

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC & TRIBAL POST-NOPR REGIONAL  
WORKSHOPS.

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PUBLIC MEETING

FRIDAY, MARCH 14, 2003

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BE IT REMEMBERED THAT, the public meeting in the matter Of Public & Tribal Post-NOPR Regional Workshops was taken before Mary Jacks, Court Reporter and Notary Public, on Friday, March 14, 2003, commencing at the hour of 9:00 a.m., the proceedings being reported at 1401 Hayden Island Drive, Portland, Oregon.

APPEARANCES

LARRY CROCKER, FERC

KERRY GRIFFIN, NOAA FISHERIES

LIZ MOLLOY, FERC

ANN MILES, FERC

TIM WELCH, FERC

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PORTLAND, OREGON

FRIDAY, MARCH 14, 2003

9:00 A.M.

MS. MOLLOY: I'd like to welcome everyone. Thanks for coming, and I appreciate your -- your sitting, sort of, towards this side and -- and so we're closer together and such.

I want to introduce myself. I'm Liz Molloy. I was named by the chairman as tribal liaison for this rulemaking and so I'm going to be facilitating today. And with me, I have Ann Miles from the Office of Energy Projects, and Tim Welch, and I'm embarrassed --

MR. GRIFFIN: Kerry Griffin.

MS. MOLLOY: Kerry Griffin from --

MR. GRIFFIN: NOAA Fisheries.

MS. MOLLOY: -- NOAA Fisheries, formerly known as NMFS. The restrooms are back by the stairs, in case you didn't see them on the way in. I explored. I -- I verified personally that that's where they are. And we're going to go through pretty much on the agenda that is on page A1 of the book.

Tim's going to give us a presentation, sort of, going over the -- the rulemaking and some questions that FERC has. And then we'll hear clarifying kinds of questions, if we can explain anything that --

that isn't clear about the rule. And then we're going to identify some issues that you all may have that we can discuss further.

After we identify them, we're going to then try to have an interactive discussion of issues and solutions and -- and take any other questions that anyone might have.

At the end, what we'd like to do is make this, sort of, an interactive discussion and -- and answer things, so if you have any prepared statements, we've set aside a little time at the end that you can present it to the group or you could just give it to the -- the stenographer.

I'm trying to think. Have I missed anything? I think that's pretty much it. I'd like to start with introductions. If every -- If we can start around the room and introduce who you are and who you represent, that would be great. And if you would use the microphones, please. They're -- They're gathered about. And if you could use them, that way it's recorded and if there's any question on -- on what was typed up, then they can listen to it and verify and it helps them out a lot. So if I can start -- if I can start at this end.

MR. LINDERMAN: I'm Chuck Linderman, director of energy supply policy at the Edison Electric

Institute on behalf of licensees.

MR. BRONCHO: Claude Broncho,  
Shoshone-Bannock tribes, Fort Hall, Idaho.

MR. HOWARD: Ted Howard,  
Shoshone-Paiute tribes.

MR. CLARY: Don Clary from Holland  
Knight representing the Shoshone-Paiute tribe.

MR. PRIOR: Good morning, Kyle Prior  
with the Shoshone-Paiute tribes.

MS. HANSON: Kari Hanson, Energy News  
Data.

MS. SCHAFF: I'm Margie Schaff. I'm  
with the Affiliated Tribes of Northwest Indians, Economic  
Development Corporation.

MR. KANAIR: I'm Dan Kanair. I'm with  
Snoqualmie tribe.

MS. MOLLOY: Again, I'm Liz Molloy  
with FERC.

MS. MILES: Ann Miles -- Ann Miles  
with FERC.

MR. WELCH: Tim Welch with FERC.

MR. GRIFFIN: Kerry Griffin with NOAA  
Fisheries.

MR. TEEMAN: Albert Teeman,  
Burns-Paiute tribe.

MR. BERG: Mel Berg, B.L.M.,  
Washington, D.C.

MR. MCDONALD: Stan McDonald, B.L.M.

MR. HEINITH: Bob Heinith with the  
Columbia River Intertribal Fish Commission.

MR. HALLER: Good morning. Greg  
Haller with the Nez Perce tribe.

MR. BURNHAM: Bernie Burnham, Bureau  
of Indian Affairs, Northwest Regional Office.

MR. HENRIKSON: Gerald Henrikson,  
Bureau of Indian Affairs, Warm Springs agency.

MR. MEYERS: Dave Meyers, Idaho Power  
Company.

MS. MOLLOY: And Art, if I could have  
you introduce.

MR. ART ANGLE: Art Angle, Enterprise  
Rancheria.

MR. CLIFFORD ANGLE: Clifford Angle  
from Enterprise Rancheria, California.

MS. MOLLOY: Thank you so much. I'm  
now going to turn -- Did I get everyone? Did I -- I  
didn't miss anyone. I'm now going to turn it over to Tim  
to -- to make the presentation. Thanks.

MR. WELCH: Thanks, Liz. I hope  
everyone has had a chance to sign in and get a -- our

souvenir program for today's presentation and today's discussion because there's going to be a number of -- of things that we're going to -- we're going to be referring to this constantly throughout the day.

Starting in -- in enclosure B, my presentation I'm about to give you is -- is in there and there's some areas in here that -- to, kind of, take notes if you want to jot down some notes as I'm -- as I'm going through this.

As Liz said, I'm going to present to you, sort of, a -- hopefully, a brief overview of our notice of proposed rulemaking. And what -- What I'm going to do is, first, I'm going to talk about, sort of, our rulemaking journey, about, sort of, where we've been and, kind of, where we're going. And then, as I said, briefly, kind of, go through some of the highlights with you.

And then at the end, we have a number of questions that are actually posed in the -- in the notice itself that we, sort of, summarize. And that's just to, sort of, stimulate your -- your thinking a little bit on the -- on the types of -- of -- of issues that we still want information on. And hopefully, that'll form the basis for our issue identification, which is our next step in the process at this meeting, to identify some issues that we can -- that we can discuss.

So talking a little bit about our journey, back in September of 2002, we issued a -- a public notice. This, sort of, set the stage for everything to happen. It, sort of, set the stage for a series of FERC and resource agency joint sponsored public and tribal forums.

I know many of you were at the tribal forum that we had up in -- up in Tacoma last fall. So we had about six of those around the country where we tried to gather information prior to issuing a notice of proposed rulemaking just trying to gather information about what people's thoughts were, about whether, number one, there was a need for a -- a new licensing process. And if so, what that new hydro licensing process should look like.

So -- And then in December, we -- we followed that up with what we called stakeholder drafting sessions where we invited many different stakeholder groups, including some Indian tribes, to Washington, D.C. to get a little bit more specific and actually begin thinking about and drafting language for certain concepts of how the process should look. And I know many of you in this room were at -- were at that stakeholder drafting session that we had in December.

Now we followed -- We took all the

information from that drafting session from our tribal forums and we sat down with our sister federal agencies that have a role in the Federal Power Act, the Forest Service, NOAA Fisheries, and the Department of the Interior, and we began drafting the specific language, much of which what you see in the notice of proposed rulemaking.

So we worked on that until about the -- the middle of January. So at the end of February, we had the notice prepared. We presented it to the commission. The commission unanimously voted it out and issued it on February 20th, 2003. And so that, sort of, brings us up to -- to the present. So in March and April, we're going to, sort of, repeat our -- our regional visits, and this time we're calling them regional workshops where we're going to try to get more input very -- now very specific on our -- our specific proposal for a new process.

Comments on the notice will be due on April 21st, so at the end of April, so you still have about a little over five weeks or so to prepare your formal written comments with the commission.

Now again, at the end of April, we're going to again convene some stakeholder drafting sessions where once again you will be invited to come to

Washington, D.C. and, once again, start drafting specific language for the final rule based on our proposal in the notice of proposed rulemaking.

Now once again, we're going to have on line registration for that that's going to open up sometime in the middle of April so you -- where you'll be able to register for that on line. So that will be a -- The last drafting session before the NOPR was a two-day affair. This is going to be a four-day affair for -- and so we're really going to work you hard this time. So we're -- we're -- people refer to that as hydro hell week so be prepared for that.

Then in -- of course, in March and primarily in the end of April, for all the month of May, we will once again, convene with our sister resource agencies and begin drafting the language for the -- for the -- a final rule but will anticipate presenting that to the commission for their vote at the end of -- of July, so having said -- described our -- our -- our process to you where we're gathering input from all aspects of -- of the public. One of the things that -- or one of the major --

MR. GRIFFIN: There's a question. Do you have a question?

MR. WELCH: Yeah, Bob.

MR. HEINITH: Yeah, I do. I -- Is

there any opportunity for the tribes to respond to the final rule or is this last drafting session in D.C. the last opportunity for the tribes to give input into this rule?

MR. WELCH: I would -- I would say that that -- those drafting sessions would be the last opportunity for the input.

MR. GRIFFIN: Just a reminder for the stenographer, we need to identify your name and speak into the microphone whenever you speak today.

MS. MOLLOY: And also, and if you can give your last name. But if I could -- just one thing, the -- the other thing would be in written comments. If there's particular language, you know, that someone feels that they want to propose but they can't get to Washington or something, feel free to -- to set it out in comments that are filed with the commission so that -- that it gets to the commission.

MR. HEINITH: Those are due April 21st?

MR. WELCH: April 21st, that's right.

MR. HEINITH: And -- And another question, Bob Heinith, Intertribal Fish Commission, staff will be drawing up the final rule with the other agencies; is that correct?

MR. WELCH: That's right.

MR. HEINITH: And then it'll go to the commission for final approval?

MR. WELCH: That's right.

MR. HEINITH: Will it just be one final rule or will there be options for the commission to choose from within the final rule?

MR. WELCH: Well, when we did the notice, we -- it was pretty much one option so I'm thinking that's the way we're -- we're leaning again. We got any -- Bob was wondering would there be a possibility for options for the commission to go around.

MS. MILES: I'm not sure on that. I mean, normally with a project, there certainly are alternatives to a project whether they're -- I suppose the staff could offer the commission alternatives. I think probably in most cases we will make our best recommendation. But if there seems to be some aspect that maybe, sort of, the staff isn't able to make a decision, they could offer alternatives to the commission.

One thing I did want to make sure of, FERC staff will be working with the resource agencies March through May in drafting language. But then FERC staff on its own for the last month will get the rule ready for the commission without the federal agencies

working with us. So we're -- We're working with the federal agencies, especially because of the mandatory conditioning authorities that they have and looking at how -- how that can be well integrated. But in the end, it is the commission's rule. It isn't anyone else's, so that's what they'll be doing.

MR. HEINITH: One other question, Bob Heinith again. Do the resource agencies, federal resource agencies, include the Bureau of Indian Affairs?

MR. WELCH: It includes the Department of Interior and they're -- and they're representing all the bureaus.

MR. HEINITH: The solicitor's office?

MR. WELCH: Yes.

MR. HEINITH: Thank you.

MR. WELCH: Okay, so the con -- one of the themes that we heard again and again and again at these tribal forums are -- are -- was integrate, integrate, integrate. Integrate other agencies and other entity's processes into a new licensing process, so it should come to -- to no surprise to anyone we came up with a -- lo and behold, an integrated licensing process and that's what I'm going to spend most of my time talking to you today.

Now as with most -- most things, the

devil's always in the details, so during this second round of workshops, that's what we would like to focus with you today. Help us to dot Is and cross the Ts and zero in on very specific areas that you might have some problems with and specifically tell us, you know, what kind of concept or language would make you feel more comfortable. So we need you to help us, sort of -- sort of, fill in all the -- all the little details as we, kind of, put the big puzzle together.

So the proposed rule basically does two things. It creates a new integrated licensing process, which you will find a handy dandy flow chart on the back of your books. So, sort of, keep this handy. We'll be referring to it throughout the day, so this is the integrated licensing process.

And basically, it's, sort of, broken down into three areas. The first year working on what we're calling a process plan -- I'll talk a little bit about that in -- in -- in a minute -- and the development of the important study plan.

The second two years, sometimes could be more than two years, will be the conducting of the studies and the actual development of the application. And the remaining time will be the application processing by FERC, one and a-half years.

So that first year is, sort of, these  
-- this -- this top row. The second year is, sort of, the  
-- the middle row. And then this -- these bottom two rows  
here are the application processing.

Now in addition to introducing a -- a  
-- proposing a new integrated licensing process, we also  
made a few changes to the traditional process, which is  
the current licensing process.

And what -- what we did was we took a  
couple of elements that we thought were beneficial that  
were in the integrated licensing process and we applied  
them to the traditional process, as well. And they  
include increased public participation and early study  
dispute resolution. Those two concepts are now in the  
traditional process.

We think that the integrated licensing  
process improves the process efficiency, timeliness, and  
it also provides for a better answer at the end. In other  
words, it provides for a better license with -- with  
better conditions.

So let me talk first about how we  
think that the new process improves the efficiency of the  
current process. One of the big, major aspects of the  
integrated licensing process is that the application  
preparation is done in conjunction with FERC's NEPA

scoping.

Now think about that in contrast with the traditional process that we're currently under when FERC conducts its NEPA scoping after the application is filed with the commission, so the application is prepared under the traditional. Then the ap -- Then it's -- Then it's filed with the commission and the commission does its scoping.

We've taken that scoping. We've moved it to the very beginning, so those two things are done simultaneously.

We've also coordinated with other -- the participating processes, and the -- the primary one I'm thinking of is the 401 water quality certification from either states or in some cases tribes.

And also, trying to get the public, primarily non-governmental org -- organizations and local folks, in -- increased public participation at the very beginning of the process.

Now we think that the ILP improves process timeliness by requiring that FERC staff become involved at the very beginning of the process. Once again, recall that under the traditional process, FERC staff typically does not get involved until after the application is filed.

We think that with FERC's -- early FERC involvement, we'll have a much better chance of moving the process along and -- and meeting schedules and deadlines.

Now as I said earlier, FERC will be assisting with what we're going to call the process plan. That's one of the very first things that happens in the integrated licensing process. It happens at the very first site visit, FERC scoping meeting. It's one of the most important aspects of -- of this whole -- whole thing, where we're going to put together with the assistance of all the other entities in the process -- putting together an overall process plan that integrates all the other processes into one, sort of, master schedule that everyone can understand and follow.

We all -- Also, we think the ILP improves timeliness by allowing for early study plan development, and more importantly, both informal and formal study dispute resolution process early.

Once again, that is in stark contrast to the traditional process where typically studies aren't resolved until after the application is filed with the commission. So we'll talk a little bit more in detail about this informal and formal study dispute resolution process that -- that happens early on.

This graph here illustrates that -- the dramatic decrease in application processing time that we're expecting with the integrated process. So this is basically the time that the -- that FERC receives the application, which would be the zero on the X axis, to the time the commission -- the months later where the commission actually issues the license order.

So this top bar here under the traditional process is actual data that we had in the FERC 603 report, which -- which reported an -- or a median processing time of about 47 months under the traditional process from the time the application was received until the license order was issued.

Now this bottom bar in the integrated process, this obviously is not real data because we haven't implemented the process yet, but our projection is that the integrated process -- application processing time will be around 17 months, so you can see it's a pretty dramatic decrease in application processing time.

Now there's a number of reasons for this and a lot of it is that the information is -- is developed before this point in the integrated process whereas a lot of the information is developed after this point in the traditional process, which quite often can add quite a bit more time to the process.

The other thing I'd like to point out to you is this -- this two-year mark, the 24-month mark, which is the time where the -- where the current -- in relicensing situations, a time that the current license would expire.

So as you can see, under the traditional process, in many instances the commission is issuing annual licenses to, sort of, keep the project operating until the new license has been issued.

We're anticipating that when we integrate a process, we'll have the new license in place well before the license expires such that the commission would in only rare occasions have to issue annual licenses.

So I have another -- probably about another seven points of other significant aspects of the NOPR that I'd like to quickly go over with you just to give you a brief overview.

So I'd like to talk about process selection, a change in the cooperating agency intervening -- intervenor policy, an issue that's probably one of the main ones we're going to talk about today, our -- our proposed change in -- in how we consult with Indian tribes and advance notice of license expiration, the new -- what we're calling pre-application document, which would

replace the current initial consultation package under the current regulations. We're going to talk a little bit about our proposed methodology for study dispute resolution, and finally, some changes to the content of the application.

Now we're proposing that with the adoption of the integrated licensing process, FERC will now have three distinct ways to obtain a license, the integrated, the traditional and the ALP, the alternative process.

The important thing to remember here is the second point that we're proposing, that the integrated process be the default process; that every -- all applicants are using the integrated process unless they can demonstrate a -- a need to use either the traditional or the alternative.

So with the traditional process, the applicant must request to use that process and it will ask for public comments and comments from resource agencies and tribes when it files its notice of intent. The commission will then look at those comments and decide whether or not to approve or disapprove the applicant's request to use the traditional or the alternative process in lieu of the default process, the integrated process.

Currently, the commission policy for a

cooperating agency is that if another agency such as the -- the Forest Service wants to cooperate and do a joint -- a NEPA document, we preclude that entity from also being an intervenor in the process.

Now we are proposing to change that in order to promote more cooperation between FERC and other federal agencies. We're proposing to change our policy for permitting a federal agency to be both a cooperator and an intervenor at the same time.

Now we know a lot of people have some concerns about ex parte communication so we're also proposing to modify the ex parte rule to require only disclosure of specific study information that one agency, say the Forest Service, would pass on to FERC staff.

So, for example, if they came with a -- like a specific study on recreation or something, we would be required to put that on the record for all parties to see. What would not be required to put on the record would be exchanges of drafts of the NEPA document.

If, you know, we prepare a section, give it to the -- say, the -- the Forest Service if they were a cooperator, to look at -- we'd be passing back and forth these drafts. We wouldn't be required to put that on the record. The thinking is that that document eventually will be in the public view.

Now tribal consultation, we are proposing that commission staff would initiate very early discussions with any effected Indian tribes in order -- and here's the key point -- to develop the consultation procedures. Instead of trying to lay out a -- very detailed procedures for consultation with Indian tribes, we decided it would be best to just have an initial meeting where we would work with the individual tribe or tribes to, sort of, tailor the consultation to fit the needs of the tribe in the particular licensing proceeding.

Now to help us do that, we're proposing to establish a position of -- of -- a permanent position of tribal liaison at FERC. That person would, sort of, be the point contact at FERC for Indian tribes in all matters involving the commission.

Now as Liz said earlier, she is now the tribal liaison but just for the rulemaking, so at -- once this rule goes into effect, we will be filling a position of tribal liaison.

Another concept that we heard a lot about at our forums was advance notice of license expiration, and this is a concept that FERC would send a letter before the entire process begins at some specified time. We haven't specified that time yet. And we will be interested in input on that.

We would notify the licensee well in advance of the notice of intent and provide -- to alert them that, number one, hey, guess what, your license is expiring soon, and to alert them to the requirements of the notice of intent, the pre-application -- pre-application document and the -- and the process selection, the three processes.

And it's, sort of, a head's up to the potential applicants that have to relicense their project that, you know, these are the requirements. This is what you need to get ready for. So it's kind of like a little -- like a wake-up call.

Let's talk a little bit about the pre-application document, which -- which is -- this is one of the first things that as Indian tribes you're going to see in the process and it replaces the current, initial consultation package, which is under the traditional process, and it's a much more detailed document.

And the idea here is to provide all the participants in the process with the -- sort of, the available, basic environmental information about the project. And it'll provide the basis for, most importantly, the -- the identification of the issues that are important to the participants in order to begin to develop studies, so study requests. And the whole thing

would provide the basis for the FERC NEPA scoping document.

Now one of the things that we're trying to do here is we're trying to keep the -- the form and the content of, sort of, the underlying document in the proceeding in the same form and content of a -- as an environmental document, and I'll get into that in -- in just a minute.

So you'll see in the rule that this pre-application document, the form and the content is the precursor to the Exhibit E, which is the -- the environmental part of the application. In other words, things will be presented in very distinct resource areas and you'll see that theme throughout the entire proceeding, so it's almost like it's a living document and so you'll see this document evolve until it ends up being the FERC -- FERC NEPA document.

Just one more thing about the pre-application document. We're very interested in information from you all and for -- from -- from all participants in the process about how detailed that should be. Right now, it's asking for a lot of information. Do you think it needs to ask for more information, less? We'd like to hear a little bit about that.

Now study dispute resolution, as I

said, in the integrated licensing process we're proposing very early study dispute resolution and I'm going to go through the -- sort of, the process very quickly with you.

The foundation for the study dispute resolution process are the -- what we're calling the study -- study plan criteria. We've outlined a series of seven criteria that all study requesters will use in making study requests, and that's found, I think, in -- in section 5.10 of the new rule.

Now the first step in the process is once the study requests are in, the applicant will formulate a study plan and circulate it for comment. The first step in the process is an informal dispute resolution process. If there's something that you don't like about the applicant's study plan, we give the opportunity for all the parties, including FERC staff, the applicant, all the participants to meet to try to resolve the differences. So you will be able to bring your dispute with the applicant's study plan to the commission staff right away and we'll sit down and convene a one- or two-day meeting or whatever it takes, maybe even a series of meetings to, sort of, resolve those differences and get a study plan that everyone can live with.

Now once that process is complete, the applicant will file its final study plan with the

commission. Then FERC itself will approve the study plan and the schedule either as is or with any needed modifications. Now the second step involves the resource agencies that have mandatory conditioning authority including state and tribal water quality agencies. They may be involved in a more formal dispute approved -- dispute approved study plan.

So in other words, if the study plan is finally approved by the commission, is not acceptable for those agencies that have mandatory condition authority under the Federal Power Act and state and tribal water quality agencies, if that study plan does not meet their needs, they are involved in the -- sort of, the second tier of the formal dispute res -- study resolution.

So that would begin by FERC convening an advisory panel consisting of FERC staff, which would be a different FERC staff member than had been involved with the process, so we'll get some fresh eyes on that, resource agency staff and a third party neutral. In other words, another person that has expertise in the particular area that's acceptable to the other two folks. Now they'll spend some time -- Ann, what is it, 30 -- 30 days maximum?

MS. MILES: Yes.

MR. WELCH: Thirty days maximum to

look at the -- the disputed study and look to see if it applies to the study plan cri -- criteria.

Now the applicant is involved here by providing both the comments and the information surrounding the studies. The applicant would also play a unique role here.

MR. HEINITH: Question, Tim.

MR. WELCH: Yeah.

MR. HEINITH: Bob Heinith, who at FERC will be the -- making the decision on -- on the -- on the panel?

MR. WELCH: On who's on -- on the panel?

MR. HEINITH: Yeah, will that be an ALJ or --

MR. WELCH: No, that'll be an internal thing in -- in our office. We'll have a pool of people that we'll assign to be the other person. So it -- it will be a technical person as opposed to an -- an ALJ, so if it's a fishery issue, it will be another one of our fishery biologists.

