NOTE

LIMITING TRIBAL RIGHTS UNDER THE FEDERAL POWER ACT: *SKOKOMISH INDIAN TRIBE V. UNITED STATES*

I. INTRODUCTION

The City of Tacoma, Washington, (City) obtained a fifty-year "minor part" license from the Federal Power Commission (FPC) in 1924 to flood federal land. The City needed this license to continue building its Cushman Hydroelectric Project (Project), which is located on the North Fork Skokomish River, upstream from the Skokomish Indian Tribe's (Tribe) reservation. The Project diverts almost all of the water from the North Fork to power-generating facilities. Diverting the North Fork reduced the flow of the Skokomish River and caused aggradation, which "occurs when deposits of sediment cause the floor of the river to build up over time, leading to flooding and elevated water tables."[1] As downstream landowners, the Tribe claimed that it suffered losses of nearly $5 billion due to "flooding of the Tribe's reservation, failure of septic systems, contamination of water wells, blocking of fish migration, damage to the Tribe's orchards and pastures and silting over of many of the Tribe's fisheries and shellfish beaches."[2]

After the Federal Energy Regulatory Commission (FERC) granted the City a major license in 1998, the Tribe sued the City, Tacoma Public Utilities (collectively Tacoma), and the United States in Federal District Court for the

1. Skokomish Indian Tribe v. United States, 410 F.3d 506, 509 n.1 (9th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1025 (2006).

2. *Id.* at 509-10.

Western District of Washington for damage caused by the Project.[3] In addition to raising a number of claims under a treaty, 42 U.S.C. § 1983 (deprivation of rights under color of law), and state law, the Tribe asserted a cause of action against Tacoma under section 10(c) of the Federal Power Act (FPA), which states in pertinent part as follows:

> Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor[e].[4]

Holding that section 10(c) does not provide a separate cause of action, the District Court dismissed the Tribe's section 10(c) claim and granted summary judgment as to the Tribe's claims under Washington state law on statute of limitations grounds.[5]

The Ninth Circuit agreed with the District Court. In evaluating the Tribe's section 10(c) claim, the Ninth Circuit followed decisions from the Second and D.C. Circuits that held FPA "section [10(c)] does not create a federal private right of action, but instead preserves only existing state-law claims against [project] licensees."[6] Restricting itself to this narrow category of potential claims, the *Skokomish* court affirmed the District Court's dismissal of the Tribe's state law claims on statute of limitations grounds.[7]

This Note focuses on the Ninth Circuit's interpretation of FPA section 10(c), in which the court limited the Tribe's potential claims for property damages caused by FPA licensees to those that could be asserted under state law. It argues that the *Skokomish* court's holding unduly limits the assertion of Indian rights in the context of the FPA and is questionable for two major reasons. First, the Ninth Circuit relied on other circuit court decisions that appear to be inapposite because, among other things, they did not involve Indian rights. Second, neither the plain language nor the legislative history of section 10(c) evinces only using state law for damage claims against licensees. Indian interests are traditionally federal in nature, conferring rights under federal law because state law would inadequately protect those interests. This Note further argues that the Ninth Circuit's application of section 10(c) was arguably incorrect in the first instance because that provision does not apply to all actions for damages. The plain language of section 10(c) states that it applies only to liability associated with project works "constructed under the license."[8] As the facts of the *Skokomish* decision indicate, a substantial portion of the damages accrued long before the FERC issued Tacoma a major project license. In addition, the Tribe's interests were never protected under the license as required by the FPA.

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3. *Skokomish*, 410 F.3d at 509.

4. 16 U.S.C. § 803(c) (2000).

5. *Skokomish*, 410 F.3d at 516-19.

6. *Id.* at 519 (citing DiLaura v. Power Auth. of N.Y., 982 F.2d 73, 77-79 (2d Cir. 1992); South Carolina Pub. Serv. Auth. v. FERC, 850 F.2d 788, 793-95 (D.C. Cir. 1988)).

7. The court found that the statute of limitations for the Tribe's aggradation claims began by February 16, 1989, the date the Tribe's attorney wrote the Washington Department of Ecology to protest Tacoma's diversion of the North Fork and the accompanying aggradation problems. *Skokomish*, 410 F.3d 517-18.

8. 16 U.S.C. § 803(c) (2000).

II. FACTS

In 1855, Governor Stevens of the Washington Territory, representing the United States, negotiated the Treaty of Point No Point[9] (Treaty) with the Tribe.[10] The Treaty called for the Tribe to cede its land to the United States for money while reserving a piece of land for the Tribe's exclusive use as well as giving the Tribe fishing rights "at usual and accustomed grounds and stations . . . in common with all citizens."[11] The problems between the Tribe and Tacoma date back to 1917, when Tacoma began planning for the Project.[12]

Tacoma received a fifty year "minor part" license from the FPC in 1924 to flood 8.8 acres of federal land pursuant to the Federal Water Power Act of 1920 (FWPA).[13] The 1924 minor part license enabled Tacoma to continue building the Project, which operated independent from federal regulation until 1974, when Tacoma applied for a major project license covering the entire Project.[14] In 1998, taking twenty-four years to complete Tacoma's license application, the FERC issued Tacoma a forty-year major license for the Project.[15]

