

**OFF-LICENSE SETTLEMENT AGREEMENT BETWEEN PUBLIC UTILITY
DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON,
AND THE KALISPEL TRIBE OF INDIANS**

This Off-License Settlement Agreement (“OLSA”) is entered into between the Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”) and the Kalispel Tribe of Indians (“Tribe”) in connection with some of the PUD’s environmental obligations related to the operation of the Box Canyon Hydroelectric Project.

SECTION 1: RECITALS

- 1.1.** In 1952, the Federal Energy Regulatory Commission (“FERC”) licensed the PUD to construct and operate the Box Canyon Hydroelectric Project (“Project”), FERC No. 2042. The Project is located on the Pend Oreille River in northeastern Washington and northwestern Idaho.
- 1.2.** The Project occupies approximately 717 acres of federal lands. Specifically, the Project: (1) inundates 493 acres of land within the Kalispel Indian Reservation along the Pend Oreille River (in the upper half of the 55-mile reservoir) that the United States holds in trust for the Tribe; and (2) occupies 190.25 acres within the Colville National Forest.
- 1.3.** The PUD applied to FERC for a new license in January 2000. The Tribe, U.S. Department of Interior (“Interior”), U.S. Forest Service (“Forest Service”), Washington State Department of Fish and Wildlife, Washington State Department of Ecology (“Ecology”), the State of Idaho, and other entities intervened. The PUD operated the Project pursuant to annual licenses from the time the 1952 license expired in January 2002 until July 11, 2005.
- 1.4.** Pursuant to section 4(e) of the Federal Power Act (“FPA”), 16 U.S.C. § 797(e), Interior and the Forest Service submitted conditions to FERC to be included in the new license. Pursuant to FPA section 18, 16 U.S.C. § 811, Interior also submitted fishway prescriptions to FERC to be included in the new license. Relevant to this OLSA, the conditions included the precursor to the Trout Habitat Restoration Program (“THRP”) and the fishway conditions and prescriptions for downstream fish passage at Box Canyon Dam and both upstream and downstream fish passage at the Calispell Creek Pumping Plant (“CCPP”), adjacent to the Box Canyon reservoir.
- 1.5.** On July 11, 2005, FERC issued the PUD a new 50-year license (the “License”) to operate the Project. In addition to Interior’s section 18 fishway prescriptions, FERC included in the License the section 4(e) conditions of Interior and the Forest Service in their entirety. However, FERC modified Interior’s and the Forest Service’s section 4(e) conditions to limit their applicability to either Reservation lands or National Forest System lands located “within the Project boundary.”

- 1.6.** In August 2005, the PUD, Ponderay Newsprint Company (“PNC”), Interior, the Forest Service, and others sought rehearing of the License order before FERC. On November 17, 2006, FERC issued an order revising the License. 117 FERC ¶ 61,205. Among other things, FERC included Interior’s and the Forest Service’s section 4(e) conditions and Interior’s section 18 fishway prescriptions without limitation or modification.
- 1.7.** After FERC issued its November 17, 2006 order revising the License, the PUD and PNC petitioned for review of the License in the U.S. Court of Appeals for the District of Columbia Circuit (Nos. 06-1387 and 06-1389). Interior, the Forest Service, and the Tribe intervened in the petition proceedings.
- 1.8.** The PUD and PNC also filed complaints in the U.S. District Court for the District of Columbia (Nos. 06-365 and 06-768). In their complaints, the PUD and PNC asked the District Court to set aside a regulation promulgated by Interior that established that the trial-type hearings set forth in section 241 of the Energy Policy Act of 2005, 16 U.S.C. § 811, did not apply to any hydropower proceedings for which a license had been issued as of November 7, 2005, which includes the Box Canyon proceeding at issue. The District Court stayed proceedings pending resolution of the PUD’s and PNC’s petitions for review in the Court of Appeals.
- 1.9.** The PUD, PNC, Interior, Forest Service, and Tribe (collectively, “the Parties”) entered into mediation as directed by the Court of Appeals. After the Parties made significant progress towards a settlement, the Court of Appeals stayed proceedings on the PUD’s and PNC’s petitions to allow the Parties to pursue a final settlement agreement.
- 1.10.** The Parties entered into a Settlement Agreement on January 28, 2009 (“2009 Settlement Agreement”), which was incorporated into the License by FERC order on February 19, 2010. 130 FERC ¶ 62,148. Relevant to this OLSA, the 2009 Settlement Agreement replaced some of Interior’s earlier license conditions under FPA section 4(e) and all of the fishway prescriptions under FPA section 18 with the current conditions, which generally include upstream and downstream fish passage at Box Canyon Dam and the Calispell Creek Pumping Plant (in Appendix C), as well as a program of off-site mitigation (the THRP) to improve habitat for Target Fish Species in the Project vicinity (in Appendix A). In addition, under the 2009 Settlement Agreement, the PUD dismissed its pending appeals in the D.C. Circuit Court referenced in subsection 1.7 and in the D.C. District Court referenced in subsection 1.8.
- 1.11.** Pursuant to section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, Ecology issued a certification for the Project on December 30, 2002, and amended it on February 21, 2003, Ecology Order No. 02WQER-5121A-01. The section 401 certification imposed various water quality-related conditions on the Project, subject to modification through Ecology’s later completion of applicable total maximum daily load (TMDL) studies for temperature and total dissolved gas in the Pend Oreille River. The temperature TMDL is currently awaiting approval by EPA, and is subject

to an appeal by the PUD before the Superior Court of Thurston County, Washington, Cause No. 11-2-01027-6.

- 1.12.** As part of the Project works, the PUD operates the CCPP, which discharges water from Calispell Creek on the upstream side of a railway embankment back into the creek on the downstream side of the embankment, near the confluence with the Pend Oreille River. On January 2, 2003, the EPA issued a CWA section 401 certification purporting to impose water quality-related conditions on the License due to discharges from the CCPP. The PUD filed suit in the U.S. District Court for the District of Columbia (No. 1:04cv2224) claiming that the EPA lacked jurisdiction over the CCPP and that the conditions of the certification violated EPA's own regulations. The Tribe intervened. The case has been stayed since 2007 pending potential settlement by those parties.
- 1.13.** The PUD and Tribe began meeting in early 2014 and successively thereafter to consider options for a path forward that provides a better focus on conservation outcomes, leading to the Amended Settlement Agreement and this OLSA.
- 1.14.** The Parties have now negotiated the Amended Settlement Agreement in the shared belief that certain costs, obligations, and efforts required under the 2009 Settlement Agreement can be reallocated to yield better outcomes for the Tribe and for fish populations in the Lower Pend Oreille Basin. The Parties anticipate that the Amended Settlement Agreement will be executed contemporaneously with this OLSA.
- 1.15.** The PUD and Tribe have entered into this OLSA as a component of the negotiation that led to the Amended Settlement Agreement. This OLSA places certain financial obligations (summarized in Attachment A) on the PUD in exchange for the Tribe's endorsement of the Amended Settlement Agreement, forbearance of actions to enforce or expand the PUD's environmental obligations under the License, and commitment to help the PUD meet those environmental obligations if certain conditions are met.

SECTION 2: PURPOSES OF THIS AGREEMENT

- 2.1.** The main purposes of this OLSA are to resolve disputes between the PUD and Tribe regarding the environmental impacts of the Project on the Tribe and its fisheries, and to use PUD funds to achieve greater benefits for the Tribe and better outcomes for fish than if those funds were expended toward satisfying existing obligations under the License and the 2009 Settlement Agreement.
- 2.2.** The PUD and Tribe intend that, in exchange for specified funding and commitments to the Tribe:

 - (a) the PUD shall be relieved of its obligation during the License term to implement downstream fish passage at Box Canyon Dam (pursuant to Section 5 of this OLSA);

- (b) the PUD shall be relieved of its obligations during the License term to implement upstream and/or downstream fish passage at the CCPP (pursuant to Section 6 of this OLSA); and
- (c) the PUD's current water quality obligations shall be satisfied and all related disputes resolved (pursuant to Section 7 of this OLSA).

2.3. The PUD and Tribe intend that such funding is provided by the PUD in settlement of such existing obligations, and that accepting such funds does not make the Tribe a contractor of the PUD. The PUD and the Tribe also recognize that significant non-monetary benefits will accrue to each other through this OLSA. They intend to take advantage of the collaborative opportunities this OLSA offers, and hope to continue strengthening their relationship for their long-term mutual benefit beyond the scope of this OLSA.

SECTION 3: DEFINITIONS

- (1) "2009 Settlement Agreement" means the settlement agreement entered into by the PUD, the Tribe, PNC, Interior, and the Forest Service on January 28, 2009, adopting revised fishway prescriptions and section 4(e) conditions, which were subsequently incorporated into the License by FERC *Order on Settlement Agreement and Amending License*, on February 19, 2010 (130 FERC ¶ 62,148), and subject to several subsequent schedule amendments to further negotiation of the OLSA, most recently *Order Granting Extension of Time* (Oct. 12, 2017).
- (2) "Amended Conditions and Prescriptions" means the amended FPA section 4(e) conditions and section 18 prescriptions that are attached to the Amended Settlement Agreement as Appendices A and C.
- (3) "Amended Settlement Agreement" means the agreement among the PUD, the Tribe, PNC, Interior, and the Forest Service entered into contemporaneously with this OLSA to amend the terms of the 2009 Settlement Agreement.
- (4) "Box Canyon Dam" means the concrete dam and integral spillway structure located at river mile 34.4 on the Pend Oreille River, Pend Oreille County, Washington, as described in License paragraph 11.
- (5) "CCPP" means the Calispell Creek Pumping Plant.
- (6) "CCPP Section 401 Certification" means the EPA's § 401 *Certification Conditions for Calispell Creek Pump Works Under FERC Project No. 2042-013 (Box Canyon Dam)*, dated January 2, 2003.
- (7) "Corps" means the United States Army Corps of Engineers.
- (8) "EPA" means U.S. Environmental Protection Agency.

- (9) “License” means the new license issued by FERC on July 11, 2005, to the PUD to operate the Project, 112 FERC ¶ 61,055, as amended by FERC on February 29, 2010 to incorporate the appendices to the 2009 Settlement Agreement, 130 FERC ¶ 62,148, and most recently amended on Oct. 12, 2017.
- (10) “Pend Oreille Temperature TMDL” means the *Pend Oreille River Temperature Total Maximum Daily Load – Water Quality Improvement Report*, under section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), as revised by Ecology in November, 2011 (Ecology Pub. No. 10-10-065), and currently pending approval by the EPA.
- (11) “PPO” means the Plan for Pump Operations to be approved by EPA under General Condition 14 to the CCPP Section 401 Certification, a proposed final version of which is attached as Attachment B to this OLSA.
- (12) “Project” means the Box Canyon Hydroelectric Project, FERC No. 2042, located on the Pend Oreille River in northeastern Washington and northwestern Idaho.
- (13) “Revised Plan E” means the “Revised Plan E for Operation of Calispell Creek Pumps” executed March 5, 2013 by the PUD and March 20, 2013 by Diking District No. 2 of Usk, Washington (of which FERC incorporated an earlier version into the License, 112 FERC ¶ 61,055, 61,488 (2005)), attached as Attachment C to this OLSA.
- (14) “Target Fish Species” means bull trout, westslope cutthroat trout, and mountain whitefish. *See Order on Settlement Agreement and Amending License*, 130 FERC ¶ 62,148 (2010), at ¶ 25 and Appendix C § 1.1.C.
- (15) “THRP” means the Trout Habitat Restoration Program required by Interior as Revised 4(e) Condition 6 to the License, *Order on Settlement Agreement and Amending License*, 130 FERC ¶ 62,148 (2010), Appendix A, as amended by the Amended Settlement Agreement and its appendices.

SECTION 4: DURATION OF AGREEMENT

- 4.1. Effective date.** This OLSA shall become effective on the date (the “Effective Date”) when both of the following conditions have been met:
- (a) Both the PUD and Tribe have executed this OLSA; and
 - (b) FERC has issued an order amending the License to incorporate the revised appendices attached to the Amended Settlement Agreement without material alteration.

Unless and until both of these conditions have been met, this OLSA shall have no legal effect.

- 4.2. Termination.** This OLSA shall terminate: (1) on the date of any FERC order revoking the License, (2) on the date of any FERC order conditionally approving

surrender of the License, (3) on the date of any FERC order issuing or denying the PUD a new license (other than an annual license) for the Project under 16 U.S.C. § 808, or (4) at the option of the PUD or Tribe following the material breach of the other pursuant to subsections 4.4, 5.7, 6.6, 8.1, or 10.3 upon notice to the other pursuant to subsection 8.6.

- 4.3. Material Breach by the Tribe.** If this OLSA is terminated under subsection 4.2 due to a material breach by the Tribe, the rights and obligations of this OLSA shall continue in force consistent with subsection 9.c. of the Amended Settlement Agreement. In the event of such termination, the Tribe shall remit any unspent funds to the PUD, which shall then promptly deposit those funds into the escrow account identified in subsection 9.c. of the Amended Settlement Agreement.
- 4.4. Material Breach by PUD.** Except as otherwise provided in this OLSA, failure by the PUD to make a payment as required under this OLSA shall constitute a material breach. In that event, the Tribe may notify the PUD in writing that it is in material breach, including notice of a date (not less than 30 days after the notice) within which the PUD must make payment in order to cure the breach. If the PUD does not make payment by such date, the Tribe and PUD shall proceed to dispute resolution as provided in Section 8. Following completion of the dispute resolution process, the Tribe may terminate this OLSA if the arbitrator finds that the PUD failed to cure a material breach. In the event of termination, the Tribe's remedies shall be limited to petitioning for reversion to the License terms based on the 2009 Settlement Agreement, as described below in this subsection, and the PUD shall be relieved of its obligation to make any payments to the Tribe that would have been due after the termination date.

