

AMENDMENT NO. _____ Calendar No. _____

Purpose: To replace hydroelectric licensing provisions relating to alternative conditions and fishways, exempt the State of Alaska from certain requirements applicable to small hydroelectric projects, and allow the refurbishment and operation of a small hydroelectric facility in central Montana.

IN THE SENATE OF THE UNITED STATES—109th Cong., 1st Sess.

S. _____

To enhance the energy security of the United States, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. DOMENICI to Title II—Renewable Energy (FLO05767.LC)

Viz:

1 At the end of title II, add the following:

2 **Subtitle E—Hydroelectric**

3 **SEC. 251. ALTERNATIVE CONDITIONS AND FISHWAYS.**

4 (a) FEDERAL RESERVATIONS.—Section 4(e) of the
5 Federal Power Act (16 U.S.C. 797(e)) is amended by in-
6 serting after “adequate protection and utilization of such
7 reservation.” at the end of the first proviso the following:

1 “The license applicant and any party to the proceeding
2 shall be entitled to a determination on the record, after
3 opportunity for an agency trial-type hearing of no more
4 than 90 days, on any disputed issues of material fact with
5 respect to such conditions. All disputed issues of material
6 fact raised by any party shall be determined in a single
7 trial-type hearing to be conducted within a time frame es-
8 tablished by the Commission for each license proceeding.
9 Within 90 days of the date of enactment of this Act, the
10 Secretaries of the Interior, Commerce, and Agriculture
11 shall establish jointly, by rule, the procedures for such ex-
12 pedited trial-type hearing, including the opportunity to un-
13 dertake discovery and cross-examine witnesses, in con-
14 sultation with the Federal Energy Regulatory Commis-
15 sion.”.

16 (b) FISHWAYS.—Section 18 of the Federal Power Act
17 (16 U.S.C. 811) is amended by inserting after “and such
18 fishways as may be prescribed by the Secretary of Com-
19 merce.” the following: “The license applicant and any
20 party to the proceeding shall be entitled to a determination
21 on the record, after opportunity for an agency trial-type
22 hearing of no more than 90 days, on any disputed issues
23 of material fact with respect to such fishways. All disputed
24 issues of material fact raised by any party shall be deter-
25 mined in a single trial-type hearing to be conducted within

1 a time frame established by the Commission for each li-
2 cense proceeding. Within 90 days of the date of enactment
3 of this Act, the Secretaries of the Interior, Commerce, and
4 Agriculture shall establish jointly, by rule, the procedures
5 for such expedited trial-type hearing, including the oppor-
6 tunity to undertake discovery and cross-examine wit-
7 nesses, in consultation with the Federal Energy Regu-
8 latory Commission.”.

9 (c) ALTERNATIVE CONDITIONS AND PRESCRIP-
10 TIONS.—Part I of the Federal Power Act (16 U.S.C. 791a
11 et seq.) is amended by adding the following new section
12 at the end thereof:

13 **“SEC. 33. ALTERNATIVE CONDITIONS AND PRESCRIPTIONS.**

14 “(a) ALTERNATIVE CONDITIONS.—(1) Whenever any
15 person applies for a license for any project works within
16 any reservation of the United States, and the Secretary
17 of the department under whose supervision such reserva-
18 tion falls (referred to in this subsection as the ‘Secretary’)
19 deems a condition to such license to be necessary under
20 the first proviso of section 4(e), the license applicant or
21 any other party to the license proceeding may propose an
22 alternative condition.

23 “(2) Notwithstanding the first proviso of section 4(e),
24 the Secretary shall accept the proposed alternative condi-
25 tion referred to in paragraph (1), and the Commission

1 shall include in the license such alternative condition, if
2 the Secretary determines, based on substantial evidence
3 provided by the license applicant, any other party to the
4 proceeding, or otherwise available to the Secretary, that
5 such alternative condition—

6 “(A) provides for the adequate protection and
7 utilization of the reservation; and

8 “(B) the Secretary concurs with the license ap-
9 plicant’s judgment that the alternative condition will
10 either—

11 “(i) cost significantly less to implement; or

12 “(ii) result in improved operation of the
13 project works for electricity production, as com-
14 pared to the condition initially deemed nec-
15 essary by the Secretary.

16 “(3) The Secretary concerned shall submit into the
17 public record of the Commission proceeding with any con-
18 dition under section 4(e) or alternative condition it accepts
19 under this section, a written statement explaining the
20 basis for such condition, and reason for not accepting any
21 alternative condition under this section. The written state-
22 ment must demonstrate that the Secretary gave equal con-
23 sideration to the effects of the condition adopted and alter-
24 natives not accepted on energy supply, distribution, cost,
25 and use; flood control; navigation; water supply; and air

1 quality (in addition to the preservation of other aspects
2 of environmental quality); based on such information as
3 may be available to the Secretary, including information
4 voluntarily provided in a timely manner by the applicant
5 and others. The Secretary shall also submit, together with
6 the aforementioned written statement, all studies, data,
7 and other factual information available to the Secretary
8 and relevant to the Secretary's decision.

9 “(4) If the Secretary does not accept an applicant's
10 alternative condition under this section, and the Commis-
11 sion finds that the Secretary's condition would be incon-
12 sistent with the purposes of this part, or other applicable
13 law, the Commission may refer the dispute to the Commis-
14 sion's Dispute Resolution Service. The Dispute Resolution
15 Service shall consult with the Secretary and the Commis-
16 sion and issue a non-binding advisory within 90 days. The
17 Secretary may accept the Dispute Resolution Service advi-
18 sory unless the Secretary finds that the recommendation
19 will not adequately protect the reservation. The Secretary
20 shall submit the advisory and the Secretary's final written
21 determination into the record of the Commission's pro-
22 ceeding.

