

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

Ramm Power Group LLC

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Project No. 14869-000

Project No. 14869-001

COMMENTS OF ELIM MINING (USA) INCORPORATED

Pursuant to Section 5.3(d)(2) of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) regulations,¹ Elim Mining (USA) Incorporated (“Elim”), submits these comments on the “Letter Requesting Use of the Traditional Licensing Process”(“TLP Request”)² and accompanying documents³ submitted in the captioned proceeding by Ramm Power Group LLC (“Ramm”) on January 15, 2020.⁴ As explained in more detail herein, Elim respectfully requests that the Commission deny Ramm’s TLP Request, cancel the preliminary permit granted to Ramm, and terminate the proceeding.

I. INTRODUCTION

This proceeding began on March 1, 2018, when Ramm filed in Project No. 14869-000 an application for a preliminary permit to study the feasibility of developing an approximately 160 MW closed-loop pumped storage hydro project near Casa Grande in Pinal County, Arizona (the

¹ 18 C.F.R. § 5.3(d)(2).

² Notice of Intent to File Application for Original FERC License (“NOI”) and a Pre-application Document (“PAD”) at 13.

³ The accompanying documents are the NOI and PAD.

⁴ Consistent with Commission precedent, Elim is not moving to intervene in this proceeding at this time but plans to intervene at the appropriate time. *See America First Hydro LLC*, 163 FERC ¶ 61,039 (2018). If the Commission believes that it is appropriate for Elim to intervene now, Elim respectfully requests that the Commission treat these comments as a motion to intervene and find that Elim’s participation is in the public interest, grant its intervention, and accord it full rights to participate as a party in this proceeding.

“Project”).⁵ The proposed site for the Project is an approximately 2,000-acre parcel of land that comprises the entirety of the former Sacaton Copper Mine site (the “Site”).⁶ The Commission issued the preliminary permit on July 19, 2018.⁷ Ramm submitted the TLP Request on January 15, 2020.⁸

Ramm’s Project is located on the exact same Site for which Elim has a legally binding purchase agreement (“Purchase Agreement”) with the ASARCO Multi-State Environmental Custodial Trust (the “Trust”) and plans to restart mining operations. The Trust was established to take title to certain properties as part of American Smelting and Refining Company’s (“ASARCO”) bankruptcy, including this Site, and to remediate and, if possible, to sell the properties for future development in a manner that protects human health and the environment.

Elim has invested significant effort and resources in its mining project, i.e., restarting the Sacaton Mine under a new name, the Cactus Mine. Elim has also engaged with the Trust and the Trust’s beneficiaries, the United States Environmental Protection Agency (“EPA”) and the state of Arizona, through its Department of Environmental Quality (“ADEQ”), to demonstrate that Elim’s future plans for the Site are compatible with the long-term environmental protectiveness of

⁵ The Project would also involve construction of the following new facilities:

- (1) a 28-foot-high dam with a total crest length of 6,000 feet, creating a 1,300 acre-foot upper reservoir with a maximum surface elevation of 1,456 feet mean sea level (MSL);
- (2) a 200-foot-long, 12-foot-diameter steel penstock extending from the upper reservoir dam to the powerhouse;
- (3) an underground powerhouse with two 75-megawatt pump/turbine units;
- (4) a 2,200-foot-long, 14-foot-diameter low pressure draft tube extending from the powerhouse to the lower reservoir;
- (5) a 1,500 acre-foot lower reservoir with a maximum reservoir surface elevation of 455 feet MSL to be located within an existing pit mine (no dam needed);
- (6) a new 200-megavolt-ampere substation located adjacent to the upper reservoir;
- (7) a 2,500-foot-long, 137-kilovolt (kV) transmission line extending from the project’s substation to existing 137-kV transmission lines owned by Arizona Public Service; and
- (8) appurtenant facilities.

See Ramm Power Group LLC, 164 FERC ¶ 62,037, P 2 (2018). Ramm is proposing to use the existing 1200-foot deep open pit-mine for the lower reservoir and an adjacent plateau for the upper reservoir.

⁶ NOI and PAD at 14.

⁷ *Ramm Power Group LLC*, 164 FERC ¶ 62,037 (2018).

⁸ NOI and PAD.

the Site remediation. ADEQ and EPA approved the Purchase Agreement, and Elim entered into a Prospective Purchaser Agreement with ADEQ. The Prospective Purchaser Agreement details the ongoing obligations of Elim to ensure that future use of the Site is consistent with maintaining the remediation work and the overall protection of the human health and the environment.⁹

By pursuing the Project and filing the TLP Request, NOI, and PAD, Ramm appears to be seeking to leverage the Commission's authority to accomplish what it was unable to accomplish through negotiations: acquisition of the Site.¹⁰ By doing so, Ramm ignores the environmental condition of the Site and the ongoing obligations to maintain the environmental protectiveness of the remediation conducted at the Site. As the soon-to-be owner of the Site, Elim respectfully requests that the Commission not interfere with Elim's legally binding Purchase Agreement.

Development of the Cactus Mine is incompatible with the development of Ramm's Project and is a more beneficial use of the Site. Both projects cannot co-exist on the Site. Elim's Cactus Mine has the support of the Trust, the Site's current owner; ADEQ; and EPA. None of these stakeholders support Ramm's Project. As demonstrated herein, the Commission should reject the NOI and PAD.

First, Ramm does not need a hydroelectric license to develop the Project. The Project would not be located on federal land, a navigable water, or Commerce Clause stream, nor would the Project use water or energy from a federal hydroelectric facility.¹¹ Accordingly, the Commission should refrain from exercising its permissive jurisdiction over the Project.¹² Second, the Project would be located on a Site that is subject to environmental mitigation at the state level.

⁹ Prospective Purchaser Agreement between the Arizona Department of Environmental Quality and Elim Mining (USA) Incorporated (Dec. 24, 2019) (on file in the Official Records of Pinal County, Arizona, Recorder as Fee Number 2020-001815).

