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BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

- - - - -x
IN THE MATTER OF: : Project Number
KLAMATH HYDROELECTRIC PROJECT : P-2082-027
- - - - -x

Hoopa Valley Neighborhood
Facilities
Highway 96
Hoopa, CA

Thursday, January 13, 2005

The above-entitled matter came on for public
meeting, pursuant to notice at 10:15 a.m.

INTRO SPEAKER: CLIFFORD LYLE MARSHALL
Chairman, Hoopa Valley Tribe

1 P R O C E E D I N G S

2 MR. MARSHALL: My name is Clifford Lyle Marshall.
3 I'm Chairman of the Hoopa Valley Tribe. First, I'd like to
4 welcome you all to the Hoopa Valley Indian Reservation. If
5 there's anything that you need, please let me know.

6 I want to express our tribe's appreciation to the
7 Federal Energy Regulatory Commission for recognizing and
8 accepting your obligations to fully consult with Indian
9 Tribes in fulfilling your trust obligations to our
10 Government and our people. We appreciate the leadership
11 that FERC has demonstrated in developing your Policy
12 Statement on Consultation with Indian Tribes in Commission
13 Proceedings.

14 Unlike the general concepts of the public trust
15 doctrine, Indian Tribes have a special relationship with the
16 United States that is based on a unique legal and political
17 status that is guaranteed under the United States
18 Constitution, various treaties, agreements, and laws. The
19 history of the United States and tribal relations describes
20 tragic and disappointing past that is riddled with Federal
21 conflicts of interest, competing political and economic
22 interests, displacement of Indian rights, values and
23 obligations in favor of other priorities, and quite often
24 simply the setting aside of Indian interests and obligations
25 so that the United States can obtain its own goals and

1 priorities at significant cost to Indian Tribes and our
2 members.

3 There are many signs that demonstrate that we
4 live today in an environment that is overtaxed, overly
5 consumed, and historically poorly managed--all of which has
6 primarily focused on achieving short-term benefits. There
7 is no better example of these problems than in the areas of
8 Indian trust. We've participated in forums of litigation,
9 consultation, mediation and reorganization--unfortunately,
10 each trying to achieve some short-term result.

11 Today, we have special trustees and special trust
12 officers that have been specifically designed to achieve
13 even more short-term results without regard to what long-
14 term complications may arise. It is my hope that these
15 proceedings that are the true beginning of the end of the
16 old standard of only working toward short-term goals that we
17 are all committed to working to fulfill the obligations the
18 United States holds to Indian tribes.

19 The presentation of the Tribe today will address
20 a broad range of issues that represent a comprehensive
21 basin-wide approach to management of the Klamath River fish
22 and water issues, which are our primary concern. We do not
23 believe that these FERC proceedings can or should be done in
24 a vacuum with regard to the other contributing factors that
25 impact fishery and water resources. To address only the

1 FERC issues independent of other critical issues is another
2 way of dealing with short-term objectives without regard to
3 the overall health of the Klamath Basin environment. And,
4 at the conclusion of this process, we believe that there
5 must be built into any FERC licensing process provisions for
6 mandatory adaptive management requirements with terms,
7 conditions, and plans upon which the license is based. It
8 is not possible, in our opinion, to address in a single
9 license every issue that is either known today or that will
10 evolve in the future in any long-term license. An adaptive
11 management requirement in the license we believe is a
12 mechanism that will allow the FERC process and ongoing
13 PacifiCorp operations to be integrated into the overall
14 comprehensive management program of the Klamath Basin.

15 Today the Tribe's presentation is from our Fish
16 and Water Division will address the following topics:

17 Klamath Basin water supply and Tribal Water
18 Quality Permitting Requirements;

19 Trinity River Record of Decision and Trinity
20 contributions to the health of the Klamath River;

21 FERC proceedings and license terms and conditions
22 that are contributing impacts to the health of the Klamath
23 River;

24 Overview of the impacts of the 2001 Klamath fish
25 kill and ongoing annual juvenile mortality;

1 Perspective on the implementation and enforcement
2 of existing PP&L/PacifiCorp license terms and conditions;

3 Perspectives on the status of existing Klamath
4 River fish stocks; and

5 Perspectives on Klamath River Basin-wide
6 comprehensive management and adaptive management
7 requirements.

8 My technical staff today will provide additional
9 comments on each of the topics that I've identified as well
10 as other issues that they believe to be important to these
11 proceedings. While the Hoopa Tribe is committed to working
12 with the Federal Energy Regulatory Commission, the
13 Departments of Commerce and Interior as our trustees, as
14 well as the PacifiCorp through the licensing process, it
15 must be understood that status quo in the operations of the
16 FERC-licensed dams today on the Klamath River is not
17 acceptable to us. The construction and operation of the
18 FERC-licensed dams on the Klamath River have almost entirely
19 destroyed the Klamath spring Chinook populations that were
20 once the most dominant fish species that Indian people
21 relied upon for subsistence, ceremonies, and trade for
22 thousands of years. Even the most preliminary review of the
23 terms and conditions of the existing license clearly
24 demonstrates that there has been no monitoring nor even
25 elementary actions attempted to prevent the destruction of

1 critical Klamath Basin fishery stocks. This situation
2 cannot be allowed to continue.

3 I strongly believe that there is a need for
4 comprehensive Basin-wide management plan, adequate
5 implementation and enforcement of agreements, and
6 cooperative and meaningful ongoing adaptive management
7 provisions built into every fish and water management
8 program in the Basin. The Hoopa Valley Tribe has formally
9 endorsed the Conservation Implementation Program, the CIP,
10 proposal that has been sponsored by a number of management
11 agencies throughout the Klamath Basin. Even with the best
12 situations, it will likely take a number of years to design
13 a CIP plan that fully integrates all Klamath activities in a
14 coordinated process. Without FERC, integration of Klamath
15 programs is not possible at all.

16 This concludes my general statements and my
17 technical staff will address these issues in more detail.
18 Again, I welcome you to the Hoopa Valley Indian Reservation,
19 and I and my staff are available to assist you in any manner
20 possible while you are here. Food is an issue. We'll find
21 you places to eat. And I look forward to working with you
22 and others throughout this proceeding as we address our
23 individual and collective needs. Thank you very much for
24 being here.

25 With that, the--I'd like to do introductions.

1 Thank you. Today representing the Tribal Council is Leroy
2 Jackson, a Tribal Council member. Joseph Jarnaghan, a
3 Tribal Councilman. In-house counsel, Ms. Grett Hurley. Our
4 Self-Governance Coordinator is Danny Jordan, who's also one
5 of our principal negotiators on fisheries issues. Our
6 attorney, Mr. Thomas Schlosser. And our Fisheries Program
7 Director and Fishery Biologist, Mike Orcutt.

8 So, with that then, thank you. Thank you again
9 for being here.

10 MR. STEWARD: Excuse me. I should introduce
11 myself, but we haven't had a chance to meet.

12 MR. MARSHALL: No.

13 MR. STEWARD: My name is Cleve Steward. I've
14 recently been retained by the Tribe to assist in the
15 technical--or matters, issues related to the Klamath
16 Relicensing.

17 MR. MARSHALL: Mr. Steward, I apologize. I have
18 signed your contract.

19 MR. STEWARD: No offense taken.

20 (Laughter.)

21 That's all I need.

22 MR. MARSHALL: So we've met. Thank you.

23 MR. : And Ken Norton and George in the
24 back.

25 MR. MARSHALL: Other members of our staff again,

1 yes, Ken Norton is our Tribal Environmental Protection
2 Agency Director. And our other fisheries biologist is
3 George Cassidy (ph).

4 MR. MUDRE: My name is John Mudre, and I'm on the
5 staff with the Federal Energy Regulatory Commission. I'm
6 the project coordinator for the relicensing of the Klamath
7 Project. And with me today is Rollie Wilson, who is our new
8 Tribal Liaison Officer, a position that was established in
9 August--or at least was filled in August. And we can talk
10 more about that later. Also with me is Douglas Hjorth, who
11 is spearheading the preparation of the EIS under our
12 direction. He's with the Commission support contractor for
13 the preparation of environmental documents, and with him
14 also is Marty Bowers (ph). She is the Cultural Resources
15 Specialist for Louis Bergere that is working on--also on--
16 will be working on the preparation of the EIS. There are
17 also probably 18 or some more team members that will be
18 working on that document that aren't here today.

19 And let me say from our standpoint, in a general
20 sense, what we'd like to do today is get to know you better
21 and the Tribe; find out what your concerns are about the
22 relicensing process; and also to explain to you, as much as
23 you'd like to hear about FERC, you know, who they are, what
24 this relicensing is all about, and how the process is going
25 to play out, and how you can participate in it. Again, that

1 to whatever extent you want to do that.

2 But so we'll let you, you know, that's--we don't
3 really have any agenda other than that. So we're here to
4 hear what you have to say and answer any questions you may
5 have.

6 MR. MARSHALL: Terrific. Yes.

7 MR. HAGANS: Chairman Marshall, my name is
8 Patrick Hagans (ph), and I'm here with William Qu (ph)
9 Associates. My colleague, Brian Woolsey, is also here.
10 We've been assisting your water quality department and that
11 of four other tribes. And we've been party to discussions
12 related to relicensing, and I'm here only for technical
13 support in so much as Ken or you should need it.

14 MR. MARSHALL: Thank you. Thank you for those
15 introductions. Yes?

16 MR. HAUSEN: Mr. Chairman, my name is Russ
17 Hausen, and I'm here as an observer for PacifiCorp, and I
18 appreciate very much the hospitality the Tribe has shown us
19 today, and this opportunity to better understand your
20 concerns.

21 CHAIRMAN MARSHALL: Thank you. Okay. With that,
22 I think my statement was I would turn it over to my
23 technical people to address a number of topics. And so,
24 this very technical subject I think on behalf of myself, the
25 Tribal Council members, and the Tribe absent two

1 technicalities our concerns generally are the quality of
2 life within our local environment. And that quality of life
3 and that local environment includes a river system that our
4 people relied on, lived with and a part of since the
5 beginning of time.

6 And I'd--as I approach middle age, I know what
7 the river was when I was a child and what the rivers are
8 today. And those who are older than me and have more
9 experience--more life experience--know the differences and
10 can see the impacts. We have engaged in a very serious way
11 to protect the rivers that we rely on because they are so
12 much a part of us. I invite all of you to come back here
13 next summer because this river is still the river in this
14 country that you can swim in and play in and fish in and
15 raft in. And that is so rare today. And whether the north
16 in California, there isn't a river south of Sacramento that
17 has--that is alive. That isn't so polluted that, you know,
18 fish don't live in anymore.

19 So I think we are committed certainly to our
20 long-term survival. It's Indian Peaks, over by the name is
21 Indian Peak, but it includes living with a river that has
22 vitality and life. And those are my general comments.

23 I leave it to the technical people to tell you
24 how we can perhaps coordinate our way to make sure that that
25 happens. And we can use--make use of the river.

1 MR. ORCUTT: Okay. Well, I guess I could start
2 that. I guess when--

3 CHAIRMAN MARSHALL: Could you just--what's your
4 name?

5 MR. ORCUTT: Oh, Michael Orcutt, Fisheries
6 Director for the Hoopa Valley Tribe, for the record.

7 But I guess would make an opening clarification.
8 I think everybody is well aware of this, but maybe you never
9 said this, but the minutes and the transcripts of the
10 meetings, it's all being recorded. It will be written
11 transcripts available at some point.

12 MR. MUDRE: Yeah. Let me--

13 MR. ORCUTT: So I just want to point that out--

14 MR. MUDRE: Can I just say a few words.

15 MR. ORCUTT: Before we started.

16 MR. MUDRE: Yeah. But we do have a court
17 reporter here today, and the purpose of having the court
18 reporter here today is so that the information that is
19 brought to the table and discussed today can all be
20 accurately put into the Commission's records. The
21 Commission can only use information that's in the record in
22 its licensing decisions, so we needed to make sure that
23 accurately get down what you tell us. And there will be
24 transcripts made available. They will be available on the
25 Commission's web site in approximately two weeks from today.

1 It's a little--sometimes a little inconvenient to have to
2 say your name, you know, every time you speak, but it's
3 important so we can get the proper comments attributed to
4 the right person. Maybe the first time anyway you should,
5 if you have a name that's hard to spell, go ahead and spell
6 it for the court reporter.

7 MR. ORCUTT: Okay. With that, again, my name is
8 Michael Orcutt. I also will have a written copy of the
9 points I'm making today.

10 My background is, as the Chairman said, I have a
11 degree in fishery biology. I've been involved over the
12 years. Most of my career has been spent working on Klamath
13 and Trinity River issues. I'm one of the original members
14 of the Klamath Basin Task Force, so I've been involved on a
15 number of issues, and I think as we seek solutions, the
16 Chairman is correct in saying that FERC is but one part of
17 the many evolving issues that need to be addressed as we
18 seek to restore fish populations to some semblance of what
19 existed in the past.

20 I'm also a Hoopa Valley Tribal member. And
21 today, what I wanted to do is--again, I have a written copy
22 of what I'm going to cover, so if I miss something, there is
23 something to be entered into the record. Also, just as a
24 matter of information, we're probably more than likely, as
25 Cleve said, he's come on board. We'll probably seek--in the

1 process of seeking additional resources so in all
2 likelihood, we'll be making additional written comments as
3 we proceed with the process.

4 So today what I wanted to speak about is a couple
5 of--some various comments on the relicensing process. I
6 wanted to give some background about it. Some slight
7 deviations from that the Chairman said, but about six
8 different subject areas I wanted to cover, with
9 recommendations as appropriate.

10 And just by way of background, the Hoopa Valley
11 Indian Reservation is the largest land-based reservation in
12 the State of California. There is some 90,000 acres of
13 land. Most of the lands, as you can see outside the valley
14 floor, are conifers, primarily Douglas fir. We have a
15 number of streams that support anadromous fish. The Tribe
16 has been actively involved over the years in the restoration
17 of that.

18 We're located primarily on the lower 12 miles of
19 the Trinity River, which is the largest tributary to the
20 Klamath River, and I think you had mentioned that you came
21 down the river as a--at the confluence at Wichpeq (ph).
22 There's some 42 river miles below that before it goes into
23 the Pacific Ocean. We focused a lot of our efforts and some
24 of the discussion today will be regarding restoration and
25 the efforts the Tribe has undertaken in the Trinity River.

1 But we should also mention a couple of things. I think Tom
2 is going to discuss the water quality standard. But the
3 area immediately above Wichpeq, the northeastern corner
4 boundary of the reservation, encompasses the Klamath River.
5 So the Klamath River--and a lot of people are not well aware
6 of this--is on the Hoopa Valley Reservation. So that's a
7 fact. It's within the boundaries of the reservation. We
8 have some 2,200 members. And, as you're probably aware, the
9 Tribe is one of two tribes that have federally reserved
10 fishing rights in the Basin. That's been adjudicated in the
11 Parvano (ph) case--1993 I believe that was. And because
12 there's a federal obligation and a recognition that these
13 reservations were set aside for Indian purposes and a part
14 of that purpose is hunting, fishing, and gathering, and
15 there's acknowledgement of that, there's an obvious trust
16 responsibility, and I know you guys have the policy, but I
17 think it's worth reacknowledging that the trust
18 responsibility is one of the primary reasons and the FERC,
19 as other federal agencies, have an obligation to ensure that
20 those rights are protected.

21 And what I--one other things as well that we
22 always include in the statement is because of those reserve
23 rights, the Tribe is actively involved in a number of issues
24 that affect fish populations in the Klamath Basin, and we
25 frequently use the term co-manager. The Tribe is a co-

1 manager, along with state and federal and other tribal
2 entities in the Basin. And I guess an overview of my
3 presentation--again has slightly deviated from what Lyle has
4 mentioned--we wanted to talk about water quantity and water
5 quality as it flows out of the upper Basin. I wanted to
6 talk a little bit about the Trinity River and how it's--
7 should be and needs to be integrated into a Basin-wide
8 approach. I wanted to talk about some of the impacts from
9 the current hydropower conditions that we see today. I
10 wanted to touch on the fish kill of 2002 that occurred on
11 the Lower Klamath. I wanted to give a quick overview of
12 what the existing status of the population that are
13 remaining in the Basin. And finally, I wanted to summarize
14 that--and with each subject matter what I wanted to do is
15 provide recommendations where, again, where appropriate.

16 So the--as folks are well aware that have been
17 involved with the FERC process, the Klamath River was once
18 one of the third largest producers of anadromous fish on the
19 West Coast; supported substantial populations of Chinook,
20 Coho, steelhead, and somewhat lesser species that are
21 important to tribes, like lamprey, like sturgeon. On the
22 Lower Klamath, there's eulachon or candlefish that used to
23 be in the Basin. And specifically, we have a real concern
24 about the status of spring run Chinook. As you're aware,
25 spring run was the dominant species that's documented that

1 used to go up into the upper Basin. That was cut off in the
2 1920s. We have a concern about the viability of
3 reintroducing fish and what the I guess seed stock if that
4 was to be considered in the future.

5 Today, what we see is anadromous fish again are
6 denied access to above the project area, and there's many,
7 many impacts as we look from the headwaters to the Pacific
8 Ocean, starting in the head waters areas, as you're well
9 aware. There's irrigation diversion in the Sprague and
10 Williamson that affect water quality and water quantity as
11 it goes into Upper Klamath Lake. Reclamation operates a
12 substantial irrigation project below Upper Klamath Lake for
13 irrigation. And over the years, we've seen some of the
14 impacts from the balancing of things like endangered species
15 that exist in the Lake as they balance that with the
16 downstream needs of the listed Coho for one example.

17 And then finally the--as the subject of today's
18 discussion is that those six dams that presently exist have
19 some impact on water quality as they course through those
20 dams.

21 So what are our recommendations in that? One of
22 our recommendations is my understanding of the next step in
23 the process is the EIS that you've mentioned. We would like
24 to see the issue of water quality below Irongate as it is
25 affected by potential dam operations. We'd like to see

1 volition of this passage be addressed. I think that's
2 consistent with what we've submitted with our inter-Tribal
3 Fish Commission. The Tribe has submitted comments back in
4 July, and it's consistent with that. The EIS should include
5 an economic analysis and a restored anadromous fishery,
6 including potential economic benefits. And again, back to
7 the fact that spring run Chinook used to be up there. It
8 should look at the logistics economically of that species if
9 it's to be reintroduced--one of the species be the spring
10 run Chinook, and, as we're well aware, there is only remnant
11 populations that remain in the Salmon River. There's some
12 in the south brook of the Trinity. But, by and large, it's
13 a hatchery driven population, basically in the Trinity River
14 Basin presently.

15 Secondly, I wanted to talk about the Trinity
16 River. Just some quick background on that. The Trinity is
17 the largest tributary to the Klamath. It's one of the--
18 outside of Janney (ph) Creek largest outer Basin transfer of
19 water in the Basin. There has been severe decline since the
20 early '60s when the project was operated. And various
21 responses, both congressionally and administratively to
22 those populations declines in the Trinity River.

23 All that said, the Trinity presently today
24 produces 30 to 50 percent of the fall Chinook. Most of the
25 naturally spawning Chinook in the Basin are produced in the

1 Trinity River, both at the hatchery and in the target area,
2 which is the lower 40 miles below the dams. And substantial
3 numbers of Coho and steelhead relative to the Klamath side
4 production are produced in the Trinity River.

5 Now I say all that to say that okay there was a
6 lot of impacts from the diversions. There's congressional
7 mandates to restore the river. We're getting a restoration
8 program in place over there. And yet one of our real
9 concerns are that the Trinity fish can't exist in isolation.
10 Both the adults and the juveniles need to go through the
11 lower 42 miles of the Klamath River, so it's very important
12 that the water quality of the river be assessed that's
13 affected by this project.

14 Some of the remaining challenges in terms of
15 getting the Trinity program up and running: there's still
16 continued litigation. Some of the beneficiaries--Westlands
17 and other California power agency--I think the remaining
18 legal matter that remains is I think Febru--what--the end
19 of--February 1 is the deadline for cert of petitions, and
20 we're hearing of various rumors on whether they're going to
21 be pursuing that or not. But that remains. But the law of
22 the land presently at the appeals court level is to record a
23 decision as to law of the land. We have some concerns that
24 we're working with the Interior and their commitment to the
25 full implementation of the Trinity Record of Decision.

