UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FFP Project 101, LLC	)	
	)	P-14861-002
Goldendale Energy Storage Project	)	

COLUMBIA RIVERKEEPER'S REQUEST FOR REHEARING OF ORDER ISSUING ORIGINAL LICENSE AND REQUEST FOR STAY

1. Pursuant to Section 313(a) of the Federal Power Act (**FPA**), 16 U.S.C. § 825*l*(a), Rule 713 of the Federal Energy Regulatory Commission's (**Commission** or **FERC**) Rules of Practice and Procedure, 18 C.F.R. § 385.713, and the Administrative Procedure Act (**APA**), 5 U.S.C. § 706, Columbia Riverkeeper (**Riverkeeper**) requests rehearing of the Commission's January 22, 2026 Order Issuing Original License (**License Order**) for the Goldendale Energy Pumped Storage Hydroelectric Project (**Project**) to FFP Project 101, LLC (**FFP**), and requests that the Commission stay the effectiveness of the license pending rehearing and any subsequent judicial review.[1]

2. Rehearing and a stay are required to prevent irreparable harm because the Commission authorized a federal undertaking in a manner that irreversibly commits the agency to a specific project footprint, design, and operational scheme before completing its mandatory obligations under the National Historic Preservation Act (**NHPA**), 54 U.S.C. § 306108. The Commission further based its licensing decision on environmental review and public-interest determinations that omit critical information and rely on post-approval mitigation, in violation of

[1] This request is timely filed. The thirty-day deadline for rehearing of the January 22, 2026 order fell on a Saturday (February 21); pursuant to 18 C.F.R. § 385.2007(a)(2), the deadline is therefore the next business day, Monday, February 23. *See Commonwealth Power Co.*, 65 FERC ¶ 61,242, 62,187 (1993); *Advanced Energy United, Inc. v. FERC,* 82 F.4th 1095, 1110 (D.C. Cir. 2023).

the National Environmental Policy Act (**NEPA**), 42 U.S.C. § 4321 et seq., and FPA sections 4(e) and 10(a), 16 U.S.C. §§ 797(e), 803(a). As a result, the License Order lacks substantial evidence and is arbitrary, capricious, and contrary to law.

I. DESCRIPTION OF COLUMBIA RIVERKEEPER

3. Riverkeeper is a nonprofit public interest conservation organization dedicated to restoring and protecting the water quality of the Columbia River and all life connected to it. Riverkeeper represents more than 16,000 members and supporters throughout the Columbia River Basin who live, work, and recreate along the river and depend on its ecological integrity. Riverkeeper and its members use and enjoy the Columbia River for fishing, swimming, boating, wildlife viewing, scientific study, and cultural and aesthetic purposes, all of which would be directly affected by the Project.

4. Riverkeeper represents individuals who are enrolled members of the Confederated Tribes and Bands of the Yakama Nation (**Yakama Nation**). The Riverkeeper members with enrolled status are active Riverkeeper Board members, volunteers, or participants in the mission of restoring and protecting the Columbia River and all life connected to it. These Riverkeeper members with enrolled status contribute traditional ecological knowledge from their multi-generational descendancy living in the Columbia Hills Archaeological District. These enrolled members have a right to exercise fishing, hunting, and gathering practices as reserved and asserted by their tribal government pursuant to the Yakama Nation's Treaty with the United States, 12 Stat. 951 (June 9, 1855) (**Yakama Nation Treaty**).

5. Yakama Nation enrolled members who, in some cases, are also members of Riverkeeper, testified to the Commission that they are active "food gatherer[s] in this area" and exercise Yakama Nation Treaty-reserved gathering practices for spiritually and culturally

significant food and medicine in the proposed Project area. *See, e.g.,* "Transcript of the May 3, 2023 Public Comment Meeting," eLibrary No. 20230601-4004 (Jun. 1, 2023), Evening Session, pp. 38-40 (PDF pp. 193-195). Enrolled members from multiple federally recognized tribal governments also exercise their Treaty-gathering rights and harvest roots in the area. *Id.* at Morning Session, pp. 52, 57 (PDF pp. 52, 57).

6. Riverkeeper's interests in this proceeding center on ensuring that the Commission gives full and equal consideration to non-developmental values of the Columbia River, including water quality, fish and wildlife habitat, recreation, and cultural resources. Riverkeeper seeks to ensure that any new license complies with applicable state and federal environmental legal requirements including, but not limited to, the Commission's trust and statutory responsibilities to Tribes, and is consistent with the public interest.

7. Riverkeeper filed a timely, unopposed Motion to Intervene in this proceeding, eLibrary no. 20210216-5071 (Feb. 16, 2021), and thus is entitled to seek rehearing and other relief, as described herein. *See* 16 U.S.C. § 825*l*(a); 18 C.F.R. §§ 385.214, 385.713.

II. STATEMENT OF FACTS

8. The Project is a proposed 1,200-megawatt, closed-loop pumped storage facility located in Klickitat County, Washington. The Project footprint lies within areas known as Pushpum, Nch'íima, and T'at'ałíyapa, Traditional Cultural Properties (**TCPs**) of profound religious, cultural, and historical significance to the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation (**CTUIR**), the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe, which are eligible for listing in the National Register of Historic Places. *See* License Order ¶¶ 9, 138. These areas are directly used and form part of an interconnected cultural landscape that continues to be actively used for ceremonial,

subsistence, and cultural practices. License Order ¶ 93 (*citing* Final Environmental Impact Statement, eLibrary no. 20240208-3036 (Feb. 8. 2024) (**Final EIS**), p. 131). As one example, for the Yakama Nation, Pushpum's natural seed bank has made it a ceremonial gathering space for root and medicine harvests in connection with the religious observances of the neighboring Rock Creek Longhouse, where enrolled tribal members exercise spiritual and subsistence practices reserved under the Yakama Nation Treaty. The Commission has acknowledged that these areas have been used continuously for thousands of years for resource gathering, ceremonial practices, and other cultural activities that remain central to Tribal identity and religious life. Final EIS, pp. 90-92.

9. In the Final EIS, Commission staff found that construction and operation of the Project would result in permanent and irreversible adverse effects to multiple National Register-eligible archaeological sites, the Columbia Hills Archaeological District, and the identified TCPs. These findings reflect staff's conclusion that the Project would permanently alter or destroy historic properties and associated cultural landscapes, resulting in a loss of integrity that cannot be remedied through later restoration. *Id.* at 131. The Final EIS further recognized that these impacts would cumulatively add to extensive prior disturbances caused by dams, wind energy development, industrial activity, and transmission infrastructure in the region, compounding the incremental loss of Tribal cultural resources and traditional use areas. *Id*.

10. Beginning in 2019 through issuance of the License Order, the Yakama Nation, CTUIR, Riverkeeper, and others repeatedly objected that the NHPA section 106 consultation process regarding the Project's potential impacts to historic and cultural resources was incomplete, and warned that issuing a license before resolving adverse effects would foreclose avoidance alternatives and reduce mitigation to a post-approval exercise. These objections were raised in

formal filings responding to the License Application, environmental scoping, Draft and Final EIS, draft Programmatic Agreements, and the final draft Programmatic Agreement. *See, e.g.* letter from Chairman Gerald Lewis (Yakama Nation) to Sec'y Debbie-Anne A. Reese (FERC), eLibrary no. 20241101-5279 (Nov. 1, 2024), p. 2; letter from Teara Farrow Ferman (CTUIR) to Sec'y Debbie-Anne A. Reese (FERC), eLibrary no. 20240123-5091 (Jan. 22, 2024), pp. 2-3; Riverkeeper and Washington Conservation Action Education Fund, "Comments in Response to the Revised Draft Programmatic Agreement," eLibrary no. 20250630-5186 (June 30, 2025) (**Riverkeeper et al. June 30, 2025 Comments**); letter from Chairman Gerald Lewis (Yakama Nation) to Sec'y Debbie-Anne A. Reese (FERC), eLibrary no. 20250701-5051 (Jun. 30, 2025), pp. 1-7 (**Yakama Nation's June 30, 2025 Comments**); letter from Chairman Gerald Lewis (Yakama Nation) to Sec'y Debbie-Anne A. Reese (FERC), eLibrary no. 20250801-5211 (Aug. 1, 2025), pp. 1-4 (**Yakama Nation's August 1, 2025 Comments**).[2]

