Regulation and Ownership of Hydroelectric Facilities on Tribal Lands

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## Overview

Water plays a critical role in our health, economy, and environment. It can even provide public benefit as it flows downhill, if the potential energy is converted into hydroelectric power (hydropower). Since the early 1900s, the United States (US) government has invested in construction of major infrastructure projects, including dams, to stimulate the economy and meet public demand for electricity.
The benefits of hydropower include a cost effective and reliable source of renewable energy, jobs, and an offset to the public’s dependency on fossil fuels and foreign resources. The costs include negative impact to the environment, including destruction of migratory fish habitat and a build-up of toxins such as blue-green algae (cyanobacteria). While such impacts were immediately clear to Tribes reliant on fish and streams for sustenance and cultural practices, it has taken decades of growing public awareness to establish the regulation necessary to begin addressing these significant impacts.

On tribal land, sovereignty can complicate the regulation of the sale and/or distribution of hydropower as the federal, tribal, and state governments typically all have a role. But strong partnerships between all three governments, and even private interests, can enable the benefits of hydropower while addressing the negative impacts of dams. Further, tribal ownership and/or management of dams may provide opportunities of mutual benefit for all stakeholders.

**Purpose**

This paper is intended as a primer on the legal issues associated with the regulation of hydropower facilities on tribal lands.\(^1\) It provides an overview of governmental authority, the legal framework, examples of tribal ownership of facilities, and concludes with observations on challenges and future opportunities for such tribal ownership.

**Context**

Like other nations formed by a foreign population moving to already inhabited land, the US government and early settlers established themselves by legally, politically, and culturally

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\(^1\) The need for an overview of the legal framework and issues associated with hydropower on tribal lands was identified during my service as a Law Clerk for the US Army Corps of Engineers. Special thanks to: Retired Justice Hans Linde for his challenge to go beyond recitation of the law to offer a perspective on furthering a public benefit, the late Dave Frohmayer for his advice on approaching this topic, Professor Howie Arnett for his expertise on Indian law, Jen Gleeson for her guidance on energy regulation, Cass Skinner for her review of this paper, and the Hans Linde Fellowship Committee for their support of this research.
sidelining the indigenous populations.² Over time, US policy has evolved from forced relocation of Tribes and reeducation in boarding schools to greater recognition of Indian rights and support for greater self-determination, including support for development of energy resources on Tribal land.³

Over 2.5 million people self-identify as “Indian” and 1.8 million as “part Indian,” totaling 1.5% of the US population.⁴ There are 566 federally recognized American Indian tribes and Alaska Natives,⁵ and are approximately 326 Indian reservations⁶ in the US.

There is a notable distinction between hydropower facilities and power utilities. The facility is the structure, consisting of a dam built across a stream at a point where a change in elevation provides the potential energy that is converted into energy. The utility is the electric power company that is in the business of generating, transmitting and/or distributing electricity for sale in a regulated market. The owner(s) of the facility and utility typically hire professional staff, a specialized company, or create a subsidiary to manage the facility or utility. The generation, transmission, and sale of electricity is regulated by one or more governments.

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² Johnson and Graham's Leasee v. William McIntosh (Johnson v. McIntosh), 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). The Chief Justice for the then-fledgling US Supreme Court wrote the opinion establishing the Discovery Doctrine as the basis for US law limiting aboriginal title to the right to use and occupy the land, but not to hold fee title, which was extinguished by conquest.
³ The US “has a unique legal and political relationship with Indian tribes and Alaska Native entities as provided by the Constitution of the United States, treaties, court decisions and Federal statutes.” The BIA’s Division of Energy and Mineral Development provides assistance to federally recognized tribes and Indian allottees on trust lands to evaluate their energy and mineral resource potential on their lands. BIA website, June 2015.
⁴ 2000 US census.
⁵ A federally recognized tribe is an American Indian or Alaska Native tribe recognized as having a government-to-government relationship with the US, inclusive of the responsibilities, powers, limitations, and obligations of that designation. Such tribes are entitled to receive certain federal benefits, services and protections. US Bureau of Indian Affairs (BIA) website, May 2015.
⁶ A federal Indian reservation is “an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.” The federal government holds approximately 56.2 million acres in trust for various Indian tribes and individuals. Some reservations are remnants of a tribe’s original land base, while others were created by the federal government for resettlement purposes. Not every federally recognized tribe has a reservation. BIA website, May 2015.
**Governmental Authority**

Governmental authority is based on a combination of foundational documents, politically-formed legislation, interpretive law, and the power to enforce. A constitution establishes the delegation of authority within a government, and international protocol typically establishes authority between governments. Within the federal government, the hierarchy of legal authority is: treaties, the US constitution, federal statutes, federal administrative agency rules, federal case law, a state’s constitution, state statutes, state agency rules, and state case law. Individual states do not have the authority to assert control over federal lands within their jurisdiction. For the federal and state governments, intra-governmental authority is established through the legislative, judicial, and executive branches. Congressional / Legislative authority is established through statutes, judicial authority is established through case law, and executive authority is established through executive policies, orders, and government agency appointments.

**Federal**

The federal government retains certain authority over natural resources through a series of established doctrines, based on direct or interpreted authority from the Constitution, including:

- Treaty Clause\(^9\) – Presidential authority to make treaties, with Senate concurrence;\(^{10}\)
- Supremacy Clause – preempts state laws that are incompatible with federal requirements.
- Property Clause – congressional authority to make rules and regulations respecting the territory and/or property of the US;

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\(^{7}\) The Tenth Amendment to the US Constitution establishes the federal government has only those powers delegated by the Constitution and that all remaining power is reserved for the states or the people.

\(^{8}\) *Nye County*, 920 F. Supp. 1108 (D. Nev. 1996). The Court held that the Equal Footing Doctrine did not enable states to exert control over federal lands, as asserted by the “sagebrush rebellions.” A state may have limited ability to assert authority over Tribes within the state’s boundaries, as addressed in the Indian Law section of this paper.

\(^{9}\) Article II, Section 2, Clause 2 of the US Constitution, known as the Treaty Clause, states that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur…” Further, Article VI, Section 2 states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

\(^{10}\) Congress has limited the President’s right to make treaties with Indian Tribes in 1871.
• Commerce Clause – congressional authority to make rules and regulations for economic activities relating to interstate commerce;
• Necessary & Proper Clause – authority to make laws to carry out retained powers;
• Spending Clause – congressional authority to incentivize states to adopt programs consistent with federal interest by attaching conditions to receipt of federal funds; and
• Doctrine of Displacement – separation of power between branches of government.

**Relationship with Tribes**

The US government acknowledges federally recognized Tribes as sovereign governments; however, the US courts have varied their interpretation of international law as it applies to federally recognized tribes and recognition of previously signed treaties. Tribes are recognized as having established rights to move across international borders, but cannot declare war, engage in foreign relations, or issue their own currency. Since the early 1800s, the US Supreme Court has held that the US has legal dominance over Native Americans, recognizing Tribes only as "domestic dependent nations." The court limited state control over Tribes,

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11 Cohen’s Handbook of Federal Indian Law, 2005 Edition, p. xvii. Indian Reorganization Act of 1934, Section 16: federal recognition for Indian tribal rights to exercise sovereign authority pursuant to constitutional representative governments; 25 USC § 476; and Section 17: federal authority for Indian tribes to charter corporations for the purpose of conducting economic activities; 25 USC § 477. Also, United States v. Lara, 541 U.S. 193, 124 S.Ct. 1628 (2004). The Tribe acted in the capacity of a separate sovereign. Further, the BIA acknowledges tribal sovereignty as one of the inherent rights of self-government reserved for a federally recognized tribe, including the right to form governments, to make and enforce laws, to tax, to determine tribal citizenship; to license and regulate activities within their jurisdiction, and to exclude persons from tribal lands. BIA website, May 2015.

