



August 6, 2024

Debbie-Anne A. Reese
Acting Secretary
Office of the Secretary
Federal Energy Regulatory Commission
Washington D.C. 20426

*Ref: Revised Draft Programmatic Agreement for Proposed Goldendale Energy Storage Project
FERC Project: P-14861-002
Washington and Oregon
ACHP Case Number: 017907*

Dear Acting Secretary Reese:

Attached is our letter of July 26, 2024, which provides comments to FERC on the status of the Section 106 review for the referenced undertaking. These comments should be considered by FERC as it continues the consultation process to resolve the undertaking's adverse effects. If you have any questions, please contact Rachael Mangum at (202) 517-0214 or by email at rmangum@achp.gov and reference the ACHP Case Number above.

Sincerely,

Jaime Loichinger
Director
Office of Federal Agency Programs

Enclosure



July 26, 2024

David Turner, Chief
Northwest Branch, Division of Hydropower Licensing
Federal Energy Regulatory Commission
Washington D.C. 20426

*Ref. Revised Draft Programmatic Agreement for Proposed Goldendale Energy Storage Project
FERC Project: P-14861-002
Washington and Oregon
ACHP Case Number: 017987*

Dear Mr. Turner:

The Advisory Council on Historic Preservation (ACHP) is responding to the letter dated May 6, 2024, from the Federal Energy Regulatory Commission (FERC) requesting comments on a revised draft Programmatic Agreement (PA) for the proposed Goldendale Energy Storage Project. The project requires a license from FERC, making it an undertaking subject to review by FERC under Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA) (54 U.S.C. §§ 300101 et seq.) and its implementing regulations, “Protection of Historic Properties” (36 CFR Part 800). On July 11, 2024, the ACHP received FERC’s summary of the consultation meeting held on June 17, 2024, for discussion of FERC’s responses to comments by the ACHP and other consulting parties on a previous draft of the PA issued by FERC on March 31, 2023. Based on those comments and other correspondence, it is clear that there are ongoing concerns regarding the undertaking’s effects on important historic properties of religious and cultural significance to federally recognized Tribes (Tribes), including the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation), Confederated Tribes of the Umatilla Indian Reservation (Umatilla), Confederated Tribes of the Warm Springs Reservation of Oregon (Warm Springs), and the Nez Perce Tribe (Nez Perce), and challenges in the nature of FERC’s consultation with those Tribes throughout the Section 106 review for this undertaking. We consider these issues in the following.

The efficient development of viable alternative energy projects such as closed-loop pumped storage projects like Goldendale in the context of the mounting effects of global warming and climate change is unquestionably important. The project is intended to combine with and supplement other sources of sustainable alternative power, by providing supplemental power during periods of peak energy demand. The project has local, statewide, and regional support, and will assist the citizens of Washington State in meeting a statewide mandate to transition to 100 % renewable energy by 2045. In general, Tribes in the region have been supportive of such projects as well. It is important that federal agencies that provide authorization or assistance for such projects carry out associated environmental reviews efficiently and correctly. Under Section 106 of the NHPA, federal agencies are required to ‘take into account’ the effects on historic properties from the undertakings they permit, license, or assist. The Section 106 review process as set forth in the statute and its implementing regulations requires the federal agency to identify historic properties that may be affected in the Area of Potential Effects (APE) of the undertaking, assess effects to such properties, and develop ways to avoid, minimize, and mitigate adverse effects. All of these steps must be carried out in good faith consultation with Tribes that may ascribe religious and cultural

significance to the properties that may be affected, and with other appropriate consulting parties representing communities that have an interest in the properties that may be affected.

However, as we noted in our letter of May 16, 2023, this case illustrates how the structure and routine of its licensing review and FERC's *ex parte* communication rules (*ex parte*) can work to prevent FERC from consulting with Tribes in a way that enables Tribes to share confidential information about properties of great religious and cultural significance for them in the APE. These self-imposed constraints also function to ensure that effects to such properties are not considered early in planning and in the licensing process when alternatives regarding siting and design could be more realistically considered and less costly to pursue for the applicant. In this case, throughout the early licensing process, from consideration of an Order of Preliminary Permit in 2018 and at numerous subsequent points, FERC dismissed comments from the Yakama Nation regarding the presence of important properties of religious and cultural significance at the proposed project site as premature and irrelevant to the issues under consideration at that stage of the review. Consideration of such concerns was relegated by FERC to the later stages of the review to be considered as potential effects of construction and operation of the project. However, such a sequencing of the review fails to acknowledge that issuance of the Order of Preliminary Permit and subsequent steps in the review essentially lock in the location and parameters of an undertaking, eliminating the opportunity for FERC or the proponent to realistically consider alternatives to avoid or minimize effects to highly significant properties of religious and cultural significance that the Tribes know are present.

