

consultation under Section 106 of the NHPA, 36 CFR 800.16(f). This regulation, which is not specific to tribal consultation, defines consultation as “the process of seeking, discussing and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.” It adds that “[The Secretary of Interior’s] ‘Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act’ provide further guidance on consultation.”

279. In our view, tribal consultation pursuant to our trust responsibility encompasses far more than implementation of NHPA Section 106. It includes every issue of concern to an Indian tribe related to a treaty, statute, or executive order where the Commission can, through the exercise of its authorities under the FPA, fulfill its trust responsibility. That is a very broad concept, and we are convinced that establishing the consultation process with respect to any particular case through direct communications with the affected tribes will be more meaningful than any general language we could put in the regulations.<sup>257</sup>

## 2. Tribal Liaison

280. Our proposal to establish a Tribal Liaison was supported by all of the commenting tribes and the Advisory Council.<sup>258</sup> There is a consensus among the commenters that the liaison should not be merely a clerical position, but should also not have decisional authority.<sup>259</sup>

281. Commenters suggest various roles and responsibilities for the 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;<sup>260</sup> assisting tribal

knowledge of and participation in the Commission’s processes;<sup>261</sup> educating Commission staff about tribes and the trust responsibility and treaty obligations;<sup>262</sup> assisting tribes in learning how to access and effectively use the informational resources of the Commission’s Web site;<sup>263</sup> 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.<sup>264</sup>

282. GLIFWC and Menominee state 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.

283. The Tribal Group essentially endorsed all of these recommended responsibilities and added the following:

- Coordinate with tribal liaisons at other agencies;
- Help determine which tribes may be affected by likely future relicensing applications or original license applications;
- Inform potentially affected tribes about potential future relicensing applications and facilitate tribal participation in rulemaking proceedings;
- Become educated about the rights of Indians;
- Assist tribes in making known their issues and views on compliance with treaties and the trust responsibility;
- Ensure that tribes are informed of studies and information with cultural resources or treaty rights implications;
- Manage communications between the Commission and tribes when the *ex parte* rule is in effect;
- Facilitate communications between applicants and tribes; and
- Facilitate informal dispute resolution between the applicant and a tribe.

284. Only Skokomish and NW Indians suggest that the Tribal Liaison should play an active role in the substantive resolution of licensing proceedings. NW Indians recommend that the Tribal Liaison or Liaisons should be educated about individual tribes and their

interests in specific proceedings and act as their advocate within the Commission.

285. We agree with the majority of the commenters that the Tribal Liaison should be a facilitator of government-to-government consultation, and should not be responsible for resolution of substantive issues. The latter requires expertise with specific resources, plus a thorough knowledge of the facts relevant to a specific case. The Commission employs technical experts for such matters, as do many tribes. The Tribal Liaison will provide expertise with respect to matters of process.

286. Regarding the specific responsibilities of the position, the Tribal Liaison will seek to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission’s various statutory functions and programs. The Tribal Liaison will work with the tribes during Commission proceedings, to ensure that the tribes’ views are appropriately considered at every step of the process. The Tribal Liaison will act as a guide for the tribes to Commission processes, and will strive to ensure that consultation requirements are met. The Tribal Liaison will have considerable flexibility in carrying out these responsibilities, consistent with the evolving nature of tribal consultation.

287. Various commenters indicate 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 suggestions in this regard include multiple liaison positions based on regions of the country, watersheds or river basins, or sub-regions within a state.<sup>265</sup> Pacific Legacy suggests 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.

288. Our decision on the number of Commission staff serving as Tribal Liaison involves two basic considerations; the responsibilities of the position and the level of effort necessary to effectively carry out the responsibilities. At this point we can define the responsibilities of the position, but only time and experience will tell us with certainty what level of effort is necessary.

<sup>257</sup> S-P states that the rules should require each license proceeding to include an assessment of treaty rights and an agreement with the tribe on how those rights will be honored. Although treaty rights need to be considered, S-P appears to suggest that the Commission and the tribe must reach agreement on the substantive disposition of the license application. That is something we cannot do consistent with our statutory responsibilities.

<sup>258</sup> S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, HRC, Advisory Council, Menominee, Skokomish, Interior, NF Rancheria.

<sup>259</sup> S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, Menominee.

<sup>260</sup> 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.

<sup>261</sup> SCE.

<sup>262</sup> GLIFWC, Menominee.

<sup>263</sup> GLIFWC.

<sup>264</sup> Interior.

<sup>265</sup> Pacific Legacy, GLIFWC, Menominee, CRITFC, S-P, California, Interior.