

Testimony of Ray Pierre III
Vice Chairman
Kalispel Tribe of Indians
Hearing: “The Challenges of Keeping Hydropower Affordable
and Opportunities for New Development”
Subcommittee on Water, Power and Oceans
Committee on Natural Resources
United States House of Representatives
May 3, 2017

Good afternoon, my name is Ray Pierre III and I am the Vice Chairman of the Kalispel Tribe of Indians. Thank you for the opportunity to present our thoughts on hydropower and its relationship to my Tribe, in particular, and to Indian Country, in general.

My people’s aboriginal territory was more than 2.3 million acres or about twice the size of Delaware. It followed the Pend Oreille and Clark Fork Rivers throughout present-day northeastern Washington, northern Idaho, and western Montana. Today our tribe resides on a 4,600-acre reservation located along the Pend Oreille River in northeastern Washington state.

These 4,600 acres are the center of our universe. These are the lands we clung to after the arrival of homesteaders and that we refused to negotiate over when Isaac Stevens – first as the Indian agent and later as the territorial governor – came to discuss a treaty with the United States. We view President Woodrow Wilson’s designation of these lands as our Reservation by Executive Order in 1914 as a testament to the fact that the Kalispel people will not be separated from them.

But the hard truth is that the Kalispel Tribe has functionally lost 10 percent of these lands since the Reservation was created. This loss is the result of the manipulation of our sacred river, ntXwe (provider of all), by the addition of hydropower throughout the basin.

Beginning in the 1930s, the Columbia River Basin experienced a hydropower boom. This boom found its way to the Pend Oreille Basin by the 1950s, and today there are eight major hydroelectric projects in the Pend Oreille/Clark Fork Basin. Of these projects, only one occupies the Kalispel Reservation – the Box Canyon Hydroelectric Project – but all eight have lasting impacts on our Tribe and culture, and the natural and physical environment.

In 1952, the Federal Energy Regulatory Commission (FERC) issued a license to Public Utility District No. 1 of Pend Oreille County (PUD) to construct and operate the Box Canyon Dam. The dam is physically located 30 miles downstream of the Kalispel Reservation but resulted in a 56-mile reservoir that permanently occupies 10 percent of the Reservation. As is the case for all eight projects impacting the Tribe, the PUD was issued the license without any requirement by FERC to protect the Tribe or its homelands, and without regard to the irrevocable impacts to the

natural and physical environment that the project would undoubtedly have as a result of construction and ongoing operation. Today the Reservation has less physical space for houses and economic development; our fisheries have been ruined due to the extirpation of bull trout from Kalispel waters; our free-flowing river has been reduced to a series of reservoirs that allow non-native species to outcompete our native fish; and our water quality has been substantially degraded by changes in the river's hydrology. The list goes on.

For more than 30 years the PUD was able to operate the Box Canyon Dam free from any requirement to mitigate these impacts. The years of contentious litigation delayed and curtailed any legitimate recourse for the Tribe. This continued until it was time for the Dam to be relicensed.

The relicensing process for Box Canyon was perhaps the most difficult, emotionally charged, and overwhelming endeavor the Kalispel Tribe has ever taken on. The mediator the PUD and the Tribe agreed to utilize from the federal mediation service commented at the time that in his 30 years he had never been part of a more difficult negotiation. In the end, we relied on the support of then-Deputy Secretary of the Interior Steven Griles and our state's congressional delegation to support mandatory 4(e) conditions that for the first time in 50+ years attempted to *begin* to mitigate the impacts of the project on the Tribe.

Section 4(e) of the Federal Power Act (FPA) is the strongest and clearest authorization (and requirement of the federal government) to protect Indian reservations from the impacts of hydropower. It authorizes the Secretary of the Interior to prescribe conditions to ensure that hydropower developments that occupy or impact an Indian reservation are consistent with the purposes of that reservation. The FPA gives Interior relatively wide latitude to exercise this solemn duty and restricts FERC from overruling 4(e) conditions — in part because the Secretary of the Interior embodies the federal government's trust responsibility to tribes and also because it is charged with overseeing Indian reservations.