1 We're working with the administration on that as well as
2 Congress.

3 The recommendations I would have on the Trinity
4 as it pertains to this project. Again, I think it needs to
5 be, like the Chairman said, integrated into an overall
6 comprehensive management. There's a lot of lip service that
7 I've heard over the years that there needs to be
8 coordination on the Klamath operations, the Trinity
9 operations. I think that needs to become a reality. We're
10 pushing on other fronts to have that occur.

11 One of the aspects of the Trinity program is an
12 adaptive environmental assessment and management program.
13 I'd I guess make a recommendation that in the FERC process
14 that it includes an adaptive management approach. And I'd
15 say look at the scientific process that's described in the
16 ROD for consideration for use in the FERC as that process
17 moves forward and terms and conditions are developed in the
18 future.

19 The present impacts from the hydro project
20 include water quality again is compromised. There's heating
21 as it moves through the reservoirs. There's an algae blooms
22 that occur, as folks are aware that the Klamath is a
23 naturally eutropic system. Lots of different things
24 impacting that, including the upper Basin irrigation
25 project, but the fact that it moves through and is retained

1 in those reservoirs is an impact. There's loss of oxygen.
2 Elevated temperatures, low dissolved oxygen, pH, and
3 unionized ammonia in the main stem Klamath creates stressful
4 conditions for salmonids. Release of nutrient rich
5 headwater--or excuse me--heated water at Irongate Dam
6 continue to pose threats to endemic fish stocks in the
7 Basin. Again, the breadth of anadromy ends at Irongate
8 atria, and again that's something that we're advocating be
9 looked fully at.

10 And an emerging issue that we're really concerned
11 about is the fact that we're seeing reduced production on
12 the Klamath side. For example, this past year the
13 escapement, we were talking with Cal Fish and Game and some
14 of their folks, the target for escapement this year was
15 35,000 naturally escaping fall Chinook. It's probably going
16 to be about 10,000 fish under that, and it looks to be
17 relative--the Trinity side looks to be I guess in comparison
18 to some of the main stem Klamath side tributaries relatively
19 healthy in comparison with those streams, and one of the
20 things we're seeing are chronic fish die offs of juveniles
21 as they exit the system. We have a concern that the project
22 has potential impacts on diseases and outbreak of diseases.
23 And that needs to be evaluated as well.

24 The next area I wanted to talk about is the fish
25 kill of 2002. As folks are aware--well aware--it was one of

1 the largest documented fish kills in America--in North
2 America--well, not North America--I believe there was some
3 in Canada--but in the United States. Cal Fish and Games,
4 its most recent report estimates some approximating 70,000
5 Chinook died in the lower river. One of the things that
6 we're extremely concerned about is that a good number of
7 those fish, when they--part of our tags that were recovered
8 in that fish kill were destined to return to the Trinity.
9 In fact, we do have a report that we can probably submit as
10 well that our staff did that showed that a substantial
11 number of those fish were destined to return to Trinity.
12 Our harvest--our--the escapement enumeration sites on the
13 Trinity showed that the Trinity perhaps was impacted at a
14 higher rate than Klamath, the main stem Klamath side stocks.
15 So that's a concern. Again, the adults need to go--if they
16 can't get to the lower, or if there's a bottleneck on the
17 Klamath, they can't get up into the Trinity.

18 I've mentioned we're concerned about conditions
19 in the Klamath as it affects juveniles. And there is--we
20 realize I guess--fully realize that on the main stem
21 Klamath, where the quantities of water are affected
22 primarily as from the water that comes out of the irrigation
23 project. There is some latitude within the project
24 operation to provide water for fishery protection purposes.
25 I believe in our July comments, we reflected on the fact

1 that in 2002, when we saw the onset of the fish kill, there
2 was an additional four or some 460 CFS that was let down the
3 river because of the project operation.

4 And I don't have any recommendations for that at
5 this point other than the water quality concern we have.
6 The status of populations in the Basin are one in which both
7 races of Chinook have undergone status review for ESA--
8 federal ESA listing. There is--given the status and the
9 historic levels of spring Chinook in the upper Klamath, it
10 looks like a substantial number of the spring race are gone
11 now. Steelhead have been petitioned twice for listing. The
12 summer race of steelhead in the Basin--I'm talking the
13 entire Klamath Basin, including Trinity is dangerously low.
14 Coho, as people are well aware are listed under state and
15 federal ESA. Pacific lamprey are part of a petition for
16 listing. The Fish and Wildlife Service is evaluating that.
17 Sturgeon--there's both green and white sturgeon in the
18 Klamath-Trinity Basins. Green sturgeon are under--presently
19 under status review, and although nobody has raised the
20 eulachon, just in talking with our counterparts on the Lower
21 Klamath are virtually gone from the Lower Klamath.

22 So, in summary, I guess summary of our
23 recommendation. Again, what the Chairman said, the FERC
24 process must be a part of a larger comprehensive Basin wide
25 approach. FERC is but one element of the overall impacts to

1 the fishery. There is things like the water adjudication in
2 terms of water quantity. Those need to occur. We're fully
3 supportive of evaluation of fish passage, including looking
4 at the spring run and the logistics of spring run
5 reintroduction to the upper Klamath. As the Chairman said,
6 the Tribe realizes as well that a lot of what potentially
7 comes out of the FERC relicensing process they'll need--
8 potentially need funding. The CIP is a potential for
9 providing the authority and the funding for possible
10 implementation, things like if dam decommissioning is a
11 viable alternative, there will need to be funding to do
12 that. And presently, it appears that CIP is the mechanism
13 for doing that.

14 Strongly recommend that you consider adaptive
15 management as you proceed in the process. Again, our
16 concern for water quality. The Trinity needs to be
17 integrated into the overall approach in the Basin. And
18 lastly, any of the analysis that occurs with the EIS needs
19 to not strictly be above Irongate. It needs to fully
20 address socio-economic and cultural impacts below the
21 project area. There are tribal fisheries. There are ocean
22 fisheries. There are recreational fisheries that are
23 impacted, potentially impacted, by the project and they need
24 to be fully evaluated in the EIS process.

25 So I guess I'd ask my colleagues, either Danny or

1 George, if there's anything to add or there is any
2 clarification. Again, I have one copy--a copy for you if
3 there is something I missed or was unclear for the meeting
4 minutes.

5 CHAIRMAN MARSHALL: Thank you. Did you want to
6 address the Tribal Water Quality Committee, Tom?

7 MR. SCHLOSSER: Sure. I'd like to. I'm Tom
8 Schlosser. That's S-C-H-L-O-S-S-E-R, and I'm an attorney
9 for the Tribe. And one of the unusual features of Hoopa's
10 involvement in the relicensing is the Tribe's treatment as a
11 state status under the Clean Water Act.

12 When the Clean Water Act was amended in 1987 to
13 allow Tribes to be treated as states for water quality
14 purposes, Congress recognized that tribal governments had
15 broad inherent authority to protect their environments and
16 protect their people and tremendous expertise. And so this
17 process is set up under which a tribe that wants to take on
18 water quality regulation applies and goes through a
19 certification procedure with EPA, which Hoopa did more than
20 10 years ago--quite some time ago.

21 As Mr. Orcutt has pointed out, the main stem of
22 the Klamath River is reservation waters. It flows across
23 the reservation at a point upstream of the confluence. So
24 you actually saw it when you drove through there this
25 morning or yesterday. And the Tribe has been very involved

1 in water quality matters within its reservation. Now, most
2 of the reservation is in the Trinity watershed, but there
3 are a number of parts of the Tribe's water quality control
4 plan which relate specifically to the Klamath already. The
5 Tribe is also going through the triennial review process for
6 water quality standards. So, you know, there will be future
7 public hearings and consideration of amendments and so on.

8 Recently, as reflected in the some letters that
9 have been filed in the FERC record, there has been confusion
10 about whether we think that there must be two certifications
11 under the water quality standards--two 401 certs. And that
12 isn't the way we see it. We think there is one water
13 quality certification, which initially at least will be
14 issued by the State of California through the state water
15 quality control board of the North Coast Regional Water
16 Quality Control Board.

17 But like situations where more than one state is
18 affected by the discharges from the project, there is a
19 dispute resolution mechanism that could be invoked here,
20 something we'd like to avoid. We'd like to make sure that
21 the Tribe standards are respected and incorporated in the
22 initial water quality certification.

23 Now, as we understand the dispute process, if it
24 goes to this, if you get a 401 cert from California, then
25 you pass that on to the EPA Administrator, and the EPA

1 Administrator determines it affects a downstream state or
2 Tribe in this instance, then notice is given to us; and if
3 we find that the Tribe standard has been abridged, then we
4 file an objection and ultimately FERC could end up holding a
5 hearing, and incorporating additional conditions to reflect
6 the Tribe's water quality standards.

7 And so I wonder whether--I wonder how we can
8 avoid going through that loop or whether there is something
9 you can do to facilitate inclusion of the Tribe's standards
10 in the first instance so we don't end up with a second
11 hearing before the agency.

12 And as I was thinking about that today, I
13 realized that I'm not sure--at least I don't know whether
14 the Commission has encountered the possibility of dispute
15 resolution under Section 401 in the context of trust
16 responsibility and the Commission's government to government
17 relationship with the Tribe.

18 So it is a little different from what you might
19 otherwise have in dispute resolution under Section 401. And
20 I wonder whether you have any suggestion of what we can do
21 or what the Commission or the staff could do to facilitate
22 incorporation of the Tribe's standards at an early stage in
23 this 401 cert process.

24 MR. MUDRE: This is John Mudre. But I think
25 you're correct in your assessment that we may not have gone

1 down this road before with respect to 401s and downstream
2 tribal interests. Probably, and we haven't done the
3 research to answer the questions. I can't answer your
4 question probably fully now, but certainly one approach is
5 in the 401 water quality certificate conditions are--they're
6 mandatory for us. We must include them in the license, and
7 we can't issue a license without a water quality
8 certificate. So one simple way, it would seem, to ensure
9 that what you want gets into the water quality certificate
10 is maybe somehow to work with the state authorities to, you
11 know, to ensure that what--you know, what they're going to
12 put into the license is going to be protective of your
13 interests.

14 In that manner, it doesn't--it really--it doesn't
15 enter into our ballpark at all in terms of making a decision
16 one way or another or holding hearings or anything like
17 that.

18 So it would seem to me that that would be the
19 simplest approach. Beyond that, you know, I'm not sure what
20 other approach would be--would work. Certainly, we would
21 need to know what it is that you want obviously. And when,
22 you know, in your response to, say, our ready for
23 environmental analysis notice when we request preliminary
24 terms and conditions would be, you know, an appropriate time
25 to let us know, you know, these are the things that--these

1 are the water quality standards that we think are necessary
2 to protect our interests.

3 And then we can consider those standards in our
4 environmental analyses and then be able to judge, you know,
5 are they going to be met. Are they not going to be met, you
6 know, what would have to be done to--so that they would be
7 met in the technical analysis.

8 Beyond that, in terms of, you know, how the legal
9 road would turn, you know, I really can't advise you on
10 that. I don't know, Rollie, do you have anything more to
11 add?

12 MR. WILSON: This is Rollie Wilson. I was going
13 to recommend actually the same thing that John did, although
14 I might also throw out I'm not sure to what extent you might
15 also want to be talking with the State of Oregon. My
16 experience with 401 certifications and tribes and hydropower
17 is that there will be--like the State of California will go
18 through a notice and comment opportunity as it develops the
19 401. But even sort of more significant than that, I would
20 suggest that the Hoopa Tribe--what I was going to say, Tom,
21 was how is your relationship with the State of California?
22 Because I think the important thing there is the Hoopa
23 Tribe's governmental relationship with the State of
24 California governmental entities, and working out with them,
25 as you've described, ahead of time how everybody's water

1 quality standards are going to be met. I think you
2 described the process well based on my reading of the cases
3 that are out there that discuss tribes and water quality
4 certifying entities in relationship to states. I think you
5 described it well, and I think, as John noted, the best way
6 to ensure that the Tribe's interests are taken care of is
7 done as early as possible and those relationships with those
8 state entities, and I'm not sure whether that would include
9 the State of Oregon or not. I'm not sure how, and if
10 they'll be issuing a 401, and how all that will play out.

11 And I think working that situation out, if you do
12 end up going into the sphere of resolution before EPA, I
13 think working those kinds of issues out before it ever gets
14 to the Federal Energy Regulatory Commission is probably the
15 best way to get the Tribe's interest up front and heard as
16 well as integrated under the process, rather than having it
17 come to FERC with three--potentially three opinions as to
18 what the water quality standards should be or what the
19 permit should say.

20 MR. SCHLOSSER: Well, this is Tom Schlosser
21 again. Following up on--you mentioned the ready for
22 environmental analysis notice, and I guess as we understand
23 it, that's kind of a key event in triggering not only the
24 EIS, but the request for conditions from the various
25 permitting agencies.

1 And so we're very interested in your best guess
2 as to when that REA notice is going to come out. I saw in
3 the Commission's record earlier this week that there were
4 several letters to entities who had commented referring to
5 studies and you were asking that some of the stuff that
6 wasn't available be submitted. Is it right that the REA
7 notice won't issue until you get those submission that
8 you've called for or when is this going to happen?

9 MR. MUDRE: Yeah, right. That's a good question,
10 and I'll just provide a little bit of background and then
11 end up by answering those questions.

12 But the license--current license expires in 2006.
13 Our regulations require that an application for relicense be
14 filed two years prior to the expiration of the existing
15 license. So, in February of this year, PacifiCorp filed an
16 application for a new license for the--

17 MR. WILSON: Last year.

18 MR. MUDRE: Oh, that's right. We got it on New
19 Years. 2004. And they filed their application for
20 relicense, and we issued notice of that filing and requested
21 any additional study requests from whomever--you know, from
22 stakeholders who were wanting to send any in. We also
23 reviewed the application to make sure that all the required
24 elements under our regulations were there. We did find a
25 few items that we considered were missing and sent out a

1 letter requesting that they send in that information, which
2 they did.

3 So once we determined all the statutorily
4 required elements were present, we then issued a notice
5 accepting the license application and requesting motions to
6 intervene, to become a party to the proceeding basically.

7 So then we also began our review of the
8 application to make sure that we have the information
9 necessary to make a license--you know, to base a licensing
10 decision on. Once the--the Commission must determine
11 whether and under what conditions to issue a new license for
12 this project. To support the Commission's decision, we are
13 preparing the Environmental Impact Statement. So, we
14 reviewed the application, all the information that was in
15 it. We looked at the additional study requests that were
16 sent in, and so then we're in the process now of preparing
17 an additional information request that we will send to
18 PacifiCorp that will list the remainder of the information
19 that we think we need to have before we can prepare our
20 environmental document.

21 And there were a hundred--about 180 additional
22 study requests that we got in. The application was
23 somewhere between seven and eight feet tall if you stacked
24 it all up, from one end to another. So it has taken us a
25 while to get through all of that information. We also held

1 six scoping meetings--and I know some of you were at the
2 ones we had in Eureka--to get to lay out our initial
3 thoughts on what analysis needed to be included in our
4 Environmental Impact Statement and to request comments from
5 different parties on what else they think they need to look
6 at.

7 So and also at this time, we're going through the
8 scoping comments that we received, both the written ones and
9 the oral ones, and we will be releasing soon our scoping
10 document two, which is our final listing of what we think we
11 need to look at.

12 So, in the near future, we'll be issuing that
13 additional information request, scoping document two, and
14 we'll also be responding to all of the additional study
15 requests.

16 So all three of those hopefully will be on the
17 street before too long--hopefully, this month--and within a
18 month anyway. And in our additional information request, we
19 will have our new schedule for, you know, the remainder of
20 the lessons processing activities that will include when we
21 anticipate that the ready for environmental analysis notice
22 will be issued. That's going to--that date is going to
23 depend on, you know, the time frames that we provide
24 specific or to give us, you know, the information that we're
25 asking for.

1 And, at this time, we haven't nailed those down
2 completely, so I can't tell you exactly today when that REA
3 notice is going to be issued. But again, in about a month,
4 we'll be able to provide you with that information.

5 MR. WILSON: Tom, as John was talking, I was
6 thinking of one of the things to say that help provide some
7 additional context under why I think you should build that
8 relationship with the state and work closely with them on
9 their 401 permit. The Federal Power Act, as you probably
10 know, provides a lot of authority for land managing agencies
11 and states to tell us, FERC, the license issuing entity what
12 that license should be, and so the process that the state
13 goes under in its 401 and the decisions that it comes to as
14 to what should be included in that permit, as John said,
15 must be included in our license. And so that's a great
16 authority that's given to them, and they have a lot of
17 weight in the process as to what the license is going to
18 say. So I think working with them ahead of time really
19 would benefit the Tribe greatly.

20 Also they will go through sort of their own
21 process for providing that information to us. I can't
22 remember, John, I think the State of California, did they
23 wait for one of our NEPA documents to come out before they--
24 they had--I thought I recall from some ruling exchanges that
25 we went through with them that they had some sort of obscure

1 practices for when they do their 401.

2 MR. MUDRE: Well, they--because of the California
3 Environmental Quality Act, CEQA, because issuance of a water
4 quality certificate is a discretionary act for them, they
5 must comply with CEQA. They need to--which is sort of the
6 state counterpart to NEPA. They need to have an
7 environmental document to support their water quality
8 certificate.

9 In an ideal world, they could adopt our NEPA
10 document and use that as the basis for their certification
11 conditions. There are some differences between NEPA and
12 CEQA, and CEQA will require some analyses that aren't
13 required by NEPA. So, in moist instances, they--they need
14 to do some more analyses or, you know, conceivably a
15 complete EIR, Environmental Impact Report, to support their
16 conditions.

17 They do like to see our analyses and the draft--
18 sometimes, you know, the timing is completely up to them as
19 to when they issue it. Sometimes they're done before we're
20 ready to issue a license, but, in many cases, we've prepared
21 our EIS, and we need to wait 'til they finish their water
22 quality certificate and their environmental analyses before--
23 -again, before we issue our license because again we cannot
24 issue a license without the water quality certificate. So
25 we've been talking with them and trying to streamline the

1 process or come up with ways that make our environmental
2 documents more amenable to their process, and we made some
3 headway, but we're not--you know, we're not all the way
4 there yet. But again, it can vary as to the timing of, you
5 know, whether it comes out, you know, when their
6 certificates come out. And it all depends on--they have to
7 be comfortable that they have the information to support
8 their certificate.

9 CHAIRMAN MARSHALL: The point for clarification
10 is that the Water Quality Review Board--is that the agency's
11 requirement?

12 MR. HIGGINS: It's actually run through the
13 state--out of Sacramento, by the State Water Resources
14 Control Board.

15 CHAIRMAN MARSHALL: Water Resources Control
16 Board?

17 MR. HIGGINS: Yeah. I'm Patrick Higgins.

18 MR. MARTIN: Ken Martin, Environmental Director
19 for the Hoopa Valley Tribe. I would like to expound on what
20 Mr. Schlosser has said. As our Water Quality Control Plan
21 has been adopted by a BA which has in 2002, September 11th.
22 Within the development of that criteria--

23 COURT REPORTER: I don't--I can hear him.

24 MR. MUDRE: Oh, okay.

25 COURT REPORTER: I still need the identification

1 for Mr. Martin.

2 MR. MARTIN: Ken Martin, Environmental Director,
3 Land Director for the Hoopa Valley Tribe. In the
4 development of that criteria for waters on the reservation,
5 we developed criteria that is specifically for the Klamath
6 Committee--Trinity River and the Klamath. In the
7 development, we worked hand and hand with the North Coast
8 Water Quality Control Board and the stakeholders. They're
9 identical criteria in regards to bacteriological, toxic
10 substances, and dissolved oxygen. Tom mentioned that we may
11 be going--we will--are going through a triennial review
12 process, and we'll be--formally adopted standards by the
13 Yurop Tribe (ph) that may be applied.

14 MR. ORCUTT: This is Mike Orcutt. I had a couple
15 of questions on your comment, sir. The first is this
16 Federal Power Act's granting of I guess my wording on what
17 you said was some advisory capacity to I think you said land
18 use agencies. Is that--now that's the state boards and
19 other--they fit that criteria?