MR. HEINITH: So it's directed staff?

MR. WELCH: Yes.

MR. CLARY: Just to clarify, non-mandatory tribes would not be a part of the --

MR. WELCH: Not -- Not -- That's right. Not a part of the formal dispute resolution process.

MR. CLARY: -- leading to copies or anything, it's -- they're totally out.

MR. WELCH: I'm not sure if the -- Will -- Will -- Will the other parties be a part of the -- will they know what's going on?

MS. MILES: The decision -- Anything that's filed on the record would be available to everyone, so the -- the way the regs read right now, the applicant is able to file comments on -- to the panel to form a panel.

A lot of people have asked questions about whether other people can file comment. That may be something we want to talk about --

MR. WELCH: That's something we want to talk about.

MS. MILES: -- this afternoon and let's get it on the issues list, and -- so we can have a more detailed discussion of it later.

MR. WELCH: Now, as I said, the panel would then convene and make a decision as to whether or not the study criteria are or are not met. They will come up with a decision and they will provide that decision to

the FERC director of energy projects and that OEP director will make the decision with the dispute in respect to the study criteria and any other applicable law or FERC policy, so that will end the formal dispute -- study dispute resolution process.

Application content, what we did was we asked FERC staff what are some things that you typically have to ask for in additional information requests, not pertaining so much to studies, but just basic information? What's something that we always seem to have to ask for time and time again that isn't in the regulations?

And they came up with a -- a number of things, and a couple of them are to -- to add -- have applicants add information about both minimum and maximum hydraulic capacity. I think right now it just requires minimum hydraulic capacity.

And another more important thing is we're requiring applicants to provide what the cost is to develop the license application, for two reasons. We -- We have used cost to develop a license application in our developmental analysis and our NEPA document.

And also, we still want to keep track of how much this is costing applicants to prepare license applications under the new process, so we want to, kind

of, keep those data so we can look at it five, ten years down the line, determine -- to determine whether or not -- how much this is, kind of, costing applicants.

So we're also requiring that project boundary information be included for both licenses and exemptions. Under the current regulations, liner (phonetic) license applications are now required to provide project boundary information for whatever reason. We're -- We're changing that, or proposing to change that so that we have project boundary information for all projects, so I think -- Is this it? I think so.

Okay, as I spoke to you before about -- when I was talking to you about the pre-application document, now we've revised the -- the form and content of the Exhibit E in the application to look more like an environmental document. In other words, the -- the applicant will have to provide us information in this format for each resource area, whether it be fisheries, other resources, terrestrial resources.

There will be a description of the affected environment, the applicant's environmental analysis, the applicant's proposed measures, any unavoidable adverse impacts the -- it identifies, and a developmental analysis, so this will look very much like -- in the same form and content as the FERC NEPA document.

So we thought if we, sort of, had it, sort of, a consistent format throughout the process, it will be much -- made helpful to participants to, sort of -- sort of, see that document evolve throughout the whole process.

Oh, yeah, as I said earlier, we're -- we're proposing a number of questions in the NOPR and these are, sort of, a summary of those questions. And this is, once again -- is, sort of, to -- to stimulate your thinking a little bit so when we go to identify our issues you have a little bit of an idea of at least some of the information that we might be interested in.

So I'm just going to go through these questions very quickly. Are the contents of the pre-application document -- are they appropriate? Do they need to be more detailed or less detailed? Is the proposal for early contact with Indian tribes -- is that adequate to improve tribal consultation?

Are the proposed study plan criteria -- are they adequate? Do they need to be modified? What modifications, if any, should be made to -- to both the informal and the formal study dispute resolution process?

Should resource agencies provide preliminary recommendations and conditions prior to the draft of the final application? Right now, the rule -- in the new rule, we're proposing that happens after the --

ready for environmental analysis.

Are the recommended time frames associated with the proposed integrated license process adequate? Now as you can see on your flow chart in the back, there's -- we've put in these little tiny numbers, which is the numbers of days between these boxes. We want to know a little bit more about whether you think those numbers are realistic? Yeah.

MR. BRONCHO: Claude Broncho, Shoshone-Bannock tribe. In this integrated license in the back, where does the -- are the tribes included in the -- on this process?

MR. WELCH: The tribes -- The tribes --

MR. BRONCHO: The section in there.

MR. WELCH: Yeah, the tribal consultation isn't in this -- this particular flow chart. It's mentioned in the preamble on page -- Help me FERC staff.

MS. MOLLOY: C45.

MR. WELCH: I'm sorry?

MS. MOLLOY: C45.

MR. WELCH: C45, so we're not proposing that tribal consultation be in the regulation text itself but that it will be a -- a commission

practice. And so it's described in the preamble of the -- of the notice but not in the actual reg text itself. And maybe that's something that we want to -- maybe a little -- put it on our issues list for discussion.

MR. BRONCHO: Just a continuation of that, is there a reason for that? And, you know, I see it but I -- the initiative in regards to the first part of the public or not public or government.

MR. WELCH: Okay, one of the things that's required in the integrated licensing process is a draft license application. And we're asking, is it -- is it necessary to have a draft license application or should we just have a requirement to go straight to final?

Are there recommendations -- recommended deadlines for filing the 401 water quality certification application? Are they appropriate?

What, if any, criteria should be considered in determining the use of a traditional licensing process? Does the proposed --

MR. BRONCHO: Just a question, Claudeo, Shoshone-Bannock, under that 401, under that water quality, when -- when you say that tribes have authority in there, is that under, like, a tribal authority rule through E.P.A. and --

MR. WELCH: Yes.

MR. BRONCHO: -- as a state?

MR. WELCH: If -- If the --

MR. BRONCHO: If they have been  
recognized in that area.

MR. WELCH: If they have been  
recognized by the E.P.A. and gotten that formal  
designation through the Clean Water Act, that's what I'm  
specifically referring to.

MR. BRONCHO: Okay.

MR. WELCH: What -- What  
recommendations are there that you might have -- this is  
something we're very interested in today -- regarding what  
the roles and responsibilities of that proposed FERC  
tribal liaison. What should that person do?

Does anyone have any suggestion on how  
the regulations could be modified to accommodate small  
hydro projects? How can FERC best inform Indian tribes of  
future licensing proceedings? That might be tied in a  
little bit with the tribal liaison.

Is the explanation in the notice of  
existing procedures for consultation under the National  
Historic Preservation Act, Section 106 -- is that  
sufficiently explained in the rule? That's -- I think  
that's it. John.

MR. MARTIN: John Martin, B.L.M.

Going back to one of your slides, the application content, revised Exhibit E in the form of an environmental document, B6 there, and it points out the parts of a -- like an environmental impact statement.

My question is, has -- is there going to be changes as to what the content will look like or -- or the degree of information that will be placed in there? There are certain kinds of standards. Agencies have certain standards that they establish for what the effected environment looks like, what -- what it documents and -- and how it proceeds to do that. And the analysis that takes place, you know, the -- the -- evaluating the impacts of -- of a proposed action and then alternatives and such -- such things.

Will there be -- Will that be expanding or changing? Again, I know the devil's in the details, again, but --

MR. WELCH: Right.

MR. MARTIN: -- there is some issues as far as the content or context that some of the very specific issues, socioeconomic issues, you know, obviously, and there's many others that may or may not contain and -- and obviously everybody has a different viewpoint on that. I was just wondering if there were going to be some changes made perhaps or there -- was

going to be more specified as to what that would actually look like.

MR. WELCH: Okay. I would -- I would refer to -- to how we have it set up right now in -- in the -- in the regulation text, but, John, we would be interested in any specific comments you have regarding that about how you think it should look, so we're -- we're still kind of open on that one. Ann.

MS. MILES: John, you may want to take a look at section 5.17 because it goes through application content in quite a bit of detail and specifies, you know, what should be each -- in each of those sections. It talks a little bit about cumulative effects. It talks about the different other regulations that need to be complied with.

So if you think, you know, that's good, great. But if you've got -- Like Tim said, if you've got changes or additions that you'd like to see in that, we'd like the details of it.

MR. WELCH: Okay, so I'll turn things back over to our facilitator.

MS. MOLLOY: Well, I'm -- I'm wondering if there are any other questions to clarify, sort of, what we've gone over, any questions you have that -- that needs a -- a fuller explanation before we, sort

of, identify issues that we want to discuss further.

MR. GRIFFIN: Yeah, I have a -- I have a question. So we're on that agenda items now, clarifications?

MS. MOLLOY: Yes.

MR. GRIFFIN: Okay. I was wondering if you guys could -- This is Kerry Griffin with NOAA Fisheries. If you could just give a couple of examples of which types of communications would and would not be subject to ex parte under the proposed changes.

You said the drafts of -- of envi -- of the NEPA document or environmental documents would not have -- would not be subject to public, you know, disclosure or posting, but would phone calls and all letters or could you just clarify that?

MS. MILES: Kerry, you're talking about if an agency chooses to be a cooperating agency --

MR. GRIFFIN: Yes.

MS. MOLLOY: -- also? The change in policy was being able to be both a cooperating agency and an intervenor?

MR. GRIFFIN: Yes.

MS. MILES: The idea is that studies or data, that type of information that people would want to look at the details of, will need to be placed in the

record. So if a cooperating agency comes forward with some sort of a study, specific data, that would -- we would make sure that that gets into the record.

When you're working with a cooperating agency, there's a lot of discussion about the draft or final environmental document. Those kinds of discussions in producing the document wouldn't be -- wouldn't need to be on the record because what would be on the record would be the document that's either the draft or the final, the actual NEPA document.

Let me give a little more information on this because it's been -- it's an issue that bothers a lot of people. And the -- The idea with having a cooperating agency, the arrangement that FERC typically has is that FERC is the lead agency. And if another federal agency in this case needs to do an environmental document in order to issue their permit, like the 4E conditions if the project's on federal lands or a section 18 fish way prescription, if they need the environmental document, what we want to do in trying to look at ways to cut time and cost in this process is to be able to be use the same document. So the idea is that we would work together to gather the study information and then work together to display in this environmental document the analysis.

And what -- what we have -- FERC would try to do is to make sure that sections of the environmental document that deal with the resources, like water resources, fisheries resources, cultural, are strictly analysis and not conclusions or recommendations.

Then we would actually make the recommendations. FERC has a responsibility to look at the best comprehensive use of the water way in the public interest and that includes balancing resources. That's -- That's our mandate.

If we have a cooperating agency, that may not be their mandate. So we have the potential to come to different conclusions on the results, conclusions based on that analysis. And we would, I think, try to work out some consensus on the conclusions. But if we're not able to, we then could display in FERC's portion of that document where we do our comprehensive development, what we think the conclusions are and the federal agency could -- could come to different conclusions.

MR. CLARY: Don Clary, Shoshone-Paiute, I was wondering, would this be the point of the program where it might be appropriate to ask about the consultation procedure, basically, and -- and I guess it's alluded to in the document and we discussed it briefly that there will be a meeting early on and what

have you. But I'd kind of like to get a hypothetical, kind of, a feel for, you know, how staff feels this would -- would go, how it would be transacted, questions along the lines of who participated. Would be -- You know, obviously our position would be it should be brought to the tribes. I want to make sure that you folks agree that that's appropriate.

And then the question would be things along the lines of assuming that certain things were agreed to in that meeting, would there be milestones. Would there be any kind of consequences if an applicant, say, didn't comply with certain things that were agreed to? And if so, how would those be enforced? Can you give me, kind of, a feel for that kind of stuff?

MR. WELCH: Yeah.

MS. MOLLOY: I -- I -- I think --

MR. CLARY: Or do you want to hold off on this?

MS. MOLLOY: I -- I -- I -- I -- We definitely want to talk about that and -- and I think that's probably one of the highest priority items on -- on what to talk about. But it does occur to me as you -- as you start talking, because it will lead to a dialogue, that what we might want to do right now, since -- since I think we -- we've clarified, I think everyone understands,

sort of, the general feeling here, that -- that we identify, sort of, all of our -- our issues that we want to touch so we have an idea of how much -- how much time we want to, you know, sort of, spend on each thing and -- and take care of that right now. So I think right now we should identify all those, and I actually -- you've written that down and was put up there. I -- I have three so far and -- and we can put them up or --

MR. WELCH: Are -- Are there anymore clarifying questions, like, you know, did you mean this or that?

MR. HEINITH: Yeah, I -- I have one. Bob Heinith on -- on the tribal liaison. Would that be one person or a group of people because it would take an awful lot of effort even on one --

MR. WELCH: Yeah.

MR. HEINITH: So what's -- what's the thought?

MS. MOLLOY: And this is, again, where we're exploring what the needs are and -- and, sort of, what the role might be so that we can -- we can bring back the -- the feedback and the discussion on -- on what it would be. It's not set yet, I don't think.

MR. HEINITH: It's not set, okay.

MR. WELCH: To answer your question.

MS. MILES: Let's put that on the list to discuss.

MR. HEINITH: Okay.

MS. MILES: Because we've got some thoughts but we need your input on that one. It's -- It is -- It is not at all fixed what that would look like.

MR. GRIFFIN: I -- I have another clarifying question. This is Kerry Griffin. I can ask; right?

MR. WELCH: Yes, Kerry.

MR. GRIFFIN: Thank you.

MR. BURNHAM: Before you go into that, this is Bernie Burnham, could we get this list started up here so we could --

MS. MOLLOY: Yeah, and, in fact, I'm going to move up and -- and just to change things up --

MR. WELCH: Okay.

MS. MOLLOY: I'll change things up more.

MR. WELCH: Okay.

MS. MOLLOY: I can work the top or the bottom of the table. I'm flexible. It's just a question of if I can turn the computer on.

MR. GRIFFIN: So, Ann, you can probably help me with this one. On section 5.1A --

MS. MILES: What page are you on?

MR. GRIFFIN: Page D78. Oh, maybe that's -- maybe not. That's not it. It's -- Oh, it's page D80, 5.21A. It talks about the commission accepting the application and issuing a ready for environmental analysis notice. And what it says is when the commission has determined that the application meets the commission's filing requirements as specified in 5.16 and 5.17, the approved study plan has been completed and any deficiencies have been cured, etc., etc., it will issue public notice as required.

The -- The phrase that says when the approved study plan has been completed, can you clarify? There was some confusion yesterday and that's why I'm bringing this up. Does that mean that -- that the study plan has been written and completed or the studies have been completed?

MS. MILES: It means that the studies required by the study plan have been completed.

MR. GRIFFIN: That's -- That's what I thought, and when someone brought that up to my attention yesterday, they pointed out that that could be misinterpreted, so --

MS. MILES: If -- If that's not clear, we cer -- that is the intention of that; that all the

information that is needed to move forward with the environmental document has been developed, and we can clarify that in the --

MR. GRIFFIN: Thanks.

MS. MOLLOY: All right, any other clarifying questions?

MR. HOWARD: I don't have a question.

I just have a comment. Oh, excuse me, Ted Howard, Shoshone-Paiute tribes. Tim, in the -- in the overview that you gave on -- on different proposals that you have, I think there's much to be said about tribal sovereignty and trust obligations.

I still feel that you are missing the mark on tribal sovereignty and the actual sovereign status of tribes and what that means, and the obligations of the federal government to federally recognized tribes, treaty obligations, land titles that may be unsettled, those obligations that our tribes made and reserved various rights for themselves with the federal government.

And when we speak of the federal government, that means every agency including FERC that falls under -- under the government, have to acknowledge that and comply with those laws and obligations that were -- that our people made with the federal government at the time our lands were given and -- and the various laws that

pertain to native American tribes all have to be recognized and dealt with as sovereigns. I see in many instances we're wadded in with the public or stakeholders, which we are not. We are sovereign governments, sovereign entities, like any other sovereign government might be or -- or sovereign country.

MR. CLARY: Maybe we could -- Could I -- just maybe, perhaps, we could discuss later on how regulations might best reflect that sovereignty issue.

MR. WELCH: Okay.

MR. HALLER: Greg Haller, Nez Perce tribe. I think an issue that needs to be up there is the dispute resolution process and why tribes are not -- tribes without 401 authority are not included in that.

MS. MOLLOY: Any other issues? Art.

MR. ART ANGLE: Art Angle, Enterprise Rancheria. In this FERC process, I know that some tribes have funding, some tribes don't have funding. In particular, I'm from a tribe that, you know, we have no base or anything, but -- so we have a real problem with participating in regards to consult -- consultants, some attorney issues that we need to clarify. So we have a funding issue that for proper consultation, proper participation, funding needs to be available to tribes that, you know, are in a situation where funding is not

there.

MR. CLARY: Before identifying issues for -- for later discussion, I think we'd like to talk a little bit about time frames that are currently specified in the draft. And then also, with regard to content of studies, we feel that there should be some particular areas that are specifically addressed and that will be a very beneficial change at this point in time. It may speed the process.

MR. WELCH: Go ahead, Greg.

MR. HALLER: Greg Haller, Nez Perce tribe. Probably an issue under the application content section, 5.17, couple issues there.

MR. WELCH: Margie, you had your -- sorry.

MS. SCHAFF: I have kind of a list.

This is Margie Schaff with Affiliated Tribes and Northwest Indians. I think something that needs to be on the list and -- and I think that my colleagues mentioned it earlier was trust responsibility, and FERC's -- you have the trust responsibility. I think that could be a fairly long conversation this afternoon, actually.

I also think -- And I don't know if this is up there, maybe under the contents of studies, but one of the things that we suggested in our earlier

comments to rulemaking was the in depth history of projects. And this may go along also with trust responsibility. The fact that many of these projects are subject to prior agreements, whether they be tribal treaties or -- or other kinds of agreements tribes made early on in their history, so the addition of -- of an in depth history of projects.

MS. MOLLOY: In the license application?

MS. SCHAFF: Well --

MS. MOLLOY: Where would I --

MS. SCHAFF: I think that it has to be part of the decision making process. I'm -- I'm not an expert in the FERC licensing process so I don't know exactly where it would go, but it's something I think is important.

Another issue may be tribes as applicants. I think you're going to see more and more tribes that actually apply for licenses or compete for licenses, and when tribes are actually applicants, how the rules may be different or may not be different.

And then also the question of new licenses and how these rules apply. And maybe it's -- it's already in there. Maybe that's the clarification I need, whether or not these rules will apply to new

licenses for small projects and that sort of thing.

MS. MOLLOY: One clarification on that, when you -- when -- in -- in FERC language, under our statute, a new -- new license is a -- a relicense, a project that's been existing and it -- and it is up for relicense. It's a -- It gets a new license. And -- And one for a project that hasn't existed at all would be an original license. And it sounds like you might be talking about original?

MS. SCHAFF: That's right, whether or not these rules apply there or how --

MR. WELCH: Well, I think we can answer that right off the bat. Yes, these rules -- new rules will apply both to original licenses and new licenses.

MS. SCHAFF: Okay.

MS. MILES: However, we realized in -- in drafting it that it was a little more problematic for original licenses so we've asked questions about whether it is a good idea to -- for them to apply to original projects.

MS. SCHAFF: And then is there a small project process that's different or that's -- is exempted from these rules?

MR. WELCH: Again, the -- the answer

is, no, that we're proposing this apply to both small and large projects. But again, as Ann said earlier, we have asked the specific question about that.

MS. MOLLOY: There is the ability in any -- use of any process to waive certain parts of the regulations, if need be, and -- and we have done that in cases with smaller projects who've used the traditional process when they didn't all apply. And that's still written into the new integrated licensing process.

MR. WELCH: Greg.

MR. HALLER: Greg Haller, I think we need to discuss project impacts that extend beyond project boundaries as well as cumulative effects and how the new rules may apply to assessing those impacts.

MR. WELCH: Bernie.

MR. BURNHAM: Bernie Burnham, would it be possible to -- to get a printout of the issues that were identified yesterday? I mean, I -- as you indicated, some of these folks don't work with hydro every day. Some of them do. But that might also bring us some thoughts they might have as to other people's concerns and how they -- how they relate.

MR. WELCH: I -- I think Liz -- Liz is getting it, Ann?

MS. MILES: Oh, she is?

MR. WELCH: It's right There. If we could hook it up to a printer.

MS. MILES: We can ask the staff here if they can download this for us so we can get a printout of it.

MR. BURNHAM: That would be great.

MS. MILES: We'll do that at the break.

MR. BURNHAM: Okay. There it is.

MS. MOLLOY: Here it is. It -- It goes on. I'll -- I'll -- I'll scroll. I'll hold this up for a minute here and then I'll scroll down and just get, sort of, a flavor of it.

MR. WELCH: The -- The numbers that you see up there are the number of people that -- when we prioritized we took a vote on which ones we should talk about first so that those numbers beginning with 23, 17, 14.

MS. SCHAFF: I'm sorry. Could you say that again, the vote thing?

MR. WELCH: Oh, I'm sorry. Yesterday, we made the list and then we prioritized it, so we just had -- had how many people want to talk about studies and that's what those numbers are.

MS. MILES: So that those -- The list

is in the order of interest in yesterday's group for which topics they wanted to discuss first.

MS. MOLLOY: It wasn't original, but we moved it around. And those slash marks are indicating we had discussed it. After -- After we discussed it, we marked it.

MR. MARTIN: John Martin, B.L.M. Yesterday, I wish I would have asked this one, but maybe I'll ask it today and see what happens. Exempted projects, those very, very small ones that have -- like, their irrigation canals have been converted and such. You guys don't really evaluate those. However, when new -- when relicensing comes up, some of those projects are contained within.

Evaluation, whether they are no longer exempted or -- or -- or not. How -- Is that built into this process or could it be or would it be?

MR. WELCH: We're proposing to -- to make no changes to the exemption rules. These -- These would be non-exempted projects. An -- An exemption -- An exempted project is exempted forever.

MS. TURNER-WALSH: Denise Turner-Walsh for the Burns-Paiute tribe. I'm interested in some clarification on why the tribal consultation would only be in the preamble and not an actual regulatory provision,

what FERC's thinking is on that.

MS. MOLLOY: I have early consultation up there.

MR. WELCH: Go ahead, Ted.

MR. HOWARD: Somewhere near the -- the discussion that's gonna -- that's gonna reflect tribal sovereignty -- somewhere in there we need to discuss the tribal liaison because that is relevant to tribal sovereignty and consultation.

MS. MOLLOY: Okay, I've identified tribal liaison as that first one.

MR. HOWARD: Okay. Will it capture it, then?

MR. WELCH: Greg.

MR. HALLER: Greg Haller, probably would be worthwhile to have a discussion on the criteria that FERC's gonna use and what input, if any, the tribes and agencies may have in the process that the applicant chooses, almost like we had the discussion yesterday.

MS. MOLLOY: On both of those, would it be the tribal involvement in -- in both the process choice and the criteria for --

MR. HALLER: The criteria that FERC set out, if any, for deciding what process and then tribal involvement in that selection.

MR. WELCH: Go ahead, Art.

