

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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In the Matter of: :

HYDROELECTRIC LICENSING : Docket No.

REGULATIONS NOTICE of : RM02-16-000

PROPOSED RULEMAKING :

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Red Lion Hotel
1401 Arden Way
Sierra Room
Sacramento, California

Monday, March 24, 2003

Day 1 of 2

Pages 1 to 191

The above-entitled matter came on pursuant to
notice at 9:05 a.m.

BEFORE:

ELIZABETH MOLLOY, Facilitator
Federal Energy Regulatory Commission
888 First Street, N.E., Room 51-19
Washington, D. C. 20426

PANEL:

Timothy J. Welch, FERC, Office of Energy Projects
John Clements, FERC, Office of General Counsel
Ken Hogan, Hydro Licensing
Mona Janopaul, U.S. Forest Service
Dilip Paul, U.S. Forest Service, Hydro-FERC Specialist
Alison Macdougall, Pacific Gas and Electric Company

PRESENT:

John S. Blair, FERC
Sharon Carter, North Fork Rancheria, Tribal Treasurer
Jessica Erickson, Nevada Irrigation District
Patrick Beihn, North Fork Rancheria, Vice Chair
Leora "Lu" Beihn, North Fork Mono Rancheria; Native
American Consultant, Pacific Legacy
Patrick Beihn, North Fork Mono Rancheria, Vice Chair
Carl Fourstar, Water Administrator, Fort Peck

Assiniboine

Sioux Tribes, Northeast Montana

PRESENT, continued:

Jennifer Thomas, Bureau of Indian Affairs, Sacramento

Regional Office

Betty Smart, Wright Ranch Hydro

Mel Berg, Bureau of Land Management, Washington

Michelle LeBeau, Tribal attorney, Holland and Knight

Darcie Houck, California Energy Commission

Jim McKinney, State of California, the Resources Agency

Mark Connor, Engineering Operations Manager,

Northern Lights

Les Nicholson, Nevada Irrigation District, Hydro

Manager

Cyrus No , California Energy Markets

Cathy Messerschmitt, North Fork Rancheria

Leland Gardner, Consultant for the Colorado River

Indian

Tribes

Elaine Fink, North Fork Rancheria, Tribal Chairperson

Jacquie Davis-Van Huss, North Fork Rancheria, Tribal

Secretary

Les Nicholson, Nevada Irrigation District

David Houel

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P R O C E E D I N G S

(9:05 a.m.)

FACILITATOR MOLLOY: Welcome. Thank you for coming. I'd like to welcome everyone here today.

We have the agenda in the front of this book on A-1. We are pretty much going to follow it. We may deviate on occasion, depending how things go, but that's our goal is to follow this.

One thing I'd like to start with, if I can, is have everyone introduce themselves so that we know who's here. If you can speak into the microphones, it will help on getting the notes. And if you would identify yourself by your name and who you're representing, it would also help to get the comments with the right people. I'll start over on this side.

MR. NOE: Here?

FACILITATOR MOLLOY: Yes.

MR. NO : My name is Cyrus No . I'm the publisher of California Energy Markets, clearing up and soon to be publisher of a publication called Relicensing Reporter. I'm based in Seattle. We have bureaus in Sacramento and San Francisco, as well.

MR. GARDENER: I'm Leland Gardener, consultant for the Colorado River Indian Tribes down in Parker, Arizona. I live in Sunnyvale, California. And I am also a

member of the Navajo Tribe and part Bishop Paiute. I'm happy to be here.

MS. CARTER: Good morning. Sharon Carter, North Fork Rancheria, Tribal Treasurer.

MS. MESSERSCHMITT: Good morning. Cathy Messerschmitt, North Fork Rancheria. I'm the Environmental Planner.

MS. FINK: Hi, I'm Elaine Fink. I'm the Tribal Chairperson for North Fork Rancheria. And that is the Mono Tribe.

MS. DAVIS-VAN HUSS: Good morning. I'm Jacquie Davis-Van Huss. I'm also from the North Fork Rancheria. And I'm the Tribal Secretary.

MR. BEIHN: Good morning. We're here in force.

(Laughter.)

MR. BEIHN: I'm Patrick Beihn, and I'm Tribal Vice Chair of the North Fork Mono Rancheria.

MS. BEIHN: Hi. I'm Lu Beihn. I'm a citizen of the North Fork Rancheria. I am also a Native American Consultant with Pacific Legacy who is the Corporation that worked for Southern California Edison.

MR. FOURSTAR: My name is Carl Fourstar. I'm the Administrator for the Water Resource Office of the Assiniboine and Sioux Tribes at the Fort Peck Indian Reservation up in Northeast Montana. We're located on the

Missouri River up there. Thank you.

MS. THOMAS: Jennifer Thomas, from the Bureau of Indian Affairs, the Regional Office here in Sacramento.

MR. BERG: Mel Berg, Bureau of Land Management, Washington, D. C.

(Public address system malfunctions.)

MR. HOGAN: Ken Hogan with FERC, Washington, D. C.

MR. WELCH: Tim Welch with FERC.

FACILITATOR MOLLOY: Liz Molloy with FERC.

(Comments off the record.)

MR. WELCH: Tim Welch, FERC.

FACILITATOR MOLLOY: Liz Molloy, FERC.

MS. JANOPAUL: Mona Janopaul, Forest Service.

MR. PAUL: Dilip Paul. I'm with the Unit Office here, Forest Service.

MS. HOUCK: Darcie Houck with the California Energy Commission.

MR. McKINNEY: Jim McKinney, State of California, the Resources Agency.

MR. CONNOR: I'm Mark Connor. I'm with Northern Lights up in Northern Idaho.

MS. ERICKSON: Jessica Erickson, Nevada Irrigation District.

MR. NICHOLSON: Hi. I'm Les Nicholson with the

Nevada Irrigation District, Yuba Bear River Project, a hydro project up along Interstate 80 in what they call the Drum-Spaulding System.

FACILITATOR MOLLOY: All right. Thanks, everyone, for identifying yourselves.

I just want to remind everyone that there's going to be a transcript made of this. And it will be available sometime, probably a couple weeks from now. And it will be available on the FERC website once it is ready.

We have a presentation that Tim will be giving. And then we will sort of highlight the questions that FERC had raised. And then we will try to seek questions you might have or issues you all have that we can discuss. And then we'll discuss them after that.

You had a question?

MS. [SPEAKER]: I just have a request that we have -- at the end of the day have a copy of the sign-in sheet, please?

FACILITATOR MOLLOY: Sure, no problem.

Anything else? All right.

(Comments off the record.)

FACILITATOR MOLLOY: All right. And, again, I think I mentioned this earlier, but I'm being reminded to remind you all to say your name when you speak so that it shows up. Perfect.

Thanks a lot. And here's Tim.

Heeere's Tim.

MR. WELCH: Good morning, everyone.

As I said earlier, I'm Tim Welch with the FERC Staff Office of Energy Projects. I've been involved in these proposed rulemaking sessions since September of last year. And I've met many of you at some of our other meetings.

The first thing we're going to do here this morning is sort of do two things. First, we're going to sort of go over our sort of our rulemaking journey, where we been and then kind of where we're going. And also go and hit some of the highlights of the proposed rules role with you, just so we can sort of all have our bearings up straight and we all sort of make sure we're kind of talking about the same thing. And from time to time I'll be referring to the yellow booklet here. And I'll point out various aspects of it as I go through my talk.

(Laughter.)

MR. WELCH: That was supposed to be a subtle signal.

(Laughter and comments off the record.)

MR. WELCH: Okay. Just to take you where we've been so far, as I said earlier, we sort of kicked the whole thing off back in September of 2002 with a public notice.

And that public notice outlined a series of Resource Agency-FERC co-sponsored public and tribal forums where we went out and went across the country, just as to sort of gather people's ideas about a new hydro licensing process. And many of you were involved with me with FERC on the forum.

Before I go much further, our whole schedule is found on the inside cover, inside back cover, of your yellow book here. And it goes into a lot more detail than I'm going through now, but you might want to sort of follow on. It gives us a little timeline and that type of thing.

So, anyway, sort of back last fall we sort of crisscrossed the country and we went around and got people's ideas about a new licensing process. So we tried to get a little bit more focused. And in December we had what we called Stakeholder Drafting Sessions. That was a two-day conference in Washington, D. C., which many of you in this room attended. In that way, as I said, we tried to get a little bit more specific and we tried to actually draft some conceptual language that the Commission could use in its Notice of Proposed Rulemaking.

And you'll notice that a lot of the ideas that came out of those two-day drafting sessions in December are actually in the proposed rule.

So once we wrapped that up, from the middle of December through the middle of January we got together with

our sister federal agencies, that is, those agencies that are specifically involved in licensing of hydropower projects through the Federal Power Act. That's the Department of Commerce, specifically the National Marine Fisheries Service, Department of Agriculture, the Forest Service, and the Department of the Interior. We got together with those agencies to draft the specific language that much of which is in the proposed rule.

So that brings us to a few weeks ago, last February, where the Commission voted unanimously to issue the Notice of Proposed Rulemaking that is outlined in your book beginning on page -- in Enclosure C -- so C-1 is the entire NOPR, including the preamble.

So that brings us to now, in March, April where once again we're sort of crisscrossing the country where we'll be here in Sacramento. Last week we were in Portland, Oregon. Later on this week will be down in Charlotte, North Carolina. And then next week in Manchester, New Hampshire, and also a meeting in Washington, D. C. We're having a series of regional workshops just to get people's input and reactions and answer questions about this Notice of Proposed Rulemaking.

Now just to note that -- actually I have a pointer here -- and April 21st, 2003 that is the deadline for your written comments in response to this February 20th.

So keep this date in mind, April 21st, is when the written comments are due.

Now once the written comments are all in then we're going to have, once again, another series of stakeholders drafting sessions. Now this time this will be a four-day drafting session. And people refer to it as "hydro hell week." And, once again, it will be in Washington, D. C. -- you're all welcome to attend -- beginning the middle of April or so, I think April 18th, or something like that. We'll begin registration, online registration, for those stakeholder drafting sessions.

Once again, as we get closer and closer to the final rule we'll be getting more and more specific. And so hopefully will have a good diverse group of stakeholders to draft language for the Commission's final rule.

So once that's completed in March we're currently having meetings with our sister resource agencies. And for most of April and May we will again meet with them and begin putting together the finishing touches on a final rule which we expect the Commission will vote on in July of 2003.

Now that sort of outlines the process so far. As you can see, it's an evolving process and we're sort of in the actual -- in the middle of it right now. So there's still -- this rule, this proposed rule, is still, you know, coming together, evolving. We're still getting people's

comments. But we're hopefully getting more and more, more specific here.

Now throughout this process, especially in the tribal and public forums that we had last fall, if we heard one thing, one theme, it was integrate, integrate, integrate, integrate. I got it sort of pounded into my head.

So it comes as no surprise that we've come up -- in the Notice of Proposed Rulemaking, we've come up with what's called an "integrated licensing process." And you'll find our proposed integrated licensing process on the back. And it goes through the difference steps, and it also has the various section numbers down there in the left-hand corner, the various parts of Section 5 where you can go back and look at the actual language.

So we think we really have a rule here, a proposed rule here, that we believe that everyone can sort of grab a piece of it and say, "Yeah, I think this can meet my needs." I don't think we're there yet. I think we have a ways to go. As with most things, the devil is in the details. And that's why we're here today, to help -- asking you to help us sort of dot the i's and cross the t's. That's why we're here today.

Okay. So let's go ahead and get into it. Now the proposed rule does two things.

First, as I said, it creates a new integrated licensing process. And it also proposes changes to what's called the traditional process. And I'll get into this in just a moment.

Now as far as a new integrated licensing process, it sort of breaks down into three general areas. And we have some timeframes in here that are recommended that we think in most cases this is how long it's going to take. But, remember, it could vary depending on the specific licensing proceeding.

Now the first part is sort of the top row and sort of half the middle row here. And it's called, "The development of a process plan and a study plan." And I'll go into a little bit more detail on this process plan. But that sort of a key cornerstone of this whole thing, that FERC staff, with the assistance of other agencies and tribes that are involved in the process come together and put together a plan about how every agencies' process is going to integrate together to create the integrated licensing process.

And most of the time will be spent developing the applicant's study plan, what studies need to be done in order to generate necessary information that everyone will need when they go to comment and propose environmental measures in the license applications.

Now the second part of it takes -- we're projected to take about two years. That's the conduction of the actual studies themselves and correspondingly the development of the applicant's application.

Now once that application is filed at FERC by statute two years before license expiration, then the Commission takes application processing. And we're hoping that that's going to take about a year and a half. So we'll go into these little timeframes in a little bit more in a minute.

Now, as I said, the other part of the rulemaking is a few changes to the traditional process. What we did was we took a couple of concepts from the integrated licensing process and applied them to the traditional process to improve the existing process as well. And that includes increased public participation in the traditional and early study dispute resolutions. And I'll get into a little bit more on that in a few moments.

Now we think that the integrated licensing process improves both the efficiency and the timeliness of the process. In addition to that, we think that at the end you're going to come out with a better answer. In other words, a better license that everyone can sort have some ownership in.

Now I'm going to talk about two aspects,

efficiency and timeliness. Now regarding the efficiency we think that the proposed process improves the efficiency by requiring that the applications be prepared in conjunction with FERC's NEPA scoping.

Now contrast that with the existing traditional process where FERC's scoping is done after the application is filed. We're proposing here that NEPA scoping is done at the very beginning of the process with all participants scoping the issues. So much earlier NEPA scoping.

Second and, as we said, this is sort of the cornerstone of the integrated process, it's coordination with other participants' processes. And I'm speaking specifically about 401 Water Quality Certification that's often involved with both states and tribes.

We also believe that we'll gain some efficiency by increased public participation, identifying the stakeholders in the public sector very early on in the process so that they can evolve from the very beginning rather than towards the end when the license is already filed at FERC. We're trying to identify those people in the process much earlier.

Okay. Now we've covered efficiency. Now timeliness. We think that the process will improve the timeliness of the application because it involves early FERC staff assistance. FERC staff will be involved in this

process from the very beginning.

Once again, contrast that with the existing traditional process where FERC staff does not get involved for the first two years of study developments but only gets involved when the application is filed at FERC. Once again, we're proposing that FERC staff oversee the process from the very beginning and publish a schedule and a process plan that will sort of drive the whole process.

And that's our second point here, is the FERC staff will be involved with both the process plan and the schedules. We think that we will also have improvements in timeliness by early study plan development in both informal and formal study dispute resolutions. Once again, in contrast with the traditional process where study dispute resolution often only takes place after the application is filed with the Commission.

Quite often we get applications at FERC where there's still disputes about studies. FERC has to resolve those disputes and then often requires one or two additional years of study. We're proposing in the integrated process that that be done in the very beginning of the process.

Now we just have a little graph here, a very simple graph, to show you some of the improvements in timeliness. And what we have here, this is the application processing time. This is the time when FERC receives the

application, which will be zero here on the X access, from the time that the Commission issues the licensing decision.

This top bar under the traditional process, these are actual data from our 603 report that says that the median processing time for applications at FERC under the traditional process was -- the median processing time was 40- -- 47 months.

Now the integrated process, this isn't -- these aren't real data. These are our projections. We think that the -- with the time savings for the reasons that I just mentioned, we think we can get that down to 17 months, a drastic decrease in application processing time at the Commission.

Now the other point I want to -- the other part of the graph I'd like to point out to you is for the 24 months line here, which is -- this is the two-year point where at this point the current license will have expired.

So you could see under the traditional process in a large majority of the cases the Commission has to issue what's called "annual licenses" in order to keep the project operating. We think that under the integrated process we'll have plenty of time to get a brand new license in place before the current license expires.

And now that I've sort of gone over sort of a general brought overview of the process, I'd like to talk

about a few other significant aspects of the Notice of Proposed Rulemaking. I'd like to talk about process selection, cooperating agency intervenor policy, and something of interest to all of you here, our practice and policy for tribal consultation advanced under the case of license expiration, talk a little bit about what we're calling the "preapplication document," which replaces the current initial consultation package. I'd like to talk about study dispute resolution. And finally some changes to our requirements for the content of an applicant license application.

Now process selection: With the creation of integrated licensing process FERC now has three processes. The integrated process, the traditional process that many of you are familiar with, and the alternative licensing process, the ALP, that I know many of you are also very familiar with. So we'll have three processes.

Now the key here is we're proposing that the new integrated process be the default process. In other words, if an applicant wishes to use either the traditional or the alternative process they must request use of that process, and they must ask for public comment in their notice of intent to refile.

The Commission will then look at those comments. And then the Commission staff will either approve or deny

the request, depending on the reasons brought forth by the applicant and the public comment. And the Commission staff will decide whether it's all right for the applicant to use either the traditional or the alternative.

Now cooperating agencies: Currently under our existing policy we quite often cooperate with another federal agency on our NEPA documents. And primarily our cooperating agency is typically the Forest Service. Our current policy states that an agency that cooperates with FERC on a NEPA document is not allowed to be both a cooperator and an intervenor at the same time.

So if you want to cooperate, you must agree not to seek intervenor status or party status which has a lot of legal implications. And often it is a hindrance to another federal agency cooperating with us.

We are proposing to change that policy now by permitting intervention by federal agencies cooperating on NEPA documents. In other words, now we propose to allow a federal agency to be both a cooperator and an intervenor.

Now a lot of people have concerns about ex parte. Those are our rules that sort of open up the process so that, you know, agencies aren't in the, you know, smoke-filled room making, you know, the "big deal."

So we're proposing to require disclosure of any study information that's exchanged between a cooperating

agency and FERC. Just study information. Like if the Forest Service comes through with a study on sensitive plants and gives it to FERC staff as a cooperator, we would be required to disclose that information to public records.

How this is different is that what we would not disclose is exchanging drafts back and forth. If we were cooperating with the Forest Service and we were exchanging drafts of a NEPA document back and forth, we would not be required to disclose that information. Only if there was new technical information.

Tribal consultation: Now we've heard a lot about tribal consultation at many of our public forums. What we are proposing to do is to change our current policy and formalize it a little bit, where we would require that Commission staff would initiate very early discussions quite often before the notice of intent for the affected Indian Tribes. That's to develop a consultation procedure so that we can tailor the consultation to the particular tribe in a particular situation.

Now to help us do that, we're proposing to establish a position of tribal liaison. That would be a point contact person for the tribes at FERC in any proceeding that's involved at the Commission even beyond hydro. Right now for the rulemaking our tribal liaison is Liz Molloy. So we're proposing to do that, a permanent

position on that.

Advanced notification of license expiration:

This was an idea that was born at some of the stakeholder drafting sessions. And under this FERC would notify the licensee when their license expires well in advance of the deadline for the notice of intent, which is five to five and a half years before license expiration. This is sort of like sort of a wake-up call to licensees to sort of say, you know, "Your license is expiring on such-and-such a date." And to alert to the licensee to some of the requirements for filing a notice of intent, for filing a preapplication document and process selection. It's to sort of jumpstart the applicant into moving forward with some of these things that need to be filed with FERC at the very beginning of the process.

(Comments off the record.)

MR. WELCH: Now one of the first things that will be required under not only the integrated process now but even under the traditional process is for filing of what we're calling a "preapplication document." This takes the place of the initial consultation package.

And what this is it provides all the participants in a licensing proceeding with all of the available environmental information about the project, basically about the existing environment, the affected environment, any

studies that have been done, a description of the watershed, description of the project.

In the rule there's some very specific things that need to be in that. And we'd like some feedback on the level of specificity of the preapplication document. Now this document will provide the basis for, first of all, the most important thing, what are the important issues in this particular relicensing. And that forms the basis for the study requests that are coming in from both the tribes and the agencies, and finally the FERC NEPA scoping document. So this will sort of being the precursor to that.

Now we sort of set up sort of the form of that preapplication document to look very -- excuse me -- that preapplication document to look very much like an environmental document, with the idea here being that this would be an evolving document throughout the entire five to five-and-a-half-year process that would begin with a preapplication document, the description of the existing environment, and would eventually morph from that into the license application that would morph eventually into the Commission's NEPA document. So the form of the content is the precursor to the Exhibit E which is the environmental report in the applicant's license application.

Study dispute resolution: Now, as I said, we've

developed a process to resolve study disputes very early in the process. Under the current regulations there is a dispute resolution process which involves writing a letter to the Director of the Office of Energy Projects who then resolves any dispute, in writing, through letter-writing.

We decided to expand to that a little bit and make it a little bit more interactive with the license participant. So the basis of the study dispute resolution process is the study plan criteria. And that's outlined in Section 5.10. And that outlines a series of eight factors that all participants will use in evaluating study requests. So we ask you to take a look at that and give us some feedback about that.

So the first step in the process would be the applicant filing its draft study plan for comment. Once the comments are in, FERC staff would convene a meeting to begin the first phase of study dispute resolution, informal phase, a study plan meeting, a one- or two-day meeting, or even three days if that's what it takes, of all participants to sort of resolve the whole study plan question. Okay? So we try to resolve those differences.

After that meeting FERC would then either approve the study plan as is or with any needed modifications that the Commission felt would fulfill the needs of the participant.

Now this begins the more formal study dispute resolution process where resource agencies, including any state and tribal water quality agencies -- that is, these are agencies with specific mandatory conditioning authority, either under the Federal Power Act or under the Clean Water Act -- may dispute the FERC-approved study plan.

If that dispute is filed with FERC, FERC would immediately convene what's called an "advisory panel," which consists of FERC staff. That would be staff other than what -- other than the person working on the project. In other words, we'd get some fresh eyes in there, a member from the resource agency, or water quality certifying agency, or tribe staff, and a third-party neutral. That would be another person that would be acceptable to other two folks on the panel.

Now this panel would look at the study dispute and match it up against the study plan criteria to determine whether or not a particular study plan met those criteria.

Now how is the applicant involved here? The applicant would provide a very key role where they would be providing comment and information because they're the ones that are going to be doing the study.

Now the panel then makes a finding as to whether or not the study criteria are or are not met. Once it comes up with the finding, it will provide the finding to the FERC

Director of Energy Projects. And the FERC Director would then make a decision on that dispute with respect to the study criteria, or any applicable law, or FERC policy.

Application Contracts: One of the things we did was we went to FERC staff, and we asked FERC staff, "What are some things that typically you have to ask for in an additional information request for basic information, that it always seems we have to ask for? Let's just put it in the regulations so we don't have to constantly ask for it."

And so we have some new requirements that conform to sort of our established practice, the information that we need in almost every relicensing project, information on minimum and maximum hydraulic capacity -- and a big change here -- the cost to develop the license application.

Under the traditional process these are not part of the application, but we're proposing that they become part of the requirements for an application.

The other thing is project boundary information for both licenses and exemptions so everybody knows exactly where the project boundary is. This is a change in that under the current regulations minor projects are not required to provide project boundary information. For whatever reason, I don't know. But now all applicants have to provide project boundary information.

Okay. Another change: As I said earlier, we're

hoping that the application and the preapplication document will be this evolving environmental document. And to do that, we've revised Exhibit E to make it more in the form of an environmental document. So it will be -- basically we'll ask the applicants to divide your application into sort of these components: the affected environment, the applicant analysis based on its study, the applicant's proposed environmental measures, identification of unavoidable adverse impact, and a developmental analysis. Now you could see this is very, very similar to a FERC NEPA document. So we sort of have the basis from the applicant's application to begin our NEPA document.

So I've sort of gone and sort of hit some of the highlights. I know you probably have a lot of questions here. And we'll have some time for some clarifying questions here in a moment. And then we'll be sort of listing some topics for discussion.

Just to sort of stimulate your thinking a little bit, we have a series of questions that we pose throughout the preamble of the NOPR. And I've just summarized a few of them here just to sort of get you in the mindset of some of the types of issues that the Commission is looking for feedback on.

The first question is: Are the contents of the preapplication document appropriate? It's very specific.

Is it too specific? Is it not specific enough?

The second question: What, if any, criteria should be considered in determining the use of the traditional licensing process? As I mentioned before, the applicant, if it wanted to use the traditional licensing process, would request public comment and make a case to FERC why they should use it. Right now the proposed language just says they should show good cause. Some have brought forth an idea that there may be some criteria associated with that.

Are the proposed study criteria adequate? In Section 5.10 is sort of a seven or eight factors, I think seven factors, that we use to determine the adequacy of a study request. Are they adequate? Excuse me.

What modifications, if any, should be made to the study dispute resolution process, both the informal part and the formal part?

