

**TESTIMONY OF
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HOUSE ENERGY AND COMMERCE COMMITTEE HEARING
ON
MODERNIZING HYDROPOWER: LICENSING AND REFORMS
FOR A CLEAN ENERGY FUTURE**

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Mr. Chairman and members of the Committee thank you for the opportunity to testify today. My name is Mary Pavel. I am currently a partner in the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, LLP. I previously served as the Chief Counsel and Staff Director for the Senate Committee on Indian Affairs. I am an attorney for the Skokomish Indian Tribe and a member of the Tribe, and I have been a participant in the Uncommon Dialogue process since its inception.

I think the best way to illustrate the importance of the proposed reform to the Federal Power Act to recognize Tribal sovereignty and the proper role of Tribes to protect their lands and resources when the Federal Government is considering the licensing/relicensing of a hydroelectric facility is to tell the story of my Tribe, the Skokomish Tribe, and the construction and licensing of the Cushman Dam on the North Fork of the Skokomish River in Washington State.

A. The Skokomish Reservation

Since time immemorial, the people of the Skokomish Indian Tribe occupied and controlled lands adjacent to the Skokomish River and Hood Canal on the Olympic Peninsula of Washington State. In 1855, the Skokomish Indian Tribe entered into a treaty with the United States government, which reserved a permanent homeland for the Skokomish people near their ancestral villages along the Skokomish River at the southernmost point of Hood Canal. *See* Treaty of Point No Point, January 26, 1855, 12 Stat. 933, reprinted in II C. Kappler, *Indian Affairs, Laws and Treaties* at 674-77; *see also U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Boldt*).

The location of the Reservation was intended to facilitate easy access to the Skokomish River, its tributaries, and the tidelands and salt water of Hood Canal that sustained the Skokomish people for generations. *Id.* at 376-77. The Reservation's location near the Skokomish River and the waters of Hood Canal supported the fish dependent lifestyle and culture of the Tribe. In 1905, the United States Supreme Court correctly acknowledged that for Pacific Northwest Indian tribes, fishing and hunting resources "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371 (1905).

The treaty with the United States also reserved to the Skokomish people “the right of taking fish at usual and accustomed grounds and stations” as well as hunting rights “on open and unclaimed land.” *Boldt*, 384 F. Supp. at 376-77. The Skokomish people relied and continue to rely on natural resources of the Skokomish River for subsistence, economy, ceremonial, cultural, religious, and other purposes. *Id.* Many tribal members derive all or a part of their income from the fish and shellfish of the Skokomish River system.

B. Section 4(e) of the Federal Power Act

The focus of my testimony today is the Section 4(e) of the Federal Power Act and the importance of this provision in protecting the resources that are vital to the Skokomish Tribe. In one scholarly article, it is said, “the Federal Power was premised on the principle that electric power potential of the Nation’s navigable waterways is a public resource, which should be harnessed in a manner consistent with the public interest.” Kirsch, Peter J. and Sietz, J. Barton, “The Role of the Federal Energy Regulatory Commission in Protecting Non-Consumptive Water Uses” (1990) presented at *Moving the West’s Water to New Uses: Winners and Losers* (Summer Conference, June 6-8)) at <http://scholar.law.colorado.edu/moving-west-s-water-to-new-uses/13/>. Section 4(e) of the Federal Power Act is the tool that ensures that when this development happens it is consistent with the purposes of other federal lands and most importantly, for the purposes of this testimony, Federal Indian reservations. See Sommerville, Thane D., “Tribes and Dams: Using Section 4(e) of the Federal Power Act to Protect Indian Tribes and Restore Reservation Resources,” *Bellwether, Seattle University School of Law* (Spring 2009).

Currently, it is only the Secretary of the Interior who can impose conditions to protect federal Indian Reservations, when projects licensed by the Federal Power Energy Regulatory Commission (“FERC”) are located on tribal trust lands. See 16 U.S.C. § 797(e). More specifically, the Federal Power Act authorizes the licensing of hydroelectric power projects within reservations, but only upon an affirmative determination by FERC that the license “will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.” 16 U.S.C. § 797(e). In addition, Section 4(e) requires that any license issued within a Reservation shall be subject to and contain such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of such reservations. *Id.*

