



United States Department of the Interior  
BUREAU OF INDIAN AFFAIRS  
Eastern Oklahoma Region  
Eastern Oklahoma Regional Office  
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Debbie-Anne A. Reese, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE, Room 1A  
Washington, DC 20426

Re: Bureau of Indian Affairs Comments on the Pre-Application Document and Scoping Document 1 and Study Requests

Dear Secretary Reese:

Pursuant to 18 C.F.R. § 5.9(a), the United States Department of the Interior, Bureau of Indian Affairs, Eastern Oklahoma Region ("Bureau"), submits the following comments on the Pre-Application Document ("PAD") and Scoping Document 1 and study requests.

### **COMMENTS**

The Bureau exercises authorities and responsibilities of the Secretary under the Federal Power Act, including the development and imposition of conditions on licenses granted by the Federal Energy Regulatory Commission ("FERC") deemed necessary for the adequate protection and utilization of Indian reservations, tribal lands, and Indian trust resources. The Pushmataha County Pumped Storage Hydroelectric Project ("Project") proposed by Southeast Oklahoma Power Corporation ("Applicant") is located within the exterior boundaries of the Choctaw Nation of Oklahoma Reservation. The Project's proposed pumped storage site is located near tribal trust lands, as well as trust and restricted fee allotments. The Project's proposed transmission lines would also be located near or actually cross tribal trust lands and trust/restricted allotments.

### **Water Rights Studies**

#### ***Groundwater***

Applicant has proposed a groundwater feasibility study although Applicant has suggested that there will be no groundwater used. Although groundwater feasibility should be studied to verify Applicant's claim that it will not require groundwater, the groundwater study should also include the *effects* on groundwater (quantity and quality) due to Project construction and operations if a

license were granted. For example, the Applicant should be required to study the effects on groundwater of the construction of the reservoirs and Project equipment, including any effects of dewatering. As explained with respect to surface water and the Bureau's requested Hydrologic and Hydraulic (H&H) Study, the Applicant should also study the connectivity between groundwater and surface water, including the effect on surface water from the Project's impact on groundwater, as well as the effect on groundwater from the surface water use Applicant proposes.

### ***Surface Water***

The study that the Applicant had prepared to estimate the amount of water it would take to do the initial intake and periodic recharges of the reservoir(s) is inadequate because it did not consider the *effects* of such intake and recharge. Applicant has proposed a groundwater feasibility study although Applicant has suggested that there will be no groundwater used. Although groundwater feasibility should still be studied to verify Applicant's claim that it will not require groundwater, as well as to study any connectivity between groundwater and the surface water use Applicant proposes, a groundwater feasibility study alone is inadequate since it would not provide much, if any, information about the project and surface water elevations, flows, quantity, quality, or uses. For this reason, the Bureau is requesting a Hydrologic and Hydraulic (H&H) Study as set forth below.

### **Cultural and Tribal Resources Study**

The Applicant proposes a cultural and tribal resources study which will include an archaeological survey of proposed Project disturbance areas. The Bureau supports a cultural and tribal resources study; however, very little detail about the Applicant's proposed study (including goals, objectives, and methodology) is included in the PAD.

The cultural and tribal resources study should examine how the construction and operation of the Project may affect tribal historic properties, as well as other tribal resources identified through archival research, oral interviews, field inspections, and appropriate tribal consultation.

The Area of Potential Effect (APE) should be appropriately delineated in consultation with interested Indian Tribes. The APE may not be the same as the area of effect defined under the National Environmental Policy Act (NEPA). The APE should include all elements of the undertaking, including any staging locations outside the project boundary, locations where the undertaking may result in ground disturbance, locations where elements of the undertaking may be visible or audible, and locations where the Project may result in changes in land use or public access.

The proposed project is located just a few miles from the historical capital of the Choctaw Nation at Tuskahoma. There is tribal trust land as well as individual trust and restricted allotments in the vicinity of the Project. The area in which the Project would be located was inhabited by Caddo tribes in the 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> centuries and Fourche Maline and other Woodland Period peoples prior to that.

The Applicant proposes to perform a pedestrian survey. Provision should be made to potentially require Applicant to perform shovel testing in a second phase of the study if the pedestrian survey is inadequate to obtain necessary information. This area of Oklahoma is heavily wooded, with substantial ground vegetation. Further, banks of rivers and creeks often are not susceptible to effective pedestrian surveys. At a minimum, the Applicant should conduct adequate shovel tests in areas identified by the pedestrian survey as having the potential to include historical, cultural or tribal resources, in addition to the banks of the relevant creeks and rivers.

The Applicant must obtain the necessary permits required by federal agencies prior to fieldwork. Archaeologists must be qualified and meet the professional standards of 36 C.F.R. § 296.8 and the Secretary of the Interior's Standards and Guidelines for Professional Qualifications. The study should adhere to the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation. *See* 48 Fed. Reg. 44716 (Sep. 29, 1983).

Information obtained during the cultural and tribal resources study, including the locations of archaeological sites or other sensitive cultural resource information, should be kept confidential and not disclosed to the public.

