

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

)	
)	Project No. 14992-000
)	
Pumped Hydro Storage, LLC)	MOTION TO INTERVENE BY SAVE
)	THE COLORADO, GRAND CANYON
)	TRUST, LIVING RIVERS &
Preliminary Permit Application for)	COLORADO RIVERKEEPER,
Navajo Nation Salt Trail Canyon)	SIERRA CLUB, WATERKEEPER
Pumped Storage Project)	ALLIANCE, INC., AND WILDEARTH
_____)	GUARDIANS

November 18, 2019

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INTRODUCTION

On October 2, 2019, the Federal Energy Regulatory Commission issued a notice of acceptance of Pumped Hydro Storage, LLC's ("Pumped Hydro") application for a preliminary permit for the Navajo Nation Salt Trail Canyon Pumped Storage Project (the "Salt Trail Canyon Project") (Project No. 14992-000). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, Save the Colorado, Grand Canyon Trust, Living Rivers & Colorado Riverkeeper, Sierra Club, Waterkeeper Alliance, Inc., and WildEarth Guardians (collectively, the "Conservation Coalition") hereby move to intervene in the preliminary permit proceeding and oppose the requested permit. *See* 18 C.F.R. § 385.214. This motion to intervene is timely because it is filed within the 60-day window initiated by the Commission's notice of acceptance dated October 2, 2019. *See id.* § 385.210(b).¹

The core and unresolvable problem with the Salt Trail Canyon Project is that it would dam the Little Colorado River on the Navajo Nation, at a location just outside Grand Canyon National Park. This section of the Little Colorado River often takes on a vivid, turquoise color due to a complex of springs that send warm, limestone-rich water over travertine dams, before it flows into the muddy Colorado River in the Grand Canyon. The confluence of these two rivers with contrasting waters is otherworldly and renowned. The confluence is also essential to the survival and recovery of the endangered humpback chub, and it is a sacred place to

¹ Living Rivers & Colorado Riverkeeper previously filed an individual Motion to Intervene in this proceeding on October 10, 2019. This Motion to Intervene supplements the earlier motion, and Living Rivers now plans to participate in this proceeding as a member of the Conservation Coalition.

many Native peoples. This area is invaluable and irreplaceable, and it is unsuitable for hydropower development.

The Commission should dismiss the preliminary permit application for two primary reasons. First, Pumped Hydro lacks the requisite “fitness” for a preliminary permit and it is unlikely to diligently pursue a project it has admitted is speculative and unlikely. One of Pumped Hydro’s two principal members has a long history of denied, canceled, and surrendered preliminary permits. Moreover, Pumped Hydro has filed five preliminary permit applications for projects with a collective capacity of 10,850 megawatts (MW). This is nearly equal to the capacity of all the other projects with pending permit applications before the Commission. Underscoring the speculative nature of the project, Pumped Hydro’s other principal member recently conceded the company is unlikely to build both the Salt Trail Canyon Project and a nearby project for which it filed a separate permit application. Taken together, these circumstances demonstrate the proposal is excessively speculative and unlikely to proceed to licensing.

Second, even if Pumped Hydro were to file a license application, the Commission will very likely deny the license. The company proposes to build a dam and reservoir in the humpback chub’s critical habitat, and the dam and reservoir would likely eliminate the spawning grounds for the sole spawning population of humpback chub in the Grand Canyon. It is implausible that this could occur in compliance with the Endangered Species Act’s protections for the humpback chub. The project would also interfere with the exceedingly complex operation of Glen Canyon Dam, further hindering humpback chub recovery.

In addition, the Hopi Tribe has opposed the project, due to its impacts on Traditional Cultural Properties and other sacred areas that are important to the

Hopi Tribe, the Navajo Nation, and other Native peoples. The Commission must consult with all impacted tribes under the National Historic Preservation Act before it licenses the project, and the Hopi Tribe's opposition reveals the improbability of securing approval from all affected tribes. This serves as a profound, if not insurmountable, obstacle to the project's ultimate approval. Moreover, if the Navajo Nation were to oppose the project, Pumped Hydro will face numerous legal and policy barriers that would prevent the Commission from issuing a license, as the project would be located entirely on Navajo Nation lands.

For these reasons, issuing a preliminary permit for the Salt Trail Canyon Project would needlessly sow controversy and unreasonably expend the Commission's limited resources. The Commission should therefore dismiss the preliminary permit application.

BACKGROUND

I. The Little Colorado River

The Little Colorado River's headwaters are in the White Mountains in far eastern Arizona, and the river winds over 300 miles through northern Arizona and the Navajo Nation before carving a deep gorge into the Grand Canyon.² Large stretches of the river often run dry, as only its headwaters and the spring-fed reaches just above the confluence with the Colorado River are perennial.³ But during spring snowmelt and summer storms, the river's often-dry beds can become a raging torrent, carrying as much as eighty times their average daily flow.⁴ Because

² See U.S. Bureau of Reclamation, *Little Colorado River Management Plan* 14 (May 2009), <https://tinyurl.com/ydo4nqp2> (Attach. 1).

³ *Id.* at 16–17.

⁴ See *id.* at 16.

the river is free of dams and reservoirs aside from the stretch near its headwaters, these peak flows are loaded with sediment that pours into the Grand Canyon.⁵ These floods scour and reshape the river channel, which benefits the humpback chub habitat above the confluence.⁶

When it is not flooding, the river flows perennially at the confluence only because of a complex of springs that emerge from a large regional groundwater aquifer in roughly the last dozen miles of the river's course.⁷ These springs contribute approximately half the long-term total flows of the Little Colorado River at the confluence.⁸ The spring water emerges at about 70°F, a temperature that far exceeds the cold, dam-controlled flows of the Colorado River.⁹ As a result, this short stretch of the Little Colorado River is a safe haven for species, such as the humpback chub, that cannot thrive in the mainstem's cold waters.¹⁰ The springs are also the reason for the Little Colorado River's striking turquoise color, due to the water's unusual chemical composition.¹¹

II. Pumped Hydro recently filed preliminary permit applications for five projects with 10,850 MW of collective capacity

Pumped Hydro is a Phoenix, Arizona company that was formed in March 2019.¹² The company has two principal members: Justin Rundle and Steve Irwin.¹³

⁵ *Id.* at 76.

⁶ *Id.* at 105.

⁷ *Id.* at 17.

⁸ *Id.* at 18.

⁹ *Id.* at 17; U.S. Fish & Wildlife Serv., *Species Status Assessment for the Humpback Chub (Gila cypha)* 60 (Mar. 2018), <https://tinyurl.com/y4qqbnwr> [hereinafter *Species Status Assessment*] (Attach. 2).

¹⁰ *Species Status Assessment* at 16, 22 (Attach. 2).

¹¹ U.S. Bureau of Reclamation, *Little Colorado River Management Plan* 17 (Attach. 1).

¹² Ariz. Corp. Comm'n, *Pumped Hydro Storage Articles of Org.* (Attach. 3).

¹³ *Id.*

Just one month after Mr. Rundle and Mr. Irwin formed the company, Pumped Hydro filed its first preliminary permit application for a 2,100 MW project that would be located fifteen miles southwest of Phoenix.¹⁴ Within the first two months of its existence, the company filed preliminary permit applications for five pumped storage projects in Arizona, including the Salt Trail Canyon Project.¹⁵

In total, Pumped Hydro has filed preliminary permit applications for five projects that have a collective capacity of 10,850 MW. In comparison, all other pending pumped storage permit applications across the United States have a collective capacity of 13,890 MW.¹⁶ In addition, the twenty-four pumped storage projects that are currently operating and licensed across the United States have a collective capacity of approximately 16,500 MW.¹⁷ Thus, Pumped Hydro is requesting preliminary permits for projects that represent 44% of the overall pumped storage capacity currently pending before the Commission in permit applications. Moreover, if Pumped Hydro were to construct all five proposed projects, the company would increase the United States' existing licensed pumped storage capacity by approximately 66%.

¹⁴ Project No. 14989-000, Appl. for Prelim. Permit for Gila River Indian Community Pumped Storage Project (Apr. 30, 2019).

¹⁵ Project No. 14995-000, Appl. for Prelim. Permit for San Francisco River Pumped Storage Project (May 14, 2019); Project No. 14994-000, Appl. for Prelim. Permit for Navajo Nation Little Colorado River Pumped Storage Project (May 10, 2019); Project No. 14992-000, Appl. for Prelim. Permit for Navajo Nation Salt Trail Canyon Pumped Storage Project (May 8, 2019); Project No. 14990-000, Appl. for Prelim. Permit for Salt River Project Indian Spring Pumped Storage Project (May 3, 2019); Project No. 14989-000, Appl. for Prelim. Permit for Gila River Indian Community Pumped Storage Project (Apr. 30, 2019).

¹⁶ Fed. Energy Regulatory Comm'n, Pending Preliminary Permits for Pumped Storage Projects (Sept. 1, 2019), <https://tinyurl.com/y4vpbp4h> (Attach. 4).

¹⁷ Fed. Energy Regulatory Comm'n, Pumped Storage Projects, <https://tinyurl.com/y4tm4lne> (last updated Sept. 24, 2019) (Attach. 5).

