

# Tribes and Dams: Using Section 4(e) of the Federal Power Act to Protect Indian Tribes and Restore Reservation Resources\*

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The Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to license private hydroelectric dams on lands under federal jurisdiction, including Indian reservations.<sup>2</sup> Section 4(e) of the Federal Power Act authorizes the Secretary of the Interior to impose conditions for the protection of Indian lands that are encumbered by FERC-licensed facilities.<sup>3</sup> The purpose of the conditioning authority provided in section 4(e) is to protect and restore Indian reservation resources impacted by FERC-licensed projects.<sup>4</sup> This article examines the section 4(e) conditioning authority and uses the recent settlement agreement in the relicensing of the Cushman Hydroelectric Project to illustrate the role that section 4(e) plays in the relicensing of hydroelectric projects located within Indian reservations.

Perhaps no segment of the United States population has been more

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<sup>2</sup> U.S.C. § 797(e)(2006). The Federal Energy Regulatory Commission (FERC), formerly known as the Federal Power Commission, is authorized to issue licenses to persons, corporations, states, or municipalities “for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power . . . .” *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (authorizing the Secretary of the Interior to impose conditions “necessary for the protection and utilization of such reservation”).

adversely affected by the development and operation of hydroelectric dams than Indian tribes.<sup>5</sup> Throughout much of the twentieth century, private and federal entities regularly constructed dams on or nearby Indian reservations.<sup>6</sup> These dams inundated reservation lands and traditional fishing and hunting grounds with water.<sup>7</sup> Often constructed without fish passage systems, dams blocked hundreds of miles of spawning and rearing habitat for fish, bringing once plentiful runs to near-extinction.<sup>8</sup> Hydroelectric project reservoirs flooded irreplaceable cultural

<sup>5</sup> See, e.g., MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 186 (Penguin Books 1993) (1986) (“One of the least known consequences of water development in America is its impact on the Indians . . .”).

<sup>6</sup> Federal court decisions over the past two decades provide a sampling of the many private hydroelectric developments that physically burden Indian lands. See, e.g., *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (involving hydroelectric dams and associated facilities crossing over the La Jolla, Rincon, and San Pasqual reservations, licensed by FERC in 1924); *Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (involving private hydroelectric development partially constructed within Skokomish Indian Reservation, given minor part license by FERC in 1924); *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738 (D.C. Cir. 2001) (involving reservoir partially located on Lac Vieux Desert Indian Reservation, licensed by FERC in 1959); *United States v. Pend Oreille County Pub. Util. Dist. No. 1*, 135 F.3d 602 (9th Cir. 1998) (involving private hydroelectric project that flooded portions of the Kalispel Indian Reservation, licensed by FERC in 1952 for a location downstream of the reservation); *Confederated Tribes of the Colville Reservation v. United States*, 964 F.2d 1102 (Fed. Cir. 1992) (involving Colville Indian Tribe’s claim for compensation relating to construction of Grand Coulee Dam, provisionally licensed by FERC in 1933, but ultimately constructed and operated by the United States, inundating portions of Colville Indian Reservation); *Washington Water Power Co. v. FERC*, 775 F.2d 305 (D.C. Cir. 1985) (involving private hydroelectric facility located on southern boundary of the Spokane Indian Reservation, authorized by special Congressional legislation in 1905 and constructed in 1911).

<sup>7</sup> Numerous federal hydropower developments are located on or near Indian lands and traditional fishing grounds. See, e.g., MICHAEL C. BLUMM, *SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON* 1–30 (BookWorld Publications 2002); Michael C. Blumm et al., *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 ENVTL. L. 709, 712 n.8 (2006) [hereinafter *Art of Deception*] (discussing development of Federal Columbia River Power System, which includes fourteen sets of large dams, powerhouses, and associated reservoirs, which flooded numerous traditional Indian fishing and hunting grounds); REISNER, *supra* n.4, at 186–90 (1986) (describing inundation of Fort Berthold Reservation behind the United States’ Garrison Dam reservoir).