In the event of termination due to a breach by the PUD, the Tribe may petition Interior and FERC to amend the License to reinstate the conditions and prescriptions contained in Appendices A and C of the 2009 Settlement Agreement, updated with reasonable new timelines and standards for implementation, which shall not, without the PUD's consent, allow less time for each task or milestone than was allowed under the appendices to the 2009 Settlement Agreement as incorporated into the License. Such timelines and standards shall be based on the best available science and shall be developed in consultation with the Technical Committee. In the event of such reinstatement, the Tribe shall advocate to both Interior and FERC for the PUD to retain credit under the amended License for the restoration of all stream miles awarded by the Technical Committee prior to the termination date. The PUD and Tribe agree that they will not challenge Interior's submission to FERC of the updated 2009 appendices pursuant to this subsection, nor FERC's issuance of a license amendment that incorporates them into the License, except that each Party retains its full rights to participate as a member of the Technical Committee in developing the new timelines and standards for implementation, including any Technical Committee dispute resolution process pursuant to the License.

SECTION 5: DOWNSTREAM FISH PASSAGE DEFERRAL AT BOX CANYON DAM

- 5.1. Background: PUD's Obligations Regarding Box Canyon Fish Passage Under License.** Under sections 4(e) and 18 of the FPA, 16 U.S.C. §§ 797(e) and 811, respectively, Interior prescribed downstream fish passage facilities at Box Canyon Dam as a condition of the License. 2009 Settlement Agreement, Appendix C, § 1.3, incorporated into the License at 130 FERC ¶ 62,148, 64,403 (2010). Interior also prescribed the THRP, a program of stream restoration intended to mitigate the impact of Project operations on Target Fish Species. *See generally id.*, Appendix A.
- 5.2. Modification of PUD's Obligations under Amended Settlement Agreement.** Under the Amended Settlement Agreement, Interior has agreed, with the Tribe's support, to revise Appendix C so as to refrain from exercising its authority under FPA sections 4(e) and 18 to require the construction of downstream fish passage at Box Canyon Dam, for the term of the License. Revised Appendix C also specifies that the PUD shall reinstate fishway design development for downstream fish passage at Box Canyon Dam as part of the pre-application consultation process for any future FERC license (other than an annual license) after expiration of the License, if Interior notifies the PUD in writing no earlier than 10 years prior to the expiration of the License (or 2045) that, based on the best available science, downstream fish passage survival at Box Canyon Dam is a significant causative factor in the depression of self-sustaining populations of migratory Target Fish Species in the lower Pend Oreille River. The PUD reserves the right to challenge, under applicable law, any fish passage prescription included in any future FERC license after expiration of the License. In consideration for the Tribe's support in securing Interior's agreement to refrain from exercising its authority under FPA sections 4(e) and 18 to require downstream fish passage at Box Canyon Dam for the term of the License, the PUD agrees to provide funding to the Tribe and potentially to the Corps as described in subsections 5.3 and 5.4.
- 5.3. Albeni Falls Upstream Fish Passage Funding.**
- (a) Within 30 days after the following conditions are met, or otherwise by written agreement of the PUD and Tribe, the PUD shall pay the Tribe \$10 million for contribution toward the construction of upstream fish passage facilities at Albeni Falls Dam:
 - (1) The Corps has secured all required internal and external approvals and permits necessary to construct upstream fish passage facilities at Albeni Falls Dam;
 - (2) The Corps and/or others have entered an agreement to provide funds that, when combined with the PUD's \$10 million contribution under this subsection, are sufficient to construct such upstream fish passage facilities;

(3) The PUD has received written confirmation from the Corps that conditions (1) and (2) of this subsection have been satisfied, along with any written indemnification and/or other assurances that the PUD may require from the Corps consistent with paragraph (b) of this subsection; and

(4) The PUD has received written concurrence from the Tribe as to the design of such fish passage facilities, which the Tribe shall not unreasonably withhold, along with written indemnification from the Tribe consistent with paragraph (b) of this subsection.

(b) The PUD's liability under this subsection shall be strictly limited to the payment obligation provided in this subsection. The PUD shall have no responsibility for the design, construction, maintenance, or operation of upstream fish passage facilities at Albeni Falls Dam; shall not be liable for any cost overruns, negligence, or misfeasance in the design, construction, maintenance, or operation of such upstream passage; and shall have no responsibility for the effectiveness of such upstream fish passage, or for any adverse impacts on fish or other natural resources resulting from such upstream fish passage.

(c) If conditions (1) through (4) in paragraph (a) of this subsection have not all occurred within 6 years after the Effective Date, the PUD's obligation to transfer \$10 million to the Tribe for contribution toward the construction of upstream fish passage facilities at Albeni Falls Dam shall expire, and the PUD shall instead transfer \$10 million to the Watershed Program in addition to the PUD's next scheduled Watershed Program payment under subsection 5.4.

5.4. Watershed Program Funding. The PUD shall contribute \$36 million to a Watershed Program established by the Tribe. This contribution shall be divided into 25 consecutive annual installments, the first of which shall be due within 60 days of the Effective Date. Subsequent payments shall be due on the anniversary of the Effective Date for each of the next 24 years. The amount of the first three payments shall be \$1 million, and the amount of the 22 payments thereafter shall be \$1.5 million.

5.5. Watershed Program Establishment and Purpose. The Tribe shall establish a written Watershed Program with input from the Technical Committee. While the Tribe shall be solely responsible for the Watershed Program's management, financial administration, and implementation, the Tribe will work collaboratively with the Technical Committee to maximize conservation benefits under the Watershed Program. The Tribe may deposit funds received under subsection 5.4 into the Reserve Fund contemplated by subsection 5.6 prior to meeting this requirement, but it shall not expend Watershed Program funds until a written Watershed Program is established and a copy is provided to the PUD.

The purposes of the Watershed Program will be to complete restoration measures in the mainstem Pend Oreille River and its tributaries in order to help mitigate the effects of the Project. The Tribe will coordinate its efforts under the Watershed Program with the conservation priorities identified in the Comprehensive Plan performed pursuant to the Amended Settlement Agreement under Revised Appendix A, subsection 6.1.

Although the Watershed Program may have some overlap with the THRP, it is a distinct program that will focus on completing high priority conservation actions rather than restoring a particular number of stream miles. The PUD's obligation to fund the Watershed Program is unrelated to any funding obligations the PUD has under the THRP, as described in the Amended Settlement Agreement or its appendices.

The Tribe shall coordinate with the PUD and the Technical Committee (as defined in the 2009 Settlement Agreement, § 1) on Watershed Program projects, but shall not be required to obtain their approval. The PUD will not necessarily receive stream mile credits for any Watershed Program project that is performed in a THRP tributary, but may incorporate improvements resulting from the Watershed Program into the PUD's efforts to restore that tributary. If the PUD eventually receives THRP credit for a tributary reach in which a Watershed Program project was performed, it shall assume the long-term monitoring and maintenance obligations for such reach, as required by the THRP, so long as the Tribe secures (or, if on land under the Tribe's control, grants) the PUD right of access sufficient for such monitoring and maintenance.

5.6. Uses of Watershed Program Funds. Watershed Program funds shall only be used for the following purposes:

- (a) Watershed assessments, planning, and reasonable administration;
- (b) Fish passage and fish management (e.g. non-native fish control and Target Fish Species supplementation);
- (c) Water temperature abatement;
- (d) Habitat restoration (e.g. geomorphic improvements, barrier removal, and floodplain restoration);
- (e) Acquisition of conservation easements and/or land to protect fish and wildlife habitat; and
- (f) Natural resource enhancement and protection efforts.

In planning and implementing Watershed Program projects, the Tribe's first priority shall be to help provide upstream fish passage at Albeni Falls Dam. To that end, the Tribe shall deposit the first five payments under subsection 5.4 into a distinct, interest bearing account with the intent of contributing this "Reserved Fund" to the construction of upstream fish passage at Albeni Falls Dam. If the Corps has not

provided upstream fish passage at Albeni Falls Dam within 5 years of the Effective Date, the Tribe may use the Reserved Fund for any authorized purpose under this subsection.

If, on the date payments are due under subsection 5.4 in years 6-9 of this OLSA, (a) efforts to secure upstream fish passage at Albeni Falls Dam have not been successful due to the limited amount of non-federal funds available; (b) a timeline for construction of upstream fish passage at Albeni Falls Dam is described in a biological opinion; and (c) the Corps is making a good faith effort to secure upstream fish passage at Albeni Falls Dam, the Tribe shall continue to maintain the Reserved Fund, including any monies transferred by the PUD to the Tribe pursuant to subsection 5.3, and will endeavor to contribute additional Watershed Program funds to the Reserved Fund due to the importance of securing upstream fish passage at Albeni Falls Dam. The Tribe may use the Reserved Fund for any authorized purpose under this subsection if any of the conditions above are not met after year 5 or upstream fish passage at Albeni Falls Dam has not been provided within 10 years of the Effective Date.

The Tribe's second priority for the Watershed Program shall be projects that are most likely to yield water temperature benefits as measured within the Project boundary.

- 5.7. Annual Reports.** By January 31 of each year of this OLSA, the Tribe shall provide the PUD with a written annual report (similar in form and substance to Attachment D) summarizing the activities undertaken and funds expended for each authorized purpose under the Watershed Program during the preceding calendar year. Within the same timeframe the Tribe shall provide the Technical Committee with a similar report summarizing activities undertaken within each authorized purpose of the Watershed Program for the calendar year. The PUD shall not request, nor shall the Tribe be required to provide, sensitive information not related to the subject matter of this OLSA. The PUD shall notify the Tribe if it has any concerns about the annual report within 30 days of receipt. The Tribe shall make a good faith effort to address any concerns that are within the scope of what the Tribe is required to provide under this subsection, and shall provide the PUD with a revised annual report within 30 days of receiving notice of the PUD's concerns. The revised annual report shall be considered final unless the PUD initiates arbitration pursuant to the paragraph below. If the PUD does not initiate arbitration within 30 days of receiving the revised annual report, the PUD shall waive such right as well as all future claims that the Tribe has mismanaged funds during the preceding calendar year.

In the event that: (1) the Tribe does not provide a written annual report to the PUD by the January 31 deadline; or (2) the PUD reasonably believes, based on the content of or an omission from the revised annual report provided by the Tribe pursuant to the paragraph above, that the Tribe has managed or expended Watershed Program funds in a grossly negligent manner, the PUD shall have the right to initiate arbitration under subsection 8.3. The PUD shall have the right to suspend payments due under subsection 5.4 until the arbitration is completed, and any such suspension shall not constitute a material breach under subsection 4.4. If the arbitrator finds that the Tribe

managed or expended Watershed Program funds in a grossly negligent manner, the PUD may treat that as a finding of material breach and terminate this OLSA under subsection 4.2.

If the Washington State Auditor requests information from the PUD concerning the Tribe's use of funds provided by the PUD under this Section, and if that information has not been provided by the Tribe in its annual report pursuant to the preceding paragraph, the PUD shall provide the Tribe with a copy of the Washington State Auditor's request for information. The Tribe shall cooperate with the PUD to timely respond to the Washington State Auditor's request unless the Tribe concludes in good faith that to do so would harm the Tribe's sovereign interests, in which case the PUD shall have the right to initiate dispute resolution under Section 8 to determine whether such conclusion was made in good faith. The PUD shall have the right to suspend payments during the pendency of the dispute resolution process, and any suspension based on a good faith belief that such suspension is justified shall not constitute a material breach under subsection 4.4. Nothing in this subsection, including the requirement to cooperate in responding to information requests from the State Auditor, shall be construed as obligating the Tribe to adhere to any particular state government audit standards.

If the arbitrator finds that the PUD's suspension of payment under this subsection was not made in good faith, the PUD shall pay the Tribe the balance due up to that date under subsection 5.4 and the Tribe's reasonable attorney fees. The Tribe may also treat such a finding as a material breach and terminate this OLSA under subsection 4.2.

SECTION 6: FISH PASSAGE DEFERRAL AT CCPP

- 6.1. Background: PUD's Obligation Under License Regarding CCPP Fish Passage.** Under sections 4(e) and 18 of the FPA, 16 U.S.C. §§ 797(e) and 811, respectively, Interior prescribed upstream and downstream fish passage at the CCPP as a condition of the License. 2009 Settlement Agreement, Appendix C at pages 21-33, incorporated into the License at 130 FERC ¶ 62,148, ¶¶ 64,414-64,421 (2010).
- 6.2. Modification of PUD Obligations under Amended Settlement Agreement.** Under the Amended Settlement Agreement, Interior has agreed, with the Tribe's support, to refrain from exercising its authority under FPA sections 4(e) and 18 to require fish passage at the CCPP for the term of the License (including any annual licenses thereafter). The purpose of this modification is to reallocate PUD resources to alternate conservation measures that will more timely and effectively mitigate Project effects than would upstream and downstream fish passage at the CCPP. These measures shall be performed through a Conservation Program established by the Tribe and funded by the PUD.
- 6.3. Conservation Program Establishment and Purpose.** The Tribe shall establish a written Conservation Program within 180 days of the Effective Date to mitigate Project effects in lieu of upstream and downstream fish passage at the CCPP. The

purpose of this program is to provide the Tribe with options for improving harvest opportunities, and to protect access to and use of natural resources of importance to the Tribe through the measures identified in subsection 6.5.

