

REMOVING THE IMPASSE: ALTERNATIVE AVENUES TO ASSERTING TRIBAL INTERESTS IN FISH PASSAGE

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The Similkameen Indians tell the legend of Coyote, who lived on the upper Similkameen River:

One day, after deciding he would like to take a wife, [Coyote] left his territory, carrying his home on his back, and traveled down the Similkameen River. Wherever he saw an Indian family with daughters, he would stop and set up his home on the opposite side of the river, make himself presentable and then cross over the river and ask the father for the hand of one his daughters. He offered salmon in exchange for the daughter's hand in marriage, but was rejected by the families and the daughters, as they preferred venison or elk instead of salmon for their food supply. Finally, upon reaching the junction with the Okanogan, Coyote found an Indian family who agreed to accept the salmon, and he settled there with his new wife. However, because he was so harshly rejected by the Similkameen Indians, he went back up the Similkameen and proceeded to build a very high falls, making it impossible for salmon to make their run up the Similkameen (LeMay 1979).²

In 1920, the Okanogan County Power Authority completed the Enloe Dam at the site of Coyote Falls, so named for the Similkameen legend. The dam pro-

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² Craig Holstein and John Eminger, *Historic American Engineering Record: Enloe Dam*, prepared for Okanogan County PUD Draft License Application, Exhibit E.4.1. (1990) (citing, Dixie LeMay, *The Similkameen Rock Wall*, Unpublished ms., (1979)).

vided power to the area's mining community for over four decades.³ Now that the dam's owner is in the process of relicensing the site for hydropower production, local tribes and bands are using the consultation opportunities the process provides to assert their tribal rights, and are finding this method far more promising than traditional court battles.

There is no shortage of examples demonstrating the erosion of Indian tribal rights throughout the history of what is the present-day United States. From land-taking during the Age of Discovery, through the establishment of the Doctrines of Discovery and Conquest in *Johnson v. McIntosh*,⁴ to the recent U.S. Supreme Court decisions in *United States v. Navajo Nation*,⁵ Indian tribal interests, and the ability of tribes to assert those interests with any tangible results, have become less and less viable. Courts have occasionally provided limited relief, as they did in the recent *Culverts*⁶ decisions, which fell under the *U.S. v. Washington*⁷ line of cases in the Western District of Washington. However, in most cases, if the tribes wish to ensure that the federal government and its agencies fulfill their fiduciary duties under the government's trust relationship with Indian tribes, the courts are no longer the best option.

Faced with this reality, tribes have had to find dynamic and inventive ways to assert their interests on the federal, state, and local levels. Tribes have begun to take advantage of their consultation rights during the Federal Energy Regulatory Commission (FERC) relicensing process, which are granted both statutorily and by Executive Order, to advocate for their treaty-provided rights. Although tribes have historically had limited success asserting their rights through consultations with non-Indian governmental entities, the Obama administration has demonstrated an invigorated approach to protecting Indian tribal rights through increased government-to-government consultation. This has been a welcome policy change in Indian Country, and with more Indians represented in the executive branch than ever before, the Obama administration has set a hopeful tone for consultation as a meaningful means for tribes to assert their rights.

³ Okanogan County, *Enloe Dam Hydroelectric Project, Factsheet #1: Background, History and Existing Conditions*, available at <http://www.okanoganpud.org/enloe/factsht1.pdf> (last visited November 13, 2009).

⁴ *Johnson v. McIntosh*, 21 U.S. 543, 5 L.ED. 681, 8 WHEAT. 543 (1823).

⁵ *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009).

⁶ *United States v. State of Washington*, 2007 WL 2437166 (W.D. Wash. 2007).

⁷ *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

The process of hydroelectric dam relicensing has emerged as an important vehicle by which tribes, through consultation, can assert their rights. This paper describes the relicensing process through the lens of the Enloe Hydroelectric Project relicensing and explores new means by which tribes in the Pacific Northwest, through consultation with federal agencies, have successfully enforced fishing rights and other environmental protections in the Columbia River basin.

Part I covers the statutory framework underlying the process of FERC relicensing and introduces the opportunity for tribal consultations in the relicensing process. Part II breaks down the FERC relicensing process into the applicable components and procedures. Part III discusses the history of the Enloe Dam, while Part IV follows the Enloe Hydroelectric Project relicensing process. Part V highlights the fish passage controversy at Enloe Dam, focusing on the tribes' positions and the outcomes of the Enloe project. Finally, Part VI discusses how consultation during administrative processes such as dam relicensing gives tribes a new and promising forum in which to advance their sovereignty, rights, and policies.

I. STATUTORY PROVISIONS

The following section addresses the statutory provisions relevant to non-federal hydropower dam relicensing and then introduces the tribal consultation requirements of the process.

A. The Federal Power Act

The Federal Power Act (FPA) governs FERC's licensing and relicensing of non-federal hydropower dams.⁸ Today, the FPA requires that FERC give equal consideration to fish and wildlife protection as is given to the economies of power production, and in some cases the FPA requires that FERC accept other resource agencies' license conditions as mandatory.⁹

Beginning in 1920, the FPA contained some authorization for federal agencies responsible for the protection of fish and federal reservations to include

⁸ 16 U.S.C. §§ 791(a)-825 (2006); see *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946) (FERC has paramount, preemptive authority in licensing of non-federal hydro-power dams and projects).

⁹ 16 U.S.C. §§ 797(e), 803(j)(1).

license conditions to protect those resources.¹⁰ However, during the six decades after 1920, both the hydropower licensing agency and the statute it administered focused almost exclusively on the generation of hydroelectric power, to the exclusion of environmental protection.¹¹

Congress amended the FPA in the 1986 Electric Consumer Protection Act¹² to require that FERC include license conditions to “protect, mitigate damages to, and enhance, fish and wildlife” affected by a hydropower project. This amendment was prompted by recommendations from the National Marine Fisheries Service (the Fisheries Service), the U.S. Fish and Wildlife Service (FWS), and state fish and wildlife agencies.¹³ However, the 1986 amendments left FERC with the discretion to reject such recommendations if it determined that the recommendations were inconsistent with other FPA provisions.¹⁴

Today, the FPA also gives certain governmental entities, such as federal and state resource management agencies and tribes, the authority to be heard and affect the relicensing process. It grants to these entities both mandatory authority, meaning the authority to make recommendations that FERC must follow, and non-mandatory authority, meaning the authority to make recommendations that FERC can either reject or accept when it makes its final determinations.¹⁵

The FPA grants mandatory authority in sections 4, 10, and 18. Subsection 4(e) provides the Secretaries of the Interior and Agriculture with the authority to issue conditions on a license for the adequate protection and utilization of federal reservations (such as an Indian reservation or a national forest) within

¹⁰ 16 U.S.C. § 803(a)(1); Adell Louise Amos, Symposium: At the Crossroads: In Search of Sustainable Solutions in the Klamath Basin, *Hydropower Reform and the Impact of the Energy Policy Act of 2005 on the Klamath Basin: Renewed Optimism or Same Old Song?* 22 J. ENVTL. L. & LITIG. 1, 8 (2007).

¹¹ Nancy K. Kubasek & Chaz A. Giles, *Dammed to Be Divided: Resolving the Controversy over the Destruction of the Snake River Dams and Providing a Model for Future Decision-Making*, 25 Wm. & Mary Envtl. L. & Pol’y Rev. 675, 682-83 (2001).

¹² Electric Consumer Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (codified in scattered sections of 16 U.S.C. §§ 792-828(c) (2000)).

¹³ 16 U.S.C. § 803(j)(1) (2000).

¹⁴ *Id.* at (j)(2).