¹⁰ Progress Report Sacaton Energy Storage Project at 1, Docket No. P-14869 (filed July 8, 2019) (noting that Ramm submitted a purchase offer to the Site's owner, the Trust).

¹¹ See 16 U.S.C. § 817(1).

¹² See *Kahawai Power 4, LLC*, 137 FERC ¶ 61,057 (2011).

The Commission has, in the past, recognized the impacts of environmental remediation at proposed sites and has rescinded preliminary permits under certain circumstances.¹³ Elim requests that the Commission take the same action here. Ultimately, because the Commission's practice is to deny licenses to projects that are not the highest and best use,¹⁴ and because the Project is not the highest and best use of the Site, the Commission should stop processing Ramm's Project.

Even if the Commission does not reject the NOI and PAD, the Commission should process Ramm's license application utilizing the Commission's default Integrated Licensing Process ("ILP"). Ramm has not provided sufficient justification for its request to deviate from the ILP. In determining whether to grant a request to use the TLP, the Commission considers six factors.¹⁵ Each of these factors favors using the ILP for the Project and denying the TLP Request.

The ILP, instead of the TLP, is more likely to result in a timely license issuance because it provides for strict deadlines and robust dispute-resolution procedures to address the complex environmental issues and competing uses surrounding the Site and the Project area. Similarly, the resource issues are highly complex, which favor using the ILP. Most significantly, however, Ramm understates the level of anticipated controversy in its TLP Request. Elim has invested considerable resources to further its development of the Cactus Mine, and Elim intends to continue to proceed with that development, particularly given that the Cactus Mine has the support of the Trust, ADEQ, and EPA.

¹³ See *Green Energy Storage Corp.*, 150 FERC ¶ 61,042 (2015).

¹⁴ See, e.g., *Summit Hydropower*, 61 FERC ¶ 61,010 (1992).

¹⁵ See 18 C.F.R. § 5.3(c)(1)(ii). The factors are: (a) likelihood of timely license issuance; (b) complexity of the resource issues; (c) level of anticipated controversy; (d) relative cost of the traditional process compared to the integrated process; (e) the amount of available information and potential for significant disputes over studies; and (f) other factors believed to be pertinent. See *id.*

II. COMMUNICATIONS, SERVICE, AND NOTICE

Elim requests that the following persons be placed on the official service list in this proceeding:

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III. BACKGROUND

A. ASARCO Development and Mining Operations

ASARCO owned the Site beginning at least in the early 1960s when its geologists first discovered the Sacaton mineral deposit. ASARCO began operating the Site as a large, open-pit copper mine in 1972 and ceased operations in 1984 when copper prices declined to the point that mining at the Site was uneconomic. A year later, ASARCO contemplated converting the Site into a non-hazardous solid waste landfill but dropped that plan in 1987 because of strong public opposition.

B. Site Contamination

Elim understands through the company's due diligence that the soil and groundwater at the Site are contaminated with heavy metals. Specifically, Elim understands that the groundwater in the vicinity of the Site is highly mineralized and contains elevated levels of arsenic, chromium, selenium, and zinc, and therefore is unfit for domestic, livestock, or agricultural use. The open-pit from ASARCO's mining, which Ramm proposes to use as the bottom reservoir for its proposed

Project, serves as a “terminal sink”¹⁶ in the local ground water hydrology regime and contains water with high mineralization and a very low pH.

C. The ASARCO Bankruptcy and Trust Acquisition

ASARCO then filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, on August 9, 2005. After an unsuccessful bidding process to purchase ASARCO’s assets, the Bankruptcy Court, on June 5, 2009, approved five settlements providing recovery for environmental claims at numerous ASARCO sites throughout the United States, including the Sacaton Mine.¹⁷ Under the settlement pertaining to the Site, ASARCO agreed to pay \$20 million for environmental remediation.¹⁸ Upon confirmation of the bankruptcy plan, the Trust took title to the Site on December 9, 2009.

D. Elim’s Acquisition of the Site

As the Site moved through remediation, the Trust began accepting offers to purchase the Site.¹⁹ Elim and Ramm submitted offers for the Site.²⁰ In considering the competing offers, stakeholders considered whether Elim or Ramm was best suited to develop the Site. As evidenced by Elim’s selection as the purchaser of the Site, stakeholders agreed Elim is in the best position to ensure the effectiveness of the remediation, while maximizing the return for Arizonians. Accordingly, Elim and the Trust entered into the Purchase Agreement, dated July 23, 2019, under which Elim will finalize the purchase of the Site once the Trust has completed, to ADEQ’s

¹⁶ A terminal sink occurs as the result of at least two factors. First, the pit lake is below the surrounding water table. Second, the area is arid, leading to significant evaporation from the pit lake. What storm and groundwater enters the pit lake evaporates before migrating into the surrounding groundwater. Thus, the terminal sink is a delicate balance whereby the contaminated water in the pit lake remains in the pit lake, with limited impacts on the surrounding environment.

¹⁷ *In re Asarco LLC*, No. 05-21207, 2009 WL 8176641 (Bankr. S.D. Tex. June 5, 2009).

¹⁸ *Id.* at *28.

¹⁹ Although the Trust had executed an Option and Purchase Agreement to convey the Site to an unidentified third party in August 2013, that transaction was never consummated.

²⁰ See Progress Report Sacaton Energy Storage Project at 1, Docket No. P-14869 (filed July 8, 2019).

satisfaction, the remediation activities outlined in the Site Improvement Plan (“SIP”), as amended.²¹ Pursuant to the Purchase Agreement, closing will take place on or before March 31, 2020. After taking steps to ensure that the future owner of the Site had the background, knowledge, and wherewithal to operate the Site for the highest and best return for the taxpayers of Arizona and in a manner protective of human health and the environment, ADEQ and EPA approved the Purchase Agreement in September 2019.