20 MR. MUDRE: It could be like the Forest Service
21 with its 4E conditioning authority. Also, you have federal
22 agencies.

23 MR. WILSON: I'm sorry. I should have said
24 federal land managing agencies.

25 MR. ORCUTT: Oh.

1 MR. WILSON: Yeah. The Federal Power Act--

2 MR. ORCUTT: Well, what--because what I had
3 gotten from what you said I thought that you were saying
4 that for--as the state went through its review process and
5 the cert process that that was--that doesn't apply to the
6 state entities, just federal?

7 MR. WILSON: Yeah. Sorry. This is Rollie
8 Wilson. I don't know. Maybe the California Water Resources
9 Control Board, when they're issuing their 401 permit, they
10 may go and talk to their state land managing agencies to see
11 what interests those folks are interested in. I don't know
12 if they'll do that or not. The point I was trying to make
13 is more of a general one which is the Federal Power Act,
14 when it came into its current form in the '20s, 1920s, it
15 tried to bring a lot of agencies under one statute and that
16 included Department of the Interior, Agriculture, and
17 Commerce--federal agencies who manage land or other
18 resources. And it also brought states in and tribes under
19 401 permitting authority.

20 So you have five or six fairly big players with a
21 lot of authority to kind of put this license together in the
22 early stages before it ever gets to us, the license issuers.
23 So the point I was trying to make was that there are lot of
24 entities out there--federal agencies and state water quality
25 agencies who will have very direct say as to what goes into

1 the license commissions.

2 MR. ORCUTT: Okay. But another question sort of
3 related to that, and you had mentioned you were unclear
4 Oregon has to certify under 401. Wouldn't that be the--

5 MR. WILSON: They do.

6 MR. ORCUTT: They do.

7 MR. WILSON: Yeah.

8 MR. ORCUTT: Because some of the dams are in
9 Oregon.

10 MR. MUDRE: Well, if there are discharges in the
11 State of Oregon, then it will required a water quality
12 certificate from Oregon, as well as from California.

13 MR. ORCUTT: Okay.

14 MR. WILSON: And all of that, one way or another,
15 has to end up as sort of one set of conditions that a person
16 that operates a hydro power project can figure out how to
17 deal with and so that we'll be able to--you need to be
18 allowed discussions as to how those can all work together.

19 MR. MUDRE: Well, yeah, they certainly they can't
20 be inconsistent.

21 MR. ORCUTT: Seems like--

22 MR. MUDRE: One can't prevent the other from
23 occurrence.

24 MR. ORCUTT: Maybe the commonality amongst all
25 the entities is the Federal EPA as a sort of coordinator or

1 consolidator of the all the different authorities that are
2 within the areas.

3 MR. WILSON: Certainly for Clean Water Act stuff-
4 -definitely. And I don't know that FERC has any experience
5 with EPA in mediating 401 issues, but I think that they
6 might be a really useful tool.

7 MR. MUDRE: 'Cause, again, when the certificate
8 gets to us, we can't really change it or do anything with
9 it. So--other than put it into a license.

10 CHAIRMAN MARSHALL: Did you want to make a
11 comment?

12 MR. HIGGINS: Patrick Higgins. I think I've been
13 attending these meetings both at Quartz Valley Indian
14 Reservation and at the Resighini Rancheria, and I would like
15 to kind of call Hoopa's attention to the fact that, and
16 correct me if I'm wrong, Dr. Mudre, that actually the state
17 may stand aside in terms of issuing a 401 certification in
18 which FERC acts as an end loop. And also for the Council's
19 background information, what the Oregon Department of
20 Environmental Quality and the state Water Resources Control
21 Board have both stated in environmental documents leading
22 into this, coming in on PacifiCorp's final licensing
23 agreement that there are substantial water quality problems
24 related to the operation of these facilities for which they
25 do not think that there may be mitigation. And they are

1 calling for studies of decommissioning.

2 But I guess the question is could they both stand
3 aside and dump it in your lap, John?

4 MR. MUDRE: Well, in theory, they can waive their
5 certification authority. I think the chances are well less
6 than zero that that would ever happen in the states.
7 There's great interest with both Oregon and the State of
8 California in this relicensing proceeding, and I can see no
9 circumstance under which they would waive their authority in
10 this case.

11 MR. SCHLOSSER: This is Tom Schlosser again.
12 This discussion reminds me that the Federal Power Act has a
13 special definition of the word reservation so that I guess
14 even though the Klamath River is on this reservation, it's
15 not a reservation within the meaning of the Act, 'cause
16 we're downstream of the project boundaries.

17 But I wonder whether there are reservations--
18 federal reservations--within the project boundaries. That
19 is, are there federal lands are--the wildlife refuges within
20 the boundaries?

21 MR. MUDRE: There are federal lands within the
22 existing project boundary. Whether they qualify as
23 reservations under the Federal Power Act--I don't think any
24 determination has been one way--been made one way or another
25 on that.

1 I think the BLM has stated on the record that
2 they feel that they have 4E conditioning authority, but the
3 Commission hasn't addressed the, you know, whether they
4 think they do or not, and it's probably premature at this
5 time to have done that.

6 MR. WILSON: I assume--

7 MR. MUDRE: If they have it, they have it.

8 MR. WILSON: Tom, I assume that you've been
9 talking with David Diamond (ph) and Bill Battenburg's (ph)
10 office at Interior.

11 MR. SCHLOSSER: Not yet.

12 MR. WILSON: Okay. They would be the ones who
13 would be--probably the contact point to direct you to what
14 process Interior is under.

15 MR. SCHLOSSER: Well--this is Tom Schlosser
16 again. You mentioned the state's high degree of interest in
17 what's going here, and, as you know, there are settlement
18 discussions going on between the licensee and many of the
19 interested parties. And I gather that sometimes FERC
20 participates in those, and sometimes the Commission doesn't.
21 And I wondered whether you could tell us something about
22 your experience of when participation by Commission staff
23 has helped--whether it might be a good idea here; what we
24 could expect.

25 MR. MUDRE: Well, I can speak to that some. The

1 Commission likes settlement agreements because they feel
2 that they need to prepare licensing decisions. They're
3 going to be more agreeable to people that, you know, to the
4 stakeholders.

5 On occasion, the Commission does involve staff in
6 some of these settlement negotiations. They--we don't--
7 people request us. Usually, it comes--the licensee will
8 request that FERC provide some staff to help in the
9 negotiations. And in many--not every instance--but in many
10 instances, the Commission decides that they will provide
11 staff to help in the settlements. When we do that, the
12 Commission will issue a notice that the staff that are going
13 to help in the settlements are what we call separated staff.
14 They're no longer allowed to advise the Commission in the
15 licensing decision, so they're pretty much neutral instead.
16 But what they--their purpose can be--to get at different
17 purposes. They could advise the stakeholders on what they
18 think the Commission--how the Commission might respond, you
19 know, to this or this, you know, settlement approach. They
20 can inform the parties as to whether something that they're
21 kind of proposes within the Commission's jurisdiction or
22 not. Often times, settlements will involve measures that
23 aren't under our jurisdiction, so we can't include them in a
24 license, but they are part of the settlement. And we can
25 acknowledge that, you know, that that's part of the

1 settlement, although it's nothing that we can enforce.

2 It's--that's set up in a jurisdiction.

3 Sometimes the FERC staff act as facilitators for
4 the settlements. Other times, they are just there to
5 provide information when asked. So that is a possibility.
6 To my knowledge, we have not been asked to participate in
7 the settlements at this time, although we are--I think there
8 have been some preliminary discussions as to, you know,
9 whether, you know, it's something that we could do or not
10 do.

11 But, to my knowledge, there's been no official
12 request, and no decision. So it's something that could
13 happen, and if, you know, if asked, you know, it may well--
14 if it's requested, we may well end up separating some staff
15 to help out, because, again, we do think settlements are
16 valuable and produce good licenses.

17 MR. WILSON: In addition, there are a growing
18 number of examples of settlement agreements that have been
19 submitted to FERC, and you can see on our website through
20 the record kind of what the Commission's response has been
21 to those, where we've had to take stuff out because it was
22 not in our jurisdiction or where we have left things the way
23 they are. There's a--it's relatively new, but there's a
24 growing number of examples of each of those things. And one
25 point I'd like to make about settlements: although they can

1 be complicated to construct, one thing I think they do do
2 better than sort of a traditional FERC license is adaptive
3 management, which you all have noted is important to the
4 Tribe. It's easier in a settlement context to incorporate
5 adaptive management proposals I think than in sort of a
6 traditional licensing approach, which tends to be kind of a
7 compliance enforcement sort of thing versus groups of people
8 working together to figure out how to solve the next
9 problem. So that could be something that the Tribe is
10 interested in.

11 MR. MUDRE: This is John Mudre. I'll add one
12 other point and that is that although the Commission does
13 like settlements, it is our practice not to wait around 'til
14 we get one in. So we will continue our license application
15 process and according to our normal schedule while the
16 settlement talks are going on.

17 MR. HURLEY: This is Grett Hurley. John, is
18 there any--if someone requested a stakeholder and a
19 settlement request, let's say the Hoopa Tribe request for
20 FERC participation, what is the decision on FERC? How do
21 they--do you automatically send people over at the request
22 of let's say a tribe based on one.

23 MR. MUDRE: Well--

24 MR. HURLEY: Could you share a duty of FERC or
25 let's say stakeholders' objectives, and we do not want this

1 person in there. How is that decision made?

2 MR. MUDRE: Well, I mean, I think most of these
3 requests would sort of come, you know, at a decision made by
4 the collaborative group that, yes, we want to have, you
5 know, a FERC involved in the settlement discussions. It
6 wouldn't be just one--you know, one--one of the parties
7 requesting it and then it would come. So, I think, you
8 know, we would need to be held that--you know, that this is
9 something that's supported by the entire group.

10 The second point would be, you know, do we have
11 the resources, you know, available to provide people. You
12 know, these settlements can take a while, and they are
13 manpower intensive, particularly for us if they're in
14 California. Our staff--because I've been involved in one,
15 and it's basically, you know, it was pretty much one week a
16 month of my time, you know, for one, you know, a two-day
17 meeting a month to something like that. It's resource
18 intensive, so we need to make sure that we have the people
19 to do it, but again in the higher profile cases, and where
20 we think that the prospects of settlement are, you know, are
21 good, you know, we typically--we probably say yes more than
22 we say no, although I haven't, you know, gone through and
23 added things up.

24 MR. HURLEY: If funding wasn't an issue for a
25 person who up, though, in general, yes?

1 MR. MUDRE: Well, it's just so much--it's not so
2 much funding as manpower. I mean, we just--we have a
3 limited number of staff and a lot of things to do. And, you
4 know, it's a big piece of work.

5 MR. JORDAN: Danny Jordan from the Hoopa Tribe.
6 I have a question about the post-licensing process and
7 FERC's involvement, because the problems we have on the
8 Klamath River are--seem to be the basically the result of a--
9 --just a cumulative effect of the lack of coordination among
10 management agencies, decision makers, and in the post-
11 license process, and assuming we get adaptive management
12 integrated into the actual license document itself,
13 everything that I've seen in relationship to the past
14 activities of FERC and the license holder is that it changes
15 to the license needs to go through an amendment or has gone
16 through an amendment process.

17 Now, if we were to integrate adaptive management
18 into this, and to where we could actually respond to the
19 environmental changes in the Basin, our fish populations, or
20 whatever, what's the post enforcement or monitoring process
21 that will be integrated and how is FERC integrated into the
22 rest of the management agency infrastructure that we expect
23 to be, you know, being developed over the next 20 years or
24 so under the CIP process?

25 MR. MUDRE: Well, I don't know if I can answer

1 every part of your question. But the Commission does make
2 sure that once a license is issued that the project is
3 operated in conformance with the various terms and
4 conditions. We have a, you know, one of the--the Division
5 of Hydropower Compliance and Administration which does that.
6 They--you know, their job is to make sure that the projects
7 that are operated in accordance with the license, and
8 they're in charge of processing licensing amendment
9 applications when they come in.

10 The existing license, you know, was issued in the
11 mid-'50s, and certainly a license of those days is a lot
12 different than licenses as they appear now. They have fewer
13 environmental measures that--you know, built into them, and
14 assessing compliance with them was, you know, relatively
15 easy. You checked, you know, on whether the minimum close,
16 and here they are. Here's what they're supposed to be.
17 It's okay.

18 With more complicated licensing, the--you know,
19 monitoring the compliance is--it gets more difficult, you
20 know, as well. But we still have to do it.

21 So when we are preparing license articles by
22 starting conditions, we have to give some thought as to
23 well, how are we going to be able to, you know, ensure
24 compliance with these articles. So that's important to us.
25 And we try to make sure that, you know, we can track

1 compliance with these things.

2 With respect to what, you know, how it's going to
3 play out with multiple players 20 years down the road, you
4 know, I can't really address that or tell you how that's
5 going to happen, but we do enforce compliance with the, you
6 know, the terms of the licenses. So that's something that
7 will be done. How it's going to be done, you know, right
8 now for a license that's going to be issued, I can't tell
9 you.

10 MR. JORDAN: Just as a follow up--a question on
11 that. Given the fact that we have multiple agencies with
12 multiple independent jurisdictions--

13 MR. MUDRE: Right. Right.

14 MR. JORDAN: In the Basin, is there a need to
15 incorporate into a license a dispute resolution process,
16 'cause I don't imagine that FERC or the State of California,
17 Hoopa Tribe for that matter, is willing to delegate
18 authority to any other group or whether they can delegate
19 authority--

20 MR. MUDRE: Right. Right. Right.

21 MR. JORDAN: To any other group for enforcement
22 purposes of our respective requirements. So is there a need
23 to have some kind of a coordination enforcement mechanism to
24 where if whether it be Tribe's water quality standards or
25 Oregon or California or fish passage requirements or

1 whatever are not being implemented in accordance with the
2 needs and concerns of a particular agency, is there a need
3 to have some kind of mechanism that--or is it just solely
4 FERC as the enforcement agency, 'cause it gets back where
5 Tom raises that we could have a series of independent
6 disputes going on, all trying to get to the same issue, each
7 being in different jurisdictions.

8 MR. MUDRE: Right. You know, that's certainly
9 like a legitimate concern. You know, this is not a simple
10 project. We have the Bureau of Reclamation upstream. We
11 have the Endangered Species Act. We have the tribes. But
12 just as the tribes may be unwilling to sort of delegate
13 things, the Commission can't delegate its responsibilities
14 to other agencies either. We can only can--we only have
15 jurisdiction over licensees, so we can make other agencies
16 do things. So it's--you know, it would be a good--if there
17 was a way that, you know, we could figure out how to do it
18 and no one's responsibilities or jurisdictions are to be
19 compromised, that would be a good thing. But we'd need to
20 figure out how to do that.

21 MR. JORDAN: Well, perhaps you ought to look at
22 this as another part of what Rollie talked about is that
23 having a kind of a joint process established prior to the
24 licensing, you're going to need to affect. Maybe it's
25 something that we as management agencies need to sit down--

1 MR. MUDRE: Right.

2 MR. JORDAN: With the other agencies and say how
3 would we actually enforce these things and do it in a timely
4 manner.

5 MR. MUDRE: And that--and those--you know, they
6 are amenable, as Rollie said, to settlements. The Rock
7 Creek-Cresta a settlement in California established what
8 they call an ERC, or environmental review committee, that,
9 you know, is tracking the results of studies done post-
10 licensing, and it does have adaptive management provisions
11 built into it.

12 So that's--and I think Maculommy (ph) settlement
13 agreement there is a similar--similar type of set up. So we
14 can look at those examples and how they work and, you know,
15 maybe try to use something like that here. It's a
16 possibility.

17 CHAIRMAN MARSHALL: How about--let's get some. I
18 can see everybody. You can't see each other.

19 (Laughter.)

20 MR. STEWARD: Clive Steward, Technical Advisor to
21 the Tribe. That's spelled S-T-E-W-A-R-D. On the subject of
22 compliance. When the new license is issued, it more or less
23 wipes the slate clean. The new terms kick in. Is there
24 going to be an assessment of the record of compliance by the
25 proponent?

1 MR. MUDRE: Yeah.

2 MR. STEWARD: Prior to that?

3 MR. MUDRE: That's a component of every
4 relicensing is that we look at the compliance history of the
5 licensee.

6 MR. STEWARD: And does that somehow influence
7 your--the terms that you prescribe--the record of
8 compliance?

9 MR. MUDRE: Well, we consider it, and, you know,
10 we consider it for a reason. But I don't think--I'm not
11 aware that, you know, conditions are going to be any
12 different because they, you know, were a good complier and
13 this is a bad complier. I think it's more--we'll probably
14 more reflect on why their license is issued at all as
15 opposed to whether it has more checks and safeguards built
16 into it.

17 MR. : I wanted to follow up on--

18 CHAIRMAN MARSHALL: You need to--thank you.

19 MR. HJORTH: Doug Hjorth. I wanted to follow up
20 on something that John had just said and emphasize the
21 importance of certain components in settlements and that's
22 such things as technical advisory committees. When we see
23 that in our environmental review, we usually--at least I as
24 the analyst and I'm very happy about that--if there is not a
25 settlement in place, it still makes a lot of sense for

1 technical review committees to exist, review information, to
2 implement an adaptive program. However, if it's not spelled
3 out in a settlement, as John mentioned earlier, the
4 Commission only has authority over the licensee, and it gets
5 very awkward writing a recommendation where a technical
6 review committee is formed. Basically, what we end up doing
7 is asking the licensee to ask certain parties, key parties,
8 that have probably been integral in the relicensing
9 procedure--proceeding--to participate in a technical review
10 committee. Conceivably, if everybody said no, I don't want
11 to participate, there is no technical review committee,
12 because the licensee has invited people, and if they've
13 chosen not to participate, which, you know, for one reason
14 or another may be the case, then there is no technical
15 review committee, and it really sublimates the whole
16 intention of adaptive management.

17 So if we can get that into a settlement in some
18 form, it really expedites an adaptive approach to
19 relicensing and a new license for this project. So I just
20 wanted to emphasize that it's very awkward for us as
21 analysts to incorporate adaptive management when we only
22 have authority over the licensee.

23 CHAIRMAN MARSHALL: Chairman Marshall. You made
24 a comment earlier about us coordinating with the state about
25 water quality, and the Water Quality Review Board you said

1 has an authority to require certain things within the
2 license. They have some authority, and I don't know what
3 that authority--the extent of that authority is.

4 Our concern--I mean, being expressed is that in a
5 settlement, comprehensive settlement, with multiple
6 agencies, how do we--how will we assure ourselves that the
7 agreements within the settlement are honored? Are--you
8 know, are complied with? Your authority is over the
9 licensee. Would we then turn to the state, who is--who
10 would--or adds this conditions and say you're--it's your
11 authority; it's your duty? One thing is, you know, signing
12 a document that's not enforceable is not--it's a worthless
13 piece of paper.

14 MR. MUDRE: This is John Mudre. I can answer
15 that I think, and that is that a lot of times what we see
16 when we do have settlements then is, you know--a lot of
17 times the Water Control Board in particular won't sign a
18 settlement; won't be a party to a settlement because of
19 their I guess they're--they're sort of a quasi judicial
20 board as well. So they may participate in a settlement and
21 everything. They may not sign it, but what they typically
22 do and what the Forest Service will typically do with their
23 4E conditions, they'll still issue their water quality
24 certificates to 4E conditions, but they'll be consistent
25 with the settlement. So the provisions of the settlement

1 that apply to the different agencies will be incorporated
2 into their mandatory conditions of the license.

3 So then they are part of the license that, you
4 know, that FERC has the authority to enforce.

5 MR. WILSON: Lyle, I think you raise a good
6 point. Enforcement of settlements in a FERC licensing
7 process and sort of ensuring that everybody is going to do
8 what they'd say they do in the future is a difficult thing
9 because there is multiple agencies and multiple
10 jurisdictions, and we're all kind of limited.

11 One--dispute resolution type panels was raised
12 earlier. I think some recent FERC orders, even though we
13 only have jurisdiction over the licensee, if a settlement
14 agreement is before us, and there's a dispute resolution
15 panel that consists of multiple agencies, I think there are
16 a couple FERC orders that you can find that will show us
17 sort of requiring those agencies to come to the table and
18 work things out on whatever adaptive management issue might
19 be before them.