¹⁵ (citing 16 U.S.C. §§ 791a-823d, generally, and §§ 797(e), 803(a)(1), 803(j), 811 (2000)).

their jurisdiction.¹⁶ Subsection 10(j) provides that the Fisheries Service, the FWS, and state fish and wildlife agencies “may make recommendations to FERC on conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project.”¹⁷ These recommendations are mandatory unless FERC determines that they are inconsistent with the requirements and intent of the FPA.¹⁸ Finally, section 18 provides that the Secretaries may propose mandatory prescriptions on a license for fish passage.¹⁹

The non-mandatory authority is contained in section 10 of the FPA. Subsection 10(a)(1) requires FERC to determine that a hydroelectric project is “best adapted” to a comprehensive plan, and subsection 10(a)(2) states that when making its comprehensive plan, FERC must consider the recommendations of Indian tribes.²⁰ In addition, the comprehensive plan should serve the public interests in a river basin, improve waterways and power development, and provide adequate protection, mitigation and enhancement of fish and wildlife.²¹

Several judicial opinions have construed the FPA to eliminate FERC's discretion to reject some environmental recommendations by resource management agencies. In 1984, the U.S. Supreme Court held that FPA subsection 4(e) authorizes the agency responsible for managing a federal reservation to impose license conditions on FERC hydropower projects that the land management agency deems “necessary for the adequate protection and utilization of such

¹⁶ 16 U.S.C. § 797(e); *see also* *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding that FERC must include the 4(e) conditions in any license it issues, and that once FERC issues the license, the applicant or other parties can seek judicial review, including review of the Department's mandatory conditions); Amos, *supra* note 10 at 6. The Department of Agriculture houses the National Forest Service, which has authority over all national forest lands; the Department of the Interior houses a number of agencies that meet the definition of “reservation” under 4(e), including the Bureau of Indian Affairs for Indian reservations, the Bureau of Reclamation for lands associated with reclamation projects, the BLM for reservations of public lands, the FWS for lands in the National Wildlife Refuge System, and the National Park Service for National Parks reserves. *See* Amos, *supra* note 10, at 5-6.

¹⁷ Amos, *supra* note 10, at 7.

¹⁸ *Id.*

¹⁹ *Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000) (holding that FERC cannot modify, reject, or reclassify any section 18 fishway prescription submitted by the Secretaries of Interior or Commerce); Amos, 22 J. Env'tl. L. & Litig. 1, at 5-6.

²⁰ *See* 16 U.S.C. § 803(a)(1).

²¹ *Id.* at § 803(a)(2).

reservations,”²² even where FERC disagreed with the agency's conditions.²³ In addition, FPA section 18 states that FERC “shall require the construction, maintenance, and operation by a licensee at its own expense of such . . . fishways”²⁴ as may be prescribed by the Fisheries Service and the Fish and Wildlife Service.²⁵ Finally, in 2000, the Ninth Circuit held that FERC lacks discretion to modify or reject resource agency fishway prescriptions under section 18.²⁶

B. The Energy Policy Act of 2005

In the Energy Policy Act of 2005, Congress made several amendments to FPA sections 4, 10 and 18.²⁷ One amendment particularly beneficial to Indian tribes was to subsection 10(a); this amendment required FERC to consider an Indian tribe's recommendations if the tribe is affected by a hydropower project. The legislative history of the bill in the House of Representatives specifically states that subsection 10(a)(2)(B), which requires the consultation, “was added in recognition that Indian tribes often have a high degree of concern and unique interests in hydroelectric licensing proceedings and can make important contributions.”²⁸

Although some of the Energy Policy Act amendments benefitted tribes, the truth is that Congress enacted the 2005 amendments due in large part to the efforts of energy and utilities lobbies, who wanted to erect additional hurdles for federal management agencies, conservationist groups, tribal governments and others who may want to impose prescriptions and conditions to FERC relicensing. The lobbies were primarily targeting the mandatory impositions by

²² *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding that FERC must include the 4(e) conditions in any license it issues, and that once FERC issues the license, the applicant or other parties can seek judicial review, including review of the Department's mandatory conditions).

²³ *Id.*

²⁴ *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 1701(b), 106 Stat. 3008 (1992). Congress has clarified that a “fishway” consists of “physical structures, facilities, or devices necessary to maintain all life stages” of fish which allow “the safe and timely upstream and downstream passage of fish” past a hydroelectric dam. Congress further decreed that the Secretaries of Commerce and the Interior would have to concur in order for any future FERC regulatory definition of the term “fishway” to be valid; *Id.*

²⁵ 16 U.S.C. § 811 (2006).

²⁶ *Am. Rivers*, 201 F.3d at 1210. A final decision of note is the 1994 decision in *Wisconsin Public Service v. FERC*, 32 F.3d 1165 (7th Cir. 1994). In that case, the Seventh Circuit held that the Fisheries Service and FWS had the authority to re-open a license to add a fishway prescription. However, neither agency has yet to test this power.

²⁷ Energy Policy Act of 2005, Pub. L. No. 109-58, § 241, 119 Stat. 594, 674-77; *see also* *Escondido*, 466 U.S. at 772; *Am. Rivers*, 201 F.3d at 1191, 1210-11.

²⁸ H.R. REP. NO. 99-934, at 22 (1986) *reprinted in* 1986 U.S.C.C.A.N. 2536, 2539.

resources agencies under FPA sections 4(e) and 18.²⁹ In the final reconciled bill leading to the Energy Policy Act, section 241 reads: “the FPA authorizes the applicant or any party to the licensing proceeding to propose an alternative to any condition or fishway prescription that the federal resource management agencies have imposed on the license under sections 4(e) and 18.”³⁰ Thus, section 241 provides any party to the licensing process, including the applicant, an expedited agency hearing when it disputes a material issue of fact on which an agency based its conclusions and additionally allows the party to propose their own alternative conditions or prescriptions.³¹

The Energy Policy Act requires that an agency proposing a condition or prescription concede to a proposed alternative when the alternative, for section 4(e) conditions, “provides for the adequate protection and utilization of the reservation”; or, for section 18 prescriptions, is “no less protective than the fishway initially prescribed . . . and the alternative . . . will cost significantly less to implement [or] result in improved . . . electricity production.”³² As a final failsafe, however, the agencies responsible for the original conditions or prescriptions must then determine whether a proposed alternative sufficiently meets the statutory standards of the FPA.³³ An agency may decide *not* to accept

²⁹ David H. Becker, *The Challenges of Dam Removal: the History and Lessons of the Condit Dam and Potential Threats from the 2005 Federal Power Act Amendments*, 36 *Env'tl. L.* 811, 820, (2006). According to Becker, the National Hydropower Association began lobbying for these changes in the mid 1990s. (See *Comprehensive Energy Legislation Clears Congress*, Foster Elec. Report, Aug. 3, 2005, at 1, available at 2005 WLNR 12719277.); See also, *id.* at fn. 258 (detailing the proposed Hydroelectric Licensing Process Improvement Act of 2000 that would have limited agencies to “direct” projects at the lowest possible cost; the failed Energy Policy Act of 2003 that was extinguished by a Senate filibuster) (referencing Edison Elec. Inst., Summary of Hydroelectric-Related Provisions, Title II - Renewable Energy, H.R. 6-Energy Policy Act of 2003, Conference Report, November 18, 2003; Energy Policy Act in House of Representatives Looks for Partnership in Senate, Foster Nat. Gas Report, June 24, 2004, at 8, available at 2004 WLNR 16744910 (describing November 2003 filibuster of Act)).

³⁰ Becker, *supra* note 29 at 851.

³¹ Congress also added an additional sub-proceeding by amending section 33 of the FPA so that an applicant or any party to the process could propose alternate conditions and prescriptions. 16 U.S.C. §§ 811, 823d. In this instance, it is the Secretary of Interior or Agriculture who must make the decision; the process and standards mirror those found in section 241.

³² Becker, *supra* note 29, at 851 (citing Energy Policy Act of 2005 § 241(c)).