As allowed in the Section 106 regulations, FERC authorized the applicant to initiate the Section 106 review including sponsoring research to identify historic properties that may be affected by the undertaking. In doing so, FERC acknowledges that it remains responsible for its government-to-government relationship with Tribes, but in relying on *ex parte*, prevents itself from actualizing that relationship productively in the Section 106 review. Based on the identification effort sponsored by the project proponent, FERC has concluded that the undertaking will adversely affect five archaeological sites that are individually eligible for inclusion on the National Register of Historic Places (NRHP) and are contributing elements to the larger Columbia Hills Archaeological District, and variably contributing elements to three eligible Traditional Cultural Properties (TCPs). FERC has also found that the undertaking will adversely affect those three TCPs (Pushpum, Nch'ima, and T'at'aliyapa), which constitute an overlapping traditional cultural landscape (TCL) used for traditional resource gathering and other ritual and cultural activities. FERC acknowledges that construction of the project reservoirs will permanently prevent culturally significant activities from occurring in the area occupied by the reservoirs. It will also alter the viewshed, setting, and context for cultural activities in a way that will interfere with the resource gathering and ceremonial use of the TCPs, degrading the integrity and cultural significance of the TCPs for the Tribes.

The identification effort relied in part on surveys carried out by the Yakama Nation, Umatilla, and Nez Perce or researchers they proposed, but the resulting reports did not include expansive details about the religious and cultural significance of the properties. This was likely because the Tribes were reluctant or unable to share with the applicant and the public, due to religious and cultural constraints and restrictions. In response to the Yakama Nation's requests to be able to share additional information confidentially directly with FERC in the context of the government-to-government relationship, FERC has indicated that due to its *ex parte* rules, it cannot use in decision-making any confidential information from Tribes that is not shared with the proponent and other parties to the FERC review.

Such self-imposed structural challenges to the good faith consideration of effects to significant properties of religious and cultural significance to Tribes in FERC's review can be reinforced by the standardized routines that are developed to work through the steps of the Section 106 review: identification of historic properties, assessment of effect and adverse effect, and resolution of adverse effects. The rote process that evolves can lead to a simplification of and an assumed equivalency among historic properties, that are

functionally treated as if they are of equal significance. Proponents, their consultants, and even agency staff may not be particularly knowledgeable about or sensitive to the importance of such properties for the Tribes involved and may downplay the significance of such properties and fail to understand the nature and extent of the impact. They may also ultimately assume that because federal agencies are required to seek ways to avoid, minimize, and/or mitigate (resolve) adverse effects, mitigation measures are always possible and therefore can also ultimately be considered adequate to address the adverse effects to any historic property. This rationalization may interfere with a federal agency's ability to achieve a realistic understanding of the significance of an historic property, especially properties that are integrally linked to the cultural identity and the lifeways of a Tribe.

As such, the result can be a trivialization of historic properties and proposed mitigation measures. In this case, the proponent and FERC have suggested that appropriate steps to resolve adverse effects might include: '... displaying artifacts in a museum or museum-like setting; interpreting historic properties, via interpretive panels, displays, walking tours, or other means, to enable the history and importance of the properties to be shared within the public; or listing a historic property in the National Register.' This kind of mitigation does not sufficiently reflect the significance of these properties. In correspondence and in meetings, the Yakama Nation and the Umatilla have rejected those suggestions regarding the resolution of the adverse effects. The Yakama have repeatedly indicated that no real mitigation is possible, and during the June 16, 2024, meeting indicated their representatives present were not prepared to discuss mitigation as FERC had yet to consult with them at the government-to-government level in a confidential manner regarding information that FERC should consider in its decision-making process. In that meeting, the Umatilla repeated their suggestions that any mitigation should include the purchase of land or easements, in the APE or elsewhere, to guarantee Tribal access to First Foods, and access to other resource gathering and ceremonial locations.

The Umatilla's proposals go beyond the simplistic mitigation treatments that have been referenced in passing by the proponent or others and begin to address in part the ongoing and living significance of the TCPs and TCL for the Tribes. Further, they begin to approach acknowledgement of the nature of the adverse effects. A recent report developed by the Department of Interior, "Historic and Ongoing Impacts of Federal Dams on the Columbia River Basin Tribes," issued June 14, 2024, provides appropriate context for FERC consideration of these types of projects in the region. The DOI report serves as an acknowledgement that the construction and operation of dams on rivers in the Pacific Northwest were a devastating imposition on Tribes in the region. Though construction of the dams was intended to provide a number of public benefits including generation of hydroelectric power, storage and distribution of water for irrigation and other uses, creation of jobs, and recreational opportunities, it also had a devastating effect on the lifeways, culture, and economies of Tribes in the region. The dams and reservoirs blocked access for salmon to upstream spawning grounds challenging species survival, interfered with the annual salmon runs and Tribal fish harvesting, and inundated Tribal villages, sacred sites, and the usual and accustomed places Tribal members used for fishing and other resource gathering, and as a result, dramatically altered the lifeways and economies of the Tribes.

