

**Attachment 2: Comments received on the record of the Draft Proposed Order**

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## MCVEIGH-WALKER Chase \* ODOE

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**From:** CLEARANCE ORSHPO \* OPRD  
**Sent:** Monday, October 21, 2024 3:07 PM  
**To:** MCVEIGH-WALKER Chase \* ODOE  
**Subject:** RE: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

THIS E-MAIL CONFIRMS RECEIPT OF AN ELECTRONIC SUBMISSION FOR AN HISTORIC RESOURCE/106 REVIEW

THIS E-MAIL DOES NOT REPRESENT CONCLUSION OF THE REVIEW/106 CONSULTATION.....

We received a clearance submission on your above referenced project. Thank you.

The assigned SHPO Case Number is 18-0246 . Refer to this case number on all future correspondence or submitting any change to the scope of work for review using the provided SHPO case number. Please retain this email for your records.

If the SHPO chooses to not respond within 30 calendar days from receipt of this submittal your responsibilities under Section 106 of the National Historic Preservation Act of 1966 as amended, Oregon Revised Statute 358.653, local permitting process, and/or other similar request are complete and the project may proceed as described in the submitted scope of work. The 30-day SHPO response period for this project ends after 11/16/2024 .

Federal and state laws protecting cultural resources, local permitting requirements; and necessary consultation with Native American Indian Tribes for federal, state and local government projects still apply.

See <https://www.oregon.gov/oprd/OH/Pages/lawsrules.aspx> .

Do not respond to this email.

---

**From:** MCVEIGH-WALKER Chase \* ODOE <[chase.mcveigh-walker@oregon.gov](mailto:chase.mcveigh-walker@oregon.gov)>  
**Sent:** Friday, October 18, 2024 4:54 PM  
**To:** CLEARANCE ORSHPO \* OPRD <[orshpo.clearance@oregon.gov](mailto:orshpo.clearance@oregon.gov)>  
**Cc:** ESTERSON Sarah \* ODOE <[Sarah.ESTERSON@energy.oregon.gov](mailto:Sarah.ESTERSON@energy.oregon.gov)>  
**Subject:** FW: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

Please see the attached documents.

Click [here](#) if you are having trouble viewing this message.



## **Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing**

On October 18, 2024, the Oregon Department of Energy issued its Draft Proposed Order (DPO) on Request for Amendment 1 (RFA1) of the Madras Solar Energy Facility Site Certificate. On the same date, the Department issued a Public Notice of a public comment period on the Complete RFA1, DPO, and public hearing. These documents and the notice are available on the [Department's website](#).

RFA1 seeks Council approval to extend the construction commencement deadline 3 years; from June 25, 2024 to June 25, 2027; with a new completion deadline of 18 months after construction commences; and adjustments to quantities of previously approved facility components.

The Madras Solar Energy Facility is an approved but not yet constructed 63 megawatt (MW) solar PV electrical generating facility located within a site boundary of 284 acres, approximately 5.5 miles west of the City of Madras in Jefferson County, OR.

The certificate holder is Madras PV1, LLC., a wholly owned subsidiary of Ecoplexus Inc.

### **Comment Period:**

Written comments on the DPO and RFA1 must be received by the Department **before the close of the record of the public hearing on November 14, 2024** and must be submitted in writing through the [public comment portal](#), by mail, email, or fax to the address below, or via oral or written comments submitted at the public hearing:

Chase McVeigh-Walker, Senior Siting Analyst  
550 Capitol Street NE  
Salem, OR 97301  
Phone: 971-600-5323  
Email: [chase.mcveigh-walker@energy.oregon.gov](mailto:chase.mcveigh-walker@energy.oregon.gov)  
Fax: 503-373-7806

The goal of the [online comment portal](#) is to provide a convenient option to submit input on projects. To get started, choose the “Madras Solar Energy Facility RFA1” project from the drop-down menu. Click “Next” and follow the instructions on screen. You will receive an email confirmation after submitting your comment.

ODOE also has a new [docket system](#) available which displays comments that have been submitted. Comments for this RFA1 and DPO will be [posted to the docket](#) and will normally be available to view within 3 business days of receipt.

**Public Hearing:**

A Public Hearing on the RFA1 and DPO will be held on November 14, 2024 in Madras, OR, to provide the public opportunity to comment. It will be held in person and remotely. Details on how to attend in person, or participate remotely, are included in the Public Notice that is posted to the [project website](#).

**In Person/Webinar Public Hearing Information:**

Date: November 14, 2024  
Start Time: 5:30 p.m. Pacific Time (PT)  
In Person: Inn at Cross Keys Station  
66 NW Cedar Street  
Madras, Oregon 97741

*You received this notice either because you previously signed up for email updates related to this project or all Energy Facility Siting Council activities. You will automatically receive all future notices unless you unsubscribe via [ClickDimensions](#) or by contacting ODOE.*

*If you have any questions or comments about ClickDimensions please feel free to contact ODOE’s Administrative Assistant Nancy Hatch at 503-428-7905, toll-free in Oregon at 800-221-8035, or email to [Nancy.Hatch@energy.oregon.gov](mailto:Nancy.Hatch@energy.oregon.gov).*



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***Leading Oregon to a safe, equitable, clean, and sustainable energy future.***

The Oregon Department of Energy helps Oregonians make informed decisions and maintain a resilient and affordable energy system. We advance solutions to shape an equitable clean energy transition, protect the environment and public health, and responsibly balance energy needs and impacts for current and future generations.



[AskEnergy@oregon.gov](mailto:AskEnergy@oregon.gov) | 503-378-4040 | 550 Capitol St. NE in Salem  
Click [here](#) to unsubscribe or [here](#) to change your Subscription Preferences.

## MCVEIGH-WALKER Chase \* ODOE

---

**From:** RYAN Peter \* DSL  
**Sent:** Monday, October 21, 2024 8:45 AM  
**To:** MCVEIGH-WALKER Chase \* ODOE  
**Subject:** RE: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

Good Morning Chase,

In response to ODOE's request for comments for the Madras Solar Energy Facility Site Certificate, DSL notes that the approval for the wetland delineation report prepared for the site expired on March 5, 2024. However, that same agency decision from 2019 agreed with the applicant's consultant that no jurisdictional wetlands or waterways were present within the project's study area. Please let me know if you have any questions.

Peter Ryan, PWS Emeritus

Aquatic Resource Specialist

Oregon Department of State Lands | 775 Summer Street, NE, Ste. 100, Salem, Oregon 97301-1279  
503.779.4159 | **Workdays:** Monday-Thursday | **Out of Office:** Fridays

---

**From:** MCVEIGH-WALKER Chase \* ODOE <chase.mcveigh-walker@oregon.gov>  
**Sent:** Friday, October 18, 2024 4:31 PM  
**To:** MCVEIGH-WALKER Chase \* ODOE <Chase.MCVEIGH-WALKER@energy.oregon.gov>  
**Cc:** ESTERSON Sarah \* ODOE <Sarah.ESTERSON@energy.oregon.gov>  
**Subject:** FW: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

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ENERGY FACILITY SITING COUNCIL

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RFA1 seeks Council approval to extend the construction commencement deadline 3 years; from June 25, 2024 to June 25, 2027; with a new completion deadline of 18 months after construction commences; and adjustments to quantities of previously approved facility components.

The Madras Solar Energy Facility is an approved but not yet constructed 63 megawatt (MW) solar PV electrical generating facility located within a site boundary of 284 acres, approximately 5.5 miles west of the City of Madras in Jefferson County, OR.

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Chase McVeigh-Walker, Senior Siting Analyst  
550 Capitol Street NE  
Salem, OR 97301  
Phone: 971-600-5323  
Email: [chase.mcveigh-walker@energy.oregon.gov](mailto:chase.mcveigh-walker@energy.oregon.gov)  
Fax: 503-373-7806

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[AskEnergy@oregon.gov](mailto:AskEnergy@oregon.gov) | 503-378-4040 | 550 Capitol St. NE in Salem  
Click [here](#) to unsubscribe or [here](#) to change your Subscription Preferences.

## MCVEIGH-WALKER Chase \* ODOE

---

**From:** BROWN Jordan A \* ODA  
**Sent:** Friday, October 25, 2024 10:11 AM  
**To:** MCVEIGH-WALKER Chase \* ODOE  
**Cc:** MARSHALL Danielle \* ODA  
**Subject:** Re: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

Chase,

Thanks for checking and for the info you provided. After looking into the project, we still have no comment. No listed plants are known to occur in Jefferson County.

Cheers

**Jordan Brown, Program Lead Conservation Biologist**  
**Oregon Department of Agriculture – Native Plant Conservation**

635 Capitol St NE, Salem, OR 97301-2532

PH: 541.737.2346 | CELL: 541.224.2245 | WEB: Oregon.gov/ODA

Pronouns: he, him, his

**ODA Customer Service Survey** – Please share your feedback in just 2-3 minutes: <https://oda.fyi/ODAsurvey>

**Encuesta sobre el servicio de atención al cliente de la ODA** – Por favor, comparte su opinion en solo 2-3 minutos: <https://oda.fyi/ODAsurveyEspanol>

---

**From:** MCVEIGH-WALKER Chase \* ODOE <chase.mcveigh-walker@oregon.gov>

**Date:** Thursday, October 24, 2024 at 8:54 AM

**To:** BROWN Jordan A \* ODA <Jordan.A.BROWN@oda.oregon.gov>

**Cc:** MARSHALL Danielle \* ODA <Danielle.MARSHALL@oda.oregon.gov>

**Subject:** RE: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

Good morning Jordan (and Danielle),

I looked back through my records on this project, and it doesn't appear ODA commented on the record of the ASC when this project was being reviewed and approved in 2021. However, results of the certificate holders literature review indicate that there are/were no state listed threatened or endangered plants, or suitable habitat within the analysis area. The entirety of the 280-acre site boundary is Category 4 habitat (specifically Exotic annual Grassland, and Rabbitbrush Shrub-Steppe). At this point, feel free to comment on any changes in fact or law since the approval of the Final Order (June 2021) or the amendment request itself (to extend construction commencement and completion dates) if you would like to. Thanks for reaching out, and let me know if you have any additional questions or would like to set up a call.

Regards,  
-Chase



**Chase McVeigh-Walker**

Senior Siting Analyst

*pronouns: he/him/his*

550 Capitol St. NE | Salem, OR 97301

P: 971-600-5323

P (In Oregon): 800-221-8035



Stay connected!

---

**From:** BROWN Jordan A \* ODA <Jordan.A.BROWN@oda.oregon.gov>

**Sent:** Friday, October 18, 2024 4:40 PM

**To:** MCVEIGH-WALKER Chase \* ODOE <chase.mcveigh-walker@oregon.gov>

**Cc:** MARSHALL Danielle \* ODA <Danielle.MARSHALL@oda.oregon.gov>

**Subject:** Re: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

Chase,

Did you already receive comment from ODA on this step of the project? I can't recall when we last provided comment on this particular project. If you do still need a response from us, please just let us know.

Thanks!

Jordan Brown, Program Lead Conservation Biologist  
Oregon Department of Agriculture – Native Plant Conservation

635 Capitol St NE, Salem, OR 97301-2532

PH: 541.737.2346 | CELL: 541.224.2245 | WEB: Oregon.gov/ODA

Pronouns: he, him, his

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---

**From:** MCVEIGH-WALKER Chase \* ODOE <[chase.mcveigh-walker@oregon.gov](mailto:chase.mcveigh-walker@oregon.gov)>

**Date:** Friday, October 18, 2024 at 4:30 PM

**To:** MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)>

**Cc:** ESTERSON Sarah \* ODOE <[Sarah.ESTERSON@energy.oregon.gov](mailto:Sarah.ESTERSON@energy.oregon.gov)>

**Subject:** FW: Email Summary of Public Notice of Complete Request for Amendment 1 for the Madras Solar Energy Facility Site Certificate, Issuance of Draft Proposed Order on RFA1, Public Comment Period on RFA1 and DPO, and Public Hearing

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Chase McVeigh-Walker, Senior Siting Analyst  
550 Capitol Street NE  
Salem, OR 97301  
Phone: 971-600-5323  
Email: [chase.mcveigh-walker@energy.oregon.gov](mailto:chase.mcveigh-walker@energy.oregon.gov)  
Fax: 503-373-7806

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[AskEnergy@oregon.gov](mailto:AskEnergy@oregon.gov) | 503-378-4040 | 550 Capitol St. NE in Salem  
Click [here](#) to unsubscribe or [here](#) to change your Subscription Preferences.



## DESCHUTES VALLEY WATER DISTRICT

881 S.W. Culver Hwy. • Madras, Oregon 97741 • Phone 541.475.3849/Fax 541.475.6013

November 12, 2024

Paul Szewczykowski  
Ecoplexus  
[pszewczykowski@ecoplexus.com](mailto:pszewczykowski@ecoplexus.com)

Dear Mr. Szewczykowski,

Deschutes Valley Water District is a municipal corporation incorporated under Chapter 264 of the O.R.S for the purpose of delivering domestic water to persons within and without the District boundaries that request it.

Ecoplexus has requested access to water during construction up to 12.8 MG and water on an annual basis of up to 1.7 MG for maintenance and cleaning of a solar array. We are willing and able to serve the needs with domestic drinking water for the requested amounts provided. Ecoplexus would have access to the water provided at our nearby fill station only. The fill station is located at 881 SW Culver Hwy, Madras, OR 97741.

Deschutes Valley Water District reserves the right to reject any or all applications for future water services when, in our opinion, additional services would jeopardize the sanitary water supply to our customers and/or if the applicant has not met the rules and regulations of the District.

Respectfully,

A handwritten signature in blue ink that reads "Joel Gehrett".

Joel Gehrett, P.E.  
General Manager





Jefferson County Fire & EMS  
PO BOX 30 – 765 S. 5<sup>th</sup>  
Madras, OR 97741  
P: 541-475-7274

To: Madras PV1, LLC  
Re: Madras Solar Energy Project on Elk Dr.  
Date: June 24<sup>th</sup>, 2024

Madras PV1, LLC,

As you are aware, Jefferson County Fire and EMS provides emergency response services from our main fire station in Madras – 765 South 5<sup>th</sup> St, with a substation in Culver, 200 1<sup>st</sup> Ave. We appreciate your continued communication regarding your location.

Effective March 22, 2023, your location at the following address has been permanently annexed into our fire district:

South Half of South half, section 30, township 10 south, range 13 east of the Willamette Meridian, Jefferson County, Oregon. 10-13-31 100, account #192.

North half, section 31, Township 10 south, Range 13 East of the Willamette Meridian, Jefferson County, Oregon, excepting county road #630. 10-31-31 100, Account 193.

We will ensure ongoing fire and life safety services to your location as part of our commitment to community safety.

If you have any questions, please call the district. Thank you for your cooperation and partnership in enhancing public safety within our district.

Best regards,

Jeff Blake  
Fire Chief  
Jefferson County Fire & EMS

**From:** [Paul Szewczykowski](#)  
**Sent:** Wednesday, November 13, 2024 4:56 PM  
**To:** [MCVEIGH-WALKER Chase \\* ODOE](#)  
**Cc:** [Rosalie Annand](#); [Andrews, Carrie](#); [Kyle Robrock](#)  
**Subject:** Re: DPO Public Comment Period Extension Request (CTWS) 2024-11-12  
**Attachments:** [JC Fire and EMS Service Letter \(1\).pdf](#)

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Chase, one more letter I'm not sure that you have. This is confirming our site has been annexed into the fire district service area.

On Wed, Nov 13, 2024 at 9:19 AM MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)> wrote:

Thank you very much Paul. I will reference the letter/transmittal of the letter as a comment received from the certificate holder in my presentation. If you have any additional comments on the DPO, please don't hesitate to send my way, or provide tomorrow at the hearing.

Regards,  
-Chase

---

**From:** Paul Szewczykowski <[pszewczykowski@ecoplexus.com](mailto:pszewczykowski@ecoplexus.com)>  
**Sent:** Wednesday, November 13, 2024 6:50 AM  
**To:** MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)>  
**Cc:** Rosalie Annand <[rannand@ecoplexus.com](mailto:rannand@ecoplexus.com)>; Andrews, Carrie <[carrie.andrews@tetrattech.com](mailto:carrie.andrews@tetrattech.com)>; Kyle Robrock <[krobrock@ecoplexus.com](mailto:krobrock@ecoplexus.com)>  
**Subject:** Re: DPO Public Comment Period Extension Request (CTWS) 2024-11-12

Chase, if needed here is an updated letter of water availability from Deschutes Valley Water District.

On Tue, Nov 12, 2024 at 5:27 PM Paul Szewczykowski <[pszewczykowski@ecoplexus.com](mailto:pszewczykowski@ecoplexus.com)> wrote:

Received. Thanks again.

On Tue, Nov 12, 2024 at 5:00 PM MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)> wrote:

No Problem Paul.

Yes, I did receive your email yesterday (sorry for not confirming). I can/will incorporate the two photos into the PowerPoint.

(in an effort to not send you a bajillion more emails)... Attached to this email, please find three additional "comments" from reviewing agencies received the last week of October. If any additional comments are received before the public hearing, I will provide them as promptly as possible to you and the Madras Team.

Regards,  
-Chase



**Chase McVeigh-Walker**  
Senior Siting Analyst  
*pronouns: he/him/his*  
550 Capitol St. NE | Salem, OR 97301  
P: 971-600-5323  
P (In Oregon): 800-221-8035



Stay connected!

---

**From:** Paul Szewczykowski <[pszewczykowski@ecoplexus.com](mailto:pszewczykowski@ecoplexus.com)>  
**Sent:** Tuesday, November 12, 2024 3:46 PM  
**To:** MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)>  
**Cc:** Rosalie Annand <[rannand@ecoplexus.com](mailto:rannand@ecoplexus.com)>; Andrews, Carrie <[carrie.andrews@tetrattech.com](mailto:carrie.andrews@tetrattech.com)>; Kyle Robrock <[krobrock@ecoplexus.com](mailto:krobrock@ecoplexus.com)>  
**Subject:** Re: DPO Public Comment Period Extension Request (CTWS) 2024-11-12

Thank you Chase. I did receive a copy of their request today from Ellen Grover. My understanding is that the Council will need to consider their request at the hearing.

Also, did you receive the current site photos I sent you yesterday? I was hoping you could include those in your presentation materials.

I have attached them again here.

Thanks again and I look forward to meeting you in person at the hearing.

On Tue, Nov 12, 2024 at 4:39 PM MCVEIGH-WALKER Chase \* ODOE <[Chase.MCVEIGH-WALKER@energy.oregon.gov](mailto:Chase.MCVEIGH-WALKER@energy.oregon.gov)> wrote:

Good Afternoon Paul,

Earlier today, the Department received an Extension Request for Madras Solar Energy Facility Amendment 1 Draft Proposed Order Public Comment Period. The request was submitted on behalf of the Confederated Tribes of the Warm Springs Reservation of Oregon, and is attached to this email.

I see you were "CC'd" on the original email from Ellen Grover, but I wanted to make sure you received the request.

Regards,  
-Chase



**Chase McVeigh-Walker**  
Senior Siting Analyst  
*pronouns: he/him/his*  
550 Capitol St. NE | Salem, OR 97301  
P: 971-600-5323  
P (In Oregon): 800-221-8035



Stay connected!

[Ecoplexus, Inc.](#) | [LinkedIn](#)

[Ecoplexus, Inc.](#) | [LinkedIn](#)

[Ecoplexus, Inc.](#) | [LinkedIn](#)

**From:** [Ellen Grover](#)  
**Sent:** Tuesday, November 12, 2024 11:32 AM  
**To:** [MCVEIGH-WALKER Chase \\* ODOE](#)  
**Cc:** [Cathy Ehl](#); [Revital Kogot](#); [Paul Szewczykowski](#)  
**Subject:** CTWS Extension of Public Record Request - Madras Solar  
**Attachments:** [Extension request-c1.pdf](#)

---

Good morning Chase: Attached please find our request to extend the public record. Kind regards,  
Ellen



**BBK**  
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[Ellen Grover](#)

Partner

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November 12, 2024

**VIA EMAIL: CHASE.MCVEIGH-WALKER@ENERGY.OREGON.GOV**

Chase McVeigh-Walker  
Senior Siting Analyst  
Oregon Department of Energy  
550 Capital St. NE, 1st Floor  
Salem, OR 97301

Re: Request for Extension of Public Record - Request for Amendment 1 to  
Site Certificate for Madras Solar Energy Facility Site Certificate  
("Request for Amendment")

Dear Mr. McVeigh-Walker:

This office represents the Confederated Tribes of the Warm Springs Reservation of Oregon and its wholly owned enterprise Warm Springs Power and Water Enterprises (collectively "Tribe"). The Tribe submits this request for a 21-day extension of time to submit comments in this proceeding, from the current due date of November 14, 2024, to November 25, 2024. The Tribe has contacted counsel for Site Certificate Holder Madras PV1, LLC ("Madras") and is authorized to state that Madras does not oppose this motion.

The Commission has well-established discretion to control its own docket. The Tribe is a co-owner of the Federal Energy Regulatory Commission ("FERC") licensed facility on which Madras seeks transmission interconnection. Madras has initiated, and the Tribe is participating in, FERC proceedings regarding their proposed use of the facility. The Tribe is diligently working to prepare comments on the Request for Amendment. However, additional time—at least 11 days—is necessary to fully investigate the factual and legal issues raised by the Request for Amendment and prepare a fulsome response. This extension is consistent with the Tribe's extension request in the FERC proceeding and would allow the Tribe and Madras to focus on their efforts to schedule further discussions that have the potential to streamline the issues presented for the Council's review. No prejudice or inconvenience will result for any party as a result of granting this unopposed motion. Good cause thus exists to grant this request.

Chase McVeigh-Walker

November 12, 2024

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Accordingly, the Tribe respectfully request that the Council expeditiously grant this request and extend the deadline for submitting public record comments in this proceeding to November 25, 2024.

Sincerely,



Ellen Grover

of BEST BEST & KRIEGER LLP

EG

cc: Cathy Ehli  
Paul Szewczykowski

**From:** [ODOE ITService](#) \* [ODOE](#)  
**Sent:** Monday, November 18, 2024 2:10 AM  
**To:** [MCVEIGH-WALKER Chase](#) \* [ODOE](#)  
**Subject:** New Public Comment submitted for project : RFA1 and DPO for Madras  
Solar Energy Facility

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**Organization:** alaska airlines terminal in seattle

**Submitted by:** daniel craig

**Email:** danielcraig3001@gmail.com

**Zip Code:**

**Siting Project Phase:** DPO

**Comment Summary:**

we need bad fo rhe environment

Please Click on the following link to view the full [Comment Details](#)

**From:** [Ellen Grover](#)  
**Sent:** Thursday, December 5, 2024 2:44 PM  
**To:** [MCVEIGH-WALKER Chase \\* ODOE](#)  
**Cc:** [Cathy Ehli](#); [Robert Brunoe](#)  
**Subject:** Comments - Request for Amendment 1 to Site Certificate for Madras Solar Energy Facility Site Certificate  
**Attachments:** [Exhibit 6 - Order Disclaiming Jurisdiction 20001124-0002-c1.pdf](#)

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Good afternoon Chase:

On behalf of Warm Springs Power and Water Enterprises, I am providing the attached comments and information on the above referenced file. This will be in 4 separate emails due to size and is comprised of the following materials:

Comment Letter from WSPWE  
Exhibit 1 - 1855 CTWS Treaty  
Exhibit 2 – CTWS Ceded Lands Map  
Exhibit 3 – CTWS/PGE Long Term Global Settlement Agreement  
Exhibit 4 – FERC License for Project No. 2030  
Exhibit 5 – Map of Madras Project Area  
Exhibit 6 – FERC Order Disclaiming Jurisdiction

Please let me know if you have trouble receiving any of these materials.

Thank you, Ellen



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[Ellen Grover](#)

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## Warm Springs Power & Water Enterprises

P.O. BOX 960 · WARM SPRINGS, OR 97761

(541) 553-1046

December 5, 2024

Chase McVeigh-Walker  
Senior Siting Analyst  
Oregon Department of Energy  
550 Capital St. NE, 1st Floor  
Salem, OR 97301

Re: Comments - Request for Amendment 1 to Site Certificate for Madras Solar Energy Facility Site Certificate (“Request for Amendment”)

Dear Mr. McVeigh-Walker:

My name is Cathy Ehli, General Manager of Warm Springs Power and Water Enterprises (“WSPWE”). WSPWE is a wholly owned enterprise of the Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS” or “Tribe”). On behalf of the Tribe, by and through WSPWE, I submit the following comments on the requested Amendment 1 to Site Certificate for the Madras Solar Energy Facility Site Council.

### **A. Background**

The Confederated Tribes of the Warm Springs Reservation of Oregon is a federally-recognized, self-governing, sovereign Indian tribe and the legal successor-in-interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon, dated June 25, 1855, 12 Stat 963 (“Treaty” or “1855 Treaty”).<sup>1</sup> CTWS is legally organized under a constitution and bylaws ratified by the members of the Tribe on December 18, 1937, and approved by the Assistant Secretary of the Interior of the United States on February 14, 1938, pursuant to Section 12 of the Act of June 18, 1934, as amended and consists of three confederated Indian tribal groups: the Warm Springs, the Wasco and the Paiute. Pursuant to the 1855 Treaty, the Tribe ceded approximately 10 million acres of land (“ceded lands”) to the United States and reserved approximately 640,000 acres for exclusive use and occupation of the Tribe and its members as a permanent homeland (“Warm Springs Reservation”).<sup>2</sup>

While the Warm Springs Reservation is reserved for the Tribe’s exclusive use, the Tribe’s sovereignty and culture depends on the practices and lands and waters that have sustained it since time immemorial. Its people have utilized and occupied the Columbia River Basin since time immemorial. In the 1855 Treaty, the Tribe’s predecessors ceded much of those lands to the United States. However, the Tribe and its members are a “salmon people” for whom fishing is “not much less necessary to [their] existence \* \* \* than the atmosphere they breathe[.]” *See United States v. Winans*, 198 US 371, 381 (1905). Retaining the Tribe’s right, among others, to continue its fishing practices was a primary objective of the

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<sup>1</sup> A copy of the 1855 Treaty is attached as Exhibit “1”

<sup>2</sup> A map of the Tribe’s ceded lands is attached as Exhibit “2”

Chase McVeigh-Walker  
December 5, 2024  
Page 2

Tribe during the treaty negotiations, and tribal rights to fish, unimpeded, at all usual and accustomed places, including off-Reservation, was enforced in the federal court litigation known as *United States v. Oregon*. The Tribe's rights under the 1855 Treaty include a legally-enforceable right to the protection of fish habitat because the treaty fishing right would be "worthless without harvestable fish." *United States v. Washington*, 853 F3d 946, 965 (9th Cir 2017), *aff'd by equally divided court*, 138 S Ct 1832 (2018). The Tribe's goal is to maintain and enhance traditional and Treaty-protected fish and wildlife resources within the Columbia River Basin, including the Deschutes basin within which the Pelton Hydroelectric Project No. 2030 ("Pelton Project") lies.

The Pelton Project consists of three dams on the Deschutes River<sup>3</sup> and is located wholly within the Tribe's ceded lands. Since the middle of the channel of the Deschutes River forms the eastern boundary of the Warm Springs Reservation, and one of the Deschutes River's major tributaries, the Metolius River, forms a significant portion of the southern boundary of the Reservation, approximately one-third of the Pelton Project FERC boundary is located on Warm Springs Reservation lands.

## **B. Federal Energy Regulatory Commission License**

Under the Federal Power Act (FPA), the Federal Energy Regulatory Commission ("FERC") holds exclusive authority over the licensing and regulation of hydroelectric projects, including associated facilities and transmission lines. The Pelton Project was originally licensed by the Federal Power Commission ("FPC") in 1951. *See Federal Power Comm'n v. State of Oregon*, 349 U.S. 435 (1955). The original license was issued to PGE for a 50-year term and authorized construction of the Pelton and Reregulating Dams. In 1960 the FPC amended the license to authorize PGE to construct the Round Butte Dam, and in 1980 the license was later amended to authorize the Tribe to construct power generation facilities in the Reregulating Dam and to designate the Tribe and PGE as joint licensees. During the original license term, the Project had problems with fish passage. The dams created a total barrier to migration by resident salmonids from reaching historical spawning and rearing areas. By 1973, fish passage was abandoned in favor of a fish hatchery. *See Deschutes River Alliance v. Portland Gen. Elec. Co.*, 331 F.Supp 1187 (D.Or. 2018), *rev'd on other grounds* 1 F4th 1153 (9<sup>th</sup> Cir. 2021). This result had a profound impact on the Tribe.

In 1999, both the Tribe and PGE recognized that the FERC license for the Pelton Project would expire on December 31, 2001. The Tribe and PGE filed competing applications to continue the operation and maintenance of the Pelton Project. The Tribe and PGE entered into a Long-Term Global Settlement and Compensation Agreement<sup>4</sup>, dated as of April 12, 2000 ("GSA") among the Tribe, the U.S. Department of Interior ("Interior") and PGE, and various related agreements, including an Ownership and Operation Agreement, dated as of January 1, 2002 by and between the Tribe and PGE (the "O&O Agreement"). The GSA and the use of Tribal lands and resources thereunder were approved by the U.S. Congress pursuant to Public Law 107-102, which was enacted December 27, 2001, and effective retroactively to the date of the GSA. As part of PGE's compensation to the Tribe, the GSA provided the

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<sup>3</sup> The Round Butte Dam, the Pelton Dam, and the Reregulating Dam.

<sup>4</sup> A copy of the GSA is attached as Exhibit "3"

Chase McVeigh-Walker  
December 5, 2024  
Page 3

Tribe with the opportunity to acquire an ownership interest in Pelton Project assets owned by PGE. The compensation granted by PGE to the Tribe under the GSA includes, among other forms of compensation, “[a]ll of PGE’s actual and potential obligations to the Tribes pursuant to Section 10(e)” of the Federal Power Act. GSA at p.22. Under related agreements, it also obligates PGE to purchase all of the power from the Project at a price equal to public index price, including the Tribes’ ownership allocation of such power.

After exercising an initial purchase of 33.33% and a first purchase option of 16.66%, the Tribe is now a 49.99 percent owner of the Pelton Project assets previously entirely owned by PGE, including, among other facilities, the 230 kV generator tie line between the Pelton Dam and the Round Butte Switchyard (“Pelton generator line”). A second purchase option of 0.02%, exercisable on December 31, 2036, will result in the Tribe being the majority owner of the Pelton Project.

In June 2001, the Tribe and PGE filed an amendment to combine their license applications and became co-applicants for a new license. In July 2004, the Tribe and PGE, along with twenty stakeholders including Deschutes County, entered into Pelton Project Relicensing Settlement Agreement. *See Deschutes River Alliance, supra*. The Tribe and PGE filed the Pelton Project Relicensing Settlement Agreement with FERC. On June 21, 2005, FERC issued an order approving the settlement and issuing a new fifty-year license to the Tribe and PGE (“2005 FERC License”). 111 FERC ¶ 61,450, order on rehearing, 117 FERC ¶ 61,112 (2006).<sup>5</sup> The Tribe and PGE are joint-licensees without limitation, and therefore PGE and the Tribes are “jointly and severally liable for fulfilling all statutory and regulatory obligations under the license” for the Project.<sup>6</sup>

In connection with the 2005 FERC License, FERC required significant protection, mitigation and enhancement measures (“PMEs”) at the Pelton Project, including a Fish Passage Plan that is intended to establish self-sustaining harvestable anadromous fish runs of Chinook salmon, steelhead, and sockeye salmon above the Pelton Project. *See Id.* The Fish Passage Plan contains a three- phase fish passage program that requires substantial capital improvements and fish reintroduction efforts. The 2005 FERC License also required construction of a selective water withdrawal facility (“SWW”) for the purpose of improving water quality conditions and aiding the Fish Passage Program and the establishment of the Pelton Round Butte Fund for the purpose of funding enhancement projects for fish and wildlife resources and habitat throughout the Deschutes basin. *See Deschutes River Alliance, supra*. Since the issuance of the 2005 FERC license, the Tribe and PGE have spent, in accordance with their ownership interests, (either directly or through the Pelton Round Butte Fund) over \$175 million on the Fish Passage Plan and other enhancement projects.<sup>7</sup>

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<sup>5</sup> A copy of the 2005 FERC License is attached as Exhibit “4”

<sup>6</sup> *Portland Gen. Elec. Co. & Confederated Tribes of the Warm Springs Reservation of Or.*, 93 FERC ¶ 61,183 at p. 61,603 and 61,604 (explaining that designating PGE and the Tribes as co-licensees without limitation “advances our policy that co-licensees be jointly and severally liable for license compliance”).

<sup>7</sup> The Tribe has issued the Confederated Tribes of Warm Springs Reservation of Oregon's Hydroelectric Revenue Bonds (Pelton-Round Butte Project) Series 2021 (Taxable Fixed Rate) in the principal amount of \$40,955,000 (the “Series 2021 Bonds”) to finance the first purchase option to acquire the additional 16.66 interest in the Pelton Project and related expenses, and issued the Tribes’ Hydroelectric Revenue Refunding Bonds, Series 2019A (Pelton-Round Butte Project) (Taxable Fixed Rate refunding) (Green Bonds) in the principal amount of \$19,970,00 the Hydroelectric revenue Refunding Bonds, Series 2019B (Pelton-Round Butte Project) (Tribal Economic Development bonds – Tax-Exempt Fixed Rate Refunding) (Green 12805.12131\42996211.1

Chase McVeigh-Walker  
 December 5, 2024  
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The Tribe's power sale revenues to PGE under the O&O Agreement, therefore, are necessary to satisfy PGE's obligations under the 2005 FERC license to pay 10(e) compensation to the Tribe for its use of Tribal lands for the Pelton Project and supply needed capital to pay for the Tribe's ownership acquisition costs and, importantly, for the extensive mitigation and enhancement projects under the 2005 FERC license, including the Fish Passage Program. The Pelton generator line is necessary to ensure that the Tribe's generation from the Pelton dam produces the revenues critical for license compliance and to meet the Tribe's obligations and sovereign interests. It is essential to the Tribe, among other considerations, that this facility continue to operate efficiently to meet these needs.

### C. Madras PV1 LLC Request

In 2020, the Council determined that Madras PV1 LLC ("Madras") submitted a complete application for a site certificate. In its 2021 Site Certificate, the Council authorizes certain related and supporting facilities including a substation, point of interconnection switching station and 230 kV transmission line. In fact, the EFSC Site Certificate identifies a fenced Facility Site Boundary. *See* Site Certificate Figure C-1. The Pelton generator line is included in the Pelton Project boundary. This means it is within FERC's exclusive jurisdiction under Part I of the Federal Power Act. Yet, the Site Certificate incorporates the Pelton generator line as bisecting the EFSC Facility Site Boundary which means that the State Site Certificate would eliminate access to the FERC licensed facility by construction of a fenced boundary. Site Certificate Condition GEN-GS-07 also purports to authorize the certificate holder to "construct a 230 kV transmission line anywhere within the approved corridor, subject to the site certificate conditions of the site certificate. The approved corridor extends approximately 200 feet in length between the facility substation and the Point of Interconnect, and 0.5-of-a-mile in width" which means that the Council is authorizing a related and supporting facility to enter the FERC project boundary for a non-Pelton Project purpose.<sup>8</sup>

The Site Certificate describes the 230 kV transmission line as follows:

The 230 kV transmission line extends approximately 200 feet within the approved site boundary and connects the Point of Interconnect to PGE's existing Pelton Dam to Round Butte 230 kV transmission line. The 230 kV transmission line is approved to use up to 4, 80-foot H-frame poles, each placed in concrete foundations approximately 12 feet deep and 4 feet in diameter.

This description is both inaccurate and incomplete. The Pelton generator line is not, in fact, an interconnected transmission grid line, but a generator-owned lead line and it is designated as a "primary transmission line" under the FERC Pelton Project license.<sup>9</sup> *See* 111 FERC ¶ 61,450 at pp 5 and 41. The

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Bonds), in the principal amount of \$20,375,000 (collectively the "Series 2019 Bonds") to refund certain outstanding obligations of the Tribe with respect to the Pelton Project, of which \$78 million remains outstanding.

<sup>8</sup> A map that shows the components of the Pelton Project and the proposed Madras Solar project is attached at Exhibit "5"

<sup>9</sup> A "primary transmission line" designated under a FERC license is one that conveys electricity to the interconnected grid.

<https://www.ferc.gov/sites/default/files/2020-04/HydropowerPrimer.pdf>

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Page 5

7.9-mile long Pelton generator line carries only energy generated by the Tribe and PGE at the Pelton dam to the Round Butte Switchyard where the energy generation then enters the interconnected transmission system. *Id.* The Pelton generator line is jointly owned by PGE (50.01%) and the Tribe (49.99%), and the Tribe is not regulated as a public utility.<sup>10</sup> As such, the Pelton generator line is not subject to regulation under FERC's open access policies.

This distinction is material to the Request for Amendment. OAR 245-027-0375(2) provides that in order for the Council to "issue an amended site certificate, the Council must determine that the preponderance of evidence on the record supports" a conclusion that the "facility complies with all laws and Council standards applicable to an original site certificate application." We do not believe the Council can make this finding based on the current record.

Madras' facility would utilize more than 12 acres of high-value farmland and therefore does not comply with OAR 660-0330130(38)(g). Pursuant to OAR 345-022-0030, Madras sought to obtain approval through an exception to statewide planning goal 3. The Council approved the goal exception, finding that the proposed facility was "locationally dependent." Final Order on Application for Site Certificate in the Matter of the Application for Site Certificate for the Madras Solar Energy Facility (June 21, 2021) ("Final Order") at 101. In particular, Madras asserted that it had "immediate onsite interconnection to Portland General Electric's (PGE) 230 kV Pelton to Round Butte transmission line, which then provides interconnection and delivery from the facility to the regional transmission system without the need to build a new transmission line." *Id.* This was a critical assertion supporting the Council's goal exception determination:

"The Council agrees that the fact that there is an existing 230 kV transmission line within the site boundary, with interconnection capacity, where only a short transmission line segment within the proposed perimeter fenceline would be needed represents unique conditions that would allow for a nearly direct interconnection." *Id.*

The Council also determined that the 200 foot long related and supporting facility to the proposed point of interconnection was an "associated transmission line" subject to the siting standards of ORS 215.274. The Council found that Madras could demonstrate compliance with this standard because the associated transmission line is locationally dependent—*viz.*,

"the applicant explains that the facility has been sited along PGE's existing 230-kV Pelton Dam to Round Butte transmission line as shown on figure K-2. This location would connect the facility to the Northwest power grid. The Facility layout was specifically designed to allow the interconnection with the existing 230-kV transmission line to occur in the middle of the Facility site. The Facility substation is positioned in close proximity to the existing PGE transmission line right of way. As represented on Figures C-

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<sup>10</sup> 93 FERC ¶ 61, 182 (FERC Docket No. ER01-53-000, issued November 21, 2000), attached as Exhibit "6" 12805.12131\42996211.1

Chase McVeigh-Walker  
December 5, 2024  
Page 6

2a and C-2b of ASC Exhibit C, the POI would be located within the existing PGE Transmission line right of way.” Final Order at 89.

Madras’ facility lacks access to any capacity on the Pelton generator line and any interconnection to the Northwest power grid because it has not obtained any approval to interconnect with the Tribe’s facility and it has not otherwise obtained approval for a non-Pelton Project use of Pelton Project lands and facilities. The Tribe asserts that this is not feasible without the Tribe’s consent. While the Tribe understands that Madras has entered into a Large Generator Interconnection Agreement (“LGIA”) with PGE, the Tribe is not a party to this agreement, PGE has no authority to bind the Tribe, and the Tribe has not agreed to an interconnection of its facility. The LGIA is also expressly contingent on Madras obtaining “support for the FERC application in writing from the Joint Licensee of the Pelton-Round Butte Project, the Confederated Tribes of Warm Springs.” The circumstances of Madras’ request are unique. The Tribe has reasonably considered the commercial and regulatory implications related to this request, of which there are many, and determined that they are not inconsequential. The Tribe has not provided its consent, although it remains open to the possibility of providing the necessary consent.

Madras has filed a FERC petition for Declaratory Order, or in the Alternative, Application for Interconnection and Transmission Services and Request for Expedited Action. (Docket Nos. EL24-150-000, TX24-5-000). In this action, Madras asks FERC to exercise discretion to declare that the Tribe does not have the right to consent to interconnection of its facility and, in the alternative, to issue an order under Sections 210, 211 and 212 of the Federal Power Act directing that the Tribe and Madras take all actions needed to make Madras’ interconnection effective. Madras further asserts that FERC has reserved discretionary authority in the 2005 FERC license to amend the Pelton Project hydropower license to the extent necessary to allow Madras’ interconnection. The Tribe does not concur that FERC has the discretionary authority as advocated by Madras and, to the extent discretion does exist, does not believe that FERC will order use of the Tribe’s facilities over its objection. For example and without limitation, under Section 6 of the FPA, provides that licenses “may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days’ notice.” 16 USC § 799. The language of Section 6 indicates that FERC lacks authority to alter the license without the mutual consent of the licensee and the Commission. 16 USC § 799. Accordingly, this requires both licensees (the Tribe and PGE) to consent to Madras’ proposal.

Further, the Tribe questions whether the Council is preempted under the FPA. The language of the FPA clearly authorizes only FERC to issue licenses for dams to generate electrical power, including the transmission of the same. 16 USC § 797(e). While the State retains some control of the appropriation, use and distribution of water, none of the Council’s findings or its Site Certificate deal with water. *See Sayles Hydro Associates v. Maughan*, 985 Fed 451 (9th Cir. 1993) (finding that Congress has occupied the field in the matter of federal licenses under the Federal Power Act and that the state lacks the power to do anything but determine proprietary water rights). Instead, the Site Certificate includes the FERC licensed Pelton generator line within the state siting boundary, where the state certificate would eliminate access to the line by construction of a fenced boundary. This represents a conflict. Furthermore, as noted above, Site Certificate Condition GEN-GS-07 purports to authorize the certificate holder to “construct a 230 kV transmission line anywhere within the approved corridor, subject to the site certificate conditions of the site

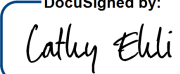
Chase McVeigh-Walker  
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Page 7

certificate. The approved corridor extends approximately 200 feet in length between the facility substation and the Point of Interconnect, and 0.5-of-a-mile in width.” In other words, the Council is authorizing a related and supporting facility to enter the FERC project boundary for a non-Pelton Project purpose where FERC has reserved exclusive authority to regulate the Pelton generator line.

**D. Conclusion**

In short, without the Tribe’s consent and/or if FERC issues an order granting the relief requested by Madras, the Tribe respectfully asserts that the Council simply cannot make the findings necessary to meet its standards and that Council approvals that are inconsistent with FERC’s exclusive authority may be preempted. The Tribe urges the Commission, at a minimum, to impose conditions of approval necessary to permit it to make the necessary findings to meet the Council’s standards and to craft any modifications to the Site Certificate necessary to conflict with FERC authority.

Sincerely,

DocuSigned by:  
  
AED98468436146B  
Cathy Ehli – General Manager  
of Warm Springs Power & Water Enterprises

# EXHIBIT 1



1855 WL 10418(Trty.)  
(TREATY)

## TREATY WITH THE TRIBES OF MIDDLE OREGON, 1855.

June 25, 1855.

Articles of agreement and convention made and concluded at Wasco, near the Dalles of the Columbia River, in Oregon Territory, by Joel Palmer, superintendent of Indian affairs, on the part of the United States, and the following-named chiefs and head-men of the confederated tribes and bands of Indians, residing in Middle Oregon, they being duly authorized thereto by their respective bands, to wit: Symtustus, Locks-quis-sa, Shick-a-me, and Kuck-up, chiefs of the Taih or Upper De Chutes band of Walla-Wallas; Stocket-ly and Iso, chiefs of the Wyam or Lower De Chutes band of Walla-Wallas; Alexis and Talkish, chiefs of the Tenino band of Walla-Wallas; Yise, chief of the Dock-Spus or John Day's River band of Walla-Wallas; Mark, William Chenook, and Cush-Kella, chiefs of the Dalles band of the Wascoes; Toh-simph, chief of the Ki-gal-twal-la band of Wascoes; and Wal-la-chin, chief of the Dog River band of Wascoes. [FNA][FNB]

**ARTICLE 1**

The above-named confederated bands of Indians cede to the United States all their right, title, and claim to all and every part of the country claimed by them, included in the following boundaries, to wit: [FNC]

Commencing in the middle of the Columbia River, at the Cascade Falls, and running thence southerly to the summit of the Cascade Mountains; thence along said summit to the forty-fourth parallel of north latitude; thence east on that parallel to the summit of the Blue Mountains, or the western boundary of the Sho-sho-ne or Snake country; thence northerly along that summit to a point due east from the head-waters of Willow Creek; thence west to the head-waters of said creek; thence down said stream to its junction with the Columbia River; and thence down the channel of the Columbia River to the place of beginning. Provided, however, that so much of the country described above as is contained in the following boundaries, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation, to wit: [FND][FNE]

Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains; thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains; [FNF] thence to the summit of said mountains; thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; heading in this peak, to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent. [FNG]

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the United States other than is provided for by this treaty; and, until the expiration of the time specified, the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, and not actually inclosed by said Indians. Provided, however, That prior to the removal of said Indians to said reservation, and before any improvements contemplated by this treaty shall have been commenced, that if the three principal bands, to wit: the Wascopum, Tiah, or Upper De Chutes, and the Lower De Chutes bands of Walla-Wallas shall express in council, a desire that some other reservation may be selected for them, that the three bands named may select each three persons of their respective bands, who with the superintendent of Indian affairs or agent, as may by him be directed, shall proceed to examine, and if another location can be selected, better suited to the condition and wants of said Indians, that is unoccupied by the whites, and upon which the board of

commissioners thus selected may agree, the same shall be declared a reservation for said Indians, instead of the tract named in this treaty. Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them. And provided, also, That if any band or bands of Indians, residing in and claiming any portion or portions of the country in this article, shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several and other payments herein named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid, as consideration and payment in full for the tracts in said country claimed by them. And provided, also, That where substantial improvements have been made by any members of the bands being parties to this treaty, who are compelled to abandon them in consequence of said treaty, the same shall be valued, under the direction of the President of the United States, and payment made therefor; or, in lieu of said payment, improvements of equal extent and value at their option shall be made for them on the tracts assigned to each respectively. [FNH][FNI][FNJ][FNK] [FNL][FNM]

## ARTICLE 2

In consideration of, and payment for, the country hereby ceded, the United States agree to pay the bands and tribes of Indians claiming territory and residing in said country, the several sums of money following, to wit: [FNN]

Eight thousand dollars per annum for the first five years, commencing on the first day of September, 1856, or as soon thereafter as practicable.

Six thousand dollars per annum for the term of five years next succeeding the first five.

Four thousand dollars per annum for the term of five years next succeeding the second five; and

Two thousand dollars per annum for the term of five years next succeeding the third five.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to time, at his discretion determine what proportion thereof shall be expended for such objects as in his judgment will promote their well-being and advance them in civilization; for their moral improvement and education; for building, opening and fencing farms, breaking land, providing teams, stock, agricultural implements, seeds, &c.; for clothing, provisions, and tools; for medical purposes, providing mechanics and farmers, and for arms and ammunition. [FNO]

## ARTICLE 3

The United States agree to pay said Indians the additional sum of fifty thousand dollars, a portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing, after the ratification thereof and prior to their removal, such articles as may be deemed by the President essential to their want; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, clothing and provisions, tools, seeds, and for the payment of employees; and for subsisting the Indians the first year after their removal. [FNP]

## ARTICLE 4

In addition to the considerations specified the United States agree to erect, at suitable points on the reservation, one sawmill and one flouring-mill; suitable hospital buildings; one school-house; one blacksmith-shop with a tin and a gunsmith-shop thereto attached; one wagon and plough maker shop; and for one sawyer, one miller, one superintendent of farming operations, a farmer, a physician, a school-teacher, a blacksmith, and a wagon and plough maker, a dwelling house and the requisite outbuildings for

each; and to purchase and keep in repair for the time specified for furnishing employees all necessary mill-fixtures, mechanics' tools, medicines and hospital stores, books and stationery for schools, and furniture for employees. [FNQ]

The United States further engage to secure and pay for the services and subsistence, for the term of fifteen years, of one farmer, one blacksmith, and one wagon and plough maker; and for the term of twenty years, of one physician, one sawyer, one miller, one superintendent of farming operations, and one school teacher. [FNR]

The United States also engage to erect four dwelling-houses, one for the head chief of the confederated bands, and one each for the Upper and Lower De Chutes bands of Walla-Wallas, and for the Wascopum band of Wascoes, and to fence and plough for each of the said chiefs ten acres of land; also to pay the head chief of the confederated bands a salary of five hundred dollars per annum for twenty years, commencing six months after the three principal bands named in this treaty shall have removed to the reservation, or as soon thereafter as a head chief should be elected: And provided, also, That at any time when by the death, resignation, or removal of the chief selected, there shall be a vacancy and a successor appointed or selected, the salary, the dwelling, and improvements shall be possessed by said successor, so long as he shall occupy the position as head chief; so also with reference to the dwellings and improvements provided for by this treaty for the head chiefs of the three principal bands named. [FNS][FNT]

#### ARTICLE 5

The President may, from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for these Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege, and locate[FNU] thereon permanently. To a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres for each additional three members. And the President may provide such rules and regulations as will secure to the family in case of the death of the head thereof the possession and enjoyment of such permanent home and the improvement thereon; and he may, at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years and shall be exempt from levy, sale, or forfeiture, which condition shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restrictions. Provided, however, That no State legislature shall remove the restrictions herein provided for without the consent of Congress. And provided, also, That if any person or family shall at any time neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place indicating a desire to abandon his home, the President may, if the patent shall have been issued, revoke the same, and if not issued, cancel the assignment, and may also withhold from such person, or family, their portion of the annuities, or other money due them, until they shall have returned to such permanent home and resumed the pursuits of industry, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation. [FNV][FNW][FNX]

#### ARTICLE 6

The annuities of the Indians shall not be taken to pay the debts of individuals. [FNY]

#### ARTICLE 7

The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredation on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians except in self-defence, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents for decision, and abide thereby; and if any of the said

Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the case of depredations against citizens; said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians. [FNZ][FNAA] [FNBB]

#### ARTICLE 8

In order to prevent the evils of intemperance among said Indians, it is hereby provided, that if any one of them shall drink liquor to excess, or procure it for others to drink, his or her proportion of the annuities may be withheld from him or her for such time as the President may determine. [FNCC]

#### ARTICLE 9

The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interest may require it, that all roads, highways, and railroads shall have the right of way through the reservation herein designated, or which may at any time hereafter be set apart as a reservation for said Indians. [FNDD]

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNEE]

In testimony whereof, the said Joel Palmer, on the part of the United States, and the undersigned, chiefs, headmen, and delegates of the said confederated bands, have hereunto set their hands and seals, this twenty-fifth day of June, eighteen hundred fifty-five.

Joel Palmer, Superintendent of Indian Affairs, O.T. (L.S.)

Wasco:

Mark, his x mark. (L.S.)

William Chenook, his x mark. (L.S.)

Cush Kella, his x mark. (L.S.)

Lower De Chutes:

Stock-etley, his x mark. (L.S.)

Iso, his x mark. (L.S.)

Upper De Chutes:

Simtustus, his x mark. (L.S.)

Locksquissa, his x mark. (L.S.)

Shick-ame, his x mark. (L.S.)

Kuck-up, his x mark. (L.S.)

Tenino:

Alexsee, his x mark. (L.S.)

Talekish, his x mark. (L.S.)

Dog River Wasco:

Walachin, his x mark. (L.S.)

Tah Symph, his x mark. (L.S.)

Ash-na-chat, his x mark. (L.S.)

Che-wot-nleth, his x mark. (L.S.)

Te-cho, his x mark. (L.S.)

Sha-qually, his x mark. (L.S.)

Louis, his x mark. (L.S.)

Yise, his x mark. (L.S.)

Stamite, his x mark. (L.S.)

Ta-cho, his x mark. (L.S.)

Penop-teyot, his x mark. (L.S.)

Elosh-kish-kie, his x mark. (L.S.)

Am. Zelic, his x mark. (L.S.)

Ke-chac, his x mark. (L.S.)

Tanes Salmon, his x mark. (L.S.)

Ta-kos, his x mark. (L.S.)

David, his x mark. (L.S.)

Sowal-we, his x mark. (L.S.)

Postie, his x mark. (L.S.)

Yawan-shewit, his x mark. (L.S.)

Own-aps, his x mark. (L.S.)

Kossa, his x mark. (L.S.)

Pa-wash-ti-mane, his x mark. (L.S.)

Ma-we-nit, his x mark. (L.S.)

Tipso, his x mark. (L.S.)

Jim, his x mark. (L.S.)

Peter, his x mark. (L.S.)

Na-yoct, his x mark. (L.S.)

Wal-tacom, his x mark. (L.S.)

Cho-kalth, his x mark. (L.S.)

Pal-sta, his x mark. (L.S.)

Mission John, his x mark. (L.S.)

Le Ka-ya, his x mark. (L.S.)

La-wit-chin, his x mark. (L.S.)

Low-las, his x mark. (L.S.)

Thomson, his x mark. (L.S.)

Charley, his x mark. (L.S.)

Copefornia, his x mark. (L.S.)

Wa-toi-mettla, his x mark. (L.S.)

Ke-la, his x mark. (L.S.)

Pa-ow-ne, his x mark. (L.S.)

Kuck-up, his x mark. (L.S.)

Poyet, his x mark. (L.S.)

Ya-wa-clax, his x mark. (L.S.)

Tam-cha-wit, his x mark. (L.S.)

Tam-mo-yo-cam, his x mark. (L.S.)

Was-ca-can, his x mark. (L.S.)

Talle Kish, his x mark. (L.S.)

Waleme Toach, his x mark. (L.S.)

Site-we-loch, his x mark. (L.S.)

Ma-ni-nect, his x mark. (L.S.)

Pich-kan, his x mark. (L.S.)

Pouh-que, his x mark. (L.S.)

Eye-eya, his x mark. (L.S.)

Kam-kus, his x mark. (L.S.)

Sim-yo, his x mark. (L.S.)

Kas-la-chin, his x mark. (L.S.)

Pio-sho-she, his x mark. (L.S.)

Mop-pa-man, his x mark. (L.S.)

Sho-es, his x mark. (L.S.)

Ta-mo-lits, his x mark. (L.S.)

Ka-lim, his x mark. (L.S.)

Ta-yes, his x mark. (L.S.)

Was-en-was, his x mark. (L.S.)

E-yath Kloppy, his x mark. (L.S.)

Paddy, his x mark. (L.S.)

Sto-quin, his x mark. (L.S.)

Charley-man, his x mark. (L.S.)

Ile-cho, his x mark. (L.S.)

Pate-cham, his x mark. (L.S.)

Yan-che-woc, his x mark. (L.S.)

Ya-toch-la-le, his x mark. (L.S.)

Alpy, his x mark. (L.S.)

Pich, his x mark. (L.S.)

William, his x mark. (L.S.)

Peter, his x mark. (L.S.)

Ischa Ya, his x mark. (L.S.)

George, his x mark. (L.S.)

Jim, his x mark. (L.S.)

Se-ya-las-ka, his x mark. (L.S.)

Ha-lai-kola, his x mark. (L.S.)

Pierro, his x mark. (L.S.)

Ash-lo-wash, his x mark. (L.S.)

Paya-tilch, his x mark. (L.S.)

Sae-pa-waltcha, his x mark. (L.S.)

Shalquilkey, his x mark. (L.S.)

Wa-qual-lol, his x mark. (L.S.)

Sim-kui-kui, his x mark. (L.S.)

Wacha-chiley, his x mark. (L.S.)

Chi-kal-kin, his x mark. (L.S.)

Squa-yash, his x mark. (L.S.)

Sha Ka, his x mark. (L.S.)

Keau-i-sene, his x mark. (L.S.)

Che-chis, his x mark. (L.S.)

Sche-noway, his x mark. (L.S.)



Scho-ley, his x mark. (L.S.)

We-ya-thley, his x mark. (L.S.)

Pa-leyathley, his x mark. (L.S.)

Keyath, his x mark. (L.S.)

I-poth-pal, his x mark. (L.S.)

S. Kolps, his x mark. (L.S.)

Walimtalín, his x mark. (L.S.)

Tash Wick, his x mark. (L.S.)

Hawatch-can, his x mark. (L.S.)

Ta-wait-cla, his x mark. (L.S.)

Patoch Snort, his x mark. (L.S.)

Tachins, his x mark. (L.S.)

Comochal, his x mark. (L.S.)

Passayei, his x mark. (L.S.)

Watan-cha, his x mark. (L.S.)

Ta-wash, his x mark. (L.S.)

A-nouth-shot, his x mark. (L.S.)

Hanwake, his x mark. (L.S.)

Pata-la-set, his x mark. (L.S.)

Tash-weict, his x mark. (L.S.)

Wescha-matolla, his x mark. (L.S.)

Chle-mochle-mo, his x mark. (L.S.)

Quae-tus, his x mark. (L.S.)

Skuilts, his x mark. (L.S.)

Panosпам, his x mark. (L.S.)

Stolameta, his x mark. (L.S.)

Tamayechotote, his x mark. (L.S.)

Qua-losh-kin, his x mark. (L.S.)

Wiska Ka, his x mark. (L.S.)

Che-lo-tha, his x mark. (L.S.)

Wetone-yath, his x mark. (L.S.)

We-ya-lo-cho-wit, his x mark. (L.S.)

Yoka-nolth, his x mark. (L.S.)

Wacha-ka-polle, his x mark. (L.S.)

Kon-ne, his x mark. (L.S.)

Ash-ka-wish, his x mark. (L.S.)

Pasquai, his x mark. (L.S.)

Wasso-kui, his x mark. (L.S.)

Quaino-sath, his x mark. (L.S.)

Cha-ya-tema, his x mark. (L.S.)

Wa-ya-lo-chol-wit, his x mark. (L.S.)

Flitch Kui Kui, his x mark. (L.S.)

Walcha Kas, his x mark. (L.S.)

Watch-tla, his x mark. (L.S.)

Enias, his x mark. (L.S.)

Signed in presence of - -

Wm. C. McKay, secretary of treaty, O.T.

R. R. Thompson, Indian agent.

R. B. Metcalfe, Indian sub-agent.

C. Mespotie.

John Flett, interpreter.

Dominick Jondron, his x mark, interpreter.

Mathew Dofa, his x mark, interpreter.

#### Footnotes

- A Ratified Mar. 8, 1859.  
FNB Proclaimed Apr. 18, 1859.  
FNC Cession of lands to the United States.  
FND Boundaries.  
FNE Reservation.  
FNF Boundaries.  
FNG Whites not to reside thereon unless, etc.  
FNH Bands to settle thereon within a year.  
FNI Another reservation to be selected in lieu of this, if, etc.  
FNJ Rights and privileges secured to Indians.  
FNK See Art. 1, treaty of Nov. 1, 1865.  
FNL Proviso in case any band does not accede to this treaty.  
FNM Allowance for improvements if, etc.  
FNN Payments by the United States.  
FNO How to be expended.  
FNP \$50,000 additional to be expended for buildings, etc.  
FNQ United States to erect sawmills, school-house, etc.  
FNR To furnish farmer, mechanics, physician, etc.  
FNS To erect dwelling houses, etc., for head chiefs.  
FNT Successor of head chief to take them.  
FNU Lands may be allotted to individual Indians for permanent homes.  
FNV Patents to issue therefor; conditions thereof.  
FNW Restrictions not to be removed without, etc.  
FNX Patent may be cancelled.  
FNY Annuities of Indians not to pay debt of individuals.  
FNZ Bands to preserve friendly relations.  
FNAA To pay for depredations.  
FNBB Not to make war, except, etc.  
FNCC Annuities to be withheld from those drinking liquor to excess.  
FNDD Roads, etc., may be made through reservation.  
FNEE When treaty to take effect.

---

End of Document

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# EXHIBIT 2

# The Confederated Tribes of Warm Springs Ceded Lands and Property

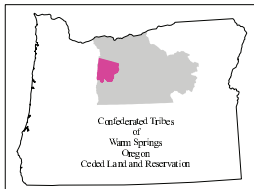
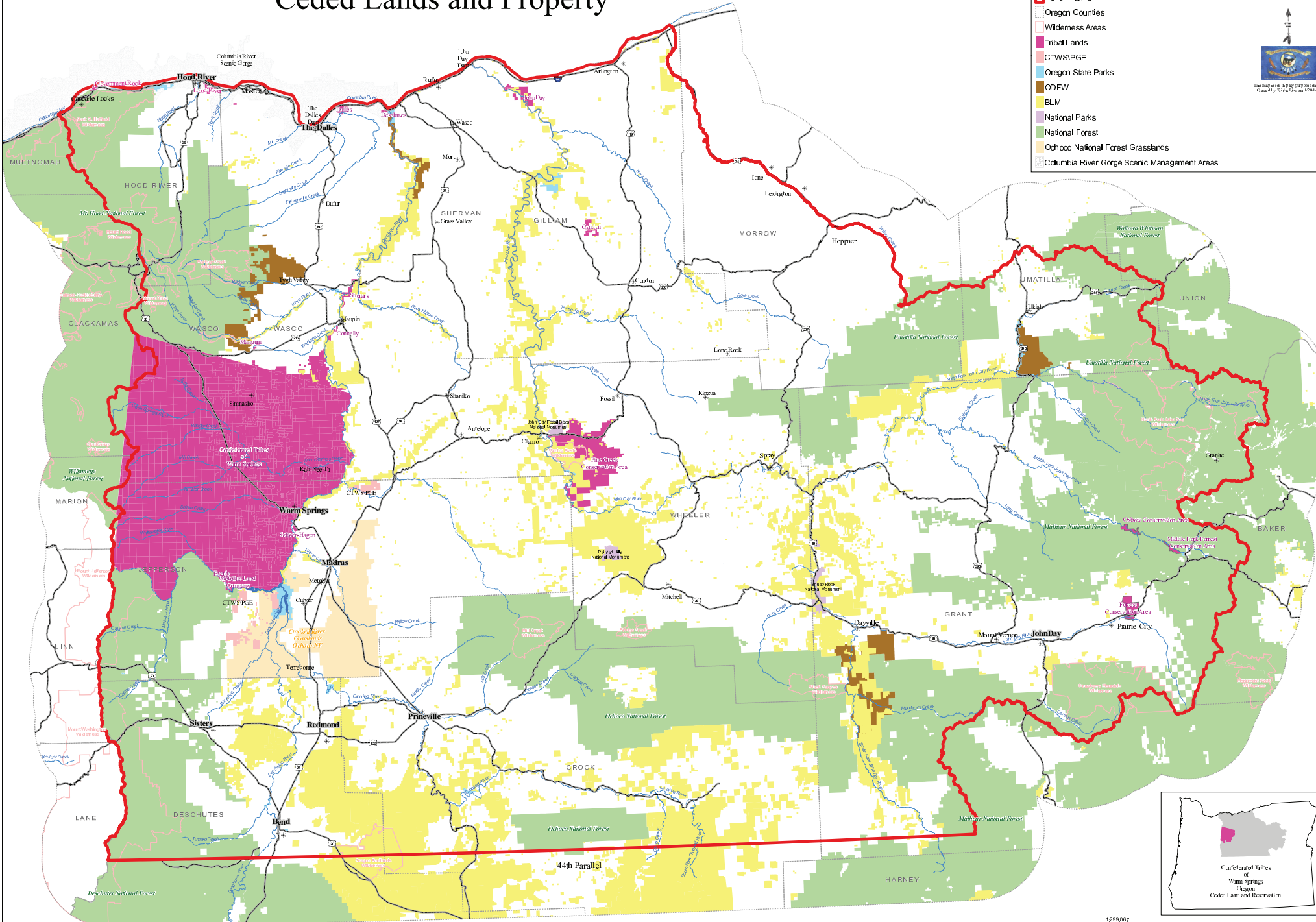
**Legend**

- Major Roads
- Streams
- Ceded Lands
- Oregon Counties
- Wilderness Areas
- Tribal Lands
- CTWSIPGE
- Oregon State Parks
- CDFW
- BLM
- National Parks
- National Forest
- Ochoco National Forest Grasslands
- Columbia River Gorge Scenic Management Areas

Ceded land boundary description from the Treaty of 1855 as follows: Commencing in the middle of the Columbia River, at the Cascade Falls, and running thence westerly to the summit of the Cascade Mountains; thence in a straight line to the first sharp point of north latitude; thence east on that parallel to the summit of the Black Mountains, or the western boundary of the Shoshone or Snake country; thence westerly along that summit to a point due east from the intersection of Wigwag creek; thence west to the headwaters of said creek; thence down said stream to its junction with the Columbia River; and thence down the channel of the Columbia River to the place of beginning.



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# EXHIBIT 3

1 This LONG-TERM GLOBAL SETTLEMENT AND COMPENSATION  
2 AGREEMENT, is dated as of April 12, 2000 (this "Agreement"), and is by and among  
3 The Confederated Tribes of the Warm Springs Reservation of Oregon, a federally  
4 recognized Indian tribe having a Constitution and Bylaws and Corporate Charter adopted  
5 pursuant to the terms of the Indian Reorganization Act (the "Tribes"), the United States  
6 Department of the Interior, acting by and through the Secretary of the United States  
7 Department of the Interior (collectively, "Interior"), and Portland General Electric  
8 Company, an Oregon corporation ("PGE"). (The Tribes, Interior and PGE are each  
9 referred to individually herein as a "Party" and collectively as the "Parties").

