

commitment to promote a government-to-government relationship between itself and federally-recognized Indian tribes. The policy statement recognizes the sovereignty of tribal nations and the Commission's trust responsibility to Indian tribes. The policy statement also establishes a tribal liaison position. Finally, the policy statement establishes certain actions specific to the hydroelectric program. Part 2 of the Commission's regulations will be amended to implement the policy.

II. Background

2. This policy statement evolved out of the recent rulemaking proceeding to develop an improved process to prepare and review license applications for non-federal hydropower projects.¹ To ensure that tribal issues were addressed in the rulemaking, the Commission held special tribal forums in October and November 2002. As a result of several requests at those forums, the Chairman appointed a tribal liaison for the rulemaking proceeding.²

3. After the Notice of Proposed Regulation (NOPR) was issued in February 2003, Commission staff held regional public and tribal outreach meetings in March and April 2003 to discuss the NOPR.³ The Commission also held drafting sessions, including a special tribal session (Tribal Group), to attempt to reach consensus on a number of issues raised in the NOPR. The final rule is being issued concurrently with this policy statement.⁴

4. In written comments and meetings on the hydro rule,⁵ Indian tribes discussed the Commission's trust responsibility as it relates to treaty rights, legislation, and executive orders. Several tribes stated that as sovereign entities, they have government-to-government consultation rights that differ from those applicable to agencies and the general public, because they must be determined by mutual agreement between the Commission and individual tribes in a case-specific and issue-specific context.⁶ However, the tribes also stated that the Commission

should specifically establish its tribal consultation process in its regulations.⁷

5. The Commission, in its NOPR, proposed to establish a tribal liaison for the hydroelectric licensing program. This proposal was supported by all of the commenting tribes and the Advisory Council on Historic Preservation.⁸ One commenter recommended that the liaison should be available not only for hydro matters, but also for other Commission programs.⁹ There was a consensus among the commenters that the liaison should not be a clerical position, but should be a staff person with substantive knowledge of the process that will be followed.¹⁰

6. In addition, commenters suggested various roles and responsibilities for a Tribal Liaison. These include facilitating government-to-government consultation by directing tribes to the right person or persons to deal with substantive or policy issues; ensuring that communications are maintained between tribal representatives and Commission staff throughout the proceeding;¹¹ assisting tribal knowledge of and participation in the Commission's processes;¹² educating Commission staff about tribes and the trust responsibility and treaty obligations;¹³ assisting tribes in learning how to access and effectively use the informational resources of the Commission's Web site;¹⁴ and informing tribes of activities at a project during licensing and throughout the term of a license that may affect tribal resources on or off the reservation.¹⁵

7. GLIFWC and Menominee stated that, because the process for government-to-government consultation needs to be developed in agreement with each tribe, the roles and responsibilities of the tribal liaison cannot be fully determined at the outset, but must evolve in response to the

development of tribal-specific agreements.

8. The Tribal Group essentially endorsed all of these proposed roles and added several others, including: coordinating with tribal liaisons at other agencies; becoming educated about the rights of Indians; assisting tribes in making known their issues and views on compliance with treaties; ensuring that tribes are informed of studies and information with cultural-resource or treaty-rights implications; managing communications between the Commission and tribes when the *ex parte* regulations are applicable; facilitating communications between applicants and tribes; facilitating informal dispute resolution between applicants and tribes; helping to determine which tribes may be affected by likely future hydropower relicensing applications or original license applications; and informing potentially affected tribes about potential future relicensing applications.

9. While most commenters recommended that the tribal liaison should be non-decisional staff, Skokomish and NW Indians proposed that the tribal liaison should play an active role in the substantive resolution of licensing proceedings. NW Indians recommended that the tribal liaison or liaisons should be educated about individual tribes and their interests in specific proceedings and should act as their advocate within the Commission.

10. Various commenters indicated that there are too many tribes and too many tribe-specific, case-specific, and interrelated regional or watershed issues for one person to understand and act upon. Some suggested appointing multiple liaisons based on regions of the country, watersheds or river basins, or sub-regions within a state.¹⁶ Pacific Legacy suggested that the efforts of the Commission's liaison should be complemented by a liaison from each tribe for each project, to be funded by the applicant. The Tribal Group stated that the tribal liaison should be a regional position, with an overall coordinator position at the Commission's headquarters.

III. Discussion

11. The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their

¹ Hydroelectric Licensing under the Federal Power Act, RM02-16-000, 68 FR 13988 (Mar. 21, 2003); IV FERC Stats. & Regs. ¶ 32,568 (Feb. 20, 2003).

² Letter dated January 10, 2003, to Tribal Leaders from Chairman Pat Wood, III.

³ These regional meetings were held in Portland, Oregon; Sacramento, California; Charlotte, North Carolina; Manchester, New Hampshire; and Milwaukee, Wisconsin.

⁴ Hydroelectric Licensing under the Federal Power Act, Docket No. RM02-16-000; Final Rule.

⁵ A list of commenters and their abbreviations is attached as Appendix A.

⁶ S-B, S-P, CRITFC, NW Indians, Nez Perce, Umatilla, GLIFWC, NF Rancheria.

⁷ Nez Perce, Menominee, NF Rancheria, S-B, Maidu, NW Indians, CRITFC, S-P, NHA, and Interior agreed.

⁸ S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, HRC, ACHP, Menominee, Skokomish, Interior, NF Rancheria.

⁹ NW Indians.

¹⁰ S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, Menominee, Tribal Group.

¹¹ NW Indians, Nez Perce, Umatilla, GLIFWC, Menominee. They indicate that the correct person would depend on the issues under consideration; e.g., a technical issue dealing with a fisheries study would be dealt with by a fishery biologist, while an issue concerning the appropriate elements of government-to-government consultation with the tribe might be directed to senior Commission staff. We agree.

¹² SCE.

¹³ GLIFWC, Menominee.

¹⁴ GLIFWC.

¹⁵ Interior.

¹⁶ Pacific Legacy, GLIFWC, Menominee, CRITFC, S-P, California, Interior.