11. The Advisory Council on Historic Preservation (**ACHP**) also filed comments critical of the Commission's Section 106 process. The ACHP noted that the Commission had repeatedly dismissed Yakama Nation and other Tribal concerns about the presence and significance

[2] The Yakama Nation has commented extensively. *See, e.g.,* eLibrary no. 20250328-5385 (Mar. 28, 2025) (asserting Yakama Nation concerns under the Revised Draft Programmatic Agreement process); eLibrary no. 20241119-5015 (Nov. 18, 2024) (asserting Yakama Nation concerns under the Revised Draft Programmatic Agreement process); eLibrary no. 20240806-4000 (Jul. 24, 2024) (asserting Yakama Nation concerns for the incomplete Historic Properties Management Plan; eLibrary no. 20240718-5017 (Jul. 17, 2024) (transmitting the Washington State Environmental Justice Council's concern regarding the lack of government-to-government consultation with federally-recognized tribes); eLibrary no. 20231103-5019 (Nov. 2, 2023) (repeating Yakama Nation's concerns regarding the Commission's failure to comply with NHPA); eLibrary no. 20230607-5029 (Jun. 6, 2023) (asserting Yakama Nation concerns for section 106 failure during Draft EIS); eLibrary no. 20230501-5126 (Apr. 28, 2023) (asserting Yakama Nation concerns for section 106 failure during Draft EIS); eLibrary no. 20220523-5196 (May 23, 2022) (providing Yakama Nation recommendations to cure procedural and technical deficiencies under the Draft EIS Ready for Environmental Analysis phase); eLibrary no. 20210916-3021 (Sept. 13, 2021) (asserting FERC's non-delegable government-to-government consultation obligation to the Yakama Nation); eLibrary no. 20201228-5550 (Dec. 28, 2020) (asserting Yakama Nation's concern that FERC was failing to actually consider the scope of TCP's during the environmental scoping phase); eLibrary no. 20200311-5230 (Mar. 11, 2020) (asserting Yakama Nation's concern that FERC should consider avoiding or minimizing adverse effects); and eLibrary no. 20190228-5314 (Feb. 21, 2019) (providing concerns on the Pre-Application Document).

of culturally important properties within the Project area as premature during earlier stages of review, deferring consideration of those concerns until after key siting and design decisions for the preferred alternative had already been made. The ACHP further warned that the Commission's licensing procedures and sequencing here effectively locked in the Project's location and parameters early in the process, eliminating realistic opportunities to consider alternatives to avoid or minimize harm to historic properties of religious and cultural significance to affected Tribes. *See* Yakama Nation, "Comment on the Draft EIS for the Goldendale Energy Storage Project," 20230607-5029 (June 6, 2023), Ex. A (enclosing letter from Reid J. Nelson (ACHP) to Vince Yearick (FERC), eLibrary no. 20230516-5113 (May 16, 2023)).

12. Prior to issuance of the License Order, the Commission executed a Programmatic Agreement under Section 106 of the NHPA notwithstanding the Commission's findings that the nature, location, and severity of adverse effects had already been identified.[3] The Programmatic Agreement (p. 2) expressly acknowledges that the Project will adversely affect identified historic properties, including TCPs, and provides that resolution of those adverse effects will occur through future, post-license processes (*id.* at 5-9). Those processes include development of a Historic Properties Management Plan (**HPMP**), which the License Order allows to be submitted up to one year after license issuance and which will (theoretically) identify specific avoidance, minimization, and mitigation measures only *after* the Commission has approved the Project and fixed its footprint

[3] "Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, the Washington State Historic Preservation Office and the Oregon State Historic Preservation Office for Managing and Mitigating for Historic Properties that May Be Affected by Issuing a License to FFP Project 101, LLC for the Construction and Operation of the Goldendale Energy Storage Project in Klickitat County, Washington and Sherman County, Oregon (FERC No. 14861-002)," eLibrary no. 20250926-4000 (Sept. 26, 2025).

and design.[4] *Id.* at 5-9; *see also* Yakama Nation's August 1, 2025 Comments, pp. 4-5; Riverkeeper et al. June 30, 2025 Comments.

13. The Yakama Nation, ACHP, CTUIR, Riverkeeper, and the Washington State Historic Preservation Officer (**SHPO**) from the Department of Archaeology and Historic Preservation (**DAHP**) objected that the Programmatic Agreement and HPMP framework was conceptual and permissive, noting that it allows FFP to seek concurrence on mitigation measures but ultimately to file and implement a HPMP without adopting Tribal or SHPO recommendations or meeting any substantive mitigation standard. *See, e.g.,* Yakama Nation's Aug. 1, 2025 Comments, pp. 2-3; letter from Jaime Loichinger (ACHP) to Nicholas Jayjack (FERC), eLibrary no. 20250701-4001 (Jun. 30, 2025); letter from Teara Farrow Ferman (CTUIR) to Nicholas Jayjack (FERC), eLibrary no. 20250410-5001 (Apr. 10, 2025); Riverkeeper et al.'s June 30, 2025 Comments; letter from Allyson Brooks (DAHP) to Michael Tust (FERC), eLibrary no. 20250331-5187 (Mar. 27, 2025).

14. Despite these ongoing objections, the Commission issued the License Order on January 22, 2026.

15. Although the License Order issued on January 22, the Clean Water Act section 401 water quality certification issued by the Washington Department of Ecology on May 22, 2023, for the Project remains the subject of an appeal pending in state court. *See Columbia Riverkeeper v. State Pollution Control Hearings Board*, et al., Wash. Ct. App. Div. I, Case No. 88259.

16. This rehearing request follows.

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[4] In January 2025, while consultation regarding mitigation measures was ongoing, Rye Development, "FFP's developer and agent for the project" (License Order ¶ 1, n. 1), withdrew from scheduled mitigation discussions with the Yakama Nation and the Washington SHPO and requested unilateral issuance of the license, asserting that further engagement would not be productive. Yakama Nation's August 1, 2025 Comments, p. 2.

III. STATEMENT OF ISSUES

17. As required by the Commission's Rules, 18 C.F.R. § 385.713(c), Riverkeeper lists the following issues for rehearing:

A. Whether the License Order is Final Agency Action that Irreversibly Committed the Commission to the Project Without NHPA Compliance.

Cases

Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990)

Bus. & Residents All. of E. Harlem v. Jackson, 430 F.3d 584 (2d Cir. 2005)

Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999)

Nat'l Min. Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003)

Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006)

Statutes

54 U.S.C. § 306108

Regulations

36 C.F.R. § 800.2(a)(3)

36 C.F.R. § 800.5(a)

36 C.F.R. § 800.6(a)

Policy

ACHP, *Section 106 Regulations User's Guide*

B. Whether the Commission Unlawfully Relied on a Programmatic Agreement to Defer Resolution of Already Identified Adverse Effects.