III. The Salt Trail Canyon Project

The Salt Trail Canyon Project would have a capacity of 1,500 MW.¹⁸ This project would be nearly as large as the 2,000 MW Big Chino Valley Project, which is currently the largest pumped storage project in the nation that has received a preliminary permit.¹⁹ On May 8, 2019, Pumped Hydro submitted the initial preliminary permit application for the Salt Trail Canyon Project. The company submitted a revised application on July 31, 2019, in response to the Commission's request for additional information. The Commission issued its notice accepting the application for filing on October 2, 2019.

Pumped Hydro proposes to construct a 1,000-foot-long and 140-foot-high dam on the Little Colorado River to create the lower reservoir for the proposed project.²⁰ The lower reservoir would cover 150 acres and hold 6,750 acre-feet of water.²¹ The upper reservoir would be located east of the Little Colorado River, and would require construction of a 500-foot-long and 240-foot-high dam.²² The upper reservoir would cover 60 acres and hold 6,000 acre-feet of water.²³ The project would also require the construction of twenty miles of new transmission lines.²⁴

¹⁸ Project No. 14992-000, Rev. Appl. for Prelim. Permit for Navajo Nation Salt Trail Canyon Pumped Storage Project at 7 & Ex. 3-2 (July 31, 2019).

¹⁹ *Big Chino Valley Pumped Storage, LLC*, 161 FERC ¶ 62,235 (2017); Fed. Energy Regulatory Comm'n, Issued Preliminary Permits for Pumped Storage Projects (Sept. 1, 2019), <https://tinyurl.com/y65bynlz> (Attach. 6); William Driscoll, *2 GW of pumped hydro storage proposed for Arizona*, pv magazine (Apr. 19, 2019), <https://tinyurl.com/y4n7ynn4> (Attach. 7).

²⁰ Project No. 14992-000, Rev. Prelim. Permit Appl. at 6.

²¹ *Id.* at 7.

²² *Id.* at 6 & Ex. 3-2.

²³ *Id.* at 7.

²⁴ *Id.* at 7 & Ex. 3-1.

These new dams, reservoirs, and transmission lines would be “located entirely on Navajo Nation lands.”²⁵ Notably, the new dams and reservoirs would be located just a few miles from the boundary of Grand Canyon National Park, although the application does not disclose this fact.

IV. The nearby Little Colorado River Project

The Salt Trail Canyon Project is not the only pumped storage project that Pumped Hydro has proposed in this important and sensitive area. At the same time Pumped Hydro proposed the Salt Trail Canyon Project, it also proposed another pumped storage project just a few miles downstream. The company has named that project the Navajo Nation Little Colorado River Pumped Storage Project (the “Little Colorado River Project”), and it is the subject of a separate preliminary permit application proceeding (Project No. 14994-0000). The Little Colorado River Project would require the construction of two additional dams and reservoirs on the Little Colorado River, approximately a half-mile upstream from the entrance to Grand Canyon National Park.²⁶

V. Impacts to the endangered humpback chub

The humpback chub is one of four Colorado River fish species listed as endangered under the Endangered Species Act (ESA). 59 Fed. Reg. 13,374 (Mar. 21, 1994) (determining critical habitat for the four species); 32 Fed. Reg. 4001 (Mar. 11, 1967) (initially designating the humpback chub as endangered under the ESA’s legal predecessors). The humpback chub is an ancient fish endemic to the warm-water

²⁵ *Id.* at 6.

²⁶ The Conservation Coalition has separately requested intervention in the Little Colorado River Project proceeding, and also opposes a preliminary permit for that project.

stretches of the Colorado River basin.²⁷ Humpback chub live in river canyons characterized by rocky habitat and swift currents, and historically lived in the Colorado, Green, and Yampa rivers.²⁸ Humpback chub were once very abundant in the Grand Canyon.²⁹ But the construction of dams and other diversions throughout the Colorado River basin, along with predation by non-native species and other factors, put the fish on the brink of extinction.³⁰ The construction of Glen Canyon Dam in 1963 just upstream of the Grand Canyon separated the Colorado River into two distinct basins. As a barrier to migration, the dam also separated the chub into two distinct populations. Today, there are four populations of chub upstream of Glen Canyon Dam and one population below the dam.³¹

The largest remaining population of the humpback chub resides in the Lower Colorado River and its confluence with the Colorado River.³² The U.S. Fish and Wildlife Service (FWS) has designated this area—from the lower 8 miles of the Little Colorado River to its confluence with the Colorado River—as critical habitat for this species. 59 Fed. Reg. at 13,398. The Little Colorado River is particularly important to the humpback chub because it is the primary spawning grounds for the species in the Grand Canyon.³³ According to the National Park Service, the humpback chub in the Little Colorado River is “the only known spawning population of humpback chub

²⁷ Species Status Assessment at vi (Attach. 2).

²⁸ *Id.*

²⁹ U.S. Nat’l Park Serv., Humpback Chub (*Gila cypha*), <https://tinyurl.com/y6apmvvo> (last updated Feb. 24, 2015) (Attach. 8).

³⁰ Species Status Assessment at vi (Attach. 2).

³¹ *Id.*

³² U.S. Nat’l Park Serv., Humpback Chub (*Gila cypha*) (Attach. 8); U.S. Fish & Wildlife Serv., *Humpback Chub (Gila cypha) 5-Year Review: Summary and Evaluation* 5 (Mar. 19, 2018), <https://tinyurl.com/y2tnlc2s> (Attach. 9).

³³ Species Status Assessment at 16, 19, 59 (Attach. 2).

in Grand Canyon.”³⁴ The Little Colorado River is particularly well-suited for humpback chub spawning, unlike other waters in the Grand Canyon, because of its diverse canyon rocky habitat, warm temperatures, suitable river flows, and other factors.³⁵

The construction and operation of Glen Canyon Dam is a major cause of the humpback chub’s decline.³⁶ The dam dramatically reduced the Colorado River’s water temperature, rendering it unusable for humpback chub spawning, egg incubation, and larvae development.³⁷ Glen Canyon Dam also altered the Colorado River’s natural flows and reduced sediment levels, which further harmed the species.³⁸ In response, the Department of the Interior has developed a Long-Term Experimental and Management Plan (LTEMP) for Glen Canyon Dam operations.³⁹ The LTEMP is intended to provide a comprehensive framework for managing the dam for the next two decades, so the agency can attempt to fulfill its statutory obligations to conserve the humpback chub and meet other statutory obligations.⁴⁰

The Salt Trail Canyon Project would require construction of a dam and reservoir on the Little Colorado River, in the humpback chub’s critical habitat. This new dam and reservoir would very likely eliminate the spawning grounds for the sole spawning population of humpback chub in the Grand Canyon. In addition, the

³⁴ U.S. Nat’l Park Serv., Humpback Chub (*Gila cypha*) (Attach. 8).

³⁵ Species Status Assessment at vi–viii, 15–18 (Attach. 2).

³⁶ U.S. Fish & Wildlife Serv., *Humpback Chub Recovery Plan* 11–13 (2d. rev. 1990) (Attach. 10).

³⁷ Species Status Assessment at 16, 59 (Attach. 2).

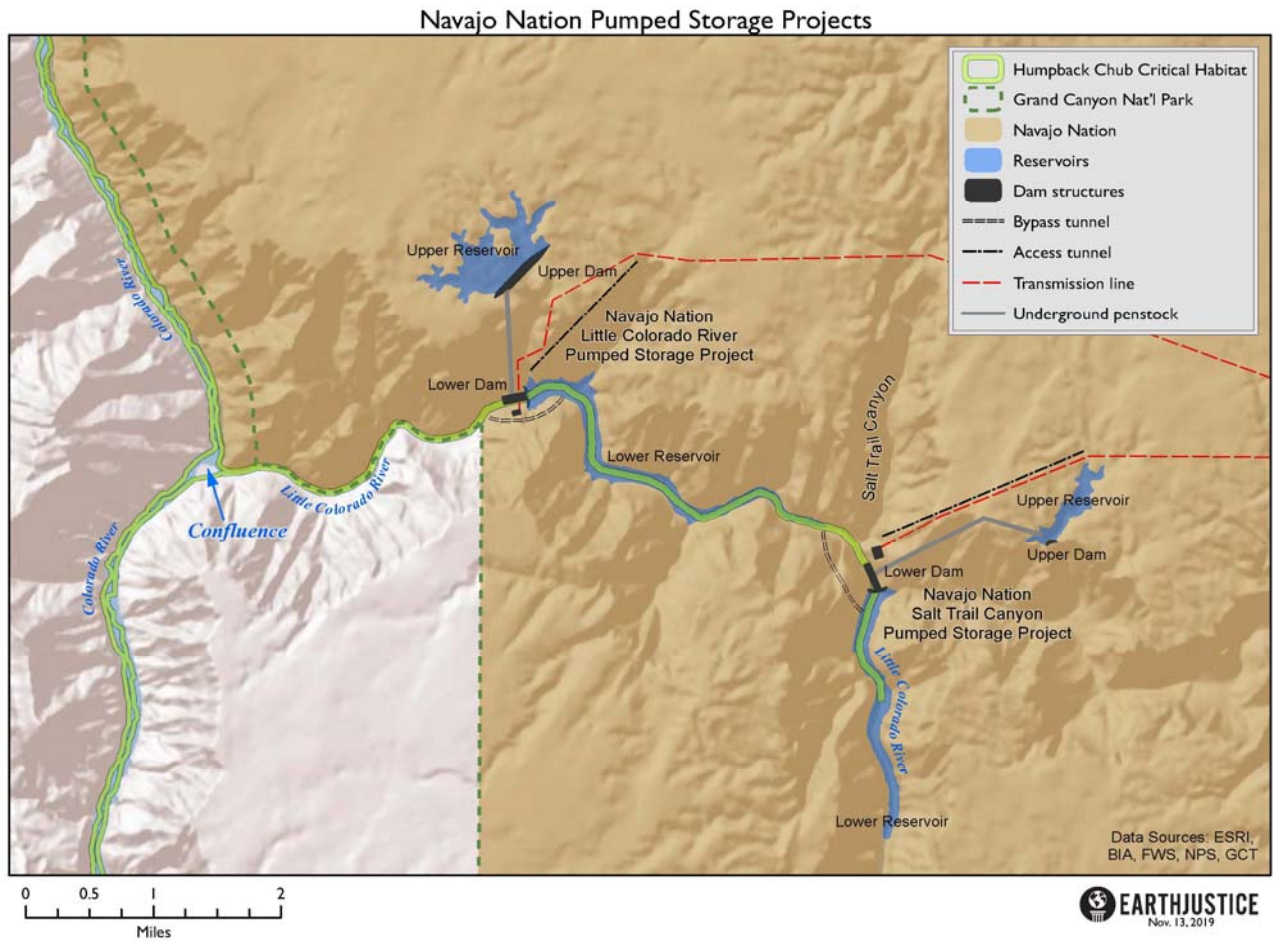
³⁸ U.S. Dep’t of Interior, Bureau of Reclamation & Nat’l Park Serv., *Glen Canyon Dam Long-Term Experimental and Management Plan Evtl. Impact Statement ES-43–ES-44* (Oct. 2016), <https://tinyurl.com/y4cpjchs> [hereinafter LTEMP FEIS] (Attach. 11).