10 RECITALS  
11

12 WHEREAS, the Tribes are a federally recognized Indian tribe organized under a  
13 constitution and bylaws ratified by the members of the Tribes on December 18, 1937, and  
14 approved by the Assistant Secretary of the Interior of the United States on February 14,  
15 1938, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by  
16 the Act of June 15, 1935 (49 Stat. 378);

17 WHEREAS, the Tribes ratified on April 23, 1938 a corporate charter issued to  
18 them by Interior pursuant to Section 17 of such Act of June 18, 1934;

19 WHEREAS, pursuant to the foregoing authorities the Tribes exercise  
20 governmental and corporate powers over tribal lands and resources within the boundaries  
21 of the Warm Springs Indian Reservation of Oregon (the "Tribal Lands") as such  
22 reservation is described in that certain Treaty between the United States of America and  
23 the Tribes and Bands of Middle Oregon executed June 25, 1855 (12 Stat. 963);

24 WHEREAS, PGE is an electric utility engaged in generating, transmitting and  
25 distributing electric energy to approximately 700,000 retail customers in the State of  
26 Oregon;

27 WHEREAS, the Tribes and PGE are parties to an agreement, dated December 22,  
28 1955, as amended February 16, 1961 (the "1955 Agreement"), attached hereto as  
29 Exhibit A;

30 WHEREAS, pursuant to the 1955 Agreement, (a) the Tribes granted PGE certain  
31 easements and rights necessary to the construction and operation of (i) the Pelton Dam  
32 and the Round Butte Dam and the generation and transmission facilities associated  
33 therewith and (ii) the Pelton Reregulating Dam, and (b) (i) the compensation to be paid to  
34 the Tribes by PGE for such easements and rights was established and (ii) certain rights of  
35 the Tribes, including the right of the Tribes to construct, operate and maintain generation  
36 facilities in the Pelton Reregulating Dam were also established or affirmed;

37 WHEREAS, pursuant to the 1955 Agreement, and the license for Project  
38 No. 2030 as granted and amended by the Federal Power Commission (predecessor of the  
39 Federal Energy Regulatory Commission) ("FERC"), (a) PGE constructed, operates and  
40 maintains (i) the Pelton Dam, the Round Butte Dam and the generation and transmission

1 facilities associated therewith and (ii) the Pelton Reregulating Dam, and (b) the Tribes  
2 constructed, operate and maintain the generation facilities in the Pelton Reregulating  
3 Dam and the transmission facilities associated therewith. (The Pelton Dam, the Round  
4 Butte Dam and the generation and transmission facilities associated therewith, together  
5 with the Pelton Reregulating Dam and the generation facilities therein, and all related  
6 facilities and licenses are collectively referred to herein as "Project No. 2030");

7 WHEREAS, the Tribes and PGE are co-licensees of the Original License (as  
8 defined below) for Project No. 2030, "to the extent of their interests", and such Original  
9 License expires December 31, 2001, and if FERC has not issued a new long-term license  
10 by that date, then it will issue annual licenses to the Tribes and PGE as co-licensees until  
11 the issuance of such new license;

12 WHEREAS, pursuant to Section 10(e) ("Section 10(e)") of the Federal Power  
13 Act, as amended (the "Federal Power Act") (16 U.S.C. 803(e)), FERC is authorized, with  
14 the approval of the Indian tribe having jurisdiction of such lands, (a) to fix a reasonable  
15 annual charge for use of tribal lands used by a FERC-licensed hydroelectric project and  
16 (b) to readjust such charge periodically during the term of such license;

17 WHEREAS, the Tribes and PGE have in the past disagreed about the appropriate  
18 level of compensation to be paid to the Tribes by PGE pursuant to the 1955 Agreement  
19 and Section 10(e), and these disagreements led to disputes between the Tribes and PGE  
20 before various arbitration panels, FERC, the United States District Court for the District  
21 of Oregon, the United States Court of Appeals for the Ninth Circuit and the Warm  
22 Springs Tribal Court;

23 WHEREAS, the Parties entered into a Settlement Agreement dated February 6,  
24 1985 (the "1985 Settlement Agreement"), attached hereto as Exhibit B, which resolved  
25 their then-existing disputes and established the compensation to be paid to the Tribes by  
26 PGE through December 31, 2001;

27 WHEREAS, as required by Section 15 of the Federal Power Act (16 U.S.C. 808)  
28 and the FERC regulations thereunder (18 C.F.R. 16.6), on December 9, 1996, PGE filed a  
29 notice of intent to file an application for a new FERC license for Project No. 2030  
30 effective at the end of the current license. On December 28, 1998, pursuant to FERC  
31 regulations (18 C.F.R. 16.8) PGE initiated second-stage consultation for its application  
32 by circulating its draft application for such new license to the Tribes and to the  
33 appropriate federal, state and local agencies, and to certain nongovernmental  
34 organizations. On December 16, 1999 PGE filed its final application for a new FERC  
35 license for Project No. 2030 effective at the end of the current license. As required by  
36 these same provisions, on December 26, 1996, the Tribes filed a notice of intent to file a  
37 competing application for such Project No. 2030 license. On April 5, 1999 the Tribes  
38 initiated second-stage consultation for its application by circulating its draft application  
39 for such new license to PGE and to the appropriate federal, state and local agencies, and  
40 to certain nongovernmental organizations. On December 17, 1999 the Tribes filed their  
41 final application for a new FERC license for Project No. 2030 effective at the end of the  
42 current license;



1           WHEREAS, on March 11, 1998, the Tribal Council of the Tribes enacted  
2 Ordinance No. 77, titled "Hydroelectric Licensing and Regulation Ordinance" (the  
3 "Tribes' Hydroelectric Ordinance") relating to the development and operation of  
4 hydroelectric projects affecting the Warm Springs Reservation and off-reservation  
5 reserved interests;

6           WHEREAS, pursuant to various sections of the Federal Power Act, FERC has  
7 authority to impose conditions on original and subsequent licenses for hydroelectric  
8 projects subject to its jurisdiction;

9           WHEREAS, pursuant to Section 4(e) ("Section 4(e)") of the Federal Power Act,  
10 (16 U.S.C. 797(e)) the Secretary of the Interior has authority to require FERC to include  
11 in hydroelectric licenses within reservations of the United States such conditions as the  
12 Secretary deems necessary for the adequate protection and utilization of such  
13 reservations;

14           WHEREAS, the Tribes and PGE desire, subject to the terms and conditions  
15 provided in this Agreement, to enter into a long-term comprehensive agreement in order  
16 to (a) provide for their respective rights and obligations with respect to Project No. 2030  
17 from and after the Effective Date of this Agreement, including all manner and means of  
18 consideration of any kind to be provided to the Tribes in connection with Project No.  
19 2030 and PGE's activities related thereto for the duration of the new long-term FERC  
20 license for such project, (b) minimize the potential for future disagreements between  
21 them with respect to Project No. 2030 arising from the matters addressed in this  
22 Agreement, including with respect to such consideration, (c) avoid the incremental  
23 expenses and damage to their relationship which could result from a continued contest  
24 between them as to which of them should become the new licensee for Project No. 2030  
25 at the expiration of the current license term and (d) settle all existing disputes,  
26 controversies and Claims (as defined below) between them;

27           WHEREAS, the Tribes have expressed the desire to acquire an ownership interest  
28 in the Pelton and Round Butte Facilities (as defined below) in lieu of cash or other  
29 consideration including all manner and means of consideration of any kind to be provided  
30 to the Tribes in connection with Project No. 2030 and PGE's activities related thereto for  
31 the duration of the new long-term FERC license for such project;

32           WHEREAS, if PGE transfers such ownership interest to the Tribes pursuant to  
33 this Agreement in lieu of cash or other consideration of any kind to be provided to the  
34 Tribes including all manner and means of consideration of any kind to be provided to the  
35 Tribes in connection with Project No. 2030 and PGE's activities related thereto for the  
36 duration of the new long-term FERC license for such project, the Tribes have agreed to  
37 provide to PGE the assurances set forth in this Agreement that the Tribes will not seek  
38 under any circumstances, and will be legally unable to seek in any forum, any other or  
39 further consideration in connection with Project No. 2030 and PGE's activities related  
40 thereto other than that which is expressly provided for in this Agreement;

1 WHEREAS, to achieve these objectives, the Tribes and PGE have negotiated in  
2 good faith for several years the potential terms and conditions of such a long-term  
3 comprehensive agreement, and the Tribes and PGE believe this Agreement will achieve  
4 such objectives;

5 WHEREAS, the members of the Tribes by vote at an election held March 28,  
6 2000, ratified the terms of this Agreement;

7 WHEREAS, Interior, acting to fulfill its trust responsibility to the Tribes and its  
8 authorities under the Federal Power Act on behalf of the Tribes, has determined that this  
9 Agreement is in the Tribes' interest; and

10 NOW THEREFORE, in consideration of the premises and the representations,  
11 warranties, covenants and agreements contained herein, the Parties hereto, intending to be  
12 legally bound, hereby agree as follows:

13 **ARTICLE I**  
14 **DEFINITIONS**

15 1.1 Definitions.

16 As used in this Agreement, the following terms shall have the meanings specified  
17 in this Section 1.1:

18 (1) "1955 Agreement" has the meaning set forth in the recitals hereof.

19 (2) "1985 Settlement Agreement" has the meaning set forth in the recitals  
20 hereof.

21 (3) "Additional Compensation" means any Compensation beyond that  
22 described in Article V of this Agreement.

23 (4) "Affiliate" means, with respect to any Person, any other Person directly or  
24 indirectly controlling or controlled by, or under direct or indirect control with, such  
25 Person. For purposes of this definition, the term "control" shall mean the possession,  
26 directly or indirectly, of the power to direct or cause the direction of the management  
27 policies of such Person, whether through the ownership of voting securities or by contract  
28 or otherwise.

29 (5) "Agreement" has the meaning set forth in the introductory paragraph  
30 hereof.

31 (6) "Applicable Law" means all laws, statutes, rules, regulations, ordinances  
32 and other pronouncements having the effect of law of the United States, any tribal  
33 government, any foreign country or any domestic or foreign state, county, city or other  
34 political subdivision or of any Governmental Authority.

1 (7) "Asset Purchase Agreement" means the Asset Purchase Agreement,  
2 effective as of the Transfer Date, between the Tribes and PGE, attached hereto as Exhibit  
3 C.

4 (8) "Business Day" means any day other than Saturday, Sunday, a legal  
5 holiday or a day on which banking institutions in Portland, Oregon are authorized by law  
6 or other governmental action to close.

7 (9) "Claimable Event" means a non-fortuitous event for which insurance is  
8 generally available commercially and that results in demonstrated bodily or personal  
9 injury or property damage.

10 (10) "Claims" means liabilities, obligations, losses, damages, penalties, claims  
11 (including without limitation claims involving liability in tort, strict liability or  
12 otherwise), actions, suits, judgments, costs, expenses and disbursements (including  
13 without limitation attorney fees and expenses) of any kind and nature whatsoever without  
14 any limitation as to amount.

15 (11) "Clean Water Act" means 33 U.S.C. 1251 et seq.

16 (12) "Closing" shall have the meaning set forth in Section 11.8.

17 (13) "Closing Date" means the date which is the later of (a) two (2) Business  
18 Days following the date upon which all of the conditions to each of the Parties' respective  
19 obligations hereunder as set forth in Article XI shall have been satisfied or waived or (b)  
20 such other date as the Parties may mutually agree and upon which the Closing actually  
21 takes place.

22 (14) "Compensation" means the transfer relative to Project No. 2030, directly  
23 or indirectly, of any consideration from PGE to the Tribes or any of its members, or to  
24 Interior for the benefit of the Tribes or any of its members, or to any third party for the  
25 benefit of the Tribes or any of its members, but does not include:

26 (i) Any payment to the Tribes or its members for damages or  
27 injury to persons or property of their members resulting from a Claimable  
28 Event as defined above;

29 (ii) Any payments to the Tribes for damages resulting from a  
30 breach by PGE of this Agreement or any of the Included Agreements;

31 (iii) Any payments to the Tribes or its members for damages or  
32 injury to persons or property of their members resulting from any  
33 negligent operation by PGE of the Transmission Facilities;

34 (iv) Any payments to the Tribes or its members for services  
35 rendered which are not required to be performed by the Tribes or its  
36 members pursuant to this Agreement, but which are nevertheless requested  
37 in writing by PGE;

1 (v) The costs of implementing FERC Licensing Orders (as  
2 defined below);

3 (vi) The payment of any fee described in Section 5.9(f);

4 (vii) The payment of any penalty described in Section 5.9(i);

5 (viii) Any payment(s) to the Tribes or its members for damages  
6 to Treaty Reserved Rights;

7 (ix) Any payment to the Tribes or its members resulting from  
8 the criminal misconduct of PGE, its officers, employees and agents or  
9 from other misconduct of PGE, its officers, employees and agents which  
10 results from an express intention to damage the Tribes or its members.

11 Notwithstanding Section 1.1(14)(v) above, "Compensation" does include the  
12 costs specified in Section 5.10(e) as being borne exclusively by the Tribes and for which  
13 the Tribes are to reimburse PGE pursuant to Section 10.3(d) if PGE pays them initially.

14 (15) "Effective Date" means the date of execution of this Agreement by all  
15 Parties hereto.

16 (16) "Endangered Species Act" means 16 U.S.C. 1531 et seq.

17 (17) "Escrow Agent" means the agent appointed pursuant to the Escrow  
18 Agreement.

19 (18) "Escrow Agreement" means the Escrow Agreement, dated as of the  
20 Closing Date, between the Tribes and PGE, attached hereto as Exhibit I providing for the  
21 release to the Tribes of the conveyances for the Undivided 33.33% Interest on December  
22 31, 2001, subject to payment of the purchase price therefor as provided in the Asset  
23 Purchase Agreement.

24 (19) "Federal Power Act" has the meaning set forth in the recitals hereof.

25 (20) "FERC" has the meaning set forth in the recitals hereof.

26 (21) "FERC Approval" has the meaning set forth in Section 10.1(a).

27 (22) "FERC Licensing Orders" means all orders issued by FERC related to  
28 Project No. 2030.

29 (23) "Final Order" means an order of any regulatory body having jurisdiction  
30 over a matter and for which there is no longer any opportunity for administrative or  
31 judicial review of such order.

32 (24) "First Purchase Option" has the meaning set forth in Section 5.6(a).

33 (25) "Fish and Wildlife Coordination Act" means 16 U.S.C. 661 et seq.

1 (26) "Governmental Authority" means any court, tribunal, arbitrator, authority,  
2 agency, commission, official or other instrumentality of the United States, any foreign  
3 country or any domestic or foreign state, county, city or other political subdivision or any  
4 Native American tribal council or similar governing entity.

5 (27) "Included Agreements" means the Asset Purchase Agreement, the Escrow  
6 Agreement, the Ownership and Operation Agreement and the Mutual General Release.

7 (28) "Interior" has the meaning set forth in the introductory paragraph hereto.

8 (29) "Investment Grade" means a rating (as measured by either Standard &  
9 Poor's or Moody's, or if neither is available, a rating from an alternate rating source  
10 selected by PGE and reasonably acceptable to the Tribes) of the long-term, unsecured,  
11 senior debt not supported by third-party credit enhancement of the Person in question  
12 equal or superior to BBB- (Standard & Poor's) or Baa3 (Moody's).

13 (30) "Mutual General Release" means the Mutual General Release, dated as of  
14 the Closing Date, between the Tribes and PGE, in the form attached hereto as Exhibit E.

15 (31) "Net Book Value of Pelton and Round Butte Facilities" means the original  
16 cost of the Pelton and Round Butte Facilities reflected on PGE's books of account from  
17 time to time, including additions, improvements, betterments, work in progress, property  
18 held for future use in connection with the Pelton and Round Butte Facilities (including all  
19 property purchased or otherwise acquired in connection with PGE's efforts to obtain a  
20 new or renewed license from FERC for Project No. 2030) and all costs incurred in  
21 connection with PGE's efforts to obtain a new or renewed license from FERC for Project  
22 No. 2030 (including fees and expenses of attorneys and consultants)), less accumulated  
23 depreciation as reflected on PGE's books of account from time to time. "Net Book Value  
24 of Pelton and Round Butte Facilities" shall also include the reasonable and necessary  
25 costs incurred by the Tribes, and reimbursed by PGE, to obtain the New FERC License  
26 (as defined below) with respect to the Pelton and Round Butte Facilities (as defined  
27 below), but not those costs incurred with respect to the Reregulating Dam Generating  
28 Facilities (as defined below).

29 (32) "New FERC License" means the first long-term (not annual) license for  
30 Project No. 2030 to be issued by FERC following the expiration of the Original License  
31 and any annual licenses to be sought jointly by the Tribes and PGE as co-licensees.

32 (33) "New License Expiration Date" means the date on which the New FERC  
33 License (including any annual licenses granted by FERC prior to the issuance of a third  
34 long-term license) for Project No. 2030 expires.

35 (34) "New License Term" means the period from the effective date of the New  
36 FERC License through the New License Expiration Date.

37 (35) "OPUC" means the Oregon Public Utility Commission.

38 (36) "OPUC Approval" has the meaning set forth in Section 10.1(c).

1 (37) "Original License" means the original fifty (50) year license, as amended,  
2 for Project No. 2030 issued by FERC with an expiration date of December 31, 2001, plus  
3 all annual licenses issued by FERC prior to issuance of the New FERC License.

4 (38) "Other Transmission Lines" means all transmission lines and equipment  
5 that are part of the Pelton and Round Butte Facilities, other than those lines and  
6 equipment related exclusively to the transmission of power generated by the Reregulating  
7 Dam Generating Facilities.

8 (39) "Ownership and Operation Agreement" means the Agreement for  
9 Ownership and Operation of the Pelton and Round Butte Dams and Generating Facilities,  
10 dated as of the Closing Date and to be effective as of the Transfer Date, between the  
11 Tribes and PGE, in the form attached hereto as Exhibit D.

12 (40) "Parties" or "Party" have the meanings set forth in the introductory  
13 paragraph hereto.

14 (41) "Pelton Reregulating Dam" means the dam downstream of Pelton Dam  
15 constructed by PGE simultaneously with the construction of Pelton Dam and designed to  
16 reregulate the flow of water in the Deschutes River after its release from Pelton Dam.

17 (42) "Pelton and Round Butte Facilities" means Project No. 2030 minus the  
18 Reregulating Dam Generating Facilities and the Transmission Facilities.

19 (43) "Person" means any natural person, corporation, general partnership,  
20 limited partnership, proprietorship, limited liability company, other business  
21 organization, trust, union, association or Governmental Authority.

22 (44) "PGE" has the meaning set forth in the introductory paragraph hereto.

23 (45) "PGE Personnel and Invitees" has the meaning set forth in Section 4.10.

24 (46) "Proceedings" has the meaning set forth in Section 13.3 (a).

25 (47) "Project No. 2030" has the meaning set forth in the recitals hereof.

26 (48) "Project Use Rights" means those rights expressly granted to PGE by the  
27 Tribes pursuant to Article IV.

28 (49) "Reregulating Dam Generating Facilities" means the electrical generating  
29 facilities installed by the Tribes in the Pelton Reregulating Dam, plus those transmission  
30 lines and equipment related exclusively to the transmission of power by such generating  
31 facilities.

32 (50) "Round Butte Switching Station 230 kV Main Bus" means the bus  
33 identified in the diagram attached hereto as Exhibit J.

34 (51) "SEC" has the meaning set forth in Section 10.1(f).

- 1 (52) "SEC Approval" has the meaning set forth in Section 10.1(f).
- 2 (53) "Second Purchase Date" has the meaning set forth in Section 5.6(b).
- 3 (54) "Second Purchase Option" has the meaning set forth in Section 5.6(b).
- 4 (55) "Secretary" means the Secretary of the Department of the Interior.
- 5 (56) "Section 4(e)" has the meaning set forth in the recitals hereof.
- 6 (57) "Section 10(e)" has the meaning set forth in the recitals hereof.
- 7 (58) "State Water Right" has the meaning set forth in Section 10.1(e).
- 8 (59) "Stated Term" means the period specified in the New FERC License as  
9 the term of such license. The "Stated Term" shall not include any annual license periods  
10 that follow the specified or implied expiration date of such license.
- 11 (60) "Term" means the term of this Agreement as provided in Article XII.
- 12 (61) "Transfer Date" means the date upon which has occurred both the  
13 satisfaction of the Escrow Conditions and delivery of the Escrow Documents (as such  
14 terms are defined in the Escrow Agreement) pursuant to Section 3(a) of the Escrow  
15 Agreement.
- 16 (62) "Transmission Facilities" means the 230 kV transmission line from the  
17 Round Butte Dam to the Bethel Substation in Salem, Oregon, plus (x) the appurtenant  
18 facilities identified by the boxes enclosed by red broken lines in the diagram attached  
19 hereto as Exhibit J and (y) an undivided 28% interest in the Round Butte Switching  
20 Station 230 kV Main Bus (as defined above).
- 21 (63) "Treaty" means the treaty of June 25, 1855, between the Tribes and Bands  
22 of Middle Oregon and the United States of America. (12 Stat. 963)
- 23 (64) "Treaty Reserved Rights" means the rights of the Tribes to hunt, fish,  
24 gather roots and berries, and pasture livestock reserved in the Treaty, and the Tribes'  
25 implied rights to water to support these rights as such implied rights are defined from  
26 time to time by applicable federal law.
- 27 (65) "Tribes" has the meaning set forth in the introductory paragraph hereof.
- 28 (66) "Tribal Lands" has the meaning set forth in the recitals hereof.
- 29 (67) "Tribes' Hydroelectric Ordinance" has the meaning set forth in the recitals  
30 hereof.
- 31 (68) "Undivided 33.33% Interest" has the meaning set forth in Section 5.1.
- 32 (69) "Undivided 16.66% Interest" has the meaning set forth in Section 5.6(a).

1 (70) "Undivided .02% Interest" has the meaning set forth in Section 5.6(b).

2 1.2 Interpretations.

3 In this Agreement, unless a clear contrary intention appears: (a) the singular  
4 number includes the plural number and vice versa; (b) reference to any person includes  
5 such person's successors and assigns but, if applicable, only if such successors and  
6 assigns are permitted by this Agreement, and reference to a person in a particular  
7 capacity excludes such person in any other capacity; (c) reference to any gender includes  
8 each other gender; (d) reference to any agreement (including this Agreement), document  
9 or instrument means such agreement, document or instrument as amended or modified  
10 and in effect from time to time in accordance with the terms thereof and, if applicable, the  
11 terms hereof; (e) reference to any Article, Section, Schedule or Exhibit means such  
12 Article, Section, Schedule or Exhibit to this Agreement, and references in any Article,  
13 Section, Schedule, Exhibit or definition to any clause means such clause of such Article,  
14 Section, Schedule, Exhibit or definition; (f) "hereunder", "hereof", "hereto", "herein" and  
15 words of similar import are references to this Agreement as a whole and not to any  
16 particular Section or other provision hereof; (g) relative to the determination of any  
17 period of time, "from" means "from and including", "to" means "to but excluding" and  
18 "through" means "through and including"; (h) "including" (and with correlative meaning  
19 "include") means including without limiting the generality of any description preceding  
20 such term; and (i) reference to any law (including statutes and ordinances) means such  
21 law as amended, modified, codified or reenacted, in whole or in part, and in effect from  
22 time to time, including rules and regulations promulgated thereunder.

23 **ARTICLE II**  
24 **TREATY RESERVED RIGHTS**

25 2.1 Importance of Treaty Reserved Rights.

26 The Parties recognize and acknowledge the importance to the Tribes of the Treaty  
27 Reserved Rights and the fact that these Treaty Reserved Rights are the subject of a trust  
28 relationship between the Tribes and the United States. The Parties do not intend for any  
29 part of this Agreement to impair the protection of the Tribes' Treaty Reserved Rights.

30 2.2 No Waivers Related to Treaty Reserved Rights Claims.

31 Interior does not by this Agreement waive any of the Secretary's rights or duties  
32 to protect, preserve and maintain the Tribes' Treaty Reserved Rights. The Tribes do not  
33 by this Agreement waive any Claim(s) against PGE they may have for any harm to  
34 Treaty Reserved Rights which may occur after the Effective Date. Moreover, the Tribes  
35 also do not release or waive any Claims for damages to Treaty Reserved Rights to the  
36 extent, and only to the extent, both (a) the damages are incurred by the Tribes subsequent  
37 to the Effective Date and (b) the acts or omissions by PGE giving rise to such Claims (x)  
38 had occurred or were continuing to occur as of the Effective Date (y) or occurred after the  
39 Effective Date. PGE does not by this Agreement waive any defenses it may have against  
40 any such Claims.



1  
2 **ARTICLE III**  
**SETTLEMENT AND RELEASE OF CLAIMS**

3 In reliance upon the representations, warranties, covenants and agreements of  
4 each of the Parties as set forth herein and (a) in the case of PGE, in consideration for the  
5 Project Use Rights granted to PGE by the Tribes as set forth in Article IV hereof, and (b)  
6 in the case of the Tribes, for the consideration to be provided to the Tribes by PGE as set  
7 forth in Section 4.5 and Article V hereof, each of the Parties agrees that:

8 **3.1 Settlement.**

9 This Agreement and the Included Agreements are intended fully, finally and  
10 irrevocably to:

11 (a) resolve any disputes and contests between the Tribes and PGE  
12 regarding who should obtain the New FERC License;

13 (b) establish the terms upon which PGE will transfer certain interests in  
14 Project No. 2030 to the Tribes;

15 (c) establish the respective rights and obligations of the Tribes and PGE  
16 with respect to Project No. 2030 and their activities related thereto, including but not  
17 limited to: (i) Treaty Reserved Rights, (ii) use of Tribal Lands with respect to Project No.  
18 2030, (iii) consideration to be paid by PGE to the Tribes with respect to such use of  
19 Tribal Lands, Project No. 2030 and all of PGE's activities related to such project, (iv) the  
20 Tribes' and PGE's joint application to FERC for the New FERC License, (v) ownership  
21 interests in Project No. 2030 and exercise of the respective rights of the owners of Project  
22 No. 2030 and (vi) the exercise by the Tribes of their authority within the scope of their  
23 jurisdiction as provided in Article VI ; and

24 (d) resolve any and all other disputes between the Tribes and PGE as of  
25 the Effective Date excluding comments by Interior and the Tribes on PGE's draft  
26 application for the New FERC License.

27 **3.2 Release of Claims.**

28 At the Closing, (a) all past and present Claims by the Tribes or PGE arising in any  
29 way out of the 1955 Agreement or the 1985 Settlement Agreement existing as of the  
30 Effective Date and (b) all past and present Claims by the Tribes or PGE arising from any  
31 other source existing as of the Effective Date shall be released and waived by each of  
32 PGE and the Tribes by the execution of the Mutual General Release. Notwithstanding the  
33 foregoing, the Tribes pursuant to such Mutual General Release do not release or waive  
34 any Claims for damages to the extent, and only to the extent, both (x) the damages are  
35 incurred by the Tribes subsequent to the Effective Date and (y) the acts or omissions by  
36 PGE giving rise to such Claims had occurred and were continuing to occur as of the  
37 Effective Date.



1 attached hereto as Schedule 4.1(b). The location of the Pelton Reregulating Dam is also  
2 shown on the map attached hereto as Schedule 4.1(b).

3 (c) An easement and the right to use so much of the Tribal Lands on the  
4 westerly side of the Deschutes River and so much of the river bed as may be owned by  
5 the Tribes at the site of the Round Butte Dam in Section 22, Township 11 south, Range  
6 12, E.W.M., Jefferson County, Oregon, to such an extent as may be reasonably necessary  
7 for PGE to operate and maintain (and rebuild if necessary) thereon a dam approximately  
8 440 feet in height, but which in no event will raise the elevation at the reservoir behind  
9 such dam above the elevation of 1950 feet above mean sea level U.S.C. & G.S. datum,  
10 together with penstocks, side channels, tunnels, spillways, a powerhouse located  
11 immediately downstream from the said dam, substations, switching stations, buildings,  
12 structures, transmission lines and distribution lines, together with poles, wires and  
13 appurtenances of any kind or nature which may be necessary or useful in connection with  
14 the generation, transformation, transmission and distribution of electric energy from the  
15 Pelton and Round Butte Facilities and located as shown on the maps attached hereto as  
16 Schedule 4.1(c). The location of the Round Butte Dam and powerhouse is also shown on  
17 the map attached hereto as Schedule 4.1(c).

#### 18 4.2 Flowage Easements.

19 The Tribes grant to PGE, its successors and assigns, and consent to the grant by  
20 Interior, the following flowage easements:

21 (a) The right to use of Tribal Lands on the westerly side of the Deschutes  
22 River and such lands adjacent to any tributaries thereof, for the purpose of a reservoir  
23 behind the Pelton Dam as hereinabove described, and the right to flood said lands up to  
24 an approximate elevation of 1585 feet above mean sea level, U.S.C.&G.S. datum and  
25 which said land is situated in Sections 24, 25, 26, 35 and 36, Township 10 south,  
26 Range 12, E.W.M., Sections 2, 10, 11, 15 and 22 in Township 11 south, Range 12,  
27 E.W.M., Sections 7 and 18, Township 10 south, Range 12.5, E.W.M., and Sections 18  
28 and 19 in Township 10 south, Range 13, E.W.M. in Jefferson County, Oregon as shown  
29 on the maps attached hereto as Schedule 4.1(a).

30 (b) The right to the use of Tribal Lands on the westerly side of the  
31 Deschutes River and such lands adjacent to any tributaries thereof, for purposes of a  
32 reservoir behind the Pelton Reregulating Dam in connection with Project No. 2030 as  
33 hereinbefore described, and the right to flood said lands up to an approximate elevation  
34 of 1440 feet above mean sea level, U.S.C. & G.S. datum, and which lands are situated in  
35 Sections 1, 12 and 13 in Township 10 south, Range 12, E.W.M., and Sections 18 and 19  
36 in Township 10 south, Range 13, E.W.M., in Jefferson County, Oregon, as shown on the  
37 maps attached hereto as Schedule 4.1(b).

38 (c) The right to use of Tribal Lands on the westerly side of the Deschutes  
39 River and westerly and northerly banks of the Metolius River and Tribal Lands adjacent  
40 to the tributaries of either of said rivers, for purposes of a reservoir not exceeding 1950  
41 feet above mean sea level, U.S.C. & G.S. datum, behind the Round Butte Dam, and

1 which lands are situated on the westerly bank of the Deschutes River and the westerly  
2 and northerly banks of the Metolius River, and adjacent to the tributaries of either river,  
3 in Sections 21, 22, 27, 28, 29 and 30 in Township 11 south, Range 12 E.W.M., Sections  
4 18, 19, 20, 21, 22, 23, 25, 26, 27, 28 and 29 in Township 11 south, Range 11 E.W.M. in  
5 Jefferson County, Oregon, as shown on the map attached hereto as Schedule 4.1(c).

6 4.3 Easements for Transmission Facilities and Other Transmission Lines.

7 The Tribes hereby grant, and consent to the grant by Interior, to PGE, its  
8 successors and assigns, easements and rights as follows:

9 An easement and right of way over and across the Tribal Lands from the Round  
10 Butte switching station adjacent to the Round Butte Dam in a general northwesterly  
11 direction to the westerly boundary of the Warm Springs Reservation as shown in part on  
12 Schedule 4.1(c) to be used for the purpose of the operation and maintenance (and  
13 rebuilding if necessary) of the Transmission Facilities or such other connections as may  
14 be necessary or useful, and an easement and right of way over and across Tribal Lands  
15 from the Pelton powerhouse to the Round Butte powerhouse as shown in part on  
16 Schedule 4.3 to be used for the purpose of the operation and maintenance (and rebuilding  
17 if necessary) of Other Transmission Lines between said powerhouses, together with any  
18 substations, switching stations, poles, wires, and appurtenances of any kind or nature  
19 which may be necessary or useful in connection with the operation or maintenance (and  
20 rebuilding if necessary) of said Other Transmission Lines, together with the present and  
21 future right to cut or trim danger trees within a distance of 200 feet on each side of the  
22 centerline of said right of way, a danger tree being a tree, growing or dead, which  
23 because of its condition, location or size might in PGE's judgment constitute a hazard to  
24 the Transmission Facilities or Other Transmission Lines. Both of the foregoing rights of  
25 way for said Transmission Facilities and Other Transmission Lines shall extend 100 feet  
26 on each side of the center line thereof.

27 It is understood and agreed by the Parties that PGE shall have the right to go upon  
28 the Tribal Lands and make surveys to determine the location of said transmission rights  
29 of way.

30 4.4 Easement for Access Roads.

31 The Tribes hereby grant to PGE, its successors and assigns, and consent to the  
32 grant by Interior of, an easement across the Tribal Lands to the extent that the same may  
33 be necessary or convenient for access roads to and from the Pelton and Round Butte  
34 Facilities and Transmission Facilities, it being understood that said roads shall be located  
35 at such places as will not interfere with any present structures placed on said Tribal Lands  
36 by the Tribes. It is further understood and agreed that the Tribes may have the right to  
37 use any and all roads so constructed, operated or maintained by PGE for constructing,  
38 operating and maintaining the Pelton and Round Butte Facilities and the Transmission  
39 Facilities.

1           Upon construction of any roads across fenced land, PGE agrees to place cattle  
2 guards at all places where any fence is opened for such road. Upon cessation of use of  
3 any such road or abandonment thereof by PGE, PGE shall notify the Tribes, and PGE  
4 agrees to replace the fence at such road opening and remove said cattle guards if  
5 requested in writing to do so by the Tribes.

#### 6           4.5 Payments for Timber Cut or Removed.

7           It is understood and agreed by the Parties that if it is necessary for PGE in (a) the  
8 operation or maintenance (and rebuilding if necessary) of the Transmission Facilities or  
9 Other Transmission Lines, (b) the inundation of any areas or (c) the construction,  
10 operation or maintenance of access roads pursuant to Section 4.4, to cut or remove any  
11 timber or trees situated on the Tribal Lands, then PGE agrees to pay to the Tribes, or their  
12 duly authorized agent, the value of the said standing timber, logs or trees thereby cut or  
13 removed, including any value of immature trees. In the event of any dispute arising as to  
14 the amount or value of such trees or timber so cut or removed, then the Parties agree that  
15 an independent cruiser or log scaling company agreeable to both the Tribes and PGE may  
16 be called upon to determine the value of any such timber, trees or logs removed  
17 therefrom, and the finding of such independent cruiser or scaling company shall be final  
18 and binding upon the Parties to this Agreement, except as hereinafter provided. Payment  
19 for any such timber shall be made by PGE to the Tribes within thirty (30) days after the  
20 removal of the same, or if the price therefor is to be determined by an independent cruiser  
21 or log scaling company, then such payment shall be made within thirty (30) days after the  
22 determination by such independent cruiser or scaling company, provided always that in  
23 lieu of the obligation of PGE to pay for such timber, logs or trees, if the Tribal Council  
24 shall so elect, the timber, logs or trees referred to in this Section 4.5 shall be sold by the  
25 Tribes.

#### 26           4.6 Access for Other Project Purposes.

27           The Tribes hereby grant to PGE, its successors and assigns access across Tribal  
28 Lands to the extent that the same may be necessary or convenient for all other purposes  
29 related to the operation and maintenance of the Pelton and Round Butte Facilities,  
30 specifically including activities related to the performance of studies involving Project  
31 No. 2030. PGE agrees to provide the Tribes' Secretary-Treasurer reasonable advance  
32 notice of its intent to go upon Tribal Lands to perform studies and to provide to the  
33 Tribes all the data collected in the course of performing such studies.

#### 34           4.7 Rights Limited to Tribal Lands; Assistance with Respect to Other Lands.

35           The rights granted or consented to by the Tribes to PGE pursuant to this  
36 Agreement cover lands or property held in trust by the United States for the benefit of the  
37 Tribes or otherwise owned by the Tribes as Tribal Lands, and this Agreement grants no  
38 rights over or across lands or property which may be beneficially or otherwise owned by  
39 any individual member or members of the Tribes in his or her own right. The Tribes  
40 agree, however, that they shall make reasonable efforts to assist PGE in securing on  
41 reasonable terms such rights over or across lands or property which may be beneficially

1 or otherwise owned by any individual member or members of the Tribes in his or her  
2 own right and which are necessary or useful to the generation of power from the Pelton  
3 and Round Butte Facilities and the transmission of such power by the Transmission  
4 Facilities and Other Transmission Lines.

5 4.8 Use of Reservoir Pools by the Tribes and Members of the Tribes.

6 Insofar as it shall not conflict with the operation or maintenance (and rebuilding if  
7 necessary) of the Pelton and Round Butte Facilities, or be in violation of any Applicable  
8 Law, the Tribes and members of the Tribes shall have the right to the continued use of the  
9 respective pools behind the Pelton Dam, Round Butte Dam and Reregulating Dam.

10 4.9 Agreement Rights Attached to the Land.

11 It is understood and agreed that this Agreement shall be binding upon the  
12 successors and assigns of PGE as an owner of the Pelton and Round Butte Facilities and  
13 the Transmission Facilities and attached to the land and shall be binding upon the  
14 successors in interest of the Tribes. It is understood and agreed that the easements  
15 granted by this Article IV shall run with the ownership of the Pelton and Round Butte  
16 Facilities and the Transmission Facilities and that such rights shall be segregable between  
17 the Pelton and Round Butte Facilities and the Transmission Facilities. In the event that  
18 either the Pelton facilities, the Round Butte facilities or the Transmission Facilities are  
19 sold, transferred or conveyed by PGE in accordance with Section 14.2 hereof, or acquired  
20 by process of eminent domain by persons other than PGE, then the obligations of PGE to  
21 the Tribes shall cease and terminate as to such facilities and become an obligation of the  
22 successors in interest of PGE as to the respective facilities herein described.

23 4.10 Quiet Enjoyment; Reservation of Rights by Tribes.

24 PGE shall, as between it and the Tribes, Interior and any Person claiming by or  
25 through the Tribes or Interior, be entitled to the full, unrestricted and quiet enjoyment of  
26 all the Project Use Rights granted to it under this Agreement, including all reasonable and  
27 necessary access and use by PGE and PGE's officers, employees, agents, Affiliates,  
28 suppliers, contractors, subcontractors, licensees, invitees and permitted successor and  
29 assigns (such Persons are hereinafter referred to as "PGE Personnel and Invitees"). The  
30 Parties intend that this Agreement shall not limit or restrict the Tribes' governmental  
31 powers over Persons other than PGE and PGE Personnel and Invitees, except as such  
32 limitations or restrictions may be required by terms of this Agreement or PGE's Project  
33 Use Rights, or except as necessary to comply with the terms of the Original FERC  
34 License, the New FERC License or the State Water Right, as applicable. The Parties  
35 further intend that this Agreement shall not limit or restrict the Tribes' governmental  
36 powers over PGE and PGE Personnel and Invitees with respect to activities not  
37 reasonably contemplated by this Agreement and the Included Agreements. The Parties  
38 specifically understand and agreed as follows:

39 (a) Except as provided otherwise in this Agreement, the Included  
40 Agreements or any applicable license issued by FERC or the State of Oregon, and only to

1 the extent not inconsistent with and not impairing or interfering in any way with PGE's  
2 use of the Project Use Rights under this Agreement (including impairment by  
3 interference with the operation or maintenance, and rebuilding if necessary, of the Pelton  
4 and Round Butte Facilities and the Transmission Facilities or causing undue hazard in  
5 connection with such facilities) the Tribes shall retain the following rights to the extent  
6 such rights exist and do not conflict with federal law, including but not limited to the  
7 United States Constitution, federal common law and acts of the United States Congress:

8 (i) All rights of every kind, other than Project Use Rights, in  
9 the Tribal Lands for which the Project Use Rights are granted;

10 (ii) The right to permit use of all Tribal Lands for which  
11 Project Use Rights are granted for any purposes not inconsistent with the  
12 use thereof by PGE, it being understood that the generation of  
13 hydroelectric power would be inconsistent with the use thereof by PGE;

14 (iii) The right to exclude from all Tribal Lands for which  
15 Project Use Rights are granted any Person other than PGE and PGE  
16 Personnel and Invitees;

17 (iv) All mining rights in all Tribal Lands for which Project Use  
18 Rights are granted not inconsistent with PGE's use thereof;

19 (v) Upon the termination of the Project Use Rights hereunder  
20 and PGE's interests in the FERC License for Project No. 2030, the Tribes  
21 shall possess their full right to occupy all such Tribal Lands and exclude  
22 any nonmembers from such lands, including PGE and PGE Personnel and  
23 Invitees;

24 (vi) All regulatory authority over all Tribal Lands for which  
25 Project Use Rights are granted, with respect to hunting, fishing, camping,  
26 boating and all other recreational activities as specified in Article VI;

27 (vii) Police power and adjudicatory authority relative to Persons  
28 other than PGE and PGE Personnel and Invitees over all Tribal Lands for  
29 which Project Use Rights are granted;

30 (viii) All traffic control authority over any and all access roads  
31 for which Project Use Rights are granted;

32 (ix) Police power and adjudicatory authority over PGE and  
33 PGE Personnel and Invitees with respect only to activities not reasonably  
34 contemplated by this Agreement and the Included Agreements.

35 (b) The Project Use Rights granted by the Tribes under this Article IV are  
36 not intended and should not be construed as conveyances of a fee interest in any Tribal  
37 Lands. The Tribes' grant of Project Use Rights under this Article IV is not perpetual and  
38 shall terminate in the event of any termination occurring under Article XII herein, or at

1 such time as PGE and its permitted successors and assigns are no longer a licensee for  
2 Project No. 2030.

3 (c) In the event of any conflict between this Section 4.10 and any other  
4 express provision of this Agreement, such express provision shall control.

5 (d) Disputes over the exercise of tribal powers referred to in this Article  
6 shall be resolved in accordance with Article XIII of this Agreement.

7 4.11 Other Rights Necessary to the Operation of Project No. 2030.

8 If the Tribes acquire, or are otherwise determined to possess, non-consumptive  
9 water rights necessary to the operation of Project No. 2030, the Tribes grant PGE the  
10 right to use such water rights but only in connection with the operation of Project No.  
11 2030. Except as provided in this section, this Agreement does not limit the Tribes' right  
12 to use its water rights, including those set forth in Article IV of the Water Rights  
13 Settlement Agreement dated November 17, 1997, between the Tribes, the State of  
14 Oregon and the United States.  
15

16 **ARTICLE V**  
17 **COMPENSATION TO THE TRIBES**

18 For the period from the Effective Date through the Transfer Date, PGE shall  
19 continue to compensate the Tribes pursuant to the terms of the 1955 Agreement and the  
20 1985 Settlement Agreement. Effective upon the Transfer Date, PGE's obligations to  
21 compensate the Tribes pursuant to the 1955 Agreement and the 1985 Settlement  
22 Agreement shall cease and PGE shall provide to the Tribes the exclusive Compensation  
23 described below in this Article V.

24 5.1 Sale of Certain Interests in Project No. 2030.

25 At the price and on the other terms and subject to the conditions set forth in the  
26 Asset Purchase Agreement, PGE shall sell and the Tribes shall purchase on the Transfer  
27 Date an undivided 33.33% interest in the Pelton and Round Butte Facilities (the  
28 "Undivided 33.33% Interest") as they shall exist on the Transfer Date.

29 5.2 Ownership and Operation Agreement.

30 At the Closing, PGE and the Tribes shall execute the Ownership and Operation  
31 Agreement with the Tribes to be effective as of the Transfer Date.

32 5.3 Operation of Generating Unit in Pelton Reregulating Dam.

33 The Tribes shall retain the exclusive right to operate and maintain (and rebuild if  
34 necessary) at the expense of the Tribes one hydroelectric generating unit in the Pelton  
35 Reregulating Dam with suitable structures, accessories and appurtenances located as



1 determined by mutual agreement of the Tribes and PGE. The amounts of water to be  
2 released either through the gates in the Pelton Reregulating Dam or through such  
3 hydroelectric generating unit and the water levels of the reservoir behind such dam shall  
4 be determined by PGE consistent with the terms of the New FERC License and other  
5 regulatory requirements. To the extent not inconsistent therewith, PGE shall give  
6 consideration so far as possible to such generation by the Tribes provided that in doing so  
7 PGE shall not be required to compromise generation from the Pelton and Round Butte  
8 Facilities.

9 5.4 Excess Hatchery Fish.

10 To the extent the Round Butte hatchery continues as a part of the terms and  
11 conditions of the New FERC License, fish trapped at the Pelton trap that are in excess of  
12 the number needed for the hatchery program or other aspects of the long-term fisheries  
13 program required under the New FERC License shall be provided to the Tribes for their  
14 use.

15 5.5 Employment of Members of the Tribes.

16 To the extent not prohibited by Applicable Law, PGE shall use its best efforts to  
17 afford all reasonable opportunities for employment to qualified members of the Tribes in  
18 connection with the operation and maintenance (and rebuilding if necessary) of the  
19 Pelton and Round Butte Facilities and Transmission Facilities. Such opportunities  
20 include the conduct of studies carried out in connection with Project No. 2030.

21 5.6 Options to Purchase Additional Interests.

22 (a) PGE hereby grants the Tribes the option to purchase ("First Purchase  
23 Option"), as of 2400 hours Pacific time on December 31, 2021, an undivided 16.66%  
24 interest in the Pelton and Round Butte Facilities as such facilities exist as of such date  
25 (the "Undivided 16.66% Interest"). PGE may revoke such First Purchase Option in its  
26 sole discretion at any time prior to and including January 2, 2021 if this Agreement (a) is  
27 breached in any material way by the Tribes or (b) ceases to remain in full force and  
28 effect. The Tribes may exercise this First Purchase Option by written notice to PGE no  
29 sooner than January 2, 2019 and no later than July 1, 2021; if the Tribes do not exercise  
30 the First Purchase Option by July 1, 2021, then it shall expire. In the event the Tribes  
31 exercise this First Purchase Option, PGE shall sell the Undivided 16.66% Interest to the  
32 Tribes, and the Tribes shall purchase such interest from PGE, upon the same terms and  
33 conditions as those contained in the Asset Purchase Agreement, subject only to the  
34 following modifications:

35 (i) the time of closing, transfer of title and payment of the  
36 purchase price shall be 2400 hours Pacific time on December 31, 2021;

37 (ii) the Purchased Assets, as defined in the Asset Purchase  
38 Agreement, purchased by the Tribes shall be the Undivided 16.66%  
39 Interest in the Pelton and Round Butte Facilities as such facilities exist as  
40 of 2400 hours Pacific time on December 31, 2021; and

1 (iii) the Purchase Price, as defined in the Asset Purchase  
2 Agreement, shall be .2498 times PGE's Ownership Share of the Net Book  
3 Value of the Pelton and Round Butte Facilities as of 2400 hours Pacific  
4 time on December 31, 2021, as reflected on PGE's books of account as of  
5 that time.

6 (b) PGE hereby grants the Tribes the option to purchase ("Second  
7 Purchase Option"), as of the Second Purchase Date (as defined below), an undivided  
8 .02% interest in the Pelton and Round Butte Facilities as such facilities exist as of such  
9 Second Purchase Date (the "Undivided .02% Interest"). PGE may revoke such Second  
10 Purchase Option in its sole discretion at any time prior to and including the date one year  
11 prior to the Second Purchase Date if this Agreement (a) is breached in any material way  
12 by the Tribes or (b) ceases to remain in full force and effect. The Tribes may exercise  
13 this Second Purchase Option by written notice to PGE no sooner than three years prior to  
14 the Second Purchase Date and no later than one year prior to the Second Purchase Date;  
15 if the Tribes do not exercise the Second Purchase Option by the date one year prior to the  
16 Second Purchase Date, then it shall expire. In the event the Tribes exercise this Second  
17 Purchase Option, PGE shall sell the Undivided .02% Interest to the Tribes, and the  
18 Tribes shall purchase such interest from PGE, upon the same terms and conditions as  
19 those contained in the Asset Purchase Agreement, subject only to the following  
20 modifications:

21 (i) the date of closing, transfer of title and payment of the  
22 purchase price shall be the Second Purchase Date and shall be determined  
23 by application of the following formula:

$$24 \quad \text{"Second Purchase Date"} = \text{July 1, 2014} + \frac{(\text{AL} + \text{ST})}{2}$$

26 Where AL = the number of years (rounded to one decimal place)  
27 from January 1, 2002 to the date FERC issues the  
28 New FERC License and

29 ST = the Stated Term.

30 provided, however, that the Second Purchase Date shall be at 2400 hours  
31 Pacific time on the December 31 or June 30 closest to the date arrived at by  
32 application of the foregoing formula (or if not a Business Day, then the  
33 next Business Day thereafter) and provided, further, that in no event shall  
34 the Second Purchase Date be a date later than the earlier of (A) 2400 hours  
35 Pacific time on December 31, 2036 and (B) the date that is one year prior  
36 to the end of the Stated Term;

37 (ii) the Purchased Assets, as defined in the Asset Purchase  
38 Agreement, purchased by the Tribes shall be the Undivided .02% Interest  
39 in the Pelton and Round Butte Facilities as such facilities exist as of the  
40 Second Purchase Date; and

1 (iii) the Purchase Price, as defined in the Asset Purchase  
2 Agreement, shall be .0004 times PGE's Ownership Share of the Net Book  
3 Value of the Pelton and Round Butte Facilities as of the Second Purchase  
4 Date, as reflected on PGE's books of account as of that date.

5 (c) The Tribes' exercise of the First Purchase Option and the Second  
6 Purchase may be advanced to an earlier date as provided in Section 12.3 of the  
7 Ownership and Operation Agreement. In the event such advancement occurs, then the  
8 date of closing, transfer of title and payment of the purchase price, as well as the  
9 Purchased Assets (as defined in the Asset Purchase Agreement) and the Purchase Price  
10 (as defined in the Asset Purchase Agreement) shall all be as determined pursuant to such  
11 Section 12.3 of the Ownership and Operation Agreement.

12 5.7 Payments Specifically for Transmission Rights of Way.

13 For the rights of way for the Transmission Facilities and Other Transmission  
14 Lines, as described in Section 4.3, and for roads and other access used in connection with  
15 the operation and maintenance (and rebuilding if necessary) of the Transmission  
16 Facilities and Other Transmission Lines and for any other areas reasonably necessary  
17 which PGE desires to keep clear of growing trees, PGE shall pay a monthly rental of one  
18 dollar and fifty cents (\$1.50) per acre for such area, but in any event the said area shall  
19 include a width of not less than 100 feet on each side of the center line of the  
20 transmission lines. In addition, PGE shall compensate the Tribes for timber cut or  
21 removed as provided in Section 4.5.

22 5.8 Transmission Service for Tribes.

23 If the Tribes elect pursuant to Section 5.10 of the Ownership and Operation  
24 Agreement to take for direct consumption or marketing the Tribes' Ownership Share of  
25 the Project Rights (as these terms are defined in the Ownership and Operation  
26 Agreement) of the Pelton and Round Butte Facilities, PGE shall respond to any request  
27 from the Tribes for transmission services by offering the Tribes transmission services in  
28 accordance with PGE's tariff for such services then on file with FERC, at the prices and  
29 terms and upon the conditions contained therein.

30 5.9 Sole and Exclusive Means of Compensation.

31 The Tribes and Interior acknowledge that PGE would not enter into this  
32 Agreement if this Agreement did not provide and incorporate the sole and exclusive  
33 means by which PGE shall provide Compensation to the Tribes for any and all of PGE's  
34 activities, and the impacts thereof, in any way connected, directly or indirectly, with  
35 Project No. 2030. The Tribes and Interior expressly agree that the Compensation to be  
36 received by the Tribes from PGE as set forth in the foregoing sections of this Article V  
37 shall represent full and complete Compensation to the Tribes for PGE's ownership and  
38 operation of the Pelton and Round Butte Facilities and the Transmission Facilities, and  
39 the impacts thereof, including:

1 (a) All the Project Use Rights granted by the Tribes as described in Article  
2 IV hereof;

3 (b) All of PGE's actual and potential obligations to the Tribes pursuant to  
4 Section 10(e);

5 (c) All of PGE's actual and potential obligations to provide Compensation  
6 to the Tribes pursuant to the potential license conditions described in Section 5.10(e)(i)-  
7 (vii);

8 (d) Any and all taxes of any possible form which the Tribes might impose  
9 upon PGE including, but not limited to, income, ad valorem, property, generation, BTU  
10 or energy, fuel, sales, use, gross receipts, privilege, business, occupation, severance, first  
11 use, conservation, transmission, consumption, excise, lease and transaction taxes;

12 (e) Any and all assessments of any possible form which the Tribes might  
13 impose upon PGE, its property or its activities;

14 (f) Any and all permit and other fees of any possible form which the  
15 Tribes might impose upon PGE, its property or its activities, other than fees charged PGE  
16 by the Tribes which (i) are pursuant to the Tribes' administration of the Clean Water Act  
17 or other federal acts pursuant to similar delegations of federal authority to regulate, (ii)  
18 represent reasonable costs incurred by the Tribes to administer such Act or acts and (iii)  
19 are no higher than similar fees charged by the United States and the State of Oregon to  
20 other Persons under such Act or acts;

21 (g) Any and all uses whatsoever of the Tribes' water rights necessary for  
22 the operation of Project No. 2030, whether or not such uses are consumptive;

23 (h) All forms of Compensation to the Tribes currently contemplated, or  
24 which may in the future be contemplated, by the Tribes' Hydroelectric Ordinance;

25 (i) Any and all penalties of any possible form which the Tribes might  
26 impose upon PGE, its property or its activities, other than any such penalties which (i) are  
27 pursuant to the Tribes' administration of the Clean Water Act and the Tribes'  
28 administration of other federal acts pursuant to similar delegations of federal authority to  
29 regulate and (ii) are no higher than similar penalties assessed by the United States or the  
30 State of Oregon to other Persons under such Act or acts; and

31 (j) any and all other potential bases for and forms of Compensation to the  
32 Tribes connected in any possible way to PGE's activities related to Project No. 2030, the  
33 Tribes and the Warm Springs Reservation of Oregon.

34 5.10 Costs to Comply with Provisions of FERC Licensing Orders.

35 All costs incurred by PGE and the Tribes during the New License Term to comply  
36 with FERC Licensing Orders shall be borne by PGE and the Tribes as provided in this  
37 Section 5.10.

1 (a) PGE agrees to bear exclusively all costs related solely to the operation  
2 or existence of the Transmission Facilities, including the costs of complying with all  
3 FERC Licensing Orders related thereto.

4 (b) The Tribes agree to bear exclusively all costs related solely to  
5 operation or existence of the Pelton Reregulating Dam Generating Facilities, including  
6 the costs of complying with all FERC Licensing Orders related thereto.

7 (c) The Tribes and PGE agree to bear exclusively as Costs of Operation  
8 pursuant to the Ownership and Operation Agreement all costs related solely to operation  
9 or existence of the Pelton Dam or the Round Butte Dam, including the costs of  
10 complying with all FERC Licensing Orders related thereto.

11 (d) All costs incurred by PGE and the Tribes during the New License  
12 Term to comply with FERC Licensing Orders, other than costs described in Section  
13 5.10(a), (b) and (c) above, shall be allocated between (x) the Pelton and Round Butte  
14 Facilities and (y) the Pelton Reregulating Dam Generating Facilities as follows:

15 (i) The Pelton and Round Butte Facilities shall bear 98% of  
16 such costs; and

17 (ii) The Pelton Reregulating Dam Generating Facilities shall  
18 bear 2% of such costs.

19 (e) Except as provided otherwise in Section 5.10(a), (b), (c) and (d) and  
20 this Section 5.10(e), all costs incurred by PGE and the Tribes during the New License  
21 Term to comply with FERC Licensing Orders related to Interior's exercise of its  
22 authority under federal law, including but not limited to the Federal Power Act, the  
23 Endangered Species Act and the Fish and Wildlife Coordination Act, to (i) assure the  
24 adequate protection and utilization of the Warm Springs Reservation of Oregon and (ii)  
25 protect, mitigate and enhance natural resources affected by Project No, 2030 (including  
26 but not limited to fish, wildlife, cultural and recreational resources), shall be treated as  
27 Costs of Operation (as defined in the Ownership and Operation Agreement) and shall be  
28 shared by PGE and the Tribes pursuant to the Ownership and Operation Agreement. The  
29 Tribes agree that they will bear exclusively, and that PGE shall therefore not be required  
30 to share or bear pursuant to the Ownership and Operation Agreement or otherwise, all  
31 costs related to Interior's exercise of its authority under federal law, including but not  
32 limited to the Federal Power Act, the Endangered Species Act and the Fish and Wildlife  
33 Coordination Act, to (x) assure the adequate protection and utilization of the Warm  
34 Springs Reservation of Oregon and (y) protect, mitigate and enhance natural resources  
35 affected by Project No, 2030 (including but not limited to fish, wildlife, cultural and  
36 recreational resources), which exercise of such authority:

37 (i) Requires the payment of money to the Tribes or members  
38 of the Tribes, or to any Person for the purpose of facilitating a payment of  
39 money either to the Tribes or members of the Tribes or;

1 (ii) Both (A) requires the purchase, lease or other form of  
2 acquisition of property of whatever kind (real, personal, intangible or  
3 otherwise), and the transfer or dedication of such property to the Tribes or  
4 members of the Tribes, or to any Person for the purpose of facilitating  
5 such a transfer or dedication of property either to the Tribes or members of  
6 the Tribes or the transfer or dedication of property owned by PGE to the  
7 Tribes or members of the Tribes, or to any Person for the purpose of  
8 facilitating such transfer or dedication of property either to the Tribes or  
9 members of the Tribes and (B) exceeds an aggregate total of one million  
10 dollars (\$1 million) during the Term of this Agreement;

11 (iii) Requires the employment of the Tribes or members of the  
12 Tribes (in either case, whether or not to perform studies or other work  
13 related to Project No. 2030);

14 (iv) Arises in any way from a determination by the Secretary  
15 that the Compensation received by the Tribes pursuant to this Agreement  
16 is in any way inadequate, whether relative to Section 10(e) or otherwise;

17 (v) Is designed both (A) to reduce the potential amount or  
18 value of generation from the Pelton and Round Butte Facilities and (B) to  
19 increase the potential amount or value of generation from the Reregulating  
20 Dam Generating Facilities;

21 (vi) Requires development, construction or creation of new  
22 facilities, or improvements to or additions to existing facilities which  
23 facilities in either case (A) are not designed to address impacts of Project  
24 No. 2030 on natural resources, including land, (B) are not required to be  
25 open generally to the general public and (C) are not directly related to  
26 operation of Project No. 2030; or

27 (vii) Involves mitigation (whether in the form of consideration  
28 to be granted to the Tribes or members of the Tribes, or to any Person for  
29 the purpose of facilitating a payment of money either to the Tribes or  
30 members of the Tribes, or some other form) for impacts on the Warm  
31 Springs Reservation of Oregon caused by activities which (A) take place  
32 outside the boundaries of the Warm Springs Reservation of Oregon, (B)  
33 are not directly related either to the operation of Project No. 2030 or  
34 recreation activities sponsored by Project No. 2030, and (C) are  
35 undertaken by Person(s) who are neither Parties to this Agreement, nor  
36 Affiliates of one of the Parties.

37 5.11 PGE's Remedies if Additional Taxes or Fees Paid.

38 If (a) the Tribes impose taxes or fees which are otherwise prohibited by the terms  
39 of Article V or Article X or would have been prohibited if not found invalid and (b) PGE  
40 elects to pay such taxes or fees, then, as non-exclusive remedies therefor, PGE shall be

1 entitled to (x) schedule the Tribes' Ownership Share of Project Rights (as such terms are  
2 defined in the Ownership and Operation Agreement) and receive the benefit thereof until  
3 PGE has been fully reimbursed on account of such taxes or fees and (y) offset any such  
4 amounts against any and all obligations PGE may have to the Tribes until such amounts  
5 have been fully reimbursed.

6           5.12 Reservation of Interior Authority.

7           Interior reserves all authority it has under federal law, including but not limited to  
8 the Federal Power Act, the Endangered Species Act and the Fish and Wildlife  
9 Coordination Act, to (i) assure the adequate protection and utilization of the Warm  
10 Springs Reservation of Oregon and (ii) protect, mitigate and enhance natural resources  
11 affected by Project No. 2030 (including but not limited to fish, wildlife, cultural and  
12 recreational resources), and nothing in this Agreement limits Interior's exercise of such  
13 authority.

14           5.13 PGE's Remedies if Additional Compensation Imposed by Interior.

15           (a) In the event Interior seeks to impose, or FERC accepts an Interior  
16 recommendation to impose, any condition(s) on the New FERC License which would  
17 require any modification of the ownership of the Pelton and Round Butte Facilities at any  
18 time or which would require PGE to pay the Tribes Additional Compensation, PGE may  
19 do any or all of the following:

20                       (i) challenge legally the conditions so imposed by Interior or  
21 FERC;

22                       (ii) pay the Additional Compensation and achieve  
23 reimbursement as provided in Section 5.13(b);

24                       (iii) reject the New FERC License as provided in Section 12.8;  
25 and

26                       (iv) pursue any other remedies available by law.

27 Interior does not waive any defenses available to it to respond to any such action taken by  
28 PGE.

29  
30           (b) If (i) Interior imposes conditions on the New FERC License which  
31 require PGE to pay the Tribes Additional Compensation (whether directly or indirectly),  
32 or FERC imposes such conditions upon Interior's recommendation, and (ii) PGE elects to  
33 pay such Additional Compensation and (iii) the Tribes fail to reimburse PGE  
34 immediately for any and all such amounts paid by PGE as required by Section 9.3(d),  
35 then, as non-exclusive remedies therefor, PGE shall be entitled to (x) schedule the Tribes'  
36 Allocation (as such term is defined in the Ownership and Operation Agreement) and  
37 receive the benefits thereof until PGE has been fully reimbursed and (y) offset such past  
38 due amounts against any and all obligations it may have to the Tribes until such amounts  
39 have been fully reimbursed.

1  
2 **ARTICLE VI**  
**NATURAL RESOURCE REGULATION AND MANAGEMENT BY THE TRIBES**

3 6.1 Powers.

4 (a) Pursuant to the Constitution referenced in the recitals hereof, the  
5 Tribes in their governmental capacity exercise certain governmental powers over natural  
6 resources on Tribal Lands. In particular, the Constitution empowers the Tribal Council,  
7 among other things, “(t)o prohibit the overgrazing of lands or other depletion of the  
8 capital or natural resources of the Tribe by ordinances which shall be subject to approval  
9 by the Secretary of the Interior” and “(t)o regulate the uses and disposition of tribal  
10 property; to protect and preserve the tribal property, wild life and natural resources...”.  
11 The Parties agree that these powers are not constrained by this Agreement and the  
12 Included Agreements, except as specifically set forth in this Agreement and the Included  
13 Agreements and except as the exercise of such governmental powers may be constrained  
14 by federal law, including but not limited to the United States Constitution, federal  
15 common law and Acts of the United States Congress. In the event of any conflict  
16 between this Article VI and any other express provision of this Agreement, such express  
17 provision shall control.

18 6.2 Specific Tribal Ordinances.

19 PGE and the Tribes agree that the following Tribal ordinances regulating natural  
20 resources on Tribal Lands shall apply to their activities on such lands related to Project  
21 No. 2030, except as otherwise specifically set forth in this Agreement and the Included  
22 Agreements, except as necessary to comply with the terms of the Original FERC License,  
23 the New FERC License or the State Water Right, as applicable, and except as the  
24 application of such ordinances is in conflict with federal law, including but not limited to  
25 the United States Constitution, federal common law and Acts of the United States  
26 Congress:

27 (a) Warm Springs Tribal Code Chapter 340 “Fishing Code”;

28 (b) Warm Springs Tribal Code Chapter 350 “Hunting and Trapping  
29 Code”;

30 (c) Warm Springs Tribal Code Chapter 411 “Zoning and Land Use Code”;

31 (d) Warm Springs Tribal Code Chapter 432 “Water Quality Standards,  
32 Beneficial Uses, and Treatment Criteria”;

33 (e) Warm Springs Tribal Code Chapter 433 “Implementing Provisions for  
34 Tribal Water Quality Standards, Beneficial Uses, and Treatment Criteria”;

35 (f) Warm Springs Tribal Code Chapter 460 “Range and Livestock  
36 Ordinance”;



1 (g) Warm Springs Tribal Code Chapter 475 “Hydroelectric Licensing and  
2 Regulation Ordinance”;

3 (h) Warm Springs Tribal Code Chapter 490 “Protection and Management  
4 of Archaeological, Historical and Cultural Resources”;

5 (i) Tribal Integrated Resources Management Plans I and II;

6 (j) Warm Springs Management Plan;

7 (k) Warm Springs Flood Damage Prevention Ordinance #77;

8 (l) Warm Springs Tribal Code Chapter 401 “Warm Springs Wild &  
9 Scenic Rivers Act”; and

10 (m) Warm Springs Water Management Plan – Tribal Resolution No. 2980.

11 6.3 New Regulations and Amendments to Existing Regulations.

12 The Tribes agree that prior to adopting new regulations or ordinances, or  
13 amending existing regulations or ordinances, that in any case could potentially affect  
14 Project No. 2030, the Tribes shall fully consult with PGE and take into consideration any  
15 and all concerns identified by PGE. The Tribes further agree that they will not effect any  
16 new regulation or ordinance, or amendment to an existing regulation or ordinance, that  
17 creates economic burdens on Project No. 2030 unless either: (a) PGE has given its  
18 consent, (b) such economic burdens are less than or equal to like burdens which would be  
19 imposed on Project No. 2030 by another Governmental Authority in the absence of  
20 regulation by the Tribes or (c) the Tribes commit to bear individually the entire cost of  
21 such additional economic burdens.

22 6.4 Exercise of Delegated Authority.

23 PGE acknowledges that the Tribes have been delegated certain regulatory  
24 authority under the Clean Water Act and that the Tribes may be delegated similar  
25 authority in the future pursuant to other congressional acts. The Parties agree that except  
26 to the extent the Tribes’ exercise of such delegated regulatory authority would be  
27 inconsistent with this Agreement, the Included Agreements, the Original FERC License,  
28 the New FERC License or the State Water Right, the provisions of this Agreement shall  
29 not constrain the Tribes’ exercise of such delegated regulatory authority. The costs  
30 related to the Pelton and Round Butte Facilities of complying with the Tribes’ exercise of  
31 such delegated regulatory authority shall be treated as Costs of Operation under the  
32 Ownership and Operation Agreement.

33 6.5 Conflict with Other Provisions.

34 In the event of conflict between the provisions of this Article VI and any other  
35 provisions of this Agreement or the Included Agreements, such other provisions of this  
36 Agreement or the Included Agreements shall control.

1  
2 **ARTICLE VII**  
**REPRESENTATIONS AND WARRANTIES OF PGE**

3 As a material inducement to the Tribes to enter into this Agreement, PGE hereby  
4 represents and warrants to the Tribes as follows:

5 7.1 Corporate Existence of PGE.

6 PGE is a corporation duly incorporated, validly existing under the laws of the  
7 State of Oregon. PGE has heretofore made available to the Tribes complete and correct  
8 copies of its articles of incorporation, as amended, and bylaws (or other comparable  
9 corporate charter documents), as currently in effect.

10 7.2 Authority.

11 PGE has full corporate power and authority to execute and deliver this Agreement  
12 and the Included Agreements, to perform its obligations hereunder and thereunder and to  
13 consummate the transactions contemplated hereby and thereby. The execution and  
14 delivery by PGE of this Agreement and the Included Agreements, and the performance  
15 by PGE of its obligations hereunder and thereunder, have been duly and validly  
16 authorized by the Board of Directors of PGE, and no other corporate action on the part of  
17 PGE or its shareholder is necessary. This Agreement has been duly and validly executed  
18 and delivered by PGE and, subject to receipt of FERC Approval, OPUC Approval and  
19 SEC Approval, constitutes, and upon the execution and delivery by the Tribes and PGE  
20 of the Included Agreements, such Included Agreements will constitute, legal, valid and  
21 binding obligations of PGE enforceable against PGE in accordance with their terms  
22 except as the same may be limited by bankruptcy, insolvency, reorganization,  
23 arrangement, moratorium or other similar laws relating to or affecting the rights of  
24 creditors generally, or by general equitable principles.

25 7.3 No Conflicts.