In addition to the Purchase Agreement, Elim and ADEQ entered into a Prospective Purchaser Agreement, which provides Elim’s obligations for the long-term management of the Site to ensure the environmental effectiveness of the remediation outlined in the SIP.²² By entering into the Prospective Purchaser Agreement, the beneficiaries of the Trust recognize that Elim is a capable steward of the Site and that its contemplated activities will be a beneficial use of the Site, consistent with ensuring the adequacy of the remediation to protect human health and the environment. The Prospective Purchaser Agreement was finalized after a public comment period.²³

Even though other parties approached the State of Arizona and the Trust with plans to develop the Site, the Trust and the State, with EPA’s consent, selected Elim to operate the Site because of Elim’s expertise operating mines on both greenfield (new sites) and brownfield

²¹ See NOI and PAD at 47-225. The remediation includes the removal of the majority of the surface facilities (apart from the two core sheds and the administration building) and some of the building foundations; re-grading, repairing, revegetating, and capping the tailings storage facility; removing stockpiled water rock from the waste-rock dump (“WRD”); re-grading, revegetating, and covering the WRD; implementing stormwater controls and re-grading the mill and mechanical areas; covering and revegetating the concentrator; covering the underground-mine shaft; installing a new site perimeter fence; and drilling of ten monitoring wells.

²² Prospective Purchaser Agreement between the Arizona Department of Environmental Quality and Elim Mining (USA) Incorporated (Dec. 24, 2019) (on file in the Official Records of Pinal County, Arizona, Recorder as Fee Number 2020-001815).

²³ Ramm provided no comment on the Prospective Purchaser Agreement.

(previously mined) sites, Elim's professionalism, and its plans to re-open the Sacaton Mine, which will provide many benefits to the area.

For instance, Elim has already used local geologists and other experts for its exploration program. Elim also hopes to hire a majority of its employees from Casa Grande and Pinal County and plans to contact a nearby college for skilled workers once the mine has reopened. Elim's redevelopment of the Sacaton Mine will put the property in the hands of a team that has decades of mining experience. This background includes significant knowhow in areas of concurrent reclamation and site closure. The creation of locally based high-wage jobs will provide much needed economic benefits to the region, where the vast majority of working-age residents commute outside of the region. Elim's plans also include the generation of significant tax revenues that will benefit state and local governments. In addition to direct economic benefits, Elim's activities will create substantial indirect and induced economic benefits to the region. All of these benefits were instrumental to Elim's selection as the steward of the Site.

Environmental stewardship of the Site is a major concern for all affected parties. The Trust took custody of the Site and the \$20 million allocated for remediation of the Site by the bankruptcy court. To ensure proper remediation, the Trust entered the Site into the ADEQ's voluntary remediation program. ADEQ listed the Site in the voluntary remediation program in 2010. ADEQ approved the SIP for the site in March 2019, and in June 2019 remediation began. The Trust submitted the Site Improvement Plan Completion Report to ADEQ in January 2020. The remediation completed to-date includes: the removal of the majority of the surface facilities (apart from the two core sheds and the administration building) and some of the building foundations; the capping of the Tailings Impoundment; the covering of the tails dump facility with alluvium and hydro-seeding, which entailed re-handling several alluvium cover stockpiles; the installation

of new site perimeter fencing; and the drilling of ten monitoring wells. Groundwater monitoring and revegetation are ongoing. Completion of this remediation places the Site in a state that it will be acceptable to transfer to a new environmental steward. Once Elim takes title to the Site, Elim will undertake stewardship of the Site pursuant to the Prospective Purchaser Agreement. After mining is complete, Elim will cap the WRD and close the underground mine.

E. Parties

1. Elim

Elim is a private mineral-resource-development company with headquarters in Sparks, Nevada and Tempe, Arizona. Elim is rooted in the identification, acquisition, exploration, development, and sustainable production of precious and base metal properties in well-known geographic regions. The company seeks assets with significant potential for proven and probable mineral reserves. Elim is managed by mining executives with a combined 210 years' experience in mine operations and business. With a history and reputation for strategically launching, revitalizing, and leading multi-million-dollar mining organizations, the team has achieved tremendous growth and value in a socially and environmentally responsible manner.

Elim is acquiring the Site with the intent of restarting production of copper, a metal critical for electrical infrastructure development, from the mine. Although the primary resource at the mine is copper, Elim will also explore for and potentially co-produce gold, silver, and molybdenum deposits. Elim has invested considerable time, money, and resources in an extensive exploration program pursuant to an access agreement with the Trust to expedite the permitting and development of the Cactus Mine.

The exploration program included creation of a database of all of ASARCO's drilling information. Elim then created a computer model of the Sacaton ore bodies and other known copper mineralization on the Site, based on the historical drilling information. Elim subsequently

completed two confirmatory drill holes—totaling almost 4,100 feet of core—into the Sacaton East ore zone. These two drill holes confirmed the historical geological information and included comprehensive geochemistry and assaying. Elim started an exploration drilling program in November 2019 that, when completed, will comprise 18 core holes totaling 35,000 feet of drilling. Two holes are currently in progress at approximately 1,450 feet of drilling each. Elim also completed 55 sonic drill holes totaling 5,119.5 feet on the WRD to enable economic evaluation of the WRD as a potential copper resource. Approximately 2,050 samples from this drilling have been assayed for copper. A second round of sonic drilling is planned for early 2020 that will comprise another 50 holes totaling 5,000 feet of drilling (2,000 samples). This second round will include a more comprehensive drill assessment of the northeast extension of the historical orebody at the mine. Elim will determine whether a third round of drilling in all areas is needed once it has analyzed the results from the second round. Elim intends to initiate property-scale geophysical and geochemical surveys to aid in the total evaluation of the Site. Elim also plans to draft a detailed environmental plan. Overall, Elim has invested more than \$4 million in preliminary work to assess the Site and intends to invest over \$80 million to further remediate the Site and restart mining operations.