³⁹ *Id.* at ES-1.

⁴⁰ *Id.* at ES-3.

new dams and reservoirs would exacerbate Glen Canyon Dam’s harmful impacts to the humpback chub by further reducing the Colorado River’s temperatures and sediment levels through the Grand Canyon, while also changing the timing and amount of river flows. Notably, a recent news article quoted Mr. Irwin of Pumped Hydro as stating: “The humpback chub is the first major obstacle we see for this.”⁴¹

The following map shows the location of the Salt Trail Canyon and Little Colorado River Projects, and the humpback chub critical habitat.



⁴¹ Felicia Fonseca, *Hydro company proposes to dam Little Colorado River east of Grand Canyon*, L.A. Times (Oct. 8, 2019, 1:20 PM), <https://tinyurl.com/y5hklzkg> (Attach. 12).

VI. Impacts to tribal cultural resources and sacred sites

The Salt Trail Canyon Project would also harm Traditional Cultural Properties and sacred sites of numerous tribes. The Grand Canyon is a sacred place to Native peoples, including the Navajo Nation, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Paiute Indian Tribe of Utah, and the Zuni Tribe of the Zuni Indian Reservation.⁴² The confluence of the Little Colorado and Colorado Rivers is also a sacred place to many Native peoples.⁴³ In addition, the Little Colorado River gorge—where the proposed project would be located—contains numerous sacred sites, such as the Hopi Salt Trail and the location where the Hopi’s ancestors emerged into this world.⁴⁴ Recognizing the importance of this area to numerous tribes and Native peoples, the U.S. Bureau of Reclamation has determined the Grand Canyon and the Little Colorado River gorge are eligible for listing on the National Register of Historic Places as Traditional Cultural Properties.⁴⁵

Although the project would be located on Navajo Nation lands, the Hopi Tribe and Navajo Nation have entered into an Intergovernmental Compact in which each tribe has agreed to maintain and protect religious sites on their lands for the use

⁴² See, e.g., Programmatic Agreement among U.S. Bureau of Reclamation, et al. Regarding the Glen Canyon Dam Operations and Non-Flow Actions Identified in the Long Term Experimental and Management Plan Env'tl. Impact Statement and Record of Decision 1 (May 9, 2017), <https://tinyurl.com/yxed6m3r> [hereinafter LTEMP Programmatic Agreement] (Attach. 13).

⁴³ See, e.g., *id.* at 4–5; Navajo Nation Div. of Nat. Res., About, <https://tinyurl.com/y5atdqr7> (last visited Nov. 15, 2019) (Attach. 14).

⁴⁴ See, e.g., Letter from Clark W. Tenakhongva, Vice Chairman, Hopi Tribe & Timothy L. Nuvangyaoma, Chairman, Hopi Tribe, to Kimberly D. Bose, Secretary, Fed. Energy Regulatory Comm'n 1 (Oct. 23, 2019) [hereinafter Hopi Opposition Letter] (Attach. 15).

⁴⁵ LTEMP Programmatic Agreement at 5 (Attach. 13).

and benefit of the members of both tribes.⁴⁶ The Compact explicitly notes the significance of the Hopi Salt Trail.⁴⁷ The Compact also commits the Navajo Nation to “prohibit[ing] any new man-made improvement, structure, installation, or apparatus” that would be placed near certain confidential religious sites.⁴⁸

The Hopi Tribe has already submitted a letter in this proceeding opposing the project, which highlights these impacts. The Hopi Tribe stated:

Any development within the area of the Confluence will forever compromise the spiritual integrity of this Sacred Place. The Hopi Tribe and many other Southwestern Tribes including the Navajo Nation hold the Grand Canyon as a sacred place of reverence, respect and conservation stewardship. We are aware that the Zuni Tribe emerged from the Grand Canyon. The Havasupai Tribe lives in the Grand Canyon. It is important to preserve and protect these sites from harm and wrongful exploitation.

This proposed development and location is simply unacceptable to Hopi religious leaders, practitioners and the Hopi people as it will significantly and forever adversely impact Hopi sacred places to which Hopis have aboriginal title and use, and title and use through the Intergovernmental Compact between the Navajo Nation and the Hopi Tribe. Hopi religious leaders and the Hopi people in general strongly oppose this proposal.⁴⁹

The Hopi Tribe’s letter also notes that although Pumped Hydro was required to list the tribes the project may impact, the application only listed the Navajo Nation and omitted any mention of the Hopi Tribe, the Zuni Tribe, the Havasupai Tribe, and other tribes.⁵⁰

While Pumped Hydro acknowledged the project would impact the Navajo Nation, the company did not secure the Navajo Nation’s support before filing the

⁴⁶ Navajo Nation Council Res. CS-35-06, 20th Navajo Nation Council, 4th year (2006), <https://tinyurl.com/y496u44s> (Attach. 16).

⁴⁷ *Id.* (Intergovernmental Compact art. 2.2).

⁴⁸ *Id.* (Intergovernmental Compact art. 4.1).

⁴⁹ Hopi Opposition Letter at 2 (Attach. 15).

⁵⁰ *Id.* at 3.

permit application. Navajo Nation President Jonathan Nez has stated that he had not spoken with anyone from Pumped Hydro regarding the proposed project, and a recent news article quoted Mr. Nez as stating:

With any project or proposal that is presented to the Navajo Nation, we weigh the pros and cons in terms of employment opportunities, economic development, water resources, environmental impact and other factors. We are ever mindful that we must respect our environment. The local Navajo communities must be informed, and their voices must be heard.⁵¹

In addition, another recent news article explained that a spokesperson for the Navajo Nation Division of Economic Development stated the tribe has not committed support to the project, as it is not favorable to the tribe and there are concerns about the effects on local communities.⁵²

This is not the first time that a company has proposed to develop a project that would impact the confluence and nearby areas. In 2017, the Navajo Nation rejected a private developer's proposal to construct the Escalade Project on Navajo lands. That proposal involved a large commercial development and gondola that would have been located at the confluence of the Little Colorado and Colorado Rivers. The Navajo Nation Council rejected that proposal in large part due to its impacts to tribal cultural resources.⁵³ A news article quoted then-Navajo Nation President Russell Begaye as stating that “[t]he confluence has huge religious significance to the Navajo people,” and that “[i]t has been attractive to developers,

⁵¹ Fonseca, *Hydro company proposes to dam Little Colorado River* (Attach. 12).

⁵² Ryan Heinsius, *Navajo Nation Hasn't Pursued Little Colorado River Dam Proposals*, KNAU (Oct. 2, 2019), <https://tinyurl.com/y4fbab99> (Attach. 17).

⁵³ Chiara Sottile, *Navajo Nation Votes Down Controversial Hotel and Tram Project at Grand Canyon*, NBC News (Nov. 1, 2017 5:20 PM), <https://tinyurl.com/y8me2jou> (Attach. 18).

but our people and our medicine people have always had stories about the emergence of our people from that area.”⁵⁴

INTERESTS OF INTERVENORS

I. The Conservation Coalition’s interests

The Conservation Coalition’s interests in this permit proceeding are in the public interest pursuant to 18 C.F.R. § 385.214(b)(2)(iii), as described below.