³³ *Id.*

an alternative³⁴ as long as the decision is documented in writing and shows that the agency has given “equal consideration” to the effect of the original and proposed alternative condition or prescription. The agency’s decision must be based on “energy supply, distribution, and use; flood control; navigation; water supply; and air quality.”³⁵

The Energy Policy Act also amended FPA section 33, which now allows a license applicant or other party to join the proceeding and propose alternative conditions to the ones set forth by federal agencies.³⁶

Together, the FPA amendments add additional administrative steps to the licensing process. However, the amendments also empower the appropriate Secretary to approve or reject any proposed conditions or prescriptions based on both whether the alternative condition provides for adequate reservation protection and utilization and whether it provides for the same cost-effectiveness of the original condition.³⁷ The Energy Policy Act also allows for a dispute resolution process if the Secretary decides not to adopt a proposed condition, which provides a trial-like hearing.³⁸

Given the Energy Policy Act’s amendments and the resultant increased costs and burdens on those involved in FERC licensing, the consultation privilege that the FPA gives to resource management agencies, tribes and others may be called into question,³⁹ but there is as yet little evidence to show that the amendments hamper consultation’s effectiveness in protecting fish and wildlife habitat.

³⁴ Even after the agency has determined to accept or decline alternatives, the 2005 Amendments empower FERC to influence mandatory conditions and prescriptions. If FERC determines that the agency’s final decision on conditions or prescriptions “would be inconsistent with the purposes of this part, or other applicable law,” FERC may refer the dispute to its Dispute Resolution Service (DRS). The FERC DRS must issue its findings in a non-binding advisory within ninety days. Energy Policy Act of 2005 § 241(c). The agency then has the option to accept the non-binding advisory, unless it finds that the recommendation will not adequately protect the reservation (for section 4(e) conditions) or “fish resources” (for section 18 prescriptions). *Id.* at 851-852.

³⁵ *Id.* at 851.

³⁶ 16 U.S.C. §§ 811, 823d(b); *See* Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69804 (November 17, 2005) (to be codified at 7 C.F.R. pt. 1, 43 C.F.R. pt. 45, 50 C.F.R. pt. 221).

³⁷ *Id.* at § 823(a)(2).

³⁸ Amos, *supra* note 10, at 12. Prof. Amos notes that, “In the Klamath Project proceedings, parties utilized both the hearings and the administrative processes are now complete. Although both the hearings and alternative process were invoked, the mandatory condition agency dispute-resolution process has not been invoked. As a result, the Klamath Project relicensing provided the community with an opportunity to evaluate the implications of the new [Energy Policy Act] provisions.”

³⁹ *Id.* at 13.

C. *The National Environmental Policy Act*

The National Environmental Policy Act (NEPA) requires that federal agencies comply with its section 102⁴⁰ requirements when a proposed major action could significantly affect the environment. The President's Council on Environmental Quality requires the lead agency to prepare a detailed written statement addressing NEPA concerns.⁴¹ Because of the minimal amount of construction and generally known environmental impacts in the case of dam relicensing, this is usually an Environmental Assessment (EA), rather than the more robust Environmental Impact Statement (EIS).⁴² The EA is a concise public document,⁴³ which describes both environmental impacts, including any adverse environmental impacts, and alternatives to the proposed action.⁴⁴ The EA in dam relicensing is an accumulation of all the previous studies and information requests made during the comment periods, and the EA addresses issues identified during the scoping phases of the relicensing process.⁴⁵

D. *The Endangered Species Act*

Section 7. Section 7 of the Endangered Species Act (ESA)⁴⁶ prohibits federal actions that “jeopardize the continued existence of listed species or that destroy or adversely modify critical habitat.”⁴⁷

Before approving a relicensing, FERC must obtain biological opinions from both the FWS and the Fisheries Service on the present and future effects of the dam on threatened and endangered species.⁴⁸ These agencies must identify reasonable and prudent measures to minimize harm to, and takings of, listed species.⁴⁹ For all intents and purposes, these measures become mandatory conditions for the permitted action.⁵⁰

Section 9. The ESA further prohibits “any person” from taking “any endangered [or threatened] species,” except as provided for elsewhere under the

⁴⁰ 42 U.S.C. § 4332(C) (2006).

⁴¹ 18 C.F.R. § 380 (2006).

⁴² 40 C.F.R. pt. 1501.1 (2006).

⁴³ *Id.* at 1508.9.

⁴⁴ 42 U.S.C. § 4332(C) (2006).

⁴⁵ *Economic Analysis for Hydropower Project Relicensing: Guidance and Alternative Method*, <http://www.fws.gov/policy/hydrochap7.pdf> (last visited April 10, 2010).

⁴⁶ 7 U.S.C. § 136, 16 U.S.C. § 1531 (1973).

⁴⁷ Becker, *supra* note 29, at 838.; See Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006).

⁴⁸ 16 U.S.C. § 1536(a)(2)-(3) (2006). The FWS has jurisdiction over wildlife and inland fish, while NOAA Fisheries has jurisdiction over anadromous fish. See Becker, *supra* note 29, at 834.

⁴⁹ 16 U.S.C. § 1536(b)(3)(A) (2006).

⁵⁰ See *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (noting that a BiOp has a “virtually determinative effect” in limiting another agency's discretion); See Becker, *supra* note 29, at fn. 150.

Act.⁵¹ Section 10 provides exceptions to the taking prohibitions such as with an Incidental Taking Permit that EPA may issue to a licensee to protect them from penalties for minimal, incidental takings.⁵²

E. The Clean Water Act

State 401 Certification. Because water from hydroelectric dams constitutes a “discharge” under the federal Clean Water Act (CWA),⁵³ license applicants must obtain state certifications that their operations will comply with state water quality standards under section CWA 401.⁵⁴ For example, because the Enloe Hydroelectric Project would be situated in Washington State, the Washington Department of Ecology (WDE) is responsible for completing several reviews prior to FERC’s licensing decision.⁵⁵ To obtain a license renewal, Okanogan County Public Utilities Department (Okanogan PUD) must obtain Ecology’s state section 401 certification that the water flow and quality will comply with the applicable provisions.⁵⁶

Courts have announced three major rules that define the role of the CWA in FERC relicensing: (1) they recognize that states have the authority to enforce their water quality standards by requiring certification under section 401 of the CWA;⁵⁷ (2) they recognize that FERC has no discretion to reject state section 401 conditions;⁵⁸ and finally, (3) they recognize that FERC may insert its own water-quality standards into a license, so long as those requirements are no less stringent than those in the state section 401 certification.⁵⁹

F. The National Historic Preservation Act

Section 106 of the National Historic Preservation Act of 1966⁶⁰ (NHPA) requires that federal agencies consider the effect of any proposed undertakings

⁵¹ 16 U.S.C. § 1536 (2006).

⁵² *Id.*

⁵³ 33 U.S.C. § 1341 (2006).

⁵⁴ *S.D. Warren Co. v. Maine Bd. Of Env’tl. Prot.*, 547 U.S. 370, 380; *See also* Daniel Pollak, *S.D. Warren and the Erosion of Federal Preeminence in Hydropower Regulation*, 34 *ECOLOGY L.Q.* 763 (2007).

⁵⁵ *See* Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1217 (9th Cir. 2008) (While state water standards provide minimum requirements under section 401, FERC is allowed to require even more stringent rules in its final license or license renewal).

⁵⁶ 33 U.S.C. § 1341(a)(1) (2006).

⁵⁷ *Pub. Util. Dist. No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 722-23 (1994) (part of the FERC licensing process may include state water quality standards).

⁵⁸ *Am. Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) (FERC lacks authority to reject state-imposed conditions pursuant to CWA section 401 state water quality certification).

⁵⁹ *Snoqualmie Indian Tribe*, 545 F.3d at 1210.