12 A customary law norm binds a nation even if it has not formally recognized the norm. However, only those rules that nations believe themselves obligated to perform become binding customary law. Restatement (Third) of Foreign Relations Law, § 102 cmt. c.


14 Tribes are permitted free passage without restriction across the US-Canada board if they are at least fifty percent Indian by blood (8 U.S.C. § 1359), and free movement across the US-Mexico border (25 U.S.C. § 1300b-13(d)).

15BIA website, FAQs, May 2015.

16 Cohen’s Handbook of Federal Indian Law, 2005 Edition, p. xvii, § 5.07. Johnson v. M’Intosh, 21 U.S. 543, 574 (1823). The Supreme Court relied on the international law norms of discovery doctrine, the existence and scope of Indian title to property, and inherent tribal sovereignty. The English crown’s doctrine of “initial discovery” of “terra nullius” (nobody there) lands were used by the Court to limit the property rights of Indians; the Supreme Court ruled that the fledgling American government had inherited all of the land when it drove out the British during the US Revolutionary war, despite the critical assistance of the Iroquois Nation.

17 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831). The Court held that the relationship between Tribes and the US government "resembles that of a ward to his guardian."
instead recognizing the Tribes’ right to exercise authority within the defined boundaries of their reservation.\textsuperscript{18} There are thousands of reported judicial decisions in Indian Law.\textsuperscript{19}

The US Constitution grants Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”\textsuperscript{20} This legislative authority has changed notably throughout US history, often driven by public sentiment and demand for Tribal resources. Once their preemptive authority was recognized by the Supreme Court, Congress ended treaty making in 1871. Congress codified\textsuperscript{21} over four thousand treaties and statutes dealing with Tribes through Congressional Acts, Executive Orders and Agreements.

Presidential policies towards the Tribes has also varied notably, from George Washington’s gratitude to Andrew Jackson’s forced relocations. Since Richard Nixon, presidents have generally demonstrated respect for Indian rights through Executive Orders and Presidential Memoranda, on such issues as:

- Tribal Sovereignty – federal government recognizes that Tribal governments are sovereign entities.\textsuperscript{22}
- Trust Responsibilities – federal agencies are to work to meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities.\textsuperscript{23}

\textsuperscript{18} Worcester v. Georgia, 31 U.S. 515, 560-61 (1832).
\textsuperscript{19} Cohen’s Handbook of Federal Indian Law, 2005 Edition, p. xvii. Felix Cohen has been dubbed the “Father of Federal Indian Law” and is credited with authoring the federal treatise. But it is of note that he was aided immeasurably by his wife, writer and editor Lucy M. Kramer. Kramer’s studies in Indian affairs predated Cohen’s. And while her expertise qualified for a Ph.D. in three subjects (mathematics, anthropology and/or linguistics), completion of her degree was cut short when she married Cohen and followed him to Washington, DC, after he was hired to author the treatise. Kramer’s expertise, research and hard work were fundamental to the development of the Handbook; she editing all 46 volumes of the primary source materials. After Cohen’s death, Kramer compiled, edited, and secured publication of his collected works. Like many women who shaped history, she remains – literally and figuratively – relegated to a footnote.
\textsuperscript{20} U.S. Constitution, Art. I, Sect. 8.
\textsuperscript{21} Between 1778 and 1871, the US Senate ratified 370 treaties (an additional 45 were negotiated but not ratified). BIA website, May 2015.
\textsuperscript{22} Executive Order 13175 Consultation and Coordination With Indian Tribal Governments (06 Nov 2000): "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."
\textsuperscript{23} Presidential Memorandum (29 Apr 1994) Government-to-Government Relations With Native American Tribal Governments: "Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes."
• Government-to-Government – federal agencies are to ensure that federal government leaders and Tribal leaders meet as governments and recognize that Tribes have the right to be treated in accordance with principles of self-determination.24

• Pre-Decisional Consultation – federal agencies are to involve Tribes collaboratively, before and throughout decision making, to ensure the timely exchange of information, the consideration of disparate viewpoints, and the utilization of fair and impartial dispute resolution processes.25

The US Department of the Interior Bureau of Indian Affairs (BIA), established in 1824 to manage the federal government’s commitments to the Tribes,26 currently provides direct or indirect services to approximately 1.9 million American Indians and Alaska Natives.27 Under its trust obligation, the US government holds approximately 56.2 million acres in trust for various Indian Tribes and individuals. The US administers approximately 326 Indian land areas as federal Indian reservations.28 While the US participates in international dialogue on the treatment of indigenous peoples, it has avoided signing onto such international agreements.29

24 Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments (06 Nov 2000): “The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.”

25 Presidential Memorandum (Apr 1994) Government-to-Government Relations With Native American Tribal Governments: “Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.”

26 The BIA provides services directly or through contracts, grants, or compacts. The BIA is responsible for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust for Indian Tribes and Alaska Natives. BIA website, June 2015.

27 Determination of who is eligible to use the term American Indian or Alaska Native depends on several factors. A major factor is “blood degree” and recognition by a federally recognized tribe or village as an enrolled member and/or the US, but other factors include: knowledge of his or her tribe’s culture, history, language, religion, familial kinships, and strength of identification as American Indian or Alaska Native. BIA website, May 2015.

28 These lands held in trust include: reservations, pueblos, rancherias, missions, villages, communities, etc. The largest being the Navajo Nation Reservation in Arizona, New Mexico, and Utah (16 million acres), and the smallest being the Pit River Tribe’s cemetery in California (only 1.3 acres). Source: BIA website, May 2015.

29 The 2007 United Nations (UN) Declaration on the Rights of Indigenous Peoples (Resolution 61/295) recognized the rights of native peoples within their own countries. While not legally binding under international law, the Declaration represents “the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions” (September 13, 2007 UN press release). President Obama signed the Declaration on December 16, 2010, but it is unclear if his support will impact US policy regarding Indian Tribes. The US is a founding member of the UN whose Charter recognizes the key principle of self-determination of people and the rights of indigenous peoples (U.N. Charter arts. 1 & 55).
Relationship with States

The relationship between the federal and state governments is defined in the Supremacy Clause, establishing federal law as the "supreme law of the land." This clause gives rise to the doctrine of preemption, which states that federal law, whether express or implied, preempts state law when the laws conflict, unless the federal law is deemed unconstitutional or the Supremacy Clause is determined not to apply.

Tribal

The Constitution grants Congress plenary power over Indian Affairs, and state’s rights over Tribes are limited to those expressly authorized by Congress. Congress has transferred some authority to the states, including Public Law 280 and the McCarran Amendment. The Supreme Court upheld a limit to state authority in the early 1800s, but also upheld the congressional transfer of authority to states under the McCarran Amendment.