The Skokomish Tribe’s experience with the Federal Power Act is an example of when the trustee completely abdicates its responsibility under the Act and as well as an example of when the trustee half-heartedly embraces its responsibility under the Act. The Skokomish Tribe’s experience with the Federal Power Act further demonstrates the critical importance that Section 4(e) plays in balancing the use of the Nation’s waters for the development of hydropower with terms and conditions essential to ensuring that

hydropower is not developed at the expense of other vitally important resources. But most importantly this story illustrates why it is time, in the era of Tribal Self-Determination, where Tribes are operating multi-million federal programs pursuant to the Indian Self-Determination Education and Assistance Act and managing air and water resources pursuant to the Clean Air Act and the Clean Water Act, to empower Tribes to step into the shoes of the Secretary and ensure that they put forward mandatory conditions under the Federal Power Act to protect their reservations and resources.

C. Initial Licensing of the Cushman Hydroelectric Project

Since the early 1900s, the City of Tacoma and others recognized the hydropower possibilities for the Skokomish River. The Skokomish Tribe equally recognized the potential devastation that hydropower development would cause the Skokomish Tribe, its people and its resources. These concerns are well documented in correspondence between the Tribe and officials of the highest levels within the federal government, including officials within the Department of Justice and the Department of the Interior. These concerns were also expressed to the City of Tacoma.

On November 21, 1923, the City of Tacoma requested a “minor license” from the United States, through the Federal Power Commission (now FERC) for the operation of the Cushman Hydroelectric Project. *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 554 (9th Cir. 2003). Notwithstanding the repeatedly expressed Tribal concerns regarding the impact that hydropower development would have on its treaty protected fishery and its Reservation, Tacoma submitted its license application without any measures for fish passage or any other mitigation to protect the Tribe and its Reservation. *See City of Tacoma’s Application to Federal Power Commission for a License to Flood Certain Lands of the United States* (November 21, 1923).¹ Moreover, Tacoma’s 1923 application did not inform the Federal Power Commission that the main power plant and a portion of the project transmission line would be on the Skokomish Reservation, or that Tacoma intended to divert and dry up the entirety of the North Fork Skokomish River upstream of the Reservation. *Id.* Nor did the Federal Power Commission conduct any investigation to determine potential impacts to the Skokomish Tribe or the Skokomish Reservation. In 1924, the United States, through the Federal Power Commission, granted the City of Tacoma authorization to flood 8.8 acres of federal land through a so-called “minor part” license. *See License for A Minor Part of a Complete Project, Project. 460, Washington City of Tacoma, O.C. Merrill, Executive Secretary Federal Power Commission* (June 3, 1924). The license did not authorize the construction, operation, or maintenance of any dams, reservoirs, powerhouses, transmission lines or appurtenances. *Id.* The “minor part” license only authorized activity on less than two-tenths of one

¹ Copies of the records of this history are part of the record of proceedings in *Skokomish Indian Tribe v. United States*, No. C99-5606 (E.D. Wash.).

percent of the area actually occupied by the present-day Cushman Project. *Skokomish v. United States*, 332 F.3d at 565 (Tashima, J., dissenting).

In 1924, the City of Tacoma began construction of the Cushman Hydroelectric facility on the North Fork of the Skokomish River under the fifty-year “minor part” license issued by the Federal Power Commission. The Cushman Project became fully operational in 1930. From its inception, the Project was vigorously resisted by the Skokomish Tribe because of its impacts on Reservation lands and treaty fishing rights. The record in the Tribe’s case against the City of Tacoma and the United States documents the Tribe’s repeated requests to the Interior Department to take action to protect the Skokomish Tribe and its Reservation, and its multiple requests to the Interior and Justice Departments for assistance and litigation in both state and federal courts. *See* record of proceedings in *Skokomish Indian Tribe v. United States*, No. C99-5606 (E.D. Wash.). However, the Interior Department did nothing to protect the Tribe or its Reservation, despite Interior’s authority (exclusive of the Tribe) under the Federal Power Act to protect the Tribe’s Reservation and despite the United States’ obligations under the Treaty with the Tribe to protect the rights guaranteed it under that Treaty. *See Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1959); *White Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003).

The Cushman Project includes two dams, two power houses, penstocks, a pipeline, transmission lines and other structures. *City of Tacoma v. FERC*, 460 F.3d 53, 59 (D.C. Cir. 2006). Most of the Project’s structures lie just northwesterly and in close proximity to the Skokomish Indian Reservation. One power house and the project transmission lines are within the Reservation, with the transmission lines being located on trust property. The two dams totally block fish passage up the North Fork of the Skokomish River. Further, the entire flow of the North Fork of the Skokomish River was diverted from its channel and sent by pipeline to an out of basin power house on Hood Canal (a bay of the Puget Sound). *City of Tacoma*, 460 F.3d at 59.

