

FERC Aims For A Better Tribal Consultation Process

By **Jody Cummings and Monique Watson**

The Federal Energy Regulatory Commission has announced amendments to its Policy Statement on Consultation with Indian Tribes in Commission Proceedings. Revisions were published in the Federal Register on Oct. 24.[1]

The updated policy statement clarifies that FERC will use its environmental documents and agency decisional documents to communicate how tribal input has been considered; clarifies that tribal treaty rights are considered in agency decisionmaking; and adds corporations established under the Alaska Native Claims Settlement Act to the entities with whom FERC will consult pursuant to the policy statement.

The 2003 Policy Statement

FERC originally issued its Policy Statement on Consultation with Indian Tribes in Commission Proceedings in 2003. In that statement, codified at 18 C.F.R. 2.1c, FERC sets out guidelines for its decision-making processes that may have implications for American Indian tribes, and acknowledges foundational principles concerning the unique relationship between the United States and American Indian tribes as defined by treaties, statutes and case law, including:

- American Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice and manage and control their resources;
- Several executive branch authorities, departments and agencies are directed to consult with federally-recognized tribes;
- As a federal agency, FERC has trust responsibility to tribes that requires it to adhere to certain fiduciary standards in its dealings with tribes;
- Consultation should involve direct contact between agencies and tribes, and should recognize the status of the tribes as governmental sovereigns;
- FERC will assure that tribal concerns and interests are considered whenever its actions or decisions have the potential to adversely affect tribes or American Indian trust resources;
- FERC will seek to engage tribes in high-level meetings to discuss general matters of importance, such as those that uniquely affect the tribes; and



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- Among FERC's goals will be an effort to develop working relationships with tribes, and establish procedures to educate FERC staff about tribal governments and cultures, and to educate tribes about FERC's various statutory functions and programs.

The 2003 policy statement includes two other features worth noting. First, it gives special attention to FERC's hydroelectric licensing process — likely due in part to the fact that FERC issued regulations regarding the licensing of hydroelectric highlights concurrently with publication of the policy statement. The policy statement recognizes that the hydroelectric licensing process will benefit by more direct and substantial consultation between FERC staff and tribes, and expresses FERC's commitment to increase direct communications with tribal representatives on such matters where possible.

The policy statement also indicates that FERC will make efforts to notify potentially affected tribes about upcoming hydroelectric licensing processes, discuss the consultation process and establish case-by-case consultation procedures consistent with FERC's ex parte rules. When considering any proposed hydroelectric project, the policy statement states that FERC will consider any comprehensive plans prepared by tribes or intertribal organizations for improving, developing or conserving affected waterways.

Second, the policy statement suggests that FERC's tribal consultation commitment might be more limited than those of other regulatory agencies, given its independent, quasi-judicial status. The policy statement notes FERC's decision-making role on applications filed before it and resolving issues among parties appearing before it — including American Indian tribes.

The policy statement also indicates that there may be some limitations on FERC's ability to engage with any party — including an American Indian tribe — in a contested case, citing the requirements of the Administrative Procedure Act; FERC rules regarding off-the-record communications (sometimes the case when agencies engage in government-to-government consultations with tribes pursuant to Executive Order 13175); and the nature of FERC's licensing and certificating processes, as well as its review of jurisdictional rates, terms and conditions.

Changes to the Policy Statement

FERC's recent changes to the policy statement follow a report issued by the U.S. Government Accountability Office in March, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects." The GAO report is the product of a two-year study undertaken by the GAO to review tribal consultation practices of 21 federal agencies involved in permitting, review and/or funding of infrastructure projects, including FERC.

Among other topics, the GAO report examines federal agency compliance with government-to-government consultation responsibilities as directed by Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments";[1] tribal consultation practices during federal infrastructure permitting processes; and opportunities for tribal input in off-reservation projects that have potential to impact tribal lands. The GAO report includes a specific recommendation that FERC include in its tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects.

Following the GAO's analysis, FERC updated the policy statement in three areas.

Communication Concerning Tribal Input

Consistent with the GAO report's recommendation, FERC has added language to the policy statement indicating that FERC will set forth in its environmental (i.e., National Environmental Policy Act) documents and decisional documents and orders how tribal input from consultation was considered in agency decisionmaking. In taking this step, FERC notes that given its role as a neutral, quasi-judicial body and its requirements under the Administrative Procedure Act and FERC rules regarding off-the-record conversations, its past practice has been to address tribal input and concerns in its environmental decisions. The policy statement will now reflect FERC's stated practice.