Cases

Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)

Statutes

54 U.S.C. § 306108

Regulations

36 C.F.R. § 800.6(b)

36 C.F.R. § 800.9(c)

36 C.F.R. § 800.14(b)(1)(ii)

Policy

ACHP, *Guidance on Agreement Documents* (2011)

ACHP, *Types of Agreement Documents in Section 106: What They Are and When They Should Be Used* (2018)

C. Whether the Commission Failed to Satisfy Its Non-Delegable Duty of Government-To-Government Tribal Consultation.

Cases

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001)

Hualapai Indian Tribe v. Haaland, 755 F. Supp. 3d 1165 (D. Ariz. 2024)

Joint Bd. of Control v. United States, 862 F.2d 195 (9th Cir. 1988)

Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995)

Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)

Skokomish Indian Tribe v. FERC, 121 F.3d 1303 (9th Cir. 1997)

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021)

Statutes

5 U.S.C. § 557(d)(1)

54 U.S.C. § 302706(b)

54 U.S.C. § 307103(a)

Regulations

18 C.F.R. § 2.1c

18 C.F.R. § 385.2201(e)

18 C.F.R. § 385.2201(g)

36 C.F.R. § 800.2(c)(2)(ii)

36 C.F.R. § 800.11(c)

D. Whether the Commission Violated NEPA by Issuing a Final Licensing Decision on an Incomplete Environmental Record.

<u>Cases</u>

Env't Def. v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 69 (D.D.C. 2007)

Grand Canyon Tr. v. F.A.A., 290 F.3d 339 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002)

Kleppe v. Sierra Club, 427 U.S. 390 (1976)

Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174 (4th Cir. 2005)

Pac. Coast Fed'n of Fishermen's Associations v. Blank, 693 F.3d 1084 (9th Cir. 2012)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)

S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009)

Te-Moak Tribe v. U.S. Dep't of the Interior, 609 F.3d 592 (9th Cir. 2010)

<u>Statutes</u>

42 U.S.C. § 4332(C)(ii)

E. Whether the Commission's Public Interest Finding under the FPA Is Arbitrary and Capricious and Not Supported by Substantial Evidence.

<u>Cases</u>

American Rivers v. FERC, 895 F.3d 32 (D.C. Cir. 2018)

Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29 (1983)

Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006)

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021)

Udall v. Fed. Power Comm'n, 387 U.S. 428 (1967)

Administrative Decisions

Mead Corp., Publ'g Paper Div., 72 FERC ¶ 61,027 (1995)

Statutes

16 U.S.C. § 797(e)

16 U.S.C. § 803(a)

54 U.S.C. § 306108

Regulations

36 C.F.R. § 800.4

36 C.F.R. § 800.5

36 C.F.R. § 800.6

F. Whether Vacatur is the Appropriate Remedy.

Cases

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993)

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021)

G. Whether the License Order Prejudices Judicial Review under FPA section 313.

Cases

Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006)

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021)

IV. STANDARD OF REVIEW

18. The Commission's issuance of a hydropower license under the FPA is final agency action subject to judicial review under the APA. *See City of Tacoma v. FERC*, 460 F.3d 53, 66 (D.C. Cir. 2006).

19. Under APA section 706(2), a reviewing court must set aside agency action that is arbitrary, capricious, an abuse of discretion, in excess of statutory authority, without observance of procedure required by law, or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2)(A), (C) - (E); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (***State Farm***).

20. Although judicial review is deferential, the Commission must examine the relevant data and articulate a satisfactory explanation for its decision, including a rational connection between the facts found and the choices made. An agency action is arbitrary and capricious if the agency has failed to consider an important aspect of the problem, relied on factors Congress did not intend it to consider, or offered an explanation that runs counter to the evidence before it. *See State Farm*, 463 U.S. at 43; *Am. Rivers v. FERC*, 895 F.3d 32, 43–44 (D.C. Cir. 2018) (***Am. Rivers*****).**

21. Compliance with mandatory procedural statutes, including the NHPA and NEPA, is reviewed under APA section 706(2)(D). Failure to observe required procedures, particularly those governing timing, consultation, and consideration of alternatives, constitutes reversible error regardless of the agency's view of the project's merits. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1050–51 (D.C. Cir. 2021) (***Standing Rock Sioux*****);** *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

22. Section 313(b) of the FPA further provides that the Commission's factual findings are conclusive only if supported by substantial evidence in the administrative record. *See* 16 U.S.C. § 825*l*(b); *City of Clarksville v. FERC*, 888 F.3d 477, 484 (D.C. Cir. 2018). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and does not include speculation, post hoc rationalization, or reliance on unresolved

future processes. *See Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002); *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *Am. Rivers***,** 895 F.3d at 44-46.

V. THE LICENSE ORDER IS FINAL AGENCY ACTION THAT IRREVERSIBLY COMMITTED THE COMMISSION TO THE PROJECT WITHOUT LAWFUL NHPA COMPLIANCE.

A. License Issuance Is an Irretrievable Commitment of Resources

23. The License Order "issues an original license for the Goldendale Project," authorizing construction and operation of a 1,200-MW pumped storage facility. License Order ¶ 1. The Order represents the culmination of the Commission's decisionmaking process and marks the point at which the agency affirmatively authorizes the Project to proceed, subject only to post-approval conditions and implementation requirements.

24. Issuance of a hydropower license under Part I of the FPA constitutes final agency action that authorizes land disturbance, excavation, and the destruction of historic properties. Courts consistently treat such approvals as irretrievable commitments of resources because they fix the project footprint, approve the basic design and operational parameters, and foreclose consideration of fundamental alternatives. The presence of post-license conditions or later plan approvals does not negate finality or cure the commitment of resources inherent in license issuance.

25. NHPA compliance must occur before an agency commits to an action that forecloses alternatives. 54 U.S.C. § 306108; *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787-88 (9th Cir. 2006) (***Pit River Tribe***); *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003); *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005); *Attakai v. United States*, 746 F. Supp. 1395, 1405–06 (D. Ariz. 1990).

26. Once an agency has approved an undertaking and locked in its essential features, consultation and mitigation conducted afterward cannot fulfill Section 106's decision-forcing function. *Pit River Tribe*, 469 at 787 ("the later NHPA review cannot cure the earlier violation").

B. The License Order Acknowledges Irreversible Adverse Effects to Historic Properties

27. The Commission expressly acknowledges that the Project will cause "unavoidable" and "irreversible" adverse effects to five National Register-eligible archaeological sites, each contributing to the Columbia Hills Archaeological District, and three National Register-eligible TCPs. License Order ¶¶ 40, 138–139; Final EIS, pp. 89-90. These findings are not tentative or speculative; they reflect the Commission's conclusion that permanent harm to historic properties will occur if the Project is built as licensed.

28. The License Order incorporates the Final EIS findings that direct and indirect adverse effects to TCPs such as Pushpum, Nch'íma, and T'at'ałíyapa will be permanent and cumulative. License Order ¶¶ 93-94, 138-39; *see also* Final EIS, p. 131. The Commission further recognizes that these impacts add to extensive prior disturbances from dams, wind energy development, industrial activity, and transmission infrastructure, compounding the loss of culturally significant landscapes.

29. In addition to these acknowledged impacts, the Commission's determinations do not account for the additional significance of two additional Multiple Property Districts that have independent and cumulative cultural resource significance to the Yakama Nation. *See* Final EIS, pp. 90-91. As the Yakama Nation has explained, the Project's adverse effects to the National Register-eligible and TCP-designated Multiple Property Districts result in further loss to the Yakama Nation's cultural resources beyond the immediate APE. *See, e.g.,* Yakama Nation's Aug. 1, 2025 Comments, Ex. B (enclosing letter from Gerald Lewis (Chairman) to Sec'y Bose (FERC)

dated Jun. 6, 2023), p. 2. Those losses are a direct consequence of the undertaking as licensed, yet the License Order does not identify measures to avoid, minimize, or mitigate them.

30. The License Order acknowledges that "[a]ll five [National Register-eligible] archaeological sites would be removed to construct the upper and lower reservoirs," and further concludes that this outcome has no mitigation value, reflecting the Commission's recognition that the resulting impacts are total and irreversible. License Order ¶ 93. Despite this acknowledgement, the Commission's public-interest analysis excluded the costs associated with mitigating adverse cultural impacts, explaining that such costs were "unknown" because they would depend on measures requested by the Tribes in the future. *Id.* ¶ 184; Final EIS Appendix F, Table F-1, item 21c, p. F-20. As a result, the License Order evaluates the Project's benefits and costs without accounting for the full magnitude of the Project's most significant and concentrated adverse effects to historic properties, even though those effects had been identified and deemed unavoidable at the time of licensing. *See* License Order ¶¶ 93, 184, 190. The Commission thus treated irreversible cultural losses as having neither mitigation value nor quantifiable cost, while nevertheless relying on future mitigation processes to justify approval.