2. The Trust

As noted, the Trust was created as part of the resolution of ASARCO's bankruptcy proceeding and is the current owner of the Site. The primary purpose of the Trust vis-à-vis the Site is to remediate the Site and then, if possible, sell it. The beneficiaries of the Trust are the state of Arizona, through ADEQ, and the United States, through EPA. Any transfer of property from the Trust must be approved by the beneficiaries, ADEQ and EPA.

3. ADEQ

Arizona established the ADEQ in 1987. ADEQ is a separate, cabinet-level agency. ADEQ administers all of the State’s environmental protection programs, including programs delegated to the states by the federal government. ADEQ’s core functions consist of planning, permitting, compliance management, monitoring, assessment, cleanups, and outreach. ADEQ oversees remediation at the Site. And ADEQ also must approve the transfer of the Site.

4. Ramm

Ramm is a private US-based start-up in the business of developing pumped storage hydropower facilities. Ramm appears to be one of several interlocking companies who have sought licenses from the Commission for pumped-storage hydro facilities at or adjacent to the Site.²⁴ To Elim’s knowledge neither Ramm, nor any of its interlocking affiliates, have successfully developed a pumped-storage project under the Commission’s licensing authority.²⁵

²⁴ One of Ramm’s two members appears to have been the Chief Financial Officer of Green Energy Storage Corp., which previously had a preliminary permit at the Site; further, Ramm’s agent, Adam Rouselle, is the same agent as Renewable Energy Aggregators (“REA”) who applied for a Commission preliminary permit on property adjacent to the Site. See “Preliminary Permit Application for the Sacaton Pumped-Storage Project,” at 4 Docket No. P-14589 (filed Feb. 24, 2014) (listing Rich Gresham as Green Energy Storage Corp.’s Chief Financial Officer); Ramm’s Power Group LLC, Initial Report at 2, <https://ccfs.sos.wa.gov/#/>, search “Ramm Power Group”; select “RAMM POWER GROUP LLC” hyperlink; select “Filing History” hyperlink; select “View Documents” hyperlink under “INITIAL REPORT”; and select the document icon hyperlink under “Action” (listing Richard Gresham, at the same address as the REA application, as a member of Ramm); “Application for Preliminary Permit for Casa Grande Pumped-Storage Hydro Project,” at 4 Docket No. P-15010 (filed Oct. 11, 2019) (designating Adam Rouselle as REA’s agent); “Application for Preliminary Permit for Casa Grande Pumped-Storage Hydro Project,” Docket No. P-15010 (filed Jan. 2, 2020) (same); NOI and PAD at 21 (designating Adam Rouselle as Ramm’s agent).

²⁵ Ramm and its interlocking affiliates’ previous and continued activity at and around the Site could potentially raise issues of site banking. The Commission’s policy against site banking prescribes that an entity unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop the site. *Pub. Util. Dist. No. 1 of Pend Oreille Cnty., Wash.*, 124 FERC ¶ 61,064, at P 31 (2008); see also *Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (concluding the Commission’s conclusion that site banking is inconsistent with the Federal Power Act (“FPA”) is “not only clearly reasonable” but also supported by the terms of the FPA); see also *H2O Holdings, LLC*, 147 FERC ¶ 61,219 (2015) (denying rehearing on denial of preliminary permit on basis of site banking to successor entity of original, lapsed preliminary-permit holder).

IV. COMMENTS

Before addressing the topics specific to Ramm's TLP Request, Elim comments on whether the Commission should even accept the NOI and PAD. Elim believes that it is appropriate for the Commission to reject the NOI and PAD and cancel Ramm's preliminary permit. Should the Commission proceed with Ramm's NOI and PAD, Elim explains why, due to the complexity of, and controversy surrounding, the Project, the Commission should deny the TLP Request and require use of the ILP.

A. Termination of the Project Is an Appropriate Outcome.

Elim submits that the Commission should dismiss the Project and cancel Ramm's preliminary permit. Because the Project falls within the Commission's permissive jurisdiction, Ramm does not need a Commission license to proceed with the Project and dismissing the instant case would not preclude Ramm from pursuing its business goals. Rather, it appears that Ramm is seeking to utilize the Commission's permissive jurisdiction to wrest control of the Site from Elim, having failed to obtain the Site in a market transaction. The Commission should not countenance Ramm's attempts here. Moreover, because the Site has been the subject of extensive remediation and will require ongoing care and maintenance to ensure that the adequacy of the remediation work to protect human health and the environment is not compromised, the Commission should, similar to what it has done in the past,²⁶ rescind the preliminary permit. Ultimately, the Commission should reject the NOI and PAD because it is not the highest and best use for the Site and would create more environmental externalities than the Cactus Mine.

²⁶ See *Green Energy Storage Corp.*, 150 FERC ¶ 61,042 (2015).

1. The Commission's Jurisdiction Is Permissive.

If a license is not required under Section 23(b)(1) of the FPA,²⁷ the Commission may, nevertheless, issue a license under Section 4(e) of the FPA.²⁸ The Project does not fall within the Commission's mandatory jurisdiction. The Project would not be located on a navigable water or Commerce Clause stream.²⁹ Nor would the Project be on federal land or use water or energy from a federal hydroelectric facility.³⁰ Accordingly, Ramm is not required to obtain a FERC license to pursue its business goals. Therefore, Ramm is seeking to utilize the Commission's permissive jurisdiction in the instant case.