⁶⁰ 16 U.S.C. § 470a-470w-6 (2006).

on properties listed or eligible for listing in the National Register of Historic Places, which is administered by the National Park Service.⁶¹ If a proposed project will have an adverse effect on significant cultural resources listed or eligible for listing in the Register, the state or tribal Historic Preservation Officer may recommend development of a memorandum of agreement or programmatic agreement.⁶² These documents identify specific measures to mitigate the adverse effects of the project on Register-eligible resources as well as procedures to provide ongoing consultation and appropriate management of cultural resources at the project site.⁶³

G. Consultation Requirements

FERC relicensing, through the tribal consultation requirements provided by the FPA, provides a valuable opportunity for tribes to assert their various rights as well as their sovereign status. Through consultations during the relicensing process, tribes can impose protective provisions to guide federal decisions and mitigate the environmental impacts of dams. The consultation process begins soon after the Notice of Intent is filed, when a division of FERC meets with affected and interested tribes in private meetings. This procedure's foundation is in FERC's 2003 Policy Statement on consultation with Indian tribes.⁶⁴

The U.S. government has at times demonstrated a commitment to tribal consultation, and in 2000 President Bill Clinton became only the second U.S. President to invite leaders of every tribe to the White House.⁶⁵ Subsequently, on November 6, 2000, President Clinton issued Executive Order 13175, *Consultation and Coordination with Tribal Governments*,⁶⁶ which,

“[reaffirmed] our commitment to tribal sovereignty, self-determination, and self-government [building] on prior actions and [strengthening] our government-to-government relationship with Indian tribes. It will ensure that all Executive departments and agencies consult with Indian tribes and re-

⁶¹ *Id.*

⁶² See Washington Department of Archaeology and Historic Preservation at <http://www.dahp.wa.gov> (last visited March 7, 2010).

⁶³ *Id.*

⁶⁴ FERC, *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, 68 Fed. Reg. 46,452; 18 C.F.R. § 5.7.

⁶⁵ William J. Clinton, *Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments*, Weekly Compilation of Presidential Documents 2806 (November 6, 2000).

⁶⁶ Exec. Order No. 13175, 65 Fed. Reg. 67,249 (November 9, 2000).

spect tribal sovereignty as they develop policy on issues that impact Indian communities.”⁶⁷

E.O. 13175 requires that the federal government and its agencies consult with tribal officials when developing federal policies that have tribal implications in order to strengthen government-to-government relationships and reduce the imposition of unfunded mandates upon the tribes.⁶⁸ “Policies” in this context are policies pertaining to regulations, legislative comments, or proposed legislative and other policy statements.⁶⁹ E.O. 13175 requires that all federal government agencies respect tribal honor treaties as well as the tribes’ rights to self-government and sovereignty. In addition, agencies must act as to meet the responsibilities of the government’s trust relationship with tribes.⁷⁰ Finally, federal agencies must each develop an accountability process, one which will ensure that tribes have input in decisions and that those decisions will not impose compliance costs. This accountability process must include collaborative means of developing regulations (including negotiated rulemaking).⁷¹

On November 5, 2009, almost exactly nine years after President Clinton issued E.O. 13175, President Barack Obama issued the Memorandum for the Heads of Executive Departments and Agencies at the White House Tribal Nations Conference in Washington, D.C. In that memorandum, President Obama pledged to continue and enhance the government-to-government consultations between tribes and the U.S. Government, thereby reaffirming E.O. 13175.⁷²

Although participating in the hydropower relicensing process can be both time and resource-intensive, it allows tribes to protect their land rights, fish and water rights, as well as their interest in sacred sites and other culturally significant areas.

II. INTRODUCTION TO FERC RELICENSING

The FPA charges FERC⁷³ with the task of hydroelectric dam relicensing for non-federal dams. Understanding the FERC relicensing process is particularly

⁶⁷ Clinton, *supra* note 65.

⁶⁸ Exec. Order No. 13175, 65 Fed. Reg. at 67,249.

⁶⁹ *Id.*

⁷⁰ *Id.* at 67,250.

⁷¹ *Id.* at 67,259.

⁷² Memorandum for Heads of Executive Departments and Agencies Relating to Consultation with Tribes, 74 Fed. Reg. 57879, 57881 (November 5, 2009).

⁷³ Formerly the Federal Power Commission.

important today considering that over 1,000 dams and other hydropower projects will be up for relicensing in the next 40 years.⁷⁴

To shorten and streamline the lengthy license renewal process, FERC developed and implemented the Integrated Licensing Process (ILP).⁷⁵ The ILP is a multi-year process that involves more than twenty distinct steps and associated deadlines.⁷⁶ Although the ILP is the default process and the one discussed in this paper, licensees may petition FERC to use the Traditional or Alternative Licensing Processes.⁷⁷ For example, the Okanogan PUD, the license applicant for the Enloe Hydroelectric Project discussed later in this paper, chose to opt out of the ILP. However, while the processes may be different, each contains opportunities for tribal consultation.

The ILP is the shortest of the licensing processes, and it both requires less agency resources and promotes inter-organizational collaboration. However, all of the licensing processes are generally lengthy, and relicensing often takes at least five years given the timelines for each stage.⁷⁸ There are two main phases of this lengthy relicensing process: the pre-filing phase, and the post-filing stage.

Phase I: Pre-Filing Phase.

An applicant begins the relicensing process by filing an initial proposal and informational document called the Pre-Application Document.⁷⁹ This opens the first notice and comment period, during which FERC seeks input from the public, federal, state and local departments and resource agencies, non-governmental organizations, and Indian tribes.⁸⁰ The purpose of this initial round of communication is to “(1) identify environmental issues regarding a

⁷⁴ FERC, COMPLETE LIST OF ISSUED LICENSES,

<http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls> (last visited April 10, 2010).

⁷⁵ FERC, HYDROELECTRIC LICENSING UNDER THE FEDERAL POWER ACT, 104 FERC 61,109 (July 23, 2003). FERC retained its other two processes, the traditional licensing process and the alternative licensing process, but the ILP is now the default process. 18 C.F.R. §§ 5.1(f), 5.3 (a)-(b)(2006).

⁷⁶ 18 C.F.R. §§ 5.1-5.26 (2006); Amos, *supra* note 10.

⁷⁷ Preliminary licenses filed after July 23, 2005 use the ILP process by default, unless the licensee requests the use of either the TLP or ALP. Okanogan PUD filed January 25, 2005, and has requested to use the Traditional Licensing Process for the Enloe Dam. See Okanogan Country Fact-sheet #1.

⁷⁸ Amos, *supra* note 10, at 8 (Professor Adell Amos notes that, “even at five years, the ILP represents a significant stride toward more efficient resolution of the process. The ILP was designed to streamline the licensing process by allowing the pre-filing consultation process and the scoping process under the National Environmental Policy Act (NEPA) to occur simultaneously rather than sequentially”).

⁷⁹ FERC, HYDROPOWER LICENSING – GET INVOLVED: A GUIDE FOR THE PUBLIC, Office of Energy Projects, at 6 (2009), available at <http://www.ferc.gov/for-citizens/citizen-guides/hydro-guide.pdf>.

⁸⁰ *Id.*; See 18 C.F.R. § 5.7 (2006).

proposed or existing project and (2) determine what studies are needed in order to better understand these issues.⁸¹ The Pre-Application Document sets forth an overview of all existing information related to the project, including known environmental impacts.⁸² The pre-application stage also includes scoping under NEPA and the development of a study plan to address issues that are necessary for any condition in the licensing decision.⁸³ This stage concludes with the development and filing of the Final License Application, which the applicant must file with FERC at least two years before the existing license expires.⁸⁴

Phase II: Post-Filing Phase.

The post-filing process involves the drafting and submission of the NEPA compliance document, mandatory and non-mandatory conditions and prescriptions. It also includes the ESA section 7 consultation, the CWA section 401 state water-quality certification, and compliance with the NHPA.⁸⁵

After the licensee, resource management agencies, and certified parties have submitted all documents and settlement agreements, there is a final comment period where FERC once again seeks input from federal, state and local departments and resource agencies, the public, non-governmental organizations, and Indian tribes.⁸⁶ The process ultimately concludes when FERC issues a new licensing order to the applicant.⁸⁷ Once issued, the licensing decision, including any mandatory or non-mandatory conditions and prescriptions, is subject to rehearing before FERC and subsequent judicial review.⁸⁸ While the post-filing phase may seem brief from this description, disagreements and protests at the various stages often significantly lengthen the process.