31. As described in Section IX, *infra*, the consequences of this omission are reflected in the Commission's public interest analysis. Despite acknowledging that adverse effects to cultural resources would occur and that those effects were irreversible, the Commission failed to meaningfully evaluate the scope and consequences of those effects. Even after Washington State identified a potential mitigation liability ranging from $25 million to $39 million, the Commission did not assess how those impacts bear on the public interest or reconcile those costs with its benefit-cost evaluation. *See* Gov. Jay Inslee Comment, eLibrary no. 20250115-5072 (Jan. 14, 2025), p. 2; email from Allyson Brooks (DAHP) to Michael Tust (FERC), eLibrary no. 20241008-3013 (Oct.

4, 2024), p. 4. As a result, the License Order evaluates the Project's public interest benefits without accounting for the actual scope and cost of the identified cultural-resource harms.

32. Against this backdrop, despite these acknowledged irreversible adverse effects, the Commission proceeded to issue the license without identifying or evaluating any avoidance alternative capable of preventing or reducing harm to historic properties. The Yakama Nation, Riverkeeper, and other parties explained that approving the Project under these circumstances would violate NHPA section 106 by foreclosing avoidance at the only stage when it remained possible and relegating mitigation to a post-approval exercise with no ability to influence the outcome. Riverkeeper and Washington Conservation Action Education Fund, "Comments in Response to Rye Development's Request to Move Forward with Licensing Order," eLibrary no. 20250221-5184 (Feb. 21, 2025) (**Riverkeeper et al. Feb. 21, 2025 Comments**), pp. 8-13; letter from Gerald Lewis (Yakama Nation) to Debbie-Anne A. Reese (FERC), eLibrary no. 20241119-5015 (Nov. 18, 2024), pp. 2-3; letter from Allyson Brooks (DAHP), to Michael Tust (FERC), eLibrary no. 20250102-5293 (Jan. 2, 2025), pp. 2-3; letter from Allyson Brooks (DAHP) to Michael Tust (FERC), eLibrary no. 20250331-5187 (Mar. 27, 2025), pp. 1-2; letter from Jaime Loichinger (ACHP) to Debbie-Anne A. Reese (FERC), eLibrary no. 20240805-5105 (Aug. 6, 2024), pp. 2-4. The Commission did not dispute that the Project's harms were unavoidable as licensed, did not respond to the core legal objection, and did not explain how Section 106's decision-forcing purpose could be satisfied once irreversible effects had already been accepted.

C. License Issuance Foreclosed Consideration of Avoidance Alternatives

33. Having acknowledged that the Project would cause irreversible adverse effects to historic properties, the Commission was required under the NHPA to consider avoidance

alternatives, not merely post-approval non-specific mitigation, before approving the undertaking.[5] 36 C.F.R. §§ 800.5(a), 800.6(a). Avoidance is the preferred means of resolving adverse effects under Section 106, with minimization or mitigation considered only where avoidance is not feasible, particularly where impacts to historic properties are permanent or irreversible. *See* 36 C.F.R. § 800.6(a); ACHP, *Section 106 Regulations User's Guide*; *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 808–09 (9th Cir. 1999) (***Muckleshoot Indian Tribe***); *Pit River Tribe*, 469 F.3d at 787.

34. Instead, by issuing the license, the Commission foreclosed consideration of avoidance alternatives such as project relocation, downsizing, redesign, or exclusion of areas encompassing TCPs. License issuance fixed the Project's location, footprint, and fundamental design, such that any subsequent consultation was limited to measures that could not alter whether or where the Project would proceed.

35. An agency's commitment to an action before evaluating avoidance alternatives violates the NHPA. *See Muckleshoot Indian Tribe*, 177 F.3d at 808-09. As the Ninth Circuit has explained, where an agency approves a project before completing Section 106 consultation, subsequent consultation does not satisfy the statute because it deprives Tribes and the public of a meaningful opportunity to influence whether and how the project proceeds. That is what occurred here, where the Commission licensed the Project despite knowing that avoidance and minimization alternatives and effective mitigation measures existed only in theory, not in practice, once approval was granted.

[5] Federal agencies are responsible to independently evaluate and document the basis for their findings and determinations under Section 106, including consideration of alternatives. 36 C.F.R. § 800.2(a)(3). The Commission did not do so here. *See* Riverkeeper et al. Feb. 21, 2025 Comments, pp. 10-13.

VI. THE COMMISSION UNLAWFULLY RELIED ON A PROGRAMMATIC AGREEMENT TO DEFER RESOLUTION OF KNOWN ADVERSE EFFECTS.

A. Programmatic Agreements May Not Be Used to Defer Mitigation for Known Harms

36. A Programmatic Agreement may be used only when "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). This narrow exception reflects Section 106's general rule that identification of historic properties, assessment of adverse effects, and resolution of those effects must occur before approval. A Programmatic Agreement is therefore permissible only where genuine uncertainty about effects makes pre-approval resolution impracticable, not where impacts are already identified and determined to be without mitigation value and irreversible.[6]

37. Where adverse effects have already been identified, Section 106 does not permit an agency to approve an undertaking first and defer resolution of those effects until later. Reliance on a Programmatic Agreement to postpone resolution of known adverse effects collapses Section 106's mandatory sequencing requirements and converts a pre-approval, decision-forcing safeguard into a post-approval administrative exercise, contrary to the NHPA and its implementing regulations. Such deferral deprives Tribes, consulting parties, and decisionmakers of the

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[6] As Riverkeeper previously commented, even where an agency chooses to satisfy its Section 106 obligations through a Programmatic Agreement because the "effects on historic properties cannot be fully determined prior to approval of an undertaking," 36 C.F.R. § 800.14(b)(1)(ii), the agency remains obligated to resolve adverse effects, to the extent they are known, in consultation with the SHPO, ACHP, and any affected Tribes. *See* 36 C.F.R. § 800.6(b). Execution of a Programmatic Agreement does not satisfy this obligation unless the agreement includes clear and enforceable measures to mitigate identified adverse effects, as well as enforceable procedures to complete identification and resolution of remaining effects before approval or implementation of the undertaking. Absent such documented and enforceable measures, there is no basis for the agency to find that the undertaking's adverse effects can be mitigated, or that any unmitigated effects are justifiable. *See* 36 C.F.R. § 800.9(c); *see also* ACHP, *Guidance on Agreement Documents* (2011) ("The **stipulations** form the heart of the agreement by detailing each of the avoidance, minimization, or mitigation measures the federal agency has agreed to ensure are implemented." (emphasis in original)); ACHP, *Types of Agreement Documents in Section 106: What They Are and When They Should Be Used* (2018), p. 3 ("the agreement must be written carefully and clearly so that everyone understands what it calls for and the agency is able to fully carry out all legal obligations to which it has agreed.").

opportunity to evaluate whether the identified adverse effects can be avoided or meaningfully minimized before the agency commits to the undertaking. *See* Riverkeeper et al. June 30, 2025 Comments, pp. 4-6; Yakama Nation's June 30, 2025 Comments.

38. Here, the Commission expressly identified the Project's adverse effects and found they were unavoidable, without mitigation value, and irreversible. License Order ¶¶ 93-94, 138-139. Those findings eliminate any factual basis for invoking a Programmatic Agreement, because the nature, location, and severity of the effects were neither speculative nor indeterminate at the time of licensing.