Should the resource agencies provide preliminary recommendations and conditions prior to the draft of a final license application? Right now we're proposing that the resource agencies would provide the recommendations, terms, and conditions in response to the ready-for-environmental analysis notice. There's been some proposals that the agencies and the tribes file those a little bit earlier in the process. We want to know what you think about that

idea.

Are the recommended timeframes associated with the proposed integrated process adequate? If you look on your flowchart it's got little numbers here up in the upper right-hand corner that represent the number of days between those boxes. We'd like them -- right now we're just sort of in the draft proposal stage. We want to know if those are realistic or not.

The new rule requires a draft license application which would mirror the final license application. We want to know: Is that even necessary. Someone said that we should just go right to the final and sort of skip the draft application phase.

Are the recommended deadlines for the filing water quality certification application, is that appropriate, especially those tribes that have water quality certifying authority? Well, I want you to pay attention to that.

Right now if under the proposed rule we're proposing that the application be filed at the same time the application to FERC comes in. Some have suggested that perhaps the REA notice would be a better time for an applicant to file a application for its 401 Water Quality Certification.

Are there any suggestions in how the regulations

could be modified to accommodate small projects, you know, sort of small less than, say, five megawatt projects.

And two questions that we will undoubtedly be focused on today is the proposal for early contact with Indian Tribes; is that adequate to ensure improved tribal consultation?

And a question that generated a lot of discussion in Portland: What are your recommendations regarding the roles and responsibilities of the FERC tribal liaison? Now we don't go into a lot of detail about what the FERC tribal liaison would do, where will it be housed, how many would there be? We're looking for input from the tribes on a tribal liaison position that you think can meet your needs.

And that's all I got.

FACILITATOR MOLLOY: Are there any questions before we let Tim, you know, sit down, or anything? Are there any questions on --

MR. WELCH: Any clarification questions, --

FACILITATOR MOLLOY: Right.

MR. WELCH: -- things you don't understand, or -- and not only with the slide show but, I mean, you know, what did you mean by this, or what did you mean by that type of thing?

MR. GARDNER: All right.

MR. WELCH: Facilitator?

FACILITATOR MOLLOY: Leland. Leland?

MR. GARDNER: Yes. This discussion doesn't go to what's involved with the so-called NRG proposal, as far as I can see. It is that correct?

MR. WELCH: Well, what we did, Leland, was we had a whole series of proposals. We had one from the National Review Group, we had one from the Interagency Hydropower Committee, we had one from the State of California, we had one from the National Hydropower Association. What we did was we sort of made a big chart and we sort of pulled different aspects of all those different proposals into our one proposal.

MR. GARDNER: So this does embody whatever they have proposed with the NRG Group?

MR. WELCH: It embodies parts of it. And if you read the preamble, depending on the part, we talk about all the different processes in the parts that we pulled out. And some of the parts we didn't pull out, we explained why.

Les?

MR. NICHOLSON: Yeah, a question that I have, you know, the five-year proposed license program seems rather short for a complicated relicensing, which I think maybe we -- maybe we are the only ones that fit into that realm.

But currently we have existing outside agreements with other agencies on lots of issues, headwater benefits,

water rights, even storage in certain reservoirs. Will FERC allow those types of agreements to go forward outside of the actual license in this new process, or will they have to be incorporated into some new license?

MR. WELCH: We're hoping, to the extent possible, that you can incorporate all those agreements, sort of bring them all into the licensing process. You know, we recognize that there's other things going on that are very complex involving water rights. The Commission felt very strongly that they wanted to keep the process within the statutory timeframe, the five to five and a half years.

That, however, doesn't preclude an applicant from starting the process early on its own if it faced some of those very complex issues, sort of try to get those at least jumpstarted before the notice of intent.

MR. NICHOLSON: Okay. And I have --

FACILITATOR MOLLOY: I just want to step in and remind people that when they start speaking to give their full name so that the --

MR. NICHOLSON: Yeah. I'm sorry. I'm Les Nicholson, the Hydro Manager for Nevada Irrigation District.

FACILITATOR MOLLOY: Any other clarifications?

MR. NICHOLSON: I have one more question. Les Nicholson with Nevada Irrigation District.

Also there's some question on either the

expansion or the shrinking of project boundaries. The U.S. Forest Service expressed interest in expanding boundaries in some areas of the Sierras here when looking at relicensing. And we've expressed interest in shrinking some of the areas based on what happened during the old 50-year license.

Will this become part of the Forest Service mandatory conditions, or will FERC hold to the existing boundaries on most instances for this process?

MR. WELCH: I think it's going to depend on the specific project. But the Commission, when it issues the license, will determine what the project boundary should be. And what we look for with the project boundary is a boundary on all facilities necessary to operate the project. That's what we're looking at.

FACILITATOR MOLLOY: Any other questions? Oh, yes.

MR. WELCH: Lu?

MS. BEIHN: This is Lu Beihn. Lu Beihn.

Tim, when you said -- when you were talking about the boundaries and the facilities, does that include the roads to the projects?

FACILITATOR MOLLOY: It depends.

MR. WELCH: Sometimes. Yeah, sometimes. If that -- if that road was -- I mean, I'm just speaking hypothetically here. But I would think that if that road

was necessary for someone to get to a project in order to operate it, I would say maybe. I really going out on a limb there for you.

Go ahead, Mona.

MS. JANOPAUL: Mona Janopaul, Forest Service.

You know, whether it's -- regardless of whether it's within or without the FERC project boundary, if you are occupying federal lands and you're not within the FERC boundary you will certainly have to obtain a special use authorization from the Forest Service.

So, Lu, that goes to your question about roads.

You know, we have a lot of projects that the boundaries are so big and then that the roads or transmission lines go outside those.

And if you are occupying federal lands, whether it's BuRec, BLM, or Forest Service, or tribal lands, you know, there should be a special use authorization under the Federal Lands Management Act.

MS. BEIHN: This is Lu Beihn again.

That was the reason for the question, was we have to determine who is responsible for each of these, the roads in. And is Forest Service going to issue the permit? What boundaries are those going to be in? And that was probably the reason why we wanted to expand the boundaries.

FACILITATOR MOLLOY: Any other questions?

Leland.

MR. GARDNER: Leland Gardner, Colorado River Indian Tribes.

In connection with the operation of the tribal liaison and also in connection with the need for the tribes to participate in things like water quality matters, is there any thought of providing some kind of funding to tribes to operate in these areas, assuming that they don't have a water quality agency or a staff that's capable of tackling these license issues?

MR. WELCH: That's not something that we're proposing right now, but that's a question that has frequently come up at the tribal meeting, funding. Right now, all I can say is we're not proposing to fund any stakeholder, any tribe, or any agency.

FACILITATOR MOLLOY: Any -- Les?

MR. NICHOLSON: Yeah, Les Nicholson from Nevada Irrigation District.

Will the tribal liaison be able or be prepared to assist the licensee in contacting the tribes within their area. In our, you know, in our particular case is not real clear cut just who we'd be in contact with.

FACILITATOR MOLLOY: You know, I can -- I mean right now the tribal liaison position is somewhat amorphous because we're looking input. But it is certainly envisioned

that in addition to providing support for tribes, education, contact of when things are occurring, help in that regard, it would also be to facilitate to the extent, you know, that it would help, and to educate licensees and applicants on the importance and what would be, you know, entailed from there end. But we are still looking input on what people think it should be, and we'll try to craft it to meet everyone's needs.

Any other questions, clarifications?

MS. DAVIS-VAN HUSS: This is --

FACILITATOR MOLLOY: Hold on.

MS. DAVIS-VAN HUSS: Excuse me. This is Jacquie Davis-Van Huss.

Being the tribal liaison, you're responsible to answer or cover 554 tribes of the United States during this short timeframe, this process; is that correct? Since this is my first meeting.

FACILITATOR MOLLOY: Yes.

MS. DAVIS-VAN HUSS: Okay.

FACILITATOR MOLLOY: I'm an awesome person. Not all necessarily have hydro in the area. But, yes, for the rulemaking, I've been tapped as the person to try to field questions, get out information, and try to coordinate. And, as I said, we're still looking at sort of the slope and, you know, how many people, or the breadth of what a tribal

liaison officer role would be for the future. But in the meantime FERC wanted to get someone right away. And that was me.

Alison?

MS. MACDOUGALL: I'm Alison Macdougall from Pacific Gas and Electric Company.

FACILITATOR MOLLOY: Oh, I have to apologize. I had Leland next. And then when I saw your hand. So Leland, and then Alison.

MR. GARDNER: Sorry. Leland Gardner.

I had a question about the tribes' participation as an active party. Is there any provision or any thought about applications by tribes themselves to build or realize in these project under some kind of shortened procedure so that they don't have to go through all these piles of paper for years?

MR. WELCH: You know, that was -- someone brought that up at the Portland meeting for discussion, for some reason they left and we never got to it. The answer to your question is no, we're not proposing any special process for tribes. A tribe would be treated as any other applicant under our proposed process.

FACILITATOR MOLLOY: Alison?

MS. MACDOUGALL: I'll just -- I'm thinking about the tribal liaison, your role in that and how that would be.

How active would the tribal liaison be? I mean, I know that with our relicensings, for example, we have meetings on a monthly basis with different tribes, throughout the relicensing process, to get their comments and concerns and try to address them as best that we can. How active would the FERC be in those kinds -- would you, as the tribal liaison, be involved in those, or would you be appointing somebody to be involved in those? How active will you be in those kinds of meetings?

FACILITATOR MOLLOY: Again, we're still looking at sort of scope and role. It would probably depend on different proceedings as to what would be needed, or asked for, or done.

But that's where we're trying to find out how much of a role do people want from FERC on that and, again, you know, sort of what the vision is. So that's still sort of being developed. But I think for each individual proceeding I envision it being somewhat dependent on the proceeding.

MR. WELCH: I guess, just to add to that, remember every project also has a cultural resources person on the team who is intimately involved with tribal issues. So I'm not sure if we're envisioning that the tribal liaison would be, you know, involved in the very specific technical issues on every single project. They would sort of oversee

everything and sort of make sure that the whole process is working.

FACILITATOR MOLLOY: Cathy?

MS. MESSERSCHMITT: Thanks, Liz. This is Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

Just a cautionary comment, Tim, with regard to your last remark. Not every project has a cultural resource person that is active with the tribes. We have had that problem in our area where that person is out, just not connected.

I want to move on, though, to my question. As I was reading through the condensed version of the ILP, I came across the term, "political subdivision," with regard to the tribes. And I wanted to know what was meant by that. What you mean by "political subdivision"?

MR. WELCH: Could you give me the -- yeah, I guess I would have to look at it in context.

MS. MESSERSCHMITT: It was in the strike-out version, Tim, on page 52, Notification of Intent. And it was the requirements to notify. And when you went down to 5 -- it's 5.3, and you have Section (a), (b). And it's in (b), "Requirement to Notify."

FACILITATOR MOLLOY: Say that -- what page now? Well, --

MS. MESSERSCHMITT: It's page 52 in the strike-

out version.

FACILITATOR MOLLOY: Well, it's similar -- uh-huh, it's the last line on the page, I think.

MR. WELCH: D-48?

FACILITATOR MOLLOY: It's D-48, Section 5.3, (b)

--

MS. MESSERSCHMITT: (8)(ii).

FACILITATOR MOLLOY: -- (8)(ii), yeah.

MR. WELCH: "Every city, town, Indian Tribe, or similar political subdivision." Yeah, yeah, right.

FACILITATOR MOLLOY: I mean, that's --

MR. WELCH: Copies --

FACILITATOR MOLLOY: -- any kind of government type of thing in the area.

MS. MESSERSCHMITT: Okay. I guess I was a little confused because I think it's pretty clear that Native American Federally-Recognized Tribes are government, a sovereign government. And so when I read this I was like I don't understand that, because we're not -- it's my understanding we're not a political subdivision. We're a government.

MR. WELCH: Yeah. So that the word "similar," is what's bothersome?

MS. MESSERSCHMITT: Yeah. Yeah, it is that Native American tribes are a political subdivision instead

of a federally-recognized tribal sovereignty, --

MR. WELCH: Uh-huh, uh-huh.

MS. MESSERSCHMITT: -- a tribal government. I'm sorry if that seems to nitpicky, Tim, but --

MR. WELCH: No, that's --

MS. MESSERSCHMITT: -- if we start going down the road it's going to crush somebody, I think.

FACILITATOR MOLLOY: Would it, an idea, would it work for you if Indian Tribes were separately listed as a (iii), or under the mailing thing?

MS. MESSERSCHMITT: I think the idea that I had, Liz, was that when we start using terminology, you know, or you haven't worked with me much, but Tim, I about drove him crazy in Washington. It's because I'm a stickler for terminology.

FACILITATOR MOLLOY: Everyone does.

MR. WELCH: I've recovered. I've had a lot of therapy.

MS. MESSERSCHMITT: Thank you, Tim. And I just think that we need to be very clear when we're addressing Native American tribes. And that's one of the things that I didn't get with this entire -- with a new integrated licensing process in general. I know that you have the part on tribes and consultation and stuff.

But when you look at the -- I call it a matrix,

your thing on the back. It lumps tribes in with the public.

And so when I first read this thing, I did not understand

where tribes fell because we should be listed with

government.

FACILITATOR MOLLOY: Um-hum.

MS. MESSERSCHMITT: Right?

FACILITATOR MOLLOY: I absolutely hear you. And

I appreciate it that you've mentioned that. Part of -- two

things -- three things. If I keep going I could be like a

whole hand.

One thing is when thinking of this, think if my

one question was: Would it help to list it separately? The

key part in this thing is getting out, you know, the

mailing, getting the addresses, you know, on the record

there so that there's a follow-up. And, you know, we can

make sure everyone knows that they are talking to everyone

they need to.

(Comments off the record.)

FACILITATOR MOLLOY: So we want to find a way to

do that, to make sure that we get that out there, that it --

and however, you know, we want to phrase it, we can work on

that. You know, so think about how we can do that.

Two, we want to -- so that today we want to

identify these types of issues and discuss it. And so we're

kind of going to go through and identify a bunch of issues

and then start going through it so we can try to cover as much as we can and as much as is important to everyone to talk about. So that type of thing I do want to hear, and we all want to get out. I just want to make sure we've clarified everything first and then we start going through.

And at this point I've forgotten three, but I'm sure it was a crucial important thing and it will come to me, you know, tonight about 2:00 a.m. So let's finish clarifying, and then we'll take a little break. Then we're going to identify what we want to talk about and then get into talking about it.

I see Jim, and then Leland.

MR. MCKINNEY: Jim McKinney, California Resources Agency.

I'd just like to comment that I think Cathy's question is not nitpicky. It really goes to how are the tribes and all the various representations of tribes recognized in the FERC notification process. So it may be a small phrase, but I think there's a lot of importance and history to that. So generally the state supports the efforts of the tribes to really kind of clarify and specify their roles in this process.

FACILITATOR MOLLOY: Excellent, thanks.

Leland.

MS. MESSERSCHMITT: Thank you.

MR. GARDNER: Thank you. Leland Gardner.

This is my first meeting, so this probably has been asked before. As you probably know the Bureau of Indian Affairs and the Indian Health Service give preference to Indian activities in letting contracts on Indian reservations.

Is there any possibility that FERC's licensed projects can be conditioned to get the same kind of buy-Indian preference to Indian labor and services when the facility is located on Indian lands?

FACILITATOR MOLLOY: I don't know. We'll certainly pass that comment on and think about it.

MR. WELCH: Right now we just have never been involved with who the applicant chooses to hire or not hire. We've never -- that's sort of a road we've never been down, but it's an interesting idea.

MS. JANOPPAUL: This is Mona Janopaul.

You might contact -- I think Mel is the only person here from Department of Interior today. But maybe he could follow up. If there is an issue, BIA does have conditioning authority for a license. So, you know, maybe you can do some follow-up on that with Mel and have raised to the BIA and see if that's a condition that they are interested in putting in the FERC licenses as opposed to the Commission following up on it.

MR. GARDNER: I know that the Secretary of Energy has a stated Indian policy which I think is consistent with what I'm suggesting. And I think that any kind of condition of that sort doesn't have to come from the Interior Department but can be initiated in the energy area.

FACILITATOR MOLLOY: Lu, did you have a comment?

MS. BEIHN: Lu Beihn, Mono.

I have two questions, one for you, Liz, and one for Tim. For your --

FACILITATOR MOLLOY: Make mine the easy question.

MS. BEIHN: Well, for your position you're saying that it's going to be developed and you're working on it. Who are you working on it with? In our last meeting in Washington we had discussed being a part of working with you on how we thought maybe it should be worked out. How and when do you plan on getting together with some of us to do that? I mean, do --

FACILITATOR MOLLOY: Today.

MS. BEIHN: Today, okay.

FACILITATOR MOLLOY: Well, it's ongoing. As we're looking into the rule and everything, one of our questions is, you know, how do you envision it, what would you like to see in it? And so it's not only today but it's in comments or anything you feel throughout this rulemaking process that would help us out on sort of, you know, trying

to crack this. This role would be, you know, extremely helpful and we appreciate it.

MS. BEIHN: Well, we do have some definite suggestions that we'd like to make. And maybe we can meet with you, you know, on the side somewhere and at least talk them out and see if it would be helpful to because, you know, we have some good ideas.

FACILITATOR MOLLOY: Excellent.

MS. BEIHN: I think you could probably use them.

FACILITATOR MOLLOY: I'll take any idea I can get.

MS. BEIHN: And, Tim, you referred to a cultural resource individual that were working on these projects. Now is that a FERC representative, or is that somebody else? I mean, is that something that Van Button was doing with like PG&E and SCE; is that who you are referred to?

MR. WELCH: Yes, Van would be --

MS. BEIHN: Van would be the one.

MR. WELCH: -- an example.

MS. BEIHN: Okay. Well, then we do have --

MR. WELCH: He's our cultural resources person for that particular project.

MS. BEIHN: Okay. So then we do have him. I just wondered, you know, if that was exactly the position he had taken, because I think Cathy was referring to maybe --

MS. MESSERSCHMITT: A different one.

MS. BEIHN: -- a different one in the area. And he's done a fine job, so we appreciate Van.

MR. WELCH: I'll pass that along.

FACILITATOR MOLLOY: And it's on the record now, so good.

Any other clarifications? Let's take -- oh, yes.

MR. FOURSTAR: Carl Fourstar of the Fort Peck Tribes.

Just a comment and a question of this discussion of Indian Tribes being recognized. You know, I think that kind of ties in with your last slide up there. Is a proposal for early contact with Indian Tribes, adequate, and so on. I think as long as the Indian Tribes can be reassured or assured that the comments are going to be heard and acted upon, that would be great, you know, rather than just taken and listen to and discarded, well, that's fine.

Next. The other thing is a lot of Indian Tribes probably are not really familiar with the FERC, FERC's role in the energy regulatory business. I know that sounds kind of funny. But life being what it is, life is filled with strange things.

Probably along the line, Liz, I'm going to be asking you for is a Western Area Power Administration, so on and so forth, what is your role? How do you folks interface

with DOE, and so on? I'm going to want to know who all the players are in our part of the country that will be affected by FERC or anyone else.

FACILITATOR MOLLOY: Tim is going to take that one.

MR. FOURSTAR: Tim will take care of it?

MR. WELCH: No. I said, "Do you want to that one."

(Laughter.)

FACILITATOR MOLLOY: What I heard, I distinctly heard is, "I'll take that one."

MR. WELCH: Well, as far as our relationship with the Department of Energy we are an independent regulatory agency. We're not part of DOE per se. I mean, administratively we're tied with them. But the Secretary of Energy does not to make FERC policy, or anything like that. We're an independent regulatory agency. And it's the same with some of the other, you know, WAPA, BPA, those types of agencies. So we don't have any kind of -- we're definitely separate from them.

As far as your comment about education, I think, it's a good one. And one of the things we're proposing with the tribal consultation is that it's a two-way street, especially the sort of the initial meeting, which may or may not be tribal consultation itself, depending on the specific

circumstance. We're really looking at that as a real education process where we would come in and learn about the tribes.

And then we would also come in and talk to the tribes about who is FERC, what do we do, and how this process works. So we're hoping that it will be sort of a two-way educational dialogue.

I mean, I don't know if you're talking about something on a grander scale than -- I'm talking project specific -- but maybe something on a grander scale would be appropriate, as well.

FACILITATOR MOLLOY: We're also interested in if people would be interested in sort of a regional workshop or something that explained the FERC process and what one could expect, you know, that would get people ready for maybe down-the-road-a-piece, you know, situations.

But we're sort of exploring and we want to hear whether that would be of value to people and how they think that that should be done. And so, I mean, we are kind of -- we're still trying to, you know, sort of hear sort of all the bounds and interests and needs and see how we can meet them all.

Does that answer?

MR. FOURSTAR: It pretty much does. It's been 25 years or more since I've had any dealings with FERC. And a

lot has changed, and so on and so forth. And so I'm trying to refresh myself on a lot of these areas.

FACILITATOR MOLLOY: Excellent.

Any other clarification questions? Leland.

MR. GARDNER: Just one more. Is it correct that the regulatory activities of FERC are some way financed or subsidized by applicants and licensees?

FACILITATOR MOLLOY: They pay annual charges for the administration of Part 1 of the Federal Power Act. And they are billed every year for costs incurred by FERC and other agencies, other federal agencies, for administration of Part 1 of the Act.

MR. GARDNER: And do applicants, when they become an applicant, begin paying at that point?

FACILITATOR MOLLOY: Yes, as long as the project is constructed. So on relicense, yes, they would. On original license, it doesn't start until the project is constructed, I believe. And it's part of their license. It's usually one of the first articles in the back of the license.

MR. WELCH: Just add to that, though, Liz is right. I mean there are annual charges involved with administration of the Part 1 of the Federal Power Act. But those charges go into the federal treasury, and we're appropriated a budget just like any other agency.

FACILITATOR MOLLOY: It doesn't --

MR. WELCH: It doesn't, I mean, we just --

FACILITATOR MOLLOY: It doesn't come directly to us.

MR. WELCH: It doesn't come directly to FERC, it goes to --

FACILITATOR MOLLOY: It goes to the federal government.

MR. WELCH: It goes to them.

MR. GARDNER: The reason I was asking is to find out whether there is some possibility that applicants could finance some Indian participation in this preplanning and prelicensing activity where the tribes don't have the money to do it.

FACILITATOR MOLLOY: In some cases they have. It's a voluntary effort by licensees. Some have and some haven't.

MR. GARDNER: But this --

MR. WELCH: I see some of you were nodding your head.

Lu?

MS. BEIHN: Lu Beihn.

Yeah, the licensee I referred to earlier does offer mileage for attending meetings. You can turn in a little request form that, you know, if you're having

hardship getting to meetings for the relicensings, they will pay for that, for a meeting. And, like I said, they have me as a Native American consultant on that project and they're paying for that. So I attend a lot of meetings and represent eight groups, five federally-recognized tribes and three nonprofit organizations.

So, you know, we work closely with the licensee to try to work those things out. And it's working out pretty well with this one licensee.

FACILITATOR MOLLOY: Excellent.

Any other clarification questions?

Let's take a short 15-minute break. And it's quarter past, so it'll be at 10:30 we'll resume.

(Recess taken from 10:30 a.m. to 10:40 a.m.)

FACILITATOR MOLLOY: All right. At this point we sort of want to identify some issues or topics that we want to talk about. And if we can kind of get them -- Ken's going to type them up as we identify them. And then we will know what we've got to get through for the end of the day.

MR. HOGAN: No comments on the spelling.

FACILITATOR MOLLOY: If you word an issue really kind of complicated it could be fun.

MR. HOGAN: Short words, three-letter max.

FACILITATOR MOLLOY: And if you speak very fast so we can watch his fingers, you know, it could be our

entertainment.

Anyone have any issues they want to stick up there?

MR. WELCH: Cathy?

MS. MESSERSCHMITT: We always have issues. I do actually have some questions. Give me a second here. Won't take but a second.

(Comments off the record.)

MS. MESSERSCHMITT: I'll go through my pages, okay, systematically.

FACILITATOR MOLLOY: That's all right.

MS. MESSERSCHMITT: On page 16, I'm going through this, so hopefully they both --

MR. WELCH: Is this in the preamble for the text language?

MS. MESSERSCHMITT: I think it's in the preamble, Tim. Yeah, I think it is. It's at the very beginning. I'm so sorry. I just know it's page 16. Yeah, it's in the discussion part.