MR. ART ANGLE: I'd like to have some definitions in regards to mandatory statutory authority and who is on that list.

MR. WELCH: Oh, sorry. Bernie.

MR. BURNHAM: Bernie Burnham, Bureau of Indian Affairs. I have a -- a question that goes to -- I guess as is presented on page B5 and then again on B6, and it -- the continuing issue here when FERC, for example, approves a study plan with the modification as the center block after you go through some -- some process of getting input. And then again, kind of, the dispute resolution, kind of a consideration over on the first block on page six -- page six where it says the OEP director makes a decision on criteria.

When -- When we articulated data needs and so forth with respect to 4E -- setting 4E conditions and since it appears the department would be really involved in -- in this process, by virtue of the fact that it appears to be partly -- has no -- it is not involved in the final decision making process there, is that a subordination authority from DOI from the standpoint of our 4E role to FERC?

If, for example, FERC determines that we don't need the information or in -- in the course of

trying to set conditions to provide the protection and utilization for reservation?

MS. MILES: I'd say, Bernie, that that's one for you to talk about within the Department of Interior, because this was -- this process -- dispute resolution process is worked out with the federal agencies. And we don't have anyone from Interior here today who was -- who worked on this. So if you've got a concern about that, I would work with your folks on it.

MR. BURNHAM: Well, I raised that issue, and -- and I -- I will give that a shot, but I also raised that issue here because we work with 47 tribes throughout the Northwest. And virtually every one of those tribes has an interest in -- ranging everywhere from cultural resource considerations where -- where -- or whatever all the way through to, I think we have six or seven tribes with actual projects on reservation where we have 4E authority. And unfortunately, I'm of the opinion that -- that tribes that have 4E -- have had projects on a reservation with 4E authority represented here -- but just looking around the table here, there's a whole lot of folks that are missing here that are directly affected by what we're talking about.

MS. MILES: Okay, I hope they'll participate, you know, through the written comments or

whatever.

MR. BURNHAM: Well, I think you're going to hear some of the problems they have with this participation process.

MS. MILES: Okay.

MR. HEINITH: Bob Heinith, Intertribal Fish Commission. I'd kind of like to step back to some of the initial premises of this rulemaking, and, you know, I -- I know the folks from our commission and I think a lot of tribes around the table in Tacoma said why can't we have one process instead of three? So I'd like to put that on the table.

I'd also like to ask some questions about the scope of the rulemaking. There was several things suggested up in Tacoma, such as decommissioning hydroelectric projects and other things that -- that the commission's decided not to include on this rulemaking, and I'd like to have a discussion of that.

Under the new rule, it appears that the -- the tribes are cut out of study -- study dispute resolution proceedings, whereas under the traditional process they're included in that. I'd like to have a Discussion on that.

It appears that the commission staff makes a decision on what type of license process it's

going to be. I think before it was -- it was the commission itself that made those sort of decisions, so I'd like to have a discussion on that.

It suggested that only two years of -- of studies are necessary. In the Columbia basin here, typically we look at three years as a minimum for study requirements, so I'd like to have a discussion on that.

And finally, I'd like a discussion on -- on the issue of environmental justice. A -- License may disproportionately prejudice tribes and other minority groups and how that -- I think we believe that needs to be a part of this ruling.

MS. MOLLOY: All right, I'll run through -- Are there any others? I'm -- Yes.

MR. KANAIR: Hi, I'm Dan Kanair with Snoqualmie tribe. And it was mentioned to discuss cumulative impacts, and I would like to bring up the suggestion that those would include either pending or proposed projects in the area, that -- in a discussion of cumulative impacts. For instance, if other agencies have projects or an application is pending.

Also, the time line for filing a -- a request for an additional study on page D6 seems limited to 60 days after the application is filed. That seems a short deadline. If -- Especially if the tribe or other

party gets notice sometime after the filing date and has to review the application and assess needs for additional studies. I think that should be extended.

I'd also -- I -- Ivgo -- The concern over the criteria for selecting application process for integrated versus traditional and the -- the default. That seems to give it preference over direction to -- to go one way before the application is even started.

And then on relicensing issues, what sort of factors are -- are weighed towards the original licensee as opposed to a relicense versus either other alternatives or possible decommissioning operations and such?

MR. WELCH: Ted.

MR. HOWARD: Yes, and -- and somewhere there -- I don't think it's been mentioned, but I'd -- This is Ted Howard, Shoshone-Paiute tribes. I'd like to discuss to some extent the section 106, National Historic Reservation Act. Also, the cooperating agencies and -- and other relevant laws that are not being mentioned.

MS. MOLLOY: Let me -- If there's any others?

MS. MILES: Liz, did you get all --

MS. MOLLOY: I'm not sure I did, so as I go through, when -- when we -- We'll fill that in. That

-- That -- I wanted to make sure I got everyone's here.

I'm not sure that I got them all.

First one, tribal liaison position office, the functions and roles, early consultation including where it's described, ability to comment on formal dispute resolution, and the dispute resolution process, in general.

MR. WELCH: Hang on.

MR. HOWARD: Maybe I better tell you a little bit. I think tribal sovereignty, trust responsibility needs to be above the early consultation. That'll lay the -- set the stage for the --

MS. MOLLOY: That's fine. Actually, once I go through these to make sure I've got all the ones up on that -- on the page, then I'm gonna go -- we're gonna go through them and prioritize, where I think, then, things will fall out, you know, highest and where does it talk about the -- the -- to the lesser.

Trust responsibility, how regulations might better reflect sovereignty, funding issues, time frames including for additional study request, con -- contents of studies and timing, application content, in depth history of project, tribes as applicant and the issues raised with that, applicability to original license, applicability and -- and options with regard to

small projects, project impact beyond boundary, cumulative impacts, exempted projects, tribal involvement in process selection, and in general, process selection, definitions of mandatory and statutory and who is on the list, a question regarding or discussion regarding why one process instead of three, the scope of the rulemaking and issues that it doesn't cover including this decommissioning, environmental justice, pending projects, the cumulative effects involved there, and 106 compliance and other laws.

And did I -- is there -- are they captured in there or -- or did I -- is something not captured in -- in -- in that list that was --

MR. BRONCHO: Looked like additional studies, you incorporated that, and then if there's -- how -- how things are weighted in terms of if there's a preference for the original licensee versus the alternatives and tribal impacts.

MR. WELCH: Go ahead.

MR. BRONCHO: What we're talking about here is, what I see, they're all leading up to the treaty rights.

MS. MILES: I think you need to pull the mike up here to your mouth or your face for it to pick up your voice.

MR. HOWARD: Liz.

MS. MOLLOY: Yes.

MR. HOWARD: A -- A comment on the cooperating agencies. I don't know if that's --

MS. MOLLOY: I don't think that's -- I don't think I put that down.

MR. BRONCHO: One of those things -- Claude Broncho, Shoshone-Bannock tribes. Under the treaty rights, you gotta include the statues, executive orders and also other of the other legal issues.

MS. MOLLOY: You just wanted to see if I could type executive orders. It's the pressure. Any others? And the numbers you saw on the version from yesterday was we -- we voted how many had interest in something that they wanted to discuss and, sort of, counted them up, and -- and then we ranked it by highest number to lowest.

MR. HALLER: I'd like to jump in on that.

MS. MOLLOY: You may.

MR. HALLER: I don't think that that's necessary for this meeting to prioritize the vote. I think every issue raised here is a priority and it's a small enough group that I think we have enough time.

MS. MOLLOY: Does anyone want to start with a particular one? Ted.

MR. HOWARD: Yeah, Ted Howard, Shoshone-Paiute tribes. I think we need to -- to separate those in such a way where we -- we start with tribal sovereignty and the various rights, treaty rights, etc., which will set -- set the stage for some of the other discussions. Yes, set the -- set the foundation for that, and treaty rights, those types of things needs to be up on top.

MS. MOLLOY: Okay. Did I catch everything? I was going to stop us on our schedule at 10:30. We're going to take a break. It's 10:35 so if we could take a 15-minute break.

(Whereupon, a brief recess was taken.)

MS. MOLLOY: All right, this is the -- We'll start with our first issue, which is -- is now treaty right, statutes, executive orders, etc. We also have tied in there trust responsibility, how regulations might better reflect sovereignty. Would anyone like to say anything on this, or who would like to be the first person?

MR. HOWARD: I'll take a stab at it. Ted Howard, Shoshone-Paiute tribes. When we speak of treaty rights, those sometimes are re -- referred to as the supreme law of the land. In other words, these were agreements which reserved certain rights and resources.

And they were rights that were reserved by the tribes and not something that was given to the tribes by the United States government before -- or I should say during the time that the people were placed on reservations.

And also, here in looking in your booklet I see on page C48, 116, you acknowledge to some extent that consultation should be conducted in a sensitive manner, respectful of tribal properties and must recognize the government to government relationships of federal government to Indian tribes.

And in reading through this consultation section for tribes, I see where it steers off in another direction as well because as we go through this, it points out that you want to acknowledge that, but on the other hand, it's pretty much written as to how they want to go about that and fails to include tribes on -- on a lot of these things.

And also, there are trust obligations. Within the United States Constitution, there are three sovereigns that are mentioned. That's the U.S. government, state governments and tribal governments. So the tribes are not stakeholders. We're not the public. We are sovereign entities, and the United States government is a trustee to these resources that we'll be talking about in regard to relicensing and other

activities that's gonna be taking place on federal lands.

And in -- In our case, in -- in the process with the licensees that we're dealing with, many of these things were done without tribal involvement whatsoever. So that's why I wanted to mention the importance of treaty rights, tribal rights and trust obligations.

These obligations, like I say, were made by the -- with the United States government and the tribes, and regardless of which agency that we're speaking to, all of these agencies must comply with federal laws and these obligations that were made and agreed to in the beginning. Claudeo, do you want to add to that?

MR. BRONCHO: Claudeo Broncho, Shoshone-Bannock tribe. A lot of what Ted was mentioning -- we can't speak on behalf of all the tribes, but there are those executive orders and statues that need to be recognized, too, along with those treaty rights, and the vast areas of resources that were given up.

And I want to go further into that because what was given up at the time we were forced on -- on reservations and rounded up and with loss of life of many of our people, some of those are peace treaties. Some of those are forced treaties. And some of those -- those issues still bother us to this day, too, because you

can't replace the cultural and the spirituality of -- of those -- of those issues there of -- of the loss of life.

And so when you have these dams that are up for relicensing, what Ted was mentioning, some of them are 50 years. Our people weren't consulted at that time or they were forced to sign an agreement that gave up those rights, but those rights are something that we can't pass onto our -- the future of our -- our kids because a lot of those -- a lot of those areas that we're talking about where these dams are -- are where we buried our people.

The lifestyle and the life blood of our people are -- are in that land. And these risk assessments and different things like that that are being assessed on these, doesn't address that -- the plants that we used for medicinal purposes, the water that we used as the water of life that all human beings need.

And in this process here, what we mentioned with -- we said -- turn to the back of this proposed rulemaking. It doesn't mention tribes. And what was mentioned by Denise over there from -- I guess from Paiute who was -- mentioned that we need to be in this process because of what Ted mentioned that the treaties are the law of the land. It's the first contract with America, you know.

And so those are things that are very key and that's why you have us sitting at this table. And there are many tribes out there. This Portland area right now, we have one of the largest tribal constituents in this area right here that are being affected here and you don't have full representation.

And what was mentioned is the comment period, and a lot of those, when you don't get no comment, we rely on the treaties that are in place because you can't do away with those. Only congress can do away with those rights.

And so what I mentioned early in regards to statutes and executive orders and also litigation, you know, there's nothing in -- in our treaties that said that our treaties had to be litigated for them to be good. They were supposed to be understood at the time when the treaties were made as the way the people understood 'em at that time, and things are being eroded away in regards to this relicensing issue. And it's very minimal to what the people can -- that are represented here today.

But I just wanted to mention that -- one thing in regards to the consultation process, and it ties all together in regards to the treaty rights with the federal government. The consultation process is each

individual sovereign have their own con -- consultation process.

As an example, maybe our tribe would say: You meet with our -- our tribal council. They're -- They're our elected officials. Our chairman sits in the capacity of the people to the president off the United States or to the governor of each individual state.

And so when we talk about the federal rights, we mean the treaty with the United States, not with the state government. But we try to work along as good managers and so forth with that -- with those issues, so I just wanted to say that much because it all ties together with all these issues that are listed on that board and -- and that, the talk with these treaty rights and executive orders, statute, and the rights reserved for the future of our -- our people.

MS. MOLLOY: Any -- Anyone else?

MR. HOWARD: Maybe just one quick addition to that -- that I forgot to mention. Ted Howard, Shoshone-Paiute tribes. Is -- Is -- In our particular situation in southwestern Idaho, there are two unratified treaties and the land title was never -- never litigated. In other words, the tribes still hold the operational title to southwestern Idaho. Our -- Our leaders signed these treaties in good faith and moved to the reservation,

but to this day, the United States government has not offered to settle that. Thank you.

MS. MOLLOY: Don.

MR. CLARY: Yeah, I'd just like to, kind of, put this a little bit more in -- in context with regard to what we do with this. I think the -- our initial reaction, I'm just phrasing our initial reaction. I'm looking to -- to follow up at some point, when it's appropriate, with the staff's idea of how the consultation process -- they be under the current state of the draft -- would be operative.

But, you know, clearly what -- what's being stated here is there are treaty rights. There are executive orders and what have you. And while we would acknowledge that the -- those vary -- perhaps, as they might be applied tribe to tribe, we do believe in their supremacy and that's overriding in all -- in all instances. And we felt that what we need to do in these situations is take a look at tribes and treat them as you do other agencies when you're commencing this process.

We don't believe that there could be, and I think you, I'm sure, found this, one size fits all as far as a specific procedure stating what the concerns will be, how they're going to be addressed and what have you, and that kind of procedure established in the very

beginning.

But we do feel that there could be at least a statement of what -- an assessment of treaty rights and statute with that particular tribe, an agreement basically reached as to how those are going to be honored during the licensing procedure and -- and, you know, basically a procedure agreed to between the parties that would be enforceable in some way if the applicant, for example, did not honor it, so that throughout the proceeding, you know, and this -- the -- And also -- I'm sorry, these should also be incorporated in the regulation itself so that we can make sure that, you know, we have something ultimately to enforce at some point in time if it's not pursued.

And I think that's what I'm -- I think we're trying to say here is that, A, it sets the stage. And then secondarily, I think we need to maybe jump ahead a little bit and just say, even if we're different, it doesn't mean that this can be ignored.

Not saying that you're suggesting that it be ignored, but that, I think, we can work across this. It will effectively deal with that, I think is what I'm trying to say. Thank you.

MS. MOLLOY: Anyone? Yes.

MS. SCHAFF: Margie Schaff of

Affiliated Tribes of Northwest Indians, Economic Development Corporation. I -- I'd like to look a little bit at FERC's implementation of the trust responsibility, the treaties and the statutes and the executive orders. And many tribes were created by executive orders and so the executive orders are not just the executive orders that are instituted government to government, those kind of things. But also, the executive orders that actually created some of the tribes and reservations, those are actually the -- that's the law. Those are the issues. Those are the way that the tribes were set up and those are, kind of, our standards. But the way that those treaties and executive orders and statutes are implemented has to do with your trust responsibility.

FERC has basically made a very careful review of federal law as how the trust responsibility needs to be implemented. And federal law, of course, is very diverse. There are many different statements about how the trust responsibility is supposed to work.

And generally, what the trust responsibility means is that the federal government treats the Indian tribes as their beneficiaries of a trust and all of the resources that the tribes have are held in trust on behalf of those tribes by the United States and by the executive order, by the executive agencies.

Now FERC, because it is an administrative executive agency with some hearing powers and decision making authority, has read all the different federal laws with regard to trust responsibility. And in a true irony, they have chosen the statements of trust responsibility that provide them the smallest amount that they can possibly do. And the whole point of the trust responsibility says that the government is responsible for treating the tribes as their beneficiaries and they have a fiduciary responsibility.

So in exercising that fiduciary responsibility, FERC has basically said that because it has to make decisions, it has to look at situations and weigh things; that it does not have any particular responsibility to look at tribes any differently than anybody else. And they're reading the most narrow view of federal law that there is. And granted that there are many different other statements of federal law that propose that the responsibility of the federal are much greater.

So FERC's lawyers have taken the position some time ago that they are in this narrowest view of what -- how it exercises trust responsibility. And I would like to say that I think many of the tribes, and I -- I've never talked to a tribe that hasn't said this, that that's an inappropriate way for the federal

government to act under the trust responsibility and under the obligations and so forth. And especially because FERC in doing the hydro relicensing process -- is actually affecting and implementing the very resources that are protected in those treaties. And there are fish, there are the cultural resources and they're the exact things that those treaties were designed to implement.

And so if, in fact -- if FERC in its decision making process looked at those things and said, well, we don't really have a responsibility here because there's no actual federal law that requires us to give the tribes anything better than anybody else, and they're taking that narrow view of federal law, they're actually doing a very large disservice to the tribes.

So I think it's very important for FERC, and this is an opportunity for you to look at more implementation of the trust responsibility and do it a little differently.

And I guess I'll also say that the trust responsibility has two components. And I'm -- I'm pleased to see that one of the components is being addressed here, and the fact that we're all sitting in this meeting is an example of you're looking at the process, the procedural part of the trust responsibility. You're wanting to consult with tribes.

Now I've also heard a lot of, kind of, grumbling and people that have said, well, we've said all this stuff to FERC before and they're not listening. And what's really important is what's in the rule. It's not what's in the section 116, 117, so forth, in the NOPR. What's important is what's in the rule, and none of this stuff is in the rule. And I think it's very important that this be in the rule.

So that goes to the second harm of the trust responsibility, not just the procedural consultation and so forth. It's the substantive decision making that FERC makes, and -- and the other federal agencies, as well.

And that substantive decision making says that when you're looking at a decision that's going to impact a tribal resource, their fish, their culture, their land, you have to give higher thought to the federal trust responsibility and higher thought to the tribal beneficiaries than you do to an energy company who is looking to make money or to an irrigation company that's looking for water. The tribal responsibility comes first. And that is nowhere reflected in current FERC policy.

And I beat my head on the wall for this issue on the electric side of FERC, as well. And I think they may be at some point starting to turn around

and look at this differently.

And I think a lot of this is an educational problem. I think that people don't understand what is the trust responsibility, and they hear all this stuff about trust responsibility, yeah, yeah, yeah, but it has to be the -- the process. You have to include the tribes in the process in a substantive manner. And then when it comes time for you to make your decision, you have to look at the tribal concerns and tribal considerations and then tribal resources and say it is my obligation as a federal officer to make sure that those tribal considerations are made.

So that, to me, is one of the key things that FERC needs to understand in doing this rulemaking. The rule has to reflect those things. The rule has to say how tribes are going to be treated, and also to say that tribes -- tribal treaty resources and tribal cultural resources and tribal resources will be treated in a manner that gives them the utmost respect.

So I think that, to me, is -- is the most basic thing we can learn from this meeting and I hope that all the other issues are a little easier. If we can try to keep that it in mind.

MS. MILES: I'd like to actually say something. I appreciate all of your discussion of this

and clarifying for us exactly how you -- how you perceive the treaty rights and other responsibilities and things that you'd like to have us do.

And I -- I particularly appreciate these two aspects of it and one of them I'd like to spend a little time on, which may not be the most important one to you but I think it's -- it's one we can do a better job in this rule, and it's the process aspect of making sure we're all around the table, making sure the right things are in the record. Because we did try to do a couple things in the rule itself and I -- my impression is it hasn't gone far enough for you.

And I wanted to point out the two things. One is the creation of the tribal liaison position. Through that position, there is the potential to get into more depth in some of these other areas.

It may be that we want to do something, like, make a list of things that would be very important for that position to do.

The other is we did add something to the preliminary application document very pointedly to deal with tribal issues. And I'm interested in knowing from you whether it gets at these kinds of things that you're talking about in your treaty rights.

On page D55, there's a discussion --

or there's a section that we now have asked applicants to include. Does everyone understand the very first thing when applicants file their notice of intent is to file with us what we call a pre-application document that identifies the resources of concern? And this would also include tribal interests in those resources, helping us understand what is the interest in the resource, not just fish for fish escape, but what is your relationship to those fish, or your relationship to some sort of cultural practices.

So that's what that tribal resources -- that -- that is something new. It's not in our current documents. And it's an effort on our part to try to get a -- to try to identify at the very beginning of the process what we do need to be looking at for tribal resources. Then -- So that's some substantive information.

The other is the early notification and consultation with the tribe. That's not in the rule right now. Perhaps it's something that can be added to the rule itself. It's in the preamble and it is a practice that we intend to implement. But if -- if it would be better that that was codified in the rule, then, please, let us know that.

The idea with that early consultation is to sit down with the tribes, with us, and I think we --

we would like to know from you -- do you want at that point for it to be a high level person. A high level person might not necessarily be the person who's used to dealing with cultural resources. Should it be the tribal liaison, you know? What type of person is the appropriate person for that type of a kick-off meeting? And what do we want on the table at that meeting?

I think those are things that are very important for us to discuss today. I would hope they would go a long way for dealing with your concerns, at least on the process structural part of it and getting into the substantive issues.

MS. MOLLOY: Claude.

MR. BRONCHO: Claude Broncho, Shoshone-Bannock tribe. In regards to what she was mentioning, I think it would have to depend on the individual sovereign you're dealing with because they have different consultation processes for the issues because you can't put us all in one big boat because some might have a different cultural issue and it's not just stones and bones. It goes beyond that, like I mentioned earlier.

And also, if it's air quality, depending on different programs that the different tribes have from water quality standards to Clean Air Act to RICRA, CIRCLA, (phonetic), DOE facilities sitting in our

back yards and different things like that. So I think it depends on the individual tribe.

And I guess on -- on page C49 under 119, it, kind of, addresses the proposed rule related to the administrative action for the tribal liaison with -- and how much authority -- I guess the question I asked was how much authority does the tribal liaison have? Is that person just gonna be a contact person? Is that person gonna be able to say yes or no on an issue? Or does it have to -- Like you mentioned, does it have to go to a higher level?

And the way our consultation process is, is it has to go to a higher level. The person that can make that decision as who the tribes would probably want to deal with from the -- from the tribal council or elected officials.

MR. HOWARD: Ted Howard, Shoshone-Paiute tribes. The same paragraph that Claudeo just referenced, 119 on page C49, it says the tribal liaison will provide a single, dedicated point of contact and resource to which native Americans can go to regardless of the proceeding or issue.

And the way I interpret that is that's the end of the line for the tribes. You can't go further than that. This -- This is where you go. And that's

totally inappropriate.