20 Now can we really require the Department of the
21 Interior to come to the table and work things out? That's
22 kind of an open legal question, but I think some recent FERC
23 orders to show us making steps towards that. Although when
24 it comes down to implementing a license and getting the
25 resources protected with the money spent out of mitigation

1 done, all that does again fall directly to the licensee.
2 And that's really the lands that we can directly control.

3 So we call it a settlement, but in my mind it's
4 really federal regulation of how a project is going to
5 operate. And so it's a--I think a difficult legal
6 landscape, and you have to rely on your lawyers to sort of
7 construct a process that would work best for the Tribe in
8 ensuring that they will stick to their commitments in the
9 future.

10 CHAIRMAN MARSHALL: Well, we're still trying to
11 figure out how to get enforcement in treaties.

12 (Laughter.)

13 CHAIRMAN MARSHALL: It's going to take a while.

14 MR. WILSON: Dan, if I could address a couple of
15 other points that you raised. You've talked about the
16 conservation implementation thing a couple times now. I'd
17 have to reread the statute to check, but under Section
18 10(a), the Commission considers comprehensive management
19 plans developed by certain entities, and we consider them in
20 our licensing.

21 I'm not sure if it has to be on the same river
22 that's in the licensing or if it can be an adjacent river.
23 But it seems to me if we looked at that section 10(a), we
24 could figure out whether or not the plan that you all have
25 developed is something that should be considered in the

1 licensing process, and that might be one way to bring kind
2 of your efforts together in this licensing. I can't
3 remember the--subject.

4 MR. JORDAN: Can I make? Can I clarify something
5 I--Danny Jordan. The only existing formal written plan is
6 the Trinity River ROD, and that will be integrated into the
7 CIP. But the CIP is a new concept, new project or activity
8 that is just being undertaken to coordinate with the Basin.
9 And the FERC licensing happens to fall right in the initial
10 conceptual design of CIP.

11 So CIP will likely take shape after the license
12 is issued, assuming it's issued in 2006.

13 So, and I just wanted to make sure that there are
14 provisions so that as CIP brings the other issues forward,
15 that the FERC process is compatible. And that's what
16 adaptive management would actually do that.

17 MR. WILSON: You reminded me of my other point.
18 And I don't know to what extent we could in the future
19 incorporate all those CIP things, but adaptive management in
20 FERC licenses is another difficult issue to figure out, and
21 I think the key to it, because as you say you go down the
22 road and in the future you get me information and you change
23 your decision how to operate something, the key I think is
24 building an agreement or a license that has sort of
25 boundaries on what's possible. That gives our contractors

1 something to assess underneath the document. So we can, you
2 know, reasonably decide whether what the license we're
3 issuing is going to comply with NEPA.

4 But then if in the future you ever have something
5 that is such new information that it takes you in a
6 different course, you probably wouldn't be able to do that
7 based on the original NEPA document. So there would need to
8 be some sort of license amendment proceeding or sort of
9 review things in some way.

10 So we can encompass some of that--

11 MR. JORDAN: Sure.

12 MR. WILSON: With management, but not a broad--

13 MR. STEWARD: Cleve Steward. One of my concerns
14 about the post license phase and tribal participation in
15 that adaptive management support is that it may, the tribe,
16 may elect not to sign a settlement agreement for whatever
17 reason; is it because you want to retain your autonomy or
18 because you object to some of the conditions of the new
19 license, in which case my concern is the Tribe might be
20 excluded from these decision making bodies during the post-
21 license phase. Would FERC represent the tribe's interests
22 in that matter? Would they both argue for a seat at the
23 table for the tribe or actually represent--help represent
24 the tribe's interest at these meetings? This isn't a
25 hypothetical question, by the way. I can think of very

1 specific incidents where the tribe has been excluded because
2 it chose not to sign the settlement agreement, and the
3 decision was left up to the licensee as to whether they
4 would be included in technical and policy committees.

5 MR. MUDRE: What the Commission likes to do when
6 it is putting together license conditions that require
7 certain activities and involve other entities like state
8 agencies or tribes is to--is to have them involved in, you
9 know, have them involved in, you know, in the post-licensing
10 activities--preparation of the plans, review of, you know,
11 reports as to how, you know, how something is working--have
12 some of the new measures.

13 So we would like to see the participation of the
14 affected parties in these post-licensing, you know, boards
15 or, you know, activities and things.

16 Would it be possible for us to require that a
17 tribe, you know, must be allowed to attend and participate,
18 I'm not sure. I think we could. But I guess it would
19 depend on whether it was, you know, whether these were set
20 up because the Commission has jurisdiction versus where they
21 don't have the jurisdiction. So there may be instances
22 where we couldn't, but my guess is that, you know, that we
23 could.

24 MR. HJORTH: Doug Hjorth. Just kind of following
25 up on what John is saying. And again, this is all

1 hypothetical because we aren't working with actual
2 conditions. As John says, it would be hoped for that the
3 tribe would chose to participate if there is a settlement.
4 If, for whatever reason, they did not, and I think my
5 understanding is that the Commission would look at a
6 settlement and try to make a determination if the key
7 stakeholders were involved in that settlement. And if there
8 was--there were some key stakeholders who were not signatory
9 parties to that settlement, the Commission could decide that
10 any adaptive management proposal or plan or report would
11 also have to seek comments from that other key entity, and
12 then the comments of that key entity would be filed with the
13 Commission, along with the adaptive program and report--
14 whatever--that might lead to a change in project operations
15 based on new information.

16 The Commission then has to--any proposed change
17 in an existing license, the Commission needs to approve that
18 before it's actually implemented. And in doing that, they
19 would obviously weight heavily on the stakeholders that were
20 participating in the settlement, but they could also
21 consider the comments of other key entities that may not be
22 signatory parties to the settlement and factor those into
23 tweaks, modifications or whatever to the plan or the
24 modified project operations that the Commission may approve.

25 And this is all hypothetical, but that is a way

1 that a key stakeholder that may not chose to sign the
2 settlement could be recognized and factored into the
3 ultimate plan that's approved by the Commission.

4 MR. MUDRE: Right. And this is John Mudre. And
5 I'll add one thing to that. And that is when we do receive
6 a settlement at the Commission, we will issue a public
7 notice that we received a settlement and request comments on
8 it. So, you know, if, you know, that would be a perfect
9 opportunity to say that even if you didn't sign it, to say,
10 well, you know, we would like to be involved with this, and
11 then the Commission can make its decision on yeah, you know,
12 these guys, you know, should be involved also. So that was
13 the point I wanted to make.

14 The other point is that the Commission does look
15 at, you know, who signed the settlement agreement or how,
16 you know, what percentage, say, of the stakeholders. If
17 it's just two stakeholders out of 20 that come up with the
18 settlement agreement, you know, that's--it's not going to
19 have as much weight and--if it's, you know, everyone--all 20
20 out of 20 stakeholders have signed it, and, you know,
21 everyone thinks it's a great idea. So, there are
22 settlements, and there are settlements.

23 MR. HURLEY: This is Grett Hurley. What about
24 those persons who may not have either participated into--in
25 the settlement agreement at all by either choice or maybe

1 were not allowed later on in the settlement process to join
2 in.

3 MR. MUDRE: Right.

4 MR. HURLEY: How is--is that the same?

5 MR. MUDRE: Well, they can still comment on the
6 settlements. Anyone--you know, when we issue a public
7 notice requesting comments like that, it goes to everyone.
8 And so, it's not just the comments of the settling party.
9 We pretty much consider, to a large extent, that, you know,
10 one--a stakeholder's comments or its, you know--if it signed
11 the settlement agreement, we assume that they like what's in
12 it.

13 MR. WILSON: To answer your question again, Doug
14 I think makes a good point. The way I see his point is even
15 if a settlement gets approved by FERC and incorporated in
16 the license, and let's say the tribe or some other entity
17 decides not to be a signatory to that settlement, there is
18 still another forum for the tribe's concerns to be heard.
19 You know, there's the ongoing settlement process, but, as
20 Doug noted, everything still has to be run through FERC when
21 there are kind of major decisions in that settlement--
22 perhaps adaptive management decisions or adaptive changes to
23 the license. And so the tribe or another entity would not
24 be sort of necessarily locked outside of that settlement
25 because you could always refer to the FERC forum and have

1 your comments directly before the Commission in that way.

2 I think the thing that the tribe would sense that
3 it was really missing out on was whatever initial
4 discussions were leading up to the decision by the
5 settlement parties before it got filed with FERC. That
6 would be kind of the practical thing that was lost.

7 CHAIRMAN MARSHALL: Chairman Marshall. One of
8 the things that we were discussing earlier was the 2001 fish
9 kill. And I guess my question is your relationship with
10 Bureau of Recreation, which manages the dam and manage the
11 power. And they contracted water. And in the event of a
12 foreseeable emergency, we believe it was foreseeable, we
13 couldn't get any type of movement to release additional
14 water to avoid that catastrophe. The license--I mean, the
15 contracts were locked in. If the settlement is part of a
16 license--again, this is in the event of this type of
17 foreseeable calamity--does FERC have the power to say you
18 have to forego power production in order to protect an
19 endangered species or is that another agency or how would
20 we--how would a settlement play in that situation be
21 enforced.

22 MR. MUDRE: I think a settlement could include
23 provisions whereby, for example, if it was decided that, you
24 know, a fish kill is going to occur, if those aren't raised,
25 that it would contain provisions that, you know, if this

1 happens, then the licensee will release, you know, X more
2 water than it does and that it otherwise would. The problem
3 with the Klamath project is they don't have a lot of storage
4 in their own reservoir, so they can increase flows, you
5 know, somewhat for a small period of time, but any, you
6 know, longer period higher release, greater volumes of water
7 would require that the Bureau of Reclamation release more
8 water into the project that this input can then pass
9 through.

10 I think in most instances like that, PacifiCorp
11 doesn't--wouldn't really lose generation because they would
12 just pass, you know, the water downstream through the units
13 and not spill it. So I don't see that a loss of generation
14 is really--comes from the bay, and, you know, in most of
15 those cases we could imagine.

16 MR. JORDAN: Just a clarification. Danny Jordan.
17 There are scenarios where if the--as we ran into the last
18 time--these multiple agency approval process. Just like
19 we're bringing 50,000--up to 50,000 acre feet of water out
20 of the Trinity River pulse flows to help the lower Klamath
21 to kind of--to help the fish get up to at least to Wichepeq
22 (ph). There are scenarios where if the water is not
23 available for whatever reason--contract requirements or
24 whatever--in the upper Basin from Bureau of Reclamation,
25 those reserve water pools--if, in fact, the dams remain in

1 place--can be an emergency supply for a short period of
2 time.

3 MR. MUDRE: And I think. Yeah. I think what
4 you'll find is that PacifiCorp did release some extra water
5 as the fish kill was unfolding.

6 MR. JORDAN: That was--yeah, that was a common
7 thing about the 460 or whatever.

8 MR. MUDRE: So they did--you know, they were--and
9 they weren't required to. They did it because they thought
10 it was a great thing to do.

11 MR. JARNAGHAN: Are there minimum flow
12 requirements in the licensing process?

13 Oh, Joseph Jarnaghan. J-A-R-N-A-G-H-A-N.

14 MR. MUDRE: There are minimum flow requirements
15 in the existing license. However, in recent years, the
16 Bureau of Reclamation has pretty much dictated to PacifiCorp
17 and how much water it was being given, and PacifiCorp
18 basically operates as a run a river project, you know, when
19 you look at both ends of it. I mean, what goes in the
20 project is what comes out, although they do peek and play
21 with flows within the project itself.

22 MR. JARNAGHAN: The Reclamation is the authority
23 on the kind of water--

24 MR. MUDRE: The Reclamation--I mean, its releases
25 are driven by the biological opinions. You know, I mean,

1 the Endangered Species Act. So we'll just have to see what
2 the new license does with respect to minimum flow
3 requirements, but there--you know, there are many projects
4 below federal facilities and they just--they operate with
5 the water they're given, and that's that.

6 MR. HIGGINS: Patrick Higgins. For Mr.
7 Jarnaghan's benefit, in fact the biological opinion
8 specified that no less than 900 cubic feet per second should
9 come out of Irongate Dam in the 10-year plan of operation
10 that the Bureau then imposed over the objections of some
11 staffers who then soon later quit the agency over the issue--
12 --is now 700, and that was, in fact, the flows--or 750--
13 somewhere in there, with flows at the time of the fish kill.
14 So the original biological opinion was departed from the 10-
15 year project operations plan.

16 MR. MUDRE: But one point is that the Commission
17 came--made Bureau of Reclamation release more water
18 downstream.

19 MR. WILSON: Chairman Marshall, to answer your
20 question. I think they may have an unfortunate situation of
21 having two federal entities upstream from you, and I think,
22 as your folks have pointed out, conditions can be put into
23 the PacifiCorp license that ensure that if a fish kill is
24 imminent that the water gets through the PacifiCorp project,
25 but then you got to pick up the phone and call the

1 Department of Interior and make sure that they're going to
2 release the water. And we can help facilitate some of that
3 intergovernmental communication. Our current chairman is
4 really interested in trying to get rid of those sort of
5 roadblocks. But his term is limited, so I think kind of
6 whatever lines you've got into the Department of Interior is
7 probably the best way to get the water out of the--most
8 upstream project.

9 MR. SCHLOSSER: This is Tom Schlosser. I wanted
10 to go back a little bit to the existing license. You
11 mentioned it was issued in the '50s, and, of course, we
12 didn't have a lot of environmental laws then that we do now.
13 But--and I'm not sure of this--but I think that Section 18
14 in Fish Ways was part of the Federal Power Act when a
15 license was issued. And I wondered, you know the project is
16 a complicated one, and I can't keep it all straight in my
17 mind. I wonder if you could tell us a little bit about it
18 kind of dam by dam, to the extent there are fish ways and
19 whether the Commission looked at requiring fish ways, you
20 know, in the California dams.

21 MR. MUDRE: Right.

22 MR. SCHLOSSER: At the time it was licensed.

23 MR. MUDRE: Yeah, I think I can give you an
24 overview of that. Obviously, I wasn't around when the
25 license was issued, but the lowest most--lower most dam is

1 Irongate Dam at river mile about 180. It has no upstream or
2 downstream fish passage facilities. It was built--it was
3 actually an amendment to the license that occurred in 1961.
4 It was put in place to reregulate the peaking flows from the
5 upstream Copco (ph) and J.C. Boyle (ph) developments.

6 Apparently what was decided at that time was that
7 an upstream fish passage there wasn't practical because of
8 the height of the dam, among other things, and so PacifiCorp
9 was required to build a mitigation fish hatchery at Irongate
10 that would mitigate for the loss of spawning habitat between
11 Irongate Dam and Copco Dam.

12 Neither of the two Copco developments has
13 upstream or downstream fish passage either. The first
14 upstream fish passage facility is located at J.C. Boyle Dam.
15 There is a fish ladder for upstream fish passage at Keno
16 (ph) Dam, which is a non-generating facility that is being
17 proposed for removal from the new project license by
18 PacifiCorp. The next dam upstream is the Link River (ph)
19 Dam, which is the federal dam, which had a fish ladder that
20 didn't work all that well. And there are building a new
21 state of the art fish ladder there, and they have put
22 downstream fish passage facilities or screening facilities
23 on the A Canal. That was done by the Bureau of Reclamation
24 because we had to do so--it is a Reclamation dam. And
25 that's it in a nutshell.

1 There are some proposals in the license
2 application for downstream fish passage at J.C. Boyle and
3 that's it. But there are no specific proposals at this
4 point for upstream fish passage at Irongate.

5 CHAIRMAN MARSHALL: Chairman Marshall. Can I ask
6 a what might sound like a really stupid question, but why
7 would you put fish ladders on dams above the lowest three
8 dams that don't have fish ladders. Is there a--

9 MR. MUDRE: Well, there are resident fishes--

10 CHAIRMAN MARSHALL: That go?

11 MR. MUDRE: In that stretch that move upstream
12 and downstream. The suckers--some of the suckers. The
13 trout. And maybe, you know, the thought was that at some
14 point there would be downstream fish passage, you know,
15 facilities, so you would already have your facilities at the
16 upstream dams.

17 MR. HIGGINS: Patrick Higgins. They're in
18 Oregon. Oregon requires fish passage over any dam that's
19 built, period. California was mushy. That's why Kauco (ph)
20 was originally built in California as opposed to Oregon.
21 And so it followed then that since Kauco was already in and
22 blocking fish passage, well then why would you provide it at
23 Irongate.

24 MR. JORDAN: Just to follow up--Danny Jordan. A
25 follow-up question of Chairman Marshall's. Has there been

1 any analysis done on the effectiveness of those fish
2 passage--from J.C. Boyle, Keno, and Link?

3 MR. MUDRE: Yes. And there are reports that
4 PacifiCorp has provided that look at, you know, there are
5 fish passage studies for different facilities. I think the,
6 you know, Cal Fish and Game and Oregon State biologists have
7 also done some of their own analyses as to, you know,
8 whether those little fish passage devices are working
9 properly and there's a consensus among the agencies that
10 improvements, you know, could be made, particularly at J.C.
11 Boyle.

12 MR. JORDAN: And what--would they be compatible
13 with anadromous fish?

14 MR. MUDRE: I'm not sure. I don't--I guess I
15 haven't looked at it that closely to know. You know, when
16 you build a fish ladder, you have to consider what type of
17 fish you want to pass and, you know, and how many. And then
18 use that information, and, you know, sizing the facility--
19 the size and the type that you're going to build.

20 CHAIRMAN MARSHALL: This gentleman wanted to say
21 something.

22 MR. : I don't recall. But thank you.

23 CHAIRMAN MARSHALL: Let's go here first.

24 MR. HJORTH: Okay. Thank you. Doug Hjorth. One
25 of the issues that Boyle is being looked at now is there may

1 be a flow blockage--the channel configuration downstream at
2 the fish ladder is such that the combination of channel
3 constriction and flow that's forced through that channel may
4 actually be representing a barrier to upstream movement to
5 the base of the fish ladder. So one of the things that
6 we'll be doing in our analysis is not only looking at the
7 fish ladders themselves, but the approach to the fish
8 ladder. I can tell you that based on the records so far, we
9 would be looking at the effect on the fish ladders for not
10 only resident fish but anadromous fish. So what is
11 happening now probably focuses on resident fish. Our
12 analysis is going to be a little more long-term in nature
13 and we'd certainly be looking at passage requirements for
14 anadromous as well as resident fish.

15 CHAIRMAN MARSHALL: Do you have anything?

16 MR. MUDRE: I just going to add to that.

17 CHAIRMAN MARSHALL: Go ahead.

18 MR. MUDRE: John Mudre. Is that the Department
19 of Interior and Commerce do have authority under Section 18
20 to prescribe upstream and downstream fish passage
21 facilities, you know, as part of the licensing process.

22 CHAIRMAN MARSHALL: Mr. Higgins.

23 MR. HIGGINS: On the same issue, the National
24 Marine Fisheries Service did a study for fish passage. They
25 estimated roughly that it would be about \$130 million to

1 install ladders at Irongate and Copco Dams in order to pass
2 fish upstream in California. PacifiCorp has looked at this
3 from two angles--one is cost, which cannot be retrieved from
4 the operation of the project, and two, the efficacy of
5 restoring fish to the upper Basin, which they contend
6 there's no point in putting fish up there because the water
7 quality is so bad. I won't digress into that, but I will
8 point out that what John and the staff said at Quartz Valley
9 Indian Community and at Resighini is that just as the 401
10 cannot be modified by FERC as it moves forward, if National
11 Marine Fisheries Service stays with requirements for dam
12 fish passage that cannot be altered by FERC, and will have
13 possibly a great deal of bearing on whether or not the
14 company considers operation of the project in the future to
15 be cost effective or for them to go for after replacement
16 power costs that the California Energy Commission indicates
17 that it's likely that the replacement costs of them building
18 a co-generation facility or some other mechanism to build--
19 you know, to derive power would be substantially less than
20 the full encumbrance of all the costs associated with fish
21 passage and mitigation in that regard.

