



Skokomish Indian Tribe

Tribal Center (360) 426-4232

N. 80 Tribal Center Road

FAX (360) 877-5943

Skokomish Nation, WA 98584

August 30, 2006

United States Department of the Interior
Bureau of Indian Affairs
Office of Indian Energy and Economic Development
Room 20 South Interior Building
1951 Constitution Avenue NW
Washington, DC 20245

Re: Comments on Energy Policy Act of 2005, Section 1813 Draft Report to Congress

The following comments submitted on behalf of the Skokomish Indian Tribe accompany oral comments delivered at the public meeting held at the Carlisle Hotel, Albuquerque, New Mexico on August 30, 2006.

GENERAL COMMENTS

The Skokomish Tribe is opposed to legislation that would remove consent authority from tribes and grant the Secretary of the Interior authority to consent to energy rights-of-way across tribal lands. The Skokomish Tribe is also opposed to legislation that would lead to development of a generalized formula for just compensation concerning damages and annual charges for energy rights-of-way on tribal land. Just compensation should take into account specific facts and circumstances of disputes. The Draft Report is incomplete because it does not present case studies involving willful trespass by power companies on tribal lands. The Tribe's concerns are discussed below.

That case study approach taken in the Draft Report fails to take into consideration significant, egregious actions taken by energy companies and the Department of the Interior to obtain rights-of-ways across reservation lands and the resulting impacts on tribes and their members. *See Sec. 1.2.* Nor does the Draft Report include any discussion of cases in which energy companies have occupied tribal lands unlawfully, without valid rights-of-way, subsequent litigation and the success and failure of settlement negotiations to resolve such disputes. Without inclusion of such worst case examples of energy development and right-of-way disputes involving treaty rights, tribal resources and tribal lands, the report to Congress lacks the necessary balance to accurately describe the effects of proposed energy right-of-way legislation. Therefore, the Draft Report is misleading for what it does not include.

One such glaring example involves the Skokomish Tribe; City of Tacoma, Washington; and the Cushman Hydroelectric Project which is situated on the North Fork of the Skokomish River, outside the Skokomish Indian Reservation and a powerplant and transmission structures

within the Skokomish Indian Reservation. The Skokomish Tribe has been severely impacted by the project and has been involved in protracted litigation with the City of Tacoma and the United States over damages from the project and project relicensing.

In 1920, Tacoma began plans to develop the Cushman hydroelectric power project and instituted condemnation proceedings in state court against owners of trust and allotted lands within the Skokomish Indian Reservation. The United States was not a party to that state court action. The court found that the project was in the public interest and ordered Tacoma to pay damages for portions of two allotments and granted perpetual easements across three. This was a “conditional judgment” subject to the United States government’s approval, through its “proper authorities.” Subsequently, the Assistant Commissioner of Indian Affairs approved the state court’s conditional judgment upon reasoning that the condemnation was authorized by Section 3 of the Act of March 3, 1901, 31 Stat. 1083-84 (now codified as 25 U.S.C. §357). *See United States v. City of Tacoma*, 332 F.3d 574, 576-77 (9th Cir. 2003). That court held that the 1920 condemnation of allotted lands was unlawful and the Assistant Commissioner’s approval of the condemnation was without effect. Thus, Tacoma has engaged in continuing trespass through occupation of allotted lands with its power transmission lines, towers and access road. Significantly, Tacoma’s power transmission lines cross trust lands on the Skokomish Indian Reservation in which the Skokomish Tribe owns undivided interests.

In 1924, the Federal Power Commission (FPC), predecessor of the Federal Energy Regulatory Commission (FERC), issued a 50-year minor part license to flood 8.8 acres of United States Forest Service land outside the Skokomish Indian Reservation. The FPC order stated that the “license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired.” *Id.* (citations omitted) In 1963, the FPC determined that its hydroelectric licensing jurisdiction extended to entire whole projects. *Pac. Gas & Elec. Co.*, 29 FPC 1265, 1266 (1963). Tacoma sought relicensing of the Cushman project in 1974 when its license expired and continued operating the project for 24 years thereafter during litigation that followed. The Tribe’s position is that FERC was asked to issue a new license for the Cushman Project since only a minor part license was issued originally. Since the entire Cushman Project has recently been swept into the FERC process, it is inconceivable that the major license does not interfere with the purpose for which the Skokomish Indian Reservation was created.

The Cushman Project diverted all of the flows from the North Fork of the Skokomish River for more than sixty years with the exception of rare emergency spills. The North Fork was the most productive portion of the Skokomish River for salmon, steelhead, bulltrout and other fish species which the Tribe harvested under treaty fishing rights guaranteed by the 1855 Treaty of Point No Point, 12 Stat.933. Three fish species in the Skokomish River are now listed as threatened under the Endangered Species Act. The Cushman Project blocked critical fish passage into Lake Cushman which was needed to maintain a sockeye salmon fishery. The North Fork waters were and are being diverted to Hood Canal through a power plant operated by Tacoma situated on the Skokomish Indian Reservation. Thus, North Fork waters that were historically valuable for raising fish to sustain the Tribe were, for more than sixty years, used to generate hydropower by Tacoma. Tacoma continues to divert 92.5 % of the North Fork’s water. *City of Tacoma v. Federal Energy Regulatory Commission*, ___ F.3d, ___, ___, 2006 WL 2411362 (D.C. Cir., Aug.22, 2006).