<sup>8</sup> See FED. ENERGY. REG. COMM’N, FERC No. P-2082-027, DRAFT ENVTL. IMPACT STATEMENT FOR THE KLAMATH HYDROELECTRIC PROJECT 3–263 (2006) (citing studies that estimate Klamath Hydroelectric Project blocks over 350 miles of historic anadromous fish habitat in Northern California and Southern Oregon); 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 ENVTL. L. 811, 819 (2006) (citing studies that estimate removal of Condit Dam on White Salmon River in Washington State would open up at least 14 miles of historic salmon habitat and 33 miles of steelhead habitat); *Art of Deception*, *supra* n.6, at 720 n.47 (discussing Hells Canyon Hydroelectric Complex, which eliminated access to 211 miles of historic spawning ground for Snake River fall chinook).

resources: cultural areas adjacent to shorelines, for example, gradually wore away from erosion impacts caused by the project's operations. The era of large dam building left a permanent scar on Indian reservations by degrading, and in some cases destroying, tribes' natural and cultural resources.<sup>9</sup>

Many private hydroelectric dams operating within Indian reservations are presently seeking, or will soon seek, new operating licenses from FERC.<sup>10</sup> These relicensing proceedings provide Indian tribes with a unique opportunity to use the legal mechanisms of modern environmental law to restore their damaged natural and cultural resources. Today, licensees must comply with the environmental requirements of the Federal Power Act, Clean Water Act, Endangered Species Act, National Environmental Policy Act, National Historic Preservation Act, and, if applicable, basin specific laws such as the Northwest Power Act.<sup>11</sup> In light of these changes in the law and the increased focus on non-power values,

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<sup>9</sup> In recent years, Indian tribes have sought damages against the United States and hydroelectric licensees for impairment of tribal treaty rights resulting from construction and operation of hydroelectric dams. To date, these claims have been unsuccessful. See *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc) (holding Tribe could not recover monetary damages for licensee's alleged interference with treaty reserved fishing rights, but holding that Tribe's claim against United States for damages could proceed before United States Court of Federal Claims); *Klamath Tribes of Oregon v. PacifiCorp*, No. Civ. 04-644-CO, 2005 WL 1661821 (D. Or. July 13, 2005) (unreported) (dismissing Tribes' claim of \$1 billion in damages against utility company resulting from interference with treaty reserved fishing rights); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994) (dismissing Tribe's claim for damages against utility company based on decimation of Snake River fish runs). For criticisms of these opinions, see Mason D. Morisset, *The Cushman Dam and Indian Treaty Rights: Skokomish Indian Tribe v. United States et al.*, 27 PUB. LAND & RESOURCES L. REV. 23 (2006); Alexander Hays V., *The Nez Perce Water Rights Settlement and the Revolution in Indian Country*, 36 ENVTL. L. 869, 879-81 (2006) (criticizing Nez Perce decision); and William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 ENVTL. L. 397 (2005).

<sup>10</sup> See Lydia T. Grimm, *Fishery Protection and FERC Hydroelectric Relicensing Under ECPA: Maintaining A Deadly Status Quo*, 20 ENVTL. L. 929, 930 n.4 (1990) (noting that over two hundred FERC licenses were scheduled to expire in the 1990's). In California alone, forty-six federally licensed hydroelectric projects are undergoing or scheduled to undergo FERC relicensing between 1997 and 2016. See CALIFORNIA ENERGY COMMISSION, STAFF REPORT, CALIFORNIA HYDROPOWER SYSTEM: ENERGY AND ENVIRONMENT, app. D at 19 (2003), available at <http://www.energy.ca.gov/publications/displayOneReport.php?pubNum=P100-03-018>.

<sup>11</sup> *City of Tacoma v. FERC*, 460 F.3d 53, 73 (D.C. Cir. 2006) (describing changes in environmental law and "shift in national priorities" since the development-focused 1920's); see also Michael C. Blumm and Viki A. Nadol, *The Decline of the Hydropower Czar And The Rise Of Agency Pluralism In Hydroelectric Relicensing*, 26 COLUM. J. ENVTL. L. 81, 83 (2001) (explaining that the new legal regime governing hydroelectric relicensing "offers significant opportunities to restructure streamflows to improve water quality, fish and wildlife, and recreation areas.").

