



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

August 1, 2025

FILED ELECTRONICALLY

Debbie-Anne A. Reese, Secretary
Federal Energy Regulatory Commission
12225 Wilkins Ave.
Rockville, Maryland 20852

Travis Voyles
Advisory Council on Historic Preservation
401 F St. NW, Ste. 308
Washington, D.C. 20001

RE: YAKAMA NATION'S COMMENT ON FINAL DRAFT PROGRAMMATIC AGREEMENT, DATED JULY 17, 2025 (FERC P-14861-002 | ACHP NO. 017907)

Dear Secretary Reese and Vice Chair Voyles,

I am writing on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) in response to the Final Draft Programmatic Agreement, dated July 17, 2025, (“PA”) for the proposed Goldendale Energy Storage Project, No. P-14861-002 (“Project”) issued by the Federal Energy Regulatory Commission’s (“Commission”) Division of Hydropower Licensing. The Yakama Nation preserves, incorporates, and reasserts the previous comments filed with the Federal Energy Regulatory Commission (“FERC”). The Yakama Nation calls on the Advisory Council on Historic Preservation (“Council”) to reconsider against signing the PA as written¹ and for any action taken by FERC to terminate consultation pursuant to 36 C.F.R. § 800.7 also include a concurrent denial of the Project license on the basis that Free Flow Power Project 101, LLC dba Rye Development (“Project Applicant”) has failed to participate in productive dialog to provide reasonable mitigation.

As summarized below and through prior comments, FERC’s conclusion that the “PA does not fail to provide sufficient mitigation” is erroneous and ignores the record of Yakama Nation’s comments.² The FERC has routinely failed to comply with procedural requirements under the National Historic Preservation Act (“NHPA”), and its implementing regulations, resulting in a lack of substantive consideration or mitigation for the Yakama Nation’s Traditional Cultural Properties (“TCP’s”) and this PA improperly transfers benefits to the Project Applicant to the detriment and loss of enrolled Yakama members’ religious and cultural beliefs attached to the Project site.

¹ Email from Jaime Loichinger (Council) to Michael Tust (FERC, Division of Hydropower Licensing), eLibrary no. 20250731-4000 (Jul. 31, 2025).

² Letter enclosing Revised Draft Programmatic Agreement from Nicholas Jayjack (FERC, Division of Hydropower Licensing), eLibrary no. 20250717-3075 (Jul. 17, 2025).

I. Stipulation No. I Does Not Provide Reasonable Mitigation

The Council has previously underscored insufficiencies in the Historic Properties Management Plan (“HPMP”), going back to preliminary advice filed in 2023 “the consultation to resolve adverse effects, the fourth step in the Section 106 review, cannot be delegated under 36 CFR § 800.2(c)(4).”³ The Council has repeated its “suggest[ion] that the HPMP be renamed to reflect its mitigative nature, rather than management responsibilities.”⁴ The core problem with the HPMP is far more than semantics because “FERC appears to have prevented itself from taking advantage of early opportunities to work with the proponent and Tribes to achieve a balance between the obligations of the government-to-government and trust relationship between federal agencies and Tribes and the responsibility to facilitate efficient and transparent review and implementation of projects in the broader public interest.”⁵ The PA signals an aspiration to provide “specific measures to resolve unavoidable adverse effects to historic properties that will result from project construction” but a sufficient PA must actually provide for mitigation in substance.⁶ The PA Stipulations as applied would not even prevent the Project Applicant from their current pattern of frustrating substantive mitigation discussions.

i. 36 C.F.R. § 800.7 Should Not Be Used Against Yakama Nation When The Project Applicant Withdrew From Mitigation Planning

As noted above, FERC’s authority to terminate further discussion on the PA under 36 CFR § 800.7 must not be used to penalize the Yakama Nation, which participated in developing mitigation for the PA with FERC, the Council, and the Washington State Historic Preservation Officer (“SHPO”), when the Project Applicant abandoned the meetings. The Yakama Nation utilized productive discussions with the SHPO to identify a path to reasonable mitigation on December 10, 2024 and January 10, 2025. On January 2, 2025, the Project Applicant withdrew from mitigation discussions and requested unilateral issuance of the FERC license on the basis that “further engagement with [SHPO] would not be productive.”⁷ To date, the evidence of from the PA process shows manipulation to exclude or minimize the Yakama Nation’s comments about the underlying resources – which should be a basis for more protective measures, *not less*.

Importantly, ground-disturbing activities should not be licensed until the PA prescribes reasonable mitigation. However, in Stipulation I.A. the Project Applicant is merely required to “seek” concurrence on the management plan as the basis for filing the HPMP in the first year of the FERC license. The Council has already identified the problem

³ Letter from Reid Nelson (Council) to Vince Yearick (FERC, Division of Hydropower Licensing), eLibrary no. 20230516-5113, at 2 (May 16, 2023).

⁴ Letter from Jaime Loichinger (Council) to Nicholas Jayjack (FERC, Division of Hydropower Licensing), eLibrary no. 20250701-4001 (Jun. 30, 2025).

⁵ *Supra* note 3, eLibrary no. 20230516-5113 at 3.

⁶ PA Stipulations § I.A at 6.

⁷ Letter from Gerald Lewis (Yakama Nation) to Debbie-Anne Reese (FERC), eLibrary no. 20250701-5051 at 6 (Jun. 30, 2025) (Attached as Exhibit A).

AUGUST 1, 2025

PAGE 2 OF 5 - YAKAMA NATION’S COMMENT ON FINAL DRAFT PROGRAMMATIC AGREEMENT, DATED JULY 17, 2025 (FERC P-14861-002 | ACHP NO. 017907).

with this permissive Stipulation, that FERC must “address comments made by consulting parties, including those FERC’s applicant may reject or disagree with...how FERC will meet is Section 106 requirement to ensure the undertaking’s adverse effects are resolved.”⁸ This is important because the Project Applicant has already exhibited behavior of permanently cancelling meetings when they disagree with the SHPO, which is a signatory to the PA.⁹

Stipulation I.D. further demonstrates the lack of foundation for FERC to properly consider Yakama Nation’s comments on the underlying resources when the Project Applicant disagrees. After seeking concurrence with at least 30 days for a response, the Project Applicant is permitted to file the HPMP for FERC approval without adopting recommendations from concurring parties.¹⁰ The PA does not prescribe any basis on which the Project Applicant can reject a recommendation or any standard of review by which FERC must evaluate the Project Applicant’s reason for rejecting a recommendation. The Council has already identified problems with a practice like this, “FERC’s delegation of the initiation of Section 106 to proponents . . . and the ex parte rule very often serve to insulate FERC staff and decision makers from early and effective government-to-government consultation with Tribes . . . thus preventing FERC from being fully informed.”¹¹ This Stipulation does not remove similar barriers as those that corrupted the HPMP’s original development.

Stipulation I.E. shows promise by requiring a qualified facilitator that will direct the Project Applicant to “work with the consulting parties” in the development of the HPMP.¹² However, as the Council has previously noted, FERC should “consider the inclusion of a stipulation that requires the development of a plan that more clearly outlines how it meets its consultation responsibilities to Tribes.”¹³ While the Council’s earlier comments intended to address tribal consultation programmatically, this Stipulation should be designed to prevent FERC from getting isolated from information necessary to consider the sacred TCP’s most harmed by this Project’s adverse impacts. Under this Stipulation, the Project Applicant’s material work product is preserving detailed records of “consultation efforts”. The Yakama Nation questions if the Project Applicant is still enabled by weak Stipulations to performatively withdraw, like they did this year, from making actual mitigation commitments in collaboration with the SHPO and Yakama Nation.

The Stipulations do not provide the Yakama Nation with any contractual right, either as an invited signatory or through a Memorandum of Agreement (“MOA”), to resolve the Project’s adverse effects. A required MOA pursuant to the PA and the HPMP would provide accountability for agreed-upon measures, roles, responsibilities, timeframes, and provisions to address adverse effects to individual parties.

⁸ Letter from Jaime Loichinger (Council) to Nicholas Jayjack (FERC, Division of Hydropower Licensing), eLibrary no. 20250701-4001 (Jun. 30, 2025).

