



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

November 7, 2017

The Honorable Paul Ryan, Speaker
The Honorable Nancy Pelosi, Minority Leader
Honorable Members of the House of Representatives
Washington, DC 20515

Re: Hydro legislation still bad for Indian Tribes, States and Users of Public Waterways

Dear Speaker Ryan, Minority Leader Pelosi and Honorable Members of Congress,

Yesterday, when the Rules Committee discussed HR 3043, the Hydropower Policy Modernization Act of 2017, a number of members of the committee including Chairman Sessions, Congressman Cole, Congressman Newhouse, Congressman McGovern, Congresswoman Cheney as well as the Chairman Walden and Ranking Subcommittee Member Rush (who were testifying), all stressed the importance of ensuring that Indian tribes have their treaty rights and natural resources protected by any actions of the Congress relative to hydropower reform. We greatly appreciate the concerns of these members and the amount of time they spent discussing tribes and dam relicensing. I think many of them were aware of the degree to which the placement of dams has negatively affected a number of reservations, flooding some and damaging salmon runs at others. While there was universal agreement that the rights of tribes and states must be protected, there was not agreement on whether HR 3043 accomplishes that laudable intent. I must tell you that the bill does not do so.

First understand what the Federal Power Act (FPA) now says.

- Under provisions that have been in effect for decades, state governments, pursuant to the Clean Water Act, are able to set water quality standards at hydro dams. Such conditions are mandatory. Allowing states to establish water quality standards, a key aspect of Federalism that many in Congress have always fought for, was a lynchpin of the grand bargain reached when the Clean Water Act became law. While Federalism has not really benefitted Indian tribes, we are surprised that the Congress would weaken the ability of states to protect the public in this fashion. We hope you will read what many states have said in letters to the Committee, i.e., HR 3043 weakens their ability to ensure their standards are met during the licensing process. Letters of this nature have come from entities as varied as the Western Governors Association and the Southern States Energy Board.

- Also under the longstanding language of Section 4(e) of the FPA, Cabinet Secretaries with authority over “federal reservations” are directed to ensure that a proposed hydro project doesn’t negatively affect a reservation or interfere with its congressionally designated use. These include all lands and marine reserves in the Federal estate from Indian reservations, to National Forests to Wildlife Refuges. Section 18 of the FPA deals with the establishment or modification of fishways to ensure fish can pass over these dams. The Secretaries of Commerce (for NMFS) and Interior (for USFWS) deal with fish passage and the Secretaries of Interior (for BIA, BLM, USFWS and NPS) and Agriculture (for USFS) deal with protecting federal reservations. They have the authority to propose mandatory conditions on hydro dams to ensure their operation protects these federal resources that belong to all Americans.

The legislation weakens the conditioning authority for protecting state water quality, for fishways and for federal reservations by transferring significant decision-making authority to FERC. Under the bill, FERC and the license applicant can challenge the necessity of a condition and have that challenge heard via a trial-type hearing only at FERC before an Administrative Law Judge (ALJ) at that agency. Under present law, decisions such as these are heard by ALJs in the agency making the recommendation, where the expertise resides. This provision in the bill is legislating forum shopping and directing that the decision be made before an entity whose expertise is in areas such as energy markets and safety at power plants. FERC and its ALJs have no expertise relative to Indian treaty rights or the Federal Land Policy and Management Act among many bedrock laws and FERC testified before the Committee that they do not want to be given this newfound authority. While having trial-type hearings at FERC and authorizing FERC to set all manner of schedules in the permitting process will certainly create countless billable hours for attorneys representing license applicants, it will do nothing to protect the interest of Indian tribes or the public at large, and as stated above, is directly contrary to state authority under the Clean Water Act and Secretarial authority now found in the Federal Power Act.

Yesterday we heard that this process will expedite licensing but if that is the goal then wouldn't it make sense to determine when an application for a license is complete? Tribes repeatedly asked the hydropower industry to clarify that matter in the bill but they refused. Why? Existing hydropower dam licenses were issued decades ago before any environmental statutes were on the books and many of those dams are fish killers. Under the present law, when a license expires the operator can automatically get annual extensions allowing it to operate under 30-50 year old standards. These extensions can go on for year after year with the operator not having to spend any money to mitigate the damage to fish or other resources. This is more than ironic considering that the hydropower industry is telling Congress that they need the legislation to ensure certainty and time frames in the relicensing process. Additionally, the bill is drafted in such a fashion that FERC can set schedules that are so abbreviated that Tribes, Cabinet Secretaries or States who wish to comment and perhaps undertake a fishery study when necessary may not have the time to properly prepare suggested or mandatory operating conditions. It is noteworthy that FERC told the Committee that they don't see the legislation actually streamlining the application process. Also, we checked today and could find no tribes in support of this bill.

We believe the Amendment in the Nature of a Substitute (AINS) incorporates much of what the majority proposed in HR 3043 while incorporating many changes that are reflective of the input that the Committee received from states and tribes who took the time to relay views and concerns to the Committee. A key part is the requirement for a negotiated rule-making to improve and expedite the hydro licensing process by bringing in states, local governments, stakeholders and tribes to FERC to develop a process that will enable FERC to make decisions on license applications within a maximum of three years. We urge you to vote for the AINS. Without such changes it is highly unlikely that the bill will make it through the Senate. Thank you for considering our views.

Sincerely,



Jode L. Goudy
Tribal Council Chairman