

that the Commission may engage in with any party in a contested case.

111. The Commission believes that the licensing process will benefit by more direct and substantial consultation between the Commission staff and Indian tribes. Because of the unique status of Indian tribes in relation to the Federal government, it may be beneficial to increase direct communications with tribal representatives in appropriate cases. The type and manner of consultation with Indian tribes should fit the circumstances. Different issues and stages of a proceeding may call for different approaches, and there are some limitations that must be observed. However, there are a number of steps that the Commission staff can take to improve consultation with Indian tribes on matters affecting their interests in hydroelectric licensing.

112. For example, it may be mutually beneficial for the staff and Indian tribes to engage in some high-level meetings to discuss general matters of importance, rather than issues involved in specific licensing proceedings. These could be arranged for particular tribes, regions, or river basins, if appropriate.

113. There are also opportunities for greater involvement with Indian tribes before a licensing proceeding has begun. Indian tribes may be reluctant to consult with the applicant, preferring to meet directly with the Commission staff. In these cases, the staff should consider some means of direct communication with the tribe, at an appropriate level, to explain the consultation process and the importance of tribal participation, and to learn more about the tribe's culture. Because it would occur before the proceeding commences, the Commission's rules regarding off-the-record communications would not apply. Our proposal to establish a tribal liaison, discussed below, responds to this concern.

114. Once the licensing proceeding has begun, the Commission's rules prohibiting off-the-record communications must be observed. These rules apply in any case in which an intervenor disputes a material issue, and they generally prohibit off-the-record communications relevant to the merits of a proceeding between Commission employees involved in the decisional process and interested persons outside the agency. Thus, they would prevent Commissioners or Commission staff from consulting privately in a contested proceeding with representatives of any party to the proceeding, whether on a government-to-government basis or in any other

capacity, to discuss matters relevant to the merits of the proceeding.

115. However, under special exemptions provided in the rules, communications concerning the staff's preparation of environmental documents are permitted, as are communications with tribal and other governmental representatives if the tribe or government agency is not a party to the proceeding. In each instance, the staff must promptly disclose the substance of the communication and place it in the record for the proceeding. Using these guidelines, Commission staff can work to ensure that consultation with Indian tribes is both meaningful and appropriate to the circumstances of particular cases. For example, staff might consider holding a high-level "kick-off" meeting or invitation to participate, or a separate scoping meeting with tribal representatives.

116. As part of the licensing process, the Commission must also comply with section 106 of the NHPA. Section 106 requires the Commission to take into account the effect of its actions on historic properties, and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The NHPA expressly provides that traditional cultural properties that are of religious or cultural significance to Indian tribes can be considered historic properties. It also requires the Commission to consult with representatives of Federally recognized Indian tribes that attach religious or cultural significance to those properties, if they may be affected by the licensing action. The Council's regulations provide that this consultation "should be conducted in a sensitive manner respectful of tribal sovereignty," and "must recognize the government-to-government relationship between the Federal government and Indian tribes."<sup>140</sup> If direct communication between Commission and tribal representatives occurs as part of the Section 106 process, it must be conducted in compliance with the Commission's rules regarding off-the-record communications.

117. A few tribes recommend that consultation be limited to Federally recognized tribes.<sup>141</sup> The Commission is sensitive to the fact that Federal recognition establishes certain rights that are not enjoyed by non-recognized tribes, and that there may be competing interests at stake. For instance, some Federally recognized tribes have authority to issue water quality

certification under section 401 of the Clean Water Act with respect to actions that require a Federal license and are located on reservation lands. Consultation under section 106 of the NHPA differs, depending on the tribe's status.<sup>142</sup> The Council's regulations concerning government-to-government consultation apply only to Federally recognized tribes. However, they also provide for consultation with non-Federally recognized tribes as consulting parties that have an interest in the proposed licensing action.<sup>143</sup> If a Federally recognized tribe has an approved Tribal Historic Preservation Officer (THPO), the Commission is required to consult with the THPO instead of the SHPO for undertakings that affect historic properties on tribal lands. We intend for the licensing process to be conducted in a manner consistent with the proper exercise of such rights, and that tribes be consulted at the earliest practicable opportunity. We believe, however, that members of unrecognized tribes can have Native American cultural resources that should also be respected by the Commission. We will therefore direct our staff to consult with non-recognized tribes that choose to participate in license proceedings.

118. The tribes and other commenters made many suggestions intended to enhance early consultation. These include: Commission contact with tribes before the due date for an existing licensee's NOI to better understand tribal issues and to ensure that the tribes are fully aware of the licensing process;<sup>144</sup> Commission and tribe-only meetings to ensure confidential treatment of cultural resources and for NEPA scoping;<sup>145</sup> development with each tribe of a plan for consultation with that tribe;<sup>146</sup> more timely notice of deadlines and flexible deadlines;<sup>147</sup> facilitation services for consultation between tribes and the Commission or tribes and license applicants;<sup>148</sup> and that comprehensive information on future license expirations and the state of any existing consultations be posted

<sup>142</sup> As used in the NHPA and the Council's regulations, the term, "Indian tribe" refers to Federally recognized tribes; thus, only a Federally recognized tribe has the right to participate in Section 106 consultation. See <http://www.achp.gov/regs Tribes.htm>.

<sup>143</sup> 36 CFR 800.2(C)(5) and 800.3(f).

<sup>144</sup> PacifiCorp, PRT.

<sup>145</sup> NF Rancheria. Several tribes broadly stated their concern that the licensing process protect the confidentiality of cultural resources; e.g., Choctaw, PRT, Shoshone, NF Rancheria.

<sup>146</sup> SCE, Idaho Power, EEI, NHA, NEU, Nez Perce.

<sup>147</sup> CRITFC, St. Regis Mohawks.

<sup>148</sup> Idaho Power, PRT, Nez Perce.

<sup>140</sup> 36 CFR 800.2(c)(2)(ii)(B) and (C).

<sup>141</sup> Choctaw, Catwaba.