Well, I don't feel that -- that it's an option. When you look at government to government consultation or government to government meeting, this is -- with policy makers from the FERC and the policy makers of the tribal governments -- this is not with the janitor or somebody else. When we go somewhere, the general from our tribe does not expect to speak to someone of a lower echelon where they're to speak with your policy people, so maybe from --

MR. CLARY: Could I -- Could I just --

MR. HOWARD: -- the legal aspect --

MR. CLARY: -- maybe if I could ask for a clarification, guys. When -- The role of the tribal liaison, I took, to be something which was added to and not to be in any way a deviation of our other rights to participate as parties in the proceedings; is that correct?

MS. MILES: Precisely, it is in addition to all of our rights to participate throughout the process. It doesn't take anything away. It adds.

MR. CLARY: And maybe it would be helpful to just add some language to clarify that fact, to that effect.

MS. MOLLOY: Okay. Okay.

MR. CLARY: Is that -- Is that --

MR. HOWARD: Yeah, I just -- Are --

We're just not comfortable with the wording that way this

--

MR. WELCH: I -- I guess your -- your analogy of the -- of the end of the line, I would say, didn't look at it as a wall. We looked at it as the door.

MR. HOWARD: Well, I certainly hope it's -- it's written that way because so many times this type of wording becomes a law when we agree to that.

MS. MOLLOY: Okay. Ted, if you have language of how you would like us to describe that, please give it to us. That would be helpful, because it was meant to be an opening, another option for us to understand and learn how to do better consultation with the tribes.

MR. CLARY: Perhaps if we could hear back a little bit more from you with regard to how you view the -- the -- the role of the tribal liaison as far as, you know, will this person have power to make -- resolve disputes, things along those lines, or is it just more of a communication type of a post? You know, what's -- what do you think is going to be going on?

MS. MILES: It's -- Well, it's not firmed up at all and our commissioners themselves had some

thoughts on it and they would like to hear your thoughts on it. So I can only speak for myself, I guess, and what -- what -- where I think it might be useful and ask you for how it would be useful to you. It doesn't substitute for the process, for this flow chart. Our hope is that you will participate at every step in this process where you want to be. And our hope is that these regulations make it clear that we hope you'll be there at every step telling us what your issues are, what studies you think need to be done, what environmental measures you think are necessary. So if we haven't made that clear, we need to do a better job of it.

Our intentions, when we have listed everyone that needs to be consulted with, tribes is one of those people, and we didn't mean to group you as a part of people, but we listed everyone. We listed federal agencies, state agencies, Indian tribes, the public as a whole.

The commission wants to be inclusive of everyone, so that -- and -- and the goal of this integrated process is that everybody's at the table and we have opportunity for discussion like this.

What we tried to do is to go one step further with the tribes and recognize that there are issues you want to discuss with us alone and just with the

caveat that we have to watch our ex parte rule, which is explained in here, and that we don't run afoul of -- of that. But also, understanding your need for confidentiality and -- and recognizing that we certainly can have things that are privileged.

So it -- it wasn't to reduce things.

It was to add on a tribal liaison, early consultation so we can make sure we understand what process you would like us to engage in with you but with the expectations that this is where a lot of the decision making -- so I guess I -- in answering your question, it may be that the tribal liaison may be an opportunity to address the bigger issues, the treaty rights issues, these bigger issues that may not be taken care of. But for individual projects, being here at the table in this integrated process is really quite key.

MS. MOLLOY: Greg.

MR. HALLER: Greg Haller, Nez Perce tribe. A couple points on some of those points that you just mentioned.

I think first, you could go a long way in recognizing consultation, early consultation, tribal sovereignty and treaty rights by going the extra step and putting in this flow chart. In fact, I've just marked on these different boxes different points where you could

have check-ins with tribes for whatever type of consultation they told you they wanted, whether it's on a staff to staff basis or on a commission to policy maker basis.

I mean, throughout this whole flow chart, which is good for describing the process and how it's going to work, I mean, you could easily put in number -- you know, on box one, tribal consultation occurs here. Box four, it occurs there. Box seven, ten, etc., throughout this whole list, and I think that would go a long way, and if the tribes feel comfortable that FERC is serious about recognizing treaty rights, trust responsibility. And I'd like some -- some thought on that.

And I guess my second point regarding the role of the tribal liaison, do you really think that one person is going to be able to -- I mean, ideally, we would have one tribal liaison per project. Less than ideal than that would be one tribal liaison per region. So somewhere we got to move from one per nation and have discussion on whether it's going to be one per project or at least one per region, at a minimum.

MS. MILES: May I ask you a question about that? There -- There will be a staff person who is -- is their technical expertise dealing with cultural

resources. They'll be on every project where there is an issue.

MR. HALLER: Right, but they're not the liaison.

MS. MILES: But they're not the liaison, so I think we were looking at the liaison as a -- a bigger, maybe more -- rather than project specific issues, bigger issues.

MR. HALLER: But then that goes to the -- I'm sorry to interrupt.

MS. MILES: Go ahead.

MR. HALLER: That goes to the point that these gentlemen are raising that that's not a policy person. Those bigger issues, they're gonna want to have formal government to government consultation about, not with a staffer.

The tribal liaison can answer -- would be ideally answering individual questions to tribes regarding the process for each relicensing that the tribes are involved in. The bigger issues, the consultation, that kind of thing, that's gotta be on the government to government level.

MS. MILES: Okay, so I -- What I'm feeling like is we've got a semantics issue with the word tribal liaison.

MR. HALLER: No.

MS. MILES: No.

MR. HALLER: No, I think it's got to be identified that, A, one person is nearly not enough. And -- And -- And, B, that -- what the role of that person is, which I -- I see we're going to get into. But on the larger issues of consultation and trust responsibility, that really goes to the government to government level.

I think what you're proposing with the liaison is just to answer, sort of, general questions that tribes may have about a proceeding or how their rights are being impacted, in general, and I don't think you'd be able to bring it down to the specificity that individual tribes are going to require.

MS. MOLLOY: Part of -- Part of, sort of, how many or how -- how it's designed does follow, sort of, on the -- the functions that we'll need, where we're looking for input on what things to be doing.

As we, sort of, clarify, sort of, what would meet everyone's needs for -- for a liaison or an office of liaisons, you know, to deal with, that will perhaps govern, you know, how large or -- or, you know, what size or how many would need to do that. Do you -- Do you agree? I mean, they're kind of related. Once we establish, sort of --

MR. HALLER: Well, yes and no. I mean, the consultation issues and the government to government relationship are going to be separate but also part of the -- a relicensing proceeding. But I don't think that the one person can cover both functions and I think the tribes will very clearly say that, that they're interested in talking to the commission, to the decision makers, on these larger issues of -- of trust and -- and of treaty rights and how those are going to be protected in the proceeding. I -- I just don't see that the tribal liaison will satisfy that, especially if there's only one.

MS. MILES: Okay. So when you're thinking of tribal -- because I'm not sure the commission wasn't thinking of a tribal liaison as the -- the chairman or someone in a very high level position.

MR. HALLER: I'm pretty sure they weren't.

MS. MILES: But it -- it may have been. I think there was a bit of a perception that the tribal liaison would be more the government to government and that individual staff people who would be dealing with cultural resources on the individual projects and there would be one of those assigned to every project and there are probably four or five people that deal with it at the commission, so --

MR. HALLER: But you acknowledge that what we're telling you here is that that's not sufficient?

MS. MILES: That -- What I'm hearing is -- I probably am still confused.

MR. WELCH: I -- I am.

MS. MILES: That's why -- What I'm -- Maybe it -- Let's -- Let's forget using the word and see about what the substance is of what you'd like, what you -- who you -- who you need to deal with at FERC.

MR. WELCH: Margie had a point.

MS. SCHAFF: You know, the way I'm accustomed to thinking of this, and -- and I don't know if this clarifies for everybody, but there -- there has to be more than one. There's -- There's the government to government formal consultation, and what that means is you get a letter from an Indian tribe saying we have a problem or an issue and we need to sit down with somebody on the same level.

If -- If the tribe is going to send their environmental guy, they want to sit down with your environmental person or your person dealing with that issue. If they're going to send their chairman of their tribe, they want to speak to a commissioner or somebody at the level that can actually make a change and a difference. That is formal government to government

consultation.

A tribal liaison's role, in my opinion, is to do everything that the tribe needs to be done for -- they need to look at the process and -- and do things like setting up meetings, interfacing with tribes on a day-to-day basis, trying to make sure that things don't get to a point where you need to have government to government consultation.

And so the tribe -- tribal liaison's role, in my opinion, would be somebody who just has the day-to-day work dealing with tribal issues and then when it becomes a governmental issue, government to government, the tribe will ask you for formal consultation or you can initiate formal consultation if you see that there is something that you need to fix. I don't know if that's --

MS. MILES: Is that the general perception?

MR. HALLER: Yes.

MR. WELCH: So couldn't the tribal liaison, though, be monitoring that situation and if, in fact, there was a big issue where the tribal council wanted to talk to this higher up that the tribal liaison would make that happen.

MR. HALLER: Yeah, that's a perfect -- perfect role, perfect thing for the person --

MR. WELCH: I think that's kind of  
what --

MS. MILES: Would the tribal liaison  
be dealing with specific project issues primarily? That  
would be their -- that's the way you see their role?  
Okay, okay, thank you. Because I think we had somewhat of  
a different perception.

MR. MERKLE: Yes, this is Carl Merkle,  
Umatilla. The way we've dealt with tribal liaisons with --  
with other agencies -- some agencies have them here in the  
Northwest, is -- is, I think, similar to what Greg was  
saying before I swiped the microphone. That they -- they  
frequently keep us informed about day-to-day events, a  
unanimous -- news developments, notices of meetings and  
things like that, and where necessary, grease the skids to  
make meetings happen, trade agendas back and forth, work  
on establishing dates that are agreeable to both the  
tribal officials, tribal policy members and -- and high  
ranking officials with the agencies, doing things like  
that.

But when we have a -- a sticky issue  
with a particular agency that is of concern to a member of  
-- of our tribe's board, that issue is not resolved by  
talking to what is termed the tribal liaison for the  
Corps, for B.P.A., or something like that. They do the

mechanics of -- of -- of setting up consultation, government to government meetings, similar to, you know, tribal staff doing that as -- as well.

MR. WELCH: Okay, gotcha.

MS. MOLLOY: Claude.

MR. BRONCHO: Yeah, the other thing that's gonna come up in here is the -- the other different federal agencies and -- and some of them have consultation processes and it's government to government. And -- And there are documents out there that this is their process.

Does that mean that we're going to try to develop a proposed rule so that everybody could be on the same page? I mean, you could probably contact E.P.A., Corps of Engineers, the Forest Service, the B.O.R., the B.L.M., and -- and tribes and put this government to government into one document, is the way I understand it because they do have different processes, how they interpret the government to government relationship.

So that's going to be a big task in itself because right now, as an example, the region, the area office, and the local governments and -- and the local D.O.E. and E.P.A., whoever we're dealing with, interpret those all different and so when you go back to central in Washington, D.C. they deal with 'em. This is how we're supposed to be dealing this -- with this but at

the local level, E.P.A. as an example, don't follow that same process.

And so that probably needs to be clarified in the government to government, and that's what throws us off while we're trying to deal with that, that everything else is going through. Just call it the divide and conquer theory.

MS. MOLLOY: Margie, did you --

MS. SCHAFF: Yeah, I -- I kind of -- just moving into the next issue and I don't know if we're done yet but we sort of --

MR. HALLER: I had more. I had --

MS. SCHAFF: I'll -- I'll save my comments then.

MR. HALLER: I'm Greg Haller, again. I guess I just wanted a response to my suggestion for putting in check-in points in this flow chart.

MS. MOLLOY: We -- We'd like a copy of your ideas.

MR. HALLER: We'll submit them in formal comments.

MR. WELCH: Could I --

MR. HALLER: I just would like some informal thought about that in your perspective.

MR. WELCH: What I was -- What I was

thinking, Greg -- Tim Welch -- I guess I -- I mean, I thought of both approaches, about putting in specific things along here, but then I thought I heard that it might not work for every tribe to do it a set way. So I was thinking that, sort of, the initial meeting, you know, well -- you know, whoever we -- if the tribal liaison does it, that we would -- this would be done with FERC staff and the tribe. We would take this chart and say, where would you like the key points to be, rather than putting in fixed key points in the rule.

I mean, some tribes might -- might say, you know, well, I -- we want to be consulted here and only here and others might say, we want to be consulted here, here, here, here, here, here, here, and here so that's kind of what we were thinking. We may want to leave it a little more -- a little more open.

MR. HALLER: I could -- I could see how that would -- where -- you know, where you're coming from on that, and that may be a good way to tailor it to individual tribes.

MR. WELCH: Well, that's what we were thinking.

MR. HALLER: But I think that -- I think we could pretty much come into agreement that there are certain major points in here that you should be

checking in regardless and I think acknowledging those along this flow chart would go a long way to alleviating these concerns.

MS. MOLLOY: And -- And it's conceivable, I mean, we -- we could set it up that we set up sort of a -- a default one where -- where we propose following, you know, an idea of -- of check-ins that could be altered based on individual -- you know, and there's nothing that says it has to be, you know. It can be modified as appropriate.

MR. HALLER: I agree.

MS. MOLLOY: Don had a --

MR. CLARY: Yeah, Don Clary, I just wanted to clarify that -- just wanted to make sure to go back, that we didn't lose the idea that that's -- even though we were talking a little bit about what was involved in consultation, we still wanted to have these -- these check points, basically. I think that's pretty firmly our position.

And I think that to the extent we -- it's a good idea to set up a more generic type approach where, you know, parties would have the ability to deviate from that at the beginning meeting, let's say, or what have you. But the one thing which I would say is that I would want to make sure that if there's a problem that

developed with regard to that, that it has the force of a rule, basically, as well. I think that's very important.

MS. MOLLOY: And -- And Greg, did you have other --

MR. HALLER: No.

MR. MERKLE: Carl Merkle with Umatilla tribes. Yeah, I'd just like to add to what Greg said. I think it is better to -- to put in some check points at -- at very definite steps along the way. I mean, frankly, if a particular tribe interested in a project is -- is unable or uninterested or -- or busy at that particular point or just unwilling to meet at that -- that time, they'll tell you and they'll say another time is better and that's fine. But, you know, leaving them out entirely I -- I think, sort of, may -- may go too much toward -- toward, you know, fogging up the responsibility or not making that responsibility clear enough.

Another question I had, you mentioned on D55 the -- the requirement in any initial application about providing information on tribal resources. That -- That would all be provided by the applicant; correct?

MS. MILES: Yes, with the opportunity for you to comment then.

MR. MERKLE: Are there any -- any kind of specific requirements on how the applicant would go

about working with the tribe to get this? I don't -- I don't see those here.

I mean, I'm -- I'm just wondering, you know, not -- not naming any names, but a major project that's -- that's being addressed right now that, you know, substantially cut off half or more of -- of the region's salmon habitat claimed in some of their materials that their project didn't have any impact on tribes. We, of course, contested that -- that claim, but that was an indication of how, you know, egregiously wrong headed sometimes applicants can be in their version -- their interpretation of their effects on tribal resources.

And I wonder what recourse we have to -- to challenge that other than, you know, commenting to them that they're way off base because, frankly, you know, in our comments to them they said, well, thank you very much. We'll -- We'll correct it later, and we have to wait to see what they're going to say later.

MS. MILES: Okay. Let me tell you the way that would work in this integrated process because it is very different.

MR. MERKLE: Okay.

MS. MILES: If you want to go to the chart, box one is that preliminary application document. So that's where we've added the addition of tribal

resource issues. And, yes, that is prepared by the applicant.

When you get to -- then -- then we will be noticing that in box 3A. FERC staff is going to issue a notice and we're going to make everyone aware of that preliminary application document.

Then in box four, that's a FERC scoping meeting, so we will be there at that meeting. It's the opportunity to discuss the issues and any issues that the tribe would have. I mean, this would be a very important meeting to be at. Any issues that the tribe would have that you felt weren't addressed appropriately in that pre-application document, this is where you discuss it. This is where you would lay your issues on the table.

There would be a discussion of existing information there. What do we have that get at those issues and what sort of information needs do people have so this is an early on in the process opportunity where FERC staff is there too, unlike the traditional process.

Then the next step is number five. Box five is written comments on that pre-application document. So that's your opportunity to put anything that you think needs to be in the record on those issues into

the record, so the whole point of this integrated is to make sure that that stuff happens at the very beginning and that everyone is there putting their issues on the table.

MS. TURNER-WALSH: Denise

Turner-Walsh, Burns-Paiute tribe. Is this going to replace this alternative and traditional process that you have now under the regulation so that there's going to be just one process? Is this just one process that's proposed now or are you going to leave the other kinds of processes intact and adopt an integrated licensing process that we're talking about today? I'm not understanding.

MR. WELCH: This would be a third

process, so there would be three, but this would be the default. In other words, if you wanted to use the traditional or the alternative, you'd have to get comment and show what we're calling good cause to use the other -- other, either the traditional or if you had a -- a consensus group, the alternative. And then the commission would either approve or disapprove, but this would be the default. So we're -- I mean, we're expect -- we're expecting that this will be used the majority of the time.

MS. MOLLOY: And -- And projects

currently going through their process, will continue to go through the process that they -- they started with, so

this would -- this would affect future applications.

MR. MERKLE: Yeah, another point --

Carl Merkle, Umatilla tribes again. I -- I don't -- I don't know whether Margie was looking for a response or -- or what, but I just want to follow up on -- on some of what she said earlier.

I -- I think the tribes would be heartened or feel more comfortable in seeing something in the rule itself, not merely in the preamble, but somewhere some type of acknowledgment of -- of the trust responsibility and -- and what it entails.

As she pointed out, it's both procedural and substantive, and I think what -- The Department of Interior has specific guidelines for -- for assessing impacts on tribal trust assets.

But, you know, FERC, like all the federal agencies, has -- has a duty, not merely procedural duties but affirm -- affirmative duty to protect and safeguard the assets that were set aside by the treaty, tribal trust assets.

I know they have, you know, fair -- fair amount of obligations as -- as -- under such acts as the Federal Power Act. But they -- they do also have a -- a duty as -- as described in many court cases to safeguard fish, cultural resources, other assets, resources, that

are essential to maintaining the integrity of the tribes and treaties.

And -- And, you know, I know -- you know, as -- as Margie pointed out, it's not strictly a case of balancing in -- in a lot of instances. Those -- The safeguarding those tribal assets comes first. That's part of the special relationship between the federal government and tribes.

And I know, you know -- I -- I expect Joe Barton, Billy Clawson (phonetic) and those folks to not understand, you know, what that obligation is and demand balancing, but, you know, the -- the attorneys and others with FERC should be familiar with those cases and understand that FERC in addition to -- to being in charge of overseeing the nation's power system and -- and licensing power facilities, they cannot do that in a way that undermines tribal treaties and the trust responsibility and -- and causes harm to fish and wildlife and other resources that are tribe protected. I'd like to see something like that in the rule itself that recognizes that specifically.

MS. MOLLOY: Darryl -- No, I'm sorry, no, Bernie. I saw a hand. I just didn't attribute it to the right body.

MR. BURNHAM: Bernie Burnham, Bureau

of Indian Affairs. In -- In describing this liaison person's role with this new process and consultation, is that person's role going to be described with respect to the other two established processes and the coordination that's necessary if those processes are implemented as opposed to this one? I think if you're going to start it here, it's going to have to be comprehensive.

MS. MILES: The idea is that it would apply to all -- whichever process is used.

MR. WELCH: Greg.

MR. HALLER: Greg Haller, Nez Perce tribe. In -- In general, we support the idea of a tribal liaison. I think that that is a positive step. But what if this rule goes down in flames, are you going to commit to hiring tribal liaisons? Because it -- it just seems to me that you could hire someone now. I mean, you know there's a need. It's just a staff and budgeting issue.

MS. MOLLOY: And defining what the role is.

MR. HALLER: Defining what the role is, yeah.

MS. MOLLOY: Be -- Before we hire someone, we want to know what we're gonna -- what -- what they -- what we need them for so that we can, you know, hire someone who can actually meet those.

MR. HALLER: Right, but the question is, is the rulemaking required to -- to hire a tribal liaison or liaisons, more preferably?

MS. MILES: The rulemaking is committed to having that position, but the -- I need to make clear that we already have a staff of several people who deal with the individual projects and -- and from how I'm hearing you describe the tribe -- what -- what you think of as a tribal liaison, those people are on our staff right now.

There -- There is a project -- Every project that needs a cultural resource person has one assigned. That's why we had such a long discussion about what is a tribal liaison because we -- we, in our heads, had it as -- as the government to government person and not as the individual staff person that's working on the project and arranging the meetings, making the meetings happen, make the mechanics happen, because -- because that person exists right now.

MR. HALLER: I would disagree.

MS. MILES: You would disagree.

MR. MERKLE: I never heard of a FERC staffer setting up a meeting or talking about a particular project in my life and I've been --

MS. MILES: Okay. Well, maybe that's,

then -- maybe as a part of this, it's how that staff person can do a better job, that some of -- and I -- we're open to hearing suggestions in that area.

MR. HALLER: I think you heard what the group here has just said about what they think the role of liaison should be, greasing the skids, making sure tribes are aware of what's going on, etc., opening the door to the commission when we want formal consultation, but that person doesn't exist now.

MS. MILES: Actually, can we list those things? Make sure we've got those all on the record for what that -- what that person should do or persons.

MR. HALLER: I think Carl had an --

MR. MERKLE: Well, and -- and I -- I don't know if that's necessarily what all they should do. Maybe they should be doing more. I'm just saying that's our experience now. I think in the Northwest, when we hear the term tribal liaison, there's some agencies that have them, and -- and those people with that designation, that is what they do now.

So I'm just -- That -- That -- That's probably why, you know, that's our understanding when we hear tribal liaison. That -- That's been our experience in the functions they perform now. Maybe -- Maybe they could do more. Maybe we can embark on that. Maybe they

can do some of those things. But that -- That's why you're talking about the semantics of what liaison means. That's how we think of them because that's been our experience.

MR. WELCH: Tim -- Tim Welch. Is there a -- Is there a model from another agency that --

MS. MOLLOY: Yeah, to help us.

MR. MERKLE: Yes, we've had -- we've had a few. We've had -- We've had some at the Army Corps of Engineers. We've had some with -- one with Bonneville but she was too effective in representing tribal interests and she got whacked. They didn't -- They didn't like the fact that she took trust responsibility seriously and actually thought she had an obligation to help and assist tribes so she's no longer in that position.

But -- But, yeah, I mean, there's -- there's one with Bonneville. There's one with -- with the Corps. There's one somewhat with -- with NMFS, and, you know, different people have different views on how well or -- or -- or ineffectively they perform, and -- and I think there are some --

MR. WELCH: I'm just thinking --

MR. MERKLE: -- some that are very good.

MR. WELCH: I was thinking more along

the lines of function, not -- not how they carry out that function.