The federal government's trust responsibility is a legally binding obligation to federally recognized Indian tribes. The United States Supreme Court described this obligation in *Seminole Nation v. United States* when it declared the federal government "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes. The trust responsibility is a sacred obligation and duty. The federal government's trust responsibility is borne by all its agencies including the Federal Energy Regulatory Commission. FERC and the agencies it deals with during the licensing process must take the federal trust obligations to Indian tribes into account when it decides to issue a license and what conditions are attached to that license. Unfortunately, since FERC's mission is to regulate interstate transmission of electricity and it has little experience dealing with Indian tribes, the agency is not the best situated to truly understand the impacts that a license may have on tribal lands. That is another reason why Interior is empowered to require 4(e) conditions on licenses.

Section 4(e) is our best, albeit imperfect, remedy for attempting to mitigate the impact of hydroelectric projects while simultaneously bringing them into the 21st Century consistent with federal law, including the Clean Water Act and Endangered Species Act. As a result of these conditions, there now is a suite of conservation measures in place in the FERC license for Box

Canyon Dam, and these measures give us reason to be optimistic and have helped fuel collaborative efforts today between the Tribe and the PUD that 15 years ago could never be imagined. This optimism is bolstered by complementary section 4(e) conditions and section 18 prescriptions at other FERC-licensed facilities in the Pend Oreille Basin, as well as renewed efforts by the U.S. Army Corps of Engineers to provide fish passage at Albeni Falls Dam.

Another important tool in protecting tribal lands in the relicensing process is the Clean Water Act. Congress enacted the Clean Water Act (CWA) in 1972 and it established the basic structure for regulating pollutant discharges into the waters of the United States. The CWA also recognizes the inherent right of states to manage their water quality and it provides states a mechanism to protect their resources in hydroelectric licensing through Section 401 of the Act. States utilize Section 401 Water Quality Certification to ensure enough water is in the river for fish, wildlife, recreation, human consumption, and project operation.

The CWA was amended in 1987 to authorize Indian tribes to obtain “treatment as state” (TAS) status if they met certain regulatory criteria and demonstrate the capacity to implement the program. The Environmental Protection Agency may delegate CWA program authority only over waters “within the area of the Tribal Government’s jurisdiction,” but approval of tribal water quality standards under CWA Section 303 can affect upstream, or in the case of dams downstream, off-reservation sources.

The CWA provides Indian tribes that have secured TAS with the ability to issue Water Quality Certifications that protect the water quality within their jurisdiction. These tribes are able to utilize certifications to maintain clean water, adequate water levels for wildlife and recreation, and to impose drinking water standards. Tribes have also utilized the CWA to protect their water quality during hydroelectric licensing. The construction or operation of a hydroelectric dam on a tribe’s water system can have a profound impact on the quality of its water and the water level. The CWA provides tribes with an essential tool to mitigate some of the negative impacts of hydroelectric dams on their water systems.

As the Committee looks to the future of hydropower and how to keep it “affordable,” I would be remiss if I did not underscore that at least for projects impacting tribes, most likely all of those projects were originally constructed without consultation or compensation to tribes, without mitigation to the long-term impacts, and in many cases, caused physical and emotional harm to tribal lands and sacred sites – all of which should have been mitigated, if not pursuant to the Federal Power Act, then consistent with the federal trust responsibility and established federal law. Said another way, these are projects that have operated under a false belief that relicensing would enable operations to continue free from these legal and financial requirements.

Much has been suggested that the cost of mandatory conditioning and a perceived longer than necessary timeline for licensing. Based on my Tribe’s experience, I would say that the licensing process takes as much time as it should. Licenses are typically issued for 50-year periods, so it is essential that the Department of the Interior gets its 4(e) conditions (and section 18 fishway prescriptions) correct. The Kalispel Tribe has been involved in the development of several FERC licenses, and in our experience, the only time the licensing process gets hung up is when the licensee refuses to acknowledge that there is a real cost to the privilege of impeding a

navigable river and occupying a reservation for five decades, or simply in refusing to share data with the agencies and other stakeholders.

It is unfair to suggest that the challenges of relicensing existing projects or licensing new hydropower are Indian Country's to bear. To our knowledge, there are only a dozen 4(e) tribes across the nation. I cannot speak for all of them, but I can say from the Kalispel Tribe's perspective that the Federal Power Act has been one of the most important statutes in protecting the purposes of the Kalispel Reservation. We think it is essential to retain Interior's current section 4(e) and 18 authorities in order to continue to protect the purposes of Indian reservations, and we think the procedural concerns regarding the licensing process are overblown in light of the privilege that is being conferred upon the licensees.

Thank you for the opportunity to testify today. I would be happy to take any questions.