Federally recognized Tribes and states have a government-to-government relationship. Tribes are not subordinate to states and have the authority to regulate activities on their lands independent from state government control, with the exception of criminal authority under 

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30 U.S. Constitution, Article VI.
32 Congress transferred federal control of law enforcement authority from federal to state governments in six states (California, Minnesota except the Red Lake Nation, Nebraska, Oregon except the Warm Springs Tribe, Wisconsin except the Menominee Indian Reservation, and Alaska). Ten states were later added: Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah. Public Law 83-280 (67 Stat. 588).
33 In 1952, Congress waived the US’s sovereign immunity in lawsuits regarding ownership or management of water rights, allowing others to join the lawsuit as a defendant. The net result was enabling lawsuits concerning federal water rights to be tried in state courts. 43 U.S.C. Sect. 666 (1952).
34 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). The Court held that the Cherokee Nation was a federal protectorate in which the laws of Georgia could "have no force."
35 Colorado River Water Conservation District v. US, 424 U.S. 800 (1976). Certain states have jurisdiction to quantify Indian entitlement rights. Under the McCarran Amendment, a state's general stream adjudication process subjected the Tribe to the state's quantification proceedings. However, the Court left open the question of whether a Tribe could perfect its rights in an original federal court action in the absence of a state proceeding.
36 BIA website, FAQs, May 2015.
Public Law 280. Tribes and states may collaborate on matters of mutual concern, such as environmental protection and law enforcement, through compacts or other agreements.37

**States**

Federal power over states is limited by the 10th Amendment.38 States have “police power” which is the right of a government to make laws and regulations to protect the health, safety, morals, and general welfare of its citizens. Under the Equal footing Doctrine, states gain the equal sovereignty to other states when they attain statehood.

**The Legal Landscape**

**Water Law**

Water law is challenging in that it can be considered as a “right” – similar to property law – and yet the traditional concept of ownership is limited due to the fact that water is a moving resources that is part of a shared hydrological cycle that cannot be controlled. With the exception of federal provisions of reserved water rights for public lands and for Tribes, states set and administer their own water laws regulating and enforcing private water rights. Water law has evolved differently in different parts of the country, based on availability and government policy during the formation of statehood, but follows either riparian rights, prior appropriation, or some hybrid of the two. Eastern states, which traditionally have had an abundance of water, follow riparian law, enabling streamside land owners to make reasonable use of the water flowing by their property. Western states, where water is often scarce and has to be channeled

37 Public Law 280 (67 Stat. 588) does not grant states regulatory power over tribes or lands held in trust by the United States; federally guaranteed tribal hunting, trapping, and fishing rights; basic tribal governmental functions such as enrollment and domestic relations; nor the power to impose state taxes. These states also may not regulate matters such as environmental control, land use, gambling, and licenses on federal Indian reservations. BIA website, FAQs, May 2015.
38 U.S. Const., 10th Amendment: “…powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
away from streams to be used, typically follow prior appropriation; this "first in time, first in right" principle is based on when the water was first put to beneficial use.

The federal government recognizes Tribal water rights. The federal government exercised primary authority for waterways until 1952, with congressional passage of the McCarran Amendment, which granted states authority to adjudicate stream rights.

Congressional authority to exercise power over navigable waterways is based in the Commerce Clause. While Congress initially left regulation of water power to the states, it began developing national policy in the late nineteenth and early twentieth century.

Energy Law

The Federal Power Act (FPA) of 1920 established a comprehensive national policy. The primary purpose was to regulate hydropower projects under a single agency of technical experts to focus on developing a comprehensive system of “improvement and utilization” of the nation’s waterways. The FPA created an administrative agency: initially the Federal Power Commission, later renamed the Federal Energy Regulatory Commission (FERC). FERC has

39 Winters v. US, 207 U.S. 564 (1908). The Supreme Court affirmed a decree enjoining private companies from utilizing river waters intended for an Indian Reservation, upholding Indian water rights.
40 43 U.S.C. Section 666 (1952). Upheld by the Supreme Court in Colorado River Water Conservation District v. US, 424 U.S. 800 (1976). Certain states have jurisdiction to quantify Indian entitlement rights. Under the McCarran Amendment, a state's "general stream adjudication" process subjected the tribe to the state's quantification proceedings. However, the Court left open the question of whether a tribe could perfect its rights in an original federal court action in the absence of a state proceeding.
42 William F. Fox, Jr., Federal Regulation of Energy §1.02, art. 5 (1983).
44 It helped to end the political battle between private and public interests over the development and regulation of hydropower resources in the US, as Congress no longer had to individually authorize each nonfederal hydropower projects built during the major dam-building era in the US. The FPA has since been amended several times. 16 U.S.C. § 791-825u (2000).
46 The first major amendment to FPA’s hydropower licensing requirements since 1935 was the Electric Consumer Protection Act of 1986 (ECPA). Pub. L. No. 99-495, 100 Stat. 243 (1986). The four principal changes to Part I of the FPA included: more sensitivity to fish and wildlife and other non-power stream uses by requiring FERC to give “equal consideration” to non-power uses and to consider fish and wildlife agency recommendations in project licensing (newly added section 10(j)).
authority to regulate interstate sale and transmission of electricity, and to license private
hydropower projects that cross or are in navigable waters, public lands, or federal reservations.
Facilities on non-navigable waters may also require a license if FERC finds the "interests of
interstate or foreign commerce would be affected" by the project.

Over time, FERC’s mandate has evolved to include providing for the “adequate
protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds
and habitat), and for other beneficial uses, including irrigation, flood control, water supply, and
recreational… purposes. The passage of federal programs has established additional
authority from federal and state agencies to establish license conditions over hydropower project
licenses, under Section 4(e) and 18 of the FPA and Section 401 of the Clean Water Act. In the
1935 Amendment, FERC was given responsibility for regulating all wholesale transactions of
electrical power, regardless of the location of seller and purchaser, and authority to administer
regulation for non-federal hydropower projects to support comprehensive development of rivers
for energy generation and other beneficial uses. FERC has interpreted their authority to
include licensing of non-federal hydropower projects owned by Indian tribes.

48 Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965). The Court sustained FERC’s decision requiring a license for a “pumped-storage” facility because the power generated would be transmitted across state lines, and improper operation could affect the timing of the flows of the navigable portion of the river downstream.
51 16 U.S. Code 791 et seq. Specifically, The authority authorizes FERC to “… issue licenses to citizens of the United States, or to any association of such citizens … for the purpose of operating, and maintaining dams … in any of the streams or other bodies of water which Congress has jurisdiction under its authority to regulate commerce … upon … reservations of the United States …” 16 U.S.C. §797, Section 4(e).
The 1970s energy crisis resulted in passage of the Public Utility Regulatory Policy Act (PURPA).\textsuperscript{53} To be eligible for PURPA, a project had to “not have substantial adverse effects on the environment” and meet the terms and conditions set by fish and wildlife agencies. Subsequent amendments to US energy policy increased FERC’s enforcement authority, enabling the agency to monitor and investigate, require compliance, impose civil penalties, and ultimately revoke license when the licensee was in violation of a compliance order.\textsuperscript{54} The 1995 FPA amendment requires a hydropower facility to be decommissioned if it is not re-licensed.\textsuperscript{55}

Congress, however, included recognition of state’s rights in the amended energy policies. As dams affect the flow of streams, two sections of the FPA preserve state law:

- Section 9(b) requires applicants to submit evidence of compliance with state laws, but does not give state governments a veto power over federal projects,\textsuperscript{56} and
- Section 27 affirms the FPA is not intended to usurp state law,\textsuperscript{57} but does not authorize the state to impose project conditions.\textsuperscript{58} FERC’s authority may be qualified, however, when Congress delegates responsibility for environmental protection to a state.