Settlement Agreements.

The relicensing process promotes a collaborative approach, the goal of which is to create a settlement agreement between the licensee and one or more

⁸¹ FERC, *supra* note 79.

⁸² *Id.*; See 18 C.F.R. § 5.7 (2006).

⁸³ 18 § 5.9; 40 C.F.R. § 1501.7 (2006).

⁸⁴ 18 C.F.R. §§ 5.17-5.18 (2006).

⁸⁵ See 18 C.F.R. §§ 5.24-5.25 (NEPA compliance); 18 C.F.R. §§ 5.23-5.24 (mandatory terms and conditions); 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14 (ESA consultation); 18 C.F.R. § 5.23(b) (water-quality certification); 16 U.S.C. § 1456 (2006) (Coastal Zone Management Act compliance); 16 U.S.C. §§ 470-470x-6 (National Historic Preservation Act compliance).

⁸⁶ FERC, *Hydropower Licensing – Get Involved: A Guide for the Public*, Office of Energy Projects, (2009), available at <http://www.ferc.gov/for-citizens/citizen-guides/hydro-guide.pdf>.

⁸⁷ 18 C.F.R. § 5.26(e) (2006).

⁸⁸ 16 U.S.C. § 825/(b) (2006). The District of Columbia Court of Appeals has sole jurisdiction in FERC licensing appeals.

parties or stakeholders. A settlement agreement is a written agreement regarding the operation of the project that outlines what environmental mitigation measures will be put into place in the final license.⁸⁹ These agreements may be comprehensive or simply an agreement on one or more issues. If the provisions in a settlement agreement are consistent with FERC policies, they will be included in the license.⁹⁰

III. THE ENLOE DAM

This section gives an introduction and brief history of the Enloe Dam and its surrounding area in order to give context and perspective to the process itself, which is discussed in Part IV.

Pre-Dam History.

According to the 1990 Draft License Application Exhibit E.4.1, Coyote Falls were also called Squantl or the “Rock Wall” by the Similkameen Bands.⁹¹ This name was first recorded by Smith and Calkins in their U.S. Geological Survey Report entitled “A Geological Reconnaissance Across the Cascade Range”.⁹² As the falls was approximately thirty-three feet high and fairly perpendicular, it is believed that the falls created a natural barrier beyond which migratory fish such as chinook and steelhead appear to have never migrated.⁹³ Tribal member Susan Cohen stated in an interview that “there have never been any salmon in the Similkameen north of the Rock Wall.”⁹⁴ Cohen went on to explain that local tribes would fish for salmon at the base of the falls but never upriver from that point.⁹⁵

Early Hydroelectric Development.

The Similkameen Power Company was established in 1902, and in 1903 the Company secured the water and land rights on the Similkameen River at Coyote Falls, which is approximately three and a half miles above Oroville.⁹⁶ Over the next three years, the Company constructed a power plant that supplied

⁸⁹ FERC, *supra* note 79 at 15-16.

⁹⁰ See FERC, POLICY STATEMENT ON HYDROPOWER LICENSING SETTLEMENTS available at <http://www.ferc.gov/whats-new/comm-meet/092106/H-1.pdf>.

⁹¹ Craig Holstine and John Eminger, *Historic American Engineering Record: Enloe Dam*, prepared for Okanogan County PUD Draft License Application, Exhibit E.4.1. at 5 (1990).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (citing Dixie LeMay, *The Similkameen Rock Wall*, Unpublished ms., (1979)).

⁹⁵ *Id.*

⁹⁶ *Id.*

power and light to the towns of Oroville and Nighthawk and additionally a 100 horsepower pump for the local irrigation project. The Company also had power contracts with the Owasco and Ivanhoe mines.⁹⁷

Enloe Era.

Eugene Enloe incorporated the Okanogan Valley Power Company in June 1913.⁹⁸ The Enloe Dam was completed in 1920 and served the mining communities of the surrounding area.⁹⁹ Washington Water Power purchased the property in 1923 and operated the facilities until 1945, at which point the Okanogan PUD acquired the facilities for hydroelectric power generation.¹⁰⁰ The Okanogan PUD ceased the dams hydroelectric production in 1959,¹⁰¹ when the Bonneville Power Administration installed a high-voltage transmission line that provided for the Okanogan Valley's power needs.¹⁰² Today, the dam remains nonproductive.

Enloe Hydroelectric Project.

The Enloe Hydroelectric Project would involve the development of a small hydropower plant on the Similkameen River just below the existing Enloe Dam and would also include the preservation of historic facilities.¹⁰³ The Okanogan PUD estimates that the Enloe Hydroelectric Project could generate up to half of the power in the Oroville area with an average production of five megawatts and the capacity to produce up to nine megawatts.¹⁰⁴

The Okanogan PUD believes that the proposed Enloe Hydroelectric Project is the most cost effective and environmentally sound option for the renewed power production of the dam site. The project would leave the current Enloe Dam structure but develop a new approach channel, penstock, powerhouse, and tailrace on the east bank of the Similkameen River near the dam. The Okanogan PUD would also install a fish screen at the intake.¹⁰⁵ This proposal would optimize the hydraulic and generating capacity while still providing environmental benefits.¹⁰⁶ Specifically, placing the powerhouse upstream

⁹⁷ Holstein and Eminger, *supra* note 2, at 5.

⁹⁸ Okanogan Count Factsheet #1.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Holstine and Eminger, *supra* note 2.

¹⁰³ Okanogan PUD, Factsheet# 1.

¹⁰⁴ *Id.*

¹⁰⁵ Okanogan County, *Enloe Dam Hydroelectric Project, Factsheet #2*, available at <http://www.okanoganpud.org/enloe/factsht2.pdf> (last visited November 13, 2009).

¹⁰⁶ *Id.*

closer to the dam and replacing sections of penstock with open channels will reduce the length of the bypass channel and provide for lower environmental impacts to fish habitat and higher water quality immediately downstream of the dam. The east bank configuration also facilitates conservation of existing power generating facilities, including the Enloe Dam structure, as a historic landmark.¹⁰⁷

IV. THE ENLOE DAM RELICENSING PROCESS

The preceding sections presented overviews of the statutory basis for relicensing, the administrative process of relicensing, and the history of both the existing Enloe Dam and the proposed Enloe Hydroelectric Project. This section draws upon that background to detail the actual process as it has unfolded in the context of the Enloe Dam relicensing effort, in order to give a practical example of the relicensing process and to show how the Okanogan Bands and Confederated Tribes of the Colville Reservation (Colville Tribes) have used the process to advocate for their interests. Although the proposed Enloe Hydroelectric Project is a new project that is near does not use the existing dam's power-producing facilities, the Okanogan PUD is undergoing a relicensing because the site itself had previously been licensed for hydropower production. This is also the reason the relicensing process often alternately termed the Enloe Hydroelectric Project and the Enloe Dam relicensing process.

Step 1: First Stage Consultation.

On January 25, 2005, the Okanogan PUD submitted its Notice of Intent to submit an Application for Preliminary Permit. Pursuant to 8 C.F.R. §§ 4.38 and 16.8,¹⁰⁸ the Okanogan PUD contacted potentially affected tribes and the applicable state and federal agencies. The Okanogan PUD provided these interested parties with a detailed description of the project and its anticipated environmental effects, a list of proposed studies, and a notice that the county intended to seek a new license. The Okanogan PUD then submitted its application on April 27, 2005.

At that point, interested parties submitted Motions of Intervention to become a party to the process. Becoming a party¹⁰⁹ to FERC relicensing proceedings is a relatively simple endeavor. The licensee is automatically a party, as are

¹⁰⁷ *Id.*

¹⁰⁸ See FERC, *supra* note 79 at 4-1, 4-2.