⁹ *Supra* note 7 (Attached as Exhibit A).

¹⁰ PA Stipulations § I.D at 9.

¹¹ *Supra* note 3, eLibrary no. 20230516-5113 at 4.

¹² PA Stipulations § I.E. at 9.

¹³ Letter from Jaime Loichinger (Council) to Debbie-Anne Reese (FERC), eLibrary no. 20241108-5146, Comment on PA Stipulation § II at 10 (Nov. 8, 2024).

AUGUST 1, 2025

PAGE 3 OF 5 - YAKAMA NATION’S COMMENT ON FINAL DRAFT PROGRAMMATIC AGREEMENT, DATED JULY 17, 2025 (FERC P-14861-002 | ACHP NO. 017907).

II. Conclusion

The Yakama Nation has been deeply disappointed in the FERC's failure to take its statutory and trust responsibilities seriously in the face of irreversible harm to sacred and religious TCPs. Regardless, Yakama Nation continues to exercise every opportunity under the law to advocate for the preservation of its religious and cultural practices.

Respectfully,

Gerald Lewis
GERALD LEWIS, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

AUGUST 1, 2025

PAGE 4 OF 5 - YAKAMA NATION'S COMMENT ON FINAL DRAFT PROGRAMMATIC AGREEMENT, DATED JULY 17, 2025 (FERC P-14861-002 | ACHP No. 017907).

EXHIBIT A

Letter from Yakama Tribal Council Chairman to Secretary Debbie-Anne Reese, eLibrary 20250701-5051 (June 30, 2025).

Exhibit Coversheet Only.

[Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 30, 2025

FILED ELECTRONICALLY

Debbie-Anne A. Reese, Secretary
Federal Energy Regulatory Commission
888 First St. NE, Rm. 1A
Washington, D.C. 20426
c/o: Michael Tust, Michael.Tust@ferc.gov

RE: YAKAMA NATION'S COMMENT ON REVISED DRAFT PROGRAMMATIC AGREEMENT,
DATED MAY 29, 2025 (FERC P-14861-002 | ACHP No. 017907).

Dear Secretary Reese,

I am writing on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) in response to the Revised Draft Programmatic Agreement, dated May 29, 2025, (“PA”) for the proposed Goldendale Energy Storage Project, No. P-14861-002 (“Project”) issued by the Federal Energy Regulatory Commission’s (“Commission”) Division of Hydropower Licensing. As summarized below, signing this PA now is improper because the PA fails to mitigate, or otherwise resolve adverse effects, that Project construction and operation will cause by damaging Yakama Nation’s Traditional Cultural Properties (“TCP’s”).

The Yakama Nation continues to urge the Advisory Council on Historic Preservation (“Council”), the Washington State Department of Archaeology and Historic Preservation (“DAHP”), and the Oregon State Historic Preservation Officer (“Oregon SHPO”) to use subsequent PA discussions related to this undertaking to prescribe specific mitigation. This PA operates with a necessary counterpart document, a Draft Historic Properties Management Plan, dated January 25, 2022 (“HPMP”), that was developed outside of government-to-government consultation with the Yakama Nation. Signing the PA now, while ignoring comments in some instances and excluding comments in other circumstances from the Yakama Nation, unjustly enriches the Project Applicant and creates a perverse incentive to manipulate or evade the National Historic Preservation Act (“NHPA”) while indigenous people rely in good faith on its statutory protections of their sacred sites. No party disputes that the proposed Project damages or destroys historic properties eligible for inclusion on the National Register of Historic Places (“National Register”) – the Yakama Nation’s extensive participation with the Council, DAHP, and the Commission Docket, is good faith effort that reasonable, specific, and enforceable mitigation can be identified prior to issuing a Project license.

The Yakama Nation continues comment on PA drafting as part of its reasonable and good faith effort to resolve the PA's deficiencies, as well as address insufficient mitigation within the draft HPMP. The Yakama Nation continues to incorporate and preserve its previously asserted concerns, specifically in regards to the Draft HPMP, that was developed without government-to-government consultation on the basis of the Commission's own Rule 2201¹ and over the Yakama Nation's sustained objection to Commission's attempted delegation of its Section 106 consultation duty to the Project Applicant.² The Yakama Nation has inherent and Treaty-reserved rights to assert substantive consideration of the five archaeological sites and three TCP's that will be adversely affected by this undertaking.

I. The PA Fails To Provide Reasonable Mitigation

The NHPA establishes requirements for federal agencies to protect and preserve "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object."³ Historic properties are defined to include properties of traditional religious and cultural importance to a federally-recognized Indian tribes that meet criteria for the National Register.⁴ TCP's are a type of historic property that are "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."⁵

Federal agencies may develop programmatic agreements governing alternate procedures for section 106 compliance.⁶ Federal agencies must allow for "the development and implementation of agreements in consultation with the [SHPO], local governments, [and] Indian tribes . . . regarding the means by which adverse effects on historic property will be considered" including the use of memorandums of agreement and programmatic agreements.⁷ A programmatic agreement is "a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a federal agency program, complex undertaking or other situations in accordance with § 800.14(b)."⁸

¹ 18 C.F.R. § 385.2201. *See generally* Letter from Vince Yearick, Division of Hydropower Licensing, to Delano Saluskin, Chairman, Yakama Nation Tribal Council, regarding Information About Off-the-Record Communications and Filing Confidential Information (Dec. 9, 2021).

² Letter from Casey Barney, Yakama Nation Cultural Resource Program Manager, to Suzanne Novak and David Turner, Division of Hydropower Licensing regarding Section 106 Consultation Authorization, Goldendale Energy Storage Project (P-14861) (Sep. 13, 2021).

³ 54 U.S.C. § 300.308.

⁴ 36 C.F.R. § 800.16(l)(1).

⁵ U.S. Dep't of the Interior, NPS, Guidelines for Evaluating and Documenting Trad. Cult. Prop. 1, 10-11 (1992).

⁶ 36 C.F.F. § 800.14(b).

⁷ 54 U.S.C. §306102 (b)(5); 36 C.F.R. §§ 800.6(a) and 800.14(b).

⁸ 36 C.F.R. §§ 800.14(b) and 800.16(t).

JUNE 30, 2025

PAGE 2 OF 9 - YAKAMA NATION'S COMMENT ON REVISED DRAFT PROGRAMMATIC AGREEMENT, DATED MAY 29, 2025 (FERC P-14861-002 | ACHP No. 017907).

i. *Specific Mitigation Is Missing.*

Without specific mitigation measures the PA is an avenue to do nothing to address unavoidable and significant impacts despite its severe harm to Yakama Nation. This PA incorporates a three-year old Draft HPMP and uses circular logic to hide the still missing reasonable mitigation that is required by NHPA. This PA only contains direction to provide subjective (i.e. largely unenforceable and/or lacking accountability) protocols up to a year after the proposed Project is licensed. Under the PA, the Commission requires “the Licensee to implement the provisions of this PA” while then requiring “[w]ithin one year...the Licensee will file with the Commission for approval a revised HPMP specifying how historic properties will be *managed in the Project’s area . . .*.”⁹ The Council’s request, which Commission staff have rejected, to rename the HPMP from a “*Management*” plan to a “*Mitigation*” plan identifies the larger issue – a glaring lack of substantive mitigation in the PA or the associated Draft HPMP. The title *and* substance of the HPMP need to be updated with reasonable mitigation for known adverse effects if either document is intended to function as a NHPA-compliant instrument.

The PA only names “mitigation” once, in providing that the Draft HPMP will include “measures to resolve unavoidable adverse effects to identified historic properties[,]” which permissively “should include...other appropriate mitigation measures designed to resolve unavoidable adverse effects to Traditional Cultural Properties developed in consultation with the Washington SHPO, Oregon SHPO, ACHP, and the Tribes.”¹⁰ The Commission defines the Project’s unavoidable adverse effects as damage or loss to five prehistoric archaeological sites and three Traditional Cultural properties included in or eligible for inclusion in the National Register.¹¹ And yet, this PA and Draft HPMP do not include objective or quantitative parameters to define minimum benchmarks that constitute appropriate minimum measures.