This use of the Commission's permissive jurisdiction by Ramm is effectively "claim jumping" on Elim's superior use of the Site. When the Commission first recognized its permissive jurisdiction over projects on Commerce Clause waters, the concern arose that non-owners of project sites would use the permissive process to seize property from existing projects.³¹ To mitigate this concern, the Commission established a policy that "no regulatory purpose would be served by entertaining a third party's preliminary permit application for a [permissive-jurisdiction] project where" there is an existing project at the site.³² Therefore, if a third-party application is filed for an existing site, the Commission will generally deny the application.³³

²⁷ 16 U.S.C. § 817(1). Section 23(b)(1) of the FPA requires a FERC license for any hydroelectric facility 1) "across, along, or in any of the navigable waters of the United States," 2) "upon any part of the public lands or reservations of the United States, or" 3) that uses "the surplus water or water power from any Government dam." Additionally, a license may be required if a hydroelectric facility is associated with a nonnavigable stream "over which Congress has jurisdiction under its authority to regulate" interstate and foreign commerce. *Id.* In such cases, a license is required only if the facility will affect interstate commerce, such as through being connected to the interstate grid, and is constructed or modified after August 26, 1935. *See id.*

²⁸ 16 U.S.C. § 797(e).

²⁹ NOI and PAD at 13-15.

³⁰ *Id.*

³¹ *See Cooley v. Fed. Energy Regulatory Comm'n*, 843 F.2d 1464, 1470-71 (D.C. Cir. 1988) (recognizing concern that existing project owners not subject to the Commission's mandatory jurisdiction would find their projects the subject of applications under the Commission's permissive jurisdiction and be at risk to lose their project); *Orange & Rockland Utils., Inc.*, 40 FERC ¶ 61,222, at p. 61,764 (1987).

³² *Inghams Corp.*, 52 FERC ¶ 61,107, at p. 61,508 (1990).

³³ *Id.* at p. 61,508 n.13.

Most significantly, the Commission recognizes that working through a state-approval process in lieu of obtaining a license from the Commission should not be frustrated, and the Commission exercises restraint when its licensing authority is used to circumvent the state process: “Were [the Commission] to issue a preliminary permit to [a claim-jumper],” the Commission has explained, “the [claim-jumper] would then have first-to-file priority over [the existing project], even though that entity ha[d] been working with state authorities to develop a project at the same site.”³⁴ Therefore, the Commission policy is to not approve of this “type of unwarranted ‘claim-jumping.’”³⁵

Although Elim is not proposing a hydroelectric project, this case is consistent with the Commission’s claim-jumping precedent. Similar to the facts in *Kahawai Power*,³⁶ Elim has been working closely with the necessary state and federal actors to develop the mine site, including entering into legally binding agreements with these stakeholders to purchase and remediate the Site. Further, Elim has undertaken studies in an effort to move the Cactus Mine into development.³⁷ Elim created computer models of the ore body with historical drilling information. Elim then implemented a confirmatory drill program followed by an exploratory drill-hole program. Elim has also completed sonic drill holes on the WRD. Approximately 2,050 samples from this drilling have been assayed for copper. Granting Ramm the ability to move forward with its application would effectively allow Ramm to “claim-jump” over Elim’s competing use.

³⁴ *Kahawai Power 4, LLC*, 137 FERC ¶ 61,057 (2011). In *Kahawai Power*, a company had received an interest in state land to develop a hydroelectric project. *Id.* at P 4. The company had undertaken efforts with the goal of eventually securing a state permit to construct and operate the hydroelectric project. *Id.* While these efforts were underway, another hydroelectric company applied for a preliminary permit under the Commission’s permissive jurisdiction for a project on the same site. *Id.* at P 6. The Commission rejected the permit, finding the application “to be a type of unwarranted ‘claim-jumping.’” *Id.* at P 22.

³⁵ *See, e.g., id.* at P 22.

³⁶ *Compare id.* at P 4.

³⁷ *Compare id.*

Because the Commission’s jurisdiction is at most permissive, Elim urges the Commission to decline to exercise its jurisdiction in this proceeding, cancel the previously issued preliminary permit, dismiss the TLP Request, and terminate the proceeding.

2. The Cactus Mine Is the Highest and Best Use of the Site.

To approve a hydroelectric license, the Commission must conclude that the Project is “best adapted to a comprehensive plan for improving or developing a waterway.”³⁸ The Commission must consider the use of the waterway for the benefit of interstate commerce, “for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . . *and for other beneficial public uses.*”³⁹ The Commission must give equal consideration to both “power and development purposes” and “energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”⁴⁰ Commission precedent recognizes the potential for impacts to the local economy.⁴¹ In short, “[u]nder the ‘best adapted’ standard, the Commission must assure the ‘highest and best use’ of the site and not merely that the license suits the public interest.”⁴² Because the Project is not the highest and best use of the Site—either environmentally or economically—the Commission should reject the NOI and PAD.

(a) The Cactus Mine Is More Environmentally Beneficial.

The Cactus Mine will lead to better environmental outcomes than Ramm’s Project. The Commission is being asked to balance the development of a speculative closed-loop, pumped-

³⁸ 16 U.S.C. § 803(a)(1).

³⁹ *Id.* § 803(a)(1) (emphasis added).

⁴⁰ *Id.* § 797(e).

⁴¹ *See, e.g., Summit Hydropower*, 61 FERC ¶ 61,010, at p. 61,080-81 (1992).

⁴² *Centralia v. Fed. Energy Regulatory Comm’n*, 799 F.2d 475, 483 (9th Cir. 1986); *see also Mun. Elec. Asso. v. Fed. Power Comm’n*, 414 F.2d 1206, 1207 (D.C. Cir. 1969) (“[Section 10(a)] does not merely require that the license suit the public interest, or be appropriate, but in effect imposes a ‘highest and best use’ standard.”).

storage project with unknown environmental impacts against the development of the Site as a mining project with strict environmental oversight and requirements to ensure the ongoing protectiveness of the remediation work undertaken at the Site. As noted above, ASARCO's previous mining activity created a pit approximately 930 feet deep. The pit acts as a terminal sink for groundwater in the area. Thus, although groundwater flows into the pit, little water migrates from the pit lake to the surrounding environment.⁴³ The pit lake is highly mineralized and has a very low pH. In the remedial design for the Site, it was determined that, despite this mineralization and low pH, additional study or remediation of the pit lake was unnecessary because the pit lake is a terminal sink.⁴⁴ Ramm's filing ignores these facts, and proposes to use the pit, and the pit lake, as the bottom reservoir for its proposed project.⁴⁵ This plan would result in pumping the mineralized low pH water around the Site and has the potential to disrupt the hydrologic regime that serves as the basis for determining that the pit lake did not pose a threat of contaminating groundwater.