FERC “not only has the authority but the obligation to evaluate existing projects completely anew upon expiration of their license terms.”<sup>12</sup>

The relicensing of the Cushman Hydroelectric Project highlights the difficulty of relicensing a hydroelectric project built in the 1920’s in a manner that conforms with current federal environmental laws. The license for the Cushman Project, a portion of which is located within the Skokomish Indian Reservation in Washington State, expired in 1974. On January 12, 2009, after thirty-five years of contentious dispute,<sup>13</sup> the Skokomish Indian Tribe, City of Tacoma, and multiple state and federal government agencies executed a settlement agreement providing terms for a new license for the Cushman Project.<sup>14</sup>

Although the Cushman relicensing exposes many flaws in the existing FERC process, it also illustrates one of the most important tools that Indian tribes have to protect reservation resources from impacts of FERC-licensed hydroelectric projects – section 4(e) of the Federal Power Act.<sup>15</sup> In 2006, the Skokomish Tribe successfully argued to the D.C. Circuit Court of Appeals that the Secretary of the Interior has broad authority to impose license conditions for the protection of the Tribe’s reservation under section 4(e).<sup>16</sup> This court decision affirming the Secretary’s broad authority to impose section 4(e) conditions laid the groundwork for two years of negotiations that ultimately resulted in a favorable settlement for the Tribe and the Skokomish River. The Cushman relicensing illustrates the importance of section 4(e) as a legal tool to protect reservation resources from the

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<sup>12</sup> *Tacoma*, 460 F.3d at 73–74; *see also* 16 U.S.C. § 808(a)(1)(2006) (authorizing United States to relicense hydroelectric projects at end of license term “upon such terms and conditions as may be authorized or required under the then existing laws and regulations”).

<sup>13</sup> The litigation surrounding the Cushman Project is addressed in numerous reported court decisions. *See Tacoma*, 460 F.3d 53 (affirming Secretary of Interior’s conditions for the protection of Skokomish Indian Reservation); *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc) (holding Tribe could not recover monetary damages against City of Tacoma based on construction and operation of Cushman Project); *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003) (holding that Tacoma’s purported condemnation of tribal lands for development of Cushman Project was unlawful); *Skokomish Tribe v. Fitzsimmons*, 97 Wash. App. 84, 982 P.2d 1179 (Wash. Ct. App. 1999) (finding that State of Washington’s purported certification of Coastal Zone Management Act compliance for Cushman Project failed to comply with state law).

<sup>14</sup> Settlement documents are available at [http://elibrary.FERC.gov/idmws/file\\_list.asp?accession\\_num=20090121-5218](http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20090121-5218) (last visited Apr. 7, 2009).

<sup>15</sup> 16 U.S.C. § 797(e).

<sup>16</sup> *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

impacts associated with FERC-licensed hydroelectric projects.

## I. SECTION 4(E) AND PRE-CUSHMAN JUDICIAL INTERPRETATIONS

The Federal Power Act authorizes FERC to license the construction, operation, and maintenance of privately-owned hydroelectric dams on federal public lands and reservations, including lands held in trust for Indian tribes.<sup>17</sup> FERC may issue licenses for hydroelectric development within a federal reservation only if it determines that the license will not be “inconsistent with the purpose for which the reservation was created or acquired.”<sup>18</sup> Section 4(e) of the Federal Power Act authorizes federal agencies to impose conditions on FERC licenses to the extent necessary to protect the federal and tribal lands under their jurisdiction.<sup>19</sup> Section 4(e) does not authorize Indian tribes to directly impose conditions on projects located within their reservation; rather, the tribe must rely on the Secretary of the Interior to prescribe conditions to protect the tribe and its lands.<sup>20</sup>

Federal courts have delineated the scope of the Secretary of the Interior’s section 4(e) conditioning authority in two significant cases involving Indian tribes. In the first case, *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*,<sup>21</sup> the United States Supreme Court held that section 4(e) provides the Secretary with jurisdiction to impose conditions on hydroelectric projects that are located, in whole or in part, within an Indian reservation.<sup>22</sup> The conditions imposed by the Secretary must be reasonably related to protection of the reservation and its

<sup>17</sup> 16 U.S.C. § 797(e).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Courts have interpreted section 4(e) as a statute enacted for the benefit and protection of Indian tribes. *Tacoma*, 460 F.3d at 64 (stating that FPA section 4(e) is for benefit of Indian tribes); *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223, 1236 (9th Cir. 1982) (“although the FPA was not enacted primarily for the benefit of dependent Indian tribes, . . . section 4(e) . . . was included by Congress for that precise purpose”). Thus, the failure of the United States to impose conditions necessary to protect the tribe or trust resources may violate the fiduciary trust duty owed to tribes. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.05(4)(b) (2005 ed.) (stating “if the Secretary subordinates tribal interests to other public interests in such a way as to cause actual harm to the tribe’s interest, an actionable claim for breach of trust will lie”) (citing *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972)).