The Commission’s Project Docket is replete with preliminary suggestions for both scope and types of mitigation measures.¹² This is not a situation where consultation parties are failing to develop a programmatic agreement for implementation, but comments are being willfully ignored. This PA does not respond to the Council’s request for information on the scope of discussed mitigation between \$25 million and not less than one percent of the

⁹ PA Recitals ¶ 18 and Stipulations I.A at 5 (May 29, 2025) (emphasis added).

¹⁰ PA Stipulations IC.3 at 7 (May 29, 2025).

¹¹ PA Recitals ¶ 4 at 2 (May 29, 2025).

¹² Letter from Chairman Gerald Lewis, Yakama Nation, to David Turner, Division of Hydropower Licensing, 3-4 (Apr. 28, 2023)(requesting an MOA to resolve adverse effects); Letter from Anthony Aronica, Yakama Nation, to Michael Tust, Commission Office of Energy Projects, 1 (Jul. 24, 2025)(noting cumulative adverse effects at the Project site); Email from Dr. Allyson Brooks, DAHP, to Michael Tust, Commission Office of Energy Projects (Oct. 14, 2024)(requesting stipulations for funding to implement the HPMP); Letters from Chairman Gerald Lewis, Yakama Nation Tribal Council, to Secretary Debbie-Anne A. Reese, Commission, 3 (Nov. 18, 2024)(noting lack of sufficient mitigation in HPMP) and 2-3 (Nov. 1, 2024)(identifying law stewardship, property conservation, and indigenous seed nurseries for mitigation); Letter from Governor Jay Inslee, Washington State, to Secretary Debbie-Anne A. Reese, Commission, 1 (Jan. 14, 2025)(recommending mitigation to protect sacred and cultural places from further development); Letter from Dr. Allyson Brooks, DAHP, to Michael Tust, Commission Office of Energy Projects, 1-2 (Mar. 27, 2025)(requesting clarity on proposed PA funding, expectations, and mitigation).

proposed Project's development cost be secured through any written commitment.¹³ If this PA did respond to the Council's request for this information, it would quantify types of mitigation measures for the land conservancy of other sites that are sacred to the religious practices of Yakama People, securing permanent replacement root gathering grounds and access for Treaty-reserved harvest rights, and community improvements for the adjacent tribal longhouse people to supplement their maintenance and continuing cultural identity on the adversely effected indigenous landscape.

The consultation parties are here and have been extensively participating in the development of this PA so that mitigation can be quantified before Project licensing. The Council's role in the licensing decision is designed to create accountability. Failing to specify or quantify any scope or measure of mitigation in the PA signals to the Project Applicant that it is in their interest to avoid or minimize their *responsibility* for the Project's adverse effects, not the harmful impacts to the National Register-eligible sites or TCP's.

ii. Managing Avoidable Harm Does Not Mitigate For Unavoidable Harm.

The PA and its associated Draft HPMP do not prescribe reasonable mitigation, but merely to "provide protocols for identifying, assessing, and resolving adverse effects to historic properties in consultation with appropriate consulting parties over the duration of the license for this Undertaking."¹⁴ As written, providing "protocols" is different than specifying reasonable mitigation with objective and quantitative measures for the Project's unavoidable adverse effects. The Yakama Nation and Yakama People will feel extreme pain and sacrifice for damaged or lost TCP's beginning with the Project's construction phase – when the reservoir excavation and conveyance tunnel drilling will blast and disfigure our culturally and religiously significant sites. While this PA and Draft HPMP call for subjective and narrative "protocol" over a period likely to extend for 50 years, the Yakama Nation and its enrolled members face acute and harmful consequences as soon as the proposed Project breaks ground.

Two Environmental Impact Statements conclude that the Project will adversely affect National Register-eligible sites.¹⁵ The PA contemplates a future HPMP that includes "provisions for preserving in place those cultural sites that are eligible for listing in the National Register, *where feasible*.¹⁶ But, this stipulation ignores National Register-eligible sites that cannot be feasibly preserved in place. Notably, the PA is not requiring the future HPMP to quantify mitigation for this adverse effect, *where not feasible*. The PA also provides a future HPMP to include "a listing of the location of the known National Register-eligible cultural sites *to be avoided* and how they will be marked and *avoided where*

¹³ Letter from Jaime Loichinger, Council Office of Federal Agency Programs, to Nicholas Jayjack, Commission Division of Hydropower Licensing, 3 (Mar. 25, 2025).

¹⁴ PA Recitals ¶ 8 at 3 (May 29, 2025).

¹⁵ Final Environmental Impact Statement for Hydropower License re the Goldendale Energy Storage Project under P-14861-002, eLibrary no. 20240208-3036 (Feb. 8, 2024); Washington Department of Ecology Final Environmental Impact Statement, App. H Tribal Resource Analysis Report at S-1 (Dec. 21, 2022).

¹⁶ PA Stipulations I.C.1 at 6 (May 29, 2025) (emphasis added).

*possible[.]*¹⁷ Notably again, this PA stipulation falls short of establishing objective measures for National Register-eligible sites that cannot be avoided. The PA and the Draft HPMP do not manage the adverse effects found by both Environmental Impact Statements and fail to mandate specific mitigation requirements to satisfy NHPA's prescription for adverse effects, where *avoidance is not possible*.

II. The PA Makes Section 106 Defects Worse, Not Better

The “core requirement” of the NHPA is contained in the body of federal regulations generally referred to as section 106.¹⁸ Section 106 establishes “stop, look, *and listen*” requirements for federal agencies to determine the potential effects to historic properties prior to an undertaking.¹⁹ Federal agencies must complete four steps prior to an undertaking: (1) identify undertakings that might affect historic properties, (2) identify and evaluate potentially affected historic properties, (3) evaluate adverse effects, and (4) seek ways to avoid, minimize, or *mitigate* adverse effects.²⁰ In carrying out its section 106 responsibilities, federal agencies are required to consult with “any Indian tribe...that attaches religious and cultural significance” to a historic property.²¹

i. *Where Are NHPA Protections For Yakama Nation: No Consultation On HPMP And No Signatory Standing In The PA*

Under 36 C.F.R. § 800.2(c)(4), the “agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, *but remains legally responsible for all findings and determinations* charged to the agency official . . . [f]ederal agencies that provide authorizations to applicants *remain responsible for their government-to-government relationships with Indian tribes.*”²² The Commission and the Council have a trust responsibility to the Yakama Nation on a section 106 government-to-government basis.²³ And yet, this PA attempts to export mitigation obligations to an associated Draft HPMP wherein Yakama Nation was denied government-to-government consultation.²⁴

¹⁷ PA Stipulations I.C.4(c) at 7 (May 29, 2025) (emphasis added).

¹⁸ *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

¹⁹ *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999) (emphasis added). See also 54 U.S.C. § 306108.

²⁰ 54 U.S.C. § 306108 and 36 C.F.R. §§ 800.3-800.6. (emphasis added).

²¹ 54 U.S.C. § 302706 and 36 C.F.R. § 800.4(a)(4).

²² (emphasis added).

²³ 18 C.F.R. § 2.1c and 36 C.F.R. § 800.2(c)(4).

²⁴ Letter from Chairman Delano Saluskin, Yakama Nation, to Secretary Kimberly Bose, Commission, 3-4 (May 23, 2022)(recommending government-to-government consultation between the Commission and Yakama Nation); Letter from Dr. Robert Whitlam, DAHP, to Michael Tust, Commission Office of Energy Projects, 2 (Apr. 25, 2023)(expressing concern over the failed tribal consultation); Letter from Chairman Gerald Lewis, Yakama Nation, to David Turner, Commission Division of Hydropower Licensing, 3-4 (Apr. 28, 2023)(describing the failed consultation with the Yakama Nation); Letter from Reid Nelson, Council, to Vince Yearick, Commission Division of Hydropower Licensing, 3-5 (May 16, 2023)(describing how the Commission could fulfill its section 106 duty consistent with the NHPA); Letter from Chairman Gerald Lewis, Yakama Nation, to Secretary Kimberly Bose, Commission, 1-6 (Jun. 6, 2023)(regarding the Commission’s consultation failure and resulting incomplete HPMP)(Attached as Exhibit B).

