

attached hereto and incorporated by reference herein, and fully described in the Explanatory Statement below. The parties request that the Agreement be made part of the Box Canyon license as a special article. The parties have submitted a disk in 6.1 WordPerfect format containing the text of the Agreement for the Commission's convenience. The parties to the Agreement have also attached additional draft license articles modeled on similar articles adopted by the Commission in other settlement proceedings (see discussion in Explanatory Statement), and which are also included on the disk provided to the Commission.

This Offer of Settlement and Agreement provides the basis for the issuance of a license amendment to the District for the period between the Commission's approval of this Offer of Settlement and Agreement and the expiration of the term of the original license on January 31, 2002, and the term of any annual license for the Box Canyon Project, subject to the terms and conditions of the attached Agreement.

In addition, for the reasons discussed in the Explanatory Statement, the parties request that: 1) the Offer of Settlement be publicly noticed, 2) pursuant to Rule 207(a)(5) of the Commission's regulations, 18 C.F.R. § 385.207(a)(5), the date comments on this Offer of Settlement are due to the Commission under Rule 602(f), 18 C.F.R. § 385.602(f), be waived or the deadlines for comment and reply be extended so that the comment period can commence on the

date notice is issued rather than the date the Agreement is filed; and 3) the Commission provide expedited review and approval of this Offer of Settlement and Agreement. If the Commission chooses not to waive Rule 602(f)(2), comments on this Offer of Settlement would be due on or before 20 days from the date of filing.

EXPLANATORY STATEMENT

BACKGROUND

The Box Canyon hydroelectric project ("Project") is located on the Pend Oreille River in northeastern Washington State. The Federal Power Commission issued the original 50-year license to construct and operate the Project on February 7, 1952, Public Utility District No. 1 of Pend Oreille County, Wash., 11 FPC 786 (1952), and the Project began operation in 1955. The Project license was subsequently amended on March 18, 1963. Public Utility District No. 1 of Pend Oreille County, Wash., 29 FPC 534 (1963).

In 1980, the United States, in its sovereign capacity and as trustee on behalf of the Kalispel Tribe of Indians and certain Indian allottees holding trust allotments on the Reservation, brought an action in trespass and for injunctive relief in the United States District Court for the Eastern District of Washington ("District Court"), against the District, claiming that the Box Canyon Project was flooding trust lands within the Kalispel Indian Reservation without

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legal authority.^{2/} The Tribe and the State of Washington subsequently intervened in that action.

Following several District Court decisions and two decisions of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), U.S. v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991), cert. denied, 502 U.S. 956 (1991), and U.S. v. Pend Oreille Public Utility Dist. No. 1, 28 F.3d 1544 (9th Cir. 1994), cert. denied, 115 S.Ct. 1356 (1995), the District Court, by Amended Order and Amended Judgment filed October 30, 1995, ("Amended Judgment"), awarded the United States and the Tribe trespass damages and injunctive relief.^{3/}

The District Court permanently enjoined the District from flooding above elevation 2028 feet Mean Sea Level as measured at the Cusick gage, but stayed the injunction for that amount of time necessary for the Commission to act upon the District's application to amend its license for authority to flood the Indian trust lands. The stay of the injunction is subject to certain conditions, including prompt submission

^{2/} The Kalispel Indian Reservation was established by Executive Order No. 1904, dated March 23, 1914, IV Kappler, Indian Affairs: Laws and Treaties 105 (1929). In addition to being located on Indian trust lands, a portion of the Project's reservoir is also located within the Colville National Forest and the Cusick Flats Unit of the Little Pend Oreille National Wildlife Refuge.

^{3/} That Amended Judgment was recently affirmed by the Ninth Circuit Court of Appeals. See United States v. Public Utility District No. 1 of Pend Oreille County, 135 F.3d 602 (9th Cir. 1998).

of a license amendment application, satisfaction of the Amended Judgment within one year, and payment of an annual fee for continued flooding, pending Commission disposition of the amendment application. See Amended Order at 6-7, October 30, 1995.

On May 24, 1995, the District filed a Petition for Declaratory Order, or in the Alternative, Application to Amend License, and Request for Hearing ("Petition") with the Commission alleging that it had authority under the terms of the 1963 license amendment to occupy Indian trust lands of the Kalispel Indian Reservation. The Department and the Tribe filed in opposition to the Petition.^{4/} On November 13, 1996, the Commission issued an Order on Petition for Declaratory Order and on Complaint Proceeding, denying the District's request that the 1963 license amendment and the terms of the existing Project license authorize the District to occupy Kalispel Indian Reservation lands, and finding that the requirements of section 4(e) and section 10(e) of the Federal Power Act had not been met for the Box Canyon Project. Public Utility District No. 1 of Pend Oreille County, Wash., 77 FERC ¶ 61,146 at pp. 61,548-49 (1996). The Commission also

^{4/} Additionally, the Commission had previously received a letter complaint from the Department on March 7, 1986, requesting an investigation of the Box Canyon Project to determine whether the Project was being operated within the terms of its license.

dismissed the application to amend the license without prejudice. Id. at p. 61,553.