26 The execution and delivery by PGE of this Agreement, the execution and delivery  
27 by PGE of the Included Agreements, the performance by PGE of its obligations under  
28 this Agreement and the Included Agreements and the consummation of the transactions  
29 contemplated hereby and thereby will not:

30 (a) conflict with or result in a violation or breach of any of the terms,  
31 conditions or provisions of the articles of incorporation, as amended, or bylaws, as  
32 amended (or other comparable corporate charter documents) of PGE,

33 (b) require any consent, approval, authorization or permit, or filing with or  
34 notification to any Governmental Authority, except for (i) FERC Approval, OPUC  
35 Approval, SEC Approval and the approval specified in Section 10.1(e) and (ii) those  
36 requirements which become applicable to PGE as a result of the specific regulatory status  
37 of the Tribes (or any of its Affiliates) or as a result of any other facts that specifically

1 relate to the business or activities in which the Tribes (or any of its Affiliates) are or are  
2 proposed to be engaged;

3 (c) result in a default (or give rise to any right of termination, cancellation  
4 or acceleration or require any consent or approval) under any of the terms, conditions or  
5 provisions of any note, bond, mortgage, indenture, license, agreement or other instrument  
6 or obligation to which PGE is a party or by which PGE may be bound, except for such  
7 defaults (or rights of termination, cancellation or acceleration or any consent or approval)  
8 as to which requisite waivers or consents have been obtained; or

9 (d) conflict with or result in any violation or breach of any term or  
10 provision of any law or order applicable to PGE.

#### 11 7.4 Legal Proceedings.

12 Except as disclosed in Schedule 7.4 hereto, there are no actions or proceedings  
13 pending or, to the knowledge of PGE, threatened against, relating to or affecting PGE  
14 with respect to the ownership, operation or maintenance of the Pelton and Round Butte  
15 Facilities which could reasonably be expected to result in the issuance of an order  
16 restraining, enjoining or otherwise prohibiting or making illegal the consummation of any  
17 of the transactions contemplated by this Agreement or any of the Included Agreements.

### 18

## 19 **ARTICLE VIII**

## 20 **REPRESENTATIONS AND WARRANTIES OF THE TRIBES AND INTERIOR**

#### 21 8.1 Representations and Warranties of the Tribes.

22 As a material inducement to PGE to enter into this Agreement, the Tribes hereby  
23 represent and warrant to PGE as follows:

24 (a) Tribal Existence. The Tribes are a federally recognized Indian tribe  
25 duly and validly organized under a constitution and bylaws ratified by the members of the  
26 Tribes on December 18, 1937, and approved by the Assistant Secretary of Interior of the  
27 United States on February 14, 1938, pursuant to Section 16 of the Act of June 18, 1934  
28 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). The Tribes ratified  
29 on April 23, 1938 a corporate charter issued to them by Interior pursuant to Section 17 of  
30 such Act of June 18, 1934. Pursuant to the foregoing authorities the Tribes exercise  
31 governmental and corporate powers over Tribal Lands within the boundaries of the Warm  
32 Springs Indian Reservation as described in that certain Treaty between the United States  
33 and the Tribes and Bands of the Middle Oregon executed June 25, 1855. The Tribes have  
34 heretofore made available to PGE complete and correct copies of their constitution,  
35 bylaws and corporate charter, as currently in effect.

36 (b) Statutory Authorization. This Agreement, specifically including the  
37 grants of the Project Use Rights described in Article IV hereof, is authorized pursuant to

1 25 U.S.C. § 2, and Sections 4(e) and 10(e)(1) of the Federal Power Act (16 U.S.C. §  
2 797(e) and § 803(e)(1)). In addition, Interior has approved the Agreement pursuant to 25  
3 U.S.C. Section 81, as amended by Public Law 106-179, the Indian Tribal Economic  
4 Development and Contract Encouragement Act of 2000 (See Exhibit K). To the extent  
5 the Transmission Facilities are at any time not included within the description of Project  
6 No. 2030 for purposes of the FERC license for Project No. 2030 or any other portion of  
7 the Tribal Lands described in Article IV is not at any time included within the project  
8 boundary described in the FERC license, the grants of the Project Use Rights described in  
9 Article IV are approval by the General Right-of-Way Act of 1948, 25 USC 323-328.

10 (c) Authority. The Tribes have full power and authority to enter into this  
11 Agreement and the Included Agreements to which they are a party, to perform their  
12 obligations hereunder and thereunder and to consummate the transactions contemplated  
13 hereby and thereby. The execution and delivery by the Tribes of this Agreement and the  
14 Included Agreements, and the performance by the Tribes of their obligations hereunder  
15 and thereunder, have been duly and validly authorized by the members of the Tribes and  
16 the Tribal Council of the Tribes and no other tribal action on the part of the Tribes is  
17 necessary. To the best of the Tribes' knowledge and belief, the execution and delivery by  
18 the Tribes of this Agreement and the Included Agreements, and the performance by the  
19 Tribes of their obligations hereunder and thereunder, have been duly and validly  
20 authorized by Interior, and no other action by Interior is necessary to consummate the  
21 transactions contemplated hereby and thereby. This Agreement has been duly and  
22 validly executed and delivered by the Tribes. Assuming this Agreement has been duly  
23 and validly executed and approved by Interior and, subject to receipt of FERC Approval  
24 and OPUC Approval, this Agreement constitutes, and upon the execution and delivery by  
25 the Tribes and PGE of the Included Agreements, such Included Agreements will  
26 constitute, legal, valid and binding obligations of the Tribes enforceable against the  
27 Tribes in accordance with their terms, except as the same may be limited by bankruptcy,  
28 insolvency, reorganization, arrangement, moratorium or other similar laws relating to or  
29 affecting the rights of creditors generally, or by general equitable principles.

30 (d) No Conflicts. The execution and delivery by the Tribes of this  
31 Agreement, the execution and delivery by the Tribes of the Included Agreements, the  
32 performance by the Tribes of their obligations under this Agreement and the Included  
33 Agreements, the consummation of the transactions contemplated hereby and thereby and  
34 PGE's exercise of the Project Use Rights and the rights granted PGE under the  
35 Ownership and Operation Agreement will not:

36 (i) conflict with or result in a violation or breach of any of the  
37 terms, conditions or provisions of the constitution, bylaws or corporate  
38 charter of the Tribes;

39 (ii) require any consent, approval, authorization or permit, or  
40 filing with or notification to any Governmental Authority, except for (A)  
41 the duly authorized execution and approval of this Agreement by Interior,  
42 (B) the FERC Approval, the OPUC Approval and the approval specified  
43 in Section 10.1(e), and (C) those requirements which become applicable to

1 the Tribes as a result of the specific regulatory status of PGE (or any of its  
2 affiliates) or as a result of any other facts that specifically relate to the  
3 business or activities in which PGE (or any of its affiliates) is or is  
4 proposed to be engaged;

5 (iii) result in a default (or give rise to any right of termination,  
6 cancellation or acceleration) under any of the terms, conditions or  
7 provisions of any note, bond, mortgage, indenture, license, agreement or  
8 other instrument or obligation to which the Tribes are a party or by which  
9 any of its assets and properties may be bound, except for such defaults (or  
10 rights of termination, cancellation or acceleration) as to which requisite  
11 waivers or consents have been obtained; or

12 (iv) conflict with or result in a violation or breach of any term  
13 or provision of any law or order applicable to the Tribes, including laws or  
14 regulations promulgated by the Tribes, including those regulations and  
15 ordinances listed in Section 6.2(a)-(m) or any other Tribal environmental,  
16 land use planning, zoning or other similar regulation or ordinance.

17 8.2 Representations and Warranties of the Tribes and Interior.

18 As a material inducement to PGE to enter into this Agreement, the Tribes and  
19 Interior hereby individually and jointly represent and warrant to PGE as follows:

20 (a) Tribal Lands. The Tribal Lands are held in trust by the United States  
21 for the benefit of the Tribes and are not the subject of any other (i) right of way, (ii)  
22 easement, (iii) lease, (iv) contract for sale, (v) contract encumbrance or (vi) any other  
23 written or oral agreement that is inconsistent with the Project Use Rights granted PGE  
24 under this Agreement and all other rights granted PGE under the Ownership and  
25 Operation Agreement.

26 (b) Legal Proceedings. Except as disclosed in Schedule 8.2 hereto,

27 (i) there are no actions or proceedings pending or, to the  
28 knowledge of the Tribes or Interior, threatened against, relating to or  
29 affecting the Tribes or any of the Tribal Lands which could reasonably be  
30 expected to result in the issuance of an order restraining, enjoining or  
31 otherwise prohibiting or making illegal the consummation of any of the  
32 transactions contemplated by this Agreement or any of the Included  
33 Agreements; and

34 (ii) the Tribal Lands are not subject to any existing or  
35 threatened adverse claims that are inconsistent with the rights granted PGE  
36 under this Agreement and the Included Agreements.

37 (c) Purposes of the Reservation. The use of the Project Use Rights for  
38 hydroelectric power generation, transmission of power and related activities; the  
39 execution and delivery by the Tribes of this Agreement and the Included Agreements; the

1 performance by the Tribes of their obligations under this Agreement and such Included  
2 Agreements and the consummation of the transactions contemplated hereby and thereby  
3 will not interfere or be inconsistent with the purposes for which the Warm Springs  
4 Reservation of Oregon was created.

5 8.3 Representations and Warranties of Interior.

6 As a material inducement to PGE to enter into this Agreement, Interior hereby  
7 represents and warrants to PGE as follows:

8 (a) Statutory Authorization. This Agreement, specifically including the  
9 grants of the Project Use Rights described in Article IV hereof, is authorized pursuant to  
10 25 U.S.C. § 2, and Sections 4(e) and 10(e)(1) of the Federal Power Act (16 U.S.C. §  
11 797(e) and § 803(e)(1)). In addition, Interior has approved the Agreement pursuant to 25  
12 U.S.C. Section 81, as amended by Public Law 106-179, the Indian Tribal Economic  
13 Development and Contract Encouragement Act of 2000 (See Exhibit K). To the extent  
14 the Transmission Facilities are at any time not included within the description of Project  
15 No. 2030 for purposes of the FERC license for Project No. 2030 or any other portion of  
16 the Tribal Lands described in Article IV is not at any time included within the project  
17 boundary described in the FERC license, the grants of the Project Use Rights described in  
18 Article IV are approved by the General Right-of-Way Act of 1948, 25 USC 323-328.

19 (b) Authority. This Agreement has been duly authorized, executed,  
20 delivered and approved by Interior and no other action on the part of Interior is necessary.  
21 Assuming that this Agreement has been duly authorized, executed and delivered by PGE,  
22 this Agreement, subject to receipt of the FERC Approval and the OPUC Approval,  
23 constitutes a legal, valid and binding obligation of Interior enforceable against Interior in  
24 accordance with its terms except as the same may be limited by bankruptcy, insolvency,  
25 reorganization, arrangement, moratorium or other similar laws relating to or affecting the  
26 rights of creditors generally, or by general equitable principles.

27 (c) Exercise of Trust Responsibility. The execution and approval of the  
28 Agreement are consistent with Interior's trust responsibility to the Tribes.

29 (d) No Conflicts. The execution and delivery by Interior of this  
30 Agreement, the performance by Interior of its obligations under this Agreement and the  
31 consummation of the transactions contemplated hereby and thereby will not:

32 (i) require any consent, approval, authorization or permit, or  
33 filing with or notification to any Governmental Authority, except for (A)  
34 the duly authorized execution and approval of this Agreement by Interior,  
35 (B) the FERC Approval, the OPUC Approval and the approval specified  
36 in Section 10.1(e), and (C) those requirements which become applicable to  
37 the Tribes as a result of the specific regulatory status of PGE (or any of its  
38 affiliates) or as a result of any other facts that specifically relate to the  
39 business or activities in which PGE (or any of its affiliates) is or is  
40 proposed to be engaged; or

1 (ii) conflict with or result in a violation or breach of any term  
2 or provision of any statute, law, regulation or rule, or any judgment,  
3 decree or order of any court or Governmental Authority applicable to  
4 Interior.

5 **ARTICLE IX**  
6 **REPRESENTATIONS AND WARRANTIES OF THE TRIBES AND PGE**

7 As a material inducement to Interior to enter into this Agreement, the Tribes and  
8 PGE hereby individually and jointly represent and warrant to Interior as follows:

9 **9.1 Reservation of Interior Authority.**

10 The Tribes and PGE acknowledge that Interior reserves all authority it has  
11 pursuant to federal law, including but not limited to the Federal Power Act, the  
12 Endangered Species Act and the Fish and Wildlife Coordination Act, to (i) assure the  
13 adequate protection and utilization of the Warm Springs Reservation of Oregon and (ii)  
14 protect, mitigate and enhance natural resources affected by Project No, 2030 (including  
15 but not limited to fish, wildlife, cultural and recreational resources), and that nothing in  
16 this Agreement limits Interior's exercise of such authority.

17 **9.2 The Tribes' Status as Co-owner and Co-licensee.**

18 The Tribes and PGE acknowledge that Interior's exercise of its authorities under  
19 federal law, including but not limited to the Federal Power Act, the Endangered Species  
20 Act and the Fish and Wildlife Coordination Act, to (i) assure the adequate protection and  
21 utilization of the Warm Springs Reservation of Oregon and (ii) protect, mitigate and  
22 enhance natural resources affected by Project No. 2030 (including but not limited to fish,  
23 wildlife, cultural and recreational resources) will not be restricted or limited by the  
24 circumstance of the Tribes being a co-owner and co-licensee of Project No. 2030.

25 **ARTICLE X**  
26 **COVENANTS OF THE PARTIES**

27 **10.1 Regulatory Approvals.**

28 (a) FERC Approval of this Agreement. Within thirty (30) days after the  
29 Effective Date, the Tribes and PGE shall file this Agreement with FERC seeking  
30 expedited approval by FERC of this Agreement and, to the extent of FERC's jurisdiction,  
31 the transactions contemplated hereby. Such FERC approval ("FERC Approval") shall  
32 include:

1 (i) Approval by FERC of the future transfer of PGE interests  
2 to the Tribes pursuant to this Agreement and the Asset Purchase  
3 Agreement;

4 (ii) Approval by FERC that the Compensation to be paid to the  
5 Tribes by PGE pursuant to this Agreement shall be the exclusive means of  
6 satisfying PGE's obligations to the Tribes pursuant to Section 10(e) for the  
7 period beginning upon the Transfer Date and continuing during the full  
8 term of any New FERC License, including a waiver by FERC of its  
9 authority to re-establish compensation at ten-year intervals under Section  
10 10(e); and

11 (iii) all other matters within FERC's jurisdiction relating to this  
12 Agreement, the Asset Purchase Agreement, the Ownership and Operation  
13 Agreement and the transactions contemplated hereby and thereby.

14 (b) New FERC License. As of the Effective Date, the Tribes and PGE  
15 covenant to take no further steps whatsoever to compete for the New FERC License or  
16 any other license. From and after the Effective Date, the Tribes and PGE covenant to  
17 cooperate to merge their final applications for a New FERC License into a new joint  
18 application for a New FERC License with a term of fifty (50) years. PGE and the Tribes  
19 intend that such new joint application will be filed as promptly as reasonably possible  
20 following receipt of both FERC Approval and OPUC Approval. PGE and the Tribes  
21 agree to form a relicensing consensus group, composed of representatives of both, whose  
22 task will be to create the new joint application. This relicensing consensus group shall  
23 identify differences between the Tribes' and PGE's final applications, with particular  
24 emphasis on the Exhibit E mitigation package, and shall work collaboratively to develop  
25 common positions that are acceptable to both entities. PGE and the Tribes agree to  
26 submit the joint application to Interior for comment for a reasonable period prior to filing  
27 it with FERC and to consider any comments made by Interior during such period. PGE  
28 and the Tribes also agree that they will continue to utilize an open and cooperative  
29 approach with natural resource agencies and groups involved in the Project's relicensing.

30 (c) OPUC Approval of Property Sales. PGE shall promptly file an  
31 application with the OPUC for approval ("OPUC Approval") to (i) transfer utility  
32 property to the Tribes pursuant to the Asset Purchase Agreement and (ii) to transfer  
33 utility property to the Tribes in the event the Tribes exercise the options described in  
34 Section 5.6. The Tribes shall provide such support for such application as PGE may  
35 reasonably request.

36 (d) Pelton and Round Butte Facilities Section 4(e) Conditions. The Tribes  
37 and PGE covenant to cooperate fully with each other to obtain Interior's acknowledgment  
38 that no Section 4(e) conditions in the New FERC License are necessary or appropriate  
39 related to the ownership of Project No. 2030 and that no Section 4(e) condition should be  
40 imposed that would result in a term of the New FERC License of less than fifty (50)  
41 years.



1 (e) Oregon Department of Water Resources Approval. From and after the  
2 Effective Date, PGE and the Tribes covenant to cooperate fully with each other to seek  
3 from the Oregon Department of Water Resources a reauthorized water right ("State  
4 Water Right") to replace State Hydroelectric License #222 and State Hydroelectric  
5 License #217. PGE and the Tribes shall seek such State Water Right for all of Project  
6 No. 2030. Within thirty (30) days after the Effective Date, the Tribes and PGE shall file  
7 a joint amendment to their filed notices of intent notifying the Oregon Water Resources  
8 Department of their intention to file a joint application for the State Water Right on terms  
9 consistent with this Agreement. The Tribes and PGE agree to take no further steps  
10 whatsoever to file separate or competing applications for such State Water Right or any  
11 other license. Such State Water Right application shall encompass all of Project  
12 No. 2030, including the Pelton Reregulating Dam Generating Facilities. It is the goal of  
13 PGE and the Tribes that such State Water Right be consistent with the terms of the New  
14 FERC License.

15 (f) SEC Approval of Sale of Utility Assets. PGE shall promptly request,  
16 or shall cause Sierra Pacific Resources (which is in the process of acquiring all of the  
17 common stock of PGE) to request, from the United States Securities and Exchange  
18 Commission ("SEC") approval ("SEC Approval") to (i) sell utility assets to the Tribes  
19 pursuant to the Asset Purchase Agreement and (ii) sell utility assets to the Tribes in the  
20 event the Tribes exercise the options described in Section 5.6.

21 10.2 Additional Covenants of PGE.

22 PGE covenants and agrees with the Tribes that, at all times from and after the  
23 Effective Date and continuing throughout the Term of this Agreement, PGE will comply  
24 with all covenants and provisions of this Section 10.2, except to the extent the Tribes may  
25 otherwise consent in writing.

26 (a) Regulatory and Other Approvals. PGE will:

27 (i) (A) take all reasonable steps necessary or desirable, and  
28 proceed diligently and in good faith and use all reasonable efforts, as  
29 promptly as practicable to obtain all consents, approvals or actions of, to  
30 make all filings with and to give all notices to Governmental Authorities  
31 provided that the Final Orders of the OPUC and FERC approving (x) the  
32 transaction and (y) the terms and conditions of each of the Included  
33 Agreements and the respective regulatory treatment of any and all  
34 financial impacts thereof in each case shall be in form and substance  
35 satisfactory to PGE in its sole discretion and (B) take all reasonable steps  
36 necessary or desirable to obtain all consents, approvals or actions, and  
37 give all notices to, any other Person required of PGE, in each case, to  
38 consummate the transactions contemplated hereby and by the Included  
39 Agreements, including the FERC Approval, the OPUC Approval and the  
40 SEC Approval;

1 (ii) provide such other information and communications to  
2 such Governmental Authorities or other Persons as such Governmental  
3 Authorities or other Persons may reasonably request in connection  
4 therewith; and

5 (iii) provide reasonable cooperation (A) to the Tribes in  
6 obtaining all consents, approvals or actions of, making all filings with and  
7 giving all notices to Governmental Authorities or other Persons required  
8 of the Tribes to consummate the transactions contemplated hereby and by  
9 the Included Agreements and (B) to the Tribes and the Tribes' potential  
10 lenders in connection with the Tribes' financing for the transactions  
11 contemplated by this Agreement.

12 Prior to making any filings with a Governmental Authority pursuant to this Section  
13 10.2(a) other than the request for SEC Approval, PGE agrees to provide copies of such  
14 filings to the Tribes and Interior. Nothing in this Agreement shall require PGE to  
15 institute litigation or to pay or agree to pay any sum of money or make financial  
16 accommodations (other than the payment or incurrence of customary expenses and filing  
17 or other fees) in order to obtain any necessary consent, approval or authorization,  
18 including the FERC Approval, the OPUC Approval and the SEC Approval. PGE will  
19 provide prompt notification to the Tribes when any such consent, approval, action, filing  
20 or notice referred to in clause (i) above is obtained, taken, made or given, as applicable,  
21 and will advise the Tribes of any communications (and, unless precluded by law or order,  
22 provide copies of any such communications that are in writing) with any Governmental  
23 Authority or other Person regarding any of the transactions contemplated by this  
24 Agreement or any of the Included Agreements.

25  
26 (b) Compensation to the Tribes. Provided PGE has not been required to  
27 pay the Tribes Additional Compensation, PGE hereby covenants not to seek, and waives  
28 any and all rights it may have to seek, or in any way to obtain, pursuant to Section 10(e)  
29 or otherwise, any reduction in the Compensation to be paid by PGE pursuant to Article V  
30 of this Agreement for the period from the Effective Date through the New License  
31 Expiration Date. Nothing in this Section 10.2 (b) shall prohibit PGE from opposing any  
32 attempt to achieve Additional Compensation for the Tribes.

33 (c) Legal Proceedings. PGE covenants that it will not initiate, prosecute  
34 or accept the benefit of any Proceeding in any court, including tribal court, if the purpose  
35 or effect of the action would be to invalidate this Agreement or the Included Agreements,  
36 or any provision(s) thereof.

### 37 10.3 Additional Covenants of the Tribes

38 The Tribes covenant and agree with PGE that, at all times from and after the  
39 Effective Date and continuing throughout the Term of this Agreement, the Tribes will  
40 comply with all covenants and provisions of this Section 10.3, except to the extent PGE  
41 may otherwise consent in writing.

1 (a) Regulatory and Other Approvals. The Tribes will:

2 (i) (A) take all reasonable steps necessary or desirable, and  
3 proceed diligently and in good faith and use all reasonable efforts, as  
4 promptly as practicable to obtain all consents, approvals or actions of, to  
5 make all filings with and to give all notices to Governmental Authorities  
6 provided that the Final Order of FERC approving (x) the transaction and  
7 (y) the terms and conditions of each of the Included Agreements shall be  
8 in form and substance satisfactory to the Tribes in their sole discretion and  
9 (B) take all reasonable steps necessary or desirable to obtain all consents,  
10 approvals or actions, and give all notices to, any other Person required of  
11 the Tribes, in each case, to consummate the transactions contemplated  
12 hereby and by the Included Agreements, including the FERC Approval;

13 (ii) provide such other information and communications to  
14 such Governmental Authorities or other Persons as such Governmental  
15 Authorities or other Persons may reasonably request in connection  
16 therewith; and

17 (iii) provide reasonable cooperation to PGE in obtaining the  
18 OPUC Approval and all other consents, approvals or actions of, making  
19 all filings with and giving all notices to Governmental Authorities or other  
20 Persons required of PGE to consummate the transactions contemplated  
21 hereby and by the Included Agreements.

22 Prior to making any filings with a Governmental Authority pursuant to this Section  
23 10.3(a), the Tribes agree to provide copies of such filings to PGE and Interior. Nothing  
24 in this Agreement shall require the Tribes to institute litigation or to pay or agree to pay  
25 any sum of money or make financial accommodations (other than the payment or  
26 incurrence of customary expenses and filing or other fees) in order to obtain any  
27 necessary consent, approval or authorization including FERC Approval, OPUC Approval  
28 and SEC Approval. The Tribes will provide prompt notification to PGE when any such  
29 consent, approval, action, filing or notice referred to in clause (i) above is obtained,  
30 taken, made or given, as applicable, and will advise PGE of any communications (and,  
31 unless precluded by law or order, provide copies of any such communications that are in  
32 writing) with any Governmental Authority or other Person regarding any of the  
33 transactions contemplated by this Agreement or any of the Included Agreements.  
34

35 (b) Compensation to the Tribes. The Tribes hereby covenant not to seek,  
36 and waive any and all rights they may have to seek, or in any way to obtain, pursuant to  
37 Section 10(e) or otherwise, Additional Compensation from PGE, PGE's customers or  
38 PGE's Personnel and Invitees, for PGE's activities contemplated by this Agreement and  
39 the Included Agreements for the period from the Effective Date through the New License  
40 Expiration Date. The Tribes specifically hereby covenant not to seek Additional  
41 Compensation from PGE during such period for intangible rights or impacts thereon, (i)  
42 to the extent such rights are not Treaty Reserved Rights and (ii) to the extent any such

1 impacts do not result from an insurable event as defined by the policies of insurance  
2 described in Section 11.2 of the Ownership and Operation Agreement.

3 (c) No Indirect Compensation. The Tribes covenant that they will not  
4 impose or assess any fees, assessments or taxes (including, without limitation, income,  
5 sales, use, gross receipts, privilege, business or other taxes) on any Person with respect to  
6 any such Person's (i) involvement in the planning, design, permitting, construction,  
7 operation or maintenance of any of the Pelton and Round Butte Facilities or the  
8 Transmission Facilities or (ii) purchase, transmission or distribution of electric energy  
9 produced by the Pelton and Round Butte Facilities.

10 (d) Additional Compensation Imposed by Interior. To the extent Interior  
11 imposes conditions on the New FERC License which require PGE to pay the Tribes any  
12 Additional Compensation (whether directly or indirectly), or FERC imposes such  
13 condition(s) upon Interior's recommendation, if PGE elects to pay such Additional  
14 Compensation, the Tribes covenant and agree to reimburse PGE immediately for any and  
15 all such amounts paid by PGE.

16 (e) Regulations and Ordinances. Except as otherwise provided in Section  
17 6.3, the Tribes hereby covenant not to impose any (i) new environmental, land use  
18 planning, zoning or other similar regulations or ordinances, or (ii) amendments to  
19 currently existing environmental, land use planning, zoning or other similar regulations  
20 or ordinances, in either case that would conflict with use of PGE's Project Use Rights  
21 under the terms of this Agreement and the Included Agreements for hydroelectric power  
22 generation, transmission of power and related activities or materially impair the value of  
23 Project No. 2030. The Tribes also hereby covenant that in exercising the regulatory  
24 authorities described in Article VI hereof vis-a-vis Project No. 2030 and PGE, the Tribes  
25 will:

26 (i) Act in a non-discriminatory manner;

27 (ii) Impose burdens no greater than imposed by the State of  
28 Oregon or the United States Environmental Protection Agency under  
29 similar regulations;

30 (iii) Not act with a purpose of negating or subverting any part of  
31 this Agreement or the Included Agreements;

32 (iv) Not require or demand actions compliance with which  
33 would result in a violation of the Original FERC License (to the extent it  
34 remains in effect), the New FERC License or the State Water Right; and

35 (v) Not act in a manner that represents an abuse or misuse of  
36 Tribal authority.

37 (f) Legal Proceedings. The Tribes covenant that they will not initiate,  
38 prosecute or accept the benefit of any Proceeding in any court, including tribal court, if  
39 the purpose or effect of the action would be to invalidate this Agreement or the Included

1 Agreements, or any provision(s) thereof, and that for as long as this Agreement or any of  
2 the Included Agreements shall remain in effect according to their terms, the Tribes will  
3 not take any action in any tribal court if a purpose or effect of that action would be to  
4 establish or assert jurisdiction of that court over PGE with respect to this Agreement or  
5 any of the Included Agreements.

6 (g) Quiet Enjoyment. Consistent with the provisions of Section 4.10, the  
7 Tribes covenant to provide PGE the full, unrestricted and quiet enjoyment of the Project  
8 Use Rights.

9 (h) Funding to Permit Transfer of Undivided 33.33% Interest. The Tribes  
10 covenant to make their best efforts to obtain funding to permit them to deliver the  
11 Purchase Price (as defined in the Asset Purchase Agreement) to PGE on January 1, 2002,  
12 or the first Business Day thereafter. If despite such efforts the Tribes are not able to  
13 obtain such funding by January 1, 2002, then The Tribes covenant to continue to make  
14 their best efforts to obtain funding to permit them to deliver the Purchase Price to PGE as  
15 soon as possible prior to the Outside Date (as defined in the Escrow Agreement).

#### 16 10.4 Covenants of Interior.

17 (a) Regulatory and other approval. Interior covenants to provide  
18 reasonable cooperation to the Tribes and to PGE in obtaining the FERC Approval and all  
19 other consents, approvals or actions of, making all filings with and giving all notices to  
20 Governmental Authorities or other Persons required of the Tribes and PGE to  
21 consummate the transactions contemplated hereby and by the Included Agreements.

22 (b) Compensation to the Tribes. Except as it may do so pursuant to its  
23 authorities that Interior has specifically reserved pursuant to Section 5.12, including  
24 potential conditions referenced in Section 5.10(e), Interior hereby covenants not to seek,  
25 and waives any and all rights it may have to seek or in any way to obtain, on behalf of the  
26 Tribes in connection with Project No. 2030, any Additional Compensation from PGE,  
27 PGE's customers or PGE's Personnel and Invitees, for PGE's activities contemplated by  
28 this Agreement and the Included Agreements. Interior also hereby covenants not to  
29 recommend or seek, pursuant to Section 10(e), Compensation that is different than or  
30 inconsistent with that contained in this Agreement.

31 (c) Quiet Enjoyment. Consistent with the provisions of Section 4.10,  
32 Interior covenants to provide PGE the full, unrestricted and quiet enjoyment of the  
33 Project Use Rights.

### 34 **ARTICLE XI** 35 **CONDITIONS TO CLOSING**

36 The obligations of the Tribes and PGE hereunder to consummate the transactions  
37 to be consummated at Closing are subject to the fulfillment, at or before the Closing, of  
38 each of the following conditions (all or any of which may be waived in whole or in part  
39 by the Party having the benefit of such condition in its sole discretion):

1           11.1   Representations and Warranties.

2           The representations and warranties made by each of the Parties to the other  
3 Parties in this Agreement and the Included Agreements, taken as a whole, shall be true  
4 and correct, in all material respects, on and as of the Closing as though repeated on and as  
5 of the Closing or, in the case of representations and warranties made as of a specified  
6 date earlier than the Closing, on and as of such earlier date.

7           11.2   Performance.

8           Each of the Parties shall have performed and complied with, in all material  
9 respects, the agreements, covenants and obligations required by this Agreement to be so  
10 performed or complied with by such Party at or before the Closing.

11          11.3   Orders and Laws.

12          There shall not be in effect on the Closing Date any order or law restraining,  
13 enjoining or otherwise prohibiting or making illegal the consummation of any of the  
14 transactions contemplated by this Agreement or any of the Included Agreements.

15          11.4   Regulatory Consents and Approvals.

16                 (a) The FERC Approval and the OPUC Approval shall have been duly  
17 obtained, made or given and shall be in full force and effect and shall be Final Orders.

18                 (b) The FERC Approval shall be satisfactory to PGE, the Tribes and  
19 Interior in each such Party's sole discretion, including approving the transactions  
20 contemplated hereby and the terms and conditions of this Agreement and each of the  
21 Included Agreements, and, with respect to PGE, the regulatory treatment of any and all  
22 financial impacts thereof.

23                 (c) The OPUC Approval shall be satisfactory in all respects to PGE in its  
24 sole discretion, including approving the transactions contemplated hereby and the terms  
25 and conditions of this Agreement and each of the Included Agreements and the  
26 regulatory treatment of any and all financial impacts thereof.

27                 (d) The OPUC Approval shall be satisfactory to Tribes in their sole  
28 discretion, but only to the extent that the OPUC Approval contains provisions which  
29 would have a material adverse effect on the interests of the Tribes under this Agreement  
30 and the Included Agreements taken as a whole.

31                 (e) The OPUC Approval shall be satisfactory to Interior in its sole  
32 discretion, but only to the extent that the OPUC Approval contains provisions which  
33 would have a material adverse effect on the interests of the Tribes under this Agreement  
34 and the Included Agreements taken as a whole.

35                 (f) Unless the sale of PGE to Sierra Pacific Resources shall have been  
36 terminated as of the Closing Date, either (i) the SEC Approval shall have been duly

1 obtained, made or given and shall be in full force and effect and shall be a Final Order or  
2 (ii) the SEC shall have issued a Final Order determining SEC Approval is not required  
3 for the sales of assets provided for by this Agreement.

4 (g) The SEC Approval shall be satisfactory in all respects to PGE in its  
5 sole discretion, including approving the transactions contemplated hereby and the terms  
6 and conditions of this Agreement and each of the Included Agreements and the  
7 regulatory treatment of any and all financial impacts thereof.

8 (h) All terminations or expirations of waiting periods imposed by any  
9 Governmental Authority necessary for the consummation of the transactions  
10 contemplated by this Agreement and the Included Agreements shall have occurred.

11 11.5 Conditions to Included Agreements.

12 Each of the respective conditions to the obligations of the Tribes and PGE to the  
13 Included Agreements, as set forth in such Included Agreements, shall have been satisfied  
14 or waived by the Party entitled to waive same.

15 11.6 Proceedings.

16 All corporate and other proceedings to be taken by each of the Tribes and PGE in  
17 connection with the transactions contemplated hereby, including the vote of the members  
18 of the Tribes referenced in the recitals hereto, and all documents incident thereto shall be  
19 reasonably satisfactory in form and substance to the other Party and its counsel, and such  
20 Party and its counsel shall have received all such certified or other copies of such  
21 documents as it or they may reasonably request.

22 11.7 Deliveries.

23 PGE and the Tribes shall have executed and delivered (a) the Asset Purchase  
24 Agreement, (b) the Ownership and Operation Agreement, (c) the Escrow Agreement, (d)  
25 the Mutual General Release, and (e) the opinions of counsel, dated as of the Closing  
26 Date, in the forms provided as Exhibits F and L, hereto, together with any and all other  
27 documents, instruments and payments required to be delivered pursuant thereto or  
28 pursuant to other provisions of this Agreement and the Included Agreements. Both the  
29 Opinion of Counsel attached hereto as Exhibit H and the approval statement attached  
30 hereto as Exhibit K delivered by Interior to the Tribes and PGE in connection with the  
31 execution of this Agreement shall not have been withdrawn or disavowed by Interior.

32 11.8 Closing.

33 Following the satisfaction or waiver of the conditions set forth in this Article XI,  
34 there shall be a closing of the transactions contemplated by this Agreement ("Closing").  
35 The Closing shall take place at the principal offices of PGE, or at such other place as  
36 PGE and the Tribes mutually agree, at 10:00 A.M. local time on the Closing Date. At the  
37 Closing, PGE and the Tribes shall execute and deliver (a) to each other, the Escrow  
38 Agreement and (b) to the Escrow Agent, pursuant to the terms and conditions of the

1 Escrow Agreement fully executed copies of (i) the Asset Purchase Agreement, (ii) the  
2 Ownership and Operation Agreement, (iii) the Mutual Settlement and Release, (iv) the  
3 Escrow Agreement (v) the opinions of counsel required by the Asset Purchase Agreement  
4 and (vi) such other and further documents, instruments, certificates and conveyances as  
5 may be necessary and appropriate to carry out and give effect to the transactions  
6 contemplated by this Agreement and the Included Agreements.

7  
8 **ARTICLE XII**  
9 **TERM AND TERMINATION**

10 This Agreement shall be effective upon the Effective Date. The Term of this  
11 Agreement shall be from the Effective Date through the New License Expiration Date;  
12 provided, however, that any obligations of any of the Parties outstanding as of the New  
13 License Expiration Date shall survive and continue. This Agreement shall be subject to  
14 termination prior to the expiration of such Term only as provided in this Article XII.  
15 Except as expressly provided in this Article XII, each of the Parties, to the extent not  
16 prohibited by law, waives all rights now or hereafter existing, conferred by statute,  
17 common law or otherwise to quit, terminate or surrender this Agreement.

18 12.1 Mutual Agreement.

19 This Agreement may be terminated at any time by mutual written consent of PGE,  
20 Interior and the Tribes.

21 12.2 Lapse of Time Prior to Closing.

22 This Agreement may be terminated by PGE, the Tribes or Interior if the Closing  
23 shall not have occurred on or before the day that is one hundred eighty (180) days after  
24 the Effective Date, provided that the right to terminate this Agreement under this  
25 Section 12.2 shall not be available to any Party whose failure to fulfill any obligation  
26 under this Agreement or any Included Agreement has been the cause of, or resulted in,  
27 the failure of the Closing to occur on or before such date; provided, however, further that  
28 if on such date any of the conditions to the Closing set forth in Section 11.4 shall not  
29 have been fulfilled, but all other conditions to the Closing shall be fulfilled or shall be  
30 capable of being fulfilled, then this Agreement may not be terminated until the first  
31 anniversary of the Effective Date.

32 12.3 Failure to Obtain Approvals/Injunction.

33 This Agreement may be immediately terminated by either PGE, the Tribes or  
34 Interior prior to the Closing if (a) any Governmental Authority whose consent is a  
35 condition to the obligations of PGE or the Tribes shall have determined not to grant its  
36 consent, (b) the FERC Approval, the OPUC Approval and the SEC Approval shall have  
37 been obtained but shall contain terms or conditions which are unsatisfactory to PGE, the  
38 Tribes and/or Interior as provided in Section 11.4, (c) one or more courts of competent



1 jurisdiction of the United States or of any state thereof shall have issued a Final Order  
2 permanently restraining, enjoining or otherwise prohibiting the Closing or (d) any statute,  
3 rule or regulation shall have been enacted by any state or federal government authority  
4 in the United States that prohibits consummation of the Closing.

5 12.4 Material Violation or Breach.

6 (a) Prior to the Closing, this Agreement may be terminated by the Tribes  
7 if there has been a material violation or breach by PGE of any agreement, representation  
8 or warranty contained in this Agreement that has rendered the satisfaction of any  
9 condition to the obligations of the Tribes to effect the Closing impossible and such  
10 violation or breach has not been waived by the Tribes. Prior to the Closing, this  
11 Agreement may also be terminated by the Tribes if (i) there has been a material violation  
12 or breach by PGE of any agreement, representation or warranty contained in this  
13 Agreement, (ii) such material violation or breach has not been waived by the Tribes, (iii)  
14 such material violation or breach is capable of being cured by PGE and (iv) PGE has  
15 failed (A) to cure such material violation or breach within thirty (30) days of receipt of  
16 written notice thereof by the Tribes or (B) in the event a material breach cannot be cured  
17 despite diligent efforts within a thirty (30) day period, PGE has failed to initiate promptly  
18 and maintain continuously diligent efforts to cure such breach.

19 (b) Prior to the Closing, this Agreement may be terminated by PGE if  
20 there has been a material violation or breach by the Tribes of any agreement,  
21 representation or warranty contained in this Agreement that has rendered the satisfaction  
22 of any condition to the obligations of PGE to effect the Closing impossible and such  
23 violation or breach has not been waived by PGE. Prior to the Closing, this Agreement  
24 may also be terminated by PGE if (i) there has been a material violation or breach by the  
25 Tribes of any agreement, representation or warranty contained in this Agreement, (ii)  
26 such violation or breach has not been waived by PGE, (iii) such material breach is  
27 capable of being cured by the Tribes and (iv) the Tribes have failed (A) to cure such  
28 material breach within thirty (30) days of receipt of written notice thereof by PGE or (B)  
29 in the event a material breach cannot be cured despite diligent efforts within a thirty (30)  
30 day period, the Tribes have failed to initiate promptly and maintain continuously diligent  
31 efforts to cure such breach.

32 (c) After the Closing and prior to the Transfer Date, this Agreement may  
33 be terminated by the Tribes only (i) if (A) there has been a material violation or breach by  
34 PGE of any agreement, representation or warranty contained in this Agreement of such  
35 significance as to deprive the Tribes of the material economic benefits and overall value  
36 of the consideration provided to the Tribes by PGE pursuant to all of the terms and  
37 conditions of this Agreement, (B) such material violation or breach has not been waived  
38 by the Tribes, and (C) PGE has failed to cure such material violation or breach within  
39 seventy-five (75) days of written notice thereof by the Tribes or (ii) pursuant to Section  
40 12.5(b). For all other material violations or breaches of this Agreement by PGE after the  
41 Closing the Tribes shall be entitled, subject to the limitations on damages and remedies  
42 otherwise provided for herein, to seek such remedies other than termination, including

1 damages and fees of attorneys, against PGE with respect to any such breach as are  
2 provided in this Agreement or as are otherwise available at law or in equity.

3 (d) After the Closing and prior to the Transfer Date, this Agreement may  
4 be terminated by PGE only (i) if (A) there has been a material violation or breach by the  
5 Tribes of any agreement, representation or warranty contained in this Agreement of such  
6 significance as to deprive PGE of the material economic benefits and overall value of the  
7 consideration provided to PGE by the Tribes pursuant to all of the terms and conditions  
8 of this Agreement, (B) such material violation or breach has not been waived by PGE,  
9 and (C) the Tribes have failed to cure such material violation or breach within seventy-  
10 five (75) days of written notice thereof by PGE or (ii) pursuant to Section 12.5(a) or (iii)  
11 if the Tribes have not satisfied Escrow Condition 2 described in Schedule B of the  
12 Escrow Agreement by the Outside Date and such failure is continuing. For all other  
13 material violations or breaches of this Agreement by the Tribes after the Closing PGE  
14 shall be entitled, subject to the limitations on damages and remedies otherwise provided  
15 for herein, to seek such remedies other than termination, including damages and fees of  
16 attorneys, against the Tribes with respect to any such breach as are provided in this  
17 Agreement or as are otherwise available at law or in equity.

#### 18 12.5 Subsequent Regulatory Events.

19 (a) If at any time prior to the Transfer Date, FERC or any court enters a  
20 Final Order with respect to Project No. 2030 or the Pelton and Round Butte Facilities  
21 which conflicts with, alters, amends, reconsiders, modifies, or in any way affects the  
22 terms and conditions of the FERC Approval so as, in PGE's reasonable business  
23 judgment, to have material adverse effect on the economic benefits to PGE of the  
24 transactions contemplated by this Agreement and the Included Agreements taken as a  
25 whole, or to impose upon PGE an obligation to pay Additional Compensation to the  
26 Tribes, PGE shall have the right, to be exercised only within sixty (60) days of the date of  
27 the subject Final Order, to terminate this Agreement and the Included Agreements upon  
28 written notice to the Tribes and Interior.

29 (b) If at any time prior to the Transfer Date, FERC or any court enters a  
30 Final Order with respect to Project No. 2030 or the Pelton and Round Butte Facilities  
31 which conflicts with, alters, amends, reconsiders, modifies, or in any way affects the  
32 terms and conditions of the FERC Approval so as, in the Tribes' reasonable business  
33 judgment, to have a material adverse effect on the economic benefits to the Tribes of the  
34 transactions contemplated by this Agreement and the Included Agreements taken as a  
35 whole, or to reduce the Compensation to the Tribes below that provided in Article IV, the  
36 Tribes shall have the right, to be exercised only within sixty (60) days of the date of the  
37 subject Final Order, to terminate this Agreement and the Included Agreements upon  
38 written notice to PGE and Interior.

#### 39 12.6 Effect of Any Failure of FERC to Issue the New FERC License to PGE 40 and the Tribes.

41 Prior to or after the Transfer Date:

1 (a) In the event FERC determines not to issue the Tribes and PGE the  
 2 New FERC License, then either or both of the Tribes and PGE may challenge legally  
 3 such determination. Pending the timely filing of any such challenge and during the  
 4 pendency of any filed challenge, including all appeals thereof, this Agreement shall  
 5 remain in full force and effect and neither the Tribes nor PGE shall have the right to  
 6 terminate this Agreement on account of such FERC determination. In the event of any  
 7 FERC determination not to issue to the Tribes and PGE the New FERC License which  
 8 determination becomes a Final Order, this Agreement and the Included Agreements shall  
 9 thereupon terminate without further action by any Party.

10 (b) In the event this Agreement is terminated pursuant to this Section 12.6,  
 11 the Tribes and PGE shall comply with any orders of FERC with respect to its associated  
 12 determination and the costs thereof shall be Costs of Operation as defined in the  
 13 Ownership and Operation Agreement. Notwithstanding the foregoing sentence, if this  
 14 Agreement is terminated pursuant to this Section 12.6, then PGE shall bear a portion of  
 15 what would otherwise be costs borne by the Tribes related to the decommissioning of the  
 16 Pelton and Round Butte Facilities. Such portion of the decommissioning costs that would  
 17 have been borne by the Tribes as Costs of Operation shall be a function of the date when  
 18 the FERC determination not to issue to the Tribes and PGE the New FERC License  
 19 becomes no longer subject to appeal in accordance with the following table. Beginning  
 20 in the year 2002 PGE shall bear ninety-eight percent (98%) of what otherwise would  
 21 have been the Tribes Ownership Share of decommissioning costs; each year thereafter the  
 22 percentage borne by PGE shall be reduced by two percent (2%). The following table  
 23 illustrates this arrangement, assuming that by the date indicated FERC has not issued the  
 24 New FERC License.

<u>Date FERC Determination Final</u>	<u>Portion of the Tribes' Ownership Share of Decommissioning Costs Borne by PGE</u>
2002	98%
2003	96%
2004	94%
2005	92%
2006	90%
2007	88%

36 Once FERC issues the New FERC License, PGE shall have no responsibility to bear any  
 37 of the Tribes' Ownership Share of decommissioning costs.

38  
 39 12.7 Rejection of Proposed New FERC License by the Tribes or PGE or Both.

40 Prior to or after the Transfer Date:

41 (a) In the event FERC issues a proposed New FERC License that  
 42 materially conflicts with the terms or conditions of this Agreement or is otherwise  
 43 unacceptable in the judgment of the Tribes or PGE or both, then either the Tribes or PGE,

1 or both, may challenge legally the conflicting terms and conditions and/or acceptable  
2 provisions proposed by FERC. Pending the timely filing of any such challenge and  
3 during the pendency of any filed challenge, including all appeals thereof, this Agreement  
4 shall remain in full force and effect and no Party shall have the right to terminate this  
5 Agreement on account of such FERC determination. In the event any such FERC  
6 proposed terms and conditions and/or unacceptable provisions to the New FERC License  
7 become no longer subject to appeal, then either the Tribes or PGE, or both, may reject the  
8 proposed New FERC license. Any such rejection (or failure to accept the new license  
9 within the period required by FERC) shall automatically constitute a notice of  
10 termination by the rejecting Party to the other Parties to this Agreement.

11 (b) In the event this Agreement is terminated pursuant to this Section 12.7,  
12 the Parties shall comply with any orders of FERC with respect to its associated  
13 determination and the costs thereof shall be Costs of Operation as defined in the  
14 Ownership and Operation Agreement.

15 12.8 Rejection by PGE Resulting from Conditions.

16 As provided in Section 5.13, PGE may reject the New FERC License and  
17 terminate this Agreement in the event Interior seeks to impose any condition(s) on the  
18 New FERC License, or FERC accepts an Interior recommendation to impose  
19 condition(s), which would require any modification of the ownership of the Pelton and  
20 Round Butte Facilities at any time or which would require PGE to pay the Tribes any  
21 Additional Compensation.

22 12.9 Failure of Tribes to Secure Funding in Order to Pay Purchase Price.

23 In the event the Tribes have fulfilled their covenant contained in Section 10.3(h),  
24 but nevertheless do not secure the funding to pay to PGE the Purchase Price (as defined  
25 in the Asset Purchase Agreement), this Agreement and the Included Agreements shall  
26 terminate upon the Outside Date (as defined in the Escrow Agreement) without further  
27 action by any Party.

28 12.10 Effect of Termination.

29 If this Agreement is validly terminated pursuant to this Article XII, this  
30 Agreement shall forthwith become null and void, and there shall be no liability or  
31 obligation on the part of any Party (or any of their respective officers, directors,  
32 employees, agents or other representatives or Affiliates), except as provided in the next  
33 succeeding sentence and except as may be expressly provided to the contrary herein.  
34 Notwithstanding any other provision in this Agreement to the contrary, upon termination  
35 by the Tribes of this Agreement, PGE shall remain liable to the Tribes for any willful  
36 breach by PGE of the representations, warranties or covenants of PGE set forth in this  
37 Agreement existing at the time of such termination, and the Tribes shall remain liable to  
38 PGE for any willful breach by the Tribes of the representations, warranties or covenants  
39 of the Tribes set forth in this Agreement existing at the time of such termination, and  
40 either Party, subject to the limitations on damages and remedies otherwise provided for

1 herein, may seek such remedies, including damage and fees of attorneys, against the other  
2 with respect to any such breach as are provided in this Agreement as are otherwise  
3 available at law or in equity. Upon any termination prior to the Transfer Date, and only  
4 upon any such termination prior to the Transfer Date, each of the Parties shall be restored  
5 to the position they occupied with respect to the subject matter of this Agreement and the  
6 Included Agreements as if this Agreement and the Included Agreements had not been  
7 executed and delivered, including with respect to their competing applications for the  
8 New FERC License and any and all pre-existing Claims, rights, obligations and duties of  
9 the Parties.

10 12.11 Effect of FERC Issuance of a New FERC License for a Stated Term Less  
11 than Forty (40) Years.

12 (a) The Tribes and PGE have individually and mutually determined that it  
13 is in their interests to obtain a New FERC License with a Stated Term of fifty (50) years.  
14 They have also determined that such a Stated Term would best allow them to incur over  
15 an appropriate period costs to mitigate potential impacts of Project No. 2030 on natural  
16 resources. Finally, the Tribes and PGE have negotiated the economic benefits and costs  
17 of this Agreement on the basis that the sum of (a) the period from January 1, 2002 to the  
18 date FERC issues the New FERC License, (b) the Stated Term and (c) the period from  
19 the end of such Stated Term to the date FERC issues a third long-term license for Project  
20 No. 2030, will be at least fifty (50) years and that the Compensation being paid by PGE  
21 under this Agreement relates to the rights granted PGE hereunder for a period at least that  
22 long. The Tribes and PGE acknowledge that were the New FERC License to be for a  
23 Stated Term less than forty (40) years and were the rights granted PGE hereunder to  
24 expire after the New License Expiration Date, then PGE would have compensated the  
25 Tribes to a greater extent than intended. The Tribes and PGE therefore agree that in the  
26 event FERC issues the New FERC License for a Stated Term less than forty (40) years  
27 and either the Tribes or PGE or both are licensees for the subsequent FERC license, then  
28 the Tribes and PGE shall make an equitable adjustment in the economics of this  
29 Agreement to account for the lesser period of the New FERC License.

30 (b) If the conditions specified in Section 12.11(a) are met, then the nature  
31 and extent, if any, of the equitable adjustment referenced therein shall be as provided in  
32 this Section 12.11(b).

33 (i) In the event PGE and the Tribes continue as co-licensees of  
34 Project No. 2030 beyond the New License Expiration Date with the same  
35 percentage ownership shares as they had as of the New License Expiration  
36 Date, the Tribes hereby waive their entitlement to collect Section 10(e)  
37 payments from PGE commencing on the New License Expiration Date  
38 and continuing for a period equal to 40 years minus the Stated Term.

39 (ii) In the event PGE's Ownership Share in Project No. 2030  
40 subsequent to the New License Expiration Date is less than 49.99%, the  
41 Tribes shall pay to PGE the net benefits (the fair market value of the  
42 Project's output less the costs to produce such output) of the project not

1 received by PGE for the number of years by which the Stated Term is less  
 2 than forty (40) years. (Thus, for example, if the Stated Term were thirty-  
 3 five (35) years and PGE did not continue as a licensee, then PGE would be  
 4 entitled to be paid 49.99% of the net benefits of the Project for the five  
 5 year period commencing on the New License Expiration Date. If the  
 6 Stated Term were thirty-five (35) years and PGE did continued as a  
 7 licensee having a 25% ownership percentage, then PGE would be entitled  
 8 to be paid 24.99% of the net benefits of the Project for the five year period  
 9 commencing on the New License Expiration Date). The calculation of net  
 10 benefits is based on the actual hourly market value of the energy, the  
 11 prescheduled amount of energy based upon capability of the Pelton and  
 12 Round Butte Facilities, and the capital, operations, and maintenance costs  
 13 PGE would have incurred if it still owned 49.99% of the Pelton and Round  
 14 Butte Facilities. Such net benefits shall be calculated in accordance with  
 15 the following formula:

16 Annual Tribes Payment to PGE = (OP\*Annual Energy Value)  
 17 - (OP/49.99%)\*((GP + Additions - AD-DT) \*  
 18 CC)  
 19 - O&M \* OP  
 20 - Depreciation\*OP  
 21 - Property Taxes\*OP)

22 Where,

- 23 **OP** = The difference obtained by subtracting PGE's Ownership Share  
 24 percentage after the New License Expiration Date from 49.99%  
 25 **GP** = PGE's gross plant in service value associated at the end  
 26 of the New FERC License  
 27 **AD** = PGE's accumulated depreciation at the end of the New FERC  
 28 License plus "Depreciation" (as defined below) subsequent to the  
 29 end of the New FERC License  
 30 **DT** = PGE's deferred taxes at the end of the New FERC License plus  
 31 deferred taxes that would have been accrued subsequent to the  
 32 end of the New FERC License  
 33 **Additions** = .4999 times total Project cumulative Capital Additions  
 34 following the end of the New FERC License  
 35 **Depreciation** = .4999 times total annual Project Depreciation on plant &  
 36 Capital Additions following the end of the New FERC License  
 37 **O&M** = Total annual Project direct operation & maintenance expenses  
 38 but not to exceed the average real annual Project direct O&M for  
 39 the last ten years of the New FERC License (determined by  
 40 adjusting actuals to account for changes in the CPI) unless such  
 41 excess is attributable to conditions imposed by the FERC license  
 42 which follows the New FERC License (Budget trued up to actuals  
 43 at year end)  
 44 **CC** = PGE's weighted average cost of capital, grossed up for income  
 45 taxes, of 12%

1 **Scheduled Hourly Project Energy** = Available Project Energy pre-  
2 scheduled on hourly basis

3 **Hourly Market Price** = Mid-Columbia hourly market price or  
4 appropriate substitute

5 **Annual Energy Value** = Annual sum (Scheduled Hourly Project  
6 Energy \* Hourly Market Price)  
7

8 For purposes of the monthly calculation the energy value would be for the  
9 specific month, O&M would be the budget spread equally over the year  
10 and trued up to actuals in the December billing, while the capital costs are  
11 assumed to be spread equally over the year with no true up during the  
12 year. Payments would be made on a monthly basis within 15 days of the  
13 end of the month. Payments by the Tribes to PGE pursuant to this Section  
14 12.11(b)(ii) would be net of all Section 10(e) obligations PGE would  
15 have to the Tribes for the applicable period related to PGE's actual  
16 ownership percentage of the Pelton and Round Butte Facilities.  
17

18 (iii) In the event PGE's Ownership Share in Project No. 2030  
19 subsequent to the New License Expiration Date exceeds 49.99%, PGE  
20 shall pay to the Tribes the net benefits (the fair market value of the  
21 Project's output less the costs to produce such output) of the project not  
22 received by the Tribes for the number of years by which the Stated Term  
23 is less than forty (40) years. (Thus, for example, if the Stated Term were  
24 thirty-five (35) years and the Tribes did not continue as a licensee, then,  
25 assuming the Tribes had exercised all their purchase options, the Tribes  
26 would be entitled to be paid 50.01% of the net benefits of the Project for  
27 the five year period commencing on the New License Expiration Date. If  
28 the Stated Term were thirty-five (35) years and the Tribes continued as a  
29 licensee having a 25% ownership percentage, then the Tribes would be  
30 entitled to be paid 25.01% of the net benefits of the Project for the five  
31 year period commencing on the New License Expiration Date). The  
32 calculation of net benefits is based on the actual hourly market value of  
33 the energy, the prescheduled amount of energy based upon capability of  
34 the Pelton and Round Butte Facilities, and the capital, operations, and  
35 maintenance costs the Tribes would have incurred if they still owned  
36 50.01% of the Pelton and Round Butte Facilities. Such net benefits shall  
37 be calculated in accordance with the following formula:

38 Annual PGE Payment to the Tribes =(OP\*Annual Energy Value)

- 39 - DS  
40 - O&M \* OP  
41 - R&R  
42 - PT  
43 - A

44 Where,

1           **OP** = The difference obtained by subtracting the Tribes' Ownership  
2           Share percentage after the New License Expiration Date from  
3           50.01%  
4           **DS** = The Tribes' hypothetical debt service related to OP, including  
5           return of and return on any Tribal equity at the same rate and  
6           using the same term as debt financing  
7           **R&R** = Renewals and replacements, plus any other capital requirements,  
8           related to OP that the Tribes would have normally funded from  
9           revenue, less interest on reserves associated with financing  
10          **PT** = Payments in lieu of taxes the Tribes would have made relative to  
11          OP  
12          **A** = The Tribes Project administration costs related to OP  
13          **O&M** = Total annual Project direct operation & maintenance expenses  
14          but not to exceed the average real annual Project direct O&M for  
15          the last ten years of the New FERC License (determined by  
16          adjusting actuals to account for changes in the CPI) unless such  
17          excess is attributable to conditions imposed by the FERC license  
18          which follows the New FERC License (Budget trued up to actuals  
19          at year end)  
20          **Scheduled Hourly Project Energy** = Available Project Energy pre-  
21          scheduled on hourly basis  
22          **Hourly Market Price** = Mid-Columbia hourly market price or  
23          appropriate substitute  
24          **Annual Energy Value** = Annual sum (Scheduled Hourly Project  
25          Energy \* Hourly Market Price)

26  
27          For purposes of the monthly calculation the energy value would be for the  
28          specific month, O&M would be the budget spread equally over the year  
29          and trued up to actuals in the December billing, while the capital costs are  
30          assumed to be spread equally over the year with no true up during the  
31          year. Payments would be made on a monthly basis within 15 days of the  
32          end of the month. Payments by PGE to the Tribes pursuant to this Section  
33          12.11(b)(iii) would be in lieu of all Section 10(e) obligations PGE would  
34          have to the Tribes for the applicable period.

35  
36                 (iv)     In the event neither PGE nor the Tribes continue as a  
37          licensee of the Project , then neither PGE nor the Tribes shall be entitled to  
38          an equitable adjustment to account for the shorter term of the New FERC  
39          License.

40                 (c) Other than as specified in this Section 12.11, neither the Tribes nor  
41          PGE shall be entitled to an adjustment to account for the period from January 1, 2002  
42          through the New License Expiration Date being a period shorter than or longer than fifty  
43          (50) years.



1 12.12 Rights at End of New FERC License.

2 The Tribes and PGE agree that each of them shall be permitted, if they wish, to  
3 compete for the FERC license for Project No. 2030 that follows the New FERC License  
4 and that nothing in this Agreement shall preclude them from doing so. In the event the  
5 ownership shares of the Tribes and PGE in the Pelton and Round Butte Facilities are  
6 different during such new license period from what they are at the end of the New FERC  
7 License, then the Party achieving an increase shall purchase its increased share from the  
8 other Party at the price lawfully determined by FERC for such ownership share.

9 **ARTICLE XIII**  
10 **WAIVER OF IMMUNITY; DISPUTES**

11 13.1 Waiver of Immunity.

12 The Tribes acknowledge and agree that in entering into this Agreement and the  
13 Included Agreements, they may incur obligations to PGE, and PGE’s successors and  
14 assigns, and may become liable to these parties for injunctive or declaratory relief or for  
15 damages. The Tribes further acknowledge that PGE would not enter into this Agreement  
16 and the Included Agreements with the Tribes if the Tribes could defeat or hinder  
17 enforcement against them of the rights granted to PGE by claiming sovereign immunity.  
18 SUBJECT TO THE PROVISIONS OF SECTION 13.5, THE TRIBES THEREFORE  
19 HEREBY CONSENT TO SUIT, ARBITRATION, ENFORCEMENT AND  
20 COLLECTION OF JUDGMENTS, AWARDS, INJUNCTIONS AND DECLARATORY  
21 JUDGMENTS AS TO ANY OBLIGATIONS ARISING OUT OF THIS AGREEMENT  
22 AND THE INCLUDED AGREEMENTS. THE TRIBES FURTHER EXPRESSLY  
23 WAIVE, WITHOUT LIMITATION, ANY CLAIM OR ASSERTION OF SOVEREIGN  
24 IMMUNITY FROM SUIT IN ACTIONS (A) TO INTERPRET OR ENFORCE ANY  
25 PROVISION OF OR RIGHTS GRANTED IN THIS AGREEMENT, (B) TO SEEK  
26 JUDGMENT FOR MONETARY OBLIGATIONS ARISING UNDER THIS  
27 AGREEMENT AND THE INCLUDED AGREEMENTS AND (C) TO ENFORCE AND  
28 COLLECT ANY JUDGMENT IN ANY SUIT OR ARBITRATION CONCERNING OR  
29 ARISING OUT OF THIS AGREEMENT AND THE INCLUDED AGREEMENTS.

30 13.2 Choice of Laws.

31 This Agreement shall be governed by, and construed, interpreted and enforced in  
32 accordance with, the substantive law of the State of Oregon (without reference to any  
33 principles of conflicts of laws), except to the extent such Oregon laws may be preempted  
34 by the laws of the United States of America.

35 13.3 Dispute Resolution between the Tribes and PGE

36 (a) Mandatory Mediation. As a condition precedent to commencing any  
37 proceedings, suit, action or arbitration by one of the Tribes or PGE against the other  
38 relating to this Agreement, the subject matter hereof, any activities undertaken pursuant  
39 to this Agreement or with respect to the operation, maintenance or management of the

1 Pelton and Round Butte Facilities (collectively referred to as “Proceedings”), the  
2 complaining Party shall first submit the claim or controversy to mandatory mediation for  
3 a period of ninety (90) days following appointment of a mediator; provided, that the  
4 Tribes and PGE need not pursue mediation with respect to any dispute arising under  
5 Section 4.5 relating to timber valuations or to obtain immediate injunctive relief to  
6 prevent irreparable harm. The Tribes and PGE agree to cooperate and operate in good  
7 faith to appoint the mediator and to attempt to resolve all matters in dispute with the  
8 assistance of the mediator. If the Tribes and PGE are unable to agree unanimously upon  
9 the appointment of the mediator, then they shall unanimously seek appointment of a  
10 mediator by the Chief Judge of the United States District Court for the District of Oregon.  
11 If the Chief Judge refuses, or fails, to act within twenty (20) days the mediator shall be  
12 selected by the senior United States Senator for the State of Oregon. PGE and the Tribes  
13 agree to share equally the mediator’s fees and expenses. In the event the senior United  
14 States Senator for the State of Oregon also refuses or fails to act within such period, then  
15 either the Tribes or PGE may bypass mediation and proceed in accordance with  
16 paragraphs (b) and (c) below.

17 (b) Jurisdiction and Venue. The Tribes and PGE agree that any disputes  
18 concerning, relating to or arising out of this Agreement and the Included Agreements  
19 present a federal question. With respect to any Proceeding each of the Tribes and PGE  
20 irrevocably submits to the exclusive jurisdiction of the United States District Court for  
21 the District of Oregon located in Portland, Oregon. Each of the Tribes and PGE  
22 irrevocably waives any objection which it may have at any time to the laying of venue of  
23 any Proceeding brought in the United States District Court for the District of Oregon  
24 located in Portland, Oregon, waives any claim that such Proceeding has been brought in  
25 an inconvenient forum and further waives the right to object, with respect to such  
26 Proceeding, that such court should not exercise its jurisdiction or should defer to some  
27 other judicial or administrative tribunal. In the event such court determines that the  
28 subject matter of the Proceeding does not fall within the statutory jurisdiction of U.S.  
29 District Courts or for any reason declines to exercise jurisdiction over the Proceeding,  
30 then the dispute shall be resolved by judicial proceedings in a court of the State of  
31 Oregon which has jurisdiction and venue. Except for the limited purpose specified in  
32 Section 13.3(c) below, each of the Tribes and PGE irrevocably waives any right it might  
33 otherwise have to seek to have any Proceeding determined in any tribal court and agrees  
34 that assumption of jurisdiction by any federal or state court shall not be delayed or  
35 curtailed by any doctrine requiring exhaustion of tribal court remedies. The Tribes  
36 specifically waive any right they may have to have any Proceeding involving PGE and  
37 PGE’s Personnel and Invitees and their activities related to Project No. 2030 determined  
38 in any tribal court. PGE’s entry into this Agreement and the Included Agreements shall  
39 not be deemed to give rise to a consensual relationship that would establish the Tribes’  
40 jurisdiction over PGE’s activities.

41 (c) Determination by FERC or Arbitration if No U.S. District Court or  
42 Oregon State Court Jurisdiction. In the event both the United States District Court for the  
43 District of Oregon and the courts of the State of Oregon determine that the subject matter  
44 of the Proceeding does not fall within their statutory jurisdiction or for any reason both  
45 decline to exercise jurisdiction over the Proceeding, then the Tribes and PGE shall first

1 seek to have such Proceeding determined by FERC. The Tribes and PGE further agree  
2 that in the event any Proceeding is so brought to FERC and FERC declines to determine  
3 the Proceeding, then the Tribes and PGE shall submit the Proceeding to arbitration in  
4 Portland, Oregon under the Commercial Arbitration Rules of the American Arbitration  
5 Association in effect on the date such arbitration is commenced, including the optional  
6 rules for provisional remedies of such association; provided, however, that any provision  
7 of this Article XIII shall control over any conflicting rules of the American Arbitration  
8 Association. The Tribes and PGE agree that any such Proceeding shall be submitted to  
9 three arbitrators selected by the American Arbitration Association from its panel of  
10 arbitrators. The arbitrators shall not have authority to award damages prohibited by this  
11 Agreement. The Tribes and PGE further agree that they will faithfully observe this  
12 Agreement and the rules, that they will abide by and perform any award rendered by the  
13 arbitrators and that a judgment of a court having jurisdiction may be entered upon the  
14 award; provided, however, the award may be challenged and modified in whole or part or  
15 denied enforcement in whole or part, but only on the basis that the award exceeded the  
16 scope of the arbitrators' authority under this Agreement or the Federal Arbitration Act. In  
17 the event neither a federal court nor an Oregon court has, or will accept, jurisdiction to  
18 enter an order upon the award, then the Tribes and PGE agree that a tribal court judge pro  
19 tempore of the Warm Springs Tribal Court shall have jurisdiction exclusively for the  
20 purpose of entering an order upon the award. The tribal court judge pro tempore shall be  
21 a retired federal court judge who shall be selected from a publicly available list of retired  
22 federal court judges, by mutual agreement of the Tribes and PGE, with each of the Tribes  
23 and PGE proposing three names from such list to the other and the Tribes and PGE  
24 seeking to reach agreement on a judge from such proposed names within fifteen days  
25 after the exchange of their respective lists of three names. If the Tribes and PGE are  
26 unable to agree on a judge from such list, the selection shall be made from such publicly  
27 available list by the CPR Institute for Dispute Resolution, 366 Madison Ave., New York,  
28 NY ("CPR"). If CPR is unable or unwilling to select such judge, then the selection shall  
29 be made from such publicly available lists, taking into consideration the names provided  
30 on the lists proposed by the Tribes and PGE, by another alternative dispute resolution  
31 service agreeable to the Tribes and PGE. Judges proposed or selected shall provide to  
32 each of the Tribes and PGE statements of any relationships with either Party. Any judge  
33 selected shall be impartial and shall not have disqualifying relationships with any Party.

34 13.4 Disputes in which Interior is a Participant.