39. In these circumstances, deferring resolution of adverse effects through a Programmatic Agreement violates the NHPA. *See Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1111 (S.D. Cal. 2010) (***Quechan Tribe***). An agency may not approve an undertaking and rely on later consultation or mitigation planning to satisfy Section 106 where it has sufficient information to identify and assess adverse effects before approval. The Commission's reliance on a Programmatic Agreement in these circumstances therefore violates Section 106.

B. The License Order Defers Enforceable Mitigation Until After License Issuance

40. The License Order relies on the future development and implementation of a HPMP to address cultural impacts. License Order ¶¶ 40, 54. The HPMP was neither finalized nor made enforceable at the time of license issuance, is not subject to binding conditions, and has not undergone meaningful public or Tribal review. The License further allows the HPMP to be submitted up to one year after license approval, long after the Commission's licensing decision is final and project parameters have been fixed.

41. The License Order (¶ 54) expressly acknowledges that specific treatment measures, avoidance strategies, and mitigation commitments will be determined only after the license has been issued. By design, this approach decouples project approval from mitigation, allowing the Commission to authorize a Project it has already found will cause irreversible harms to cultural resources while deferring resolution of those harms to future proceedings. This approach locks in the Project footprint, design elements, and core operational parameters before enforceable mitigation is identified, effectively foreclosing meaningful consideration of avoidance or minimization and providing no assurance that mitigation, if developed, will be adequate.

42. As Riverkeeper has previously explained, this sequencing violates the NHPA because it denies Tribes and the public a meaningful opportunity to evaluate whether identified adverse effects can be avoided or adequately mitigated before the agency makes its approval decision. *See* Riverkeeper et al. June 30, 2025 Comments, pp. 3-6. It also deprives the Commission itself of the information necessary to determine whether reasonable avoidance alternatives exist or whether the Project should proceed at all in light of its acknowledged irreversible impacts. Consultation, and the identification and evaluation of mitigation measures, conducted only after license issuance cannot perform Section 106's decision-forcing function because the Commission has already committed to the undertaking.

VII. THE COMMISSION FAILED TO SATISFY ITS NON-DELEGABLE DUTY OF GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION.

A. Tribal Consultation Is Mandatory, Structural, and Non-Delegable

43. Where historic properties of religious or cultural significance to Tribes may be affected, federal agencies "shall consult" with those Tribes on a government-to-government basis. 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2)(ii); 18 C.F.R. § 2.1c. This duty is not discretionary and applies whenever an undertaking may affect properties of religious and cultural significance

to Tribes, including TCPs that are eligible for listing in the National Register. *Hualapai Indian Tribe v. Haaland*, 755 F. Supp. 3d 1165, 1176 (D. Ariz. 2024) (***Hualapai Indian Tribe***); *Quechan Tribe*, 755 F. Supp. At 1104. Consultation must be initiated early, conducted in good faith, and carried through to resolution before the agency reaches a final decision on whether and how to proceed. *Quechan Tribe*, 755 F. Supp. 2d at 1109.

44. The Commission's Tribal Policy expressly recognizes that this consultation obligation rests solely with the Commission and cannot be delegated to a license applicant or postponed to post-approval processes. 18 C.F.R. § 2.1c. Consistent with that policy, the Commission retains independent responsibility to ensure that Tribal concerns are meaningfully considered and addressed as part of the agency's own decisionmaking, rather than deferred to later resource plan development or implementation stages.

45. Failure to conduct Tribal consultation at the correct time is a structural error that infects the entire decision and is not subject to harmless-error analysis. *See Standing Rock Sioux*, 985 F.3d at 1052. Where consultation is incomplete at the time of approval, the defect cannot be cured after the fact because the agency has already committed itself to a course of action, foreclosing meaningful consideration of avoidance alternatives and undermining the integrity of the consultation process itself. *See Quechan Tribe*, 755 F. Supp. 2d at 1119–20.

B. The License Order Issued Despite Unresolved Tribal Objections

46. The Yakama Nation and others repeatedly objected that Section 106 consultation was incomplete prior to license issuance and that avoidance, minimization, and mitigation measures for identified adverse effects to TCPs remained largely unexplored and undefined. Those objections went to the core purposes of Section 106, including the Tribes' ability to evaluate

whether impacts to culturally significant landscapes could be avoided or meaningfully minimized before approval.

47. Riverkeeper documented these objections and explained that unresolved consultation disputes preclude a lawful Section 106 finding. Riverkeeper et al. Feb. 21, 2025 Comments, pp. 6-15. As those comments explained, issuing a license while consultation remains ongoing converts Section 106 from a pre-decisional safeguard into a post-decisional formality, contrary to the statute and its implementing regulations.

48. The License Order does not identify any point at which these Tribal objections were resolved prior to license issuance. License Order ¶¶ 40-41, 54. Nor does the Order explain how the Commission could lawfully conclude that consultation was sufficient while deferring the identification of mitigation measures and treatment plans to future, post-license processes. The absence of any finding that consultation had reached resolution confirms that the Commission proceeded despite acknowledged and unresolved Tribal concerns.

49. The Commission's failure to complete Section 106 consultation before licensing also renders its environmental justice analysis arbitrary and incomplete. Section 106 consultation is the primary mechanism through which disproportionate impacts to Tribal cultural resources are identified, evaluated, and avoided or minimized. By approving the Project before resolving known adverse effects to TCPs, the Commission ensured that the very impacts giving rise to environmental justice concerns were not meaningfully addressed at the time of decision.

C. *Skokomish* Does Not Excuse the Commission's Failure to Conduct Lawful Tribal Consultation

50. The Commission's reliance on *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997) (***Skokomish***), to support its assertion that the federal trust responsibility does not require compliance with additional procedural protections in the licensing process is misplaced.

License Order ¶ 84. *Skokomish* stands only for the limited proposition that the federal trust responsibility does not override clear statutory limits or confer substantive rights inconsistent with the FPA. *See Skokomish*, 121 F.3d at 1309. It does not address, much less resolve, the question presented here: whether the Commission may approve a project while deferring mandatory consultation and resolution of identified, irreversible, adverse effects to Tribal cultural resources until after license issuance.

51. In *Skokomish*, the Ninth Circuit upheld the Commission's rejection of a competing permit application that was barred by Commission regulations governing mutually exclusive filings. *Id.* The court did not consider compliance with the NHPA, did not address the timing or adequacy of Tribal consultation, and did not involve approval of an undertaking that the Commission acknowledged would cause irreversible harm to TCPs. Nothing in *Skokomish* suggests that the trust responsibility permits the Commission to relax, postpone, or disregard mandatory procedural protections enacted by Congress.

52. Here, the Tribes do not seek "greater rights" than those provided under the FPA. They seek enforcement of existing statutory requirements that apply to all federal agencies, including the Commission: completion of government-to-government consultation, consideration of avoidance and minimization alternatives, and resolution of known adverse effects before the agency commits to an undertaking.[7] The trust responsibility is relevant not because it expands Tribal rights beyond the FPA, but because it informs how the Commission must exercise its

[7] The federal trust duty applies equally to all federal agencies: "We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights ….. *See, e.g., Joint Bd. of Control v. United States,* 862 F.2d 195, 198 (9th Cir. 1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole." *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995).

discretion and comply with procedural mandates where agency action threatens permanent harm to Tribal interests.[8]

53. The Commission's error is therefore not a failure to confer special treatment, but a failure to comply with mandatory procedural statutes at the point when compliance mattered, pre-license issuance. By approving the Project while deferring consultation, including identification and evaluation of alternatives and mitigation to post-license processes, the Commission acted inconsistently with the NHPA, the FPA, the APA, and the trust responsibility principles that require informed and careful decisionmaking before irreversible commitments are made.

D. The Commission Erred by Invoking Its Ex Parte Rule to Refuse Confidential Government-to-Government Consultation with Yakama Nation and other Affected Tribes.