- 6.4. Conservation Program Funding.** The PUD shall contribute \$20 million to the Conservation Program established by the Tribe under subsection 6.3. This contribution shall be prorated into 20 consecutive annual installments of \$1 million, the first of which shall be due within 60 days of the Effective Date. Subsequent payments shall be due on the anniversary of the Effective Date for each of the next 19 years. The PUD's requirements regarding contributions to the Conservation Program are in addition to, and separate from, its obligations to contribute funding to the Watershed Program as discussed in subsection 5.4, above.
- 6.5. Uses of Conservation Program Funds.** The Tribe shall only use funds dedicated to the Conservation Program for the following purposes:
- (a) Capital improvements, operations, and maintenance of the Kalispel Tribe Fish Hatchery;
 - (b) Fish passage and fish management (e.g. non-native fish control and Target Fish Species supplementation);
 - (c) Land acquisition to provide enhanced harvest opportunities for members of the Tribe;
 - (d) Provision of low cost fishing and hunting opportunities for members of the Tribe;
 - (e) Stream and/or habitat restoration efforts that are complementary to the PUD's efforts toward fulfillment of the License conditions;
 - (f) Natural resource enhancement and protection efforts;
 - (g) Water temperature abatement; and
 - (h) Reasonable planning and administration of the Conservation Program.

In planning and implementing Conservation Program projects, the Tribe shall prioritize projects that are most likely to yield water temperature benefits as measured within the Project boundary.

- 6.6. Annual Reports.** By January 31 of each year of this OLSA, the Tribe shall provide the PUD with a written annual report (similar in form and substance to Attachment D) summarizing the activities undertaken and funds expended for each authorized purpose under the Conservation Program during the preceding calendar year. Within the same timeframe, the Tribe shall provide the Technical Committee with a similar report summarizing activities undertaken within each authorized purpose of the Conservation Program (subsection 6.5) for the calendar year. The PUD shall not

request, nor shall the Tribe be required to provide, sensitive information not related to the subject matter of this OLSA. The PUD shall notify the Tribe if it has any concerns about the annual report within 30 days of receipt. The Tribe shall make a good faith effort to address any concerns that are within the scope of what the Tribe is required to provide under this subsection, and shall provide the PUD with a revised annual report within 30 days of receiving notice of the PUD's concerns. The revised annual report shall be considered final unless the PUD initiates arbitration pursuant to the paragraph below. If the PUD does not initiate arbitration within 30 days of receiving the revised annual report, the PUD shall waive such right as well as all future claims that the Tribe has mismanaged funds during the preceding calendar year.

In the event that: (1) the Tribe does not provide a written annual report to the PUD by the January 31 deadline; or (2) the PUD reasonably believes, based on the content of or an omission from the revised annual report provided by the Tribe pursuant to the paragraph above, that the Tribe has managed or expended Conservation Program funds in a grossly negligent manner, the PUD shall have the right to initiate arbitration under subsection 8.3. The PUD shall have the right to suspend payments due under subsection 6.4 until the arbitration is completed, and any such suspension shall not constitute a material breach under subsection 4.4. If the arbitrator finds that the Tribe managed or expended Conservation Program funds in a grossly negligent manner, the PUD may treat that as a finding of material breach and terminate this OLSA under subsection 4.2.

If the Washington State Auditor requests information from the PUD concerning the Tribe's use of funds provided by the PUD under this Section, and if that information has not been provided by the Tribe in its annual report pursuant to the preceding paragraph, the PUD shall provide the Tribe with a copy of the Washington State Auditor's request for information. The Tribe shall cooperate with the PUD to timely respond to the Washington State Auditor's request unless the Tribe concludes in good faith that to do so would harm the Tribe's sovereign interests, in which case the PUD shall have the right to initiate dispute resolution under Section 8 to determine whether such conclusion was made in good faith. The PUD shall have the right to suspend payments during the pendency of the dispute resolution process, and any suspension based on a good faith belief that such suspension is justified shall not constitute a material breach under subsection 4.4. Nothing in this subsection, including the requirement to cooperate in responding to information requests from the State Auditor, shall be construed as obligating the Tribe to adhere to any particular state government audit standards.

If the arbitrator finds that the PUD's suspension of payment under this subsection was not made in good faith, the PUD shall pay the Tribe the balance due up to that date under subsection 6.4 and the Tribe's reasonable attorney fees. The Tribe may also treat such a finding as a material breach and terminate this OLSA under subsection 4.2.

SECTION 7: WATER QUALITY COMPLIANCE

7.1. Resolution of All Water Quality Issues. The PUD and Tribe intend by this OLSA to resolve all current issues between the PUD and Tribe related to the PUD's compliance with State, Federal, and Tribal water quality laws and regulations. Resolution of these issues shall occur through a combination of actions performed by the Tribe with Watershed and Conservation Program funding provided by the PUD, as well as the additional commitments described below.

7.2. Finalization of Pend Oreille Temperature TMDL and Temperature Attainment Plan. Within 60 days after the Effective Date, the Tribe shall:

- (a) notify the EPA through Attachment E that it supports EPA approval of the Pend Oreille Temperature TMDL without amendment; and
- (b) notify Ecology through Attachment F that it supports approval of the proposed Temperature Attainment Plan ("TAP") for the Project (attached to this OLSA as Attachment G), pursuant to the Pend Oreille Temperature TMDL, and that it does not support inclusion of any other "reasonable and feasible improvements" under WAC 173-201A-510(5)(b) with respect to temperature beyond those described in that Attachment.

If the Tribe completes requirements (a) and (b) above and EPA approves the Pend Oreille Temperature TMDL, the PUD shall contribute \$3 million to the Tribe's Watershed Program. This contribution shall be prorated into 10 consecutive annual payments of \$300,000, and payments shall be due at the time of and in addition to the Watershed Program payments under subsection 5.4. If EPA approves the Pend Oreille Temperature TMDL, the PUD shall also, within 60 days after EPA's approval, move for voluntary dismissal of its pending appeal of the Pend Oreille Temperature TMDL before the Superior Court of Thurston County, Washington, Cause No. 11-2-01027-6.

7.3. Amendment of License and Approval of a Plan for Pump Operations ("PPO") to Align with Revised Plan E. Within 60 days after the Effective Date, the Tribe shall

- (a) Notify the EPA through Attachment H that it supports EPA approval of a PPO fully consistent with Revised Plan E, and that it specifically supports EPA approval of the proposed PPO attached as Attachment B to this OLSA; and
- (b) Notify FERC through Attachment I that it supports amendment of the License to incorporate Revised Plan E, replacing in its entirety the existing Plan E, Appendix F to the 2005 License Order, 112 FERC ¶ 61,055, 61,488 (2005).

If FERC approves of the License amendment without material modification to Appendix F and if the EPA approves a PPO fully consistent with Revised Plan E, the PUD shall join with the Tribe and EPA in a motion for dismissal with prejudice of the PUD's pending appeal of the CCPP Section 401 Certification before the U.S. District Court for the District of Columbia, case no. 1:04cv2224 (RCL), and shall contribute

an additional \$3 million to the Tribe's Conservation Program. This contribution shall be prorated into ten consecutive annual payments of \$300,000, and payments shall be due at the time of and in addition to Conservation Program payments under subsection 6.4.

- 7.4. Revised Plan E.** In recognition of practical and legal difficulties attendant to revising Revised Plan E, the PUD and Tribe agree that this OLSA shall not require the PUD to take any action inconsistent with, or that would require renegotiation of, Revised Plan E. The PUD, however, shall not be limited in its authority to renegotiate or modify Revised Plan E with the parties thereto at its own discretion. If any such modifications to Revised Plan E result in significant impairments to water quality, the Tribe may suspend its forbearance obligation under subsection 7.7 in order to seek reasonable mitigation.
- 7.5. Power Lake.** After occurrence of the conditions for payment under subsection 7.3, the PUD, in consultation with the Tribe and subject to the limitations of Revised Plan E, shall attempt to operate Power Lake Dam to reduce downstream water temperatures during critical warming periods.
- 7.6. Calispell Creek Pumping Plant Operations.** After occurrence of the conditions for payment under subsection 7.3, the PUD, in consultation with the Tribe and subject to the limitations of Revised Plan E, shall attempt to operate the CCPP to reduce water temperature in Calispell Creek. This will be accomplished by maintaining continuous flow at all times and matching incoming flows while maintaining water elevation as specified in Revised Plan E (and as anticipated in the PPO) during critical warming periods.
- 7.7. Calispell Creek Pumping Plant Forbearance.** The Tribe shall not seek to regulate or require mitigation of Calispell Creek water quality related to CCPP operations by the PUD for a period of 10 years from the Effective Date. The Tribe also shall not, for a period of 10 years from the Effective Date, seek or support any amendments to the CCPP Section 401 Certification or to Ecology's amended CWA section 401 water quality certification for the Project, Ecology Order No. 02WQER-5121A-01, dated February 21, 2003.
- 7.8. Shared Risk of Water Quality Cost Overruns.** The PUD and Tribe intend that the activities listed in the proposed TAP, Attachment G to this OLSA; the Watershed Program as described in Section 5 of this OLSA; the Conservation Program as described in Section 6 of this OLSA; and operational commitments at the CCPP (subsection 7.6) and Power Lake Dam (subsection 7.5), without more, shall meet the PUD's obligations under the Pend Oreille Temperature TMDL (including the TAP to be approved by Ecology for the Project). The PUD and Tribe also intend that the actions required by the CCPP Section 401 Certification, Revised Plan E, and the funding commitments in this OLSA, without more, shall meet the PUD's water quality obligations with respect to operation of the CCPP.

In any year during the 10-year payment terms under subsections 7.2 and 7.3 in which the PUD incurs water quality compliance costs related to CCPP operations or the Pend Oreille Temperature TMDL (including the costs of obtaining approval of and implementing the TAP) beyond the commitments listed in the previous paragraph of this subsection, the PUD may deduct such additional compliance costs first from the next annual payment due under subsection 7.3 and then from the next annual payment due under subsection 7.2. However, those payments shall not be less than zero and the PUD shall be responsible for any remaining compliance costs in any year in which the payments under subsections 7.2 and 7.3 are reduced to zero. For example, if the PUD is required to implement an additional “reasonable and feasible improvement” that costs \$1 million within a year, the PUD would not make payments to the Tribe of \$600,000 in that year pursuant to subsections 7.2 and 7.3, and would instead use that \$600,000 plus an additional \$400,000 of PUD money to pay for the additional reasonable and feasible improvement.

If the PUD incurs water quality compliance costs after the 10-year payment periods under subsections 7.2 and 7.3, the Tribe shall have no obligation to contribute any funds received from the PUD under this OLSA to offset such compliance costs. However, the Tribe shall make a good-faith effort to expedite completion of the Tribe’s high-priority conservation actions that help satisfy the PUD’s water quality-related obligations, and the Tribe shall support PUD efforts to obtain regulatory credit toward such obligations for any conservation work performed by the Tribe with funds provided under this OLSA. The Tribe also agrees not to impose, support, or otherwise encourage the imposition of a fish passage requirement at the CCPP at the PUD’s expense for the duration of this OLSA by any means, including but not limited to the imposition of such a requirement pursuant to a certification issued under CWA section 401 or an amendment to the License pursuant to the Federal Power Act. Nothing in this subsection shall limit the Tribe from advocating or seeking to construct fish passage at CCPP without any use of PUD funds or resources.

SECTION 8: DISPUTE RESOLUTION

- 8.1. Waiver of Sovereign Immunity.** The Tribe, through the waiver of sovereign immunity approved by the Kalispel Business Committee and attached as Attachment J to this OLSA, expressly waives any claim or assertion of sovereign immunity for the limited purposes of (a) participating in arbitration with the PUD under subsection 8.3, (b) a lawsuit in which the PUD seeks to compel such arbitration in the event of the Tribe’s refusal to arbitrate, (c) a lawsuit to enter and enforce judgment on an arbitrator’s award under subsection 8.3, or (d) a lawsuit in which the PUD alleges that the arbitration award under subsection 8.3 exceeded the scope of the arbitrator’s authority under the Revised Code of Washington. Revocation or amendment of this sovereign immunity waiver without the prior consent of the PUD shall constitute a material breach of this OLSA and be grounds for termination under subsection 4.2.

The Tribe expressly consents to suit in the courts of Washington State solely for the limited purpose described above. The Tribe also agrees not to assert that the Tribe or its courts have jurisdiction over, or that tribal remedies must be exhausted with respect to, any proceeding for which the Tribe has waived its sovereign immunity under this subsection.

To the extent the PUD now or ever has any claim or assertion of sovereign immunity regarding the arbitration and legal review process permitted in subsection 8.3, the PUD expressly waives it with respect to that process.

8.2. Informal Dispute Resolution. If a dispute arises out of or relates to this OLSA, the PUD and Tribe agree to first use their best efforts to cooperatively resolve such dispute. If a dispute cannot be resolved within 30 days despite the best efforts of both PUD and Tribe, either party may proceed to subsection 8.3 (Arbitration and Venue).

8.3. Arbitration and Venue. If the PUD and Tribe are unable to settle a dispute arising under this OLSA, it is hereby agreed that the dispute shall then be referred to a mutually acceptable arbitrator, or if one cannot be agreed upon, to the nearest office of Washington Arbitration & Mediation Service (“WAMS”) for resolution within ninety (90) days of a written request for arbitration submitted by either party. The PUD and Tribe agree that if they cannot agree on a mutually acceptable arbitrator within ten (10) business days of the request for arbitration by either party, the dispute will be referred to WAMS (or another neutral entity if WAMS no longer exists) for preparation of a Strike List for arbitrator selection. All arbitration proceedings shall be conducted in accordance with the Rules of Arbitration of WAMS (or the applicable neutral entity if WAMS no longer exists) or applicable administrative service, RCW 7.04A, and reasonable discovery provisions as may be stipulated or ordered. The arbitrator’s decision shall be final and binding and judgment may be entered thereon, with all remedies otherwise available in court (subject to subsection 8.5) also available in arbitration. If the arbitrator’s decision conflicts with the License or Amended Settlement Agreement, the terms of the License or Amended Settlement Agreement shall control. Except as provided in subsections 5.7 and 6.6 of this OLSA, the PUD and Tribe agree to equally share the costs of the arbitration process, with each party responsible for paying its own attorneys’ fees.