22 MR. JORDAN: Danny Jordan. I have a question
23 about the legal standard for fish passage. As we've been--
24 since 1918 that Copco was built. There was no mitigation
25 requirement for that. And so what in--has in effect

1 happened is that the mainly spring run has been eliminated
2 because of that. And it's solely because of basically
3 blockage of the river.

4 What is the legal standard on reintroducing a
5 species that was never supposed to be eliminated? Like I
6 say, is the standard that the fish are dead so we don't have
7 to mitigate now because they're long since gone, or that as
8 some of the--it seems to be the FERC requirement is to
9 protect the traditional species in that system.

10 So basically, the bottom line is the question is,
11 can FERC require the reintroduction of spring Chinook stock
12 or any fish that has been basically--above Keno--that has
13 basically been killed by a project or construction in 1918?

14 MR. MUDRE: Well, FERC can require measures, you
15 know, enhancement measures, protective measures, mitigation
16 measures, but I'm not sure in this case that FERC would want
17 to by itself decide, yes, we're going to require the
18 reintroduction of spring Chinook here, because I think from
19 our perspective, you know, they should be--it's a larger
20 issue than just FERC. If--we would certainly want to have
21 all the agencies that have some stake in the fisheries and
22 the tribes to--everyone be on board with, you know, this is
23 a good thing or this is a bad thing because, you know, there
24 are, you know, in theory things could go wrong with--you
25 know, you end up introducing disease or something else that

1 ends up hurting, you know, the fish that you do have. So
2 it's something that could be done. It may well be a good
3 idea, you know, but, you know, we'd like to see a consensus
4 and, you know, make sure that it--if we were going to do it,
5 we would want to make sure that it was a good idea.

6 MR. JORDAN: Nick, well from FERC's standpoint,
7 is that a part of the settlement agreement?

8 MR. MUDRE: We're not really a fishery--we're not
9 really a fishery management agency type thing.

10 MR. JORDAN: Yeah. But from FERC's standpoint,
11 is that a part of the settlement agreement or how--

12 MR. MUDRE: It could be a part of the settlement
13 agreement.

14 MR. JORDAN: Would you--because absent an
15 agreement among management agencies, then it would be left
16 up to FERC to make that decision.

17 MR. WILSON: Not exactly. As folks have
18 mentioned, there's Section 18 of the Federal Power Act, and
19 the fishery agencies--U.S. Fish and Wildlife Service
20 primarily for resident fish and NOAA fisheries for
21 anadromous fish--could submit conditions to FERC which we
22 would--that are supported by substantial evidence need to
23 include in the license and thus provide for fish passage.
24 John's point I think was correct that the situation, Danny,
25 is really kind of more--it's complex. You asked for a legal

1 standard, and one that I think we can offer to you in sort
2 of our NEPA review is FERC uses that as its baseline for the
3 NEPA review the existing environment. And so the--I think
4 consequently the environment that we would be using for our
5 NEPA review would not include spring Chinook above the dams.

6 But we would use historical information about what used to
7 be there as a part of our analysis. And so, all of that
8 kind of comes together with your fishery agencies who would
9 like to see passage, to expand it and improve the health of
10 the habitat and all the responsibilities of all these
11 federal agencies to provide for the choice fisheries. You
12 can see all those things coming together probably in license
13 in one form or another address to address the fishery
14 issues.

15 MR. MUDRE: I mean, even--even if there wasn't a
16 settlement agreement, the agencies in, say, their 10J
17 recommendations could recommend that, you know, spring
18 Chinook should be reintroduced into the Basin and that sort
19 of thing. So that's--you know, that's a way of getting the
20 information to us that they think it's a good idea. I don't
21 think that restoring fish stocking would be something that
22 could be done under Section 18, because it's not really a
23 fish passage requirement; and it would seem to me, and I'm
24 not a lawyer obviously, that that would be something that
25 couldn't be done under Section 18. But there are the

1 mechanisms where that, you know, where that could happen.

2 MR. HURLEY: Grett Hurley. I think you could be
3 done under Section 18. It's like Fish and Wildlife Service
4 and NOAA Fisheries could, you know, want fish restored to
5 its historic reaches.

6 MR. MUDRE: Yeah.

7 MR. HURLEY: You know, which would sanction it
8 further up.

9 MR. MUDRE: But if the fish isn't there--

10 MR. WILSON: Yeah. A lot of them--

11 MR. HURLEY: I mean, it's there. Just not as
12 many.

13 MR. MUDRE: Yeah.

14 MR. HURLEY: Not as many.

15 MR. WILSON: John is correct that Section 18
16 talks specifically about passage facilities. It's not
17 necessarily concerned with what species and where, but sort
18 of the larger environmental make up of the license,
19 including 10J and 10A recommendations. That would have to
20 do with things like mitigation, providing for seed stock,
21 and things like that.

22 MR. MUDRE: Yeah, they--they just can specify
23 which species that you need--they need passage for, but
24 again, I don't think they can--you know, they can't require
25 that, you know, the stocking of that fish into the river.

1 It would not be a fish passage.

2 MR. HIGGINS: I have a point of clarification.
3 Pat Higgins here. I'm one of the assumptions here, and that
4 is that you would have to physically reintroduce them,
5 Danny.

6 MR. JORDAN: Sure. Sure.

7 MR. HIGGINS: There are spring Chinook despite
8 the lack of any obvious habitat capability above Issue Falls
9 (ph) that jump the falls all summer long. Those are spring
10 Chinook. They are a remnant run. There is something called
11 metapopulation function, where salmon actually--while they
12 are really noted for their homing ability, they also have
13 something that actually has been recently noted in the
14 Klamath, and that is this--they move around. And it's
15 called metapopulation function. Essentially, the fish in
16 the Trinity, as they run into stress in the gorge by Burnt
17 Ranch (ph) have actually shown up with radio tacks in Blue
18 Creek and in the estuary. So they are actually--these fish
19 are moving around upstream and downstream hundreds of miles
20 when they're being caught in fisheries, ceremonial fisheries
21 largely, the Shapishi (ph) in the middle of summer, that
22 indicates that there is still some vital thread of spring
23 Chinook. Before the dam was put in the lowest one at
24 Irongate, there was sufficient springs just coming out of
25 the cliffs between there and Copco to maintain a remnant run

1 of summer steelhead and spring Chinook, and I believe that
2 if those dams were removed and access to those what are
3 considered as what Mike and George and I would call refugia
4 (ph)--co-water areas of extraordinary good health, because
5 the water is coming right out of the cliffs right there,
6 that those populations, to some degree, would reestablish.
7 It's the contention of the--of others in the upper Basin,
8 particularly PacifiCorp, that the viability of habitats in
9 upper Klamath Lake and above would not allow spring Chinook
10 to be reintroduced at present. I think as a scientist I
11 would have to agree. But that doesn't mean that in a
12 hundred years, if we do the right thing and go more on
13 Indian time than on, you know, short-term scales, that those
14 fish would not reexplore and reestablish their distribution
15 in that region.

16 So I don't think, you know, you certainly
17 wouldn't bring fish from elsewhere. The springers were
18 showing up at the door of Irongate and trying to hang out in
19 the main stem, but as they tried to culture them in 1964,
20 '66, they didn't have the facilities to hold them. I mean,
21 that--today, we take fish in like that and create conditions
22 for remnant populations like the winter run on the
23 Sacramento at tremendous public expense, but at that time
24 they just jumped up the ladder and died in the tanks.

25 So those fish are still around, and I wouldn't go

1 with the default assumption that fish passage itself would
2 remedy the problem of their reestablishment by and in
3 itself.

4 MR. JORDAN: And let me clarify that. I didn't
5 mean that we have to actually physically take--truck some
6 eggs or whatever up there, but it's real obvious that
7 complete blockage of their system that fish cannot possibly
8 get beyond is a problem for the fish. And it's--we're
9 never--and if we simply removed the obstacles to make fish
10 passage adequate, it very well could bring back those viable
11 stocks.

12 MR. STEWARD: Cleve Steward. How far up does
13 Coho historically run?

14 MR. HIGGINS: Coho are well known to have run up
15 as far as Shovel (ph) and likely up to Spencer Creek, which
16 is in the vicinity of J.C. Boyle Dam.

17 MR. STEWARD: Okay. Well, another way to get at
18 this is through the Section 7 consultation and the terms and
19 conditions are reasonable and prudent alternatives that are
20 part of the biological opinion. The National Marine Fishery
21 Service and Fish and Wildlife Service can specify that in
22 order to restore--recover Coho and protect against--protect
23 the population against jeopardy, fish passage and
24 recolonization efforts be implemented as part of their
25 license.

1 MR. HIGGINS: And I wasn't try to--what I was
2 basically trying to do is find out what FERC needs for the
3 license purposes that provide for these kind of tribal needs
4 and tribal concerns, but it sounds like what you need is the
5 information from the other agencies to be incorporated into
6 that--a lot of which has already been done.

7 MR. WILSON: Well, and some of that information,
8 Danny, could come from the tribe itself. Under Section 10A
9 of the Federal Power Act, the tribe can submit
10 recommendations based on information that you all may have
11 about the fisheries or your desires for future fisheries.
12 So there is lots of ways that could come out.

13 MR. ORCUTT: Just Mike Orcutt. A follow-up minor
14 question, but does that--those other provisions of Section--
15 I guess you're talking about Section 18 include state
16 agencies and what authority do state agencies have to make
17 any recommendations as far as passage, reintroduction or any
18 of those two issues?

19 MR. WILSON: It depends on the state you talk to.

20 MR. MUDRE: Yeah, but they don't have Section 18--
21 --nor authority under Section 18--

22 MR. ORCUTT: So there's no specific authority
23 under the Act, but they--

24 MR. MUDRE: Some states have their own laws as to
25 fish passage in dams, as Pat alluded with Oregon.

1 MR. WILSON: There is some question as to--well,
2 some states will tell you there's some question as to
3 whether the Federal Power Act preempts state authority to
4 have its own fish passage law. In the Federal Power Act,
5 which federal entities would probably tell you governs all
6 of this process, Fish and Wildlife Service and Department of
7 Commerce are the two agencies that have the authority to
8 provide fish passage. I think it's possible for you to see
9 a state trying to prescribe fish passage under their own
10 state law or potentially as a part of a 401 permit, where a
11 tribe is a part of a tribal 401 and the tribe has such
12 authority. So there are a number of ways you could see that
13 sort of thing come forward. The most sort of legally solid
14 one is Section 18 of the Federal Power Act.

15 MR. ORCUTT: In the federal agencies--fisheries.
16 Okay.

17 MR. HJORTH: Thank you. Doug Hjorth. One of the
18 things you've got to remember, though, is that in order to
19 submit a Section 18 fish way prescription, the prescribing
20 agency also needs to submit an administrative record, which
21 is subject to public comment. A lot of times--or most times
22 what they will do is offer a preliminary prescription with
23 their administrative record on that to date, and solicit
24 public comments; and that would be an opportunity outside of
25 the growth proceeding for folks such as the Tribe to make

1 comments on those prescriptions in draft form. A lot of
2 times we will see those preliminary prescriptions, but they
3 are not yet final, and then they either--NOAA Fisheries or
4 Interior will issue a final fish way prescription, and that
5 is what we have no authority to change. But it has to have
6 addressed the comment received and those need to be part of
7 their administrative record. So such issues as will
8 restoration introduce passage and the disease upstream and
9 possibly affect native populations.

10 I would think those would all be addressed in
11 that administrative record for fish ways and allow us to
12 incorporate that information into our NEPA analysis
13 hopefully.

14 So there is a process for comments to be made and
15 respond to concerns that others have raised on restoration
16 of anadromous fish to their historical range on the Klamath.
17 So the administrative record is an important element, and it
18 is--has been required based on previous court proceedings.

19 MR. JORDAN: Just a clarification on something.
20 John said that--if I interpreted it right--that the Federal
21 Power Act doesn't necessarily require replanting or
22 restocking, but it requires fish passage. Is that?

23 MR. MUDRE: Well, no. I think what I said was
24 Section 18 of the Federal Power Act allows the Interior and
25 Commerce to provide--prescribe fish passage measures.

1 MR. JORDAN: Okay.

2 MR. MUDRE: So there's been argument over the
3 years is what is a measure and what isn't a measure. Like
4 is a study of effectiveness is that measure. And so the
5 courts have made determinations on that. I haven't seen
6 anywhere where restocking of fish has been determined to be
7 a fish passage measure.

8 MR. JORDAN: Okay. But if it is outside of fish
9 passage, and FERC is limited to fish passage basically--

10 MR. MUDRE: Well, no. FERC isn't limited to fish
11 passage.

12 MR. JORDAN: Okay. But my question is why would
13 then PacifiCorp be allowed to use other environmental
14 concerns about the survival of fish outside of the project
15 as a reason for not requiring fish passage in the license
16 itself. Isn't--it seems like you couldn't--

17 MR. MUDRE: Well, yeah, I mean, the Commission
18 has to look at all aspects and balance different resources
19 against others. We could require a fish passage measure at
20 X dam. But if we thought it was going to be very expensive
21 and wouldn't do any good, then why would we do that?

22 MR. JORDAN: But isn't that at determination by
23 another agency, whether it be State of California, Oregon
24 Fish and Wildlife, National Marine Fishery Service, or
25 tribes?

1 MR. MUDRE: I don't think I understand your
2 question?

3 CHAIRMAN MARSHALL: Chairman Marshall. Maybe I
4 can help. You said earlier state agencies have the
5 authority to add provisions to the license. State agencies
6 said fish passage is in the license. Does that become
7 subject to--

8 MR. MUDRE: I think I have seen fish passage
9 facilities as part of a 401 water quality certificate.

10 MR. HJORTH: I think they've tried that before.

11 MR. WILSON: They have some authority to require
12 fish passage. It's--there's some legal question as to
13 whether they can really do that. If they were to do it,
14 they would try and do it under the Clean Water Act, Section
15 401 Permit, whose--which permit we have to include in our
16 license regardless of what the state has to say. The other
17 thing is there are a few states, maybe one state, that has
18 its own fish passage state law, and they could try to
19 require us to include that into a license. Again, some of a
20 legal question as to whether they can really do that or not.
21 But Section 18 of the Federal Power Act definitely allows
22 U.S. Department of Commerce and Fish and Wildlife Service to
23 put into a FERC license the requirement for fish passage.

24 Danny, I wanted to get back to a question that
25 you were asking.

1 MR. STEWARD: Can I fill in the blank?

2 MR. WILSON: Yeah. Sure.

3 MR. STEWARD: In the instance that you cited
4 where a state tried to impose fish passage conditions as
5 part of the 401 certification, was that in California?

6 MR. WILSON: I don't know.

7 MR. MUDRE: No that specific example.

8 MR. STEWARD: How did the agency respond to that?

9 MR. MUDRE: They get creative with the 401 water
10 quality condition sometimes and try to put things that, you
11 know, to us initially at first glance didn't appear to have
12 anything to do with water quality. But it seems that the
13 courts have been giving--recently have been giving them
14 great, you know, leeway in what they can include in the
15 water quality certificate. I don't recall the specific
16 license where they've tried that, so I don't know--I can't
17 tell you--

18 MR. STEWARD: Okay.

19 MR. MUDRE: You know, the outcome of that. But if
20 it is--if it is in the water quality certificate, we really
21 don't have the ability to challenge it. Now, the applicant
22 again can challenge it in the process where they, you know,
23 the 401 certificates also have their own little process, and
24 they can be administratively challenged as well. But it's
25 not part of the FERC proceeding. It's outside of that.

1 MR. WILSON: I recall--I wanted to highlight
2 another opportunity for tribal involvement in the process.
3 Doug was talking about the administrative record for the
4 various agencies' conditions. Some of you may know this
5 already. The Departments of Interior and Commerce go
6 through what they call the mandatory conditions review
7 process, and so where they will be submitting conditions for
8 inclusion in the FERC license, they do that first as
9 preliminary conditions, and they'll do that in response to
10 the ready for environmental analysis notice. The
11 preliminary conditions are supposed to come out 60 days
12 after the REA. And they request comments on them. The
13 tribe can submit comments, can work with your trustees at
14 those agencies to let them know how you feel about the
15 conditions, and then I don't remember the exact timing, but
16 then sometime later they issue final conditions. It can be
17 hard to track down the mandatory conditions review process
18 because it was--when initially implemented only implemented
19 as policy. But it's recently going through a rule making
20 procedure. There's a notice of proposed rule making which
21 you can find in the Federal Register, and it will describe
22 for you well I think the current process, which is not in a
23 rule making.

24 It also, just to note for you, contemplates an
25 appeals process for mandatory conditions within the

1 Department of the Interior. And there is--in the proposed
2 appeals process, you're not just strictly talking about a
3 legal opportunity for the tribe to get involved in an
4 Interior rule making. In the appeals process for mandatory
5 conditions, there is some--the process Interior has laid out
6 allows for some tribal involvement in that. If you all have
7 comments on that process that's been laid out, again that's
8 David Diamond--build that shop at Interior, and they would
9 be interested to hear I think how you all feel about sort of
10 the conditioning process that they propose.

11 So, in case you didn't feel you had enough to
12 deal with the state and the 401, you probably should be
13 working closely with Interior and Commerce agencies as they
14 develop their conditions at least the--

15 CHAIRMAN MARSHALL: Do they coordinate those--
16 Commerce and Interior?

17 MR. WILSON: Do they coordinate their conditions
18 with each other? There is a--

19 CHAIRMAN MARSHALL: Evaluations?

20 MR. WILSON: I'm sorry.

21 CHAIRMAN MARSHALL: Yeah.

22 MR. WILSON: Yeah. There are some documents. I
23 think they're called ITFs. Interagency Task Force documents
24 that was done in kind of the early 2000s, and there's agency
25 policy on working together, on coming up with their

1 conditions and their information.

2 MR. HIGGINS: Interestingly--Patrick Higgins. On
3 the Klamath side, with PacifiCorp, they have been kind of
4 very inclusive, and all the parties to discussions have also
5 met separately under something called the TANGO--Tribes,
6 Agencies, and NGO's. And so there has been--in this case,
7 an inordinate amount of communication between fish and game,
8 Indians, and all the various parties from the various
9 agencies, and it has had--been highly beneficial in terms of
10 them kind of understanding the project overall from their
11 different perspectives. And so there may be quite a bit of
12 input from fish and game. While they may not have no
13 authority, they may have had substantial influence on dams
14 in terms of their decision for fish passage.

15 MR. MUDRE: And John Mudre. And the importance
16 of cooperation between the agencies is probably easily seen
17 by the two biological opinions that the Klamath Project--
18 Irrigation Project--where NITS (ph) required high flows
19 downstream. Interior required high levels--lake levels in
20 Upper Klamath Lake, and, you know, the two have sort of--
21 work against each other. And in that instance, it was the
22 irrigators that, you know, that paid the price there in
23 terms of they are the ones that had to give the water so to
24 speak so that both biological opinions could be satisfied.

25 MR. STEWARD: Cleve Steward. Is your agency

1 participating--have you formally initiated consultation with
2 the service agencies? Do you anticipate doing that or sort
3 of leaving it up to PacifiCorp, and will that process be
4 completed prior to issuance of the new license?

5 MR. MUDRE: Well, obviously, we need to comply
6 with Section 7 of the Endangered Species Act, which is the
7 interagency consultation. We have a discretionary act, and
8 we have to, you know, we have to comply with the law. So we
9 will be consulting with NIMPS (ph) and with Interior with
10 respect to endangered species that may be affected by the
11 project o the issuance of a new license.

12 MR. STEWARD: Would that take place before the
13 license is issued?

14 MR. MUDRE: We'd like to have consultation
15 completed before issuance of a license. There's been a few
16 instances where it was taking a very long time to get a
17 biological opinion, and we issued license that said
18 basically--that left a provision that said, well, you know,
19 when a biological opinion is issued that, you know, we'll
20 add some conditions to make sure that, you know, that our--
21 that we do need to do under ESA. So the conditions were
22 added to protect endangered species after the issuance of a
23 license. But our preference is to do it beforehand.

