



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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## TRIBAL INTERESTS, INSTREAM FLOWS & HYDROPOWER LICENSING

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USING THE LICENSING PROCESS TO ADDRESS TRIBAL CONCERNS

by Mason Morisset, Morisset, Schlosser, Jozwiak & Somerville (Seattle, WA)

INTRODUCTION HYDROPOWER IMPACTS & LEGAL RECOURSE

Hydropower facilities have numerous impacts on water resources and especially on stream flows. The licensing and relicensing processes for these facilities rightfully include avenues to consider and address a range of such impacts.

Dam construction and operation will impact: water quality at the project; impoundment elevations of associated reservoirs; flow releases to the subject river for fish; channel conveyance capacity of the river, possible reduction of flooding on the river; restoration or maintenance of fish habitat in the river and its tributaries; water quality, fish, and habitat; downstream and upstream fish passage; fish supplementation; tailrace monitoring of fish migration delay, injury, and mortality; measures to protect and enhance federally listed threatened and endangered fish species; terrestrial habitat and wildlife protection; shoreline management and recreation enhancements; and managing cultural resources and historic properties.

Indian tribes are often adversely affected by these issues and the impact of a project on instream water flows. However, there are substantial legal tools available during the hydropower licensing process that tribes may utilize to protect their interests in maintaining appropriate instream flows. This article describes some of those tools.

FEDERAL ACTS & TRIBAL AUTHORITY

Several federal acts have bearing on hydropower licensing, as do the sovereign rights of the tribes.

Tribal Regulatory Authority

Indian tribes as sovereigns can exercise considerable regulatory control over certain aspects of reservations and particularly over water flowing through or adjacent to it. The Clean Water Act also provides that the United States is authorized to treat Indian tribes as a state (TAS) for purposes of applicable sections of the CWA. 33 U.S.C. § 1377(e). For tribes that qualify, this provision can provide substantial authority for the tribe to influence instream flows where a hydropower project will affect waters flowing through or adjacent to a reservation.

Tribes, Hydropower, & Instream Flows

Federal and State Input

Fishways

Reservation Purposes

Quality Certification

FERC Authority

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Federal Power Act Provisions

FPA Section 10(j) Recommendations

Section 10(j) of the Federal Power Act (FPA), 16 U.S.C. § 803(j)(1) (2006), requires the Federal Energy Regulatory Commission (FERC), when issuing a license, to include conditions based on recommendations by federal *and* state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq. (2006) — “to adequately, and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the hydropower project (Project). Obviously, tribes that have natural resource interests can utilize these statutes to protect those interests.

FPA Section 18 Prescriptions

Section 18 of the FPA, 16 U.S.C. § 811 (2006), provides that FERC shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the US Secretary of the Interior or the US Secretary of Commerce, as appropriate.

FPA Section 4(e) Conditions

Section 4(e) of the FPA, 16 U.S.C. § 797(e) (2006), provides that FERC may issue a license for a Project located on a federal reservation only if it finds that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired. Reservations are defined in section 3(2) of the FPA, 16 U.S.C. § 796(2) (2006), and include Indian reservations.

Clean Water Act Provisions

The federal Clean Water Act (CWA) provides that an applicant for a federal license or permit to conduct any activity (such as a hydropower facility), which may result in any discharge into the navigational waters of the US, shall provide the licensing or permitting agency (in this case FERC) a certification from the state in which the discharge originates. 33 U.S.C. § 1341 (FWPCA § 401). That certification will include compliance with: CWA § 1311 (Effluent Limitations); CWA § 1312 (Water Quality Related Effluent Limitations); CWA § 1313 (Water Quality Standards and Implementation); and CWA § 1317 (Toxic and Pre-treatment Effluent Standards). Obviously, compliance with these statutory provisions and applicable regulations can have a major impact on stream flows associated with the hydropower project.