I've was reading through and through this thing, and I thought I had the answer before. I thought somebody had made that very clear. But it keeps coming up throughout the document.

And what it was, is it said, "Some commentators also suggest that the traditional process needs to be

retained as a fallback in the event that the integrated process or the ALP breaks down."

And I'm going -- yikes. So I thought I heard, in Washington, that if we start a process, ALP, ILP, TLP, that that's the process you stay with. You don't change horses in the middle of the stream.

Well, what I read here is that if, say, you go through ALP process, you're in it and you get total disintegration, it just implodes. Then can you say, "Okay, it didn't work, so now we're going to change horses to another process"? Is that what that --

MR. WELCH: I think so. I think we have provisions so if the ALP falls apart you revert back to the traditional. Now, that brings up an interesting question. Once this rule is in place, I'm assuming that if the ALP falls apart you would fall back to the default which would be the integrated process.

I don't think we have anything in here -- and you never know -- that says: If the ILP falls apart you fall back to the traditional. I don't think we have that. I don't know. Is that...?

FACILITATOR MOLLOY: I do note that here where you're referring is actually identifying what commentators stated.

MR. WELCH: Right.

FACILITATOR MOLLOY: We're actually keeping all three. And in one aspect once -- processes that are already happening, already occurring, we're not changing to ILP. And the big reason for that is a lot of the ILP is early consultation, early involvement, early resolution of things, processes that have already started and are underway, that time is past.

So it wouldn't be fair, we believe, to bring those processes over to the ILP and have missed out on the really crucial part that we think the ILP offers.

So we're going to have the three processes because the existing ones that are currently occurring we're not changing over. We're also making the ILP the default method. So it would be in situations that are special and have unique things that the traditional process would offer for a particular one.

And I can't, frankly, think of the exact fact pattern that would be. But just in case there is one, we're leaving that. And people would have to apply and get permission to use that, also for the ALP. Now, this is a proposal we have. We think this is going to work. We really think this is going to be great. But there is the traditional there for right now.

I suppose, you know, a possibility of this, if something about this is totally unworkable we still have an

existing system that has worked, albeit it could be improved. But it, you know, operates.

MR. WELCH: And, on the other hand, I think that the possibility does exist that, you know, five, ten years down the line if the integrated process is working just fine and no one is even using the traditional then, you know, the other part could occur.

MS. MESSERSCHMITT: Yeah. And I understand all of that. I understand that the ILP is the draft. And I do understand that this was just a comment. But it keeps coming up.

FACILITATOR MOLLOY: Correct.

MR. WELCH: Yeah.

MS. MESSERSCHMITT: People keep bringing that up: If something disintegrates are we going to be able to shift horses. So my concern is that -- and not that I think hydropower companies are evil. But if they start an ALP process, two things that echo through this entire document: One of them is cost. Cost comes up. I mean it seems like it's almost a hologram in the background of this whole thing that keeps saying "cost."

And if they start an ALP process and then it becomes too cost burdensome for them, there are ways that they could torpedo the process to break down and then go to a less-expensive process. And what I wanted to know is

somewhere over the rainbow this thing will work and will be good. And we would hope that that works. But the reality of it is: What are those possibilities if it doesn't work? And that's my question.

FACILITATOR MOLLOY: All right. What are your -- next one. And sort of goal -- I'm sorry, I see Lu here -- and the goal in part of this would be to identify all the things we want to talk about, and then come back and talk about things, even though I just talked about anything.

Lu, and then back to you.

MS. BEIHN: Lu Beihn, Mono.

Tim, when you said -- I just want to ask you if you can give an example of why an ALP would fall apart. You used that term, "fall apart." Why? Can you think of something?

MR. WELCH: Yeah. Well, let's -- you know, just to be very stark, all the stakeholders participating, they can just get so disgusted with meetings that aren't going anywhere, they all get up and walk out of the room and then don't come to any more meetings.

I mean, you know, if you're in an ALP and an applicant is sitting in a room by itself, kind of no point. So I think the ALP regulations say that, you know, any of the participants can petition FERC at any time to sort of bail out of the process. And FERC would basically sort of

look at the situation and, you know, at one -- I mean, if it's like one party, you know. But if it's like three, four crucial parties, I think FERC would say, "Well, guess what, folks, this didn't work."

So then they would -- FERC would decide at what point of the -- well, as we're talking today -- the traditional process, about what point are they at, and then you would sort of take it on from there. But, to my knowledge, that has not happened, yet.

MS. BEIHN: Okay. Lu again. Okay. So we're -- when one licensee -- we're in the process for two years and looking kind of scary. And if that did happen, which process would they go to? At this point it's supposed to be five years, and we're already two years in.

MR. WELCH: Well, yeah. Today before the .0, what would they do. Well, I know, but what if they -- or we adopted the rule, but they started the ALP.

FACILITATOR MOLLOY: It's always --

MR. WELCH: Thank you, Lu. Is there to smoke coming out of my ear? I'm sorry. Go ahead. What? I'm not sure if it would have to be the traditional or then you would fall back on integrated, because the integrated -- I think because they start it under the previous rule, then it would probably fall back to the traditional.

FACILITATOR MOLLOY: Again, for the same reason

where the ILP has a lot of front-end consultation and involvement and stuff. But it's a good question because, as you can see, we didn't have a ready answer.

MR. WELCH: Thank you for pointing that out, Liz.

FACILITATOR MOLLOY: I want to be upfront here.

MS. JANOPAUL: Well, I have a clarification question about some of these questions then. Are you also proposing that there not be three processes, or -- you know, I wasn't clear. Maybe it was Cathy or Lu. But is that also an issue, the number of processes?

MS. MESSERSCHMITT: This is Cathy Messerschmitt, North Fork Environmental Planner.

Mona, for me is not -- obviously we have three processes. And my attitude is always: Okay, if this is what we have, then let's make do the best we can and make those adjustments.

I don't have a problem per se with three processes. My concern is that -- is the switching-horses thing, because as Leland has said -- if you permit me calling him Leland. I apologize. As he has said tribal resources are very limited. And we get down the road with one process and we know that process. We've spent months and months and money going through that process, and then the hydro company comes back and says, "Uh, it didn't work; we're going somewhere else." And then we got to regroup,

and we're basically starting back from square one.

And to me having -- I used to this word in Washington -- a "buffet" of choices is okay. I understand the need for it. But I guess I'm saying cautiously or, you know, walk trepidatiously because it could be something that turns out very ugly.

MS. MACDOUGALL: I have sort of a comment on that. I think you make a really good point.

FACILITATOR MOLLOY: Identify yourself.

MS. MACDOUGALL: Oh, Alison Macdougall, Pacific Gas and Electric.

You've got a really good point. And, yeah, you're talking about a buffet of choices. And I think -- let me make sure that I have this clear. With this particular program when we have the three choices, the default would be to integrate it, correct? If an applicant or a licensee wants to go to either the ALP or the TLP then they have to petition, essentially petition, and make a case to the FERC who will make that decision.

If we end up in a ALP or a TLP, and not an integrated, and it falls apart, you've got to really good points about tribes. I mean, they've got a lot invested at that point in the relicensing process, a lot of time, a lot of resources.

You're right, it should be that the licensee I

don't think should be the one to sit back and say, "Okay, we're changing horses midstream here." I would think that that would be the FERC that would have to make that decision, not necessarily the licensee. I think all the parties could come back to the table and say, 'Look, is this working? Is it not working? Where we go from here?'

MR. WELCH: Yeah, but I mean that's the point. I mean, yeah, before -- I mean we would not allow an applicant just to change the processes willy-nilly.

MS. MACDOUGALL: Right.

MR. WELCH: I mean there would have to be a plethora of information and reasons for why. I mean one of the reasons you just put forward any -- I think if the tribe came forward with FERC to say, 'Hey, we put in a lot of time and resources and energy into this process. Changing now would be very difficult for us.' I mean we would have to give that a lot of weight.

MS. MACDOUGALL: Yeah.

MR. WELCH: I mean -- or we don't want just willy-nilly switching back and forth. That doesn't serve -- it doesn't serve anybody.

MS. MACDOUGALL: Well, and licensee's also have a lot invested up to that point as well.

MR. WELCH: Right, exactly.

MS. MACDOUGALL: You know, and to --

MR. WELCH: But the point being if it gets to the point -- and I just point to ALP, and it's just not working. If no one is collaborating, you know, then it doesn't -- you know, you just can't move forward.

FACILITATOR MOLLOY: Lu.

MS. BEIHN: Lu Beihn, Mono.

To answer your question, Mona, I felt that that's why we were working on as integrated by this process to refine the past ones to make a better one and hopefully stick to that. So I'm hoping we don't revert back to the past ones and go forward with this integrated one. If we can make it the best we can that's why were working so hard on it, right?

MS. JANOPPAUL: Right.

FACILITATOR MOLLOY: Cyrus.

MR. NO : Wouldn't your dispute resolution be taken somewhere before it blew up?

MR. WELCH: Well, under the ALP -- correct me if I'm wrong here, Liz. But in the ALP the regulation states that, you know, in the communication protocol of the collaborative group, they sort of have their own dispute resolution process. And I think if that gets to a point where there's a stalemate then they do come to FERC. However, you know, even if that happened in the -- once again the answer was not satisfactory to the collaborative

parties. And, I mean, I don't know.

FACILITATOR MOLLOY: As we said to this hasn't happened.

MR. WELCH: Yeah, exactly. Let's not even talk about it.

FACILITATOR MOLLOY: So we don't have a lot of experience because it just -- it hasn't. I mean there have been ALPs where at different points people have been frustrated. And ultimately things have worked out. So I mean -- but they've never come in and said, you know, we have to go to a different process.

All right. Let's identify -- let's find -- let's try to set up our issues here. And then we -- you know, we can come back to things. But I just want to make sure we get out there. One, I -- if I could, you know, speak about the tribal liaison role and position; we want to discuss that at some point. If I could be so bold as to put that up.

MR. WELCH: As I was telling Cathy a little bit earlier in Portland, we actually made a list, you know, 1, 2, 3, 4, 5, 6, whatever, of all the things that people felt that tribal liaison should or should not do. That's why I would like to do that.

FACILITATOR MOLLOY: L-i-a-i-s-o-n.

MR. WELCH: I never could spell that word. Yeah,

uh-huh, there you go.

Yes?

MS. MESSERSCHMITT: This is Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

Another thing I would like to see spring up is the whole water quality authority and the whole water issue. I don't think we can walk away from this table without straightening or at least addressing it.

FACILITATOR MOLLOY: Okay. Water quality issues. Jim?

MR. McKINNEY: Jim McKinney, California Resources Agency.

Last fall I think the tribes in the State of California identified kind of several overlapping interests in the rulemaking. And a couple of the issues that have jelled from that that I would like to get your views on here are the adequacy of what FERC has established for the pre-NOI consultation phase.

We had a lot of discussion last time about how do we make sure that all of the interests and all the issues are fully fleshed out before the NOI and especially now that we've got a five-year sprint from NOI to license expiration. I would like to see what the tribal representatives think about the sufficiency of that part, Item Number 2. What I'd like to get your views on is the study dispute resolution

process and specifically the eligibility to participate in that process. If the one year frontloading period is the heart of this proposed reform, the SDR is just a critical part in making that work and again making sure that this five-year sprint actually works.

FACILITATOR MOLLOY: Excellent.

Any others? Yes.

MS. SMART: Yes. I don't know if this is on.

FACILITATOR MOLLOY: I think it's on, yeah.

MS. SMART: All right.

FACILITATOR MOLLOY: Make sure to identify yourself.

MS. SMART: Betty Smart with the Wright Ranch Hydroelectric Project.

We have probably one of the smallest hydroelectrics. And I'm looking at the process and all of this, and -- and there are no resources. It's just -- it's not a large, it's just a small thing.

Are we governed -- I'd like to just know where we fit into the whole picture. What would we be required to do? And it involves cost and time and expertise.

FACILITATOR MOLLOY: How small are you?

MS. SMART: Ten kw.

MR. WELCH: Would you like to -- we characterize it for all small projects; you got it.

MR. HOGAN: Yes.

FACILITATOR MOLLOY: All right. Other issues?

Leland.

MR. GARDNER: This may just be a question. Are pump storage projects governed by the same set of rules as a run-of-the-river hydro?

FACILITATOR MOLLOY: Yes, the same regulations.

MR. GARDNER: These activities are becoming more popular in terms of at looking at Indian reservations for these sites, even in areas that are -- where no rivers exist, like Arizona. So I think it's important that maybe some of those tribes who are not in river territory ought to be aware of that and ought to know that they need to be educated about this process.

Thank you.

FACILITATOR MOLLOY: Any others? Yes, Cyrus.

MR. NO : Slippage.

FACILITATOR MOLLOY: Slippage. See, he gave you a nice short one there. Slippage.

MR. NO : And I mean slippage in the -- in the -- in 17 months, not in the previous one.

FACILITATOR MOLLOY: In the new -- in the new proposal?

MR. NO : In -- yeah. In the integrated, yeah.

FACILITATOR MOLLOY: Any other issues?

And there's an "i" between the "l" and the "t."

Jim?

MR. McKINNEY: Jim McKinney, Resources Agency.

Is the slippage the same as "What if it doesn't work"? What if -- what if the sprint process doesn't work?

MR. NO : Then the timescale becomes a problem.
And you can't do all of these things federally run.

MR. WELCH: Yeah, okay.

MR. NO : Then blow it up, or you simply extend it, then pick up maybe an annualized license, it doesn't show no recorders.

MR. McKINNEY: We have a lot of questions and we'll make more of those comments tomorrow. But, again, I'd like to know what the tribal views are on that point.

FACILITATOR MOLLOY: Excellent.

Any other issues?

MR. NICHOLSON: I have one. Les Nicholson from NID.

And is the issue of reopeners on some of the licenses, what would perhaps trigger that reopener, or what's the staff looking at from the aspect of a reopen on a license?

FACILITATOR MOLLOY: Any others? We're getting a good list together. Make sure -- is that everything up there on the screen, Ken?

MR. HOGAN: Should be.

FACILITATOR MOLLOY: As you look at the list, are we missing anything anyone wants to particularly bring up? We have: Process cost; and selection switching; number of processes; tribal liaison position, what it is, what it should be; water quality issues; pre-NOI meeting, is it adequate, and does it do what it needs to do; dispute resolution process, and who's involved; time -- cost and time for small projects of the new proceeding; contacting tribes and education.

Though that was specifically on pump storage projects, as I recall, and so it was contacting tribes and education thereof of tribes not -- not close to streams. So it would be -- I understand that from Leland to be more those who might not realize that they needed to know about things.

MR. GARDNER: Yes.

FACILITATOR MOLLOY: So it was beyond, you know, sort of the group that might know.

Slippage; flexibility of time lines in the new process; and when reopeners are used and what would trigger it.

And Mona has a point.

MS. JANOPPAUL: Mona Janopaul, Forest Service.

There were a couple of issues on page B-7 that are

posed that I would particularly, if somebody -- they seem to fit in with some of these earlier questions, at least one does. And that's the what-if-any criteria should be used if the Commission grants an applicant's election of a traditional licensing process.

And I know -- I understood the response that, you know, whatever process they pick, we just -- we just want to make sure that's the process they stay with. But if you -- if you have any erudition on that issue of what criteria you would like a licensee to meet before it is allowed to use the TLP, I would be interested in hearing that.

And the other issue which is posed here, which I can see affecting tribal interests, is the one where the Commission has been interested. And it's down in the second frame, number 20, "Should resource agencies," and then I also heard Tim say, "including tribes, provide preliminary recommendations and conditions prior to a draft or final license application?" If you have any thoughts on that I -- I'd certainly like to hear. But those are a couple of issues that I -- you know, if you have any feedback on, I'd sure like to hear them.

FACILITATOR MOLLOY: Yes, Cathy.

MS. MESSERSCHMITT: I just have a question for you, Mona. When you're talking about tribes, are you talking about tribes with regulatory authority or tribes in

general?

MS. JANOPAUL: (No audible response.)

MS. MESSERSCHMITT: Okay.

FACILITATOR MOLLOY: Thanks.

Yes, Carl?

MR. FOURSTAR: Carl Fourstar, the Fort Peck Tribes.

In this discussion about contacting tribes, the education of tribes, FERC and everyone else should bear in mind, including the applicants for licenses, that all tribes, we've entered into agreements with the United States government on a nation-to-nation basis.

Each reservation, each tribe, has -- their agreements are slightly different. You cannot put tribes into one shoe. It happens over time and time again. But there's always -- there's more expense -- it's a more expensive process to the government, to the applicants.

So in the interests of trying unity, trying to work together and such, that educational process should extend to the applicants. Let them know that up it's up to them to address all the Indian Tribes or identify all the people that are along the line. And I guess FERC, being the regulatory agency, was going to -- it was going to be a given that you are going to know who they are going to have to address. And that checklist will, when the applicants

are coming in, you will be checking those suckers off.

And each tribe would then be given an opportunity to respond. And that should cut out a lot of things there. But at the same time it should work, as I say, in the interest of unity and getting things done. Because we all have the same interest. We are all interested in the environment, we all like electricity, we like this, we like that. And sometimes we get -- we take the adversary position. So you're either for -- if you're not for me you're against me. You know, there's no middle road or no - - today's world seems to be more and more of that, you're either this or you're that. We can't seem to work together.

So if we can, perhaps the education of the applicants would be a strong point. And I've worked with enough nonIndians throughout my life and all that sort of stuff, and we still do, and I found that -- I'm President of the Fort Beck Water Users Association. It's a relatively small irrigation project, -- but we work together. There's more nonIndians on there than there are Indians, but we know that we need to the water. We know we have to work together.

MR. [SPEAKER]: Is that...

MR. FOURSTAR: Pretty much. At least, you know, just a buzzword, you know, a tickler of just getting started.

FACILITATOR MOLLOY: All right. Thanks.

Les and then Leland.

MR. NICHOLSON: One thing that makes us licensees and project holders a little bit nervous is the -- under the alternative licensing process -- is the issue of baseline. A lot of the folks that we've interacted with, you know, have a different idea of what baseline conditions should be. And so I think it's important early on that the FERC staff, you know, introduce that to everyone so everyone is educated on really what we're dealing with here as far as baseline for relicensing issues.

FACILITATOR MOLLOY: Leland.

MR. GARDNER: Thank you. I'm Leland Gardner.

I just wanted to pick up on the point made by Mr. Fourstar from Fort Peck concerning the difference between tribes and the difference between the lands that they have. And this comes from an experience I had with the Navajo Tribe in connection with a DOE project to clean up polluted groundwater from uranium. DOE had encountered this problem before up in Grand Junction.

And the simple answer there was to just fence off this acreage and pay the landowners so they can go somewhere else and buy some land, and just relocate. And then they came down to Monument Valley in Arizona, the middle of the Navajo Reservation. And they said, "Well, this might be an

easy answer here, too." A lot cheaper than trying to clean it up, because it's a real mess.

Well, when you're dealing with a reservation which was established by treaty, and these people are there for centuries, it's not the same as telling them -- telling somebody in Grand Junction to go to Denver and by another house. You just can't take someone from a treaty reservation and tell them "Go to L.A. or go to Phoenix, or whatever, and we'll buy you another house." Because this by treaty is their land.

So when you're talking about hydro projects the same kind of differentiation may have to be made depending on what tribes you're dealing with. So that's a takeoff on what Mr. Fourstar said. But -- and it may not apply to every tribes. Some tribes are pretty mobile, but some are not.

MR. WELCH: Leland, how would you characterize that for our list there?

MR. GARDNER: Well, I'd say "unique proprietorship of interest in Indian lands."

FACILITATOR MOLLOY: We're challenging Ken on his spelling.

MR. WELCH: You got a spell check.

MR. HOGAN: That's right.

FACILITATOR MOLLOY: Any other issues we want to

put up there?

MR. WELCH: Do we have any? We have any?

I guess I would like to talk about the whole concept of tribal consultation itself, people's ideas about how that -- how that would work. We got till 4:00.

FACILITATOR MOLLOY: All right. Any others?

That was a pretty good list. Oops, just changed color. Ken didn't really like the black-and-white thing. He's obviously going out on his own on this one.

MR. WELCH: Only two words. There you go.

Is that it?

FACILITATOR MOLLOY: All right. Do we have any we want to take first or do we just want to start working down through there? Is there any -- do we want to the --

MR. WELCH: In some of the larger meetings we vote, but, I don't know, this is a pretty small group. I guess we could just --

FACILITATOR MOLLOY: Start at the beginning and work through.

MR. WELCH: I don't know. How about if we just have someone -- instead of going in order, may be some people could just --

FACILITATOR MOLLOY: Just talk.

MR. WELCH: -- shout out their point and say, "Let's do that one." First come, first served, I guess.

FACILITATOR MOLLOY: That has a certain chaos sound. I think we'll start at the beginning and work through.

(Laughter.)

MR. WELCH: Are you Type A?

FACILITATOR MOLLOY: Process cost, selection and switching. We discussed that some when we put it up on the list. Do we need to explore that further? Are we comfortable with what we've sort of put out there? I think we, you know, don't have all the answers. But we did hear the concern that there is a concern about switching and sort of the number of times switching and not for it to be something that could be easily done, I think. That we want to ensure that there is a commitment to the process that started and that it not be something that could just be happening easily.

Is there more?

MS. MESSERSCHMITT: Well, I think -- correct me if I'm wrong, Mona, but I think what I wrote down under that is the criteria that you wanted, an idea of criteria for switching. Is that right?

FACILITATOR MOLLOY: That was a subpart really, yes.

MS. JANOPPAUL: Either for switching or for -- if the traditional process is going to be retained and it must

be something the applicant must apply to do, what kind of criteria would you be interested in.

For instance, in the D. C. drafting sessions and also in the agencies working with FERC, we made a number of proposals about criteria. And maybe you remember some of them: Small projects, five megawatts or less, all agencies and tribes sign on to support the traditional process. No apparent significant interests. You know, noncomplex, noncontroversial. I mean those were some of the things we talked about in the drafting sessions. Maybe this is the time to come back with them. But I am -- I am curious because it -- again like Tim and Liz, I'm trying to work this out in my mind.

If we say the ILP is the default, what happens if you start into an ALP or a traditional and it goes awry? Now this is clearly a hypothetical because, as they said, we just don't have that as a real case.

Would it makes sense to default to the ILP under those circumstances given that you're supposed to do a lot of work upfront? I just don't know how that would work. So I mean those are really open questions that we are looking for constructive input on.

And, you know, so I think the Commission is wide open. There have been sort of things back and forth. We've certainly heard people like Betty with small projects who

say we've got to keep the traditional process. But then I've heard from big licensees, like two in California, that they also want that traditional available for larger projects. So I think we're specifically looking for criteria from commentors for both switching and when you -- how you qualify to get permission to use the traditional under this new guise. Okay?

MS. MESSERSCHMITT: Yeah. Yeah.

FACILITATOR MOLLOY: Now do have any ideas on criteria?

MS. MESSERSCHMITT: Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

I saw Jim -- Jim look like he had something, and maybe I missed that. So jump in here, Jim, if I missed something. But I like the idea of keeping it projects by size. I mean, yes, it would be -- I can see how the larger project would want to go with a TLP. But it's not -- it doesn't integrate everybody. It doesn't bring anybody in.

Now with these revisions, that might preclude some of that with this new revised traditional process, but I still think that size of the project has to be a criteria. I mean that's what I think.

FACILITATOR MOLLOY: Any others? Jim, did you -- she looked your way, so now I am.

MR. McKINNEY: Okay. I'll look back, Cathy.

One of the concerns the states has with using size as a criteria for choosing various processes is that size is not commensurate with level of impact. That's pretty -- at least in our agencies that's a real strong concern.

Sometimes the small projects really don't have much effect and they're not controversial. But some of the small ones can be some of the most complicated cases we've got right now that are in relicensing.

MS. MESSERSCHMITT: So could you leave size in, but also add complexity; would that address some of that?

MR. McKINNEY: Say complexity and some sense of the level of impact. I mean are there serious water quality issues, are there serious impacts to fisheries or aquatic biology?

MS. MESSERSCHMITT: Yeah, I see your point. I agree with it too. Yeah, I agree.

MS. SMART: Could you -- this is Betty Smart with Right Ranch Hydro.

Could you explain what you mean by the complexity of a small project, how that could affect in larger impact than a large one? Or I'm not understanding you.