Two sections of the FPA, as amended, are relevant to tribal land (a.k.a. Indian Country):

- Section 4(e): authorizes FERC to issue licenses for hydropower projects, and authorizes federal land managers to condition licenses to ensure consistency with underlying purpose of affected federal reservations; 16 U.S.C. § 797(e).
- Section 10(e): authorizes FERC, subject to approval of the affected Indian Tribe, to “fix a reasonable annual charge for the use” of an Indian reservation; 16 U.S.C. § 803(e).

\textsuperscript{53} Section 210 of PURPA, 16 U.S.C. §§ 824a-3, gives small hydroelectric generators a guaranteed market by requiring electric utilities to purchase power from “qualifying facilities” (i.e. up to 800 MW) at “the incremental cost of alternative electric energy.” While not all sections of the bill provided benefits (e.g. sections 402 and 403 of PURPA offered loans to project developers, 16 U.S.C. §§ 2702-2703, though received virtually no funding), the constitutionality of PURPA was upheld in 1982 (FERC v. Mississippi, 456 U.S. 742). PURPA was followed by the Energy Security Act to stimulate interest in hydropower.


\textsuperscript{55} 60 Fed Reg. 339.

\textsuperscript{56} First Iowa Hydro–Electric Co-op. v. Federal Power Comm’n, 328 U.S. 152 (1946). The Supreme Court upheld a FERC license for a hydropower project on a tributary of the Iowa River where it was not possible to comply with both state and federal permit requirements, stating that § 9(b) is merely informational and state law would frustrate the FPA’s purpose of comprehensive nationwide planning.

\textsuperscript{57} “Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”

\textsuperscript{58} California v. FERC, 495 U.S. 490 (1990).
Incentives for Tribal Enterprise

In the last 40 years, some key pieces of federal legislation, and their subsequent amendments, have provided assistance in transitioning to Tribal control of the hydropower utilities serving their reservations:

- **Indian Self-Determination and Education Assistance Act of 1975** – authorized the orderly transition of programs and services from federal to Tribal control.

- **Indian Tribal Government Tax Status Act of 1982** – authorized Tribes to borrow money on a tax exempt status to finance an essential government functions, including electricity and water.\(^59\)

- **Energy Policy Act of 1992** – grants financial assistance to Tribes for energy purposes.\(^60\)

- **Energy Policy Act of 2005** – Title V provides programs to improve Indian energy programs and policies.\(^61\)

- **American Recovery and Reinvestment Act of 2009** – provided competitive funding for energy efficient capacity-building and projects that can be utilized by Tribes.\(^62\)

The BIA’s Division of Water and Power is responsible for irrigation construction, dam rehabilitation, and the operation and maintenance of dams, irrigation, and power projects. Under this program, the BIA is responsible for more than 135 major water projects, including: dams, irrigation projects, revenue generating power operations, and flood plain management.\(^63\) On some reservations, the BIA has helped to develop hydropower utilities or irrigation systems for the local population, including:\(^64\)

1. **BIA/Colorado River Agency Electric System** – on the Colorado River Indian Reservation in Arizona, this BIA-operated facility serves 3,000 customers in a 432 square mile area;\(^65\)

2. **San Carols Indian Irrigation Project** – on Gila River Indian Reservations in Arizona and California, this BIA-operated facility serves 2,000 customers over 1,200 square miles; and

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\(^{59}\) This authority to borrow infrastructure funds on a tax-exempt status has long since been available to non-tribal state governments, cities, counties, special districts, and other governmental agencies.

\(^{60}\) Section 2603 mandates energy self-sufficiency demonstration programs and loans to tribal governments, and section 2606 offers grants for energy efficient and renewable energy programs on reservations.

\(^{61}\) While not fully funded, it establishes obligations to study Indian energy issues and consult with Tribes on energy matters; it also prompted several feasibility studies that triggered interest in energy development on reservations.

\(^{62}\) The direct block grants – directly to the Tribes rather than through a state government agency – has been effective in raising awareness among Tribes of the options available to develop their own energy resources, as well as form partnerships with third-party agencies in the energy industry.

\(^{63}\) Source: www.bia.gov.

\(^{64}\) Tribal Authority Process: Case Studies on the Conversion of On-Reservation Electric Utilities to Tribal Ownership and Operation, prepared by the Western Area Power Administration, Renewable Resources Program, for the US Department of Energy, Tribal Energy Program, September 2010.

\(^{65}\) Federal Register listing 25 CFR 175 sets forth the operating responsibilities and methodologies for BIA-administered electric utilities on reservations.
3. Mission Valley Power – on the Flathead Indian Reservation in Montana, this facility serves approximately 13,000 customers in a 980 square mile area and is operated by the Tribal Council of the Confederated Salish and Kootenai Tribes.

**Tribal Control of Waterways**

Tribes have reserved rights to water on their reservation; however, states may have the right to manage the waters flowing through their reservation and the riverbeds. A Tribal utility’s Board of Directors regulates the energy generated and used exclusively on their reservation.

**State Control of Waterways**

The federal government relinquishes control of public resources to the states (other than federally designated lands) when statehood is granted. Two provisions of the FPA indicate that Congress intended to retain, not preempt, state law: Section 9(a) requires applicants to demonstrate compliance with state laws governing the use of beds and banks of streams; and Section 27 stipulates that the FPA should not be interpreted as affecting state law regarding any vested rights, including the control, appropriation, use, or distribution of water. However, the Supreme Court did not require the FPA to comply with state law which the court upheld as recently as 1990. A state’s Public Utility Commission (PUC) regulates the retail sale of electricity within its jurisdiction.

**Indian Law**

Most Indian reservations in the US receive their electricity from a source other than their Tribe. Tribes that generate their own electricity either built their own facility, received BIA

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70 First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).
assistance, or acquired an existing utility developed by a private company. Tribes pursue hydropower ownership opportunities for several reasons:

- Greater self-sufficiency and Tribal sovereignty;
- Economic development;
- Dissatisfaction with the current system operators (federal or private);
- Desire for more eco-friendly management practices;
- Increased feasibility given federal economic and technical support for self-reliance projects and economic development; and
- Changes in the law enabling Tribes to obtain project financing.

**Tribal Rights on Tribal Land and to Natural Resources**

Differing federal policies over the past two centuries have resulted in different types of land designations. “Indian Country” may include land both on and off of Indian reservations.

All land located on or within an Indian reservation is Indian Country, regardless of ownership. Reservation land includes: Tribal Fee Land, Tribal Trust Land, Trust Allotment, Restricted Fee, Federal Public Domain Land (previously opened for homesteading), and Non-Indian Fee Land. Off-reservation land includes: Tribal Trust Land and Off-Reservation Allotments. A Tribe is deemed to have authority over Tribal lands on their reservation, with the possible exception of fee lands. The state has authority for conflicts occurring on off-reservation Tribal lands.