Notwithstanding issuance of the license, the Tribe continued to pursue avenues for readdress and protection of its treaty rights. Frustrated by the failure of the United States to protect it, the Tribe attempted to seek legal recourse against the development and associated impacts of the Cushman Project on its own. The Tribe was prevented from doing so by the United States. In a petition submitted to the Secretary by letter dated August 17, 1930, the Tribe petitioned the United States to approve legal representation by private attorneys to represent the Tribe against Tacoma. *See* Petition to the Secretary of the Interior, Department of Indian Affairs, Washington, D.C. by George H. Adams et al (August 17, 1930). On October 10, 1930, the acting Commissioner of Indian Affairs refused the Tribal members’ request for legal representation, and reported that “steps that have already been taken by the Department of Justice to protect their interests.” *See* Letter from Henry Scattergood to Nicholson, Superintendent, Taholah Agency (October 10, 1930). There were no such steps.

Meanwhile, on September 13, 1930, tribal members sued in state court to enjoin Tacoma from diverting the North Fork out of its watershed. *See Complaint, Henry R. Allen, et al, Mason County Superior Court* (September 13, 1930). Two days later, tribal members—including my great-grandfather--on behalf of themselves and the Tribe sued in federal district court to enjoin Tacoma, arguing that the diversion would ruin their salmon fishery, and diminish their treaty fishing rights, thwart a primary purpose of the reservation, and irreparably destroy their principal means of livelihood. *Complaint, Adams v. City of Tacoma*, Case No. 428 (W.D. Wash. 1930). The federal district court dismissed the Tribe's suit against Tacoma holding that the Tribe could not represent itself and could only be represented by the United States. *Adams v. City of Tacoma*, Case No. 428 (W.D. Wash. 1930).

Following this dismissal, the Tribe was forced to rely solely on the United States as trustee to protect its interests. However, the United States declined to bring suit, or take any other form of action, to protect the Tribe's rights. In 1934, Assistant United States Attorney General Harry W. Blair informed United States Attorney for Western Washington, Charles J. Dennis that the United States had a right to bring suit for damage to the Skokomish Indians' treaty rights and cited a July 7, 1934 report evidencing significant damage resulting from the diversion of the North Fork Skokomish River. *See Letter from Harry W. Blair Assistant Attorney General to J. Charles Dennis, United States Attorney* (September 15, 1934). Assistant Attorney General Blair directed United States Attorney Dennis to investigate the matter, determine the extent of damage, and bring legal action if warranted. *Id.*

However, United States Attorney Dennis had served as attorney to the City of Tacoma from 1920-1923 and again from 1928-1932. In that capacity, he represented Tacoma in cases relating to the Cushman Project and the damming and diversion of the North Fork. In September 1934, in what is clearly an ethical violation and conflict of interest, United States Attorney Dennis recommended against the United States filing suit against Tacoma for the purpose of protecting the Tribe's fishing rights. *See Letter from Charles Dennis, United States Attorney to United States Attorney General* (September 24, 1934).

In 1935, the Assistant Secretary of the Interior agreed with Tacoma's former attorney's recommendation that no legal action would be taken by the United States on behalf of the Tribe to protect the Tribe's rights against the damming and diversion of the North Fork Skokomish River. *See Letter from Oscar Chapman, ASIA, to U.S. Attorney General*, (October. 1, 1935).

D. Impact on the Skokomish Reservation for the Trustee's Failure

As a consequence, Tacoma operated this facility without any “significant license conditions.” *City of Tacoma v. FERC*, 460 F.3d 53, 66 (D.C. Cir. 2006). The failure of Interior to exercise its statutory duty to impose any – let alone “appropriate-license conditions” in 1924 resulted in the destruction of the once plentiful Skokomish North Fork fisheries, the flooding of almost thirty percent of the Skokomish Reservation and the continued degradation of the entire Skokomish Watershed and the destruction of treaty protected cultural and wildlife resources. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 509-510 (9th Cir. 2005) (*en banc*).

The dewatering of the North Fork completely destroyed the salmon run up what was once a premier Tribal as well as a sports fishery, with grievous economic and cultural consequences for the Tribe. *See 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*). *See also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979) (the Treaty of Point No Point entitles the Tribe an opportunity to harvest up to a maximum of 50% of harvestable resources).