MR. McKINNEY: Yeah. Ought to do a hypothetical because I think one other groundrules is we don't talk about active cases here, which --

FACILITATOR MOLLOY: Correct.

MS. SMART: I'm not asking for that.

MR. McKINNEY: -- limits a lot of what's going on in California.

FACILITATOR MOLLOY: Right. But now he has to think how to -- how to phrase it.

MR. WELCH: Say they're with this project.

MR. McKINNEY: What? Say that again.

MR. WELCH: Say there was this project. Let's call it some McKinney project.

MR. McKINNEY: Say there was a little project that was maybe three or four megawatts. It's been there a long time. Say that's historic and out of fisheries habitat. Say that a diversion dam for that project either fully or partially blocks upstream spawning areas for the unanimous fishery. Those are really complicated issues. They take a lot of time to study, a lot of time to work out. And we're talking three or four megawatts is not big, doesn't generate a lot of revenue, but there may be some very costly environmental impacts that have to be addressed in a relicensing for that particular project.

Does that help clarify?

MS. SMART: Yes.

FACILITATOR MOLLOY: Now, I mean, what you may see here is there might be a broad definition of small project, too, because -- I mean ten kilowatts I think small. But --

but there are others. And some of it depends on location. I mean you can take a ten-kilowatt project and put it in just the right spot and affect a lot of things. You know, though -- you know, so that's been one of the things, is that there could be something that raises concerns even on a small project. And that's sort of where people are kind of working around here.

Are there any other criteria that one --

MR. WELCH: Sorry.

MR. NICHOLSON: Les Nicholson from the NID.

The small project issue, are you referring to -- are we referring specifically to small projects that were either conduit exempt or had some other type of special license? Or are you talking about those that are part of a bigger picture?

FACILITATOR MOLLOY: Two -- there's a couple different things. We have licenses and we have small projects, very small projects that are under license. We also have what are called exemptions. And there's two different kinds of exemptions. This does not apply to exemptions. That's a different type of thing.

And there's particular criteria that a project has to meet to fall within the exemption, but that's a different thing. This process only applies to licenses. But a license can be very small. There is no minimum, and it can

be very large. So --

MR. NICHOLSON: Well, I'm still confused. I'm sorry here, but I'm blockheaded.

FACILITATOR MOLLOY: That's okay.

MR. NICHOLSON: There were small projects there were added to larger project features under PURPA here in California in the early part of the '80s, '85, '86. So for our example, we have an 85-megawatt project that has a five megawatt and a one and a half and a 500 kw added to those guys.

Are you saying that within that project that those can be exempt if they were -- if they fit the small project criteria, or they now are going to become part of a larger license picture? I'm not sure I understand how that works or how you envisioned it working.

MR. WELCH: The example that you gave, Les, are those projects currently under a FERC license?

MR. NICHOLSON: Yes. Well, two are under -- clearly conduit exemptions. One is -- one was added to the existing project license in '86.

MR. WELCH: Okay.

MR. NICHOLSON: The five-megawatt --

MR. WELCH: The conduit -- the conduit exemption is a kind of an exemption.

MR. NICHOLSON: Okay.

MR. WELCH: For life. Now the other part that was added to the existing license, we would still treat as part of that license when it --

MR. NICHOLSON: Okay.

MR. WELCH: -- came up for relicensing.

MR. NICHOLSON: It would be the license as a whole?

MR. WELCH: Yes.

MR. NICHOLSON: Okay.

FACILITATOR MOLLOY: Michelle.

MS. LEBEAU: Hi, my name is Michelle LeBeau. I'm an attorney with Holland and Knight. We represent many Indian Tribes across the country. I'm sitting and for Don Clary today.

FACILITATOR MOLLOY: And doing a fine job.

MS. LEBEAU: And not as knowledgeable as he is. So I was just trying to ask a question about where the language in the rule, where the switching was possible. But think I found it. Is that in Part 5 in Section 5.2? Is that the language that you're referring to when you're discussing the switching between different -- the ALP and the TLP?

I just want to make sure I'm focused on the right language that you guys are discussing. Actually 5.1, so it's page D-45 and D-46.

MR. WELCH: Well, not so much the switching, but the request to use the not default.

MS. LEBEAU: So where would this -- the potential for switching, what language would that fall under in the proposed rule or is that outside of the scope?

MR. WELCH: I don't think it's in the proposed reg, it's just a concept.

MS. LEBEAU: Okay.

MR. WELCH: The process from switching from an ALP, alternative licensing process, is in the ALP rules, existing ALP rules, which is 4.34(i).

FACILITATOR MOLLOY: All right. Any other comments on -- on criteria for process selection or switching?

All right. The next issue is number of processes. Any comments?

MR. WELCH: Is anyone interested in four processes?

FACILITATOR MOLLOY: No. Eight, ten.

Jim?

MR. McKINNEY: I have a question. Jim McKinney, Resources Agency.

Could FERC staff just elaborate a bit on why the TLP was maintained in the rulemaking so that option is available to licensees?

MR. WELCH: Again, there was a number of commentors, primarily from the hydroelectric industry, brought forth that comment to us, that they felt that the traditional process would be appropriate in certain circumstances, and should be retained. So that Commissioners thought that that was -- that was valid for a number of reasons.

You know, we talked a little bit about this morning, -- you know, that we sort of still have the traditional if, for whatever reason, the integrated process did not work out. That was just basically to address a number of comments that it should be retained under certain circumstances.

FACILITATOR MOLLOY: And again, remember, it's not -- the default will be the ILP and that will have to be on a special request. So the question would be can you think of any criteria that we might want to add to require licensees to show before choosing that process or allowing them to go to that process? If there's anything, you know, you can think of that we should consider when we're making that assessment.

Yes, Cathy.

MS. MESSERSCHMITT: Cathy Messerschmitt, North Fork Rancheria.

I think when you're deciding whether or not to

allow them to switch, you know, Tim said it earlier, is impact to the people involved and the process. You know, their -- their input as to what it's cost to them to stay with this process and what it would cost if they did switch, impacts to the partners involved in the process, I guess, is how I think you say. I think that has to be a criteria. Because, you know, like I said, the front runner to everything I've read is cost.

And for a hydro company to come back and say 'It's going to cost us too much to keep up with this process based on the benefit of what we're going to get out of it,' you know, I understand that. But I don't think that should be the only issue.

FACILITATOR MOLLOY: Anyone else?

All right. Travel liaison position, what it is, what it should be. What should it do?

Cathy.

MS. MESSERSCHMITT: I was waiting for Lu to jump in.

FACILITATOR MOLLOY: I'll take Lu, I'm willing.

MR. WELCH: Who's writing all the criteria down right now?

MS. JANOPPAUL: She's got to position PD ready.

MS. BEIHN: Okay. Lu Beihn, Mono.

I have a lot of ideas about that, but Carl touched

on a lot of it earlier, is that we tried to make that clear in D. C. in December, that one tribal liaison would not be enough. So we're going to have to figure out how we're going to do this.

We suggested a liaison for -- the licensees should have one. And this is -- it just makes total sense is to have one for each project that they're doing.

FACILITATOR MOLLOY: The licensee?

MS. BEIHN: The licensee. We've asked the licensees in our area to do that, you know. And whether we put it in the HPMP or how we're going to do this, we haven't come to that point yet. But we have with one of them, but not the other.

But you cannot go to a tribe up north that -- I'll just say Enterprise, for instance.

FACILITATOR MOLLOY: They're not here.

MS. BEIHN: You can't -- you can't take me as a liaison for the Enterprise Rancheria when I don't belong there and I have no idea with their traditional lands are and who the elders are to talk to. I know in my area and I can do that.

So we may have to have a layer of liaisons from you, Liz, you know, to a California one or either three California, you know, Northern, Central and Southern. And then from there project related, because, like I said, the

northern one is not going to know what Central California needs are. And they're not going to know our Big Creek San Joaquin area. They're not going to know, you know, the other project areas. They're just -- that's just not going to happen.

So that -- and I know people are going to say, 'Well, that's going to cost more.' But, you know, is the licensees are interested in really working with the tribes, they will see to it that that gets done. And I think we're right at that level right now. I don't think that would be a problem.

MR. WELCH: Could I just question a little bit more, Lu? So would you be -- sometimes we kind of jump back and forth from FERC tribal liaison to applicant tribal liaison. So let's just talk about each one of those one at a time.

For the applicant tribal liaison, would you be looking for some sort of language that would require an applicant to designate a tribal liaison for that particular licensing project? I just want to be clear.

MS. BEIHN: The individual tribes would have to. Is that what you're talking about?

MR. WELCH: No, no. Actually -- well, that's an idea, but I thought you were -- or the direction I thought you were going was that you would be looking for a

requirement that would say something like, "An applicant shall designate its tribal liaison. Someone who works for the company" --

MS. BEIHN: No.

MR. WELCH: -- "to act as a" -- so that's not what you look for?

MS. BEIHN: No.

MR. WELCH: Okay.

MS. BEIHN: No.

MR. WELCH: I'll block that out of my mind.

MS. BEIHN: We do have that. I mean that is a suggestion with one licensee because of a certain project that's being done in the area. That actually was their suggestion to have a person oversee the HPMP throughout that period. And we did ask for that to be a Native American. And they can call it consultant or liaison or whatever they want to call it. But we do feel that, you know, in order to keep track of that HPMP we like that person to be Native American so that all those concerns are covered throughout the license process, throughout the whole project.

MR. WELCH: So you're looking for someone from one of the tribes involved?

MS. BEIHN: Um-hum, yes

MR. WELCH: To be the --

MS. BEIHN: And that would be my next suggestion

is that it would be a Native American.

FACILITATOR MOLLOY: And so then on the -- just to clarify, because I think Tim and I were hearing the same thing, which was not what I think you meant. For each license process there should be a liaison at FERC or part of FERC, not the licensee?

MS. BEIHN: I would like both.

FACILITATOR MOLLOY: Okay.

MS. BEIHN: And I think that's what we're working on now because of -- you know, like I asked earlier about Van being there for the cultural resources.

MR. WELCH: So would you --

MS. BEIHN: And we know that we can go to that person, you know, with our concerns and they will be taken to FERC.

MR. WELCH: So you would consider Van to be the tribal liaison for that particular project? I see heads shaking.

MS. BEIHN: Only because that's our only choice at this time.

MR. WELCH: Okay. But in -- but in the future world you would want something more or better than that?

MS. BEIHN: Um-hum, yes. Well, we wouldn't mind having Van, but like I tried --

MR. WELCH: No, I mean I'm not exempting Van.

MS. BEIHN: -- I'm saying that the tribes would like a Native American tribal liaison to address the concerns. And that would be coming from -- you know, because FERC Commissioners suggested we -- well, he offered to have one, so we have Liz now. But what we're trying to say is that one person cannot do the job.

MR. WELCH: Okay.

MS. BEIHN: And that one person being the tribal liaison cannot be sensitive to tribal issues if they're not Native American.

MR. WELCH: Gotcha.

FACILITATOR MOLLOY: All right. I have Catherine and then --

MR. WELCH: Sorry.

FACILITATOR MOLLOY: -- and then --

MS. BEIHN: They are dragging it out of me.

FACILITATOR MOLLOY: Cathy and then Alison.

MS. MESSERSCHMITT: Thank you. Cathy Messerschmitt, North Fork Rancheria.

What we're sitting here discussing and I hope that I'm talking about is similar to what Lu wants. What I see, what I envision is like a matrix, but working from the bottom up. Yes, to answer your question, Tim, I would like to see language that encourages if not out and out says that a licensee would engage a tribal liaison that's project

specific.

We have a process in our area where that works very, very well. And when cost is brought up, it has -- you know, I think it will bear out that it saves a lot of money because it -- it smooths the way for the relationship between the applicant and the tribe. And everybody knows what's going on and are able to address study disputes and project disputes, you know, wherever they are on that project-specific level.

Now that tribal liaison in what I am envisioning in my mind, that project-specific tribal liaison would then conduit, plug into the tribal liaison at FERC. And then if there are issues, those two tribal liaison or coordinators, however you want to label them, would work together to try to address whatever problems are going on or whatever gaps are left out. That seems to be what makes the most sense to what we're dealing with here.

FACILITATOR MOLLOY: Okay. Thanks.

Alison and then Carl.

MS. LEBEAU: Yeah. I kind of -- I kind of agree with Cathy, that it -- the way I guess I would envision seeing it, it would be sort of a tiered approach. You've got you at the top and then on each project we have -- each hydro project has a cultural -- a FERC archeologist, for example, or a cultural resource specialist that's

responsible for that particular project.

Well, there perhaps should also be a, you know, a FERC under you, another FERC liaison, tribal liaison, that would work closely with the cultural resources FERC person. That liaison can perhaps be the first initial contact with the tribal groups, find out exactly who the players are, who the tribes are both federally and nonfederally-recognized tribes, because there's a lot of those out there, too, and to make that initial contact. And then that person would be -- could perhaps work with those tribes to figure out who is the representative of that particular tribe or group that's going to be the tribal liaison for that particular project. So sort of a tiered approach.

I think it would be important too to develop at some point early some sort of an MOU or an MOA between -- I don't know if it could be -- I'm not sure how it would work. But you'd need to have something on the ground to consider what happens down the road. The relicensings are a long process. And I know that this is going to be -- supposed to streamline it and make it not quite -- you know, instead of five to ten years make it two years, something like that. But there has to be some flexibility in there, I think, for changes in tribal structure and changes in -- I mean just speaking on the personal side of it.

I mean you can work with a tribe who has, for

example, an environmental office and they have specific people whose job it is to review these kinds of documents and to be the key players. And -- but those players sometimes change over the course of a license period. And so that there should be some sort of agreement upfront before the relicensing process starts about who those players are going to be, what their roles are going to be, what to do should the players change, you know.

FACILITATOR MOLLOY: How about on the idea of requiring or encouraging licensees to have tribal liaisons for the project?

MS. LEBEAU: Well, I think in most cases licensees already to some extent do. They know who -- you know, early on they contact the Native American Heritage Commission who tells you who the tribes are and who they should be consulting with. And are they contact those tribes. At least this is just from my experience, I can't speak for other licensees or other applicants, but they generally do establish, for example, a committee to work on specific relicensing issues. And they work directly with the tribes.

Sometimes the tribe appoints an environmental officer that a licensee -- that helps coordinate the meetings and who the attendees are. And then they relay that information back to the council and it kind of goes back and forth. I think it really depends on -- some tribes

may already have that particular person in place. Sometimes they don't, and maybe one needs to be selected. I think it's on a project-by-project basis.

FACILITATOR MOLLOY: Carl, I think.

MR. FOURSTAR: I think that young lady just about covered everything there, so -- but Carl Fourstar, Fort Peck tribes.

I mean it's all been said, but I'll speak as a member of the Fort Peck Tribes. And any agreement that's made, that needs to be ratified or comes from our tribal executive board. We have our constitution and bylaws.

To back up a little bit, the Assiniboine Tribe and the Sioux Tribe, we then entered into agreements with the United States government. Then we'll back off from there a little bit. And sometimes the United States government reneged on some of their -- we look at them as contracts, in which case then we have to go to court. And we've won our last few.

We just look at it as a business. We entered into a business deal, we're going to give up certain grounds, and in return we're going to receive certain things.

So with that in mind we kind of keep a handle on things here. We have an interest in the water quality. We have an interest in the environment. We have an interest in the traditional cultural properties or sacred sites.

Now as a result of our -- I'm going to kind of jump around here a little; I hope you bear with me. But as a result of that we went into this business deal with the United States government and the president. And you folks, the federal agencies, all work for the president and so forth. So as a result you all have a trust responsibility to honor those agreements that was made with the Indian Tribes.

The Bureau of Indian Affairs has been appointed as trustee for Indian lands and so forth. I haven't heard much mention of them, but we kind of hold them responsible. And somewhere along the line you probably should be looking at working with the Bureau of Indian Affairs. It might ease your burden somewhat. There's some things already in place that could be covered.

We work with the -- as Indian Tribes we work with the Bureau of Indian Affairs, we work with the Office of Environmental Protection, and numerous cultural type groups. A lot of laws have been passed on that.

So to jump down to a licensee wanting to build a hydroelectric entity to generate power, what is it going to affect, the water, the land? You know, who's going to be affected by this? And I think somewhere along the line they'll be looking at maybe changing the way they approach things. Because you can't just come and displace people

because, you know, that doesn't work. It sounds good. In the movies it looks good, but in reality it doesn't work too well.

So all the things, I just wanted to point out that there is a number of liaison entities. You've got the Bureau of Indian Affairs there. There's 27 tribes along the Missouri River that have formed a coalition of Indian Tribes along the Missouri, the Mni Sose. But even there with those tribes, we all view our areas as different, our traditional areas that we -- that we traveled in the past are somewhat different.

It's not an easy thing, so it might be up to -- the burden might be upon FERC if you're going to play that role as to -- to identify the things would need to be accomplished in working with OEP and others. I think you're already got everything. It's just a matter of putting your checklist up there and who's going to address these.

And that's all going to say, because each Indian Tribe addresses things a little bit differently. At Assiniboine there's Assiniboine's at Fort Belknap, there's Assiniboine's at Fort Peck, and we look at things a little different. The Sioux Tribes on different reservations, we all look at things a little bit differently.

So -- thank you. I think we're all carried away here.

FACILITATOR MOLLOY: I had Michelle, and did I see Sharon, did I see you? Okay, so Michelle and then Sharon.

MS. LEBEAU: Michelle LeBeau, Holland and Knight.

I just want to say that I do agree with what the ladies here have said about the different -- that more layers may seem more complicated and more costly, but I think of the long-term it may be a cost savings to have information upfront and have availability of a Commission liaison available to tribes.

And I'm going to put on my -- take off my lawyer hat and put on my tribal hat. I used to be on the Tribal Council of the Pit River Tribe. And as, you know, our relationship with a licensee depending on -- the time period fluctuated, but when I was a member of the council, we had a very good working relationship with PG&E.

And the cultural resource people in our tribe were assigned and given the responsibility to bring that information back from PG&E. And I thought that that was very helpful. However, at times where that relationship wasn't so great, having a Commission liaison would have been helpful, to have information flow directly to the tribe.

And I think it would have saved the tribes some resources that were limited already. So I can see that that may save money in the dispute resolution process and maybe can cut some corners there when one type of information flow loses

whatever it had, you know, and falls apart.

So for what it's worth, that's my Pit River comment. And just to clarify, I'm not representing the Tribe here today, although they are a client of ours.

FACILITATOR MOLLOY: Excellent. Thank you.

Sharon.

MS. FINK: Elaine Fink, Tribal Chairperson for North Fork Rancheria.

I have to say this. There definitely is a definition of "consultation" or mere "notification." And this is what we're facing with some of the electric companies. We feel like one in our area is really putting forth the effort and really consulting with us, because, as Timothy brought out earlier, it is a two-way street to get our comments. But then you have other ones that want to just -- just merely yes, "We have a meeting. Yes, you're all invited to the meeting, and we are notifying and we are consulting with the tribe." There is definite definitions, and I think a licensee need to know this. And they needed to deal with the tribes in that order.

FACILITATOR MOLLOY: Do you think that would speak to providing education to applicants on what consultation, you know, would entail and --

MS. FINK: It would help.

FACILITATOR MOLLOY: -- that type of thing? Do

you think that would --

MS. FINK: Yes.

FACILITATOR MOLLOY: And did I see Leland raise --
did you raise your hand?

MR. GARDNER: Yes, thank you.

I just wanted to suggest another area that I think is growing in terms of tribal interest, and that is electricity itself. As you probably know, the Western Area Power Administration has recognized tribes up in the Missouri Basin. And they are getting allocations of electricity for the first time and they've just recognized 55 tribes in the Colorado River Basin. Their allocations become effective in 2004.

The tribes with hydro resources I think are -- I think in very envious positions if they can themselves can get a piece of the hydroelectricity. And this has never, to my knowledge, ever been offered in an application or in a license project. But I think it would be very attractive for tribes. And I think there must be some way in which it could -- that area could be investigated.

For example, this happened a long time ago, and that was when the Four Corners plant was built in Arizona, New Mexico using the tribal coal. As part of the coal lease, the tribe got a 30-year contract for electricity at an extremely low rate. And the tribe built its electricity

system using that base, that resource, where there was no electricity available before that. So I think that we should not overlook this possibility as a compensation for tribes if they are interested and have the ability to take advantage of it.

FACILITATOR MOLLOY: Thanks.

Any other comments on the tribal liaison position?

Lu.

MS. BEIHN: Lu Beihn, Mono.

I just wanted to say that with the tribal councils, a lot of them are different, a lot of them have different things in their constitution, bylaws, et cetera. And, like I said before, in our area we have five federally-recognized tribes that are Mono. And they are also different.

So what has to be done is that if they do have an environmental department, the environmental department head has to be notified of everything that has to do with the license, you know, applications. But they also have to realize that they have to -- they have to send notifications to tribal council, which would be the tribal chair. So in that area we know when they're having elections. We know -- you know, we pretty much know what's going on in our area.

So that tribal liaison that would be in that position would be -- you know, we're requesting Native

Americans so that they could be involved with the tribes, so that the people in the area have the trust for them, that know they're on top of things. When one group has an election, right away the people that are involved in this process would be notified immediately that there's a new tribal chair, this person is so-and-so.

Don't send them a letter in the past tense eight months ago that's addressed to the old tribal chair. I mean that's offensive because people do not keep up with, you know, what's going on in the Native American community, which they should be doing. And so the notification list should be -- would be kept updated.

Your meeting notice -- your meetings that make our elders and other people in the communities uncomfortable having a nonIndian come and tell them certain things that they're suspicious with in the first place, it's helpful to have a Native American liaison that they already know, that they can trust to come in and say, 'These people want to come and talk with you today. It's about this.' You know, 'We want to protect our cultural resources, we want to protect our water, we want to do all these things. We need your help, we need your input, we need you to tell us some of the old ways and what needs to be done so we can relate it to them and they want to come talk. Yes or no?' I mean, you know, if they say no, well, it's like you can do it.

So there's a lot of issues involved with the liaison that FERC is going to have to investigate and find out how to go about doing that. But also the licensees have to do that, you know, because they're very timid about meeting with people. So it's real important that you have one of their own people come and make the arrangements to have these meetings and to have discussions about these things. That's probably the most important.

FACILITATOR MOLLOY: Cathy and then Alison.

MS. MESSERSCHMITT: Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

I get nervous when I talk at these things and sometimes I misspeak. With regard to what benefits Native American Tribes, with regard to where we're at in our area I just wanted to reiterate what Lu said. Because I've heard people say before, 'Well, that's the environmental planner's job, is to tell the tribe what's going on with that particular project.'

Not being Native American, there are times when I'm talking but I'm not talking in a language they understand, meaning I'm speaking English and they understand English, but I'm not using terminology that they understand, and they don't get it. And that's my failure, to not communicate correctly.

That's where the value of having a Native American

to do that project-specific liaison position is almost invaluable and a service that someone like me can't provide.

FACILITATOR MOLLOY: Alison.

MS. MACDOUGALL: I just kind of -- she just said what I was going to say, pretty much. But I think what the message at least that I'm hearing from folks is that it's really clear that on a tribe-by-tribe basis, I mean there has to be sensitivity to -- you have to be able to -- it's not as cut and dried, I think, as perhaps the FERC or -- you know, would like.

We've got -- we're talking about a streamlined process here, but we have to understand that tribal consultation takes a long time. It's a huge effort. You have to establish trust, you have to establish relationships, you have to figure out what makes each tribe work, and who the key players are, and how best to communicate with them, and, you know, who should be doing that communication.

And at least one of the -- at least for me that's one of the things about relicensing, that it takes a very long time to do that, because trust isn't something that is a given right upfront. They're not going to necessarily sit down and tell you everything you want to hear just because you ask, you know. And so you have to -- I like the idea of streamlining the process, but I think it also has to be

flexible to accommodate the needs of the tribal people, as well, and to accommodate consultation that could take some time. And I have a little bit of doubt whether this streamlined process can do that, but that's my opinion.

MR. WELCH: Well, one thing and this is under a different category here, what is tribal consultation. I think we recognize that. And I think our hope is that the initial contact with the Indian Tribe, where we would sort of work with the tribe to map out the consultation process, would be a process that's in parallel with this. I mean it would obviously -- there would be check-in points for the tribes along the point. But I'm not saying that this process right here would govern the tribal consultation as well. I mean I think that's one thinking that...