The PUD and Tribe agree that the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this OLSA that are not affected by the dispute.

The sole and exclusive jurisdiction and venue of any legal action shall be in the Pend Oreille County Superior Court in and for the State of Washington.

8.4. Choice of Laws. This OLSA shall be governed by, and construed, interpreted, and enforced in accordance with, the substantive law of the State of Washington (without reference to any principles of conflicts of laws).

- 8.5. Limitation on Remedies.** The PUD and Tribe recognize the potential magnitude of consequential, incidental, or punitive damages that might arise from this OLSA and desire to eliminate the risks each might face were such categories of damages not excluded. In no event shall either party be liable to the other or a third party for any potential consequential, incidental, or punitive damages.
- 8.6. Means of Notification.** Any notice, demand, or request related to this OLSA shall be in writing and shall be deemed properly served, given, or made if delivered in person or sent by electronic mail or by acknowledged delivery, or sent by registered or certified mail, postage prepaid to the person specified below. The PUD and Tribe may modify the notification information below by giving the other 14 days written notice of the change.

To the Tribe:	To the PUD:
Kalispel Tribe of Indians P.O. Box 39 Usk, WA 99180 Attention: Executive Director of Natural Resources Phone: (509) 445-1147 Fax: (509) 445-1705	Public Utility District No. 1 of Pend Oreille County P.O. Box 190 Newport, WA 99156-0190 Attention: General Manager Phone: (509) 447-3137 Fax: (509) 447-5824

SECTION 9: ASSIGNMENT OF OLSA

Neither this OLSA nor any right, interest, or obligation hereunder may be assigned, sold, transferred, or conveyed by either party without the prior written consent of the other, which party may withhold its consent in its sole discretion, and any attempted assignment not in compliance with this Section shall be void, except assignments and transfers that occur by operation of law. No assignment or transfer of this OLSA, or any interest herein, shall relieve the PUD and/or Tribe of any obligation incurred hereunder prior to such assignment.

SECTION 10: MISCELLANEOUS

- 10.1. Entire Agreement.** This OLSA, in conjunction with the 2009 Settlement Agreement as amended by the Amended Settlement Agreement, contains the complete and exclusive agreement of the PUD and the Tribe with respect to the subject matter thereof, and supersedes all discussions, negotiations, representations, warranties, commitments, offers, agreements in principle, and other writings prior to the Effective Date of this OLSA, with respect to its subject matter.

10.2. Modification. This OLSA may be amended or modified only by written consent of both the PUD and Tribe.

10.3. Expansion or Avoidance of License Obligations. The Tribe shall not invoke, support the invocation of, or rely upon any reopener clause set forth in the License for the purposes of obtaining additional obligations under the License relating to this OLSA. Any such attempt to reopen the License shall constitute a material breach of this OLSA, and shall suspend all PUD obligations under this OLSA, including all payments to the Tribe. This subsection shall not apply to the Tribe's invocation of a CWA section 401 certification reopener following the 10-year deferral period in subsection 7.7.

The PUD shall not take or support any actions materially inconsistent with this OLSA. Any such action shall constitute a material breach of this OLSA, shall suspend all of the Tribe's obligations under this OLSA, and may release Interior's fish passage deferrals at Box Canyon Dam and the CCPP.

If either party believes the other is in material breach of this subsection, it may notify the other party in writing of the claimed material breach, the nature of the breach, whether the notifying party believes the breach can be cured, and if so, what actions by the breaching party would cure the breach. If, after such notice, the parties cannot agree that a material breach has been cured within a reasonable time, either party shall have the right to initiate dispute resolution under Section 8. Following completion of the dispute resolution process, if the arbitrator finds that there has been an uncured material breach, the non-breaching party may terminate this OLSA.

10.4. Further Assurances. Subject to the terms and conditions of this OLSA, the PUD and Tribe shall each use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper, and advisable under applicable law to consummate and make effective this OLSA, including efforts to obtain all required consents and approvals. Neither party shall, without the prior written consent of the other, take or fail to take any action that would reasonably be expected to prevent or materially impede, interfere with, or delay this OLSA. From time to time after the execution of this OLSA by both the PUD and Tribe, whether prior to or after the execution and without further consideration, the PUD and Tribe shall, each at its own expense, execute and deliver such documents and provide such information to the other as such party may reasonably request in order to accomplish, consummate, and perform its respective obligations under this OLSA.

10.5. Severability. If any provision of this OLSA is held to be illegal, invalid, or unenforceable under any present or future law, and if the rights or obligations of either party under this OLSA will not be materially and adversely affected thereby, (i) such provision shall be fully severable, (ii) this OLSA shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part thereof, (iii) the remaining provisions of this OLSA shall remain in full force and effect and will not be affected by the illegal, invalid, or unenforceable provision or by its severance herefrom, and (iv) in lieu of such illegal, invalid, or unenforceable

- provision, the PUD and Tribe shall, in good faith, negotiate a mutually acceptable, legal, valid, and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as possible, and shall promptly take all actions necessary to amend this OLSA to include the mutually acceptable, legal, valid, and enforceable provision.
- 10.6. Waivers.** Except as otherwise provided herein, no provision of this OLSA may be waived except in writing. No failure by the PUD or Tribe to exercise, and no delay in exercising short of a statutory limitation, any right, power, or remedy under this OLSA shall operate as a waiver thereof. Any waiver at any time by a party of its right with respect to this OLSA, or with respect to any other matter arising in connection herewith, shall not be deemed a waiver with respect to any other matter.
- 10.7. No Third-Party Beneficiaries.** This OLSA shall not create any right or interest in any member of the public or any other entity as a third-party beneficiary and shall not authorize any third party to maintain a suit at law or equity pursuant to this OLSA. The duties, obligations, and responsibilities of the PUD and Tribe with respect to third parties shall remain as imposed under applicable law.
- 10.8. Parties Bound.** This OLSA is binding upon the PUD and Tribe and their successors and assigns. In the event of a change in ownership of the Project and transfer of the License to the new owner, the PUD shall have no further obligation under the License or this OLSA. In the event of a voluntary change of ownership, the PUD agrees that the acceptance of an assignment of this OLSA by the new owner shall be a condition of the transaction. In the event of an involuntary change of ownership, the PUD shall offer to assign this OLSA to the new owner.
- 10.9. No Reliance.** The PUD and Tribe acknowledge that in entering into this OLSA, each has not relied on any statement, representation, or promise of the other or of any other person or entity, except as expressly stated in this OLSA.
- 10.10. Assumption of Risk.** In entering into this OLSA, the PUD and Tribe each assume the risk of any mistake of fact or law, and if either or both subsequently discovers that any understanding of the facts or the law was incorrect, neither party shall be entitled to, nor shall attempt to, set aside this OLSA or any portion hereof.
- 10.11. Waiver of Defenses.** The PUD and Tribe release each other from any and all claims relating to the formation and negotiation of this OLSA, including reformation, rescission, mistake of fact, or mistake of law. The PUD and Tribe further agree that they waive and will not raise in any court, administrative body, or other tribunal any claim that avoids or defends against the enforcement of this OLSA other than the express conditions set forth in this OLSA.
- 10.12. Independent Counsel.** The PUD and Tribe acknowledge that they have been represented by independent counsel in connection with this OLSA, they fully understand the terms of this OLSA, and they voluntarily agree to those terms for the

purposes of making a full compromise and settlement of the subject matter of this OLSA.

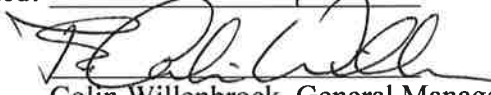
10.13. Headings. The headings used for the Sections and subsections herein are for convenience and reference purposes only, and shall in no way affect the meaning or interpretation of the provisions of this OLSA.

10.14. Legal Authority. The PUD and Tribe each represents and warrants to the other that it has full authority and power to enter into this OLSA, that its representatives who sign below are duly authorized by it to enter into this OLSA, and that nothing herein violates any law, regulation, judicial or regulatory order, or agreement applicable to such warranting party.

10.15. Agreement Execution.

IN WITNESS WHEREOF, the PUD and Tribe have caused this OLSA to be executed by their properly authorized officers as of the date last written below.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

Dated: March 18, 2019
By: 
Colin Willenbrock, General Manager

KALISPEL TRIBE OF INDIANS

Dated: _____

By: _____
Glen Nenema, Chairman

purposes of making a full compromise and settlement of the subject matter of this OLSA.

10.13. Headings. The headings used for the Sections and subsections herein are for convenience and reference purposes only, and shall in no way affect the meaning or interpretation of the provisions of this OLSA.

10.14. Legal Authority. The PUD and Tribe each represents and warrants to the other that it has full authority and power to enter into this OLSA, that its representatives who sign below are duly authorized by it to enter into this OLSA, and that nothing herein violates any law, regulation, judicial or regulatory order, or agreement applicable to such warranting party.

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IN WITNESS WHEREOF, the PUD and Tribe have caused this OLSA to be executed by their properly authorized officers as of the date last written below.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

Dated: _____

By: _____
Colin Willenbrock, General Manager

KALISPEL TRIBE OF INDIANS

Dated: 3-19-19

By: Glen Nenema
Glen Nenema, Chairman

ATTACHMENT A
SUMMARY OF FINANCIAL OBLIGATIONS

ATTACHMENT A
SUMMARY OF FINANCIAL OBLIGATIONS

This Attachment is included for the convenience of the PUD and Tribe only and shall have no legal effect. In case of any inconsistency between this Attachment and the OLSA, the language of the OLSA shall control.

Payment for	Year(s) due	Amount	Conditions
Albeni Falls Fish Passage (§ 5.3)	Upon occurrence of conditions and request of Corps and Tribe	\$10 million (within 30 days of Tribe's request)	License-term abeyance of downstream fish passage at Box Canyon Dam
Watershed Program (§ 5.4)	Years 1-25 of OLSA	\$36 million (\$1 million for payments 1-3, \$1.5 million for payments 4-25)	License-term abeyance of downstream fish passage at Box Canyon Dam
Conservation Program (§ 6.4)	Years 1-20 of OLSA	\$20 million (\$1 million per year)	License-term abeyance of upstream and downstream fish passage at CCPP
PO River Temperature TMDL (§ 7.2)	10 consecutive years from TMDL approval	\$3 million (\$300k added to Watershed Program payment, less excess PUD costs)	Tribal letter of support to EPA for approval of TMDL and subsequent EPA approval
Plan for Pump Operations (§ 7.3)	10 consecutive years from FERC approval of Revised Plan E	\$3 million (\$300k added to Conservation Program payment, less excess PUD costs)	Revised Plan E sufficient for CCPP water quality compliance for 10-year period

ATTACHMENT B

PLAN FOR PUMP OPERATIONS AT THE CALISPELL CREEK PUMPING PLANT

Box Canyon Hydroelectric Project FERC No. 2042
Plan for Pump Operations at the Calispell Creek Pumping Plant

Filed by
Public Utility District No.1 of Pend Oreille County



March 2019

Plan for Pump Operations at the Calispell Creek Pumping Plant

The following Plan for Pump Operations ("PPO") is submitted by the Public Utility District No.1 of Pend Oreille County ("District"), licensee of the Box Canyon Hydroelectric Project (FERC No. 2042 ("Project")), pursuant to Paragraph 14.1 of the Clean Water Act Section 401 Certification ("EPA 401 Certification") for the Project, which was issued by the U.S. Environmental Protection Agency ("EPA") on January 2, 2003. The EPA 401 Certification applies to the operation of the Calispell Creek Pumping Plant ("CCPP"), project works associated with the Box Canyon Project. Submission of this PPO satisfies the District's obligations under Paragraph 14.1 of the EPA 401 Certification. Compliance with the terms of this PPO, as approved by EPA, shall constitute compliance with Paragraphs 13.3 and 13.4 and Subparagraph 14.1.7 of the EPA 401 Certification.

This plan provides for two existing pumps, each of 65 cfs capacity (100 horse power pumps), and four existing pumps, each of >100 cfs capacity (two pumps at 250 horse power and two pumps at 300 horse power), at the dike at Cusick. All 6 pumps are equipped with Variable Frequency Drives (VFDs) capable of operating from full speed (66hz for the 250/300 hp pumps and 70hz for the 100 hp pumps), down to 50% speed (33hz and 35hz respectively), to provide continuous flow at a variety of water surface elevations and stream flows. Individual pump capacity will be managed to provide continuous outflow to match Calispell Creek inflow at the pumping station and maintain an upper water surface elevation of 2026.0 plus or minus 3 tenths of a foot for as much of the year as possible but especially during times when creek temperatures are expected to be at or above water quality standards. Due to the installation of the VFDs the total peak pump capacity has increased more than 10% over its previous capacity and is greater than the normal winter runoff, but there still may be very high flow times when the elevation of Calispell Creek water will be higher than 2026.0, even with all 6 pumps running. If that occurs, operation will proceed according to items 1 through 4 below, and Revised Plan E.

The District shall operate the Calispell Creek Pumping Plant as follows:

1. At least one pump will run at all times using a variable speed drive to maintain a constant flow and constant target elevation of 2026.0 plus or minus 3 tenths of a foot except for such times that flows exceed the capacity of all 6 pumps or to allow for maintenance and to accommodate electric or mechanical outages.
2. At such a time when flows have increased above the capacity for all 6 pumps to maintain elevation 2026, the elevation will increase as necessary for the pumps to continue to match incoming flows until Calispell Creek flows exceed the maximum pump capacity of all 6 pumps (this only occurs during peak winter runoff).
3. During those times when Calispell Creek flows exceed the maximum pump capacity of all 6 pumps (winter runoff) the pumps will continue to operate at maximum output.
4. Subject to conditions in Revised Plan E and in addition to operations described in items 1 through 3 above, when the actual elevation of the Pend Oreille River at Cusick is lower than the actual elevation of Calispell Creek at the dike, the District may, at its option, open the gates through the dike and thereby allow Calispell Creek to flow downstream into the Pend Oreille River.