In 1905, the Supreme Court held that Tribes have access to treaty-designated resources. The Court established that a treaty “was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.” A Tribe’s “reserved water right” to ensure

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72 Id. (Tribal Authority Process, 2010).
75 Montana v. US, 450 U.S. 544 (1981). Tribes do not own the riverbed for rivers running through their reservation, unless specifically called out as such in the treaty, agreement, or executive order. Riverbeds are owned by the state.
76 United States v. Winans, 198 U.S. 371 (1905). In an 8-1 decision, the Supreme Court held that the Treaty with the Yakima of 1855, in addition to similar treaties, protected Indian’s rights to fishing, hunting, and other access to natural resources. The Court applied the Treaty Clause of the US Constitution, Art. II, § 2 cl. 2.
survival and sustenance was reaffirmed by the Supreme Court in 1976\(^{77}\) and by the 9\(^{th}\) Circuit Court in 1983 (cert. denied).\(^{78}\) The latter case is notable in that the Tribe no longer had a reservation.\(^{79}\) However, the Court still recognized the Tribe’s need and right to water sufficient to honor their treaty, which reserved the Tribe’s right to the continued hunting and fishing activities both on and off of their reservation.

**Environmental Law**

Hydropower facilities result in several potentially significant environmental effects, including the disruption of fish habitat and migration, increasing water temperatures, and even changing the chemical composition of the water. Prior to issuing a license, FERC must find the proposed project is "best adapted to a comprehensive plan" for water development, navigation, water power, "and for other beneficial public uses, including recreational purposes."\(^{80}\)

Several federal statutes require consideration of natural resources in federal projects:

- National Environmental Policy Act (NEPA)\(^{81}\) – requires an Environmental Impact Statement (ESA) to be prepared for a major federal action that may significantly affect the human environment. The purpose is to inform decision makers of potential impacts.
- Clean Water Act\(^{82}\) – requires an agency to verify that state water quality standards will not be violated before FERC issues a license.\(^{83}\)

\(^{77}\) Colville Confederated Tribes v. Walton, 426 U.S. 128, 96 S.Ct. 2062; 647 F.2d 42, 48 (1976). The 9th Circuit held that the obligation of the US government was to guarantee the tribes sufficient water to allow them to achieve their reservation's purposes rather than simply to meet their economic needs by other means (i.e. support of self-determination). The ruling overturned a Washington court's ruling that the Tribe did not need sufficient instream flow as they had access to fish from a federal hatchery.

\(^{78}\) United States v. Adair, 723 F.2d 1394 (1983), cert. denied 467 U.S. 1252 (1984). “[W]here, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use. In the present case, the Klamath Tribe . . . has depended upon the waters in question to support its hunting and fishing activities for over 1,000 years.”

\(^{79}\) Congress dissolved the Klamath Reservation during the allotment period based on controversial circumstances.

\(^{80}\) 16 U.S.C.A. § 803(a). National Wildlife Fed'n v. Federal Energy Regulatory Comm'n, 801 F.2d 1505 (9th Cir.1986). The Court will examine a FERC refusal to develop a comprehensive plan if the refusal is supported by the record or is arbitrary and capricious.

\(^{81}\) 42 U.S.C.A. §§ 4331.

\(^{82}\) § 401, 33 U.S.C.A. § 1341.

- Fish and Wildlife Coordination Act[^1] (FWCA) – requires "equal consideration," among the multiple purposes of water projects, for wildlife conservation in water resource development programs. The purpose is for agencies to coordinate efforts in undertaking or permitting a project, prior to construction, to protect fish and wildlife.

- Pacific Northwest Electric Power Planning and Conservation Act[^2] allocates supplies and mitigates impacts of federally produced hydropower, including to anadromous fish. The Act calls for a regional council to develop a plan for protection, mitigation, and enhancement of fish and wildlife.[^3]

**Relevance for Tribal Land**

When Tribes have treaty fishing rights on a river, interference with river flows that damage fish habitat may reduce the ability of Tribes to take a meaningful share of fish. In such cases, the US Department of the Interior is charged by statute with developing license conditions to protect (the purposes of) an Indian reservation.[^4]

One of the primary impacts of dams is on salmon, which are a migratory (anadromous) fish that seek to travel from fresh water streams to the salt water ocean as part of its life cycle. They spend their adult lives in the ocean, but travel upstream to lay their eggs. Pacific salmon may swim hundreds, even thousands, of miles to get back to the stream where they hatched.[^5] Healthy salmon runs are necessary for a robust economy, food supply, and cultural resources for both Indian and non-Indian communities in the western US.

There are several process and resource/pollution laws related to environmental protection that may impact hydropower facilities. The process laws include the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). The resource/pollution laws include: the Endangered Species Act (ESA), Migratory Bird Treaty Act, National Forest

[^3]: National Wildlife Fed'n v. Federal Energy Regulatory Comm'n, 801 F.2d 1505 (9th Cir.1986). The Council's plans must be "tak[en] into account at each relevant stage" of FERC proceedings and managers of federal power facilities are required to afford "equitable treatment" to fish and wildlife.
[^4]: City of Tacoma v. FERC, 460 F.3d 53 (D.C.Cir.2006). The court rejected FERC's attempt to put time limits on agency and take over these responsibilities.
[^5]: US Fish & Wildlife Service (USFWS) website, June 2015
Management Act (NFMA), and the Clean Water Act (CWA). Potentially relevant sections of the CWA include: 301 – water quality standards, 401 – state certification, 402 – National Pollutant Discharge Elimination System (NPDES), and 404 – filling of wetlands.

Impact to salmon is a major source of contention associated with dams. Healthy salmon runs are impacted by the “Five Hs”: Hydroelectric dams on migratory rivers, Habitat destruction, over-Harvest, competition/genetic impacts from Hatchery fish, and increased Heat from our changing climate and overdevelopment along stretches of migratory rivers.89

Dams block passage, requiring expensive (and not always successful) fish ladders or alternate means of transportation around dams (by truck or barge). In addition, the ability of salmon to migrate and lay eggs is further reduced by degrading the quality of streams, which may be impacted by logging, mining, pollution, and development adjacent or within the drainage pattern of streams. Some stocks of salmon have been so severely reduced they are now listed as endangered or threatened species under the Endangered Species Act (ESA).90 Primary listing and recovery responsibilities for Pacific salmon belong to the Department of Commerce's National Marine Fisheries Service. The US Fish and Wildlife Service and other federal and state agencies also have recovery responsibilities.

Treaty Rights may be subject to environmental protection.91 Section 7 of the ESA addresses federal government actions that impact listed species, requiring consultation.

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89 USFWS website, June 2015.
90 A 1991 report by the American Fisheries Society indicated that 214 of about 400 stocks of salmon, steelhead, and sea-run cutthroat trout in the Northwest and California are at risk of extinction. The report also indicated that 106 are already extinct. USFWS website, June 2015.
91 US v. Washington, 384 F.Supp. 312 (1974). Also known as the “Boldt Decision,” the Court held that: 1) the state has the authority to regulate Tribe's off-reservation fishing rights only to the extent necessary for conservation of fishery resource; 2) Tribes can regulate the treaty fishing rights of its members under its government powers. The decision struck down certain statutes and regulations in the State of Washington.
However, tribal fishing is not a federal action. There is no settled legal authority on whether the ESA takes legal precedence over Treaty fishing rights.