MR. McKINNEY: I have a comment.

FACILITATOR MOLLOY: Jeff -- oh, yes. I'm sorry.

MR. McKINNEY: Jim McKinney, Resources Agency.

I think this is a really important set of issues that we're talking about. And I really appreciate the effort that FERC staff have gone to to address this set of issues.

I don't see a lot of specificity in the proposed rule about this set of issues. And I know that in our -- say, for example, our state and tribal conference calls where we have about ten states and five tribes, there are a

lot of ideas that come up with this -- or come up regarding this. And, similarly, last December at the drafting sessions there were tribal representatives from the Nez Perce and the Columbia Intertribal Basin who also had a lot of really solid ideas.

I thought I understood that FERC was going to set up some kind of working group or, say, technical team to really dig into this, work directly with the tribes, and create a process that addresses a lot of the tribal concerns. I get -- there's so much in the NOPR. I mean there's just so many issues you guys are tackling at once. But I think some of the tribal stuff, it's buried, and you've got to work really hard to find it.

So that would be my -- it's both a question because I thought was going to be one of the resulting processes from December. And that I would make that as a suggestion in the few months we have remaining here in this NOPR.

FACILITATOR MOLLOY: All right. Thank you.

It's just about noon, five minutes to noon. In case that means anything to anyone. Shall we break for lunch and come back at 1:00? Oh, look it showed up on the list.

MS. [SPEAKER]: Off and on it would just appear.

FACILITATOR MOLLOY: All right. Well, enjoy

lunch. We do have one request and that is that you sit in the same seats.

(Laughter.)

MR. WELCH: Yeah. No switching.

FACILITATOR MOLLOY: And I have a chart that I've made. So I'll know.

MR. WELCH: This guy wanted that?

FACILITATOR MOLLOY: I'm trying, you know, hard enough to try to keep the names lined up. And, as you know, I messed up. But -- and you guys look like that kind. But it will help out on the recording if he sees where everyone else is, it's helping him out, so...

MS. SMART: Can I just a real quick that unfortunately I've got to cut out. I have a --

FACILITATOR MOLLOY: We'll miss you.

MS. SMART: A what?

FACILITATOR MOLLOY: We'll miss you.

MS. SMART: But it was good to meet you all and --

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MR. WELCH: Thank you. Thanks for coming.

FACILITATOR MOLLOY: Do you have any -- any comments on any the other ones before you head out, if you want to share with us? We'll give you that opportunity just before lunch.

MS. SMART: All of them. All of them, but I'm

anxious to see the notes, the transcribed notes.

FACILITATOR MOLLOY: All right.

(Luncheon recess taken from 12:00 p.m. to 1:16 p.m.)

FACILITATOR MOLLOY: Let's get started again.

I'll try not to provide feedback quite that way.

I just want to introduce -- I assume most of you know or have run into before John Clements, who is next to Ken. If you haven't, this is John Clements, and he's joined us this afternoon.

And I don't think we have anyone else who's joined us who wasn't here this morning, so...

He works on rules.

MR. CLEMENTS: I'm the lawyer.

MR. WELCH: John would --

FACILITATOR MOLLOY: He dabbles in rules.

MR. WELCH: John took the lead on authoring the preamble.

MR. CLEMENTS: I type good, too.

FACILITATOR MOLLOY: You can give Ken pointers on the crusher typing.

MR. HOGAN: Let's trade seats.

FACILITATOR MOLLOY: Our next issue -- we've covered some, and our next issue is the water quality issues. And do we have anyone who wants to comment or

expand on -- on a subpart of this that we want to cover,
or...

MS. MESSERSCHMITT: Cathy Messerschmitt, North
Fork Rancheria, environmental planner.

The reason that I asked you about that is because
what -- what I was reading in the book, everything that I've
-- and I call it book because -- sorry, that's what I turned
out to be -- is that it keeps talking about states and
tribes with regulatory authority, with -- with water quality
issue authority. It does not address tribes that don't have
that. And I'm specifically talking about with regard to the
dispute resolution.

It says that there is a venue for states and
tribes that have regulatory authority to address the studies
that go into study dispute, but it doesn't say whether
tribes that don't have it can. And I'm assuming they can,
but that's an assumption.

MR. WELCH: The way that the rule is written, and
you're partial correct, but let me just clarify it.

MS. MESSERSCHMITT: Okay.

MR. WELCH: There's two aspects to the dispute
resolution process. The first aspect is, if you look on
your chart, probably it would be termed, deemed "informal
dispute resolution," and that would sort of cover probably
boxes 6 through 11, with emphasize on box 9, which is the

time that all the parties, regardless of whether they have regulatory, mandatory conditioning authority or not come together and participate in study dispute resolution process.

Now from boxes 12 through 14 is -- is another type of dispute resolution, and that part is reserved for those agencies and tribes that have some sort of mandatory conditioning authority, whether it be under the Federal Power Act or in the case of tribes, they're designated by EPA as having 401 water quality certificate authority.

So that's -- that's the distinction. It's not that the tribes wouldn't have that venue, they would have the first part, but they would only have the second part if they were a water-qualifying certifying tribe.

MS. MESSERSCHMITT: Okay. Thank you.

FACILITATOR MOLLOY: Any other issues on water quality issues? Was it -- yes, Jim.

MR. McKINNEY: Jim McKinney, the Resources Agency.

Just for the benefit of the tribal reps that won't be at tomorrow's forum, where we'll be making our full comments on these and other issues, the State of California does have concerns about the timing of 401 water quality certification applications. We think it should be much later in the process, after the Ready for Environmental Analysis, about the time the draft NEPA document is

released.

We're also concerned about the joint environmental documents. As you know for 401, we've got to do a CEQA document in California, so we think there's an easy win there with matching that up with the NEPA process some more.

And for the study dispute resolution process, we're going to formally recommend that the formal dispute resolution, not the informal one, be opened to states and tribes and then agencies with 10(a) and 10(j) authorities. That way everybody who has a stake and an interest in making sure that the right studies are done to answer the right questions can be assured that they will be involved in the final dispute resolution process.

FACILITATOR MOLLOY: Yes.

MR. NICHOLSON: I have a question for -- pardon? I'm sorry, I'm Les Nicholson from the Nevada Irrigation District.

In regards to California and this 401 process, you know currently there's an ongoing CALFED Bay Delta water quality reissuance of water rights in California, so to speak, the adjudication of those water rights. That's going to be down the road a ways, probably eight, nine, ten years.

Is this process flexible enough to be able to meet that change in water quality certification as time goes on or is it going to be rigid to whatever you have when you

apply for your NOI?

MR. CLEMENTS: You want me to do that?

MR. WELCH: Yeah. Is that a question for the state or FERC staff?

MR. NICHOLSON: Well, I'm asking, I guess --

MR. WELCH: Go ahead, Jim.

MR. NICHOLSON: Is FERC flexible enough to be able to manage the state's ongoing change in water quality issues here in California?

MR. CLEMENTS: My guess is that we -- our intention is to continue the existing practice, which is that we go through the licensing proceeding and we issue licenses, but we reserve authority to make any necessary modifications to the license as a result of the ultimate outcome of ongoing or future water quality -- pardon me -- water rights proceedings, but we would not hold up a license simply because there was a water quality -- or, pardon me -- a water rights proceeding ongoing.

MR. NICHOLSON: Okay.

MR. CLEMENTS: In Nevada -- or, pardon me -- Idaho they've been at the Snake River for about 25 years, so we're -- and it hasn't affected anything. We've just issued licenses and we have this authority in there, but you should ask for it. Ask for that reservation.

FACILITATOR MOLLOY: Any other comments or

questions? Cathy.

MS. MESSERSCHMITT: After we have this one I think it would be more timely to talk next about slippage, flexibility, and time lines, because they dovetail into each other with regard to what you're talking about right there. And I think from everything I've been able to read in this, there really isn't a safety net for if -- for example, the study disputes end up taking three years instead of two.

MR. WELCH: The studies or the study dispute?

MS. MESSERSCHMITT: The studies.

MR. WELCH: Studies, okay.

Is that what -- are we -- oh, is that with water

--

MS. MESSERSCHMITT: That's a suggestion.

MR. WELCH: Yeah. Just to clarify a little bit on the time for studies. When I was doing our presentation I -- I did mention that the process that you see on the back of the -- of the book provides for about a two-year study period. We think that that's fairly reasonable and we think that that is what we see most -- most of the time. However, we recognize that in a number of cases of more complex projects, more than two years of study would be required.

So as far as the actual time for studies, I would refer you to the actual study plan, which would be back on box 11, that would be issued by the Commission. And that

would -- that would actually designate the study period.

Now recognize that there could be studies going on when the applicant files its application. That application date is fixed by statute. They have to file an application two years before expiration, but we do recognize that there could be studies ongoing at that time. There is a requirement for an applicant to know what status are still ongoing according to the study plan and providing a schedule for when those studies would be completed.

Now if you'll also look on Section 5.21, the Ready for Environmental Analysis, if there are studies ongoing the Commission will not -- we will not issue that Ready for Environmental Analysis until all the studies in the Commission-approved study plan have been completed.

MS. MESSERSCHMITT: Okay. So if is what I'm hearing, Tim, then that this -- that this five-and-a-half or five-year timeframe, if the project is more complicated and studies have to take longer, then it would expand to maybe six years or...?

MR. WELCH: It could, whatever is necessary for the studies to get done.

MS. MESSERSCHMITT: Okay.

FACILITATOR MOLLOY: Any other comments or questions?

MR. CLEMENTS: Cathy, on that last one there's

also in 5.28(f)(2), which is on page D-86, there is a catch-all provision which authorizes the director of Energy Projects to waive or modify time periods within these Part 5 regulations. And presumably that would be on a good-cause basis.

MS. MESSERSCHMITT: Okay.

MR. CLEMENTS: But the expectation and certainly the hope is that people would be able to work together and conclude a process within five and a half years in the general case.

FACILITATOR MOLLOY: And the waiving timeframes is timeframes excluding the two years prior to license expiration, which --

MS. MESSERSCHMITT: Right, yeah.

MR. CLEMENTS: Yeah. That's statutory, we can't waive that.

MS. MESSERSCHMITT: Yeah, I understood that.

MR. CLEMENTS: Although it would be nice.

FACILITATOR MOLLOY: Any other comments, questions on this, on the slippage, time lines? Jim.

MR. McKINNEY: I guess a general question. Jim McKinney, Resources Agency. That's why we're really curious as to what happens if -- if this doesn't work, if there are speed bumps in the road. It seems that there's not a lot of time between the end of the second study season and the

beginning of the draft application development -- there's actually no time.

And, as I understand the process, you are expecting applicants to begin developing that draft application in the form of these, I think, status reports through the two study seasons. But I think a big question for the state is again what provisions are there, what contingencies are there if the process doesn't work as planned. Do we slip into long-term annual licensing or do we get decisions that may not be based on a full evidentiary record?

MR. WELCH: Well, I don't think we'll get decisions not based on a full evidentiary record. We will -- the process will take as long as it takes to get the information that's necessary for us to make our decision and hopefully you as well.

I mean I'm not sure -- the issue you brought up about the draft application is a sticky one. I think it's just going -- our expectation on what's in that draft application would be, you know, to the extent that an applicant can use the information that has been developed thus far to develop PM&E measures, that they would do that, recognizing that if there's still outstanding information that's needed that they could only go as far as they could go.

But, you know, as these guys said, I mean they have to file at that particular time, so...

FACILITATOR MOLLOY: Cathy.

MS. MESSERSCHMITT: Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

I have to apologize, Tim, because we've already discussed this, but I'm going to throw it out there so the rest of the group can hear it. We've talked quite a bit at length in North Fork, the Rancheria, about HR-1013, which is the new congressional bill, that they had a similar bill out last year, but this is the new one, they just had hearings on last week. And, you know, I think this is timely to bring this up now and say: What happens if that passes? What's FERC going to do then?

MR. WELCH: Well, we'll be in a room very similar to this one --

(Laughter.)

MR. WELCH: -- developing the rules that are necessary to implement that legislation. I -- you know, I -- I don't know. What --

MR. CLEMENTS: We tend to get kind of blas about it because almost in every Congress there is hydro legislation bills that come up and they rarely actually pass something. And the last time they really jumped on it was 1992. So, you know, you have to forgive us on the staff for

just kind of having a 'Yeah, if it happens it'll happen'
attitude.

MR. WELCH: Yeah. I mean I'm not trying to go --

MR. CLEMENTS: But he's right --

MR. WELCH: -- like naaay. But I mean you do --
you do your job. You participate with stakeholders. You
make your rules the best you can. And whatever those guys
under the dome do, I mean...

FACILITATOR MOLLOY: You then adjust.

MR. WELCH: You then adjust.

I mean last week our office director did testify
on the Hill. And he talked to the committee about this very
rulemaking and emphasized that we are working with both
resource agencies, tribes, and applicants, and all
stakeholders to develop this rule to make the process
better, so we made that loud and clear -- I know, I wrote
that part of the testimony.

FACILITATOR MOLLOY: Thanks, Tim.

Any other comments, questions? Lu.

MS. BEIHN: Lu Beihn, Mono.

Liz, could you just introduce John again to North
Fork Rancheria Tribal Council? Maybe he'd like to know
their names and their positions on the --

FACILITATOR MOLLOY: Sure.

MR. CLEMENTS: Sure.

MS. BEIHN: Thank you.

FACILITATOR MOLLOY: This is John Clements in the blue shirt. He is a major contributor to the rule. As he noted, he types well. He has a passing -- passing ability to think as well. And he, you know, has been the real -- real force. Yeah, he's helped us get to where we are right now, tremendously. He is the cornerstone -- excellent -- and so this is John. And if --

MR. CLEMENTS: That's another way of saying I'm at the bottom.

MR. WELCH: He is -- he is --

FACILITATOR MOLLOY: He is the foundation.

MR. WELCH: He is the wind beneath our wings.

MR. CLEMENTS: Just get it overwith, Liz, okay?

FACILITATOR MOLLOY: Cyrus, if you want to start and we'll work around again?

MR. NO : Yeah. I'm Cyrus No , the publisher of California Energy Markets Clearing Up and hopefully soon a newsletter called "Relicensing Reporter," the flyer for which is around here. And I'm based in Seattle. We have offices in San Francisco and Sacramento.

MS. CARTER: Sharon Carter, North Fork Rancheria, Tribal Council Treasurer.

MS. MESSERSCHMITT: I'm Cathy Messerschmitt, North Fork Rancheria, Environmental Planner.

MS. FINK: Elaine Fink, Tribal Chairperson of North Fork Rancheria.

MS. DAVIS: Jackie Davis, Roundhouse, North Fork Rancheria, Tribal Secretary, and a friend of Congressman Radanovich. That's why I brought this up, because he is a representative of our area and I know that he's been lobbying pretty hard. And, you know, that's why I brought -- had Cathy bring that up, because that's of vital importance to me, because he is from our area.

MR. BEIHN: Patrick Beihn, North Fork Rancheria, Vice Chair.

MS. BEIHN: Lu Beihn, Mono, et cetera.

(Laughter.)

MR. FOURSTAR: Carl Fourstar, the Water Administrator for the Fort Peck Assiniboine Sioux Tribes, Northeast Montana.

MS. THOMAS: Jennifer Thomas, Bureau of Indian Affairs, Sacramento Regional Office.

MS. SMART: Betty Smart, Wright Ranch Hydro.

MR. BERG: Mel Berg, BLM, Washington.

MR. HOGAN: And you know me.

FACILITATOR MOLLOY: You know Ken and Tim.

MR. PAUL: I'm Dilip Paul. I'm one of the members of the FERC Hydro Team, the Regional Office based in Sacramento. Thank you.

MS. LeBEAU: Michelle LeBeau, Tribal attorney from Holland and Knight.

MS. HOUCK: Darcie Houck, California Energy Commission.

MR. McKINNEY: Jim McKinney, State of California, the Resources Agency.

MR. CONNOR: Mark Connor, Engineering Operations Manager at Northern Lights.

MS. ERICKSON: Jessica Erickson, Nevada Irrigation District.

MR. NICHOLSON: Les Nicholson with the Nevada Irrigation District, Hydro Manager.

MR. WELCH: And, Mona, you want to introduce someone here?

MS. JANOPPAUL: This is my mother. It's her birthday this week.

[SPEAKERS]: Happy birthday.

MS. [SPEAKER]: Thank you.

MR. WELCH: It's on the record.

FACILITATOR MOLLOY: All right. The next issue that's up there is the pre-NOI meeting and I believe this one also was what would constitute consultation and what would we want. And Cathy's telling me further.

MS. MESSERSCHMITT: I'm sorry. I thought this was -- I didn't put it up there, but I thought this was what

would be included in the pre-NOI letter, right? Okay. I'm sorry.

FACILITATOR MOLLOY: It can -- it can -- that's a good place to start. I think there was more.

Any ideas on this?

MS. MESSERSCHMITT: I think what was discussed before and, Jim and Lu, some of you other guys that were here, if I'm wrong, just slap me down and tell me what was right, I believe what they talked about was that that -- in that pre-NOI letter would be a letter to the hydro company saying what its responsibilities were as far as contacting the local tribes and other interested parties, not just tribes, but it would be your organizations, your rec, river, all of that. And that that would be part of the pre-NOI package, is that that be mandatory to -- to be able to include everybody at the beginning, to frontload the process. Right?

Okay. I'm getting some nods.

FACILITATOR MOLLOY: We were...

MR. WELCH: The advance notice.

FACILITATOR MOLLOY: To tribes.

MR. WELCH: To the applicant.

FACILITATOR MOLLOY: Or to the applicant.

MS. MESSERSCHMITT: Yeah. That goes to the applicant, right?

MR. McKINNEY: And if I can follow up on that?

FACILITATOR MOLLOY: Yes.

MR. McKINNEY: Jim McKinney, Resources Agency. We were also curious, I think as the tribes are, when does this pre-NOI period start and kind of what happens between pre-NOI and NOI? That seems to be just a critically important phase, again, if we're going to frontload this and sprint to the finish, so there's a lot of important work that could be done in that period, but it's just not clear where we are in kind of thinking through that.

MR. WELCH: Carl.

MR. FOURSTAR: Along these lines -- Carl Fourstar, Fort Peck Tribes. How does FERC and the applicants intend to deal with the -- not speaking of Indians -- the nonIndian landowners, conservation districts, counties, cities, towns?

The reason I put it in that context is on the Fort Peck Reservation, for example, the land ownership is checker board. As a result, as I mentioned earlier, a lot of us work together, regardless. We don't run by race. We're working by with what we've got.

The conservation districts -- the county conservation districts sometimes speak for a lot of the farmers and ranchers and their concerns. You've got the river running here and they've got -- they own the land along the river and so forth, and whatever happens they're

going to be affected.

How is the FERC and the applicants going to deal with those people? And there might be a lot of common ground here is all I'm saying.

FACILITATOR MOLLOY: Do you want to take the first part?

MR. CLEMENTS: I think the intent of the whole pre-NOI application is to -- is to let the licensee -- first talking about the licensee end of it, is to let the licensee know or remind them -- believe it or not, there are some that really are kind of up to speed -- that they do have the relicensing coming and that they need to get ready. And it's going to tell them and refer them to the regulations. So that when -- when the notice of intent issues there's a package of information that has to go with that, the pre-application document which is set out in the early parts of the Part 5 rules.

So it's really -- that part is a wake-up call to the licensee to get moving. And the licensee doesn't have a specific obligation to contact those people before that NOI is due. But we think that in the course of putting together the pre-application document that it's likely that will licensees will want to have some contacts and get in touch with those people. But when the NOI is filed, that's when the actual process will start. There will be public

notices.

And if an applicant wants to use, for instance, the traditional process, then when they issue their NOI they're also going to have to have local newspaper notifications, you know, in the county or the counties where the project is located and things like that. So that no one is intended to be excluded by any of this. It's just that that's the start of the actual sort of public process, if you will, is when the NOI is issued, and the notices that go with that.

Does that answer it or were you looking for more?

MR. FOURSTAR: No, that's fine. It was more or less a rhetorical question anyway. But these things are always good to -- I just want to throw them out there. And sometimes I'll just say things, I'm not really asking a question, but just sort of thinking out loud, I guess. Because -- mainly because those are things that are going to crop up. And, as I mentioned, back home there we work together on this and we're tired of doing battle with the Corps of Engineers and everybody and their brother that wants to do something with the resource, but we found ways to do it, so it works.

FACILITATOR MOLLOY: Cathy.

MS. MESSERSCHMITT: In the pre-NOI isn't also that when FERC would -- would make the applicant aware of what

processes are available, the three processes?

MR. WELCH: Yes.

MS. MESSERSCHMITT: And then that way everybody knows what's available and what gears they'll have to go through. I mean they won't have made a decision by then, but they will know what's available, right?

MR. CLEMENTS: Our hope is that long before they even get this pre-NOI letter from us, that they will have looked at the regulations to see what's going on.

MS. MESSERSCHMITT: Hopefully.

MR. CLEMENTS: We have high hopes for that.

MR. WELCH: Getting back to Jim's question earlier about the timeframe, we did not specify a timeframe in it, right? We --

MR. CLEMENTS: No.

MR. WELCH: We just said a significant time or a good enough time, or something like that. So I think we're open for some discussion.

I mean we've heard three years. Between one and three years is -- I've never heard anything less than a year, but...

MR. CLEMENTS: It's been ranging, but, you know, we're happy to hear what people want to say about that, because that's important, you know, when that letter goes out.

MR. WELCH: Yes.

MS. MESSERSCHMITT: Yes, it is.

MR. McKINNEY: Let me -- let me ask my question in a way that's more focused on the tribal forum today. What would FERC staff do, and perhaps with this new tribal liaison position, to help ensure that applicants and tribes are working together closely, that each party is informed of what is about to come up?

It seems like this pre-NOI period is the opportunity for that to take place. And I think we had really good discussion this morning about, you know, the varying roles and responsibilities of the tribal liaison. But this is where that gets put into action. This is one of the times in the process where that's put into action. So I'm curious as to what thought has gone into that that may or may not be reflected in the NOPR.

MR. WELCH: Well, I think it would be -- I mean the most important thing is that initial contact between the FERC staff and the tribal liaison; and whether -- whether or not that involves the applicant for the initial contact meeting, I'm not exactly sure about yet. But -- so I think that that initial meeting would sort of set the stage about how the applicant would be involved in the process.

But I do -- I do agree that it's sort of incumbent on us to sort of mesh those two entities together. I think

it's a very important relationship, and so I think it's sort of -- we're sort of taking on that responsible. And I do think it's very important it happen in the pre-NOI period.

FACILITATOR MOLLOY: And that's where we're looking at, at sort of the formation and how we should set up. Probably in different -- in each different project, as we talked this morning, it's going to be different, you know, what's needed, what's involved, you know, how it's going to play out. So that's where we are trying to look at this. But we do see that the notification to the tribes early on and trying to establish what the process would be in the -- in the individual process -- project is key. And it would be -- you know, during that period would be an excellent opportunity to get everything working.

MR. CLEMENTS: The one thing I would say that I don't think you can expect to see in a final rule is a directive to the licensee to do things before the NOI. The notification would be a notification, not a direction to take some specific action. And certainly it would -- you know, we would inform the licensee to the extent that we were aware, you know, of tribes in the vicinity or that would be affected by project resources. And I assume that the liaison function will include informing the tribes of, you know, upcoming relicenses and licensees that may affect them.

The one kind of exception to that is if a licensee wants to do the alternative process, because that is so consensus based they're going to have to do the same thing they have to do now when they apply to use the alternative process, which is to show that they have some kind of a critical mass consensus to go ahead and use that process. And that inevitably is going to require a significant amount of work before the NOI, because when they file the NOI they also have to file at that time a request to use the ALP. And that's specifically provided for in the regs.

If they want to use the traditional process, then they can hold their fire until they file the NOI, which would include their request to use that. And there are specific directions in the draft regs as to, you know, how entities could comment on that. It's a very tight timeframe for that, though.

FACILITATOR MOLLOY: Any other comments or questions on this? Ideas. All right. Sorry.

MS. MESSERSCHMITT: Before you go, I just remembered one thing. The other thing that was talked about that I remember is talking about inclusion of maps and things of that nature. Was that in the pre-NOI, Tim; do you remember that?

MR. WELCH: I do -- I do remember talking about that at the stakeholder drafting session.

MS. MESSERSCHMITT: Okay.