<sup>21</sup> *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

<sup>22</sup> *Id.* at 780–81.

people and supported by evidence in the administrative record.<sup>23</sup> However, FERC has no authority to reject conditions submitted by the Secretary under section 4(e).<sup>24</sup> Only the federal courts, and not FERC, have the legal authority to reject or invalidate section 4(e) conditions.<sup>25</sup>

In *Escondido*, FERC argued that the Federal Power Act gave it ultimate authority to determine all conditions of a FERC license and that it could decline to adopt the section 4(e) conditions submitted by the Secretary of the Interior.<sup>26</sup> The Supreme Court disagreed, finding that Congress intended the Secretaries to retain a prominent role in licensing decisions involving federal lands.<sup>27</sup> Thus, should FERC substantively disagree that a condition is necessary to protect the reservation, its only two options are to include the condition in the new license or refuse to issue a license altogether. If another party seeks judicial review (a likely prospect in FERC relicensings),<sup>28</sup> FERC may argue on appeal that the conditions are outside the scope of the section 4(e) authority.<sup>29</sup> However, FERC has no authority to unilaterally seek judicial review of conditions in a license that it issues.<sup>30</sup>

The Court in *Escondido* also held that the Secretary does not have authority to impose conditions for the protection of reservations which are affected by, but contain no part of, the licensed project works.<sup>31</sup> In *Escondido*, project facilities

<sup>23</sup> *Id.* at 777. Courts will evaluate the Secretary of the Interior's determination that a condition is "reasonably related" to the protection of the reservation under the arbitrary and capricious standard of review. See *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (finding that Secretary of Interior's fishway prescription was arbitrary and capricious and not supported by evidence in the record). The arbitrary and capricious standard of review is deferential to the Secretary's determination, but the court will examine whether there is a rational connection between the facts and the choice made. *Id.* at 663 n.3. See also *Escondido*, 466 U.S. at 778 n.20 (stating "the court is to sustain the conditions if they are consistent with the law and supported by the evidence presented to the Commission, either by the Secretary or other interested parties").

<sup>24</sup> *Escondido*, 466 U.S. at 777-78.

<sup>25</sup> *Id.* at 777.

<sup>26</sup> *Id.* at 770.

<sup>27</sup> *Id.* at 775.

<sup>28</sup> *Id.* at 778 n.20 (noting the "unlikely event that none of the parties to the licensing proceeding seeks [judicial] review").

<sup>29</sup> *Id.*

<sup>30</sup> *Escondido Mut. Water Co. v. FERC*, 466 U.S. 765, 778 n.20 (1984).

<sup>31</sup> *Id.* at 781.

were located within the La Jolla, Rincon, and San Pasqual Reservations. Project diversions also affected the Pala, Yuima, and Pauma Reservations, but the Court held that section 4(e) did not authorize the Secretary to impose conditions for the benefit of those latter reservations due to the absence of any project facilities within those reservation lands.<sup>32</sup> Thus, under *Escondido*, Indian reservations that are located entirely downstream of a hydroelectric project receive no protection from section 4(e) even though those reservations may suffer significant impact from project operations.<sup>33</sup>

A question left unanswered in *Escondido* was, assuming that some small portion of a hydroelectric project fell within reservation boundaries, could the Secretary impose conditions on other portions of the project located outside the reservation if such conditions were necessary for protection of the reservation? FERC unsurprisingly took the position that the Secretary could not impose section 4(e) conditions on portions of the project located outside reservation boundaries.<sup>34</sup> According to FERC, Congress did not intend to grant the Secretaries authority to condition an entire hydroelectric project merely because a power line, access road, or some other small portion of the project, crossed over a corner of the reservation.<sup>35</sup> FERC argued that such a theory could lead to any number of results that would be inconsistent with the letter and intent of section 4(e):