35 (a) Voluntary mediation. Prior to commencing any Proceedings relating  
36 to Interior's actions or inactions under this Agreement, the Parties shall, to the extent  
37 practicable, provide notice of the dispute and an opportunity to meet to resolve the  
38 dispute.

39 (b) Jurisdiction. The Tribes and PGE agree that any disputes concerning,  
40 relating to or arising out of this Agreement and the Included Agreements that involve  
41 Interior present a federal question. With respect to any Proceeding involving Interior each  
42 of the Tribes and PGE irrevocably submits to the exclusive jurisdiction of the courts of  
43 the United States. The Tribes and PGE each irrevocably waives any objection which it  
44 may have at any time that such court should not exercise its jurisdiction or should defer to

1 some other judicial or administrative tribunal. Each of the Tribes and PGE irrevocably  
2 waives any right it might otherwise have to seek to have any Proceeding in which Interior  
3 is a participant determined in any tribal court and agrees that assumption of jurisdiction  
4 by any federal court shall not be delayed or curtailed by any doctrine requiring  
5 exhaustion of tribal court remedies.

6 (c) No waiver of sovereign immunity of Interior. Interior does not waive  
7 any claim or assertion of sovereign immunity from suit.

8 13.5 Limitations on Recourse.

9 As of the Transfer Date, the Tribes and PGE hereby pledge all their Project Rights  
10 (as defined in the Ownership and Operation Agreement) of the Pelton and Round Butte  
11 Facilities to satisfy any and all obligations they may have to each other under this  
12 Agreement and otherwise with respect to the Pelton and Round Butte Facilities. As of  
13 the Transfer Date, PGE agrees to seek satisfaction of any money damage claims it may  
14 have against the Tribes under this Agreement and the Included Agreements with respect  
15 to the Pelton and Round Butte Facilities only from the Tribes' Allocation (as defined in  
16 the Ownership and Operation Agreement). Likewise, as of the Transfer Date the Tribes  
17 agree to seek satisfaction of any money damage claims they may have against PGE under  
18 this Agreement and the Included Agreements with respect to the Pelton and Round Butte  
19 Facilities only from PGE's Allocation (as defined in the Ownership and Operation  
20 Agreement). The provisions of this Section 13.5 do not limit the rights of either the  
21 Tribes or PGE to seek (a) specific performance of this Agreement, (b) other injunctive  
22 relief or (c) any other form of non-monetary relief.

23 13.6 Disclaimer of Tribal Court Jurisdiction Over Actions by Third Parties  
24 Against PGE.

25 Tribal courts shall have no jurisdiction in any actions by any Person not a Party to  
26 this Agreement against PGE during the Term of this Agreement.

27 **ARTICLE XIV**  
28 **MISCELLANEOUS**

29 14.1 Further Assurances; Post-Closing Cooperation.

30 Subject to the terms and conditions of this Agreement, PGE and the Tribes shall  
31 each use commercially reasonable efforts to take, or cause to be taken, all actions and to  
32 do, or cause to be done, all things necessary, proper and advisable under Applicable Law  
33 to consummate and make effective the transactions contemplated by this Agreement and  
34 the Included Agreements, including efforts to obtain all required consents and approvals.  
35 Neither of the Parties shall, without the prior written consent of the other Party, take or  
36 fail to take any action that would reasonably be expected to prevent or materially impede,  
37 interfere with or delay the transactions contemplated by this Agreement or any of the  
38 Included Agreements. From time to time after the date hereof, whether prior to or after  
39 the Closing, and without further consideration, the Parties shall, each at its own expense,

1 execute and deliver such documents, and provide such information, to the other Party as  
2 such Party may reasonably request in order to accomplish and consummate the  
3 transactions contemplated by, and perform their respective obligations under, this  
4 Agreement and the Included Agreements. At the request of PGE, the Tribes shall execute  
5 a short-form version of this Agreement for recordation.

6 14.2 Assignments and Transfers

7 Neither this Agreement nor any right, interest or obligation hereunder may be  
8 assigned, sold, transferred or conveyed by either the Tribes or PGE without the prior  
9 written consent of the other, which Party may withhold its consent in its sole discretion,  
10 and any attempted assignment not in compliance therewith shall be void, except the  
11 following assignments and transfers which shall not require such consent:

12 (a) assignments and transfers which occur by operation of law;

13 (b) assignments and transfers by the Tribes of any of their rights under the  
14 Ownership and Operation Agreement specifically permitted by Section 12.1(c) of the  
15 Ownership and Operation Agreement; or

16 (c) assignments and transfers by PGE of its rights, interests and  
17 obligations hereunder, in whole or in part, in conjunction with an assignment or transfer  
18 permitted pursuant to Section 12.1(d)-(h) of the Ownership and Operation Agreement.

19 Assignments and transfers shall not relieve either the Tribes or PGE of any  
20 obligation hereunder, except to the extent agreed in writing by the other Party, provided  
21 that an otherwise valid assignment or transfer by PGE to a Person (a) having, as of the  
22 date of such assignment or transfer, a tangible net worth not less than that of PGE as of  
23 such date (or whose obligations hereunder are guaranteed by a Person having such  
24 tangible net worth), and (b) having an Investment Grade or higher rating on its senior,  
25 unsecured debt as of such date, shall automatically result in a full and complete release of  
26 PGE from all of its unmatured obligations hereunder and a novation of this Agreement  
27 between the Tribes and such assignee or transferee.

28 Assignment or transfers by PGE of a portion or all of its ownership shares of the  
29 Project are subject to PGE's obligations, and the Tribes' rights, pursuant to Section 5.6 of  
30 this Agreement.

31 14.3 Notices.

32 (a) Means of Notification. Unless this Agreement specifically requires  
33 otherwise, any notice, demand or request provided for in this Agreement, or served, given  
34 or made in connection with it, shall be in writing and shall be deemed properly served,  
35 given or made if delivered in person or sent by telegraph, telex, or fax or by  
36 acknowledged delivery, or sent by registered or certified mail, postage prepaid to the  
37 person specified below:

38

1           **To the Tribes:**  
2           Confederated Tribes of the Warm Springs Reservation  
3           Chairman, Tribal Council  
4           P. O. Box C  
5           Warm Springs, OR 97761

6  
7           with a copy to:

8  
9           Confederated Tribes of the Warm Springs Reservation  
10          Secretary-Treasurer  
11          P. O. Box C  
12          Warm Springs, OR 97761

13  
14          and a copy to:

15  
16          Mr. Dennis C. Karnopp, Esq.  
17          Karnopp, Petersen, Noteboom, Hansen, Arnett, & Sayeg LLP  
18          1201 NW Wall St.  
19          Suite 300  
20          Bend, OR 97701

21  
22          **To Interior:**  
23          Secretary  
24          U.S. Department of the Interior  
25          1849 C Street, NW Mail Stop 7229  
26          Washington, DC 20240-0001

27  
28          with a copy to:

29  
30          Solicitor  
31          U.S. Department of the Interior  
32          1849 C Street, NW Mail Stop 6352  
33          Washington, DC 20240-0001

34  
35          and with a copy to:

36  
37          Northwest Regional Director  
38          Northwest Region  
39          Bureau of Indian Affairs  
40          911 NE 11<sup>th</sup> Ave.  
41          Portland, OR 97232

42  
43          **To PGE:**  
44          Portland General Electric Company  
45          Attention: Senior Vice President, Power Supply  
46          1-World Trade Center-17

1 121 SW Salmon Street  
2 Portland, OR 97204

3  
4 with a copy to:

5  
6 Portland General Electric Company  
7 Attention: General Counsel  
8 1-World Trade Center-17  
9 121 SW Salmon Street  
10 Portland, OR 97204

11  
12 (b) Effective Time. Notice given pursuant to this Section 14.3 shall be  
13 effective upon physical receipt by both of the two remaining Parties.

14 14.4 No Consequential, Incidental or Punitive Damages.

15 Consistent with the Recitals to this Agreement, the Tribes and PGE desire to  
16 minimize to the extent possible the potential for future disagreements between them with  
17 respect to Project No. 2030 from matters arising under this Agreement. The Tribes and  
18 PGE also recognize the potential magnitude of the potential consequential, incidental or  
19 punitive damages that might arise from this Agreement and desire to eliminate the risks  
20 each might face were such categories of damages not excluded. For these reasons, the  
21 Tribes and PGE agree that the remedies available to them shall be limited as provided  
22 below.

23 (a) THE TRIBES AND PGE AGREE THAT FOR ANY CLAIM  
24 ARISING FROM A THEORY BASED ON CONTRACT LAW, IN NO EVENT  
25 SHALL EITHER THE TRIBES OR PGE BE LIABLE TO EACH OTHER  
26 HEREUNDER FOR ANY LOST OR PROSPECTIVE PROFITS OR ANY OTHER  
27 CONSEQUENTIAL (INCLUDING, BUT NOT LIMITED TO REPLACEMENT  
28 POWER COSTS), PUNITIVE, EXEMPLARY, INCIDENTAL OR INDIRECT LOSSES  
29 OR DAMAGES UNDER OR IN RESPECT OF THIS AGREEMENT OR FOR ANY  
30 BREACH OR FAILURE OF PERFORMANCE RELATED HERETO HOWSOEVER  
31 CAUSED.

32 (b) THE TRIBES AND PGE AGREE THAT FOR ANY CLAIM  
33 ARISING FROM A THEORY BASED ON TORT LAW, IN NO EVENT SHALL  
34 EITHER THE TRIBES OR PGE BE LIABLE TO EACH OTHER HEREUNDER FOR  
35 ANY LOST OR PROSPECTIVE PROFITS OR ANY OTHER CONSEQUENTIAL  
36 (INCLUDING, BUT NOT LIMITED TO REPLACEMENT POWER COSTS),  
37 PUNITIVE, EXEMPLARY, INCIDENTAL OR INDIRECT LOSSES OR DAMAGES  
38 UNDER OR IN RESPECT OF THIS AGREEMENT OR FOR ANY BREACH OR  
39 FAILURE OF PERFORMANCE RELATED HERETO HOWSOEVER CAUSED,  
40 WHETHER OR NOT ARISING FROM A PARTY'S SOLE, JOINT OR CURRENT  
41 NEGLIGENCE, GROSS NEGLIGENCE OR RECKLESS CONDUCT.

1 (c) To the extent the foregoing limitations of liability and exclusions of  
2 damages are for any reason determined to be ineffective by a court of competent  
3 jurisdiction, the Parties stipulate that the calculation of damages for those Claims which  
4 survive the limitations and exclusions specifically set forth in paragraphs (a) and (b) shall  
5 be no greater than \$500,000 per Claim.

6 14.5 Severability.

7 If any provision of this Agreement is held to be illegal, invalid or unenforceable  
8 under any present or future law, and if the rights or obligations of any Party hereto under  
9 this Agreement will not be materially and adversely affected thereby, (a) such provision  
10 will be fully severable, (b) this Agreement shall be construed and enforced as if such  
11 illegal, invalid or unenforceable provision had never comprised a part hereof, (c) the  
12 remaining provisions of this Agreement shall remain in full force and effect and will not  
13 be affected by the illegal, invalid or unenforceable provision or by its severance herefrom  
14 and (d) in lieu of such illegal, invalid or unenforceable provision, there shall be added  
15 automatically as a part of this Agreement a legal, valid and enforceable provision as  
16 similar in terms to such illegal, invalid or unenforceable provision as may be possible.

17 14.6 Attorney Fees and Litigation Expenses.

18 This Section 14.6 shall apply to the Tribes and PGE, but shall not apply to Interior  
19 either in terms of being obligated to pay or entitled to recover. In the event any  
20 Proceeding is commenced to recover damages or enforce any rights or obligations under  
21 this Agreement, then the prevailing Party (i.e. either the Tribes or PGE) in such action  
22 shall be entitled to recover from the non-prevailing Party (i.e. either the Tribes or PGE)  
23 its attorney fees, including the reasonable fees of in-house counsel, expert fees, and all  
24 reasonable out-of-pocket expenses incurred in enforcing the prevailing Party's rights  
25 under this Agreement, regardless of whether those fees, costs or expenses are otherwise  
26 recoverable as costs in the Proceeding, including all fees and expenses incurred in  
27 investigation and preparation of the Proceeding before it is filed and upon appeal.

28 14.7 Waivers.

29 Except as otherwise provided herein, no provision of this Agreement may be  
30 waived except in writing. No failure by any Party to exercise, and no delay in exercising,  
31 short of the statutory period, any right, power or remedy under this Agreement shall  
32 operate as a waiver thereof. Any waiver at any time by a Party of its right with respect to  
33 a default under this Agreement, or with respect to any other matter arising in connection  
34 therewith, shall not be deemed a waiver with respect to any subsequent default or matter.

35 14.8 No Third-Party Beneficiaries.

36 None of the promises, rights or obligations contained in this Agreement shall  
37 inure to the benefit of any Person or entity not a Party to this Agreement; and no action  
38 may be commenced or prosecuted against any Party by any third party claiming to be a  
39 third-party beneficiary of this Agreement or the transactions contemplated hereby.



1           14.9   No Reliance.

2           Each Party acknowledges that in entering into this Agreement, it has not relied on  
3 any statement, representation or promise of the other Party or any other Person or entity,  
4 except as expressly stated in this Agreement.

5           14.10 Assumption of Risk.

6           In entering into this Agreement, each of the Parties assumes the risk of any  
7 mistake of fact or law, and if either or both of the Parties should subsequently discover  
8 that any understanding of the facts or the law was incorrect, neither of the Parties shall be  
9 entitled to, nor shall attempt to, set aside this Agreement or any portion thereof.

10          14.11 Waiver of Defenses.

11          Upon the Effective Date of this Agreement, PGE and the Tribes release each other  
12 from any and all Claims relating to the formation and negotiation of this Agreement,  
13 including reformation, rescission, mistake of fact, or mistake of law. PGE and the Tribes  
14 further agree that they waive and will not raise in any court, administrative body or other  
15 tribunal any Claim in avoidance of or defense to the enforcement of this Agreement other  
16 than the express conditions set forth in this Agreement.

17          14.12 Waiver of Certain Claims by Tribes against Interior.

18          Interior has reviewed this Agreement and has found it in the Tribes' interest based  
19 on Interior's evaluation of the likely range of future market prices for power and potential  
20 costs of obtaining and implementing a New FERC License. Nonetheless, in entering this  
21 Agreement, the Tribes acknowledge that they are assuming the risk of a fluctuating  
22 market price for power, and the risk of costs of obtaining and implementing a New FERC  
23 License. Therefore, the Tribes waive and release any Claims against Interior for losses of  
24 any kind arising out of the market price for power or arising out of the costs of obtaining  
25 and implementing a New FERC License.

26          14.13 Independent Counsel.

27          The Parties acknowledge that they have been represented by independent counsel  
28 in connection with this Agreement, they fully understand the terms of this Agreement,  
29 and they voluntarily agree to those terms for the purposes of making a full compromise  
30 and settlement of the subject matter of this Agreement.

31          14.14 Opinions of Counsel.

32          Prior to the execution of this Agreement, the Parties have delivered to each other  
33 the opinions of counsel attached hereto as Exhibits F, G and H. The Parties agree that  
34 receipt of such opinions was a material consideration for each of them in entering into  
35 this Agreement.

1           14.15 Headings.

2           The headings used for the sections herein are for convenience and reference  
3 purposes only and shall in no way affect the meaning or interpretation of the provisions  
4 of this Agreement.

5           14.16 Entire Agreement.

6           This Agreement constitutes the complete and entire expression of agreement  
7 between the Parties and supersedes all prior and contemporaneous offers, promises,  
8 representations, negotiations, discussions, and communications, whether written or oral,  
9 which may have been made in connection with the subject matter of this Agreement.  
10 Any such representations or claims are hereby disclaimed. This Agreement may be  
11 signed in counterparts.

12                           IN WITNESS WHEREOF, having read and intending to be bound by the  
13 provisions of this Long-Term Global Settlement and Compensation Agreement, the  
14 Parties have executed this Agreement as of the date first above written.

15  
16 THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF  
17 OREGON

18  
19  
20 By: \_\_\_\_\_

21 Name:

22 Title: Chairman

23  
24  
25 THE UNITED STATES DEPARTMENT OF THE INTERIOR, acting by and through  
26 the Secretary of the United States Department of the Interior

27  
28  
29 By: \_\_\_\_\_

30 Name:

31 Title: DEPUTY SECRETARY

32  
33  
34 PORTLAND GENERAL ELECTRIC COMPANY

35  
36  
37 By: \_\_\_\_\_

38 Name: Peggy Fowler

39 Title: Chief Executive Officer and President  
40

# EXHIBIT 4

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Portland General Electric Company and  
Confederated Tribes of the Warm Springs  
Reservation of Oregon

Project No. 2030-036

ORDER APPROVING SETTLEMENT AND ISSUING NEW LICENSE

(Issued June 21, 2005)

1. On December 16 and 17, 1999, Portland General Electric Company (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes), respectively, filed competing applications to continue operation and maintenance of the 366.82-megawatt (MW) Pelton Round Butte Hydroelectric Project No. 2030 (Pelton Round Butte Project), located on the Deschutes River<sup>1</sup> in Jefferson County, Oregon. The project occupies 3,503.74 acres of federal and tribal lands administered by the U.S. Forest Service (Forest Service), U.S. Bureau of Land Management (BLM), and U.S. Bureau of Indian Affairs (BIA).<sup>2</sup>
2. On June 29, 2001, PGE and the Tribes jointly filed an amendment to combine their license applications and become co-applicants for a new license. Subsequently, on July 30, 2004, PGE and the Tribes filed a comprehensive Settlement Agreement signed by PGE, the Tribes, and 20 stakeholders. The Settlement Agreement includes proposed license articles embodying the provisions of the agreement. For the reasons discussed below, this order incorporates most of the Settlement Agreement's proposed license

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<sup>1</sup> Parts of the project backwaters extend 7 miles into the Crooked River and 13 miles into the Metolius River.

<sup>2</sup> Federal Power Act (FPA) section 23(b)(1), 16 U.S.C. 817 (1), requires the project to be licensed because of its location on federal lands.

articles and issues a new license for the Pelton Round Butte Project. Issuing a new license is in the public interest because it would allow the project to continue generating electric energy to serve growing regional demand while protecting and enhancing environmental, recreational, and cultural resources.

### **BACKGROUND**

3. The original license for the Pelton Round Butte Project was issued to PGE on December 21, 1951, with a term expiring on December 31, 2001.<sup>3</sup> In 1979, PGE and the Tribes applied to amend the license to permit the Tribes to construct and operate a 15-MW powerhouse at the project's Reregulating Dam. In 1980, the Commission approved the amendment, pursuant to which the Tribes became a joint licensee for the project to the extent of their interests.<sup>4</sup> On November 21, 2000, the Commission amended the license to designate PGE and the Tribes co-licensees without limitation.<sup>5</sup> Since expiration of the existing license, PGE and the Tribes have operated the project under annual licenses.<sup>6</sup>

4. On April 20, 2000, PGE, the Tribes, and the U.S. Department of the Interior (Interior) filed a request for approval of a Long-Term Global Settlement and Compensation Agreement (Global Agreement). The Global Agreement resolved long-standing issues between PGE and the Tribes regarding the project's use and occupancy of 2,161.9 acres of Tribal reservation lands. The Global Agreement stipulated, among other things, that PGE and the Tribes would merge their competing relicense applications into one and become co-applicants, thereby eliminating the competition for a new license. The Commission approved the Global Agreement on November 21, 2000, and noted that once the relicense application amendment was filed, the Commission would merge the two proceedings into one.<sup>7</sup> On July 11, 2001, subsequent to the filing of the joint relicense application amendment, the Commission issued a notice merging both license applications into one docket, P-2030-036.

5. On August 10, 2001, the Commission issued a notice accepting the joint relicense application amendment and setting a deadline of October 10, 2001, for filing protests and motions to intervene. Timely motions to intervene were filed by Jefferson County, Oregon; the U.S. Department of Agriculture; Interior; Trout Unlimited; American Rivers;

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<sup>3</sup> 10 FPC 450 (1951).

<sup>4</sup> 10 FERC ¶ 62,142. The Commission no longer approves segregated license interests of this kind.

<sup>5</sup> 93 FERC ¶ 61,183 (2000).

<sup>6</sup> See Section 15(a)(1) of the FPA, 16 U.S.C. § 808(a)(1).

<sup>7</sup> 93 FERC ¶ 61,183.

Native Fish Society; Oregon Trout; WaterWatch of Oregon; and the National Marine Fisheries Service (NOAA Fisheries).<sup>8</sup> Late motions to intervene were filed by the State of Oregon on October 23, 2001, and jointly by the Cities of Bend, Redmond, and Madras, Oregon, and the Deschutes Valley Water District (Cities and District) on April 25, 2003. The State of Oregon and the Cities and District were granted late intervention on November 21, 2001, and July 1, 2003, respectively. None of the motions to intervene were in opposition to the project. Comments in response to the notice were filed by the Forest Service, BLM, and Interior.

6. On August 29, 2003, the Commission staff issued, for public comment, a draft Environmental Impact Statement (EIS) that evaluated the potential impacts of continued operation of the Pelton Round Butte Project. Comments on the draft EIS were filed by WaterWatch of Oregon, Oregon Water Resources Department on behalf of the Oregon Department of Fish and Wildlife (Oregon DFW), PGE and the Tribes jointly, the Tribes' Natural Resources Departments, Forest Service, Interior, U.S. Environmental Protection Agency, NOAA Fisheries, and Jefferson County.

7. On December 29, 2003, PGE and the Tribes filed a Description of Proposed Preferred Alternative, describing an agreement in principle on environmental measures that the parties were intending to include in a final Settlement Agreement. PGE and the Tribes stated that they were offering the Description of Proposed Preferred Alternative prior to the execution of the final settlement to enable Commission staff to analyze an alternative in the final EIS that corresponded to the intent of many of the parties working to reach final settlement.<sup>9</sup>

8. On June 7, 2004, the Commission staff issued a final EIS that recommended adopting most of the measures included in the Description of Proposed Preferred Alternative, along with additional measures recommended by staff.

9. On July 30, 2004, PGE and the Tribes filed a Settlement Agreement that proposes measures consistent with the Description of Proposed Preferred Alternative and resolves various issues related to the relicensing of the Pelton Round Butte Project. The Settlement Agreement, which was signed by PGE, the Tribes, and all of the other entities

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<sup>8</sup> The motions were timely and unopposed, and therefore, automatically granted pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214(c)(1) (2004).

<sup>9</sup> PGE and the Tribes filed an updated Description of Proposed Preferred Alternative on April 27, 2004.

who are parties to the relicensing proceeding, with the exception of the Deschutes Valley Water District,<sup>10</sup> effectively amends the relicense application and constitutes PGE's and the Tribe's proposed action. The Commission issued notice of the Settlement Agreement on August 4, 2004. Oregon DFW, Oregon DEQ, Oregon WRD, Oregon Parks, American Rivers, Oregon Trout, Trout Unlimited, and Native Fish Society all filed comments in support of the Settlement Agreement. No entity opposed the agreement.

10. The motions to intervene and comments received from interested agencies and individuals throughout the proceeding, as well as the provisions of the Settlement Agreement, have been fully considered in determining whether, and under what conditions, to issue this license.

## **PROJECT DESCRIPTION**

### **A. Project Facilities**

11. The 366.82-MW Pelton Round Butte Project consists of three developments located on the Deschutes River, Crooked River, and Metolius River. The powerhouses for all three developments are integral with each of the three project dams. The 247.12-MW Round Butte Development is the uppermost development and includes the 4,000-acre Lake Billy Chinook, the project's largest storage reservoir. Lake Billy Chinook is located on the Deschutes, Metolius, and Crooked Rivers. The dam for the 100.8-MW Pelton Development is located on the Deschutes River about 7 miles downstream from the Round Butte Dam. The 540-acre Pelton reservoir, known as Lake Simtustus, begins at the base of the Round Butte Dam. The 18.9-MW Reregulating Development is the most downstream development; its 190-acre reservoir on the Deschutes River extends from the tailwater of the Pelton Dam 2.5 miles downstream to the Reregulating Dam.

12. The principal features of the Round Butte Development are: (1) a 1,382-foot-long, 440-foot-high compacted, rock-filled embankment dam; (2) a 535,000-acre-foot reservoir (Lake Billy Chinook); (3) a powerhouse containing three 82.35-MW turbine generating units and one 70-kilowatt generating unit with a total installed capacity of 247.12 MW;

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<sup>10</sup> The 20 signatories are U.S. Bureau of Indian Affairs (BIA); BLM; U.S. Fish and Wildlife Service (FWS); NOAA Fisheries; Forest Service; Oregon Department of Environmental Quality (Oregon DEQ); Oregon DFW; Oregon Water Resources Department (Oregon WRD); Oregon Parks and Recreation Department (Oregon Parks); Deschutes County, Oregon; Jefferson County, Oregon; City of Bend, Oregon; City of Madras, Oregon; City of Redmond, Oregon; Avion Water Company (Avion); American Rivers; The Native Fish Society; Oregon Trout; Trout Unlimited; and WaterWatch of Oregon.

(4) three 2,800-foot-long, 230-kilovolt (kV) transmission lines extending from the powerhouse to the Round Butte Switchyard; (5) a fish hatchery (Round Butte Hatchery) located adjacent to the dam; and (6) appurtenant facilities.

13. The principal features of the Pelton Development are: (1) a 636-foot-long, 204-foot-high concrete arch dam with a crest elevation of 1,585 feet mean sea level (msl); (2) 7-mile-long, 540-acre reservoir (Lake Simtustus) with a gross storage capacity of 31,000 acre-feet at a normal maximum water surface elevation of 1,580 feet msl; (3) a powerhouse with three turbine generating units with a total installed capacity of 100.8 MW; (4) a 7.9-mile-long, 230-kV transmission line extending from the powerhouse to the Round Butte Switchyard; and (7) other appurtenances.

14. The principal features of the Reregulating Development are: (1) a 1,067-foot-long, 88-foot-high rock-filled embankment dam with a spillway crest elevation of 1,402 feet msl; (2) a 2.5-mile-long, 190-acre reservoir with a gross storage capacity of 3,500-acre-feet and a useable storage capacity of 3,270 acre-feet at a normal maximum water surface elevation of 1,435 feet msl; (3) a non-operating 3-mile-long fishway extending from the tailrace upstream to the forebay of the Pelton Development; (4) a powerhouse containing one 18.9-MW, bulb-type turbine generating unit; (5) a 200-foot-long, 6.9 kV primary transmission line extending from the generator to a step-up transformer located adjacent to the powerhouse; and (7) other appurtenances.

15. A complete description of the Pelton Round Butte project facilities can be found in ordering paragraph (B).

## **B. Project Operation**

16. The Round Butte and Pelton developments are operated as peaking facilities, typically generating between the hours of 6 a.m. and 11 p.m. daily. Lake Billy Chinook provides seasonal storage and is currently drawn down as much as 85 feet, to elevation 1,860 feet msl, in the winter, although typically the lake is only drawn down about 10 feet, to elevation 1,935 feet. The lake is typically refilled during the months of April and May. During the summer, the reservoir is held at the highest practicable level with a relatively stable pool elevation that usually does not fluctuate more than 1.0 feet below the normal maximum pool elevation of 1,945 feet msl. The surface elevation of Lake Simtustus usually fluctuates less than 0.75 feet per day but exceeds 3.5 feet per day about 25 percent of the time due to flow fluctuations produced by Round Butte.

17. The Reregulating Development is operated to attenuate high and low peak flows produced by the upstream developments. Flow releases are controlled to maintain an average daily flow in the Deschutes River downstream of the Reregulating Dam that approximates the average daily inflow to the project. The Reregulating Reservoir surface elevation fluctuates as much as 27 feet (between 1,435 feet msl and 1,408 feet msl) daily;



however, typical fluctuations are about 15 feet daily. The turbine and spillway gates automatically respond to river stage measurements recorded at a United States Geological Survey (USGS) gage (No. 14092500) located at the dam.<sup>11</sup>

18. Under the original license, flows downstream of the Reregulating Dam are kept at or above a minimum flow of: (1) 3,000 cfs or inflow, if less, from July 1 through February 28; and (2) 3,500 cfs or inflow, if less, from March 1 through June 30.<sup>12</sup> Ramping rates below Reregulating Dam are limited to 0.1 feet per hour and 0.4 feet per day, except from May 15 to October 15, when ramping rates are limited to 0.1 feet per hour and 0.2 feet per day.

## **SETTLEMENT AGREEMENT**

### **A. Contents**

19. The Settlement Agreement establishes measures for the protection, mitigation, and enhancement of resources affected by the project under a new license, and specifies procedures to be used by the parties to ensure the implementation of the license articles contained in the new license, including an adaptive management framework for future collaborative efforts. The Settlement Agreement is divided into eight sections and includes twelve exhibits and six appendices.

20. Sections 1 through 6 establish the general terms and conditions that govern the relationship among the parties and provide for implementation of the Agreement. Section 3 in particular expresses the parties' intent for the Commission to include in the project license proposed articles contained in Exhibit A of the Agreement, and establishes Implementation Committees to work with the licensees in implementing a number of the articles.

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<sup>11</sup> The project and the USGS have separate sensing tapes and electrical transmitters connected to the gage's measuring apparatus. The project's transmitter provides flow information for the project operator for control of the Reregulating Development while the USGS's transmitter provides stage and flow data for gage reporting purposes (*See* Settlement Agreement, Appendix C, pp. 1-2).

<sup>12</sup> Under certain circumstances when the inflow to the project has been less than the prescribed minimum flow, discharge below Reregulating Dam has been reduced to a flow less than that of inflow to maintain targeted reservoir surface elevations. *See* EIS at 11-12 and Exhibit B of the license application at B-5.

21. The four types of committees specified by Exhibit K are: the Fish Committee, Terrestrial Resources Working Group, Recreation Resources Working Group, and Shoreline Management Working Group. Each of the committees includes representatives from the licensees, Forest Service, BIA, BLM, the Tribes Branch of Natural Resources, and Oregon DFW. The Fish Committee, Recreation Resources Work Group, and Shoreline Management Work Group include additional entities.<sup>13</sup> The committees are consulted entities in the development and implementation of various study plans, reports, facility designs, and operational plans and are meant to have a pivotal role in the administration of a large variety of post-licensing activities, including changes in protection and enhancement measures on behalf of fish and wildlife, water quality, and recreation.
22. Section 7 establishes a dispute resolution process for purposes of resolving disputed actions and otherwise keeping the Agreement in effect.
23. Section 8 sets forth the general provisions of the Agreement and lists the parties to the Agreement and their primary contacts.
24. The proposed license articles in Exhibit A of the Settlement Agreement, summarized below, specify general license provisions (Proposed Articles 1-7); operating conditions (Proposed Articles 8-16); aquatic resource measures (Proposed Articles 17-41); terrestrial resource measures (Proposed Articles 42-44); recreation, aesthetic, and cultural resource measures (Proposed Articles 45-57); Deschutes River fish habitat studies and enhancement measures (Proposed Articles 58-60); and establishment of a fish and wildlife enhancement fund (Pelton Round Butte Fund) (Proposed Article 61).
25. Proposed Article 1 provides for PGE and the Tribes to establish a Fish Committee, Terrestrial Resources Working Group, Recreation Resources Working Group, Shoreline Management Working Group, and Pelton Round Butte Fund Governing Board, each of which would consist of the licensees and specified agencies and non-governmental organizations. The Fish Committee and Terrestrial Resources, Recreation Resources, and Shoreline Management Working Groups would be responsible for commenting and making recommendations on study plans, reports, facility designs, and operating and implementation plans. The Pelton Round Butte Fund Governing Board would be responsible for making decisions on the use of the Pelton Round Butte Fund.
26. Proposed Article 2 provides the Settlement Agreement parties access to, through, and across the project lands and waters for purposes of inspecting the project facilities and records.

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<sup>13</sup> See Exhibit K of the Agreement for a complete listing of parties comprising each of the four committees.

27. Proposed Article 3 provides for PGE and the Tribes to enter into an agreement with Jefferson County pursuant to which PGE and the Tribes would fund an additional land-based law enforcement officer and two additional part-time marine or law enforcement personnel to patrol project lands and waterways. The unspecified funding amount would be used for salaries, benefits, training, watercraft, vehicles, and associated law enforcement equipment and supplies.

28. Proposed Article 4 provides for PGE and the Tribes to take immediate action to prevent fish, wildlife, and plant species from being killed, harmed, or endangered due to unanticipated or emergency situations associated with project facilities or project operations. The proposed article also provides for PGE and the Tribes to notify fish and wildlife agencies within 6 hours of the onset of situations that affect federally listed, threatened and endangered species and within 48 hours for non-federally listed species.

29. Proposed Article 5 provides for PGE and the Tribes to obtain a special use authorization from the Forest Service or BLM, as appropriate, for the occupancy and use of federal lands added to the project boundary due to any future amendment of the license. The proposed article also provides for PGE and the Tribes to: (1) obtain written approval from the Forest Service and BLM prior to making changes to project facilities located on federal lands; (2) participate with the Forest Service or BLM in resolving any potential conflicts between project activities and any other authorized activities on federal lands; (3) prepare site-specific plans for habitat and ground-disturbing activities on federal lands as required by the license; and (4) conduct or fund any environmental analysis deemed by the Forest Service or BLM, as appropriate, for site-specific activities or plans associated with the license.

30. Proposed Article 6 establishes a procedure for escalating costs associated with the various funding provisions contained in other proposed articles.

31. Proposed Article 7 provides for PGE and the Tribes, when conducting habitat or ground-disturbing activities on tribal reservation lands, to comply with the requirements of the Tribes' Integrated Resources Management Plan.

32. Proposed Article 8 provides for PGE and the Tribes to implement a project operating plan included with the Settlement Agreement as Exhibit C. Proposed Articles 9-14 specify the plan's operational provisions including stage change limits (Proposed Article 9), gaging of project inflow and outflow (Proposed Articles 10 and 11), minimum operating flows (Proposed Article 12), procedures during long-term low flow conditions (Proposed Article 13), and seasonal drawdown and fluctuation limits (Proposed Article 14).

33. Proposed Article 15 provides for PGE and the Tribes to develop and implement an Operations Compliance Plan to monitor compliance with the operational conditions specified in Proposed Articles 9, 12, and 14.
34. Proposed Article 16 provides for PGE and the Tribes to conduct water quality monitoring pursuant to a water quality monitoring and management plan required by the section 401 of the Clean Water Act certifications for the project.
35. Proposed Article 17 provides for PGE and the Tribes to implement a Fish Passage Plan attached as Exhibit D to the Settlement Agreement.
36. Proposed Article 18 establishes fish passage criteria and goals for the upstream and downstream fish passage facilities specified in Proposed Article 17.
37. Proposed Article 19 provides for PGE and the Tribes to design, construct, operate, and monitor the fishways specified in Proposed Article 17 according to an implementation schedule attached to the Settlement Agreement as Exhibit D.
38. Proposed Article 20 provides for a design and schedule for phased construction of selective water withdrawal and downstream fish passage facilities at the Round Butte dam.
39. Proposed Article 21 provides for PGE and the Tribes to submit all downstream fish design investigations, preliminary design plans and specifications, and final design plans and specifications associated with temporary and permanent downstream fishways at Round Butte dam to the Fish Committee for review and to specified fish agencies for approval. The proposed article also provides for PGE and the Tribes to take a number of modeling and design steps prior to constructing the selective water withdrawal and downstream fish passage facilities.
40. Proposed Article 22 establishes screening criteria for the downstream passage facilities.
41. Proposed Article 23 provides for PGE and the Tribes to evaluate the hydraulic performance of a deep exclusion screen specified in Proposed Article 17 and to conduct fish screen impingement studies.
42. Proposed Article 24 specifies that the design of the permanent downstream collection facility specified in Proposed Article 17 include the ability to add pumps in the future for providing attraction flows.

43. Proposed Article 25 provides for PGE and the Tribes to provide upstream passage using a trap-and-haul process until permanent upstream passage would be implemented per Proposed Article 17. Proposed Article 25 also provides for the development and implementation of a monitoring plan for trap-and-haul upstream passage.

44. Proposed Article 26 provides for preliminary and final design and construction plans for an Adult Release Facility at the Round Butte forebay. The proposed article also provides for the development and implementation of operation and evaluation plans for the facility.

45. Proposed Article 27 provides for PGE and the Tribes to, upon installation of permanent downstream passage facilities at Round Butte dam and within 24 months of achieving downstream survival targets specified in the Fish Passage Plan for Lake Billy Chinook, conduct a study of the feasibility of volitional upstream fish passage at the project and provide a report of the results to the Fish Committee. Proposed Article 27 further provides for PGE and the Tribes to develop and submit to the Fish Committee a plan to implement volitional upstream passage at the project, including testing and verification studies, unless the Fish Committee and specified agencies decide that volitional upstream passage should not be installed. The plan for constructing volitional upstream passage at the project would be due within 24 months of a decision by specified fish agencies that volitional upstream passage at the project should be provided by PGE and the Tribes. In the event the fish agencies decide volitional upstream passage should not proceed as contemplated, the proposed article provides for PGE and the Tribes to file a plan with the Commission to continue trap-and-haul operations and conduct a future feasibility investigation. During any such trap-and-haul operations, PGE and the Tribes would monitor survival and take any feasible measures necessary to comply with the survival standards specified in Proposed Article 25.

46. Proposed Article 28 provides for PGE and the Tribes to transport all juvenile salmonids captured at Round Butte dam between February 1 and July 31 to the lower Deschutes River, bypassing Lake Simtustus and the Reregulating Reservoir. During the remainder of the year, the proposed article provides for PGE and the Tribes, upon the request of the Fish Committee, to transport the juvenile salmonids to Lake Simtustus. If the juveniles would be transported to Lake Simtustus, Proposed Article 28 provides for PGE and the Tribes to file a plan with the Commission to upgrade the east-side upstream fish trap at the Round Butte dam and operate it annually for part or all of the period May 1 through September 30 to capture and return maturing adult resident salmonids back into Lake Billy Chinook.

47. Proposed Article 29 provides for PGE and the Tribes to file a schedule for the development of plans for testing and verification studies described in the Fish Passage Plan included in Exhibit D of the Settlement Agreement. Upon Commission approval of the schedule, Proposed Article 29 provides for PGE and the Tribes to develop the testing

and verification study plans, and implement them upon the approval of specified fish agencies and the Commission. Proposed Article 29 further provides for PGE and the Tribes to file plans with the Commission for making any modifications to facilities needed to ensure safe, timely, and effective fish passage.

48. Proposed Article 30 provides for PGE and the Tribes to develop plans for measures or modifications to the downstream facilities needed to achieve the criteria and goals set forth in Proposed Articles 18 and 22.

49. Proposed Article 31 provides for long-term monitoring of downstream collection facilities as described in the Fish Passage Plan in Exhibit D of the Settlement Agreement.

50. Proposed Article 32 provides for the utilization of annual work plans to document actions consistent with the Fish Passage Plan in Exhibit D of the Settlement Agreement. The proposed article also provides for the filing of annual reports with the Commission documenting Fish Passage Plan activities that occurred during the previous year.

51. Proposed Article 33 provides for PGE and the Tribes to maintain the fishways by keeping them clear of debris and other material that could hinder fish passage.

52. Proposed Article 34 provides for PGE and the Tribes to implement a number of steps in the event that the criteria and goals of Proposed Article 18, as related to temporary downstream facilities, have not been achieved. These steps include notifying the Fish Committee and Commission that the criteria and goals have not been achieved, and as directed by the Fish Committee, either develop a plan to continue operation and testing of temporary downstream passage facilities, begin implementing an alternative fish passage plan, or pursue non-passage mitigation. After approval by the specified fish agencies, the selected plan would be filed with the Commission for its approval.

53. Proposed Article 35 is similar to Proposed Article 34, but applies to contingency actions to be taken in the event that permanent downstream passage facilities do not meet the criteria and goals specified in Proposed Article 18.

54. Proposed Article 36 provides for PGE and the Tribes to enter into an agreement with Oregon DFW to develop a plan for a fish health management program at the project. The plan would include funding for fish health services and supplies associated with production of salmon and steelhead eggs and fry at the project's Round Butte Hatchery, diagnosis of disease in mortalities at fish facilities, and monitoring of disease agents in wild fish populations. Proposed Article 36 further provides for PGE and the Tribes to enter into another agreement with Oregon DFW pursuant to which PGE and the Tribes

would fund one full-time Oregon DFW fish health specialist and one seasonal Oregon DFW Experimental Biological Aide for the interim and part of the final fish passage phases. Funding would be applied to salaries, benefits, training, vehicles, travel, supplies, equipment, and overhead to support the Oregon DFW personnel.

55. Proposed Article 37 provides for PGE and the Tribes to enter into an agreement with Oregon DFW to fund hatchery operations at no more than the current production levels of spring Chinook salmon and summer steelhead for the term of the license. Proposed Article 37 further provides for PGE and the Tribes, within 6 months of entering into the hatchery agreement, to file with the Commission a hatchery improvement plan. In addition, PGE and the Tribes are to file, upon the request of the Fish Committee, a plan with the Commission to undertake changes in equipment to support production of sockeye salmon. PGE and the Tribes, in cooperation with Oregon DFW and the Tribes' BNR, would periodically review the hatchery program to determine whether the program is meeting its goals. The reviews would be funded by PGE and the Tribes. Draft and final reviews would be provided to the Fish Committee.

56. Proposed Article 38 provides for PGE and the Tribes to conduct a Pacific lamprey passage evaluation and mitigation plan as described in the Fish Passage Plan.

57. Proposed Article 39 provides for PGE and the Tribes to develop and implement a native fish monitoring plan to evaluate the effects of reintroducing anadromous fish upstream of the project on resident fish populations.

58. Proposed Article 40 provides for PGE and the Tribes to enter into agreements with Oregon DFW to provide funding for one full-time Oregon DFW fisheries biologist and 10 percent of the cost of an Oregon DFW Facilities Engineer. Funding would be provided for salaries, benefits, training, vehicles, travel, supplies, and equipment and overhead to support the employees. The agreements would specify that the funding is to be used to support Oregon DFW's involvement in fisheries and terrestrial projects conducted pursuant to the terms of the license.

59. Proposed Article 41 provides for PGE and the Tribes to file with the Commission a report documenting the status of interim measures related to fish passage and water rights acquisition on a non-project tributary (Squaw Creek) to the Deschutes River.<sup>14</sup>

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<sup>14</sup> The interim measures are listed in Exhibit B of the Settlement Agreement.

60. Proposed Article 42 provides for the development and implementation of a terrestrial resources management plan that includes provisions stipulated in Exhibit E to the Settlement Agreement. The proposed article also requires annual reports documenting implementation of the management plan, implementation of an adaptive management process, and funding of wildlife staff at the project.
61. Proposed Article 43 provides for the implementation of interim terrestrial resource measures while the terrestrial resources management plan is being developed. The measures would include upland vegetation management; exotic and invasive vegetation management; various bald eagle, golden eagle, osprey, and waterfowl surveys; avian power line electrocution assessments; and Pelton fish ladder wildlife protection.
62. Proposed Article 44 provides for PGE and the Tribes to enter into an agreement with the Forest Service pursuant to which PGE and the Tribes would provide the Forest Service with no more than \$15,000 annually for the purpose of supporting the Forest Service's and BLM's participation in the development of the Terrestrial Resources Management Plan.
63. Proposed Article 45 provides for the development and implementation of a Recreation Resources Implementation Plan that includes recreation measures described in Exhibit G to the Settlement Agreement as well as measures designed to mitigate for project-related recreation authorized or implemented by entities other than PGE and the Tribes.
64. Proposed Article 46 provides for PGE and the Tribes to fund various recreation measures at the project, including entering into an agreement with the Tribes to provide funding for operation and maintenance of the Tribes' Indian Park Campground and Chinook Island Day-Use Area.
65. Proposed Article 47 provides for PGE and the Tribes to conduct an emergency communications coverage study addressing the ability of emergency response personnel at the project to contact each other and external emergency services and file a report of the results. Based on the results of the study, Proposed Article 47 provides for PGE and the Tribes to fund measures necessary to provide for emergency and safety communications at the project.
66. Proposed Article 48 provides for PGE and the Tribes to develop and implement an Integrated Interpretation and Education Plan to inform the public about resource and project features in the project area. The proposed article provides for a cap of no more than \$75,000 for plan development and no more than \$20,000 annually (adjusted for inflation) for plan implementation.



67. Proposed Article 49 provides for PGE and the Tribes to develop and implement a Shoreline Management Plan that includes standards and guidelines for shoreline development, installation of new docks, and modification of existing docks.

68. Proposed Article 50 provides for PGE and the Tribes to develop and implement a Shoreline Erosion Plan to monitor and control stream and reservoir shoreline erosion at the project.

69. Proposed Article 51 provides for PGE and the Tribes to develop and file an Aesthetic Resources Protection Plan that includes measures to improve the existing project fish ladder, Pelton Dam Road, Round Butte Switchyard, Pelton Park, Round Butte Overlook Park, and Round Butte dam and powerhouse area. The plan includes measures to improve non-project, non-licensee-owned facilities.

70. Proposed Article 52 provides for PGE and the Tribes to either negotiate an agreement with the Forest Service that would provide for PGE and the Tribes to collect and retain revenue from and operate and maintain specified Forest Service-owned recreation facilities at the project, or to develop a mechanism that would provide for PGE and the Tribes to pay the Forest Service specified percentages of the operation and maintenance costs of the facilities that would exceed revenue produced at the facilities.

71. Proposed Article 53 provides for PGE and the Tribes to enter into an agreement with the Forest Service to provide both annual and one-time funding for upgrades to and maintenance of specified Forest Service roads that lead to the project.

72. Proposed Article 54 provides for PGE and the Tribes to enter into an agreement with the Forest Service to make three payments to the Forest Service for infrastructure maintenance or improvements to the non-project Haystack Reservoir.

73. Proposed Article 55 provides for PGE and the Tribes to enter into an agreement with the BLM to implement measures at and provide funding for various BLM-managed recreation sites located downstream of the project.

74. Proposed Article 56 provides for PGE and the Tribes to enter into an agreement with Jefferson County, Oregon, pursuant to which PGE and the Tribes would fund road maintenance activities on Jefferson County roads affected by the project.

75. Proposed Article 57 provides for implementation of a Programmatic Agreement (PA), including a Cultural Resources Management Plan.

76. Proposed Article 58 provides for PGE and the Tribes to develop and implement a Lower River Gravel Study Plan that includes provisions to study gravel transport downstream of the project and augment gravel where necessary to enhance spawning habitat.

77. Proposed Article 59 provides for PGE and the Tribes to develop and implement a Large Wood Management Plan for the collection, transport, and placement of large wood entering Lake Billy Chinook. Placement of large wood would occur along the reservoir shorelines or in the Deschutes River downstream of the project.

78. Proposed Article 60 provides for PGE and the Tribes to develop and implement a plan for habitat improvements in the Trout Creek watershed located downstream of the project.

79. Proposed Article 61 provides for PGE and the Tribes to establish the Pelton Round Butte Fund with an initial amount of \$3.5 million (2003 dollars) and four additional payments in 2007, 2011, 2013, and 2020 totaling \$21,500,000 (2003 dollars) subject to adjustment for escalation at specified percentages. The funds would be used for acquisition of water rights and for aquatic, riparian, and wetland habitat protection and enhancements in the basin both upstream and downstream of the project. Distribution and use of funds would be decided by a Governing Board made up of PGE and the Tribes and various specified federal and state fish and wildlife agencies and non-governmental organizations.

80. On October 19, 2004, Commission staff held a technical conference with most of the Settlement Agreement parties to discuss the Settlement Agreement and proposed articles.<sup>15</sup>

## **B. Discussion**

81. The Settlement Agreement addresses the signatories' various environmental concerns while preserving power production at the project. Overall, the terms of the Settlement Agreement achieve an appropriate balance between continued project generation and environmental measures. We commend the parties for their successful efforts to reach consensus on the broad range of issues involved in the operation of this project and the development of a sound framework for a continuing collaborative approach to the management of the project and its resources.

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<sup>15</sup> Staff noticed the meeting on September 30, 2004, and invited all interested parties to participate.

82. The new license order we issue today includes the substance of most of the license articles proposed by the Settlement Agreement, with certain modifications as described next.<sup>16</sup> We also discuss those proposed license articles that we do not adopt and the reasons for not doing so.

83. The Settlement Agreement's Proposed Article 1 provides for the establishment of various implementation committees consisting of the licensees and specified agencies and non-governmental organizations. The committees would be responsible for consulting on the development of various plans, reports, and designs specified in the Settlement Agreement, reviewing reports, and making decisions with regard to the distribution of monies from the Pelton Round Butte Fund. Although the license includes the substance of the proposal as Article 402 of the license, we remind the Settlement Agreement parties that the Commission only has jurisdiction over the licensees, and therefore, can only require the licensees' participation on the committees.

84. The Settlement Agreement's Proposed Article 1 also provides that, in the event that consensus among members of the implementation committees with regard to studies, plans, designs, and reports cannot be reached, PGE and the Tribes will delay filing the disputed study, plan, design, or report until the completion of a dispute resolution process specified in section 7.5 of the Settlement Agreement. Although we are including the Proposed Article 1 provisions, including the dispute resolution process, in Article 402 of the license, we are also including a requirement in Article 402 for PGE and the Tribes to file the disputed material prior to the completion of the dispute resolution process if the Commission directs the licensees to do so. We envision the Commission needing to invoke this reservation as a very rare occurrence; however, we are including this requirement to ensure that the Commission's responsibility to administer the terms of the license and ensure accomplishment of project purposes in a timely fashion is not frustrated by an extraordinarily lengthy dispute resolution process.

85. The Settlement Agreement provides for possible modifications to project structures and operations during the license term. For example, certain of the proposed articles contain provisions to implement additional mitigation measures and update plans. While such adaptive management provisions are not uncommon in licenses issued in recent years, some of the proposed articles would put project modifications under the direction of entities comprising the implementation committees. It is, however, the

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<sup>16</sup> The specific conditions of the license that incorporate the substance of most of the Settlement Agreement's proposed license articles include ordering paragraphs (H) and (I) and Articles 401 through 436.

licensees' responsibility to obtain the Commission's approval, through appropriate license amendments, for all material amendments to the project and license.<sup>17</sup> The Commission is charged with determining whether amendments will meet the comprehensive development/public interest standards of Federal Power Act (FPA) section 10(a)(1), which continues to govern regulation of a project throughout the term of its license.<sup>18</sup> For this reason, the articles of this license provide for Commission review and approval of any material changes to the project.<sup>19</sup>

86. The Settlement Agreement's Proposed Article 7 provides for PGE and the Tribes, prior to commencing habitat- or ground-disturbing activities on tribal reservation lands, to comply with the Tribes' Integrated Resources Management Plan. The Integrated Resources Management Plan was filed with the Commission by the Tribes on June 13, 2005. Article 408 requires PGE and the Tribes to file an explanation of the relevance of the plan with regard to project-related habitat- or ground-disturbing activities on tribal reservation lands, and reserves the Commission's authority to require them to comply with the plan.

87. The Settlement Agreement's Proposed Article 8 provides for implementation of a Project Operation Plan found in Exhibit C of the Settlement Agreement and as set forth in Proposed Articles 9 through 14 of the Settlement Agreement. We are including the substance of Proposed Articles 9-14 as Articles 409-414 of the license, but we are not including Proposed Article 8, because we find the proposed article to be redundant with the individual operational requirements stipulated in the license.

88. The Settlement Agreement includes provisions for plans to be approved by various Settlement Agreement parties before the plans are filed with the Commission. The Commission has held that the requirement for an entity's prior approval of plans submitted to the Commission is substantially satisfied by a license requirement to consult

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<sup>17</sup> See, e.g., Standard Articles 2 and 3 of the license, Form L-5, which is published at 54 FPC 1799, 1799-1800 (1975) and incorporated by reference in ordering paragraph (K) below.

<sup>18</sup> See, e.g., *S.D. Warren Co.*, 68 FERC ¶ 61,213 at 62,022 (1994).

<sup>19</sup> See, e.g., *PacifiCorp*, 105 FERC ¶ 62,207 at 64,460 (2003). A license article cannot provide for the automatic amendment of the license based upon future occurrences. Rather, the licensee is free to file with the Commission an application for amendment of its license, if future conditions warrant.

with various entities prior to plan submission to the Commission for approval and a requirement to explain how it has accommodated the concerns of the consulted entity.<sup>20</sup> Therefore, in those articles requiring the licensees to file a plan with the Commission for approval, we are including our consultation requirement rather than a requirement to obtain prior approval of the plan.

89. The Settlement Agreement's Proposed Articles 34 and 35 provide for PGE and the Tribes to implement alternative mitigation in the event that fish passage for some or all species would ultimately be found to be infeasible at the Round Butte development. The alternative mitigation would be "consistent with the fish passage objective of providing ecosystem integrity and self-sustaining harvestable populations of fish," and would be implemented in place of constructing, operating, and maintaining, or if already constructed, continuing to operate and maintain the permanent downstream fish passage facilities. The amount of mitigation would be equivalent to the remaining net present value of the costs for constructing, operating, and maintaining the permanent downstream passage facilities that would otherwise have been incurred by PGE and the Tribes.

90. We are unable to make a public interest determination with regard to the proposed alternative mitigation measures, because the measures have yet to be identified, and there is uncertainty with regard to the need for the measures. Further, such a license provision would presume a cost for as yet unidentified measures. Therefore, we are not including the alternative mitigation provisions of Proposed Articles 34 and 35 in the license. As discussed below, we are including an article in the license that reserves the Commission's authority to require fishways that may be prescribed by NOAA Fisheries or Interior for the Pelton Round Butte Project. Future fish passage needs could be addressed via this fishway reservation article. Further, the license includes by reference in ordering paragraph (K), Standard Article 15 of Form L-5, which allows fish and wildlife agencies to petition the Commission to reopen the license to include additional measures for fish and wildlife.

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<sup>20</sup> See *P.U.D. No. 1 of Okanogan County, WA*, 88 FERC ¶ 61,040 (1999), *order on reh'g*, 90 FERC ¶ 61,169 (2000) (Project No. 10536).

91. The Settlement Agreement's Proposed Article 41 provides for PGE and the Tribes to file a report with the Commission documenting the status of interim fish passage and water acquisition measures listed in Appendix B of the Settlement Agreement.<sup>21</sup>

Section 3.3 of the Settlement Agreement states that these measures are to be undertaken prior to issuance of any new license for the project and promptly upon the effective date of the Settlement Agreement. Because PGE and the Tribes have agreed to commence implementation of these measures outside of the license, and therefore, apart from Commission oversight, we see no purpose in requiring PGE and the Tribes to document with the Commission the status of the implementation of the measures.

92. The Settlement Agreement's Proposed Article 42 provides for PGE and the Tribes to file a Terrestrial Resources Implementation Plan (TRMP) for Commission approval to carry out terrestrial resource protection, mitigation, and enhancement measures set forth in Exhibit E of the Settlement Agreement. Management and maintenance activities under the plan would be applied to lands both within and outside of the project boundary, and would include any lands acquired by PGE and the Tribes during the license term.<sup>22</sup> The TRMP would be updated every five years as approved by the Commission. We are including the substance of Proposed Article 42 as Article 422 of the license to the extent the measures apply to lands within the project boundary.<sup>23</sup> We are also including a requirement in Article 422 that the TRMP clearly indicate those lands within the project boundary to which the measures apply.

93. The Settlement Agreement's Proposed Article 43 provides for PGE and the Tribes to implement various interim measures for terrestrial resources while the TRMP is being developed. These interim measures include: upland vegetation management; exotic and

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<sup>21</sup> These measures include: (1) constructability/feasibility designs for the selective water withdrawal facility; (2) assistance to Oregon DFW on bull trout spawning surveys in the Metolius River; (3) a determination of the timing and relative numbers of juvenile, non-anadromous sockeye salmon (kokanee) migrating into Lake Billy Chinook; (4) estimation of the spawning escapement of kokanee in the Metolius River and tributaries; (5) radio-tagging of steelhead smolts from the Crooked River basin; and (6) acquiring water rights on Squaw Creek, a tributary to the Deschutes River upstream of the project, to transfer to the state of Oregon to be held as instream water rights.

<sup>22</sup> Non-project lands include Forest Service and BLM roads, campgrounds, trails, and adjacent lands.

<sup>23</sup> At this time, PGE and the Tribes have not stated their intent for the non-project lands, much of which are federal lands, to be brought into the project boundary, with the exception of 10,797 acres of jointly held lands for which we approve inclusion in the project boundary in ordering paragraph (C) of the license.

invasive plant control; raptor nesting, winter use, and roost surveys; avian powerline electrocution and collision surveys and mitigation; waterfowl surveys; and installation of small animal crossings over the Pelton Fish Ladder. Plans for the surveys and design drawings for the construction activities at the Pelton Fish Ladder have not been filed with the Commission. We note that we cannot authorize the activities without knowing the specific steps that PGE and the Tribes will take to implement the measures, which include making changes to project facilities; therefore, although we are including the interim measures to the extent they apply to project lands in Article 423 of the license, we are requiring PGE and the Tribes to file a plan for Commission approval describing the activities and including design drawings for the construction of the wildlife crossings prior to implementing the measures.

94. The Settlement Agreement's Proposed Articles 45, 46, 52, 54, and 55 provide for recreation mitigation or enhancement measures at non-project sites. The final EIS recommended the measures at the non-project sites specified in Proposed Articles 45, 46, and 52,<sup>24</sup> and we are requiring these measures, which will enhance public recreation in the project area. Given our conclusion that these recreation areas are necessary for the project purpose of recreation, we further require that these areas be included within the project boundary.<sup>25</sup>

95. The Settlement Agreement's Proposed Article 45 also provides for PGE and the Tribes to fund a study designed to evaluate the technical feasibility of an off-shore boat moorage program and fund the installation of up to 50 moorages in Lake Billy Chinook if unspecified land management agencies agree to develop, implement, and enforce regulations regarding the use of the moorages and enforce the closure of other areas where boats tie-up to the shore. Although we are including in Article 424 a requirement for PGE and the Tribes to evaluate the technical feasibility of implementing an off-shore boat moorage program at Lake Billy Chinook, we cannot require the installation of up to

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<sup>24</sup> The final EIS did not recommend funding of recreation-related measures at the Forest Service-managed Haystack Reservoir and BLM-managed lower Deschutes Wild and Scenic river sites, as set forth in Proposed Articles 54 and 55. The final EIS concluded these measures would not address project-related effects on recreation resources. *See* final EIS at 242-244 and 320. Further, sufficient recreation is provided at the project through the other measures required in this license. Accordingly, the license does not include the measures specified in Proposed Articles 54 and 55.

<sup>25</sup> *See, e.g., Kennebec Water Power Company*, 102 FERC ¶ 61,259 at 61,798 (2003) ("Lands dedicated to project purposes must be included in the project boundary . . ."). The fact that the lands in question are to be within the project boundary does not, however, mean that PGE and the Tribe must acquire title to them; rather, they must have sufficient interests to carry out project purposes. *See Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 at n.16.

50 moorages to be contingent upon the actions of other entities. Therefore, we are instead requiring PGE and the Tribes to include with the evaluation of the program, any recommendations for the installation and maintenance of up to 50 offshore moorages in Lake Billy Chinook.

96. The Settlement Agreement's Proposed Article 53 provides for PGE and the Tribes to enter into an agreement with the Forest Service whereby PGE and the Tribes would make one-time payments and annual contributions to upgrade and maintain non-project, Forest Service roads leading to the western, Metolius River arm of Lake Billy Chinook. The EIS concluded that upgrading and maintaining these roads would provide for continued public access to the Metolius River arm of Lake Billy Chinook, would help the Forest Service maintain the roads, and would address some of the effects associated with recreational access to remote areas of Lake Billy Chinook.<sup>26</sup> Based on the conclusion that these roads are necessary to support recreation at, and provide access to, the project, in Article 431 we require a plan to provide project-related road upgrades and maintenance, which will address the need for maintenance at project access roads identified by Proposed Article 53. We will not require ongoing actions requiring Commission oversight of non-project lands without those lands being brought into the project boundary. Because we are requiring PGE to take actions with respect to these roads throughout the term of the license, Article 431 requires that they be included within the project boundary.

97. The Settlement Agreement's Proposed Article 54 provides for PGE and the Tribes to enter into an agreement with Jefferson County to upgrade and maintain county-owned roads in the project area. The EIS noted that various of these roads (including Jordan Road, Dizney Lane, and Pelton Dam Road) provide important access to the project area.<sup>27</sup> Therefore, as discussed above with respect to the Forest Service roads, we include in license Article 431 provisions providing for project-related upgrades and maintenance of county roads identified in Proposed Article 431, and will require that these roads be included in the project boundary.

98. The Settlement Agreement's Proposed Article 61 provides for the establishment of the Pelton Round Butte Fund for fish and wildlife habitat enhancements and mitigation throughout the basin. Decisions on fund distribution, including selection of mitigation or enhancement projects, would take place at a future date by a Governing Board composed of various Settlement Agreement parties, including PGE and the Tribes. PGE and the Tribes would be under no ongoing obligation to maintain funded projects once they would be completed.

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<sup>26</sup> See EIS at 254-55.

<sup>27</sup> *Id.* at 254.



99. The Commission has stated that it generally does not favor such funds but prefers to require licensees to undertake specific measures to resolve project effects, especially in cases where it is not clear to what extent the funds will be used for activities related to the project.<sup>28</sup> In this case, the types of measures that would be funded have been stipulated in section II.B of Exhibit H of the Settlement Agreement and include: land acquisition or lease of riparian lands, wetlands, and uplands; water rights acquisition or lease for instream flows; water conservation; conservation easements, construction of non-project fish passage facilities and removal of non-project barriers to fish migrations; instream habitat improvements; riparian and wetland protection and enhancement; and restoration of fish and wildlife habitats adversely affected by recreation.

100. We note that habitat alteration owing to beaver trapping, agricultural stream diversions, and construction of small hydroelectric dams has been extensive in the Deschutes River basin.<sup>29</sup> Implementation of the funded measures would improve habitat conditions upstream and downstream of the project for aquatic species, including federally listed steelhead, and would increase the likelihood that self-sustaining runs of spring Chinook salmon and summer steelhead would be restored in the upper basin,<sup>30</sup> both of which are goals of the Fish Passage Plan component of the Settlement Agreement.<sup>31</sup> Implementation of the funded measures would also enhance riverine, riparian, and wetland habitats for wildlife.<sup>32</sup> While as noted, we prefer the implementation of specific measures to the establishment of general funds, the parties here have made clear many of the measures which will be paid for by the fund, and have satisfied us that the fund will be used for environmental measures related to the project, including the protection and enhancement of federally listed species. For these reasons, we are including establishment of the Pelton Round Butte Fund in the license as Article 436.

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<sup>28</sup> See, e.g., *Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056 (2005) (P-2169, Tapoco Hydroelectric Project).

<sup>29</sup> See final EIS at 100-101.

<sup>30</sup> See final EIS at 142-149.

<sup>31</sup> See Exhibit D of the Settlement Agreement at 4.

<sup>32</sup> See final EIS at 186-187. The fund could be used for terrestrial resource enhancements related to wildlife affected by reservoir operations. However, use of the fund for activities upstream and downstream of the project that support anadromous fish reintroduction has a higher priority. See Exhibit H of the Settlement Agreement (“The Pelton Round Butte Fund Implementation Plan”) at 5.

101. The Settlement Agreement includes specific dollar limitations (*e.g.*, PGE and the Tribes are to implement an Integrated Interpretation and Education Plan for the project to inform the public about resources and project features in the project area at a total expense to the licensees of no more than \$75,000). The Commission has stated that it is important for all entities involved in settlements to know that the Commission considers it the licensee's obligation to complete the measures required by license articles, in the absence of authorization from the Commission to the contrary, and that dollar figures agreed to by the parties are not absolute limitations.<sup>33</sup> Therefore, we are including Article 438 to reserve the Commission's authority to require the licensees to fulfill the requirements of this license notwithstanding the limitations on expenditures included in this license.

### **WATER QUALITY CERTIFICATION**

102. Under Section 401(a)(1) of the Clean Water Act (CWA),<sup>34</sup> the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA<sup>35</sup> provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.

103. The Pelton Round Butte Project has identifiable discharges in the State of Oregon and on tribal lands within the Warm Springs Reservation of Oregon. Therefore, both the State of Oregon and the Confederated Tribes of Warm Springs Water Control Board (Tribes' Water Board), the tribal entity that has regulatory authority to administer a water quality standards program, are empowered by Section 401(a)(1) of the CWA to issue water quality certification.

104. On June 26, 2001, PGE and the Tribes applied to the Tribes' Water Board and the Oregon Division of Environmental Quality (Oregon DEQ) for certification for the Pelton Round Butte Project, which the Tribes' Water Board and Oregon DEQ received on June 25, 2001, and June 26, 2001, respectively. On June 24, 2002, both the Tribes' Water Board and Oregon DEQ issued certifications for the project. Oregon DEQ's

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<sup>33</sup> See *Virginia Electric Power Co.*, 110 FERC ¶ 61, 241 (2005) (P-2009, Roanoke Rapids and Gaston Hydroelectric Project).

<sup>34</sup> 33 U.S.C. § 1341(a)(1).

<sup>35</sup> 33 U.S.C. § 1341(d).

certification includes 20 conditions and the Water Board's certification includes 16 conditions, which are set forth in Appendix A and B of this order and incorporated into the license (*see* ordering paragraphs (F) and (G)). The certifications include requirements for water quality management and monitoring (water temperature, dissolved oxygen, pH, total dissolved gases, turbidity, toxic substances, bacteria); nuisance phytoplankton growth control; oil and hazard substances spill prevention and control; ramping rates; reservoir operating levels; minimum flows; project operations; gaging; fish passage; large woody debris management; sediment transport studies; fish habitat enhancements upstream of the project area; and compliance and administration. Article 401 requires the licensees to file, for Commission approval, a plan for mitigation of total dissolved gas noncompliance as stipulated by the Oregon DEQ conditions.

#### **SECTION 4(E) FINDINGS AND CONDITIONS**

105. Section 4(e) of the FPA,<sup>36</sup> states that the Commission may issue a license for a project located within a reservation only if it finds that the license will not interfere or be inconsistent with the purposes for which the reservation was created or acquired. Section 3(2) of the FPA<sup>37</sup> defines "reservations" as including national forests, which in some regions encompass grasslands. Portions of the Pelton Round Butte Project occupy lands located within the Deschutes, Mt. Hood, and Willamette National Forests, and the Crooked River National Grassland. These federal lands are under the supervision of the Forest Service.<sup>38</sup>

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<sup>36</sup> 16 U.S.C. § 797(e).

<sup>37</sup> 16 U.S.C. § 796(2).

<sup>38</sup> Portions of the headwaters of the project's largest reservoir, Lake Billy Chinook, are located in the Deschutes National Forest. Other portions of Lake Billy Chinook as well as Lake Simtustus (the next reservoir downstream) and part of the Pelton development transmission line, are located in the Crooked River National Grassland.

Portions of Lake Billy Chinook, Lake Simtustus, and the Reregulating Reservoir, along with parts of Pelton Dam and powerhouse, Round Butte Dam and powerhouse, Pelton fish ladder, and the Round Butte transmission lines are located on lands under the supervision of BLM.