¹⁰⁹ (see Appendix A)

the governmental resource management agencies responsible for lands, studies, or reports.¹¹⁰ Any other person or entity that shows a direct interest in the proceedings and their outcome, such as tribes, fishing groups, and conservation groups, may intervene to also become a party.¹¹¹ The process affords every party two fundamental rights: (1) the right to receive service with all of the documents filed in the proceeding, and (2) the right to file a motion for a judicial review or rehearing after a final decision from FERC.¹¹² Finally, any party may challenge material facts and propose alternatives to the resource agencies.¹¹³

Between May 11 and July 21, 2005, both the Washington State Department of Ecology and the US Department of the Interior filed comments and Motions of Intervention. The Okanogan PUD held its Initial Consultation Meeting in August, which included a meeting and tour for interested parties and stakeholders.¹¹⁴

The Okanogan PUD also formed the Cultural Resources Working Group to address issues related to the historic and cultural resources, including the original powerhouse, which was listed on the National Register of Historic Places in 1978, and tribal cultural sites and resources.¹¹⁵ The Working Group worked with the Bureau of Land Management, Washington State Department of Archaeology and Historic Preservation, and the Colville Tribes to draft the NHPA section 106 documentation and the protection, mitigation and enhancement documents.¹¹⁶

Following FERC's Order Issuing Preliminary Permit¹¹⁷ on September 26, 2005, consultation letters were distributed to the Fisheries Service, FWS, the Washington State Historic Preservation Office, and the Colville Tribal Business

¹¹⁰ This list includes both state and federal agencies. Federal agencies can include agencies such as the USFWS, the Fisheries Service, NFS, BLM, BIA, and Bureau of Reclamations. State agencies can include agencies such as the state Fish and Game services, the state department responsible for CWA section 401 certification, and state historical departments.

¹¹¹ 18 C.F.R. § 385.214(a) (2006); *see also* HYDROPOWER REFORM COAL., CITIZEN TOOLKIT FOR EFFECTIVE PARTICIPATION IN HYDROPOWER LICENSING, 60 (2005) available at http://www.hydroreform.org/sites/www.hydroreform.org/files/hydroguide_11_13.pdf.

¹¹² Amos, *supra* note 10, at 14 (citing 16 U.S.C. § 825I(b) (2006)); *see also* § 385.713; FERC, *supra* note 79 at 60.

¹¹³ RESOURCE AGENCY PROCEDURES FOR CONDITIONS AND PRESCRIPTIONS IN HYDROPOWER LICENSES, 70 Fed. Reg. 69804, 69809 (November 17, 2005). Whether fish were historically found above a dam would constitute a material fact.

¹¹⁴ Okanogan Country Factsheet #1.

¹¹⁵ *Id.*

¹¹⁶ *See* 36 C.F.R. § 800 (2006).

¹¹⁷ While under the thirty-six month Preliminary Permit, the licensee must supply FERC with a Progress Report every six months.

Council. Prior to Okanogan PUD's First Six Month Preliminary Progress Report, the Fisheries Service, Canada Fisheries and Oceans, Washington Department of Ecology, and the Columbia River Inter-Tribal Fish Commission (CRITFC) submitted comments on the Initial Consultation Meeting. This completed the first stage consultation.

Step 2: Beginning of Second Stage Consultation: Studies and Draft Application Preparation.

Once all of the study plans were finalized, the Okanogan PUD began to undertake the studies identified as necessary in the first stage consultations. On March 27, 2007, after submitting its Third Six Month Preliminary Progress Report, the Okanogan PUD informed FERC that it was preparing a Draft License Application (DLA), the primary document developed during the second stage consultation. The Okanogan PUD forwarded the DLA to FERC for review in November of 2007. The DLA contains the results of first stage consultation studies, the proposed protection, mitigation, and enhancement measures, and the responses to comments and recommendations.¹¹⁸

Step 3: Completion of Second Stage Consultation.

The next step in the relicensing process involved the distribution of the DLA to resource agencies, tribes, and any member of the public who so requests. The parties had ninety days in which to comment on the information contained in the DLA; in general, if a party has a substantive disagreement with an applicant's proposed measures or resource impact conclusions, the applicant must hold a joint meeting to resolve the issues.¹¹⁹

The Okanogan PUD's DLA precipitated comments from American Rivers, the National Parks Service, American Whitewater, CRITFC, the Washington Department of Ecology, the Fisheries Service, and FWS. As a result of the large volume of comments and protests, Okanogan PUD filed a Motion for Extension of Time to schedule a meeting to resolve the disagreements, which was subsequently granted in March of 2008.

Step 4: Third Stage Consultation.

Third stage consultation commenced with the filing of the completed Final License Application (FLA), which included all the resolved issues of the DLA, and which the Okanogan PUD submitted on September 5, 2008. FERC issued

¹¹⁸ 18 C.F.R. § 5.16 (2006).

¹¹⁹ FERC, at 4-9 (2005).

notice that the application had been accepted on October 29, 2008, and solicited Motions to Intervene and protests. In response, nearly a dozen parties, including recreation groups, public interest groups, and state and federal agencies, filed timely Motions to Intervene. Additionally, the Washington State Department of Fish and Wildlife, the National Parks Service, and the Department of the Interior all submitted further study requests.

Step 5: Application Process and NEPA Compliance.

Based upon the FLA comments and additional studies, FERC released a Scoping Document thirty days prior to holding a public Scoping Meeting, which was held on January 14, 2009.¹²⁰ Scoping generally refers to the identification of environmental impacts a project could have. The Scoping Document describes the project and its potential issues, which are used in conjunction with the pursuant comment period to determine the issues addressed in the EA or EIS.

Following the Scoping Meeting, there was another comment and protest period. Comments were submitted during February 2009, and the Lower Similkameen Indian Band requested a meeting be scheduled to discuss the upcoming Environmental Assessment. After that meeting was held, the Lower Similkameen and Colville Tribes submitted comments regarding anadromous fish passage at the Enloe Dam.

Due to the amount of comments, continued questions over fish passage, and EPA's Notice of Intent to prepare an Environmental Assessment, FERC announced a second round of scoping in order to assess the project-related effects on environmental resources. After the release of the Second Scoping Document, the Okanogan PUD, through the Cultural Resource Working Group, released a study request from the Washington State Department of Archaeology and Historic Preservation pursuant to section 106 of the NHPA. This study was named the Historic Properties Management Plan and Culture Resources Section 106 Technical Report.

The final part of Step 5 is the preparation of the Environmental Assessment. At this writing, no assessment has been finalized.

There are two more steps that the Okanogan PUD must follow to complete the relicensing process. Step 6 is the completion of the FPA section 10(j) requirements, and Step 7 entails License Issuance and Monitoring.¹²¹

¹²⁰ *Id.* at 4-13.

¹²¹ Hydropower Reform Coal., *supra* note 111.

V. FISH PASSAGE CONTROVERSY

Over the past 35 years, the Okanogan PUD has made repeated efforts to license the Enloe Dam as a hydropower facility after it was decommissioned in 1959.¹²² Although the Okanogan PUD was able to acquire new licenses, one in 1986 and another in 1996, disputes over prescriptions for fish passage led FERC to rescind the licenses.¹²³

In the early 1980s, the United States was interested in adding fish passages at Enloe Dam in order to allow salmon migration to the Upper Similkameen, as many questioned whether spring and summer chinook and steelhead formerly inhabited the Similkameen River upstream from the falls at the present site of Enloe Dam. Fish passage would enable anadromous fish, including chinook and other Pacific salmon species, to access areas of the river above the dam.¹²⁴ The fish passage proposal was terminated, however, after the Okanogan Nation, the Canadian Ministry of Water, Land and Air Protection, and Canadian organizations expressed considerable concern over the introduction of what they considered to be non-native fish to the Upper Similkameen.¹²⁵

Now supported by the Fisheries Service, the environmental report in Appendix E of the FLA noted that Similkameen (Coyote) Falls, about 370 feet below Enloe Dam, forms a thirty-three foot barrier impassable to anadromous fish.¹²⁶ These are the falls mentioned in the Similkameen legend of Coyote. In a letter to FERC, Chief Joe Dennis of the Lower Similkameen stated that, “We [the Band] do not agree to the introduction of species of fish clearly not indigenous to the Similkameen River above the falls. These species would negatively impact upon the existing fish population and therefore our aboriginal rights pertaining to those fish”. Chief Joe Dennis’s position is shared by many

¹²² Okanogan County, Factsheet #1.