As to CWA compliance, FERC has authority to take corrective action if a State fails to act to certify licensee compliance. In *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991), the applicant asked that FERC issue a license after the State of Washington withdrew a § 401 certification (33 U.S.C. § 1341 (FWPCA § 401)). That Court held that FERC must ascertain whether a valid certification exists before issuing a license. *Id.* at 624-25. The Court rejected FERC’s insistence that it was “powerless” to do anything and that the licensee’s only recourse was in State court. *Id.* at 620. Compliance with Washington State’s water quality standards there would likely have resulted in mandatory flow-related conditions. *See Jefferson County PUD v. Ecology*, 511 U.S. 700 (1994).

CWA Section 401 does not authorize “certification:”

- by private settlement without public notice;
- that expires upon license issuance; or
- that omits the CWA’s mandatory attestations. 40 C.F.R. § 121.2(a).

Obviously, a tribe can insist on CWA compliance to protect its interests.

Federal Endangered Species Act Provisions (16 U.S.C. § 1531-1544)

A hydropower project cannot impede stream flows in such a way as to “take” endangered species unless such taking is “incidental” to an “incidental take permit” provided by the relevant agency. The need for a licensee to comply with this statute and the requirements that may be set by the relevant regulatory agency (such as US Fish and Wildlife Service or NOAA Fisheries) should be obvious. The licensee may “take” protected species only pursuant to an “incidental take permit” as provided for in the statute. *See* 16 U.S.C. § 1539(a)(B).

Coastal Zone Management Act

The Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et seq.*, requires that applicants provide FERC with “certification” that the proposal “complies with the enforceable policies of the State’s [coastal] program” and “will be conducted in a manner consistent with the program.” 16 U.S.C. § 1456(c)(3)(A). The State has sixty days to notify FERC of concurrence with or objection to an applicant’s certification, after which concurrence is conclusively presumed. *Id.* This process often results in state-issued mandatory license conditions.

However, FERC should refrain from issuing the license until a State: (1) affirmatively concurs in license certification; (2) timely objects; or (3) fails to act by timely objection. *Id.* Where the State timely acknowledged that a Project violated the state program but refused to take any action (Section 5.16), a Washington court of appeals invalidated such behavior as “arbitrary and capricious.” *Skokomish v. Fitzsimmons*, 97 Wash. App. 84, 95, *rev. denied* 143 Wash. 2d 1018 (2000).

FERC LICENSING & TRIBAL RIGHTS

LEGAL CONSTRAINTS ON FERC LICENSING POWER WHERE TRIBES ARE AFFECTED

FERC’s Trust Responsibility to Tribes

As is true of all federal agencies, FERC has a trust responsibility to protect tribal trust assets, which include treaty fishing and water rights and Reservation lands. *See United States v. Mitchell*, 463 U.S. 206 (1983); *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). FERC must interpret the FPA “liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (citations omitted).

Section 4(e) of the FPA directs FERC to issue a license “...within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired.” 16 U.S.C. § 797(e). A Cabinet Secretary may determine license conditions that protect the resources of a reservation under the Secretary’s jurisdiction. FERC “must include the Secretary’s conditions in the license even if it disagrees with them.” *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772 (1984).

FERC Must Honor Interior Conditions Where Tribal Reservations Are Involved

CITY OF TACOMA V. FERC

In an important victory for tribes, the D.C. Circuit Court held in *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) that FERC must include the Interior Department’s § 4(e) conditions in any license it issues for a Project which was partially on an Indian reservation. *Id.* at 64-67. The Skokomish Tribe had proposed even more stringent protective conditions but was satisfied that the Interior Department’s conditions would go far towards the goals of restoring the Skokomish River and fisheries resources. The federal court of appeals rejected FERC’s argument that the Interior Secretary’s § 4(e) conditions must be limited to the impacts of the Project facilities actually located on reservation lands — which were a transmission line and access road. That court concluded instead that since some Project facilities are located on reservation land, the Secretary may impose any license “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.” *Id.* at 67. Relying on *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 at 777-79 (1984), the court of appeals held that the FPA “gives FERC no discretion to reject Interior’s § 4(e) conditions,” (460 F.3d at 67). The court of appeals remanded the case for further proceedings, leaving open opportunities for: (1) FERC to “express its disagreement” with the conditions and seek to persuade Interior to modify them; (2) FERC to deny the license; and (3) the City to litigate the reasonableness of the conditions. *Id.*