It seems reasonable to suggest that FERC's licensing of projects like Goldendale essentially operates to continue and extend the type of imposition on Tribal lifeways acknowledged by the DOI for the construction of the dams, when such undertakings impact important properties of religious and cultural significance to Tribes associated with the lifeways of the Tribes. Thus, a resolution of adverse effects for impacts to such TCPs and TCLs that includes attempts to facilitate access to culturally significant ceremonial and resource areas like First Foods or fishing sites seems obvious and reasonable. Acknowledgment of that context should also be grounds for FERC to establish an exception to its *ex parte* rules for consultation with Tribes for these types of projects. Establishing the exception would acknowledge the continuing imposition on the Tribes from these types of important projects, the significance of properties affected, and also reflect respect for the government-to-government relationship between federal agencies and federally recognized Tribes.

This undertaking and its associated Section 106 review highlight the need for FERC to establish a balance between its government-to-government obligations and the responsibility to facilitate efficient and transparent review and implementation of projects like Goldendale in the broader public interest. This would necessarily involve addressing the challenges in its license review process to ensure consideration of proposed project sites by a prospective license applicant at a very early stage in planning and design as an initial step in licensing that can be informed by the goal of avoiding and minimizing impacts to extremely important properties of religious and cultural significance to Tribes. In order to do so, FERC must be proactive in working with Tribes to identify properties of concern and establish parameters for proponents to consider in site selection and project design.

With that in mind, specific to the Goldendale project and as noted in our May 16, 2023, letter, FERC should provide the Tribes with opportunities to share information that will be kept confidential, and, as the federal agency which is responsible for resolving adverse effects, belatedly consider any ways the project could be additionally altered to avoid and minimize adverse effects. FERC might then consider actions to mitigate adverse effects that focus on the properties of religious and cultural significance to the Yakama Nation and other Tribes, having been more fully informed by appropriate consultation. FERC should further revise the proposed draft PA to specifically reference aspects of the mitigation it will require. FERC should also require modification of the draft Historic Properties Management Plan (HPMP) to provide details regarding the resolution of known adverse effects, along with the protocols for future consultation among the licensee and appropriate consulting parties to address potential effects to historic properties arising from operation, maintenance, and upgrade of the facility that is covered under the license.

The current revised draft PA does not differ greatly from the draft PA issued in March of 2023. It does not address the central ongoing concerns of the Tribes or reflect consideration of comments in the consulting party meeting of June 17, 2024. Both drafts are based on a template PA that was developed to complement an outline for HPMPs developed by FERC and the ACHP in 2002. However, use of such a template PA has proven increasingly insufficient in recent years, as reflected in comments with regard to PAs and HPMPs for other undertakings provided by SHPOs, the ACHP, and a number of Tribes. The ACHP is currently reviewing the revised draft PA provided in May to include reference to concerns expressed by the Tribes and Washington SHPO and will need additional time to complete our review. We request that FERC provide a version of the revised draft PA in Word format to facilitate review and editing.

However, we also want to ensure that FERC is aware that edits to the PA will need to include a stipulation that specifies what FERC's expectations are regarding the minimum acceptable appropriate resolution of adverse effects to the TCPs/TCL identified in the APE, and a requirement that the HPMP must be concurred upon by SHPO and ACHP, prior to finalization by FERC. FERC should also clearly acknowledge at this time that the earlier mitigation ideas presented by the applicant are insufficient to resolve the undertaking's significant adverse effects to Tribal historic properties and engage in consultation with the Tribes to develop mitigation ideas that can be implemented through the HPMP.

As FERC is likely aware, the optimal locations for these types of extremely important alternative energy projects will very often be locations where Tribes recognize important TCPs and landscapes of foundational religious and cultural importance to their Tribal identity and cultural lifeways. The Section 106 review for this undertaking reinforces the need for FERC to formally recognize exceptions to its *ex parte* communication rules for confidential consultation with Tribes regarding properties of religious and cultural significance for them. Such consultation should be timed to inform the earliest stages of FERC's licensing process for specific undertakings and supplemented by ongoing consultation by FERC with Tribes to identify and characterize likely locations for pumped storage projects, to assist future proponents as early as possible with information about siting and design of future projects.

The ACHP provides these comments to assist FERC in addressing the concerns expressed by the consulting parties in order to progress in the Section 106 review. If you have any questions or require our further assistance, please contact Rachael Mangum at (202) 517-0214 or by email at rmangum@achp.gov and reference the ACHP Case Number above.

Sincerely,

A handwritten signature in blue ink that reads "jaime loichinger". The signature is written in a cursive, lowercase style.

Jaime Loichinger
Director
Office of Federal Agency Programs

Document Content(s)

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