Save the Colorado

Save the Colorado is a grassroots, non-profit 501(c)(3) environmental organization dedicated to the protection and restoration of the Colorado River and its tributaries. Save the Colorado has approximately 20,000 members, supporters, and followers throughout the Colorado River Basin, including within Arizona. Save the Colorado’s mission is to promote the conservation of the Colorado River and its tributaries through science, public education, advocacy, and litigation, by opposing new dams and diversions. Recently, Save the Colorado opposed the Bureau of Reclamation’s management plan for Glen Canyon Dam, which regulates the Colorado River’s flows through the Grand Canyon. *See, e.g.,* Compl., ECF No. 1, *Save the Colo. v. U.S. Dep’t of the Interior*, No. 3:19-cv-08285-MTL (D. Ariz. Oct. 1, 2019). Save the Colorado has actively opposed every proposed new dam, diversion, and pipeline in the Colorado River basin—including in Colorado, Wyoming, and Utah—through litigation and pre-permitting processes.

Grand Canyon Trust

Grand Canyon Trust is a nonprofit corporation with over 3,500 members. The Trust is headquartered in Flagstaff, Arizona and has offices in Utah and

⁵⁴ *Id.*

Colorado. The Trust's mission is to safeguard the wonders of the Grand Canyon and the Colorado Plateau, while supporting the rights of Native peoples. The Trust's advocacy is motivated by a vision for the Colorado Plateau in which wildness, a diversity of plants and animals, clean air, and flowing rivers abound, and where a livable climate endures.

Advocating for the protection of the confluence and of the humpback chub has often been a focal point of the Trust's work to protect the Grand Canyon. In 1992, for example, the Trust worked closely with Senator McCain to secure the passage of the Grand Canyon Protection Act of 1992, which instructed the Secretary of Interior to alter the management of the Glen Canyon Dam to protect the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established. An adaptive management program for the Glen Canyon Dam ensued whose purpose was to adjust the dam's operations to protect downstream resources, including the humpback chub. In the wake of this decision, the Trust spent many years in federal court under the Endangered Species Act advocating for additional adjustments to the dam's operation to avoid jeopardizing the humpback chub and adversely modifying its critical habitat.

In recent years, the Trust has worked in support of local families advocating at the chapter level of the Navajo Nation in opposition to a private developer's proposal to build a gondola and mega-resort at the confluence. In 2017, after more than six years of resistance from local families, the Navajo Nation Council rejected the bill that would have enabled this so-called "Escalade" development to proceed. The Trust continues today to back the efforts of local families to permanently protect the confluence and to support sustainable, culturally appropriate businesses as an alternative to mega-developments like the Escalade.

Living Rivers & Colorado Riverkeeper

Living Rivers & Colorado Riverkeeper is a watershed advocacy organization dedicated to the protection of the Colorado River and the many rivers of the American West. Living Rivers is headquartered in Moab, Utah and is a non-profit 501(c)(3) organization that emphasizes achieving ecological river restoration while balancing human needs. Living Rivers' many supporters and members live throughout the Colorado River Basin, including Arizona. Recently, Living Rivers has opposed the Bureau of Reclamation's management plan for Glen Canyon Dam, which regulates the Colorado River's flows through the Grand Canyon. *Id.*

As noted above, Living Rivers previously filed an individual Motion to Intervene in this proceeding. *See supra* 1 n.1. This Motion to Intervene supplements its earlier motion, and Living Rivers now plans to participate in this proceeding as a member of the Conservation Coalition.

Sierra Club

The Sierra Club is America's largest and most influential grassroots environmental organization, with more than 3.5 million members and supporters. In addition to protecting every person's right to get outdoors and access the healing power of nature, the Sierra Club works to promote clean energy, safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action. The Grand Canyon Chapter of the Sierra Club, representing more than 13,000 members, has a long history of public education and advocacy to protect the Grand Canyon and the water and public land resources in the Colorado River Basin. In recent years, the Sierra Club has worked to change operations of Glen Canyon Dam to benefit the downstream ecosystem, advocated for restoring the Colorado Pikeminnow to the

mainstem of the Colorado, worked to ensure better management of the Colorado River through Grand Canyon National Park, and opposed developments at the confluence of the Colorado and Little Colorado rivers.

Waterkeeper Alliance, Inc.

Waterkeeper Alliance, Inc. is a global nonprofit environmental organization dedicated to protecting and restoring water quality to ensure the world's waters are drinkable, fishable, and swimmable. Waterkeeper Alliance is comprised of more than 300 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, protecting over 2.5 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of approximately 175 U.S. Waterkeeper Member Organizations and Affiliates, which include Living Rivers and other organizations in Utah and Arizona, to preserve and protect waterways. Waterkeeper also represents the collective interests of over 10,000 individual supporting members that live, work, and recreate in and near waterways across the nation, including in Arizona. Waterkeeper, through its Free Flowing Rivers initiative, supports clean and free-flowing rivers and waterways, and opposes new dams and diversions, mitigating dams where there is no other option and removing dams wherever possible. In recent years, Waterkeeper has increasingly engaged in public advocacy, administrative proceedings, and litigation aimed at reducing the water quantity, water quality, and climate change impacts of dam and diversion projects, particularly in the western United States and the Colorado River Basin.

WildEarth Guardians

WildEarth Guardians is a regional non-profit working for 30 years to protect and restore the wildlife, wild places, wild rivers, and health of the American West. With offices throughout the western United States and representing 275,000

members and activists, Guardians seeks to safeguard and restore dynamic flows in western rivers, advocate for western water policy reform, ensure protection of imperiled fish and wildlife, and fight to undam and restore healthy and sustainable aquatic and riparian ecosystems for future generations.

II. The Conservation Coalition's intervention is in the public interest

Intervention by the Conservation Coalition is in the public interest. *See* 18 C.F.R. § 385.214(b)(2)(iii). The Conservation Coalition represents a cross-section of organizations and members that have unique and direct interests in the Little Colorado River, the Colorado River, and the Grand Canyon that the Salt Trail Canyon Project will harm if it proceeds.

The Conservation Coalition organizations have direct and tangible interests in protecting the Little Colorado and Colorado Rivers, and in preserving the wildlife and recreation activities that rely on healthy rivers. Their members use and enjoy the areas affected by the proposed pumped storage project for aesthetic enjoyment, spiritual renewal, and recreation, including rafting, fishing, camping, hiking, photography, wildlife viewing, and enjoyment of the outdoors. Many members rely on these waterways and the nearby lands for their recreational, scientific, educational, cultural, conservation, and economic interests.

The Salt Trail Canyon Project would harm these interests. The project's new dams and reservoirs would irreversibly degrade the ecology of the Little Colorado River, and the fish and wildlife that live in and near the river, especially the humpback chub. The dam across the Little Colorado River would choke the river's sediment supply, which would reduce sediment inflows into the Grand Canyon that maintain its life-sustaining beaches and sandbars. The project would also spoil, if not extinguish, the renowned turquoise color of the river's final miles. In addition,

the dams and reservoirs would also negatively affect the Colorado River's flows through the Grand Canyon, cutting off seasonally high flows that nourish the Canyon's inner gorge. This project would thus directly harm the rivers, national parks, public lands, fish, wildlife, and cultural resources that each organization and its members highly value. No other party can adequately represent these same interests.

In addition, many of the members of the Conservation Coalition have special knowledge of the Commission's preliminary permit proceedings, as they intervened in the Wyco Power and Water preliminary permit proceeding for the Flaming Gorge Pipeline and successfully opposed a preliminary permit for that project (specifically Sierra Club, Save the Colorado, and Living Rivers intervened in the Wyco proceeding). *See Wyco Power & Water, Inc.*, 138 FERC ¶ 62,150 (2012) (denying preliminary permit application). These groups and their members have developed knowledge and relevant experience regarding preliminary permits and hydropower projects that will benefit the public interest in this proceeding.

The Conservation Coalition will actively participate in this preliminary permit process and in any subsequent licensing proceeding to ensure the protection of the Little Colorado and Colorado Rivers, and Grand Canyon National Park. This participation will lead to more informed decision making, develop a more complete record, and be in the public interest. Accordingly, the Conservation Coalition organizations request intervention on behalf of themselves and their members.

LEGAL BACKGROUND

The purpose of the Federal Power Act (FPA) is to promote balanced and responsible hydropower development. The FPA authorizes the Commission to license private hydropower projects, but requires the Commission to weigh the

power generation and developmental goals of a project against impacts to fish, wildlife, recreation, and other resources before issuing a license. 16 U.S.C. § 797(e); *Udall v. Fed. Power Comm'n*, 387 U.S. 428, 450 (1967); *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1191 n.6 (9th Cir. 2000); *Symbiotics, LLC*, 99 FERC ¶ 61,100, at 61,417 (2002).

The FPA also authorizes the Commission to issue preliminary permits for potential hydropower projects. 16 U.S.C. § 798; 18 C.F.R. § 4.80. According to the Commission, the “purpose of a preliminary permit is to encourage hydroelectric development” by providing a permit holder a first-in-time right to file a license application to construct and operate a hydropower project while the permit holder determines the feasibility of the project and prepares the license application. *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at ¶ 4 (2006).

The Commission has “broad discretion” to determine whether to issue a preliminary permit. *Symbiotics, LLC*, 100 FERC ¶ 61,010, at 61,018 (2002); *see also Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects* (Docket No. RM07-08-000), at 3 n.9 (Feb. 15, 2007) (“[N]othing in the FPA requires the Commission to issue a preliminary permit; whether to do so is a matter solely within the Commission’s discretion.”). Although the Commission’s general policy is to defer analysis of a project’s impacts until the later licensing proceedings, the Commission has discretion to deny a preliminary permit application at any time, so long as “it articulates a rational basis for not issuing the permit.” *Wyco Power & Water, Inc.*, 139 FERC ¶ 61,124, at 61,852 (2012); *see also Mt. Hope Waterpower*, 116 FERC ¶ 61,232, at ¶ 4 (“We may, however, make exceptions to established policies if we articulate a rational basis for doing so, and we have recently done so with regard

to issuance of preliminary permits in other proceedings.”). The Commission has exercised this discretion on a number of occasions.