24 CHAIRMAN MARSHALL: Bob.

25 MR. HJORTH: Thank you, Chairman Marshall. I

1 guess I can't speak whether Interior and Commerce or NOAA
2 Fisheries will coordinate the fish way prescriptions. I
3 have been involved in a number of projects where both are
4 heavily interested in them, and I've never seen a case where
5 one has issued a prescription that may be in conflict with
6 another. Usually, they will get together, file a unified
7 fish way prescription, if that's what they chose to do, and
8 I have seen them work it out amongst themselves as to which
9 agency will take the lead in prescribing the fish way. I've
10 never seen a case of--or I'm personally not aware of a case
11 where they would not coordinate their fish way
12 prescriptions. Again, you know, whether that continues in
13 the future is unknown, but it's obviously in their best
14 interest to coordinate such a major event as a prescription.

15 MR. WILSON: Okay. I was going to say the ESA
16 Section 7 process can be like the 401 permit process. In
17 this case, the State of California wants as much information
18 as it can possibly get before it makes a 401 permit
19 decision.

20 Similarly, the ESA agencies like to have
21 something close to what the final license is going to look
22 like before they feel like they can undertake their ESA
23 processes.

24 So a lot of people want the information, and then
25 a lot of stuff ends up getting crammed in at the end of the

1 process. The trick is to figure out how to engage people
2 ahead of time and get them to--work there--as the process.

3 MR. HIGGINS: There is--Patrick Higgins. There
4 is quite a bit of paper trail from the agencies in the
5 PacifiCorp final license agreement. So their positions are
6 fairly clear and well staked out.

7 MR. JORDAN: Mr. Chairman? Danny Jordan. I have
8 a question about the length of the license. I know that
9 there is a--everything that we've seen is up to 50 years.
10 We haven't seen any--we know that there's a typical standard
11 on it, but the original license that was issued was--
12 extended for long-term--30, 50 years whatever--for the
13 purpose of repaying. That's not what we have here now
14 absent--

15 MR. MUDRE: Correct.

16 MR. JORDAN: Any new cost of the fish passage,
17 which must be paid for--

18 MR. MUDRE: Right.

19 MR. JORDAN: Which may affect the term. But is
20 there--how much flexibility both in a typical contract, but
21 also under the legal minimum I guess how long can these
22 contracts be issued?

23 MR. MUDRE: Well, John Mudre. The Commission has
24 authority to issue licenses with terms ranging from 30 to 50
25 years. You know, a lot of times with, you know, original

1 licenses, as you mentioned, they are given 50 year terms
2 because they need the time to recoup in their investment and
3 all that sort of thing. But on relicensing, it's a little
4 bit different. If it's the relicensing of project, it
5 basically says, you know, continue to operate the project as
6 you have been with, you know, maybe minimal enhancements and
7 things like that. The standard is a 30-year license. If
8 there's major, major additions or expenses with regard to
9 mitigation measures, you know, it could be 50 years again.
10 If it's somewhere in between, it could be 40 years. So we
11 sort of look at, you know, how much additional expense or
12 measures or things like that are involved and then base the
13 license term on that.

14 But again, the standard is 30.

15 MR. JORDAN: Is there a--

16 MR. MUDRE: Sometimes we do like a 33 year or a
17 37 year if we wan to try to make projects in the same basin
18 have licenses expire at the same time so that the next time
19 that the relicense it--you know, you're looking at--maybe
20 you're looking at the whole river basin rather than, you
21 know, one project in it. So when possible, we will try to
22 set the license terms so that, you know, it will expire at
23 the same time as another one in the watershed.

24 MR. JORDAN: Is that a minimum legal standard?

25 MR. MUDRE: Which?

1 MR. JORDAN: Set out in the Federal Power Act?

2 MR. MUDRE: The 30- to 50-year part is.

3 MR. JORDAN: Okay. Because--

4 MR. MUDRE: So we couldn't do a 28-year license.

5 MR. JORDAN: There's been some discussion on the
6 tribal side, not just with Hoopa but the other tribes, about
7 what could a decommissioning contract provide, and there's
8 discussion about--and we understand there are methods of
9 designing a license where you could actually allow for a 10-
10 year period or whatever to generate the revenues to
11 decommission the dam. But how are they integrated, and are
12 they, in fact, 10-year contracts at license as opposed to
13 30?

14 MR. MUDRE: Well, I haven't seen one set up that
15 way. Licenses can be surrendered, so, in theory, you know,
16 after 10 years, they can say--well, you know, we want to
17 surrender this project and not operate it anymore. So that
18 would be a way that, you know, conceivably the project
19 operation could end at--you know, after a shorter period of
20 time than the 30 years. A lot of times, though, when we get
21 surrender applications, we will--I think, you know, maybe
22 ask that--you know, if there's any other people that are
23 going to take over the project or something like that, which
24 would sort of defeat the whole purpose.

25 MR. JORDAN: So in these settlement discussions

1 with PacifiCorp, if there could be an agreement on one, two,
2 three or six--whatever--dams that would be decommissioned,
3 and there's an agreement that in 10 years that those--
4 Irongate, for example--would be removed, is it my hearing
5 that FERC would not have the legal authority to enforce that
6 if it's less than operation of a 30-year contract?

7 MR. MUDRE: Well, no. If it's--if it's just one
8 dam, part of the development, I think that could be done.
9 It's when you get to there's no more project, you know,
10 there's no license anymore. We couldn't--I'm not aware of
11 any specific cases where this has happened, but I know it
12 wouldn't be a problem to take out one dam, 'cause I mean
13 that could be done as a license amendment.

14 MR. JORDAN: Well, how would--

15 MR. MUDRE: In that matter, too.

16 MR. JORDAN: Is--this license is for all six
17 dams.

18 MR. MUDRE: Right.

19 MR. JORDAN: There's a single license. How would
20 you deal with the individual, because each one has its own
21 requirements from a biological standpoint, environmental
22 standpoint. So how would you actually integrate individual
23 requirements for each operation, each site, an entire
24 contract. Is that actually how it's done or is it just one
25 license?

1 MR. MUDRE: It's one license, but there are
2 different requirements for the different developments.

3 MR. WILSON: I don't have a lot of talk with--

4 MR. MUDRE: Yeah. Like, you know, this
5 development had a minimum flow of, you know, 200 CFS,
6 whereas this one, you know, has 400 CFS. So I mean, you
7 know, there--one license describes how the whole project
8 operates.

9 MR. JORDAN: So it's conceivable that there would
10 be a provision that says decommission Irongate within 10
11 years or something like that?

12 CHAIRMAN MARSHALL: Chairman Marshall. Can you
13 clarify decommission? Does FERC have the authority to order
14 dam removal? Is decommission the same as retire or is
15 decommission removal?

16 MR. MUDRE: It could be either way. You could
17 have decommissioning or retirement, you know, with or
18 without dam--you know, being left in place.

19 Obviously, if we were going to de--

20 CHAIRMAN MARSHALL: So FERC has the authority to
21 order removal?

22 MR. MUDRE: That's my understanding.

23 MR. JARNAGHAN: So if a license was surrendered,
24 there would be no requirement of decommissioning for certain
25 or--

1 MR. MUDRE: It has to be--it would be looked at,
2 and the determination would be made as to--you know, is it
3 in the public interest to have this dam removed or--and I
4 mean, there may--you know, in other cases, and there may be
5 a good reason to leave the dam there if it's on, say, a big
6 water supply.

7 Let me raise one other option that we haven't
8 really discussed yet. And there is another potential
9 outcome here, and that's called federal takeover of the
10 facility. That's something that instead of issuing a
11 license for a project if there's a federal agency that makes
12 a determination that they want to take over operation of
13 facilities and do with it what they want to, that's a
14 possibility. I don't think it's happened before, but there
15 are provisions for that. It hasn't happened in this case
16 that Reclamation or Interior said that that's something that
17 they want to do, but it is something that--it's a possible
18 outcome, and it may be a way of addressing some people's
19 concerns or, you know, better ensuring that what happens at
20 the Klamath Irrigation Project and what happens these six
21 dams has been integrated as a baseline type of approach.

22 MR. JORDAN: Danny Jordan. I just want to
23 clarify one thing, and I'm not even sure that this is even
24 feasible, and maybe this is not a discussion for here, but
25 maybe in another discussion, but another forum. But it is

1 conceivable to actually delicense each of these dams, drain
2 the reservoirs, and basically leave the gates open with the
3 dams there, and by doing that fish passage and reduce--
4 increase the water quality because you're going to have
5 reserve in it. Is that--it sounds like what you said is
6 that?

7 MR. MUDRE: Well, it's physically--I mean, you
8 know, it's technologically--I mean, it's possible. It's
9 something you could do. Whether or not it would be a good
10 thing to leave the dam there, I mean, I would be I would
11 think quite unsightly.

12 MR. JORDAN: But once the FERC--

13 MR. MUDRE: It's certainly a cheaper than taking
14 an entire dam out. It may be part of a phased strategy--

15 MR. JORDAN: Sure.

16 MR. MUDRE: You know, eventually removing the
17 whole thing.

18 MR. JORDAN: But once the license is withdrawn
19 and the operation cease to exist as a FERC project, FERC
20 itself would not have--

21 MR. MUDRE: Jurisdiction.

22 MR. JORDAN: Any responsibilities or jurisdiction
23 so the actual long-term fix for the dam--removal or
24 whatever--would be with other agencies?

25 MR. MUDRE: Well, the thing is when we do issue--

1 approve a surrender of a license, it comes with conditions.
2 And the surrender is not final until all of those conditions
3 have been met. So they would have a license, and they would
4 be under our jurisdiction until everything that they were
5 supposed to do has been done. So, you know, that prevents
6 what you were talking about.

7 MR. WILSON: Well, but one of those conditions
8 could be transferring control over what happens on the
9 project--

10 MR. MUDRE: Sure.

11 MR. WILSON: To some other entity.

12 MR. JORDAN: Sure.

13 MR. WILSON: For removal or maintenance or safety
14 operation or whatever.

15 CHAIRMAN MARSHALL: You want to say something?

16 MR. HJORTH: John Driftwood (ph) might come up
17 with the--there are conditions associated with any
18 decommissioning that the Commission has a limited experience
19 with ordering decommissioning, but it has been done, and
20 there are conditions associated with that. Those are
21 generally short--relatively short-term conditions that allow
22 for the safe dismantling if, indeed, the project facilities
23 are to be dismantled in an environmentally sensitive manner.
24 But the Commission would not allow an applicant to walk away
25 from a project and just let it go and whatever happens

1 happens.

2 CHAIRMAN MARSHALL: Do you have any examples of
3 where FERC has ordered the removal of a dam and for what
4 reasons?

5 MR. MUDRE: I'll let Doug answer that one, since
6 he was involved personally with that.

7 MR. HJORTH: Yeah. Doug Hjorth. Yeah, the one
8 that everybody refers to is the Edwards Dam case, which is
9 the lower most dam on the Kennebec River in Maine. I was
10 blessed with being the DPM on that project for the
11 Commission. And so, it was--a very difficult project to
12 work on in that you have to weigh the pros and cons of dam
13 removal, and in this case sufficient evidence in our mind
14 was presented to warrant dam removal. It's the first time
15 the Commission ever had a--ordered a dam removal against the
16 licensee's wishes. So there are there--there are voluntary,
17 you know, surrenders that have been made by licensees, but
18 this is the first case, and it's very unusual site-specific
19 conditions that led to that decision.

20 So the Commission I'm fairly certain would not
21 want everybody to say that this is a normal event in any
22 circumstance. But under highly unusual and site-specific
23 circumstances, it has been done. And the primary reason in
24 this case for dam removal was restoration of anadromous
25 fish. The key species involved were not salmon. They were

1 sturgeon. Federally listed short nosed sturgeon was the
2 key. There was no effective fish passage technology in
3 existence that would allow that to happen. And so that in
4 essence was the--one of the major drivers. There were a lot
5 of other factors that were considered in. But the answer is
6 yes. It was painful. I can tell you.

7 MR. WILSON: What's your--it's Rollie Wilson. In
8 this day and age, the Edwards case was some years ago. More
9 recently what you're more likely to see are dam removals
10 coming as a part of a settlement agreement. And you've got,
11 as in this case, a five or six dam project, and for economic
12 or mitigation reasons, it just starts to make sense to both
13 the licensee and the participants in the process to
14 negotiate removal of a few of the dams, and so that's--
15 there's a couple more recent events of those in the
16 Commission proceedings.

17 CHAIRMAN MARSHALL: Chairman Marshall. Of those
18 examples what was the conditions that convinced the licensee
19 that--what was the reason?

20 MR. MUDRE: Well, I can answer that. One of the
21 big problems that licensees have and the reasons that they
22 are willing to go to the settlement table is the mandatory
23 conditioning authority with the agencies. It's a very big
24 hammer, and, you know, if they want to get a--if they still
25 want to have a project that they can, you know, operate

1 profitably, you know, they are willing to concede part of
2 their project rather than get a set of water quality
3 certificate conditions that makes the entire thing, you
4 know, just a very bad deal for them.

5 So the mandatory conditioning authority is a
6 great--and the fact that FERC can change it is a big driver
7 to get these licensees to the table.

8 CHAIRMAN MARSHALL: It probably goes back to the
9 state agency and the 401 process.

10 MR. MUDRE: In that, and, you know, 4E conditions
11 sometimes as well. But 401 is a big--probably the biggest
12 one or the one that's been used most.

13 CHAIRMAN MARSHALL: Tom?

14 MR. SCHLOSSER: Tom Schlosser. One question I
15 had involves the government to government consultation that
16 we're doing right now.

17 MR. MUDRE: Did you have to wait 'til Rollie left
18 the room to ask that?

19 MR. SCHLOSSER: Sorry. I didn't see him leave.
20 But you know the answer to this.

21 CHAIRMAN MARSHALL: You want to wait. You want
22 him to come back?

23 MR. MUDRE: I mean, that's his bailiwick.

24 MR. SCHLOSSER: Okay.

25 CHAIRMAN MARSHALL: It's noon. You guys want to

1 take a five-minute, ten-minute break and--

2 MR. MUDRE: Yeah. That's fine.

3 CHAIRMAN MARSHALL: How about we ask this one
4 last question, and then we'll take a break and see what we
5 can do about lunch?

6 MR. MUDRE: Okay.

7 CHAIRMAN MARSHALL: Thank you for coming back.
8 Here comes the million dollar question.

9 MR. SCHLOSSER: Rollie. It's Tom Schlosser. I
10 was starting to ask a question about the government to
11 government consultation process. And I really appreciate
12 the effort the Commission is making today and visiting with
13 other tribes. But I wonder if you'd talk to us about where
14 we go from here, and about further government to government
15 consultation--you know, further points in the process of
16 which we should be expecting to do this or how we can make
17 it work best for both sides?

18 MR. WILSON: I don't think John and I did our
19 little two-man show on the FERC process. I guess you talked
20 a little bit about the REA notice coming out and the draft
21 environmental documents that will come out after that.

22 I'm sort of speculating a little bit, Tom,
23 because, as you know, this is a new policy for the
24 Commission. It's a--my position is a new position and how
25 we fulfill our tribal trust responsibilities as well as our

1 commitments to government to government consultation are
2 kind of all new endeavors for the Commission.

3 Just speaking then sort of based on what I could
4 imagine being good process. I suspect that because of the
5 FERC licensing process contains so many things that need to
6 happen, like the preparation of environmental documents, the
7 request for additional studies, I would recommend tying
8 future meetings with the tribe around those significant
9 mileposts, either before or after if the tribe was concerned
10 with how its comments got reflected in our environmental
11 documents or wanted to make comments to us before a document
12 was to come out. I would strongly suggest tying any sort of
13 future meetings around those documents.

14 And there may be other important processes in the
15 licensing process, like things that may happen under ESA or
16 in relation to state 401s.

17 As reflected in our tribal policy, we do
18 government to government consultation in something of a
19 tension with our other duties to carry out our quasi
20 judicial proceedings and comply with the Administrative
21 Procedures Act, due process, as well as our ex parte
22 regulations prohibiting off the record communications once a
23 contested proceeding is started.

24 Minn Hydropower we have been using the filing of
25 the license application in the filing of interventions by

1 all the parties, because usually all those parties have very
2 different views as to how the license application should go
3 forward. We've been using that as our point for when we
4 determine the proceeding to be contested. And after that,
5 we can't speak with any party off the record. It's both a
6 protect--a fairness issue for all the other parties, as well
7 as a protection for the parties because it ensures that all
8 the information that you give us goes on to our record and
9 can be used by the Commission in its decision making. If
10 you were to just give us a call on the phone and, you know,
11 give us all your comments over the phone, that kind of
12 individual conversation cannot be used by the Commission in
13 its decision making. So we do things like this. We have
14 public meetings. We can continue to do them in the kind of
15 atmosphere where it's a dialogue between us and the Tribe.
16 And any hopes that our general public would just be
17 observers. They wouldn't necessarily be participating in
18 the dialogue. But we need to do them in a way that complies
19 with our ex parte rules as well as our administrative
20 procedure obligations.

21 So I guess to get back to your original point of
22 moving forward, my preference in the federal government is
23 not to create additional paper. If the Tribe feels like a
24 consultation protocol sort of would best suit the Tribe in
25 its purpose, we can explore that option. But my feeling is

1 that we have a fairly well defined licensing process, and we
2 can use that structure to organize meetings around when the
3 Tribe feels it's important.

4 We want to be sure to plan ahead because we have
5 to give two weeks notice for these kind of meetings now that
6 it's a contested proceeding, and it's for--the public can
7 attend. We can set up the court reporter and so on. But I
8 would suggest using the existing structure and just making
9 sure that we keep in communication about when the Tribe
10 would like to meet in the future.

11 MR. MUDRE: Yeah, this is John Mudre. Probably
12 what we would--in a normal--our normal process, our next
13 round of public meetings would be to receive comments on the
14 draft environmental impact statement. So, I mean, but that
15 may be the next time to--that we can meet with you to get,
16 you know, get your comments on the draft EIS. I mean, if we
17 want to do--we could do it at our regular meetings, but if
18 that was important, then we needed to do it separately. You
19 know, we could look into doing that.

20 MR. WILSON: Excuse me. John makes a good point.
21 The future conversations between us and the Tribe doesn't
22 necessarily have to happen in a tribal consultation setting.
23 If the Tribe is comfortable bringing its issues to our
24 otherwise public meetings and discussing environmental
25 documents there, we can continue to dialogue with you in

1 those forums as well. But these meetings also not only are
2 helpful for you, but they're helpful for us, too, because we
3 want to carry forth our obligations to the Tribe and meeting
4 in kind of this more personal setting with you helps us
5 understand your concerns better and carry them back to D.C.
6 with us.

7 CHAIRMAN MARSHALL: Chairman Marshall. Could you
8 clarify when is--which agencies do the environmental impact
9 statement and when that's going to be--when that draft is
10 going to be scheduled?

11 MR. MUDRE: Right. We are--FERC prepares its own
12 independent environmental analysis to support the
13 conditions--the Commission's licensing decision. So we are
14 the ones preparing, along with our support contractors, the
15 environmental impact statement.

16 As to when, you know, when that is going to hit
17 the streets, we don't know that date with certainty at this
18 point. We have--there's a couple of steps we have to take
19 first, and, as we discussed, you know, one of them is the
20 REA notice, ready for environmental analysis. When we issue
21 that, again, that will show our proposed schedule for the
22 remainder of the process, which will include when we think
23 the DEIS will be out; you know, when the comment period will
24 end; and when we'll issue the final EIS. So we'll let you
25 know. We just can't let you know today.

1 CHAIRMAN MARSHALL: Do you know the scope of the
2 environmental impact statement?

3 MR. MUDRE: Well, we have issued scoping document
4 one, and we have--we have six scoping meetings to get
5 comments on what people think is the appropriate scope of
6 our analysis. We are now--we've reviewed those comments,
7 and we're preparing scoping document two, which will be our
8 final statement as to what, you know, what we think we need
9 to--what we will be considering in the EIS.

10 CHAIRMAN MARSHALL: Mr. Higgins, does that
11 include the--some analysis of the remnant runs that you were
12 referring to and the possibility of the historical
13 anadromous runs reestablishing itself in this?