MR. MERKLE: Yeah, they do a lot of, I think, what I -- what I described.

MR. HALLER: Basically, they -- they do what Elizabeth's done for this rule. I've received at least two correspondences from her letting me know this meeting is coming up, this rule is happening. That's the kind of --

MS. MOLLOY: At least phone call.

MR. HALLER: And at least one phone call. That's the kind of thing, I think, that at least I view as a tribal liaison's role.

MR. GRIFFIN: Kerry Griffin with NOAA Fisheries. This is really good to hear, and hopefully, what might come out of this discussion is, you know, a list, a -- a task list of what is expected. You know, get it in the record. Get it in writing. Maybe, then, you know, steal a job description from one of the other agencies that you like.

MS. MOLLOY: I believe that's used as a model.

MR. GRIFFIN: Yeah.

MS. MOLLOY: We avoid steal.

MR. GRIFFIN: Borrow indefinitely.

Yes, so anyway, I just -- I just -- I just want to make sure we don't miss this opportunity to actually get -- get something down in -- in writing because this -- this -- I don't want to lose the, sort of, train of thought that we have here.

MR. MERKLE: And -- But one of the problems that -- that -- that should be noted is that when we have this communication back and forth, you know, a -- a tribal liaison is with an agency informing us about, you know, meetings, events, activities, rulemaking and whatnot. Some people with that same agency, say higher up in that agency, will think that consultation has occurred and we constantly have to correct them on that notion that -- that, you know, in -- informing us about meetings like this one and -- and, you know -- you know, cooperatively or in some cases unilaterally setting up meeting dates and -- and things like that, that is not consultation.

So -- So, you know, that mistake is -- is made that -- that, you know, providing the tribes with information and -- and doing things -- things such as that is -- is not -- is not consultation. It's a -- It's often, generally always, a necessary step toward consultation but that -- that needs to be clear, as well.

MR. WELCH: Ted.

MS. MOLLOY: Yes, Ted.

MR. HOWARD: I think maybe just one comment. As has been mentioned, you know, consultation is viewed differently by different agencies and tribes, but the one thing we've discovered in our process with -- with the agencies is that there are two types of consultation. One is the general consultation, which never comes to an end. It's continuous.

There are others that are site specific to certain projects that do come to closure but it has to be an agreement by both parties when that consultation is complete, not one can go there and -- and meet with you and say it's done. You have to be in agreement that you've completed the consultation on -- on the site specific issue. But consultation, per se, is -- is ongoing. It's never ending.

MS. MOLLOY: It's 12 o'clock.

MR. HOWARD: Let's go eat.

MR. WELCH: Any questions about what we should do?

MS. MOLLOY: Why don't we break for an hour and come back.

(Whereupon, a lunch recess was taken.)

MS. MOLLOY: Welcome back. I hope everyone had a good lunch. I want to introduce Larry Crocker from Chairman Wood's office. He's joined us for

the afternoon. And if you wouldn't mind, I think it would be -- since we did introduce everyone this morning, if we could go around one more time so that Larry knows who we have here. And I will again start with this side.

MR. LINDERMAN: Chuck Linderman,  
Edison Electric Institute.

MR. BRONCHO: Claude Broncho,  
Shoshone-Bannock tribes.

MR. HOWARD: Ted Howard,  
Shoshone-Paiute tribes.

MR. CLARY: Don Clary, Shoshone-Paiute  
tribes.

MR. PRIOR: Kyle Prior,  
Shoshone-Paiute tribes.

MR. ART ANGLE: Art Angle, Enterprise  
Rancheria, California.

MR. CLIFFORD ANGLE: Clifford Angle,  
Enterprise Rancheria, California.

MS. SCHAFF: Margie Schaff, Affiliated  
Tribes of Northwest Indians, Economic Development  
Corporation.

MS. MOLLOY: Liz Molloy, FERC.

MS. MILES: Ann Miles, FERC.

MR. WELCH: Tim Welch, FERC.

MR. GRIFFIN: Kerry Griffin, National

Marine Fishery Services.

MS. TURNER-WALSH: Denise

Turner-Walsh, Burns-Paiute tribe.

MR. BERG: Mel Berg, B.L.M.,

Washington, D.C.

MR. MCDONALD: Stan McDonald B.L.M.

MR. MERKLE: Carl Merkle, Umatilla

tribe.

MR. HEINITH: Bob Heinith with the

Columbia River Intertribal Fishing Commission.

MR. HALLER: Greg Haller with the Nez

Perce tribe.

MR. BURNHAM: Bernie Burnham, Bureau

of Indiana Affairs.

MS. MOLLOY: Thanks. We had started

discussing some of the issues and -- and we still have a

-- a number of them to go so we'll just pick up and -- and

try to cover as many as we can this afternoon.

We -- We have the idea of early

consultation and one question came up on where described

and -- and I think what it would entail and stuff. Did

anyone have any ideas or questions more specific to --

MS. SCHAFF: Could we go back to the

tribal liaison thing?

MS. MOLLOY: Yes.

MS. SCHAFF: I still had some comments there.

MS. MOLLOY: Certainly.

MS. SCHAFF: I guess you were asking for -- for some of the examples that -- I think that a tribal liaison might do and I think in -- in addition to setting up meetings, I think there were a few other things. Providing information flow from FERC outward, you know, notice to the tribes of anything that's going on at FERC that might be relevant or important.

And also going -- communication flowing the other direction, so advocating or representing tribal interests internal to FERC. And along with that, I think that an education role is very important, that that person understand tribal trust responsibility and understand particular issues of a particular tribe, the history of a project as it impacts the tribe or whatever and to be able to then explain that within FERC during the internal meetings and in the internal discussions when the decisions are being made to make sure that the tribal position is advocated.

So, you know, to me, the position shouldn't be just a clerical position where people are setting up meetings and -- and that sort of thing. I think it has to be a little bit more. And so you have to

have a person in there that's a high enough level of a person that can -- can maintain those sorts of responsibilities and not -- not someone who's in more of a secretarial mode.

So another question that comes up, then, is to whom do they report? And they have to report to someone high enough up in the organization so that if things start going sideways, that person can actually make a difference and bring the process back around and get some appropriate decision makers in to -- to respond to the way issues are going. So in that respect, it has to be a high enough level of a position and a high enough level of reporting so that -- that those issues can happen.

And then I think we've also raised the issue of how many tribal liaisons do we need and where are those people going to be positioned? I think it's important in some respects that their offices are out in the region, but then they also have to be able to take their information back to FERC and take it back to the leadership.

So, you know, it's really a toss up, in my mind, whether there would best be a person out in the field or if they would best be a person interior to the -- to the FERC organization in -- at -- in the D.C.

office.

And I guess the other comment I had about the tribal liaison position, and to me, this is one of the main reasons I came to this meeting today, was that I do a lot of work on the electrical side and I would hope that the tribal liaison position would be someone that would also be able to interface on the electrical side with tribes, as opposed to someone who was hired for the purpose of the relicensing process.

And some of the other tribes may disagree with that because certainly it's a very big job to do everything that FERC does and to deal with tribes on all levels, but I think we have a need on that side of the house, as well.

MS. MOLLOY: Anyone? Greg.

MR. HALLER: More of a process question, hydro hell week, as you've described, our comments are due to you April 20th, I believe or --

MR. HOWARD: 21st.

MR. WELCH: 21st.

MR. HALLER: 21st, are you going to be incorporating those comments into the draft or the -- the -- the writing sessions, break-out sessions, or how is that going to work? I mean, do our -- Are comments the end of the line or what are you going to use for the basis

for those drafting sessions?

MR. WELCH: The -- The reason that that -- I know the two things are pretty close together, but --

MR. HALLER: Yeah, I don't see how you can digest it all.

MR. WELCH: Yeah, we're gonna -- I mean, it's -- There's going to be a lot of homework, especially for FERC staff, but we're gonna try to compile those comments as quickly as we can and put them in a -- in a, you know, form so that people can digest them, but, you know, I think the people who attend those stakeholder drafting sessions are going to be very interested in what the comments were.

One thing we're considering -- Well, I'm pretty sure we're going to do -- we'll -- we'll have some sort of a large group session at the very beginning where we'll review, you know, hit the -- hit the major points of a lot of the comments just to give people who are going to participate in the hell week a sense of, you know, where the people from the -- these types of meetings are coming from.

MR. HALLER: So do you anticipate -- Like, if I go, I'm going to, of course, bring my comments and use language right out of there as a basis during

those sessions. I mean, do you anticipate that that's what other people are going to do or --

MR. WELCH: I -- I think yes. Yes.

MS. MOLLOY: And -- And with regard to the -- the filing date, you know, it doesn't mean you have to wait until then to -- to file. If anyone has comments prepared before then, send 'em in so we can get started on that because if they all come in on the last day --

MR. HALLER: Which they will.

MS. MOLLOY: That's why I'm trying to encourage anyone who --

MR. HALLER: It's a pretty quick turnaround time. That's -- That's my only concern that, you know, less than two weeks before the drafting sessions. I'm just wondering if that's realistic.

MR. CLARY: Sounds like a fixed date.

MS. MILES: It -- It is a fixed date.

We actually moved it back a week from when it was supposed to be. It was supposed to be a week earlier, and in looking at our schedule, we couldn't move it any later than that.

We are planning also in figuring out what issues really people may want to talk about at the -- the drafting session -- is to take a -- a real close look at what people have raised at these various regional

workshops, and we expect that that will give us a pretty good idea of where people's concerns are.

MS. MOLLOY: Any other -- Yes.

MR. HEINITH: Yes, Bob Heinith. Quick -- Going back to the tribal liaison position. I think it would be good to have one liaison person to deal with the -- on the watershed by watershed basis. They'd have an understanding if you have multiple projects being relicensed in -- in one watershed.

For example, on the Columbia River here, the Snake River, I think we consider it to be one watershed, the mid Columbia region where you have several FERC projects in other watersheds, so there'd be an understanding of -- of the interrelated issues surrounding those different relicensing proceedings.

MS. MOLLOY: Any other comments on the tribal liaison? Okay, well, if anyone thinks of anything, mention it and we'll -- we'll go back to it.

The early consultation, any questions on or comment on that?

MR. CLARY: Well, perhaps -- Don Clary, Shoshone-Paiute. Perhaps now might be the time. If -- And -- And I -- Perhaps it's good enough to just say if -- if staff didn't have anything particularly with regard to defining how those consultations would go, then

that's fine. We -- We -- We just need to define that -- then we need to know that, but if there was something that you had in mind as, kind of -- if you could give, kind of, like a hypothetical how you perceive this would take place, I still would like to hear about it. That's --

MS. MILES: This is the pre-NOI consultation. Okay, I'm trying to see if there's anything actually in here. Do you know what page it's on so that I can --

MR. CLARY: I don't.

MS. MILES: Okay. I'll tell you off the top of my head then. I thought it probably had a couple of goals. One is to make sure we identify the appropriate tribes, and that is the first step. Who is it that needs to be involved in a particular project? What involvement do they want to have? Getting perhaps as specific as what sort of -- you know, going through the flow chart and seeing exactly how they want to participate in this process.

I also think it would be -- if it's not a tribe that we know very well, that it would be getting to know the tribe and if the tribe has questions about how to participate in the FERC process, what -- what the process is to address those concerns. I'm sure there's more and we'd like to hear what you think.

MR. HOWARD: Yeah, Ann, I -- I think that would all come out in -- in your -- as -- as we stated. I -- I -- If I remem -- If I heard right, is that this new rule would -- would encourage consultation early in the process and I'm sure that's where this information that you're seeking will come out because in light of tribal sovereignty, tribes will vary into -- into what level they want to participate in.

So I'm sure, you know, there's no way that we can answer -- answer for all the tribes that are gonna be involved and -- but that would come out in you consultation with that tribe as to what extent and to what level they want -- they want to be involved in.

MR. CLARY: Could -- Could I go back just real quickly and just follow up on that. Just with -- with regard to this, would, for example, identifications of studies, things along those lines, would they take -- that place -- or make identification study requests, would that take place at this time or would it take place later on in the process in another consultation? How would that work?

MS. MILES: I guess it might be a project specific thing. I -- I don't think we've gotten that specific. If -- The identification of studies definitely happens in that first year of consultation,

whether it's appropriate to do it at that early meeting, I don't know. Do you have thoughts on that?

MR. CLARY: Yeah, well, I -- I --

There may be some instances where, for example, the studies need to be done earlier so it might be appropriate in that kind of a circumstance to bring those kind of issues up. I would -- That's one possibility.

But what -- I guess where I'm going here would be I'm trying to think how the regulation might be changed, how we might suggest the regulation might be changed, so -- to, kind of, accommodate this, but do it on a more generic basis so it's not binding for all tribes.

But we might talk about the kind of things in the regulation that might be addressed at this particular meeting, such as early studies or, you know, other issues that the tribes want to do to address at that point in time, maybe come up with kind of a laundry list kind of thing of what could be considered.

MR. WELCH: Yeah, like consultation may include --

MR. CLARY: Right.

MS. MOLLOY: Would you like to make a list --

MR. WELCH: Could you -- we make that

--

MR. CLARY: Yeah, we could probably do that. Yeah, certainly, we could -- I can't -- not prepared to do it here but we can --

MR. WELCH: Oh, oh, okay, I was thinking maybe people just quickly --

MR. CLARY: If -- If people want to -- want to -- Well, that's good if anybody wants to --

MR. HEINITH: This is Bob. I think in general you can identify the -- the re -- tribal resources and the impacts of trying to relicense and get into the specifics so that -- that FERC would have an understanding from the affected tribes exactly what we're talking about and not have to wait until down the road for the applicant to do their own perspective on what they think what tribal resources are going to be impacted.

MR. CLARY: Also, perhaps the -- the treaty -- applicable treaty issues and applicable executive order issues, things along those lines should be identified at that time.

MR. WELCH: I don't know, maybe it would be mentioned earlier, but I would like to maybe see possibly on the list the -- the whole education aspect, not only from, you know, education from FERC, the tribe on the process, like we're talking about today, then correspondingly, education for FERC staff of tribal

history and maybe this all goes in with applicable treaties so, you know, two-way education or something like that.

MS. MOLLOY: Any other ideas?

MR. BRONCHO: Claude Broncho, this time frame that we're working under, you know, I know there's what they call technical consultation and there's the government to government, and what -- what are we looking at in regards to the time frame as we talk?

MS. MILES: The time frame for processing an application?

MR. BRONCHO: For this -- On this whole proposed rulemaking.

MS. MILES: Yeah, the -- What -- What our expectation is is that a -- a licensee can file its notice of intent, which is in box one in the flow chart, five to five and a-half years before their license expires. Then they have to file their application two years before it expires, so we've got a three to three and a-half year period for consultation and making determinations on a study plan and carrying out the studies and preparing the application. And then we have a two-year period for processing that application, doing the environmental review and that type of information.

And our expectation is that beyond

that time frame, we would have this early meeting with the tribes to initiate consultation, so that would -- And --

And we haven't established the time for that, at what point before the notice of intent is filed is appropriate, so certainly might want to comment on that. So the total is -- is a five to five and a-half year time frame, which a -- with a little bit earlier than that initiating consultation with tribes.

MS. MOLLOY: Any other comments or -- or anything for the list of brainstorming ideas? Carl.

MR. MERKLE: Carl Merkle, Umatilla tribes. I don't know if it's in the -- in the rulemaking or even if it's appropriate to put in the rulemaking, but I wonder as -- as part of this initiative or in any other way, are you contemplating any kind of funding opportunities for the tribes to engage in all this participation, some -- some practical means to better help us to do all this work?

MS. MILES: FERC hasn't been or isn't in a position, really, to fund. I think in several instances applicants or licensees may be willing to -- to fund tribes' participation in the process, but so far, the commission hasn't done that and I don't know if there's any greater opportunity there.

MS. MOLLOY: Greg.

MR. HALLER: A suggestion for -- for that, to help facilitate that applicant funding -- As maybe a way to facilitate, you know, the applicant providing funds, FERC could maybe make a mention of that in the rule or in their discussions with the applicant to ensure tribal participation.

We've had some experience with that and it's been very helpful in bringing relevant staff to the table, and the -- the applicant took that on themselves, but it may be worth it for FERC to throw that out there as a way to -- to facilitate that.

MS. SCHAFF: Kind of a second suggestion in that same regard, and maybe FERC or a tribal liaison person might be a suggested idea. There is -- There are two bills right now that have been introduced in congress that are tribal energy bills, one by Senator Hagel, one by Senator Bingaman. And there are hearings next week before congress and one of the major functions of both of those bills is to provide tribes funding for different energy projects. Hydro relicensing is not mentioned. I think the -- the senate, committee for Indian Affairs staff got a letter from FERC saying that they would like that to be included as something authorized for funding, it might be a really -- Include -- get that added to the list, tribes are on the table and

it's a letter that might be really appropriate for the hearing next week on --

MS. MOLLOY: 522 and 471.

MS. MILES: Do the bills provide for direct funding for tribes for participation in the various activities?

MS. SCHAFF: Yes, through the Department of Energy.

MS. MOLLOY: All right.

MR. GRIFFIN: Sorry. Are -- Are those house -- house or senate?

MS. MOLLOY: Senate bills.

MS. SCHAFF: I'm not sure if 471 is the right number. I'm pretty sure so you might want to check on that.

MR. BRONCHO: Claude Broncho, maybe the -- The bills that I was thinking that they were was S1766 and HR2436, but maybe we need to clarify that to see what bills are affecting us.

MS. MOLLOY: All right. Yes, sir.

MR. MCDONALD: Stan McDonald, B.L.M. This is more in the form of a question here, but it goes to early consultation and perhaps the tribal liaison's role. But in -- I guess it's on page D49 under section 5.3 under the notice of intent is that the license

applicant at the time it files its notification may -- may request to be designated as the commission's non-federal representative.

Have you given any thought to including in the rules and regulations, sort of, the criteria that you would use in evaluating that request? And is there -- I'm wondering, is there a role for the tribal liaison to be able to identify issues that might assist FERC in evaluating that request and when it's appropriate to have an -- an applicant serve as the non-federal representative for purposes of Endangered Species Act, marine fisheries conservation, and National Historic Preservation Act?

MS. MILES: I can't say that I recall having a discussion about that but you raise a good issue.

MR. HOWARD: Ted Howard, Shoshone-Paiute tribes. In regard to -- to Stan's question, the applicant that we're involved with does not consult with the tribes. It has not. We attended a meeting with them last year. Tribes have been involved to some extent in the collaborative process but we've never been involved as a sovereign entity.

But I think any time the licensee or the applicant is gonna speak on behalf of the tribe and our resources, they need to meet with the tribes and set

down what the tribes' interests are.

In regard to the applicant in our area, I don't see in any way, shape or form that they can speak on behalf of the tribes because they've never visited with us on that. So I think it's, you know, that FERC needs to stress to the -- to the applicant to consult with the tribes, so that's what I wanted to add.

MS. MOLLOY: Anything else on early consultation?

MR. HOWARD: May -- Maybe just one other before we leave that subject, in regard to studies. Yesterday we talked a little bit about the importance of including ethnography with -- with the -- with the archeological surveys, etc. That needs to be started as early as possible because a lot of times -- and -- and this is just a -- a comment in -- in the -- in an educational sense for you, but many times we have to interact with tribal elders that may reside in -- on different reservations but they came from the area that we're talking about.

I guess my point being that those -- some of those studies needs to be initiated early with the tribes so we can have adequate time to get the information that we need for you. And a lot of times I know that tribes are -- are tagged as the bad guys because when we

get the notification at the eleventh hour and we can't -- we're not prepared, we're not finished by the time the deadline rolls around, then that's usually what happens, so -- so hopefully, after we've made these rules, they will be involved a lot earlier in the process.

MS. MOLLOY: Anything else on early consultation? And another issue was on the dispute resolution, and I think before we start talking about that, we're -- we're -- we want to, kind of, go over that process so that everyone's talking about the same thing.

MS. MILES: Okay. Let me take a minute and, if you would, look at your flow charts. I -- I wanted to go through what this rule proposes for the dispute resolution process so we're all on the same wavelength.

The -- The applicant provides some study plan information, I think, way back in -- in box one. But at the point that we really get a draft study plan is box six, and FERC will take that draft study plan and attach it to its scoping document, which is issued in box seven, so the scoping document identifies the issues around the project, what will be -- what -- what types of issues are -- are identified as needing to be studied and what things aren't.

And then there will be the study plan

for how to gather information to address those issues and also perhaps identification already of information that's already on the record that can be used for understanding the issues and coming up with environment measures.

In box eight, there's the opportunity to comment on the scoping document and the study plan. And then box nine is a meeting where they're dis -- that -- that is focused on discussion of any issues with those studies. So if -- if at that point in -- in box nine there's a study that you believe is necessary and an applicant isn't proposing to do it, that's where we have the discussion about that study. You know, why is it -- what do you need? Why do you think you need it? How does it need to be done? What data do we expect to get from it? And how are we going to use that data to try to answer the questions?

At the end of that meeting, then in box ten, the applicant will revise its study plan. As a result of those discussions, they may feel like they need to make some changes to the study -- their draft study plan. That's what -- what we would get in box ten.

And then in box 11, that's the point at which the commission makes the decision, the commission staff and -- and -- we haven't specified in the rule, and we may want to, whether that's an office director letter

or -- or whomever. But the commission will look at what's in the record at that point. What did people propose originally for studies? What was the discussion at the study meeting about the pros and cons of doing various studies? Any information that you may have filed on why you need what you -- what you need. The office director, then, makes the decision and that's in box 11.

So that is -- We're calling that part of the dispute resolution process an informal dispute resolution process but that's -- that's your opportunity to say what you need, why you need it, and to have the office director or -- or the commission make a decision on what's needed and what's not needed. We -- We expect that most studies will be resolved through that method.

We have added in here, and that's box 12, 13 and 14, for any agencies with mandatory conditioning -- conditioning authority to have a -- a very formal opportunity for dispute with convening of panel and a final order on whether that particular study that's in dispute is needed or not needed. And that final decision, again, is made at the commission by the office director.

Does that -- I've -- Does that make it clearer what -- what's -- what's laid out in this process?

MR. HOWARD: One question, Ann. Ted Howard, Shoshone-Paiute tribes. As it was mentioned

before, that tribal consultation or tribal involvement was never identified within this flow cart. Where -- Where would the tribes be involved?

MS. MILES: The tribes -- One thing about the flow chart, we -- we didn't list any particular participant's names. We didn't list federal agencies or -- or state agencies or tribes or the general public. We used the flow chart just to establish what the step was in the process.

And in the actual rule, the five -- section five of the rule, tribes are identified in many spots. So I'll turn to the rule in a minute, but the expectation would be that you would be --

Let me start at the very beginning because it's almost in every step. You would be commenting -- attending the scoping meeting in box four, commenting on the application, the pre-application document and the scoping issues in box five, commenting in box eight on the scoping document and the study plan, attending the study plan meeting in box nine.

