

Skokomish Indian Tribe

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The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20510

The Honorable Frank Pallone, Jr
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20510

Re: Proposed Amendments to the Federal Power Act

Dear Chairman Upton and Ranking Member Pallone:

I write to again express the Skokomish Tribe's strong objections to the amendments to the Federal Power Act that are now being considered by the House Energy and Commerce Committee.

If this bill is enacted as approved by the Committee, it would represent one of the most significant roll backs of the federal trust responsibility since termination. For more than ninety years the Federal Power Act directed Interior and other land management agencies to impose conditions on hydroelectric projects to protect federal lands including federal Indian Reservations and Treaty protected resources. However, in the first forty years, the federal land management agencies largely ignored this responsibility. As a consequence of this abdication to the Skokomish Tribe, our Reservation and our resources paid a very high price.

Our story is but one of many across Indian country. In the 1920s Tacoma City and Light received a license for the Cushman Dam on the North Fork of the Skokomish River. The entire flow of the North Fork of the Skokomish River was diverted from its channel and sent to a power house on Hood Canal (a bay of the Puget Sound). The dewatering of the North Fork completely destroyed a premier salmon run, with grievous economic and cultural consequences for the Tribe. See generally, *City of Tacoma v. FERC*, 460 F.3d 53, 62 (D.C. Cir. 2006); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 509-510 (9th Cir. 2005) (*en banc* revised). In terms of direct impact on the

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Skokomish Reservation itself, the dewatering of the North Fork resulted in an approximately 40% reduction in the flow of the Skokomish River mainstem. This change in the hydrology of the Skokomish River caused one-third of the Reservation to be flooded. *Skokomish v. United States*, 410 F.3d at 509-510, see also *id.* at 521 (dissenting opinion of Judge Graber). In short, this project almost completely destroyed the Reservation and the fishery for which the Reservation was established.

The original Cushman Dam license expired in 1974 and the Skokomish Tribe spent significant time, energy and resources to ensure that the United States would not once again abdicate its responsibility to the Tribe and sought conditions on the new license that would protect the Skokomish Reservation. At every turn Tacoma and the hydropower industry fought the Tribe. However, in 2006, the Skokomish Tribe won the right for the Department of the Interior to exercise its Federal Power Act 4(e) conditioning authority to protect the Reservation and the Tribe. *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 59 (D.C. Cir. 2006) (“*Cushman*”)

As a result of this decision, the Cushman project is now being operated in a manner meant to reverse the more than 80 years of damage to the Skokomish Reservation. These changes are slow but, over time, there will be improvements to the flow of the mainstem and flooding will lessen. Reservation lands that are waterlogged and useless will be restored and productive for the Tribe and our members again.

The bill now before the Committee would essentially reverse the decision that my Tribe fought so hard for, and will let FERC set the timeline for 4(e) mandatory conditions and other conditions, including Section 18 (fishways) and Clean Water Act Permits. The bill goes on to require the agency to imposing these conditions to give equal weight to power generating interests. Again, this would significantly undermine the federal trust responsibility to my tribe and others. If a hydroelectric project is located on Tribal lands, then the only consideration the Secretary has is to impose conditions that protect that Reservation. There is no balance of other interests. This has been the law for almost ninety years. The Tribe is at a loss for why Congress would want to change this now.

Furthermore, the bill before the Committee seeks to have FERC, an agency with no experience or capacity, the responsibility for determining the scope of environmental review that Interior, Commerce, States and even Tribes should take.

A change to the Federal Power Act is not needed. First, sections 4(e), 18 and the other related provisions of the Federal Power Act, establish proper checks and balances in the licensing process. While FERC is examining a broad range of issues in connection with the license application or renewal, the Interior Secretary can bring to bear Interior’s knowledge and expertise regarding the needs of Indian country, the potential impact of the project on the Indian reservation, and address measures to ensure the proper

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protection of that reservation. Other sections of the Act likewise establish appropriate checks and balances by recognizing and giving effect to the responsibilities and expertise that such other agencies have on natural resource management – such as that provided by Interior’s Fish & Wildlife Service and the Department of Commerce on fisheries and fish passage facilities as well as the vital and longstanding authority exercised by States and Tribes in setting water quality standards under the Clean Water Act. While hydropower is clean energy, it is clean only because of the important role that these other agencies, with the necessary expertise, have in addressing terms and conditions for hydropower licenses. FERC does not have the technical capacity to make these decisions.

The current process affords the hydropower industry ample opportunity to consider and respond to potential Section 4(e), 18 and Clean Water Act conditions. Hydropower licenses can (and in fact do) actively participate in the process by which these conditions are deliberated and set. And while these conditions are not subject to modification by FERC, they are subject to judicial review, and FERC is free to express its disagreement with the conditions, so that FERC’s views can also be considered by the courts.

Finally, while the current process may take time to complete necessary studies and vetting of potential conditions, any delay in renewing licenses does not harm the hydropower licensees. As a general matter, until the license renewal process is completed, hydropower licenses are able to operate under their existing licenses which, in our experience, typically do not have many of the conditions needed to protect Indian reservations or natural resources.

We urge you to oppose amendments to the Federal Power Act that would undermine the federal trust responsibility to protect Indian Reservations or that would alter the Interior Secretary’s authority under section 4(e), the provisions of section 18, or the Clean Water Act.

Sincerely,


Charles “Guy” Miller