14 MR. ORCUTT: The FERC document is--

15 CHAIRMAN MARSHALL: If the passage was open?

16 MR. ORCUTT: The FERC document is responsive to
17 PacifiCorp's final license agreement. It's kind of like
18 PacifiCorp raised these issues. Now, FERC will come out
19 with a revised scoping that also includes that of other
20 parties. And so, but the first pass of their document was
21 not direct in terms of the way that it referred to
22 decommissioning. It didn't look like a major option. It
23 was in their document. And the issue of approved fish
24 passage was addressed but I don't think the reestablishment
25 of runs and the fish population function work.

1 Now, I also have to say that Mike and the Fish
2 Department have worked closely with the EUROCC (ph) under the
3 Fish and Water Commission, which I do not participate in.
4 And they may have comments to FERC and related to
5 PacifiCorp's FLA related to these issues. But the comments
6 I've helped to generate have not emphasized this except in
7 the Quartz Valley and Resighini, where they don't have fish
8 departments. So these issues are kind of handled by others.
9 So Mike and George may be more versed on that question than
10 I.

11 MR. MUDRE: But the main point is that we haven't
12 issued scoping document two yet. And we have--we've read
13 the scoping document to have said, you know, you also need
14 to do this beyond what you said you were going to do. And,
15 you know, we will incorporate those comments into SD2 and
16 address them there, and that will be our, again, our final
17 statement as to, you know, what we will plan on looking at.

18 MR. ORCUTT: This is Mike Orcutt. Oh, to
19 interrupt. Related to that discussion, it's good to hear
20 what some thought processes on where we go from here.
21 Within the notes that I had taken, I thought you said after
22 the--I mean, you know, if the REA is released, the
23 regulatory agencies have 60 days to submit draft Section 18.

24 MR. MUDRE: Yeah. It's still JA Section 18.

25 MR. ORCUTT: Yeah, all of those.

1 MR. MUDRE: Yeah, all the recommendations.

2 MR. ORCUTT: All of those license requirements--
3 draft license requirements. How would we participate in
4 that process because that seems like a pretty critical part--
5 --that will occur well before the draft EIS is done. How
6 could we facilitate that--would you anticipate the Tribe
7 having to consult with those two agencies individually to do
8 that versus?

9 MR. MUDRE: Well, you can do that. You can
10 respond directly to our notice requesting terms and
11 conditions and things like that as well. But, you know,
12 maybe it is to your interest to work with the states to make
13 sure that their recommendations are, you know, consistent
14 with what you want to see in there, too.

15 MR. ORCUTT: Well, just to clarify, and I was
16 really--the ones that I guess are critical from what I've
17 under--my understanding is the federal fishery regulatory
18 agencies and their draft conditions that will be out.
19 That's what I heard you say earlier: 60 days after the REA.
20 I guess that was what I'm thinking about.

21 MR. MUDRE: Well, that gives us something, you
22 know, to look at in our environmental documents. So, you
23 know, they serve as the basis for alternatives that we can
24 consider. You know, maybe we'll consider it, and, you know,
25 measures that could be incorporated into the license.

1 MR. WILSON: I guess what John is saying is that
2 there's two ways you can comment on the section that keeps
3 prescriptions, as well as any other recommendations or
4 conditions that come in to us after the REA. One is we will
5 be analyzing all those things in our draft environmental
6 document. And so kind of indirectly, you can comment on
7 them back through us. Another way is those agencies will be
8 going through their own processes, issuing drafts, taking
9 comments, and then revising them in both the Section 18
10 context, not 10J or 10A. Those are just recommendations.
11 But the 401 permitting process. That will go through a
12 draft and a final phase. All of those things will be
13 submitted to us on our formal record. And when those
14 agencies do that, they have to send out copies to the entire
15 service list, and I believe you all have intervened in, and
16 you've got your attorneys and your agencies on the service
17 list. So you should be receiving copies of all that stuff,
18 and I'm sorry to say it, but there's about three or four
19 parallel processes out there, not to mention if you all get
20 involved in the settlement discussion that you just sort of
21 need to pay attention to.

22 CHAIRMAN MARSHALL: We've ordered sandwiches so
23 maybe this is a good time to break. And if anybody's a
24 vegetarian, I may have to order salads from the deli, so let
25 me know.

1 MR. MUDRE: Do you have a feel for how much more
2 discussions we want to have or--we're willing to stay as
3 long as you want to talk to us. But just from planning
4 standpoint.

5 CHAIRMAN MARSHALL: We don't get any visitors, so
6 we'll just keep you here.

7 (Laughter.)

8 MR. MUDRE: Okay.

9 CHAIRMAN MARSHALL: If we could go off the
10 record?

11 (Whereupon, a recess was taken.)

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AFTERNOON SESSION

(12:20 p.m.)

CHAIRMAN MARSHALL: Yeah. You want me to say that again?

COURT REPORTER: Yes.

CHAIRMAN MARSHALL: Right before we broke, you guys were talking about a two-man presentation about the process, and we kind of covered it in pieces. Would you kindly briefly explain what the process is? We're now engaged in a process with PacifiCorp in negotiations. We've had the final, and we need to get all our--supposed to get all our stuff done. Can you explain your process and timeframe?

MR. MUDRE: Well, can we--let's see.

MR. WILSON: Whoops. I think what he's asking John is go ahead and be redundant. It's just sort of in a different context. Lay out what the FERC process is. What we've go to do.

MR. MUDRE: Yeah, we can do that. Just as background, the Federal Energy Regulatory Commission is composed of five commissioners that are appointed by the President, and confirmed by the Senate. I mean, you know the license application was filed in February of 2004. And we issued a notice that it had been filed. We issued subsequent to that a notice that accepting the application,

1 requesting the issues to intervene. We're preparing--we're
2 looking at the additional study requests that we've seen,
3 preparing additional information requests, and then the
4 process of preparing the scoping document two that we talked
5 about.

6 Once--well, we'll issue our additional
7 information request, which will have our revised schedule
8 for completing the license processing. And that REA notice
9 will be issued after we receive all the additional
10 information that we asked for. And then we'll begin in
11 earnest preparation of the environmental document that's
12 going to be the basis for the Commission's decision in this
13 matter.

14 CHAIRMAN MARSHALL: The scoping document is it
15 the second document?

16 MR. MUDRE: Scoping document two. Right.

17 CHAIRMAN MARSHALL: For public comment?

18 MR. MUDRE: No, it's not issued for--I mean, we
19 don't request comment when we issue it. We do that after we
20 issue scoping document one. You can send in comments, and
21 let us know what you think about it, but it's not--we won't--
22 --we don't request comments when we issue it.

23 CHAIRMAN MARSHALL: We won't do a scoping
24 document three?

25 MR. MUDRE: Yeah.

1 CHAIRMAN MARSHALL: Scoping document two will be
2 the last one.

3 MR. MUDRE: I won't incorporate any comments
4 until we receive those comments.

5 CHAIRMAN MARSHALL: Are we satisfied that it's
6 covering everything that we want to be scoped?

7 MR. MUDRE: Well, unfortunately, you haven't seen
8 the scoping document two, so you don't know. And we issued
9 scoping document one. We've received lots of comments, and
10 we'll be addressing the comments in scoping document two,
11 and then you can see, you know, which things we added to it,
12 and which things that we didn't add to it.

13 CHAIRMAN MARSHALL: Is that comment period
14 closed?

15 MR. MUDRE: Which comment period?

16 CHAIRMAN MARSHALL: For scoping one?

17 MR. MUDRE: For scoping one, yes. A long time
18 ago. End of July. And, but again, we got lots of comments,
19 written comments. Six scoping meetings, and lots of oral
20 comments, too. And, again, once we get all we need, we'll
21 begin in earnest the preparation of the draft EIS. And, you
22 know, we'll analyze the proposed action, you know, what
23 we'll call staff's alternative, which may include measures
24 that aren't being proposed by the license--by the applicant,
25 but, you know, either have been proposed by--some of the

1 names these are tribes or something we think of ourselves.
2 And then when that's complete, we issue the draft EIS, and
3 we'll have a--we're required to have a 45-day comment
4 period. For very long, involved EIS's we normally extend
5 that to a 60-day comment period to give everybody time,
6 because it's a tremendous amount of information, as you all
7 know. We'll get the comments back in from everyone, and
8 then address those comments in the final EIS. The final EIS
9 will be issued and again not requesting comments, but, you
10 know, make sure people can see what we've done. How we've
11 addressed our comments. And again, once the--you know, that
12 document is complete, then the Commission relies on it in
13 its licensing decision. Again, we do need to have a water
14 quality certificate before they can issue a license, so, you
15 know, we may need to wait around for that or it may be, you
16 know, some other time. Time will tell.

17 Depending on the outcome of the settlement
18 negotiations, this thing could take a different turn. If
19 we--if there is a settlement reached and we get it early
20 enough, you know, we could consider it in our draft
21 environmental impact statement. If it doesn't come in until
22 after that's issued, obviously, you know, we're--we can't
23 consider it. And that document in that case we'd consider
24 it in our final EIS, and we may request comments on the
25 settlement, we'd probably request comments on our analysis

1 of the settlement if the first time we looked at it is in
2 the final EIS.

3 And then having, you know, water quality
4 certificate we'll have done or hopefully will be done with
5 the ESA consultation. And, you know, at that point we're
6 ready to issue a license.

7 You know, we're behind. We published the
8 schedule initially in scoping document one I think that
9 showed license issuance in February of 2006, which would
10 have been at the time the old license expires. Looking at
11 this point, and they're not going to meet that schedule with
12 all the--extending the scoping period with the volume of the
13 comments and anything else we've got. But you'll see what
14 the new schedule is when we issue the additional information
15 request.

16 CHAIRMAN MARSHALL: Okay. So that's when we'll
17 know some specific times.

18 MR. MUDRE: Right.

19 MR. WILSON: I guess what I'd like to do is in
20 addition to what John has said highlight for you along the
21 way in different places that the Tribe can participate. Is
22 there something else you wanted to say, John?

23 MR. MUDRE: Doug reminded me that if the license
24 expires--old license expires before the new license is
25 issued, the Commission issues annual licenses for the

1 project. So they'll get an annual license to operate the
2 project under the same terms and conditions as the old
3 license. So--

4 CHAIRMAN MARSHALL: If we don't come to a
5 settlement agreement before--what is it? March 2006.

6 MR. MUDRE: Well, end of February--beginning of
7 March.

8 CHAIRMAN MARSHALL: Okay. February 2006.

9 MR. MUDRE: 28th. Yeah.

10 CHAIRMAN MARSHALL: And you'd issue an annual?

11 MR. MUDRE: Well, no, we would issue an annual as
12 soon as the old one expires if a new one hasn't been issued.
13 So maybe you've got a settlement into us, but we haven't had
14 enough time to look at it or we haven't finished our process
15 yet. There could any number of reasons why, but if--it
16 can't be operated without a license, so we have to--we
17 issued the annual licenses. And they have the same terms
18 and conditions as the old license.

19 MR. STEWARD: Cleve Steward. I hear what you
20 just said, but is it not possible to impose additional
21 conditions, for instance, mitigation that everybody,
22 including the licensee, agrees are a good idea as part of a
23 new annual, a renewed license?

24 MR. MUDRE: Of an annual license?

25 MR. STEWARD: Of an annual license.

1 MR. MUDRE: I don't think we've ever done that.
2 I mean there are certain things that the applicant and
3 licensee could do voluntarily, but it's pretty much
4 considered an administrative action in that we don't do, say,
5 an environmental document to support the issuance of an
6 annual license. And it's--we don't really consider it an
7 agency action from that standpoint either. So it's sort of
8 an automatic extension of the existing license is the way to
9 look at it.

10 MR. WILSON: There are instances where things
11 have carried on for so many years that people start talking
12 about interim conditions.

13 MR. MUDRE: Yeah.

14 MR. WILSON: And so there are a couple of those
15 where the Commission has requested interim conditions.
16 Those are pretty unusual. As much as any of us like to--do
17 not want to drag this out, if you start doing interim
18 conditions, that can change the biological opinions or the
19 type of analysis or ESA's of the deal, and so you kind of
20 want to get it done. You don't want to extend it too long.
21 But if you start trying to implement new things, you can
22 accidentally push the date out because agencies have to
23 reconsider stuff.

24 So it's--your sort of have to weigh your options,

1 and I think as the Commission helps get it done, which is
2 clear.

3 MR. MUDRE: That would be the ideal thing to do
4 is just get through the license issue as soon as we can.

5 MR. WILSON: So in the process that John
6 described--

7 CHAIRMAN MARSHALL: Or not.

8 MR. WILSON: Excuse me.

9 CHAIRMAN MARSHALL: Or not.

10 MR. MUDRE: Or not, yeah. Yeah. Sure. Sorry.
11 To make a decision as soon as we can. I said a decision.

12 MR. WILSON: So in the process that John
13 described, I'd like to hit a couple points where the--to
14 explain ways--ensure that the tribes can participate.

15 As John mentioned, we'll be issuing additional
16 study requests soon. They'll probably be opportunity in
17 those for the tribes to comment on additional information
18 that comes in from PacifiCorp. I don't know what actually
19 has been--what additional study requests may come out, but
20 there might even be opportunities for folks to work together
21 in producing that information. In other proceedings that
22 I've had experience in there's been some of that
23 opportunity. And then scoping document two will come out.

24 The next sort of really big thing is the draft
25 environmental impact document which everybody will want to

1 review; the tribes can comment on. And if folks feel it's
2 necessary, there could be additional tribal consultation
3 meetings at that time, too.

4 Oh, let me back up a second. Before that,
5 though, when the REA notice comes out, there's a 60-day time
6 period for conditions and recommendations to come in. The
7 tribe can submit recommendations under Section 10A of the
8 Federal Power Act to the Commission for how the project
9 should operate. Also your other federal agencies will be
10 submitting preliminary conditions. You'll want to talk with
11 those folks about those. And the state agencies may or may
12 not be issuing preliminary 401 permits at that time. And
13 you have the opportunity to interact with those agencies on
14 what they're doing in their 401.

15 In addition, apparently, there are settlement
16 negotiations going on. That's another place where the tribe
17 can be at the table and influence perhaps in the licensing
18 decision. I think it was mentioned earlier--I think that
19 one caution that I would throw out is even if there are
20 settlement negotiations going on, we still have an
21 obligation to complete our federal power process. And we
22 will need to do that whether or not a settlement is reached
23 or not. And so we will continue along with our steps in the
24 road. And so as the tribe is participating in settlement
25 negotiations, I would caution that you not forget about the

1 regulated FERC process. It can be difficult to do both at
2 the same time, but if the settlement negotiations fall apart
3 at the last minute, we'll still need to carry through with
4 our process, and you'll want to make sure that you'll have
5 all of your information submitted into our process. That is
6 the one that for certain will happen. The settlement could
7 come more, though, depending on how successful it is.

8 And then kind of getting back to what John said
9 after the license is issued there will be 60 days folks can
10 request for a hearing, and then after that licenses can be
11 appealed to the circuit court of appeals, so there is a
12 process even after license issuance. At that point, it's
13 kind of an agency deference type standard, so again early in
14 the process working with the state agencies and the federal
15 agencies is the time to really influence the process in
16 terms of the Tribe's concerns and issues.

17 MR. JORDAN: Just clarification. Danny Jordan.
18 You said appeal to the Interior Board of Appeals, is that
19 what you said?

20 MR. WILSON: What did I say--the Circuit Court of
21 Appeals.

22 MR. JORDAN: Oh.

23 MR. WILSON: Ninth Circuit, D.C. Circuit. But
24 the first step is rehearing before the Commission, unlike an
25 agency.

1 CHAIRMAN MARSHALL: So in the process that we're
2 going to go through in--in the process that we're going
3 through with PacifiCorp where you have all the federal
4 agencies represented and state agencies represented and the
5 two states, they're going to be provided--they're going
6 continue through the process of licensing at the same time.
7 So we're not--nobody's spending--nothing is halted in the
8 settlement negotiations. The process will be ongoing--

9 MR. MUDRE: Ideally, you know--

10 CHAIRMAN MARSHALL: So we should proceed as if
11 there is no settlement?

12 MR. MUDRE: Right. Until there is one.

13 MR. WILSON: Yeah, you got to kind of watch your
14 back door so to speak. The--what has happened in the past
15 if the settlement is near, sometimes you'll get some folks
16 higher up in the Department of Interior calling over to FERC
17 saying, hey, we got this settlement. It's really close.
18 You might get a phone call from PacifiCorp to the Commission
19 saying, you know, we're really close on the settlement. Can
20 you guys hold off your process for a while? And depending
21 on where things are at, maybe everybody will come to D.C.
22 and have a meeting before some of the FERC staff, some of
23 John's higher ups, and say can you guys pull off on your
24 schedule. We've got a settlement that's really close.

1 So depending on where you're at, we can allow for
2 flexibility, but at some point--excuse me--

3 COURT REPORTER: Could you make his mike closer
4 to the Chairman?

5 CHAIRMAN MARSHALL: I'll just talk louder. I'll
6 try.

7 MR. WILSON: At some point, we can exercise the
8 flexibility in the schedule, but also when it comes down to
9 did the license get issued or not, Congress looks to us for
10 that responsibility, and, you know, everybody is beholding
11 to Congress, so it can make sure that we're getting licenses
12 issued and making them happy with fulfilling our process.

13 MR. MUDRE: Yeah, the problem is sometimes the
14 settlements drag out and out and out, and we've had, you
15 know, licenses that are--applications that have been around
16 for 19, 20 years because we're waiting, you know, for a
17 settlement. And so at some point, they decided well, you
18 know, we're not going to assume that even though, you know,
19 say a settlement is imminent that, you know, that it is
20 actually is. So we continue our parallel process. We like
21 the settlements, but in most cases, you know, we're not
22 going to wait around for them. Granted that there are some
23 exceptions like Rollie said. I mean, it's not a hard and
24 fast rule, and we still do it, but the general rule is we
25 keep going.

1 MR. WILSON: One of the reasons why--

2 CHAIRMAN MARSHALL: Or not?

3 MR. WILSON: Mm?

4 MR. WILSON: Well, we have to do something.

5 MR. MUDRE: Yeah, we have to do something.

6 MR. WILSON: One of the reasons why we think it's
7 important to get the new licenses issued is the new licenses
8 being now 50 years later are dramatically different from the
9 existing license, and so it's important to us to get NEPA
10 review, get mitigation measures in place, and issue that new
11 license. And so if it does start to get 10 or 20 more
12 years, that's 10 or 20 more years where the project is
13 operated under the old standards and not the new ones. And
14 we'd like to bring all these projects up to date.

15 CHAIRMAN MARSHALL: Is it reasonable for us to
16 pursue a settlement that has a comprehensive proposal, a
17 adaptive management proposal. I mean, because--because this
18 project goes beyond the boundaries of the river, beyond the
19 boundaries of the dam, above and below, and extends across
20 two states. Is that something that we should be trying to
21 do in terms of coming--presenting you with a proposal that
22 you can put in a license?

23 MR. MUDRE: Well, it's probably in your best
24 interest. The thing is we have limited jurisdiction, so
25 what we see in settlements a lot of times there will be like

1 Appendix A or Part A and Part B, so the first part of the
2 settlement includes everything that they've agreed upon that
3 is under folks' jurisdiction. So we can incorporate that
4 part into the license. The second part, or Part B, would be
5 things the parties have agreed to that aren't within FERC's
6 jurisdiction. They may involve other things in the
7 watershed, for example, that we don't have any jurisdiction
8 over. We acknowledge, you know, that these things have been
9 agreed to, but we also acknowledge that we don't have any
10 jurisdiction over them and can't enforce them. But still,
11 if you've got the people to agree to it, and someone can
12 enforce it--you know, see--to enforce it.

13 CHAIRMAN MARSHALL: Are they enforceable by a
14 court? I mean, in terms of a contract--

15 MR. MUDRE: Yeah.

16 CHAIRMAN MARSHALL: And I see when the contract--

17
18 MR. WILSON: There is immense legal opinion about
19 that. In settlement discussions, a lot of folks raise the
20 contract idea. But there are also occasions where folks
21 have tried to take a law--I can't give you a specific
22 example, just things that I've heard in this context--we try
23 and take that contract to a district court, and they'll say,
24 oh, this is related to a FERC license. We can't touch this.
25 We don't have jurisdiction over those.

1 And so, you know, folks have different theories
2 on how to handle a settlement in the FERC context. And I
3 guess the best thing we can do is to turn you to your legal
4 counsel and get their best opinion as to what's the best
5 step to take, because it is not the clearest legal picture.