FERC LICENSING & TRIBAL INSTREAM FLOW CONCERNS

TRIBES CAN UTILIZE LICENSE CONDITIONS TO PROTECT INSTREAM FLOWS

EXAMPLE: FERC PROJECT NO. 460 (CUSHMAN)

Utilizing the tools described above, tribes can insist on resource license additions involving instream flows to protect natural resources and tribal property, and address other issues. The following are some examples taken from a real case, FERC Project No. 460 (Cushman) 132 FERC ¶ 61,037 (July 15, 2010). The Cushman hydroelectric project is owned and operated the City of Tacoma, Washington.

Upstream Fish Passage

A licensee can be directed to provide safe, timely, and effective upstream fish passage at a Project for the term of the license. These terms can require the licensee to install, operate, maintain and monitor fish passage facilities at its own expense.

FISH PASSAGE FACILITIES MAY BE DESIGNED TO:

- protect and mitigate damages to fisheries
- provide access to historic spawning and rearing habitat
- enhance the restoration of fish to the river system

All of these kinds of provisions can have a significant effect on instream flows.

Fish Passage Monitoring Plans

A licensee can be required to implement Fish Passage Monitoring Plans.

FISH PASSAGE MONITORING PLANS CAN:

- measure fish survival through the reservoir, fishways, and transport mechanisms
- access compliance with survival and performance standards for effective passage
- inform the implementation of fish passage conditions

**Tribes,
Hydropower,
& Instream
Flows**

**Trust Assets
Protection**

**Reservation
Purpose**

**FPA § 4(e)
Inclusion**

**Scope of
Conditions**

**Mitigating
Conditions**

Tools in Action

Fish Passage

Monitoring

**Tribes,
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& Instream
Flows**

ESA Plans

Instream Flows

Fish Supplementation Programs

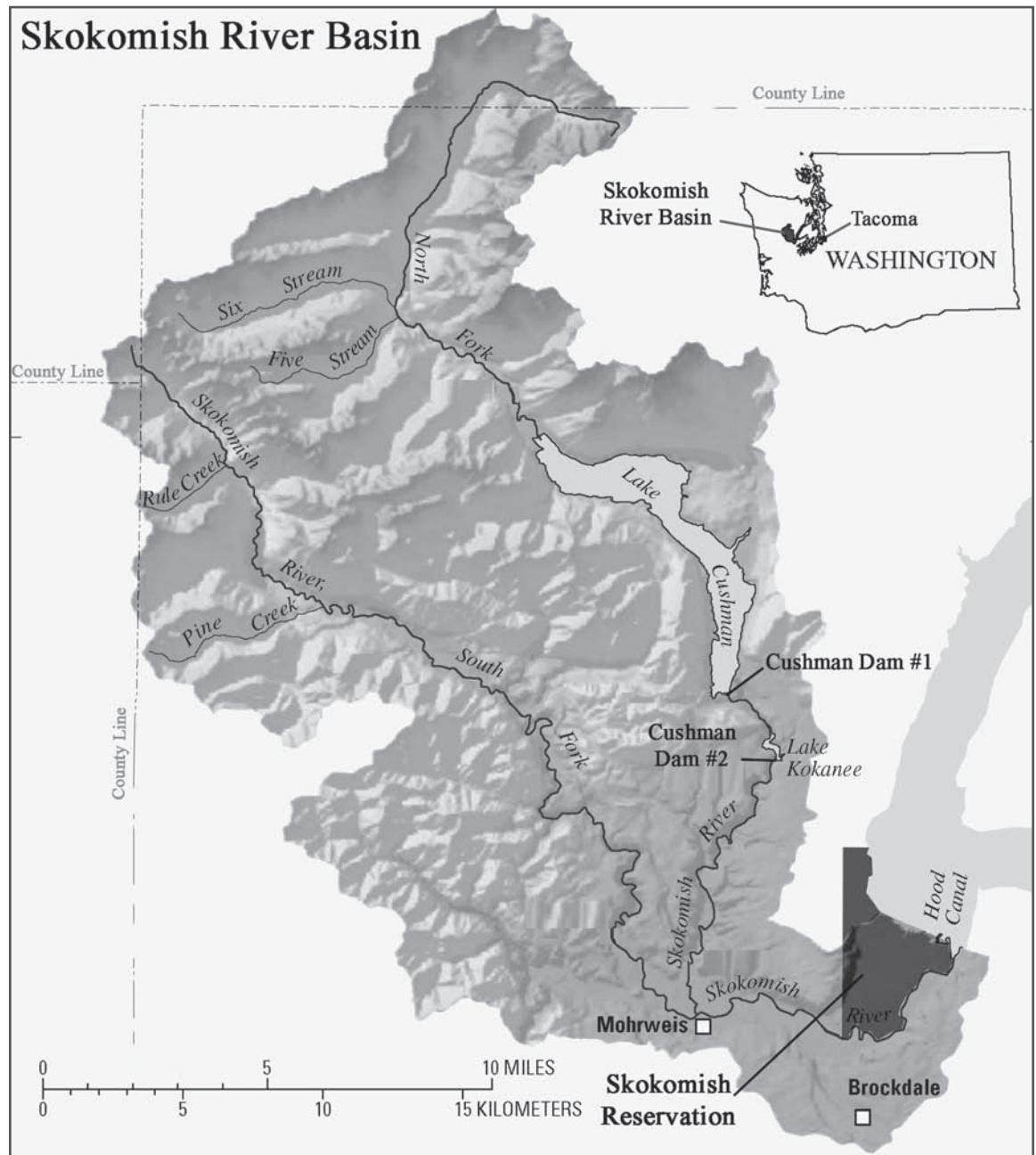
Licensees can be required to develop a plan to implement a fish supplementation program. The purposes of fish supplementation programs are to protect, address damages to, and enhance fisheries. The FISH SUPPLEMENTATION PROGRAM OBJECTIVES INCLUDE:

- supporting the reintroduction, restoration, and long-term maintenance of anadromous fish populations
- providing harvest opportunities to treaty Indian and non-treaty fishers
- providing recreational fishing opportunities

Threatened and Endangered Species Plans

A licensee can be required to develop a Threatened and Endangered Species Protection Plan (T&E Plan). The T&E Plan may include measures to protect such species as: salmon; steelhead; bull trout; peregrine falcon; bald eagle; marbled murrelet; and spotted owl. T&E Plan protections can apply during both project construction and project operation and include measures to protect critical habitat for these species.

The implications for instream flows are obvious, especially with regard to fish resources.



**Tribes,
Hydropower,
& Instream
Flows**

**Minimum Flow
Purposes**

**License Flow
Particulars**

**Water
Budget**

**Review &
Adaptation**

**Flood
Mitigation**

**Variable
Approach**

**Water Quality
Actions**

Fisheries, Wildlife and Habitat Committee

A licensee can be required to establish and convene a Fisheries, Wildlife and Habitat Committee (FWHC) for the purpose of consultation with the licensee on fisheries. This committee can include the affected tribe as an active member. The licensee can be required to obtain the views of — and attempt to reach consensus among — the specified parties or specified committee whenever the license requires the licensee to consult.

Minimum Flows

FERC can require a licensee to release flows from a Project, in accordance with all components of a flow regime required by the license.

THE PURPOSES OF MINIMUM FLOW LICENSE CONDITIONS CAN INCLUDE:

- protecting, mitigating, and enhancing fish and wildlife resources, riparian vegetation, aesthetic resources, and water quality
- providing safe, timely, and effective fish passage
- improving sediment transport

Flow regimes can include several components, such as the following examples from the Cushman Dam Project’s license.

Article 407 of the license requires the licensee to release a minimum flow of 240 cubic feet per second (cfs) or inflow to the Project, whichever is less, for the protection and enhancement of fish and wildlife resources, riparian vegetation, aesthetic resources, and water quality in the river downstream of the dam. Article 407 accommodates these objectives while also addressing fish migration, channel formation, and sediment transport in the mainstem. Sediment transport also supports several objectives identified in proposed Article 403 to reduce the human health and welfare risks of flooding.

