

269. Many commenters²⁴⁷ also noted their appreciation for the Commission's discussion, but stated that the government-to-government consultation process should be specifically defined in the regulations, so as to clarify the role of tribes in the licensing process and to prevent confusion between tribal consultation and consultation with other entities. They state that the rules should be sufficiently flexible to accommodate case-specific circumstances and incorporate recognition of treaty rights into decisions on studies, resource impact analyses, and license conditions.

270. Various specific suggestions were also made regarding tribal consultation. For instance, the Tribal Group indicates that tribal consultation should begin when the Commission sends the licensee the advance notice of license expiration. GLIFWC, citing tribal government decision-making processes, and NF Rancheria, asserting a need for as complete a record as possible when the NOI is filed, support pre-NOI contacts between the Tribal Liaison and the potentially affected tribes. Catawba and Choctaw state that consultation needs to begin with the chief or governing body, rather than other tribal members or employees. Catawba also recommends that Commission staff visit tribal lands in order to understand local issues. The Tribal Group recommends including in the regulations a requirement for a meeting between the Commission, potentially affected tribes, and other concerned Federal agencies shortly after notice of the NOI and PAD is issued. The Tribal Group and others²⁴⁸ also recommend that certain points in the licensing process be designated at which the Commission and tribes would assess consultation to date and seek agreement on next steps to ensure that appropriate communication takes place throughout the process.²⁴⁹ Maidu states that the regulations must specifically recognize the tribes' right to comment on cultural and historical resources study proposals.

271. Concerns were also expressed about the timing of consultation. One example is that some tribes require any agreement with another entity to be ratified by an executive board, while some require only the agreement of the

tribal chief.²⁵⁰ Another concern is that tribal councils don't meet according to Commission schedules, but have their own schedules. This may involve meetings on a monthly, quarterly, or other basis, so that advance notice of schedules is very important.²⁵¹

272. S-P states that tribal sovereignty requires issues scoping to be separate for tribes. NW Indians, on the other hand, suggest that tribes need to be in the same scoping process with other entities because they are likely to have overlapping issues and because the interests of other participants (such as recreational users of project lands) may be adverse to those of the tribes.

273. In light of these comments, we have decided to take a three-pronged approach to better fulfill our trust responsibility. The first prong is to publish in our regulations a policy statement on tribal consultation. The policy statement was developed from our review of the written policies of other Federal agencies concerning the trust responsibility and government-to-government consultation.²⁵² The policy statement is being issued contemporaneous with this final rule in a separate docket²⁵³ and will appear in part 2 of the Commission's regulations, "General Policy and Interpretations."²⁵⁴ The policy statement will apply to all of the Commission's program areas and, for hydroelectric licensing, to all licensing proceedings, regardless of which process is used.

274. The policy statement recognizes the unique relationship between the Federal government and Indian tribes as defined by treaties, statutes, and judicial decisions. It acknowledges the Commission's trust relationships. It states that the Commission will endeavor to work with the tribes on a government-to-government basis pursuant to trust responsibilities, the

FPA, and any other statutes governing the Commission's authority. It notes that the Commission functions as a neutral, quasi-judicial body and as such is bound by the APA and Commission rules regarding off-the-record communications. It states that the Commission will assure tribal issues and interests are considered in making decisions. Specifically to the hydroelectric program, it states that the Commission will notify tribes at the time of the NOI and will consider comprehensive plans prepared by tribes or intertribal organizations.

275. The second prong of our approach is to establish the Tribal Liaison position, discussed below. The third prong is inclusion in the regulations of a meeting with willing Indian tribes no later than 30 days after filing of the NOI.²⁵⁵

276. NW Indians and S-B state that the Commission's rules must acknowledge that the trust responsibility supersedes public interest balancing under the FPA. We do not agree. The Commission carries out its trust responsibility towards Indian tribes in the context of the FPA, and the trust responsibility does not require the Commission to afford tribes greater rights than they would otherwise have under the FPA.²⁵⁶

277. We will not attempt to further define the government-to-government consultation process in the regulations. The review of tribal comments above makes clear that there is no consensus on what such specific provisions might be. The one consistent comment is that an effective process needs to be established in consultation with individual tribes. Under these circumstances, we conclude that the most effective way to move forward is to issue the policy statement; include a provision in the integrated process regulations to ensure that tribal consultation begins, at the latest, no later than 30 days after issuance of the NOI; and establish the Tribal Liaison.

278. Although some other Federal agencies have done so, we will also not include a more general definition of tribal consultation in the regulations. BIA, for instance, is guided by the definition of the Advisory Council in the latter's regulations governing

²⁵⁰ Fort Peck, NF Rancheria.

²⁵¹ Catawba, Choctaw.

²⁵² We reviewed the policies of other independent agencies, including the Federal Communications Commission, FCC No. 00-207 (June 8, 2000), 16 FCC Rcd 4078; 2000 FCC LEXIS 3245; 20 Comm. Reg. (P&F) 1316; the Federal Emergency Management Agency, "Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments (Sept. 25, 1998), 64 Fed. Reg. 2096 (Jan. 12, 1999); the Environmental Protection Agency (EPA), Memorandum to all EPA Employees from Christine Todd Whitman, EPA Administrator, dated July 12, 2001; and the Nuclear Regulatory Commission (NRC), Memorandum to NRC Commissioners from William D. Travers, Executive Director for Operations, dated February 2, 2001.

²⁵³ Order No. 635 Policy Statement on Consultation with Indian Tribes in Commission Proceedings (PL03-4-000), III FERC Stats. & Regs., Regulations Preambles 104 FERC ¶ 61,108 (July 23, 2003).

²⁵⁴ 18 CFR 2.1(c).

²⁵⁵ 18 CFR 5.7.

²⁵⁶ City of Tacoma, WA, 71 FERC ¶ 61,381 at p. 62,493 (1995); Skokomish Indian Tribe, 72 FERC ¶ 61,268 (1995); See also FPC v. Tuscarora Indian Nation, 362 U.S. 99 at p. 118 (1960), *reh. denied*, 362 U.S. 956; and City of Tacoma, WA, 89 FERC ¶ 61,275 (1999). In this regard, we note particularly that the Tribal Group agreed that government-to-government consultation must be consistent with the Commission's *ex parte* regulations.

²⁴⁷ Nez Perce, Menominee, NF Rancheria, Maidu, NW Indians, CRITFC, S-P, CRITFC. NHA and Interior agree.

²⁴⁸ Nez Perce, Umatilla, Interior.

²⁴⁹ Interior recommends that, in addition to a pre-NOI check, there should be a check point when the parties receive the potential applicant's proposed study plan and another when the application has been filed.