Moreover, the Trust and the beneficiaries of the Trust, EPA and ADEQ, have sought a future use of the Site that provides for the long-term environmental protectiveness of the remedial work completed by the Trust. By attempting to leverage the FERC licensing process to obtain the Site, Ramm is attempting to circumvent the Trust, EPA, and ADEQ's objective and obtain the Site without having to gain these stakeholders' consent or commit to ensure the protectiveness of the remediation at the Site.

Elim will be a better steward of the Site. Elim entered into a Prospective Purchaser Agreement with ADEQ that sets forth clear obligations on Elim to ensure that the remediation

⁴³ NOI and PAD at 57 (SIP).

⁴⁴ *Id.*

⁴⁵ NOI and PAD at 14.

required by the SIP is maintained post-mining, Elim will reclaim and remediate the Site to protect human health and the environment.⁴⁶ Elim's management has specific experience in concurrent reclamation and site closure, including at brownfield sites. The SIP includes specific requirements for remediation of the WRD. Elim is taking on those obligations and must ensure that the WRD is properly remediated. If Elim does not control the Site, alternative plans must be developed to complete this work. In contrast to Elim's assumption of the obligation to remediate the WRD, Ramm proposes to use the WRD as the location for the Project's upper reservoir.⁴⁷ This proposal ignores the SIP's mandate that remediation of the WRD eliminate the exposure of mineralized rock in the WRD to the environment.

The simple fact is that the Site has a complicated environmental history, and the Trust, EPA, and ADEQ vetted Elim's purchase and proposed use of the Site. They determined Elim's proposal is consistent with ensuring the environmental protectiveness of the remediation conducted at the Site. Ramm's Project in contrast raises significant environmental concerns. These circumstances alone should dissuade the Commission from wading into these complex environmental issues.⁴⁸

⁴⁶ Prospective Purchaser Agreement between the Arizona Department of Environmental Quality and Elim Mining (USA) Incorporated (Dec. 24, 2019) (on file in the Official Records of Pinal County, Arizona, Recorder as Fee Number 2020-001815).

⁴⁷ Preliminary Permit Application for the Sacaton Energy Storage Project at 9.

⁴⁸ See *Green Energy Storage Corp.*, 150 FERC ¶ 61,042 (2015). In *Green Energy*, the Commission initially issued a preliminary permit for a closed-loop, pumped-storage project in Nevada. *Id.* at P 1. The project would have used an old mine pit for the lower reservoir. *Id.* at P 6. The project area was contaminated with heavy metals and part of a Superfund site. *Id.* Although the original order granting the preliminary permit acknowledged the project area was part of a Superfund site, upon further consideration, the Commission saw no reason to issue a preliminary permit when the site was undergoing remediation. *Id.* at P 8. Therefore, the preliminary permit was rescinded. *Id.*

Elim recognizes that the facts in *Green Energy* are somewhat different than this case. The Site is in a voluntary remediation program, not the federal Superfund program. And remediation is nearing completion, though revegetation and groundwater monitoring is ongoing. Nevertheless, in *Green Energy*, the Commission recognized the complexity of the issues that arise when a proposed project site is contaminated. See *id.* As it did in *Green Energy*, the Commission should leave the decision-making process with regard to the future use of the Site in the hands of those who have been intimately involved in the remediation for over a decade.

(b) The Cactus Mine Will Have Superior Economic Benefits.

Additionally, the benefits of the Cactus Mine on the local economy support rejection of Ramm's Project. The economic benefits to be derived from Elim's Cactus Mine dovetail nicely with the needs of the surrounding Pinal County and greater Casa Grande/Maricopa regions. These regions are part of a surge in recent commercial, industrial, and residential developments. The area has experienced high inward migration. This migration has made Pinal County one of the fastest growing counties in the United States. However, the region faces serious challenges going forward.

First, the local communities struggle to provide high-wage local jobs; a great deal of the region's population commutes North to the Phoenix metropolitan area or South to the Tucson metropolitan area. Pinal County also struggles with an adequate water supply. One of the leading factors in the region's housing shortage is that new residential developments cannot obtain 100-year assured water supplies, as required in the Pinal Active Management Area.⁴⁹ With the changing economic mix in Pinal County—going from a largely agricultural to a residential and production-based economy—the region must balance its water supply wisely. With the retirement of agricultural uses, the region has the opportunity to develop in ways that can balance industrial and residential needs in accordance with the supply. The Cactus Mine will fit into the region's long-term water plans and will return significant value to the area by, as mentioned, creating high-wage jobs that keep workers in the region, in addition to other substantial direct, indirect, and induced economic activity.

Terminating these proceedings would not be the first time the Commission has relied on economic (and environmental) grounds to reject a project. In *Summit Hydropower*,⁵⁰ the

⁴⁹ See Ariz. Rev. Stat. Ann. § 32-2181(c).

⁵⁰ 61 FERC ¶ 61,010 (1992).