ATTACHMENT C
REVISED PLAN E

REVISED PLAN E
For Operation of Calispell Creek Pumps

This Agreement is entered into by and between Public Utility District No. 1 of Pend Oreille County (PUD) of Newport, WA and Diking District No. 2 (Diking District) of Usk, WA, (the Parties); both municipal organizations organized under the laws of the State of Washington, and shall be effective on the date written below.

This is the entire Agreement between the Parties, and this Agreement supercedes any and all previous agreements, written or verbal, between the Parties concerning the operation of the Calispell Creek Pumping Plant.

All elevations referred to in this plan refer to the elevation on the USGS Cusick gauge at Cusick at river mile 70.1.

This Revised Plan E has provisions for installation of new pumps by the PUD and modification of pump operations to accommodate the requirements of the new FERC License for the Box Canyon Project, which include facilities at Calispell Creek and the requirements of the EPA Section 401 Water Quality Certification for the Box Canyon Hydroelectric Project.

The PUD agrees to operate the Calispell Creek Pumping Plant in coordination with the Box Canyon Hydroelectric Project as follows:

- (1) While the dike gates are closed, and river flows are below 70,000 cfs, Box Canyon Dam may maintain 2.0 foot backwater (above natural) at Albeni Falls Dam. At 70,000 cfs, an elevation of 2041 is reached at Cusick. This elevation (2041.0) results from a flow of about 70,000 cfs with 2.0 foot of backwater at Albeni Falls, and is also the natural elevation for mean high water of approximately 90,000 cfs at Cusick. As flows further increase, this elevation shall not be exceeded if operation of gates at Box Canyon can prevent it, and it will be maintained as long as possible by opening the Box Canyon gates. After the flow exceeds 90,000 cfs, the Box Canyon plant will be out of production due to loss of head, and after it is out of production, the Box Canyon gates will be entirely removed, allowing the Pend Oreille to raise in its completely natural manner.
- (2) After the flood peak of the Pend Oreille has passed, and the river has receded in a natural manner to elevation 2041 at Cusick, this elevation will be held until 2.0 foot backwater is again reached at Albeni Falls at a flow of 70,000 cfs and then 2.0 foot of backwater will be maintained.

- (3) This plan provides two existing pumps, each of 65 cfs capacity, four existing pumps, each of 100 cfs capacity, and two new fish-friendly pumps planned to be operational by the date required in the FERC license each of 80 cfs capacity, at the dike at Cusick. These pumps will be set to operate automatically to maintain an approximate target elevation of between 2027.0 and 2028.0 from November 1 to May 31, in the Calispell inside the Diking District at Cusick. To achieve this, pumps will normally be set to start automatically at an elevation of 2028.0 and shut down automatically at elevation 2027.0, keeping the Calispell within this range until such time as the two new pumps become operational, the target will become elevation 2026.0 plus or minus 3 inches except for such times high flows exceed the capacity of the new pumps. After the new pumps become operational, at least one pump will run at all times using variable speed drive to maintain a constant flow and constant target elevation. This total pump capacity is more than the normal winter runoff, but there still may be very high flow times when the elevation of the Calispell water will be higher than 2028.0 (2026.0), even with all 8 pumps running. If that occurs, operation will be according to (4) below.

From June 1 to October 31, the pumps will be set to operate automatically to maintain an approximate elevation of between 2027.0 and 2027.5 until such time as the two new pumps become operational, at which point the target elevation will become elevation 2026.0 plus or minus 3 inches. To achieve this, until the new pumps are operational, pumps will normally be set to start automatically at an elevation of 2027.5 and shut down automatically at elevation 2027.0, keeping the Calispell within this range. After the new pumps are operational, at least one pump will run at all times using variable speed drive to maintain a constant flow and constant target elevation. There still may be high flow times when the elevation of the Calispell water will be higher than 2027.5 (or 2026.0); even with all 8 pumps running. If that occurs, operation will be according to (4) below.

The PUD agrees to indemnify the owners of land within the Diking District on Calispell River between the pumps and the Duck Club Dam for damages caused by the operation of the new pumps to hold the Calispell water below the 2027.0 elevation, including making revisions necessary to intake structures to ensure the landowners can continue to exercise their water rights on the Calispell. Matters in dispute regarding indemnification shall not be a basis for liquidated damages under (6) below.

- (4) Whenever the elevation of the Pend Oreille River reaches 2032.25, the natural elevation of the quantity of water flowing in the Pend Oreille shall be computed, (the natural elevation of 43,000 cfs being 2032.25), and pumping of Calispell water will be continued at the capacity of the pumps until the Calispell reaches

either 2032.25, if the Pend Oreille is flowing less than 43,000 cfs, or the natural elevation of the Pend Oreille is flowing 43,000 cfs, or more. The gates at Box Canyon Dam will begin to be opened no later than when the Calispell reaches 2031.75 or the natural elevation if above 2031.75. When the elevation of the Pend Oreille River equals the elevation of the Calispell, the dike gates shall then be opened and the Calispell allowed to flow out in its natural manner for such periods as it will continue to flow out. If the natural elevation of the Pend Oreille becomes such that flow is reversed in the Calispell, the dike gates shall be again closed and shall remain closed with the pumps operating while the natural elevation of the Pend Oreille is higher than that of the Calispell. "Natural elevation" is defined to mean the level at Cusick that the Pend Oreille River would reach if there were no gates installed at Box Canyon Dam at any particular flow.

- (5) After a flood condition, when the flow of the Pend Oreille River drops back down to approximately 43,000 cfs, which is equivalent to a natural elevation of 2032.5 at Cusick, or if the flow in the Calispell is such that the pumps are able to pump enough to lower the Calispell level, the dike gates will be closed, and the Calispell River water level will be pumped down to elevation 2027.0 and maintained at this elevation as described in (3) above.
- (6) The Parties agree that the elevations, dates and other operating criteria contained in Revised Plan E are essential conditions of this Agreement. The PUD assumes responsibility for all the maintenance and operation of the six (or eight) pumps at the Calispell Pumping Station and the maintenance of the culverts in the railroad dike at the mouth of the Calispell River that prevent flooding behind the dike during high water. The Parties further agree that if the PUD does not operate the Calispell Pumps in accordance with Revised Plan E, the Diking District will suffer loss and damages. As it is very difficult to establish the exact amount of damages in the event of noncompliance with Revised Plan E, the Parties agree that the following amounts are fair and equitable liquidated damages for noncompliance with Revised Plan E.
 - From March 15 to June 1 -- \$10,000 per day of noncompliance.
 - From June 2 to March 14 -- \$ 1,000 per day of noncompliance.

Should any noncompliance continue for more than 5 consecutive days, an additional amount of \$50,000 of liquidated damages shall be paid. For each 5 consecutive days of noncompliance, an additional \$50,000 of liquidated damages shall accrue. The PUD agrees to pay to the Diking District the above liquidated damages within 90 days of the beginning of any noncompliance event.

The Diking District agrees that the liquidated damages specified above will satisfy any and all damages incurred by the Diking District and that no additional claims of damages shall be made by the Diking District, except as is mentioned in the following paragraph. The Parties agree that the amount of these liquidated damages may be re-negotiated five years after the date of this Agreement, and once every five years after that, and that any new amounts of liquidated damages must be agreed upon by both Parties at that time, in writing, and shall be amended to this Agreement.

The Parties further agree that the liquidated damages specified above may not completely protect the Diking District from third party liabilities. Therefore, in the event of a non-compliance with Revised Plan E, the PUD agrees to reimburse the Diking District for any final judgement amount, awarded to a third party by an authorized Court, that is in excess of the liquidated damages specified above, as long as such judgement is based upon such non-compliance event. The PUD is not obligated to pay any judgement amounts that are less than the liquidated damages paid to the Diking District for the non-compliance event, or for any judgements against the Diking District that are not related to a Revised Plan E non-compliance event.

The Parties agree that the PUD will make its best effort to operate the Calispell Pumps in accordance with Revised Plan E. "Best efforts" is defined to include, but not be limited to, taking prompt action when it is necessary to start or stop pumps, opening gates at Box Canyon at maximum allowable rates, and performing any required maintenance work on the pumps promptly and expeditiously. The PUD is not responsible for noncompliance with Revised Plan E if such noncompliance is due to acts of God or other force majeure events that are not under the control of the PUD, such as floods, droughts, civil unrest, or war.


- (7) From time to time, the PUD may apply in advance in writing for permission and approval from the Diking District to modify or not fully comply with Revised Plan E for short periods of time due to maintenance of the pumps and dike or other operating needs or emergencies, and if approved in advance by the Diking District, no liquidated damages shall accrue or become payable during any such period if approved and accepted in advance by the Diking District.
- (8) Furthermore, from time to time, the Diking District may request to the PUD in writing short term modifications to the pump operations or Calispell Creek levels to facilitate dike maintenance activities, Calispell Lake operations, or specific agricultural needs of its members. The PUD shall use its best efforts to comply with all such written requests. It is agreed that no liquidated damages would

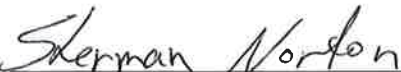
apply due to any such operational changes requested in writing by the Diking District. The Diking District agrees that all individual requests for short term modification of operating methods or levels made by its individual members will be made first to the Diking District by the members, and then by the Diking District to the PUD, so that both Parties are aware of all changes that might be in effect at any one time. To facilitate coordination of this Agreement and to provide for potential short term modifications to Revised Plan E, the Parties agree to meet annually during the first week of March to plan, discuss and possibly agree upon any modifications to Revised Plan E operations desired by either Party for the upcoming season.

- (9) For the first three years of this Agreement, in the month of September each year, the Parties shall meet and discuss operating procedures, communications, and the overall functioning of this Agreement, and propose any changes or modifications to the Agreement deemed desirable by either of the Parties. Any such proposed changes shall be negotiated in good faith by both Parties, and when consensus is reached, any changes shall be reduced to writing, signed by both Parties and amended to this Agreement. After three years, meetings will be held at five-year intervals, unless agreed upon by both parties that such five-year meetings are unnecessary.
- (10) This Agreement shall remain in force until such time as it is terminated by mutual agreement of the Parties in writing. Any changes or amendments to this Agreement shall be reduced to writing and signed by both Parties before any such changes are considered to be in effect.

Accepted By:
Diking District No. 2



Commissioner


Commissioner


Commissioner

3 - 20 - 13
Date

Accepted By:
Public Utility District No. 1
of Pend Oreille County

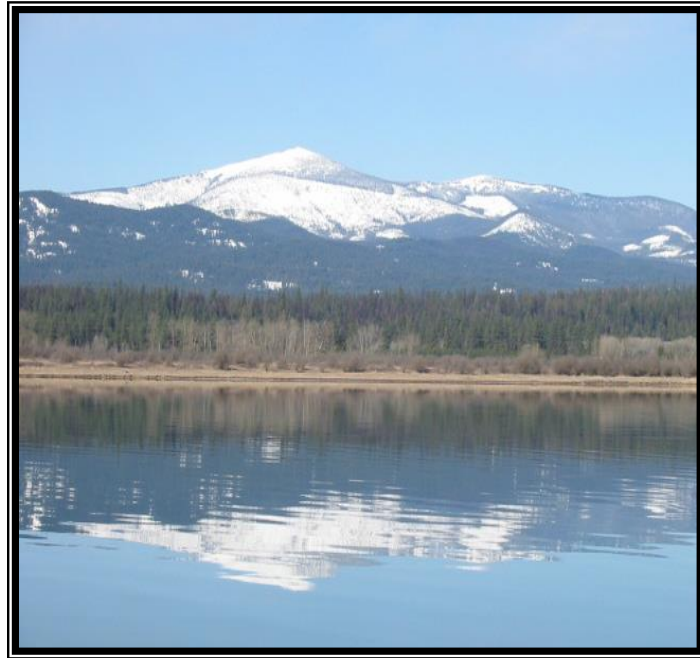

General Manager

March 5, 2013
Date

ATTACHMENT D

**EXAMPLE ANNUAL REPORT TEMPLATE FOR
WATERSHED AND CONSERVATION PROGRAMS**

Kalispel Tribe of Indians Watershed Program 20XX Annual Report



Report covers work performed from January - December 20XX

Prepared by
Kalispel Tribe's Natural Resources Department
P.O. Box 39, Usk, WA 99180

January 20XX+1

Introduction

The Kalispel Tribe of Indians (“Tribe”) is providing this Annual Report to Public Utility District No. 1 of Pend Oreille County (“PUD”) consistent with Section 5.7 of the two parties’ Off-License Settlement Agreement (“OLSA”), which became effective on [date]. The Annual Report includes an Income Statement outlining all revenue received and expenses incurred during the 20XX calendar year, as well as a Project Summary of all work performed with Watershed Program funds during this time period. The Project Summary categorizes this work by the most relevant authorized use under Section 5.6 of the OLSA, and explains how the work is consistent with the written Watershed Program established under subsection 5.5 of the OLSA and the Comprehensive Plan established under Section 6.1 of Appendix A to the Amended Settlement Agreement, [reference]. The map below highlights the location of each project performed.

