



National
Congress of
American
Indians

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American Indians**

The Embassy of Tribal Nations
1516 P Street, NW
Washington, DC 20005
Phone: (202) 466-7767
Fax: (202) 466-7797
www.ncai.org



NATIVE AMERICAN RIGHTS FUND

**Native American
Rights Fund**

Main Office
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Fax: (303) 443-7776
www.narf.org

July 27, 2015

The Honorable Lisa Murkowski, *Chairwoman*
U.S. Senate Committee on Energy and
Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Maria Cantwell, *Ranking Member*
U.S. Senate Committee on Energy and
Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

**Re: NCAI & NARF Concern Regarding Hydropower Provisions in the Draft Energy
Policy Modernization Act of 2015**

Dear Chairwoman Murkowski and Ranking Member Cantwell:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities and the Native American Rights Fund (NARF), the national Indian legal defense fund dedicated to asserting and defending the rights of Indian tribes and individuals, we are writing to express our concerns regarding certain hydropower provisions in the recently released draft of the Energy Policy Modernization Act of 2015 which is scheduled for mark-up by the U.S. Senate Committee on Energy and Natural Resources on July 28, 2015. NCAI and NARF respectfully request that Sections 3001(c) and 3001(g) of the Draft Bill be changed or removed.

First, the draft of the Energy Policy Modernization Act (EPMA) of 2015 will weaken the current protections Indian tribes have through the Mandatory Conditions requirements under Section 4(e) of the Federal Power Act. Section 3001(c) of the EPMA only allows the Department of the Interior, or other federal agencies responsible for supervising that reservation land, to impose resource protection conditions to just the limited portion of the reservation land where the project works are located, so long as there is a clear and direct nexus to that project. This completely limits and undermines the ability of Indian tribes and federal agencies with trust and treaty responsibilities to address hydropower's effects on water flow, water levels, and fish habitats. It imposes new conditions which do not recognize the reality of natural resource protection, and creates substantial hurdles for agencies to act in their capacities as trustees for Indian lands and resources.

Further, Section 3001(c) overturns the watershed case of *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53 (D.C. Cir. 2006), which affirmed the authority of federal agencies to address the impacts of water diversion taking place off reservation lands which flooded the Skokomish Indian Tribe's Reservation. The Court ruled in favor of the Tribe and upheld the Department of the Interior's authority to impose mandatory conditions under Section 4(e) of the Federal Power Act to protect reservation lands throughout the entire operations of the project and reaffirmed over 80 years of

practice under the Act. Diluting this requirement now would not only put Indian lands and natural resources in jeopardy, but it would diminish the federal trust responsibility.

Additionally, the draft EPMA imposes a similar limitation, as described above, on fish passage ways. Section 3001(g) of the Draft Bill would require the construction, maintenance, and operation of fishways *only* if they are necessary to mitigate the effects of a project on fish populations, which takes away federal agency authority to protect a sacred resource: our fish. The new requirement, and the added “clear and direct nexus” language, again provides a substantial burden on tribes and agencies to protect fish resources at critical time when many fish populations are shrinking to dangerously low numbers. This in turn puts tribal trust resources and tribal treaty rights at risk.

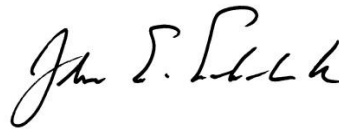
With your histories of being strong champions for Indian Country, and continually showing commitment to the protection of tribal homelands and natural resources, we are hopefully that we can work together to remove these harmful provisions from the draft Energy Policy Modernization Act of 2015 and pass legislation that strikes the delicate balance of improving energy production and access for all Americans while protecting our natural resources and the environment.

If you have any questions, please contact NCAI Staff Attorney & Legislative Counsel Colby Duren, cduren@ncai.org or (202) 466-7767.

Sincerely,



Jacqueline Pata
Executive Director
National Congress of American Indians



John E. Echohawk
Executive Director
Native American Rights Fund