And then when you get to box 15, that's when we're actually doing the studies. And at the end of a season of studies, the applicant would be summarizing the studies. And then there would be opportunity for you to comment on those -- the re -- the

study results, see if you need any more information than what may have been gathered and there's to be another meeting.

MR. HOWARD: Ann, I hope in the scoping meetings where you -- where you mentioned in four that tribes will be attending scoping meeting, I certainly hope that these scoping meetings are not with the general public. These scoping meetings need to be done separately with the tribes because of sovereignty. This is -- So many times, we're wadded into the general public, which is inappropriate. You need to have your tribes' scoping meetings separate.

MR. WELCH: Would that scoping meeting, then, be part of the consultation process that would be established from the initial consultation meeting?

MR. HOWARD: Again, I think this would depend on the tribe you're working with. You know, some tribes would probably agree to that, but I'm not sure if they all will. But maybe as Don said before, that we could draw up some wording that would -- would address that in the general sense.

MR. WELCH: Maybe that's another thing for our list when we were listing the things that will be part of the consultation meeting.

MS. MOLLOY: Okay. And the words?

MR. WELCH: Schedule FERC's tribal scoping meeting.

MR. CLARY: Did -- Could I just elaborate just a little bit. I think, yeah, I -- I think that's correct that if we could put it in -- in that context or at least talk about if there's some reason why scoping can't be done with particular issues at that time, we could discuss what would be appropriate -- appropriately deferred. We could do it that way.

And then I don't know if -- and I apologize having just gotten back in the room, but does this also -- was Ted also addressing the concern with regard to confidentiality of -- of artifacts and things along those lines, or is this totally separate with regard to the -- okay, this is just something which comes up in the context of, okay -- clearly we, I think -- I don't know, I guess could I ask a point of clarification on that in the reg as it's currently drafted. Are there provisions which talk about or offer the opportunity for consultations with regard to artifacts and things of a confidential manner? I believe there's already under the current regs some -- some provision to that; is there not?

MS. MILES: In the current regulations, there's provisions for privileged information

so it's not divulged to the general public.

MS. SCHAFF: I have a question on the -- having individual scoping meetings and scoping meetings with everyone. And a -- a part of what's contemplated in the integrated process, and it may be troublesome to you, is -- is to try to have people talking at the same time so there can be some sharing of how studies often -- you know, a study that's being done for recreation could influence some tribal resources and if you're not at the table discussing it at the same time, then that information isn't shared.

So I'm wondering how to do the integration. That is a lot of what this is trying to get at. But the need for the tribe -- well, the desire for the tribes for separate meetings because of sovereignty or because of confidentiality and I wondered if you had suggestions in that area.

MR. CLARY: Can we -- Can we have just a second?

MS. MOLLOY: Sure.

MR. BRONCHO: Just a question while these guys are discussing that, in regards to the -- Claude Broncho -- the scoping -- the option instead of it being put out, will those be in specific areas such as -- like in Idaho, will it be in Boise or will they be in

Idaho Falls or -- or Pocatello? And if they are in -- in -- depending on the different areas of the states, whether it's southwestern or northern or southeastern, since --

Well, I'm just assuming that the scoping would be open to the public but also at the same time they could have a two-day and still keep it open similar to here, similar to the meetings that took place here today and yesterday.

It seems now -- one was open for the public and this one's also open for the public also, but -- but primarily you're addressing the tribal portion in this -- this forum right there, but yesterday was open for the rest.

So, I mean, I'm just wondering, couldn't something like that be initiated and be clarified in -- in regards to scoping and -- and so forth? I don't know about consultation. I think Ted said it had to depend on individual tribes or sovereign government.

MR. WELCH: Yeah, I think that at the consultation meeting, if the -- if the tribe identified a desire to do that, that very thing that you just mentioned, you know, I think that's something -- we have done that in other proceedings. One that I was involved where we had a, quote, public scoping meeting one day followed up on the reservation by a tribal scoping meeting

and I, for one, found that to be quite rewarding. We've done that. We have done that.

MS. MOLLOY: Greg.

MR. HALLER: Greg Haller, Nez Perce tribe. As the new rule pertains to study dispute resolution, at least speaking for the Nez Perce tribe, that's a giant step backwards from the existing rule, and I want to make sure everyone is clear that the formal dispute resolution process is only for agencies or tribes with 401 authority, so you have to have water quality standards and recog -- and have them recognized by E.P.A.'s treatment at the state before you can enter into the formal dispute resolution process; correct?

MS. MILES: It could be on a reservation also where's there's a 4E authority.

MR. HALLER: Right. Okay.

MS. MILES: It's a mandatory conditioning authority.

MR. HALLER: Right, the existing rules, though, go beyond that. Existing rules allow for tribes to have a dispute worked out with FERC directly. It has nothing to do with your mandatory conditioning authority.

You could -- The rules say, I believe, that we're to provide recommendations at the very -- at

the very least. But this is gonna be a big problem for Nez Perce and I think for most tribes because especially when you're talking about cultural resources or treaty reserved resources that are not four -- have anything to do with 401 or fish way prescriptions, but are as important to the tribes, and you're basically -- as Ted said, you're lumping the tribes in with the public in the informal dispute resolution.

And I know you have high hopes that most of the study disputes are going to be solved before you get to dispute resolution, and maybe it's just my lack of experience and having only dealt with one project, but we hit a brick wall for the applicant and that's it, end of story. And the only recourse we've had is to go to FERC, even early on in the process and we've, you know, asked for additional studies early on in the process to get these issues raised up and at least they're heard.

Now when you move beyond -- we can't move beyond box nine, and you're really limiting and affecting the sovereignty and the resources of tribes by not permitting them to go to the commission directly with a study dispute and you're -- by limiting the -- such -- it's the same concern that the states have that they --

MR. WELCH: I guess, I'm -- I'm really concerned about your perception that this is a step

backwards because we don't want to step backwards. Under the -- Maybe we're not talking about the same thing, but under the current regulations or the traditional process, there is a study dispute process in the pre-filing process that's -- that's used very infrequently and consists of a disputing party writing a letter to the office director and the office director, then, just makes the decision and resolves the dispute and writes the letter back.

Now we have FERC staff being involved throughout the process. We have an opportunity for you to meet face to face with FERC staff beyond just writing a letter to the office director to state your case at the study plan meeting. To me, that -- that's a step forward.

MR. HALLER: Right, now within that context, yeah, you've -- you've -- you've integrated more meetings and more face time throughout the first few boxes there, but then if you don't have 401 authority, you're done. And a lot of these issues are going to be not related to just water quality where we're gonna have serious problems with the study plans as they may exist.

MS. MOLLOY: What --

MR. HALLER: And if we have no recourse for that, then, in effect, you've cut us out of the dispute resolution, so that's where I'm saying that's a step back.

MS. MOLLOY: One other thing, and --  
and I hear what you're saying and -- and -- and I'm only  
mentioning this because I didn't hear a particular mention  
and -- and it is something -- again, where we're looking  
at it, is we're trying to improve and -- and -- and give  
better opportunity for working things out, is that -- that  
under the study plan, in the -- early in the process, FERC  
is actually going in and approving the -- the plan and the  
-- and the time lines, which is something we don't do  
currently at that -- at that phase of things, so we're  
trying to get -- that -- that we are looking at getting  
involved so -- so that you don't have a situation where --  
where someone's asking for a study and here's the why.

MR. HALLER: Well, I -- I can see it  
happening. I mean, we -- I have examples of it from my  
own experience and I just, you know -- cutting it off to  
those with water quality authority only is -- is not  
inclusive of every issue we've raised regarding  
consultation and trust responsibility.

MR. MERKLE: Why not include it even  
if we don't have --

MR. HALLER: Yeah, I mean, that would  
be this -- that would be the suggestion, you know --

MR. CLARY: Does FERC have an  
objection --

MR. HALLER: -- 401 authority and/or tribes.

MR. CLARY: Yeah, could I just toss in here -- I mean, we, during the earlier portion of this, came in and there was a great deal of discussion about how we were gonna have study dispute resolution and what have you, and this is something which, frankly, it was never pinned down at the earlier phases as to just what that meant. But we have as -- as Greg talks about, gone through a number of situations where we've made repeatedly requests for study disputes, gone to great expense to do so. They have not been responded to by the applicant and we have not been in a situation where, you know, we felt that we could have any real recourse until much later in the process to do anything about that. So our hope was here that we had an opportunity to address this here and add another place where we could perhaps, as others -- could step in and -- and get a resolution, and -- and our attitude is people are in this for various reasons.

One of the things that we felt we would get out of this would be perhaps an ability to get study disputes resolved that aren't for our purposes and I -- I don't see what's wrong with that. I think that's -- that's, you know, something which should be something that we could work into the process.

MS. MILES: I think that's also our goal.

MR. CLARY: Okay.

MS. MILES: I mean, you're suggesting a -- a different way of doing it than -- than what we had conceived.

MR. CLARY: Right.

MR. MERKLE: This is Carl Merkle with Umatilla again. Yeah, I -- I think, you know, as Greg pointed out, clearly the -- the -- the process you've described here with -- with earlier involvement by FERC and more -- more face time, more -- more meetings and involvement with the applicant, with any luck, that will, you know, go toward alleviating disputes, and nobody will even end up in -- in, you know, box, what, 12B.

But, you know, some of us have had some experiences which haven't been too pleasant or -- or happy and haven't had very positive results so that we still have to think about the eventuality that we may have these disputes.

So, I mean, I -- I -- I think that the early involvement on FERC, that -- that that aspect is good, but nevertheless, I'd like to know if FERC wants to limit participation and formal dispute to tribes only with mandatory authority. Why is that? Or will you consider

opening it to all -- all tribes, appropriate tribes affected by a project whether or not they have mandatory authority. Do you consider altering the rule that way?

MR. WELCH: That's definitely on the table for us to discuss. But can I -- Can I add -- Can I throw out one more hypothetical? Let's say, for instance, that you voiced your concern about a particular study in box nine at the study plan meetings part of the informal resolution and the applicant continues not to include your particular study, and then going to box 11, FERC then looks at it and also does not include your study, could your next step or your next recourse then move over to the -- maybe the parallel tribal consultation process for further dispute resolution? So that -- So that maybe it's not such a -- such a dead end.

MR. MERKLE: If -- If -- If a tribe is the only one that's disputing it and has a -- has a particular dispute.

MR. HALLER: In -- In some ways that may even be better than the dispute resolution process you've proposed which is have a panel of people working out the issue. It may be better especially in terms of confidentiality on cultural resources.

And -- And let me just back up. It may not just be a question of doing a study or not doing a

study. It can very well also be a question of who's doing the study.

We have examples of an applicant hiring contractors that were -- the tribes found offensive because of past work that they have done regarding on -- regarding archeological and resource inventories or -- or that type of thing, so it's not just whether the study is done or not. It could be who's doing it.

But the consultation process may allow a better dispute resolution process than -- for tribes than perhaps maybe what's described for the rest of the agencies with, you know, 401 authority. So there could be something to explore there, to answer your question.

MR. CLARY: Yeah, I -- I would just say at the risk of stating the obvious, the regulation would have to incorporate, rather than being the vehicle for doing it.

MS. MOLLOY: Anything else on this? Time frames on additional study requests, as I recall this arose in the context of -- actually, it arose in general on time frames and then in the context of under the current system additional study requests are -- are allowed later in the process than envisioned here.

MR. HALLER: Excuse me, Elizabeth, I think there was one other, which was just a dispute res --

resolution process, as well.

MS. MOLLOY: Oh, I apologize.

MR. HALLER: And -- And that -- we, kind of, touched on it with the -- the panel. I think it's on D -- D62 and D63. And this was brought up yesterday, for those who weren't here yesterday, but I think it's worthwhile for people in this room to hear it. D3, a third person selected by the other two panelists with a pre-established list of persons with expertise in the resource area.

One of the questions yesterday was what if you can't find a third person? Who's going to develop a list and -- and -- and how does that process really play out. So if -- Maybe you can give some examples to that for the group here.

MS. MILES: Well, as far as the list, FERC would develop that and have a list. People would have the opportunity to write in to be on the list. We haven't looked at exactly what that -- you know, how to develop that list, so if you have comments on that, that would be good. But the idea would be that it -- it would be a -- a list that was kept at FERC and there would be some application process to be on the list.

MR. HALLER: So that tribes couldn't nominate, say, a cultural resource expert --

MS. MILES: Sure.

MR. HALLER: -- for that list --

MS. MILES: Sure.

MR. HALLER: -- for that person?

MS. MILES: And -- And you might put in your comments that that's something you'd -- you'd like to do because we haven't flushed that out.

MR. HALLER: Okay. The last part of that paragraph, if no third panel member has been selected by the other two panelists within 15 days, those two panel members will carry out the duties of the panel. So what if you have a stalemate, one person saying they got to do the study, the other person saying they don't, how are you gonna --

MS. MILES: That -- That recommendation would go to the office director and their rationale for what their vote was and then --

MR. WELCH: They would look at all --

MS. MILES: -- he would need to look at the size of the issue and make the decision. It's not -- That's not the ideal. And you're right. There was a lot of discussion about not having the third person there. The reasoning behind putting a time frame on this is that we didn't want the dispute resolution process to drag out for some inordinate period of time, so we thought if they

couldn't decide or they couldn't find someone, that no one on the list was available, that the process just needed to move on.

MR. HALLER: Okay. That was all I had there.

MS. MOLLOY: Anyone else? Ted.

MR. HOWARD: Just a suggestion, I imagine here shortly we're going to start losing people due to time. Maybe -- Maybe we should look and see what we have left and -- and see what the -- like, we should start looking at that.

MS. MOLLOY: Okay. Everyone's got their list in front of them, I assume.

MR. GRIFFIN: There are a couple of those that I think that are mostly just clarifications that we can hear, sort of, quickly probably and just scratch off the list, like the original license question.

MS. MOLLOY: We -- That -- That question was does this apply to original license and -- and we answered that earlier that it does.

MR. CLARY: Timing is not enough.

MS. MOLLOY: What?

MR. CLARY: Timing is just not enough.

MS. MOLLOY: The --

MR. CLARY: Need more.

MS. MOLLOY: Small project, there had been a -- there had been discussion about whether these could be, sort of, excluded or a different -- different process used for it, but there's no -- I guess you can answer this better, but, I mean, there's basically no way to categorically say that -- that just because a project is small or a certain size that it may not have -- you know, you can't say it doesn't have an effect on things or -- or it has to go out, or it wouldn't benefit from this -- this process or it shouldn't go through this process. So while there is the election, you know, to apply to use one of the other processes, there's nothing -- no group of projects that -- that it would defer to another -- another way. Does that make sense?

MR. HOWARD: And may I say something? You know, regardless of the -- the size of a project, I think, first, before you -- you change anything as to how you do it, first, you must consult with a tribe because this project may be small to you but it might be an area that's very important to a tribe. So you can't necessarily minimize that because there's definitely some -- some trust obligations in regard to the -- you as an agency and also the status of the tribes.

MR. GRIFFIN: That's right, we -- that goes along the same lines of what we were just talking

about from National Marine Fishery Services' perspective.

You have a very, quote, small project, you know, the couple of megawatts or something that has a very big impacts and you know, may -- vice versa, potentially, so that's why that's, sort of, a -- a moving target.

MR. HOWARD: Right, but I think once you consult with the tribes and -- and if there isn't anything there, maybe then you can expedite it somehow, but -- but we've been involved in -- in consultation issues for a number of years and -- and I know there are some projects, you know, that -- that take a little longer than others to move along.

MS. MOLLOY: On exempted projects, we stated earlier that this rule does not apply so I think that's that one. And I think we discussed the one process that we have, one that -- the default process is -- is this new integrated process but that the other two will remain but have to be elected and -- and --

MR. HOWARD: Liz.

MR. HALLER: A question regarding that.

MR. HOWARD: Liz.

MS. MOLLOY: Ted, then you.

MR. HOWARD: Before you go on, exempted project, now when you say exempted project, is

that on federal lands or what are you calling exempted?

MS. MOLLOY: There's two different kinds of exempted projects. There is what we call five megawatt exemption and there's a conduit exemption. And -- And stuck right here in this small one, I can tell you that one can be on federal land and one can't, but I'm drawing a blank. I know that it -- that they -- they're very small. They involve no -- no building for -- for five megawatt. You can't build a new dam. You can't -- You know, it's -- it's very limited and it's perceived as -- generally, as a small thing that -- that shouldn't have much of an effect on things. Usually, it has to be on -- if it's not on federal land, and, as I said, only one of them, and I'm drawing a blank, I mean, I'd have to, you know, think a little harder here, but otherwise the -- the person has to own the land, you know, basically. And so it's -- it's got some things. On particular ones, I mean, I'd have to go through on -- on what the requirements are for each one. We don't have a lot pending right now. We haven't for a long time had a lot. But they are issued if they don't have a termination date.

MR. HOWARD: How -- How did -- Is this something that FERC came up with or where did this exempt thing come from? Is that something FERC dreamed up?

MR. WELCH: No, it's in our

regulations.

MS. MILES: Yes, but --

MS. MOLLOY: -- statute, there's --

there's a PURPA (phonetic) -- There's a statute that -- that described an exempt -- what would -- what would qualify for an exemption and --

MS. MILES: I think there was a period of time where there was a lot of interest in encouraging the development of hydropower at existing dams, and the five megawatt projects are at existing dams. There had -- There has to be an existing dam and you're adding power to it.

The conduit exemptions are on some sort of existing irrigation or other conduits and you're plunking down a -- a turbine generator. So the idea was encourage development of this resource in areas where they don't have tremendous effect. And in return for doing that, what -- what they are is exempt from licensing. So there -- there is an environmental review for the five megawatt exemption at the time that the exemption would be issued, but after that, there's no relicensing. It's issued in perpetuity.

MR. WELCH: The other part of that is the -- with an exempted project, the resource agencies, Interior or NMFS, they just specify what the terms and

conditions are for environmental writing of the exemption, so that there's no balancing by FERC or anything. As Liz said, there -- we -- we very rarely get applications for --

MS. MOLLOY: Greg.

MR. HALLER: My comment was on the one process versus three but if there was someone over there --

MS. MOLLOY: I saw a hand.

MR. CONRAD: This is Art Angle, in regards to the -- the five megawatt, did I hear you right, you said that that had to be on private land?

MS. MOLLOY: Well, it's -- We -- You -- You saw me struggling because normally when a question comes up on exempted, I -- I know the generals but because we don't see them often, I always go back and look it up.

The conduit -- the conduit license, the project facility or the project works are -- are the parts of the project except for the conduit that it's attaching to and the conduit that it's attaching to ran across federal land, the -- the project part cannot, the project features. And -- And so that's on conduit things.

So we're thinking across federal land, otherwise the -- the owner has to have the rights. There is no imminent building authority with an exemption. They

can't say I'm building a project here and because I have a federal license, a -- a FERC license, I can, you know, go through the state process and take this land. They have to have it already, the register.

MR. ART ANGLE: It kind of sounded like if you own the land, then you also own the water right, and I was a little bit concerned in regards to that because, you know, some tribes have water rights that, you know, are tribal and so I was just kind of concerned about that.

MS. MOLLOY: As I said, we have very few applications anymore because it's -- it's just a very limited type of thing. Where -- Where it's a small thing attaching to something that already exists for -- for another purpose or -- or something and it's -- it's -- several years ago we had a lot of them, and now it's -- it's less, one process versus three.

MR. HALLER: Greg Haller, I'm not -- I don't see the need for three. I see the need for two but I don't see the need for three.

MR. WELCH: What two?

MR. HALLER: Traditional and the new integrated. I'm not sure what -- what the commission is thinking by keeping the ALP if the new super improved ILP does what the ALP does and more, better, so I'm not sure

the need. If you could explain the -- the need for the ALP to remain.

MR. WELCH: I think the thinking with the ALP is that some people like to resolve things in a more -- a more collaborative process, a more flexible process, with -- you know, the ILP has very strict deadlines, you know, one, two, three, four. The ALPs tend to be more flexible. There are study groups. There are forums. There are lots of committees. If there's, like, a lot of stakeholders that want to develop their own process, it gives them the freedom.

MR. HALLER: Does the ILP preclude the formation of the work groups?

MR. WELCH: Not -- Not at all as long as you meet the -- the deadlines.

MR. MERKLE: Is that, like, the main difference is that the very specific deadlines for the ILP, greater flexibility?

MS. MILES: I think that in the ALP there's a bit more of an assumption of a collaborative working arrangement. In the ILP, it doesn't necessarily have to be like that, aside from what you said.

MR. CLARY: Can I ask a -- In traditional, why -- why the retention of traditional? That's --

MS. MILES: I think the thought was  
that --

MR. GRIFFIN: I -- I -- I can --

MS. MILES: Take it away, Kerry.

MR. GRIFFIN: One of the statements  
that we've heard especially from licensees is that one of  
their fears is what if this new rule turns out to be just  
a stinker, just a rotten egg, and there's all sorts of  
unforeseen problems, and they're left with that, being the  
only one? You know, for what it's worth.

MR. WELCH: Thank you, Kerry, we  
couldn't get ourselves to say it, especially the word  
stinker.

MS. MOLLOY: How -- How delicately  
put.

MR. HALLER: Term of art.

MR. GRIFFIN: So -- So for what it's  
worth.

MR. WELCH: I mean, Kerry's right. I  
mean, in -- there was lots of comments about retaining the  
traditional from various aspects of the hydropower  
community and, I mean, who knows if the IL -- ILP turns  
out to be everything that we think it may be. Maybe, you  
know, the traditional will eventually be phased out, but,  
you know, I think we're going to keep it for a while.

MR. GRIFFIN: And the commissioner or the chairman, Pat Woods, said at one of the meetings last November or something like that -- he said that the hope is -- his hope is that everyone will just naturally migrate to the new ILP and that -- and he implied that some time in the future, if all goes well, then the other two -- I don't know if they'd be phased out or not, but -- but his hope is that it would be an attractive enough and a good enough process that people would migrate to it.

MR. HALLER: Greg Haller, we had this discussion yesterday, but again, I think it's worthwhile for the group today if you could explain the criterion or criteria that the commission is going to use to evaluate an applicant's proposal to use one process versus another and -- and the input that's available to tribes to steer that decision in a direction.

MS. MILES: Right now, the rule says good cause and it doesn't spell out -- the -- the NOPR doesn't spell out what that criteria is but it does ask in the preamble and make some suggestions, like, should it be smaller projects? Should it be where a lot of existing information -- should everyone need to agree? Those kinds of things, so if you have -- well, I guess there's two questions. One is should there be criteria at all? And if so, what might the appropriate criteria be?