Commission considered whether to grant a license to a developer for a hydroelectric facility near a scenic waterfall. The Commission initially approved the license for the project but reversed its decision on rehearing.⁵¹ Recognizing the aesthetic value of the falls, the Commission had originally required that higher flows be released from the project at times when sight-seekers were mostly likely to view the falls, for example, during the weekend.⁵² On rehearing, the Commission concluded that no mitigation measures were sufficient that would also allow the project to be economical.⁵³ The Commission stated that the falls are a week-long attraction, so limiting high flows to weekends would inadequately protect the recreational and aesthetic quality of the falls.⁵⁴ The Commission stated, “The area is of value to [the State’s] tourist industry, and its current recreational qualities . . . will be a significant benefit to the deteriorating local economy.”⁵⁵ Because the Commission could not adequately protect the aesthetic and economic value of the falls and approve an economic project, the Commission rescinded the license.⁵⁶

Similar to the project in *Summit Hydropower*, when compared to the Cactus Mine, Ramm’s Project would have a negative impact on the local economy. The Cactus Mine will create more jobs and more economic activity than the Project. These jobs and the economic activity are critical for an area with a shortage of high-wage jobs. Accordingly, the Commission should summarily deny the Project.

The Commission also considered the economic benefits of denying a hydroelectric license in *City of Idaho Falls, Idaho*.⁵⁷ There, the Commission denied a license for a proposed project.⁵⁸

⁵¹ *Id.* at p. 61,078.

⁵² *Id.* at p. 61,079.

⁵³ *Id.* at p. 61,081.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at p. 61,081-82.

⁵⁷ 80 FERC ¶ 61,342 (1997).

⁵⁸ *Id.* at p. 62,130.

In denying the license, the Commission noted that the State was managing the reach of the river for wild trout management strategies to preserve the “important biological, sociological, and *economical benefits* of wild trout.”⁵⁹ The Commission denied the license, in part, because granting the license would counter the State’s management strategy.⁶⁰

Similar to the State in *City of Idaho Falls, Idaho*, Arizona plans for the Cactus Mine to be developed at the Site. ADEQ and EPA approved the Purchase Agreement because they believe the Cactus Mine is the best use for the Site. For the same reason, ADEQ executed the Prospective Purchaser Agreement with Elim.⁶¹ The Commission should not counter Arizona’s plans by considering an incompatible project.

B. The ILP Is the Most Appropriate Licensing Process.

If the Commission does not summarily dismiss the Project, the Commission should deny Ramm’s TLP Request and use the ILP. Section 5.3(d)(2)(v) of the Commission’s regulations direct that comments on the TLP Request should address the: 1) “[l]ikelihood of timely license issuance;” 2) “[c]omplexity of the resource issues;” 3) “[l]evel of anticipated controversy;” 4) “[r]elative cost of the traditional process compared to the integrated process;” 5) “[t]he amount of available information and potential for significant disputes over studies; and” 6) “[o]ther factors believed by the commenter to be pertinent.”⁶² If the licensing proceeding “will likely involve complex and controversial resource issues that could lead to study disputes and affect the timely issuance of a license,” the Commission will deny the request to use the TLP.⁶³ Because Ramm’s

⁵⁹ *Id.* at p. 62,133 (emphasis added).

⁶⁰ *Id.*

⁶¹ Prospective Purchaser Agreement between the Arizona Department of Environmental Quality and Elim Mining (USA) Incorporated (Dec. 24, 2019) (on file in the Official Records of Pinal County, Arizona, Recorder as Fee Number 2020-001815).

⁶² 18 C.F.R. § 5.3(d)(2)(v).

⁶³ See *America First Hydro, LLC*, Docket No. P-14856, Letter Order at 2-4 (Oct. 31, 2017); see also *Hydroelectric Licensing Under the Federal Power Act: Final Rule*, 68 Fed. Reg. 51,070, 51,075 (Aug. 25, 2003).

Project is complex, would require resolution of controversial environmental and land use issues, and cannot proceed more efficiently through the TLP, the Commission should deny the TLP Request and use the ILP.

1. Likelihood of Timely License Issuance

Relying on the TLP process would decrease the likelihood of timely license issuance. Due to the complexity of environmental issues that must be addressed, the TLP is unlikely to be a timely process. A central goal of the ILP “is for all concerned entities, including the Commission staff, to participate as early as possible, so that issues can be fully identified, study needs resolved, and necessary studies timely conducted.”⁶⁴ The ILP contains robust pre-application consultation procedures.⁶⁵ There are strict deadlines in these pre-application processes.⁶⁶ There are also dispute-resolution procedures that are binding on the applicant.⁶⁷

These pre-application consultation requirements, strict deadlines, and binding study determinations, help ensure controversies are identified early. With the TLP, such issues may not be raised until the application is already submitted or after environmental review begins.⁶⁸ Some significant issues may not be raised until after the draft environmental document is released for review.⁶⁹

Given the inevitable disagreements that will arise in this proceeding,⁷⁰ it is crucial that those issues be raised and resolved early in the process. The ILP will help ensure early issue resolution. Applying strict timelines to the resolution of those issues and well-trodden dispute-

⁶⁴ *Hydroelectric Licensing Under the Federal Power Act: Notice of Proposed Rule Making*, 68 Fed. Reg. 13,988, 13,992 (Mar. 21, 2003).

⁶⁵ See 18 C.F.R. §§ 5.9-.14.

⁶⁶ *Id.* §§ 5.9-.13.

⁶⁷ *Id.* § 5.14.

⁶⁸ *Id.* §§ 4.32(b)(7), .34(b).

⁶⁹ *Id.* § 4.34(b)(4).

⁷⁰ See *infra* § IV.B.3.

resolution mechanisms will help ensure the resolution of those disputes do not unnecessarily delay the process.

2. Complexity of the Resource Issues

The resource issues in the instant proceeding are highly complex. Ramm plans to use a non-operating mine pit for water storage and to move water in a mining pit between reservoirs.⁷¹ Through the company's due diligence, Elim understands that heavy metals were identified in the soil and groundwater. The Site was accepted into ADEQ's voluntary remediation program in 2010.⁷² The Site is subject to a SIP, which was amended on November 26, 2019.