For example, if a project is located entirely on private land with the exception of a small segment of a power line that crossed the corner of a reservation, Interior's theory would allow it to set minimum instream flows and impose other conditions on aspects of the project that have absolutely no impact on the reservation...[FERC] do not interpret section 4(e) to require

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<sup>32</sup> *Id.*

<sup>33</sup> *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223, 1236 (9th Cir. 1982) (noting a "gap" in the protection offered by section 4(e) because "a project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it.").

<sup>34</sup> *In re Minnesota Power & Light Co.*, 75 FERC ¶ 61,131 (1996) (rejecting the Secretary of Interior's assertion of broad authority to impose license conditions under section 4(e) so long as any part of a project, however small, was located on reservation lands).

<sup>35</sup> *Id.* at ¶ 61,448.

such an outcome.<sup>36</sup>

Courts declined to evaluate FERC's interpretation of the scope of section 4(e) conditioning authority until 2006,<sup>37</sup> when the Skokomish Tribe squarely presented the issue to the D.C. Circuit Court of Appeals in a case involving the Cushman Hydroelectric Project.<sup>38</sup>

## II. THE CUSHMAN LITIGATION

The Cushman Project consists of two dams on the North Fork of the Skokomish River located upstream from the five-thousand acre Skokomish Indian Reservation on the Olympic Peninsula in Washington State.<sup>39</sup> The project diverts the North Fork Skokomish River into a 2.5 mile-long tunnel that leads to a hydroelectric power plant located within the Skokomish Reservation, but on lands held in fee by the City of Tacoma, the project licensee.<sup>40</sup> A project transmission line and access road used to maintain the transmission lines are the only project facilities located on lands held in trust for the Skokomish Tribe.<sup>41</sup> The license for the Cushman Project expired in 1974, commencing a relicensing proceeding that has remained pending before FERC for the past thirty-five years.<sup>42</sup>

The Tribe has long argued to FERC and the courts that the diversion of flow out of the North Fork substantially and negatively impacts the purpose and use of the Skokomish Indian Reservation.<sup>43</sup> In addition to the impacts on fish habitat and health, the reduced flow contributes to increased silt deposits in

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 744 (D.C. Cir. 2001) (declining to "decide the precise scope of the government's power to prescribe for projects located 'within' reservations"; specifically, whether the Secretary may prescribe conditions with respect to entire projects, or only those portions of the project that actually occupy reservation lands). *Id.*

<sup>38</sup> *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

<sup>39</sup> *Id.* at 59.

<sup>40</sup> *Id.* A historical photograph of the dewatered North Fork after the construction of Cushman Dam No. 2 is provided at William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 ENVTL. L. 397, 399 (2005).

<sup>41</sup> *Tacoma*, 460 F.3d at 59.

<sup>42</sup> *Id.* at 59–60.

<sup>43</sup> See *In re City of Tacoma*, Order Issuing Subsequent Major License, 84 FERC ¶ 61,107 (July 30, 1998) (describing license conditions proposed by the Tribe and the Department of Interior); see also *In re City of Tacoma*, Order on Rehearing, 86 FERC ¶ 61,311 (Mar. 31, 1999).

the mainstem Skokomish River which flows through reservation lands. The narrowing of the river channel also contributes to flooding on tribal lands.<sup>44</sup>

To address the impacts on the Skokomish Tribe and Reservation, the Secretary of the Interior submitted conditions to FERC for inclusion in the new license for the Cushman Project.<sup>45</sup> Of significant importance to the Tribe, the Secretary developed conditions requiring continuous minimum instream flows of 240 cubic feet per second (cfs) in the North Fork and much larger flushing flows to restore the capacity of the mainstem Skokomish River—conditions which Tacoma asserted would make the project uneconomic to operate and thus result in project decommissioning.<sup>46</sup> In a 1999 order FERC rejected Interior's flow condition as outside the scope of section 4(e), maintaining that the Secretary could not impose instream flow conditions on project facilities located off the reservation.<sup>47</sup>

Both the Skokomish Tribe and the City of Tacoma petitioned for judicial review of FERC's order to the D.C. Circuit Court of Appeals.<sup>48</sup> On appeal, FERC continued to argue that the Secretary's authority was limited solely to mitigating any impacts caused by the transmission line and access road.<sup>49</sup> The Court of Appeals disagreed, broadly affirming the Secretary's authority to impose conditions on any project facilities affecting an Indian reservation, so long as some part of the

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<sup>44</sup> See *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 509–10 (9th Cir. 2005) (describing the impacts to the reservation alleged by the Tribe).