MR. WELCH: But I don't think -- I don't think that the preamble talks about that level of detail.

MS. MESSERSCHMITT: Yeah. It didn't. That's the reason I'm --

MR. WELCH: Yeah. But I think it sure would -- I think it sure would be nice to have one.

MS. MESSERSCHMITT: Well, it's just that it's been stressed over and over that you want to streamline this process, you want to shorten this process. In order to do that, that's one of the things that was beneficial of the California plan, was all that frontloading upfront. What -- to bring all the information to the table at the beginning so people could start deciding what studies they wanted to see done, where those were. Like Lu was asking earlier about the roads, are they part of the project boundary and how do you address those, and things of that nature.

So that as we're -- you know, for instance, if we have 19 hydro projects going on, which we actually do, then we know which studies are relevant where, and where we have baseline information and where we don't and how they overlap.

MR. WELCH: Right.

MS. MESSERSCHMITT: So if you frontload that at the beginning and have those maps and stuff, I think you're

just ensuring that the process will go smoothly and there will be fewer bumps, I guess.

MR. WELCH: Right. I -- I hear you. And I think what you're describing basically is the pre-application document --

MS. MESSERSCHMITT: Okay.

MR. WELCH: -- which is filed at the time of the NOI.

MS. MESSERSCHMITT: Oh, okay. So I'm getting a little -- a little ahead?

MR. WELCH: Yeah.

MS. MESSERSCHMITT: Okay.

FACILITATOR MOLLOY: All right. The next issue we have up there is dispute resolution. Now we did -- I think we addressed this already. Is there anything else we need to say on it? We talked about it earlier with the water quality issues. Yes.

MS. DAVIS: Hi. This is Jackie from North Fork Rancheria. I wanted to ask Jim to clarify. I wrote a note. We were discussing this at lunch.

You were interesting in wanting to know where FERC stood on this study dispute resolution and the qualifications. That was my note. I just wanted you to kind of explain what your question was on that. Do you remember?

MR. McKINNEY: Was that the qualifications on who would be eligible to participate in this?

MS. DAVIS: Yeah. I -- maybe that's what it is. I just wrote "qualifications."

MR. McKINNEY: Um-hum. Yeah, I think that's what I was referring to. Yeah, again, as the state agencies will talk about more tomorrow, but I definitely want to do it here as well, it's our view that the formal study dispute resolution process should not be restricted to 401 certifying agencies with water quality -- you know, 401 cert. authority. That it should be open to agencies with 10(j) authority, 10(a) authority, and to tribes who do not have 401 certification authority. Because that final dispute resolution process, as we understand it, is the last opportunity to make sure that the studies are done in a way that answers the questions that are most important to stakeholders and tribes and state agencies in a given relicensing.

I don't know; does that help?

MS. DAVIS: Yes.

MR. McKINNEY: Okay.

MS. DAVIS: This is Jackie again. Thank you, Jim.

FACILITATOR MOLLOY: Cathy.

MS. MESSERSCHMITT: And, well, to add to that, I made a note here because I totally forgot, but that allowed

me to get my question back in with regard to water quality.

In the book, and I don't remember where it is, it talks about with regard to cost, deciding on studies, what studies to be done. That if it's too expensive to do those studies, then I believe it was the hydro could then go back to FERC and say, no, this is cost-prohibitive. And the burden is on the tribe or whoever is saying that they need that study to provide the nexus that shows that, you know, it can't be -- that the study can't be overlooked just because of cost, that it needs to be done. Right?

MR. WELCH: Well, cost and practicability is one of those study criteria that we would expect any study requester to address if it became an issue. So if that's what you're --

MS. MESSERSCHMITT: Okay. But it doesn't mean that one outweighs the other, though, right?

MR. CLEMENTS: It's -- the various factors that are supposed to be considered, and they would have presumably different weights in different circumstances, depending on what you were looking at. You know, an endangered species versus, you know, small mouth bass or something like that. So cost might tip the balance in one case and it might very well not in another.

But I guess what I wanted to say is don't think of it in terms of either -- either the applicant or an entity

requesting the studies as having a burden of proof. Your only burden I think is to address the criteria that are there, but there's no way you can look at the criteria and say that the one party or the other has a burden of proof.

MR. WELCH: I think that what we're looking for there, Cathy, is if there is -- if there is an a more inexpensive way of getting the same information, you know, how has that been considered. I think that's kind of what we're looking for.

One suggestion that was made by several members of the industry was a measure of: Is the cost of that information worth the information itself. Like is it -- is it commensurate with the amount of information that you're going to gain from it. So we're asking questions about that one.

As I said, what we're looking for mainly is if there is -- if there is an alternative method that's less expensive, did you consider that.

MS. MESSERSCHMITT: Okay. I guess -- maybe I'm -- maybe I'm looking at this from a different -- from a different perspective that isn't in line. That's why I'm asking for this clarification. Because -- I'll give you a for instance.

A hydropower has baseline data that's 20 years old. And they believe that it is too expensive to go out

and do new studies because they already have the baseline data. They go ahead and say, 'This is what we want to use.'

And then the tribal entity will come back and say, 'Wait a minute. Things have changed. That information's not germane anymore. It's outdated. We have new information.' And it's ignored because the cost -- it's cost-prohibitive.

So then the company goes and saws through an arch site. You know we can't do a oops. That arch site is gone. And, you know, we're talking about cost-prohibitive. You know it's a perception for the hydro company. It's going to be cost-prohibitive to go around that site. If they do new studies they'd realize that they have to do that, but if -- if the tribe doesn't meet that burden and say, you know, 'This isn't updated information. This isn't relevant information,' and they go ahead and do it and we lose the arch site, we don't get that back.

So in the cost arena we've lost a lot more than the hydro company would lose in dollars. Do you understand what I'm saying?

MR. WELCH: Yeah. Not so much the specific example, but I think I understand your general issue. And the only thing I would say to you is I thought the key you said was: And we thought that the old data were not germane to the new situation.

MS. MESSERSCHMITT: Um-hum.

MR. WELCH: So that puts a flag up to me, then I would be looking for your explanation as to why that is.

MS. MESSERSCHMITT: Okay. So I was right, the burden of proof then is for us to explain why it's not germane?

MR. WELCH: That's right.

MS. MESSERSCHMITT: Okay.

MR. CLEMENTS: And, similarly, they would have a burden to explain why they think that the existing 20-year-old data is not out of date, why it would still apply.

MS. MESSERSCHMITT: Okay.

MR. CLEMENTS: I mean they can't just --

MS. MESSERSCHMITT: That's fair enough.

MR. CLEMENTS: They just can't sit back.

FACILITATOR MOLLOY: Carl.

MR. FOURSTAR: Carl Fourstar, the Fort Peck Tribes.

Along with what the fellow from the irrigator from Nevada was saying over there about a baseline data, it's imperative I guess that for all the local areas, whether it be Indian reservations or irrigators, water users, that the baseline data -- their database be up to date.

From a tribal, as an Indian I kind of look at it from this point, that I think what we ought to do is we

ought to proclaim what our database is. Put the onus not upon us but on them to prove otherwise, and that should take out all the questions of cost and so forth. And that's something that the tribes might want to just keep in mind.

All too often in the past, you know in the oil fields, for example, this is proven, if -- of course -- if, if, if, you know all that sort of stuff. But, anyway, a lot of things have been learned from those processes there. So it wouldn't take much to just establish the baseline and work with EPA and their ways of doing this, and get that set up.

And for the irrigators, we've got pumps that are, as far as the federal government knows, they're safe. And up until a certain drop, but they didn't realize they'd be safe but our impellers would be losing a lot through sand and so forth, you know, at the expenses. So we had to bring that to their attention. So there's a lot of things that could be done here.

And if somebody wants to dispute those and say it's wrong, well, let them spend the money and prove it. We can always use the data. Thank you.

MR. NICHOLSON: Les Nicholson from NID. And, you know, I agree with you. I think when we think about baseline data we're talking about since the project was built, the effects that project has had since it's 30 years

or 50 years of operation.

The concern or somewhat I was hearing is you look at some type of precondition before the project was very built. You're trying to guess something that happened. You know, you're looking back in the future and that's a tough part for us to address as a licensee. The major one that comes up is some of the fishery issues, you know, about moving fish into new areas or, you know, tearing down dams, some of those types of issues. So it's the preconditions that are tough for us.

As far as existing conditions or what new pumps have done, I don't see that as a problem in our particular case.

FACILITATOR MOLLOY: Any other comments, questions? Jim.

MR. MCKINNEY: Just -- let's see. I think most of the applicants would know that under the Clean Water Act, Section 401 does have different baseline requirements. And that's part of the trick of integrating state 401 authorities and processes with FERC's authorities and processes for relicensing. And we've made that clear in earlier comments. And I think it's something that most of the applicants understand and are aware of.

FACILITATOR MOLLOY: All right. Any others?

I think Mona had a question for everyone here.

MS. JANOPAUL: Hi. A couple of questions back, particularly on proposals to make the dispute, the formal dispute resolution process available to states and tribes for recommendations, as opposed to just those agencies with what's been referred to as "mandatory conditioning authority." And I'm looking particularly at questions and issues posed on page C-33 through -38. But two in particular stand out to me from discussion today. And if anybody would like to respond verbally, that's great, or else in your comments.

And one issue is should the result of the process be binding. And that seems to be an open issue before the Commission. Some commentors have commented one way. Some commentors have commented another way.

The original proposal that we as an interagency group brought to you last year would that it not be binding on agencies with mandatory conditioning authority, but some have commented that it should be.

So if you have a position on that and you'd like to share it today or in your comments, that would be appreciated.

And the second issue would be if the process was available for recommendations as opposed to requirements. You know one of the reasons it was limited to requirement situations, I'm looking I think particularly at paragraph 86

on page C-38, it talks about the fact that for (4)(E) conditions from the Forest Service or other land management agencies or for Section 18, fishway prescriptions, that there is a requirement, an evidentiary level, that it must be substantial evidence supporting those requirements. And there is no such evidentiary hurdle for recommendations.

So one of the reasons this dispute process was being made available to agencies with mandatory conditioning authority was to ensure that we got that level of substantial evidence to support our requirements.

So with these proposals that this process also be available for recommendations, which don't have such a burden of having substantial evidence, you can make a recommendation under any sort of authority, or even a member of the public could, without having to meet that burden of substantial evidence. Are you proposing to put a higher evidentiary burden on your recommendations or, you know, how do you balance that out?

And so I'm just -- I'm curious about those two things. Would you see that it should be binding and are you looking at having a higher evidentiary burden for your recommendations that would justify a study dispute resolution process?

FACILITATOR MOLLOY: Cathy.

MS. MESSERSCHMITT: But, Mona, when you start

talking about -- with regard to agencies, I guess I'm always going to come back to the dollar thing. When you have agencies with mandatory conditioning, they have the funding to be able to do that and to build that substantiary evidence.

If the burden falls to a tribe with regard to 401, we may not have the resources to give that substantive evidence, but we have recommendations based on the cumulative effects that are happening, that are part of what's affecting the tribe. Do you understand what I'm saying? And we just don't have that physical -- I mean that fiscal conduit from the federal government, is the only way I can put that.

MS. JANOPPAUL: I'm sorry. What -- what funding do you think we have available? We're asking the licensee to do the study.

MS. MESSERSCHMITT: Yeah, I know.

MS. JANOPPAUL: We're not doing the study ourselves. We're -- this results in the licensee doing it. So, no, I don't understand --

MS. MESSERSCHMITT: Okay.

MS. JANOPPAUL: -- what you're saying about a fiscal relationship. I'm sorry. I'm just not getting it.

MS. MESSERSCHMITT: With some of this stuff, these are collaborative effort. And most of the burden is on the

hydropower, but not all of the burden.

MS. JANOPAUL: Okay.

MS. MESSERSCHMITT: So I -- I don't know. Maybe I'm not --

MS. JANOPAUL: Are you talking about in developing study requests?

MS. MESSERSCHMITT: I'm sorry?

MS. JANOPAUL: Are you talking about our development of study requests?

MS. MESSERSCHMITT: Yeah. A lot of times the mandatory conditioning agency will come back and say, 'Well, these studies have to be done based on these (4)(E) conditions. You have to do studies for fisheries. You have to do studies for plants.' But if -- if, for instance, we came out and said, 'We think that these -- this hydropower is damaging these plants that we use for gathering,' but they're not a sensitive species, then we have the burden, don't we, of proving that that is an issue? That -- we have to hire a botanist to make sure that -- that what we're saying is valid? No, yes?

MR. WELCH: Well, I mean all the study requesters are under the same burden which --

MS. MESSERSCHMITT: Okay. That's what I thought.

MR. WELCH: -- is those criteria.

MS. MESSERSCHMITT: Um-hum.

MR. WELCH: They're all under the same, I don't want to call it "burden of proof," but they're -- everyone is under that criteria of, you know, nexus to the project, you know, commonly identified, commonly accepted in the scientific community. You know that type of thing. So I think everyone's on a level playing field in that regard.

MS. MESSERSCHMITT: Okay. Okay.

FACILITATOR MOLLOY: Before I ask one other thing, we did have one more person join us, and that was John Blair from FERC. So I just wanted to introduce him.

And now I'm going to ask: Any more comments, questions on this? Yes.

MS. DAVIS: Hi. This is Jackie from North Fork Rancheria. What is his title with FERC?

FACILITATOR MOLLOY: What's your title, John?

MR. WELCH: John, what's your title?

MS. DAVIS: That's because I'm new, Jim.

MR. BLAIR: That depends on your question before I give you my title. I do licensing in the west, primarily in Idaho and in Oregon, but I do licensing in the west.

FACILITATOR MOLLOY: And he's out to help us with the two-day workshops today.

MS. DAVIS: Okay. This is Jackie again. So that's a legal aspect, right?

MR. CLEMENTS: No, he's not a lawyer.

MS. DAVIS: No?

MR. WELCH: Just plays one on TV.

MS. DAVIS: Just you are, okay.

MR. WELCH: These two.

MS. DAVIS: Oh, I'm sorry. And Liz.

MR. WELCH: The rest of us just fake it.

MR. MCKINNEY: And I just had a point of clarification. Mona, is it your interpretation that the study dispute resolution process is binding on mandatory conditioning agencies, as written?

MS. JANOPAUL: It was not proposed so by the interagency committee, but there have been a lot of commentors who have suggested it should be binding.

MR. MCKINNEY: And how do you interpret the way it's written right now in the proposed rule?

MR. CLEMENTS: I will be --

MS. JANOPAUL: I don't see that it speaks to it, but --

MR. CLEMENTS: I'll give you my take on it which is that I think it is binding in the sense that once the Commission has made the decision under this -- you know, this Part 5 and there's -- the study plan is determined, that's all the information the Commission is going to require the applicant to provide for the use of all parties to the proceeding, to the extent that a federal agency with

(4)(E) or (18) authority is able to bring other information into the record from its own resources, that would be fine. But this process gives you everything the Commission will require the applicants to do. So to that -- in that sense it's binding on the federal agencies.

It's not binding on the state water quality agencies or tribal water quality agencies because they have their own separate process under a separate federal statute, such that, you know, if -- if they were dissatisfied with the result of the dispute resolution process here, those states or tribes could use whatever authorities they have under that act, under the Clean Water Act to require additional information.

MR. MCKINNEY: And that -- I mean we're really trying to understand this part of it. That also applies to, say, the Fish and Wildlife Service and NIMs with their ESA authorities?

MR. CLEMENTS: This doesn't specifically address that. I don't -- I don't know of any ESA authority that enables a federal agency to require studies to be done. I know that, you know, agencies come to us and ask us to require applicants to do studies and gather information so that they can carry out their ESA responsibilities. And that would be worked into that. That, you know, would be a consideration. And of course when you're dealing with the

ESA the bar gets higher.

MR. MCKINNEY: Exactly, yeah. So, again, that's something that we are trying to understand and we'll obviously talk about more tomorrow is what are the limits to the integration of this process and the studies that would be addressed in the study dispute resolution process.

MR. CLEMENTS: Yeah. And --

MR. MCKINNEY: Then we'll have -- I'm not an attorney so we'll have attorneys tomorrow who can articulate this better than I can.

MR. CLEMENTS: Yeah. But we're -- we recognize that there's not a lot in there on the -- how well this integrates with ESA responsibilities and, you know, -- so bring it on. We need to hear.

MS. JANOPPAUL: We would take the corollary as federal agencies that if the director of the Office of Energy Projects had made a decision that the study was not necessary, that we had sufficient substantial evidence to issue a (4)(E) or Section 18, the corollary would be then that the licensee could not challenge that we did not have substantial evidence to move forward with our condition. So we think that's a good corollary.

We think it meets the goals that Tim talked about of moving the process forward. That this is not going to be some endless dispute that's going to go on after the

application's filed, additional study requests. The decision is made, and we'll move forward from there. So that's -- timeliness is a lot of the driving factor here.

FACILITATOR MOLLOY: Any other comments on this?

All right. Lu.

MS. BEIHN: Lu Beihn, Mono. I just wanted to say to all of you that if you have something that you're saving for tomorrow and you feel it's important for us to hear, could you let us know that today? Because North Fork Rancheria, myself, won't be here tomorrow, and I hate to miss some of these comments you're saving for tomorrow.

MR. MCKINNEY: It's not -- not saving, just --

(Laughter.)

MR. MCKINNEY: We will not hold back tomorrow, don't worry. No, it's my -- the way and I others on the state, our California interagency team has interpreted this is that this is the forum for tribes to ask the questions, express comments and concerns. So I don't want to, you know, overload it with the questions and comments and issues that the state agencies will be raising. And I think that's why FERC has created both of these forum here. But we're not trying to hold anything back.

And I'd be happy to share with you our short list of issues that will be, you know, having -- who's typing, Ken? Or is it going to be John Clements tomorrow typing?

MR. CLEMENTS: No. Ken types here. I type back in Washington.

MR. McKINNEY: Okay. I got it. So I'd be happy to share those with you.

MR. CLEMENTS: Our experience has been that the State of California never holds back its comments.

MR. HOGAN: Maybe we could just put them on an overhead.

MR. McKINNEY: Do you want me to type them up for you tonight and get it ready?

MR. HOGAN: On an overhead.

MR. WELCH: Well, I do think a lot of the issues that you all are going to bring up tomorrow are already -- you up there and, yeah, I mean the conversation we just had is probably going to be a big part of tomorrow's discussion as well.

MR. McKINNEY: Yeah. Just -- okay. Just for your interest, some of the other things that we've got on here that are not on that list are the benefits of relicensing. There's a new provision in the NOPR that's going to require applicants to describe the costs of relicensing. We're wondering where is the benefit side of that equation.

Enforcement or what if the process doesn't work. Or contingency. We have talked about that a fair amount. The quality of the pre-application document, so what is in

that pre-application document. Again we just view that as critical. If -- if it's going to be a five-year process it's got to work well from the start, which means the information that all parties, all stakeholders, all tribes, all agencies need to work on this, that needs to be in that pre-application document. How you get it there if there's no directive from FERC before that is a question that I pose now, and, you know, we've talked about that somewhat, and we'll raise it again tomorrow.

We'll also raise the timing of the 10(j) recommendations from the California Department of Fish and Game.

And that's it. So those are the ones that we -- in addition to this list here.

MS. BEIHN: Thank you.

FACILITATOR MOLLOY: All right. Our next issue that we have up there is the cost and time for small projects. And this was the issue raised that this process can be -- is considered by many to be a little overwhelming for small projects.

We discussed this somewhat, but do we still need to discuss something on it? I look to you because you're the -- you epitomize these small project.

MS. SMART: I epitomize the small project. Well, I just -- it just -- you know, the burden of the

requirements that are coming down are just overwhelming. And I don't know if there are any resources that can come in to assist someone like myself who is the sole owner and with one person who helps at the ranch to -- to come up with all of this.

And it sounds -- I know when we did the original, we have an exemption, we fell into that exemption. We had -- our hydro goes back to the 1920s. And Lester Pelton helped -- helped my uncle install it.

FACILITATOR MOLLOY: Now is your project -- does it have a license or an exemption?

MS. SMART: It has an exemption. Do we --

FACILITATOR MOLLOY: And this does not apply to that --

(Laughter.)

MS. SMART: I was sent this and I assumed that we were going to have to go through --

FACILITATOR MOLLOY: If you have an exemption, it does not apply.

MR. WELCH: Once you have an exemption you're exempted --

FACILITATOR MOLLOY: Probably because of --

MR. WELCH: -- forever.

MS. JANOPPAUL: You just won the lottery.

MR. CLEMENTS: You'll never have to get another

exemption. You only have to comply with the one you have now.

MS. SMART: I thought we had to work up to having an actual license on that.

MR. CLEMENTS: No, no. You can go have a cold one.

MR. WELCH: You can go now.

(Laughter.)

MR. WELCH: Why didn't you tell me this at nine o'clock.

MS. SMART: But if I had to, --

MR. WELCH: Well, no.

MS. SMART: -- it would be just absolutely overwhelming to have to pay, because we did, in order to get that, had to hire archaeologists and historians and go through the -- and entertain Fish and Game people, and such. So -- okay.

MR. CLEMENTS: Yeah. We did give this -- that very issue some thought before we came out with this. And the idea was that, you know, we wanted to exclude exemptions from this, and that's consistent with the congressional directive that exemptions are supposed to be something that are more -- much more easily obtained and administered.

FACILITATOR MOLLOY: All right.

MR. WELCH: But there are still issues for small

projects that we -- we need to -- we've asked for input on.

MS. JANOPAUL: Just not for your personally.

MR. WELCH: Yeah, not for your personally.

MR. CLEMENTS: Another happy -- another happy customer.

MR. WELCH: Please take a copy of our complimentary program and with our thanks.

FACILITATOR MOLLOY: All right. Sorry.

MR. NO : Cyrus No . How small is a small project?

MS. JANOPAUL: Not that small.

MR. WELCH: Well, I know the exemption -- the exemption process is five megawatts or less, but...

FACILITATOR MOLLOY: Small projects has a -- we have a definition of small project.

MR. WELCH: Five megawatts or less.

MR. CLEMENTS: There's nothing in this rule about five-megawatt projects except questions or, you know, small projects. There's no specific proposal in here with respect to those.

FACILITATOR MOLLOY: And it's not even -- I don't think it's even recognized -- I don't think it's calling small projects by five megawatts or less, is it?

MR. CLEMENTS: It's not. It's just small projects. So it's -- you know, if people had suggestions to

make about how we could try to keep things streamline for small projects, we would ask them to define what that universe is for them.

MS. JANOPPAUL: And just for the information of this group, if they didn't catch it from the FERC workshops, I heard some reference to, what, 70, 80 percent of FERC hydropower licenses are for small projects?

MR. CLEMENTS: It's about two-thirds of them are under five megawatts or five megawatts or less.

FACILITATOR MOLLOY: All right. The next issue we had was contacting tribes and education for those not near river systems. Those who might not...

MR. WELCH: That was...

MS. JANOPPAUL: Colorado. Colorado River.

FACILITATOR MOLLOY: And he left, all right. And we addressed it briefly I think, anyway.

Slippage we worked on already. Is there anything else we need on slippage?

And reopeners, the question of when would they be included and what would trigger inclusion.

MS. MESSERSCHMITT: Yeah. Just for people's benefit, would you explain what a reopener is?

MR. WELCH: Les, you brought -- this is your issue up here, right?

MR. NICHOLSON: Yeah. So --

MR. WELCH: Well, no, I mean what you meant by this, I guess.

MR. NICHOLSON: Well, we understand that some of the licenses that will be issued will have reopeners. In other words, if there is an issue by one of the mandatory conditions that aren't met or that there's some new nuance that comes into play, let's say we add -- over the next ten years we add an ESA, we add salmon into an area of the river that we currently don't have it. Is that going to provide a reopener to that license, or what triggers that? What triggers a reopener to tell you that you've got now a 30-year license, but in five years it could be reopened for any one of the mandatory conditions?

MR. WELCH: Well, -- all right. First of all, there are standard reopeners -- there are standard reopeners in every license that FERC issues. There's one for fish and wildlife issues and there's one for recreation as well.

And the reason we put those in there is if there are environmental issues that are raised some time during the license term that were not anticipated during the licensing proceedings. And a new listing of an endangered species that wasn't even contemplated at the time as being a candidate species is a perfect example of what that -- what that reopener is often used for.