It is recommended that a Cultural Resources Working Group (CRWG) be established, comprised of appropriate FERC Staff, representatives of affected Indian Tribes, and representatives of state and federal agencies. The CRWG should meet at appropriate intervals to discuss the conduct and progress of the cultural and tribal resources study.

Eventually, the cultural and tribal resources study should lead to the development and implementation of a Historic Properties Management Plan (HPMP) that considers the direct, indirect, and cumulative effects of the Project on NRHP-eligible or other Tribal resources and provides recommendations for avoiding or mitigating effects on the specified resources, whenever possible. Proposed mitigation measures should be developed in coordination with tribal representatives to reduce and minimize Project-related effects to cultural and tribal resources.

Additionally, and specifically, Section 1.1.1 needs a clearer Project area description, including Public Land Survey System (PLSS) information and also needs more maps with zoomed-in detail. These maps should show, in detail, the proposed undertaking footprint, as well as the full area of potential effect. Section 4.12 needs detailed maps that also show the project footprint and APE in relation to previous cultural resource surveys and previously identified cultural resources.

### **Water Settlement Agreement**

The State of Oklahoma has entered into a Water Settlement Agreement with the Choctaw Nation of Oklahoma and the Chickasaw Nation. *See* Pub. L. No. 114-322, § 3608, 130 Stat. 1628, 1796-1814 (2016). The Settlement Agreement became enforceable on February 28, 2024, the date the Secretary of the Interior published in the Federal Register a notice certifying that certain conditions

in the Settlement have been satisfied. *See* 89 Fed. Reg. 14699 (Feb. 28, 2024) (“The publication of this notice causes the settlement agreement executed in accordance with the Settlement Act to become enforceable . . .”). In the nearly 2000 pages included in the PAD, the Settlement Agreement is mentioned only once by the Applicant. *See* PAD at 4-45. The Settlement Agreement is not mentioned in Scoping Document 1.

Among other things, the Settlement Agreement “recognize[s] and protect[s] the Chickasaw Nation and Choctaw Nation’s respective existing water uses and also provides procedures for expanded water uses in the future . . .” *See* 89 Fed. Reg. 14700. As the Applicant concedes in the PAD, “[t]he agreement limits the water that can be withdrawn from the Kiamichi River and Sardis Lake and ensures the Tribes have an active role in decisions regarding water management.” *See* PAD at 4-45.

More specifically, the Settlement Agreement covers certain hydrologic basins, including the Kiamichi and Little River Subbasins, which the proposed Project intersects. *See* PAD at 4-27. The Settlement Agreement contains provisions requiring the Oklahoma Water Resources Board to “process all applications submitted to it for permits to appropriate surface water from [these subbasins] . . . consistent with the Settlement Agreement and the Settlement Act.” Settlement Agreement at § 5.3.1.

The Settlement Agreement also includes provisions relating to the issuance of a permit to the City of Oklahoma City to, among other things, divert and beneficially use water from the Kiamichi Basin. *See* Settlement Agreement at § 6.1.1. The Settlement Agreement includes technical requirements relating to diversion rate, bypass requirements, and flow rate. *See id.* § 6.1.6. There are restrictions on the City’s ability to release water from Sardis Lake, including withdrawals during various drought conditions. *See id.* at § 6.1.8.

In the Settlement Agreement the Choctaw and Chickasaw Nations and the United States “retain all claims for enforcement of the Settlement Agreement,” and “all rights to use and protect any water right of the Nations recognized or established pursuant to the Settlement Agreement . . .” Settlement Act, § 3608(h)(3)(A)(i)-(ii), 130 Stat. at 1809.

The submission of comments and the request of studies shall not be construed as a waiver of any provision contained in the Settlement Agreement or a waiver of any rights that the United States or the Choctaw and Chickasaw Nations have under the Settlement Agreement.

## **STUDY REQUESTS**

1. The Applicant should perform a hydrologic and hydraulic or similar study (H&H Study) that examines the proposed Project's effects on water resources, including water flow, quantity, quality, and uses.

### **Study Criteria in 18 C.F.R. § 5.9(b)**

#### **(1) Describe the goals and objectives of each study proposal and the information to be obtained.**

The goals and objectives of a hydrologic and hydraulic (H&H) study would be to obtain information related to the effects the Project would have on the surface water elevations, flow, quantity, quality, and uses. Potential information to be obtained would be whether and to what extent the project reduces surface water elevations and flows in the Kiamichi River (and downstream of the Kiamichi River) and whether and to what extent the project and/or any such reduction in surface water elevations and flow contribute to degraded water quality in the Kiamichi River (and downstream).

The H&H Study should accurately represent the effects of Project operations by establishing a baseline if there were no Project operations and comparing the proposed Project operations to the baseline. The H&H Study should include a timeframe for the entire term of the Project license.

The H&H Study should evaluate the amount of water required to refill the re-regulating reservoir over the course of the license and the effects of refilling, taking into account losses from evaporation and seepage, as well as various hypothetical scenarios of precipitation and high flow periods and low flow periods, and whether it is reasonable to assume that there will be sufficient high flow periods to allow sufficient refill of the regulating reservoir 16 times per year.