<sup>45</sup> See *In re City of Tacoma*, Order Issuing Subsequent Major License, 84 FERC ¶ 61,107 (July 30, 1998) (describing license conditions proposed by the Tribe and the Department of Interior); see also *In re City of Tacoma*, Order on Rehearing, 86 FERC ¶ 61,311 (Mar. 31, 1999).

<sup>46</sup> See *In re City of Tacoma*, Order on Rehearing, 86 FERC ¶ 61,311, at 62070–71 (Mar. 31, 1999) (citing Tacoma's argument that the cost of the license conditions constitute de facto decommissioning of the project); *Tacoma v. FERC*, 460 F.3d 53, 60, 71 (D.C. Cir. 2006) (rejecting Tacoma's de facto decommissioning argument).

<sup>47</sup> See *In re City of Tacoma*, Order on Rehearing, 86 FERC ¶ 61,311, at 62,075 (Mar. 31, 1999) (“As we stated in our prior order, Interior is authorized to prescribe, and the Commission is required to include in the license, only those conditions that relate to project works actually located on a reservation.”).

<sup>48</sup> *Tacoma*, 460 F.3d at 61. Under the Federal Power Act, petitions for judicial review of FERC orders may be filed in either “the United States Court of Appeals for any circuit wherein the licensee or public utility . . . is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.” 16 U.S.C. § 8251(b).

<sup>49</sup> *Tacoma*, 460 F.3d at 66.

project, no matter how small, is located on reservation lands.<sup>50</sup> With regard to the Cushman Project and its impact on the Skokomish Reservation, the court reached the following conclusions:

[T]he Secretary of the Interior is not limited in this proceeding to mitigating the impact the access road and the transmission line will have on the reservation. Instead, he may impose 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.<sup>51</sup>

Thus, the Secretary's conditions to improve flows and protect fish were valid even though they required actions outside the reservation.

The Cushman case is significant for Indian tribes that have any portion of a FERC-licensed project on their lands.<sup>52</sup> The United States' authority to impose reasonable conditions that are necessary to fulfill the purposes of the Indian reservation or to protect use of the tribal lands is now settled and include, for example, instream flow conditions, fish passage, or hatchery development. The section 4(e) authority is available no matter how small or benign the portion of the project located on tribal lands.<sup>53</sup> Other than the requirement that some project facilities are located on tribal lands, the only limit on the Secretary's authority is that the condition be reasonably related to protection or use of tribal lands and supported by evidence in the record.<sup>54</sup> That requirement was clearly satisfied in the Cushman proceeding, as the off-reservation diversion of the North Fork had significant adverse impacts on the Tribe.<sup>55</sup>

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 67.

<sup>52</sup> The significance is underscored by FERC orders subsequent to the Cushman decision. See *In re Pub. Util. Dist. No. 1 of Pend Oreille County*, Order on Rehearing, 117 FERC ¶ 61,205 (Nov. 17, 2006) (acknowledging that, under the *Tacoma* decision, FERC has no authority to place geographic limitations on section 4(e) conditions); *In re Portland Gen. Elec. Co.*, Order on Rehearing, 117 FERC ¶ 61,112 (Oct. 26, 2006) (acknowledging that, under the *Tacoma* decision, FERC has no authority to place strict time restrictions on Forest Service's submission of section 4(e) conditions and must include all final Forest Service 4(e) conditions in the license).

<sup>53</sup> *Tacoma*, 460 F.3d at 66.

<sup>54</sup> *Id.* at 67.

<sup>55</sup> *Id.* at 59–62.