On February 18, 1997, the District filed a second application for license amendment with the Commission. Notice of the filing was published in the Federal Register on March 18, 1997, 62 Fed. Reg. 12827 (1997), with comments and requests for intervention required to be filed with the Commission by April 18, 1997. The Department, the Tribe, the USFS and the WDFW each filed motions to intervene and provided comments opposing the application for license amendment. The parties intend by this Agreement to provide for the settlement of the license amendment application currently pending before the Commission that was filed by the District on February 18, 1997.

SUMMARY OF THE DISPUTE

The Department and the Tribe have urged the Commission to reject the District's application as patently deficient in content because, among other reasons, the District failed to: 1) include any measures in the application to protect, mitigate, or enhance resources impacted by project operation or provide sufficient information to develop conditions for the adequate protection and utilization of the Kalispel Indian Reservation pursuant to section 4(e) of the Federal Power Act; 2) include reasonable section 10(e) charges for the use and occupancy of Indian trust land; and 3) consult

with appropriate parties as part of the pre-filing consultation process. Additionally, the Department and the Tribe have taken the position that the amendment as proposed by the District is inconsistent or would otherwise interfere with the purposes of the Kalispel Indian Reservation.

The WDFW has taken the position that the District's application for license amendment is lacking because it fails to include an environmental analysis of Project impacts associated with operations above elevation 2028, as measured at the Cusick gage or mitigation measures to offset those impacts, and because the District failed to adequately consult with the WDFW. Likewise, the USFS expressed concerns with failure by the District to consult with it regarding the application for license amendment. The USFS expressed serious concern about the adverse effects of the application on National Forest resources resulting from the failure of the District to provide for protection, mitigation, or enhancement measures for National Forest resources. The USFS has also asserted that the Project is trespassing on lands of the Colville National Forest not included within the original license, and as a result, the environmental impacts of project operations on the National Forest should have been assessed and the USFS given an opportunity to develop conditions for the adequate protection and utilization of the Colville National Forest, pursuant to section 4(e) of the Federal Power Act.

The District has taken the position that it properly consulted with the appropriate parties prior to filing the license amendment application and that the license amendment is limited to an administrative function of amending Project boundaries. The District has also contended that the environmental impacts caused by operating the Box Canyon Project reservoir with up to two (2) feet of backwater on the Albeni Falls Project were considered by the state and federal agencies in 1950-1952 and 1961-1963. Therefore, the District has contended that no additional environmental mitigation measures should be required.

SUMMARY OF THE TERMS OF THE SETTLEMENT AGREEMENT

On August 1, 1997, following several years of prior settlement efforts, Commission staff inquired of the parties as to whether there might still be a possibility for settlement of these issues, if certain proposed parameters were followed, as provided in Attachment 1. Following extensive negotiations among the parties, the Department, the District, the Tribe, the WDFW and the USFS have reached agreement on measures and conditions to resolve the pending license amendment application, within the Commission staff's proposed framework. The Department, the Tribe and the District have also reached agreement on reasonable annual charges pursuant to section 10(e) of the Federal Power Act for the use of Indian trust lands as set forth in the attached

Agreement. The parties believe that the Commission's approval of this settlement would be fair and reasonable and in the public interest and therefore request the Commission to issue an order approving the Agreement, which calls for amendment of the Box Canyon Project license in accordance with the Agreement's terms.

Specifically, the Agreement reached by the parties includes:

- Formation of a Technical Committee to implement the resource terms and requirements of this Offer of Settlement and Stipulation and Agreement, including the resource terms and requirements of a license amendment issued to the District, subject to Commission oversight;
- The District's agreement to provide funding prior to the expiration of the license for the following measures: \$170,000 for tributary habitat assessment projects; \$700,000 for tributary habitat enhancement projects; \$238,000 for a Habitat Evaluation Procedure ("HEP"); up to \$2,500,000 in habitat acquisition, protection, mitigation and enhancement projects; and \$200,000 for erosion control measures;
- The District's agreement to provide to the Tribe for expenditure prior to the expiration of the license the following: \$100,000 for the development of recreational facilities on publicly accessible Kalispel Indian lands; \$80,000 for the development of final construction plans for an aquaculture facility; \$80,000 for the development of final construction plans for an interpretive center to be located on Kalispel Indian lands; \$600,000 for a Tribal Resources Fund; and \$277,000 for an intensive inventory of cultural resources.
- The District's agreement to provide, of the aforementioned obligations, \$600,000 for the Tribal Resources Fund and \$500,000 for the initiation of tributary habitat assessment, tributary habitat enhancement, HEP, erosion control and cultural

resources inventory within 30 days of execution of the Agreement;