Located upstream from the Tribe's reservation, the Project diverts nearly all of the water from one of the Skokomish River's two tributaries to power generating facilities, some of which are within the Tribe's reservation.[16] According to the Tribe, diverting one of the Skokomish River's two tributaries caused aggradation of the river.[17] As stated above, the Project allegedly caused the Tribe losses of nearly $5 billion due to its effect on tribal lands and fisheries.[18]

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9. Treaty of Point No Point, U.S.-Skokomish Indian Tribe, Jan. 26, 1855, 12 Stat. 933 [hereinafter Treaty].

10. Skokomish Indian Tribe v. United States, 332 F.3d 551, 554 (9th Cir. 2003), *aff'd in part and transferred in part en banc*, 410 F.3d 506 (9th Cir. 2005).

11. Treaty, *supra* note 9, at art. IV (rights in common).

12. Response Brief of Appellees Tacoma Public Utilities at 7-8, Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (No. 01-35845).

13. *Skokomish*, 332 F.3d at 554. The City did not have to obtain a federal license from the FPC to build and operate the Project because the Project itself was not situated on federal land and because the FPC thought the North Fork Skokomish River was non-navigable. *See infra* note 67. Later however, the FERC said the North Fork (and the entire Project) was within its jurisdiction. *City of Tacoma, Washington, Project Nos. 460-001 and -009*, 84 F.E.R.C. ¶ 61,107, at p. 61,535 n.2 (1998) (saying the North Fork is "a Commerce Clause stream").

14. *Id*. at pp. 61,535-36. Tacoma needed a major license after the FPC ruled that its licensing authority "runs to the 'project works' . . . and not to the mere occupancy and use of the government lands involved." *City of Tacoma, Washington, Project No. 460-005*, 67 F.E.R.C. ¶ 61,152, at p. 61,437 (1994) (quoting *Pacific Gas & Elec. Co.*, 29 F.P.C. 1265, 1266 (1963)).

15. 84 F.E.R.C. ¶ 61,107. Due to continued litigation of the FERC's 1998 order, Tacoma continues to divert almost all of the water from the North Fork and operates the Project as it has for the past eighty years—without any substantial license conditions or requirements, "under the same terms and conditions as the original [minor part] license." *Id.* at p. 61,536; City of Tacoma, Washington v. FERC, 460 F.3d 53, 60-61, 78 (D.C. Cir. 2006).

16. Skokomish Indian Tribe v. United States, 410 F.3d 506, 509 (9th Cir. 2005) (en banc); *City of Tacoma*, 460 F.3d at 59.

17. *See supra* note 1 and accompanying text.

18. *Skokomish*, 410 F.3d at 509-10.

III. TRADITIONAL RATIONALE FOR RESTRICTING SECTION 10(C) TO STATE LAW

The *Skokomish* court based its holding restricting the Tribe's claims to state law on *DiLaura v. Power Authority of New York*[19] and *South Carolina Public Service Authority v. FERC*.[20] In *DiLaura*, landowners on the Niagara River shoreline sued a FERC-licensed hydroelectric power company under section 10(c) and state law, claiming the hydroelectric licensee diverted too much water into the facility's power intakes during a severe winter storm.[21] This allegedly caused the Niagara River to flow backwards, "result[ing] in an ice jam with consequent flooding and ice damage to [the] plaintiffs' property."[22] The Second Circuit, considering whether section 10(c) creates a new or independent private federal claim for property damage caused by a FERC licensee, held that Congress only intended for this section to preserve existing state law claims against licensees.[23]

South Carolina involved a FERC re-licensing proceeding brought by the South Carolina Public Service Authority (SCPSA) to re-license the state-owned Santee-Cooper hydroelectric project.[24] In the underlying FERC proceeding, a joint investigative study prepared by the SCPSA, the FERC, and several consultants indicated that the hydraulic fill dam, built in 1942, could fail during an earthquake and cause flooding downstream.[25] To address that risk, the FERC considered several options and decided to adopt the state-recommended "non-structural" Emergency Action Plan (EAP).[26] But because the EAP did not eliminate the risk of property damage and was the least expensive of the viable options for the licensee to implement, the FERC conditioned its approval of the EAP on a "fair and equitable" compensation requirement, which would be added to the SCPSA's license.[27] This license condition required the state to pay "for all foreseeable property damage proximately caused by the dam fail[ing]" as a result of an earthquake.[28] Forced to either replace the dam or accept the liability provision as part of the EAP, the SCPSA appealed the FERC license condition to the D.C. Circuit.[29] The D.C. Circuit, examining whether the FERC's compensation scheme (viewed by the court as a new federal tort law imposing

19. DiLaura v. Power Auth. of N.Y., 982 F.2d 73, 77-79 (2d Cir. 1992).

20. South Carolina Pub. Serv. Auth. v. FERC, 850 F.2d 788, 793-95 (D.C. Cir. 1988).

21. *DiLaura*, 982 F.2d at 75-76.