We had some discussions about it when we were drafting the rule, but it's a really hard thing to categorize. As we already talked about with small projects, all small projects have -- don't have little effect, so -- and some larger project may not have any effects. So we ended up saying good cause and leaving a lot of flexibility in there that also -- we are also having the opportunity for everyone to comment on it and comment on what you think are the reasons, you know.

I mean, at -- every -- any time -- any time an applicant would choose to use anything other than the ILP, they would then notice it for comment and there's 15 days for everyone to comment on whether they think it's a good choice to use the traditional process. And then FERC will take a look at all those comments and say they've got some good points why it should or shouldn't be that one that's used -- used here.

The alternative process is already laid out. The applicant has to go out with the alternative and gather consensus for use of the alternative. We didn't change that at all.

MR. HALLER: I think from our perspective, the tribes best -- scratch that -- might need one process. It's hard enough to get our hands around, you know, one process let alone three for just

understanding and -- and working with it. We would lean towards just having one process.

MR. HEINITH: One process with adequate -- Bob Heinith. One process with adequate consultation, as -- as we've been talking about and adequate time for the tribes to garner their resources and -- that they have available and -- and to participate in it. It's not going to be very good if we have three processes and only one specifies tribal consultation and we're still left with the ALP and the traditional. That -- That really doesn't offer a lot to the tribes in terms of the consultation.

So I -- I -- I think, you know, that's what we're looking for, and how can -- how can we get there? We -- We would ask -- We asked for one process the last time around. Now we have three. It seems like we're going in the wrong direction here.

MR. LINDERMAN: Chuck Linder -- Chuck Linderman, the Edison Electric Institute. But do you really -- You may have three in theory and in the course of the rule to have -- but do you have -- do you have enough multiple licensees that you would be responsible for that you would have to learn and understand all three processes?

MR. HALLER: Yeah, in the Columbia

basin, most definitely.

MR. HEINITH: Yeah, I mean, we're dealing with six -- six proceedings right now and more on -- more coming.

MR. CLARY: Could I -- Are you done, Chuck?

MR. LINDERMAN: Yeah.

MR. CLARY: I just -- My concern with regard to that is I think the point that you've -- make as well, taken as far as, you know, you got a situation where, in effect, the licensee can gain the process, basically, is the concern and then can circumvent our tribal consultation and I -- I think that's the concern that we would have with regard to that. And I think maybe that's the answer. If they want to retain the three, the traditional, then perhaps there might be -- Let me ask you, would there be an option for or would this be something the commission might consider, providing consultation in the context of the traditional or the other --

MR. WELCH: I -- I -- Maybe we need to make this more clear, but I think it was our intent. Tribal consultation is tribal consultation, whether it's the ILP, the TLP. Again, we -- We're not associating it just with the ILP.

MS. MILES: The creation of the tribal liaison would be for all processes.

MR. CLARY: Okay.

MS. MILES: Not just for those that use --

MR. CLARY: Well, we were talking about integrating the -- the consultation to the schedule, for example, on -- on this and what have you. And actually -- And I think we were taking great comfort from that, that -- that, okay, that seems to be addressing what we needed to achieve to get consultation appropriately worked in but a licensee has the option to go to the traditional and we don't have that kind of a chart.

MR. WELCH: But we do have a chart for the traditional. It's a lot bigger than this one, but I'm -- I mean, I'm not trying to be facetious here --

MR. CLARY: But it's broken, I think, is what we're saying.

MR. WELCH: As far as the consultation, we would just have to use that particular chart to find out if we were in the traditional, once again, identifying some of the milestones for the tribe would be involved. As I said, we didn't intend the tribal consultation part to be associated just with the ILP.

MR. HALLER: If that could be

reflected.

MR. WELCH: Yeah, I think you're absolutely right.

MS. MOLLOY: And -- And on the -- One thing on the -- the three processes, I mean, one -- one thing is that -- the other thing that the rule does say is we're not changing the existing -- the -- the projects that are currently going to have a relicense because the -- the early part has already passed. To change over to the new process would be difficult because of -- we're work -- trying to work now is to put all of it in front, you know, a lot of working out things and -- and kind of, you know, guiding it to -- to better results is in the -- the front and in a lot of these processes that have already started, the time is passed, so even with one process, because there are existing projects that are already in the -- the loop, you would still have to deal with multiple processes, I think.

MR. HEINITH: Well, understand now -- Understand that but -- but -- but still for the -- for the future, it would be nice to have one process where -- where everybody understands what that process is and -- and we're not going to go from one to the other or shift back and forth because that takes a lot of time, as well. That's -- That's been our experience in going back and

forth between the traditional and the ALP.

MR. WELCH: Yeah.

MR. HEINITH: And that wastes a lot of time.

MS. MOLLOY: Art.

MR. ART ANGLE: Art Angle, Enterprise.

In FERC's early involvement in regards to the process, are indeed they taking some of the responsibilities of the applicant in regards to the notification and -- and some of those issues that are on the applicant prior to this?

MS. MILES: We're taking the pre-notice of intent meeting with the Indian tribes. Kicking off consultation we are taking on to ourselves, yes. And then we're going to be looking at what that process should look like. We are hoping that in many of them, that the licensee will be designated to be a representative for consultation and that you can work with -- with them through that in the particular instances.

MR. ART ANGLE: Would it be the tribal responsibility to make a determination on -- that they want to deal with the applicant or if they want to deal directly with FERC?

MS. MILES: I think that's something that we would talk about in each individual project. All of us are going to have resource issues with that and that

would be one thing that we would want to discuss. And many tribes -- many applicants may want to and some may not want to, so we would need to see what worked in a particular instance.

MS. MOLLOY: It's ten minutes 'til 3:00. Do we want to take a ten-minute break?

MR. CLARY: Could I just ask maybe -- some of us are trying to get out to some planes and so I was just wondering if maybe we might take a quick --

MS. MOLLOY: I'm game if you guys are.

MR. HOWARD: Why don't -- Why don't we just go through until -- because we are getting ready to go.

MR. CLARY: The one thing --

MS. MOLLOY: The -- The -- I'll just take this moment to point out to everyone, up on the screen are the remaining things that we haven't -- or I put them on the one -- one screen at this point and so that is the -- the universe. I think that's --

MR. HOWARD: Well, there was one thing I wanted to talk about, if -- if -- if we could here at the last minute. It's -- It's -- It's in reference to -- to the compliance of federal laws, and I think it's -- it's something that I need to throw out there and -- and I know a lot of the tribes have dealt with it already, but

it's section 106 compliance. If it's agreeable with everyone, I'd sure like to kick that around for a few minutes.

But again, I'm -- I'm looking on page C48, 116, where they acknowledge section 106 compliance and -- and mention that section 106 requires the permission to take into account effects of various actions on the historic properties.

We've dealt with this issue with other agencies and we always seem to see that -- that they want to address the National Historic Preservation Act, or should I say a part of it, in section 106, and fail to go on to bulletin 38 which includes tribal involvement.

But the point I'm trying to make is the National Historic Preservation Act is one of many that are there for -- for the protection of tribes and tribal rights, and federal agencies must comply or at least address all of the acts rather than just one. You cannot take section one -- or the National Historic Preservation Act and choose only to comply with that one. You must comply with all of them.

So I wanted to discuss that. And again, you know, it seems to try to raise the -- the advisory council, Historic Preservation Act to -- I'm going -- Historic Preservation, excuse me, to be the

authority of that. And -- And again, that's just an advisory council.

So I think this needs to address the full array of -- of acts and -- and federal mandates that are there for -- for native American tribes, American Indian's Religious Freedom Act, 13007, the various executive orders, there's a bunch of 'em, and so I just wanted to point that out.

MS. MOLLOY: Thanks. Any other comments? Time frames, we've touched on it in part while talking about other things, and there was a specific subset on that on the additional study request and the traditional process being later than -- than where we have been established now, and I can't remember who raised which part of that, but --

MR. CLARY: I -- I think I just kind of raised time frames from the perspective of the -- as we see it, the time frames that are currently stipulated in the schedule are -- are pretty tight, and with limited resources, as the tribes are, it's very difficult to meet these.

And I think -- I guess the onus is on us at this point in time in our comments to make a, you know, more developed argument as to what those time frames might more appropriately be and give some justification

and rationale for that, I suppose. I hope everybody agrees with my comments with regard to that. I think we certainly feel it's fairly stressful.

MR. HEINITH: The other point I thought was Greg's point with regard to the fact that there are some situations where studies might be -- and he's now up the road, but -- the -- the issue of -- of, you know, some studies taking longer than others and whether or not the current schedules provide for completion of, like, three years for -- for certain studies and whether or not that's, in fact -- the schedule is currently adequate for that purpose. But I think, again, the onus will be on us but we'll point out what -- what those issues are in our comments, I suppose.

MR. WELCH: As far as time for studies goes, this is a subject that we talked a lot about with the -- with the federal agencies and even though there's a two -- you know, there's, quote, this two-year time frame that's in there, we believe that that's typically what we -- what we see.

However, the important part of time frame for studies is not -- it's not the flow chart. It's the study plan. It's compliance with the study plan. If the study plan allows for a three-year study on whatever, then that study will be completed in three years.

There's -- We have some language in there that I think Kerry pointed out earlier. We probably need to clarify a little bit that -- that we, you know -- it says once FERC has the application, we will not issue the ready for environmental analysis until the studies in the study plan are completed. So there is some -- What I'm -- I guess the answer is there is some flexibility.

MR. HEINITH: Bob Heinith, Intertribal Fish Commission. With respect to the -- the study timing, in the Columbia basin three years -- three years for all the federal studies is a standard, three years. That is the standard in the basin, sometimes longer but never shorter.

So it seems to me that the FERC rate should be consistent with that at least with respect to the Columbia basin.

MS. MILES: Bob, one thing that we have as a statutory time frame, which is what we're fitting within, just so you know that we haven't done this regulatory, the statute says the application has to be filed two years before it expires and that the -- the filing of the notice of intent is three years before that, so that leaves us a three-year statutory windows for preparation of the application and doing the studies. So that's why it fit within that time frame.

MR. WELCH: So we had those two fulcrums and we had to fit all those boxes in between those two.

MR. HEINITH: So there's no way of getting ahead on -- on studies before that -- that period?

MS. MILES: Well, the hope is -- and I think that many licensees do choose to at least do basic studies on what's the status of their resource and many of them are doing it during the term of the license or earlier than that three-year time frame, so if that basic level of information is available, then what you're working with is any additional studies that you may need for your environment -- you know, to determine environmental measures.

And if the licensee was to choose to start it earlier, there's nothing to prevent them from doing that. But we were working -- just so you knew what parameters we were working with then and why -- why the time is laid out as it is.

MR. HEINITH: It seems like an applicant could -- could do a study or continue to complete a study even after the -- the application is filed.

MR. WELCH: Yes, that's right.

MR. HEINITH: Which we have almost a

zero success in getting them to do that. Once the application is filed, that usually closes the door. But it seems like that option should be there and then maybe even included in -- in the rule -- rulemaking, that sort of language that leaves that out as an option.

MR. GRIFFIN: Well, it -- it does.

That was a -- It's a concern of a lot of, you know, people involved in the process, and so what the draft rule says is that, yes, statutorily, you have to file your application at a certain time but then the next step is that the commission accepts it and says, okay, this is ready for environmental analysis. But that's the language that we're referring to is that that step won't happen until the studies are completed, so they can file their application. So the study plan could say three years, three years of studies, and even though the application is -- and correct me if I'm going off on a --

MR. WELCH: Keep going.

MR. GRIFFIN: -- gang plank here, but -- but, you know, so you've had a three-year study plan with two years 'til the license ap is due. The licensee files the license application knowing full well and everyone knows that their -- they still have another season of studies to complete.

So I think that theoretically what had

happened is when a license application sits there, the commission -- until the studies are complete, and then the commission says, okay, did they do -- did they complete the studies in accordance with the study plan? Have -- You know, are all the boxes checked? Is everyone happy? Okay, now we accept the application. Now it's compliant.

MR. WELCH: I think there's even provisions in the application that the -- the licensee has to designate any studies that are still going on at the time of the license application or a schedule for completing them.

MR. HEINITH: Your draft reg specifies two years; do they not? I thought I saw somewhere in the --

MR. WELCH: I said the -- the two years just comes from those two fulcrums where you had to fit all those boxes in there, but I don't think -- I hope it doesn't say anything that studies will be -- only be limited to two years.

MR. GRIFFIN: You know, it -- it doesn't say that. It just -- The two years is, you know, sort of the -- the -- the best of both worlds to acknowledge that, yes, they're -- yeah, some people didn't want to put -- didn't want to put any time and effort in studies. Other people wanted to say, look, you need to

allot five years for studies so just as sort of -- sort of struggling here.

That's not set in stone. No, two years is not the standard. It's -- That's just sort of a best guess for a starting point. Some might not require two years. Some might require more. But it's the study plan that will determine that. The two-year thing is -- is not a binding time frame at all as far as studies.

MS. MOLLOY: All right, the next one we have is content of studies, and also, there's a reference to timing there. Any comments on that or --

MR. HOWARD: Yeah, as far as the content of studies, yesterday, and I know not everybody was in our meeting yesterday, but we talked about the importance of including native American tradition and cultures, which would come by of ethnographic studies and I think that needs to be included in there, in the studies is -- is the ethnographic part, which would -- which would relay the -- the connection the tribes has with their environment through -- and spirituality, etc., but also there's the need for confidentiality restrictions on this information. And I think that's something, again, that will come through the consultation process.

And I saw a clause in here where it stated that the commission, how they -- a -- here, it's --

it's C50. It says the commission also has regulations and practices in place that address the tribes' confidentiality concerns. So, you know, with respect to FERC, I -- I think that's inappropriate to think that you have something in place or any of that's going to fit at all the tribes. I think it's up to the tribes to -- to develop the confidentiality restrictions that they would like to see.

MS. MOLLOY: Yes, but now what that refers to, of course, is -- is things filed with us and not --

MR. HOWARD: Well, see, that's my point. I think, for instance, if we're going to work with you on confidentiality restrictions, we might not even want to let you have that sensitive information. You understand what I'm saying?

MS. MILES: Just so you know, we don't choose what information would be confidential. That's your choice.

MR. HOWARD: Exactly.

MS. MILES: That -- And -- And the only thing that's in our regs is it allows us to keep some information confidential because, being a regulatory agency, most -- everything has to be available to everyone, but because of the understanding that there is

certain information that tribes need to keep confidential, it allows you to do it, but what that is, you choose.

MR. HOWARD: Exactly, and -- and we've been there and done that, you know, so -- and we've discovered that the only guarantee for information to remain confidential is for that information to remain with the tribes, and, of course, open so you can come and review it when you need to and -- and -- and those types of stipulations. That may vary from tribe to tribe.

MS. MILES: Again, and that would need to be a discussion that we have because of our need for certain things to be on the record as a part of the decision, even if it's on the record in a confidential nature, but that's something we'd need to talk about --

MR. HOWARD: Initial consultation; right?

MS. MILES: --in -- in a specific project, initial consultation.

MR. HOWARD: Right.

MR. WELCH: Is that something we need to add to our little list of --

MR. HOWARD: Probably a good idea, just as a place --

MR. WELCH: -- discussion of confidentiality.

MR. HOWARD: Exactly, I think that's a good point, yes.

MR. HALLER: Quick question, what remedies does FERC have at its disposal to ensure applicants do the things they're supposed to do according to the regs and this flow chart?

For example, in the existing regulations, after a draft license has been submitted, the regulations say that the applicant is to hold a joint meeting with the disagreeing resource agencies and tribes within 60 days from the date of written comments and they are to attempt to resolve some of the disagreements on the proposed PM&Es.

Two weeks ago, we had an applicant that merely went through the motions on this measure just so they could check off the box saying, yeah, we had that meeting. They made no attempt to come to an agreement or even negotiate about their proposals in the meeting.

So I'm just wondering, throughout this process, what's the stick, besides, you know, denying the license as the ultimate stick? Are there other measures?

MR. WELCH: Well, I guess the bigger stick is a deficient application. I think that's -- that's the main one. That -- That's a big risk.

MR. HALLER: But is there stuff short

of that besides building the record, you know, like, we're going to send a letter to FERC, for example, say, you know, the applicant just was going through the motions and didn't follow the regs?

MR. CLARY: Let me give you -- Could I just toss in real quickly in addition to that, there was a -- a document from which the meeting was being run. We were not provided a copy of that document and -- even though several people asked during the course of the meeting. And in response to that, they -- they stated, well, you can compile this document, which was the PMEs, out of the, you know, thousands of pages of the application if you choose to do so.

But by the way, they never did provide any synopsis of the responsive comments, which they were also reading into the record.

And I only say that, not because we want to air those things here, but because it gives you a little bit of a background as to why in our comments when we want to come back with, you know, maybe some procedural sticks, for lack of a better way of putting it, where we need to have the licensee actually complying with the consultation requirements. That's where we're coming from right now because, unfortunately, we just very -- really lived through something like that.

MR. WELCH: Just setting aside the example you're providing for a moment, you know, we think one of the benefits of the ILP is, once again, commission staff involvement, all state, is unlike the traditional process, which is the process that you're talking about right now --

MR. CLARY: Which -- Which, by the way, let me add there was a FERC representative there that day and I think he changed the entire tenor of the meeting by -- and that was very helpful.

MR. WELCH: Okay.

MR. HALLER: It wasn't clear on the regs, though, like one of our attorneys had to read the regs to 'em, but, you know, that's not --

MR. CLARY: But he did change the entire --

MR. HALLER: Yes, and when he did chime in, finally, when he -- when he felt like he had the understanding of what was and was not going on, it really made a difference on the dynamic of that meeting, very helpful.

MR. WELCH: That was going to be my point.

MR. CLARY: That's a good point.

That's true.

MS. MILES: Throughout this ILP, I mean, it is a commission approved study plan that will have a schedule to it, so there -- there are steps -- clear steps to steer clear schedules established to -- for the process and, you know, we're there, too.

MR. HALLER: So you're going to document every time they miss a -- a deadline and --

MR. CLARY: I -- I just would -- Maybe I could add, just, perhaps, something that might be helpful but I wouldn't have asked for it before, frankly, because I'm not used to having situations where people are acting that way in these kinds of context, but we may want to have some kind of language which would basically provide that, you know, necessary documentation and, you know, parties will act in good faith to the exchange of certain types of information or things along those lines just so that there's some kind of a notation along those lines so that people wouldn't engage in this kind of behavior. It's just uncalled for.

MR. WELCH: Art.

MR. ART ANGLE: In my involvement with the -- the process that we're going through with the ALP, I've learned that, you know, if indeed the applicant doesn't -- is not issued a license at the end of the term of his license, and in this case anyway, they simply get

another year, a grace period to -- to get the -- the requirements fulfilled.

Now in this new process, is that going to be the same criteria that if -- if they don't get the license, they simply get another year to finish the license or is there going to be some kind of mandatory requirements, say, in re -- like a penalty type thing? If they're not, you know -- if they haven't met the requirements of that -- the application?

MS. MILES: There isn't anything like that proposed in -- in the rule. The idea, though, is that by having everything done up front with the set schedules, with FERC's staff involved and our -- our assistance that we will be able to move through it quickly and in the majority of cases that the license will be issued before it expires or the license will be acted on before it expires so we won't have to issue those annual licenses. That's a fairly routine administrative --

MR. CLARY: Just -- Just one --

MS. MILES: -- process right now and we're not proposing to change that.

MR. CLARY: Just maybe one point of clarification. Are an issuance -- Any -- Prior to the filing of a license application, an issuance of an annual license once the license expires does not extend the

amount of time that the applicant has to file that application, the application date is in statute and never changes. The annual license just allows the -- the project to continue operating past the expiration date so it's not an extension.

MS. MOLLOY: But where it occurs is -- is after the license has been -- or the application has been filed before it's been acted on and the studies can continue if -- if there's been --

MR. ART ANGLE: The reason the question was asked is because of the fact that, you know, the applicant continues under the current -- the FERC permit.

MS. MOLLOY: Right.

MR. ART ANGLE: And so if it's -- you know, it's a 50-year license, they're -- they're operating under a 50-year permit, and, you know, it certainly is current with current laws of today.

MS. MOLLOY: And that's, of course, something we're trying to address with this new process to -- to reduce that. Application content, Greg.

MR. HALLER: Greg Haller, I'm trying to find the page number.

MR. WELCH: D60, maybe.

MR. HALLER: Thank you, yes, there it

is. Just a couple things that are suggestions you might want to require the applicant to put in there. I notice you have under 2A, every county in which any part of the project and any federal facility that will be used by the project will be located under E, all Indian tribes that may be affected.

I think very specifically it would be very useful for the applicant and the other stakeholders involved that the political boundaries of the tribes be included in this specifically. And that would include not just reservations but also ceded territory where a lot of treaty rights apply. And even treaty rights that apply to the non-ceded territory. I know that just having those boundaries up on the map makes it much more clear to the people in the room that this tribe is involved because of, you know, X, Y, Z.

MR. WELCH: Could you -- When you do your written comments, could you propose some specific language about -- I mean, I just wrote down political boundaries and tribes, but I want to make sure that I -- you know --

MR. HALLER: Sure.

MS. MOLLOY: If you could suggest the letter and number it goes into.

MR. HALLER: Yeah.

MS. MOLLOY: Plug and play.

MR. HALLER: Yes, I could see you like that.

MR. WELCH: And put it in Word Perfect format so we can cut and paste it.

MS. MOLLOY: You'll do fine. Any -- Any others?

MR. HALLER: Sorry if I'm eating candy.

MS. MOLLOY: See, Ann asked for candy and Tim and I both handed her our bowls.

MR. HALLER: Greg Haller, regarding the application content, section B, cumulative effects, this is a very important section, I believe, for tribes specifically. I think you heard earlier today, a lot of the resource damages that they have incurred haven't been mitigated for from the original license and have, kind of, been buried or forgotten. And a lot of times project impacts start with an -- with the applicant's project that's located above the one they're relicensing, and perhaps the effects also extend below, outside the project area.

So this section B, here, that -- I see a lot of work that can go into that in terms of the amount of studies that may be required to just assess and

understand those. It's -- It's kind of the idea of bringing to more of a watershed approach, eco -- ecosystem approach.

As an example, sediment could be trapped behind the applicant's dams that have already been licensed but they're upriver, but the sediment issue is important for the current application and impacts within and below that project. So it's really important, especially in the Snake and the Columbia River that we -- we get a handle on these cumulative effects.

I don't necessarily have a specific suggestion on how you do that, but I just throw out the caution that that section there, that could take years in itself or -- of -- of study. And it's -- Again, if it's the applicant doing that assessment, it may not reflect tribal views on some of the effects.

So again, it's another consultation issue, but I'm a little bit worried that that's kind of just, yeah, you have to discuss and describe, you know, what you think these effects are. But, I mean, there's a lot of people in the basin here that could tell you that the effects in the Snake River or in the Columbia start way after or below the project area.

MR. WELCH: Tim -- Tim Welch, FERC.