The 100-mile-long transmission line from the Round Butte switchyard to PGE's substation occupies 475.3 acres of lands of the Mt. Hood and Willamette National Forests. By order issued August 28, 2002, the Commission determined that it does not have jurisdiction over this line, because it is not the project's primary transmission line, and amended the license to delete the line from the project description (*See* 100 FERC ¶ 62,147). The order provided, however, that the line will remain within the project boundary until the licensees obtain all necessary permits and approvals from the Forest

106. We have reviewed the Organic Administration Act of 1897,<sup>39</sup> which established the purposes for forest reservations, and the presidential proclamations that created the Deschutes,<sup>40</sup> Mt. Hood,<sup>41</sup> and Willamette National Forests,<sup>42</sup> and the Crooked River National Grassland<sup>43</sup> within which the project is located.<sup>44</sup> There is no evidence in this proceeding to indicate that relicensing of the Pelton Round Butte Project would interfere

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Service and BLM for continued use of the federal lands. Article 201 of this license provides for the licensees' payment of annual charges for the use, occupancy, and enjoyment of 475.3 acres of federal lands for the 100-mile-long transmission line right-of-way until the licensees receive all necessary permits and approvals from the Forest Service and BLM.

<sup>39</sup> 16 U.S.C. § 473 *et seq.*

<sup>40</sup> The Deschutes National Forest was created by executive order issued June 13, 1908 (Executive Order No. 816), as part of the Cascade Range Forest Reserve.

<sup>41</sup> The Mt. Hood National Forest was created in 1908 when the northern portion of the Cascade Range Forest Reserve was merged with the Bull Run Reserve and named the Oregon National Forest. The forest was renamed Mt. Hood by executive order issued January 21, 1924 (Executive Order No. 3944).

<sup>42</sup> The Santiam National Forest and the Cascade National Forest were combined to form the Willamette National Forest by executive order issued April 6, 1933 (Executive Order No. 6104).

<sup>43</sup> By administrative order issued June 20, 1960, the Secretary of Agriculture designated 3,804,000 acres of land as national grasslands within the National Forest System under Section 31, Title III of the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1011 *et seq.*, which governs the purchase, conservation, and development of farm land that is considered submarginal or not primarily suitable for cultivation and has been retired from production and made available for Indian, park, forest, migratory bird refuge and agricultural adjustment purposes. *See* United States Department of Agriculture, Forest Service, *The Establishment and Modification of National Forest Boundaries and National Grasslands – A Chronological Record: 1891-1996*, Addendum 1-1 and 1-2 (1997). The Crooked River National Grassland is one of the 19 units permanently held for these purposes by the Department of Agriculture under the Bankhead-Jones Farm Tenant Act.

<sup>44</sup> At the time the forests were created, the Organic Administration Act of 1897, 16 U.S.C. § 475, stipulated that all national forest lands were established and administered only for watershed protection and timber production.

with the purposes of the Deschutes, Mt. Hood, and Willamette National Forests and the Crook River National Grassland. Therefore, we find that this license, as conditioned, will not interfere or be inconsistent with the purposes for which those reservations were created.

107. The Pelton Round Butte Project occupies 2,161.9 acres of tribal lands within the Tribes' Warm Springs Reservation of Oregon,<sup>45</sup> which is under the supervision of Interior's BIA. The Warm Springs Reservation was established by the Treaty of June 25, 1855, between the Tribes and Bands of Middle Oregon and the United States. The Treaty provides that the primary purpose of the reservation is to reserve to the tribes the exclusive right of taking fish in streams running through and bordering the reservation. No allegations have been made that the project would have any adverse effect upon the reservation. As discussed below, Interior has submitted 4(e) conditions for the protection and utilization of the reservation. The environmental measures required in the license will provide additional environmental benefits. We, therefore, find that the license will not interfere or be inconsistent with the purposes for which the reservation was created.

108. Section 4(e) also requires that the Commission include in licenses for projects located within a federal reservation all conditions that the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of the reservation.<sup>46</sup>

109. On November 12, 2002, the Forest Service, a signatory to the Settlement Agreement, filed 23 preliminary conditions.<sup>47</sup> The Forest Service included a schedule for filing final conditions within 90 days of the June 10, 2004, *Federal Register* notice for the final EIS, which would have been September 8, 2004.

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<sup>45</sup> The western side of the project boundary along the Deschutes River from just upstream of the Reregulating Dam to Round Butte Dam and continuing along the northern side of Lake Billy Chinook on the Metolius River arm are tribal reservation lands. Project facilities on reservation lands include portions of the Reregulating Reservoir, Lake Simtustus and the Metolius River arm of Lake Billy Chinook, as well as parts of Pelton Dam and powerhouse and Round Butte Dam and powerhouse. The Reregulating Dam and powerhouse are located entirely on lands jointly owned by PGE and the Tribes.

<sup>46</sup> *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1984).

<sup>47</sup> A summary of the preliminary 4(e) conditions is provided in the final EIS at 24-26.

110. On October 4, 2004, the Forest Service filed correspondence concerning its section 4(e) conditions. The Forest Service indicated that it was not modifying its preliminary section 4(e) conditions, but instead filing three new conditions as final 4(e) conditions. Condition No. 1 requires the licensees to comply fully with all provisions of the Settlement Agreement relating to protection, mitigation, and enhancement measures and commitments that implement activities on or affect forest lands and resources. Condition No. 2 requires the Commission's acceptance and incorporation of the Settlement Agreement and the licensees' immediate and complete implementation of the Settlement Agreement measures in accordance with the schedule set forth in the Settlement Agreement. Condition No. 2 further states that in the event either of the requirements is not met, the Forest Service reserves its right to supplement or modify the final 4(e) conditions at a later time. Condition No. 3 reserves the Forest Service's right to add, delete, or revise conditions in the event the licensees, the Forest Service, or other parties withdraw from the Settlement Agreement prior to issuance of a license for the project.

111. Because the Forest Service submitted the final 4(e) conditions after the September 8, 2004, deadline, they are untimely. Typically, in a case where an agency has previously filed preliminary section 4(e) conditions and a schedule for submitting final section 4(e) conditions, and either files the final 4(e) conditions late or does not file them at all, the Commission recognizes the preliminary 4(e) conditions as final conditions.<sup>48</sup> In this instance, however, we do not believe that the Forest Service intends for its preliminary conditions to be included as final conditions, because they are substantially different from the Settlement Agreement. Therefore, we have considered the Forest Service's untimely conditions as recommendations under section 10(a)(1), 16 U.S.C. § 803(a)(1).<sup>49</sup> Conditions 1 and 2 call for the Commission to include in the license the provisions of the Settlement Agreement relating to project lands and facilities located on federal reservations administered by the Forest Service. We are including in the license most of the Proposed License Articles that pertain to project lands and facilities located on federal reservations administered by the Forest Service.

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<sup>48</sup> See, e.g., *City of Springville*, 101 FERC ¶ 62,160 (2002) (In the absence of final section 4(e) conditions, the Forest Service's preliminary 4(e) conditions were adopted as final 4(e) conditions and included in the license).

<sup>49</sup> Section 10(a)(1) requires that any project for which the Commission issues a license shall be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

112. On November 12, 2002, Interior, also a signatory to the Settlement Agreement, filed on behalf of BIA, BLM, and the U.S. Fish and Wildlife Service (FWS), 31 preliminary conditions for the project pursuant to section 4(e). Interior included a schedule for filing final conditions within 60 days of the December 31, 2003, close of the comment period for the draft EIS, which would have been March 1, 2004. Interior subsequently requested an extension of the schedule to allow time for settlement negotiations, and staff extended the due date for Interior's final conditions to October 1, 2004.

113. Interior timely filed final section 4(e) conditions for the protection and utilization of the Warm Springs Indian Reservation<sup>50</sup> and for the federal lands managed by Interior through BLM<sup>51</sup> on September 30, 2004. In its filing, Interior also asked that the Commission adopt all of the Proposed License Articles in the Settlement Agreement in lieu of its preliminary section 4(e) conditions and that the Commission adopt the license articles and approve the Settlement Agreement without material modification. Interior's 4(e) conditions are set forth in Articles 441 and 442 of the license. A discussion of the Settlement Agreement Proposed License Articles included in the license can be found earlier in the order in the *Settlement Agreement* section.

### **SECTION 18 FISHWAY PRESCRIPTIONS**

114. Section 18 of the FPA, 16 U.S.C. § 811, provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

115. NOAA Fisheries and Interior each filed preliminary fishway prescriptions for the Pelton Round Butte Project on November 12, 2002, along with a schedule for submitting final fishway prescriptions within 60 days of the close of the comment period on the draft EIS. A draft EIS for the project was issued on August 29, 2003, requesting that all comments be filed by December 31, 2004; therefore, the due date for filing final fishway prescriptions for both NOAA Fisheries and Interior was March 1, 2004.

116. On February 12, 2004, NOAA Fisheries requested a modification of their schedule for filing final section 18 fishway prescriptions to a due date of no later than 60 days after the filing of a settlement agreement for the project. On February 27, 2004, Interior requested that the schedule for filing its fishway prescriptions be extended

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<sup>50</sup> See Attachment B of Interior's filing.

<sup>51</sup> See Attachment C of Interior's filing.

indefinitely to allow Interior time to continue settlement negotiations and arrange with the settlement parties a new deadline for filing the final prescriptions. On April 14, 2004, staff extended the due date to file final fishway prescriptions to November 1, 2004, for NOAA Fisheries and to October 1, 2004, for Interior.

117. Interior timely filed its final section 18 fishway prescriptions on September 30, 2004, and NOAA Fisheries timely filed its final prescriptions on October 27, 2004. Interior's and NOAA Fisheries' final fishway prescriptions, which comprise the Settlement Agreement's fish passage requirements, are set out in Appendices C and D to this order, and are made requirements of the license by ordering paragraphs (H) and (I), respectively.

118. Certain of the NOAA Fisheries' and Interior's fishway prescriptions contemplate unspecified, long-term changes to project operations or facilities for the purpose of facilitating safe passage for anadromous salmonids past the project. Article 401 requires the licensees to receive Commission approval through the filing of an application to amend the license prior to implementation of the measures.

119. With their filing of the final fishway prescriptions, both Interior and NOAA Fisheries requested reservation of authority to prescribe fish passage for the project. Consistent with Commission policy, Article 437 of this license reserves the Commission's authority to require fishways that may be prescribed by NOAA Fisheries or Interior for the Pelton Round Butte Project.

### **ESSENTIAL FISH HABITAT**

120. Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Stevens Act), 16 U.S.C. § 1855(b)(2), requires federal agencies to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat identified under the Act. Under section 305(b)(4)(A) of the Magnuson Stevens Act, NOAA Fisheries is required to provide Essential Fish Habitat Conservation Recommendations for actions that would adversely affect Essential Fish Habitat. Under Section 305(b)(4)(B) of the Magnuson Stevens Act, an agency must, within 30 days after receiving recommended conservation measures from NOAA Fisheries or a Regional Fishery Management Council, describe the measures proposed by the agency for avoiding, mitigating, or offsetting the effects of the agency's activity on the Essential Fish Habitat.



121. The Pacific Fisheries Management Council (PFMC) has designated Essential Fish Habitat for three species of Pacific salmon: coho, Chinook, and Puget Sound pink salmon.<sup>52</sup> Essential Fish Habitat includes all those streams, ponds, lakes, wetlands, and other waterbodies currently or historically accessible to coho and Chinook salmon in Oregon, Washington, Idaho, and California, except upstream of impassable barriers identified by the PFMC. Essential Fish Habitat in the project area includes the Deschutes River and tributaries from the confluence with the Columbia River upstream to Round Butte dam (Chinook and coho salmon) and Lake Billy Chinook (Chinook salmon).

122. On June 18, 2004, Commission staff sent NOAA Fisheries a Biological Evaluation addressing project effects on among other things, Essential Fish Habitat, and concluding that the project would not adversely affect Essential Fish Habitat. On February 28, 2005, NOAA Fisheries filed a response concluding that the project, as proposed by the Settlement Agreement, would adversely affect designated Essential Fish Habitat for Chinook and coho salmon. NOAA Fisheries proposed that the following Essential Fish Habitat conservation measures be included as license conditions:<sup>53</sup>

- (1) The Commission must require the licensees to construct and operate the project facilities identified in the Settlement Agreement; carry out the Fish Passage Plan; adhere to the Fish Passage Schedule; implement the Testing and Verification studies, Long Term Monitoring, Annual Work Plans and Reports, and Native Fish Monitoring Program; implement the Trout Creek Restoration Project, LWD management plan, and gravel augmentation study; and “other measures” identified in the Settlement Agreement.
- (2) The Commission must require the licensees to establish the Fish Committee required by the Settlement Agreement, and to adhere to the consultation and dispute resolution provisions of the Settlement Agreement.
- (3) The Commission must require the licensees to comply with all project construction activity best management practices (Appendix F of the Settlement Agreement), including measures to control erosion and sedimentation, and measures to control pollutants of any kind.

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<sup>52</sup> See Pacific Fishery Management Council. 1999. Amendment 14 to the Pacific salmon plan. Appendix A: Description and identification of essential fish habitat, adverse impacts and recommended conservation measures of salmon. Portland, Oregon.

<sup>53</sup> These conservation measures are identical to those required in the Incidental Take Statement included with NOAA Fisheries Biological Opinion filed on February 28, 2005.

123. NOAA Fisheries' conservation recommendations are included in this license as part of the Threatened and Endangered Species Plan required by Article 440.

### **ENDANGERED SPECIES ACT ISSUES**

124. Section 7(a)(2) of the Endangered Species Act of 1973<sup>54</sup> requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

125. Three federally listed species are known to occur in the project vicinity: bald eagle (threatened); the Columbia River bull trout Distinct Population Segment (DPS) (threatened); and the Middle Columbia River steelhead Evolutionarily Significant Unit (ESU) (threatened). Designated critical habitat for bull trout includes Heising Spring, the confluence of Jack Creek with the Metolius River, and a short reach of the Metolius River just upstream of the confluence with Abbot Creek, all of which are located in the Metolius River subbasin upstream of the project. Designated critical habitat downstream of the project is located on the Deschutes River and includes fragmented reaches from the mouth upstream to the project's Reregulating Dam at river mile 100.

126. On April 27, 2004, PGE and the Tribes filed a Biological Evaluation that concluded that licensing the project as proposed by the Settlement Agreement<sup>55</sup> is likely to adversely affect Middle Columbia River steelhead ESU and Columbia River bull trout DPS; may affect, but is not likely to adversely modify or destroy, bull trout critical habitat; and may affect, but is not likely to adversely affect, the bald eagle. Staff's findings in the final EIS for the project were consistent with the Biological Evaluation.

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<sup>54</sup> 16 U.S.C. § 1536(a).

<sup>55</sup> At the time, the Settlement Agreement had not been finalized; however, draft environmental measures anticipated to be included in the final settlement had been crafted by the settlement parties.

127. The Commission initiated formal consultation with NOAA Fisheries and Interior by letters dated June 18, 2004.<sup>56</sup> On November 2, 2004, Interior filed a biological opinion that concludes that issuing a license for the project, as recommended by Commission staff, is not likely to jeopardize the continued existence of the Columbia River bull trout DPS. In the same filing, Interior concurred with staff that the proposed project may affect, but is not likely to adversely affect, the bald eagle. On February 28, 2005, NOAA Fisheries filed a biological opinion that concludes that issuing a license for the project, as recommended by Commission staff, is not likely to jeopardize the continued existence of the Middle Columbia River steelhead ESU.

128. As part of their biological opinions, both Interior and NOAA Fisheries included incidental take statements with reasonable and prudent measures to minimize incidental take of bull trout and steelhead, along with terms and conditions to implement the measures. These terms and conditions included requirements to: (1) implement the Settlement Agreement measures that “avoid or minimize affects to” bull trout and steelhead,<sup>57</sup> (2) establish a Fish Committee as set forth by the Settlement Agreement; and (3) implement best management practices, as stipulated by the Settlement Agreement, during construction activities. The terms and conditions are attached to this license as Appendices E and F, and Article 440 of this license requires the licensees to develop a plan, for Commission approval, to comply with the terms and conditions of the incidental take statements.

### **NATIONAL HISTORIC PRESERVATION ACT ISSUES**

129. On December 6, 2004, the Commission, the Advisory Council on Historic Preservation, the Oregon Historic Preservation Officer, and the Tribes’ Tribal Historic Preservation Officer executed a Programmatic Agreement (PA) for managing historic properties that may be affected by the relicensing and continued operation of the Pelton Round Project. Article 432 of the new license requires the licensees to implement the

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<sup>56</sup> Staff initially attempted to initiate formal consultation with Interior and NOAA Fisheries on September 24, 2003; however, both agencies denied staff’s request by letters filed November 6 and November 12, 2003, respectively, because they felt staff did not provide them with sufficient information with regard to project effects on the species and that the time was not yet ripe to initiate consultation in light of settlement negotiations that were occurring at the time.

<sup>57</sup> NOAA Fisheries and FWS did not specify the exact Settlement Agreement terms that “avoid or minimize affects to” bull trout and steelhead.

agreement, including but not limited to a final Cultural Resources Management Plan (CRMP) for the project. This provides protection for all existing and future cultural sites located within the project boundary, and satisfies the Commission's responsibilities under section 106 of the National Historic Preservation Act.<sup>58</sup>

### **RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES**

130. Section 10(j)(1) of the FPA,<sup>59</sup> requires the Commission, when issuing a license, to include conditions based on recommendations by federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,<sup>60</sup> to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

131. Interior filed its initial fish and wildlife recommendations on November 12, 2002. These consisted of 24 detailed recommendations addressing minimum flows; project operations (ramping and reservoir drawdown limits); operations monitoring; water quality monitoring; fish habitat protection and enhancement; fish passage; fish habitat surveys and monitoring; spread of fish diseases; fish genetics in terms of appropriate stocks to reintroduce upstream of the project; fish predation; large woody debris placement; project effects on sediment transport; project effects on Pacific lamprey; effects of anadromous fish reintroduction on resident fish populations; terrestrial resources management; protection of wildlife at fishways; shoreline management; wildlife habitat connectivity; transmission line effects on birds; and project effects on threatened and endangered species, including bald eagle management and protection. On September 30, 2004, Interior filed modifications to its recommendations to incorporate Proposed Articles 8-16, 34-37, 39, 41-43, 49-50, and 58-61 of Exhibit A of the Settlement Agreement.

132. On November 12, 2002, NOAA Fisheries adopted all of Interior's initial section 10(j) recommendations that include provisions for the protection, mitigation, and enhancement of Chinook salmon, sockeye salmon, and steelhead. NOAA Fisheries filed revised recommendations on December 31, 2003, consistent with measures included in

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<sup>58</sup> 16 U.S.C. § 470s.

<sup>59</sup> 16 U.S.C. § 803(j)(1).

<sup>60</sup> 16 U.S.C. §§ 661, *et seq.*

an agreement-in-principle that was reached with the settlement parties. On October 27, 2004, NOAA Fisheries filed modifications to its revised recommendations to incorporate Proposed Articles 1-2, 4, 6, 8-13, 15-16, 34-37, 39, and 58-61 of Exhibit A of the Settlement Agreement.

133. Oregon DFW filed fish and wildlife recommendations on November 12, 2002. These consisted of 33 recommendations addressing minimum flows; project operations (ramping and reservoir drawdown limits); operations monitoring; fish habitat protection and enhancement; fish passage; fish habitat surveys and monitoring; fish health monitoring; fish entrainment monitoring; fish predation; fish hatchery upgrades; large woody debris placement; project effects on sediment transport; effects of anadromous fish reintroduction on resident fish populations; terrestrial resources management; off-site terrestrial habitat acquisition; mule deer winter range studies; protection of wildlife at fishways; effectiveness monitoring of existing wildlife crossings; shoreline management; riparian and wetland habitat restoration and improvements; invasive weed management; project effects on threatened and endangered species, including bald eagle management and protection and bat habitat improvements; funding for Jefferson County personnel to patrol the project area; project removal and site restoration in the event of project decommissioning; license term limits; and reserved authority to file modified recommendations. Oregon DFW filed revised recommendations on December 29, 2003, consistent with measures included in an agreement-in-principle that was reached with the settlement parties. On August 18, 2004, Oregon DFW filed modifications to its revised recommendations to incorporate Proposed Articles 1-4, 6, 8-15, 17-43, 45, 49-50, and 58-61 of Exhibit A of the Settlement Agreement.

134. The Settlement Agreement's proposed articles are generally consistent with the 110 separate recommendations that Commission staff considered in the final EIS.<sup>61</sup> The final EIS found certain recommendations to be outside of the scope of section 10(j), because they are not specific measures to protect fish and wildlife. These include recommendations for the establishment of a shoreline working group; funding of law enforcement officials at the project; funding of Oregon DFW personnel to coordinate Oregon DFW's involvement in the implementation of fisheries and terrestrial license requirements; development and implementation of recreation, shoreline management, and shoreline erosion plans; development and implementation of plans for off-site fish and wildlife habitat; and establishment of funds to be directed toward off-site fish and wildlife habitat enhancements.

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<sup>61</sup> Table 35 of the final EIS lists each of the recommendations and the agency or agencies that recommended it. Table 35 also specifies, as to each recommendation, whether it is within the scope of section 10(j) and whether staff recommended its adoption.

135. The recommendations reflect the provisions of the Settlement Agreement, which we adopt as license conditions through ordering paragraphs incorporating mandatory license conditions or through license articles. Those recommendations that do not fall within the scope of section 10(j) are instead considered under section 10(a)(1), 16 U.S.C. § 803(a)(1). The extent to which the license adopts those measures is discussed earlier in this order in the *Settlement Agreement* section.

### **COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM**

136. Under section 4(h) of the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839(h), the Northwest Power Planning Council (Council) developed the Columbia River Basin Fish and Wildlife Program (Program) to protect, mitigate, and enhance the fish and wildlife resources associated with development and operation of hydroelectric projects within the Columbia River Basin. Section 4(h) states that responsible federal and state agencies should provide equitable treatment for fish and wildlife resources, in addition to other purposes for which hydropower is developed, and that these agencies should take into account, to the fullest extent practicable, the program adopted under the Pacific Northwest Power Planning and Conservation Act. Specific provisions affecting non-federal hydropower projects are outlined in Appendix B of the Program.

137. The license, which among other things, includes reservoir stage change limits (Article 409); minimum flows (Article 412); reservoir drawdown and fluctuation limits (Article 414); fish passage requirements (ordering paragraphs (H) and (I)); native fish monitoring (Article 421); terrestrial resources management (Articles 422 and 423); fish spawning gravel augmentation (Article 433); large river wood management (Article 434); lower Deschutes River habitat enhancements (Article 435); and threatened and endangered species protection (Article 440) is consistent with the applicable provisions of the Program, as discussed in more detail in the final EIS. Article 439 reserves to the Commission the authority to require future alterations in project structures and operations to take into account, to the fullest extent practicable, the applicable provisions of the Program.

### **WILD AND SCENIC RIVER DESIGNATIONS**

138. Section 7(a) of the Wild and Scenic Rivers Act (Rivers Act), 16 U.S.C. § 1278(a), bars the Commission from licensing “the construction of” any dam, water conduit, or other project works “on or directly affecting any river which is designated as a component of the national wild and scenic rivers system” or from licensing any project

works below or above a wild or scenic river that would “invade” or “unreasonably diminish” the scenic, recreational and fish and wildlife values there. Section 7(a) does not bar the issuance of a license for the continued operation of the project, provided no new construction is proposed in the wild and scenic river.<sup>62</sup>

### ***Lower Deschutes River***

139. The Pelton Reregulating Dam is located near a portion of the lower Deschutes River that Congress designated a Wild and Scenic River under the Omnibus Oregon Wild and Scenic Rivers Act of 1988 (Oregon River Act).<sup>63</sup> In relationship to the Pelton Round Butte Project, the Wild and Scenic River corridor is immediately upstream and downstream of the project, but no part of the project is located in the corridor.

140. PGE and the Tribes propose replacement of an existing intake tower at the Reregulating Dam with a new intake tower, which will serve as a selective water withdrawal facility and fishway. The entrance to the proposed fishway is at the boundary of the lower Deschutes Wild and Scenic River corridor.

141. BLM and the Forest Service have determined that the proposed project will not invade the lower Deschutes Wild and Scenic River area, because the licensees do not propose construction of any new project works in the corridor. BLM and the Forest Service have also determined that the proposed project should not unreasonably diminish scenic and wildlife values in the area or have a negative effect on the fisheries resources and wildlife habitat. BLM and the Forest Service further find that the adverse effects of the proposed project, *i.e.*, sediment conditions, which existed at the date of the river’s designation, will not unreasonably diminish recreation and fisheries values provided the license articles proposed in the Settlement Agreement are adopted in their entirety.

### ***Middle Deschutes, Lower Crooked, and Metolius Rivers***

142. In relationship to the Pelton Round Butte Project, the Wild and Scenic River corridors of the Middle Deschutes, Lower Crooked, and Metolius Rivers are upstream of the project and outside of the project boundary.

143. Pursuant to section 7, BLM and the Forest Service jointly determined for the Middle Deschutes and Lower Crooked Rivers, and the Forest Service determined for the Metolius River, that the proposed project will not invade the designated areas, because the licensees do not propose construction of any project works in the wild and scenic

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<sup>62</sup> See *Northern States Power Company*, 67 FERC ¶ 61,282 (1994).

<sup>63</sup> See Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557.

river corridors and do not plan to raise the height of any dams or other project facilities. BLM and the Forest Service further determined for the respective rivers that the potential adverse effects of the project will not unreasonably diminish the scenic, recreation, wildlife, and fisheries values present in the areas.

### **TRANSMISSION LINES**

144. On January 30, 2002 (supplemented April 19, 2002), PGE and the Tribes filed an amendment application to delete the 100-mile-long, 230-kV Bethel-Round Butte transmission line from the project. The transmission line is partially located on federal lands managed by the Forest Service. By order issued August 28, 2002,<sup>64</sup> the Chief of the Engineering & Jurisdiction Branch, Division of Hydropower Administration and Compliance, issued an order finding that the transmission line is not required to be licensed. The amendment order removed the transmission line from the project description but, to prevent any gap in federal authorization for the portion of the transmission line on federal lands (475.3 acres), the order kept the line in the project boundary and under Commission jurisdiction until PGE and the Tribes obtained the necessary permits for the use and occupancy of National Forest Lands.

145. To date, PGE and the Tribes have not filed copies of the necessary permits with the Commission; therefore, ordering paragraphs (D) and (E) of the new license require that the facilities and lands deleted from the project by the April 28, 2002, amendment remain within the project boundary and under Commission jurisdiction until PGE and the Tribes file the required permits with the Commission.

146. In a March 29, 2002, letter to the Commission, PGE and the Tribes notified the Commission that Exhibit A of the license application should be corrected to indicate that the only primary transmission lines for the Reregulating development are 6.9-kV leads (about 200 feet in length) from the generator to a 6,900-volt bus at the step-up transformer located adjacent to the powerhouse. The approvals of Exhibits A, F, and G in order paragraph B reflect this change.

### **STATE AND FEDERAL COMPREHENSIVE PLANS**

147. Section 10(a)(2)(A) of the FPA, 16 U.S.C. § 803(a)(2)(A), requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways

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<sup>64</sup> 100 FERC ¶ 62,147.



affected by the project.<sup>65</sup> Under Section 10(a)(2)(A), federal and state agencies filed 137 comprehensive plans that address various resources in Oregon. Of these, the staff identified and reviewed 65 comprehensive plans that are relevant to this project.<sup>66</sup> No conflicts were found.

### **APPLICANTS' PLANS AND CAPABILITIES**

148. In accordance with sections 10(a)(2)(c) and 15(a) of the FPA,<sup>67</sup> staff evaluated PGE's and the Tribes' record as licensees with respect to the following: (A) conservation efforts; (B) compliance history and ability to comply with the new license; (C) safe management, operation, and maintenance of the project; (D) ability to provide efficient and reliable electric service; (E) need for power; (F) transmission service; (G) cost effectiveness of plans; and (H) actions affecting the public. We accept the staff's findings in each of the following areas.

#### **A. Conservation Efforts**

149. FPA section 10(a)(2)(C) requires the Commission to consider the extent of electric consumption efficiency programs in the case of license applicants primarily engaged in the generation or sale of electric power. PGE is such an applicant. PGE has engaged in energy efficiency programs since 1970 and continues to offer programs that promote the use of energy efficient lighting and appliances. PGE's integrated resource planning program proposes other demand side energy consumption efficiency measures such as time-of-use metering and direct load control to better manage peak demand by its customers. Through these programs, PGE is making satisfactory efforts to conserve electricity and reduce peak hour demands.

#### **B. Compliance History and Ability to Comply with the New License**

150. Based on a review of PGE's and the Tribes' compliance with the terms and conditions of the existing license, staff found that PGE's overall record of making timely filings and of compliance with its license is satisfactory.

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<sup>65</sup> Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19.

<sup>66</sup> See final EIS at Appendix D for a list of the applicable plans.

<sup>67</sup> 16 U.S.C. §§ 803(a)(2)(C) and 808(a).

**C. Safe Management, Operation, and Maintenance of the Project**

151. Staff reviewed PGE's and the Tribes' management, operation, and maintenance of the Pelton Round Butte Project pursuant to the requirements of 18 C.F.R. Part 12 and the Commission's Engineering Guidelines and periodic Independent Consultant's Safety Inspection Reports. The project dam has a high hazard potential classification. Staff concluded that the dam and other project works are safe, and that there is no reason to believe that PGE cannot continue to safely manage, operate, and maintain these facilities under a new license.

**D. Ability to Provide Efficient and Reliable Electric Service**

152. Staff reviewed PGE's plans and its ability to operate and maintain the project in a manner most likely to provide efficient and reliable electric service. Staff found that PGE has been operating the project in an efficient manner within the constraints of the existing license and is likely to continue to do so under a new license.

**E. Need for Power**

153. PGE is an integrated electric utility serving nearly 1.4 million people in the Portland, Oregon, metropolitan area. PGE has over 730,000 retail residential, commercial, and industrial customers. Power from the Pelton and Round Butte developments is sold to PGE customers and is transmitted via PGE's transmission and distribution system. The 247.12-MW Round Butte and 100.8-MW Pelton developments provide approximately 20 percent of PGE's 2,022-MW generating capability, which includes hydroelectric, coal, and gas facilities (PGE, 2003). The project, with its large storage reservoir, is typically operated to provide power during daily load peaks. The operational flexibility of the project is used by PGE to maintain the stability and reliability of the PGE system.

154. The Tribes market the power from the 18.9-MW generating facilities at the Reregulating development as a wholesale utility and sell the power to PGE or to others on the open market.

155. PGE is part of the Western Electricity Coordinating Council (WECC), which is composed of generators and suppliers in 12 western states, Canada, and Mexico. PGE and its resources are located within the northwest subregion of the WECC. In its 10-year Coordinated Plan Summary for the period 2004-2013, the WECC estimates that its peak summer demand will increase by an average annual compound rate of 2.2 percent to about 171,000 MW by 2013. For the 10-year period, the region projects

the addition of a net amount of about 23,000 MW of new resources, 96 percent of which is combined cycle combustion turbine capacity. With these additions, WECC projects adequate capacity to meet its estimated summer load, including a 15-percent reserve margin, through 2013.

156. In summary, the electric power provided by the Pelton Round Butte Hydroelectric Project supplies part of the current need for power by PGE's customers and the region, and can continue to contribute to meeting those needs with a clean source of energy, thereby avoiding the use of a like amount of fossil-fueled generation and its associated atmospheric emissions.

#### **F. Transmission Services**

157. The project's transmission facilities that are required to be licensed include the three 230-kV lines each extending about 2,800 feet from the Round Butte powerhouse to the Round Butte switchyard; the 230-kV primary transmission line that extends south about 7.9 miles from Pelton Development's powerhouse to the Round Butte Switchyard; and the 6.9-kV leads that extend about 200 feet connecting the generator of the Pelton Re-regulating Development to the 6.9-kV bus at the step-up transformers located adjacent to the powerhouse. PGE proposes no changes that would affect transmission facilities.<sup>68</sup>

#### **G. Cost Effectiveness of Plans**

158. The Pelton Round Butte Project develops nearly 100 percent of the hydropower flow potential of the site and, as such, represents a cost-effective level of development. In addition, PGE is proposing and this license requires several modifications to project facilities for more efficient operation, and for the protection and enhancement of fish and other environmental resources. PGE's past record as a licensee indicates it is likely to carry out these measures in a cost-effective manner.

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<sup>68</sup> As noted above, on August 28, 2002, under the previous license, the Commission approved a license amendment deleting the 100-mile-long, 230-kV Bethel to Round Butte transmission line from the project license. The amendment order requires that this transmission line remain under Commission jurisdiction until PGE accepts a special use permit from the appropriate federal land management agencies.

## H. Actions Affecting the Public

159. In its license application, PGE and the Tribes cited numerous examples of actions they have taken which benefit natural resources and the economy of the Deschutes River Basin including working cooperatively with fish and wildlife agencies on research and enhancement of fish and wildlife resources, and development of recreation facilities to improve public access to and enjoyment of project lands and waters.

### PROJECT ECONOMICS

160. In determining whether to issue a new license for an existing hydroelectric project, the Commission considers a number of public interest factors, including the economic benefits of project power. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp.*,<sup>69</sup> the Commission uses current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

161. As licensed herein under the terms of the Settlement Agreement as incorporated into this license, the Pelton Round Butte Hydroelectric Project will generate an average of 1,591,000 megawatt-hours (MWh) of electricity a year at a total annual cost of about \$26.3 million (about \$17/MWh). Based on recent market prices in the northwest region, the annual value of the project power is about \$76.1 million (about \$48/MWh), resulting in a net annual benefit of about \$49.8 million (about \$31/MWh).

162. In analyzing public interest factors, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system (ancillary benefits). These benefits include their value as almost instantaneous load-following response to dampen voltage and frequency instability on the transmission system, system-power-factor correction through condensing operations, and a source of power available to help in quickly putting fossil-fuel based generating stations back on line following a major utility system or regional blackout.

163. Ancillary services are now mostly priced at rates that recover only the cost of providing the electric service at issue, which do not resemble the prices that would occur in competitive markets. As competitive markets for ancillary services begin to develop, the ability of hydro projects to provide ancillary services to the system will increase the

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<sup>69</sup> 72 FERC ¶ 61,027 (1995).

benefits of the project. The Pelton Round Butte Project, with the large amount of storage available in Lake Billy Chinook, is PGE's primary load following resource for meeting the daily peak demands of its customers. The project will retain these valuable ancillary service benefits under the terms of the Settlement Agreement and this license.

### **COMPREHENSIVE DEVELOPMENT**

164. Sections 4(e) and 10(a)(1) of the FPA,<sup>70</sup> respectively, require the Commission to give equal consideration to the power development purposes and to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

165. The EIS for the Pelton Round Butte Project contains background information, analysis of effects, support for related license articles, and the basis for a finding that the project will not result in any major, long-term adverse environmental effects. The project would be safe if operated and maintained in accordance with the requirements of this license.

166. Based on our independent review and evaluation of the Pelton Round Butte Project, recommendations from the resource agencies and other stakeholders, the Settlement Agreement, and the no-action alternative, as documented in the EIS, we have selected the Settlement Agreement with modifications, as discussed herein, as the preferred alternative, which we conclude is best adapted to a comprehensive plan for developing the Deschutes, Crooked and Metolius Rivers. We selected this alternative because: (1) issuance of a new license would serve to maintain a beneficial, dependable, and an inexpensive source of electric energy; (2) the required environmental measures would protect and enhance fish and wildlife resources, water quality, recreational resources and historic properties; and (3) the 366.82-MW of electric energy generated from renewable resource would continue to offset the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable resources and reducing atmospheric pollution.

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<sup>70</sup> 16 U.S.C. §§ 797(e) and 803(a)(1).

**LICENSE TERM**

167. Section 15(e) of the FPA,<sup>71</sup> provides that any new license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years. The Commission's general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.<sup>72</sup>

168. This license authorizes an extensive amount of environmental measures, including new construction. As part of the Settlement Agreement, the signatories agree to a new 50-year license term. For the above reasons, and because the term of license was likely an important element in the negotiations that led to the Settlement Agreement, we are issuing this new license for a term of 50 years.

The Commission orders:

(A) This license is issued to PGE and the Tribes (licensees) to operate and maintain the Pelton Round Butte Project for a period of 50 years, effective the first day of the month in which this order is issued. The license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G included in the application for new license, filed on June 29, 2001, to the Commission Secretary.

<u>Exhibit</u> <u>G-</u>	<u>FERC</u> <u>Drawing</u> <u>No. 2030-</u>	<u>Showing</u>
1	1023	Project Boundary and Location Map - Round Butte Development
2	1024	Project Boundary and Location Map - Round Butte Development
3	1025	Project Boundary and Location Map - Round Butte Development

<sup>71</sup> 16 U.S.C. § 808(e).

<sup>72</sup> See *Wisconsin Power Company*, 94 FERC ¶ 61,164 (2001).

<u>Exhibit</u> <u>G-</u>	<u>FERC</u> <u>Drawing</u> <u>No. 2030-</u>	<u>Showing</u>
4	1026	Project Boundary and Location Map - Round Butte Development
5	1027	Project Boundary and Location Map - Round Butte Development
6	1028	Project Boundary and Location Map - Round Butte Development
7	1029	Project Boundary and Location Map - Round Butte Development
8	1030	Project Boundary and Location Map - Round Butte Development
9	1031	Project Boundary and Location Map - Round Butte Development
10	1032	Project Boundary and Location Map - Round Butte Development
11	1033	Project Boundary and Location Map - Round Butte Development
12	1034	Project Boundary and Location Map - Round Butte Development
13	1035	Project Boundary and Location Map - Pelton Development
14	1036	Project Boundary and Location Map - Pelton Development
15	1037	Project Boundary and Location Map - Pelton Development
16	1038	Project Boundary and Location Map - Pelton Development
17	1039	Project Boundary and Location Map - Pelton Development
18	1040	Project Boundary and Location Map - Pelton Development
19	1041	Project Boundary and Location Map - Pelton Development
20	1042	Project Boundary and Location Map - Wildlife Mitigation Lands
21	1043	Project Boundary and Location Map - Wildlife Mitigation Lands
22	1044	Project Boundary and Location Map - Wildlife Mitigation Lands
23	1045	Project Transmission Line - Pelton Development
24	1046	Project Transmission Line - Pelton Development
25	1047	Pelton-Round Butte Project Service Road
26	1048	12.5-kV Pelton-Round Butte Service Line
27	1049	12.5-kV Pelton-Round Butte Service Line

The following Exhibit G drawings show the location of the non-project Bethel-Round Butte transmission line which remains under Commission jurisdiction until PGE and the Tribes receive all necessary permits and approvals from the U.S. Forest Service and the U.S. Bureau of Land Management, as appropriate, for the continued use of federal lands.

<u>Exhibit G-</u>	<u>FERC Drawing No. 2030-</u>	<u>Showing</u>
28	1050	Bethel-Round Butte Transmission Line
29	1051	Bethel-Round Butte Transmission Line
30	1052	Bethel-Round Butte Transmission Line
31	1053	Bethel-Round Butte Transmission Line
32	1054	Bethel-Round Butte Transmission Line
33	1055	Bethel-Round Butte Transmission Line
34	1056	Bethel-Round Butte Transmission Line
35	1057	Bethel-Round Butte Transmission Line

(2) Project works consisting of:

The **Round Butte Development** consisting of: (1) a 440-foot-high, 1,382-foot-long rockfill, embankment dam; (2) a 4,000 acre reservoir (Lake Billy Chinook) with a gross storage capacity of 535,000-acre-feet and a maximum useable storage volume of 274,000 acre-feet (limited by this license to 76,000 acre-feet with a maximum drawdown of 20 feet) at a normal pool elevation at 1,945.0 feet mean sea level; (3) a concrete spillway intake structure topped with a 30-foot-high, 36-foot-wide radial gate; (4) an 1,800-foot-long, 21-foot-diameter spillway tunnel; (5) an 85-foot-long, varying in height and width, concrete, powerhouse intake structure; (6) a 1,425-foot-long, 23-foot-diameter power tunnel; (7) a 170-foot-long, 116-foot-wide, concrete powerhouse containing three Francis-type, turbine generating units with a total capacity of 247.050 MW and one 70-kilowatt (kW) turbine generating unit for a total installed capacity of 247.12 MW; (8) a 30-inch-diameter intake pipe and support structure, a 10-foot square platform, and a turbine discharge pipe for the 70-kW turbine; (9) three 2,800-foot-long, 230-kV primary transmission lines that extend from the transformers at the powerhouse to the Round Butte Switchyard; and (10) appurtenant facilities.



The **Pelton Development** consisting of: (1) 636-foot-long, 204-foot-high, concrete arch dam with a crest elevation of 1,585 feet msl; (2) a 7-mile-long, 540 acre reservoir (Lake Simtustus) with a gross storage capacity of 31,000 acre-feet and useable storage volume of 3,700 acre-feet at normal maximum water surface elevation of 1,580 feet mean sea level; (3) a concrete spillway equipped with two, 34-foot-wide, 22-foot-high steel Tainter gates; (4) a turbine intake system built into the upstream face of the dam and consisting of three 16-foot-diameter, approximately 100-foot-long, penstocks, equipped with trash racks and inlet gates at the face of the dam; (5) a 76-foot-long, 168-foot-wide, semi-outdoor type powerhouse containing three, Francis-type turbine generating units with a total installed capacity of 100.8 MW; (6) a 7.9-mile-long, 230-kV primary transmission line from the Pelton powerhouse to the Round Butte Switchyard; and (7) appurtenant facilities.

The **Reregulating Development** consisting of: (1) a 1,067-foot-long, 88-foot-high rockfill dam with a crest elevation of 1,402 feet msl; (2) a 2.5-mile-long, 190 acre reservoir with a gross storage capacity of 3,500 acre-feet and useable storage volume of 3,270 acre-feet at normal maximum water surface elevation of 1,435 feet mean sea level; (3) a concrete spillway equipped with four, 20-foot-wide, 14-foot-high steel gates; (4) a non-operating 3-mile-long fishway extending from the tailrace upstream to the forebay of the Pelton development; (5) a turbine intake on the upstream face of the dam, equipped with a 55-foot-high, 34-foot-wide trash rack; (6) a 159-foot-long, 44-foot-wide concrete powerhouse containing a single, 18.9-MW bulb-type turbine generator; (7) the 6.9-kV leads that extend about 200 feet connecting the generator of the Pelton Re-regulating Development to the 6.9-kV bus at the step-up transformers located adjacent to the powerhouse; and (8) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of Exhibits A and F shown below:

Exhibit A:

All of Exhibit A, modified by deleting from the description of project facilities those portions describing the 100-mile-long, 230-kV transmission line from the Round Butte switchyard to Bethel, a 3.2-mile-long, 69-kV transmission line from the Reregulating Development to the Warm Springs Substation, and the 10.5-mile-long, 12.5-kV transmission line from the Round Butte switchyard to the Reregulating Development.

## Exhibit F:

<u>Exhibit F-</u>	<u>FERC Drawing No. 2030-</u>	<u>Showing</u>
1	1001	Round Butte - General Plan, Dam and Powerhouse
2	1002	Round Butte - Dam Sections
3	1003	Round Butte - Spillway Diversion and Power Tunnels
4	1004	Round Butte - Spillway and Power Tunnel Intake
5	1005	Round Butte - Powerhouse Plans and Sections
6	1006	Round Butte - Fish Facilities, Upstream Migrant Structure
7	1007	Round Butte - Fish Facilities, Downstream Migrant Structures
8	1008	Round Butte - Fish Facilities, Downstream Migrant Lock Tank
9	1009	Round Butte - Fish Hatchery
10	1010	Round Butte - Single Line Electrical Diagram
11	1011	Round Butte - Single Line Electrical Diagram
12	1012	Round Butte - Switchyard Arrangement
13	1013	Pelton - General Plan and Sections
14	1014	Pelton - Powerhouse Plans
15	1015	Pelton - Powerhouse Cross-Section
16	1016	Pelton - Round Butte - Single Line Electrical Diagram
17	1017	Reregulating - Powerhouse and Fish Facilities
18	1018	Reregulating - Powerhouse Plan
19	1019	Reregulating - Powerhouse Transverse Section
20	1020	Reregulating - Fish Ladder/Rearing Ponds and Waterfowl Pond
21	1021	Reregulating - Single Line Electrical Diagram

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits A, F, and G, as designated in ordering paragraph (B) above, are approved and made a part of this license. Exhibits F and G shall be filed in the Commission's electronic file format as specified in Article 203. The project boundary in Exhibit G shall include 10,797 acres of lands proposed in Exhibit A, section I.D and approved by this license for inclusion in the project boundary.

(D) Commission jurisdiction over the non-project Bethel-Round Butte transmission line deleted from the project by amendment order 100 FERC ¶ 62,147 (2002), is terminated, effective on the date the licensees receive all necessary permits and approvals from the U.S. Forest Service and Bureau of Land Management, as applicable, for the continued use of federal lands. The licensees shall file copies of all permits and approvals with the Commission within 30 days of receiving the permits or approvals.

(E) Within 60 days of the termination of Commission jurisdiction over the Bethel-Round Butte transmission line as specified in ordering paragraph (D), the licensees shall file for Commission approval, revised exhibits A, F, and G drawings showing and describing the project features, boundaries, and facilities, as well as a statement indicating the revised amount of federal lands occupied by the project so the Commission can amend Article 201 of the license regarding the licensees' payment for the use of federal lands.

(F) This license is subject to the conditions submitted by the Oregon Division of Environmental Quality under section 401 of the Clean Water Act, as those conditions are set forth in Appendix A to this order.

(G) This license is subject to the conditions submitted by the Water Control Board of the Confederated Tribes of the Warm Springs Reservation of Oregon under section 401 of the Clean Water Act, as those conditions are set forth in Appendix B to this order.

(H) This license is subject to the conditions submitted by the Secretary of the U.S. Department of the Interior under section 18 of the FPA, as set forth in Appendix C to this order.

(I) This license is subject to the conditions submitted by the Secretary of the U.S. Department of Commerce under section 18 of the FPA, as set forth in Appendix D to this order.

(J) The following plans filed with the Settlement Agreement on July 30, 2004, as modified by the articles of this license, are approved and made a part of the license: (1) Project Operating Plan (Exhibit C to the Settlement Agreement); (2) Fish Passage Plan (Exhibit D to the Settlement Agreement); (3) Pelton Round Butte Fund Implementation Plan (Exhibit H to the Settlement Agreement); and (4) Cultural Resources Management Plan (Exhibit J to the Settlement Agreement).

(K) This license is subject to the articles set forth in Form L-5, entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States," 54 FPC 1792, 1799 (October 1975), and the following additional articles:

**Article 201. Administrative Annual Charges.** The licensees shall pay the United States the following annual charges, effective as of the first day of the month in which this license is issued, for the purposes of:

(A) Reimbursing the United States for the Commission's administrative costs, pursuant to Part I of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 366,820 kilowatts.

(B) Recompensing the United States for the use, occupancy and enjoyment of 3,022.60 acres of its lands, other than for transmission line right-of-way.

(C) Recompensing the United States for the use, occupancy and enjoyment of 481.14 acres of its lands, for transmission line right-of-way. Upon compliance with ordering paragraphs (D) and (E) of this order, the Commission will issue an order revising this article of the license, changing the amount of federal lands for transmission line use from 481.14 to 5.84 acres, or such other acreage as is determined at that time.

(D) All annual charges for the project's use of 2,161.9 acres of tribal reservation lands is deemed satisfied by fulfillment of the applicable terms of the Long-Term Global Settlement and Compensation Agreement, dated April 12, 2000, and approved by the Commission on November 21, 2000 (100 FERC ¶ 62,147).

(E) If modifications are made to the project boundary that involve federal lands during the license term, the Commission will adjust the annual charges accordingly.

**Article 202. Amortization Reserves.** Pursuant to section 10(d) of the Federal Power Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. The licensees shall set aside in a project amortization reserve account at the end of each fiscal year one half of the project surplus

earnings, if any, in excess of the specified rate of return per annum on the net investment. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the licensees shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The licensees shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The licensees shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on current capital ratios developed from an average of 13 monthly balances of amounts properly included in the licensees' long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

**Article 203. Exhibit Drawings.** Within 45 days of the date of issuance of the license, the licensees shall file the approved exhibit drawings in aperture card and electronic file formats.

(a) Four sets of the approved exhibit drawings shall be reproduced on silver or gelatin 35mm microfilm. All microfilm shall be mounted on type D (3-1/4" X 7-3/8") aperture cards. Prior to microfilming, the FERC Drawing Number (i.e., P-1234-1001 through P-1234-####) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (i.e., F-1, G-1, etc.), Drawing Title, and date of this license shall be typed on the upper left corner of each aperture card.

Two of the sets of aperture cards along with form FERC-587 shall be filed with the Secretary of the Commission, ATTN: OEP/DHAC. The third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office. The remaining set of aperture cards and a copy of Form FERC-587 shall be filed with the Bureau of Land Management office at the following address:

State Director  
Bureau of Land Management  
PO Box 2965  
Portland, OR 97208-2965

(b) The licensees shall file two separate sets of exhibit drawings in electronic raster format with the Secretary of the Commission, ATTN: OEP/DHAC. A third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office. Exhibit F drawings must be identified as (CEII) material under 18 CFR §388.113(c). Exhibit G drawings must be identified as (NIP) material under 18 CFR §388.112. Each drawing must be a separate electronic file, and the file name shall include: FERC Project-Drawing Number, FERC Exhibit, Drawing Title, date of this license, and file extension in the following format [P-1234-####, G-1, Project Boundary, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

IMAGERY - black & white raster file  
FILE TYPE – Tagged Image File Format, (TIFF) CCITT Group 4  
RESOLUTION – 300 dpi desired, (200 dpi min)  
DRAWING SIZE FORMAT – 24” X 36” (min), 28” X 40” (max)  
FILE SIZE – less than 1 MB desired

Each Exhibit G drawing that includes the project boundary must contain a minimum of three known reference points, arranged in a triangular format for GIS georeferencing to vector data. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown and identified on the drawing. In addition, each project boundary drawing must be stamped by a registered land surveyor.

- (c) The licensees shall file three separate sets of the project boundary data in a geo-referenced vector electronic file format (such as ArcView shape files, GeoMedia files, MapInfo files, or any similar GIS format) with the Secretary of the Commission, ATTN: OEP/DHAC. The file name shall include: FERC Project Number, data description, date of this license, and file extension in the following format [P-1234, boundary vector data, MM-DD-YYYY.SHP]. The geo-referenced electronic boundary data file must be positionally accurate to  $\pm 40$  feet in order to comply with National Map Accuracy Standards for maps at a 1:24,000 scale. A single electronic boundary data file is preferred and must contain all reference points shown on the individual project boundary drawings. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown. The data must be accompanied by a separate text file describing the map projection used (i.e., UTM, State Plane, Decimal Degrees, etc), the map datum (i.e., North American 27, North American 83, etc.), and the units of measurement (i.e., feet, meters, miles, etc.). The text file name shall include: FERC Project Number, data description, date of this license, and file extension in the following format [P-1234, project boundary metadata, MM-DD-YYYY.TXT].

**Article 204. Headwater Benefits.** If the licensees' project was directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of that term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensees shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license. The benefits will be assessed in accordance with Part 11, Subpart B, of the Commission's regulations.

**Article 301. Revised Exhibits.** Within 90 days of the completion of any construction of facilities, modification of project boundaries, or any other action required by this license that results in changes to Exhibits A, F and G, the licensees shall file for Commission approval revised Exhibits A, F, and G, as appropriate, to show those project facilities and lands as built or modified. The exhibits shall have sufficient detail to adequately delineate the relative location of project features. The licensees shall submit six copies to the Commission, one copy to the Commission's Portland Regional Engineer, and one to the Director, Division of Hydropower Administration and Compliance.

**Article 302. Review and Approval of Final Plans and Specifications.** At least 60 days before starting any license-related construction activities, the licensees shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of a supporting design report and final contract plans and specifications. The Commission may require changes to the plans and specifications to assure the work is completed in a safe and environmentally sound manner. Construction may not commence until authorized by the Regional Engineer.

**Article 303. Quality Control and Inspection Program.** At least 60 days before starting any license-related construction activities, the licensees shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the Quality Control and Inspection Program (QCIP) for the Commission's review and approval. The QCIP shall include a sediment and erosion control plan.

**Article 304. Cofferdam Construction Drawings.** Before starting construction, the licensees shall review and approve the design of contractor designed cofferdams and deep excavations. At least 30 days before starting construction of the cofferdams, the licensees shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the approved cofferdam construction drawings and specifications and the letters of approval.

**Article 305. Temporary Emergency Action Plan.** At least 60 days before starting construction, the licensees shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the Temporary Emergency Action Plan (TEAP) for the Commission's review and approval. The TEAP shall describe emergency procedures in case failure of a cofferdam, large sediment control structure, or any other water retaining structure could endanger construction workers or the public. The TEAP shall include a notification list of emergency response agencies, a plan drawing of the proposed cofferdam arrangement, the location of safety devices and escape routes, and a brief description of testing procedures.

**Article 401. Supplemental Requirements to Mandatory Conditions.**

(a) **Requirement to File Plan for Commission Approval.**

Condition H.2 of Appendix A requires the licensees to prepare a Total Dissolved Gas Noncompliance Mitigation Plan within 60 days of identifying excessive total dissolved gas concentrations. The plan shall also be submitted to the Commission for approval and must be approved by the Commission before being implemented by the licensees.

The licensees shall submit to the Commission documentation of its consultation, copies of comments and recommendations made in connection with the plan, and a description of how the plan accommodates the comments and recommendations. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information. The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the plan becomes a requirement of the license, and the licensees shall implement the plan, including any changes required by the Commission.



**(b) Requirement to File Documentation of Completion**

The licensees shall file with the Commission documentation of completion of the following activities.

Appendix	Condition No.	Facility or Activity	Due Date
A and B	G.12 (App. A) and 1.A (App. B)	Funding of a minimum of \$1.475 million for upper basin habitat enhancement measures	Within 5 years of license issuance
A	L	Request and file National Pollutant Discharge Elimination System permit applications with Oregon DEQ.	Within 30 days of license issuance
A and B	T (App. A) and 13 (App. B)	Oregon DEQ and Tribal oversight fees for § 401 certification	By July 1 of years 1 through 10 (App. A and B) and by July 1 of each year thereafter for the term of license (App. B)
B	5	Survey of users of the project reservoirs	Within 30 days of a finding of nuisance phytoplankton growth

**(c) Requirement to File Amendment Applications**

Certain conditions in Appendices A, B, C, and D contemplate unspecified, long-term changes to project operations or facilities for the purpose of mitigating environmental effects. These changes may not be implemented without prior Commission authorization granted after the filing of an application to amend the license. The conditions are listed below.

Appendix	Condition	Modification
A	C.4, E.4, F.4, H.2, and N	Additional measures to reduce the project's contribution to exceedances of state water quality

		criteria
A	G.9	Modifications of fish passage facilities
A	G.11	Additional mitigation measures to improve fish habitat quality or quantity
B	1.D.5	Additional mitigation measures to improve fish habitat
B	1.F	Additional or modified fish passage measures
B	3, 4, and 10	Additional measures to protect water quality and beneficial uses
C and D	7(a)	Modification of deep exclusion screen to meet smolt criteria
C and D	7(d)	Measures to reduce impingement on the deep exclusion screen
C and D	9(c) and 11(c)	Measures or modifications to meet smolt survival standards

**(d) Agency Coordination**

In conjunction with the Fish Passage Plan required by Ordering Paragraphs (H) and (I), the licensees shall include agency coordination provisions specified by Proposed Article 40 of the Settlement Agreement filed on July 30, 2004.

**Article 402. Implementation Committees.**

(a) The licensees shall establish a Fish Committee as provided in the Settlement Agreement filed on July 30, 2004. The Fish Committee shall consist of the licensees; and to the extent of their interests in participating, the National Marine Fisheries Service (NOAA Fisheries); U.S. Fish and Wildlife Service (USFWS); U.S. Forest Service (USFS); Bureau of Indian Affairs (BIA); Bureau of Land Management (BLM); Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR); Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB); Oregon Department of Fish and Wildlife (ODFW); Oregon Department of Environmental Quality (ODEQ), and a representative of the following non-governmental organizations: Trout Unlimited, American Rivers, Oregon Trout, and

the Native Fish Society. The licensees' development and implementation of study plans, reports, facility designs, and operating and implementation plans submitted to the Fish Committee pursuant to the terms of this license shall comply with the requirements of the Settlement Agreement, to the extent such requirements are approved by this license. The licensees' implementation of measures pursuant to this license shall be reported to the Fish Committee as provided in the Settlement Agreement and any applicable implementation plan. Copies of all filings with the Commission following consultation with the Fish Committee shall be provided to each member of the Fish Committee.

(1) Unless a different time period is specifically established pursuant to another provision of this license, the licensees shall, where consultation with the Fish Committee is required, allow a minimum of 30 days for the Fish Committee members to comment, work to achieve consensus, and to make recommendations before filing any study, operating or implementation plan, report, or facility design with the Commission. If after consideration by the Fish Committee of all comments or recommendations, consensus is not achieved regarding the study, operating or implementation plan, report, or facility design, and any member of the Fish Committee invokes dispute resolution pursuant to section 7.5 of the Settlement Agreement, the licensees shall not file any study, operating or implementation plan, report, or facility design with the Commission until the dispute resolution process has been completed, unless otherwise directed by the Commission. The licensees shall notify the Commission of the dispute prior to the commencement of the dispute resolution process. The licensees shall include with the study, operating or implementation plan, report, or facility design: documentation of consultation with the Fish Committee, copies of committee member comments and recommendations on the study, operating or implementation plan, report, or facility design after it has been prepared and provided to the Fish Committee, and specific descriptions of how the comments are accommodated by the study, operating or implementation plan, report, or facility design.

(2) NOAA Fisheries, USFWS, ODFW, and CTWS BNR are collectively referred to as the Fish Agencies. Each Fish Agency has separate and distinct statutory authorities and no agency is deemed, by virtue of concurrent approvals, to be sharing its statutory authority with any other agency or to be conceding that the approval of any other agency is required for exercise of that agency's authority. Where consultation with the Fish Committee and approval by the appropriate Fish Agencies pursuant to their respective statutory authorities is required, the licensees shall allow the Fish Agencies a minimum of 30 days to provide such approval prior to submitting the final study, operating or implementation plan, report, or facility design with the Commission. If a Fish Agency disapproves a study, operating or implementation plan, report, or facility design, the licensees shall not file the disapproved study, operating or implementation plan, report, or design with the Commission until the dispute resolution process specified in section 7.5 of the Settlement Agreement has been completed, unless otherwise directed by the Commission or the matter in dispute was addressed pursuant to section 4.3.2 of the

Settlement Agreement, in which case no further dispute resolution shall be required before such study, operating or implementation plan, report, or design is filed with the Commission.

(b) The licensees shall establish a Terrestrial Resources Working Group as provided in the Settlement Agreement. The Terrestrial Resources Working Group shall consist of the licensees; and to the extent of their interest in participating, USFWS; USFS; BIA; BLM; CTWS BNR; and ODFW. The licensees' development and implementation of study plans, reports, facility designs, and operating and implementation plans submitted to the Terrestrial Resources Working Group pursuant to the terms of this license shall comply with the requirements of the Settlement Agreement and the applicable License Implementation Plan, to the extent such requirements are approved by this license. Unless a different time period is specifically established pursuant to another provision of this License, the licensees shall, where consultation with the Terrestrial Resources Working Group is required, allow a minimum of 30 days for the Terrestrial Resources Working Group members to comment, work to achieve consensus, and to make recommendations before filing any study, operating or implementation plan, report, or facility design with the Commission. If after consideration by the Terrestrial Resources Working Group of all comments or recommendations, consensus is not achieved regarding the study, operating or implementation plan, report, or facility design, and any member of the Terrestrial Resources Working Group invokes dispute resolution pursuant to section 7.5 of the Settlement Agreement, the licensees shall not file any study, operating or implementation plan, report, or facility design with the Commission until the dispute resolution process has been completed, unless otherwise directed by the Commission. The licensees shall include with the study, operating or implementation plan, report, or facility design: documentation of consultation with the working group, copies of comments and recommendations by working group members, and specific descriptions of how the comments and recommendations are accommodated by the study, operating or implementation plan, report, or facility design.

(c) The licensees shall establish a Recreation Resources Working Group as provided in the Settlement Agreement. The Recreation Resources Working Group shall consist of the licensees; and to the extent of their interest in participating, USFS; BIA; BLM; CTWS BNR; ODFW; and Oregon Parks and Recreation Department (OPRD). The licensees' development and implementation of study plans, reports, facility designs, and operating and implementation plans submitted to the Recreation Resources Working Group pursuant to the terms of this license shall comply with the requirements of the Settlement Agreement and the applicable License Implementation Plan, to the extent such requirements are approved by this license. Unless a different time period is specifically established pursuant to another provision of this License, the licensees shall, where consultation with the Recreation Resources Working Group is required, allow a minimum of 30 days for the Recreation Resources Working Group members to comment, work to achieve consensus, and to make recommendations before filing any study, operating or

implementation plan, report, or facility design with the Commission. If after consideration by the Recreation Resources Working Group of all comments or recommendations, consensus is not achieved regarding the study, operating or implementation plan, report, or facility design, and any member of the Recreation Resources Working Group invokes dispute resolution pursuant to section 7.5 of the Settlement Agreement, the licensees shall not file any study, operating or implementation plan, report, or facility design with the Commission until the dispute resolution process has been completed, unless otherwise directed by the Commission. The licensees shall include with the study, operating or implementation plan, report, or facility design: documentation of consultation with the working group, copies of comments and recommendations by working group members, and specific descriptions of how the comments and recommendations are accommodated by the study, operating or implementation plan, report, or facility design.

(d) The licensees shall establish a Shoreline Management Working Group as provided in the Settlement Agreement. The Shoreline Management Working Group shall consist of the licensees, and to the extent of their interest in participating, USFS; BIA; BLM; CTWS BNR; ODFW; OPRD; and Jefferson County. Licensees' development and implementation of study plans, reports, facility designs, and operating and implementation plans submitted to the Shoreline Management Working Group pursuant to the terms of this license shall comply with the requirements of the Settlement Agreement and the applicable License Implementation Plan, to the extent such requirements are approved by the license. Unless a different time period is specifically established pursuant to another provision of this license, the licensees shall, where consultation with the Shoreline Management Working Group is required, allow a minimum of 30 days for the Shoreline Management Working Group members to comment, work to achieve consensus, and to make recommendations before filing any study, operating or implementation plan, report, or facility design with the Commission. If after consideration by the Shoreline Management Working Group of all comments or recommendations, consensus is not achieved regarding the study, operating or implementation plan, report, or facility design, and any member of the Shoreline Management Working Group invokes dispute resolution pursuant to section 7.5 of the Settlement Agreement, the licensees shall not file any study, operating or implementation plan, report, or facility design with the Commission until the dispute resolution process has been completed, unless otherwise directed by the Commission. The licensees shall include with the study, operating or implementation plan, report, or facility design: documentation of consultation with the working group, copies of comments and recommendations of working group members on the completed study, operating or implementation plan, report, or facility design after it has been prepared and provided to the working group, and specific descriptions of how the comments of the Shoreline Management Working Group members are accommodated by the study, operating or implementation plan, report, or facility design.

(e) The licensees shall establish the Pelton Round Butte Fund Governing Board as provided in the Pelton Round Butte Fund Implementation Plan, Exhibit H to the Settlement Agreement, to the extent of the interest of the members in participating. As such, the Pelton Round Butte Fund Governing Board shall be comprised of eleven signatories of the Settlement Agreement, including one representative or designee from the following agencies or organizations: Licensees (one representative collectively); CTWS BNR; CTWS WCB; USFWS; NOAA Fisheries; BIA; USFWS/BLM (one representative collectively); ODFW; ODEQ; OWRD; and non-governmental organizations (American Rivers, Oregon Trout, Trout Unlimited, Native Fish Society, WaterWatch of Oregon (one representative collectively)). If during the term of the license any party specified by this article decides it does not wish to participate or continue participating on the Governing Board, the Governing Board shall consist of those remaining signatory representatives or designees that wish to continue participating, and the licensees shall provide written notification to the Commission identifying the party that has decided it no longer wishes to have a representative or designee on the Governing Board and their reasons, if known.

**Article 403. Project Inspections.** The licensees shall allow parties to the Settlement Agreement filed on July 30, 2004, access to, through, and across Pelton Round Butte Hydroelectric Project lands and works for the purpose of inspecting facilities and records, including monitoring data, to monitor compliance with the license. The licensees shall allow such inspections only after the entity requesting the inspection provides the licensees reasonable notice of such inspections and agrees to follow the licensees' standard safety and security procedures when engaged in such inspections.

**Article 404. Enforcement Plan.** Within one year of license issuance, the licensees shall file for Commission approval, an Enforcement Plan which shall include how the licensees will ensure enforcement with relevant provisions of the Terrestrial Resources Management Plan required by Article 422, including, but not limited to, seasonal and permanent road closures, all-terrain vehicle use, eagle nest sites and winter range area protection, dispersed camping, shooting ordinances, wildlife harassment, and coordination with Oregon State Police and Coordinated Enforcement Programs. Enforcement may be accomplished through an agreement with Jefferson County. The plan shall include an implementation schedule.

The licensees shall prepare the plan after consultation with Jefferson County. The licensees shall include with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the county, and specific descriptions of how the county's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the county to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 405. *Emergency or Special Conditions.***

(a) If at any time, unanticipated circumstances or emergency situations arise in which Endangered Species Act (ESA) listed fish or wildlife are being killed, harmed or endangered by any of the project facilities or as a result of project operation, the licensees shall immediately take appropriate action to prevent further loss in a manner that does not pose a risk to human life, limb, or property. The licensees shall, within 6 hours, notify the nearest office of the Oregon Department of Fish and Wildlife (ODFW), National Marine Fisheries Service (NOAA Fisheries), U.S. Fish and Wildlife Service (USFWS), Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR), Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB), Oregon Department of Environmental Quality (ODEQ), and Oregon Water Resources Department (OWRD), as appropriate, and comply with any restorative measures required by the resource agencies to the extent such measures do not conflict with the conditions of this license. The licensees shall notify the Commission as soon as possible but no later than 10 days after each occurrence and inform the Commission as to the nature of the occurrence and restorative measures taken.

(b) If at any time, unanticipated circumstances or emergency situations arise in which non-ESA listed fish or wildlife are being killed, harmed or endangered by any of the project facilities or as a result of project operation, the licensees shall immediately take appropriate action to prevent further loss in a manner that does not pose a risk to human life, limb, or property. The licensees shall, within 48 hours, notify the nearest office of the ODFW, NOAA Fisheries, USFWS, CTWS BNR, CTWS WCB, ODEQ, and OWRD, as appropriate, and comply with any restorative measures required by the resource agencies to the extent such measures do not conflict with the conditions of this license. The licensees shall notify the Commission as soon as possible but no later than 10 days after each occurrence and inform the Commission as to the nature of the occurrence and restorative measures taken.

