tribes.

...

11. In the past, we applied the general policy of granting permits even where issues were raised about potential project impacts without a distinction for projects on Tribal lands opposed by Tribes. As noted, we have recently revised this policy when permits have been opposed by federal land managers or similarly affected federal agencies. We believe that our trust responsibility to Tribes counsels a similar policy in cases involving Tribal lands and, accordingly, we are establishing a new policy that the Commission will not issue preliminary permits for projects proposing to use Tribal lands if the Tribe on whose lands the project is to be located opposes the permit. 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 the project development.

Nature & People First N.M. PHS, LLC, 186 FERC ¶ 61,118 at 9, 11 (2024) (emphasis added) (footnotes omitted). See also *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,117 (2024); *Nature & People First Ariz. PHS, LLC*, 186 FERC ¶ 61,119 (2024); *Western Navajo Pumped Storage 1, LLC*, 186 FERC ¶ 61,120 (2024).

The February 2024 Policy is also consistent with FERC precedent since FERC has repeatedly denied preliminary permit applications proposed on federal lands due to opposition by the federal landowner agency. Importantly, FERC acknowledged and reiterated citations to these cases in formulating its Tribal policy discussed in this Section III above. See *FreedomWorks, LLC*, 167 FERC ¶ 62,026 (2019) (denying a permit application when the Forest Service stated it was unlikely to grant the applicant a special use permit to access forest land); *Advanced Hydropower, Inc.*, 160 FERC ¶ 62,213 (2017) (denying a permit application because the landowner, U.S. Army Corps of Engineers, opposed it); *Owyhee Hydro, LLC*, 153 FERC ¶ 62,133 (2015) (denying a permit application when the U.S. Bureau of Reclamation stated it would not authorize private development of a dam); *Advanced Hydropower, Inc.*, 155 FERC ¶ 61,007 (2016) (finding that no purpose would be served in issuing a preliminary permit because the federal agency would not give approval).

Of course, the issuance of a preliminary permit by FERC for a project on Tribal lands does not give a permittee the right to enter the reservation lands of that sovereign Tribe to study project feasibility and secure data. Tribes have authority to exclude any person or entity from entry onto their reservation. Thus, if a primary purpose of a preliminary permit is to enable the applicant “to secure the data and perform the acts required by section 802 [of the Federal Power Act],”⁷ including for “making examinations and surveys, for preparing maps, plans, specifications, and estimates,”⁸ this purpose cannot be met without the applicant first receiving Tribal authorization to perform such activities on Tribal lands. And without such authorization, the applicant has no right to enter Tribal lands and collect the data, perform surveys, or engage in other acts on the Tribal lands that might be needed to support the preliminary permit or advance the project to the licensing phase. In this regard, the better course of action is for FERC to require any applicant seeking a preliminary permit for a project on Tribal lands to first demonstrate it has the consent of the governing Tribe as a condition for the issuance of the preliminary permit. This will ensure the applicant has authority to conduct feasibility and data gathering activities on these Tribal lands. FERC’s February 2024 Policy acknowledges this fundamental point.

The proposed NOPR, however, entirely fails to acknowledge the existence of FERC’s February 2024 Policy, and it makes no effort to explain why this policy should be overruled. It also appears that the rationale expressed in FERC’s decisions and permit denials from February 15, 2024, related to how to resolve objections by federal landowners, has also been summarily dismissed by FERC.

ITAA urges FERC to retract the proposed NOPR, and instead to codify its February 2024 Policy through formal rulemaking, in fulfilment of its trust responsibility and treaty obligations to Indian Tribes.

IV. The Proposed NOPR Will Have Damaging Impacts to Tribal Ancestral Lands and Resources

While ITAA’s comments to the proposed NOPR have focused thus far on its adverse impact to Tribal sovereignty and the ability of Tribes to protect and manage their own Tribal lands and resources, it is also important to address the limitations the proposed NOPR will place on FERC regarding its consideration of objections by federal land managers, for example, managers of U.S. Forest Service and Bureau of Land Management lands (all of which are the ancestral lands of Indian Tribes). Under the proposed NOPR, FERC would have no authority to reject a preliminary permit application based upon the objections of the federal land manager with authority over the proposed site of the preliminary permit, even if the hydroelectric project could be harmful to the public lands, its resources (including cultural resources or Tribal sacred sites), or other public management considerations or goals for those lands. This is contrary to discretion vested in the FERC under the Federal Power Act. See, e.g., *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) (under the Federal

⁷ 16 U.S.C. § 797(f).

⁸ 16 U.S.C. § 798(a).

Power Act, FERC “is not obliged to issue permits to anyone who seeks them.”). It is also contrary to (among other things) Executive Order 13007 (regarding the protection of sacred sites) and existing FERC precedent which has carefully considered and respected the objections of federal land managers in the past as discussed in Section III, *supra*.

CONCLUSION

FERC has repeatedly held that it is not obligated to issue preliminary permits so long as a rational basis is articulated for the denial. *Kamargo Corp. v. FERC* at 1398. It is difficult to imagine a more rational basis for denying a permit than the objection of the owner or manager of the land on which the hydroelectric project is proposed. This is particularly true when an applicant is seeking a preliminary permit from FERC to explore the development of a hydroelectric project on Tribal lands.

On behalf of our 21 Member Tribes, ITAA respectfully requests that FERC retract this proposed NOPR immediately. If FERC declines to do this, at a minimum it should suspend further action on this proposed NOPR until FERC can meet its obligations to engage all impacted Tribes in a legally compliant, meaningful, and robust tribal consultation, including consultation with the Member Tribes of ITAA.

Thank you for your consideration of the ITAA’s comments. If you have should have any questions regarding these comments, I can be reached at (480) 258-4822 or maria.dadgar@itaa-az.org.

Sincerely,

INTER TRIBAL ASSOCIATION OF ARIZONA



Maria Dadgar, MBA
Executive Director
Inter Tribal Association of Arizona, Inc.

CC: ITAA Executive Committee
Tribal Leaders