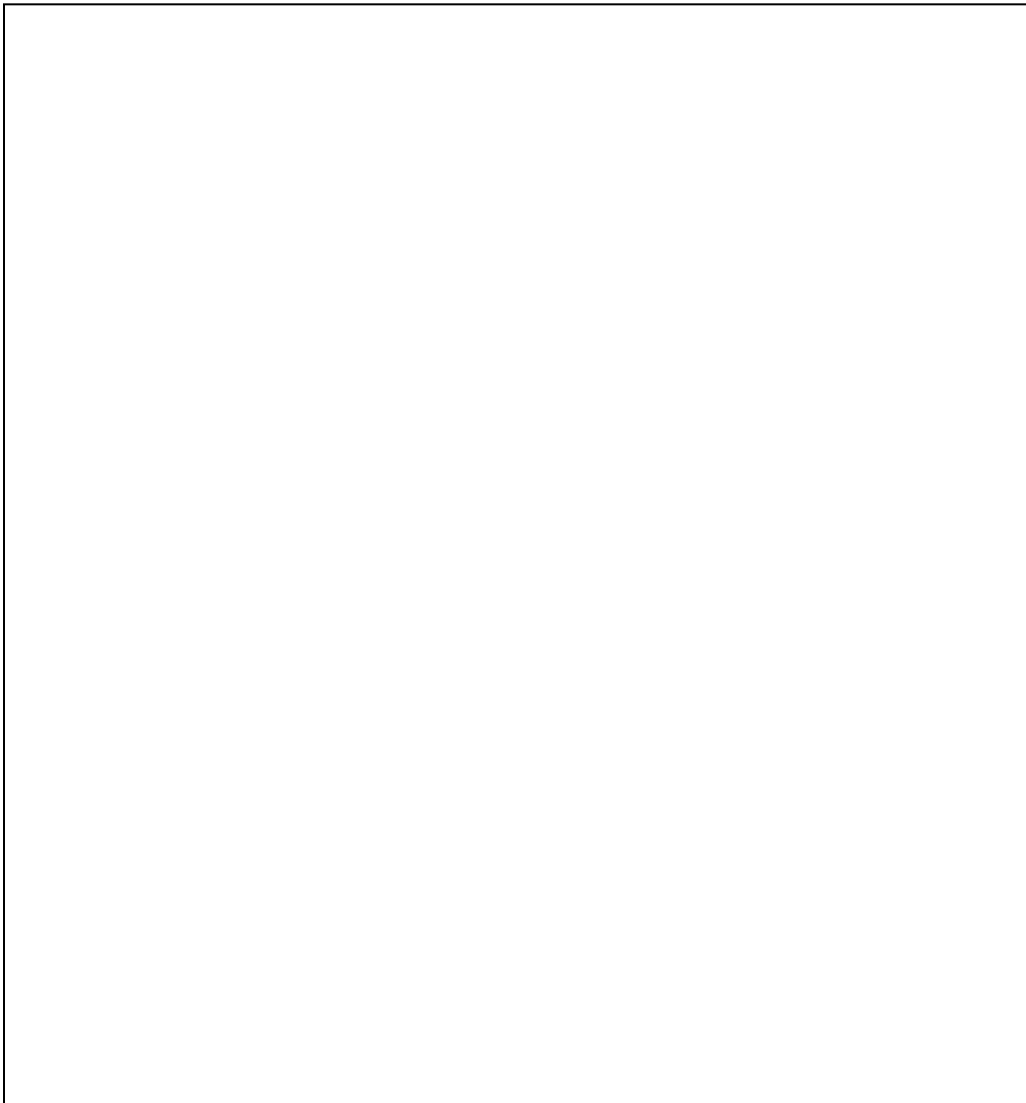


Figure 1: Location of Watershed Program Projects Performed in 20XX

Kalispel Tribe
Income Statement
FY2018

Account	Description	MTD 5/1/2018 5/31/2018	YTD Rev/Exp	Annual Budget	Variance	Account Code
0800 - 99-5100-xxxx-0800 Natural Resource Enhancement						
Revenues						
4200	Program Revenue	(8,573.65)	0.00	0.00	0.00	99-5100-4200
Total Revenues		<u>(8,573.65)</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	
Expenses						
6000	Salaries & Wages	0.00	23,958.64	110,231.00	86,272.36	99-5100-6000
6001	Overtime	0.00	133.75	0.00	(133.75)	99-5100-6001
6010	Fringe Benefits	0.00	5,206.50	32,256.00	27,049.50	99-5100-6010
6011	Fringe - Workers Comp	0.00	4.66	0.00	(4.66)	99-5100-6011
6012	Fringe - Employer Taxes	49.72	2,159.17	0.00	(2,159.17)	99-5100-6012
6017	Annual Leave Acc'd Exp	0.00	1,229.31	0.00	(1,229.31)	99-5100-6017
6260	Professional Services	4,160.00	9,897.86	15,000.00	5,102.14	99-5100-6260
6330	Indirect Costs	0.00	21,465.93	28,068.00	6,602.07	99-5100-6330
6370	Lease Expense	514.00	4,112.00	5,000.00	888.00	99-5100-6370
6480	Supplies & Materials	362.59	7,188.85	10,000.00	2,811.15	99-5100-6480
6485	Equipment (non-capital)	0.00	0.00	5,000.00	5,000.00	99-5100-6485
6505	Other -Special Events Expense	0.00	1,956.40	3,000.00	1,043.60	99-5100-6505
6510	Travel	32.18	1,510.58	7,500.00	5,989.42	99-5100-6510
6550	Utilities	0.00	2,186.24	4,000.00	1,813.76	99-5100-6550
6560	Other-Utilities-Telephone	38.92	517.49	2,000.00	1,482.51	99-5100-6560
6571	Travel Allowance	650.00	4,550.00	4,000.00	(550.00)	99-5100-6571
6578	Fuel Charges	546.59	2,876.27	2,500.00	(376.27)	99-5100-6578
Total Expenses		<u>6,354.00</u>	<u>88,953.65</u>	<u>228,555.00</u>	<u>139,601.35</u>	
NET SURPLUS/(DEFICIT)						
		<u>(14,927.65)</u>	<u>(88,953.65)</u>	<u>(228,555.00)</u>	<u>(139,601.35)</u>	

Sample Income Statement Only – Categories and Account Numbers will be tailored to the needs of the Watershed Program

Project Summary

The Tribe spent \$1,000,000 in Watershed Program funding during 20XX. Here is a breakdown of those expenses by authorized use:

[Note: the following information is fictional; it is intended only to establish an agreed-upon expectation between the Tribe and PUD regarding the appropriate level of detail for actual annual reports]

Planning and Administration

The Tribe spent 15% of our project funds this year on Planning and Administration. We completed the attached watershed plans for Smalle and CCA Creeks. Administrative costs for contract implementation and supervision were part of these expenditures. Total expenditures in this category were approximately \$150,000.

Fish Passage and Management

In conjunction with Section X.X of the Tribe's written Watershed Program and Section Y.Y of the Comprehensive Plan, and in collaboration with the USFS, the Tribe implemented three culvert replacements in CCA Creek on USFS lands to restore fish passage. We also completed annual operations and maintenance at Albeni Falls fish passage trap and haul facility. This is a 50% cost share project with BPA. The total spent on these actions was approximately \$350,000.





Habitat Restoration

In conjunction with Section X.X of the Tribe's written Watershed Program and Section Y.Y of the Comprehensive Plan, and in collaboration with the USFS, the Tribe completed large wood and bank stabilization on three stream reaches (1.2 miles) in Second Creek, a tributary to East Branch LeClerc Creek. This work was completed at an approximate cost of \$250,000



Water Temperature Abatement

In conjunction with Section X.X of the Tribe's written Watershed Program and Section Y.Y of the Comprehensive Plan, the Tribe completed seven cold water refugia structures in the Char Springs and Indian Creek areas of the east bank of the Pend Oreille River. These structures were completed at a cost of about \$150,000



Land Acquisition

No land was purchased during this year; however, approximately \$50,000 was spent in realty-related work toward future transactions.

Protection and Enhancement

The Tribe's expenditures in this category were approximately \$50,000: \$30,000 on a NEPA consultant for a Forest Stewardship Project on the East Branch of LeClerc Creek (contract attached); \$15,000 on an in-stream PCB removal study performed by WDFW (study attached); and \$5,000 on invasive species management coordination.

Savings and Investment

The Tribe deposited \$500,000 in its Watershed Program investment account. The value of this account at the end of 20XX was \$1.2 million.

ATTACHMENT E

TRIBE LETTER OF SUPPORT TO EPA RE: PEND OREILLE TEMPERATURE TMDL

[Date]

Dan Opalski, Director
Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

RE: Request for EPA Approval of the Pend Oreille River Temperature TMDL

Dear Mr. Opalski:

I am writing to notify the EPA that the Kalispel Tribe (“Tribe”) and Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”) have entered a settlement agreement to resolve a longstanding dispute related to the Washington State Department of Ecology’s November 2011 Pend Oreille River Temperature Total Maximum Daily Load, Pub. No. 10-10-065 (“TMDL”).

Pursuant to the terms of this agreement, the Tribe will establish two new conservation programs, a principal purpose of which is water temperature abatement, with funding from the PUD; the PUD will make operational changes at the Calispell Creek Pumping Plant and Power Lake Dam to help reduce downstream temperatures; and the PUD will dismiss state court litigation (Superior Court of Thurston County, WA, Cause No. 11-2-01027-6) related to the TMDL.

The Tribe anticipates that the conservation outcomes resulting from this collaborative approach to improving water temperature in the Pend Oreille River and its tributaries will be significant enough to address our concerns relative to the PUD’s obligations under the TMDL. Accordingly, we support EPA approval of the TMDL without amendment.¹

Please do not hesitate to contact me if you have any questions or concerns.

Regards,

Deane Osterman
Executive Director, Kalispel Natural Resources

¹ Although the Tribe no longer objects to EPA approval of the TMDL, the Tribe does not admit that the determinations therein are accurate and does not consent to the use of the TMDL as precedent in other proceedings. Furthermore, the Tribe expressly reserves the right to challenge third parties’ use of the TMDL to define their legal obligations in other regulatory contexts, so long as such challenge does not adversely affect the PUD.

ATTACHMENT F

TRIBE LETTER OF SUPPORT TO ECOLOGY RE: TEMPERATURE ATTAINMENT PLAN

[Date]

Heather Bartlett
Water Quality Program Manager
Department of Ecology
PO Box 47696
Olympia, WA 98504-7696

RE: Notification of Pend Oreille River Temperature TMDL Settlement Agreement

Dear Ms. Bartlett:

I am writing to notify the Department of Ecology (“Ecology”) that the Kalispel Tribe (“Tribe”) and Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”) have entered a settlement agreement to resolve a longstanding dispute related to Ecology’s November 2011 Pend Oreille River Temperature Total Maximum Daily Load, Pub. No. 10-10-065 (“TMDL”).

Pursuant to the terms of this agreement, the Tribe will establish two new conservation programs, a principal purpose of which is water temperature abatement, with funding from the PUD; the PUD will make operational changes at the Calispell Creek Pumping Plant and Power Lake Dam to help reduce downstream temperatures; and the PUD will dismiss state court litigation (Superior Court of Thurston County, WA, Cause No. 11-2-01027-6) related to the TMDL.

The Tribe anticipates that the conservation outcomes resulting from this collaborative approach to improving water temperature in the Pend Oreille River and its tributaries will be significant enough to address our concerns relative to the PUD’s obligations under the TMDL. We have accordingly notified EPA that the Tribe supports EPA approval of the TMDL.¹

The Tribe also supports Ecology’s approval of the attached Temperature Attainment Plan (“TAP”), which would implement the conservation actions contemplated by the settlement agreement. The Tribe does not support inclusion of any other “reasonable and feasible improvements” for the Box Canyon Hydroelectric Project under WAC 173-201A-510(5)(b) with respect to temperature beyond those described in the TAP.

Please do not hesitate to contact me if you have any questions or concerns.

Regards,

Deane Osterman
Executive Director, Kalispel Natural Resources

¹ Although the Tribe no longer objects to EPA approval of the TMDL, the Tribe does not admit that the determinations therein are accurate and does not consent to the use of the TMDL as precedent in other proceedings. Furthermore, the Tribe expressly reserves the right to challenge third parties’ use of the TMDL to define their legal obligations in other regulatory contexts, so long as such challenge does not adversely affect the PUD.

ATTACHMENT G
PROPOSED TEMPERATURE ATTAINMENT PLAN

**Box Canyon Hydroelectric Project
FERC No.2042**

Temperature Attainment Plan

Public Utility District No.1 of Pend Oreille County



**130 N. Washington St.
Newport, WA 99156**

June 2019

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Temperature Attainment Plan

Box Canyon Hydroelectric Project, FERC No.2042

1.0 INTRODUCTION

The Washington State Department of Ecology (Ecology) initiated a Total Maximum Daily Load (TMDL) analysis of water temperatures within the Pend Oreille River in response to observations of elevated temperatures at levels exceeding the river's specific water quality criteria. Elevated temperatures result in impacts to salmonid spawning, rearing, and migration, which is the designated use established for the river and protected by the water quality standards. Section 303(d) of the federal Clean Water Act (CWA), 33 U.S.C. § 1313(d), requires states to inventory waters not meeting water quality criteria and establish TMDLs for the pollutants exceeding those criteria.

Temperature excursions led to the inclusion of 17 locations of the Pend Oreille River within Washington State, and six tributary segments on Ecology's 303(d) list of impaired waters (Table 1-1). Once a water body is included on the 303(d) list, a TMDL study is required. The Pend Oreille River Temperature TMDL applies to the Pend Oreille River and its tributaries, aside from Calispell Creek, up to the Colville National Forest boundary, with the exception of that portion of East Branch LeClerc Creek below the Colville National Forest boundary. All private and state-owned lands within the East Branch LeClerc Creek watershed above the Colville National Forest Boundary are included in this TMDL, because the creek received a shade allocation above the National Forest boundary.