To achieve these goals, Article 407 uses a water budget of 160,000 acre-feet to support a flow regime designed to mimic the timing, duration, and frequency of annual flow events. Article 407 sets a predetermined minimum flow schedule, based on 115,835 acre-feet of storage in the main reservoir, to establish and maintain habitat improvements in the river. In addition, the annual variable flow from 44,165 acre-feet of storage will be released to address juvenile and adult fish migrations through the mainstem and lower rivers. Finally, channel formation and sediment transport flows, in addition to those provided based on storage, will be released as seasonal conditions dictate.

Additional channel formation and sediment transport flows will be subject to adaptive management over the term of the license. For instance, beginning in year five of the license and every five years thereafter, the Fisheries and Habitat Committee will evaluate the effectiveness of the flows and recommend any necessary modifications to the flow trigger, timing, and duration. If the Committee determines that these flows are not effective at improving mainstem sediment transport, it may request that the licensee cease these flows and develop and implement a Flood Damage Reduction and Mitigation Plan (Flood Mitigation Plan).

THE FLOOD MITIGATION PLAN WOULD:

- (1) outline the rationale for ending the channel forming and sediment transport flows;
- (2) identify an initial list of projects that the Licensee would implement;
- (3) include provisions for establishing a Flood Damage reduction and Mitigation Fund; and
- (4) include provisions for resuming the flows, if determined appropriate.

Projects implemented in areas that are both outside the river sub-basin, and outside the then-existing project boundary, will be onetime actions that would not result in the expansion of the project boundary.

The variable approach to flow management is more closely tied to resource needs, and will ensure a greater level of protection to the resources than would be afforded by a single minimum flow. Such an approach will allow resource managers and the Tribe to assess the flow needs for fish each year and adjust accordingly. License conditions can address the possibility that the parties may not reach agreement on flow changes by establishing a default flow regime. Finally, the long-term effects of the channel-forming and sediment-transport flows are expected to improve channel conveyance capacity, thus reducing the potential for flooding over time.

Requiring a Water Quality Enhancement Plan

A licensee can be required to develop and implement a Water Quality Enhancement Plan.

WATER QUALITY ENHANCEMENT PLANS CAN INCLUDE PROVISIONS FOR:

- (1) installing emergency intake shutoff valves on all penstock intakes;
- (2) improving and maintaining access roads to protect water quality; and
- (3) monitoring dissolved gases at all powerhouse outfalls and spillways, including mechanisms, data recording methods, a schedule, and reasonable enhancement measures if needed to maintain state water quality standards.

The license conditions can require that the plan be developed in consultation with numerous federal and state agencies as well as the affected tribe.

Tribes, Hydropower, & Instream Flows

Flow Release Monitoring

Effective Relicensing Tools

Ramping Rate Conditions

A license can require the Licensee to develop a plan to implement and maintain ramping rates for flow releases from the project designed to protect tribal interests. A licensee may be required to monitor channel morphology and substrate composition in the river to document the effects of a flow regime prescribed license conditions.

RAMPING RATE FLOW RELEASE MONITORING CAN DETERMINE:

- (1) the magnitude of flows that initiate transport of spawning-sized gravel in the river;
- (2) the extent to which high flow releases result in changes in substrate composition and changes in channel cross sections in the river; and
- (3) the extent to which high flow releases result in changes in channel cross sections and channel aggradation in the river.

CONCLUSION

These real life examples illustrate how a tribe affected by a hydropower facility can have a major impact on hydropower licensing during the relicensing process. Conditions that accompany the license are obviously critical to lessen the affects on tribes and establish management provisions going forward that address important aspects of habitat and instream flows.

FOR ADDITIONAL INFORMATION:

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Mason Morisset will be speaking on "Tribal Participation in Hydropower Projects" at the **Tribal Water Law Conference** being held **October 27 & 28** in **Las Vegas**.



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