

on the Commission's website or made available on CD ROM.¹⁴⁹

119. Our proposed rule and related administrative actions should substantially address these concerns. First, we are establishing the position of Tribal Liaison. The Tribal Liaison will provide a single, dedicated point of contact and a resource to which Native Americans can go regardless of the proceeding or issue. Also, as discussed above, the Commission will be contacting Indian tribes likely to be interested in a relicense proceeding in a time frame consistent with the advance notification to initiate discussions concerning consultation procedures.

120. Under section 304 of the NHPA, the Commission is required to withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy, risk harm to the property, or impede the use of a traditional religious site by practitioners. The Council's regulations reflect this requirement.¹⁵⁰ The Commission also has regulations and practices in place that address the tribes' confidentiality concerns. For instance, all applicants must delete from any information made available to the public specific site or property locations if their disclosure would create a risk of harm, theft, or destruction of archeological or Native American cultural resources.¹⁵¹ In addition, the regulations provide specific procedures to follow when requesting privileged treatment of documents that are either filed with the Commission or submitted to the Commission staff.¹⁵²

121. The Commission agrees that Commission-sponsored facilitation services, which some non-tribal commenters also recommend, may be useful in certain proceedings, as discussed in the preceding section. The most appropriate facilitation or dispute resolution techniques are a matter best considered in the context of specific proceedings.

122. Some tribes suggest that, because original construction of dams caused impacts to tribal resources for which there was no compensation under an original license or other pre-license construction authorization, the licensing process should provide a means to identify and mitigate for those past impacts.¹⁵³ The Commission has no

restitution or to assess damages. Moreover, the FPA does not mandate that all past environmental damage caused by a project be "mitigated" in a relicensing proceeding. Our responsibility at relicensing is to determine whether, and under what conditions, to issue a new license for a hydroelectric project. As previously stated, we use existing environmental conditions as a baseline for our analysis, and do not attempt to re-create a hypothetical pre-project environment. However, past environmental effects are relevant in assessing cumulative effects and in determining what measures are appropriate to protect, mitigate, and enhance natural resources for the new license term. This approach is reasonable, and complies with both NEPA and the FPA.¹⁵⁴

123. Some tribes state that the geographic scope of the Commission's public interest analysis with respect to tribal cultural and other resources should not be limited to resources located within the project boundary, but should extend to project impacts wherever they may occur.¹⁵⁵ The Commission agrees that there may be instances where project impacts occur outside of an existing or proposed project boundary, and that appropriate mitigation for these impacts, as well as possible changes to the project boundary, should be considered in the licensing process. For historic properties, this is taken into account in defining the project's "area of potential effect" during the consultation process under section 106 of the NHPA. Such matters are best dealt with in the context of specific proceedings.

124. Some commenters indicate that project-related social and economic issues raised by tribes should be addressed in the licensing process and should be given the same weight as developmental values.¹⁵⁶ We agree that social and economic impacts of proposed projects on tribal resources, positive and negative, need to be addressed through consultation pursuant to our trust responsibility, the NHPA section 106 process, and in the Commission's NEPA and decisional documents. The enhanced consultation measures provided by the proposed integrated process generally, and for Indian tribes in particular, should ensure that such issues are fully considered.

125. A few tribes suggest that tribal water rights should be specifically

addressed in the licensing process.¹⁵⁷ Issues concerning tribal water rights have rarely been raised in licensing proceedings, mainly because the Commission does not adjudicate water rights. The Commission's practice, when such water rights are in dispute, is that if it issues the license, it makes the license subject to a reservation of authority to reopen the license to make any changes that may be required once the water rights issues are resolved.¹⁵⁸ This safeguard has worked in the past and should continue to adequately protect tribal water rights.¹⁵⁹

126. Some commenters state that the Commission's guidelines for the development of Historic Properties Management Plans (HPMPs) are confusing with regard to how Section 106 is fulfilled and the degree of applicant responsibility. They request clarification of the distinction between government-to-government relations and consultation.¹⁶⁰ The Commission and the Council issued these guidelines jointly in May 2002.¹⁶¹ They are intended to assist license applicants in preparing their HPMPs, which the Commission includes as a license condition, and provide for the licensee's management of historic properties during the license term. These plans, while related to historic preservation, are not necessarily part of the Section 106 process. Rather, a programmatic agreement or memorandum of agreement entered into as part of the Section 106 process will usually include provisions requiring the applicant to prepare and implement an HPMP. The HPMP is often prepared in consultation with the SHPO, THPO, or Indian tribe, and may include provisions for consultation with the tribes during the term of the license. The Commission's role is to review and approve the HPMP. Thus, any consultation with tribes that may occur during the preparation or implementation of the HPMP ordinarily

¹⁵⁷ CTUIR, CRITFC.

¹⁵⁸ See, e.g., Idaho Water Resources Board, 84 FERC ¶ 61,146 (1998) (reserving authority to modify the license to reflect the outcome of pending state water right proceeding in which an Indian Tribe claimed an implied Federal reserved water right). Similarly OWRB states that license conditions should be developed consistent with interstate water compacts enacted as Federal law. It is not the Commission's intention to interfere in any way with such compacts, and we are not aware of any instance where there has been an inconsistency.

¹⁵⁹ See *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990).

¹⁶⁰ SCE, NHA. SCE states that Section 106 consultation should begin when the applicant files a draft HPMP.

¹⁶¹ Guidelines for the Development of Historic Resources Management Plans for FERC Hydroelectric Projects (May 2002), <http://www.ferc.gov/hydro/docs/hpmp/pdf>.

¹⁴⁹ NF Rancheria, PRT.

¹⁵⁰ See 36 CFR 800.6(a)(5) and 800.11(c).

¹⁵¹ 18 CFR 4.32(b)(3)(ii) and 16.7(d)(5)(ii).

¹⁵² 18 CFR 388.112.

¹⁵³ Shoshone, NW Indians.

¹⁵⁴ See Section III.D.1.c

¹⁵⁵ CTUIR, Menominee, Shoshone.

¹⁵⁶ Shoshone, CTUIR.