**Article 406. *Activities on Forest Service or Bureau of Land Management Lands.***

(a) Additional lands of the US Forest Service (USFS) or Bureau of Land Management (BLM) that are authorized for use by the licensees in a license amendment shall be subject to laws, rules, and regulations applicable to the USFS or BLM, as appropriate. Within six months of such a license amendment, the licensees shall obtain a special use

authorization from the USFS or BLM, as applicable, for occupancy and use of any lands added to the project boundary by the license amendment and file it with the Commission. The special use authorization also shall be subject to applicable enforcement procedures of the Commission at the request of the USFS or BLM.

(b) The licensees shall not make changes in the location of any constructed Project features or facilities located on National Forest System (NFS) or BLM lands, or make any departure from the requirements of any approved exhibits authorizing use or occupancy of NFS or BLM lands filed with the Commission and authorized by the new license as issued and amended before receiving comments from the USFS or BLM and approval from the Commission. Following receipt of such comments from the agency, and at least 60 days prior to initiating any such changes or departure, the licensees shall file a report with the Commission and with USFS or BLM as appropriate, describing the changes, the reasons for the changes, and showing the comments of the agency for such changes.

(c) After consultation with the USFS or BLM and before starting any activity on NFS or BLM land that USFS or BLM, as appropriate, determines may affect another federally authorized activity on those lands, the licensees shall participate with USFS or BLM in attempting to resolve any potential conflicts with representatives of those permitted uses.

(d) The licensees shall prepare site-specific plans for comment by USFS or BLM and Commission approval for habitat-disturbing and ground-disturbing activities on NFS or BLM lands required by the license, including activities contained within resource management plans required by the license that shall be prepared subsequent to license issuance. The licensees shall prepare such site-specific plans as defined in this license. The licensees shall include in such site-specific plans the following:

- (1) a map depicting the location of the proposed activity;
- (2) a description of the land management area designation for the location of the proposed activity and applicable standards and guidelines;
- (3) a description of alternative locations, designs, mitigation measures considered, and implementation and effectiveness monitoring designed to meet applicable standards and guidelines; and
- (4) data collected from surveys, biological evaluations or consultation as required by regulations applicable to ground or habitat disturbing activities on National Forest System or BLM lands in existence at the time the plan is prepared and



(i) When surveys indicate the activity may affect a species proposed for listing or listed under the federal Endangered Species Act, or that may affect that species' critical habitat, the licensees shall prepare a Biological Assessment evaluating the potential impact of the action on the species or its critical habitat and submit it to the USFS or BLM, as appropriate, for review prior to submission to the Commission.

(ii) When surveys indicate the activity may affect a USFS Regional Forester sensitive species, or a BLM Special Status species, or their habitat, the licensees shall prepare a Biological Evaluation evaluating the potential impact of the action on the species or its habitat and submit it to the USFS or BLM, as appropriate, for approval. In consultation with the Commission, the USFS or BLM may require mitigation measures for the protection of the sensitive species; however, measures which constitute long-term changes to project operations and facilities may not be implemented without prior Commission authorization granted after the filing of an application to amend the license.

**Article 407. Escalation of Costs.** Unless otherwise indicated, all costs or payment amounts specified in dollars in the license shall be deemed to be stated as of the year 2004, and the licensees shall escalate such sums as of January 1 of each following year (starting in January 2005) according to the following formula:

$$AD = D \times (NGDP)/(IGDP)$$

Where:

AD	=	Adjusted dollar amount as of January 1 of the year in which the adjustment is made.
D	=	Dollar amount prior to adjustment.
IGDP	=	“GDP-IPD” for the third quarter of the year before the previous adjustment date (or, in the case of the first adjustment, the third quarter of the year before the Effective Date).
NGDP	=	“GDP-IPD” for the third quarter of the year before the adjustment date.

“GDP-IPD” is the value published for the Gross Domestic Product Implicit Price Deflator by the U.S. Department of Commerce, Bureau of Economic Analysis in the publication *Survey of Current Business*, Table 7.1 (being on the basis of the year 2000 = 100), in the third month following the end of the applicable quarter. If that index ceases to be published, any reasonably equivalent index published by the Bureau of Economic Analysis may be substituted upon approval by the Commission. If the base year for “GDP-IPD” is changed or if publication of the index is discontinued, the licensees shall

notify the Commission as soon as possible and recommend, after consultation with the Settlement Agreement parties, adjustments or an alternative index that achieves the same economic effect.

**Article 408. Tribal Integrated Resources Management.** Within 90 days of license issuance, the licensees shall file a written explanation of those portions of the Confederated Tribes of the Warm Springs Reservation of Oregon's "Integrated Resources Management Plan" that apply to the project.

The Commission reserves the right, upon review of the licensees' filing, to require the licensees to comply with applicable portions of the plan.

**Article 409. Stage Change Limits.**

(a) The licensees shall operate the project with the following limits for stage changes below the Reregulating development: 0.1 foot/hour and 0.4 foot/day from October 16 to May 14, and 0.05 foot/hour and 0.2 foot/day from May 15 to October 15, except during certain extraordinary conditions, including: (1) flood events; (2) any event that triggers the Project Emergency Action Plan; (3) rapid changes in project inflows, when the rate of inflow change exceeds the proposed stage change limits; and (4) equipment failures or emergencies at the project facilities. During such extraordinary conditions, the licensees may deviate from these stage change limits. If the stage change limits are so modified, the licensees shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

(b) To monitor compliance with this requirement, the licensees shall record the time and control signal value for all stage change instructions at the Reregulating development and shall report any stage change control signals that are greater than the stage change limitations identified above to the National Marine Fisheries Service, U.S. Fish and Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, Oregon Department of Fish and Wildlife, and Oregon Department of Environmental Quality (collectively, "agencies"); the Confederated Tribes of the Warm Springs Reservation (CTWS) Water Control Board (WCB); CTWS Branch of Natural Resources (BNR); and the Commission. In addition, the licensees shall provide written documentation to the agencies, CTWS WCB, CTWS BNR, and the Commission of all measured stage changes at the U.S. Geological Survey Madras gage that deviate more than 0.15 ft from the control set-point value.

**Article 410. *Measurement of Flows at the U.S. Geological Survey Madras Gage.***

For determining compliance with the minimum flow requirements in the license, the licensees shall implement a protocol for measuring flows at the U.S. Geological Survey (USGS) gage at Madras, Oregon (gage no. 14092500), that includes the following elements:

- (a) ***Measured Madras Flow:*** The real-time flow release at the USGS Madras gage shall be the most recent 15-minute interval USGS gage reading, converted to flow using the USGS level vs. flow rating table. The real time flow setpoint for the USGS Madras gage shall be the most recent 15-minute interval water level setpoint in the Reregulating development control system, converted to flow using the USGS level versus flow rating table. The daily outflow of the project is defined as the average flow measured at the USGS Madras gage each calendar day. This daily outflow shall be calculated from the average of the day's 96 quarter-hour (15-minute interval) flow release readings.
- (b) ***Determination of Allowed Minimum Flow:*** The daily allowed minimum flow shall be determined each day by the licensees, based on the provisions of the Project Operating Plan, Exhibit C to the Settlement Agreement, including monthly minimum flows, refill allowances, the plus or minus ( $\pm$ ) 10-percent rule, measured inflows and other constraints. The allowed minimum flow shall be the calculated flow in cubic feet per second (cfs) adjusted up or down to match the nearest 0.01-foot measurement increment of the USGS level vs. flow rating table. The allowed minimum flow shall be calculated and recorded by the licensees before 6 a.m. of each day. Adjustment of the flow setpoint for each day shall be completed by 9 a.m. of each day.
- (c) ***License Compliance for Minimum Flows:*** The project shall be deemed to be in compliance with the minimum flow requirements whenever the flow setpoint equals or exceeds the allowed minimum flow. In order to accommodate flow measurement inaccuracies, control-system variations, and the inability of the turbine and spillway gates to exactly produce the flow setpoint, non-compliance with this minimum flow requirement is deemed to be any event where the 15-minute measured flow release falls more than 0.10 foot (approximately 260 cfs) below the allowed minimum flow for more than 30 minutes.

**Article 411. *Measurement of Project Inflows.*** The licensees shall improve the accuracy of project inflow monitoring through a combination of upstream U.S. Geological Survey (USGS) gage improvements and the installation of additional lake level monitoring stations in Lake Billy Chinook. Estimates of inflow shall be made using a combination of the "Storage Change" and "Average Ungaged" estimating methods as defined in the Project Operating Plan, Exhibit C to the Settlement Agreement.

(a) *System Modifications and Improvements:* Within six months of license issuance, the licensees shall file a plan for Commission approval to: (1) fund work by the USGS as needed at the three upstream tributary gages (Crooked River – gage no. 14087400, Deschutes River – gage no. 14076500, and Metolius River – gage no. 14091500) to allow real-time telemetry of hourly inflow data from these gages to the licensees’ project control facility; and (2) install two or more new lake level monitoring stations in Lake Billy Chinook at locations selected to reduce level measurement errors. The plan shall include an implementation schedule and provisions to install data acquisition equipment, recording hardware and software as needed to calculate inflows on a timely basis and to document the inflow record.

The licensees shall prepare the plan after consultation with the USGS and the Fish Committee established by Article 402. The licensees shall include with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the USGS and Fish Committee, and specific descriptions of how the USGS’ and Fish Committee’s comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the USGS and Fish Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees’ reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

(b) *Inflow Estimating Method:* The licensees shall estimate total project inflow every 6 hours using the “Storage Change” method. This method shall calculate inflow from measured water levels in the three project reservoirs, reservoir storage versus elevation tables, and the USGS Madras gage hourly flow record. The Lake Billy Chinook water level used in this calculation shall be the average of the level monitors in Lake Billy Chinook. The Lake Simtustus and Reregulating Reservoir water levels shall be the level recorded by the existing lake level monitors in these two impoundments.

The inflow from the three upstream USGS gages on the Crooked, Deschutes, and Metolius Rivers shall be summed every 6 hours, and this sum shall then be subtracted from the 6-hour total inflow estimate to provide an estimate of the ungaged inflow to Lake Billy Chinook. The single 6-hour estimate of ungaged inflow shall be combined with prior 6-hour estimates of the ungaged inflow (using a rolling average) to estimate the “Average Ungaged” project inflow. The net estimated hourly inflow to the project shall then be calculated by the sum of the average ungaged inflow and the hourly flows measured at the three upstream USGS gages. In the event the upstream USGS gages or communication systems fail, the licensees shall use the 6-hour total project inflow

calculation to substitute for the hourly inflow estimate, until the real-time gage monitoring can be restored. The estimated daily inflow shall be the average of the day’s 24 estimated hourly inflow values.

(c) **Schedule:** The inflow monitoring system, including all system modifications and improvements shall be installed and operational within two years of license issuance, unless otherwise directed by the Commission.

(d) **Modifications of Inflow Estimating Method:** At any time, the licensees may propose modifications regarding the inflow estimating method to improve the accuracy of the system, or to simplify the system if such simplification will not result in less accuracy. If the licensees would like to modify the estimating method or simplify the system, the licensees shall develop a plan in consultation with the Fish Committee for such modifications for Commission approval. The licensees shall include with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee, and specific descriptions of how the Fish Committee’s comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees’ reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 412. Required Minimum Flows Below the Reregulating Development.**

(a) The licensees shall operate the project to provide flow releases below the Reregulating development that equal or exceed the following minimum flows:

(1) **Target Flows:** The following table shows the target flows below the Reregulating development for each calendar month. The allowed minimum flow shall equal the target flow when project inflows exceed the target flows and the “Refill Allowance” provision is not in effect. When the “Or Inflow” or “Refill Allowance” provisions are in effect, the allowed minimum flow shall be determined pursuant to subsections (2) and (3) below.

Target flow in cubic feet per second, measured at the USGS Madras Gage No. 14092500.

	<u>Jan</u>	<u>Feb</u>	<u>Mar</u>	<u>Apr</u>	<u>May</u>	<u>Jun</u>	<u>Jul</u>	<u>Aug</u>	<u>Sep</u>	<u>Oct</u>	<u>Nov</u>	<u>Dec</u>
<u>Target Flow</u>	4,500	4,500	4,571	4,170	4,000	4,000	4,000	3,500	3,800	3,800	4,049	4,500

(2) **“Or Inflow” Provision:** In order to prevent drawdown of Lake Billy Chinook, the allowed minimum flow shall be reduced below the target flow when project inflows are less than the target flow. The allowed minimum flow shall be reduced in this case, according to the following protocol: when the lowest daily inflow during the previous 7 days is below the target flow, the allowed minimum flow shall be equal to the lowest daily inflow recorded over the past 7 days. The allowed minimum flow shall be calculated each day when the “Or Inflow” provision is in effect and the allowed minimum flow shall be changed daily, as defined by the inflow estimate.

(3) **“Refill Allowance” Provision:** The project shall be allowed a “refill allowance” between November 15 and June 15 (the reservoir refill season) to store water in Lake Billy Chinook to ensure that Lake Billy Chinook is filled to its summer operating level (minimum elevation 1,944.0 feet above mean sea level) by May 15. The “refill allowance” shall be 150 cubic feet per second (cfs) less than the lowest daily inflow recorded over the past 7 days, except under the following conditions: (i) from November through February, if daily inflows are less than 3,150 cfs and greater than 3,000 cfs, the refill allowance shall be the difference between the daily inflow and 3,000 cfs; however, in instances where the daily inflows are 3,000 cfs or less, the refill allowance shall be 0; and (ii) from March through June, if daily inflows are less than 3,650 cfs and greater than 3,500 cfs, the refill allowance shall be the difference between the daily inflow and 3,500 cfs; however, in instances where the daily inflows are 3,500 cfs or less, the refill allowance shall be 0.

(4) **Extension of Refill Allowance Provision:** If the refill allowance is less than 150 cfs during the reservoir refill season, the Refill Allowance Provision shall be extended from May 15 to June 15. During this additional month the refill allowance shall be determined based on the provisions in (a)(3) above. If the refill allowance is extended, the licensees shall notify the Commission by May 15 of the year in which the extension is made.

(b) **Fall Flow Augmentation in Lower River for Fall Chinook:** If project inflows fall below 3,000 cfs between September 16 and November 15, the licensees shall release up to 200 cfs from storage in Lake Billy Chinook to maintain a daily release of 3,000 cfs. This augmentation flow is limited to a drawdown of 4 feet measured from the average Lake Billy Chinook water surface elevation recorded on September 15. The licensees shall consult with the Fish Committee established by Article 402 regarding the amount of available water, rate of water release, and timing and duration of augmentation flows.

(c) **Run of River Operation for Lower River Flows (+/- 10-percent Rule):** The licensees shall hold river flows below the Reregulating development to within plus or minus ( $\pm$ ) 10 percent of the measured project inflow, except under the following conditions: (1) days with measured inflow in excess of 6,000 cfs; (2) any event that triggers the Project Emergency Action Plan; (3) power emergencies, as defined in the

Western States Coordinating Council Minimum Operating Reliability Criteria (March 8, 1999), as such criteria may be amended during the license term; (4) equipment failures or emergencies at one of the project dams or power plants; or (5) reservoir drawdowns are needed for safe passage of anticipated flood flows to minimize damage to life and property.

If the Operating Reliability Criteria referenced above are amended during the license term, the licensee shall file the amended criteria with the Commission within 30 days of the licensees becoming aware of the amendment.

**(d) *Fish Emergency Clause:*** In years in which project inflow is expected to be below 3,000 cfs or flow may result in in-river conditions that the Fish Committee believes to be unacceptably poor, the licensees shall consult with the Fish Committee to determine if a deviation from the “Or Inflow” provisions above or a deviation from the flow blending scheme required by the water quality certificates issued by the Oregon Department of Environmental Quality (ODEQ) and the Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB) would be likely to help avoid serious harm to native species. If the Fish Committee members agree, after consultation with ODEQ and the CTWS WCB, that a deviation is likely to help avoid such harm, and to be consistent with upstream and downstream beneficial uses, the licensees shall file for Commission approval a plan, prepared after consultation with the Fish Committee, to implement the deviation deemed necessary by the Fish Committee. The licensees shall include with the plan an implementation schedule, documentation of consultation, copies of Fish Committee comments and recommendations on the plan, and specific descriptions of how the Committee’s comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee to comment and make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee’s reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 413. Long-Term Flow Conditions.** Within one year of license issuance, the licensees shall file for Commission approval a plan to track indicators of predicted long-term low flow (LTLF) conditions in the lower Deschutes River throughout the license term. The plan shall provide that: (1) an LTLF trigger or multiple LTLF triggers will be established, using the indicators, that signal predicted onset or realized onset of LTLF conditions in the river that are lower than historically observed at the U.S. Geological Service Madras gage; (2) certain remedial actions will be initiated if an LTLF trigger is reached; (3) these LTLF triggers will not be developed or implemented to

address low flows of a non-long-term nature that may otherwise be addressed by the Fish Emergency Clause in Article 412 subsection (d) above; and (4) the LTLF trigger(s) will be reviewed and, if necessary, modified after Commission approval, at least every ten years considering new information and changes in predictive capabilities. The licensees shall develop the plan after consultation with the Fish Committee established by Article 402. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of Fish Committee comments and recommendations on the plan, and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee to comment and make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

If the LTLF trigger is reached, the licensees shall consult with the Fish Committee, Oregon Department of Environmental Quality (Oregon DEQ), and the Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB) to identify any negative effects to aquatic resources and federal wild & scenic river outstandingly remarkable values (ORV's) resulting from the lower river flows, to identify potential mitigation measures in the lower Deschutes River basin, and to determine if changes in project operations should be implemented to ameliorate such effects. The licensees shall also consult with the Oregon Parks and Recreation Department (OPRD) and, as appropriate, the Terrestrial, Recreation, and Shoreline Management Working Groups established by Article 402 regarding potential impacts to ORV's, scenic waterway values, lake recreation, cultural/archaeological resources, shoreline erosion and riparian habitat that may result from potential changes in project operations.

If changes in project operations are identified to mitigate any negative effects to aquatic resources and ORV's, the licensees shall, in consultation with the Fish Committee, Oregon DEQ, and CTWS WCB, prepare and file with the Commission a plan to implement such changes. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of consulted entities' comments and recommendations on the plan, and specific descriptions of how the consulted entities' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the consulted entities to comment and make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.



The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 414. Seasonal Drawdowns.**

(a) *Drawdown and Fluctuation Limits:* The licensees shall begin the seasonal drawdown of Lake Billy Chinook in the fall of each year followed by refill during the late fall, winter, and spring. The reservoir shall be refilled as follows:

- (1) by May 1 when inflows exceed the target flows specified by Article 412;
- (2) by May 15 when inflows are below the target flows; and
- (3) by June 15 in years when the refill allowance is less than 150 cubic feet per second (cfs) as provided in Article 412, subsection (a)(3).

Drawdown and fluctuation limits for Lake Billy Chinook, Lake Simtustus, and the Reregulating Reservoir shall be as shown in the following table.

Seasonal drawdown and fluctuation limits for project reservoirs.		
Reservoir	Operating Water Surface Elevation (feet )	
	Minimum Summer	Winter
Lake Billy Chinook	1,944 (May 15* to Sept 15)	1,925 (Sept 16 to May 14)
Lake Simtustus	1,576 (June 1 to Aug 31)	1,573 (Sept 1 to May 31)
Reregulating Reservoir	1,414 (year round)	1,414 (year round)

\*As provided in Article 412, in years when the refill allowance is less than 150 cfs, the refill date is June 15.

(b) During certain extraordinary situations, the licensees may exceed the normal seasonal drawdown limits for the project reservoirs. Such extraordinary situations include: (1) drawdown needed for safe passage of anticipated flood flows to minimize damage to life and property; (2) drawdown required to complete repairs on project facilities (including spillway gates, the intake structures, or other dam structures); and (3) power emergencies, as defined in the Western States Coordinating Council Minimum Operating Reliability Criteria (March 8, 1999), as such criteria may be amended during the license term. If the normal seasonal drawdown limits are exceeded, the licensees shall notify the Commission as soon as possible, but no later than 10 days after each such incident. If the Operating Reliability Criteria specified in item (3) are amended during the license term, the licensees shall file the amended criteria with the Commission within 30 days of the licensees' becoming aware of the amendment.

**Article 415. Operations Compliance Plan.** Within six months of license issuance, the licensees shall file with the Commission, for approval, an Operations Compliance Plan that describes how the licensees will comply with the operational requirements of this license. The plan shall include, but not be limited to:

- (a) a provision to monitor compliance with the stage change limit requirements specified in Article 409, gaging requirements specified in Article 410, inflow estimation requirements specified by Article 411; minimum flow and reservoir refill requirements specified in Article 412, implementation of long-term flow triggers specified in Article 413, and lake level requirements specified in Article 414.
- (b) a description of the exact location of all gages and/or measuring devices that would be used to monitor compliance, the method of calibration for each gage and/or measuring device, the frequency of recording for each gage and/or measuring device, and a monitoring schedule;
- (c) provisions to notify the National Marine Fisheries Service (NOAA Fisheries), U.S. Fish and Wildlife Service (USFWS), U.S. Bureau of Indian Affairs (BIA), U.S. Bureau of Land Management (BLM), Oregon Department of Fish and Wildlife (Oregon DFW), Oregon Department of Environmental Quality (Oregon DEQ), Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB), Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR) and the Commission no later than 48 hours after the licensees become aware of any deviation from the requirements specified in part (a);
- (d) a provision to maintain a log of project operation;
- (e) provisions for issuance of an Annual Project Operations Report and incident reports documenting any events where the operation of the project deviated from the operational requirements of this license. The Annual Project Operations Report shall include hourly and daily inflow records for the reporting period. Incident reports shall include hourly and daily inflow records as appropriate to document compliance with the relevant project operating constraints. Copies of all reports shall be filed with the Commission and submitted to the Coordinating Committee established pursuant to the Settlement Agreement at the times specified in Exhibit C of the Settlement Agreement;
- (f) a provision for an annual project review meeting with the Coordinating Committee defined in section 4.2 of the Settlement Agreement; and

(g) identification of a staff member of the licensees to serve as an operations compliance monitor with the responsibility for coordinating and ensuring the implementation of the Operations Compliance Plan and serving as a point of contact for compliance inquiry purposes, including a provision for notifying the Commission and the consulted agencies within 30 days if and when the compliance monitor designee changes.

The licensees shall prepare the plan after consultation with the Fish Committee established by Article 402, and the U.S. Geological Survey (USGS). The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and USGS, and specific descriptions of how the comments of Fish Committee members and USGS are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee members and the USGS to comment and to make recommendations before filing the plan with the Commission. If after consideration by the Fish Committee and USGS of all comments or recommendations, consensus is not achieved regarding the plan, and any member of the Fish Committee invokes dispute resolution pursuant to section 7.5 of the Settlement Agreement, the licensees shall not file the plan with the Commission until the dispute resolution process has been completed unless otherwise directed by the Commission. The licensees shall include with the plan, an implementation schedule, documentation of consultation with the Fish Committee and USGS, copies of committee member comments and recommendations on the plan after it has been prepared and provided to the Fish Committee and USGS, and specific descriptions of how the comments are accommodated by the plan.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 416. Water Quality Monitoring.** The licensees shall conduct water quality monitoring pursuant to the Water Quality Management and Monitoring Plan (WQMMP) approved by the Oregon Department of Environmental Quality (Oregon DEQ) and the Confederated Tribes of the Warm Springs Reservation Water Control Board (CTWS WCB) as part of the water quality certifications issued by those agencies and attached to this license as Appendices A and B, respectively. Any subsequent amendments to the WQMMP approved by ODEQ and CTWS WCB shall also be approved by the Commission prior to implementation. Copies of the annual reports submitted to ODEQ and CTWS WCB shall be filed with the Fish Committee established by Article 402 and the Commission within 30 days of their filing with Oregon DEQ and CTWS WCB.

**Article 417. Infeasibility of Temporary Downstream Facilities.** In the event that all steps identified in the Fish Passage Plan (Condition 1 of Appendices C and D) to improve collection efficiency of the temporary downstream facilities and reservoir passage or survival have been implemented, and the criteria and goals for downstream passage stated in Condition 2 of Appendices C and D have not been achieved, the licensees shall implement the following processes:

(a) **Notification.** The licensees shall timely notify the Commission and the Fish Committee established by Article 402 that the temporary downstream passage facilities have not achieved the standards set out in the criteria and goals for downstream passage stated in Condition 2 of Appendices C and D and that all steps identified in the Fish Passage Plan designed to improve collection efficiency and reservoir passage or survival have been taken as prescribed in the Fish Passage Plan.

(b) **Meeting.** The licensees shall notice a meeting of the Fish Committee within 60 days of the notice in (a) to the Commission.

(c) **Information and Analyses from Testing and Verification Studies.** Not less than 45 days before the meeting, the licensees shall provide the Fish Committee and file with the Commission a report, including analysis of the information gathered during the operation of the temporary downstream passage facilities pursuant to the Testing and Verification provisions of the Fish Passage Plan, to inform an analysis by the Fish Committee and the Commission of whether (1) testing and/or modification of the temporary downstream passage facilities should continue, (2) an alternative fish passage methodology should be implemented, or (3) fish passage is currently scientifically and technologically infeasible.

(d) **Plan with Passage Option.** If requested to do so by the Fish Committee or the Commission, the licensees shall develop a plan to implement the passage option selected under this paragraph according to the following procedures:

(1) **Temporary Collection Facilities:** If the Fish Committee believes or the Commission finds that the information provided pursuant to paragraph (c) shows demonstrable progress related to reservoir passage and survival, the licensees shall, within 60 days following the meeting, develop a plan for the continued operation, any needed modification, and testing of the temporary downstream passage facilities. The licensees shall prepare the plan in consultation with the Fish Committee established by Article 402 and the Fish Agencies (National Marine Fisheries Service, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, and Warm Springs Reservation Branch of Natural Resources). The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's

and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**(2) *Alternative Fish Passage Plan:*** If the Fish Committee believes or the Commission finds that the information provided pursuant to paragraph (c) supports selection of an alternative fish passage plan, including but not limited to tributary trapping, substantially new proposals based on the selective water withdrawal system, or any other scientifically supported fish passage methodology, the licensees shall, within 12 months of the meeting, develop an alternative fish passage plan. Any alternative fish passage plan shall be consistent with maintaining relevant water quality standards, including, but not limited to, continued operation of the selective water withdrawal facility, if the selective water withdrawal facility is necessary to achieve water quality standards. The licensees shall prepare the plan in consultation with the Fish Committee and the Fish Agencies. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**(e) *Feasibility.*** The licensees shall implement any plans developed under paragraph (d) of this article according to the schedule and procedures set out in those plans as approved by the Commission. If a plan to continue operation and testing of the temporary downstream passage facilities or an alternative fish passage plan is determined to be infeasible according to the schedule and procedures set out in any plan developed under paragraph (d) of this article, then the licensees shall utilize the procedures beginning with paragraph (a) of this article to initiate further proposals.

(f) ***New Information Regarding Fish Passage.*** If new information demonstrates that downstream fish passage may be feasible, the licensees shall, within 60 days of receiving such information, notice a meeting of the Fish Committee to determine whether downstream fish passage should be reinitiated. If the Fish Committee believes or the Commission finds that downstream fish passage should be reinitiated, the licensees shall develop a fish passage plan based on the new information then available. Such a plan shall be developed in consultation with the Fish Committee and Fish Agencies. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 418. *Infeasibility of Permanent Downstream Facilities.*** In the event that all steps identified in the Fish Passage Plan (Appendix C, Condition 1 and Appendix D, Condition 1) to improve collection efficiency of the permanent downstream facilities and reservoir passage or survival have been implemented, and the criteria and goals for downstream passage stated in Condition 2 of Appendices C and D have not been achieved, the licensees shall implement the following process:

(a) ***Notification.*** The licensees shall timely notify the Commission and the Fish Committee established by Article 402 that the permanent downstream passage facilities have not achieved the standards set out in the criteria and goals for downstream passage stated in Condition 2 of Appendices C and D and that all steps identified in the Fish Passage Plan designed to improve collection efficacy and reservoir passage or survival have been taken as prescribed in the Fish Passage Plan.

(b) ***Meeting.*** The licensees shall notice a meeting of the Fish Committee within 60 days of the notice to the Commission.

(c) ***Information and Analyses from Testing and Verification Studies.*** Not less than 45 days before the meeting, the licensees shall provide the Fish Committee and file with the Commission a report, including analysis of the information gathered during the operation of the permanent downstream passage facilities pursuant to the Testing and

Verification provisions of the Fish Passage Plan, to inform an analysis by the Fish Committee and the Commission whether (i) testing and/or modification of the permanent downstream passage facilities should continue, or (ii) fish passage is currently scientifically and technologically infeasible for some or all species.

**(d) *Plan with Passage Options.*** If requested to do so by the Fish Committee or the Commission, the licensees shall develop a plan to implement the passage option selected under this paragraph according to the following procedures:

**(1) *Permanent Collection Facilities:*** If the Fish Committee believes or the Commission determines that the information provided pursuant to paragraph (c) shows demonstrable progress related to reservoir passage and survival, the licensees shall, within 60 days following the meeting, develop a plan for the continued operation, any needed modification, and testing of the permanent downstream passage facilities. The licensees shall prepare the plan in consultation with the Fish Committee established by Article 402 and the Fish Agencies (National Marine Fisheries Service, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, and Warm Springs Branch of Natural Resources). The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**(e) *Feasibility.*** The licensees shall implement any plan developed under paragraph (d)(1) of this article according to the schedule and procedures set out in that plan. If continued operation and testing of the permanent downstream passage facilities is determined to be infeasible according to the schedule and procedures set out in any plan developed under paragraph (d) of this article, then the licensees shall utilize the procedures beginning with paragraph (a) of this article to initiate further proposals.

**(f) *New Information Regarding Fish Passage.*** If new information demonstrates that downstream fish passage may be feasible, the licensees shall, within 60 days of receiving such information, notice a meeting of the Fish Committee to determine whether downstream fish passage should be reinitiated. If the Fish Committee believes or the

Commission determines that downstream fish passage should be reinitiated, the licensees shall develop a fish passage plan based on the new information then available. Such plan shall be developed in consultation with the Fish Committee and Fish Agencies. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 419. Fish Health Management Program.** Within 18 months of license issuance, the licensees shall file for Commission approval a plan for a fish health management program at the project to support the fish passage effort, and to monitor disease incidence in Deschutes River fish populations and potential changes in the distribution of fish disease agents. The plan shall include provisions for fish health services and supplies associated with production of salmon and steelhead eggs and fry at Round Butte Hatchery as part of the Reintroduction Plan, diagnosis of disease in mortalities at fish facilities, and monitoring of disease agents in wild fish populations. The plan shall also include provisions for fish pathogen procedures developed in consultation with the Oregon Department of Fish and Wildlife Fish Health Services staff (ODFW) for trap-and-haul and volitional passage programs. The licensees shall include with the plan an implementation schedule that provides for implementation of the plan throughout the Interim Passage Phase and the first five years of the Final Passage Phase (or for the first 15 years of the Interim Passage Phase if transition to the Final Passage Phase does not occur).

The program shall provide for the evaluation of disease as a mortality factor in downstream and upstream migrating anadromous salmonids, to reduce the risk of transmitting new serious disease pathogens upstream, and other fish health management activities associated with the fish passage program. This requirement may be accomplished through an agreement with ODFW.

The licensees shall prepare the plan in consultation with the Fish Committee established by Article 402 and the Fish Agencies (National Marine Fisheries Service, U.S. Fish and Wildlife Service, ODFW, and Warm Springs Branch of Natural Resources). The licensees shall include with the plan documentation of consultation,



copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies, and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee and Fish Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 420. Round Butte Hatchery.**

(a) ***Hatchery Agreement:*** Within six months of license issuance, the licensees shall enter into with Oregon Department of Fish and Wildlife (ODFW) and file with the Commission, for approval, the "Agreement Related To The Operation Of The Round Butte Hatchery And Related Facilities" (the "Hatchery Agreement"), substantially consistent with the draft agreement included in Appendix B to the Settlement Agreement.

(b) ***Hatchery Operations:*** Within one year of license issuance, the licensees shall file for Commission approval a plan for hatchery operations at Round Butte Hatchery at no more than current production levels of spring Chinook and summer steelhead, as specified in section 8 of Appendix B of the Settlement Agreement, during the term of the license, which hatchery operations shall be consistent with: (1) the annual work plan developed under Condition 16 of Appendices C and D; (2) then-in-existence fish management policies and directives of ODFW and the Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR); (3) any Hatchery Genetics Management Plan or other directive developed between ODFW and the National Marine Fisheries Service (NOAA Fisheries) pursuant to the Endangered Species Act (ESA); and (4) the priority objective of restoring and recovering wild stocks in the Deschutes River basin. To ensure consistency with the Fish Passage Plan, the licensees shall consult with the Fish Committee established by Article 402 regarding hatchery operations. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee, and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

(c) **Hatchery Improvements:** Within six months of entering into the Hatchery Agreement with ODFW or one year of license issuance if agreement is not reached, the licensees shall, after consultation with the Fish Committee, file for Commission approval a hatchery improvement plan to implement the hatchery improvements identified in the Hatchery Agreement if such an agreement is reached or the draft agreement included in Appendix B to the Settlement Agreement if agreement is not reached. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee, and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

(d) **Sockeye:** If the Fish Committee believes that hatchery supplementation is necessary in order to reestablish an anadromous population of sockeye above Round Butte dam, the licensees shall file a plan with the Commission, for approval, to undertake the necessary changes in equipment to support hatchery capacity at the Round Butte Hatchery or provide funding to ODFW to undertake such changes for the production of sockeye. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee, and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Fish Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

If the Fish Committee determines that hatchery supplementation is not necessary in order to reestablish an anadromous population of sockeye above Round Butte dam, the licensee shall file for Commission approval written notification of and justification for the Committee's decision.

(e) **Periodic Review:** Every five years after issuance of the license, the licensees, in cooperation with ODFW and CTWS BNR to the extent of their interests in participating, shall conduct a periodic review, to be funded by the licensees, of the hatchery program to determine whether it is meeting its goals. The review shall consider federal, ODFW and CTWS BNR fish management policies and directives, any Hatchery Genetics Management Plan or other directive developed between ODFW and NOAA Fisheries pursuant to the ESA, relevant best practices, and existing information regarding recent scientific advances, and shall include recommendations for ongoing management of the hatchery program for the next five years. The licensees shall make the draft hatchery review available to the Fish Committee for review and comment. The licensees also shall make the draft hatchery review available for public review and comment through an annual workshop or other appropriate forum. The licensees shall provide notice of the annual workshop to all Settlement Agreement parties and the Commission. The licensees shall allow a minimum of 30 days for the consulted parties to comment prior to finalizing the hatchery review and filing it with the Commission. The licensees shall specify in the final review how any comments and recommendations were addressed.

If the licensees, ODFW, and CTWS BNR believe in the final review that the hatchery program is not supporting the goals of the Fish Passage Plan or supporting the goals of self-sustaining harvestable fisheries in the lower Deschutes River, the licensees shall consult with ODFW and CTWS BNR regarding changes that may be made to hatchery operations. If ODFW and CTWS BNR believe that changes to hatchery operations are necessary, the licensees shall file a plan with the Commission, for approval, to undertake the necessary changes or provide funding to ODFW to undertake such changes for the purposes of supporting the goals of the Fish Passage Plan or self-sustaining harvestable fisheries in the lower Deschutes River. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agency and Tribe, and specific descriptions of how the agency's and Tribes' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the agency and the Tribe to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

(f) If the agreement specified in item (a) is not reached, the licensees shall file for Commission approval written explanation of the dispute, including the positions taken, in lieu of filing the agreement. In the event agreement is not reached, the licensees shall remain responsible for completing items (b) through (f) of this article. The Commission reserves the right to require additional measures consistent with the terms of this article or modifications to this article in the event the agreement in item (a) is not reached.

**Article 421. Native Fish Monitoring Program.** The licensees shall, within one year of license issuance, file for Commission approval, after consultation with the Fish Committee established by Article 402, a native fish monitoring plan to evaluate effects of reintroducing anadromous fish on resident fish populations. The plan shall include the following biological and habitat components:

**(a) Biological Components:**

(1) Sockeye, steelhead, and spring Chinook spawning surveys, at locations and times determined by the Fish Committee, to assess spawning escapement, distribution, and timing for fish passed above the dams; redd counts in tributaries to Lake Billy Chinook, including the Metolius River system and Squaw Creek; and annual salmon and steelhead spawning surveys and redd counts beginning the first year that returning adult anadromous fish are passed upstream of the project and continuing after initiation of downstream passage for the length of time (about 12 years) required for three generations of adults to return. This salmon/steelhead spawning monitoring shall continue on an annual basis until the ratio of recruits to spawners (R/S ratio) is  $\geq 1$ , whereupon the licensees shall notify the Commission that an R/S ratio of  $\geq 1$  has been reached. Thereafter, as long as the R/S ratio remains  $\geq 1$ , the licensees are under no obligation to continue the spawning monitoring unless recommended by the Fish Committee and approved by the Commission. In the event that the R/S ratio decreases to  $< 1$ , the licensees shall notify the Commission, and annual spawning monitoring shall be resumed until the R/S ratio is again  $\geq 1$ .

(2) Monitoring of competition among anadromous and resident fish species in the Metolius and middle Deschutes River systems and McKay Creek following reintroduction of steelhead and salmon upstream of the project, using a combination of population monitoring and redd counts, including the following:

(i) Annual population surveys of the resident redband trout population in Squaw Creek and McKay Creek beginning in the first year of the license; following reintroduction of anadromous fish above the project, redband trout monitoring surveys in five of the first ten years after reintroduction.

(ii) Counts of redband trout redds annually in Squaw Creek and the Metolius River basin, at locations and times determined by the Fish Committee, beginning in the first year of the license and continuing until initiation of upstream passage of returning anadromous adults; following the initiation of upstream passage, redband trout redd counts in five of the first ten years after the initiation of upstream passage.

(iii) Determination of the proportion of redband trout and steelhead in Squaw Creek and McKay Creek at years 5 and 10 after reintroduction of steelhead.

(iv) Annual (unless bull trout are delisted under the Endangered Species Act) evaluation of the bull trout population using Oregon Department of Fish and Wildlife's (Oregon DFW's) annual bull trout redd counts on Metolius River tributaries, annual reservoir angler surveys during the targeted March–April bull trout fishery at Lake Billy Chinook, and monitoring of bull trout at project fish passage facilities.

(v) Monitoring of sockeye and bull trout spawning interactions through redd counts and observations for spawning site overlap during five of the first ten years after the initiation of upstream passage of returning anadromous adults; if interactions are found, more intensive redd surveys and spawning observations assessing the effects of sockeye redd superimposition on bull trout redds.

**(b) Habitat Components:**

(1) Monitoring of the quantity of habitat available upstream of the project by surveying approximately 20 miles of accessible stream above the project each year. Milestones for habitat availability monitoring shall be (i) before upstream passage (as baseline), (ii) immediately after initiation of upstream passage, and (iii) whenever changes in the quantity of accessible habitat occur (e.g., in the event passage is initiated at upstream non-project facilities), or as otherwise approved by the Commission.

(2) Monitoring of habitat effectiveness and riparian conditions above the project, using commonly-accepted protocols and by surveying about 20 miles of accessible stream above the project each year at locations and times determined by the Fish Committee. Habitat effectiveness shall be monitored during the term of the new license through fish habitat surveys and production capacity estimates. Use of a

geographic information system (GIS) database to incorporate the information and to develop, prioritize, and implement fish habitat mitigation projects and evaluate success for passage efforts.

(3) Production capacity estimates for spring Chinook, summer steelhead, and sockeye habitat within two years of license issuance. Annual reevaluation for the first ten years of the new license, and every five years thereafter, incorporation of the estimates of production capacity into life cycle modeling, and evaluation of passage success for the reintroduction of anadromous fish species above the project.

(4) Monitoring of the condition of habitat for any riparian habitat restoration project undertaken by the licensees. Monitoring programs shall be consistent with the strategies detailed in the Terrestrial Resources Management Plan required by Article 423, and shall include the following parameters: vegetation species composition; bank stability; herbaceous cover; tree/juniper/shrub cover; height and diameter of trees; canopy cover; growth and physical condition of vegetation; and distribution of vegetation.

The plan shall also include a provision for the licensees to file for Commission approval an annual report describing the prior year's monitoring activities and indicating the monitoring activities that will be undertaken in the then current year. The annual report shall be filed by February 1 commencing the year following the first year of monitoring and continuing until the year following the last year of monitoring activities under this article. The licensees shall allow a minimum of 30 days for the Fish Committee to comment on a draft of the annual report and to make recommendations before filing the final annual report with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

**Article 422. Terrestrial Resources Management Plan.**

(a) Within one year of license issuance, the licensees shall file with the Commission for approval a Terrestrial Resources Management Plan (TRMP) to implement terrestrial resource protection, mitigation, and enhancement (PME) measures as specifically set out and described in the TRMP Outline, Exhibit E to the Settlement Agreement to the extent such measures apply to lands within the project boundary. The TRMP shall clearly indicate those lands within the project boundary to which the measures apply. The TRMP shall be coordinated with the Recreation Resources Implementation Plan (Article 424), the Shoreline Management Plan (Article 428), and with existing laws and plans to ensure consistency among the plans' objectives. The TRMP shall be prepared after consultation with the Terrestrial Resources Working Group established by Article 402.

(b) The TRMP shall be the principal instrument for management of, implementation, monitoring and adaptation of PME measures for terrestrial resources affected by or related to the project. The TRMP shall include specific goals for terrestrial resources, as well as clearly defined objectives for achieving the goals. The licensees shall include in the TRMP the following resource management strategies for implementing specific PMEs:

- (1) Riparian and wetland restoration and protection strategy;
- (2) Vegetation management strategy;
- (3) Exotic and invasive vegetation management strategy;
- (4) Comprehensive bald eagle management strategy;
- (5) Raptor protection strategy;
- (6) Threatened, endangered, and sensitive (TES) species and habitats of special concern protection strategy;
- (7) Wildlife control strategy;
- (8) Travel and access management strategy;
- (9) Public access strategy;
- (10) Pelton Fish Ladder wildlife protection strategy; and
- (11) Wildlife monitoring strategy

(c) The licensees shall, after consultation with the Terrestrial Resources Working Group, file with the Commission by June 1 of each year after Commission approval of the TRMP, an annual report documenting the implementation of the TRMP. The annual TRMP report shall:

(1) Document the implementation of PME measures as scheduled in the TRMP.

(2) Describe the coming year's proposals for implementing scheduled management actions pursuant to the TRMP.

(3) Document consultation activities related to the TRMP.

(4) Document the results of monitoring of completed actions (to the extent monitoring is required for any particular action) to ensure proper implementation and effectiveness.

(d) The licensees, as part of the TRMP, shall develop and implement an adaptive management process to monitor implementation and effectiveness of terrestrial resource PME measures, and adapt implementation measures as needed to meet resource specific goals and objectives. The licensees, in consultation with the Terrestrial Resources Working Group, shall develop adaptive management proposals, including protocols and schedules, in consultation and coordination with the Terrestrial Resources Working Group. The TRMP shall be updated every 5 years during the license term in consultation with the Terrestrial Resources Working Group as part of the adaptive management process. As appropriate, the licensees shall incorporate peer review into the adaptive management process to evaluate adaptive management actions and assess technical evaluations. The TRMP updates shall be filed with the Commission for approval. Upon Commission approval, the licensees shall implement the updated plan.

(e) The licensees shall include with the TRMP and any TRMP updates stipulated in item (d) above documentation of consultation, copies of comments and recommendations on the completed plan and plan updates after they have been prepared and provided to the Working Group, and specific descriptions of how the Working Group's comments are accommodated by the plan and plan updates. The licensees shall allow a minimum of 30 days for the Working Group to comment and to make recommendations before filing the plan and plan updates with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.



The Commission reserves the right to require changes to the plan and plan updates. Implementation of the plan and plan updates shall not begin until the plan and plan updates are approved by the Commission. Upon Commission approval, the licensees shall implement the plan and plan updates, including any changes required by the Commission.

**Article 423. Terrestrial Resource Interim Measures.** Within six months of license issuance, the licensees shall file for Commission approval a plan to implement the following measures within one year of license issuance while the Terrestrial Resources Management Plan (TRMP) is being developed as provided in Article 422 and to the extent such measures apply to lands within the project boundary:

- (a) ***Upland Vegetation Management.*** The licensees shall implement upland vegetation management measures to improve, protect, and maintain terrestrial plant and wildlife habitat diversity on lands within the project boundary. The measures shall anticipate, and to the extent possible be consistent with, the TRMP Vegetation Management Strategy specified in Exhibit E of the Settlement Agreement.
- (b) ***Exotic and Invasive Vegetation Management.*** The licensees shall inventory and map noxious weed presence, distribution and density, and control, suppress, or eradicate existing infestations at sites identified in the TRMP Outline, Exhibit E of the Settlement Agreement. The weed management measures shall anticipate, and to the extent possible be consistent with, the TRMP Exotic and Invasive Vegetation Management Strategy.
- (c) ***Bald Eagle Nesting Productivity Surveys.*** The licensees shall conduct bald eagle nesting surveys to monitor trends in nesting productivity and success, and the status of bald eagle nesting pairs that use the project reservoirs. The nesting surveys shall be conducted using the protocol described in the TRMP Outline, Exhibit E of the Settlement Agreement.
- (d) ***Bald Eagle Communal Roost Surveys.*** The licensees shall conduct fall and winter communal roost surveys at known bald eagle communal roosts associated with the project reservoirs. The surveys shall be conducted using the protocols described in the TRMP Outline, Exhibit E of the Settlement Agreement.
- (e) ***Bald Eagle Winter Use Surveys.*** The licensees shall conduct winter use surveys to monitor bald eagle winter use of the project reservoirs. The surveys shall be conducted using the protocol described in the TRMP Outline, Exhibit E of the Settlement Agreement.

(f) ***Golden Eagle Nesting Productivity Surveys.*** The licensees shall conduct golden eagle nesting surveys to monitor trends in nesting productivity and success, and the status of golden eagle nesting pairs associated with the project reservoirs. The surveys shall be conducted using the protocols described in the TRMP Outline, Exhibit E of the Settlement Agreement.

(g) ***Osprey Nesting Productivity Surveys.*** The licensees shall conduct osprey nesting surveys to monitor trends in the nesting productivity of ospreys that nest in association with the project reservoirs. The licensees shall conduct the surveys using the protocol described in the TRMP Outline, Exhibit E of the Settlement Agreement.

(h) ***Avian Power Line Electrocutation and Collision.*** The licensees shall survey project-related distribution lines to identify the potential for avian electrocution. These lines include the following: (1) 12.5-kilovolt (kV) line to Round Butte powerhouse (station service feeder); (2) 12.5-kV line to Round Butte dam, spillway, and auxiliary station feeder; and (3) 12.5-kV line to the Reregulating dam. To the extent practicable and following guidelines in the publication “Suggested Practices for Raptor Protection on Power Lines: The State of the Art in 1996” (APLIC 1996) (or the most current Avian Power Line Interaction Committee [APLIC] publication for avian protection), the licensees shall rebuild or retrofit any line or power pole involved in a bird fatality or injury or identified as a high risk for avian electrocution to render the facility raptor-safe. The plan shall include a provision for the licensees to notify the Commission prior to rebuilding or retrofitting the line or power pole.

(i) ***Waterfowl Surveys.*** The licensees shall conduct waterfowl nesting productivity and winter use surveys to monitor trends in waterfowl production and use associated with the project reservoirs. The surveys shall be conducted using the protocols described in the TRMP.

(j) ***Pelton Fish Ladder Wildlife Protection.*** The licensees shall install five small animal crossings over the Pelton Fish Ladder, remove the shotgun style outlets from six culverts that pass under the fish ladder, and install a wildlife diversion device in the dirt canal section of the fish ladder to improve crossing opportunities for small mammals, reptiles, and amphibians, and reduce the potential for animal entrapment. The plan shall include detailed design drawings for these activities.

(k) ***Agency Coordination.*** The licensees shall provide for agency coordination as specified in Proposed Article 44 of the Settlement Agreement file on July 30, 2004.

(l) ***Implementation Schedule.*** The licensees shall include an implementation schedule with the plan.

The licensees shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Terrestrial Resources Working Group established by Article 402 and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Working Group to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

**Article 424. Recreation Resources Implementation Plan.** (a) Within one year of license issuance, the licensees shall file with the Commission, for approval, a Recreation Resources Implementation Plan (RRIP) to enhance recreation resources at the Pelton Round Butte Project. The licensees shall prepare the plan after consultation with the Recreation Resources Working Group established pursuant to Article 402 and in conjunction with the Terrestrial Resources Management Plan required by Article 422. The RRIP shall include the measures identified in the Exhibit G to the Settlement Agreement except that in lieu of funding the Lake Billy Chinook offshore boat mooring study, the RRIP shall include a provision for the licensees to file, after consultation with the Recreation Resources Working Group, an evaluation of the technical feasibility of implementing an off-shore boat moorage program at Lake Billy Chinook along with any recommendations for the installation and maintenance of up to 50 offshore moorages in Lake Billy Chinook.

In addition, operation and maintenance of Perry South Campground, Monty Campground, and Street Creek shall be provided for as stipulated in Proposed Article 52 of the Settlement Agreement filed on July 30, 2004.

- (b) The RRIP shall include the following objectives:
- (i) provide adequate and safe public access to the project lands and waters;
  - (ii) avoid or minimize recreation related impacts on sensitive resources; and
  - (iii) provide a range of feasible and desirable recreation opportunities based on information collected and filed pursuant to the reporting requirements for FERC Form 80 – Recreation Report, section 8 of the Commission's regulations (18 C.F.R. 8.11), and applicable existing management plans.

(c) In addition to the measures specifically identified in the “List of Measures to be included in the Recreation Resources Implementation Plan,” (Exhibit G to the Settlement Agreement) with the exception noted in item (a) above, the licensees shall implement measures designed to mitigate for project-related recreation authorized or implemented by entities other than the licensees, provided however, that the actions taken by those entities are consistent with the applicable existing management plans. Such additional measures shall be developed as needed in consultation with the Recreation Resources Working Group.

(d) Every 10 years beginning in the tenth year following license issuance, the licensees shall convene a meeting of the Recreation Resources Working Group to discuss unforeseen impacts of recreation patterns in the project area (if any) and to agree upon appropriate management actions or mitigation measures.

(e) The licensees shall file with the Commission, after consultation with the Recreation Resources Working Group, an annual report documenting the implementation of the RRIP. The annual RRIP report shall:

(i) Identify the measures implemented as scheduled in the RRIP.

(ii) Identify next year’s proposals for implementing scheduled recreation management actions.

(iii) Reconcile and document differences between each year’s proposals and any replacement or additional measures agreed upon by the licensees and the affected agencies.

(iv) Document consultation related to the RRIP.

(v) Document the results of monitoring of completed actions (to the extent monitoring is necessary for any particular action) to ensure proper implementation and effectiveness.

The licensees shall include with the plan, an implementation schedule, documentation consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Recreation Resources Working Group, and specific descriptions of how the Working Group’s comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Working Group to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee’s reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

Some of the measures specified in the RRIP apply to lands that are located outside of the project boundary. These measures include: (1) funding improvements and annual maintenance of dispersed campsites at BLM Beach, the cove area downstream from Cove Marina, west shore area of the Crooked River arm downstream from the bridge, and west shore of the Deschutes River arm downstream from the bridge; (2) making improvements to and funding NEPA compliance for Monty Campground; and (3) making improvements to and funding activities at Cove Palisades State Park. These lands in which the activities will take place shall be brought into the project boundary and the exhibit G drawings shall be revised and filed pursuant to Article 301. The 90-day deadline for filing the revised exhibits stipulated in Article 301 shall be referenced to the completion date of the specified improvements (*e.g.*, construction, modification, etc.). All structures or facilities constructed or installed in accordance with this plan shall be shown on the exhibit drawings filed pursuant to Article 301.

**Article 425. Recreation Funding Measures.** Within one year of license issuance, the licensees shall, for the enhancement of recreation resources at the Pelton Round Butte Project:

- (a) Enter into an agreement with the Confederated Tribes of the Warm Springs to provide annual funding for maintenance and operation of Indian Park Campground and Chinook Island Day-Use Area;
- (b) Provide annual funding for operation and maintenance (O&M) of Pelton and Round Butte Overlook parks, and Pelton Wildlife Overlook;
- (c) Fund a project staff person to coordinate implementation of the Recreation Resources Implementation Plan required by Article 424 and to provide for necessary resource coordination pursuant to the terms of this license;
- (d) Fund seasonal O&M costs for one new, self-contained floating restroom for use by boaters on the Metolius River arm of Lake Billy Chinook near the Bureau of Land Management beach east of Three Rivers Recreation Area; and
- (e) Close and rehabilitate the road leading into the Balancing Rocks area, develop a trail, and provide a small roadside parking area. The trail and small roadside parking area shall be brought into the project boundary and shown on the exhibit drawings filed

pursuant to Article 301. The 90-day deadline for filing the revised exhibits stipulated in Article 301 shall be referenced to the completion date of the specified improvements (e.g., construction, modification, etc.).

Within one year of license issuance, the licensees shall file with the Commission for approval a copy of the agreement specified in item (a) and documentation that the requirements of items (b) through (e) have been completed. If the agreement specified in item (a) is not reached, the licensees shall provide written explanation of the dispute, including the positions taken, in lieu of the agreement. The Commission reserves the right to require additional measures consistent with the terms of this article in the event an agreement is not reached.

**Article 426. Emergency Communications.** Within six months of license issuance, the licensees shall:

- (a) file with the Commission, for approval, a report detailing the results of a communications coverage study designed to address the following objectives:
  - (i) Emergency/Safety (ability for emergency response personnel to contact each other and to contact external emergency services);
  - (ii) Day-to-day management; and
  - (iii) General public communication outside of the immediate Pelton Round Butte Project reservoir areas.

The report shall be prepared after consultation with the Recreation Resources Working Group established by Article 402. The licensees shall include with the report documentation of consultation, copies of comments and recommendations on the completed report after it has been prepared and provided to the Working Group, and specific descriptions of how the Working Group's comments are accommodated by the report. The licensees shall allow a minimum of 30 days for the Working Group to comment before filing the report with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the report. Implementation of measures specified in the report shall not begin until the report is approved by the Commission. Upon Commission approval, the licensees shall implement measures specified by the report, including any changes required by the Commission, and as provided in paragraph (b) of this article.

(b) Within one year of license issuance, fund measures identified in the communications coverage study as necessary for emergency/safety communications, including measures to provide coverage of existing “dead areas” on project reservoirs using two-toned radio frequencies.

**Article 427. Programs for Interpretation and Education.** Within five years of license issuance, the licensees shall file for Commission approval an Integrated Interpretation and Education Plan (I & E Plan) for the Pelton Round Butte Project to inform the public about resource and project features in the project area at a total expense to the licensees of no more than \$75,000 in then-current dollars (unless otherwise directed by the Commission under Article 438). The I & E Plan shall be developed in consultation with the Recreation Resources Working Group established pursuant to Article 402 and the Oregon State Historic Preservation Officer.

The I&E Plan shall address resources in the project area, including but not limited to fishery and aquatic resources, terrestrial and wildlife resources, cultural resources, tribal culture and history, project history, and energy production. Themes related to terrestrial and wildlife resources may include resource stewardship; threatened, endangered and sensitive species biology and protection; protection of sensitive plant communities; riparian habitat restoration; winter range protection; mule deer biology and habitat requirements; and causes and effects of human disturbance. Implementation elements may include signs and signboards at designated campgrounds and at other recreation facilities within the project area. Annually, for the term of the license, the licensees shall implement agreed-upon elements of the I & E plan at an annual cost of not more than \$20,000 (unless otherwise directed by the Commission under Article 438), which amount shall be escalated as provided in Article 407.

The licensees shall include with the plan, an implementation schedule, documentation of agency and tribe consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies and tribe, and specific descriptions of how the agencies' and tribe's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the agencies and tribe to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 428. Shoreline Management Plan.** Within one year of license issuance, the licensees shall, after consultation with the Shoreline Management Working Group established pursuant to Article 402, file for Commission approval a Shoreline Management Plan (SMP) for the Pelton Round Butte Project. The SMP shall include standards and guidelines for new shoreline development, installation of new docks, and modification of existing docks.

The licensees shall include with the SMP, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed SMP after it has been prepared and provided to the Shoreline Management Working Group, and specific descriptions of how the Working Group's comments are accommodated by the SMP. The licensees shall allow a minimum of 30 days for the Working Group to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the SMP. Implementation of the SMP shall not begin until the SMP is approved by the Commission. Upon Commission approval, the licensees shall implement the SMP, including any changes required by the Commission.

**Article 429. Shoreline Erosion Plan.** Within one year of license issuance, the licensees shall, in consultation with the Shoreline Management Working Group established pursuant to Article 402, file for Commission approval, a Shoreline Erosion Plan to monitor and control stream and impoundment shoreline erosion at the Pelton Round Butte Project. The plan, at a minimum, shall include the following objectives and measures listed below.

- (1) The following objectives of the plan shall be to:
  - (a) Discuss the conditions and probable causes of, as well as potential measures for, shoreline erosion;
  - (b) Describe agreed upon actions, including, but not limited to the measures described herein; and
  - (c) Provide that all actions conducted under the shoreline erosion plan shall be developed and implemented in consultation with the Shoreline Management Working Group established pursuant to Article 402.

The licensees shall develop the plan using the annotated outline in Section E-V11 – Land Management and Use of the Final Joint Application Amendment, and any other applicable information, in consultation with the Shoreline Management Working Group.



(2) Within three years of license issuance, the licensees shall commence rehabilitation at, but not limited to, the following existing erosion sites:

- (a) Chinook Island;
- (b) Indian Park Campground;
- (c) Juniper Canyon;
- (d) Big Canyon;
- (e) Dispersed sites on the east bank just south of Round Butte dam;
- (f) Shoreline of the cove at Perry South Campground and along Spring Creek;
- (g) Shoreline upstream of the Upper Deschutes Day-Use Area;
- (h) Pelton Park;
- (i) Bureau of Land Management Beach east of the Three Rivers Marina; and
- (j) shoreline and access road at Monty Campground.

(3) The licensees shall conduct, or provide for an entity to conduct, a baseline survey of the project area to identify, map, and assess existing erosion sites that are project-related and are significantly affecting terrestrial habitats, fish habitats or water quality; or that, if the site is located on the Confederated Tribes of the Warm Springs Reservation, is causing or is likely to cause significant loss of shoreline. For each erosion site identified, the licensees shall include a re-locatable topographic survey transect, notes on sediment types, vegetative condition or fish or wildlife habitat existing on the site, photographic documentation, and an analysis of the probable causes of the erosion.

(4) Beginning in the first year following license issuance, and after consultation with the Shoreline Management Working Group, the licensees shall conduct annual monitoring of the project area to monitor existing erosion sites and identify and map any new project-related erosion sites. This annual monitoring shall follow the pattern and standards established by the baseline survey performed above and shall include the opportunity for the Shoreline Management Working Group to accompany the licensees' survey crew in the field. Information that is unchanged from any prior year's survey shall be noted, but need not be repeated. Annual monitoring of sites shall occur until

documentation of stable or improved conditions, after which additional monitoring can be changed based on consultation with the Shoreline Management Working Group and Commission approval. Annual monitoring shall also include an assessment of ongoing mitigation activities.

(5) No later than March 31 of each year after Commission approval of the Shoreline Erosion Plan, the licensees shall file with the Commission an annual report, prepared after consultation with the Shoreline Management Working Group, which identifies soil erosion control measures; describes annual maintenance of erosion control sites; identifies any other soil erosion control measures including those undertaken during emergency situations; describes coordination with other resource management plans, such as the Cultural Resources Management Plan required by Article 429 of this license; and documents consultation. Any proposed changes in the treatment or monitoring status of the erosion control site shall include the rationale for such changes.

(6) Further, the licensees shall monitor identified erosion sites following (i) any event at the Round Butte development where the outflow exceeds inflow by more than the maximum turbine flow, (ii) any drawdown of Lake Simtustus resulting in 7 or more feet of reservoir elevation change in a 24-hour period, or (iii) other events that could rapidly change the shoreline condition.

(7) The licensees shall develop site-specific measures for the erosion sites listed in (2) above, and for any project-related erosion sites identified during the baseline survey or subsequent annual monitoring. The licensees shall give preference to “soft” erosion control techniques including, bioengineering, planting and seeding of appropriate native riparian species, sediment replenishment, or anchored woody debris, but may, when necessary, utilize “hard” erosion control, including use of geotextiles, rock armoring, or other hard surfaces. The licensees shall develop the site-specific measures after consultation with the Shoreline Management Working Group.

The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Shoreline Management Working Group, and specific descriptions of how the Working Group's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Working Group to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 430. Aesthetic Resources Protection Plan.** Within one year of license issuance, the licensees shall, after consultation with the Recreation Resources Working Group established pursuant to Article 402, file with for Commission approval, an Aesthetic Resources Protection Plan (ARPP) to protect and enhance aesthetic resources at the Pelton Round Butte Project.

The ARPP shall include, but not necessarily be limited to, provisions for the following:

- (1) Fish Ladder: Coat the outside surface that is visible from the wildlife viewing platform (approximately 0.25 mile) with Permeon.
- (2) Pelton Dam Road: (a) Investigate, in the 10th year following license issuance, whether feasible and economic solutions exist to reduce the color contrast associated with the road cuts; and (b) within 10 years of license issuance, replace existing guardrail material with "rusted rail" guardrail material.
- (3) Round Butte Switchyard: When transformers are being replaced for regular maintenance and replacement, replace them with grey transformers, whenever available.
- (4) Pelton Park and Round Butte Overlook Park: (a) Apply compatible paint color on Pelton Park store and apartment building; (b) treat interior of Overlook building with compatible colors; and (c) when replacement is otherwise required, phase out existing fencing to non-galvanized, vinyl-coated fencing adjacent to the licensees' recreation sites or project maintained public access roads to the parks.
- (5) Round Butte Dam and the Round Butte Powerhouse Area: (a) Paint the Jefferson County Sheriff's boat house with a color agreed upon with the U.S. Forest Service; and (b) consult with the Recreation Resources Working Group regarding (i) appropriate colors for any fish facilities constructed pursuant to the Fish Passage Plan (Condition 1 of Appendices C and D), and (ii) appropriate treatments for any existing fish facilities on the top of Round Butte dam or in the forebay that remain as long-term components of the fish passage program.

The licensees shall prepare the plan after consultation with the Recreation Resources Working Group. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies and tribe, and specific descriptions of how the Working Group's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Working Group to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 431. Project-related Road Maintenance.** Within one year of license issuance, the licensees shall file for Commission approval a plan to provide for upgrades and maintenance of roads necessary for project purposes, which may include, but are not limited to, relevant portions of U.S. Forest Service (Forest Service) roads FS 11 and FS 1170, Dizney Lane, Pelton Dam Road, Jordan Road, and other roads adjacent to the project contemplated by Appendix D of the Settlement Agreement filed on July 20, 2004, that are required for access to project lands, waters, and facilities. The plan shall include provisions to bring into the project boundary any roads on which ongoing maintenance is to be provided under the license; such roads shall be shown on the exhibit drawings filed pursuant to Article 301. For each road, the 90-day deadline stipulated in Article 301 for filing the revised exhibits shall be referenced to the completion date of the initial maintenance activity.

The licensees shall prepare the plan after consultation with the Forest Service and Jefferson County. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Forest Service and the county, and specific descriptions of how the entities' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the entities to comment before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 432. Historic Properties.** The licensees shall implement the "Programmatic Agreement (PA) among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, the State of Oregon, State Historic Preservation Officer, and the Confederated Tribes of the Warm Springs Reservation, Tribal Historic Preservation Officer for Managing Historic Properties That May be Affected By A License Issuing to Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon for the Continued Operation of the Pelton Round Butte Hydropower Project in Jefferson County Oregon", executed on December 6, 2004, including but not limited to the final Cultural Resources Management Plan (CRMP) for the Project (Exhibit J of the Settlement Agreement filed on July 30, 2004). In the event that the Programmatic Agreement is terminated, the

licensees shall implement the provisions of the final CRMP. The Commission reserves the authority to require changes to the CRMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the CRMP, the licensees shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the Project's area of potential effect.

**Article 433. *Lower River Gravel Study.***

(a) Within one year of license issuance, the licensees shall file for Commission approval a detailed Lower River Gravel Study Plan, as described in the Lower River Gravel Study Design, Exhibit I to the Settlement Agreement. The plan shall evaluate gravel mobility, supply, and use by spawning salmonids in the lower Deschutes River from the Reregulating Dam (RM 100) to the Trout Creek confluence (RM 87.3) and shall be developed in consultation with the Fish Committee established pursuant to Article 402.

(b) As provided in the Lower River Gravel Study Design, Exhibit I to the Settlement Agreement, the study plan shall include a geomorphic component and a biological monitoring component.

(1) The geomorphic component of the study shall assess the impacts of the project on downstream gravel availability and channel morphology and to test the dynamics and quality of augmented gravels and shall include the following elements:

(i) Sediment transport monitoring.

(a) Placement of radio-tagged and colored tracer rocks (or rocks with exotic lithologies) at six to seven cross sections between the Reregulating dam and Trout Creek.

(b) Establishment of survey cross sections at the tracer gravel sites to monitor whether tracer particles had been displaced by that year's flow, or by flows greater than 6,500 cubic feet per second (cfs).

(c) Measurement of bedload transport at the Warm Springs Bridge (U.S. Highway 26) on rising and falling limbs of flows exceeding 5,500 cfs.

(d) Placement of columns of painted rocks or scour chains at each cross section to determine depth of scour and any subsequent filling.

(e) If annual monitoring described in paragraphs (a) – (d) show that sediment transport is occurring, a provision for the licensees to develop a plan for Commission approval and in consultation with the Fish Committee and Fish Agencies referenced in Article 402 to resample bed material size at the sample sites previously studied by the licensees.

(ii) Experimental Gravel Augmentation Program.

(a) The experimental gravel augmentation program shall provide for the addition, starting one year prior to the initiation of selective water withdrawal, of a total of 300 cubic yards of gravel distributed amongst at least three sites between the Reregulating dam and Shitike Creek. Sites shall be chosen in consultation with the Fish Committee to minimize potential adverse effects of the augmented gravel, including disturbance to existing spawning habitat.

(b) The licensees shall obtain all necessary tribal, federal and state permits or approvals, including but not limited to Wild and Scenic River Act Section 7 consistency determinations and Clean Water Act Section 404 (dredge/fill) permits, prior to any test gravel placement.

(2) The biological monitoring component shall monitor the quality of the augmented gravels to determine if the addition of new gravel between the Reregulating dam (RM 100) and the mouth of Shitike Creek (RM 97) would be necessary and beneficial to salmonid populations and shall include the following elements:

(i) Determination of relative use of spawning sites above and below Shitike Creek to determine if relative spawner use is shifting downstream as spawning habitat quality and quantity changes upstream.

(ii) Measurement of steelhead and rainbow spawning habitat area above and below Shitike Creek.