The three-year old Draft HPMP pre-dates the completion of the Commission's and Washington State's respective Environmental Impact Statements and should be updated based on those impact statements and section 106 consultation with Yakama Nation.²⁵ While the Commission has failed to accommodate government-to-government consultation, the Project Applicant has voluntarily quit participating with DAHP and derailed the Yakama Nation's consultation access to develop specific mitigation measures. This means that the project applicant and proposed consultative body failed to conduct a reasonable consultative process.

In January 2025, the Project Applicant called on the Commission to "move forward unilaterally in its issuance of a license for the Project."²⁶ The Commission, Council, and DAHP need to exercise special regulatory oversight here to give meaning to NHPA because the Project Applicant withdrew from actually providing mitigation measures when DAHP and the Yakama Nation started identifying specific mitigation measures through a consultative process. The Project Applicant inappropriately accused the State Historic Preservation Officer of "continued lack of substantive feedback on the mitigation . . . as well as the tone and tenor of DAHP's January 2, 2025 letter, confirms that . . . further engagement with DAHP would not be productive."²⁷

The Project Applicant asserted during the PA discussion hosted by the Commission on November 18, 2024, that its sibling development enterprises evidence success with the PA strategy of issuing the Project license before developing HPMP mitigation measures. This sequencing is currently failing in Oregon where The Klamath Tribes' highest legislative assembly, the General Council, "rejected Rye Development's complete disregard and lack of recognition of the Tribes Sovereignty, the Treaty of 1864 and all Treaty Protected Resources and the extremely significant cultural, religious, spiritual and traditional use areas in and around the Swan Lake Pumping Station."²⁸ Contrary to assurances that future HPMP revisions will be meaningful, representatives of the Project Applicant "have falsely represented to external parties and agencies that they have an active working relationship with the Klamath Tribes, when in fact, any past interactions were limited to a small number of individual council members and do not reflect the will of the General Council or the official policy of the Klamath Tribes[.]"²⁹ This Project Applicant simply "lacks the expertise to manage the Section 106 Process" and the result is that tribal interests and TCP's are threatened by termination of the PA process and future HPMP protocols that are likely to lack accountability.

Given the Project Applicant's demonstrated mitigation avoidance with Washington State and other tribal sovereigns, there is a unique basis for this PA to require stronger NHPA prescriptions for avoiding, minimizing, or *mitigating* adverse effects and for the Council to expect such terms and conditions be set by a pre-license PA. Additionally tribal

²⁵ *Supra* note 15.

²⁶ Letter to FERC Secretary Debbie-Anne Reese on behalf of license applicant FFP Project 101, LLC regarding Request to Move Forward with Licensing. (Jan. 8, 2025).

²⁷ Letter to FERC Secretary Debbie-Anne Reese on behalf of license applicant FFP Project 101, LLC regarding Request to Move Forward with Licensing. (Jan. 8, 2025).

²⁸ Letter from William E. Ray, Jr., The Klamath Tribes Tribal Council Chairman, to Gerald Lewis, Yakama Nation Tribal Council Chairman (Jun. 17, 2025).

²⁹ The Klamath Tribes Tribal Council Resolution 2025-031 (Jun. 11, 2025) (Attached as Exhibit A).

governments should be able to rely on regulatory enforcement of the NHPA statute, policy, and procedures so they are not pressured into a Community Benefit Agreement due to absentee federal trustees.

ii. The Yakama Nation's Should Be An Invited Signatory

The PA fails to state that the proposed Project is located exclusively within the enumerated Treaty boundaries of the Yakama Nation pursuant to the 1855 Treaty between the United States and the Yakamas ("Treaty").³⁰ The Yakama Nation constituent Band known as the *Kamiltjah* practices traditional longhouse activities as a fixed community within 15 miles of the proposed Project area. The *Kamiltjah* are one of the 14 named members of the Yakama confederacy under the Treaty. The *Kamiltjah* People's cultural continuity to the affected historic properties is uniquely intact due to their unbroken residency on off-Reservation federal trust allotments in this vicinity of the Treaty-territory. Even after conducting a Final Environmental Impact Statement, these elemental assignments for the adversely effected historic properties are lacking by Commission staff.

The Yakama Nation is the most adversely affected party if this proposed Project is licensed. But the Yakama Nation's interests are continuing to be ignored through the failed NHPA section 106 process and procedures that resulted in the Draft HPMP and the PA's exclusion of Yakama Nation as an invited signatory. This Project Application puts sacred religious sites at stake with a Project Applicant who demonstrates calculated mitigation avoidance. The Yakama Nation should be empowered as a PA signatory to ensure the fulfillment of the PA. The Yakama People are the ancestral stewards of the adversely effected resources since before written or human memory – this expertise and indigenous knowledge should be sought after for the protection of historic properties. Further excluding the Yakama Nation from protecting its own cultural resource interests creates a permissive regulatory scheme where disenfranchisement of federally-recognized Indian tribes is not only licensed, but also incentivized.

III. Conclusion

The Yakama Nation continues its work with all appropriate federal and state PA avenues for the purpose of reasonably addressing the destruction to its natural and cultural resources. It implores the Commission and the Council not to short-cut the procedural and substantive regulations that create accountability for the preservation of historic properties.

Respectfully,



GERALD LEWIS, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

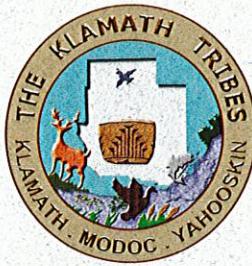
³⁰ Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. I, cl. 2.

EXHIBIT A – LETTER FROM WILLIAM E. RAY, JR., KLAMATH TRIBAL COUNCIL
AND TRIBAL COUNCIL RESOLTUION TC2025-031, THE KLAMATH TRIBES

Coversheet only. [Separate pagination].

JUNE 30, 2025

PAGE 8 OF 9 - YAKAMA NATION'S COMMENT ON REVISED DRAFT PROGRAMMATIC AGREEMENT, DATED MAY 29, 2025 (FERC P-14861-002 | ACHP No. 017907).



The Klamath Tribes Tribal Council

June 17, 2025

The Honorable Chairman Gerald Lewis
Yakama Nation
401 Fort Road
Toppenish, WA. 98948

RE: The Klamath Tribes Tribal Council Resolution TC-2025-031

The Honorable Chairman Lewis,

Waqlis?i Summacs (Hello, How are you! Relatives)

The Klamath Tribes was asked by Yakama Nation Representatives to provide actions we have taken against the Rye Development and the overall relationship.

The Klamath Tribes General Council opposed Rye Development's Swan Lake Pumping Station. On September 23, 2023, the General Council voted overwhelming NOT TO ACCEPT Rye's settlement offer for the Swan Lake project, which adversely affects and destroys spiritual, religious and traditional cultural areas of The Klamath Tribes.

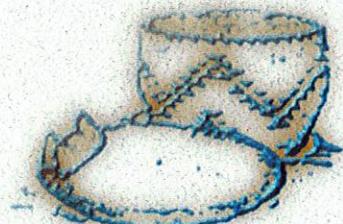
The General Council rejected Rye Development's complete disregard and lack of recognition of the Tribes Sovereignty, the Treaty of 1864 and all Treaty Protected Resources and the extremely significant cultural, religious, spiritual and traditional use areas in and around the Swan Lake Pumping Station.

We would propose a meeting between the Yakama and Klamath Tribal Councils to review how our Nations can work together to oppose Rye Development. The Klamath Tribes stands united with the Yakama Nation to oppose Rye Development.