- The District's agreement to provide \$900,000 to the USFS for Operation and Maintenance costs, including replacement costs of certain items, for three developed sites: Edgewater Campground and Day Use Facility on the Sullivan Lake District, Panhandle Campground and Day Use Facility on the Newport District, and Pioneer Campground and Day Use Facility on the Newport District and for other recreation, cultural resource, erosion control or fish and wildlife projects on the Colville National Forest;

- The District's agreement to provide \$75,000 annually, until expiration of the license and any annual licenses, directly to Pend Oreille County for the control of Eurasian milfoil within the Box Canyon Project Area;

- The District's agreement to provide \$7,000, to be used as deemed appropriate by the U.S. Fish and Wildlife Service for the following measures: (a) to assess the impact of the Project on the Cusick Flats Unit of the Little Pend Oreille National Wildlife Refuge ("Refuge Unit"), (b) to conduct a hydrologic assessment of the Refuge Unit, and (c) to plan, design and implement hydrologic restoration on the south portion of the Refuge Unit; and

- The District's agreement to make an annual payment of \$125,000 in 1997 dollars, with each subsequent payment adjusted annually by the ratio of the CPI-U as of the last day of the year in which payment is due to the CPI-U for January 1, 1997, for the use and occupancy of Indian lands within the project boundary currently in trust status pursuant to section 10(e) of the Federal Power Act, until the expiration of the original license and any annual license, with the possibility of adjustment under certain circumstances.

Additionally, the parties provide the following observations and requests for the Commission's consideration with respect to certain aspects of the Agreement:

I. Request for Expedited Review by the Commission.

The parties request that the Commission review this Agreement in an expedited fashion. Additionally, the parties to the Agreement understand that the Commission will be required to comply with a variety of federal laws during the processing of the license amendment provided for in this Agreement, and request that the Commission take whatever steps are necessary and appropriate to facilitate or expedite the required review and decision-making process.

The parties recognize that many parties to other settlements may make this same request of the Commission. However, this settlement is the result of almost two decades of litigation among the parties. The Agreement provides for many benefits to all parties. There are only four years until this license expires in 2002 and accordingly only a very limited amount of time available to implement the measures provided for in the Agreement. The parties believe that this situation is unique, and as such, necessitates expedited review and approval by the Commission.

II. Request for Special Article. The parties request that the Agreement as a whole be made a part of the license as a special article. The parties are aware that, in recent cases, the Commission has adopted specific articles reflecting the terms of a settlement agreement rather than agreements as a whole in a single article. However, in this instance, the parties would prefer that the Commission follow the model it

set out in Public Utility District No. 1 of Chelan County, Wa., 46 FERC ¶ 61,033 (1989) (Rock Island), and Public Utility District No. 1 of Douglas County, Wa., 54 FERC ¶ 61,056 (1991) (Wells). This model is preferred because the Box Canyon licensing issues have required a lengthy and arduous process for the parties to reach the Agreement provided for herein. Proceedings before the Commission related to this project among the parties date back many years and raise numerous extremely difficult issues for the parties. It was very difficult to reach agreement on the language of the Agreement and the parties felt constrained by time to develop specific license articles reflecting the terms of the Agreement. In light of these circumstances, the pendency of the currently stayed injunction, the limited time period this Agreement covers, and the limited amount of time available to implement the measures provided for in the Agreement, the parties believe that the most expeditious course of action towards full implementation of this Agreement is for the Commission to adopt this Agreement in its entirety and allow the parties to work cooperatively, rather than risk the withdrawal of any party to the Agreement if the Commission were to make a modification or condition deemed material and adverse to the party.^{5/} Alternatively, if the Commission does not adopt the

^{5/} Section B of the Agreement permits any party to withdraw its consent to the Agreement if the Commission includes provisions, modifications or conditions that are material,
(continued...)

entire Agreement in its current format as part of the license, the parties request that it adopt license articles as wholly identical in language to the Agreement as possible.

III. Request for Additional Articles. In addition to the special article requested above, the parties have attached several proposed articles for inclusion in the amended license. See Attachment 2. These articles, as modified for the purposes of this Agreement, have been included by the Commission in orders approving other settlements. See, e.g., Rock Island and Wells, supra.

IV. Request for Amendment of Special Article 31 of the Box Canyon License. When this project was initially licensed in 1951, the Commission included a special article in the license that reads as follows:

Article 31. The licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modification of the project structures and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Federal Power Commission upon the recommendations of the Washington State Department of Game, the United States Forest Service, and the Secretary of the Interior.