And the burden on that is it's either brought to

the Commission's attention by one of the resource agencies or FERC can do it under its own fruition if it's so petitioned by any entity. So under this -- this new rule, that will have no effect whatsoever on those standard articles, which are already --

MR. NICHOLSON: They'll look and smell the same is what you're saying.

MR. WELCH: That's right.

FACILITATOR MOLLOY: Any other comments on this?

MR. CLEMENTS: Can I just add sort of one thing to that. And a lot of licenses that are issuing these days, there are adaptive management plans or things like that, sort of resource goals that are set, and then there's a program of actions that would take place under the license and methods for measuring results and things like that. And if you don't get the results you're looking for then something else happens, some other action is taken.

So to some extent, depending on the license, they're all project specific, the things that trigger changes in what the requirements are under the license are sometimes predefined in those adaptive management plans or other management plans that may be included.

MR. NICHOLSON: Well, it just -- California is a changing or a moving target. I mean in our particular watershed right now we've got a designated state wild scenic

river and another one's being considered for federal. And then too -- well, Boxer builds for wilderness right in the middle of our project. We're concerned about what, you know, some of that might look like in the future during the relicensing process. Whether you call it adaptive management or reopening it, it makes it kind of tough to determine whether you're going to look at deCommissioning a project.

I mean in our particular case, we're a water agency, that's the business we're in. If today we were building those power houses, they would have been conduit exemptions, I don't imagine you'll allow them, the Commission allows to go from the license to a conduit exemption at this time, so --

MR. CLEMENTS: You can go from a license to an exemption.

MR. NICHOLSON: Well, I'm kidding in some respects. These are --

MR. CLEMENTS: Yeah.

MR. NICHOLSON: -- a little bit bigger power houses. But if it were --

(Laughter.)

MR. NICHOLSON: They're not five megawatts and under. But I mean the criteria that they fit today was an adaption to an existing facility. So when you're in the

water supply business and you're short of supply, you're always looking at those issues in particular, you know, what's going to happen as far as changing environment here in California in relationship to some of these projects.

MR. CLEMENTS: Yeah. We recognize that uncertainty. It's -- I guess it's kind of something you're going to have to live with, but --

MR. NICHOLSON: I mean I didn't know until a week ago that there weren't even mandatory -- mandatory requirements for the tribes. So, you know, it -- all of those are new wrinkles to us.

MR. CLEMENTS: Yeah. Well, not all tribes have that 401 authority. I think it's definitely --

MR. NICHOLSON: No, I understand.

MR. CLEMENTS: -- a minority.

But I -- can't conduit exemptions go up to 40 megawatts for municipalities? I think they can. You know, --

MR. NICHOLSON: Sign me up.

MR. CLEMENTS: You ought to check it out before the time comes.

FACILITATOR MOLLOY: Cyrus.

MR. NO : The seasons may come and the seasons may go, but relicensing goes on forever?

(Laughter.)

MR. WELCH: Not under this process.

MS. JANOPAUL: Is that a rhetorical statement?

MR. NO : That's good news for journalists.

FACILITATOR MOLLOY: All right. Comments under process selection criteria for the traditional licensing process. We talked a bit before that for a licensee to be able to use a traditional licensing process they would have to petition FERC and request it. And we had asked in one of our questions is should there be -- what should the criteria be for this? What should we look at and consider, and seeking idea from people on what this should be.

So any ideas? Jim?

MR. McKINNEY: Could you summarize again what -- kind of what the body of comments were from industry on why preserving the TLP was important? Then maybe I'll answer your question.

MR. CLEMENTS: I think the general gist of it was that they thought that this process would be, because of -- it compresses so much that has traditionally been stretched out into a shorter timeframe, that that might be too labor intensive and therefore dollar intensive for small projects. And so they wanted to see if there was some way to keep those streamlined, and they perceive that the traditional process is easier, I think, financially and just sort of in terms of the workload for the small project than this

process is.

I tend to think of it as being ultimately pretty much the same workload, it's just that the amount of time it takes to get it done. When you look at the pre-application document, it's not that much different from the existing document that you have to have when you issue your notice of intent. It's pretty much the same thing. There is some, I think, areas that are more labor intensive, but that was the general theory.

But at the same time when the industry was commenting, it didn't wish to reserve the TLP just for small projects. They wanted to be able to use it for projects of any size presumably when they thought it would be to the licensed applicant's advantage to use that process, without being specific about what those circumstances might be.

So that -- that's really about as good as it gets in terms of explaining the rationale for keeping the TLP from the licensees.

From the Commissioners' perspective, they wanted to give applicants a choice in terms of at least asking for a different process. They wanted to preserve the ALP, the alternative process, because it has a good track record. They wanted the proposed process here to be the default because they -- they think licensing can go much more quickly than it does if people of goodwill get together and

do the job. But they didn't want to take out there traditional process because they thought there might be circumstances where the ALP or this proposed process might not be the best way to get things done.

So from their perspective, having three potential processes would give them the ability -- or the office director actually, because it would be delegated in the first instance -- the ability to determine the best way to get the licensing process done for a specific project.

FACILITATOR MOLLOY: Mona.

MS. JANOPAUL: I heard a few ancillary comments to what John just said. I heard from a few licensees, back to his issue of cost, that if they had very complex processes or projects, that they didn't want to have to contact and include all of the public that might be necessary for the ILP, that they saw that as prohibitive.

Also some said that they didn't like the way that the ALP or the ILP would shift the NEPA work to them. And they saw that as another expense. Those are things that I heard, two things that I heard several times.

There was also the issue for some of them that if you retain the ALP and you need an offramp to a process, and we talked about this a little this morning, they said that it would just be impossible to go from an ALP to an ILP. And that therefore you had to retain the traditional process

as an offramp for the ALP.

So those were three things that I heard more than once from more than one, and at least from one or two major licensees and the state.

MR. MCKINNEY: I'm sorry. And the state, is that

--

MS. JANOPAUL: And the state.

FACILITATOR MOLLOY: Now we turn back to you, Jim.

MR. MCKINNEY: I guess formally we're still developing our thinking on this. Informally, rhetorically, I guess it raises some equity issues. If we're trying to make it faster, smarter, and cheaper, and the state and federal agencies are really digging in and the tribes are really digging in to create a better way of doing business, why do we still need, you know, the dinosaur out there?

That's just -- I understand their politics involved. I understand the cost issues. One of our positions is if you're going to generate hydropower, you've got to cover the cost of doing business, and that includes your environmental costs and public notification costs under NEPA and CEQA.

I guess that's what I would say at this point. Some of that's just my personal thinking and not an official view. So hopefully we'll have more of an answer in our written comments and then back in D. C.

FACILITATOR MOLLOY: Okay. Cathy.

MS. MESSERSCHMITT: Are those comments that John and Mona gave, are they still germane considering that you're going to change the TLP from what it was before to modify it? Because in modifying it, aren't you telling them that they have to include people at the beginning and frontload it?

MR. WELCH: Yeah. Once John said that, I kind of perked my ears up a little bit, and you're right. I mean that comment wouldn't -- no longer wash, because we're -- we're proposing to change the traditional to increase public involvement. So --

MR. CLEMENTS: Yeah. We have a question about that, too.

FACILITATOR MOLLOY: Okay.

MR. WELCH: That's a good point.

FACILITATOR MOLLOY: Any other comments?

Our next -- it's 2:30, which we have on our agenda as a break time. Do we want to take a short break? All right.

MR. McKINNEY: Excuse me. Right before the break, John or somebody who's familiar with this, could you direct me to the eligibility criteria in the regs for using -- for going to the TLP?

MR. CLEMENTS: There are none.

MR. McKINNEY: There are none.

MR. CLEMENTS: That's one of the reasons we're asking for comments.

MR. McKINNEY: It's just good -- just show good cause.

MR. CLEMENTS: It's good cause at this point.

MR. McKINNEY: Okay. And which part of that is in the NOPR?

MR. CLEMENTS: I'll dig it up for you.

MR. McKINNEY: I've got half of it memorized, but the other half is --

(Laughter.)

MS. [SPEAKER]: Yeah, right.

MR. WELCH: Okay. Break time.

FACILITATOR MOLLOY: All right. John's looking that up. Just a 15-minute, quarter of.

MR. CLEMENTS: It would be on D-46 in 5.1(f). 5.1(f), page D-46.

MR. McKINNEY: Thank you.

MR. CLEMENTS: It's actually -- it's (f)(5) on page D-47, just above Section 5.2. It says, "Request to use the traditional process or alternative procedure shall be granted for good cause shown." But feel free to suggest criteria for that.

MR. McKINNEY: So it's good cause that you're

asking for recommendations on?

MR. WELCH: Yeah.

MR. CLEMENTS: Yeah.

MR. McKINNEY: Okay. Thanks.

MS. MESSERSCHMITT: And good cause doesn't necessarily mean that they have to give evidence -- substantive evidence, right? It just means good cause?

MR. CLEMENTS: It's -- yeah, it's whatever they can convince the director is good cause.

MS. MESSERSCHMITT: Okay. Thanks.

FACILITATOR MOLLOY: All right. Fifteen-minute break, quarter of.

(Recess taken from 2:30 p.m. to 2:55 p.m.)

FACILITATOR MOLLOY: The preliminary terms and conditions from resource agencies. We had asked about the timing of those. Let me get Jim. And I was going to say we probably need Jim for this one.

Well, we could...

MR. [SPEAKER]: That's okay.

(Comments off the record.)

MR. WELCH: The basic -- well, I guess I'll just wait.

FACILITATOR MOLLOY: Well, we could skip it. We could go to education of applicants regarding individual tribes and their needs. Do you have any comments on that

one?

MS. [SPEAKER]: (Outside the range of the microphone.)

FACILITATOR MOLLOY: That's all right. We're skipping it and we're going to come back to it.

Now we're on education of applicants regarding individual tribes and their needs. Any comments, ideas, suggestions? Cyrus.

MR. NO : Cyrus No . Wouldn't this be an appropriate thing for FERC to survey? I mean is it...

FACILITATOR MOLLOY: Survey, well, okay. Yeah, it might be. Who would we survey?

MR. WELCH: Tribes.

FACILITATOR MOLLOY: Work with me here. Would we want to survey tribes on what they want, you know, to do or would we want to on applicants on what they want to know?

MR. NO : Well, supposedly aren't you trying to see which tribes are or could be associated with which projects?

FACILITATOR MOLLOY: This -- this I think was going to a different thing. This was going to a sort of a cultural, a sort of a sensitizing. I'm sorry. Is there a --

MS. MESSERSCHMITT: No, Lu's going to -- I think Lu's going to --

FACILITATOR MOLLOY: Lu's going to take this one, all right.

MS. JANOPAUL: Are you going to handle that one, Lu?

FACILITATOR MOLLOY: We never want to pass up an opportunity.

MS. BEIHN: Okay. Lu Beihn. Can you hear me?

MR. WELCH: Yup.

MS. BEIHN: What we've done on the education of the licensees up to this point is we're trying to put into the HPMPs that we've worked on some type of education for them and their workers.

Now we have problems in our area where they will go in on a project, you know, and they'll -- they'll be working within their boundaries, but then outside of their boundaries they'll do damage -- you know, they'll do other damage that they're -- they don't really -- they're not aware of it because of the lack of education they have for archaeological sites, you know, et cetera. So that's what we've been discussing with them and how to put that into the HPMP where they can gain the education, and we can teach them that. And then they can have so many sessions a year with their employees to explain those things to them and how not to turn the vehicles around in certain areas and, you know, to be real careful. So that's kind of what we're

working on. I guess that's what you're asking there.

FACILITATOR MOLLOY: I think that's -- that's --

MS. BEIHN: I'm not real sure what -- who brought that one up, but --

MR. WELCH: I mean I think that's a great point. I'm glad you made that. I'm wondering if that one goes more towards process, but I don't know.

FACILITATOR MOLLOY: Sort of educating them before the process begins on how to -- you know, how to be sensitive to the need to work with tribes and -- during the licensing process.

MS. MESSERSCHMITT: Liz, I thought this was also part of consultation, was the idea that if you're going to be project specific with the tribal liaison, that tribes tell FERC how they want to be consulted and the method they want to be consulted in, meaning, you know, do they want to be contacted by email, letter, phone, fax, you know, string and can.

I think those were process issues --

FACILITATOR MOLLOY: I think we'd have to get a special permission thing on that one. Special permit, stringing can.

MS. MESSERSCHMITT: But isn't -- I think that was part of it, was talking about -- because a lot of times the regulating agencies or these entities that deal with tribes

will say, 'Well, I'm going to come consult with you.' And the way I've seen it done in the past is that the tribes are the ones that want to decide if they'll be consulted, when they'll be consulted and what method will be used.

And I think that's part of educating the applicant on how specific tribes want to be addressed. And I believe the gentleman from Montana said something about, you know, each tribe has commonalities, but they all have different needs specific to their own areas. And I think that's part of what they were saying, that also falls into education of applicants and FERC with regard to how you outreach to tribes.

FACILITATOR MOLLOY: Am I missing something here?

Carl.

MR. FOURSTAR: Carl Fourstar, Fort Peck Tribes.

Let me bring this thing over a little bit. I might fall asleep if I lean over too far.

But the only thing I was getting at there was, to educate the applicants or the licensees, is make them aware that there are things to be addressed. And the young lady over here is right, you know each tribe does do things a little different. We all have some commonality, we've got common ground. But still we all do things in a slightly different way.

We're Indians, but we're different tribes of

Indians. We have a common -- we have some things in common, but still we're separate. And sometimes people try to put us all into one shoe, and that takes care of that issue, and that's not the case.

So the term there, "educate the applicants or those applying for the license," let them know that there's things they've got to do, and they're big boys. You know, if they want to make money, well, you know, they can understand these things. Thank you.

FACILITATOR MOLLOY: Lu.

MS. BEIHN: I guess that's kind of what I was getting at with educating them, like he was saying, is that in our area when I mentioned to you before we had so many tribes and organizations, and we say "on our side of the river," because San Joaquin separates us. But on our side of the river we are bears and coyotes and then, you know, we have different beliefs than the ones on the other side. But yet this company is dealing with all these people that have all these different beliefs.

And if one tribe believes one way, somebody needs to get that across to these -- to these licensees that, you know, you have to -- you have to deal with it, whether the person at the table is not, you know, the one representing that. Somebody has to bring those to the table, and that's the reason for the liaison, because some of those people may

not want to be at the table. So all of that is part of that education but, you know, I guess we'll get into the consultation later, but there's a lot more to be said about consultation.

FACILITATOR MOLLOY: Anything more on education of applicants and FERC?

All right. Now we'll go back to preliminary terms and conditions from resource agency. There -- the question here was on timing. And if it should be earlier in the process, and any ideas on that? Jim.

MR. WELCH: Well, let me just give maybe a little background here. One -- one idea that has been floated is that resource agencies and I guess tribes as well, the idea of filing -- if the record was complete enough at the time of the draft license application, that the agencies could come forth with preliminary terms and conditions at that time as opposed to the first time you might hear about terms and conditions, which is after the REA notice, much later in the process, the idea of earlier terms and conditions before the application is actually formally filed is that this would give the opportunity for an applicant to actually adopt those terms and conditions into its proposal or, at the very least, address them.

And it would sort of put us sort of farther along in the process if this would be done. This is something

that we're talking about with our sister federal resource agencies. It's sort of still in the discussion mode, but we did ask a question about it in the NOPR. And that's kind of where it stands.

MR. MCKINNEY: I had to review our proposal to remember what we said. I think you hit it on the head, Tim. Kind of depending on the completeness of the application and the studies filed at that time, that, yeah, at least for the state agencies, that we would be open to submitting preliminary PM&Es.

And what you said helps clarify another good reason to do that, is that gives the applicants a chance to respond. Some people think of it more as a poker game and want to see whether the applicant's going to put up before the agencies do.

MS. JANOPPAUL: A question back on that. So would it be -- would you envision it to be a request from FERC, sort of a volitional optional, or would you envision it to be something where FERC could require preliminary terms and conditions prior to the draft application?

MR. MCKINNEY: From agencies? Let's talk about it tomorrow. I don't -- I don't know.

MS. JANOPPAUL: Well, or tribes, you know.

MR. MCKINNEY: We're thinking through it, let me just put it that way.

FACILITATOR MOLLOY: Any other comments, ideas on this?

The next issue is baseline.

MR. WELCH: I think Les had that one.

FACILITATOR MOLLOY: I was going -- was that Les?

MR. WELCH: Uh-huh.

FACILITATOR MOLLOY: Les is gone. But we --

MR. WELCH: He also touched on it.

FACILITATOR MOLLOY: -- did talk about it. Yeah, we talked about it, so I think we covered --

MR. WELCH: Cyrus had something.

MR. NO : I got from talking to Les that he thinks the baseline keeps shifting.

MR. CLEMENTS: Well, our policy doesn't keep shifting. Is there --

FACILITATOR MOLLOY: Can you --

MR. CLEMENTS: Well, let me just articulate it for people who don't know, and it's -- it's here in the preamble to the reg text. The Commission considers the existing environment to be the baseline from which analysis proceeds. But that information -- excuse me -- information in the record on preproject conditions or, you know, prior existing conditions is -- can be useful in determining what may be the best thing to do for the project on a forward-looking basis. So that position hasn't changed in this rule.

Yeah, Cathy.

MS. MESSERSCHMITT: I think, John, also the guy from -- the guy from Idaho.

MR. CLEMENTS: Nevada Irrigation District.

MS. MESSERSCHMITT: Yeah. I think he also brought that up because he was saying that if there was something that happened prior to the 30-year or the 50-year license that was a condition before, he was talking about that earlier. And I -- of course he's not here, I'm not going to finish his thought, but he also brought that baseline up.

MR. CLEMENTS: Well, --

FACILITATOR MOLLOY: And I think we talked about it --

MS. MESSERSCHMITT: Did it get addressed?

FACILITATOR MOLLOY: -- when -- when --

MS. MESSERSCHMITT: Good.

FACILITATOR MOLLOY: But -- Lu.

MS. BEIHN: Lu Beihn. These -- I think we discussed this last time with you, John, in D. C. They're worried about the past effects, but if those effects are still an ongoing effect, they still count, right? I mean because -- such as the burials, you know, situation and the sites that are underneath the water. Don't -- they still have to deal with those at this time; is that what we're talking about here or --

MR. CLEMENTS: I -- I'm not disagreeing with that.

MS. BEIHN: Okay.

MR. CLEMENTS: And let me kind of try to illustrate it with an example that I'm a little more familiar with, which is if somebody builds a dam and it blocks access to migrating salmon and, you know, they did that 50 years ago. Under our policy, you know as far as the baseline goes, the baseline environmental condition for that project is that there's no passage for the salmon. And, you know, the reason is because the dam is there. So we would not ignore the fact that the dam is there.

And so what we would be looking at is on a forward-looking basis what do you do about that, because you've still got, you know, salmon presumably in the river that would like to migrate up and need to migrate up, so you have to address that issue. But the fact that something happened, you know, in the distant past or 50 years ago, or whenever the project was built, doesn't mean that you don't look at the continuing effects.

MR. MCKINNEY: But, Lu, you're asking a good question because that -- it does have pretty serious applications for when -- when you mark the cutoff for what impacts do you look at. And so FERC's position is that it's the impacts that are occurring at the time of the license application or NOI. That's what's going to be -- that

forward is what's going to be examined. Impacts that happened before that aren't really a part of the question except for this caveat that John Clements was explaining.

MR. CLEMENTS: Yeah. I mean it -- but again our approach is a forward-looking one. We could say what are we going to do about this now. Some people are continuing to take the position that we need to require some kind of reparations or something like that for the bad things that occurred during this previous period or that create some kind of a mitigation obligation, and we don't believe that's the case, we would say, 'Yeah, it's broke. What can we do to fix it going forward,' but we wouldn't say, 'What can we do to, you know, make the licensee pay for what they were authorized to do in 1943,' or something like that.

FACILITATOR MOLLOY: Any other comments on that or questions?

All right. Next we have unique proprietorship of tribal lands. And I believe that was raised as -- as a recognition of the uniqueness of the tribal -- that it wasn't --

MR. CLEMENTS: Help us out here.

FACILITATOR MOLLOY: Well, I'm trying to -- it was Leland. Was that also Leland?

MS. CARTER: That was Les. Yeah, he brought that up because of the Navajo Nation. Sharon Carter, North Fork

Rancheria. He brought up that because of the Navajo Nation or big reservations. You can't just up and leave a reservation and go into where and relocate, versus like urban people can go into and buy another house.

FACILITATOR MOLLOY: Any other comments on that?

Or I think that was just sort of a recognition of that.

And then we come to what is tribal consultation versus notification. And I look to Lu, who promised to have more on this.

MS. BEIHN: I turn it to the Tribal Chair.

MS. FINK: Elaine Fink, Tribal Chair of North Fork Rancheria.

Consultation is notification, but yet it should be participation and -- with both parties making -- jointly making decisions and with neither party having to endorse or accept in the decisionmaking process from either party also. This is how we feel.

MR. CLEMENTS: So we -- when you say that neither party has to accept the decisions of the other, were you speaking in terms of process for consultation or --

MS. FINK: As Tim brought out earlier, it should be a two-way street. There should be at least some type of discussion.

MR. CLEMENTS: But we're talking about consultation as opposed to substantive results of the

process; is that fair to say?

MS. MESSERSCHMITT: With the notification?

MS. CARTER: Um-hum.

MR. CLEMENTS: Okay.

MS. CARTER: Yeah. Because it was brought out earlier, and we've had this situation to where, yes, agencies or whomever will -- will ask for a meeting. We go to the meeting, but it's more of a process of notification. They don't really listen to what we're saying. They don't put in place what we're asking as far as liaison. It took us a while to get the position that Lu -- Lu holds right now and to get the liaison, because it's just -- it goes back to the education, as far as educating. That we do come from a culture with our traditions and peoples that are very suspicious. And, as Lu brought out earlier, the elders. So we have a traditionally respectful way that we have to deal with matters, and this is part of the consultation process we believe.

FACILITATOR MOLLOY: Lu.

MS. BEIHN: Lu Beihn. There's also -- in different tribes -- or in all of the tribes, they have their own process of what -- or understanding of what consultation is. And I believe at the North Fork Rancheria it is -- is it unanimous or all of you -- yeah, it's full tribal counsel has to be at the table consulting with any government agency

that would like to consult, otherwise it's called an informal discussion.

There are other tribes in our area that believe the same way. They may be only like one or two that say that they could speak -- the tribal chair can speak for the rest of the council. So those are the kinds of things the liaison is going to have to investigate and find out and make sure they know these things, because we have a problem with -- we just had a round of meetings with Forest Service, and they mistakenly met with just a couple of people here, a couple of people there, and they wrote it down as consultation when, in fact, the tribes went back and said, no, it wasn't consultation. Now we have to go back and have all these rounds of meetings again because that was a mistake.

MR. CLEMENTS: But that's the kind of thing that it would be very helpful for a tribe to make clear to --

MR. WELCH: Yeah.

MR. CLEMENTS: -- the Commission's liaison and, you know, to the extent you're dealing with the applicant at that stage, the applicant itself. So that when they start talking to someone they know, you know, the position of the person they're talking to and what it means in terms of the tribe.

MS. BEIHN: Right. And the --

MR. CLEMENTS: Because --

MS. BEIHN: These things have been discussed many, many times in our area. It's just that there's a lack of communication maybe internally of the -- of, you know, the organizations that are planning these meetings because we've always been pretty clear about it everywhere we go. And it was just a breakdown in communication between the people that were setting up the meetings and then the ones that carried those meetings through, you know.

MR. CLEMENTS: Yeah. People can come and go too, and so you sometimes have to keep telling people -- because it's a new face sometimes, and then you got to start all over again with them.

FACILITATOR MOLLOY: Cathy --

MS. BEIHN: But with -- you know, well, I have to say Forest Service. With the Forest Service you have cultural heritage, you know, resource managers, you have people in positions that should be on top of those things. They should know their tribes. They should know what's going on and they should be paying attention to that. And I felt like that's the -- that's the position that they hold, you know.

The same with BIA and other organizations that have these -- these cultural people in place, you know. That should be their responsibility to know that. And we're

just -- we'll keep working on it. You know, I keep giving lists of who belongs to who and who -- you know, and hopefully we'll get through it. But, you know, it's just --

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MR. WELCH: It's just that --

MS. BEIHN: It's going to be ongoing always.