23 “(b) ALTERNATIVE PRESCRIPTIONS.—(1) Whenever
24 the Secretary of the Interior or the Secretary of Commerce
25 prescribes a fishway under section 18, the license appli-

1 cant or any other party to the license proceeding may pro-
2 pose an alternative to such prescription to construct,
3 maintain, or operate a fishway.

4 “(2) Notwithstanding section 18, the Secretary of the
5 Interior or the Secretary of Commerce, as appropriate,
6 shall accept and prescribe, and the Commission shall re-
7 quire, the proposed alternative referred to in paragraph
8 (1), if the Secretary of the appropriate department deter-
9 mines, based on substantial evidence provided by the li-
10 cense applicant, any other party to the proceeding, or oth-
11 erwise available to the Secretary, that such alternative—

12 “(A) will be no less protective than the fishway
13 initially prescribed by the Secretary; and

14 “(B) the Secretary concurs with the license ap-
15 plicant’s judgment that the alternative prescription
16 will either—

17 “(i) cost significantly less to implement; or

18 “(ii) result in improved operation of the
19 project works for electricity production, as com-
20 pared to the fishway initially deemed necessary
21 by the Secretary.

22 “(3) The Secretary concerned shall submit into the
23 public record of the Commission proceeding with any pre-
24 scription under section 18 or alternative prescription it ac-
25 cepts under this section, a written statement explaining

1 the basis for such prescription, and reason for not accept-
2 ing any alternative prescription under this section. The
3 written statement must demonstrate that the Secretary
4 gave equal consideration to the effects of the prescription
5 adopted and alternatives not accepted on energy supply,
6 distribution, cost, and use; flood control; navigation; water
7 supply; and air quality (in addition to the preservation of
8 other aspects of environmental quality); based on such in-
9 formation as may be available to the Secretary, including
10 information voluntarily provided in a timely manner by the
11 applicant and others. The Secretary shall also submit, to-
12 gether with the aforementioned written statement, all
13 studies, data, and other factual information available to
14 the Secretary and relevant to the Secretary's decision.

15 “(4) If the Secretary concerned does not accept an
16 applicant's alternative prescription under this section, and
17 the Commission finds that the Secretary's prescription
18 would be inconsistent with the purposes of this part, or
19 other applicable law, the Commission may refer the dis-
20 pute to the Commission's Dispute Resolution Service. The
21 Dispute Resolution Service shall consult with the Sec-
22 retary and the Commission and issue a non-binding advi-
23 sory within 90 days. The Secretary may accept the Dis-
24 pute Resolution Service advisory unless the Secretary
25 finds that the recommendation will not adequately protect

1 the fish resources. The Secretary shall submit the advisory
2 and the Secretary's final written determination into the
3 record of the Commission.”.

4 **SEC. 252. ALASKA STATE JURISDICTION OVER SMALL HY-**
5 **DROELECTRIC PROJECTS.**

6 Section 32 of the Federal Power Act (16 U.S.C.
7 823c) is amended—

8 (1) in subsection (a)(3)(C), by inserting “except
9 as provided in subsection (j),” before “conditions”;
10 and

11 (2) by adding at the end the following:

12 “(j) FISH AND WILDLIFE.—If the State of Alaska
13 determines that a recommendation under subsection
14 (a)(3)(C) is inconsistent with paragraphs (1) and (2) of
15 subsection (a), the State of Alaska may decline to adopt
16 all or part of the recommendations in accordance with the
17 procedures established under section 10(j)(2).”.

18 **SEC. 253. FLINT CREEK HYDROELECTRIC PROJECT.**

19 (a) EXTENSION OF TIME.—Notwithstanding the time
20 period specified in section 5 of the Federal Power Act (16
21 U.S.C. 798) that would otherwise apply to the Federal En-
22 ergy Regulatory Commission (referred to in this section
23 as the “Commission”) project numbered 12107, the Com-
24 mission shall—

1 (1) if the preliminary permit is in effect on the
2 date of enactment of this Act, extend the prelimi-
3 nary permit for a period of 3 years beginning on the
4 date on which the preliminary permit expires; or

5 (2) if the preliminary permit expired before the
6 date of enactment of this Act, on request of the per-
7 mittee, reinstate the preliminary permit for an addi-
8 tional 3-year period beginning on the date of enact-
9 ment of this Act.

10 (b) LIMITATION ON CERTAIN FEES.—Notwith-
11 standing section 10(e)(1) of the Federal Power Act (16
12 U.S.C. 803(e)(1)) or any other provision of Federal law
13 providing for the payment to the United States of charges
14 for the use of Federal land for the purposes of operating
15 and maintaining a hydroelectric development licensed by
16 the Commission, any political subdivision of the State of
17 Montana that holds a Commission license for the Commis-
18 sion project numbered 12107 in Granite and Deer Lodge
19 Counties, Montana, shall be required to pay to the United
20 States for the use of that land for each year during which
21 the political subdivision continues to hold the license for
22 the project, the lesser of—

23 (1) \$25,000; or

1 (2) such annual charge as the Commission or
2 any other department or agency of the Federal Gov-
3 ernment may assess.