54. The License Order (¶ 87) relies on the Commission's ex parte rules to justify its refusal to engage in confidential, government-to-government consultation with an intervening Tribe under NHPA section 106. That position reflects a clear and outcome-determinative legal error. Neither the NHPA, the APA, nor the Commission's own regulations prohibit confidential consultation with a Tribal party. To the contrary, the NHPA affirmatively requires agencies to protect the confidentiality of sensitive Tribal cultural information. By invoking its ex parte rule to refuse consultation altogether, the Commission treated confidentiality as prohibited rather than mandatory, in direct conflict with the statute.

55. Section 106 imposes an affirmative, non-discretionary duty on federal agencies to consult with Tribes on a government-to-government basis where an undertaking may affect

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[8] While the trust responsibility does not create free-standing substantive rights, it requires agencies to carry out their statutory duties with particular care where Tribal interests are at stake. *See Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001) (explaining that the trust responsibility informs the interpretation of statutes and regulations governing agency action affecting Tribes).

historic properties of religious or cultural significance. 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2)(ii). That duty applies regardless of whether a Tribe has intervened in an agency proceeding; neither the NHPA nor its implementing regulations recognize party status as a basis for limiting, delaying, or declining consultation.

56. Equally important, the NHPA requires agencies to protect the confidentiality of sensitive Tribal information disclosed during consultation. Under Section 304, an agency "shall withhold from disclosure" information concerning the location, character, or use of historic properties where disclosure may cause harm or impede traditional religious practices. 54 U.S.C. § 307103(a); 36 C.F.R. § 800.11(c). These provisions do not become inoperative when a Tribe intervenes in a licensing proceeding; to the contrary, they impose a mandatory obligation on the Commission to design and implement consultation in a manner that preserves confidentiality where necessary.

57. The Commission's reliance on its ex parte rule improperly elevates an internal procedural regulation over binding statutory mandates. The APA's ex parte provision applies only to communications "relevant to the merits" of an adjudication and expressly exempts communications "authorized by law." 5 U.S.C. § 557(d)(1). Section 106 consultation, including confidential exchanges of culturally sensitive information, is not only authorized by law but required by law. The Commission therefore may not invoke the APA or its own procedural rules to avoid compliance with the NHPA.

58. The Commission's own regulations confirm this point. Rule 2201 exempts off-the-record communications with Tribal agencies and communications related to environmental review, subject to disclosure only to the extent not otherwise protected by law. 18 C.F.R. § 385.2201(e), (g). NHPA Section 304 is such a law. Nothing in Rule 2201 requires disclosure of sacred-site

information or prohibits confidential consultation with Tribes, including Tribes that are parties to a proceeding.

59. By treating Tribal party status as a bar to confidential consultation, the Commission imposed an unlawful condition on meaningful participation. The Commission's approach forces Tribes to choose between intervening to protect their interests and preserving the confidentiality Congress expressly guaranteed under the NHPA. That result is incompatible with the Commission's Tribal Policy, which recognizes the government-to-government nature of consultation and the Commission's independent responsibility to engage directly with Tribes. 18 C.F.R. § 2.1c.

60. The Commission also failed to consider readily available alternatives that would have allowed it to comply with both Section 106 and its procedural rules, including consultation through non-decisional staff, use of confidential appendices, redacted summaries, or in camera review. An agency acts arbitrarily when it treats a self-imposed procedural constraint as legally unavoidable without considering lawful alternatives. *See Quechan Tribe*, 755 F. Supp. 2d at 1118-20.

61. Because confidential consultation is often essential to identifying TCPs, evaluating effects, and considering avoidance alternatives, the Commission's refusal to consult deprived the Section 106 process of critical information at the pre-decisional stage when that information was most consequential. *See Hualapai Indian Tribe*, 755 F. Supp. 3d at 1176-77. The resulting error is structural and cannot be cured post-licensing because the Commission has already committed itself to a course of action before fulfilling its consultation obligations. *Standing Rock Sioux*, 985 F.3d at 1052.

VIII. THE COMMISSION VIOLATED NEPA BY ISSUING A FINAL LICENSING DECISION ON AN INCOMPLETE ENVIRONMENTAL RECORD.

62. NEPA requires the Commission to take a hard look at environmental consequences and to disclose and analyze those consequences in a manner that permits reasoned decision-making and meaningful public participation before making an irreversible and irretrievable commitment of resources. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (***Methow Valley***) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976)). Although the Commission prepared an EIS, the environmental analysis contained therein is legally deficient. An EIS is not legally adequate if it identifies serious impacts but leaves the core questions of how the impacts will be addressed and whether they can be avoided or meaningfully minimized to be decided later, after the agency has already approved the action. NEPA's function is to ensure that environmental information is available to decisionmakers and the public *at the time* the agency is deciding whether and on what terms to proceed, not after the agency has committed itself to the project.

63. The Final EIS identifies permanent and irreversible harm to cultural resources yet defers meaningful consideration of avoidance, minimization, and mitigation decisions until after approval, preventing informed decision-making at the time the Commission committed to licensing the Project. Final EIS, p. 131. That defect is not a matter of "detail" or implementation; it goes to the heart of NEPA's hard-look requirement.[9] Where the agency acknowledges permanent and irreversible impacts, NEPA requires the agency to evaluate, *prior to approval*, whether there are feasible avoidance alternatives, whether the project can be redesigned or relocated to reduce those impacts, and what specific mitigation will be required to minimize them to the extent

[9] "A court … must determine whether the agency has taken a "hard look" at an action's environmental impacts.… At the least … [a hard look] encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (internal citations omitted).

practicable. *See Methow Valley*, 490 U.S. at 351-52 (*citing* 42 U.S.C. § 4332(C)(ii))*; Env't Def. v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 69, 84-85 (D.D.C. 2007); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *see also Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012).

64. By postponing the substance of mitigation until a post-license process, the Commission deprived itself, the Tribes, and the public of the ability to assess whether avoidance or minimization alternatives existed, whether any mitigation would be adequate, enforceable, and timely, and whether the Project remained justified in light of the harms the Commission concedes will occur. In other words, the Commission treated consideration of alternatives and mitigation as an after-the-fact administrative exercise, rather than as an element that must inform the agency's threshold approval decision and its analysis of reasonable alternatives.

65. In addition, the Commission failed to adequately evaluate cumulative impacts in a landscape already burdened by extensive industrial and energy development, and improperly narrowed the scope of its analysis by excluding functionally related facilities and actions. NEPA requires analysis of cumulative impacts because the significance of a project's effects cannot be understood in isolation where the affected environment has already been altered by prior and ongoing development. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Grand Canyon Tr. v. F.A.A.*, 290 F.3d 339, 345 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002).

66. Here, the Final EIS (p. 131) acknowledges that the Project's setting has been heavily impacted by dams, wind energy development, industrial activity, and transmission infrastructure, yet the Commission did not meaningfully quantify or evaluate how the Project's additional permanent disturbances and cultural-resource losses combine with those existing stressors to create compounded and escalating impacts. A lawful cumulative impacts analysis must

do more than list other projects; it must evaluate the combined effects on the relevant resources, particularly cultural resources and TCPs, so that the Commission can determine whether incremental harms are significant when added to the baseline conditions and ongoing regional disturbance. Without that analysis, the Commission cannot credibly claim to have taken the required "hard look" or to have weighed the Project's benefits against its full environmental costs.

67. As discussed above, the Commission's failure to complete Section 106 consultation before licensing also renders its environmental justice analysis arbitrary and incomplete. *See Te-Moak Tribe v. U.S. Dep't of the Interior*, 609 F.3d 592, 607 (9th Cir. 2010). Because Section 106 consultation is the process through which impacts to Tribal cultural resources are analyzed in detail and potential avoidance measures are developed, deferring that consultation until after licensing deprived the Commission of the information necessary to evaluate whether the Project's acknowledged cultural harms would fall disproportionately on Tribal communities. As a result, the Commission approved the Project without the factual foundation needed to assess or respond to those disproportionate effects. NEPA requires the Commission to consider whether severe environmental burdens fall disproportionately on identifiable communities and to explain how those burdens were evaluated in the agency's decision.