22. *Id.* at 76.

23. *DiLaura*, 982 F.2d at 77-79 (agreeing with the lower court that the landowners failed to state a proper claim for relief).

24. *South Carolina*, 850 F.2d at 789.

25. The study said that the dam, due to its hydraulic fill construction, would fail if an earthquake greater than 6.1 on the Richter scale occurred near the dam. The area experiences such an earthquake about every one hundred years. *Id*.

26. The EAP involved installing alarms in the few downstream dwellings that might be affected and implementing a coordinated evacuation plan. The other options were "(1) do nothing; (2) require [the licensee] to remove the dam; [and] (3) require that the dam be replaced." After determining that (1) was not an option, (2) did not work because the area was dependent on the dam, and (3) was cost prohibitive, the FERC found "a comprehensive EAP would best serve the public interest." *South Carolina*, 850 F.2d at 789-90.

27. *Id.* at 791.

28. *South Carolina*, 850 F.2d at 790.

29. *Id.* at 790-91.

strict liability)[30] was appropriate to compensate an injured person for property damage instead of using state law, held that the FPA does not give the FERC the ability "to displace existing state tort law with its own rules of liability for damages caused by licensees."[31]

In reaching their respective conclusions, the D.C. and Second Circuits examined the plain language and legislative history of section 10(c) to support the view that Congress only intended for this section to preserve existing state law claims against licensees for property damage. The two circuit courts also drew upon a 1946 Supreme Court case, *First Iowa Hydro-Electric Cooperative v. FPC*,[32] for additional guidance.[33]

First Iowa is the leading case dealing with the interaction of state and federal jurisdictional issues and the FPA, Congress's broad federal initiative to develop power from the rivers and streams of the United States.[34] In that case, the state of Iowa intervened in the federal licensing of a hydroelectric project. Iowa argued that the hydroelectric cooperative (the license applicant) had to comply with state permit requirements to construct a dam on water in Iowa in addition to meeting FERC license requirements under the FPA.[35]

The Supreme Court rejected Iowa's argument as to projects constructed on waters affecting interstate commerce because compliance with Iowa's permit requirements conflicted with the FPA's license requirements.[36] The Court found that Congress, pursuant to its Commerce Clause authority, articulated in the FPA the federal government's superior right to develop the nation's navigable waters and to prevent "a dual system of futile duplication of two authorities over the same subject matter."[37] The Court, however, did not believe that Congress intended to eliminate states' rights altogether. Rather, it looked to the FPA's legislative history, where members of Congress expressed their concern of not wanting to overstep Congress's jurisdiction by passing a bill that the Supreme Court could "defeat" due to a lack of safeguards for the states.[38] For this reason, the Court thought that Congress included provisions in Part I of the FPA to protect state property laws and "proprietary rights to divert or use water."[39] And

30. South Carolina Pub. Serv. Auth. v. FERC, 850 F.2d 788, 791 (D.C. Cir. 1988).

31. *Id.* at 789, 795 ("Congress did not intend for the Commission to 'share' in the determination of when licensees would be liable to their neighbors for property damages, a decision which 'remain[s] under the jurisdiction of the States.'" (quoting First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 167-68 (1946))) (alteration in *South Carolina*).

32. First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946).

33. DiLaura v. Power Auth. of N.Y., 982 F.2d 73, 77-79 (2d Cir. 1992); *South Carolina*, 850 F.2d at 791-95.

34. *See generally* H.R. REP. NO. 66-61 (1919); *First Iowa*, 328 U.S. at 180-81 & n.23.

35. *First Iowa*, 328 U.S. at 161.

36. *Id.* at 163-71.

37. *First Iowa*, 328 U.S. at 171. The Court said that such a dual system would give states "veto power over the federal project," which "easily could destroy the effectiveness of the [FPA]." *Id.* at 164. The Court further said that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181.

38. *Id.* at 173-74 (citing 56 CONG. REC. 9810 (1918) (statement of Rep. LaFollette)).

39. First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 178 (1946). The Court noted two sections of the FPA dealing with state law: section 9(b) (codified as amended at 16 U.S.C. § 802(a)(2)) (complying with a state's property rules "as to the bed and banks of streams" and its proprietary

while the Court cited the first part of section 10(c) to support the federal responsibility and FERC authority to make "rules and regulations . . . for the protection of life, health, and property,"[40] the Court made no mention of section 10(c)'s liability provision—the last part of section 10(c)[41]—as one of the state safeguards.[42]

In ascertaining Congress's intent for section 10(c), lower courts cite the "duplication of two authorities" language and references to the states' "traditional jurisdiction" in *First Iowa* to justify the conclusion that state tort law is one of these protected state areas.[43] In this sense, *First Iowa* embodies the traditional rationale for restricting section 10(c) damage claims to state law.