Respectfully,

William E. Ray, Jr.
Tribal Chairman

501 Chiloquin Blvd. – P.O. Box 436 – Chiloquin, Oregon 97624
(541) 783-2219





The Klamath Tribes
Tribal Council
Resolution TC2025-031

A RESOLUTION AFFIRMING THE KLAMATH TRIBES' OPPOSITION TO THE GOLDENDALE AND SWAN LAKE PUMPED STORAGE PROJECTS, AND CLARIFYING THAT RYE DEVELOPMENT DOES NOT HAVE OR RECOGNIZE THE SOVEREIGNTY OF THE KLAMATH TRIBES

WHEREAS, The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and

WHEREAS, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI & VII section IVE) as approved by the General Council and most recently amended on September 26, 2013; and

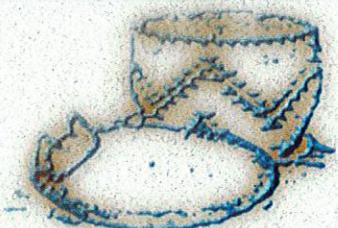
WHEREAS, The Klamath Indian Tribes Restoration Act of August 27, 1986 (P.L. 99-398) restored the Federal government-to-government recognition to the Sovereign Government of the Klamath Tribes; and

WHEREAS, The Klamath Tribes' Tribal Council is the elected governmental body of the Klamath Tribes and has been delegated the authority to direct the day to-day business and governmental affairs of the Klamath Tribes under the general guidance of the General Council (Constitution, Article VII, Section I; Tribal Council By-laws, Article I); and

WHEREAS, the Klamath Tribes is a sovereign, federally recognized Tribal government, with an inherent duty to protect our treaty-reserved resources, sacred sites, cultural lifeways, and homelands; and

WHEREAS, the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) have led efforts opposing the Goldendale Pumped Storage Project, a proposal by Rye Development and Copenhagen Infrastructure Partners which threatens sacred cultural sites including Pushpum (Juniper Point); and

WHEREAS, the Klamath Tribes likewise oppose the Swan Lake North Pumped Storage Project also proposed by Rye Development which has faced multiple General Council votes rejecting the project, including an overwhelming vote on September 30, 2023, to reject a \$40 million mitigation offer from Copenhagen Infrastructure Partners; and



WHEREAS, representatives of Rye Development, including Eric Stemle, have falsely represented to external parties and agencies that they have an active working relationship with the Klamath Tribes, when in fact, any past interactions were limited to a small number of individual council members and do not reflect the will of the General Council or the official policy of the Klamath Tribes; and

WHEREAS, The Klamath Tribes have previously passed policy resolutions dating back to September 14th, 1992 and reaffirmed during the Jordan Cove LNG opposition declaring our formal opposition to all industrial or energy projects that involve ground disturbance in sensitive cultural or treaty-reserved areas, including any project that fails to meet the standard of free, prior, and informed consent of the General Council; and

WHEREAS, any implied or stated endorsement of Rye Development, Swan Lake, or similar pumped hydro projects is hereby rejected and rescinded as inconsistent with the democratic decisions of the General Council and the cultural values of the Klamath people;

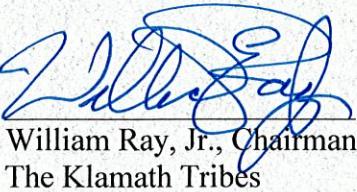
NOW THEREFORE BE IT RESOLVED, the Klamath Tribal Council reaffirms its opposition to the Goldendale Pumped Storage Project and formally declares that the Klamath Tribes are not in partnership with Rye Development or any of its representatives regarding the Swan Lake project;

BE IT FURTHER RESOLVED, that the Klamath Tribal Council stands in full solidarity with the Yakama Nation and other affected Tribes in calling for the Federal Energy Regulatory Commission (FERC) to deny the Goldendale and Swan Lake licenses due to the irreversible harm these projects would cause to tribal lifeways, sacred sites, and sovereign rights;

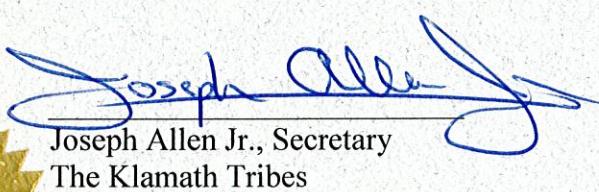
BE IT FINALLY RESOLVED, that the Klamath Tribal Council directs the Tribal Chairman to transmit this resolution to FERC, relevant federal agencies, congressional delegates, and Tribal partners, and to publicly clarify that Rye Development does not have or recognize the sovereignty of The Klamath Tribes.

CERTIFICATION

We, the undersigned, Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a "Regular" Tribal Council meeting held on the 11th day of June, 2025, where a quorum was present, the Tribal Council duly adopted this Resolution by a vote of 8 for 0 opposed, and 1 abstaining.



William Ray, Jr., Chairman
The Klamath Tribes



Joseph Allen Jr., Secretary
The Klamath Tribes



EXHIBIT B – LETTER FROM GERALD LEWIS, YAKAMA TRIBAL COUNCIL, DATED
JUNE 6, 2023 REGARDING THE LACK OF SECTION 106 CONSULTATION AND
INADEQUATE HPMP

Coversheet only. [Separate pagination].

JUNE 30, 2025

PAGE 9 OF 9 - YAKAMA NATION'S COMMENT ON REVISED DRAFT PROGRAMMATIC AGREEMENT, DATED MAY 29, 2025 (FERC P-14861-002 | ACHP No. 017907).



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 6, 2023

FILED ELECTRONICALLY

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

RE: YAKAMA NATION COMMENT ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR
THE GOLDDENDALE ENERGY STORAGE PROJECT (P-14861-002).

Dear Secretary Bose,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), which is an inherently sovereign Native Nation that is federally recognized pursuant to the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 (“Treaty”). We offer the following comments in response to the Federal Energy Regulatory Commission’s (“FERC”) Draft Environmental Impact Statement (“DEIS”), dated March 31, 2023, regarding Project No. 14861-002 (“Project”). These comments are intended to communicate and clarify the Yakama Nation’s previously asserted opposition to the FERC’s material errors in both the procedural and substantive development of the DEIS for the Project. The FERC has substantially failed thus far to uphold its statutory and federal trust obligations to the Yakama Nation and to honor duties codified by the Treaty as described below; I invite you to consult with the Yakama Nation Tribal Council on a government-to-government basis for the purpose of discussing FERC’s procedures for meeting legal compliance under the laws that govern sovereign federal-tribal relationship(s).

I. FERC’s Procedures Are Inconsistent With Applicable Law.

At virtually every Project Application step since the FERC’s Order Issuing a Preliminary Permit, the FERC has omitted federally mandated DEIS elements necessary to fulfill non-delegable obligations under Section 106 of the National Historic Preservation Act (“NHPA”). Under the NHPA, the “the head of any . . . independent agency having authority to license any undertaking . . . shall take into account the effect of the undertaking on any historic property.”¹ Further, in expressly stating that a federal agency “shall consult with any Indian tribe . . . that attaches religious and cultural significance to property” determined to be eligible for inclusion on the National Register,² Section 106 affirmatively

¹ See National Historic Preservation Act, 54 U.S.C. §§ 300101 et seq., 54 U.S.C. § 306108 (emphasis added).

² See 54 U.S.C. § 302706(a) and (b) (emphasis added).

sets forth the minimum degree to which the FERC must take into account the effect(s) of such undertaking on any historic property. The NHPA defines the “historic property” entitled to FERC’s mandatory consideration in consultation with affected tribal governments to include “any prehistoric or historic district, site, building, structure, or object included on, or *eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.*”³

The law is unambiguous and the FERC’s statutory obligations are clear. “[I]nsofar as Tribal heritage is concerned, the Section 106 process requires federal agencies to ‘consult with any Indian tribe . . . that attached religious and cultural significance to’ a historic property potentially affected by a federal undertaking.”⁴ And of perhaps greater significance, the NHPA’s Section 106 consultation mandate is a “non-delegable duty”, meaning that “federal agencies [such as the FERC] cannot unilaterally delegate their tribal consultation responsibilities to an applicant.”⁵ For such delegation to be deemed acceptable, it must be “expressly authorized by the Indian tribe to do so.”⁶

To date, the FERC has not completed its non-delegable duty owed specifically to the Yakama Nation. If allowed to proceed, an unavoidable consequence of this Project will be the destruction of five historic properties, inextricably connected to the Yakama Nation’s Traditional Cultural Properties (“TCP’s”). When the FERC has knowledge of the physical presence of five individual archaeological resources within the Project Area, including some eligible for listing on the National Register under criteria A, B, C, and D, and which are also contributing elements to the larger Columbia Hills Archaeological District, additional Yakama TCP’s, and two Multiple Property Districts,⁷ then the FERC has a duty to consult with the Yakama Nation Tribal Council for the purpose of considering the effect of authorizing a project license on the religious and cultural significance *observed by the Yakama Nation* in relation to these sites. Despite the Yakama Nation’s efforts to inform the FERC on its historical and traditional relationship with the presence and significance of its religious and cultural resources, the FERC has repeatedly declined the Yakama Nation’s communication to initiate a government-to-government consultation.