Just -- Just remember, we had a lot of discussion about

the whole cumulative effects and whether it should be part of the application or not. I mean, clearly, FERC has a responsibility under NEPA to look at cumulative effects.

So remember that this is just the -- like the applicants' cut at it, but then the commission, we, commission staff also have to address it. And so we were debating on whether even to put this in here because it is our responsibility. But we thought that if we could get the applicant thinking about it as well, then, you know, it -- it would just make things easier.

But recognize, this -- this isn't -- you know, this isn't going to be the cumulative effects analysis. I mean, it could be if it's good enough.

MR. HALLER: Right, and can -- would there be some language to, you know, describe the nexus between the projects above or below that are impacting a project that's being addressed in the proceeding?

MS. MILES: One of the things that's an issue is we can't really ask the licensee -- they need to look at what their project is affecting, and -- and this is a little bit expanding on what Tim said. We can't require them to go do studies at the -- at another project that's not theirs. We can require and -- and we of ourselves could look at -- with existing data what is going on up above and what is going on down below.

But in -- in all the discussions that we're having, it -- you know, it -- there's always a tension there between getting enough information and where you want to spend your money. And we really haven't discussed that today and it's something, I know, gets stuck in every project when you're deciding about studies because there's a -- there's an amount of money that can be spent on mitigating effects and, you know, how do you get enough information to make that decision but not spend it all there?

So I'm assuming -- I mean, that factor -- that issue hasn't come up today at all and I feel like we're going a little bit that direction. I just want to make sure we don't forget about that side of the equation.

MR. HALLER: I -- I definitely understand that, but the idea that there could be one company that owns several projects on the river and in the assessment of cumulative effects, I think that needs to be acknowledged that it may -- the company may have to go beyond just the project that they're relicensing to address some of those impacts. And I don't know how your regulations could reflect that but fish passage, sediment trapping, I mean, those are -- those are the examples I can think of right off the top of my head.

MS. MILES: A couple of the other

things that we have been doing is to -- and -- and it may not help now but it's certainly to look at the next go around trying to sync these licenses so they expire at the same time. And also, if -- if they're not expiring at the same time, to leave specific reopeners where there is a particular issue that we may need to look at during the permit, the term of that license, so it can't really address it until we've addressed some of the other projects on either side of it.

So those are some, you know, policy type things that we do do that aren't in this rule, but I understand.

MS. MOLLOY: Anything else on application content?

MR. HEINITH: Couple things, Bob Heinith, in regard to this issue. It seems like at least through the Columbia basin, U.S., Canada, salmon ought to be something that is considered in your -- in your list of applicable laws. And also, I -- I mentioned environmental justice, and it seems like that might be appropriate to have in this list as well, and tribal treaties, as well.

MR. GRIFFIN: So that would go along with addressing all laws, policies, executive orders, that are relative to tribal sources; right, Bob?

MS. MOLLOY: Any others? There can be

-- I mean, if, you know, if there's some that are -- that you're talking for, of course file it with comments and bring it up to us in that way. I don't want to, you know, make you feel you have to think of everything right now, you know. It's okay just to send -- send it in to us.

MR. HALLER: One other thing on application contents, I notice a lot of requirements for estimation of costs and practicality or availability of alternative sources of power. I don't see any mention of benefits that would likely be derived from the -- the way the project would be operated in the future and any way of quantifying those benefits. That may be useful to have something in there. Seems a lot of times that PM&Es are just evaluated on how much they cost but not the benefits they may provide in terms of either dollars or lifestyles or things like that.

MR. HEINITH: Brings up a point for me, socioeconomic costs to tribes should be considered. For example, loss -- loss of salmon and how that effects tribes on reservation in terms of -- of cultural -- cultural significance as -- as well as their health and welfare.

MS. MOLLOY: Okay. In depth history of projects, I think we discussed this some already. And -- And is there anything else we need to talk about on it?

Tribes as applicants, does anyone  
who's still here want to discuss it? Art.

MR. ART ANGLE: Now from the FERC  
perspective before an applicant can have -- make an  
application, there's a concern about water rights; isn't  
that right? You have to have water rights in order to put  
an application in? Are -- Is there any kind of criteria  
there that says that, no, you don't need water rights?  
Because, you know, like a lot of tribes, they have lands  
but they don't, per se, have the water rights.

MS. MILES: You don't have to have it  
at the time you would apply for a license but you do need  
to get it.

MS. MOLLOY: And we don't adjudicate  
it, so --

MS. MILES: You're getting it from the  
state through the state process.

MR. HALLER: What if the -- the water  
rights are in the process of being adjudicated?

MS. MILES: You mean how would that  
affect applying for a license?

MR. HALLER: How would it affect the  
FERC decision on whether or not to grant the license or  
would it still be considered or not considered?

MS. MILES: We would -- Getting into

an area -- I'm not a lawyer.

MR. WELCH: Let's just pretend that we're lawyers.

MS. MOLLOY: I'm willing to admit it. I am a lawyer, but this is not something I thought about to -- you know, until when you get into a meeting.

MR. WELCH: That's a good question. I don't know on that one.

MR. HALLER: I think someone mentioned it earlier, though, that I think -- if not in this upcoming ten years of -- of new licenses or licenses expiring, you're going to see a lot more tribes competing. And I don't know if it's appropriate in the rule, but I think the commission is going to have to make an effort to go to those tribes when they are making -- you know, making known they are going -- and giving them a little extra consideration on how to do that. Just a thought because I know that there's ongoing competition now and will be in the future.

MS. MOLLOY: Definitions of mandatory and statutory, who was on that list? That came from this side of the room.

MR. ART ANGLE: Yeah, I asked the question. The reason I asked the question is because I didn't know the definition, so I was kind of hoping you

guys would come back with that.

MS. MOLLOY: Where particularly are you --

MS. MILES: Were you looking somewhere at the regulation or just thinking about it in general?

MR. ART ANGLE: Oh, I was just thinking about in general because I know that, you know, the tribes are in that area there and I was kind of wanting to know where the tribes stood as far as any kind of, like, mandatory authority or if indeed they were -- you know, if they had statutory authority.

MS. MILES: You can gain -- There's a couple of parts of the Federal Power Act that gives mandatory authority to federal agencies, and one is under section 4E. And that's for projects that are located on reservations and that applies to an Indian reservation or to -- some Forest Service plans qualify as reservations under the definition in -- in the Federal Power Act.

The other mandatory authority is under section 18, which is for the Department of Interior and the Department of Commerce to prescribe fish ways, the passage of fish. Another mandatory authority comes through the Clean Water Act for the 401, the Clean Water Act certification, water quality certification.

And I think we said earlier if a tribe

has gone through whatever -- the E.P.A. process and is designated to issue the 401 water quality certification, then those conditions that are in that certification would be mandatory. We are not as able to change those, assuming they're qualifying.

MR. ART ANGLE: I know that, you know, some of the tribes up in this area here have, you know, reservation lands, but where we come from we have rancherias and they're very small land bases, so consequently, we are limited in our ability to meet that criteria so we're probably completely different, but we'll go into that more when we're in Sacramento.

MS. MILES: And there is a very -- There is a definition of what qualifies as reservation in the Federal Power Act and that that would need a legal interpretation.

MS. MOLLOY: Scope of rulemaking.

MR. HEINITH: You know, I think that -- that was mine. You know, how is this -- How does the commission come to decide what was in the scope of the rulemaking, and what was going to be left in and what was going to be left out? And is there -- is there an opportunity to enlarge the scope of the rulemaking?

MS. MILES: The decision was really to deal with the process itself, looking for a process and

concentrating on what that would look like, a number of people did raise other issues, bigger policy issues, and the decision was made not to deal with those, like decommissioning or things that were, in effect, statutory. So we stuck to what is regulation and not policy and not anything that would involve changes to the statutes. Obviously, we couldn't do it. We'd have to go to congress.

MR. HEINITH: Statute, no, but policy seems to be the right flexibility for --

MS. MILES: Well, you can certainly raise that, if -- if you want.

MR. HEINITH: Was it -- Was it a decision by commission staff or the commission itself?

MS. MILES: The commission issued this rule.

MR. WELCH: The commission itself.

MS. MILES: The commission itself issued the -- those in the proposed rulemaking.

MR. HEINITH: But in terms of this scoping --

MS. MILES: I can tell you they were in -- commission -- commissioner's legal advisors and the commissioner's themselves are very familiar with what's in here and they were comfortable with it. They were very

involved in the give and take in putting this together.

That -- That doesn't mean you can't continue to raise what you feel you need to raise.

MR. HEINITH: Right, well, you can say this issue can be raised in -- raised in other -- other arenas. Can you tell us what those other arenas might be?

MS. MOLLOY: I think she was saying in your comments.

MR. HEINITH: Right, right, my comments in here, but -- but some language in here said something about these things are outside -- outside the scope of -- of this rulemaking and can be dealt with in other -- other arenas.

MS. MILES: Oh, that's in the preamble? That -- That's what's in the preamble?

MR. HEINITH: Right.

MS. MILES: Well, I think often this -- the feeling was we had a very short period of time in order to work through this rule. We could not take on the world. So the choice was that what needed to be addressed through this rulemaking was the -- the licensing process and things that surrounded it.

If we were to go into huge policy issues, like decommissioning, that would -- we wouldn't be able to do it within the time frame that was allotted. So

there could be -- the commission could decide through some other form that it wanted to address decommissioning or some other policy issue. So I -- I guess that's what was meant by that, that the commission could make a decision to address that on its own through a different forum.

MS. MOLLOY: Environmental justice -- oh, I'm sorry, Carl.

MR. MERKLE: Carl Merkle, Umatilla. This may or may not be related to what we were just talking about, but perhaps other -- other forum, but I see that you're having your last workshop on April 10th in Washington, similar to this. Is this open to everyone? And will you all be conducting that one as well?

Okay, I'm -- I'm interested to see if -- I don't know if I've got the ability to be there or whatever. But -- And as far as the -- the drafting session, will that be you as well, principal FERC participants aiding at that -- at the four-day drafting session at the end of April.

MS. MILES: The FERC partici -- Yes, we will be there. We're actually having a professional facilitator facilitate those sessions. We felt they were so intense last time that we can do a decent job but we actually wanted someone who does it as a profession, so we will be with them, but they will be helping us.

MR. MERKLE: Okay. At what point will actual commission members step in to this process? When we're all done, when you find -- done a -- a draft, final rule, proposed final rule, when all these workshops and drafting sessions are over, then the -- the FERC commission itself will look at the results?

MS. MILES: Well, let me tell you what happens in issuing the NOPR. We met regularly with the commissioner's assistants, and maybe Larry can say, I'm -- I'm sure he had some interaction with -- with the chairman, and we told them -- we did briefing papers for them. We -- We went through we think these are the topics. These are -- These are the big issues that people are raising. These are the positions we see where people are. These are some suggested directions that we could go. How would you like to see us go?

So we had quite a give and take at the highest levels in trying to come up with this rule. We don't know yet how we'll do that. I'm assuming that we may perhaps do a similar interaction so that we can keep the commission -- commissioner's offices informed as we're going through the process. And Larry's here wanting to be informed.

MR. CROCKER: Right, I just wanted to point out that this isn't a situation where we put out a

proposed rule and, you know, it's going to be a rubber stamp job on the final rule. As you can tell from the preamble and the discussions that have been here, there are a number of -- of issues where we want input, where there are a lot of questions, and there were questions even amongst the commissioners, but we felt that -- that the proposed rule was good enough to get it out here and let's get comment and let's hear what -- what stakeholders have to say.

And if you have concerns, raise 'em, because we do look at the comments. The assistants will be in and out of the drafting sessions, I'm sure, maybe even the commissioners, but ultimately, a document will come up from staff and we'll discuss it up and down the hall and try to figure out such things as the role of the liaison, and, you know, should this be broader, narrower? But we wanted to get this out. We thought it was in good enough shape to put on the street right now.

MS. MOLLOY: Environmental justice, I think we've brought that up in a few spots. Is there anything else on it or -- I think, you raised it.

MR. HEINITH: Yeah, I did. You know, I -- I think as long as it's included in the application.

MS. MOLLOY: Pending projects, cumulative effects, I think we discussed that a bit on --

I think, Greg, when we were talking on -- on the cumulative impacts, I think we also discussed this.

Anything else on this?

MR. HALLER: I think someone from across the room raised the issue of pending projects.

MS. MOLLOY: Pending projects, okay.

MR. HALLER: I'm not sure --

MS. MOLLOY: Have we lost that person? Probably, I think. To the extent they -- they were talking about projects that -- that are existing -- that have been licensed already, I think we've probably got some that we're not able to send a licensee up to another project to conduct studies at someone else's project but we do examine the existing -- you know, the operation and -- and the -- the effects on different --

MR. HALLER: Could you clarify if you're allowed to do that if it's the same owner? Are you -- Can you give an order to have them study the effects of the project?

MS. MILES: We wouldn't typically do that.

MR. HALLER: If someone could show or direct the cause and effect relationship under the cumulative effects session or just documents that provide; could you -- Could you do that?

MS. MILES: I -- I think you've got two -- two issues around it. One is looking at the effects and the other is doing something about it. And the licensee at that other project will have had a license for a particular term and so we wouldn't likely go in and amend that pre-filing, not that we couldn't. I mean, many of these licenses do have reopeners in them and there is the potential to do that. We certainly would look at the -- in trying to understand the effects on the project that is up for relicensing, we would look at everything that's available to try to get at that.

MR. HALLER: Could you have a mandatory reopener section if you knew ahead of time there were cumulative effects from projects that were owned by the same company? In fact, let's say the ones upriver had already achieved their new license but there was issues identified in that proceeding. We're working down river, say, for example, on the next project. Could you have some kind of mandatory reopener conditioning in there?

MS. MOLLOY: We --

MR. HALLER: If you've identified --

MS. MOLLOY: We have on occasion where -- and -- and we've said this in our -- we have a policy statement on cumulative, and this is what Ann referred to earlier on where we tried to coordinate expiration dates

of upcoming licenses, and it also says that we can put in a reopener with a specific intent type of thing if we know something that we would want to look at later on. And sometimes we will put this in for -- you know, or will identify in the license on -- on particular issues that -- that it's addressed in the -- the standard reopener but -- but sometimes we have done the specific ones.

Relicensing preferences, I can rephrase the list if --

MR. GRIFFIN: I don't remember that one.

MS. MOLLOY: That was a --

MR. GRIFFIN: Is that, like, competing application?

MS. MOLLOY: It -- I think it -- I think it is, and also on decommissioning versus licensing. And if -- if the commission has set the proper -- I'm drawing a blank on who raised it so it may have been okay.

Okay, cooperating agencies, anymore -- anymore issues that we can talk about on cooperating agencies? Have we gone over that? Does Carl have something?

MR. WELCH: We heard that, Greg.

MR. MERKLE: I -- This is maybe going back to the -- maybe going -- going back to the scoping

issue, but you're not addressing this or are you addressing in this proposed rule anything to do with the term of the license itself?

MS. MILES: No, the rule doesn't address the term of the license.

MS. MOLLOY: Now on relicenses, the statute does say that no license less than 30 years and no license more than 50. That's in the statute, which is congressional. They're the only ones that can change that. Any other questions? Any other issues?

MR. ART ANGLE: Is there going to be a license review, like, you know, in a five-year period -- time period, ten-year period, or is it just once the license is issued it's going to be enforced for the whole time?

MS. MOLLOY: A relicense can be issued for a minimum of 30 years, a maximum of 50 years.

MR. ART ANGLE: What I'm saying is if indeed -- for example, cultural resources, federal new laws in regard to that, are the licenses going to be in -- in a situation where they have to adhere to those new laws, or, you know, does the tribes have an option for review in a five-year period of time? I think we talked about that in Washington.

MS. MILES: The -- The newer is --

issued licenses do have what we call standard reopeners in them, and for good cause you are able to go in and take a look at conditions. It's -- It's not used very often so it would depend on the circumstances.

MR. ART ANGLE: Okay. And who would have the authority to -- to issue for a reopening of that license?

MR. WELCH: Typically, the --  
Typically, the -- No, it's -- Typically, it says the state or federal resource agencies or the commission on its own motion, so other entities outside of federal, state resource agencies, like an Indian tribe, could petition the commission to request a reopener in regard -- in -- typically, it's in regard to fish and wildlife resources. I don't know if it's specific to cultural resources or not. The ones I'm familiar with are specific fish and wildlife resources.

MS. MILES: There is one for recreation, also.

MR. WELCH: And there's one for recreation, right. And we've used -- or they could be used for new listings of endangered species and that type of thing that were not contemplated during the licensing process.

MR. GRIFFIN: So then I guess to

answer your question, there's no -- there's not a standard, like, five- or ten-year review but there are provisions to reopen a license and if we change it as -- as deemed necessary.

MR. ART ANGLE: So as a tribal representative, then I would petition FERC for -- reopening for a specific issue?

MR. WELCH: If -- If there was a specific license article in the license, then, yes.

MS. MOLLOY: Anything else? Have we covered everything?

MR. HEINITH: I just had a question about -- about settlement agreements and some provisions that are reasonable comments. We asked FERC to consider provisions in this rulemaking that would expedite and foster settlements and I haven't seen anything thus far in this -- this new proposal that -- that gets at that issue. Is that something you folks have a look at in it or --

MS. MILES: I -- I think it -- I think we believed that the very process by gathering information early and having everyone deciding on what's needed has a potential to foster settlements.

We didn't, like, put a time out in here. At -- At this point we'll take a time out and we'll use settlements. We certainly hope that a lot of people

will choose to -- having worked together through this process will choose to go to settlement, but we didn't specify do it here, do it there. That would be up to the people involved in a particular project.

MR. HEINITH: Is that possible to -- to have some sort of time out in there if people are working toward settlement and -- and -- but the license door is -- is closing down?

MS. MILES: I think knowing that the application must be filed -- I mean, that's the one thing in here that there's no flexibility around. The application must be filed two years before it expires. So -- But that's not to say that a settlement can't begin before the application is filed and continue after the application is filed. That can be done. We're -- We're very fond of dual tracks, we call it, that we're continuing to process the project but also some settlement talks may be going on.

MR. HEINITH: So is there a possibility that the commission could hold off on a decision on -- on an issue of a license or -- not depending on the settlement agreements might --

MS. MILES: Yes, there's always that possibility.

MR. HEINITH: But is -- Is there a

possibility that you -- you might write something like that into this new reg?

MS. MILES: If that's something that you think should be in here, I would suggest you write it.

MR. HEINITH: Okay.

MS. MOLLOY: But remember, exact language is always helpful. Is there anything else anyone else wants to talk about? All right, did anyone have any statements they wanted to read or -- or to give to our -- our fine people here? All right, if there's nothing else --

MR. HEINITH: One -- One last question. With -- With respect to NEPA documents, we suggested in our initial comments that -- that FERC hold off making a decision on preferred alternatives. Is -- Is that something that you could entertain within the rulemaking here?

MS. MILES: Did you mean in the draft environmental document?

MR. HEINITH: Yes.

MS. MILES: We could -- I'll tell you the dilemma we've got around doing that, but we have on occasion not put a preferred alternative in a draft. The dilemma is that in order to move forward with Endangered Species Act consultation and if there's any negotiation

under section 10J for fish and wildlife recommendations, we need to have a preferred alternative, a -- a recommendation on which to consult for endangered species and on which to make some determinations for section 10J. So we usually put our preliminary recommendation in the draft so we can begin those consultations and also so we can get comments from people on it.

MR. HEINITH: Seems like you could have that without coming forth with a -- a recommendation, though. You could still have those discussions without having taken a firm position on one course or the other.

MS. MILES: How -- How do you -- Are you suggesting --

MR. HEINITH: In a draft, in a draft NEPA document.

MS. MILES: It is a draft recommendation. Are you suggesting that we call it a draft recommendation or --

MR. HEINITH: Well, suggesting maybe you not make any recommendation at all on the draft and leave the door open so that further investigations, etc., aren't prejudiced by FERC already having made a -- a decision.

MS. MILES: Okay. Thanks.

MR. HEINITH: Well, we'll put that in

our comments but it's an important point, I -- I think.

MR. GRIFFIN: It is an important point. It -- That is difficult because you're thinking in terms of a proposed federal action that -- that needs to be consulted upon for E.S.A. or historic preservation or whatever, you know, and there -- and there's a suite of alternatives.

I don't know the answer to this, but that could mean that -- that NMFS would then have to consult on every alternative because we don't know which one is the preferred alternative, and, you know, so that -- that's one part of it.

But I also know that, sort of, as -- as a mini-policy shift that FERC plans to make the NEPA documents much more, sort of, analytical, and in the draft NEPA document -- I mean, I've heard -- I don't know if it's in here or in the preamble or not, but I know that there -- that -- that there's been concern that there's too many, sort of, judgment calls made in the draft document and recommendations, you know, sort of written into the language that -- and -- and FERC would, I think -- I don't mean to speak for you guys but --

MR. WELCH: You've done a good job today.

MR. GRIFFIN: Well, why quit now. But

I -- I know they're conscious of that and -- and want to avoid that.

MR. WELCH: No, Kerry -- Kerry's absolutely right. One of the things we're proposing is not to make recommendations in the analysis section so the analysis section, sort of, stands by itself and that would allow other cooperating -- other cooperating agencies to, under NEPA, sort of, use that analysis for whatever mandatory conditioning or whatever they're using, but FERC recommendations would be in a separate section but I -- I don't know if that quite gets to what you're comment is, Bob.

MR. HEINITH: No.

MR. WELCH: You -- You would -- You would wonder if we would make recommendations at all.

MR. HEINITH: Right, I mean, that's typical of the other federal agencies. That's how they act.

MR. WELCH: But, you know, we -- Yeah, we -- we posed that a couple of -- a couple of times but you're right. It kind of drives those guys crazy.

MR. GRIFFIN: It does, and NEPA says that while you don't have to have a preferred alternative in the draft, you should, so it's -- it's encouraged to have a -- a preferred -- an identified, preferred

alternative in the draft and then you must have it in the final.

MR. HEINITH: But the final, right.

MR. GRIFFIN: Right. So --

MS. MILES: What make it so troublesome?

MR. HEINITH: I think lots of times we see there isn't equal consideration of all the alternatives once, you know, FERC comes out and says this is our recommendation. We'll go with alternative A. It prejudices the other alternatives, which many times we feel they are completely viable on their own, and that more information needs to go -- go into the process to fully develop those other alternatives before a decision is made in the final.

MS. MOLLOY: Is it possible, though, that without knowing what the preferred alternative is that -- that by the time it gets to the final you won't -- you know, there's a chance of not putting enough behind an alternative that -- that you would prefer? If -- If you know what I -- because you won't know which one FERC is considering.

MR. HEINITH: I think it really works the other way around, you know. If -- If there's already one chosen, then that's the one that gets the emphasis.