Table 1-1. Waters on the 303(d) list addressed by this TMDL (from Ecology 2011a)

Water Body Name	Identification Number	Township	Range	Section
Pend Oreille River	8610	37N	43E	05
	8617	31N	46E	07
	11452	39N	43E	21
	42513	38N	43E	20
	42512	38N	43E	19
	42515	40N	43E	10
	43539	40N	43E	03
	48297	31N	46E	18
	48345	35N	44E	18
	48346*	35N	44E	20
	48347	33N	44E	07
	48348	33N	44E	19
	48349	32N	44E	16
	48350	32N	44E	27
	48351	32N	45E	29
	48352	32N	45E	35
	48386	36N	43E	04
Cedar (Ione) Creek	38212	38N	43E	31
East Branch LeClerc Creek	21710	35N	44E	17
	21711	36N	44E	33
Little Muddy Creek	21715	37N	43E	06
Lost Creek	21717	36N	43E	22
Smalle Creek	21837	33N	43E	27

* Ecology rolled listing 48925 into listing 48346 because they were duplicates.

This Temperature Attainment Plan (TAP) describes the approach for compliance efforts and the plans for monitoring and evaluation of success in achieving attainment. The actions under this TAP are intended to help achieve the temperature allocations assigned to the Box Canyon Project in the TMDL. If the TMDL targets and water quality criteria are not met by the end of the 10-year compliance period, Ecology and the Pend Oreille PUD (District) will identify further actions required under WAC 173-201A-510(5)(g).

1.1 What is a Total Maximum Daily Load?

The CWA requires that a TMDL be developed for each of the water bodies on the 303(d) list. The TMDL study determines the extent of the water quality problem(s) and the underlying causes, and then specifies a limit on the amount of pollutants in order to improve water quality and return the surface water to criteria, achieving its beneficial uses. Then Ecology, with the assistance of local governments, agencies, and the community, develops a plan that describes actions to control the pollution and a monitoring plan to assess the effectiveness of the water quality improvement activities. The water quality improvement report (WQIR) consists of the TMDL study and implementation strategy or plan. For the Pend Oreille temperature TMDL, the WQIR is the revised *Pend Oreille River Temperature Total Maximum Daily Load – Water Quality Improvement Report*, Ecology 2011a, currently (as of March 12, 2019) pending approval by the EPA.

1.2 Study area

The Pend Oreille River is part of the Pend Oreille/Clark Fork watershed, which drains parts of Montana, Idaho, and Washington, as well as a portion of British Columbia, Canada, before entering the Columbia River. The Kalispel Indian Tribe (Tribe) Reservation (KIR) is located along a ten-mile stretch of the Pend Oreille River in Washington. The bulk of the reservation is on the east side of the river north of Usk, but a small portion is located on the west side of the river north of Cusick.

The focus of the TMDL study was the 72-mile section of the Pend Oreille River from its entrance from Idaho into Washington, near the city of Newport, to its northern exit into British Columbia, Canada. The Pend Oreille River watershed in Washington State encompasses about 1,000 square miles and comprises water resource inventory area (WRIA) 62. For the analysis, the river was divided into 12 reaches.

Within the study area, river hydraulics are affected by three hydroelectric facilities including:

- 1) Albeni Falls Dam, located in Idaho upstream of the Washington-Idaho state line and operated by the U.S. Army Corps of Engineers (COE).
- 2) Box Canyon Dam, located near the town of Ione and owned by the Pend Oreille Public Utility District.
- 3) Boundary Dam, located 18 miles downstream from Box Canyon Dam and operated by Seattle City Light (SCL).

2.0 WASHINGTON WATER QUALITY STANDARDS

In the WQIR, Ecology adopted use-based standards in 2003 that were approved by the U.S. Environmental Protection Agency (EPA) in 2006. The beneficial aquatic uses are defined in WAC 173-201A-200. Designated beneficial uses for the mainstem Pend Oreille River from the U.S. - Canada border, (RM 16.0) to the Idaho border (RM 87.7) are:

- Aquatic Life Use: Salmonid Spawning, Rearing, and Migration
- Recreation Use: Primary Contact Recreation
- Water Supply Uses: Domestic, Industrial, Agricultural, and Stock Water Supply
- Miscellaneous Uses: Wildlife Habitat, Fish Harvesting, Commerce and Navigation, Boating, and Aesthetic Values

The Washington temperature standard has two parts: Part 1, which applies when natural temperatures are over 20°C; and Part 2, which applies when natural temperatures are under 20°C. Ecology defines Parts 1 and 2 of the standard on page 7 of the Temperature TMDL (Ecology 2011) as follows:

Part 1: Temperature shall not exceed a 1-day maximum (1-DMax) of 20.0°C due to human activities. When natural conditions exceed a 1-DMax of 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C;

Part 2: Nor shall such temperature increases, at any time, exceed $t = 34/(T + 9)$ where: t = the allowable temperature increase; and T = the background temperature measured at a point unaffected by the discharges.

The Pend Oreille River is affected by discharges from dams in both Washington and Idaho, so the modeled natural condition, which represents the unaffected river, is used to define T in this TMDL.

Temperatures of water entering the Box Canyon Reservoir (BCR) of the Pend Oreille River from Albeni Falls Dam (AFD) at times exceed the applicable numeric water quality standard of 20°C (daily maximum temperature). When these conditions occur, the water quality standard allows no temperature increase of more than 0.3°C.

Washington water quality regulations (WAC173-201A-510(5)) assign a ten-year water quality compliance schedule for a dam to meet the requirements of its individualized certification and the water quality standards, including any applicable TMDL. The rules require a dam owner to develop a Water Quality Attainment Plan (WQAP), which provides a detailed approach for achieving compliance. Under WAC 173-201A-510(5)(b), the attainment plan for the Box Canyon Project required by the Temperature TMDL must contain five elements:

1. A schedule to achieve compliance that does not exceed ten years.

2. The identification of all reasonable and feasible improvements that could be used to meet standards, or if meeting the standards is not attainable, then achieve the highest attainable level of improvement
3. A description of the methods used to evaluate the reasonable and feasible improvements.
4. A plan to conduct water quality monitoring after activities are implemented with appropriate adaptive management steps.
5. The benchmarks and reporting requirements that will be used to track the progress of implementing the WQAP and meeting water quality standards.

As discussed above, the designated beneficial use protected by the water quality standard for temperature in the Pend Oreille River is aquatic life, specifically salmonid uses for migration, spawning, and rearing. The regulations require a WQAP to include reasonable and feasible improvements. The activities described below in Section 5.1 are intended to improve aquatic habitat and to achieve as much improvement as is reasonably and feasibly attainable.

3.0 TEMPERATURE ANALYSIS

Both Washington State's and the Kalispel tribal water quality criteria reference both an existing and a natural temperature condition designed to protect salmonids. The natural condition is a river temperature regime present prior to hydroelectric management, point source discharge, and riparian vegetative alteration. Because the current changes to the river are a consequence of the dams, the natural temperature condition is one that can only be estimated through the application of a water quality model. For this reason, the TMDL study used the CE-QUAL-W2 water quality model to describe both the existing and natural conditions for the Pend Oreille River. The model was used to examine, individually, the relative influence of riparian shade levels, point source discharges, and the hydroelectric facilities' operations on current river temperatures.

3.1 Overview of results

According to the TMDL, the temperature criteria for the Pend Oreille River was exceeded in particular reaches (Table 2). This occurred most prominently in the forebays of Box Canyon and Boundary dams, where Part 1 of the criteria, concerning maximum temperatures, was exceeded by an average (2004, 2005) of 0.94°C and 0.59°C, respectively.

For Part 2 of the criteria, Ecology analyzed temperatures under 20°C to 12°C. The 12°C lower limit was applied because bull trout use the river for migration in the early fall and are sensitive to temperatures above that level. (Pend Oreille River bull trout are listed for protection under the Federal Endangered Species Act.) During the time-frame associated with these temperatures (September through October), the criteria was exceeded for all of the Boundary reaches. The level of exceedance increased longitudinally from 0.14°C at Metaline to 0.53°C at the Boundary tailrace (Table 3-1).

Table 3-1. Pend Oreille River reaches and their compliance with Parts 1 and 2 of Washington State temperature criteria (from Ecology 2011a)

Criteria	Reach	River Mile Segment	Criteria Met		Level of Criteria Exceedance (°C)*	
			2004	2005	2004	2005
Part 1 – Washington State Pend Oreille River Temperature Criteria	Newport	88.0 - 84.4	Yes	Yes	==	==
	Dalkena	84.3 – 77.0	Yes	Yes	==	==
	Skookum	76.8 – 72.4	No	No	0.21°C	0.20°C
	Kalispel	72.3 – 63.7	Yes	Yes	==	==
	Middle	63.6 – 56.1	Yes	Yes	==	==
	Blueslide	56.0 – 47.7	Yes	Yes	==	==
	Tiger	47.6 – 36.4	No	No	0.44°C	0.51°C
	Box Canyon Forebay	36.2 – 34.6	No	No	0.95°C	0.93°C
	Metaline	34.4 – 27.1	No	No	0.58°C	0.17°C
	Slate	26.9 – 19.6	No	No	0.45°C	0.19°C
	Boundary Forebay	19.5 – 17.1	No	No	0.70°C	0.47°C
	Boundary Tailrace	16.8 – 16.2	No	No	0.53°C	0.27°C
Part 2 – Washington State Pend Oreille River Temperature Criteria	Newport	88.0 - 84.4	Yes	Yes	==	==
	Dalkena	84.3 – 77.0	Yes	Yes	==	==
	Skookum	76.8 – 72.4	Yes	Yes	==	==
	Kalispel	72.3 – 63.7	Yes	Yes	==	==
	Middle	63.6 – 56.1	Yes	Yes	==	==
	Blueslide	56.0 – 47.7	Yes	Yes	==	==
	Tiger	47.6 – 36.4	Yes	Yes	==	==
	Box Canyon Forebay	36.2 – 34.6	Yes	Yes	==	==
	Metaline	34.4 – 27.1	No	No	0.14°C	==
	Slate	26.9 – 19.6	No	No	0.24°C	==
	Boundary Forebay	19.5 – 17.1	No	No	0.61°C	==
	Boundary Tailrace	16.8 – 16.2	No	No	0.53°C	==

* The level of exceedance listed for each reach indicates the temperature extension beyond the relevant criteria: 0.3°C for Part 1, and the allowable temperature increase for Part 2.

4.0 TMDL ALLOCATION

4.1 Box Canyon TMDL Allocation

When natural condition river temperatures are greater than 20°C (July and August), Ecology has set equal load allocations of 0.12°C above the natural temperature condition for each of the Box Canyon and Boundary facilities due to the inter-relationship of the temperature impacts and the associated cumulative impacts in the watershed. The temperature reduction required to achieve the load allocations for Box Canyon and Boundary is 1.13°C and 0.88°C, respectively, based on 2004 results. These reductions apply during July and August in the forebays of the dams, which are the areas of maximum temperature impairment.

The allocations are set for the forebays of each facility as opposed to each reach, because the temperature impacts identified in all of the reaches can be associated with operations of the facilities. To achieve water quality standards in the forebays, Ecology anticipates that actions will need to be taken throughout the reservoirs and in the tributaries.

4.2 Planning and implementation to achieve criteria

The District and SCL own and operate Box Canyon Dam and Boundary Dam, respectively. As part of their Federal Energy Regulatory Commission (FERC) licenses, these utilities will complete actions in their 401 Water Quality Certifications to achieve the temperature criteria for

the Pend Oreille River. Specifically, the District and SCL will follow the dam compliance schedule outlined in the state water quality standards. WAC 173-201A-510(5). Pend Oreille River watershed residents and landowners are called upon to reduce water temperature by increasing the number of native trees and shrubs along the Pend Oreille River and its tributaries.

In addition, seven facilities have NPDES permits to discharge to surface waters. However, only four facilities (the town of Ione, city of Newport, Ponderay Newsprint, and the Pend Oreille Mine) discharge when the river temperatures exceed 20°C. All seven facilities will be required to monitor temperatures, and the four facilities will have temperature limits placed in their permits.

5.0 BOX CANYON PROJECT TEMPERATURE ATTAINMENT PLAN

Under WAC 173-201A-510(5)(b), dams contributing to a violation of the water quality standards must develop a water quality attainment plan that provides a detailed strategy for achieving compliance. This TAP summarizes analyses completed and outlines actions that will be implemented during the next ten years of the new license term to address the identified temperature effects in the BCR. This TAP meets the requirements of WAC 73-201A-510(5)(b).

5.1 Reasonable and Feasible Improvements

This section describes the reasonable and feasible improvements the District will implement to meet temperature standards in the affected areas of the Project. In the Director's Decision (Ecology 2011b), Ecology stated that the District's actions under the 2009 Settlement Agreement of the District's license to operate BCD,¹ specifically elements of the Trout Habitat Restoration Plan (THRP), would be used to demonstrate that the District "is moving forward with meeting applicable temperature criteria." The parties to the 2009 Settlement Agreement have recently entered into an Amended Settlement Agreement re-allocating some of the resources and obligations to achieve better environmental outcomes.²

Due to license restrictions, the District operates BCD as a run-of-the-river project, preventing the manipulation of flows or elevations in the BCR to effect a reduction in peak temperatures. Therefore, the majority of reasonable and feasible temperature reducing measures will occur in the tributaries to the BCR, with the occasional opportunity for mainstem shoreline modifications.

The actions listed below are intended to meet the District's obligations for temperature improvement. Monitoring will be used to evaluate the improvements over the 10-year implementation period. If the TMDL allocations and water quality standards are not met within the compliance period, the District will work with Ecology to determine what further actions are required under WAC 173-210A-510(5)(g).