IV. ANALYSIS

As stated above, it is the thesis of this Note that the *Skokomish* decision was wrongly decided for two main reasons. First, the Ninth Circuit improperly relied on *DiLaura* and *South Carolina* because those cases appear to be inapposite—they did not address claims arising under existing federal common law and they did not involve Indian rights. Second, section 10(c)'s plain language does not evince only using state law for damage claims against licensees, and its legislative history is vague at best as to this issue.

A. The Ninth Circuit Improperly Relied on Its Sister Circuits

The Ninth Circuit should not have been so willing to follow the holdings of *South Carolina* and *DiLaura* because those cases are distinguishable as to the nature of the relief sought by the plaintiffs. *South Carolina* involved an appellate challenge to a FERC-created liability provision in a license—no plaintiff had incurred or sued for property damage caused by a licensee.[44] In *DiLaura*, the plaintiffs claimed section 10(c) created a new or independent federal right of action.[45] Neither of these scenarios was present in *Skokomish*.

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rights "to the appropriation, diversion, and use of water") and section 27, 16 U.S.C. § 821 (a savings clause protecting a state's vested property rights referenced in section 9(b) from being superseded by the FPA). *Id.* at 161 n.6, 173-76.

40. The first part of section 10(c) states:

> That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property.

16 U.S.C. § 803(c) (2000).

41. *See supra* note 4 and accompanying text.

42. *First Iowa*, 328 U.S. at 165-168 & nn.10, 12 (also citing sections 10(a) and (b), 4(e), and 23(b) to support the FPC's final authority to issue licenses and regulate projects on waters that Congress has jurisdiction under the Commerce Clause).

43. *See, e.g.*, DiLaura v. Power Auth. of N.Y., 982 F.2d 73, 78 (2d Cir. 1992) ("Congress simply wanted to preserve the right of injured property owners to bring actions for damages against licensees in state court under traditional state tort law . . . ."); South Carolina Pub. Serv. Auth. v. FERC, 850 F.2d 788, 795 (D.C. Cir. 1988).

44. *South Carolina*, 850 F.2d at 790-91.

45. *DiLaura*, 982 F.2d at 77.

By contrast, in *Skokomish*, the plaintiff Tribe invoked section 10(c) of the Federal Power Act and sued the licensee under existing federal common law for damage to treaty-protected property.[46]

This would seem to be enough to make the *South Carolina* and *DiLaura* cases distinguishable on their face. If an existing right of action could be brought under section 10(c)—for example, one that sounded in federal common law—should that claim necessarily be precluded because Congress did not intend to (1) empower the FERC to create liability conditions in its licenses or (2) create a private cause of action under 10(c) in Part I of the Federal Power Act? The *Skokomish* court seemed to think so. But in glossing over what are clearly fundamental distinctions, the *Skokomish* court appears to have gotten it wrong.

The *Skokomish* court's conclusion is also questionable on another ground: neither of the cases on which the Ninth Circuit relied involved Indian rights, which can confer additional remedies due to their federal nature.[47] Indeed, of the circuit courts that addressed section 10(c) damage claims prior to *Skokomish*, all but one circuit said that this section only preserves existing state law causes of actions against licensees for property damages—yet none of those cases involved Indian rights.[48] Consequently, the *Skokomish* court's analysis of FPA section 10(c) in the context of Indian claims was a case of first impression. As such, its reliance on the previous circuit court cases was questionable. Instead, the Ninth Circuit should have examined the application of section 10(c) anew.

B. A Closer Look at the Plain Language and Legislative History of Section 10(c) of the Federal Power Act

The plain language of section 10(c) does not restrict damage actions to state law. Rather, it simply imposes liability upon FPA licensees for all property damage to others caused by the construction or operation of the project or its appurtenant facilities constructed under its license, without specifying or limiting the basis for that liability in any particular body of law.

Moreover, the legislative history relevant to section 10(c) shows that, while both houses of Congress considered limiting licensee liability to state law, the legislation that was ultimately signed into law as section 10(c) of the FWPA (codified as Part I of the FPA)[49] contained no such limitation. The FWPA was based on a bill that was drafted in the House of Representatives in 1917 and

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46. Opening Brief of Appellant Skokomish Indian Tribe at 18, 28-29, Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (No. 01-35845) [hereinafter Tribe's Brief].

47. *See infra* Part V.

48. *See DiLaura*, 982 F.2d at 78-79; *South Carolina*, 850 F.2d at 794. The federal cases cited by the *DiLaura* and *South Carolina* courts overlap: Pike Rapids Power Co. v. Minneapolis, St. Paul & Sault St. Marie Ry., 99 F.2d 902, 911-12 (8th Cir.) (railroad company); Key Sales Co. v. South Carolina Elec. & Gas Co., 290 F. Supp. 8, 23 (D.S.C. 1968), *aff'd*, 422 F.2d 389 (4th Cir. 1970) (per curiam) (private landowner); *but see* Seaboard Air Line R.R. v. County of Crisp, 280 F.2d 873, 875-76 (5th Cir. 1960) ("*It seems to us unlikely that the Congress intended by the language it used to do no more than to disclaim liability on the part of the United States for the acts of the licensee*." (emphasis added)) (railroad company); state cases omitted (none involving Indian rights).