The Commission has routinely dismissed preliminary permit applications if the applicant demonstrates a lack of “fitness” for a license, based on a prior history of delay or noncompliance with Commission orders. *See, e.g., Energie Grp., LLC v. Fed. Energy Regulatory Comm’n*, 511 F.3d 161, 164 (D.C. Cir. 2007) (“In deciding whether to grant a permit, FERC . . . has discretion to consider the fitness of the applicant.”); *Pac. Energy Res., LLC*, 128 FERC ¶ 62,154, at 64,460 (2009) (denying permit application because applicant failed to pursue the specific project at issue with “due diligence and good faith”); *Appalachian Rivers Res. Enhancement, LLC*, 113 FERC ¶ 62,100, at 64,288 (2005) (applicants are generally deemed unfit when there is an “unsatisfactory compliance record as a licensee”); *Ebb Lake Mut. Elec. Co.*, 44 FPC 1160, 1161–62 (1970) (denying permit application when applicant was insufficiently responsive to requests for additional information). As with all denials of preliminary permits, the purpose in evaluating the applicant’s history is to avoid tying-up hydropower sites and wasting the Commission’s valuable staff time and resources. *Pac. Energy Res.*, 128 FERC ¶ 62,154, at 64,460.

In addition, the Commission will dismiss a preliminary permit application when there is a legal bar that would prevent the Commission from granting a license for the project. *See, e.g., Energie Grp.*, 511 F.3d at 164; *Seneca Nation of Indians*, 134 FERC ¶ 62,148, at 64,246 (2011); *Appalachian Rivers Res. Enhancement, LLC*, 113 FERC ¶ 62,100, at 64,288. Similarly, the Commission will deny a permit where the “information already available indicates no license will result.” *Energie Grp.*, 511 F.3d at 164. For example, the Commission properly denied a preliminary

permit when it found a prior environmental analysis for a project was “analogous” to a legal barrier, as the analysis indicated the project was not appropriate for the site and thus no license would likely result. *Symbiotics, L.L.C. v. Fed. Energy Regulatory Comm’n*, 110 F. App’x 76, 81 (10th Cir. 2004).

The Commission will also deny a preliminary permit if the applicant is unlikely to receive the necessary authorizations to develop the project, as “there would be no purpose in issuing a preliminary permit” in those circumstances. *Freedomworks, LLC*, 167 FERC ¶ 62,026 at ¶ 11 (2019); *see also Advanced Hydropower, Inc.*, 160 FERC ¶ 62213, at ¶ 6 (2017) (denying permit where a federal agency had already stated that the proposed project was incompatible with federal purposes); *Symphony Hydro LLC*, 150 FERC ¶ 62,092, at 64,165 (2015) (same); *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210, at ¶¶ 22–25 (2016) (affirming denial of permit where the relevant agency stated the applicant’s proposed use was unacceptable and would not be permitted).

Finally, the Commission has denied preliminary permits where it found that the proposed project—or further study of the proposed project—would be contrary to the public interest. *See, e.g., Stillaquamish River Hydro*, 40 FERC ¶ 62,207, at 63,356 (1987) (proposed project not in the public interest because it would interfere with military communications and threaten national security); *Mt. Hope Waterpower*, 116 FERC ¶ 61,232, at ¶¶ 5, 12, 13, 15–17 (public interest served by denying preliminary permit to allow competition).

ARGUMENT AND STATEMENT OF POSITION

I. The Commission should dismiss Pumped Hydro’s preliminary permit application

The Commission should not issue a preliminary permit for the Salt Trail Canyon Project for two reasons. First, Pumped Hydro lacks the requisite “fitness” for a preliminary permit and it is unlikely to diligently pursue an admittedly speculative project. Second, there are substantial legal and policy barriers in place under the Endangered Species Act and National Historic Preservation Act that make the project unlikely to be licensed. In addition, the project would be located entirely on Navajo Nation lands, and without the Navajo Nation’s support Pumped Hydro cannot obtain a license.

A. Pumped Hydro lacks the requisite “fitness” for a preliminary permit, and the Salt Trail Canyon Project is excessively speculative

The Commission has discretion to dismiss a preliminary permit if the applicant has demonstrated it is unlikely to pursue the project with due diligence and good faith. *See, e.g., Energie Grp.*, 511 F.3d at 164; *Appalachian Rivers Res. Enhancement*, 113 FERC ¶ 62,100, at 64,288; *Pac. Energy Res., LLC*, 128 FERC ¶ 62,154, at 64,460. The Commission can—and should—dismiss a preliminary permit in these circumstances because a permit is not in the public interest and the Commission should not spend its time and resources on speculative and doubtful projects. *Pac. Energy Res., LLC*, 128 FERC ¶ 62,154 at 64,460. Pumped Hydro lacks the requisite “fitness” for a preliminary permit because one of its principal members has a prior history of denied, canceled, and surrendered permits. In addition, the inordinately large volume of the company’s permit applications and

Pumped Hydro’s recent comments in the media further demonstrate that the project is excessively speculative and unlikely to proceed to licensing.

The Commission should not issue a preliminary permit for the Salt Trail Canyon Project because one of Pumped Hydro’s two principal members—Justin Rundle—has a long history of seeking preliminary permits for projects that never proceeded to licensing. The Conservation Coalition is aware of at least twelve instances in the past where Mr. Rundle sought preliminary permits that were ultimately canceled, denied, or surrendered. Table 1 below summarizes these prior preliminary permits.

Table 1: Summary of Mr. Rundle’s Prior Preliminary Permits

	Preliminary Permit Action	Reason for Action	Date of Action
Project No. 14624-000 (Alamo Dam v2) ⁵⁵	Permit Canceled	Failure to submit progress report	May 13, 2015
Project No. 14353-000 (Alamo Dam v1) ⁵⁶	Permit Application Rejected	Failure to provide requested information	March 30, 2012
Project No. 13561-000 (Adler Canyon) ⁵⁷	Permit Surrendered	Large amount of capital and high risk for developing project	January 9, 2012
Project No. 11247-001 (Miss. River Lock & Dam No. 11) ⁵⁸	Permit Canceled	Failure to submit progress report	August 19, 1994
Project No. 11278-001 (Miss. River Lock & Dam no. 15) ⁵⁹	Permit Surrendered	Infeasibility of project	August 11, 1994

⁵⁵ *Alamo Dam Hydro Partners*, 151 FERC ¶ 62,104 (May 13, 2015).

⁵⁶ Letter from Timothy J. Welch, Fed. Energy Regulatory Comm’n, to Justin Rundle, Phoenix Mgmt. LLC (Mar. 30, 2012) (Attach. 19).

⁵⁷ Letter from Justin Rundle, President, Phoenix Mgmt. LLC, to Kimberly D. Bose, Secretary, Fed. Energy Regulatory Comm’n (Jan. 9, 2012) (Attach. 20).

⁵⁸ *Iowa Hydropower Dev. Corp.*, Project No. 11247-001, Order Canceling Prelim. Permit (Aug. 19, 1994) (Attach. 21).

⁵⁹ *Iowa Hydropower Dev. Corp.*, Project No. 11278-001, Notice of Surrender of Prelim. Permit (Aug. 11, 1994) (Attach. 22).

Project No. 11245-001 (Miss. River Lock & Dam No. 9) ⁶⁰	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 11246-001 (Miss. River Lock & Dam No. 10) ⁶¹	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 11248-001 (Miss. River Lock & Dam No. 12) ⁶²	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 11249-001 (Miss. River Lock & Dam No. 13) ⁶³	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 11250-001 (Miss. River Lock & Dam No. 16) ⁶⁴	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 11251-001 (Miss. River Lock & Dam No. 18) ⁶⁵	Permit Surrendered	Infeasibility of project	May 28, 1993
Project No. 10747-001 (Rathbun) ⁶⁶	Permit Canceled	Failure to submit progress report	March 19, 1990

This extensive history of noncompliance with Commission orders and a lack of due diligence for Mr. Rundle’s previous projects are evidence that his latest company, Pumped Hydro, is an “unfit” applicant for a preliminary permit. *See, e.g., Energie Grp.*, 511 F.3d at 164; *Appalachian Rivers Res. Enhancement*, 113 FERC ¶ 62,100, at 64,288.

⁶⁰ *Iowa Hydropower Dev. Corp.*, Project No. 11245-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 23).

⁶¹ *Iowa Hydropower Dev. Corp.*, Project No. 11246-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 24).

⁶² *Iowa Hydropower Dev. Corp.*, Project No. 11248-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 25).

⁶³ *Iowa Hydropower Dev. Corp.*, Project No. 11249-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 26).

⁶⁴ *Iowa Hydropower Dev. Corp.*, Project No. 11250-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 27).

⁶⁵ *Iowa Hydropower Dev. Corp.*, Project No. 11251-001, Notice of Surrender of Prelim. Permit (May 28, 1993) (Attach. 28).

⁶⁶ *Iowa Hydropower Dev. Corp.*, Project No. 10747-001, Order Canceling Prelim. Permit (Mar. 19, 1990) (Attach. 29).