In addition to the devastating impact the Cushman Project has on the North Fork fishery, the project has severely altered the flow regime of the mainstem Skokomish River preventing flushing flows and allowing aggradation to occur. The river channel has filled with gravel preventing fish passage at low water times and creating severe flooding downstream on the Skokomish Indian Reservation. The flooding on the Reservation is now so severe that the Tribe cannot construct housing for tribal members on the Skokomish River floodplain.

Even the obvious damages to the Skokomish Tribe from destruction of the North Fork fishery and filling the mainstem river with gravel does not make clear other impacts to the Tribe resulting from operation of the Cushman Project. The impacts to the Tribe's infrastructure, social institutions and cultural practices of the Tribe have been severe. The project has taken away valuable fisheries from the North Fork, prevented fish from ascending the South Fork which is full of gravel, prevented tribal members from visiting a village site which is now inundated by Lake Cushman, destroyed cultural and sacred sites important to the Tribe since time immemorial and flooded the Tribe's homeland which was guaranteed by treaty. And, Tacoma, lacking a valid right-of-way, continues to damage the Tribe and its members by its continued trespass on tribal land on the Reservation while continuing to reap tremendous financial benefits.

Tacoma has vigorously fought imposition of conditions on its reissued license required by Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e) and has operated its project for 24 years on annual renewal licenses. In 1996, the Department of the Interior issued section 4(e) conditions that, in part, were designed to protect the purposes for which the Skokomish Indian Reservation was established. FERC issued a license for continued operation of the Cushman Project with some but not all of those conditions. Tacoma has stated that it will not accept the Cushman Project license if the 4(e) conditions are made part of it asserting that the license will be uneconomic. Both Tacoma and the Tribe petitioned for review and on August 23, 2006 the United States Circuit Court for the District of Columbia Circuit held, in part, that the section 4(e) conditions issued by Interior are mandatory and remanded the matter to FERC. If FERC determines that a license to operate Cushman should issue, it must include the section 4(e) conditions submitted by Interior in 1996.

The eventual outcome of the FERC licensing case and the Tribe's pending damages claim are unclear. It is clear that congressional action, at this point, removing the Tribe's consent power for an energy right-of-way across tribal land and establishing a general formula for just compensation, without consideration of the specific facts and circumstances of this case, could deal a severe blow to the Skokomish Tribe. It is in that context that the Skokomish Tribe offers the following comments to the Draft Report.

SPECIFIC COMMENTS

Any discussion about tribal consent authority for energy rights-of-way being grounded in treaties, statutes, supreme court decisions should include a discussion of corollary fiduciary duties of the United States to ensure that consent authority is maintained. *Sec. 1.3.1.* To be sure, the cost associated with energy rights-of-way is increasing, but Tacoma's costs have been minimal for use of tribal lands for over eighty years. Moreover, uncertainty in energy right-of-way negotiations should be viewed in context with the circumstances in which they occur. *Sec. 1.3.4.* Energy right-of-way negotiations carried out during litigation can be far different than when conducted without litigation, at arms length. The ability of a Tribe to withhold consent in negotiations may well counterbalance greater financial ability of developers to engage in protracted litigation.

Industry's concern about uncertainties related to trespass situations, *Sec. 1.3.6,* from the Skokomish Tribe's viewpoint, should take into account that continued trespass was intentional, less than fair compensation was paid and no compensation was paid for use of tribal lands. Any fair discussion of just compensation for energy rights-of-way should take into account situations like the one experienced by the Skokomish Tribe. Tacoma's knowing, intentional trespass should give rise to damages based on the "power site value" rather than "fair market value" based on use of the land. In order to ensure some level of predictability and fairness in negotiating annual charges following expiration of a right-of-way or license depends to a great extent on maintaining fair treatment and a good relationship with the Tribe whose land is being used. Conversely, when industry has engaged in intentional, wrongful acts, caused substantial

damage to the Tribe while reaping enormous profits, and engaged in protracted litigation costing the Tribe millions of dollars, it is predictable that the Tribe will be less flexible in dealing with trespass and damages issues.

The value of energy rights-of-ways should be subject to the unique facts and circumstances of each case. *See Sec. 1.3.8.* The experience of the Skokomish Tribe serves as a clear illustration why creating consistent, transparent and generalized approach to valuing rights-of-ways should be rejected. Fair market value principles, discussed in Section 4, do not take into account values that are not included in such analyses such as the Tribe's ability to continue exercising treaty fishing rights, impacts to tribal social structure, cultural values, customs and practices. A cookbook approach to valuing energy rights-of-ways would be a convenient, beneficial and somewhat easy approach for industry to follow, but would place an enormous burden on Tribes to establish a value on such things as sacred places and the right to continue practicing a way of life not well understood by industry. This burden would undoubtedly lead to development of new principles of law recognized by the courts for Tribes to receive fair treatment. Instead of imposing a methodology for valuing energy rights-of-ways, the better approach is to promote even-handed negotiations ensuring that the tribes are not at risk of further loss of authority over their land base and further erosion of their sovereignty.

The Skokomish Tribe's experience with Tacoma Power is not unique. Other Tribes have been in protracted litigation with power companies over trespass on tribal lands. In the interest of providing Congress with a more accurate view of critical issues involving proposed energy right-of-way legislation, the Draft Report should be expanded to include a description of the disputes, why they arose and whether and how those disputes have been resolved.

Thank you for the opportunity to comment on the Draft Report. I trust that the Tribe's comments will be appropriately considered and addressed in further actions concerning this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian H. Collins". The signature is stylized and cursive.

Brian H. Collins
Sr. Tribal Attorney