49. Federal Water Power Act of 1920, Pub. L. No. 66-280, § 10(c), 41 Stat. 1063, 1068 (1920) (codified at 16 U.S.C. § 803(c) (2000)).

originated as H.R. 3184 in 1918.[50] H.R. 3184 does not mention using state law as the exclusive basis for licensee liability under section 10(c).[51] S. 1419,[52] an un-enacted Senate companion bill to H.R. 3184,[53] originally called for the licensee to comply with all state laws "relative to damages that may be caused" by the project before its construction.[54] Both Houses amended that provision in conference, however, omitting the reference to state law and the pre-construction liability requirement.[55]

Thus, removing the state law limitation in the un-enacted Senate companion bill and not including any such limitation in the House bill or the final legislation embodying section 10(c) seems to show a strong Congressional intent not to limit section 10(c) to actions under state law. So the question becomes one of discerning Congress's true intent in light of the policy interests implicated by the *Skokomish* decision. In other words, should section 10(c) be interpreted to allow injured plaintiffs to sue under all available remedies, including federal common law, for property damage caused by a FPA licensee? This Note concludes that the answer is "yes," at least as to Indian plaintiffs asserting rights under federal law. The supporting arguments are reviewed in the next section.

V. ARGUMENTS FOR USING FEDERAL COMMON LAW UNDER SECTION 10(C)

It is doubtful that Congress, in enacting a licensee liability provision, intended to deprive an entire class of plaintiffs—Indian plaintiffs in particular—of a broad array of existing rights under federal common law. As a matter of policy, restricting liability only to state law would conflict with the remainder of Part I of the FPA, where the hydroelectric licensing provisions embody a strong federal interest in protecting tribal interests.[56]

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50. THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 1821-23 (Bernard Schwartz ed., Chelsea House 1973) [hereinafter Schwartz] (noting that the amended H.R. 3184 was agreed to by both houses and signed by the President in 1920.); H.R. REP. NO. 66-61, at 1 (1919).

51. *See* H.R. REP. NO. 66-61, at 7 (1919); S. REP. NO. 66-180, at 14 (1919) (amending the liability clause of section 10(c) to the language as passed in the FWPA and codified in Part I of the FPA); H.R. REP. NO. 66-910 (1920) (Conf. Rep.) (making no changes to section 10(c) in S. REP. NO. 66-180 (1919)).

52. This bill amended "'[a]n act to regulate the construction of dams across navigable waters,' approved June 21, 1906, as amended by the act approved June 23, 1910." H.R. REP. NO. 65-1147, at 1 (1919) (Conf. Rep.).

53. Schwartz, *supra* note 50, at 1821 (the Senate's version of the bill died in conference when Congress adjourned).

54. The clause in S. 1419, before its amendment, stated:

> Each license issued hereunder shall contain an express condition that the licensee shall, *before the commencement of the construction of said project works*, comply with all laws of the State in which said project works, or any part thereof, are to be situated, relative to damages that may be caused, directly or indirectly, by said proposed project works; but the United States shall not be liable for any part of said damages . . . .

H.R. REP. NO. 65-1147, at 16 (1919) (Conf. Rep.) (emphasis added).

55. The House's comment to the amendment said, "[t]he purpose of this amendment is to provide that the licensee shall pay all damages caused to the property of others. It is thought that the proposed amendment accomplishes more perfectly than the language stricken." *Id.*

56. Although the FPA attempts to protect Indian interests administratively and prospectively, this does not mean that suing for past property damage is unavailable to Indians. Congress intended for all plaintiffs to

A. The Protection of Indian Interests under Part I of the Federal Power Act

The FPA provides a source of Indian rights. By enacting a specific statutory plan governing the use of "tribal lands embraced within Indian reservations,"[57] Congress made protecting Indian rights in the FPA a federal interest. While the Supreme Court affirmatively said that Congress did not intend to give Indians the ability to veto a project,[58] numerous FPA provisions require the FERC to take certain actions when a project affects reservation land.[59] The most important provisions in Part I of the FPA pertaining to Indian interests and relevant to this Note are sections 4(e),[60] 10(a),[61] and 23(b).[62]

Section 4(e) has two requirements if any of the project's physical structures are located "upon any part" of an Indian reservation. First, the FERC must find that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."[63] Second, the Secretary of Interior must put license conditions necessary "for the adequate protection and utilization of such reservation."[64] Both the Ninth and D.C. Circuits have said that the FERC must assess Indian treaty rights before putting section 4(e) license conditions and before issuing any long-term license affecting tribal land.[65]

Section 10(a) requires the FERC, as part of adapting a project to a "comprehensive plan," to consider "the recommendations . . . of Indian tribes affected by the project."[66] And before the construction of a project begins, section 23(b) requires the FERC to determine that the proposed construction will not affect any public lands or reservations, even if "the interests of interstate or foreign commerce would [not] be affected by [the] construction."[67]

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be able to sue for property damage, and there is no indication that Indians would be precluded from this. *See* discussion *supra* Part IV.

57. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960) (citing 16 U.S.C. §§ 796(2), 803(e)).

58. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 (1984).

59. The FPA defines "reservations" to include "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2) (2000).

60. 16 U.S.C. § 797(e) (2000).

61. 16 U.S.C. § 803(a) (2000).

62. 16 U.S.C. § 817 (2000)).

63. 16 U.S.C. § 797(e) (2000).

64. *Id.*

65. Rainsong Co. v. FERC, 78 F.3d 1435 (9th Cir. 1996); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Fed. Power Comm'n, 510 F.2d 198, 211 (D.C. Cir. 1975) (making such a determination under section 4(e) "can obviously only be made by ascertaining the rights conferred upon the Band by the treaties establishing the reservation."). Analyzing whether section 4(e) applied as to the Project's license, the D.C. Circuit determined that the Project's access road and transmission line on the Tribe's reservation are sufficient to trigger section 4(e) protections. *See supra* note 16 and accompanying text. While determining what rights the Treaty reserved to the Tribe is outside the scope of this Note, neither the FPC nor the Secretary of Interior made section 4(e) findings and put conditions, respectively, to protect the Tribe's reservation. City of Tacoma, Washington v. FERC, 460 F.3d 53, 65-67 (D.C. Cir. 2006). In addition, both the majority and dissent amended the en banc opinion by removing their assessments of important tribal treaty rights. Skokomish Indian Tribe v. United States, 410 F.3d 506, 509 (9th Cir. 2005).

66. 16 U.S.C. § 803(a)(1)-(3) (2000).

67. 16 U.S.C. § 817(1) (2000). Prior to the 1935 amendments to the FWPA, an application to construct a dam was discretionary if the river was not "navigable." *See* Thomas Hodgson & Sons, Inc. v. FERC, 49 F.3d 822, 826 (1st Cir. 1995); Farmington River Power Co. v. Fed. Power Comm'n, 455 F.2d 86 (2d Cir. 1972).

In addition to the specific statutory provisions that protect Indian rights, the Supreme Court has held that other FPA provisions applicable to everyone (not solely Indians) would protect Indian interests as part of the "public interest." For example, Indian tribes "cannot be deprived of any water to which they have a legal right" under section 27.[68] Section 9 requires "the license applicant [to] submit satisfactory evidence that he has obtained sufficient water rights to operate the project authorized in the license."[69] Additionally, the FERC can condition a license to allow an Indian tribe to use water it is already using "if the [FERC] determines that the [tribe's] use of the water constitutes an overriding beneficial public use" under section 10(a).[70]

Given Congress's enactment of the foregoing provisions and its obvious concern for Indians, it would be anomalous for Congress in the same statute to have intended to restrict Indians' rights under section 10(c) to state law. This is true because the role of state law pertaining to Indian relations is quite limited,[71] and applying state law exclusively may lead to dismissal under state statutes of limitations that fail to properly consider damages that accrue over many years. As will be discussed next, allowing Indian tribes to sue under federal common law for damage caused by FPA licensees would help protect certain Indian interests.[72]

B. The Protection of Indian Interests under Federal Common Law

The United States has a "unique trust relationship" with Indians.[73] Indians also have rights not available to most other plaintiffs.[74] These rights emanate from several sources, including the Constitution, treaties, federal statutes, and judicial opinions.[75]

The law developed by judicial opinions, or common law,[76] is infrequently used by federal courts due to federalism and separation of powers concerns and because congressional statutes generally provide the basis for substantive law.[77] However, "the [Supreme] Court has recognized the need and authority in some

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Although Tacoma needed a license to flood "public lands" (a national forest), the FPC made no section 23(b) findings as to the Tribe's reservation despite issuing the minor part license.

68. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 782 (1984) (citing 16 U.S.C. §§ 802(a), 821, discussed *supra* note 39). The Supreme Court has also said an agreement between the United States and an Indian tribe impliedly reserves water rights for the tribe, exempting water from appropriation under state law on the date of the agreement. Winters v. United States, 207 U.S. 564 (1908).

69. *Escondido*, 466 U.S. at 782 (citing 16 U.S.C. § 802(a)(2) (2000)).

70. *Id.* (citing 16 U.S.C. § 803(a)).

71. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1-2 (2005 ed.) (1942) [hereinafter COHEN]; County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985) (stating that "*[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law*." (emphasis added)).

72. This argument also does not detract from the holding of *First Iowa* (discussed *supra* Part III) because allowing a class of plaintiffs to use federal common law does not take away state rights; instead, it merely includes additional rights for one class of plaintiffs.

73. *Oneida*, 470 U.S. at 247; COHEN, *supra* note 71, at 122.

74. COHEN, *supra* note 71, at 8.

75. *Id.* at 1.