Consideration of Treaty Rights

FERC will also update the policy statement to expressly reference the consideration of tribal treaty rights in its decision-making. Potential impacts to tribal treaty rights (including, but not limited to, off-reservation usufructuary rights such as hunting and fishing rights and treaty-guaranteed water rights) resulting from federal agency permitting of infrastructure projects have long been an area of emphasis for tribal governments and their advocates, with a high-profile focus near the end of the Obama administration and during the Trump administration.

The notion of FERC acknowledging tribal treaty rights in agency decision-making is arguably already incorporated — at least with respect to some matters coming before FERC — in its rules on hydroelectric licensing under the Federal Power Act that were issued contemporaneously with the 2003 policy statement. There, FERC states, "[T]ribal consultation pursuant to our trust responsibility encompasses more than implementation of [National Historic Preservation Act] Section 106. It includes every issue of concern to an Indian tribe related to a treaty, statute or executive order where [FERC] can, through the exercise of its authorities under the FPA, fulfill its trust responsibility." [3]

FERC's announcement states that consistent with its existing practice of examining in the National Environmental Policy Act and decision documents the effect of agency actions on treaty rights, FERC has clarified that point in the policy statement to add a specific mention of treaty rights.

Consultation With Alaska Native Corporations

Finally, the revisions to the policy statement address concerns raised in the GAO report that some federal agencies fail to engage in consultation with corporations established under the Alaska Native Claims Settlement Act, or ANCSA, as required by federal statute. Although ANCSA corporations do not have the same legal status as sovereign tribal governments, and were not covered in the tribal consultation directive issued in EO 13175, Congress expanded the reach of EO 13175's requirements in the Consolidated Appropriations Act of 2004 by requiring agencies to consult ANCSA corporations on the same basis as Indian tribes under EO 13175.

The GAO report notes that only nine of the 21 agencies surveyed in its analysis have expressly addressed consultation with ANCSA corporations through agency-specific or department-level consultation policies they follow. Perhaps even more surprising, three agencies — the U.S. Department of Energy, the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency — responded to the GAO's inquiry on this issue by indicating that they had not addressed consultation with ANCSA corporations in their agencies' consultation policies because ANCSA corporations are not

federally recognized Indian tribes — the 2004 congressional mandate notwithstanding.

FERC was one of three regulatory independent agencies — along with the Federal Communications Commission and the Nuclear Regulatory Commission — identified by the GAO as not addressing consultation with ANCSA corporations in their policies. Notably, EO 13175 exempts "independent regulatory agencies" (as defined by 44 USC 3502(5), and which includes FERC) from its scope; although it encourages such independent agencies to comply with the EO. Consistent with that encouragement, The policy statement will now reflect that FERC's consultation policy covers ANCSA corporations.

Importantly, the updated policy statement will also distinguish the relationship between the United States and ANCSA corporations from the government-to-government relationship between the United States and federally recognized tribes in Alaska and elsewhere across the country. FERC states that the update on the policy statement concerning ANCSA corporations will not diminish the government-to-government relationship with tribal nations and the consultation obligations towards those nations.

It is also worth pointing out that for the purposes of consultation required by Section 106 of the National Historic Preservation Act as part of federal agency permitting processes, the Advisory Council on Historic Preservation regulations implementing Section 106 define "Indian tribe" to include not only federally recognized tribes, but also ANCSA regional and village corporations.[4]

What's Next?

Beyond these tweaks to the policy statement, it may not be surprising if FERC — alone or in conjunction with other agencies — takes steps to establish an information system that identifies geographic areas of tribal interest in connection with potential infrastructure permitting activity and points of contact for tribal consultation.

The GAO report indicates that when surveyed on this topic, FERC officials stated that in the absence of a central federal system containing such information, FERC was considering developing its own system with information obtained from tribes around the country. A FERC-based system, or one created in connection with other agencies, could be a next major step on the tribal consultation front.

It will also be interesting to watch how, if at all, other agencies formally respond to the GAO report's recommendations. The GAO issued 22 recommendations — most of which are agency-specific. However, few, if any, of those recommendations should require major effort by the agencies. Still, from the perspective of Indian country, how federal agency tribal consultation policies and any forthcoming changes are actually implemented to engage in meaningful consultation on topics of interest to tribes and ANCSA corporations will likely be what matters most.

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[1] 84 FR 56940.

[1] EO 13175 (2000).

[3] See Hydroelectric Licensing under the Federal Power Act, Order No. 2002, 104 FERC ¶ 61,109, at P 279 (2003), order on reh'g, 106 FERC ¶ 61,037 (2004).

[4] See 36 C.F.R. 800.16(m).