6 CHAIRMAN MARSHALL: Right. I think that goes
7 back to the question that Mr. Jordan asked. Is it important
8 to put in the dispute resolution clause or the right to sue
9 clause into the--can you put that into a FERC license?

10 MR. WILSON: We have dispute resolution in some
11 of our FERC licenses. I don't know about the right to sue--
12 those issues that you raised.

13 CHAIRMAN MARSHALL: Okay. The--one more and then
14 I'll let--because I'll forget it if I don't ask it right
15 now. And, you know, I just forgot it. Oh. Terms and
16 conditions. Because we're dealing--we deal with evolving
17 science and actually on the Klamath River side, they're
18 still developing science. The agreement is --comes up with
19 an open-ended term. It says salmon run in brood cycles of
20 four years. You want to look at least 12--I mean--excuse
21 me--at least 12 years or four broods--three brood cycles--
22 four is better--that kind of a stuff. Are those terms and
23 conditions that--have you seen anything like that in FERC
24 licenses that says the federal agency will develop--because
25 their decisions are based on science, but there has to be a

1 commitment by somebody to develop the science and that's
2 something we rely on.

3 MR. WILSON: There are studies, and I can think
4 of a couple off the top of my head, that you will see in
5 FERC license conditions. Maybe--maybe instead of a study,
6 you call it sort of experimental measures. We're going to
7 go ahead and license this thing, and then do a little bit
8 of, for example, geomorphology--gravel conditions around the
9 project to see if the salmon benefit from it, if they get
10 increased habitat. And you sort of see how it goes, and
11 then make a decision as to whether you should expand that
12 into a permanent program or you should stop it altogether.

13 Now, as you mentioned earlier, there may be some
14 question as to whether permanent expansion of in this
15 hypothetical example the gravel experiment can be covered by
16 the original NEPA document, and would you need to do a
17 license amendment or some sort of supplemental NEPA
18 document. All of those things are possible. It just kind
19 of depends on how much you can--what kind of energy you can
20 put into that original license.

21 CHAIRMAN MARSHALL: This guy right here.

22 MR. STEWARD: Cleve Steward. I'm aware of one
23 instance where a complaint--actually it went to U.S.
24 District Court--where there's a charge of lack of compliance
25 on the part of the licensee, and the court agreed, but

1 decided--declined to rule because they said it was FERC's
2 discretionary authority to decide whether a violation had
3 occurred. So FERC reserves the right to determine whether
4 compliance is met and the court defers to that. Does that
5 sound right?

6 MR. MUDRE: Yeah. Yeah.

7 CHAIRMAN MARSHALL: What do you?

8 MR. HJORTH: Yes, that there are many license
9 conditions that I can think of that allow for development of
10 science along the way. In some cases, Rollie mentions there
11 may be mixed interpretations of what a particular measure
12 might result in, and so to allow changes to be made, an
13 article and a license may say increase the minimum flow to
14 such and such; in the meantime, monitor whatever the
15 resource might be in the affected parameters that go into
16 monitoring that particular resource for a period of time
17 that makes some sense, depending on the resource. And after
18 that period, say seven years of monitoring, file a report
19 with the Commission, in consultation with appropriate
20 stakeholders, tell us what the results of that monitoring
21 resulted in, and any recommended changes to, in this case,
22 the flow regime. And they would file that recommendation in
23 their report to the Commission for approval. So that allows
24 for adaptive management to occur, for science to occur. If
25 the results aren't--if a measure is not clear from the

1 beginning of--the Commission may decide to hold off on
2 implementation of a measure until certain science studies,
3 evaluations occur, after which a recommendation would be
4 made based on the results of that evolving science. And
5 then the Commission would act on whatever the recommendation
6 of whoever the consulted parties would be.

7 So there are two different ways that might evolve
8 in a new license to allow for adaptive management, and one
9 of the recommendations after monitoring or evaluating for a
10 certain period might be implement such and such and then
11 continue to monitor for X period of time, and then file
12 another report, because, you know, maybe it's not going to
13 work as everybody thinks. Maybe instead of an enhancement,
14 it's really screwing the salmon population up even more than
15 it already is screwed up. And so it allows for--and that's
16 what I consider a good example of adaptive management that
17 incorporates science. It would normally incorporate
18 consultation with appropriate entities and allow for
19 recommendations to be filed.

20 CHAIRMAN MARSHALL: You said that--excuse me.
21 Rollie, you said that FERC acts a--has a quasi-judicial
22 function. And in hearing his comments, he says the courts
23 defer or courts say they recognize FERC's jurisdiction so
24 even in situations where a determination of whether or not

1 another agency is not complying with the terms of the lease;
2 is that correct?

3 MR. WILSON: I don't know that I'd go that far.
4 It's whether the licensee is complying with the terms of
5 the--

6 CHAIRMAN MARSHALL: Well, that--I'm trying to see
7 if they actually--well, you answered my question. It is
8 only over--it's only over the licensee.

9 MR. WILSON: I believe so.

10 MR. MUDRE: Although.

11 CHAIRMAN MARSHALL: And the court hasn't said-

12 MR. WILSON: A recent dispute resolution examples
13 in FERC licenses. We have enforced those against--other
14 people--just for the licensee.

15 Again, that's some sort of new thing and to the
16 extent that, you know, that's going to be sort of really
17 prominent or something that we're actually able to do with
18 this in the future.

19 But if folks, including other federal agencies
20 agree to sit together and work out problems in the
21 implementation of an ongoing FERC license, FERC has recently
22 adopted the position that we can at the very least require
23 all those agencies to come to the table and talk it out.
24 Now, I don't--that doesn't mean that we can require them to
25 implement anything. But in the license that they have

1 presented to us, they have said, we're going to get
2 together, and we can talk it out. And so if there having a
3 problem doing that, at this point in time, FERC has said to
4 them, hey, you agreed to go and talk it out, so now you've
5 actually got to go and do that.

6 CHAIRMAN MARSHALL: Did you have some questions?

7 MR. ORCUTT: I did. Mike Orcutt. Sort of
8 related to--I mean, it's a minor one, and it's--you said
9 after the 60-day REA that--I mean, you said after the REA,
10 the agencies--the section 18 ones can issue their draft
11 conditions. You said it's possible that the 401s could also
12 be draft to those released.

13 MR. MUDRE: The 4E's. 10 days.

14 MR. ORCUTT: Okay.

15 MR. MUDRE: You know, it's a wide number.

16 MR. ORCUTT: Oh, under these A's and 10A--

17 MR. MUDRE: Yeah.

18 MR. ORCUTT: Under the 10?

19 MR. MUDRE: And 10J's. 10A's.

20 MR. ORCUTT: And he mentioned that the state
21 possibly would--where would the Tribe fit into that, if the
22 Tribe has standing and they have the authority to grant the
23 certs. Where would you anticipate that? I guess I've heard
24 10A is what I've heard.

1 MR. WILSON: I guess to generalize, after we
2 issue our ready for environmental analysis notice, we give
3 everybody-tribes, states, federal agencies--60 days to
4 submit to us their recommendations, conditions, and so on,
5 because we want all that information so that we can then
6 assess it in our draft NEPA document. Everybody who's going
7 to submit that stuff to us, in that 60 days, does it under
8 various authorities. Federal agencies do it under Section
9 18 and 4E of the Federal Power Act, Sections 10E and 10J.
10 States and tribes do it under Section 10A. And it's
11 possible, although it doesn't seem likely in this case, that
12 the 401 certifications could come in around that time as
13 well.

14 MR. ORCUTT: So it's possible then--just to
15 follow up--Oregon might have a draft out. California might
16 have a draft out. And the Tribe would have an opportunity
17 to do a potential draft with their--

18 MR. WILSON: At the same time.

19 MR. ORCUTT: Yeah. One of the final one is just
20 an observation maybe more than anything. From what I've
21 heard, there are--really what incentive is there for both
22 the--mainly the applicant and then beyond that any incentive
23 for the agency or requirements for issuing a new license
24 with new conditions. Is that--I heard virtually nothing
25 there. You get into a situation, a scenario where it's

1 possible that you don't meet the timeframes. It's a done
2 deal that you're going to then renew that for an interim
3 basis--one year--and it could go on in perpetuity is what I
4 heard. There's--I guess I'm just wondering where is any
5 incentive is one question; and then beyond that, requirement
6 or obligation to complete that obligation?

7 MR. MUDRE: Well, we've heard from Congress in no
8 uncertain terms that, you know, licensing shouldn't take too
9 long. You know, it has taken long in the past. And our
10 Chairman has instituted a number of measures to streamline
11 the process and to put a lot of effort into getting license
12 applications processed in a timely manner. We just held I
13 guess the third of our annual workshops where we address
14 some of the older cases in front of the Commission. At the
15 beginning, they looked at all cases that were five years or
16 older. This year, since there weren't enough of those
17 around anymore, although the outstanding proceedings that
18 are three years or older received scrutiny at this workshop,
19 where you teleconference in the various parties and look
20 into what progress is being made and, you know, how can you
21 solve any impediments that might be in the way. We've also
22 developed in the last five or six years two new licensing
23 processes. You know, originally we had one, what's now
24 called the traditional licensing process. And I guess about
25 maybe seven years ago or so, we started this ALP or

1 Alternative Licensing Process, the goal of which was to sort
2 of streamline the process; get better conversations between
3 the agencies, the applicants; and more recently, you know,
4 in the last two years we've got the new or the once new
5 integrated licensing procedure process, which is another
6 effort to streamline the licensing process. It front ends a
7 lot of the NEPA work. Study plan development and things all
8 get agreed upon before the license application is submitted
9 with the Commission, so that is our incentive.

10 MR. ORCUTT: So just to clarify what I heard you
11 say then is the ones that five years were on the books, they
12 all got dealt with. So maybe as a maximum--

13 MR. MUDRE: There's still a few around, but yeah--
14 every year we look at them, and, you know, some get knocked
15 off. We get things done, but, you know, the number of--or
16 the number of older cases is steadily dropping, and the
17 criteria that we use to say whether something is old or not
18 has been dropped. So, again now anything that's been around
19 for two to three years or longer gets a lot of scrutiny,
20 gets a lot of light shed on it, and a lot of people working
21 on ways to get, you know, get it finished.

22 MR. WILSON: I guess I'd note for you, just for
23 your interest, this issue has also come up in the energy
24 bill that was proposed in the last couple of years. I have
25 no idea where that bill is at or what might happen to it.

1 You also would want to consider for yourself whether the
2 proposals in the energy bill relating to hydropower would
3 actually result in further streamlining or not. But that
4 issue is addressed in there, and if it ever reappears, you
5 may want to take a look at it and decide for yourselves
6 whether you think the new things being proposed would
7 actually make the process better or worse.

8 CHAIRMAN MARSHALL: Okay. Mr. Higgins.

9 MR. HIGGINS: Pat Higgins. The tribes
10 collectively--their water quality departments have been
11 party to discussion and have asked for additional studies.
12 Is it in the scoping two document that you will say which
13 studies should favor and must go forward and those that you
14 do not favor and why? Or is that a separate document?

15 MR. MUDRE: That will be a separate document.
16 You can see those--figure those out by looking at our
17 additional information requests and our response to
18 additional study requests. So you can clearly see which
19 we've adopted, which we've adopted in part, and which we
20 didn't think that we needed to have to license the project.

21 MR. HIGGINS: And those will be posted when?

22 MR. MUDRE: They should be out hopefully within a
23 month.

24 MR. HIGGINS: Thank you.

25 MR. MUDRE: So fairly soon.

1 MR. HIGGINS: Fairly closely to the scoping two,
2 but they're certainly--

3 MR. MUDRE: Yeah. Yeah. Yeah.

4 MR. HIGGINS: Thank you.

5 MR. WILSON: Scoping documents one and two are
6 really process documents. They're about describing the
7 range of things that we're going to look at. The additional
8 study request process is more of a substantive thing--the
9 actual nuts and bolts of what's being studied or not
10 studied.

11 MR. MUDRE: But they're all kind of tied
12 together.

13 MR. WILSON: Yeah.

14 MR. HIGGINS: Yeah. Yeah.

15 MR. STEWARD: You mentioned--Cleve Steward--some
16 pending or possibly to be introduced measures in the energy
17 bill. One I'm thinking of that came to mind when you said
18 that was where the utilities if they can come up with a
19 lower cost alternative that achieves or exceeds the
20 benefits, then your agency is obliged to permit those or
21 allow them to substitute those over the original proposal;
22 is that? I haven't been directly involved with--in this
23 type of thing, but I do recall reading something like that.
24 Is that an accurate description?

1 MR. WILSON: I guess I would--to get an accurate
2 description, I guess I would refer you to either your
3 congress people or the Thomas web site, where you can look
4 up back old bills. I do recall things in there like that,
5 as you mentioned. But again, with the new Congress, the
6 Administration's domestic priorities, other things going on
7 in the world and kind of how the energy bill fared in the
8 last couple of years, it could be that we're far away from
9 ever having to sort of think about that sort of thinking
10 again, but somebody raised a streamlining issue, and so I
11 just noted that there's another area that's being
12 considered.

13 MR. STEWARD: I just wondering whether you had
14 any other specific examples or knowledge of changes that are
15 in the offing?

16 MR. WILSON: Well, there's the energy bill, which
17 would amend the Federal Power Act to do these new
18 proceedings, whatever they might be.

19 MR. STEWARD: Okay.

20 MR. WILSON: But again, that could be far away
21 from actually ever being passed by Congress. But another
22 area is, as I mentioned before, the Department of the
23 Interior, the Department of Commerce--and I'm not sure
24 whether the Forest Service is involved or not--are going
25 through a rule making proceeding on what their agency

1 processes are going to be for submitting conditions to the
2 Commission. The Department of Interior and Commerce for
3 sure are going to formalize their mandatory conditions and
4 review process and agency regulations. And the Department
5 of Interior is also considering adopting an internal appeals
6 process for their mandatory conditions. And there are
7 provisions in there for tribal involvement. I suggest that
8 you all take a look at those and see what you think about
9 those processes and that they suit your needs. And, again,
10 that's a Department of Interior run thing. It's a David
11 Diamond and Bill Battenburg shop at Interior.

12 MR. JORDAN: Mr. Chairman? I just have two
13 questions. One is that can you direct us toward a 2A
14 license--that that should be look to language on dispute
15 resolution? And second, do you have any plans on
16 understanding that you got multiple management agencies here
17 all submitting comments. Some may conflict with one
18 another. Do you have any intention or plans on bringing the
19 government agencies together for a coordinated meeting or do
20 we do that separate, outside of FERC?

21 MR. MUDRE: Doug, are you aware of specific
22 examples.

23 MR. HJORTH: I guess that the example that I can
24 think of for dispute resolution that's incorporated into a
25 license primarily pertaining to settlements that are

1 incorporated into a license. I'm aware of several that do
2 have settlement or dispute resolution language in the
3 settlement. If the Commission accepts the terms of the
4 settlement and incorporates that settlement into the terms
5 of the license, then that dispute resolution process would
6 be part of the license.

7 Gosh, the Upper Hudson River Settlement Agreement
8 I'm fairly certain has distinct dispute resolution. El
9 Dorado is that in there?

10 MR. WILSON: My favorite is P dash 2030. It's
11 the Pelton Round Butte (ph) proceeding involving the Warm
12 Springs Tribes, involving General Electric. And I favor it
13 because I was working on that one.

14 MR. HJORTH: Are all these on the FERC web site?

15 MR. WILSON: Yeah.

16 MR. HJORTH: Okay.

17 MR. WILSON: And they can be a little difficult
18 to find, but give me a call if you want me to walk you
19 through the web site. And the Pelton one that I refer to
20 has not yet been approved, but they've filed the settlement,
21 and it is pending before us now. And there was recently a
22 Maine--Penobscot is it? I'm sure there's dispute resolution
23 proceedings in that one as well.

24 MR. HJORTH: Most settlements--Doug Hjorth. Most

1 settlements do have a dispute resolution provision in them.

2

3 MR. JORDAN: And then the other question was do
4 you have any plans on brining together the government
5 agencies to resolve any conflicts or to formulate any kind
6 of a single agreeable language that can actually be
7 considered in the license?

8 MR. WILSON: The agencies have already committed
9 to do that amongst themselves in the Interagency Task Force.
10 The Commission said to the agencies, hey, you can't give us
11 conflicting things. It makes this difficult for us to put a
12 license together and so the agencies said, well, we commit
13 to work it out before we ever submit it to you. So they
14 have a policy on doing that. And they're supposed to do
15 that. But again, there's a lot of agencies out there, and
16 it can be difficult to get everybody together. And I don't
17 know if, John, if you can think of any examples of this, but
18 I think it's possible for the Commission to get involved if
19 there is a problem or question to try and facilitate the
20 meeting.

21 MR. ORCUTT: But the interagency--just to
22 clarify--is probably federal and I'm not sure state, but
23 tribal agencies are not involved in the--

24 MR. JORDAN: That's what I'm wondering about.

25 MR. WILSON: True. It is just a federal

1 agreement. When I was involved in that, we brought in the
2 tribes and the states. Once we got all the federal heads
3 together, then we brought in the rest of the folks. But
4 you're right. It's a lot of people trying to sit around the
5 table.

6 MR. JORDAN: So it sounds like we should make the
7 contacts to the Task Force right now, and if we have any
8 questions or concerns about it, we should inform you.

9 MR. WILSON: Well, I think, though somebody
10 referred to this TOGAR Group?

11 MR. JORDAN: TANGO.

12 MR. WILSON: That to me sounds like an incidence
13 of trying to do that in this case.

14 MR. JORDAN: But is that tribes' acronym.

15 MR. HIGGINS: Tribes, agencies and non-
16 governmental organizations.

17 MR. JORDAN: Agencies.

18 MR. HIGGINS: And actually, they have a pretty
19 good paper trail. It's very enlightening. If you guys need
20 it, we have it somewhere in our archives.

21 That was Pat Higgins.

22 CHAIRMAN MARSHALL: Anything else? Do I have any
23 other questions from anybody?

24 MR. HIGGINS: Try to get the last word, Lyle.
25 This is Pat again.

1 Mike earlier brought up EPA's role as a potential
2 dispute resolution or coordination on the 401 certification,
3 and while they do not play that role, they are involved in a
4 main stem Klamath total maximum daily load study, which is a
5 water quality abatement part of the Clean Water Act. And
6 so, the Klamath is listed as impaired under the Clean Water
7 Act 303D list for nutrients, dissolved oxygen, and
8 temperature. Those are all impacted by the dam. The
9 deadline for the TMBL is 2006. Other tribes have raised the
10 issue of like--well, how can you do this process and then
11 have the EPA and the state water board weighing on how the
12 dams affect the water quality. It's out of sync. John had
13 passed me. Dr. Mudre has said that they don't have a
14 choice. They have to move forward to TMBL's going on over
15 there. What can they do? If it comes out in time, they'll
16 consider it. If it doesn't, they won't. That is a source
17 of concern for us tribes, and kind of germane to what Mike
18 raised earlier, so I just wanted to kind of include that in
19 your understanding of all these processes.

20 CHAIRMAN MARSHALL: Somebody asked another
21 question, so Mr. Higgins doesn't get the last word.

22 (Laughter.)

23 MR. WILSON: Well, I guess I can just throw out--

24

25 (Laughter.)

1 MR. WILSON: I don't think I have a chance yet to
2 tell you all my phone number is 202-502-8787. And I don't
3 know if you have John's phone number yet or not. 202-502--

4 MR. MUDRE: 8902.

5 MR. WILSON: 8902. And if you have any further
6 process questions or desire future meetings, John and I work
7 closely together when calls come in to figure out what the
8 best response would be. And we really appreciate the time
9 that you took today to learn about our process, and you
10 know, look forward to more of the time in the future.

11 CHAIRMAN MARSHALL: Thank you. I appreciate. On
12 behalf of all of us, I appreciate you all coming. Thank you
13 for being here. I'm sorry we kept you so long. We don't
14 get company here very often. I hope that you enjoy our
15 valley. It's a pretty place. Come back and visit, and
16 we'll be talking to you. Thank you very much.

17 (Whereupon, at 2:20 p.m., the meeting adjourned.)

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