**Government Immunity and Responsibility**

Federal, tribal, and state governments have a legal privilege known as sovereign immunity that limits the ability of entities to sue them unless they waive immunity, consent to be sued, or are deemed to have waived their immunity. The Tribes have such immunity in federal, state, or tribal courts unless the federal government abrogates that immunity. For lawsuits between federal, tribal, and state governments, the proper jurisdiction is Federal District Court.

Long held “natural law” suggests that the government is responsible for maintaining certain resources for the public's reasonable use. This principle, known as the Public Trust Doctrine, says government is a trustee of natural assets, that present and future citizens are beneficiaries, and establishes the government’s fiduciary obligation to protect natural assets. The Doctrine limits legislative and executive power to make laws resulting in irreversible impacts to, or unequitable distribution of, public resources. Recognized by some national and state constitutions, US courts are now considering the legal provisions of the Doctrine. With a basis in English common law, the Doctrine is an arguable extension of the Necessary and Proper Clause to steward natural resources, including the long term viability of streams and fish habitat.

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92 While not mentioned in the US Constitution, courts have recognized sovereign immunity as being inherited from English common law. Case law supports such immunity, including: Gray v. Bell, 712 F.2d 490, 507 (D.C. Cir. 1983); United States v. Mitchell, 445 U.S. 535, 538 (1980); Price v. United States, 174 U.S. 373, 375-76 (1899). The government may be liable if it can be proven to have acted in bad faith.


**Tribal Ownership, Two Examples**

Tribal sovereignty can complicate regulation of utilities on Tribal land\(^96\) but the general principles apply. FERC has authority to regulate wholesale electricity rates and transmission across state lines and PUCs retain authority to regulate retail electricity sales within the state. Regulation of electricity used on the reservation may be limited to the Tribal utility’s Board of Directors.

As Tribes across the US consider the opportunities associated with tribal ownership and/or management of hydropower facilities, lessons can be learned from the two major Tribes that have utilized the FERC re-licensing process to negotiate ownership opportunities with the private owners of hydropower projects located on their Tribal lands.

**The Warm Springs Tribe**

**The Tribe and Tribal Land**

The Warm Springs Tribe is comprised of seven signatory Tribes and bands, including the Warm Springs, Wasco, and Paiute Native American Tribes. The Tribe has 5,300 enrolled members, with about eighty percent living on or near their reservation in central Oregon.\(^97\)

In response to the growing pressures of settlers to the Oregon Territory in the mid-1800s, the Warm Springs and Wasco Tribes signed the Treaty with the Tribes of Middle Oregon in June 1855, relinquishing almost ten million acres of their traditional land in exchange for exclusive use of the 650,000 acre Warm Springs Reservation. The Treaty reserved the Tribe’s right to harvest fish, game, and other foods off the reservation in their usual and accustomed places, including along the Columbia River.\(^98\) The Reservation is 98% trust land.

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\(^96\) There are many types of Indian lands, including some not located on reservations. For the sake of simplicity, this section refers to all types of Indian lands when referencing “reservation lands.”

\(^97\) Source: Confederated Tribes of the Warm Springs Reservation of Oregon.

\(^98\) Article 1 of the Treaty language identifies the boundaries of the Reservation as the “…middle of the channel of the De Chutes River…” and reserves “…the exclusive right of taking fish in the streams running through and
**Tribal Government and Economic Development**

The tribal government provides a variety of services, including education, public safety, utilities, health, resource management, business development, and recreation. The Tribal Government is organized under a Constitution adopted under Section 16 of 1934 Wheeler-Howard Act (a.k.a. Indian Reorganization Act or IRA). Most tribal enterprises are organized under Corporate Charter adopted under Section 17 of the IRA. Of the services not offered by the tribal government, many are provided by locally-owned private businesses.

**Hydropower Facility**

The Deschutes River, fed by a consistent flow of groundwater, forms the eastern boundary of the Warm Springs Reservation. In 1910, a canyon on the river was identified as optimal for hydropower development, and the federal government set the area aside for such use.\(^9^9\) The original FERC license for the Pelton Round Butte Project was issued to a private company, Portland General Electric Company (PGE), in 1951. Construction of the hydropower facilities, which utilize over 2,000 acres of tribal land, was controversial and resulted in extensive litigation over compensation and conditions.\(^1^0^0\) Three dams and three powerhouses were built on the site over the span of several decades, including: the Pelton Dam and Powerhouse (110 megawatts or MW of energy produced) and Reregulating Dam in 1957, the Round Butte Dam and Powerhouse (338 MW) in 1964, and the Reregulating Dam Powerhouse (19.5 MW) to maintain a relatively constant flow on the river in 1982.

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\(^1^0^0\) Source of info in this section from: Confederated Tribes of the Warm Springs Reservation of Oregon and the Pelton/Round Butte Hydroelectric Project, Howie Arnett.
Construction of all three facilities was authorized by tribal referendum, but the Tribe was notably impacted by the blockage of salmon resulting from the dams. The Reregulating Dam is the first barrier reached by adult salmon and steelhead attempting to return upstream to spawn.

**Evolution of Ownership**

In 1979, the Tribe voted to establish the Warm Springs Water and Power Enterprises to operate and manage the existing hydropower facility.\(^{101}\) The amended Tribal Council-approved Plan of Operations gave authority to oversee Tribe’s ownership interest in the project, manage operations, and authorize installation of a turbine in 1982 to generate electricity for 7,000 homes.

Later in 1979, after the referendum, the Tribes\(^{102}\) submitted a competing application to FERC to amend the original project license that was set to expire in 2001 and would permit the Tribes to construct and operate a 15 MW powerhouse at the project's Reregulating Dam. FERC evaluated the competing private and tribal applications with a focus on: (1) conservation efforts; (2) compliance history and ability to comply; (3) safe management, operation, and maintenance; (4) ability to provide efficient and reliable electric service; (5) need; (6) transmission service; (7) cost effectiveness; and (8) public impact.\(^{103}\) In 1980, FERC approved the amendment, pursuant to which the Tribes became a joint licensee for the project to the extent of their interests.

This led to an extensive negotiation resulting in a Global Settlement Agreement (Settlement) between the Tribe and private entity which: 1) set out terms for the Tribe’s purchase of partial interest in project; 2) detailed the hydropower project’s future operating conditions and long-term resource protection, mitigation, and enhancement measures (to be incorporated in new

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\(^{101}\) The tribal referendum to establish the Warm Springs Water and Power Enterprises was pursuant to Section 12, Amendment III, of the Tribal Corporate Charter.

\(^{102}\) Wasco Chief Nelson Wallulatum and Tribal Council Chairman Delbert Frank submitted the Tribe’s application to FERC for the facility.