The FERC has failed to observe the minimum procedural protections mandated by Section 106 of the NHPA, “characterized aptly as a requirement that agency decisionmakers ‘stop, look, and listen’”.⁸ This defect of the FERC’s procedures has prejudiced the DEIS conclusions and recommendations against the Yakama Nation’s TCP’s and has created a clear FERC bias in favor of the proposed Project.

³ See 54 U.S.C. § 300308 (emphasis added).

⁴ See *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 733 (D.C. Cir. 2019) (applying NHPA to an Federal Communication Commission undertaking).

⁵ *Id.* at 748 (interpreting 54 U.S.C. § 302706(b)).

⁶ *Id.* (applying regulation and guidance promulgated under the Advisory Council on Historic Preservation).

⁷ See FED. ENERGY REG. COMM’N, ENVIRONMENTAL IMPACT STATEMENT FOR HYDROPOWER LICENSE, GOLDDENDALE ENERGY STORAGE PROJECT – FERC PROJECT No. 14861-002 (Mar. 31, 2023) *regarding* Draft Environmental Impact Statement at 80 – 81, 85.

⁸ See *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 166 (1st Cir. 2003) (citing *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 117 F.3d 800, 805 (9th Cir. 1999)).

i. Advisory Council on Historic Preservation Guidance for Consultation

The FERC's refusal to comply with applicable law and regulations under the National Environmental Policy Act ("NEPA") and the NHPA in the process of developing this DEIS and its subcomponent, the Project applicant's Historic Properties Management Plan ("HPMP"), has not generated an understanding of this undertaking's effects on the cultural resources. Appropriately then, conclusions and recommendations produced by the FERC's staff have been underinformed. This could be remedied; however, the FERC has instead chosen to evade consultation with the Yakama Nation government and proceed far into a substantive and procedural environmental review process without considering the significance of the affected historic properties in relation to those effected most by this undertaking – the Yakama Nation.

The NHPA established an independent agency, the Advisory Council on Historic Preservation ("AHP").⁹ It is responsible for promulgating regulations to govern the implementation of the Section 106 consultation required by the NHPA.¹⁰ This grant of statutory authority affords greater deference to the ACHP's interpretation of NHPA than the FERC's interpretation of the same, and requires federal agencies to consult with the ACHP and the State Historic Preservation Officers ("SHPO").¹¹ The ACHP guidance for section 106 "comprises four steps: initiation, identification, assessment or evaluation, and resolution" where government-to-government consultation is a background requirement of review at every stage.¹² Under federal law, the agency official is required to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking, and this requirement applies regardless of the location of the historic property in relationship to a tribal reservation.¹³ Additionally, the agency official "shall make a reasonable and good faith effort to carry out appropriate identification efforts," which requires taking into account, among other things, the nature and extent of potential effects on historic properties, applicable tribal laws, and confidentiality concerns raised by Indian tribes.¹⁴ Furthermore, a federal agency is required, "prior to the issuance of any license, to take into account the effect of the undertaking on any historic property . . . [and] must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the license, giving tribes a 'reasonable opportunity' to identify concerns and help resolve any adverse effects."¹⁵ Thus, "[i]n light of

⁹ See 54 U.S.C. § 304101.

¹⁰ See 54 U.S.C. § 304108.

¹¹ See *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1287 – 88 (D.C. Cir. 1992). See also 54 U.S.C. § 302303 and 36 C.F.R. § 800.3.

¹² See *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 745 (D.C. Cir. 2019) (interpreting the ACHP guidance for NHPA).

¹³ See 36 C.F.R. § 800.2(c)(2)(ii).

¹⁴ See 36 C.F.R. § 800.4(b)(1).

¹⁵ See *Oglala Sioux Tribe v. U.S. NRC*, 45 F.4th 291, 296 – 97 (D.C. Cir. 2022) (applying 36 C.F.R. §§ 800.2, 800.8) (emphasis added to for meaningful procedural and substantive element).

the substantial overlap between the NHPA and the NEPA inquiries, an EIS should include consideration of the likely effects on historic properties.”¹⁶

Specific to the underlying Project application, the ACHP issued clarifying guidance regarding to the consultation necessary to meet the Section 106 mandates. Here, the ACHP’s position was unequivocal – “the consultation to resolve adverse effects, the fourth step in the Section 106 review, cannot be delegated under 36 CFR § 800.2(c)(4).”¹⁷ And yet, despite the ACHP’s guidance and the Yakama Nation’s repeated written comments to the FERC dating back to 2018, the FERC *has not* acted in good faith with the Yakama Nation to initiate, identify, or carry out assessment the Yakama Nation’s legendary TCP’s of religious and cultural significance that will be adversely affected by this Project. Not only has the FERC declined opportunities to consult with the Yakama Nation on a government-to-government basis during these Section 106 steps,¹⁸ it has shown absolute disregard for its consultation obligations or maintaining even the appearance of impartiality, incredibly delegating the Project applicant to act and serve as the FERC’s ‘consultation lead’.¹⁹ In doing so, the FERC has necessarily failed to provide equal consideration for the adverse affects specifically prescribed by Section 106’s procedural protections and the ACHP’s guidance. Additionally, the FERC’s failure to act in good faith or uphold its trust responsibility to the Yakama Nation diminishes the Yakama Nation’s ability to *help resolve adverse affects* – the fourth element of Section 106 consultation because the FERC staff have developed DEIS recommendations with a HPMP based on “conceptual measures” with “insufficient information to evaluate the efficacy of the measures, their benefits, estimated costs or their acceptance to the affected tribes.”²⁰

ii. State Department of Archaeology and Historic Preservation Guidance For HPMP

The Washington State Department of Archaeology and Historic Preservation (“DAHP”) is authorized as the Washington SHPO and has also repeatedly noted FERC’s procedural deficiencies and resultant substantive harm. As noted above, the NHPA also requires federal agencies to consult with the SHPO in parallel to the government-to-government consultation with effected tribal governments to understand the religious and cultural significance to a historic property potentially affected by a federal undertaking. As identified by the SHPO to the Project applicant, “[t]he Section 106 process details a sequential step wise process in 36 CFR 800 that requires meaningful consultations between the parties and the federal agency.”²¹ The sequential process required under the regulation

¹⁶ *Id.*

¹⁷ See Exhibit A – ADVISORY COUNCIL ON HIST. PRESERVATION OPINION LETTER TO FED. ENERGY REG. COMM’N, DIV. OF HYDROPOWER LICENSING (May 16, 2023) at 2.

¹⁸ See Exhibit B – Letter from the Fed. Energy Regulatory Comm’n, Div. of Hydropower Licensing to the Yakama Nation Tribal Council Chairman (Dec. 9, 2021) (denying a government-to-government consultation with Tribal Council).

¹⁹ See Exhibit C – Letter from the Yakama Nation Cultural Resource Program Manager to the Fed. Energy Regulatory Comm’n, Div. of Hydropower Licensing (Sep. 13, 2021) (objecting to delegated section 106 consultation authorization).

²⁰ See ENVIRONMENTAL IMPACT STATEMENT at 84, *supra* note 8.