(iii) Measurement of spawner use of experimental gravel augmentation sites compared to use of other spawning areas upstream of Shitike Creek.

(iv) Measurement of spawning gravel quality parameters including permeability, and inter-gravel dissolved oxygen (IGDO).

- (v) Comparison of the survival of rainbow trout embryos within redds at the three study sites above Shitike Creek and the three study sites below Shitike Creek.
  - (vi) Comparison of invertebrate populations at the gravel augmentation sites and non-augmented control sites.
- (c) After five years of study, the licensees shall submit annual monitoring results of the gravel study to the Commission and a three-member expert review panel consisting of experts in geomorphology and fisheries selected by the licensees, in consultation with the Fish Committee.
- (d) The licensees shall request that the expert review panel believes: (1) the gravel study should be continued; (2) the licensees should implement a long-term gravel augmentation program, or (3) no further study or augmentation is needed. If the expert panel believes that (1) the project is causing impacts that could be mitigated by gravel augmentation, including examination of whether the project may be having deleterious effects on channel bedforms and spawning gravel quantity and quality, (2) that the augmentation test did not adversely affect downstream bank stability or cause downstream pool filling, and (3) that augmentation would be beneficial to fish habitat and fish populations, the licensees shall request that the expert review panel notify the Fish Committee of its conclusion that a long-term gravel augmentation action plan should be implemented or that the current study program should be extended. If, after consideration of the report of the expert panel, the Fish Committee believes that a long-term gravel augmentation program is required or that an extended study program is required, the licensees shall, after consultation with the Fish Committee develop and file a plan for Commission approval to implement such program.
- (e) The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

**Article 434. Lower River Wood Management.** Within one year of license issuance, the licensees shall file for Commission approval a Large Wood Management Plan (LWMP), developed in consultation with the Fish Committee established pursuant to Article 402. The purpose of the LWMP is to provide for (i) the management of floating wood greater than 8 inches in diameter (at the small end) by 10 feet long that enters Lake Billy Chinook and (ii) the placement of large wood along the project reservoir shorelines for the protection of riparian plantings. The LWMP shall include a monitoring plan to be conducted through the term of the license, for the evaluation of the effectiveness of placed wood, including river transport (for wood moved below the project), use by wildlife and fish, and as appropriate, erosion control for the establishment of shoreline riparian vegetation. The LWMP shall provide that the management of large wood be adapted to reflect improvements identified through monitoring to improve the erosion control function of shoreline wood and the habitat value of all wood placements for riparian vegetation, fish and wildlife. At a minimum, the plan shall include:

- (a) Description of methods to be used for collection, transport and placement of large wood entering Lake Billy Chinook (minimum size of 8 inches in diameter (at the small end) by 10 feet long);
- (b) Guidelines for placement of large wood in the Lower Deschutes River or Lake Billy Chinook;
- (c) Notification and reporting requirements, for when wood is collected, transferred and placed;
- (d) Guidelines to transfer large wood entering Lake Billy Chinook. At a minimum these guidelines shall include:
  - (1) Transfer of floating wood collected east of Rattlesnake Point in the Metolius Arm, and the Deschutes and Crooked River Arms of Lake Billy Chinook to the Lower Deschutes River for fish habitat improvement;
  - (2) Anchoring wood found floating west of Rattlesnake Point in the Metolius Arm of Lake Billy Chinook for shoreline wildlife loafing sites, riparian vegetation plantings, erosion control, or shallow water juvenile salmonid cover;
  - (3) Replacement of an equal volume, type and sizes of wood that is retained in the Metolius Arm of Lake Billy Chinook; and
  - (4) Logs found in Lake Billy Chinook that were found to have been illegally cut from the Metolius River will be replaced in the Metolius River, if feasible.



- (e) Integration with the assessment of the Terrestrial Resources Work Group established pursuant to Article 402 of available sites for riparian vegetation establishment; and
- (f) Monitoring plan for the evaluation of the effectiveness of placed wood, including river transport (for wood moved below the project), use by wildlife and fish, and as appropriate, erosion control for the establishment of shoreline riparian vegetation. If improvements are identified through monitoring, then the management of wood shall be adapted to improve the erosion control function of shoreline wood and habitat value of all wood placements for riparian vegetation, fish, and wildlife, after Commission approval.

The plan shall be developed in consultation with the Fish Committee. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and specific descriptions of how the Committee's comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

**Article 435. Lower River Fish Habitat Enhancement.** Within one year of license issuance, the licensees shall file for Commission approval a plan to implement the Trout Creek habitat enhancement project described in the Exhibit F to the Settlement Agreement. The plan shall be consistent with the requirements of Article 406 for those portions of the project on U.S. Forest Service or Bureau of Land Management lands. The plan shall be developed in consultation with the Fish Committee established pursuant to Article 402 and Fish Agencies referenced in Article 402.

The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Fish Committee and Fish Agencies and specific descriptions of how the Committee's and Agencies' comments are accommodated by the plan. The licensees shall allow a minimum of 30 days for the Committee and Agencies to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

**Article 436. Pelton Round Butte Fund.**

(a) Within 6 months of license issuance, the licensees shall establish the Pelton Round Butte Fund (the "Fund") in the initial amount of a \$3.5 million credit (2003 dollars) to fund enhancement projects for fish and wildlife resources and habitats in the Deschutes River Basin. The Fund shall be a tracking account held by licensees with all accrued interest being credited to the Fund. The Fund shall be dedicated to the funding of enhancement projects in accordance with this license article. Following this initial credit, the licensees shall make periodic credits as specified in the Pelton Round Butte Fund Implementation Plan, Exhibit H to the Settlement Agreement. Amounts credited to the Fund shall be escalated as provided in the Pelton Round Butte Fund Implementation Plan.

(b) Amounts credited to the Fund shall not be used to defray the cost of administrative, legal, and overhead costs associated with the management of the Fund, which shall be borne by the licensees. Any funds remaining unexpended at the end of the license term, including any annual licenses, shall be returned to the licensees.

(c) The licensees shall utilize the Fund in accordance with the provisions of the Pelton Round Butte Fund Implementation Plan, Exhibit H of the Settlement Agreement. Any revisions to the criteria and evaluation system as contemplated by section II.D.4 of Exhibit H shall only be implemented after Commission approval.

(d) By March 31 of each year during the license term, licensees shall provide the Commission for approval and the parties to the Settlement Agreement with an annual written report setting forth and describing all Fund activity during the previous calendar year. In addition to any other Fund activity, this report shall list withdrawals from the Fund for mitigation and enhancement projects and itemize costs associated with each project. The licensees shall prepare the report in accordance with the Pelton Round Butte Fund Implementation Plan, Exhibit H to the Settlement Agreement, after consultation with the Governing Board provided for in Exhibit H of the Settlement Agreement, or, if the Settlement Agreement has become void, in consultation with Bureau of Indian Affairs, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Oregon Department of Fish and Wildlife, Oregon Water Resources Department, Oregon Department of Environmental Quality, U.S. Forest Service, and Branch of Natural Resources and Water Control Board of the Confederated Tribes of the Warm Springs Reservation of Oregon, and any non-governmental organizations previously represented on the Governing Board (the Successor Agencies). When a draft report has been prepared, it shall be provided to the Governing Board or the Successor Agencies, as

applicable, for 30-day review and comment. The licensees shall include with the final report documentation of consultation and copies of comments and recommendations, and specific descriptions of how the final report accommodates all comments and recommendations. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

**Article 437. Reservation of Authority-Fishways.** Pursuant to section 18 of the Federal Power Act, authority is reserved to the Commission to require the licensees to construct, operate, and maintain, or provide for the construction, operation, and maintenance of such fishways as may be prescribed by either the Secretary of the Interior or the Secretary of Commerce.

**Article 438. Expenditures.** Notwithstanding the limitation on expenditures included in this license, the Commission reserves the right to require the licensees to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

**Article 439. Columbia River Basin Fish and Wildlife Program.** The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal and state fish and wildlife agencies, affected Indian Tribes, and the Northwest Power Planning Council, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

**Article 440. Threatened and Endangered Species Protection Plan.** Within six months of license issuance, the licensees shall file for Commission approval a Threatened and Endangered Species Protection Plan. The plan shall include:  
(1) provisions for all measures stipulated in the terms and conditions implementing the reasonable and prudent measures filed by the U.S. Fish and Wildlife Service and National Marine Fisheries Service on November 3, 2004, and February 28, 2005, respectively and  
(2) an implementation schedule. The reasonable and prudent measures and terms and conditions are attached to this license as Appendices E and F for reference.

As part of the plan, the licensees may reference measures implemented under other articles and ordering paragraphs of this license, as applicable, in lieu of including the measures as provisions of the plan.

The licensees shall prepare the plan after consultation with the Fish Committee and Terrestrial Resources Working Group. The licensees shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations of the plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the consulted entities' comments are

accommodated by the plan. The licensees shall allow a minimum of 30 days for the consulted entities to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing shall include the licensees' reasons, based on project –specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the plan is approved by the Commission. Upon Commission approval, the licensees shall implement the plan, including any changes required by the Commission.

**Article 441. *Reservation of Authority-Land Reservations.*** The licensees shall implement, upon order of the Commission, such additional measures as may be identified by the Secretary of the Interior pursuant to the authority provided in section 4(e) of the Federal Power Act, as necessary to ensure the adequate protection and utilization of the public land reservations under the authority of the Department of the Interior, Bureau of Land Management.

**Article 442. *Reservation of Authority-Indian Reservation.*** The licensees shall implement, upon order of the Commission, such measures as may be identified by the Secretary of the Interior, pursuant to section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), as necessary for the protection and utilization of the Warm Springs Indian Reservation.

**Article 443. *Use and Occupancy.*** (a) In accordance with the provisions of this article, the licensees shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensees may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensees shall also have continuing responsibility to supervise and control the use and occupancies, for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensees for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensees shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the licensees may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement.

To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensees shall require multiple use and occupancy of facilities for access to project lands or waters. The licensees shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensees shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensees may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensees' costs of administering the permit program. The Commission reserves the right to require the licensees to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensees may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir.

No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensees may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is 5 acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year.

At least 60 days before conveying any interest in project lands under this paragraph (d), the licensees must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or state agency official consulted, and any Federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensees to file an application for prior approval, the licensees may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensees shall consult with Federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensees shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation,

and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee shall not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the licensees to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundary. The project boundary may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensees under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(L) The licensees shall serve copies of any Commission filing required by this order on any entity specified in the order to be consulted on matters relating to that filing. Proof of service on these entities must accompany the filing with the Commission.

(M) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission. The licensees' failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission. Commissioner Kelliher concurring with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

**APPENDIX A**

Oregon Division of Environmental Quality  
Section 401 of the Clean Water Act  
Terms and Conditions

**A. Water Quality Management and Monitoring Plan**

Within 90 days of issuance of the §401 certification, the Joint Applicants, in consultation with ODEQ, shall revise the Water Quality Management and Monitoring Plan attached to these certification conditions as Exhibit A and submit the revised plan to ODEQ for approval.<sup>73</sup> The plan as approved by ODEQ is hereafter referred to in these certification conditions as the "WQMMP." Upon ODEQ approval, the WQMMP becomes a part of the §401 certification for the Project for purposes of any federal license or permit thereafter issued.

**B. Selective Water Withdrawal Facility Construction and Operation**

By no later than five years from the date of receiving a new FERC license for the Project, the Joint Applicants shall construct, test, and commence operation of the Selective Water Withdrawal (SWW) facility described in the Joint Applicants' §401 application.

**C. Temperature**

1. The SWW facility shall be operated in accordance with the Temperature Management Plan (TMP) contained in the WQMMP. The TMP shall identify those measures that the Joint Applicants will undertake to reduce the Project's contribution to exceedances of water quality standard criteria for temperature.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the temperature monitoring reasonably needed to determine (a) whether the temperature criteria continue to be exceeded in waters affected by the Project, (b) the success of the TMP in reducing the Project's contribution to any continued exceedances of the criteria, and (c) any additional measures that may be needed to reduce the Project's contribution to exceedances of the criteria.

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<sup>73</sup> The revised Water Quality Management and Monitoring Plan (WQMMP) has been completed by the licensees and can be found in Appendix C of this license.



3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a Total Maximum Daily Load (TMDL) for temperature in the portion of the Deschutes River affected by the Project, ODEQ may reevaluate the Joint Applicants' TMP in light of information acquired since the certification of the Project. If additional temperature reduction measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised TMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of the attached Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related thermal contributions to waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for temperature in waters affected by the Project, ODEQ may:

- (a) Determine whether the LA for the Project has been achieved.
- (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the TMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the TMP.
- (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the TMP to determine whether additional measures to reduce the Project's contribution to exceedances of the temperature criteria are necessary and feasible. If additional measures are necessary and feasible, ODEQ may require submittal of a revised TMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the TMP that would require the Project to reduce water temperatures beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.
- (d) If (i) additional measures to reduce the Project's contribution to exceedances of the temperature criteria are necessary to achieve the LA but the measures are not feasible, and (ii) the water quality standard has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken by all required parties within the Deschutes River Basin to achieve the TMDL for waters affected by the Project. If all feasible measures have not been undertaken, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that

all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the TMDL. If the designated beneficial uses are not adversely affected by the failure to achieve the TMDL, the Joint Applicants shall continue to implement the TMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of the TMP. If the designated beneficial uses are adversely affected by the failure to achieve the TMDL, ODEQ may modify the TMP to require additional temperature measures, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the TMP that would require the Project to reduce water temperatures beyond what would be required by the LA for the Project shall be effective only upon modification of the TMDL to reflect the reduced load allocation.

5. Any Project-related instream temperature increase of 0.25°F or less above the relevant criterion shall not be deemed to contribute to an exceedance of the temperature criterion or to a violation of the temperature water quality standard.

6. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

- (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,
- (b) Modifications to the TMP require or indicate a need for modification to the WQMP.

7. With the approval of ODEQ, the Joint Applicants may cease implementing the TMP and WQMP or may implement a modified TMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for temperature and will not contribute to the exceedance of the relevant temperature criterion in waters affected by the Project.

8. The Joint Applicants shall implement modifications requested by ODEQ in accordance with these certification conditions and the WQMMP.

**D. Dissolved Oxygen**

1. The SWW facility shall be operated in accordance with the Dissolved Oxygen Management Plan (DOMP) contained in the WQMMP. The DOMP shall identify those measures that the Joint Applicants will undertake to reduce the Project's contribution to violations of water quality standard criteria for dissolved oxygen.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the dissolved oxygen monitoring reasonably needed to determine (a) whether the dissolved oxygen criteria continue to be violated in waters affected by the Project, (b) the success of the DOMP in reducing the Project's contribution to any continued violations of the criteria, and (c) any additional measures that may be needed to reduce the Project's contribution to violations of the criteria.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a Total Maximum Daily Load (TMDL) for dissolved oxygen in the portion of the Deschutes River affected by the Project, ODEQ may reevaluate the DOMP in light of information acquired since the certification of the Project. If additional dissolved oxygen improvement measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised DOMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related impacts on dissolved oxygen concentrations in waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for dissolved oxygen in waters affected by the Project, ODEQ may:

- (a) Determine whether the LA for the Project has been achieved.
- (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the DOMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the DOMP.
- (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the DOMP to determine whether additional measures to reduce the Project's contribution to exceedances of the dissolved oxygen criteria are necessary and feasible. If additional measures

are necessary and feasible, ODEQ may require submittal of a revised DOMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the DOMP that would require the Project to increase dissolved oxygen concentrations beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

- (d) If (i) additional measures to reduce the Project's contribution to violations of the dissolved oxygen criteria are necessary to achieve the LA but the measures are not feasible, and (ii) the water quality standard for dissolved oxygen has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken within the Deschutes River Basin to achieve the LA for waters affected by the Project. If all feasible measures have not been undertaken by all required parties, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the TMDL. If the designated beneficial uses are not adversely affected by the failure to achieve the TMDL, the Joint Applicants shall continue to implement the DOMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of the DOMP. If the designated beneficial uses are adversely affected by the failure to achieve the TMDL, ODEQ may modify the DOMP to require additional dissolved oxygen measures, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the DOMP that would require the Project to increase dissolved oxygen concentrations beyond what would be required by the LA for the Project shall be effective only upon modification of the TMDL to reflect the reduced load allocation.

5. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

- (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,
- (b) Modifications to the DOMP require or indicate a need for modification to the WQMP.

6. With the approval of ODEQ, the Joint Applicants may cease implementing the DOMP and WQMP or may implement a modified DOMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for dissolved oxygen and will not contribute to violation of dissolved oxygen criteria in waters affected by the Project.

7. The Joint Applicants shall implement modifications requested by ODEQ in accordance with these certification conditions and the WQMMP.

**E. Hydrogen Ion Concentration (pH)**

1. The SWW facility shall be operated in accordance with the pH Management Plan (PHMP) contained in the WQMMP. In accordance with Oregon Administrative Rule (OAR) 340-041-0565(2Xd), the PHMP shall identify those measures (including "all practicable measures" in impoundments) that the Joint Applicants will undertake to reduce the Project's contribution to exceedances of the water quality criterion for pH.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the pH monitoring reasonably needed to determine (a) whether the pH criterion continue to be exceeded in waters affected by the Project, (b) the success of the PHMP in reducing the Project's contribution to any continued exceedances of the criterion, and (c) any additional measures that may be needed to reduce the Project's contribution to exceedances of the criterion.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a Total Maximum Daily Load (TMDL) for pH in waters affected by the Project, ODEQ may reevaluate the PHMP in light of information acquired since the certification of the Project. If additional pH measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised PHMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related pH contributions to waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for pH in waters affected by the Project, ODEQ may:
- (a) Determine whether the LA for the Project has been achieved.
  - (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the PHMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the PHMP.
  - (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the PHMP to determine whether additional measures to reduce the Project's contribution to exceedances of the pH criterion are necessary and feasible. If additional measures are necessary and feasible, ODEQ may require submittal of a revised PHMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the PHMP that would require the Project to reduce pH beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.
  - (d) If (i) additional measures to reduce the Project's contribution to exceedances of the pH criterion are necessary to achieve the LA but the measures are not feasible, and (ii) the pH water quality standard has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken by all required parties within the Deschutes River Basin to achieve the TMDL for waters affected by the Project. If all feasible measures have not been undertaken, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the TMDL. If the designated beneficial uses are not adversely affected by the failure to achieve the TMDL, the Joint Applicants shall continue to implement the PHMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of the PHMP. If the designated beneficial uses are adversely affected by the failure to achieve the TMDL, ODEQ may modify the PHMP to require additional pH measures, subject to the

limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the PHMP that would require the Project to reduce pH beyond what would be required by the LA for the Project shall be effective only upon modification of the TMDL to reflect the reduced load allocation.

5. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

- (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,
- (b) Modifications to the PHMP require or indicate a need for modification to the WQMP.

6. With the approval of ODEQ, the Joint Applicants may cease implementing the PHMP and WQMP or may implement a modified PHMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for pH and will not contribute to the exceedance of the relevant pH criterion in waters affected by the Project.

7. The Joint Applicants shall implement modifications requested by ODEQ in accordance with these certification conditions and the WQMMP.

**F. Nuisance Phytoplankton Growth and Aesthetic Conditions**

1. The SWW facility shall be operated in accordance with the Nuisance Phytoplankton Growth Management Plan (NPGMP) contained in the WQMMP. The NPGMP shall identify those measures that the Joint Applicants will undertake to reduce the Project's contribution to exceedances of the nuisance phytoplankton growth standard criteria in the event nuisance conditions develop.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the nuisance phytoplankton growth monitoring reasonably needed to determine (a) whether the nuisance phytoplankton trigger criterion is exceeded in the Project reservoirs, (b) the success of the NPGMP in reducing the Project's contribution to excessive phytoplankton levels that might lead to nuisance conditions within the Project reservoirs, and (c) any additional measures that may be needed to reduce the Project's contribution to nuisance phytoplankton conditions.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a Total Maximum Daily Load (TMDL) for nuisance phytoplankton growth in the portion of the Deschutes River affected by the Project, ODEQ may reevaluate the NPGMP in light of information acquired since the certification of the Project. If additional nuisance phytoplankton growth reduction measures are technically and economically practicable and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised NPGMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related impacts to nuisance phytoplankton growth within the Project reservoirs.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for nuisance phytoplankton growth in the portion of the Deschutes River affected by the Project, ODEQ may:

- (a) Determine whether the LA for the Project has been achieved.
- (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the NPGMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the NPGMP.
- (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the NPGMP to determine whether additional measures to reduce the Project's contribution to exceedances of the nuisance phytoplankton growth criteria are technically and economically practicable and necessary. If additional measures are technically and economically practicable and necessary, ODEQ may require submittal of a revised NPGMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the NPGMP that would require the Project to reduce nuisance phytoplankton growth beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.



5. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

- (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,
- (b) Modifications to the NPGMP require or indicate a need for modification to the WQMP.

6. With the approval of ODEQ, the Joint Applicants may cease implementing the NPGMP and WQMP or may implement a modified NPGMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for nuisance phytoplankton growth and will not contribute to the exceedance of the relevant nuisance phytoplankton growth criteria in the Project reservoirs.

7. The Joint Applicants shall implement modifications requested by ODEQ in accordance with these certification conditions and the WQMMP.

**G. Biological Criteria, Deleterious Conditions, and Protection of Designated Beneficial Uses of Salmonid Spawning, Salmonid Rearing, Resident Fish, Aquatic Life, and Wildlife, and other water quality-related state laws for the protection of fish, aquatic life and wildlife:**

1. **SWW Facility:** The Joint Applicants shall operate the Selective Water Withdrawal (SWW) facility in accordance with conditions C, D, and E of this certification.

2. **Monitoring:** Upon issuance of a new FERC license for the Project, the Joint Applicants shall conduct all monitoring, record keeping, and reporting of all parameters in accordance with the WQMP contained in the WQMMP. The WQMP shall specify monitoring sufficient to determine compliance with § 401 certification requirements for water quality, Project operations, streamflow, ramping rates, and reservoir levels.

3. **Spill Management:** The Joint Applicants shall maintain and implement current Spill Prevention, Control, and Countermeasure (SPCC) plans for oil and hazardous materials prepared in accordance with the Clean Water Act requirements of 40 CFR 112. These plans shall address all locations at the Project where Project operations may potentially result in a spill of these materials to the reservoirs or the lower

Deschutes River. In the event of a spill or release or threatened spill or release to Project reservoirs or the lower Deschutes River, the Joint Applicants shall immediately implement the site's SPCC plans and notify the Oregon Emergency Response System (OERS) at 1-800-452-0311.

4. **Ramping Rates in the lower Deschutes River:** The Joint Applicants shall operate the project with the following criteria for ramping rates: 0.1 foot/hour and 0.4 foot/day from October 16 to May 14, and 0.05 foot/hour and 0.2 foot/day from May 15 to October 15, except during certain extraordinary conditions. These extraordinary conditions are: (1) flood events; (2) any event that triggers the Project Emergency Action Plan; (3) rapid changes in Project inflows, when the rate of inflow change exceeds the proposed stage change limits; and (4) equipment failures or emergencies at the Reregulating Development. To monitor compliance with this requirement, the Joint Applicants shall record the time and control signal value for all state change instructions at the Reregulating Development and shall report any control signal changes that are greater than the ramping limitations identified above.

5. **Reservoir Levels:** The Joint Applicants shall operate Lake Billy Chinook to maintain a stable pool level between 1,944 ft. mean sea level (MSL) and 1,945 ft. MSL during the period June 15 to September 15 of each year. If it is forecasted that Lake Billy Chinook will not fill by June 15 of any year, then the Joint Applicants shall immediately notify the state Hydroelectric Application Review Team (HART) and advise of the expected refill date. If the reservoir has not been filled to normal operating pool level by June 15 of any year, this provision shall not prevent filling if water is available for storage while maintaining the minimum flow. Except during certain extraordinary circumstances described below, the Joint Applicants shall restrict the drawdown of Lake Billy Chinook to a maximum of 20 ft (elevation 1,925 ft MSL) with a target of 10 feet drawdown during normal winter operations; Lake Simtustus to a maximum drawdown limit of elevation of 1,576 ft MSL between June 1 and August 31, and elevation 1,573 ft MSL between September 1 and May 31; and the Reregulating Reservoir to 1,414 ft MSL year-round. Extraordinary circumstances allowing deviation from maximum allowable drawdowns are: (a) flood events in which drawdown is needed for safe passage of flood flows to minimize damage to life and property; (b) unforeseen occurrences in which drawdown is required to complete emergency repairs on Project facilities; (c) periodic scheduled maintenance activities that require drawdown to complete normal repairs on Project facilities (including spillway gates, the intake structure, or other dam structures); and (d) regional power system emergencies. In instances where the Joint Applicants exceed maximum drawdowns, the Joint Applicants shall provide immediate written justification to FERC and notification to HART describing cause and need for the deviation, extent of deviation, and expected timeline for bringing the reservoir(s) back to minimum allowable pool levels. If the pool level of Lake Billy Chinook is projected to be below the summer operating level (minimum elevation 1,944.0 ft MSL) between June 15 and September 15, the Joint Applicants may reduce the flow release to ensure the

reservoir reaches the minimum pool elevation of 1944.0 ft MSL. When inflows to the Project under this condition are less than target flows plus 150 cfs, then the flow release at the USGS Madras Gage No.14092500 shall be defined as the daily inflow less 150 cfs. The referenced target flows are defined in the next condition.

6. **Minimum Streamflows:** The Joint Applicants shall maintain minimum flows on a weekly basis equal to specified target flows or inflows, whichever is less. The target flows, as measured at the USGS Madras Gage No.14092500, are as follows: January 4,500 cfs, February 4,500 cfs, March 4,500 cfs, April 4,000 cfs, May 4,000 cfs, June 4,000 cfs, July 4,000 cfs, August 3,500 cfs, September 3,800 cfs, October 3,800 cfs, November 3,800 cfs, and December 4,500 cfs. During the period September 16 through November 15, the Joint Applicants shall supplement inflows as necessary to ensure a minimum flow release to the lower river of at least 3,000 cfs, subject to a maximum required supplementation of 200 cfs and cap on required drawdown of Lake Billy Chinook to achieve such supplementation equal to four feet.

7. **Run-of-River Operations:** The Joint Applicants shall hold river flows below the Reregulating Development to within  $\pm 10$  percent of the measured Project inflow under most conditions. Conditions or events where these criteria may not be followed include days with measured inflow in excess of 6,000 cfs when at least one of the following conditions exists: (1) any event that triggers the Project Emergency Action Plan; (2) power emergencies, as defined in the WSCC Minimum Operating Reliability Criteria (March 8, 1999); (3) equipment failures or emergencies at one of the Project dams or powerplants; or (4) reservoir drawdowns are needed for safe passage of anticipated flood flows to minimize damage to life and property. At times when flows are in excess of 6,000 cfs and one or more of the above exception conditions apply, the Joint Applicants shall minimize the variation beyond the  $\pm 10\%$  criterion as can be done safely.

8. **Stream Gaging:** By no later than one year from the date of receiving a new FERC license for the Project, the Joint Applicants shall fund improvements at the existing USGS gaging stations on the Crooked (Gage No.14087400), Deschutes (Gage No.14076500) and Metolius (Gage No.14091500) rivers upstream of the Project. These improvements shall include radio, telephone, or other telemetry systems to provide recording and transmission of hourly stream temperature and streamflow data to the Pelton control room.

9. **Fish Passage:** The Joint Applicants shall construct, maintain and operate, or shall arrange for the construction, maintenance and operation of such facilities and equipment for fish migration, propagation or conservation consistent with the proposed Fish Passage Plan and amendments thereto. In the event any modifications in the fish

facilities are deemed necessary, the Joint Applicants shall cooperate with Oregon Department of Fish and Wildlife (ODFW) in the design of such modifications or operation of the facilities.

10. **Large Wood:** All large wood (greater than 20 cm by 3 m) entering Lake Billy Chinook shall be removed by the Joint Applicants and placed into the lower Deschutes River below the Reregulating Dam. Following a flow event that results in the transport of significant amounts of large wood into Lake Billy Chinook, the Joint Applicants shall consult with ODFW and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS) Natural Resources Department to obtain specific guidance pertaining to the placement and monitoring of that large wood in the lower Deschutes River below the Project's Reregulating Dam. The Joint Applicants shall obtain all necessary regulatory licenses, permits, or approvals from tribal, federal, state and local authorities prior to large wood placement.

11. **Sediment Transport/Spawning Gravel:** The Joint Applicants shall perform the following studies with regard to sediment transport and spawning gravel:

- Verify the sediment transport model developed by Fassnacht (1998) by placing radio-tagged and/or colored rocks on selected bars in the Deschutes River below the Reregulating Dam. Determine at which flow levels these rocks are mobilized by checking their positions after each flow event greater than 7,000 cfs. The Joint Applicants may submit to ODEQ for approval a proposal for an alternate flow value for commencement of this monitoring pending the results of the AIR process. Buried columns of colored rocks will be utilized to determine the depth of scour at different flow levels.
- Resurvey channel cross sections at five locations utilized by Fassnacht (1998). Resurvey these annually for 5 years to determine if there is any active channel change associated with years having high flow events. If no change is detected after 5 years, resurvey them every 10 years, or after events greater than 15,000 cfs.
- If monitoring sediment transport and channel change shows significant transport or change at flows lower than predicted by Fassnacht (1998), initiate a program to measure actual bedload transport at different flow levels at the Warm Springs Bridge (US Highway 26).

- If monitoring of channel change and measuring bedload shows significant transport at levels significantly below those predicted by the geomorphology study, revisit the sites used by McClure (1998) for particle size measurements and replicate these particle surveys.
- Coordinate and lead a study of historical fish counts and spawning data directed toward determination of the cause of anadromous spawning reduction in the Lower Deschutes River from below the Reregulation Dam downstream to the mouth of Shitike Creek. In addition, the Joint Applicants shall conduct a study to determine the quality of gravel habitat for anadromous fish in this river reach. The results of this study shall be used by the Joint Applicants to determine if additional mitigation measures are necessary to improve habitat quality or quantity.

12. **Upper Basin Habitat Enhancement and Restoration:** The Joint Applicants shall work with private and governmental entities in the Deschutes River Basin to implement cost-effective habitat enhancement and restoration measures to improve the quality of water flowing into the Project. These upper basin measures shall include, but not be limited to, the creation of riparian refugia, as well as improvements such as livestock exclusion, placement of large woody debris, planting of grass, shrubs, trees, and the maintenance and creation of wetlands.

The Joint Applicants shall expend a minimum of \$1.475 million for these upper basin measures over the first 5 years of the new license in accordance with the following table.

<b>Required Mitigation Measure</b>	<b>Minimum Required Expenditure</b>
Improved Riparian Corridor Management	\$750,000
Community Habitat Education Activities	\$25,000
Establishment of Reserves and Refugia	\$700,000
<b>Total</b>	<b>\$1,475,000</b>

**H. Total Dissolved Gas**

1. The Joint Applicants shall monitor total dissolved gas at the Reregulating Dam tailrace in accordance with the WQMP contained in the WQMMP.

2. If monitoring of total dissolved gas at the Reregulating Dam tailrace at times of spill indicates noncompliance with the total dissolved gas standard, then the Joint Applicants shall immediately develop a plan and schedule for assessing the problem and developing a remedy. Such plan and schedule shall be submitted to ODEQ for

approval within 60 days of identifying the excessive total dissolved gas concentrations via monitoring. Upon approval of the remedial plan by ODEQ, the Joint Applicants shall implement the plan in accordance with the approved schedule.

**I. Turbidity**

1. The Joint Applicants shall implement the erosion control measures for erosionally-sensitive shoreline areas of the Project reservoirs as proposed in the Final Joint Application Amendment, Exhibit E-VII-13.
2. The Joint Applicants shall continue the Shoreline Planting Program at all three Project reservoirs to enhance on-site riparian habitat, as proposed in the Final Joint Application Amendment, Exhibit E-IV-41.
3. The Joint Applicants shall monitor turbidity in accordance with the WQMP contained in the WQMMP.

**J. Toxic Substances; Discoloration, Scum, Oily Slick; Aesthetic Conditions; Deleterious Conditions**

The Joint Applicants shall maintain and implement current Spill Prevention, Control, and Countermeasure (SPCC) plans for oil, hazardous materials, and non-hazardous materials prepared in accordance with the Clean Water Act requirements of 40 CFR 112. These plans shall address all locations at the Project where Project operations may potentially result in a spill of these materials to the reservoirs or the lower Deschutes River. In the event of a spill or release or threatened spill or release to Project reservoirs or the lower Deschutes River, the Joint Applicants shall immediately implement the site's SPCC plan and notify the Oregon Emergency Response System (OERS) at 1-800-452-0311.

**K. Bacteria**

The Joint Applicants shall monitor for E. coli bacteria in accordance with the WQMP contained in the WQMMP.

**L. Cooling Water Discharge Permits**

Upon issuance of a new FERC license for the Project, the Joint Applicants shall within 30 days request and file National Pollutant Discharge Elimination System (NPDES) permit applications with ODEQ for cooling water discharges at each of the three powerhouses. This condition will be considered null and void if the Joint Applicants, prior to FERC license issuance, have applied to ODEQ for these NPDES permits.

**M. § 401 Certification Compliance Schedules**

If any event occurs that is beyond the Joint Applicants' reasonable control and that causes or may cause a delay or deviation in compliance with schedules contained in this § 401 Certification, the Joint Applicants shall immediately notify ODEQ in writing of the cause of delay or deviation and its anticipated duration; the measures that have been or will be taken to prevent or minimize the delay or deviation; and the timetable by which the Joint Applicants propose to carry out such measures. It is the Joint Applicants' responsibility in the written notification to demonstrate to ODEQ's satisfaction that the delay or deviation has been or will be caused by circumstances beyond the control and despite due diligence of the Joint Applicants. If the Joint Applicants so demonstrates, ODEQ shall extend times of performance of related activities under this condition, as appropriate. Circumstances or events beyond the Joint Applicants' control include, but are not limited to, acts of nature, unforeseen strikes, work stoppages, fires, explosion, riot, sabotage, or war. ODEQ may also consider other circumstances or events as beyond the Joint Applicants' control. These other circumstances or events may include, but not be limited to, changes in state statutes; delays in the receipt of necessary approvals for construction design or permits; or delays that ODEQ agrees the Joint Applicants would not have been expected to anticipate. These other circumstances or events will only be considered if they are not due to the actions or inactions of the Joint Applicant. Increased cost of performance or consultant's failure to provide timely reports may not be considered circumstances beyond the Joint Applicants' control.

**N. § 401 Certification Modification**

ODEQ, in accordance with OAR Chapter 340, Division 48, and, as applicable, 33 USC 1341, may modify this Certification to add, delete, or alter Certification conditions as necessary and feasible to address:

- (a) adverse or potentially adverse Project effects on water quality or designated beneficial uses that did not exist or were not reasonably apparent when this Certification was issued;
- (b) TMDLs (not specifically addressed above in these Certification Conditions);
- (c) changes in water quality standards;
- (d) any failure of Certification conditions to protect water quality or designated beneficial uses as expected when the Certification was issued; or
- (e) any change in the Project or its operations that was not contemplated by this Certification that might adversely affect water quality or designated beneficial uses.

**O. Project Changes**

The Joint Applicants shall obtain ODEQ review and approval before undertaking any change to the Project that might significantly affect water quality (other than project changes required by or considered in this Certification), including changes to Project structures, operations, and flows.

**P. Project Repair or Maintenance**

The Joint Applicants shall obtain ODEQ review and approval before undertaking Project repair or maintenance activities that might significantly affect water quality (other than repair or maintenance activities required by or considered in this Certification). ODEQ may, at the Joint Applicants' request, approve specified repair and maintenance activities on a periodic or ongoing basis.

**Q. Project Inspection**

The Joint Applicants shall allow ODEQ such access as necessary to inspect the Project area and Project records required by this Certification at reasonable times as necessary to monitor compliance with § 401-certification conditions.

**R. Posting of § 401 Certification**

The Joint Applicants shall post a copy of these certification conditions in a prominent location at the Pelton Powerhouse Control Center.

**S. Water Quality Standards Compliance**

Notwithstanding the conditions of this certification, no wastes shall be discharged and no activities shall be conducted which will violate state water quality standards.

**T. Project Specific Fees**

In accordance with Oregon Revised Statutes (ORS) 543.080, the Joint Applicants shall pay a project-specific fee for ODEQ's costs of overseeing implementation of adaptive management provisions of this § 401 certification. The fee shall be \$25,000 (2002 dollars) annually, made payable to "State of Oregon, Department of Environmental Quality", and due on July 1 of each year after issuance of the new FERC license. This fee will not pay ODEQ's costs of participation, before or after issuance of the new FERC license, on the Fisheries Technical Subcommittee established by the Joint Applicants for the Project; such costs shall be paid by Joint Applicants by arrangement separate from this Certification condition. ODEQ shall credit against the fee amounts required under this Certification condition any fee or other compensation paid or payable



to ODEQ, directly or through other agencies of the State of Oregon, during the preceding year (July 1 to June 30) for ODEQ's cost of oversight of adaptive management. The fee shall expire 10 years after the first July 1 following issuance of this certification, unless terminated earlier by ODEQ because oversight of adaptive management is no longer necessary. One year before the tenth-anniversary expiration of the fee, or earlier if mutually agreed, ODEQ and the Joint Applicants shall review the need, if any, to modify, extend, or terminate the fee, in accordance with ORS 543.080. The Joint Applicants shall continue to pay any project-specific fee required after such review.

## APPENDIX B

The Water Control Board  
Confederated Tribes of the Warm  
Springs Reservation of Oregon

Section 401 of the Clean Water Act  
Terms and Conditions

### **1. Protection of beneficial uses of anadromous fish passage, salmonid spawning, salmonid rearing, and resident fish and aquatic life**

Upon FERC's issuance of a new license for the Project, the Joint Applicants shall comply with the following provisions related the Biological Criteria water quality standard and other appropriate requirements of Tribal law:

#### **A. Habitat Improvement Projects**

The Joint Applicants will work with private and governmental entities in the Deschutes River Basin to implement cost-effective habitat enhancement and restoration measures to improve the quality of water flowing into, through or below the Project. These measures will include, but not be limited to, the creation of riparian refugia, as well as improvements such as livestock exclusion, placement of large woody debris, planting of grass, shrubs, trees, and the maintenance and creation of wetlands. The Joint Applicants will expend a minimum of \$1.415 million for these measures over the first 5 years of the new license.

<b>Proposed Mitigation Measure</b>	<b>Proposed Expenditure</b>
Improved Riparian Corridor Management	\$750,000
Community Habitat Education Activities	\$25,000
Establishment of Reserves and Refugia	\$700,000
Total	\$1,475,000

#### **B. Long-Term Water Quality Monitoring and Adaptive Management**

The selective water withdrawal facility, to be built as a means to address water quality and fish passage issues, may adversely affect specific water quality parameters such as turbidity and pH. Therefore, the WCB requires a comprehensive water quality monitoring and management plan be implemented to monitor physical, chemical, and biological parameters. Implementation of this plan along with adaptive management will allow rigorous evaluation of progress towards achieving defined measures of success; and utilization of gained knowledge to make necessary modifications through time.

Knowledge gained from the water quality monitoring and management plan will receive broad review from resource managers and the public leading to informed decisions by an Implementation Oversight Committee representing the WCB, DEQ, and the Joint Applicants. The Implementation Oversight Committee will be involved in the administration of the Water Quality Management and Monitoring Plan attached hereto as Appendix A<sup>74</sup> and the adaptive management provisions of this Certification.

The Tribal Council of the Confederated Tribes of Warm Springs has delegated the responsibility and accountability to implement the Policy Statements listed in Tribal Ordinance 80 and 81 to the Water Control Board. Therefore the WCB will be responsible for all decisions requiring the exercise of delegated authority from the Federal Environmental Protection Agency under the Federal Clean Water Act and for implementing Tribal Ordinances 45, 80 and 81.

In the WCB's view the biological criteria also includes consideration of the Project's ongoing impacts on the lower Deschutes River in terms of increased recreational use of the reservoirs, increased development along reservoir shorelines, interception of large woody materials, interception of gravel and finer materials, flow modification (instream flows, ramping rates, and attenuation of flood peaks), disconnection of populations for resident fish species, and prevention of anadromy. This document addresses each of these factors insofar as they affect the support of designated beneficial uses as specified by the Tribes in the Reservoirs and the lower Deschutes River. Designated beneficial uses most sensitive to the above-listed impacts include anadromous fish passage, salmonid rearing, salmonid spawning, and resident fish and aquatic life.

The WCB therefore requires the Joint Applicants to implement a long-term monitoring program to address water quality, water quantity, biological parameters and environmental factors related to resource management objectives in the tribal waters affected by the Project. This monitoring program will provide the data necessary to assess whether the Project attains and maintains compliance with the appropriate water quality standards. The information gathered in this program will also be used in the adaptive management of project operations to meet Tribal water quality standards.

The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.

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<sup>74</sup> The revised Water Quality Management and Monitoring Plan (WQMMP) has been completed by the licensees and can be found in Appendix C of this license.

**C. Large Wood**

The WCB requires all large wood naturally entering the Reservoirs of the Project to be collected and reintroduced below the Project. Mitigation projects to reintroduce large wood back into the lower Deschutes River will be coordinated with all appropriate agencies and approved by the Implementation Oversight Committee. Projects to replace large wood in the lower river will include addition of large wood to the waters in the way of installed structures along the banks to provide for habitat diversity, streambank stability and enhancement of the environment. In addition, some large wood reintroduction projects could be coordinated with normal high flow events to allow the large wood to find its' own "home" in the lower river.

Based on the fact that there is a lack of the "ideal quality" of large wood naturally entering the Project due to riparian management activities in the upper watershed, the WCB recommends use of proposed habitat improvement mitigation funds to supplement the large wood naturally entering the reservoirs. Typically this material would be anchored or placed along shorelines or riverbanks to add stability and habitat quality. All applicable licenses, permits and clearances for mitigation or monitoring projects will be obtained prior to any activity taking place in Tribal Waters.

**D. Gravel**

The reservoirs act as a settling basin not only for gravel-sized sediment but also for finer sand and silt. This may have some adverse effects to the fisheries habitat in the lower river from the Reregulating Dam to the mouth of Shitike Creek. The level of anadromous fish spawning in this area has been documented as being lower over the last 20 years.

As a result, the Joint Applicants will take the following measures with regard to sediment transport and spawning gravel in the Deschutes River downstream of the Project:

1. Verify the sediment transport model developed by Fassnacht (1998) by placing radio-tagged and/or colored rocks on selected bars in the Deschutes River below the Reregulating Dam. Determine at which flow levels these rocks are mobilized by checking their positions after each major flow event. Initiate study at flows greater than 6,500 cfs. As data is collected at this flow level, adjustments can be made to the flow level event that would trigger future data collection needs. Buried columns of colored rocks may be utilized to determine the depth of scour at different flow levels.

2. Resurvey channel cross sections at five locations utilized by Fassnacht (1998). Resurvey these annually for 5 years to determine if there is any active channel change associated with years having high flow events. If no change is detected after 5 years, re-survey them every 5 years, or after events greater than 15,000 cfs.

3. If monitoring sediment transport and channel change shows significant transport and/or changes at flows lower than predicted by Fassnacht (1998), initiate a program to measure actual bed load transport at different flow levels at the Warm Springs bridge.

4. If monitoring of channel change and measuring bedload shows significant transport at low levels significantly below those predicted by the geomorphology study, revisit the sites used by McClure (1998) for particle size measurements and replicate these particle surveys.

5. Coordinate and lead a study of historical fish counts and spawning data to determine the cause of anadromous spawning reduction in the Lower Deschutes River from below the Reregulating Dam down to the mouth of Shitike Creek. In addition, the Applicants will conduct a study to determine anadromous gravel habitat quality in the Lower Deschutes River from below the Reregulating Dam down to the mouth of Shitike Creek.

The results of these studies and other appropriate information generated in the FERC re-licensing process will be used to determine if additional mitigation measures (such as gravel augmentation) are necessary to improve habitat quality. The Joint Applicants will consult with the appropriate regulatory authorities as to the results and findings of these studies.

#### **E. Flow Modification**

The WCB requires that the Reregulating Reservoir be used to redistribute upstream peaking flows and maintain nearly steady discharge into the Deschutes River, approximately equal to the daily average inflow to Lake Billy Chinook. Project operations will closely mimic inflows (surface and groundwater) so that the project functions as a “run of the river” system under most operational conditions. There will be no more than a 10% variation between Project inflow and Project outflow under most conditions.

## **SAFETY**

Project inflows above 6,000 cfs will be used as a trigger value whereby the project operators will:

1. Evaluate if the Project Emergency Action Plan needs to be implemented.
2. Determine if a power emergency exists (as defined in the Western Systems Coordinating Council Minimum Operating Reliability Criteria (WSCC 1999)).
3. Determine if equipment failures or emergencies exist at one of the Project dams or power plants.
4. Determine reservoir drawdown needs for safe passage of anticipated floods to minimize damage to life and property.

If any of these steps warrant a change to the outflow policy of being within plus or minus 10% of inflow, the Joint Applicants may take whatever steps are necessary to minimize impacts to the Project while protecting public health and safety. Overall direction is to minimize changes to inflow so as to provide the lower river a more normal flow regime.

## **NORMAL OPERATIONS**

These operational requirements will allow for higher peak flows to occur in the Lower River allowing for more natural channel maintenance processes. The Joint Applicants will implement the following:

1. Institute real time flow monitoring at each of the inflows to provide hourly records of flow. This will be required to ensure compliance with the “run of the river” mandate.
2. Institute real time flow monitoring at the Madras Gauge that will offer better control of flows and a significant enhancement in accurate monitoring of actual stream flows in the lower Deschutes River. This system will enable the Project to operate as “run of the river” and comply with other operational guidelines.
3. Project operations will closely mimic inflows (surface and groundwater) so that the Project functions as a “run of the river” system under most operational conditions. There will be no more than a 10% variation between Project inflow and Project outflow under most conditions. These changes will allow for higher peak flows to occur in the Lower River allowing for more natural channel maintenance processes.

4. The WCB requires that the Q80 flows for the full period of record for the Madras Gauge (1925-1999) be used as the target “minimum flow” to be released from the project to the Lower Deschutes River. In the event inflows to the Project are lower than the target “minimum flow” then inflow volumes must be released to the Lower Deschutes River. The required “minimum flow” may be reduced up to 150 cfs to ensure the refilling of Lake Billy Chinook to reach its normal minimum summer operational level of 1944 feet. The recommended target Q80 “minimum flows” are summarized below by month.

	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
1924-1999 Q80	3512	4049	4225	4263	4267	4571	4170	3721	3686	3540	3446	3431

5. Seasonal operation of Lake Billy Chinook to allow for no more than a 10 foot draw down during normal winter months with an absolute maximum drawdown of 20 feet. Lake Billy Chinook should be filled and at normal operation level of 1944 feet by 1st of April. However, if this is not possible, the reservoir must be at normal operation level of 1944 feet by June 15. The "minimum" level required to be maintained at 1944 feet from June 15 to September 15, for Lake Billy Chinook. During the fall months Lake Billy Chinook should be maintained at the 1944 feet operation level so as to provide continued protection of riparian vegetation and cultural resources.

6. Seasonal operation of Lake Simtustus to allow for a minimum elevation of 1,576 feet from June 1 to August 31 and 1,573 feet elevation from September 1 to May 31.

7. Seasonal operation of the Reregulating Reservoir to allow for a minimum elevation of 1,414 feet year round.

8. Limits on river stage changes below the Reregulating Development will be as follows:

- a. From May 15 to October 15, hourly stage control limit will be 0.05 feet with a daily stage change control limit of 0.2 feet.
- b. From October 16 to May 14, hourly stage control limit will be 0.1 feet with a daily stage change control limit of 0.4 feet. Only during extraordinary or emergency situations can the Joint Applicants deviate from these stage change limits.

**F. Fish Passage**

The WCB requires the Joint Applicants implement mitigation measures that will effectively enable fish passage and allow for re-connection of harvestable fish populations and anadromy. The WCB requires that these measures do not adversely impact the thriving populations of resident fish species in the Project Reservoirs and the healthy populations of anadromous and resident fish species in the lower Deschutes River.

The Joint Applicants are proposing the construction of a selective water withdrawal facility at Round Butte Dam to address the effects of the Project on water quality and also as a means to enable fish passage. The Joint Applicants have modeled the facility's impacts on water quality and have provided enough information to show that the water quality effects of the project can be mitigated. Fish passage issues are being studied and results may not be known for many years. If the selective water withdrawal facility on Round Butte Dam will not adequately address fish passage, the Joint Applicants still have the responsibility to implement mitigation measures that will effectively enable fish passage and allow for re-connection of fish populations and anadromy within a reasonable period of time not to exceed 10 years from issuance of FERC license. If current modeling of volitional passage has not been successfully completed after 10 years, alternative methods of re-connecting the fish populations will be developed and approved by the managing agencies having regulatory authority for fisheries in the Deschutes River and the Joint Applicants, and implemented by year 15 of the new license. The Joint Applicants may request that these time frames be adjusted by the WCB after due consultation with appropriate agencies.

The Joint Applicants will continue existing fisheries mitigation programs and evaluation of fish passage projects until the fish passage issue has been resolved.

The WCB is reasonably assured that the discussed biological criteria standard as applied to fish passage will be met with implementation of mitigation measures outlined above and with the implementation of the Water Quality Monitoring Plan and Management Plan. The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.



## **2. Dissolved Oxygen Conditions**

The Joint Applicants shall comply with the following provisions related to dissolved oxygen levels in the lower Deschutes River.

The WCB requires additional data be collected at appropriate locations to determine the correlation of the Intergravel Dissolved Oxygen (IGDO) and ambient Dissolved Oxygen (DO) for a period of 3 years following issuance of this Certificate. Until the correlation between IGDO and DO has been established and it supports a change in the applicable DO Standard, the WCB will use of the ambient DO levels (11 mg/l) as the appropriate standard. The methodology to be used in monitoring IGDO will be approved by the WCB prior to any activity taking place.

The Joint Applicants will begin construction of selective water withdrawal facilities at the Round Butte Dam within 3 years of FERC license being issued and operational to meet water quality standards by end of year five. The Joint Applicants may petition the WCB to adjust these timeframes as appropriate.

Joint Applicants will implement a combination of selective water withdrawal and operational changes to keep the river immediately below the Project within range of the relevant water quality criteria for dissolved oxygen.

The WCB is reasonably assured that the discussed dissolved oxygen criteria will be met with implementation of mitigation measures outlined above and with the implementation of a Water Quality Monitoring and Management Plan. The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.

## **3. Temperature Management Conditions**

Upon FERC's issuance of a new license for the Project, the Joint Applicants shall comply with the following provisions related to water temperatures in the Deschutes River Basin:

- Joint Applicants will begin construction of selective water withdrawal facilities at the Round Butte Dam within 3 years of FERC license being issued and operational to meet water quality standards by end of year five. The Joint Applicants may petition the WCB to adjust these timeframes as appropriate.

- Implementation of the Water Quality Monitoring and Management Plan and the Implementation Management Plan will continue to help ensure that project operations do not violate the temperature criteria.
  1. Upon the U.S. Environmental Protection Agency's (EPA's) final approval or adoption of a Total Maximum Daily Load (TMDL) for temperature in the portion of the Tribal waters affected by the Project, the WCB :
    - (a) Will seek, in conjunction with designated management agencies and in accordance with applicable law, other anthropogenic sources within the Deschutes River Basin to implement measures to reduce their contribution to exceedances of the temperature criteria; and
    - (b) May reevaluate the Water Quality Monitoring and Management Plan in light of information acquired since the certification of the Project and in light of the temperature modification measures sought to be implemented by other sources in the basin, whether or not such implementation is underway or completed for all other sources. If additional temperature improvement measures are feasible and necessary to meet a load allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), the WCB may require submittal of a revised temperature management plan that insures attainment of the LA, subject to limits set forth in the Water Quality Monitoring and Management Plan. The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.
  2. At the end of the period determined by WCB to be necessary to implement the TMDL for temperature in the portion of the Tribal waters affected by the Project, the WCB may:
    - (a) Determine whether the TMDL and LA for the Project have been achieved.

- (b) If the TMDL and LA for the Project have been achieved, the Joint Applicants shall continue to implement the Temperature Management Plan (TMP) unless, at the Joint Applicant's request, the WCB approves a modification of the Water Quality Monitoring and Management Plan.
  - (c) If the TMDL or LA for the Project has not been achieved, the WCB may require submittal of a revised temperature management plan that insures attainment of the LA, subject to limits set forth in the Water Quality Monitoring and Management Plan. The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.
3. Any Project-related in stream temperature increase of 0.25 °F, or less above the relevant criterion shall not be deemed to contribute to an exceedance of the temperature criterion or to a violation of the temperature water quality standard.

#### **4. pH (hydrogen ion concentration)**

Upon FERC's issuance of a new license for the Project, the Joint Applicants shall comply with the following provisions related to pH in the Deschutes River:

The Joint Applicants will implement the construction and operation of the selective water withdrawal facilities. Modeling results have indicated that discharges from the Reregulating Dam will continue to meet the pH criterion, with the possible exception of minor, brief, arid isolated instances during the summer months. The exceedances that are predicted are within the error of the model, and the model predictions themselves are conservative in that they are at the upper end of the error range.

Conditions in Lake Billy Chinook will improve and will meet the relevant pH criterion where the associated beneficial uses occur or are expected to occur. Any increases that occur within Lake Simtustus will be minor and will not cause a failure to comply with water quality standards in that reservoir. Moreover, Lake Billy Chinook and Lake Simtustus will continue to fall within the exemption from the pH standard. Specifically, the reservoirs existed as of January 1, 1996, and the exceedance of the pH standard occurs as a result of the impoundment in response to primary productivity

supported by nutrients that arise from sources not associated with the impoundment. With the implementation of selective water withdrawal, the Joint Applicants will have taken all practicable measures to bring pH in the impounded waters into compliance with the criterion.

The WCB is reasonably assured that the discussed pH criteria will be met with implementation of mitigation measures outlined above and with the implementation of the Water Quality Monitoring and Management Plan. The Draft Water Quality Monitoring and Management Plan (Appendix A) will be finalized (including a Quality Assurance and Quality Control Plan) within one year of the date of this Certificate being signed. The Joint Applicants may ask for an extension to this timeframe if this plan cannot be completed due to circumstances beyond their control.

(a) Upon EPA's final approval or adoption of a TMDL for pH in the Deschutes River, the WCB will determine whether the Project needs to provide additional measures to achieve an LA for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL). If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project contributions to pH exceedances in the Deschutes River below the Project or within the Projects' reservoirs. The determination shall be based on data provided through the Water Quality Monitoring Plan and other relevant information and on an analysis of the extent to which measures employed by or required of other sources within the Deschutes River Basin will result in achievement of the TMDL.

(b) If the TMDL or LA for pH has not been achieved, the WCB may require submittal of a revised pH management plan that insures attainment of the LA, subject to limits set forth in the Water Quality Monitoring and Management Plan attached to this § 401 Certification as Exhibit A.

(c) The WCB may approve cessation or modification of components of the Water Quality Monitoring Plan if the WCB determines that it will not impair the achievement of any pH TMDL or LA for the Project and will not contribute to the exceedance of the pH criterion in waters affected by the Project. Among other circumstances, the WCB may approve a request for termination of pH monitoring if the Deschutes River does not show pH exceedances for at least three consecutive years.

## **5. Nuisance Phytoplankton Growth**

Although the nuisance phytoplankton standard is exceeded in the surface waters of Lake Billy Chinook and Lake Simtustus, the WCB believes that this condition is not adversely affecting any beneficial use of either impoundment, and that the condition is due to elevated inputs of nutrients from tributaries.

There are no technically and economically practicable strategies to control this condition in the Project itself, although the implementation of selective water withdrawal may tend to reduce measured chlorophyll *a* levels. However, due to unknown effects of the selective withdrawal facility on the chlorophyll *a* levels, the WCB recommends that a reference value for current conditions be established (average chlorophyll *a* levels taken for a period of 5 years). This value will be compared against annual measurements of chlorophyll *a*. If the reference value is exceeded by more than 10% in any given sample, a replication or verification sample will be collected and analyzed within 30 days. If this verification sample also exceeds the reference value by 10%, a survey of water users will be conducted to determine the level of nuisance within the next 30 days.

The WCB is reasonably assured that the discussed nuisance phytoplankton criteria will be met with implementation of mitigation measures outlined above and with the implementation of the Water Quality Monitoring and Management Plan described in Exhibit A. The WCB however does require the Joint Applicants to conduct a survey of users of Project Reservoirs based on criteria listed above to ensure that beneficial uses are not being adversely impacted by nuisance phytoplankton.

## **6. Total Dissolved Gas**

The WCB is reasonably assured that the total dissolved gas standard will be met without special requirements. The WCB will require implementation of the Water Quality Monitoring and Management Plan for DO and Total Dissolved Gas to ensure compliance with this standard.

## **7. Antidegradation Policy**

With the implementation of the mitigation measures listed above, the WCB believes that overall water quality in and below the Project will be improved. As noted earlier, the modeled shift in temperature back toward pre-Project conditions will cause an increase over existing conditions during the first half of the year; but as this represents a reversal of a Project impact, this does not constitute a violation of the antidegradation policy. Current modeling results indicate that DO levels will improve throughout the year. The pH levels in the lower Deschutes River may increase slightly for brief periods of time, but these increases, if they occur, are not predicted to have any adverse impact on water quality or on compliance with other standards, particularly the biological criteria standard. As shown by the recently completed modeling of the lower river, the overall impact on water quality will be beneficial. Accordingly, the WCB believes that there will be a reasonable assurance that Project operations, coupled with the mitigation measures listed above, will comply with the Tribal antidegradation policies. The WCB will require implementation of the Water Quality Monitoring and Management Plan to ensure compliance with the antidegradation policy.

## 8. Naturally-Occurring Conditions

There are a number of issues related to natural conditions that need to be understood and recognized.

(a) Water temperatures are in excess of the current bull trout standard upstream of Lake Billy Chinook in the upper Deschutes River, Crooked River, and Metolius River sub-basins. It is evident that temperatures in the streams of the Deschutes River Basin naturally exceed the temperature standard set for bull trout. Groundwater entering the Crooked River at Opal Springs runs at an average temperature of 53°F (11.67°C) year round according to the Tribal Water Quality Monitoring Program. In the late summer and fall months, groundwater provides the majority of the surface flows entering Lake Billy Chinook from the Crooked River and Deschutes River arms. Therefore, surface water temperatures are naturally above the standard temperature for bull trout.

The spring fed Metolius River temperatures are also in excess of the current bull trout standard during this period. The water entering Lake Billy Chinook has a hydraulic residence time of approximately 2 months, and since the tributary streams exceed 10°C for nearly this long during the summer, it is unlikely that the temperature in the reservoir could remain below 10°C. Lake Simtustus receives nearly all of its inflow from Lake Billy Chinook, so it, too, is unlikely to remain below 10°C. Therefore, stream temperatures in the lower Deschutes River are unlikely to remain below 10 °C.

(b) Dissolved oxygen concentration in the hypolimnion of Lake Billy Chinook and Lake Simtustus follows a pattern that is typical of highly productive lakes. Biological oxidation of organic matter in the hypolimnion during the period of stratification results in depletion of oxygen. In many productive lakes, DO concentration in the hypolimnion can approach zero. In Lake Billy Chinook, however, this extreme condition is avoided because oxygen-containing water from the tributaries flows into the hypolimnion and provides a source of oxygen. In Lake Simtustus, the flow into the hypolimnion comes from the relatively well-aerated mid-depths of Lake Billy Chinook.

(c) The pattern of pH seen in the Project reservoirs and in the Deschutes River below the Project is, like the DO pattern in the reservoirs, a function of the high productivity of the water bodies. Intense photosynthetic activity results in elevated pH levels in the water. This occurs in the reservoirs, in the lower Deschutes River, and in the Deschutes and Crooked rivers above the Project. It is a consequence of the relatively high nutrient concentration in the waters of the Project, which acts to increase biological activity resulting in an increase in pH.

(d) As stated earlier, the Metolius River may be representative of the "natural" nutrient conditions of the streams flowing into the Project reservoirs. The Meltolius River is low in nitrogen and relatively high in phosphorus. The Deschutes and Crooked rivers have similar phosphorus concentrations but higher nitrogen concentrations, suggesting that they are being artificially enriched in nitrogen. The resulting high nutrient concentrations support the profuse algal production, which results in the patterns of DO and pH seen in the Project reservoirs and in the lower Deschutes River. Dense algal blooms would occur even in the absence of nitrogen enrichment because species of cyanobacteria (blue-green algae) present in Lake Billy Chinook are capable of meeting their nitrogen needs from the atmosphere in the presence of sufficient phosphorus. It is unlikely that phosphorus input could be reduced sufficiently to limit the growth of phytoplankton because of the naturally high concentration in inflowing streams.

(e) The current conditions regarding stream flow entering the Project Area may be deemed to be naturally occurring in that the Project does not regulate legal water rights obtained under State Law nor does the Project generate or create additional water above what nature delivers within the context of the entire Deschutes Basin. Given the current appropriations and their individual supporting water right certificate with corresponding priority date, the WCB is convinced that the most effective, equitable and efficient way to increase stream flow below the project is to work within the legal framework to increase flows entering the Project area. This could include use of market based incentives, land acquisitions, water right transfers and other legal methods to secure more water.

(f) Increases in surface stream flow entering the Project due to mitigation measures in the upper basin may increase temperature regimes in the reservoirs and ultimately the Lower Deschutes.

(g) The stability of the Lower Deschutes River is attributable to significant ground water sources within and immediately above the Project area. The lower Deschutes River flows are dominated by groundwater contributions in the late summer and fall months. Diurnal fluctuations are small immediately below the Project mainly due to constant groundwater contributions and present Project Operations. Although both the Deschutes and Crooked Rivers are highly managed in the upper basin, water quality within the Project is moderated to a great extent by the excellent quality and quantity of groundwater entering within the vicinity of the Project.

The WCB believes that naturally-occurring temperatures and nutrient levels may be adversely and indirectly affecting water quality within and downstream of the Project. The WCB has taken these facts into account in making their findings.

**9. Spill and Waste Management**

The Joint Applicants shall implement its Project-specific Oil Spill Prevention, Control and Countermeasure (SPCC) Plan and Waste Management Guidelines. The SPCC Plan and Waste Management Guidelines shall be kept current. In the event of a spill or release or threatened spill or release to Tribal waters, Joint Applicants shall immediately implement the site's SPCC plan, modified SPCC plan or other applicable contingency plan and notify the Oregon Emergency Response System (OERS) at 1-800-452-0311, Tribal Fire & Safety Office at (541) 553-1634, and the Natural Resources Department at (541) 553-2001.

**10. § 401 Certification Modification**

Subject to the provisions of Ordinance 80 and 81, the WCB may reconsider and add or alter conditions to the §401 Certification as necessary to address changes in conditions or knowledge or to address any failure of conditions herein to protect water quality and beneficial uses. In accordance with the Clean Water Act §401, any added or altered condition shall, so long as it is in effect, become a condition of any federal license or permit that is thereafter issued for the Project. Ordinance 81 provides a mechanism for appropriate changes to the conditions established in this §401 Certificate. With respect to an existing federal license or permit for the Project, the WCB may petition the federal agency to incorporate the added or altered condition in the federal license or permit.

**11. Project Changes**

The Joint Applicants must obtain the WCB review and approval before undertaking any change to the Project that might significantly affect water quality, including changes to Project operation and flows.

**12. Project Repair or Maintenance**

The Joint Applicants must obtain the WCB review and approval before undertaking Project repair or maintenance activities that might significantly affect water quality. The WCB may, at Joint Applicants' request, provide prior approval of such repair and maintenance activities on a periodic or ongoing basis.

**13. Costs for TEO and WCB Oversight**

In accordance with Tribal Ordinances 80 and 81, Joint Applicants shall pay a project-specific fee for the WCB and the TEO's costs of overseeing implementation of this §401 Certification. The fee shall be \$24,000 annually (2002 dollars indexed to the Federal Inflation Rate) made payable to "Tribal Environmental Office, Natural Resource Department" and due on July 1 of each year after issuance of this Certificate. If this fee



amount is found to be in excess of needs or inadequate to cover costs incurred, the Water Control Board may change the annual fee charged after consultation with the Joint Applicants.

**14. Project Inspection**

The Joint Applicants shall allow the WCB and TEO or other designated representative such access as necessary to inspect the Project area at reasonable times to monitor compliance with certification conditions.

**15. Notification**

The Joint Applicants will notify the WCB and the TEO of any future changes in the project or operation of the project.

**16. Posting of Certification**

A copy of this certification shall be prominently posted within the project powerhouse.

The Joint Applicants have provided reasonable assurances that the Project will be managed and operated in a manner that will not violate applicable tribal water quality standards. The Water Control Board as the delegated authority of Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon is reasonably assured that compliance with the certification conditions contained herein will maintain the Project consistent with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act, Tribal water quality standards, and other appropriate requirements of Tribal law related to water quality. No additional special requirements, aside from those already listed above, are needed to meet the requirements of the Tribal Water Code.

## APPENDIX C

### U.S. Fish and Wildlife Service Section 18 Fishway Prescriptions

The fishway prescriptions are identical to Proposed Articles 17-33 and 38 of Exhibit A of the Settlement Agreement. For ease of reference, we include the numbering system used in the Settlement Agreement.

#### **1. Fish Passage Plan (Proposed Article 17)**

The Licensees shall implement the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)], including but not limited to the measures described in paragraphs (a) through (d) of this article.

(a) The Licensees shall implement the Fish Passage Plan to establish self-sustaining harvestable anadromous fish runs of Chinook, steelhead and sockeye above the Project. The anadromous fish that are reintroduced shall pose acceptable minimal risks of fish disease agent introduction. The target population sizes to be used for self-sustaining harvestable runs of each species will be those developed by the Oregon Department of Fish and Wildlife (ODFW) and Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR), in conjunction with the Licensees and the Fish Committee, based on historic information, modeling, habitat production capacity estimates, and research results.

(b) The Licensees shall provide for safe, timely and effective upstream and downstream fish passage of adult and juvenile life stages of spring and fall Chinook, summer steelhead, sockeye salmon, bull trout, rainbow trout, and mountain whitefish.

(c) The Licensees shall implement a three-phase fish passage program, including sequential step-by-step implementation with clearly stated targets, accomplishments, consultation, and prerequisite requirements for each phase. The three phases are Experimental, Interim, and Final.

(i) The Experimental Passage Phase is the current stage of fish passage at the Project and includes but is not limited to modeling of currents in and water withdrawal from Lake Billy Chinook, conceptual designs for downstream passage facilities at Round Butte Dam, Pelton Fish Trap improvements, juvenile migration studies in Lake Billy Chinook, fish health monitoring, approval of the Fish Health Management program and stock selection of species.