\(^{103}\) In accordance with sections 10(a)(2)(c) and 15(a) of the FPA. Source: FERC license, pg. 38.
FERC license); and 3) included anadromous fish passage.\textsuperscript{104} The Settlement’s timeline included: one-third purchase by 2002, option for majority ownership by 2029, and adoption of a bond ordinance to enable financing. A major component of the Settlement was construction of a new fish passage system, given that the original fish ladder had failed, to enable salmon and steelhead to bypass the reregulating dam. The resulting “fish tower,” built just upstream of Round Butte Dam, is a unique design that enables juveniles swimming upstream to enter a holding pen and subsequently be transported above all three dams to spawn upstream.\textsuperscript{105} A tribal referendum in 2000 approved the Settlement, enabling the Tribe to finance purchase of the facilities. In 2005, FERC issued a new 50-year license to both the Tribe and the private entity as co-licensees.

A natural tension exists between maximizing the output generated and protecting natural resources impacted by the facility. This involves the diversion of water: sending more water through the turbines increases power output, while keeping water in streams (and not sending fish through the turbines) is necessary for fish survival. The Tribe addresses this tension in facility management by having two co-equal managers: one responsible for electrical generation and one responsible for natural resource management. When Tribal leaders make decisions regarding facility operation, both managers weigh in on the benefits and risks of a decision.\textsuperscript{106}

\textsuperscript{104} The Portland General Electric Company (PGE), the Tribes, and the US Department of the Interior filed a joint request for approval of a Long-Term Global Settlement and Compensation Agreement. The Agreement stipulated, among other things, that PGE and the Tribes would merge their competing relicense applications and become co-applicants. In July 2001, after the joint application was filed, FERC issued notice P-2030-036 merging both license applications into one docket.

\textsuperscript{105} The new “fish tower” collects juvenile salmon and steelhead so they can be transported around the dam. A unique design was necessary to address the swirling currents cause by the confluence of the Deschutes, Metolius and Crooked Rivers. The currents and temperature mix had led to the failure of previous, and more standardized, fish passage system. The uniquely designed fish tower has resulted in a system that enables chinook, sockeye, and steelhead to spawn and thrive in all three rivers above the hydropower project. Part of the original fish ladder between Pelton and Round Butte is being used for salmon rearing.

\textsuperscript{106} During an interview with Jim Manion, General Manager of Warm Springs Power and Water Enterprises, which is owned by Confederated Tribes of the Warm Springs Reservation of Oregon, he commented on his Tribe’s commitment to preservation: “We have to preserve our natural resources. This is where we live. We can’t just up and leave if we destroy them.”
The Confederated Salish and Kootenai Tribes

The Tribe and Tribal Land

The Confederated Salish and Kootenai Tribes (CSKT) are comprised of the Bitterroot Salish, the Pend d’Oreille, and the Kootenai Tribes. The approximately 7,900 active members live on the 1,310,000 acre Flathead Indian Reservation in northwestern Montana.107

The Reservation was formed by the 1855 Hellgate Treaty.108 In the treaty, the CSKT ceded over 20 million acres of their aboriginal territory, which included parts of Alberta, British Columbia, Idaho, Montana, Washington, and Wyoming. The treaty reserved the right for the CSKT to continue to access, use, and protect traditional resources throughout their aboriginal territory. While some of the Reservation lands were lost during the Allotment Act era, the Tribes have a policy of reclaiming lands whenever possible and now own over 70% of Reservation lands, including the bed and banks of the south half of Flathead Lake.

Tribal Government and Economic Development

The CSKT government is based on its 1935 Constitution. The Tribal Council manages approximately 30 agencies, including: a court system, police, education system through college, natural resources, traditional language, historical, and cultural education. The government’s annual budget is approximately $115 million, with 1,200 full-time and 600 part-time employees.

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107 Information in this section from: 1) The Confederated Salish and Kootenai Tribes website, www.cskt.org; and 2) Joe Hovenkotter, General Counsel, Energy Keepers, 2014 presentation to the Seattle University School of Law on the Kerr Hydroelectric Project.

108 The July 16, 1855, Treaty of Hellgate includes the following provisions: “There is … reserved from the lands … ceded … the tract of land included within the following boundaries, [geographic description of Flathead Reservation]. All of which shall be set apart … for the exclusive use and benefit of said confederated tribes as an Indian reservation.” Art. II, 12 Stat. 975; and “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory ….” Art. III, 12 Stat. 975.
Tribal businesses include: a holding company (6 hydro, wood products, environmental restoration businesses), electronics manufacturing company ($20M revenue), a worldwide inventory/parts services company, a bank (accounts totaling $36M), and a gaming casino.

The CSKT are in the process of taking on ownership and operational responsibilities of the Kerr Dam, a hydropower facility located on their reservation. For that purpose, they now also own an electric utility (Mission Valley Power with 20,000 customers and $21.6M revenue), and the Kerr Dam operations/marketing company (Energy Keepers, Incorporated).

**Hydropower Facility**

A private company began construction of Kerr Dam on the Flathead Indian Reservation in 1920, in conjunction with federal assimilation policies. The land was leased from the Tribe, with the private company owning the facility and operating under the original FERC license. The 200 foot high dam has three power generating units and creates a 126,000 acre natural reservoir, known as Flathead Lake. The generation capacity can operate around the clock and serve over 94,000 households (188 MW). The dam also serves as flood control. The dam is operated by CSKT/BIA-owned electrical utility Mission Valley Power, which serves almost 20,000 customers and has a $21.6 million revenue. When the facility was scheduled for relicensing, the Tribe negotiated a co-ownership agreement with the private owner that set the stage for tribal ownership in 2015.

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109 Info in this section from: 1) The Confederated Salish and Kootenai Tribes web site, www.cskt.org; and 2) Joe Hovenkotter’s (General Counsel, Energy Keepers) 2014 presentation to the Seattle University School of Law.

110 Section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. §477, permits an Indian tribe to incorporate pursuant to a corporate charter approved by the Secretary of the Interior. Under Section 17, a Tribe forms a separate legal entity from the tribal government entity. A Section 17 corporation has the power to contract, to pledge assets, and offer full or limited waivers of sovereign immunity.

111 Source: MVP web site, missionvalleypower.org.
Evolution of Ownership

The CSKT developed a business strategy to become the sole owner of the Kerr Hydropower Project, consistent with the terms of the FERC license, and take on management and operation responsibilities for the dam. The Tribe created Energy Keepers, Inc. (EKI), an Indian Reorganization Act (IRA) Section 17 corporation, to enable the Tribe to serve as a co-licensee, for the project. EKI is seeking exempt wholesale generator status from FERC to sell the electricity as a wholesale power generator at market-based rates as a source of income for the Tribe. EKI will be responsible for power marketing, specialty operations, and maintenance services by contracting with professional companies. EKI will also develop a sales portfolio to protect CSKT against market risks. The original 50-year FERC license for Kerr Dam was issued in 1930. In 1976, during the dam relicensing process, the CSKT submitted a competing license application to FERC. In response, FERC urged the private owner to negotiate with CSKT to file a joint application, and only issued a series of one-year extensions when the original license expired in 1980 to prompt the negotiation. In 1980, the Tribes successfully negotiated co-licensee status with the private owner with the option to acquire Kerr Dam as the sole owner in 2015. FERC issued a new joint 50-year license to the private company (Montana Power Company) and CSKT that runs through 2035. In 2010, CSKT began preparing to exercise its exclusive and unilateral right to acquire the Kerr Project and create its energy enterprise, giving formal notice in 2014 of intent to convey on September 5, 2015.