68. The Final EIS (pp. 111-12) recognizes that Tribal communities face unique, place-based cultural, religious, and subsistence impacts from damage to TCPs and associated landscapes. By licensing first while leaving the substance of avoidance and mitigation to future processes, the Commission ensured that the very impacts driving the environmental justice concern would not be meaningfully evaluated or addressed at the decision point when NEPA requires full disclosure and reasoned explanation. In other words, the environmental justice analysis acknowledges disproportionate burdens but fails to assess whether those burdens can be avoided, minimized, or

meaningfully mitigated in a manner that is specific, enforceable, and timely. That failure reflects not the absence of a freestanding environmental justice mandate, but the Commission's violation of NEPA's settled requirement that final decisions rest on a complete and timely analysis of acknowledged impacts and the processes necessary to avoid or mitigate disproportionate harms before the agency commits irretrievable resources.

69. For these reasons, the Commission's NEPA violations are prejudicial: they deprived decisionmakers and the public of the ability to evaluate the Project's true environmental consequences and mitigation commitments before the Commission made an irreversible licensing decision, and they undermine the legality of the License Order under the APA.

IX. THE COMMISSION'S PUBLIC-INTEREST FINDING UNDER THE FPA IS ARBITRARY AND CAPRICIOUS.

A. Sections 4(e) and 10(a) Require a Fully Informed Balancing

70. Section 106 of the NHPA requires a federal agency to identify historic properties, assess adverse effects, and resolve those effects through avoidance, minimization, or mitigation *before* approving an undertaking where effects have been identified. 54 U.S.C. § 306108; 36 C.F.R. §§ 800.4-800.6. This sequencing requirement is mandatory; an agency may not irreversibly commit resources while deferring resolution of identified adverse effects. *See Pit River Tribe*, 469 F.3d at 787-88. The Commission violated this requirement by issuing the License Order despite its express findings that the Project would cause permanent and irreversible adverse effects to identified historic properties, including TCPs of exceptional religious and cultural significance.

71. Under FPA sections 4(e) and 10(a), the Commission may issue a license only if the project is best adapted to a comprehensive plan that gives equal consideration to power development and to the protection of environmental, recreational, and cultural and historic resources. 16 U.S.C. §§ 797(e), 803(a). This determination must rest on a complete and lawful

environmental record; the deficiencies under NEPA or NHPA described above necessarily undermine the Commission's public interest finding under the FPA. *See Am. Rivers v. FERC*, 895 F.3d at 44-46.

72. The Commission cannot lawfully conclude that the Project's benefits outweigh its harms where it has not yet resolved identified, irreversible cultural impacts. *See State Farm*, 463 U.S. 29, 43. An agency acts arbitrarily and capriciously when it relies on an incomplete record, fails to grapple with the consequences of its own findings, or assumes that unresolved statutory violations can be cured through post-approval processes. *See id.*; *see also Standing Rock Sioux*, 985 F.3d at 1050-51.

73. The Commission's public-interest determination is further undermined by the absence of record support for the Project's asserted economic benefits. Under FPA section 10(a)(1), the Commission must determine whether a project as licensed is best adapted to serve the public interest, a determination that requires consideration of all issues relevant to that interest, not merely whether the project may benefit its proponent. *See Udall v. Fed. Power Comm'n*, 387 U.S. 428, 450 (1967). The Commission has identified projected economic benefits of project power as a relevant public-interest factor, *see Mead Corp., Publ'g Paper Div.*, 72 FERC ¶ 61,027, 61,068 (1995), and relied on those asserted benefits in issuing the License Order, including findings that the Project would provide dependable and economically beneficial power. *See* License Order ¶¶ 6, 182-184; *see also* Final EIS, p. 124.

74. Yet the record does not contain substantial evidence supporting the conclusion that the Project will, in fact, generate the economic benefits on which the Commission relied. Riverkeeper et al. Feb. 21, 2025 Comments, pp. 13-16. Riverkeeper submitted expert economic analysis demonstrating that the Project's assumed operating model is unlikely to generate sufficient

revenues under prevailing and projected western energy market conditions, and that the applicant has not demonstrated a viable basis for monetizing ancillary services on which profitability would depend. *Id.* at Attachment 1. The Commission did not dispute these critiques on the merits, but instead declined to evaluate them, stating that it was not required to determine whether the Project would be profitable. *See* License Order ¶ 184; Final EIS, p. L-40. Where, as here, the Commission relies on asserted economic benefits to justify approval of a project that it has found will cause devastating and irreversible harm to cultural and environmental resources, it must have record evidence that those benefits are real and attainable, not speculative or deferred to the licensee's future business decisions. In the absence of such evidence, the Commission could not lawfully conclude that the Project is best adapted to the public interest. *See* License Order ¶¶ 182–190.

75. The Commission's public-interest determination also relies on an unresolved and internally inconsistent record regarding whether the Project will result in discharges to waters of the United States. The License Order states that "no discharges are anticipated during project operation." License Order ¶¶ 145–146. That conclusion conflicts with the Final EIS, which acknowledges that the Project would lose approximately 390 acre-feet annually to evaporation and an additional 100 acre-feet through leakage from the water conveyance system. Final EIS, p. 13. Whether such leakage constitutes a discharge, including through subsurface transmission to the Columbia River, is the subject of a pending appeal in state court and turns on unresolved legal and factual questions. *See Columbia Riverkeeper v. State Pollution Control Hearings Board*, et al., Wash. Ct. App. Div. I, Case No. 88259. Given that uncertainty, the Commission lacked substantial evidence to conclude that no discharges would occur and acted arbitrarily in relying on that assumption when approving the Project.

B. Incomplete NHPA Compliance Fatally Undermines the Commission's Determination

76. Because the Commission deferred evaluation of avoidance, minimization, and mitigation of identified cultural impacts until after license issuance, it lacked the information necessary to perform the balancing required under Sections 4(e) and 10(a) of the FPA. Where NHPA compliance is incomplete at the time of approval, the agency necessarily forecloses meaningful consideration of avoidance alternatives and cannot lawfully weigh project benefits against cultural harms. *See Pit River Tribe*, 469 F.3d at 785-86.

77. This defect independently requires vacatur. Where an agency's failure to comply with NHPA deprives it of information essential to its statutory decisionmaking, the resulting approval cannot stand, even if other aspects of the record were otherwise complete. *See id.* Because the Commission's FPA determination rests on an unlawfully incomplete NHPA record, vacatur of the License Order is required regardless of the Project's asserted benefits.

78. The Commission cannot save its FPA determination by pointing to the existence of a Programmatic Agreement or to future, post-license planning obligations. Courts have squarely rejected the argument that an agency may approve an undertaking while relying on later processes to cure known NHPA deficiencies. *See Pit River Tribe*, 469 F.3d at 785-87 (holding that reliance on future consultation and mitigation cannot substitute for compliance at the time of approval). Where, as here, the agency has acknowledged irreversible adverse effects, a Programmatic Agreement that defers resolution of those effects until after license issuance cannot provide the information necessary to support the Commission's public interest balancing under the FPA or to satisfy NHPA's mandatory sequencing requirements. Allowing post-approval processes to substitute for pre-approval compliance would improperly convert the Commission's statutory

obligations into conditions subsequent and would insulate the most consequential aspects of the decision from meaningful review.

X. VACATUR IS THE APPROPRIATE REMEDY

79. Under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (***Allied-Signal***), vacatur is the appropriate remedy where the seriousness of the agency's errors outweighs any disruptive consequences of setting aside the challenged action. Both factors strongly favor vacatur here.

A. Seriousness of the Error

80. NHPA timing and consultation violations go to the heart of the statutory scheme and are presumptively serious. Section 106's core function is to ensure that agencies consider, and where possible avoid or meaningfully minimize, harm to historic properties before committing to an undertaking. Violations that occur at the timing and consultation stage are not technical or procedural missteps; they undermine the decision-forcing purpose of the statute by foreclosing meaningful consideration of alternatives and mitigation at the only point when such measures can influence the outcome.