The SIP did not contemplate that a hydroelectric project would ever be developed at the Site. Thus, the licensing process will need to determine whether it is feasible to use a legacy mine site enrolled in ADEQ's voluntary remediation program for a hydroelectric project. Stakeholders will need to assess whether the Project is compatible with, or will disturb the remedial measures. For example, the central concerns of the SIP are pit-wall stability, groundwater sink, and limiting access.⁷³ Whether the Project can be developed without compromising these aspects of the SIP are far from clear and will require complex hydrologic and geotechnical analyses. The ILP is best suited to identify and manage these complex and unique resource issues.

3. Level of Anticipated Controversy

In the TLP Request, Ramm states,

Elim Mining has stated their interest in resurrecting the property as an active mine. We have informed Elim in writing of our intent to develop this project as well as the rights conveyed from the Federal Power Act for this license. We anticipate a period of awareness and hope to solve the land ownership challenges through negotiation.⁷⁴

⁷¹ NOI and PAD at 13.

⁷² Ariz. Dep't Env'tl. Quality, Sacaton Designated Property | VRP Site (last accessed Jan. 31, 2020), https://azdeq.gov/sacaton_designated.

⁷³ NOI and PAD at 84 (SIP).

⁷⁴ NOI and PAD at 16.

Ramm significantly understates the level of anticipated controversy over the Project. Elim has committed considerable time, money, and resources to acquire its interest in the Site to enable it to develop the Site as an operating mine. During the remediation process, the Trust began accepting offers to purchase the Site. Both Elim and Ramm⁷⁵ submitted offers for the Site. In evaluating these offers, stakeholders considered whether Elim or Ramm was best suited to develop the Site. The stakeholders agreed Elim is in the best position to ensure effectiveness of the remediation, while maximizing the return for Arizonians. Having engaged in this deliberate process, stakeholders are unlikely to simply acquiesce in the development of a project they already rejected. Elim and the Trust plan to actively oppose the Ramm Project at every stage of the licensing process. They will oppose the Project on the basis of the highest and best use of the land, environmental considerations, and fundamental fairness. Elim also understands ADEQ will oppose the Project for similar reasons.

Elim also anticipates that other organizations uncomfortable with using contaminated groundwater and a site in ADEQ's voluntary remediation program to produce electricity will oppose the Project. These issues are better addressed through the ILP's pre-application consultation process than the TLP. Accordingly, this high level of controversy counsels in favor of using the ILP.

4. Relative Cost of the ILP and TLP

The ILP will be less expensive than the TLP. Ramm states—without support—that it anticipates \$1 million will be saved per month using the TLP.⁷⁶

Elim disagrees that the TLP would be less expensive, especially for the Commission. The ILP requires stakeholders to address controversies early—before an application is even filed.

⁷⁵ Progress Report Sacaton Energy Storage Project, Docket No. P-14869 (July 7, 2019).

⁷⁶ NOI and PAD at 16.

Before calling on FERC resources to help resolve study controversies, the parties must separately engage in a comment process regarding the study proposals.⁷⁷ Only if these efforts fail may parties invoke Commission resources.⁷⁸ Given the complexity of the issues, stakeholders' ability to resolve issues before resort to the Commission will limit expenses to the Commission and stakeholders.

5. Potential for Significant Disputes over Studies

Ramm overstates the amount of publicly available information regarding the Site. What studies exist concern the Site's status as an active and inactive mine, and remediation. They may provide a good pre-remediation baseline of Site conditions. But they provide no information regarding Site conditions after remediation. Moreover, none of these studies address the geotechnical, hydrologic, and environmental complexities unique to hydroelectric projects utilizing an existing, contaminated pit lake. All of these studies must be completed before an application can be submitted. Ramm's mistaken belief that these studies will help support the process underscores the significant study disputes that lie ahead.

6. Other Pertinent Factors

Given the complexity of issues, competing interests, and likely controversy of the Project, Ramm's decision to request the TLP process should give the Commission pause. The ILP process is tailor made for projects such as Ramm's Project. Ramm attempted to acquire the Site and failed to do so.⁷⁹ By seeking to bypass this stakeholder engagement, Ramm appears to be attempting to use the process to dispense with competing non-hydroelectric projects. The TLP Request reflects this objective.

⁷⁷ 18 C.F.R. §§ 5.9, .11-.13.

⁷⁸ *Id.* § 5.14.

⁷⁹ See Progress Report Sacaton Energy Storage Project, Docket No. P-14869 (July 7, 2019).

Paradoxically, in the TLP Request, Ramm suggests that “the strict schedule of the ILP” will lengthen the amount of time needed to get the project approved.⁸⁰ Ramm justifies its position by arguing that Ramm will be able to “move through [the] pre-filing process quicker and have time to develop a settlement agreement with interested parties.”⁸¹ But those pre-filing processes are meant to help the parties reach agreement on needed studies. Skipping that process with the hope of reaching a broader settlement shows that Ramm is just trying to use the licensing process to exert pressure on Elim and the Trust to back down. In short, Ramm is trying to accomplish through the Commission what it could not through direct negotiations: acquisition of the Site. For these reasons, the Commission should deny the TLP Request.

V. CONCLUSION

For the foregoing reasons, Elim respectfully requests that the Commission dismiss the TLP Request, cancel the preliminary permit, and terminate the proceeding, or, at a minimum, require Ramm to use the ILP.

Dated: February 14, 2020

Respectfully submitted,

/s/ Zeviel Simpser

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⁸⁰ NOI and PAD at 13.

⁸¹ *Id.* Note that by suggesting a settlement agreement may be necessary, Ramm effectively concedes its Project is controversial.

CERTIFICATE OF SERVICE

I hereby certify that 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 at Washington, D.C. this 14th day of February, 2019.

/s/ Marcia Stanford
Marcia Stanford

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