²¹ See Exhibit D – Letter from the State Archaeologist to the Rye Development (Dec. 15, 2021) (expressing concern in regards to the draft HPMP).

is of substantive importance to the FERC's duty to help resolve adverse affects because it is conducted for the purpose of developing "specific stipulations tailored to the particular historic, cultural, and archaeological properties effected by this undertaking."²²

The Washington SHPO subsequently stated that the FERC's inability to comply with applicable regulation "continues an unacceptable and knowing pattern of ignoring federal law and regulations stipulated in 36CFR800"²³ in regards to the HPMP that was developed by the Project applicant and accepted by the FERC on a unilateral basis. By ignoring the prescribed process for developing a draft HPMP, the FERC's DEIS is internally inconsistent and incomplete in acknowledging that "Project construction activities would directly adversely affect historic properties through physical damage within the construction footprint and damage outside the project footprint"²⁴ while assuming that FERC "would require FFP [Project applicant] to address all adverse effects to all historic properties . . . through implementation of a revised HPMP."²⁵ This DEIS accepts from the outset that cultural resources in the Project area will be diminished or eliminated from the environment and forecloses any real consideration of avoiding or minimizing adverse impacts because the FERC analysis is based on a "conceptual" and noncompliant HPMP.

The Washington SHPO has consistently emphasized to the FERC the legal requirement for collaborative consultation effort towards "specific stipulations tailored to the particular historic, cultural, archaeological properties and traditional cultural properties effected by this undertaking."²⁶ The repeated correspondence to the FERC underscores that this DEIS must consider the likely effects on historic properties through section 106 consultation for the purpose of resolving adverse effects, expressly prioritizing avoiding and minimizing the adverse affects to historic properties, consistent with the significance of the historic property that may be affected. To date, this has not happened and the FERC must consult with the Yakama Nation Tribal Council to determine the significance of the historic property, Yakama TCPs, and cultural resources that will be adversely impacted by the Project.

Washington State completed an environmental analysis and determined the Project "impacts are identified in the EIS as significant and unavoidable adverse environmental impacts to Traditional Cultural Properties, archaeological sites, culturally important plants, and other Tribal resources . . . to date, there is no information available about mitigation proposed by or supported by the Tribes that would reduce the level of impact to

²² *Id.*

²³ See Exhibit E – Letter from the State Archaeologist to the FERC (Jan. 5, 2022) (expressing concern in regards to the draft HPMP).

²⁴ See ENVIRONMENTAL IMPACT STATEMENT at 82, *supra* note 8.

²⁵ *Id.* at 84.

²⁶ See Exhibit F – Letter from the State Archaeologist to the FERC at 1 (Apr. 25, 2023) (expressing extreme concern in regards to the lack of adherence under the existing NHPA framework).

less than significant.”²⁷ Both the Yakama Nation and the Washington State environmental analysis determine that historic properties, Yakama TCPs, and cultural resources that will be damaged at this site are of legendary significance, and yet the FERC fails in this DEIS to engage in any procedural consideration of meaningful avoidance or minimization to resolve profound adverse effects caused by this Project.

iii. Necessary Parties Reject the FERC Programmatic Agreement

This DEIS relies on FERC’s intention “to execute a [Programmatic Agreement] . . . for the protection of historic properties that would be affected by project construction and operation”²⁸ The FERC published a draft Programmatic Agreement (“PA”) on March 31, 2023 concurrent with the DEIS as a tool to support the insufficient DEIS, specifically for the purposes of “protection of historic properties,” requiring the Project applicant to “address all adverse effects to all historic properties,” curing the HPMP with “specific treatment measures for affected properties,” and developing “in consultation with the Washington SHPO, [ACHP], the [U.S. Army] Corps, and participating Tribes.”²⁹ However, the PA and “current documents for this [P]roject are incomplete” and the SHPO has identified a pattern of incomplete submissions for the associated documents.³⁰ The Yakama Nation requests that the FERC explain how a pattern of incomplete and non-compliant submissions relating to sacred religious and ceremonial cultural sites meets the FERC’s ‘good faith’ standard of care³¹ or an express federal Trust responsibility³² to the Yakama Nation.

This DEIS is incomplete because the FERC proceeded with the environmental analysis without preparing the HPMP or the PA; the Washington SHPO identifies the “next step should be a collaborative consultation effort to craft a Programmatic Agreement” which has significant “consequences and implications for the decision making and the contents of an [HPMP] that should be a product of those consultations.”³³ The SHPO advises that the PA and the HPMP “should be developed from an outline that the consulting parties craft and agree upon as part of the ongoing Section 106 process” which has not happened yet.³⁴ Another draft PA signatory party, the ACHP, also ‘acknowledges and in general supports the . . . comments of the Washington SHPO and the April 28, 2023, comments of the Yakama Nation.’³⁵ Both the SHPO and the ACHP recommend several PA revisions to the FERC, including the ACHP recommendation that the FERC prescribe

²⁷ *Id.* Exhibit F at 3 (referring to Exhibit G – WASH. DEPT. OF ECOLOGY FINAL ENVIRONMENTAL IMPACT STATEMENT, APPENDIX H TRIBAL RESOURCE ANALYSIS REPORT, PROPOSED GOLDDENDALE ENERGY STORAGE PROJECT at 20 (Dec. 21, 2022)).

²⁸ See ENVIRONMENTAL IMPACT STATEMENT at 82 – 87, *supra* note 8.

²⁹ *Id.*

³⁰ Exhibit F – Letter from the State Archaeologist at 1, *supra* note 28.

³¹ *Supra* note 15.

³² See 18 C.F.R. § 2.1c

³³ See Exhibit F – Letter from the State Archaeologist at 1 – 2, *supra* note 28.

³⁴ *Id.*

³⁵ See Exhibit A – ADVISORY COUNCIL ON HIST. PRESERVATION OPINION LETTER at 5, *supra* note 17 (emphasis added).

exemptions to its *ex parte* rule that would “provide the Tribes with opportunities to share information that will be kept confidential, and, as the federal agency [FERC may], belatedly consider any ways the [P]roject could be altered to avoid and minimize adverse effects.”³⁶ As noted above, this mandatory consideration is *belated* and the FERC has injured the Yakama Nation’s ability to help resolve adverse effects; but, the Yakama Nation will participate in all Section 106 review activity to avoid and minimize adverse effects, provided that such activity is consistent with Yakama Nation law which requires protecting the confidentiality of TCP’s and prescribes a specific consultation process between the FERC and the Yakama Nation Tribal Council as a unique federal-tribal relationship between governments that is distinct from general public stakeholders.

The Yakama Nation supports the procedural and substantive revisions to the PA, and subsequently informing a HPMP, that are called for by the ACHP and the SHPO. Additionally, the U.S. Army Corps of Engineers’ (“Corps”) repudiation of the FERC’s PA and recommendation to complete a separate Section 106 consultation between the Corps and the Yakama Nation is a necessary and proper mechanism to redress, in-part, the FERC’s pattern of incomplete cultural resources analysis, HPMP, and associated documents.³⁷

II. Yakama Protection Of Resources At *Pushpum*.

The Treaty reserved a 1.3 million acre Reservation “for the exclusive use and benefit” of the Yakama people.³⁸ The Treaty further designated reserved rights for Yakamas to exercise “in common with” citizens of the United States off-Reservation at all usual and accustomed places within the Treaty Territory.³⁹ A federal treaty is considered the supreme Law of the Land under the U.S. Constitution.⁴⁰ Pursuant to its status as a sovereign Native Nation and its Treaty-reserved authority, the Yakama Nation acts as a Co-Manager of the Columbia River fishery, as recognized by federal courts,⁴¹ for the protection of environmental resources in the Yakama Nation’s Treaty Territory. The Yakama Nation’s inherent right has existed since time immemorial and is still a Treaty-reserved right for Yakama members to exercise the root gathering, fishing, practice of ceremony, and passing on cultural tradition at *Pushpum* (Juniper Point), where the Project proposes to permanently destroy legendary Yakama cultural resources. The Yakama Nation opposes the Project “development at *Pushpum* to avoid irreparable damage and

³⁶ *Id.*

³⁷ See Exhibit H – Letter from U.S. Army Corps of Engineers, Environmental Resources Branch to the FERC (Apr. 24, 2023) (declining to sign the draft PA).

³⁸ See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3.

³⁹ See *Id.* at art. III, cl. 2.

⁴⁰ See U.S. Const. art. VI, cl. 2.