In terms of direct impact on the Skokomish Reservation itself, the dewatering of the North Fork resulted in an approximately 40% reduction in the flow of the Skokomish River mainstem. The decreased flows in the mainstem greatly contributed to the massive siltation of the River, because it resulted in significant aggradation – which occurs whenever deposits of sediment cause the floor of a river to build up over time because of the absence of flushing flows. This aggradation caused almost one-third of the Reservation lands to be flooded, and resulted in the failure of septic systems, contamination of wells, blocked fish migrations, damaged Reservation orchards and pastures, and the silting over of fisheries and shellfish beaches. *Skokomish v. United States*, 410 F.3d at 509-510; *see also id.* at 521 (Graber, J., dissenting quoting technical analyses opining that dredging the channel could lessen, halt or even reverse the aggradation).

The Department of the Interior’s Report to FERC, in connection with the relicensing of the Project, estimates that the aggradation reduced the conveyance capacity of the mainstem from pre-Project levels of 18,000 cfs to approximately 5,000 cfs. Prior to the Project, the Skokomish River flooded approximately once every 1.3 years. Now the River is subject to flooding more than 10 days a year every year. In all, 27% of the Tribe’s Reservation land is repeatedly flooded and has therefore become useless. When the news shows the pictures of a fish swimming across the road in Washington State – that is the Skokomish River.

The Skokomish River estuary was also negatively impacted by the loss of river flow. The Skokomish River estuary is part of the Puget Sound Estuary system, which is classified as an estuary of national significance under the National Estuary Program of the Clean Water Act, 33 U.S.C. § 1330. By impounding and diverting the North Fork

Skokomish River out of its watershed, the Cushman Project severely reduced freshwater and nutrient inflow and altered sediment and salinity regimes, with the consequent adverse impact on the biological productivity of the Skokomish River estuary, inter-tidal delta, and Hood Canal. The Washington Department of Fish and Wildlife's Recommendations on Terms and Conditions on the Project's relicensing stated that the Skokomish River Estuary on the Reservation was an excellent shellfish gathering ground for Tribal members. But because of the Cushman project's operations, the shellfish beds on the Skokomish River Estuary were greatly reduced in size and productivity. The degradation of the Estuary is a result of both increased siltation and the septic contamination of the Estuary.

Wildlife populations were also severely impacted by the operation of the Cushman Project. The greatest impact has been upon the migratory deer and elk herds that historically wintered in the valley of the North Fork. The two reservoirs created by the Cushman Project inundated important wintering areas. The destruction of these traditional wintering areas has contributed substantially to the declining populations of deer, elk, and other game and non-game wildlife in the vicinity of the project. Finally, the flooding caused by the Project has destroyed numerous tribal historical and cultural sites.

E. The Relicensing of the Cushman Project

Given the failure of the United States to uphold its responsibility under the Federal Power Act to impose any conditions, the Tribe had to wait until the Project came up for licensing again in 1974 to address the impact of this Project on the Tribe and its Reservation.

On November 5, 1974, Tacoma filed its application for a new license. 84 FERC, ¶ 61,107 (1998). The Tribe intervened one year later 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. *Id.* at 61,536.

As stated in the FERC initial license for the Project in 1998: "Commission action on the Cushman Project license application has been delayed by a series of matters, including the lack of prerequisite water quality certification; the enactment of the Electric Consumers Protection Act of 1986; the requirements of special legislation to remove National Park status from a corner of the Project reservoir; disputes over compliance with the National Historical Preservation Act; a one year deferral of the deadline for federal agencies to refer the Commission staff's Environmental Impact Statement to the Council on Environmental Quality for review of the EIS's adequacy; and an eleventh-hour Endangered Species Act issue." *Id.*

Thus, there was a there was twenty-four years between when Tacoma filed for a license and when FERC issued its initial new license in 1998. In our view, the delay in

relicensing only benefitted Tacoma. From the time the license expired in 1974 until a renewal license was ultimately issued, Tacoma was able to operate the Cushman Dam as it had been operated since 1930. *City of Tacoma*, 460 F.3d. at 60. Essentially, what Tacoma received was not a 50-year license, but an 86s -year license to operate the project wholly free from all terms or conditions that might otherwise protect the environment, natural resources, or the Skokomish Tribe’s Reservation and Treaty rights. *Id.* at 61.