Pumped Hydro’s recent actions and statements further demonstrate it is an “unfit” applicant because it is unlikely to diligently pursue the Salt Trail Canyon Project. Within two months of its existence, Pumped Hydro filed preliminary permit applications for five pumped storage projects in Arizona that have a collective capacity of 10,850 MW. For perspective, all of the other pumped storage permit applications currently pending before the Commission have a collective capacity of 13,890 MW.⁶⁷ Moreover, all of the currently-operating and licensed pumped storage projects across the United States have a collective capacity of approximately 16,500 MW.⁶⁸ The odds are exceedingly small that this two-person Arizona company would single-handedly increase the United States’ existing licensed pumped storage capacity by approximately 66%.

Moreover, Pumped Hydro’s other principal member—Steve Irwin—has made recent statements to the media that cast further doubt on the company’s intention to diligently pursue the Salt Trail Canyon Project. In response to criticisms of this project and the nearby Little Colorado River Project, Mr. Irwin reportedly stated that “it’s unlikely both facilities will be built on the Navajo Nation.”⁶⁹ Thus, according to Mr. Irwin’s own statements, there is a substantial likelihood that the company will not move forward with the Salt Trail Canyon Project that is at issue here. Additionally, Mr. Irwin reportedly stated that even if the company does move forward with one of the projects, “[c]onstruction wouldn’t start for about 10 years.”⁷⁰

⁶⁷ Fed. Energy Regulatory Comm’n, Pending Preliminary Permits for Pumped Storage Projects (Attach. 4).

⁶⁸ Fed. Energy Regulatory Comm’n, Pumped Storage Projects (Attach. 5).

⁶⁹ Fonseca, *Hydro company proposes to dam Little Colorado* (emphasis added) (Attach. 12).

⁷⁰ *Id.*

Thus, even if Pumped Hydro were to move forward and seek a license for the Salt Trail Canyon Project, its own statements indicate it does not plan to expeditiously pursue the project. When an applicant essentially concedes shortly after filing a permit application that there is a 50% chance it will not construct the project and that the project would not be constructed within the next decade, the Commission should dismiss the permit and not “continue to direct staff resources to [the] project[].” See *Pac. Energy Res., LLC*, 128 FERC ¶ 62,154 at 64,460; see also *In re Wilson*, 28 FPC 571, 575 (1962) (“Under an application for a preliminary permit, the Commission is concerned with the general fitness of the applicant and with his good faith and purpose to prosecute his declared intent and plans diligently . . .”). The circumstances here are sufficient to find that Pumped Hydro is “unfit” for the permit it seeks, and the Commission should accordingly dismiss the permit application.

B. The Salt Trail Canyon Project is unlikely to ever be licensed

The Commission will also dismiss a preliminary permit application if the project is unlikely to receive a license. This may occur if there is a legal bar or other analogous barrier that would prevent the Commission from granting a license, or if the applicant is unlikely to receive the necessary authorizations for the project. See, e.g., *Energie Grp.*, 511 F.3d at 164; *Freedomworks*, 167 FERC ¶ 62,026 at ¶ 11.

Pumped Hydro is unlikely to receive a license for the Salt Trail Canyon Project due to the project’s impacts to the endangered humpback chub and its critical habitat, and the protections the Endangered Species Act provides to the humpback chub. In addition, the Hopi Tribe’s opposition to the project shows that its approval under the National Historic Preservation Act is not forthcoming, and this is a matter the Commission must also navigate with all other impacted tribes prior to issuing a license. Moreover, because the project would be located entirely on

Navajo Nation lands, it cannot proceed absent the Navajo Nation's support. Because Pumped Hydro is unlikely to receive a license for this project, the Commission should not issue a preliminary permit.

1. The project is inconsistent with applicable Endangered Species Act protections for the humpback chub

The ESA prohibits the Commission from taking actions that are likely to jeopardize the continued existence of the humpback chub or result in the destruction or adverse modification of its critical habitat. The Salt Trail Canyon Project is inconsistent with these ESA obligations. The project would harm the humpback chub by constructing new dams and reservoirs in the humpback chub's designated critical habitat and at its primary spawning grounds in the Grand Canyon. In addition, the project would interfere with Reclamation's management of Colorado River flows from Glen Canyon Dam, further hindering humpback chub recovery. It is therefore unlikely the Commission could license the project.

a. The Commission cannot take actions that jeopardize humpback chub recovery or result in adverse modification of its critical habitat

The FWS has listed the humpback chub as endangered. 59 Fed. Reg. 13,374. Under Section 7(a)(2) of the ESA, the Commission must ensure its actions are "not likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). Jeopardy results when an action is reasonably expected, "directly or indirectly," to "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Destruction or adverse modification means "a direct or

indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” *Id.*

To comply with the ESA, the Commission must consult with FWS before undertaking an action—including licensing a hydropower project—that “may affect” the humpback chub or its critical habitat. 16 U.S.C. § 1536(a)(2), (a)(3); 50 C.F.R. § 402.14(a). For actions that are “major construction activities,” such as the Salt Trail Canyon Project, a biological assessment (BA) is required. 50 C.F.R. § 402.12(b). The BA “shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action.” *Id.* § 402.12(a). Unless the Commission determines, as a result of the BA or as a result of an informal consultation with FWS, that its action is “not likely to adversely affect” the species or its critical habitat, the Commission must initiate formal consultation. *Id.* § 402.14(a), (b).

Following formal consultation, FWS issues a biological opinion determining whether the effects of the proposed action, taken together with its cumulative effects, are “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(g)(4). The biological opinion will find one of the following: (1) that the action is not likely to cause jeopardy or adverse modification; (2) that the action is likely to cause jeopardy or adverse modification, but such jeopardy or adverse modification can be avoided by implementing reasonable and prudent alternatives to the proposed action; or (3) that the action is likely to cause jeopardy or adverse modification, and no reasonable and prudent alternatives are available. *Id.* § 402.14(h)(1), (h)(2). Where FWS issues a

jeopardy or adverse modification biological opinion without reasonable and prudent alternatives, it is exceedingly unlikely an agency can license the project.

b. The project would harm the humpback chub's critical habitat and primary spawning grounds in the Grand Canyon

The Bureau of Reclamation has determined that “construction of a large dam and reservoir in the middle to lower reaches of the [Little Colorado River]” would be “[a] major threat to the humpback chub.”⁷¹ Pumped Hydro proposes to construct exactly that.

The lower Little Colorado River is “an important stream for the Humpback Chub,”⁷² and its unique physical environment is “vital to sustaining the humpback chub population.”⁷³ While humpback chub were once abundant in the Grand Canyon, the construction of dams and other projects fundamentally altered the physical environment of this region and were a major factor leading to the humpback chub's decline.⁷⁴ The largest remaining humpback chub population resides in the Lower Colorado River and its confluence with the Colorado River.⁷⁵ FWS has designated this area as critical habitat. 59 Fed. Reg. at 13,398.

The Little Colorado River is particularly important to the humpback chub because it is the primary spawning grounds for the species in the Grand Canyon.⁷⁶

⁷¹ U.S. Bureau of Reclamation, *Little Colorado River Management Plan* xii (Attach. 1).

⁷² Species Status Assessment at 64 (Attach. 2).

⁷³ U.S. Bureau of Reclamation, *Little Colorado River Management Plan* xi (Attach. 1).

⁷⁴ U.S. Nat'l Park Serv., Humpback Chub (*Gila cypha*) (Attach. 8); U.S. Fish & Wildlife Serv., *Humpback Chub Recovery Plan* 11–13 (Attach. 10).

⁷⁵ U.S. Nat'l Park Serv., Humpback Chub (*Gila cypha*) (Attach. 8); U.S. Fish & Wildlife Serv., *Humpback Chub (Gila cypha) 5-Year Review: Summary and Evaluation* 5 (Attach. 9).

⁷⁶ Species Status Assessment at 16, 19, 59 (Attach. 2).

According to the National Park Service, the humpback chub in the Little Colorado River is “the only known spawning population of humpback chub in Grand Canyon.”⁷⁷ Historically, humpback chub spawning likely occurred in the mainstem Colorado River.⁷⁸ But cold releases from the Glen Canyon dam starting in the 1960s have precluded spawning in the mainstem.⁷⁹ Likewise, spawning historically may have also taken place in large tributaries of the Grand Canyon, but reduced flows and increased predation have made these waters unusable and inaccessible.⁸⁰ Today, the Little Colorado River is particularly suited for humpback chub spawning, unlike other waters in the Grand Canyon, because of its diverse canyon rocky habitat, warm water temperature, suitable river flows, and other factors.⁸¹

In addition to spawning, the Little Colorado River is critical for the egg, larvae, and juvenile life stages of the humpback chub. Egg incubation and larval development of humpback chub in the Grand Canyon also occur primarily in the Little Colorado River.⁸² The majority of larvae in the Grand Canyon are produced and remain upstream in the lower 8 miles of the Little Colorado River, which is the area designated as critical habitat.⁸³ Larvae that drift further downstream into the mainstem Colorado River likely die due to the colder temperatures there.⁸⁴ Similarly, warm temperature is an important factor for the growth and survival of

⁷⁷ U.S. Nat’l Park Serv., Humpback Chub (*Gila cypha*) (Attach. 8).

⁷⁸ Species Status Assessment at 16 (Attach. 2).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See, e.g., id.* at vi–viii, 15–18.