MR. WELCH: It's just that term "consultation" is -- I mean it's just used in other -- I mean I use it all the time in, you know, consulting with resource agencies and -- you know, it's just -- I can see you have to be really careful how you use that term.

And a lot of times, yeah, we don't -- yeah. I'm glad -- I'm glad you guys are telling me all this.

MR. CLEMENTS: Can you tell us something about where you are on the idea of the interactions between the tribes and the license applicants? Because we got some comments the first time around from some tribes, and I can't remember which ones they were off the top of my head, but they said, 'We don't think that we should have to talk directly to the applicant, that in our mind government-to-government consultation needs to be in place, and that means the tribe talking to FERC.'

And I'm thinking that's fine, but that shouldn't exclude, at least in my mind, other forms of consultation or communication between the tribe and the licensed applicant

because, you know, they're the entity that's trying to get this license. And it just seems unrealistic to think that the only line of communication would be from the, you know, this tribe talks to FERC and then FERC talks to the licensed applicant and then it goes back the other way because there's -- you know, it's like that game where you -- you start -- you know, you say something at one end of the circle and by the time it gets around it's not that bad, but that kind of thing can happen. So I just -- I'm hoping for some recognition on your part that there needs to be communication, however you want to characterize it, between the tribes and the entity that's seeking a license.

MS. BEIHN: There's communication between the licensees, absolutely necessary. They call it consultation, but they -- but they and the tribes know that it's not the consultation they're talk about with federally -- federally tribes -- I mean agencies working together. There's a difference between meeting with the Forest Service as a federal agency versus the licensee. The licensee is not mandated to have consultation with the tribes, and they know that. But they're consulting because we need to. They need to understand us, we need to understand them. They need to know our needs.

We have PAs to work on. We have HPMPs to work on. We have to do those together. We have to agree upon them

and see that they get carried through throughout the whole license process. We can't do that if we go straight to FERC, see? So I mean it would be more difficult if we went straight to FERC by passing the licensee.

So, no, I think in our area with the tribes we're working with, the eight -- five recognized tribes and the other three, it -- we feel it's necessary to work with the licensee directly.

MR. CLEMENTS: Oh, well, that's --

MS. BEIHN: Yes.

MR. CLEMENTS: -- comforting to me.

MS. BEIHN: Yes.

FACILITATOR MOLLOY: All right. We have Cathy and then Carl both had comments.

MS. MESSERSCHMITT: Thank you. Cathy Messerschmitt, North Fork Rancheria.

With regard to the differences in the tribes, even -- even in our area when -- when the Forest Service, and I have to use Forest Service, even though we don't use names a whole lot of times, like with the Forest Service in particular, they have a hard time with the concept of consultation. They do like you were saying, they just use the word "consultation" and a lot of times they'll say, 'Well, we're consulting with tribes,' but they're not really doing the formal definition of consultation because they are

also consulting with people, entities, tribal organizations that are not federally recognized -- and the true definition of "consultation," government to government.

So when you have all of these different usages of "consultation," it gets confusing.

We have -- North Fork Rancheria also holds the CALFED grant, so we're dealing with CALFED water issues in California.

There was a tribe up north that developed a contact list, which would be very similar to what your tribal liaison would need to develop. They contacted each of the federally-recognized tribes and did a laundry list. You know, what is your definition of "consultation." How do you want to be consulted and what's your contact information. And then they put it in a database that they -- that they update. This is something that I'm hoping, my recommendation in future will be to go to that database, that you can issue mailing lists and update regularly. Because I don't think tribes are any different than federal agencies.

You know Tim holds the FERC biologist position now, but if he retires next week they're going to fill his position with somebody else.

MR. HOGAN: I got it.

MS. MESSERSCHMITT: See, it's the same thing.

It's just that you're looking on a tribal -- on a tribal basis. And you're saying, 'Well, they rotate councils' or 'They rotate representatives,' yes, but they're no different than any other agency or any other tribal government.

MR. WELCH: Right.

MS. MESSERSCHMITT: There's no difference in that.

MR. WELCH: He have a -- we got a database where we have addresses from, what, 600 tribes that we got from the BIA. And we understand that, correct me if I'm wrong, that that is constantly up- -- changing and updating, right? So we're going to have to develop some sort of -- the tribal liaison, one of the jobs would be to keep that, you know, contact with BIA and keep that constantly updated.

MS. MESSERSCHMITT: Well, and no offense to BIA, but we have found --

(Laughter.)

MS. MESSERSCHMITT: -- that their lists are not comprehensive. There are people who are disenfranchised because they're not on those lists, they're not contacted. So it's a work in progress.

And I would just caution anybody about not using one source to develop mailing lists, because it doesn't work that way. Mailing lists, like anything else, are a network. You contacted -- you contact these people and then you say, 'It's your' -- you know, 'Please mail to anybody you know

that is in the area and needs this information.' And, you know, I think you'll find out that a lot of people are not part of the process. Like I still go back to Daniel Cardenas from Pit River, when we were here in Sacramento the last time.

MR. WELCH: Yeah. Yeah, uh-huh.

MS. MESSERSCHMITT: You heard him loud and clear.

MR. WELCH: Yup.

MS. MESSERSCHMITT: That's it. Thank you.

MR. WELCH: Yeah -- no, and I wouldn't to bring that up too, that you're right, this mailing list is going to have to have more than just the tribal council chair. It's going to have to have the environmental contact, the tribal historic preservation officer, if there is one, and that kind of stuff too.

MR. CLEMENTS: I expect that we would also have some kind of mechanism in place for tribes to directly inform us of, you know, updates or changes --

MR. WELCH: Yeah.

MR. CLEMENTS: -- in those things. And that -- an element of consulting with the tribe on a specific license proceeding would be, you know, -- one of the things that would just be automatic is update the contacts list so that, you know, something that was done three years before and is out of date will be -- it should be fixed about the time we

start this.

MR. WELCH: Yeah. So would that be -- oh, excuse me. Go ahead.

FACILITATOR MOLLOY: Carl and then...

MR. FOURSTAR: Listening to all this here, and I came down, as I said, I'm Administrator for the Water Resource Office on the Fort Peck Tribes, and the Tribal Chairman received a notice that -- well, I won't -- a notice of this meeting, made reference to previous meetings.

I asked him about it, and he didn't know what was going on. And I was going to come except we have some interest in some other areas. And I was going to a meeting of about mid-way between here and there, so I just decided to come on up this way. Now this is all at our expense.

I come here to see what's going on and how I can use FERC, how we can use FERC or any other entity. But what I'm learning is that FERC is coming -- I don't know where you're coming from, but there's an awful lot that is taken for granted and so on and so forth.

I was in the oil business. After I retired from the service, went into the oil business, started my own company, and had to work on Indian reservations and off reservations. In doing so, we worked with cities, counties, farmers, ranchers, so on and so forth. But it was up to us to find out who we had to work with on the Indian

reservations.

There's a whole lot of service companies out there. It's a service industry. There's ways to do these things.

Now let me put my tribal cap on or as an employee of the Fort Peck Tribes, I've retired twice now, and I'll -- one of these days I'll -- I'll take it seriously. But, anyway, as the Tribes, for the Fort Peck Tribes, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, we have a 12-man council and a chairman. They are the only ones authorized to do business for the reservation. And it's done by a resolution. They have to act, and they've got committees like any other European government. They've got committees, and they work with and they agree on. It works pretty good for us.

That gives us the continuity that we -- that we need, that we're kind of proud of it. People come, people go, but the resolution stand, the action stand.

What you may want to do is figure out a way to work with these tribes. Now that sounds good. It sounds simple, but you have to kind of bear in mind, I've mentioned the Bureau of Indian Affairs once before, they're there for a purpose. They have that trust responsibility toward Indians.

If I want to do something with my land, if an

energy company wants to come on in and put something on my land, or whatever, the Tribal Council, Executive Board has no say-so over my land, but the Bureau of Indian Affairs does.

So you've got different kinds of reservations, different tribes. You've got some that fell under the Indian Reorganization Act, some that -- we don't want it; get it out of here.

We kind of like our independence. We're no different than anyone else. And, as I said earlier, the Indians were all different tribes and so on and so forth, just like the Europeans that came here. They're all different religions, different countries. So if we try to lump all the Europeans into one basket, it ain't going to work. Within the United States, it's a great country, but some -- I hope we don't ever lose sight of that.

I have to add this. Long before the Europeans came here I'd have speak to you as Assiniboine. You look in the history books, nowhere will you ever see where an Assiniboine ever waged war upon the settlers, the Europeans as they came over. Long before they came here we were told by the Creator that they're coming. They would be white -- not of white skin, but light-skinned. Their hair would be different colored. Their eyes would be different colored. And we were told that "When they get here, you're to help

them. You're all my children."

Now this is what was told to a tribe that ranged between the Great Lakes and the Rockies and from the north woods in Canada down toward the Yellowstone. And as a right of their growing up, they take their vows not to retreat in the face of the enemy, but nowhere will you see where they ever waged war upon the European or the settlers as they came through.

We traded with them. They established a trading company. Granted, down the road, we kind of got the short end of the stick and all that sort of stuff but, still, our Father didn't tell us that. What he says is to help them. So we kind of like to -- we kind of tend to believe in the Creator.

So, anyway, with all those things in mind, as I say, we still like our independence. The Tribal Executive Board from my reservation cannot tell me what to do with my land. The Bureau of Indian Affairs has that trust responsibility. When we signed the treaties, the Assinboines, we signed the treaties with the Government of the United States, the Great White Father, so we place our trust there. We have our Executive Board to deal with those lands and issues that affect us as an entity, but we're stockholders, we have an issue in it. I try to tell our board members that, we're all stockholders.

But, anyway, it'll work. And reading the thing that came out and sitting here listening what you're interested in is trying to get this licensing process through as expeditiously as possible. It can be done, but there, again, those applicants, those people who want to license, you know, they can't, -- well, shoot, they came on over here and they tried this in Montana, big oil came on through there, and they just ran over the farmers and everybody else. So they all banded together and formed organizations that made it extremely difficult.

North Dakota, they tried the same thing, and one of the oil companies told the people in North Dakota, 'Well, you know, we can always pull out of here,' and what the people of North Dakota told them, 'Well, you're welcome to it, but you ain't taking that oil with you.'

Life's a two-way street. So if people want something, work and build a partnership and agreement, and it's pretty easy to do. So maybe that's what FERC's role, is, the regulatory Commission. That's kind of a tough -- puts you guys in a tough spot, a tough position. I know how it is. You're going to get fire from everybody. But, still, -- well, I'm not going to say anything much more. I could say, well, you know that comes with the turf and all that sort of stuff. When you take the stripes, well, then you take the flak with it and the responsibility. That's

life. Just do -- do good things for everybody.

Thank you.

MR. WELCH: Thanks, Carl.

(Applause.)

MR. BLAIR: John Blair, FERC. Question: Would there be any value in formalizing the consultation? You referred to a partnership but, if for example, in Historic Resources we have memorandums of agreement. We've talked about, you know, shifting -- employees shifting positions within government agencies and tribe councils changing positions. But if you had some kind of partnership agreement or memorandum of understanding of how consultation would go forward so that whomever came in to backfill in those positions would know what the game plan is. Is there any value in that?

How would -- would tribal councils buy into something like that? Anybody. Cathy. Anybody.

MS. MESSERSCHMITT: I can only give you a -- what I would surmise, John, in that I think people have told you believe that every tribe has specific ways that they want to be consulted and that they want to be addressed. So, you know, speaking -- we can speak for our tribe and how we want that process to go and say this is how we want, you know, consultation or this is how we want this definition. But everybody has a different definition, every tribe has a

different one.

And the only thing I think we can do is keep working at an educative level to be able to address people in the way they want to be addressed when it comes to tribes. And I think that becomes a project-specific arena, in that with regard to -- to the Central Valley, when we're talking about the 27 -- I'm sorry -- 28 hydroelectric projects that are going on in the Central Valley, Lu is the conduit for that and does an excellent job of knowing how the tribes want to be addressed, when they want to be addressed, and how they're going to deal with the issues.

But would the same process work for Cortino or Robinson up north? I don't know. They would have to tell you themselves. That's why I like the idea of the database and dealing with it on that level, because you know who your contact is. You know on -- on a basis level, if they have email or if they want to be contacted by email. Some people don't want you to call them on the phone. They want you to put everything in writing so that they can look at it, decide and go from there.

So I guess -- I hope I'm giving you a little bit of information. I know I'm not exactly answering your question, but I don't think I can.

MR. BLAIR: No, you answered it. Basically I was asking, you know, in thinking of bureaucratese, trying to

standardize consultation, what you told me is that you don't think it's possible. What I was pushing for was is it possible to treat consultation like we treat historic preservation, in terms of some kind of --

FACILITATOR MOLLOY: I don't think it's so cut and dry.

MR. BLAIR: -- general criteria and agreements of how tribes will be consulted with. And essentially what you said is you don't think it would work.

FACILITATOR MOLLOY: Lu. Lu, did I see your...

MS. BEIHN: Do I have to say my name again. Lu, Beihn.

MR. WELCH: Again.

MS. BEIHN: Again.

FACILITATOR MOLLOY: It hasn't changed yet.

MS. BEIHN: I'm not real a big advocate for MOUs or MOAs, but in this situation it would -- I feel like it might work because FERC doesn't have to work with all 500, 600 tribes in the United States, okay. They have project boundaries. They have specific areas where they're doing a project, so they would be consulting with the tribe that is involved with that project boundary. And to me an MOU would probably work in that situation, you know, because then you would know right who you're working with, what they expect, and how they want to be consulted. And, yes, I think maybe

you're right, it might work in that sense. And then...

MR. WELCH: Yeah. You know, it may or may not take the form of an MOU, but I would envision that initial contact meeting, which I think will probably be the most important one, one of the first things to do would be to define all these terms.

MS. JANOPPAUL: Yes.

MR. WELCH: You know, "consultation," "conferencing," you know, and lists like who would be present and go through all that thing. And then develop your communications protocol, the email thing, the string and the can. You know, that type of thing. And put together -- it might be some sort of an MOU if the tribe and FERC wanted to do it that way. But, you know, it sounds like -- I don't know, you guys give some pretty good information here. I appreciate that.

FACILITATOR MOLLOY: Mona.

MS. JANOPPAUL: I'm looking through the preamble and there's a lot of use of the phrase "consultation," with a small "c." "Prefiling consultation," "consultation," "evening and weekend meetings with NGOs," "consultation," "consultation." Does there need to be somewhere a definition of "consultation" with a small "c" as used in a lot of this, versus "Tribal Consultation," with a capital "T," capital "C" somewhere? Because I know that consulting

is not necessarily a formal phrase to a lot of us up here.

And having formally represented a licensee or nongovernmental organization, we use the term "consulting" much more loosely.

So -- so I'm not relegating this to being near semantics, but I'm listening to this more. And I realize that "consultation" -- and I'm even looking at this bullet up here. And maybe "tribal consultation" needs to be capital "T," capital "C" and then needs to be distinguished somewhere here in a footnote or something regarding -- because a lot of what these regs address is pre-filing consultation, this kind of consul- -- and that doesn't mean the same thing to a lot of the other participants in licensing or those who have interests as it does for tribes.

And I guess I would look to BIA or the tribes to respond to something like that, to help people. I think -- I think it would help the applicants and I think it would help the rest of us make a distinction. That's just something to think about.

FACILITATOR MOLLOY: Cathy and then Carl.

MS. MESSERSCHMITT: Well, I think it goes back to knowing your audience and who you're talking to. I think you're right, when you're talking with tribes, you know, we're so used to hearing the word "consultation" with regard to formal government-to-government consultation. And I

think I've said this before, that I think there does need to be definitions and when to be specific with certain words. And I think that's a biggie, that "consultation" issue.

FACILITATOR MOLLOY: Carl.

MR. FOURSTAR: The term "semantics," I like to hear that. That's -- that's the truth right there. You know, two groups on the same subject, but because of the playing with words, they're missing each other. Talking about the same thing, but they never see each other. I've seen that time and time again.

On the term "consultation," I just want to be very careful with it, the term "consultation." If you're going to say it and mean as it counts toward something, as the lady down here says, well, then if you're going to just talk and visit with somebody, call it a "visit." Don't call it a "consulting." Because somebody's going to term that as -- I watched the Corps of Engineers and some -- some of the tribes here a couple of months ago, and they got all hot under the collar because, well, you -- 'That wasn't a consultation. We were just visiting.' And the Corps maintained -- the Corps maintained that it was a consultation period. And it wasn't.

MR. CLEMENTS: Is anyone aware of any federal or, I don't know, state agency regulations that define government-to-government consultation that we could work off

of instead of just kind of coming up with something?

So if you could give us a reference to that, that would be really spiffy.

MS. BEIHN: We'll send it to you.

MR. FOURSTAR: Tribal attorneys will address that.

MS. [SPEAKER]: Does BIA?

MS. BEIHN: Yes.

MS. [SPEAKER]: Probably.

MS. BEIHN: They better.

MS. [SPEAKER]: I think to the point they ever speak for --

MS. BEIHN: Yes. It's in their federal regulation. There's a part in there, and I can send it to you. I can't quote it right now, but it does -- it does define Indian Tribes and it defines consultation, you know, federal government-to-government consultation with that. So we can send that to you and we have pretty much all --

MR. CLEMENTS: Yeah, that would be terrific. Then we could --

MS. BEIHN: Yeah. It's in the -- yeah, in the regulations.

MR. CLEMENTS: You could even just email it to me.

MS. BEIHN: Okay. Cathy will do that.

(Laughter.)

MR. FOURSTAR: 25 CFR addresses a lot of that, I

think was what Lu was saying here.

MS. BEIHN: Oh, yeah.

MR. FOURSTAR: And you folks operate by the regs, too. It's different, but 25 covers Indians, so.

MS. BEIHN: But --

FACILITATOR MOLLOY: Lu.

MS. BEIHN: I just wanted to say I thought Mona's idea was a really good idea because -- because of the federal regs that says consultation is being used, we can't really change the word, but the capitalization of it with the "Tribal" would probably make a distinction between the two.

MR. WELCH: Yeah, I think the --

MS. BEIHN: I do, I think it's a good idea.

MR. WELCH: I think the capitalization. I think we need to be a little careful here there, because you don't want to get too boxed in by a definition of "consultation." Because, once again, it still means different things to different tribes.

MS. MESSERSCHMITT: Yes.

MR. WELCH: So I mean you want to distinguish it from other consultations, but then you don't want to box yourself in too much because then, you know, you run the risk of pigeon-holing different tribes in regards to consultation, so --

MR. CLEMENTS: Yeah. But the way it is now we don't define "consultation" really. It's defined by -- it's the things that we require the applicant to do. And it will say "consult," and then under that rubric you'll see more specific requirements for "Have this meeting. Do that." You know, "Send this letter, issue that notice." And the totality of those things is the consultation and that -- you know, as it is written now it applies to everybody, including tribes, but clearly we've got a little different animal here. So that's a good idea.

FACILITATOR MOLLOY: Cathy.

MS. MESSERSCHMITT: I was just going to say -- Cathy Messerschmitt, North Fork Rancheria, Environmental Planner. I will send you all of those different definitions.

We were just sitting here having a discussion, and there are those legal definitions of what the government defines as consultation. But there is that caveat. And that caveat is that every tribe deals with -- you know, they define "consultation" differently, so, yes, you can use the word "consultation."

And I too like Mona's distinction. I think that will work very well. But, you know, as long as you have that caveat, that each tribe defines "consultation" differently and how they want to be addressed, and all the

things that we just talked about a little while ago. So I'll send you those -- that information. It might help clarify some of this stuff.

MR. CLEMENTS: Yeah, it will. It will help.

FACILITATOR MOLLOY: Do we have any other issues or anything we want to talk about?

MS. JANOPPAUL: On the issue of consultation, you know, I can say from a resource agency perspective there are certain cases where we have not really been -- felt that we were actually consulted either. We received a letter saying, you know, 'We're going to do this' or 'We already did that.' And, you know, that was adjudged that --

MS. BEIHN: Exactly.

MS. JANOPPAUL: -- somebody had achieved consultation. So as John mentioned, there really has been no definition in the FERC regs. It has been very, very loose.

And I -- but I -- you know, I guess I've got to say what I guess I've heard Ann Miles and others say, that this new process is built on the idea of good citizenship, good fellowship, a riverwide stakeholders working together. And if you don't -- if everybody doesn't come to the table with a positive partnership point of view, you know, -- but we're relying on that. We're giving everybody the benefit of the doubt and say that everybody is going to step forward

and come to this new process with a positive point of view, which means that there is -- there is going to be a lot more openness and willingness to work together.

And this -- this is, you know, hopefully built with that kind of good attitude, good citizenship, stakeholders working together for -- for the benefit of their vision of the river of the next 30 to 50 years. So...

FACILITATOR MOLLOY: Carl.

MR. FOURSTAR: Listening to all, it's getting me started, I can't stop. I was thinking back to what Leland was saying here before he left, and I was pretty interested.

But one of the things that might happen, you know, the people apply for a license with FERC. And FERC has to go through this whole process, so on and so forth. Now you're looking at political, at entities such as tribes to deal with. And there again I bounce back to what Leland was saying. You know a lot of tribes, we don't have these resources. I came over here, you know, having to use moneys from other things.

But then, at any rate, maybe what FERC might want to do is contract with the various tribes to find these things and, you know, kind of pick your man in the field, so to speak. Just a thought.

FACILITATOR MOLLOY: To find which things? On how the process is --

MR. FOURSTAR: Well, let's say you've got, oh, I don't know, Horseapple Power Company wants to put a dam up there on the Missouri, or something, or generate electricity. You're going to want to know what Indian Tribes are involved there. So old Horseapple ain't going to -- probably isn't going to tell you. They're going to want you to do all the work and all that sort of stuff. So -- but in order to make the thing go a lot easier you're probably going to want to contract with the tribe along that reach of the Missouri, or something, that might be affected, and have them go on out and do a lot of research and so on and so forth. And maybe it could beyond that. It depends.

Just a thought. Just throwing some things -- based on what we had to go through in the oil industry when you're covering people's grounds and so on and so forth.

FACILITATOR MOLLOY: All right.

MR. FOURSTAR: Allude you to horse apples.

FACILITATOR MOLLOY: Are there any other comments, questions, ideas?

Well, I want to thank you all. We all want to thank you. We've appreciated your time and efforts.

Remainder: Written comments are due April 21st. 21st. Though, as I told someone on the break, there's no penalty for filing early. If you want to file early, you can. That will get people -- people will be able to get

started at FERC. And -- and then that's it. Thank you so much.

MR. CLEMENTS: Hope to see many of you in D. C.

MR. McKINNEY: I don't know if the tribes feel this way, but I'd like to say that, you know, from the state's perspective, we really appreciate the effort that FERC staff and the Commission are making to really come out to other parts of the country and listen to what the states and tribes have to say about reforming these procedures. We know you're making a huge effort and we really appreciate it.

MR. WELCH: Thanks, everybody.

MR. CLEMENTS: Can I say one other thing?

MR. WELCH: Oh, John.

MR. CLEMENTS: Now that we closed the meeting.

FACILITATOR MOLLOY: One other thing.

MR. CLEMENTS: In the yellow book in Appendix B, and that's on page C-101, we have that specific list of questions. To the extent that you're responding to those specific questions, it would be great if you can identify that. You know, because they have the paragraph numbers there. And that will help us organize comments when they come in.

But of course don't feel constrained by these specific questions. If you have other topics that you want

to address, then just jump right in. But the more specific you can be as to what it is in the preamble or the right text that you're talking about, that really helps.

FACILITATOR MOLLOY: And he speaks from experience.

Thanks so much.

MR. CLEMENTS: Thanks again.

MR. WELCH: Thank you.

(Whereupon, at 3:50 o'clock p.m. the Public and Tribal post-NOPR Regional Workshop was recessed to resume at 9:00 a.m. on Tuesday, March 25, 2003.)

CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before
the FEDERAL ENERGY REGULATORY COMMISSION in the Matter of:

Name of Proceeding: PUBLIC & TRIBAL POST-NOPR REGIONAL
WORKSHOPS on HYDROELECTRIC
LICENSING

under the FEDERAL POWER ACT

Docket No.: DOCKET NUMBER RM02-16-000

Place: SACRAMENTO, CALIFORNIA

Date: MONDAY, MARCH 24, 2003

were held as herein appears, and that this is the original
transcript thereof for the file of the Federal Energy
Regulatory Commission, and is a full correct transcription
of the proceedings.

Official Reporter