While the license was pending renewal, the Tribe used this time to knock on every door of the Federal government to ensure that the federal government did not once again ignore its responsibility to the Tribe. In doing so, the Tribe actively pushed Interior to move forward with 4(e) conditions that would protect the Reservation and the Treaty protected resources. The Tribe did this because Interior is the only Agency that can impose 4(e) conditions to protect Indian Reservations. Thus, it was imperative that the Tribe convince Interior to impose 4(e) conditions.

Ultimately, the conditions that Interior put forward were far less than what the Tribe wanted or believed were necessary, but at least the trustee finally acted. *See* Letter from Willie R. Taylor, Director, Office of Environmental Policy and Compliance, Department of the Interior, to Lois D. Cashell, Secretary FERC, Re Cushman Hydroelectric Project, Project No. 460, forwarding DOI section 4(e) conditions for the adequate protection and utilization of the Skokomish Indian Reservation (August 4, 1997). Despite this, FERC rejected Interior conditions, asserting that Interior had missed FERC’s unilaterally imposed 60-day deadline. *See* 84 FERC ¶ 61,549. Further, notwithstanding the well-documented adverse impacts that this Project had on the Skokomish Reservation, FERC took the position that Interior only had the authority to impose conditions on a discrete and very small portion of the Project, namely that being the transmission line right-of-way located on the Reservation. *Id.*

Both the Tribe and City filed petitions to review the Cushman Project license in the U. S. Court of Appeals for the D.C. Circuit Court. In this case, it was the Tribe who defended Interior’s authority to impose 4(e) conditions on the Project, not the federal agency itself. Once again, our trustee abdicated its responsibility. *See City of Tacoma*, 460 F.3d.53 (D.C. Cir. 2006).

In this landmark case, the D.C. Circuit held that FERC must include the Interior Department’s Section 4(e) conditions in any license it issues for the Project. *City of Tacoma v. FERC*, 460 F.3d 53, 64-67 (D.C. Cir. 2006). The Court of Appeals held that FERC “exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated other federal Agencies.” *Id.* at 65 (“FERC took all the time it needed – a full 24 years . . . Interior, in contrast, produced its license conditions within about three years.”).

The Court of Appeals also rejected FERC's argument that the Secretary's Section 4(e) conditions must be limited to the impacts of the Project facilities actually located on reservation lands. Relying on the Supreme Court's decision in *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1984), the Court concluded instead that since some of the Project facilities are located on reservation trust land, the Secretary may impose any "conditions that are designed to mitigate the effect of the project on the Skokomish River to the extent doing so is reasonably related to protecting the reservation and the Tribe." *City of Tacoma*, 460 F.3d at 67. The Court then remanded the case for further proceedings, leaving open the opportunities for: (1) FERC to "express its disagreement" with the conditions and seek to persuade Interior to modify them; (2) FERC to deny a license; and (3) the City to litigate the reasonableness of the conditions. *Id.*

This legal victory for the Tribe, the first consequential decision since the Tribe began its fight against this Project, created an opportunity for the Tribe, Tacoma, the federal government, and the State agencies to reach a global settlement for the future operation of Cushman Project, including Interior's 4(e) conditions. The global Settlement Agreement was signed by the parties in January 2009 and FERC issued a new 40-year license to Tacoma in July 2010. The benefits of the Settlement Agreement and new license, included increased carrying capacity on the Skokomish River, improved fish habitat, improved fish passage, restoration of salmon populations, including two hatcheries to reintroduce salmon to the North Fork; restoration of wildlife habitat, and restoration lands and cultural sites to the Tribe. *See Cushman Hydroelectric Project Settlement Agreement Highlights, Tacoma Power, TPU.*

F. Conclusion

The Skokomish Tribe bore the brunt of the cost of generating power at the Cushman dam for 86 years, notwithstanding that there was a provision of the law that allowed the federal government to protect the Reservation. Today, Tribal governments have some of the world's best science related to the management of their trust lands and resources. Tribal governments are in the best position to understand the impact of a project on their lands and resources and to work in concert with other land management agencies and the project proponents to develop conditions that strike the balance of interests that the Federal Power Act has always called for. In the 21st century, Tribes should not have to rely on a distant trustee to do the right thing (or the case of the Skokomish and the Cushman Dam, anything) when they have the capacity and ability to do the work themselves.

Thank you for the opportunity to testify.