⁴¹ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

destruction to the Yakama Nation's cultural resources and Treaty-reserved root gathering rights.”⁴²

i. *Juvenile Fish Survey Required To Determine New Consumptive Use Impacts*

Each federal agency shall insure that any action authorized by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat, unless granted an exemption, and in accordance with the best scientific and commercial data available.⁴³ If the agency discovers that its action may affect an Endangered Species Act (“ESA”)-listed species or its critical habitat, the agency must initiate formal consultation with the National Marine Fisheries Service (“NMFS”).⁴⁴ In formal consultation, the NMFS will prepare a biological opinion evaluating the effects of the proposed action, and determine whether the action will jeopardize a listed species.⁴⁵

The DEIS aquatic resources, section 3.3.2, is incomplete and needs a juvenile fish survey to assess the impacts of new consumptive water use for construction purposes, reservoir initial fill, and reservoir recharge on the available Columbia River in-stream water resources. Of special concern is the 7,640 acre-feet of water for the reservoir initial fill being physically consumed from the Columbia River during periods of annual low water level where multiple ESA-listed species are already subject to unacceptably high mortality due to cumulative affects of higher water temperature, lower stream connectivity and available habitat, greater predation, and man-made migration obstacles.

The DEIS is not based on the best scientific data available and must defer to subject matter experts at NMFS as minimum conditions for protecting the Columbia River fishery and its many ESA-listed species. Additionally, regardless of when the Project applicant ‘intends’ to withdraw water for new consumptive purposes or whether the FERC considers the unscreened water intake facility to be included in the Project facility⁴⁶ the NMFS is required to evaluate this undertaking for the number of ESA-listed takings that the Project action is responsible for as the conditions exist on the ground. The Yakama Nation will not accept unenforceable promises of future intake screening or limited withdrawals during juvenile salmonid migration season as a fictional environmental evaluation for the purposes of expediting this DEIS with incomplete or inaccurate information. The NMFS recommendations should be viewed as minimum requirements for protection of ESA-listed species and an enforceable basis for further determination whether there is increased mortality within the fishery during the construction or operational Project phases.

⁴² See Exhibit I – Yakama Tribal Council Resolution T-089-21 (May 24, 2021) (subsequently supported by Affiliated Tribes of Northwest Indians Resolution #2023-15 (Jan. 26, 2023) and National Congress of American Indians Resolution #ECWS-23-002 (Feb. 20, 2023).

⁴³ See 16 U.S.C. § 1536.

⁴⁴ See 50 C.F.R. § 402.14(a).

⁴⁵ See 16 U.S.C. § 1536(b)(3)(A) and 50 C.F.R. § 402.14(h)(3).

⁴⁶ See ENVIRONMENTAL IMPACT STATEMENT at 34 – 37, *supra* note 8.

ii. *State Threatened Ferruginous Hawk No Longer Monitored*

While the Project is unlikely to attract ferruginous hawks the same way it may attract eagles, the Project site is in the Pacific Flyway so migrating hawk could be in the vicinity of the Project and could be directly impacted from strikes from the nearby wind turbines during migration or indirectly impacted due to the loss of habitat. Of concern is that preferred nesting habitat for the ferruginous hawk, including small rock outcrops on the slope of steep hillsides or canyons or in isolated trees is available in the Project area. The species was observed in and near the study area in low numbers during baseline bird surveys that occurred from 1995 to 2002. Additionally, WDFW has not documented nesting sites within the study area.⁴⁷ However in the DEIS, section 3.3.2.2 (Indirect Impact/Special Status Species) of the Terrestrial Species and Habitats Resource Analysis Report, it states, “Other special status raptors such as state sensitive bald eagle and state threatened endangered ferruginous hawk *are no longer monitored, so it is unknown if they breed in the study area.*” (emphasis added). The Yakama Nation is concerned in regards to the ferruginous hawk based on a lack of recent work regarding raptor nesting surveys in the vicinity. If ferruginous hawks are nesting in the area however, they could experience indirect displacement from their habitat by the Project construction or direct impacts through collision from the adjacent turbines.

Further in DEIS, section 3.3.2.2 (Indirect Impacts), the Project applicant, as part of proposed mitigation measures, would identify areas that are currently used for roosting, nesting, or foraging by special status raptor species such as golden eagles, ferruginous hawks, and prairie falcons. The applicant has also proposed to acquire raptor foraging habitat in Klickitat County at a ratio of 1:1 for habitat area lost near the lower reservoir and at a ratio of 2:1 for habitat area lost near the upper reservoir.⁴⁸ The proposed mitigation should also be expanded to better address the larger impact on bats and avian species from the Project through its potential to attract species to the area because of the newly created habitat. Bats will be attracted to the water both as a source to drink as well as to feed on insects that will be attracted to the water. This will greatly increase the potential for bats to be killed from collisions with the adjacent wind turbines. Likewise waterfowl, known prey of bald eagles, could be attracted to the site, increasing their probability of being struck by the neighboring wind turbines.

The Project applicant has proposed mitigation to deter bats and waterfowl from the area. These include installing floating plastic shade balls and wildlife exclusion fencing in and around the reservoirs as well as employing “artificial light pollution control measures” to reduce the attraction of insects. The Project applicant will also conduct post-construction bat surveys to determine if acoustic deterrents could be implemented. These measures should be viewed as minimum mitigation requirements. If it is determined that there is increased mortality of birds and bats from turbine collisions during the operation phase of the project, then additional measures should be required to bring levels of turbine-caused mortality to pre-construction levels.

⁴⁷ See WDFW (2021). Priority Habitat and Species (PHS). Available at: <http://wdfw.wa.gov/mapping/phs/>.

⁴⁸ See Exhibit J – Letter from Rye Development to the FERC regarding: Goldendale Energy Storage Project, FERC Project No. 14861 – RESPONSE TO THE COMMISSIONS REQUEST FOR ADDITIONAL INFORMATION (Jul. 1, 2021).

III. Conclusion.

The Yakama Nation has been procedurally, and by extension substantively, injured by the extent to which the FERC has circumvented its statutory and federal trust obligations to the Yakama Nation for early and meaningful consultation in accordance with Section 106. I unambiguously invite you and/or the FERC Commissioners to consult with the Yakama Nation Tribal Council on a government-to-government basis, provided that the FERC does not require practices that are inconsistent with Yakama Nation's laws to protect the confidentiality of its TCP's or the Yakama Nation's prescription for federal-tribal consultation between federal officials and the elected members of the Yakama Nation Tribal Council. It is harmful and alarming that your FERC staff treat sovereign tribal governments like general public stakeholders or interest groups. The Yakama Nation is a sovereign governmental entity with inherent rights, Treaty-reserved rights, and federal statutory and trust mandates based on the unique federal-tribal relationship between our governments. The Yakama Nation's Treaty-reserved cultural and natural resources will be irrevocably damaged or destroyed due to the Project construction and location, and the FERC is obligated to extend this Project license application process until equal consideration is provided for all the adverse environmental effects that the Yakama Nation is able to identify in its Treaty Territory.

The Yakama Nation reserves the right to amend this response based on the results of additional information and conclusions developed during the FERC's on-going drafting of an environmental impact statement or any subsequent appeals to the Washington State Department of Ecology's Water Quality Certification Order No. 21703 (FERC No. 14861 & Corps No. 202100572) dated May 22, 2023. Additionally, the Yakama Nation preserves, incorporates, and reasserts its previous written concerns regarding this Project.⁴⁹ The Yakama Nation has reviewed and fully supports comments submitted by the Columbia Riverkeeper regarding the DEIS. The Yakama Nation encourages the FERC to give these comments significant weight as they add to a fuller understanding of the issues with the Project. For further comments or questions please contact the Tribal Administrative Director, Crystal Bass, at crystal_bass@yakama.com or at (509) 865-5121, ext. 4655.

Respectfully,



GERALD LEWIS, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Phil Rigdon, Superintendent, Yakama Nation Department of Natural Resources
Rob Whitlam, State Archaeologist, Washington Department of Archaeology & Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office

⁴⁹ See Exhibit H – Letters from the Yakama Nation regarding Project comments and concerns.

Document Content(s)

Letter (Signed)_YN_FERC_Rev. Draft PA (6.30.25).pdf1

Document Content(s)

Letter (Final) _YN_FERC_Final Draft PA (8.1.25).pdf.....1