81. The D.C. Circuit has repeatedly treated failures to comply with mandatory pre-decision requirements as serious errors warranting vacatur, particularly where the agency has already acknowledged irreversible impacts. *See Allied-Signal*, 988 F.2d at 150–51; *see also Standing Rock Sioux*, 985 F.3d at 1050-51. Here, the Commission issued the license despite acknowledging the Project would cause permanent and irreversible adverse effects to National Register-eligible sites and TCPs, while deferring resolution of those impacts to post-license processes. Because the error infected the Commission's threshold decision to license the Project, it cannot be cured through remand without vacatur.

B. Disruptive Consequences

82. Vacatur will not produce impermissibly disruptive consequences. To the contrary, it prevents irreparable harm to TCPs and historic resources and preserves the Commission's ability to comply with the law. Allowing the license to remain in effect during remand would authorize irreversible actions that could permanently destroy or degrade cultural resources before lawful consultation and mitigation decisions are completed.

83. The D.C. Circuit has emphasized that remand without vacatur is inappropriate where ongoing agency action risks irreversible environmental or cultural harm. *See Standing Rock Sioux*, 985 F.3d at 1051; *see also Allied-Signal*, 988 F.2d at 151. A vacatur here merely restores the status quo ante and ensures that the Commission completes NHPA consultation, NEPA review, and FPA balancing before authorizing irreversible impacts. Any delay associated with vacatur is the result of the Commission's own failure to comply with mandatory statutory requirements, not a reason to allow an unlawful license to remain in effect.

XI. THE LICENSE ORDER PREJUDICES JUDICIAL REVIEW UNDER FPA SECTION 313.

84. Independent of the request for a stay addressed below, and in addition to the substantive and procedural defects described above, allowing the License Order to remain in effect prejudices judicial review under Section 313 of the FPA by distorting the administrative record and foreclosing meaningful relief.

85. The Commission's decision to defer development of enforceable mitigation measures until after license issuance prejudices Riverkeeper's and the affected Tribes' rights to judicial review under Section 313 of the FPA. Because the substance, scope, and enforceability of mitigation will not be determined until well after the rehearing deadline has passed, affected parties are deprived of any meaningful opportunity to exhaust objections on rehearing to the very

measures the Commission relies upon to justify approval. This sequencing undermines Section 313's statutory review framework by insulating critical components of the Commission's decision from rehearing and judicial review and by preventing the reviewing court from assessing the legality of the License Order on a complete administrative record.

86. Courts have repeatedly rejected agency actions that structure post-approval processes in a manner that insulates critical elements of the decision from timely rehearing and judicial review. By issuing a license that relies on mitigation measures to be developed and finalized through future proceedings, the Commission has unlawfully truncated rehearing rights under Section 313 of the FPA and impaired the ability of affected parties and reviewing courts to evaluate whether the License Order complies with the NHPA, NEPA, and the FPA. *See Pit River Tribe*, 469 F.3d at 786-88 (vacating agency actions where approval preceded completion of required statutory analysis and could not be justified by reliance on future actions); *Standing Rock Sioux*, 985 F.3d at 1052-53 (holding that agencies may not rely on post-approval processes to cure serious procedural violations and emphasizing that such sequencing undermines meaningful review).

87. This sequencing independently violates the APA and the FPA by forcing judicial review to proceed on an incomplete administrative record that omits essential components of the Commission's approval decision.

XII. REQUEST FOR STAY PENDING REHEARING AND JUDICIAL REVIEW

88. Riverkeeper further requests that the Commission stay the effectiveness of the License Order pending rehearing and any subsequent judicial review, pursuant to Section 313(a) of the FPA, 16 U.S.C. § 825*l*(a), Section 705 of the APA, 5 U.S.C. § 705, and the Commission's inherent authority to preserve the status quo while it considers legal challenges to its orders. As

described below, all four stay factors weigh decisively in favor of preserving the status quo pending rehearing and any subsequent judicial review.

A. Likelihood of Success

89. Riverkeeper is likely to succeed on the merits because the License Order violates settled NHPA, NEPA, FPA, and APA judicial precedent. Although the license conditions certain ground-disturbing activities on future approval of a HPMP, issuance of the license itself authorizes the undertaking, fixes the project footprint, and shifts consultation and mitigation into a post-approval posture. Courts have repeatedly held that agencies may not irreversibly commit to a project while deferring resolution of known adverse effects to later processes. *See Pit River Tribe*, 469 F.3d at 783-88. Because the Commission issued the license despite acknowledged, irreversible impacts to cultural resources, including TCPs, Riverkeeper has a strong likelihood of success on its NHPA, NEPA, and FPA claims.

B. Irreparable Harm

90. Absent a stay, the License Order itself authorizes the federal undertaking, fixes the Project's location and design, and permits project implementation to proceed before lawful consultation and evaluation of avoidance, minimization, and mitigation measures are completed, creating a substantial risk of irreversible harm. Although certain ground-disturbing construction activities are conditioned on future approval of a HPMP, issuance of the license allows project implementation steps and post-approval processes to proceed in a manner that forecloses meaningful consideration of avoidance alternatives and places TCPs at substantial risk of irreversible harm. When consultation is conducted only after a project has been approved, the cultural, religious, and historical values embodied in affected sites cannot be fully restored through later mitigation or compensation. Courts have recognized irreparable harm where agency action

risks permanent loss of cultural resources and deprives Tribes of a meaningful opportunity for consultation before harm occurs. *See Standing Rock Sioux*, 985 F.3d at 1050-51; *Muckleshoot Indian Tribe* 177 F.3d at 808-10 (finding that post-approval consultation cannot cure the loss of a meaningful opportunity to influence agency decisionmaking regarding impacts to cultural resources).

C. Balance of Harms

91. The balance of harms strongly favors a stay here. A stay would preserve the status quo by preventing the Project from moving further into implementation while the Commission completes required consultation and review. By contrast, denial of a stay would allow the license to remain in effect, locking in the Project footprint and continuing post-approval processes that erode the ability to avoid or meaningfully minimize harm to Tribal cultural resources. Any delay resulting from a stay flows from the Commission's failure to comply with mandatory statutory requirements and does not outweigh the risk of permanent injury to irreplaceable historic properties.

D. Public Interest

92. The public interest also favors a stay. There is a strong public interest in ensuring that federal agencies comply with the NHPA, NEPA, and the FPA, honor their trust responsibilities to Tribal Nations, and complete meaningful consultation before authorizing undertakings with acknowledged irreversible impacts. Staying the license ensures that the Commission's ultimate decision is informed by a lawful and complete record, rather than by post-approval processes conducted after the agency has already committed to the Project. As the Supreme Court has recognized, the public interest is served when courts and agencies ensure that administrative action remains within statutory bounds. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

XIII. RELIEF REQUESTED

93. Riverkeeper respectfully requests that the Commission: grant rehearing; vacate the January 22, 2026 License Order; stay the effectiveness of the license pending rehearing and any judicial review; and complete NHPA section 106 consultation, including government-to-government Tribal consultation and adoption of specific, enforceable mitigation measures, *before* issuing any license.

XIV. CONCLUSION

94. For the foregoing reasons, Riverkeeper respectfully requests that the Commission grant rehearing, stay or vacate the License Order, complete its obligations under NHPA and NEPA, and reconsider whether the Project satisfies the FPA's public-interest standard on a lawful and complete record.

Dated: February 23, 2026

Respectfully submitted,

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DECLARATION OF SERVICE

Free Flow Power Project 101, LLC's Goldendale Energy Storage Project (P-14861-002)

I, Emma Roos-Collins, declare that I today served the attached "Columbia Riverkeeper's Request for Rehearing of Order Issuing Original License and Request for Stay" by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: February 23, 2026

By:

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