76. COHEN, *supra* note 71, at 1.

77. City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981).

limited areas to formulate what has come to be known as 'federal common law.'"[78] These limited areas "fall into essentially two categories: those in which a federal rule of decision is '*necessary to protect uniquely federal interests*,' and those in which Congress has given the courts the power to develop substantive law."[79] The Supreme Court has summarized its authority to use federal common law as follows:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with *the rights and obligations of the United States*, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. *In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved* or because the interstate or international nature of the controversy makes it inappropriate for state law to control.[80]

Due to the United States' obligations from the Constitution, treaties, and statutes and the unique position that Indians occupy in the United States' legal system, the Supreme Court has recognized the right of Indians to use federal common law, which confers a rich assemblage of rights not available to other plaintiffs.[81] Suing for a violation of aboriginal rights is included in this assemblage of rights.[82] These rights accrue over many years and are typically set out in a treaty, which creates obligations on the United States and provides Indians with greater rights than aboriginal title.[83]

An example of the Supreme Court using federal common law for certain Indian claims is *County of Oneida, New York v. Oneida Indian Nation of New York*.[84] In *Oneida*, the Supreme Court allowed the Oneida Tribe to sue for trespass damages under federal common law[85] because the Court thought

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78. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (citing United States v. Standard Oil Co., 332 U.S. 301, 308 (1947)).

79. *Id.* (emphasis added) (citations omitted) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

80. *Texas Industries*, 451 U.S. at 641 (emphasis added) (citations and footnotes omitted).

81. COHEN, *supra* note 71, at 1-2, 969-74. The Supreme Court said some aboriginal rights "need not be based on treaty, statute, or other formal Government action." County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 235-36 (1985) (citing Oneida Indian Nation of N.Y. v. County of Oneida, N.Y., 414 U.S. 661, 668-69 (1974); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941)) (referring to "Indians' right of occupancy").

82. *See, e.g.*, *Oneida*, 470 U.S. at 235-36 & n.6.

83. *See* COHEN, *supra* note 71, at 974-77 (recognizing original Indian title through treaties "serves to define the boundaries of the land"—instead of requiring proof of aboriginal use or occupation—and generally vests the tribe with "recognized and enforceable property rights"). "Aboriginal title refers to the Indians' exclusive right to use and occupy lands they have inhabited 'from time immemorial' . . . ." Seneca Nation of Indians v. New York, 382 F.3d 245, 248 n.4 (2d Cir. 2004) (quoting *Oneida*, 470 U.S. at 233-34).

84. County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985) (allowing the Oneidas to obtain damages under federal common law for the 1795 conveyance of 100,000 acres of tribal land to various counties in New York without the consent of the United States). Even though the New York counties violated a federal statute, the Court did not assess whether the Oneidas had an implied cause of action under a federal act because "the Indians' common-law right to sue is firmly established." *Id.* at 233. Similarly, this Note is not arguing that FPA section 10(c) provides Indians (or others) an implied right to sue.

85. The *Oneida* Court also considered whether the federal statute involved preempted the Oneida's federal common law claim. *Oneida*, 470 U.S. at 236-40. While a statutory preemption analysis is outside the

applying the state statute of limitations would be inconsistent with the underlying federal policies towards Indian land claims.[86]

While not an exhaustive discussion, the foregoing Supreme Court case illustrates that federal common law affords Indian plaintiffs additional rights for interests that may otherwise go unprotected or be under-protected under state law.[87] Only applying state law (as in *Skokomish*) may often lead to dismissal under restrictive state statutes of limitations. These state statutes of limitations are restrictive because damage to some Indian interests (such as aboriginal and treaty-protected rights) may accrue over many years,[88] thus allowing a licensee to avoid liability under section 10(c) (as courts currently interpret it).[89]

VI. SUING OUTSIDE OF SECTION 10(C)

The preceding two parts argue that the *Skokomish* court's interpretation of section 10(c) is erroneous and that this provision should not be limited, as a matter of law, to claims under state law, at least as to Indian plaintiffs. But even if this argument is wrong, Tacoma should have been prevented from raising section 10(c) as a bar to the Tribe's action because the Project was not properly licensed under the Federal Power Act.

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scope of this Note, it deserves mentioning. The general rule is that a federal statute must "'speak[] *directly* to the question' otherwise answered by federal common law" to preempt the common law cause of action. *Id.* at 236-37 (alterations in *Oneida* omitted) (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981)). In applying this rule to the *Skokomish* case, neither the plain language nor the legislative history of the FPA speaks directly to the question of damages—it only addresses the liability of licensees. *See* discussion *supra* Part IV.B. The FPA also does not "establish a comprehensive remedial plan for dealing with violations of Indian property rights" like the *Oneida* Court required for a federal statute to preempt common law remedies. *Oneida*, 470 U.S. at 237.

86. *Oneida*, 470 U.S. at 240-41 (describing the interaction of state and federal policies in applying limitation periods as follows: "In the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, *provided that the application of the state statute would not be inconsistent with underlying federal policies*." (emphasis added)). The Court also noted that applying laches would be "novel" because such an equitable defense is traditionally not applicable in a suit for damages. *Id.* at 244 n.16.