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112 Section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. §477, permits an Indian Tribe to incorporate pursuant to a corporate charter approved by the Secretary of the Interior. Under Section 17, a Tribe forms a separate legal entity from the tribal government entity. A Section 17 corporation has the power to contract, to pledge assets, and offer full or limited waivers of sovereign immunity in a “sue and be sued” clause.

113 Source: Joe Hovenkotter, General Counsel, Energy Keepers, 2014 presentation to the Seattle University School of Law on the Kerr Hydroelectric Project.

114 Private ownership went from Rocky Mountain Power Company to Montana Power Company to PPL Montana.
The CSKT included discussions on habitat protection in their re-licensing negotiation to address fish passage. The terms included designating land (670 acres from private entity and 3,100 acres from the Tribes) and funding ($17.3 million from private entities) to provide for habitat in accordance with USFWS guidance. Further, the Tribes are responsible for conducting, and the private entity for financing, fish and wildlife habitat restoration and fish stocking pursuant to a federal fish and wildlife strategy through the end of the FERC license in 2035.\footnote{According to the terms of License Article 66. This results in approximately $1.5 million annually until earlier of either license conveyed to Tribes (2015-2025) or end of license term (2035).}

**A Path Forward**

**Challenges**

Hydropower facilities face multiple challenges, including:\footnote{Based, in part, from Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West, by Bonnie G. Colby, John E. Thorson, and Sarah Britton, The University of Arizona Press, 2005.}

- Climate change and/or cyclical drought;
- International, national, and regional economic trends;
- Regional demand for electricity based on the availability of alternative sources;
- Interstate water issues regarding water rights;
- Conflicting duties of federal agencies (i.e. trust obligations vs. non-Tribal demands);
- State stream adjudication processes and adaptive watershed management practices;
- Capacity of the management agency; and
- Potential for shifting policies and funding based on administration.

**Opportunities**

While establishing a tribally owned and operated hydropower utility involves financial risks, there are multiple advantages. In addition to increased economic development and Tribal self-sufficiency, managing the facility and/or utility enables the Tribe to determine the appropriate balance between revenue generation and environmental protection. This may be
critical for Tribes reliant on fish for food, livelihood, and cultural practices. Federal resources are available to assist and incentivize Tribes to secure and manage power generation facilities.\textsuperscript{117}

A natural tension exists between maximizing the output generated and protecting natural resources impacted by the facility. Increased diversion of water through the turbines increases power output, but may have fish through inadequate stream flow or destroying smolt. The Warm Springs Tribe addresses this tension by having two co-equal managers: one responsible for electrical generation, another for natural resources. When tribal leaders make decisions regarding facility operation, both managers weigh in on the benefits and risks of a decision.\textsuperscript{118}

**Strategies**

The viability of developing, acquiring and/or managing a hydropower utility requires a full understanding of the market, resources, and customers. Keys to success include:

1. Relationship Development – building and maintaining effective working relationships;
2. Needs Assessment – understanding customer needs and available resources;
3. Opportunities Assessment – understanding the key issues, the realities of the utility market, and resolving potential challenges; and
4. A Solid Business Model – including financing mechanisms, utility management, and an effective team of decision makers.

**Relationship Development**

- Conduct an initial consultation can help establish the parameters of the discussion;
- Identify appropriate facilitators;\textsuperscript{119}
- Identify preferred communication style, processes for resolving disagreement, and preferred mean and/or location for communication;

\textsuperscript{117} The BIA’s Office of Energy and Economic Development (OEED) has published the Tribal Business Structure Handbook, 2008 Edition By Karen J. Atkinson, President, Tribal Strategies, Inc. and Kathleen M. Nilles, Partner, Holland & Knight LLP. The Self-Governance Project of the Tulalip Tribes is sponsored and published by the BIA.

\textsuperscript{118} During an interview with Jim Manion, General Manager of Warm Springs Power and Water Enterprises, which is owned by Confederated Tribes of the Warm Springs Reservation of Oregon, he commented on his Tribe’s commitment to preservation: “We have to preserve our natural resources. This is where we live. We can’t just up and leave if we destroy them.”

\textsuperscript{119} Appropriate facilitators refers to literal or figurative “translators” who can help decision-makers understand cultural meanings and nuances (whether the cultural involve ethnicity, professional experience, environmental prioritization…), and help identify when misunderstandings are developing and communication is breaking down.
• Discuss key interests – financial, environmental, stewardship, autonomy – as well as targeted opportunities and perceived risks;
• Discuss an anticipated timeline, revisiting as needed to adjust expectations;
• Mutually-develop a process for collecting data for the needs assessment and opportunities assessment, including any privacy needs or expectations.

**Needs Assessment**

• Determine characteristics, needs, and decision-making process of the Tribe;
• Size, geography, and electrical power needs of the Tribe and/or the people inhabiting the Reservation – this is critical to calculating development costs, such as for transmission lines, and be able to recoup the investment;
• Understanding of any customer dissatisfaction with the existing utility services and an awareness of whether the issues can be resolved; and
• Reasons the Tribe wants to develop or take on the electric utility.

**Opportunities Assessment**

An understanding of the market, financing, and regulatory setting is required, including:

• Current status (strengths and weaknesses) of the existing utility, including: business, organization, operations, personnel, and customers;
• Legal status of the utility, including: permitting, pending applications, and re-permitting requirements (e.g. installation of fish ladders to reduce impact of the dam);
• Projected future of the utility, including limitations based on existing laws or treaties;
• Methods available to acquire the utility.

**Solid Business Model**

A well-considered and viable business model sets the stage for a utility’s success:

• Understand the “big picture” of the regional energy market, how sales are regulated, ability to tap into a larger grid to buy or sell electricity, and opportunities for expansion;
• Understand the options – full or partial ownership and/or management of the land, power generation facility, power transmission facilities, and customer service;
• Understand the Tribe’s appetite for – and vulnerability to – risk if the venture fails;
• Anticipate the benefits and costs of owning and/or operating the utility;
• Become knowledgeable in the resources available for purchase, maintenance and management of the facility;
• Develop a realistic timeline (see CSKT’s timeline below as an example);
• Separate responsibilities for competing interests (e.g. the Warm Springs model of the Tribe having a separate electrical generation and natural resource managers); and
Consider alternate support models, such as a separate IRA Section 17 corporation to operate and manage the project, be eligible for tax benefits, and shield tribal assets from risk.

**Timeline for Acquisition**

A realistic timeline helps manage expectations and guides allocation of resources. The CSKT’s timeline was: Financing (30 years), Business Development and Incorporation (9 years), Planning and Preparation (9 years), Consultants and Partners (7 years), Directors and Managers (1 year), Conveyance Price Dispute (2 years), Operator Apprentices (2 years), Initial Power Purchase Agreements (1 year), and Conveyance (1 year). For an existing facility, a Tribe may need to wait until the dam needs to be re-licensed to prompt the facility owner to negotiate.

**Mutual Benefit**

Supporting Native American Tribes in taking on increasing ownership and management of hydropower facilities can benefit the federal, tribal, and state governments. For the federal government, increased Tribal self-sufficiency can decrease reliance on federal agencies. For the Tribes, it can increase self-sufficiency, autonomy, self-determination, and enhance the Tribe’s sovereignty. And for states, Tribal involvement in managing hydropower facilities may increase the protection of natural resources by incorporating greater cultural values of resource protection into the management and generation of electrical power.