¹²³ *Id.* According to the Okanogan PUD website, “Following a rapid increase in energy prices in the late 1970’s, the PUD filed a new application for a license in 1981. In 1983 a license was issued but subsequently rescinded at the PUD’s request in 1986. The PUD filed another application with FERC in 1991. In 1996, FERC issued an original license for a 4.1 megawatt project, then stayed the license at the PUD’s request. On February 23, 2000, the Commission rescinded the license.”

¹²⁴ Rowena Rae, *The State of Fish and Fish Habitat in the Okanogan and Similkameen Basins*, p. 79. Prepared for the Canadian Okanogan Basin Technical Working Group, Westbank, BC (2005).

¹²⁵ *Id.*

¹²⁶ See HAER Report, Appendix E.4.1 of Okanogan County PUD DLA, 4 (1990), available at http://www.okanoganpud.org/enloe/FLA/Vol_2_Appendices/Vol_2_16_Appendix_E4_1.pdf.

Tribes.^{127,128} The Fisheries Service did, however, list the “areas upstream of Enloe Dam in Washington’s Similkameen River drainage (Upper Columbia River steelhead Evolutionary Significant Unit)” as an “unoccupied area.”¹²⁹ Its Critical Habitat Analytical Review Teams identified the Upper Similkameen as an area that may be essential for the conservation of Columbia River steelhead.¹³⁰ This listing will affect the water quality standards that the Washington Department of Ecology will consider in its section 401 certification evaluation, and may result in conditions from the Fisheries Service and FWS.

The Columbia River Inter-Tribal Fish Commission commented in the Second Scoping Document that fish passage should be considered as an alternative when evaluating the project, citing the Northwest Power Planning Council’s Okanogan/Similkameen Sub-Basin Summary Statement, which states that the Enloe Dam blocks access to more than 95 percent of fish habitat potentially available in the Similkameen River. Additionally, the Bureau of Indian Affairs (BIA) states that “issuing a license without resolving the fish passage issue could be a significant burden on the licensee if any of the departments with authority to require fish passage did so during the licensing term.”¹³¹ The BIA adds that the potential to increase adult salmon populations is too substantial to be dismissed without a thoroughly developed scientific rationale.¹³² The FWS also noted that the Okanogan PUD has attempted to relicense the project three

¹²⁷ The Colville Tribes Business Council and the Okanogan Nation Alliance signed a joint letter of commitment “to the collaborative development of a regional resolution to fish passage issues at Enloe Dam, and working with the Upper and Lower Similkameen Bands in particular to protect related fishing rights and interests; . . . [t]he Council confirms its respect for the spiritual prohibitions against salmon passage at Enloe Dam, and the need to involve the Upper and Lower Similkameen Bands in related policy and program planning.” See *Collaborative Development of a Regional Resolution to Address Fish Passage Issues at Enloe Dam*, pp. 312-13. Northwest Power and Conservation Council, Okanogan Basin Plan (<http://www.nwcouncil.org/fw/subbasinplanning/okanogan/plan>) (Last visited April 10, 2010).

¹²⁸ The Yakama Tribe has expressed that it believes the dam should be removed entirely; short of decommission, the Tribe would like fish ladders installed at the Enloe Dam. The Tribe is not currently a party to the relicensing process. The CRITFC has also supported fish passage at the dam. See

<http://www.hydroreform.org/sites/www.hydroreform.org/files/CRITFC%20Comments%20on%20D LA.pdf>.

¹²⁹ ESA section 3(5)(A)(ii) defines critical habitat to include “specific areas outside the geographical area occupied” if the areas are determined by the Secretary to be “essential for the conservation of the species.” FISHERIES SERVICE S regulations at 50 CFR 424.12(e).

¹³⁰ Endangered and Threatened Species; Designation of Critical Habitat for 12 Evolutionarily Significant Units of West Coast Salmon and Steelhead in Washington, Oregon, and Idaho. 50 C.F.R. 52630 (2005). The rule became effective January 2, 2006). *Id.*

¹³¹ FERC, *Scoping Document 2 – Enloe Hydroelectric Project*, at 16 (2009).

¹³² *Id.*

times before the current relicensing effort, and in each proceeding, fish passage has been an issue of discussion among participants in the proceeding.

While it is unlikely that prescriptions for fish passage will be included at the Enloe Dam, the listing of the Upper Similkameen as part of the habitat of listed Columbia River anadromous fish will result in specifications from EPA, FWS, Fisheries Service, as well as the Washington Department of Ecology's certification regarding discharge, water temperature, and aeration.

The tribes' position against fish passage, contrary to avowed interests of some agencies in the U.S. government, is likely to prevail due to the tribes' persistence and coordination with resource management agencies and Canadian conservation groups. The Okanogan National Alliance and the Colville Tribes have been working with the Okanogan PUD on a settlement agreement to affirm the tribes' positions on fish passage and to enhance inter-organizational cooperation in the Okanogan River Basin.

A partnership of agencies and tribes agree that something needs to be done to enhance fisheries resources in the basin without constructing upstream fish passage facilities at the new Enloe Dam. This consensus appears in the Draft Upper Columbia Salmon Recovery Plan, as well as in its designation of major and minor spawning areas, neither of which includes the Similkameen above the Enloe Dam.¹³³

VI. CONCLUSIONS

Together, the 1974 *Boldt*¹³⁴ decisions, which affirmed tribes' treaty rights, and the subsequent *Culverts*¹³⁵ decisions, which found that Washington State is infringing on Indian treaty rights by constructing and maintaining culverts, demonstrate that tribes have had some limited success in asserting treaty rights through the judicial system. However, as the traditional judicial route has proven less and less fruitful, tribes have learned to successfully use administrative consultation to assert their rights, as shown by tribes' participation in the FERC relicensing process.

A hopeful sign for further progress for Indian tribes, the Obama administration has shown support for tribal rights at a level not seen since the Clinton administration and E.O. 13175. On November 6, 2009, President Obama signed

¹³³ Okanogan PUD FactSheet #2, available at <http://www.okanoganpud.org>.

¹³⁴ *United States v. State of Washington*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982).

¹³⁵ *See, e.g., United States v. State of Washington*, 2007 WL 2437166 (W.D. Wash. 2007).

a memorandum at the White House Tribal Nations Conference promising commitment to “complete and consistent implementation of E.O. 13175.” In addition, President Obama directed all federal agencies to submit a “detailed” tribal consultation plan and noted that “[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”¹³⁶

While tribal sovereignty is not a myth, the traditional judicial route for asserting this sovereignty and the accompanying treaty rights is not what it once was. However, hope may be on the horizon. Through taking advantage of the opportunity for consultation and collaboration afforded by certain administrative proceedings, tribes may depart the current crossroads and once again resurrect their rights as sovereign nations.

¹³⁶ Memorandum for Heads of Executive Departments and Agencies Relating to Consultation with Tribes, 74 Fed. Reg. 57879, 57881 (November 5, 2009).