⁸² *Id.* at 59.

⁸³ *Id.* at 20.

⁸⁴ *Id.*

juvenile humpback chub.⁸⁵ The seasonally-warmed Little Colorado River suits juveniles better than other waters in the Grand Canyon.⁸⁶

The Salt Trail Canyon Project would adversely alter this critical habitat. As the map on page 10 shows, the project's proposed lower dam and reservoir would be constructed in the designated critical habitat and at the primary spawning grounds in the lower Little Colorado River. This would necessarily change the physical environment of the Little Colorado River, the Colorado River, and the Grand Canyon. Humpback chub in the Grand Canyon need the warm temperature, diverse rocky habitat, river flows, and other unique factors of the Little Colorado River for at least four out of seven of its life stages.⁸⁷ Yet this project would alter the timing and amount of river flows throughout this area.⁸⁸ The project would also reduce water temperature and sediment levels—similar to how Glen Canyon Dam has reduced the temperature and sediment levels of the Colorado River, leading to humpback chub decline. In sum, the construction of the project would mean the largest remaining population of the endangered humpback chub in the United States would lose its critical habitat and primary spawning, egg incubation, and larvae development location.

Under these circumstances, the Salt Trail Canyon Project is highly unlikely to pass muster under the ESA. It is beyond doubt that construction of a 140-foot-high dam and 150 acre reservoir in the humpback chub's critical habitat would

⁸⁵ *Id.* at 23–24.

⁸⁶ *Id.*

⁸⁷ *See id.* at 15. The life stages of the humpback chub are spawning, eggs, larvae, age-0, juveniles, sub-adults, and adults.

⁸⁸ *See* U.S. Bureau of Reclamation, *Little Colorado River Management Plan* xi (“Streamflow reduction in the lower [Little Colorado River] is considered a serious threat to the humpback chub.”) (Attach. 1).

adversely modify that habitat. And given how crucial that habitat is to the humpback chub's survival, it is implausible that the project would not also cause jeopardy to the fish. 50 C.F.R. §§ 402.12(a), 402.14(g)(4). No reasonable and prudent alternatives should exist for a project that would eliminate the primary spawning grounds for the largest remaining humpback chub population. *Id.* § 402.14(h)(2). The construction of dams on the Colorado River and its tributaries are a primary cause of the humpback chub's decline, and the new dams and reservoirs required for this project would magnify the factors that led the humpback chub to become endangered in the first place. Because the project will not be able to proceed under the ESA, the Commission will not be able to issue a license for the project. The Commission therefore has a rational basis to deny the requested preliminary permit. *See Wyco Power & Water*, 139 FERC ¶ 61,124, at ¶ 61,852.

c. The project will interfere with the Bureau of Reclamation's management of flows from Glen Canyon Dam, which is a key component of humpback chub recovery

The Commission is also unlikely to issue a license because the Salt Trail Canyon Project would disturb the Bureau of Reclamation's management of Glen Canyon Dam. The construction and operation of Glen Canyon Dam is a major cause of the loss of humpback chub habitat and its decline.⁸⁹ The dam dramatically reduced the Colorado River's water temperature, rendering it unusable for humpback chub spawning, egg incubation, and larvae development.⁹⁰ Glen Canyon

⁸⁹ U.S. Fish & Wildlife Serv., *Humpback Chub Recovery Plan* 11 (Attach. 10).

⁹⁰ Species Status Assessment at 16, 59 (Attach. 2).

Dam also altered the Colorado River's natural flows and reduced sediment levels, which further harmed the species.⁹¹

In response to this and other adverse environmental impacts of Glen Canyon Dam, the Department of the Interior has developed a Long-Term Experimental and Management Plan (LTEMP) for its Glen Canyon Dam operations.⁹² The purpose of the LTEMP is to provide a comprehensive framework for managing the dam for the next two decades, so the agency can attempt to fulfill its statutory obligations to conserve listed species under the ESA and meet other statutory obligations.⁹³

An important objective of the LTEMP is to “[m]eet humpback chub . . . recovery goals, including maintaining a self-sustaining population, spawning habitat, and aggregations in the Colorado River and its tributaries below the Glen Canyon Dam.”⁹⁴ The LTEMP recognizes that “[m]aintain[ing] spawning habitat for humpback chub in the Lower Little Colorado River” is vital to reaching this objective.⁹⁵ In developing the LTEMP, the agency conducted Section 7 consultations with FWS, and analyzed related biological opinions and environmental impact statements.⁹⁶ The implementation of the LTEMP involves Reclamation's complex management of flow releases from Glen Canyon Dam, in an attempt to minimize impacts on canyon resources, including humpback chub habitat.⁹⁷ Because the dam also supplies hydropower, these adjustments affect its power output.

⁹¹ LTEMP FEIS at ES-43–ES-44 (Attach. 11).

⁹² *Id.* at ES-1.

⁹³ *Id.* at ES-3.

⁹⁴ *Id.* at ES-5.

⁹⁵ U.S. Fish & Wildlife Serv., *Biological Op. for the Glen Canyon Dam Long-Term Experimental and Management Plan, Coconino County, Arizona* 40 (Nov. 28, 2016), <https://tinyurl.com/tgeqkqj> (Attach. 30).

⁹⁶ LTEMP FEIS at ES-11–ES-17, ES-20, ES-40 (Attach. 11).

⁹⁷ *Id.* at ES-1.

The Salt Trail Canyon Project's new dams and reservoirs would necessarily influence the water temperature, sediment levels, river flows, and other vital components of the ecosystem in the Grand Canyon's inner gorge. This would exacerbate the current, already harmful impacts of Glen Canyon Dam on the humpback chub. This further shows that a determination of no jeopardy and no adverse modification is highly improbable. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12(a), 402.14(g)(4).

The new dams and reservoirs would also upend Reclamation's efforts to encourage humpback chub recovery, and consequently would pit the project's hydropower output against that of Glen Canyon Dam. Because the construction of the project would influence and alter water flows in the region, including in the downstream Colorado River, Reclamation would have to reconsider how it manages water releases from Glen Canyon Dam. It is hard to imagine that the project's significant adverse impacts to humpback chub would not force Reclamation to reexamine the LTEMP and adjust the operation of Glen Canyon Dam to compensate for those harms. These adjustments would inevitably affect the dam's power output. In short, if the Commission licenses this project, Reclamation might have to amend the LTEMP, or even develop a new plan.

The federal government has spent decades attempting to reduce the damage caused by Glen Canyon Dam and recover the humpback chub from the brink of extinction.⁹⁸ Licensing a project that would worsen Glen Canyon Dam's effects, and further jeopardize the species, contradicts these efforts and is inconsistent with the

⁹⁸ U.S. Fish & Wildlife Serv., *Humpback Chub Recovery Plan* 14–16 (Attach. 10).

ESA. It would also jeopardize the LTEMP, putting the Salt Trail Canyon Project's power production in direct conflict with the power output of Glen Canyon Dam. This conflict would not be in the public interest and would violate the Federal Power Act's admonition to ensure that the projects the Commission licenses are "best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development." 16 U.S.C. § 803(a)(1) (emphasis added). The Commission should dismiss the preliminary permit application.

2. The Hopi Tribe's objections stand in the project's way under the National Historic Preservation Act

The Hopi Tribe has objected to the Salt Trail Canyon Project because it would harm tribal Traditional Cultural Properties protected by the National Historic Preservation Act.⁹⁹ Traditional Cultural Properties are properties eligible for inclusion in the National Register of Historic Places because of their association with cultural practices or beliefs of a living community that are (1) rooted in that community's history, and (2) important in maintaining the continuing cultural identity of the community.¹⁰⁰ As the Bureau of Reclamation has recognized, the Grand Canyon region and the lower gorge of the Little Colorado River are Traditional Cultural Properties.¹⁰¹ The Grand Canyon is sacred to the Hopi Tribe, Navajo Nation, and other tribes.¹⁰² As Reclamation noted, Native peoples continue to maintain a cultural and spiritual connection to the Grand Canyon, and it

⁹⁹ Hopi Opposition Letter at 1 (Attach. 15).

¹⁰⁰ Patricia L. Parker & Thomas F. King, U.S. Nat'l Park Serv., *Nat'l Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* 1 (rev. 1998) (Attach. 31); *see also* 36 C.F.R. § 60.4 (listing criteria applied to evaluate properties for the National Register).

¹⁰¹ LTEMP Programmatic Agreement at 5 (Attach. 13).

¹⁰² *See, e.g., id.* at 1.

continues to be an integral part of their respective individual and collective cultural identity and way of life.¹⁰³ In addition, the area of the Little Colorado River gorge where Pumped Hydro plans to build the project contains numerous historically and culturally important sites, such as the Hopi Salt Trail and the location where the Hopi's ancestors emerged into this world.¹⁰⁴

Under Section 106 of the National Historic Preservation Act, the Commission must consider the impact of its future actions on these Traditional Cultural Properties before issuing a license. 54 U.S.C. § 306108; *City of Tacoma, Wash. v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 69 (D.C. Cir. 2006). The Commission must first consult with impacted tribes and relevant tribal historic preservation officers to identify all historic properties potentially affected by the license. 36 C.F.R. §§ 800.3, 800.4. Taking the impacted tribes' views into account, the Commission must identify reasonably foreseeable "adverse effects," which are defined as any impacts that may directly or indirectly alter any of the characteristics of a historic property eligible for listing on the National Register of Historic Places in a manner that would diminish the integrity of the property. *Id.* § 800.5(a). After identifying adverse effects, the Commission must continue to consult with impacted tribes and tribal historic preservation officers, and seek ways to avoid, minimize, or mitigate the adverse effects. *Id.* § 800.6(a), (b). Where, as here, the license would be issued to a project occurring on or affecting Traditional Cultural Properties on tribal lands, resolution of the adverse effects must involve approval from a tribal historic preservation officer. *Id.* § 800.6(b), (c).

