

UNITED STATES OF AMERICA 155 FERC ¶ 62,186  
FEDERAL ENERGY REGULATORY COMMISSION

Pyramid Lake Paiute Tribe

Project No. 14726-000

ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued June 8, 2016)

1. On November 3, 2015, the Pyramid Lake Paiute Tribe (Tribe) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the proposed Prosser Creek Hydroelectric Project No. 14726 (Prosser Creek Project or project) to be located on the Prosser Creek Dam and Reservoir on Prosser Creek, near the town of Truckee, Nevada County, California. The proposed project would be located entirely on federal land administered by the U.S. Bureau of Reclamation (Reclamation).

**I. Project Proposal**

2. The proposed project would be located at the existing discharge channel on the downstream side of the Prosser Creek Dam. It would utilize the existing intake structure in Prosser Creek Reservoir, the existing outlet structure of the dam consisting of two 560-foot-long, 9.5-foot arched concrete conduits, and the discharge channel on the downstream side of the dam. No modifications would be made to these existing structures.

3. Under the Tribe's proposal, the project would consist of the following new facilities: (1) a pressure-rated, concrete, flow-control structure located at the end of the existing low-level outlet that would include control valves to regulate flows to the proposed powerhouse or direct flows to the existing discharge channel during a powerhouse outage; (2) a 48-inch-diameter penstock to convey water from the existing outlet structures to the powerhouse and direct flow to one or both of the generating units via a common header and control valves; (3) an approximately 32-foot-wide by 62-foot-long by 33-foot-high powerhouse located on the east side of the primary discharge channel outlet containing two Francis generating units, one smaller 790-kilowatt unit and one larger 2.7-megawatt (MW) unit for a total rated capacity of 3.49 MW; (4) a 50-foot-long tailrace channel extending from the proposed powerhouse to meet the existing outlet channel; (5) a channel training wall leaving the powerhouse on the landside of the tailrace

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

channel; (6) a 650-foot-long, 69- kilovolt (kV) transmission line and electrical substation to interconnect the proposed project to the existing, nearby 69-kV transmission line owned by Liberty Utilities; and (7) appurtenant facilities.

4. The Tribe proposes to develop the proposed project in conformance with the operation of Prosser Creek Dam by the Bureau of Reclamation under the terms of the Truckee River Operating Agreement (TROA) and would generate electricity using the existing flow releases under the terms of the TROA. The Tribe does not propose to alter the timing, condition or the amount of releases from Prosser Creek Reservoir or impair any of the current functions supported by operation of this existing multi-purpose water resources project. The estimated annual generation of the Prosser Creek Hydroelectric Project would be 7.4 gigawatt-hours.

## **II. Background**

5. The Commission issued public notice of the Tribe's permit application on February 12, 2016. On April 8, 2016, the U.S. Department of Agriculture, Forest Service (Forest Service) and California Department of Fish and Wildlife (California DFW) filed timely notices of intervention with comments, and on April 11, 2016, the U.S. Department of the Interior (Interior) filed a timely notice of intervention individually and on behalf of the U.S. Fish and Wildlife Service (FWS), Reclamation, and the National Park Service.<sup>2</sup> Interior filed comments on April 4, 2016.

## **III. Discussion**

### **A. Jurisdiction**

6. Sections 4(e) and 4(f) of the FPA<sup>3</sup> authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. This jurisdiction is withdrawn if hydropower generation at the site is authorized for federal development, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction, either congressionally or administratively.<sup>4</sup>

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<sup>2</sup> Timely notices of intervention filed by State Commissions and the U.S. Departments of Agriculture and Interior are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2015).

<sup>3</sup> 16 U.S.C. §§ 797(e) and (f) (2012).

<sup>4</sup> See *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983).

7. As discussed above, the Prosser Creek Dam is part of Reclamation's Truckee Storage Project. In a letter to the President on July 18, 1935, the Secretary of the Interior recommended the Truckee Storage Project to provide upstream storage on the Truckee River for irrigation of land within the Washoe County Water Conservation District. The Truckee River Storage Project was approved by the President on September 21, 1935 pursuant to section 4 of the Act of June 25, 1910<sup>5</sup> and subsection B of section 4 of the Act of December 5, 1924.<sup>6</sup>