The H&H Study should include anticipated and potential effects of climate change on hydrology in the Kiamichi River and Project operations and characterize future climate change hydrology (proposed Project and baseline) over the term of the license.

#### **(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied.**

The Bureau's resource management goals may be found, among other places, in the 2020 Oklahoma, Kansas and Texas Final Joint Environmental Impact Statement, Bureau of Land Management Resource Management Plan, and Bureau of Indian Affairs Oklahoma Region Records of Decision and Approved Integrated Resource Management Plans (collectively, "OKT RMP"), including goals for water resources; wetlands and riparian areas; and fish, wildlife, and recreation resources. Specifically, the OKT RMP expresses goals of maintaining water quality in the streams and lakes of Oklahoma to the beneficial uses established by the plan; maintaining or enhancing fish and aquatic habitats; and managing recreations uses and opportunities.

**(3) If the requester is not a resource agency, explain any relevant public interest considerations in regard to the proposed study.**

N/A

**(4) Describe existing information concerning the subject of the study proposal, and the need for additional information.**

The 2018 HDR Study only studied the amount of water needed for initial fill of the reservoir and how much water would need to be diverted from the Kiamichi River to accomplish that fill over various periods of time. It did not assess the direct, indirect and cumulative *effects* of that diversion or of the proposed Project more generally.

Existing information includes flow gages and reservoir storage gauges (including USGS gauge data). There is also a Kiamichi River Basin Water Resources Development Plan prepared by the Oklahoma Water Resources Board in 2000.

**(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements.**

Under the Federal Power Act, any license granted by the Commission “within any reservation . . . shall be subject to and contain such conditions as the Secretary [of the Interior] . . . shall deem necessary for the adequate protection and utilization of such reservation.” 16 U.S.C. § 797(e). Further, all licenses granted by the Commission shall require as a condition that the licensee shall pay to the United States “reasonable annual charges” for, among other things, “recompensing it for the use, occupancy, and enjoyment of its lands or other property.” *Id.*, § 803(e)(1). Additionally, the Commission shall, subject to the approval of the Secretary of the Interior and the tribe with jurisdiction, “fix a reasonable annual charge for the use of [tribal lands].” *Id.*

Proposed project operations could affect habitat quantity and quality, recreation resources, water quality, water uses and potentially other resources. The construction of the reservoirs associated with the Project could result in dewatering of both groundwater and surface water, altering surface water flows and degrading water quality. Construction also has the potential to effect water quality. The infill and recharge of these reservoirs could affect surface water flows, as well as groundwater due to groundwater and surface water connectivity. The reservoirs could capture rainfall that would otherwise flow into the Kiamichi River, decreasing ordinary surface water flows. The recharge of the reservoirs 16 times per year could adversely affect surface water flows, particularly during times of reduced surface water elevations and flows.

Each of the above-mentioned effects, if studied, would inform the development of license conditions that can mitigate such effects, protect water and related resources, and calculate reasonable annual charges for any use of tribal and/or federal lands and resources.

**(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge.**

Studies that examine the effect of Project operations on water flows, quantity and quality are standard in the FERC hydropower licensing context. The study methodology proposed is typical of requirements imposed by FERC in other proceedings. The study of hydrology “encompasses the occurrence, distribution, movement and properties of water and their relationship with the environment within each phase of the hydrologic cycle.” United States Geological Survey, “What is Hydrology?”, *available at* <https://www.usgs.gov/special-topics/water-science-school/science/what-hydrology>. It is a generally accepted practice in the scientific community to consider “the quantity and quality of water as it moves through the cycle (evaporation, precipitation, streamflow, infiltration, groundwater flow, and other components).” *Id.* See also T. Davie, *Fundamentals of Hydrology* (3d ed. 2019) (describing the measurement and analytical assessment of important hydrological parameters such as streamflow and water quality, as well as analytical and modeling techniques used by practicing hydrologists in the assessment of water resources).


**(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.**

The study that the Applicant had prepared to estimate the amount of water it would take to do the initial intake and periodic recharges of the reservoir(s) is inadequate because it did not consider the *effects* of such intake and recharge. Applicant has proposed a groundwater feasibility study although Applicant has suggested that there will be no groundwater used. Although groundwater feasibility should still be studied to verify Applicant’s claim that it will not require groundwater, as well as to study any connectivity between groundwater and the surface water use Applicant proposes, a groundwater feasibility study alone is inadequate since it would not provide much, if any, information about the project and surface water elevations, flows, quantity, quality, or uses.

Based on similar studies required by FERC in other proceedings, it is estimated that the study would require six to twelve months and cost approximately \$250,000. The cost of the study is reasonable compared to the estimated \$2.5 billion cost of the Project. The benefits of the data obtained from such a study outweigh the costs. The data obtained from this study is relevant to several other considerations, including the effect on aquatic and terrestrial species, threatened and endangered species, recreation, and the Choctaw and Chickasaw Nation’s Water Settlement with the City of Oklahoma City.

Respectfully submitted,

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Acting Regional Director



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BIA Comment Letter and Study Requests Pushmataha Pumped Storage Project  
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