As provided for in the Agreement, the parties request that Article 31 be amended to add the Kalispel Tribe of Indians as a party that may also invoke these provisions.

V. Role of the Technical Committee. Under the terms of this Agreement, the Technical Committee is overseeing

^{5/} (...continued)
adverse and unacceptable to the party.

studies and implementation of the resource measures provided by the Agreement. The parties recognize that the Commission has ultimate authority to consider and approve actions proposed as a result of the studies. The parties believe that the role of the Technical Committee as provided for in this Agreement is consistent with and does not infringe upon the Commission's authority. It should be noted that the parties are proposing license articles for reporting to the Commission (see Attachment 2), for Commission disposal of disputes (see Section 26 of the Agreement), and for Commission review.

VI. Public Notice. Although under Commission regulations notice of settlement agreements is not required, the parties request that the Commission notice this Agreement. Consistent with the Commission's 1996 ruling with respect to this case, Public Utility District No. 1 of Pend Oreille County, Wa., 77 FERC ¶ 61,146 (1996), this Agreement provides benefits to individual allottees owning trust allotments on the Kalispel Indian Reservation in the form of section 10(e) charges for the use and occupancy of their allotted lands held in trust by the United States. Although these allottees benefit under the terms of this Agreement, they are not parties to the Agreement.^{6/} Because these allottees have not

^{6/} As provided for in Section 19 of the Agreement, \$125,000, appropriately adjusted annually by the CPI-U will be distributed by the Department among the Tribe and the individual allottees. There are well over 100 affected allottees, not all of whom live on the Kalispel Indian
(continued...)

participated directly in the proceeding before the Commission, and are not on the official service list for this proceeding, it is appropriate for the Commission to publicly notice the filing of this settlement in order to provide these individuals with an opportunity to comment. The parties request that the comment period for such notice be 20 days from the date of publication in the Federal Register, with 10 additional days provided for reply comments, consistent with the comment requirements typically provided for Offers of Settlement under Rule 602(f).^{7/} The parties note that Commission approval of this request would extend the time normally available for comment on settlement agreements under Commission regulations. The parties further request that the Commission also include notice in local newspapers, such as the Newport Miner and the Spokane Spokesman Review, in order to give the greatest opportunity for notice to the allottees and other interested persons.^{8/} The parties do not believe that a total comment period longer than 30 days from the date the notice is published is appropriate due to the shortness of

^{6/} (...continued)

Reservation or belong to the Kalispel Tribe of Indians.

^{7/} In light of this request for public notice and opportunity for comment, the parties are also requesting that the comment requirements provided for in Rule 602(f) be waived or extended, as discussed previously.

^{8/} The parties note that the filing of the Agreement will generate some local press activity (see e.g., joint press release provided for in Section I of the Agreement).

time remaining in the license, the need to begin full implementation of the Agreement as soon as possible, and the fact that all highly interested federal, state and tribal resource managers are signatories to the Agreement. The parties request that the Commission notice the filing of this Agreement in the Federal Register and in local newspapers as expeditiously as possible.

VII. Provisions Regarding Article 33. The parties have provided language in section 22 of the Agreement that is intended to expand the Commission's role under Article 33 of the license, within the parameters of the Commission's jurisdiction. However, the parties do not believe it is necessary to amend the terms of Article 33.

VIII. Private Right of Enforcement. The parties recognize that some of the tributary assessment and enhancement projects and the habitat acquisition, protection, mitigation and enhancement projects, as well as other projects provided for pursuant to the Agreement, will not be within the existing or amended boundaries of the Box Canyon Project. As previously discussed, the parties believe that the Commission should include all terms of the Agreement in the license, however, the parties have agreed to carry out those terms

subject to Commission approval as provided for in Sections A and B of the Agreement.^{2/}

CONCLUSION

The Department, the Tribe, the District, the WDFW and the USFS request that the Commission, after the notice and comment period requested above, 1) approve this Offer of Settlement and the attached Agreement providing for a license amendment; 2) incorporate the Agreement into the license as a special article; 3) amend the license as discussed in the Explanatory Statement; and 4) incorporate the additional draft articles provided for herein into the license.

^{2/} It should be noted that the Agreement provides for the licensee to request that newly acquired lands not currently within the project boundary be added to the project lands by the Commission. Additionally, the Commission has taken the position that certain small mitigation projects are not required to be included within the project boundary. See e.g., PacifiCorp, 80 FERC ¶ 61,334 (1997).

Respectfully submitted,

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OFFER OF SETTLEMENT AND REQUEST FOR APPROVAL OF STIPULATION
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OFFER OF SETTLEMENT AND REQUEST FOR APPROVAL OF STIPULATION
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