### III. THE CUSHMAN SETTLEMENT

The D.C. Circuit's Cushman decision had two significant impacts on the Skokomish Tribe. First, the decision required Tacoma to immediately install a new flow valve and commence the release of 240 cfs or inflow (whichever is less) from the project into the North Fork Skokomish River.<sup>56</sup> Thus, in March 2008, Tacoma completed installation of a new flow valve and began a historic restoration of flows to the river.<sup>57</sup> The second impact was that it brought Tacoma and the Tribe back to the bargaining table in an attempt to resolve all issues related to the Cushman Project, including the relicensing and the separate damages litigation that the Tribe had filed against Tacoma in 1999.<sup>58</sup>

Two years of negotiations between the Tribe, the City of Tacoma, the Bureau of Indian Affairs, and numerous other federal and state agencies,<sup>59</sup> culminated in an extensive settlement package that will likely result in significant environmental restoration of the Skokomish River, restore land to the Tribe within and near the reservation boundaries, and provide an income stream to the Tribe for the next forty years.

Under the terms of the settlement filed with FERC on January 21, 2009, Tacoma must implement a substantial program of environmental restoration and mitigation for the North Fork Skokomish River.<sup>60</sup> Tacoma must continue to release flows from the project into the North Fork but will do so pursuant to a mutually agreed-upon flow regime designed to mimic the natural hydrograph of the river. In addition, Tacoma must construct and operate a trap-and-haul fish passage system in order to restore anadromous fish to habitat above the Cushman Project for the first time in over eighty years. Tacoma will also implement a fish

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<sup>56</sup> *Id.* at 78 (vacating stay of minimum flow requirements).

<sup>57</sup> A 90-second video of the March 7, 2008 flow restoration may be viewed at <http://www.youtube.com/watch?v=I1n1mDY4nY8> (last visited Apr. 7, 2009).

<sup>58</sup> See *Skokomish Indian Tribe v. United States et al.*, 410 F.3d 506 (9th Cir. 2005).

<sup>59</sup> In addition to the Bureau of Indian Affairs, the participating federal and state agencies included the National Marine Fisheries Service, United States Forest Service, United States Fish and Wildlife Service, National Park Service, Washington Department of Fish and Wildlife, and Washington Department of Ecology.

<sup>60</sup> Settlement documents are available at [http://elibrary.FERC.gov/idmws/file\\_list.asp?accession\\_num=20090121-5218](http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20090121-5218).

supplementation program that calls for development of a new sockeye hatchery on Hood Canal and other facilities to supplement the production of spring Chinook salmon, coho salmon, and winter-run steelhead trout. Tacoma must also contribute \$3.5 million into a Habitat Restoration Fund and will add \$300,000 per year to that fund starting in year five of the license. These funds will be used to implement restoration projects in the North Fork sub-basin. Tacoma will also conduct a monitoring program and manage nearly 3,000 acres of lands around the project for the benefit of wildlife.

In addition to these environmental restoration measures, the settlement also calls for Tacoma to convey to the Tribe over 1,400 acres of land located within and nearby the Skokomish Reservation. Moreover, the Tribe will receive upfront payments of \$12.6 million once the FERC license is issued and will also share in project revenues throughout the life of the forty-year FERC license, resulting in a continuous and reliable revenue stream for tribal purposes.

Pursuant to the settlement, Tacoma will not be required to implement some of the Secretary's contested 4(e) flow conditions that arguably could have made the project uneconomical to operate. However, the combination of environmental restoration, land transfers, and monetary compensation results in a comprehensive settlement package that is consistent with section 4(e)'s mandate to ensure the adequate protection and use of the Skokomish Reservation for the Tribe and its members.

#### IV. CONCLUSION

Section 4(e) of the Federal Power Act is a significant legal tool to protect Indian tribes and reservation resources. Based on the decisions in *Escondido* and *Cushman*, the Secretary of the Interior's authority to develop and impose conditions for the protection of Indian lands burdened by FERC-licensed hydroelectric projects is now firmly established. In coming years, numerous hydroelectric projects located within Indian lands will seek new licenses from FERC. As illustrated by the *Cushman* proceeding, the development and imposition of section 4(e) conditions will likely prove critical as Indian tribes seek to mitigate the impacts of hydroelectric development on their reservations.