(ii) The Interim Passage Phase shall include investigations of fish passage methods and construction of selective water withdrawal (SWW) facilities and temporary and permanent downstream passage facilities at Round Butte Dam. Actions and adaptive management studies for this phase shall include but are not limited to:

- (1) Evaluation of the Round Butte Dam SWW system;
- (2) Hydraulic and biological evaluation of the Round Butte Dam temporary and permanent downstream collection and fish handling facilities;
- (3) Biological evaluation of the adult fish release facility;
- (4) Modification and reactivation of the Pelton Dam historical downstream migrant facility;
- (5) Conducting predation studies in Lake Billy Chinook; and
- (6) Conducting fish health monitoring and evaluation.

(iii) The Final Passage Phase shall include actions and adaptive management studies for feasibility determination, development and construction of permanent upstream fish passage facilities, contingent on the achievement of successful downstream passage at the Project. These actions and studies shall include:

- (1) Reactivation and evaluation of the Pelton Fish Ladder for volitional upstream fish passage;
- (2) Construction of new ponds or facilities to rear juvenile spring Chinook or construction of a new ladder to retain or replace existing spring Chinook rearing capacity;
- (3) Construction of a new fish ladder, or other volitional upstream fish passage facility, at Round Butte Dam; and
- (4) Continued monitoring of the success, and improvement if necessary, of fish passage for all species.

(d) The Licensees shall conduct effectiveness monitoring, annual work plans, and a phased approach that includes:

(i) A specific schedule of timelines, including Testing and Verification studies, study results, and decisions;

(ii) Analysis of self-sustaining harvestable anadromous fish runs with the use of life cycle models and evaluation of passage efficiencies and survival estimates for the different life history stages of each species;

(iii) Establishment of performance measures and monitoring success towards achieving performance measures;

(iv) Evaluation of spawning and rearing and movement of re-introduced fish species;

(v) Evaluation of movement of native resident fish species upstream and downstream through Project facilities and reservoirs;

(vi) Trap and haul of adult fish subject to the long-term goal of volitional upstream fish passage, which will eventually require construction, evaluation, and monitoring of upstream collection facilities, if determined to be feasible;

(vii) During initial implementation, capturing and marking out migrating smolts from above the Project so that they may be differentiated from other returning adults in subsequent years;

(viii) Continued reservoir and drogue studies to refine operations and implementation of structural changes that will assist juvenile migration through Lake Billy Chinook;

(ix) Annual evaluation of stock performance success via outmigrant escapement and adult returns, including periodic evaluation and validation of the model results to determine the efficacy of the passage program;

(x) Preparation of design specifications for fish passage facilities in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities; and

(xi) Fish passage standards and monitoring, evaluation and reporting requirements.

## **2. Fish Passage Criteria and Goals (Proposed Article 18)**

(a) The Licensees shall provide that upstream and downstream passage facilities will be functional during all months of the year to provide safe, timely and effective passage for resident and anadromous fish.

(b) The following table summarizes the criteria and goals for safe, timely and effective downstream and upstream passage for fish.

<b>Criteria And Goals For Safe, Timely And Effective Downstream And Upstream Passage</b>	
<b>Item</b>	<b>Criteria and Goals</b>
1. Screen Hydraulic Criteria	NOAA Fisheries smolt criteria (as provided in Article 22)
2. Downstream Passage Facility Survival (from Round Butte collection to lower Deschutes River release point)	93 percent smolt survival for temporary facility during first five years of operations.  96 percent smolt survival for permanent facility.
3. Upstream Passage Facility Survival (from lower Deschutes River collection point through Adult Release Facility)	95 percent during first five years of operations.  98 percent after five years.
4. Round Butte Reservoir Downstream Passage Associated with Temporary Passage Facilities	>50 percent of a statistically significant sample of tagged steelhead or spring Chinook outmigrants from any Project tributary averaged over four years of study.
5. Round Butte Reservoir Downstream Passage Associated with Permanent Collection Facilities	>75 percent survival of PIT-tagged smolts calculated as a rolling 4-year average during the first 12 years.

### **3. Fish Passage Schedule (Proposed Article 19)**

The Licensees shall implement the comprehensive schedule for design, construction, operations and monitoring of upstream and downstream passage facilities included in the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)].

### **4. Phased Construction of Selective Water Withdrawal and Downstream Fish Passage Facilities (Proposed Article 20)**

(a) The Licensees shall prepare, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, and file with the Commission a design and schedule to construct the selective water withdrawal and downstream passage facilities in the following two phases in accordance with the approved schedule: (1) construction of the selective water withdrawal structure, which shall include a temporary downstream passage facility and (2) construction of the permanent downstream passage facility. The temporary and permanent facilities shall both include a sampling area to support biological evaluation of the fish screens and fish bypass facilities, and a mechanical screen cleaner or some other suitable device to prevent the accumulation of sediment and debris that might otherwise impair screen function and cause the delay, injury, or mortality of downstream migrating fish at Round Butte Dam. Upon Commission approval, the Licensees shall construct the selective water withdrawal (“SWW”) and downstream passage facilities.

(b) The Licensees shall install and operate a permanent downstream fishway that meets National Marine Fisheries Service smolt criteria within the forebay at the Round Butte Dam, including fish screens, guidance devices, and fish bypass facilities as described in the Fish Passage Plan. The Licensees shall construct permanent downstream passage facilities after determining, in consultation with the Fish Committee, Oregon Department of Environmental Quality, and CTWS Water Control Board, that the blend of surface/deep water withdrawal through the selective water withdrawal facility will:

(a) satisfy the criteria for safe, timely and effective downstream passage associated with temporary passage facilities set forth in Article 18; and (b) currently meet water quality criteria set forth in the 401 certificates, or likely meet the water quality criteria within a reasonable time through continued iterative adjustments of the SWW system as constructed with permanent downstream passage facilities and/or through implementation of other water quality management strategies. The Licensees shall evaluate downstream movement as described in the Fish Passage Plan.

(c) The Licensees shall notify the Fish Committee in writing when the downstream fishways are fully operational. Operation, maintenance, and monitoring of downstream fishways shall be conducted in accordance with the Downstream Fishway Operation and Maintenance Plan and Downstream Fishway Monitoring Plan, which the Licensees shall file with the Commission after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon Commission approval and coincident with the initiation of downstream fishway operations, the Licensees shall begin implementation of the plans.

##### **5. Downstream Passage Facilities At Round Butte Dam (Proposed Article 21)**

The Licensees shall submit for the review by the Fish Committee, and for approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the results of all downstream fishway design investigations, preliminary design plans and specifications, and final design plans and specifications for the construction and operation of temporary and permanent downstream fishways at Round Butte Dam to meet National Marine Fisheries Service smolt criteria. To the extent not otherwise completed as Interim Measures as described in Exhibit B to the Settlement Agreement and reported to the Commission pursuant to Article 41, the Licensees shall complete the following modeling and design steps prior to the construction of the selective water withdrawal (SWW) facilities and the downstream fish passage facilities:

(a) ***Constructability and Feasibility:*** Constructability/feasibility design is the first step needed to select a design option and facility location.

(b) **Design Consultation:** After the constructability/feasibility design is complete and a preferred option is selected, the Licensees shall consult with the Fish Committee, Oregon Department of Environmental Quality, and the Confederated Tribes of the Warm Springs Water Control Board prior to starting detailed design.

(c) **Modeling:** If the constructability/feasibility studies do not result in a clear cut recommended design selection, then computational fluid dynamics (CFD) modeling may be used to provide additional input into the selection.

(d) **Design selection:** If the CFD modeling is not required to make the design selection, CFD modeling and the progression to the 25% design stage will be conducted concurrently. The CFD modeling results will be used to optimize facility geometry and to review design features to provide the best attraction currents in the forebay and around the facility.

(e) **Physical Model:** After the 25% design stage and the CFD modeling have been completed, the results will be used to construct a physical model of the structure. The primary purpose of the physical modeling is to investigate the internal hydraulics of the structure and to evaluate entrance hydraulic conditions. Concurrently, the design will progress to the 50% stage.

(f) **Design Consultation and Review:** After the physical modeling is complete and the design has progressed to 50%, consultation with the Fish Committee (and with the Commission for dam safety purposes) will be undertaken prior to proceeding with further design.

(g) **Final Consultation:** After consultation is complete, the design will progress to 90%, and then to final status. The Licensees shall file the final design with the Commission after consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon Commission approval, the Licensees shall construct the SWW and temporary downstream passage facilities.

## 6. **Criteria for Downstream Passage Screen Design (Proposed Article 22)**

(a) The downstream passage facilities at Round Butte Dam shall meet the National Marine Fisheries Service (NOAA Fisheries) smolt criteria; however, the facilities' exclusion plates do not have to meet the NOAA Fisheries criteria for sweeping velocity and contact time.

(b) The smolt criteria include, but are not limited to, a maximum approach velocity perpendicular to the screens and exclusion plate of 0.80 feet per second (fps), screen openings no larger than 0.25 inches, a screen sweeping velocity component no less than 0.80 fps, and a screen contact time no greater than 60 seconds. Due to the size of the structure and the experimental nature of safely attracting and capturing juvenile migrants from Lake Billy Chinook, some components of the fish screen and bypass system may require flexibility to design and construct to NOAA Fisheries smolt criteria, and the Licensees shall design the fish screening and collection facilities in consultation with the Fish Committee based on the best available scientific information.

(c) The Licensees shall design screening facilities to screen less than 14,000 cfs only if water quality modeling verifies that flows above 9,000 cfs can be routed through the deep intake without impact to the Project's ability to meet water quality standards and without detrimental impact to the flow pattern and fish attraction in Lake Billy Chinook.

#### **7. Round Butte Deep Exclusion Screen (Proposed Article 23)**

(a) The Licensees shall design the Round Butte deep exclusion screen to meet National Marine Fisheries Service (NOAA Fisheries) smolt criteria except for the criteria for sweeping velocity and contact time. In addition, outmigrant collection facilities will not be required at the deep exclusion screen. The Licensees shall evaluate hydraulic performance as soon as possible after the deep exclusion screen has been installed. If the screen does not meet applicable NOAA Fisheries smolt criteria at full hydraulic capacity, the Licensees shall take any necessary measures to meet applicable NOAA Fisheries smolt criteria. The Licensees shall continuously monitor differential pressure through the deep exclusion screen while the lower withdrawal system is in operation.

(b) The Licensees shall conduct studies of fish impingement at the Round Butte deep exclusion screen. Monitoring will be conducted during the first year after installation of the deep exclusion screen when deepwater withdrawal has been initiated, and when deepwater withdrawal is maximized. The duration of monitoring will depend on the monitoring method selected, but must be for a period sufficient for evaluating the possibility of impingement.

(c) The Licensees shall monitor the hydrodynamic and biological effects of Project operations during the first season after installation of permanent screens for the Round Butte downstream fish passage facility, and at least once every five years thereafter. The Licensees shall, in consultation with the Fish Committee, evaluate the need for additional monitoring based on the previous monitoring data.



(d) If the monitoring indicates that there is impingement of fish at the Round Butte deep exclusion screen, the Licensees shall consult with the Fish Committee to determine if impingement is significant because it impedes the Licensees' ability to achieve the objectives for Interim and Permanent Downstream Passage. If the Fish Committee determines that the effects are significant, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective authorities, take any feasible measures or implement modifications within their control that are necessary to reduce impingement below the level of significance. These measures include but are not limited to operations modifications, cleaning system modifications, louver adjustments, and deterrent systems such as strobe lights or sound to keep fish away from the exclusion screening. The Licensees shall re-evaluate the facility the next time deepwater withdrawal has been initiated or maximized. If there are no feasible structural or operational measures within the Licensees' control that will reduce impingement below significant levels, the Licensees shall, in consultation with the Fish Committee, investigate and implement alternative mitigation measures.

**8. Downstream Passage Facility Pumped Attraction (Proposed Article 24)**

The Licensees shall design the permanent downstream collection facility at Round Butte Dam to include the ability to add pumps with a total capacity of 3,000 cfs and all appurtenant devices. The Licensees shall, before construction of the permanent downstream collection facility, prepare and provide the Fish Committee a report on the need to add pumped attraction flow. The report shall be based on information gathered during the Testing and Verification studies pursuant to Article 29 and prepared in consultation with the Fish Committee. If the Fish Agencies conclude that it is necessary to add pumped attraction flow, the Licensees shall, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, develop a plan to design, construct, and operate pumps to provide appropriate attraction flow to the permanent downstream collection facilities. Upon approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall submit the plan to the Commission for approval. Upon Commission approval, the Licensees shall implement the plan.

**9. Trap and Haul Facilities (Proposed Article 25)**

(a) The Licensees shall provide upstream passage using trap and haul until volitional upstream passage is implemented pursuant to provisions of the Fish Passage Plan.

(b) The Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a final monitoring plan for the operation and maintenance of trap-and-haul fishways at the Pelton Round Butte Project. The plan shall

provide for the submission of an annual monitoring report to the Fish Committee for the duration of the operation of the interim trap-and-haul fishways. Upon Commission approval, the Licensees shall implement the plan.

(c) The Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan for conducting tests of upstream passage facility survival using standard methodology for evaluation of direct injury and mortality, and other factors. The plan shall provide that, in consultation with the Fish Committee the Licensees shall take any feasible measures or implement modifications within their control that are necessary to meet the 95 percent survival standard during the first five years of operations, and the 98 percent survival standard after five years. This survival standard applies to collection at the Pelton Trap, transportation to the adult release facility, and release through the adult release facility. After correcting any deficiencies, the Licensees shall re-test the facilities to ensure compliance with the applicable upstream passage facility survival standard. After compliance with the upstream passage facility survival standard is verified, additional re-testing will only be required if deficiencies are observed. The plan will identify the methods of observation used to detect deficiencies through long-term monitoring. Upon Commission approval, the Licensees shall implement the plan.

#### **10. Adult Release Facility (Proposed Article 26)**

(a) ***Design and Construction of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission preliminary design, final design, and construction plans for an Adult Release Facility at the Round Butte forebay. Upon Commission approval, the Licensees shall implement the plans.

(b) ***Operation of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission an operation and maintenance plan for the Adult Release Facility for the safe, timely and effective upstream passage of anadromous fish when Lake Billy Chinook is thermally stratified. Upon Commission approval, the Licensees shall implement the plan.

(c) ***Monitoring and Evaluation of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission a monitoring and evaluation plan for the Adult Release Facility. Upon Commission approval, the Licensees shall implement the plan.

(d) ***Modifications to Adult Release Facility.*** The Licensees shall prepare and provide the Fish Committee reports in accordance with the monitoring and evaluation plan for the Adult Release Facility. The reports shall be based on monitoring of the Adult Release Facility, shall describe any possible need to modify the Adult Release Facility, and shall be prepared in consultation with the Fish Committee. If the Fish Agencies conclude that the Adult Release Facility must be modified to ensure safe, timely, and effective upstream passage, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop a plan to modify the Adult Release Facility to ensure safe, timely, and effective upstream passage, which plan may include, but need not be limited to, measures or modifications required to meet the survival standard applicable to collection at the Pelton Fish Trap, transportation to the Adult Release Facility, and release through this facility into Lake Billy Chinook. Upon approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall submit the plan to the Commission for approval. Upon Commission approval, the Licensees shall implement the plan.

#### **11. Volitional Upstream Passage (Proposed Article 27)**

(a) Following the installation of the permanent downstream passage facilities at Round Butte Dam and within 24 months of when the downstream survival targets in the Fish Passage Plan for Lake Billy Chinook have been achieved, the Licensees shall conduct a study and provide the Fish Committee a report on the feasibility of volitional upstream passage. The scope of the feasibility study shall be determined in consultation with the Fish Committee. Factors to be addressed in the study, shall include, but not be limited to:

- (i) Engineering feasibility;
- (ii) Biological effectiveness, including but not limited to risk of disease transfer and stray rate for out-of-basin fish;
- (iii) Cost;
- (iv) Performance, including efficiency, of the existing trap-and-haul operation.

(b) Following submission of this report to the Fish Committee, the Licensees shall prepare a plan to implement volitional upstream passage at the Project, which plan shall include appropriate testing and verification studies, unless the appropriate Fish Agencies determine pursuant to their respective statutory authorities that volitional upstream passage facilities should not be installed because:

(i) Oregon Department of Fish and Wildlife (ODFW) and Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR) have determined that the risk of disease transfer is too great,

(ii) The stray rate for out of basin fish is not acceptable,

(iii) Volitional upstream passage is infeasible, as determined utilizing the results of the feasibility study, or

(iv) It is preferable, due to concerns with the state of the art for volitional upstream passage facilities combined with high efficacy of trap and haul operations, to continue the trap-and-haul operation for some additional specified period of time.

The plan shall be completed within 24 months of the Fish Agencies' determination that volitional upstream passage should proceed, and shall be prepared in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon approval by the Fish Agencies, the Licensees shall file the plan with the Commission. Upon Commission approval, the Licensees shall implement the plan.

(c) Upon any determination pursuant to paragraph (b) that volitional upstream passage should not be installed for the reasons specified in paragraph (b), the Licensees shall, within six months of such determination, and in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to continue trap-and-haul operations for a specified number of years and to conduct a future feasibility investigation as provided in paragraph (a). During any such continued trap-and-haul operation, the Licensees shall continue to monitor survival as required by Article 25 and shall take any feasible measures or implement modifications within their control to the trap-and-haul facilities that are necessary to comply with the survival standard in Article 25. Upon Commission approval, the Licensees shall implement the plan.

## **12. Passage at Pelton Dam (Proposed Article 28)**

(a) The Licensees shall transport all juvenile salmonids captured at the Round Butte downstream passage facility during the primary emigration period (February 1 through July 31) to the lower Deschutes River, bypassing Lake Simtustus and the Reregulating Reservoir. During the remainder of the year (August 1 through January 31), the Licensees shall, at the request of the Fish Committee, transport downstream-migrating salmonids into Lake Simtustus to utilize the lentic habitat it provides.

(b) If downstream-migrating salmonids are transported into Lake Simtustus, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to upgrade the Round Butte Dam east side upstream fish trap at the head of Lake Simtustus, and operate it annually for part or all of the period May 1 through September 30 to capture and transport maturing adult resident salmonids upstream for release into Lake Billy Chinook. Upon Commission approval, the Licensees shall implement the plan.

(c) If downstream-migrating salmonids are transported into Lake Simtustus, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to install a guidance net system at the Pelton Dam and shall operate the Pelton downstream passage facility (Pelton Skimmer) during part or all of the primary migration season (February 1 through July 31) to transport downstream migrants to the lower Deschutes River. Upon Commission approval, the Licensees shall implement the plan.

### **13. Testing and Verification Studies (Proposed Article 29)**

(a) The Licensees shall, within one year of license issuance, file with the Commission a schedule for the development of plans for Testing and Verification studies as described in this Article and in Appendix III of the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)]. The Licensees shall develop the schedule in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities.

(b) Upon Commission approval of the schedule, the Licensees shall develop the Testing and Verification study plans in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. The study plans shall provide that the Licensees shall conduct these studies with continued involvement of the Fish Committee through the annual work planning and reporting process. Each study plan will include objectives, tasks and evaluation/decision criteria. Where appropriate, study plans will be designed to evaluate the effectiveness of individual fish passage facilities in achieving the criteria and goals set forth in Articles 18 and 22. Such effectiveness evaluations shall include, at a minimum, the number of fish, by species and life stage, captured and released by the facility and a record of observations on the physical condition of the fish using the facility fishways. The Licensees shall develop Test and Verification study plans for the following study areas:

- (i) Facility Evaluation;
- (ii) Physical Reservoir Changes with Selective Water Withdrawal;

- (iii) Juvenile Salmonid Studies – Reintroduction of Anadromous Stocks Upstream of the Project;
- (iv) Juvenile Salmonid Studies – Rearing, Juvenile Densities, Habitat;
- (v) Juvenile Salmonid Studies – Juvenile Migration;
- (vi) Juvenile Salmonid Studies – Reservoir Survival/Predation, Fishery, Disease;
- (vii) Juvenile Salmonid Studies – Round Butte Dam Juvenile Collection, Downstream Transportation and Release;
- (viii) Adult Salmonid Studies – Adult Upstream Trap-and-Haul and Adult Release Facility; and
- (ix) Adult Salmonid Studies – Adult Migration/Survival/Spawning.

Study plans for multi-year studies shall provide that the Licensees may implement minor modifications to the study methodology in consultation with the Fish Committee. The need for any such minor modifications to the study methodology will be described in the annual progress report and will be based on the results of the study to date. Following approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall file the study plans with the Commission. Upon Commission approval, the Licensees shall implement the plans.

(c) Based on results of the individual Testing and Verification studies, the Licensees shall, after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file plans with the Commission for making any modifications to the facilities needed to ensure safe, timely and effective fish passage. Upon Commission approval, the Licensees shall implement the plans.

#### **14. Modification of Downstream Facilities (Proposed Article 30)**

The Licensees shall, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, develop plans for measures or modifications to the existing facilities needed to achieve the criteria and goals for safe, timely and effective fish passage set forth in Articles 18 and 22. The Licensees shall file such plans with the Commission and upon approval implement the measures or modifications.

**15. Long-Term Monitoring of Downstream Collection Facilities (Proposed Article 31)**

Within one year after activating the permanent downstream collection facilities at Round Butte Dam, the Licensees shall file with the Commission, after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, a plan for a long-term program to monitor downstream fish passage performance, as described in Appendix IV of the approved Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)]. The plan shall provide that the Licensees shall begin the long-term monitoring of the downstream passage facilities as soon as practicable after the Testing and Verification studies have demonstrated that the permanent downstream collection facilities are meeting the survival criteria and goals set forth in Article 18. Upon Commission approval, the Licensees shall implement the plan.

**16. Annual Work Plans and Reports (Proposed Article 32)**

(a) The Licensees shall utilize annual work plans to document actions to be implemented, develop monitoring and evaluation studies, and propose management, monitoring and evaluation strategies for the coming year consistent with the Fish Passage Plan. The annual work plans shall include separate study plans for each Testing and Verification study being conducted. The Licensees shall issue a draft annual work plan to the Fish Committee for review by no later than January 1, and based on consultation with the Fish Committee shall issue to the Fish Committee a final annual work plan by April 1.

(b) The Licensees shall also file an annual report with the Commission before June 1 of each year, documenting the activities of the previous year. The annual report will follow the format of the previously approved annual work plan. The annual report will include, but not be limited to:

- (i) Numbers of fish by species moved upstream and downstream.
- (ii) Upstream and downstream passage survival rates.
- (iii) Estimates of fish mortality by species associated with the fish passage facilities.
- (iv) A description and evaluation of any supplementation programs.
- (v) Any changes in the work plan from adaptive management recommendations to the fish passage program that might resolve problems that have been identified.

**17. Fishway Maintenance (Proposed Article 33)**

The Licensees shall keep all fishways in proper order and shall keep all fishway areas clear of trash, sediment, logs, debris, and other material that would hinder passage. The Licensees shall perform maintenance in sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

**18. Pacific Lamprey (Proposed Article 38)**

The Licensees shall, within one year of license issuance, file with the Commission, after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, a Pacific lamprey passage evaluation and mitigation plan as described in the approved Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)]. Upon Commission approval, the Licensees shall implement the plan.



**APPENDIX D**National Marine Fisheries Service  
Section 18 Fishway Prescriptions

The fishway prescriptions are identical to Proposed Articles 17-33 of Exhibit A of the Settlement Agreement. For ease of reference, we include the numbering system used in the Settlement Agreement.

**1. Fish Passage Plan (Article 17)**

The Licensees shall implement the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)], including but not limited to the measures described in paragraphs (a) through (d) of this article.

(a) The Licensees shall implement the Fish Passage Plan to establish self-sustaining harvestable anadromous fish runs of Chinook, steelhead and sockeye above the Project. The anadromous fish that are reintroduced shall pose acceptable minimal risks of fish disease agent introduction. The target population sizes to be used for self-sustaining harvestable runs of each species will be those developed by the Oregon Department of Fish and Wildlife (ODFW) and Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR), in conjunction with the Licensees and the Fish Committee, based on historic information, modeling, habitat production capacity estimates, and research results.

(b) The Licensees shall provide for safe, timely and effective upstream and downstream fish passage of adult and juvenile life stages of spring and fall Chinook, summer steelhead, sockeye salmon, bull trout, rainbow trout, and mountain whitefish.

(c) The Licensees shall implement a three-phase fish passage program, including sequential step-by-step implementation with clearly stated targets, accomplishments, consultation, and prerequisite requirements for each phase. The three phases are Experimental, Interim, and Final.

(i) The Experimental Passage Phase is the current stage of fish passage at the Project and includes but is not limited to modeling of currents in and water withdrawal from Lake Billy Chinook, conceptual designs for downstream passage facilities at Round Butte Dam, Pelton Fish Trap improvements, juvenile migration studies in Lake Billy Chinook, fish health monitoring, approval of the Fish Health Management program and stock selection of species.

(ii) The Interim Passage Phase shall include investigations of fish passage methods and construction of selective water withdrawal (SWW) facilities and temporary and permanent downstream passage facilities at Round Butte Dam. Actions and adaptive management studies for this phase shall include but are not limited to:

- (1) Evaluation of the Round Butte Dam SWW system;
- (2) Hydraulic and biological evaluation of the Round Butte Dam temporary and permanent downstream collection and fish handling facilities;
- (3) Biological evaluation of the adult fish release facility;
- (4) Modification and reactivation of the Pelton Dam historical downstream migrant facility;
- (5) Conducting predation studies in Lake Billy Chinook; and
- (6) Conducting fish health monitoring and evaluation.

(iii) The Final Passage Phase shall include actions and adaptive management studies for feasibility determination, development and construction of permanent upstream fish passage facilities, contingent on the achievement of successful downstream passage at the Project. These actions and studies shall include:

- (1) Reactivation and evaluation of the Pelton Fish Ladder for volitional upstream fish passage;
- (2) Construction of new ponds or facilities to rear juvenile spring Chinook or construction of a new ladder to retain or replace existing spring Chinook rearing capacity;
- (3) Construction of a new fish ladder, or other volitional upstream fish passage facility, at Round Butte Dam; and
- (4) Continued monitoring of the success, and improvement if necessary, of fish passage for all species.

(d) The Licensees shall conduct effectiveness monitoring, annual work plans, and a phased approach that includes:

(i) A specific schedule of timelines, including Testing and Verification studies, study results, and decisions;

(ii) Analysis of self-sustaining harvestable anadromous fish runs with the use of life cycle models and evaluation of passage efficiencies and survival estimates for the different life history stages of each species;

(iii) Establishment of performance measures and monitoring success towards achieving performance measures;

(iv) Evaluation of spawning and rearing and movement of re-introduced fish species;

(v) Evaluation of movement of native resident fish species upstream and downstream through Project facilities and reservoirs;

(vi) Trap and haul of adult fish subject to the long-term goal of volitional upstream fish passage, which will eventually require construction, evaluation, and monitoring of upstream collection facilities, if determined to be feasible;

(vii) During initial implementation, capturing and marking out migrating smolts from above the Project so that they may be differentiated from other returning adults in subsequent years;

(viii) Continued reservoir and drogue studies to refine operations and implementation of structural changes that will assist juvenile migration through Lake Billy Chinook;

(ix) Annual evaluation of stock performance success via outmigrant escapement and adult returns, including periodic evaluation and validation of the model results to determine the efficacy of the passage program;

(x) Preparation of design specifications for fish passage facilities in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities; and

(xi) Fish passage standards and monitoring, evaluation and reporting requirements.

## **2. Fish Passage Criteria and Goals (Article 18)**

(a) The Licensees shall provide that upstream and downstream passage facilities will be functional during all months of the year to provide safe, timely and effective passage for resident and anadromous fish.

(b) The following table summarizes the criteria and goals for safe, timely and effective downstream and upstream passage for fish.

<b>Criteria And Goals For Safe, Timely And Effective Downstream And Upstream Passage</b>	
<b>Item</b>	<b>Criteria and Goals</b>
1. Screen Hydraulic Criteria	NOAA Fisheries smolt criteria (as provided in Article 22)
2. Downstream Passage Facility Survival (from Round Butte collection to lower Deschutes River release point)	93 percent smolt survival for temporary facility during first five years of operations.  96 percent smolt survival for permanent facility.
3. Upstream Passage Facility Survival (from lower Deschutes River collection point through Adult Release Facility)	95 percent during first five years of operations.  98 percent after five years.
4. Round Butte Reservoir Downstream Passage Associated with Temporary Passage Facilities	>50 percent of a statistically significant sample of tagged steelhead or spring Chinook outmigrants from any Project tributary averaged over four years of study.
5. Round Butte Reservoir Downstream Passage Associated with Permanent Collection Facilities	>75 percent survival of PIT-tagged smolts calculated as a rolling 4-year average during the first 12 years.

### **3. Fish Passage Schedule (Proposed Article 19)**

The Licensees shall implement the comprehensive schedule for design, construction, operations and monitoring of upstream and downstream passage facilities included in the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)].

### **4. Phased Construction of Selective Water Withdrawal and Downstream Fish Passage Facilities (Proposed Article 20)**

(a) The Licensees shall prepare, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, and file with the Commission a design and schedule to construct the selective water withdrawal and downstream passage facilities in the following two phases in accordance with the approved schedule: (1) construction of the selective water withdrawal structure, which shall include a temporary downstream passage facility and (2) construction of the permanent downstream passage facility. The temporary and permanent facilities shall both include a sampling area to support biological evaluation of the fish screens and fish bypass facilities, and a mechanical screen cleaner or some other suitable device to prevent the accumulation of sediment and debris that might otherwise impair screen function and cause the delay, injury, or mortality of downstream migrating fish at Round Butte Dam. Upon Commission approval, the Licensees shall construct the selective water withdrawal (“SWW”) and downstream passage facilities.

(b) The Licensees shall install and operate a permanent downstream fishway that meets National Marine Fisheries Service smolt criteria within the forebay at the Round Butte Dam, including fish screens, guidance devices, and fish bypass facilities as described in the Fish Passage Plan. The Licensees shall construct permanent downstream passage facilities after determining, in consultation with the Fish Committee, Oregon Department of Environmental Quality, and CTWS Water Control Board, that the blend of surface/deep water withdrawal through the selective water withdrawal facility will:

(a) satisfy the criteria for safe, timely and effective downstream passage associated with temporary passage facilities set forth in Article 18; and (b) currently meet water quality criteria set forth in the 401 certificates, or likely meet the water quality criteria within a reasonable time through continued iterative adjustments of the SWW system as constructed with permanent downstream passage facilities and/or through implementation of other water quality management strategies. The Licensees shall evaluate downstream movement as described in the Fish Passage Plan.

(c) The Licensees shall notify the Fish Committee in writing when the downstream fishways are fully operational. Operation, maintenance, and monitoring of downstream fishways shall be conducted in accordance with the Downstream Fishway Operation and Maintenance Plan and Downstream Fishway Monitoring Plan, which the Licensees shall file with the Commission after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon Commission approval and coincident with the initiation of downstream fishway operations, the Licensees shall begin implementation of the plans.

##### **5. Downstream Passage Facilities At Round Butte Dam (Proposed Article 21)**

The Licensees shall submit for the review by the Fish Committee, and for approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the results of all downstream fishway design investigations, preliminary design plans and specifications, and final design plans and specifications for the construction and operation of temporary and permanent downstream fishways at Round Butte Dam to meet National Marine Fisheries Service smolt criteria. To the extent not otherwise completed as Interim Measures as described in Exhibit B to the Settlement Agreement and reported to the Commission pursuant to Article 41, the Licensees shall complete the following modeling and design steps prior to the construction of the selective water withdrawal (SWW) facilities and the downstream fish passage facilities:

(a) ***Constructability and Feasibility:*** Constructability/feasibility design is the first step needed to select a design option and facility location.

(b) **Design Consultation:** After the constructability/feasibility design is complete and a preferred option is selected, the Licensees shall consult with the Fish Committee, Oregon Department of Environmental Quality, and the Confederated Tribes of the Warm Springs Water Control Board prior to starting detailed design.

(c) **Modeling:** If the constructability/feasibility studies do not result in a clear cut recommended design selection, then computational fluid dynamics (CFD) modeling may be used to provide additional input into the selection.

(d) **Design selection:** If the CFD modeling is not required to make the design selection, CFD modeling and the progression to the 25% design stage will be conducted concurrently. The CFD modeling results will be used to optimize facility geometry and to review design features to provide the best attraction currents in the forebay and around the facility.

(e) **Physical Model:** After the 25% design stage and the CFD modeling have been completed, the results will be used to construct a physical model of the structure. The primary purpose of the physical modeling is to investigate the internal hydraulics of the structure and to evaluate entrance hydraulic conditions. Concurrently, the design will progress to the 50% stage.

(f) **Design Consultation and Review:** After the physical modeling is complete and the design has progressed to 50%, consultation with the Fish Committee (and with the Commission for dam safety purposes) will be undertaken prior to proceeding with further design.

(g) **Final Consultation:** After consultation is complete, the design will progress to 90%, and then to final status. The Licensees shall file the final design with the Commission after consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon Commission approval, the Licensees shall construct the SWW and temporary downstream passage facilities.

## 6. **Criteria for Downstream Passage Screen Design (Proposed Article 22)**

(a) The downstream passage facilities at Round Butte Dam shall meet the National Marine Fisheries Service (NOAA Fisheries) smolt criteria; however, the facilities' exclusion plates do not have to meet the NOAA Fisheries criteria for sweeping velocity and contact time.

(b) The smolt criteria include, but are not limited to, a maximum approach velocity perpendicular to the screens and exclusion plate of 0.80 feet per second (fps), screen openings no larger than 0.25 inches, a screen sweeping velocity component no less than

0.80 fps, and a screen contact time no greater than 60 seconds. Due to the size of the structure and the experimental nature of safely attracting and capturing juvenile migrants from Lake Billy Chinook, some components of the fish screen and bypass system may require flexibility to design and construct to NOAA Fisheries smolt criteria, and the Licensees shall design the fish screening and collection facilities in consultation with the Fish Committee based on the best available scientific information.

(c) The Licensees shall design screening facilities to screen less than 14,000 cfs only if water quality modeling verifies that flows above 9,000 cfs can be routed through the deep intake without impact to the Project's ability to meet water quality standards and without detrimental impact to the flow pattern and fish attraction in Lake Billy Chinook.

## **7. Round Butte Deep Exclusion Screen (Proposed Article 23)**

(a) The Licensees shall design the Round Butte deep exclusion screen to meet National Marine Fisheries Service (NOAA Fisheries) smolt criteria except for the criteria for sweeping velocity and contact time. In addition, outmigrant collection facilities will not be required at the deep exclusion screen. The Licensees shall evaluate hydraulic performance as soon as possible after the deep exclusion screen has been installed. If the screen does not meet applicable NOAA Fisheries smolt criteria at full hydraulic capacity, the Licensees shall take any necessary measures to meet applicable NOAA Fisheries smolt criteria. The Licensees shall continuously monitor differential pressure through the deep exclusion screen while the lower withdrawal system is in operation.

(b) The Licensees shall conduct studies of fish impingement at the Round Butte deep exclusion screen. Monitoring will be conducted during the first year after installation of the deep exclusion screen when deepwater withdrawal has been initiated, and when deepwater withdrawal is maximized. The duration of monitoring will depend on the monitoring method selected, but must be for a period sufficient for evaluating the possibility of impingement.

(c) The Licensees shall monitor the hydrodynamic and biological effects of Project operations during the first season after installation of permanent screens for the Round Butte downstream fish passage facility, and at least once every five years thereafter. The Licensees shall, in consultation with the Fish Committee, evaluate the need for additional monitoring based on the previous monitoring data.

(d) If the monitoring indicates that there is impingement of fish at the Round Butte deep exclusion screen, the Licensees shall consult with the Fish Committee to determine if impingement is significant because it impedes the Licensees' ability to achieve the objectives for Interim and Permanent Downstream Passage. If the Fish Committee determines that the effects are significant, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their

respective authorities, take any feasible measures or implement modifications within their control that are necessary to reduce impingement below the level of significance. These measures include but are not limited to operations modifications, cleaning system modifications, louver adjustments, and deterrent systems such as strobe lights or sound to keep fish away from the exclusion screening. The Licensees shall re-evaluate the facility the next time deepwater withdrawal has been initiated or maximized. If there are no feasible structural or operational measures within the Licensees' control that will reduce impingement below significant levels, the Licensees shall, in consultation with the Fish Committee, investigate and implement alternative mitigation measures.

#### **8. Downstream Passage Facility Pumped Attraction (Proposed Article 24)**

The Licensees shall design the permanent downstream collection facility at Round Butte Dam to include the ability to add pumps with a total capacity of 3,000 cfs and all appurtenant devices. The Licensees shall, before construction of the permanent downstream collection facility, prepare and provide the Fish Committee a report on the need to add pumped attraction flow. The report shall be based on information gathered during the Testing and Verification studies pursuant to Article 29 and prepared in consultation with the Fish Committee. If the Fish Agencies conclude that it is necessary to add pumped attraction flow, the Licensees shall, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, develop a plan to design, construct, and operate pumps to provide appropriate attraction flow to the permanent downstream collection facilities. Upon approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall submit the plan to the Commission for approval. Upon Commission approval, the Licensees shall implement the plan.

#### **9. Trap and Haul Facilities (Proposed Article 25)**

(a) The Licensees shall provide upstream passage using trap and haul until volitional upstream passage is implemented pursuant to provisions of the Fish Passage Plan.

(b) The Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a final monitoring plan for the operation and maintenance of trap-and-haul fishways at the Pelton Round Butte Project. The plan shall provide for the submission of an annual monitoring report to the Fish Committee for the duration of the operation of the interim trap-and-haul fishways. Upon Commission approval, the Licensees shall implement the plan.



(c) The Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan for conducting tests of upstream passage facility survival using standard methodology for evaluation of direct injury and mortality, and other factors. The plan shall provide that, in consultation with the Fish Committee the Licensees shall take any feasible measures or implement modifications within their control that are necessary to meet the 95 percent survival standard during the first five years of operations, and the 98 percent survival standard after five years. This survival standard applies to collection at the Pelton Trap, transportation to the adult release facility, and release through the adult release facility. After correcting any deficiencies, the Licensees shall re-test the facilities to ensure compliance with the applicable upstream passage facility survival standard. After compliance with the upstream passage facility survival standard is verified, additional re-testing will only be required if deficiencies are observed. The plan will identify the methods of observation used to detect deficiencies through long-term monitoring. Upon Commission approval, the Licensees shall implement the plan.

#### **10. Adult Release Facility (Proposed Article 26)**

(a) ***Design and Construction of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission preliminary design, final design, and construction plans for an Adult Release Facility at the Round Butte forebay. Upon Commission approval, the Licensees shall implement the plans.

(b) ***Operation of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission an operation and maintenance plan for the Adult Release Facility for the safe, timely and effective upstream passage of anadromous fish when Lake Billy Chinook is thermally stratified. Upon Commission approval, the Licensees shall implement the plan.

(c) ***Monitoring and Evaluation of Adult Release Facility.*** The Licensees shall, in consultation with the Fish Committee and with approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop and file with the Commission a monitoring and evaluation plan for the Adult Release Facility. Upon Commission approval, the Licensees shall implement the plan.

(d) ***Modifications to Adult Release Facility.*** The Licensees shall prepare and provide the Fish Committee reports in accordance with the monitoring and evaluation plan for the Adult Release Facility. The reports shall be based on monitoring of the Adult Release Facility, shall describe any possible need to modify the Adult Release Facility, and shall

be prepared in consultation with the Fish Committee. If the Fish Agencies conclude that the Adult Release Facility must be modified to ensure safe, timely, and effective upstream passage, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, develop a plan to modify the Adult Release Facility to ensure safe, timely, and effective upstream passage, which plan may include, but need not be limited to, measures or modifications required to meet the survival standard applicable to collection at the Pelton Fish Trap, transportation to the Adult Release Facility, and release through this facility into Lake Billy Chinook. Upon approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall submit the plan to the Commission for approval. Upon Commission approval, the Licensees shall implement the plan.

#### **11. Volitional Upstream Passage (Proposed Article 27)**

(a) Following the installation of the permanent downstream passage facilities at Round Butte Dam and within 24 months of when the downstream survival targets in the Fish Passage Plan for Lake Billy Chinook have been achieved, the Licensees shall conduct a study and provide the Fish Committee a report on the feasibility of volitional upstream passage. The scope of the feasibility study shall be determined in consultation with the Fish Committee. Factors to be addressed in the study, shall include, but not be limited to:

(i) Engineering feasibility;

(ii) Biological effectiveness, including but not limited to risk of disease transfer and stray rate for out-of-basin fish;

(iii) Cost;

(iv) Performance, including efficiency, of the existing trap-and-haul operation.

(b) Following submission of this report to the Fish Committee, the Licensees shall prepare a plan to implement volitional upstream passage at the Project, which plan shall include appropriate testing and verification studies, unless the appropriate Fish Agencies determine pursuant to their respective statutory authorities that volitional upstream passage facilities should not be installed because:

(i) Oregon Department of Fish and Wildlife (ODFW) and Confederated Tribes of the Warm Springs Reservation Branch of Natural Resources (CTWS BNR) have determined that the risk of disease transfer is too great,

- (ii) The stray rate for out of basin fish is not acceptable,
- (iii) Volitional upstream passage is infeasible, as determined utilizing the results of the feasibility study, or
- (iv) It is preferable, due to concerns with the state of the art for volitional upstream passage facilities combined with high efficacy of trap and haul operations, to continue the trap-and-haul operation for some additional specified period of time.

The plan shall be completed within 24 months of the Fish Agencies' determination that volitional upstream passage should proceed, and shall be prepared in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. Upon approval by the Fish Agencies, the Licensees shall file the plan with the Commission. Upon Commission approval, the Licensees shall implement the plan.

- (c) Upon any determination pursuant to paragraph (b) that volitional upstream passage should not be installed for the reasons specified in paragraph (b), the Licensees shall, within six months of such determination, and in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to continue trap-and-haul operations for a specified number of years and to conduct a future feasibility investigation as provided in paragraph (a). During any such continued trap-and-haul operation, the Licensees shall continue to monitor survival as required by Article 25 and shall take any feasible measures or implement modifications within their control to the trap-and-haul facilities that are necessary to comply with the survival standard in Article 25. Upon Commission approval, the Licensees shall implement the plan.

## **12. Passage at Pelton Dam (Proposed Article 28)**

(a) The Licensees shall transport all juvenile salmonids captured at the Round Butte downstream passage facility during the primary emigration period (February 1 through July 31) to the lower Deschutes River, bypassing Lake Simtustus and the Reregulating Reservoir. During the remainder of the year (August 1 through January 31), the Licensees shall, at the request of the Fish Committee, transport downstream-migrating salmonids into Lake Simtustus to utilize the lentic habitat it provides.

(b) If downstream-migrating salmonids are transported into Lake Simtustus, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to upgrade the Round Butte Dam east side upstream fish trap at the

head of Lake Simtustus, and operate it annually for part or all of the period May 1 through September 30 to capture and transport maturing adult resident salmonids upstream for release into Lake Billy Chinook. Upon Commission approval, the Licensees shall implement the plan.

(c) If downstream-migrating salmonids are transported into Lake Simtustus, the Licensees shall, in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file with the Commission a plan to install a guidance net system at the Pelton Dam and shall operate the Pelton downstream passage facility (Pelton Skimmer) during part or all of the primary migration season (February 1 through July 31) to transport downstream migrants to the lower Deschutes River. Upon Commission approval, the Licensees shall implement the plan.

### **13. Testing and Verification Studies (Proposed Article 29)**

(a) The Licensees shall, within one year of license issuance, file with the Commission a schedule for the development of plans for Testing and Verification studies as described in this Article and in Appendix III of the Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)]. The Licensees shall develop the schedule in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities.

(b) Upon Commission approval of the schedule, the Licensees shall develop the Testing and Verification study plans in consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities. The study plans shall provide that the Licensees shall conduct these studies with continued involvement of the Fish Committee through the annual work planning and reporting process. Each study plan will include objectives, tasks and evaluation/decision criteria. Where appropriate, study plans will be designed to evaluate the effectiveness of individual fish passage facilities in achieving the criteria and goals set forth in Articles 18 and 22. Such effectiveness evaluations shall include, at a minimum, the number of fish, by species and life stage, captured and released by the facility and a record of observations on the physical condition of the fish using the facility fishways. The Licensees shall develop Test and Verification study plans for the following study areas:

- (i) Facility Evaluation;
- (ii) Physical Reservoir Changes with Selective Water Withdrawal;
- (iii) Juvenile Salmonid Studies – Reintroduction of Anadromous Stocks Upstream of the Project;

- (iv) Juvenile Salmonid Studies – Rearing, Juvenile Densities, Habitat;
- (v) Juvenile Salmonid Studies – Juvenile Migration;
- (vi) Juvenile Salmonid Studies – Reservoir Survival/Predation, Fishery, Disease;
- (vii) Juvenile Salmonid Studies – Round Butte Dam Juvenile Collection, Downstream Transportation and Release;
- (viii) Adult Salmonid Studies – Adult Upstream Trap-and-Haul and Adult Release Facility; and
- (ix) Adult Salmonid Studies – Adult Migration/Survival/Spawning.

Study plans for multi-year studies shall provide that the Licensees may implement minor modifications to the study methodology in consultation with the Fish Committee. The need for any such minor modifications to the study methodology will be described in the annual progress report and will be based on the results of the study to date. Following approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, the Licensees shall file the study plans with the Commission. Upon Commission approval, the Licensees shall implement the plans.

(c) Based on results of the individual Testing and Verification studies, the Licensees shall, after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, file plans with the Commission for making any modifications to the facilities needed to ensure safe, timely and effective fish passage. Upon Commission approval, the Licensees shall implement the plans.

#### **14. Modification of Downstream Facilities (Proposed Article 30)**

The Licensees shall, in consultation with the Fish Committee and with approval by the appropriate Fish Agencies pursuant to their respective statutory authorities, develop plans for measures or modifications to the existing facilities needed to achieve the criteria and goals for safe, timely and effective fish passage set forth in Articles 18 and 22. The Licensees shall file such plans with the Commission and upon approval implement the measures or modifications.

**15. Long-Term Monitoring of Downstream Collection Facilities (Proposed Article 31)**

Within one year after activating the permanent downstream collection facilities at Round Butte Dam, the Licensees shall file with the Commission, after consultation with the Fish Committee and with the approval of the appropriate Fish Agencies pursuant to their respective statutory authorities, a plan for a long-term program to monitor downstream fish passage performance, as described in Appendix IV of the approved Fish Passage Plan, Exhibit D to the Settlement Agreement, approved in Ordering Paragraph [B(2)]. The plan shall provide that the Licensees shall begin the long-term monitoring of the downstream passage facilities as soon as practicable after the Testing and Verification studies have demonstrated that the permanent downstream collection facilities are meeting the survival criteria and goals set forth in Article 18. Upon Commission approval, the Licensees shall implement the plan.

**16. Annual Work Plans and Reports (Proposed Article 32)**

(a) The Licensees shall utilize annual work plans to document actions to be implemented, develop monitoring and evaluation studies, and propose management, monitoring and evaluation strategies for the coming year consistent with the Fish Passage Plan. The annual work plans shall include separate study plans for each Testing and Verification study being conducted. The Licensees shall issue a draft annual work plan to the Fish Committee for review by no later than January 1, and based on consultation with the Fish Committee shall issue to the Fish Committee a final annual work plan by April 1.

(b) The Licensees shall also file an annual report with the Commission before June 1 of each year, documenting the activities of the previous year. The annual report will follow the format of the previously approved annual work plan. The annual report will include, but not be limited to:

- (i) Numbers of fish by species moved upstream and downstream.
- (ii) Upstream and downstream passage survival rates.
- (iii) Estimates of fish mortality by species associated with the fish passage facilities.
- (iv) A description and evaluation of any supplementation programs.
- (v) Any changes in the work plan from adaptive management recommendations to the fish passage program that might resolve problems that have been identified.

**17. Fishway Maintenance (Proposed Article 33)**

The Licensees shall keep all fishways in proper order and shall keep all fishway areas clear of trash, sediment, logs, debris, and other material that would hinder passage. The Licensees shall perform maintenance in sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

**APPENDIX E**

National Marine Fisheries Service  
Endangered Species Act  
Reasonable and Prudent Measures and Terms and Conditions

Filed February 28, 2005

**Reasonable and Prudent Measures (Section 9.3 of the Biological Opinion)**

- (1) Carry out all protection, mitigation, and enhancement measures identified in the July 13, 2004, Settlement Agreement and its attachments which avoid or minimize effects to MCR steelhead.
- (2) Use the best available science to adaptively manage Project operation, maintenance, and construction activities to avoid or minimize effects to MCR steelhead during the period of the new Project license.

**Terms and Conditions (Section 9.3.1 of the Biological Opinion)**

- (1) FERC must require the Joint Applicants to construct and operate the Project facilities identified in the July 13, 2004, Settlement Agreement; carry out the Fish Passage Plan; adhere to the Fish Passage Schedule; implement the Testing and Verification studies, Long Term Monitoring, Annual Work Plans and Reports, and Native Fish Monitoring Program; implement the Trout Creek restoration Project, LWD management plan, and gravel augmentation study; and other measures identified in the July 13, 2004, Settlement Agreement.
- (2) FERC must require the Joint Applicants to establish the Fish Committee required by the July 13, 2004, Settlement Agreement, and to adhere to the consultation and dispute resolution provisions of the Settlement Agreement.
- (3) FERC must require the Joint Applicants to comply with all Project construction activity best management practices (App. F, Joint Applicants 2004), including measures to prevent concrete products from entering Project waters, measures to control erosion and sedimentation, and measures to control pollutants of any kind.



## APPENDIX F

U.S. Fish and Wildlife Service  
Endangered Species Act  
Reasonable and Prudent Measures and Terms and Conditions

Filed November 3, 2004

### **Reasonable and Prudent Measures (Section 7.3 of the Biological Opinion)**

- (1) Implement all protection, mitigation, and enhancement measures identified in the July 13, 2004, Settlement Agreement and its attachments which avoid or minimize effects to bull trout.
- (2) Use the best available science to adaptively manage Project operation, maintenance, and construction activities to avoid or minimize effects to the bull trout during the period of the new Project license.

### **Terms and Conditions (Section 7.4 of the Biological Opinion)**

1. To implement reasonable and prudent measure 1:
  - 1.1 The Commission must require the JA's to construct and operate the Project facilities identified in the July 13, 2004, Settlement Agreement, implement the Fish Passage Plan, adhere to the Fish Passage Schedule, implement the Testing and Verification studies, Long-Term Monitoring, Annual Work Plans and Reports, Native Fish Monitoring Program, and other measures identified in the July 13, 2004, Settlement Agreement.
2. To implement reasonable and prudent measure 2:
  - 2.2 The Commission must require the JA's to establish the Fish Committee required by the July 13, 2004, Settlement Agreement, and to adhere to the consultation and dispute resolution provisions of the Settlement Agreement.
  - 2.3 To implement reasonable and prudent measure 2, the Commission must require the JA's to comply with all Project construction activity best management practices, including measures to prevent concrete products from entering Project waters, measures to control erosion and sedimentation, and measures to control pollutants of any kind.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Portland General Electric Company and  
Confederated Tribes of the Warm Springs  
Reservation of Oregon

Project No. 2030-036

(Issued June 21, 2005)

KELLIHER, Commissioner, *concurring*:

This order approves a comprehensive Settlement Agreement signed by Portland General Electric Company, the Confederated Tribes of the Warm Springs Reservation of Oregon, and 20 stakeholders in the relicensing process for the Pelton Round Butte Hydroelectric Project. The Settlement Agreement includes proposed license articles embodying the provisions of the Agreement. This order incorporates most of the Settlement Agreement's proposed license articles in the new license issued for the Pelton Round Butte Project.

I join my colleagues in approving the Settlement Agreement and the issuance of a new license for the project. I am writing separately, however, to express concern about the process for deciding whether certain proposed license articles should be incorporated in the license. In some instances, this decision appears to have been based on little more than whether the final environmental impact statement (EIS) found the underlying action to be acceptable.

An EIS is a document reflecting staff's analysis of environmental issues. It is not intended to assess whether a proposed license article should be incorporated into a license issued by the Commission. That decision should be made utilizing jurisprudential standards established by the Commission. The analysis of environmental issues in an EIS does not provide such standards or otherwise utilize them.

The issue of what provisions of settlements may be incorporated into license articles has bedeviled the Commission and the broader hydroelectric community for some time. Accordingly, I want to stress my belief that it is important that the Commission act promptly to provide guidance to parties on this important issue.

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Joseph T. Kelliher



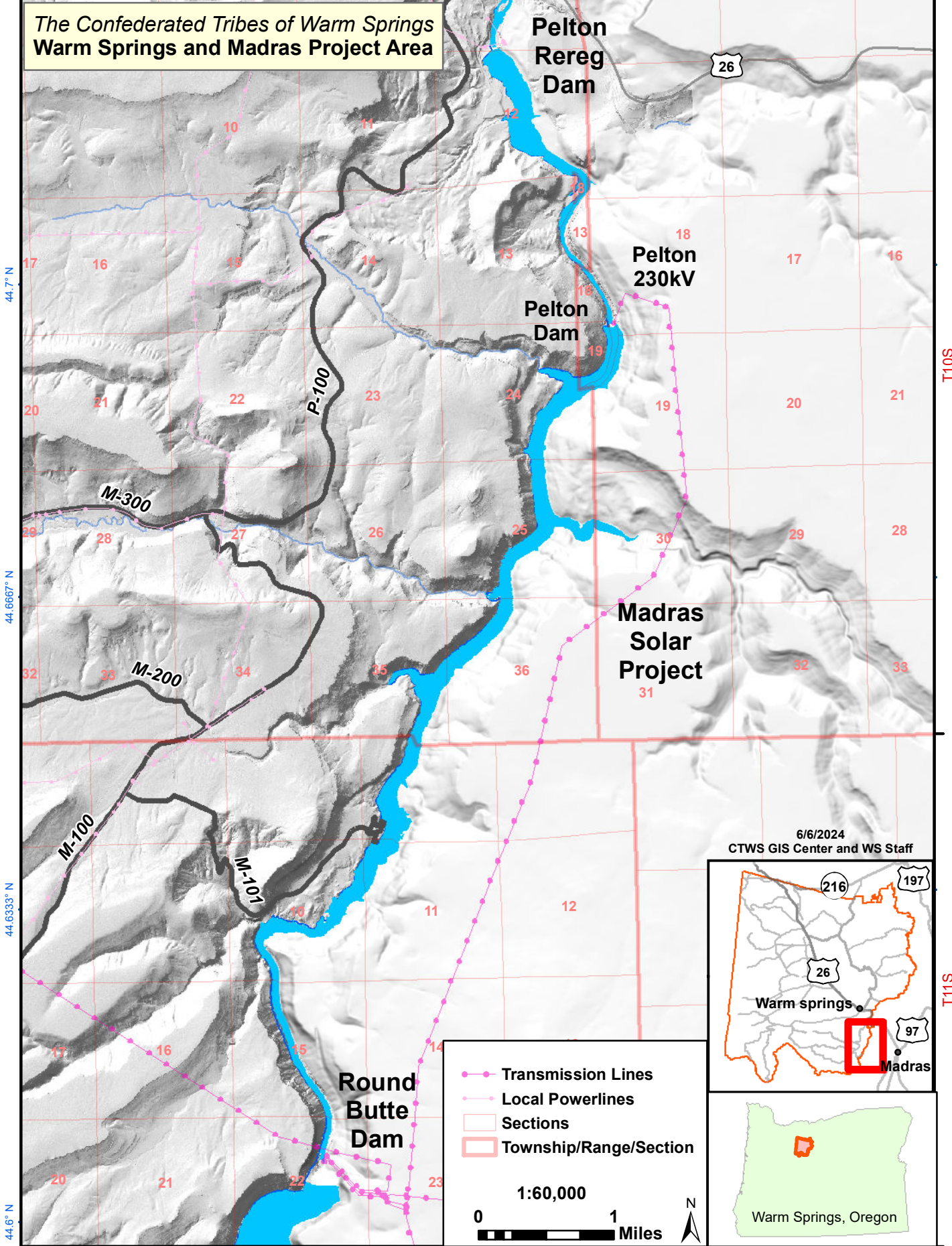
# EXHIBIT 5

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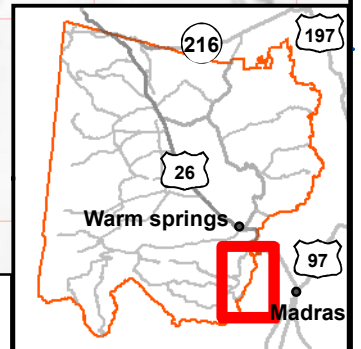
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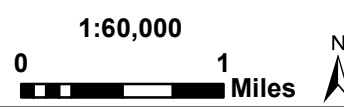
# The Confederated Tribes of Warm Springs Warm Springs and Madras Project Area



6/6/2024  
CTWS GIS Center and WS Staff



- Transmission Lines
- Local Powerlines
- Sections
- Township/Range/Section



R12E

R13E

44.7° N  
44.6667° N  
44.6333° N  
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T10S  
T11S

# EXHIBIT 6

93 FERC ¶ 61,182

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;  
William L. Massey, Linda Breathitt,  
and Curt Hébert, Jr.

Confederated Tribes of the Warm  
Springs Reservation of Oregon, a Federally  
Recognized Indian Tribe, and  
Warm Springs Power Enterprises, a Chartered  
Enterprise of the Confederated Tribes of the  
Warm Springs Reservation of Oregon

Docket No. ER01-53-000

ORDER DISCLAIMING JURISDICTION AND GRANTING  
AUTHORIZATIONS AND WAIVERS

(Issued November 21, 2000)

In this order, we disclaim jurisdiction over Warm Springs Power Enterprises (WSPE) as a public utility under Part II of the Federal Power Act (FPA) and grant requested authorizations and waivers as they pertain to Part I of the FPA.<sup>1</sup>

Background

The Tribes are a federally recognized Indian Tribe organized pursuant to Sections 16 and 17 of the Indian Reorganization Act of 1934.<sup>2</sup> They are a Federal corporation<sup>3</sup> which is a confederation of the Wasco, Warm Springs, and Paiute Tribes. The Tribes

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<sup>1</sup>Although the Confederated Tribes of Warm Springs Reservation of Oregon (Tribes) and WSPE (jointly, Petitioners) state in their application that the Tribes and WSPE will seek to engage in wholesale electric power and energy transactions as a power marketer, the Commission notes that the proposed rate schedule attached to the application only applies to WSPE.

<sup>2</sup>25 U.S.C. §§ 476 and 477 (1994).

<sup>3</sup>The Tribes were issued a federal Corporate Charter conferring federal corporate status on the Tribes.

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Docket No. ER01-53-000

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may create business enterprises that operate through a plan of operation adopted by the Tribes' Tribal Council.

WSPE is a Chartered Enterprise of the Tribes.<sup>4</sup> WSPE is the enterprise formed by the Tribes to, among other things, manage and operate the Reregulating Dam Generating Facility and to manage the Tribes' interest in Pelton/Round Butte Hydroelectric Project (Project).<sup>5</sup> The Warm Springs Reservation is located in North Central Oregon and comprises approximately 640,000 acres. WSPE seeks to engage in wholesale electric power and energy transactions as a power marketer.

On October 5, 2000, the Petitioners filed a joint application requesting that the Commission disclaim jurisdiction over WSPE's activities as a power marketer. In the case that the Commission finds jurisdiction, Petitioners have also filed an application to authorize WSPE to engage in wholesale power sales at market-based rates and further request the same waivers and authorizations as those granted by the Commission to other power marketers with market-based rate authorization. Petitioners request an effective date of December 4, 2000, 60 days after the date of the filing.

Irrespective of whether the Commission deems WSPE jurisdictional, Petitioners request (a) blanket approval, under Parts 20 and 34 of the Commission's Regulations, of future issuances regarding securities and assumptions of liabilities, subject to objection by an interested party; and (b) waiver of Parts 41, 101, and 141, with the exception of 18 C.F.R. §§ 141.14-141.15 (2000).

Notice of Petitioners' application was published in the Federal Register, 65 Fed. Reg. 61,320 (2000), with comments, protests and interventions due on or before October 26, 2000. None was filed.

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<sup>4</sup>WSPE was created pursuant to Section 12 of the Tribes' Corporate Charter, and now operates pursuant to its Fourth Amended Plan of Operation.

<sup>5</sup>In an order being issued contemporaneously with this order, in Project No. 2030-032, the Commission is approving a Settlement Agreement between the Tribes, Portland General Electric Corporation and the U.S. Department of Interior pursuant to which the Tribes will purchase a 33 percent undivided interest in the Project while retaining their 100 percent interest in the Reregulating Dam Generating Facility.



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Discussion

For the reasons discussed below, we find that WSPE is not a public utility under Part II of the FPA.

Under FPA section 201(f), there are express exemptions from the Commission's jurisdiction under Part II of the FPA. They include, "the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing..." The issue of instrumentalities under section 201(f) was addressed in City of Paris, KY v. FPC, 399 F.2d 983 (D.C. Cir. 1968). There, the court ruled that rural electric cooperatives financed by the Rural Electrification Administration (REA) are not government instrumentalities under Section 201(f).<sup>6</sup> The court acknowledged that the REA exercised "considerable supervision" over the cooperatives but stated that:

The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. REA-financed cooperatives are private nonprofit corporations organized for the benefit of their consumer-owners. They are neither operated nor controlled by any government, federal, state or local. They are neither operated nor controlled by the Rural Electrification Administration or any other government agency.

Id., at 986 (footnotes omitted).

The Commission previously addressed the issue of whether a tribal utility can be regulated under Part II of the FPA as a public utility in Sovereign Power Inc., 84 FERC ¶ 61, 014 (1998) (Sovereign). In Sovereign, the Commission ruled that it lacks jurisdiction over a tribal corporation owned and operated by the Spokane Tribe. The Commission emphasized the following facts: the enterprise was wholly owned by the Spokane Tribe; the Spokane Tribe performed government functions; the funds generated would be used for governmental purposes; such funds would decrease the need for federal funding; and the Spokane Tribe was subject to extensive federal oversight. The facts led the Commission to hold that the Spokane Tribe was a government instrumentality and that Sovereign Power, Inc., a corporation wholly-owned by that

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<sup>6</sup>REA is now the Rural Utility Service (RUS).

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instrumentality under section 201(f), was not a public utility for purposes of the Commission's jurisdiction.

Applying these tests to the facts before us, we conclude that the Tribes are an instrumentality of the "United States, a State or any political subdivision of a state."<sup>7</sup> The Tribes perform inherent government functions and the funds generated by WSPE will be used by the Tribes on the behalf of the government and in performance of government functions. The money collected by WSPE will also mean that the Tribes will need less funding from the federal government and this generally promotes the goal of encouraging tribal self-determination and economic independence.

Petitioners state that the Tribes are subject to Interior Department oversight and that the Interior Department's influence on the Tribes' actions indicate that the Tribes are, to a significant extent, linked to the federal government. The Tribes are organized pursuant to Sections 16 and 17 of the Indian Reorganization Act of 1934 (5 U.S.C. §§ 476 and 477)(1994). The majority of the Tribes' enumerated powers require the review and/or consent of the Secretary of the Interior before action may be taken. Examples of the power the federal government has over the Tribes include: approval by the Secretary of the Interior (Secretary) of the lease of Tribal lands; approval by the Secretary of the use of Tribal funds to acquire land; and approval by the Secretary of legal counsel employed to protect and advance the Tribes' rights. Furthermore, the Tribes' Constitution states that one of the Tribes' goals is to "establish and maintain, with the aid of the Federal Government, a form of home rule that shall promote the advancement and welfare of the Indians of the Warm Springs Reservation." Constitution of the By-Laws of the Tribe, Article I(a). In addition, the Tribes' Corporate Charter recognizes that the primary purpose of the Tribal government is "to provide for the proper exercise by the [Confederated] Tribe[s] of various functions heretofore performed by the Department of the Interior...." Corporate Charter, Corporate Existence, Paragraph 1. Revenues derived from hydroelectric projects provide 50 percent of the income used by the Tribe to provide essential governmental services on the Reservation.

We recognize that the Supreme Court has ruled in other contexts that Indian tribes are not instrumentalities of the government. See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (tribe's off-reservation ski resort was not "a federal instrumentality constitutionally immune from state taxes of all sorts"); United States v. Wheeler, 435 U.S. 313 (1978) (Double Jeopardy Clause does not bar successive tribal and federal prosecutions because tribe's power to punish derives from its retained sovereignty, not

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<sup>7</sup>The Tribes are not a "municipality" under section 3(f) of the FPA. See Mitex, Inc., 35 FERC ¶ 61,131 (1986).

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from federal sovereignty delegated to tribe by Congress); see also Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989) (tribe is not a federal instrumentality for purposes of Employment Retirement Income Security Act). However, none of those cases involved the FPA. The controlling standard under the FPA is set forth in City of Paris and, under that standard, the Tribes are a governmental instrumentality.

Since the Tribes are an instrumentality of the government, and WSPE is a Chartered Enterprise of this instrumentality under section 201(f), WSPE is not a public utility for purposes of our jurisdiction. Our decision here is based on the specific facts of this case, particularly the fact that WSPE is an enterprise of the Tribes.<sup>8</sup> See Enron Power Marketing, Inc. v. Pennsylvania-New Jersey-Maryland Interconnection, et al., 83 FERC 61,032 (1998).

Our conclusion is consistent with the long-standing principle of statutory construction that "statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit." See Montana v. Blackfoot Tribe, 471 U.S. 759, 766 (1985). Since neither FPA section 201(f) nor the legislative history of Parts II and III of the FPA make explicit reference to tribal utilities, we will construe this statutory silence in favor of Petitioners and conclude that WSPE, as an enterprise wholly owned by a governmental instrumentality, is exempt from regulation as a public utility by virtue of section 201(f).<sup>9</sup>

#### Authorizations and Waivers

Petitioners request blanket approval of issuances of securities or assumptions of liabilities pursuant to Parts 20 and 34 of the Commission's regulations, subject to objection by an interested party, and waiver of the accounting and related reporting requirements of Parts 41, 101, and 141, with the exception of 18 C.F.R. §§ 141.14-141.15 (2000). We will grant the requested authorizations and waivers as they pertain to Part I of the FPA.

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<sup>8</sup>It is our understanding that, as a tribal enterprise, WSPE is wholly owned by the Tribes.

<sup>9</sup>We note that pursuant to an order in Docket No. EC00-80-000 being issued contemporaneously with this order, the Tribes will own certain transmission facilities. We do not address here whether the Tribes are a transmitting utility for purposes of section 211 of the FPA.

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The Commission orders:

(A) Petitioners' request for disclaimer of jurisdiction is hereby granted, as discussed in the body of this order;

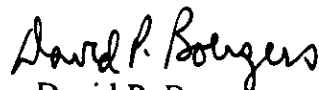
(B) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Petitioners should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214.

(C) Absent a request to be heard within the period set forth in Ordering Paragraph B above, Petitioners are hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Petitioners, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(D) Petitioners' request for waiver of Parts 41, 101 and 141 of the Commission's regulations is hereby granted, as discussed in the body of this order. Licensees remain obligated to file the Form No. 80 and the Annual Conveyance Report.

By the Commission.

( S E A L )

  
David P. Boergers,  
Secretary.

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