8. On January 6, 2016, Commission staff sent Reclamation staff a jurisdictional inquiry regarding federal hydropower development at the Prosser Creek Dam and Reservoir. In that letter, staff concluded that the Commission's jurisdiction to authorize non-federal hydropower development at the Prosser Creek Dam has not been withdrawn. As of June 7, 2016, Reclamation has not filed a response. However, in its April 11, 2016 notice of intervention, Interior stated that it intervened on behalf of Reclamation, FWS, and the National Park Service. As Reclamation's parent agency, Interior's April 12, 2016 comments include recommendations from Reclamation relating to dam safety, operations, maintenance, and water supply, but make no mention of jurisdiction. Thus, we conclude that Reclamation has received notice of the Tribe's application and does not disagree with our January 6, 2016 determination that the Commission has jurisdiction to develop non-federal hydropower at the Boca Dam and Reservoir.<sup>7</sup>

#### **B. Issues Related to Project Construction and Operation**

9. Interior noted that Reclamation is currently evaluating potentially excessive dam safety risks posed by Prosser Creek Dam to downstream inhabitants and the environment. Interior requests that construction of any improvements related to the project be delayed until the dam safety modifications are completed. Interior also noted the project would be "run of river," meaning no excess water above downstream needs will be released for the purpose of hydro generation.

10. The Forest Service noted that proposed project facilities located in visually prominent locations would need to be designed to blend with the natural surroundings;

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<sup>5</sup> Act of June 25, 1910, sec. 4, 36 Stat. 835, 836 (1910) (requiring Secretary of the Interior recommendation and Presidential approval before constructing any irrigation projects contemplated under the Reclamation Act of 1902, 32 Stat. 388).

<sup>6</sup> Act of December 5, 1924, sec. 4(B), 43 Stat. 672, 702 (1924) (requiring that the Secretary of the Interior make a finding of feasibility for a new irrigation project under the Reclamation Act of 1902, 32 Stat. 388).

<sup>7</sup> See Presumption 1 of the 1992 MOU. 58 Fed. Reg. 3269 (1992).

water quality and water temperature in the Truckee River would need to be maintained or improved; and because the river is potentially eligible for inclusion in the National Wild and Scenic River system, its wild and scenic river values would need to be protected. Both Forest Service and California DFW identified a number of fish and wildlife species that could be affected by the project, with Forest Service also noting its concern with potential project effects on wetland and riparian habitats.

11. The Forest Service also expressed concern with the potential direct, indirect, and cumulative effects that the project would have on cultural resources during construction and operation.

12. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

### **C. Consultation and Study Requirements under the Permit**

13. Interior noted that an environmental review will be required for the project, and that it will also require the project be evaluated for potential adverse impacts to dam safety, operations, maintenance, and water supply at no cost to the government.

14. Forest Service noted that the project's Area of Potential Effect will need to be surveyed for cultural resources. Forest Service also stated that downstream of Prosser Creek Dam there is an unrecorded historic site and ice dam; the site will need to be mapped, re-recorded, and evaluated for inclusion in the National Register of Historic Places. The Tribe may need to obtain an Archeological Resources Protection Act special use permit for any cultural resource studies on Forest Service land.

15. The Commission has not sought to place all relevant study requirements in preliminary permits.<sup>8</sup> Rather, the studies to be undertaken by a permittee are shaped by 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.<sup>9</sup> Further, permit

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<sup>8</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

<sup>9</sup> See 18 C.F.R. § 4.38 (2015).

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.<sup>10</sup>

#### **IV. Permit Information**

16. 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,<sup>11</sup> 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.<sup>12</sup> Because a permit is issued only to allow 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.<sup>13</sup>

17. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-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.

18. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a

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<sup>10</sup> See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

<sup>11</sup> 16 U.S.C. § 802 (2012).

<sup>12</sup> See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) (“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.”).

<sup>13</sup> 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).

Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.<sup>14</sup> 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.<sup>15</sup> 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.

19. 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 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.<sup>16</sup>

The Director orders:

(A) A preliminary permit is issued for the Prosser Creek Hydroelectric Project No. 14726 to Pyramid Lake Paiute Tribe, for a period effective the first day of the month in which this permit is issued, and ending either 36 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.

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<sup>14</sup> 18 C.F.R. §§ 5.5 and 5.6 (2015).

<sup>15</sup> See 18 C.F.R. § 5.3 (2015).

<sup>16</sup> See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(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 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

Timothy Konnert, Chief  
West Branch  
Division of Hydropower Licensing

**Form P-1 (Revised April 2011)****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 six-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.



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