87. While the dissent from the *Skokomish* en banc decision criticized the majority for not allowing the Tribe to sue under federal common law according to the *Oneida* decision, Skokomish Indian Tribe v. United States, 410 F.3d 506, 522-27 (9th Cir. 2005) (Berzon, J., dissenting in part), the dissent from the preceding decision relied on Ninth Circuit case law to argue that the Tribe should be able to sue under federal law, Skokomish Indian Tribe v. United States, 332 F.3d 551, 566-68 (9th Cir. 2003) (Tashima, J., dissenting in part) (citing United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544 (9th Cir. 1994)). However, the utility in *Pend Oreille* had to pay damages under federal law because it violated the terms of its project license. The court only cited *Oneida* in passing, choosing instead to rest its decision on section 10(e) of the FPA. *Pend Oreille*, 28 F.3d at 1549-51; 16 U.S.C. § 803(e)(1) (2000) (requires the FERC to "fix a reasonable annual charge," approved by the Indian tribe, for the licensee's use of "tribal lands embraced within Indian reservations").

88. This type of harm occurred in the *Skokomish* case, as some of the effects from diverting nearly all of the North Fork took decades before some of the aggradation-related damage was evident. Tribe's Brief, *supra* note 46, at 8-9.

89. This Note does not argue that Indian plaintiffs should be able to go back tens or hundreds of years and pick and choose claims to bring under federal common law (which has no statute of limitations). However, where equitable measures and remedies have failed to adequately protect Indian interests—particularly those secured by treaty, statute, or other agreement—Indians should be able to sue for damages under federal common law.

Section 10(c) only applies to projects "constructed under the license."[90] One of the oddities in *Skokomish* is the fact that the entire Project was never truly licensed under the FPA until Tacoma received a major project license in 1998, and most of the damages asserted by the Tribe occurred long before then.[91] The FERC admitted that it made a mistake in not licensing the entire Project in 1924,[92] and acknowledged (as did Tacoma) that Tacoma only received a minor part federal license in 1924 that allowed it to flood 8.8 acres of federal land.[93] If Tacoma did not have a proper license from the FPC for the Project, it would seem anomalous to force potential claims resulting from the improperly licensed facility into section 10(c)'s liability provision.

Further supporting this argument is the fact that in 1920, section 10(i) of the FWPA, which granted the FPC the authority to issue minor part licenses, specifically said that waiving FWPA conditions "shall not apply to lands within Indian reservations."[94] The FPC should never have issued a minor part license to Tacoma, as the Project has facilities within the Tribe's reservation.[95]

Because the FPC made a mistake in licensing the Project in 1924 and because none of the FPA requirements[96] pertaining to Indians were complied with during the licensing process (in violation of federal law), Tacoma should not be allowed refuge under FPA section 10(c) in court while operating outside the FPA in practice. Today, Tacoma still operates the Cushman Hydroelectric Project without significant federal restrictions and without the Tribe's interests being protected;[97] yet the Ninth Circuit barred the Tribe's section 10(c) claims under state law.

VII. CONCLUSION

The Ninth Circuit erroneously relied on other circuit court decisions involving the interpretation of section 10(c) of the Federal Power Act that did not involve Indian claims. While those decisions and the Ninth Circuit said Congress only intended section 10(c) to allow plaintiffs to sue under existing state law for property damage claims against project licensees, having such a bright line or per se rule is inappropriate for Indian claims due to their federal nature. The plain language of section 10(c) does not indicate that state law should apply, and its legislative history is vague at best as to this issue. In addition, Indians are able to sue under federal common law for violations of their

90. *See supra* note 4 and accompanying text.

91. *See supra* notes 14-15 and accompanying text.

92. *City of Tacoma, Washington, Project No. 460-005*, 67 F.E.R.C. ¶ 61,152, at p. 61,442 (1994) ("[T]he Commission's initial failure to issue a license for the complete project was founded upon a mistaken view of the law and the facts.").

93. *Id.* at pp. 61,437, 61,439-40.

94. *See* 16 U.S.C. § 803(i) (Historical and Statutory Notes); H.R. REP. NO. 66-910, at 4 (1920). Now section 10(i) allows the FERC to waive in its discretion any of the "conditions, provisions, and requirements of [Part I of the Federal Power Act, 16 U.S.C. §§ 791a–828c]," except the fifty-year license period and the payments to Indian tribes under section 10(e) for the use of tribal land. *Id.*

95. Skokomish Indian Tribe v. United States, 410 F.3d 506, 509 (9th Cir. 2005) (en banc); City of Tacoma, Washington v. FERC, 460 F.3d 53, 59 (D.C. Cir. 2006).

96. *See supra* Part V.A.

97. *See supra* note 15.

aboriginal rights, which are generally secured in treaties. For these reasons, the Ninth Circuit should have examined more carefully the possibility of an Indian tribe asserting a claim under federal common law for property damage caused by a FPA licensee. Furthermore, a court should not afford a licensee the protection of section 10(c) when the project was never properly licensed. As such, the Skokomish Indian Tribe should have been able to sue for damages under federal common law and outside the confines of section 10(c) as courts currently apply that section.

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