APPENDIX A: PARTIES TO THE ENLOE HYDROELECTRIC PROJECT RELICENSING

The following list provides a brief overview of the major participants in the Enloe Dam relicensing process:

Okanogan County Public Utilities Department (Okanogan PUD):

Licensor

Federal Energy Regulatory Commission (FERC):

FERC is charged by Congress with jurisdiction over the issuing of licenses for non-federal hydropower projects for a period of thirty to fifty years.¹³⁷

NOAA National Marine Fisheries Service (Fisheries Service):

The National Oceanographic and Atmospheric Administration (NOAA) is an agency situated under the Department of Commerce.¹³⁸ Its sub-agency National Marine Fisheries Service is responsible for managing, conserving, and protecting marine resources. There are several statutes under which the agency operates. Under the ESA, the Fisheries Service submits Reasonable and Prudent Alternatives or Measures regarding the taking of listed fish under the ESA. It also consults with FERC regarding any licensing that may adversely affect “essential fish habitat” (EFH).¹³⁹ The Fisheries Service also acts under three sections of the FPA: under section 10(a)¹⁴⁰ to recommend conditions to ensure a best adapted comprehensive plan for developmental and non-developmental

¹³⁷ 16 U.S.C. § 797(e) (2006) (The grant of congressional authority extends to hydropower dams “across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States”). Congress originally enacted extended federal control over dams via the Army Corps of Engineers in the Rivers and Harbors Act of 1899 (Act of Mar. 3, 1899, 30 Stat. 1151 (1899)) (codified as amended at 33 U.S.C. § 401 (2006)); it established the FPA in 1920 as the Federal Water Power Act (FWPA), 41 Stat. 1063 (1920), collecting hydropower dam licensing authority from among various federal agencies and centralized licensing decisions in a single new agency, the FPC. In 1935, Congress amended the FWPA through Title II of the Public Utility Act of 1935, making the former FWPA Part I of the FPA and adding Parts II and III to the FPA, dealing with regulation of electric utility companies. Public Utility Act of 1935, 49 Stat. 803 (1935) (codified as amended at 16 U.S.C. §§ 791a-825 (2006)); *See* Fed. Power Comm’n v. Union Elec. Co., 381 U.S. 90, 91 n.2 (1965). When Congress created FERC in 1977, the new agency assumed the functions of the FPC. Department of Energy Organization Act, 91 Stat. 565, 582 (1977) (codified as amended at 42 U.S.C. § 7171 (2006)); *See* Becker, *supra* note 29, at 820.

¹³⁸ *See* NOAA Fisheries site at <http://www.nmfs.noaa.gov>.

¹³⁹ *See* the Magnuson-Stevens Fishery Conservation and Management Act at 16 U.S.C. § 1801 (2006).

¹⁴⁰ 16 U.S.C. § 803(a).

resources; under section 10(j)¹⁴¹ to recommend conditions to protect fish and their related spawning grounds and habitats; and under section 18¹⁴² to prescribe fishways as a mandatory license condition.¹⁴³

Fish and Wildlife Service (FWS):

Under the Department of the Interior, the Fish and Wildlife Service is charged with the protection, conservation, and enhancement of non-marine fish, wildlife, and plant resources (those not falling under the auspices of the Fisheries Service).¹⁴⁴ The FWS may submit Reasonable or Prudent Alternative Measures for listed non-marine species, as well as adopt mandatory fish passage prescriptions under section 18 of the FPA and other conditions under sections 10(a) and 10(j).

Bureau of Indian Affairs (BIA):

The BIA protects and improves the quality of life of Tribes, and administers trust assets.¹⁴⁵ When any part of a project is situated on Tribal reservations, the BIA may prescribe mandatory conditions pursuant to section 4(e). It also makes recommendations for other conditions that may adversely affect Tribal lands or assets, including fishing rights and fish habitats.

Bureau of Land Management (BLM):

The BLM manages federal lands that are not National Parks, Forests, or Fish and Wildlife Refuges.¹⁴⁶ It prescribes mandatory conditions under section 4(e) for federal reservations, and may submit recommended conditions for lands and waters under section 10(a).

US Geological Survey (USGS):

Licensees may contract with the USGS for scientific data and studies regarding natural biological and physical resources, including rivers, or for designing monitoring programs or fish passages.¹⁴⁷

¹⁴¹ Also under the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. § 661 (2006).

¹⁴² 16 U.S.C. § 811 (2006).

¹⁴³ Richard Roos-Collins and Julie Gantenbein, *Citizen Toolkit for Effective Participation in Hydropower* 8 (2005).

¹⁴⁴ See FWS site at <http://www.fws.gov>.

¹⁴⁵ See BIA site at <http://www.bia.gov>.

¹⁴⁶ See BLM site at <http://www.blm.gov>.

¹⁴⁷ Roos-Collins and Gantenbein, *supra* at 9.

National Parks Service (NPS):

NPS¹⁴⁸ is charged with the preservation of unimpaired natural and cultural resources for the National Park System.¹⁴⁹ When operations do not involve park service land, the NPS occupies an advisory role to FERC on section 10(a), and represents public recreation interests. Section 4(e) specifically excludes the NPS for national parks and monuments, but it may submit conditions for other reservations.

Forest Service (FS):

Under the Department of Agriculture, the FS administers National Forests and Grasslands.¹⁵⁰ As required under the Multiple Use-Sustained Yield and National Forest Management Acts,¹⁵¹ the FS may include conditions under section 4(e) necessary to assure the requisite “high productivity of renewable resources” of its lands.¹⁵²

Environmental Protection Agency (EPA):

EPA protects against adverse impacts of various forms of pollution,¹⁵³ and approves state water quality standards and certifications under the Clean Water Act (CWA). Under that authority, it may review any environmental documents.¹⁵⁴

Washington State Department of Ecology (WDE):

Ecology issues section 401(a) CWA water certification for Washington State, without which FERC cannot issue a license on a project.¹⁵⁵ WDE also reviews historic and cultural resources in coordination with the Washington State Department of Archaeology and Historic Preservation (WDAHP) under the State Environmental Protection Act (SEPA).¹⁵⁶

¹⁴⁸ National Park Service Organic Act, 16 U.S.C. § 1 (2006).

¹⁴⁹ Besides the National Parks and Monuments, the National Park System includes such areas as National Recreation Areas, National Historic Sites, and National Rivers. See NPS site at <http://www.nps.gov>.

¹⁵⁰ Organic Act of 1897, 16 U.S.C. § 475 (2006).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 40 U.S.C. § 1.3 (2006).

¹⁵⁴ See EPA site at <http://www.epa.gov>.

¹⁵⁵ 16 U.S.C. § 821 (2006).

¹⁵⁶ See WDE site at <http://www.ecy.wa.gov>.

Washington State Department of Fish and Wildlife (WDFW):

Under sections 10(a) and 10(j), the state may recommend conditions for the protection of fish and wildlife, as well as for recreation.¹⁵⁷

Washington State Department of Archaeology and Historic Preservation (WDAHP):

This is the primary agency for historic preservation, and oversees both the National Register of Historic Places and the Washington Heritage Register. The State Historic Preservation Office (SHPO) is a state Cabinet-level agency established in 1967 in response to the National Historic Preservation Act.¹⁵⁸

Okanagan National Alliance and Confederated Tribes of the Colville Reservation:

The Okanagan National Alliance consists of seven Canadian First Nation member bands, including the Upper and Lower Similkameen Indian Bands, and the Okanagan Indian Band. They have close historical, cultural, and linguistic ties to the Confederated Tribes of the Colville Reservation (the Colville Tribes). The bands act both in their individual capacity and as the Alliance.¹⁵⁹ The Colville Tribes also has an agreement with the Okanogan PUD for power sharing and development, and the Okanogan PUD's Cultural Resource Working Group consults directly with the Tribes on assessing tribal historical and cultural resources that may be affected by dam operations.

Columbia River Inter-Tribal Fish Commission (CRITFC):

A coalition of the Warm Springs, Yakama, Umatilla, and Nez Perce tribes originally formed in 1977 as the Celilo Fish Committee with the purpose of renewing Tribal authority in fisheries management.¹⁶⁰

¹⁵⁷ See WDFW site at <http://www.wdfw.wa.gov>.

¹⁵⁸ See WDAHP site at <http://www.dahp.wa.gov>.

¹⁵⁹ See ONA site at <http://www.sylx.org>.

¹⁶⁰ See CRITFC site at <http://www.critfc.org/text/work.html>.