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.,* Hopi Opposition Letter at 1 (Attach. 15).

Here, the Commission would have to consult with the Hopi Tribe, the Navajo Nation, and any other impacted tribes that wish to participate in the consultation process. The Hopi Tribe has submitted a letter in this proceeding that “strongly oppose[s]” the Salt Trail Canyon Project.¹⁰⁵ The Hopi Tribe explained that “any development within the area of the Confluence will forever compromise the spiritual integrity of this Sacred Place.”¹⁰⁶ The Hopi Tribe also stated that “[t]his proposed development and location is simply unacceptable to Hopi religious leaders, practitioners and the Hopi people as it will significantly and forever adversely impact Hopi sacred places,” and “Hopi religious leaders and the Hopi people in general strongly oppose this proposal.”¹⁰⁷

The Hopi Tribe’s opposition to this project that would be located on Navajo Nation lands is particularly significant because the Hopi Tribe and Navajo Nation have entered into an Intergovernmental Compact in which each tribe has agreed to maintain and protect religious sites on their lands for the use and benefit of the members of both tribes.¹⁰⁸ The Compact explicitly notes the significance of the Hopi Salt Trail, which is located near the proposed pumped storage project.¹⁰⁹ The Compact also commits the Navajo Nation to “prohibit[ing] any new man-made improvement, structure, installation, or apparatus” that would be placed near certain confidential religious sites.”¹¹⁰

¹⁰⁵ Hopi Opposition Letter at 3 (Attach. 15).

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.*

¹⁰⁸ Navajo Nation Council Res. CS-35-06 (Attach. 16).

¹⁰⁹ *Id.* (Intergovernmental Compact art. 2.2).

¹¹⁰ *Id.* (Intergovernmental Compact art. 4.1).

To license the project, the Commission must seek the Hopi Tribe's agreement to allow adverse impacts to Traditional Cultural Properties. Given the Hopi Tribe's opposition to the project due to these impacts, it appears highly unlikely the tribe will agree. The Commission must also seek approval from all other tribes that wish to consult under the National Historic Preservation Act. The improbability of resolving the Hopi Tribe's objections and any others raised during the consultation process stands as a serious, if not insurmountable, impediment to Pumped Hydro's ability to obtain a license.

3. The project cannot proceed without the Navajo Nation's support

Because the Salt Trail Canyon Project would be located entirely on Navajo Nation lands, the project cannot proceed without the Navajo Nation's political and legal support. If the Navajo Nation does not support or approve of this project that would be located entirely on its lands, there are at least three additional reasons why the company would be unlikely to obtain a license.

First, if the Navajo Nation does not support the project, it could prevent or limit Pumped Hydro's ability to conduct feasibility studies—which would defeat the purpose of issuing a preliminary permit. *Freedomworks*, 167 FERC ¶ 62,026 at ¶ 11. The purpose of a preliminary permit is to provide a permit holder with a first-in-time right to file a license application while studying a project's feasibility. *Renewable Energy Aggregators*, 168 FERC ¶ 62,143, at ¶ 12 (2019). A preliminary permit “grants no land-disturbing or other property rights.” *Id.* Accordingly, the Commission makes it clear that 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.” *Id.* at ¶ 12 n.9; *see also Freedomworks*, 167 FERC ¶ 62,026 at ¶¶ 10–11 (dismissing permit application when the U.S. Forest Service denied the applicant’s request to enter its lands to conduct feasibility studies). Feasibility studies for a project that would require new dams and reservoirs can involve core bore drilling and other intensive land-disturbing activities. *See, e.g., Freedomworks*, 167 FERC ¶ 62,026 at ¶¶ 7–8. The Navajo Nation could therefore deny Pumped Hydro access to its lands to study the project, or place conditions on that access. Under either scenario, the company’s ability to conduct the necessary feasibility studies would be substantially diminished without Navajo Nation support.

Second, the Navajo Nation could deny or place conditions on the Clean Water Act 401 certification for the project. 33 U.S.C. § 1341(a)(1) (requiring a 401 certification for a “Federal license or permit” for a project that “may result in any discharge into . . . navigable waters”). The Navajo Nation administers the Clean Water Act on its lands, and thus the Navajo Nation would issue the 401 certification for this project.¹¹¹ Although this 401 certification authority “is not unbounded,” the Navajo Nation has relatively broad authority “to place restrictions on the activity as a whole” to ensure a project does not undermine the Navajo Nation’s clean water goals. *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 712 (1994); *see also S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 386 (2006) (“State certifications under § 401 are essential in the scheme to preserve state authority to address [a] broad range of pollution . . .”). If the Salt Trail Canyon Project would violate applicable water quality standards, the Navajo Nation could

¹¹¹ *See, e.g.,* U.S. Env’tl. Prot. Agency, Water Quality Standards Regulations: Navajo Nation, <https://tinyurl.com/yxvf6lxc> (last visited Nov. 15, 2019) (Attach. 32); 4 Navajo Nation Code § 1319 (codifying Navajo Nation’s 401 certification authority).

deny a 401 certification for the project. *See, e.g., Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d Cir. 2017) (affirming New York's denial of a 401 certification for a natural gas pipeline); *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008) (affirming Connecticut's denial of a 401 certification for a natural gas pipeline). Alternatively, the Navajo Nation could place conditions on the project that it "deems necessary or desirable with respect to the discharge activity." 40 C.F.R. § 121.2(a)(4).

Third, the Secretary of the Interior must ensure the project does not harm the Navajo Nation. Under section 4(e) of the FPA, the Commission may only license hydropower projects on tribal reservations subject to the conditions imposed by the Secretary of the Interior that are "deem[ed] necessary for the adequate protection and utilization of such reservation." 16 U.S.C. § 797(e). To discharge the United States' trustee obligations, the Secretary of the Interior must impose conditions on the Salt Trail Canyon Project that are necessary to protect the Navajo Nation's lands, waters, and people. *See generally Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144 (9th Cir. 2017). The Commission must accept those conditions when it issues a license for the project. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984); *City of Tacoma*, 460 F.3d at 65.

The Commission should not issue a preliminary permit because Pumped Hydro has not secured the support of the Navajo Nation, on whose lands the project would be built. Without the Navajo Nation's support, there are serious questions regarding whether Pumped Hydro could possibly do the work necessary to submit a license application during the time when the preliminary permit would be in effect, and whether a license could ever be issued. The Commission should therefore dismiss the preliminary permit application.

II. Alternatively, the Commission should require Pumped Hydro to conduct various studies on the project and allow the Conservation Coalition to participate in study development

If the Commission grants a preliminary permit for the Salt Trail Canyon Project—which it should not do—the Conservation Coalition requests that the Commission require Pumped Hydro to conduct studies that address, at a minimum, the issues described below. Also, the Conservation Coalition members request that the Commission allow them and all other parties and stakeholders to actively participate in the design and review of all studies.

1. If the project is constructed, how would the project impact humpback chub spawning grounds in and near the Little Colorado River?
2. If the project is constructed, how would the project affect downstream temperatures in the Little Colorado River and Colorado River?
3. If the project is constructed, how would the project affect sediment levels and turbidity in the Little Colorado River and Colorado River?
4. If the project is constructed, how would the project impact annual, monthly, weekly, and daily stream flows in the Little Colorado River and Colorado River?
5. If the project is constructed, how would it affect the Bureau of Reclamation's Long Term Experimental and Management Plan for Glen Canyon Dam releases?
6. What tribal cultural resources and sacred sites would be affected by the project (recognizing that this data may be confidential)?
7. If the project is constructed, what evaporative losses would occur at the two new reservoirs? To what extent would these evaporative losses exacerbate future water shortages in the Colorado River basin?
8. How will climate change impact future Colorado River flows? To what extent will the Little Colorado Project exacerbate future water shortages in the Colorado River basin?
9. Can Pumped Hydro obtain rights to the water necessary for the project? If so, on what legal basis will Pumped Hydro obtain the water rights? Would such diversion and appropriation comply with the requirements of Arizona state water law?

10. What is the “purpose and need” for this project? How would the price of energy from the project compare to the price of battery storage in Arizona today, and in the future?

SERVICE

The Conservation Coalition requests the Commission add the undersigned counsel at Earthjustice to the service list for this proceeding.

CONCLUSION

The Conservation Coalition requests the Commission grant its motion to intervene and dismiss Pumped Hydro’s preliminary permit application for the Salt Trail Canyon Project. Pumped Hydro lacks the requisite “fitness” for a preliminary permit because it is unlikely to diligently pursue this excessively speculative project. This project is also not in the public interest and a license is unlikely to result.

Respectfully submitted November 18, 2019.

/s/Michael Hiatt

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CERTIFICATE OF SERVICE

I hereby certify that in accordance with 18 C.F.R. § 385.2010, I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated November 18, 2019.

/s/ Michael Hiatt

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