¹ The settlement agreement was entered into by the PUD, the Tribe, PNC, Interior, and the Forest Service on January 28, 2009, adopting revised fishway prescriptions and section 4(e) conditions, which were subsequently incorporated into the License by FERC. FERC 2010.

² The PUD, the Tribe, PNC, Interior, and the Forest Service entered into an Amended Settlement Agreement as of June 5, 2019, which updates and alters some of the requirements of the License and the 2009 Settlement Agreement to achieve greater environmental benefits and use resources more efficiently.

5.1.1 Trout Habitat Restoration Plan

The amended license order for the Project (FERC 2010) requires the District to implement a THRP developed to restore 164 miles of stream habitat within the Pend Oreille River watershed for native salmonids. The District is currently in the process of designing and implementing a variety of restoration measures for stream habitat that are required to be restored within the implementation window of this TAP. Many of the native salmonid habitat restoration measures implemented under this program are focused on reducing stream temperatures and increasing, maintaining, or stabilizing instream flows which provide cool water input to the mainstem throughout the year. Tributary enhancements will vary in number and magnitude over the implementation period, depending on past impacts and resource needs, but will mostly consist of:

- Channel improvements, such as culvert removal and/or placement of instream structures, including large woody debris, rock and log weir installation, engineered log jams, and keystone instream structures, which serve many functions of fish habitat restoration that lead to reduced water temperatures. These channel improvements often increase stream roughness and stream depth, which slows water velocity and increases ground water recharge; they also provide instream cover/shading, and by stabilizing stream banks allow natural riparian revegetation to improve canopy cover.
- Floodplain restoration often increases canopy/instream cover and improves ground water transfer, slowing seasonal runoff events which can increase late summer cold water sources in the mainstem.
- Riparian corridor restoration compensates for increased solar exposure by stabilizing and planting banks impacted by historic erosion events, logging, over-grazing, or developed properties, and reduces water temperature directly through shading or indirectly by reducing erosion/sedimentation.
- Fencing to exclude cattle allows natural riparian vegetation recruitment and stream shading.
- Conservation easements and/or purchases will be used when needed to provide access for the activities listed above or to protect sensitive parcels from a land use change that could increase stream temperatures.

5.1.2 Mainstem projects and erosion control and prevention measures

During the next ten years, the District has made plans to implement or fund a number of erosion control projects that will protect Project shorelines on public lands, private holdings, and Tribal property. Riparian vegetation and tree planting will be included in all erosion control plans funded by the District. By restoring, enhancing, or protecting existing riparian trees and shrubs, these bank stabilization projects will provide direct shading and cool localized air temperatures through transpiration.

5.1.2.1 Private Landowner Projects

The District will contribute funding for shoreline erosion control projects for individual landowners, according to the process outlined in the Erosion Control Prevention and Remediation Plan (ECPRP) filed with FERC on September 30, 2011 (POPUD 2011).

Landowners with qualifying projects may receive \$5,000, or the total cost of the project, whichever is less. The District has developed an educational outreach brochure regarding the District's private landowner erosion control assistance program. The brochure is made available to local Natural Resources Conservation Service (NRCS) and Washington State University extension offices, and at the District's Newport, Washington office, and is distributed to the District's ratepayers in a mailing once each year. While the District's funding contribution will not exceed \$50,000 per year, there is no limit on the total number of projects or amount of shoreline that will be protected and improved under this program.

5.1.2.2 Projects on Kalispel Tribal Lands

Section 7 of the ECPRP describes several erosion control and bank protection projects identified by the Kalispel Tribe for District funding over the course of the next 10 years. These include: restoration of shoreline along Dike Road, Calispell Slough restoration work, Campbell Slough N/S Flying Goose Phase I shoreline restoration, Flying Goose phase II shoreline restoration, and Reservation North/Old Dike Spit restoration.

These projects represent 16,800 feet of shoreline, or approximately 20% of the erosion identified in the ECPRP on KIR lands.

In addition to the bank stabilization and protection projects on KIR lands listed above, the District, as part of its Historic Property Management Plan (POPUD 2007) and Comprehensive Wildlife Management Plan (CWMP) POPUD 2006), is providing funding to stabilize and revegetate several miles of shoreline on the mainstem to protect cultural/historic and wildlife management properties. While these projects have a different primary goal, the benefits to river temperature will be the same as other mainstem erosion control measures. Due to the sensitive nature of cultural and historic properties, neither the location nor amount of shoreline will be included in this plan.

Per conditions in the ECPRP and through a separate agreement with the Colville National Forest (CNF), the District will also fund remediation of areas of CNF lands along the BCR that were specified by the Forest Service as high priorities for the next ten years, to address the current level of Project-related erosion on National Forest lands. These projects are listed in Table 5-1. They represent 10,930 feet of National Forest System shoreline along the Project reservoir.

Table 5-1. Schedule for Erosion Remediation Projects on CNF Lands on the BCR	
Project	Total length of erosion (ft)
Riverbend	760
Panhandle	2,820 (1,420 treat, 1,400 plant)
Tiger	750
Yokum	4000
Pioneer	2600
Total	10,930

5.1.2.3 Cottonwood Enhancement

The District will continue its efforts to enhance cottonwood habitat on the Tacoma Creek and Everett Island Wildlife Management Areas (WMAs) and in areas outside the WMAs (as required by the Project license, Article 407). The District is also required to establish at least 14 acres of cottonwoods and at least 11 acres of riparian shrub habitat in the Project area (Forest Service Section 4(e) Condition No. 12). Additional acreage of cottonwoods can be substituted for the riparian shrub habitat, if desired. Three additional acres of cottonwoods are required to be established; 50 existing cottonwoods caged to protect them; and 100 pine trees planted on NFS lands within the Project area (shoreline).

To date the District has completed and is maintaining several acres of cottonwood plantings along Tacoma Creek in the WMA. Livestock have been excluded from the WMAs and other areas owned by the District along the shoreline, resulting in the resurgence of herbaceous and woody vegetation, including 1,500 feet of willows along the shoreline. Cottonwood stands currently cover approximately 0.5 acre on the Everett Island WMA and 3.2 acres on the Tacoma Creek WMA. Cottonwood is also a significant constituent of an additional 3.4 acres of mixed forest on the Tacoma Creek WMA. These developing stands will continue to be managed and protected to encourage growth and increase stand density to better contribute cooling to the river.

Outside the WMAs, the District has delineated 25 acres of the required habitats – 17.4 acres of cottonwood habitat, and 7.6 of wet shrub habitat. These lands were dedicated by the District to wildlife habitat in July 2008 through permanent conservation easements. An additional 7.6 acres was also identified as potentially suitable for cottonwoods and shrubs. Plantings and fencing to exclude herbivores were installed, and future plantings and protection actions are planned.

These cottonwood enhancement measures are integral to this TAP, because stands of climax woody riparian vegetation help reduce river temperatures by slowing spring snow melt, reducing peak local air temperature, and providing direct shading to the affected nearshore area of the mainstem and creek mouths.

5.1.3 Small Grant Program for Riparian Planting

As part of the CWMP, the District annually funds a small grants program to assist shoreline property owners who plant cottonwoods and other appropriate shoreline vegetation and habitat enhancements, which will continue for the next 10 years (and on throughout the term of the Project license). Unlike the erosion prevention grant program described in Section 5.1.2.1, this Riparian Planting grant program is open to any landowner regardless of the erosion potential of that property. The grant program was introduced in the summer 2010 issue of the District's Watershed News, which is distributed in a billing. Reminders will be included in the newsletter. As with the previously discussed riparian enhancement measures, providing for mature woody vegetation including cottonwood and large coniferous stands on or near the shoreline will slow snow melt events, reduce peak local air temperatures, and provide direct shading to the affected nearshore area of tributary shorelines, the mainstem, and creek mouths.

5.1.4 Shoreline Management

The District, as obligated under Articles 409 and 416 of its FERC license,, as well as Section 12.5 of the District's Shoreline Management Plan for Box Canyon Hydroelectric Project, will continue to assist Pend Oreille County with certain shoreline management responsibilities, which include consultation regarding permitting for shoreline activities that include building permits, shoreline exemptions, preliminary short plat approvals, SEPA actions, special use permits, Forest Practices Act permits, and floodplain development permits for work within or near the Project boundary. The District is charged with coordinating with the County to ensure that development along the Project reservoir will meet the requirements of all federal, state, and local laws and regulations, the Project license and plans required under the license. This permit coordination process allows the District to request the modification or rejection of project proposals that could otherwise prevent the District from meeting the goals of this TAP.

5.1.5 Kalispel Watershed Restoration Program and Conservation Program

To better meet several mutual resource goals the District will work collaboratively with the Tribe to design and implement a watershed restoration program and a conservation program for use in the tributaries and mainstem of the Pend Oreille River. , The goals and methods for achieving watershed restoration and conservation under these plans are similar, but not limited to, what was described in Sections 5.1.1 (Trout Habitat Restoration Plan) and 5.1.2 (Mainstem Projects and Erosion Control and Prevention Measures). The Tribe will ultimately be responsible for selecting and implementing the measures using these funds, so the District does not control those decisions and is not responsible for specific outcomes under these programs.

However, both the District and Tribe anticipate significant overlap between these programs and the District's temperature attainment efforts. These programs are still being developed, but will likely include both tributary and mainstem protection and stabilizations measures, enhance stream cover and riparian vegetation, and increase shading. In addition to measures previously discussed, the watershed restoration program and conservation program will likely implement projects specifically to address water temperature abatement.

5.1.6 Power Lake

The District, in consultation with the Tribe, and subject to the limitations of existing operational restrictions, shall attempt to operate Power Lake Dam to reduce downstream water temperatures during critical warming periods.

5.1.7 Calispell Creek Pumping Plant Operations

The District, in consultation with the Tribe, and subject to the limitations of existing operational restrictions, shall attempt to operate the Calispell Creek Pumping Plant to reduce water temperature in Calispell Creek. This will be accomplished by maintaining continuous flow at all times, and matching incoming flows while maintaining established water surface elevations during critical warming periods. While temperatures in Calispell Creek are not regulated by the Pend Oreille River temperature TMDL, actions taken to cool Calispell Creek before it discharges into the Pend Oreille River will help meet the goals of this TAP.

5.2 Temperature Monitoring

The District has conducted water quality monitoring efforts in the BCR since 1997. Under the Water Quality Monitoring Plan (WQMP) (POPUD 2005) for the Project that was developed in compliance with the 401 Certification for the new license, and approved by Ecology in December, 2005, the District has, and will continue to, monitor temperature and other water quality parameters to provide Ecology with water quality data to demonstrate the Project's progress towards meeting and remaining in compliance with State water quality standards.

5.2.1 Mainstem Pend Oreille River Temperature Monitoring

Under the current WQMP, water temperature is monitored, along with other water quality parameters, in the forebay, tailrace, at Usk, and at the Albeni tailrace, during designated timeframes as outlined in Table 5-2.

Table 5-2. Pend Oreille River Temperature Monitoring under Box Canyon Project WQMP		
Location	Monitoring Period	Sample Frequency
Box Canyon Dam forebay	4/1 – 10/31	Continuous 1-hour
BCD tailrace	4/1 – 10/31	Continuous 1-hour
Albeni Falls Dam tailrace	4/1 – 10/31	Continuous 1-hour
Usk Bridge	4/1 – 10/31	Continuous 1-hour

5.2.2 Tributary Temperature Monitoring

The District will place temperature sensors (Tidbits) in project stream sections within watersheds being restored under the THRP. Temperature monitors will be placed at three locations in each project stream section: at the upstream, middle, and downstream end of the stream section. Locations and timeframes of tributary stream projects are outlined in the THRP Watershed Plan (POPUD 2014b).

5.2.3 Meteorological Data Collection

The District will collect and compile available (existing) meteorological data at selected locations, and will collect meteorological data at its weather station at BCD, including air temperature, wind speed, and direction. This meteorological data will be used to compare to average atmospheric conditions, and therefore whether the year in question is “average,” a “warm year,” or a “cool year.” It can also be used in future temperature modeling applications.

5.3 Compliance Schedule

The measures described in this plan will be conducted over the next ten years according to the following schedule.

Table 5-4. Schedule of Box Canyon Project Temperature Attainment Activities	
Activity	Schedule
Trout Habitat Restoration	Ongoing
Erosion Control and Prevention projects on Kalispel lands	Construction complete 2022
Erosion Control and Prevention projects on CNF lands	Construction complete 2028
Riparian cottonwood and shrub enhancements	Ongoing
Small grants fund for riparian planting	Annual grant opportunity for life of project license
Shoreline management	Ongoing for project license term
Kalispel Watershed Restoration Program and Conservation Program	Settlement provides for plan development by Tribe in year 1 with project implementation ongoing thereafter
Power Lake Management	Changes in operations will be discussed and implemented if possible within the next 10 years
Calispell Creek Pumping Plant Operations	Ongoing
Monitoring	
Mainstem Pend Oreille River temperature monitoring	Ongoing
Tributary temperature monitoring	Will occur during next 10 years in stream segments restored under the THRP according to priorities in the Watershed Plan
Reporting	Activities and monitoring results reported to Ecology annually

After the ten-year compliance schedule under this plan, if the TMDL allocations and water quality standards are not met, the District will work with Ecology to determine what further actions are required under WAC 173-210A-510(5)(g). That subsection first requires evaluation of any new reasonable and feasible technologies that have been developed to achieve compliance with the standard and development of a new compliance schedule to evaluate and incorporate that technology. WAC 173-210A-510(5)(g)(i). If no such new improvements are identified at that time, the District will then propose alternative means of compliance such as site specific criteria, a use attainability analysis, or a water quality offset. *See* WAC 173-210A-510(5)(g)(ii) (and regulations referenced therein).

5.4 Reporting

The District will report annually on its efforts toward attaining temperature compliance. This reporting will be included as part of the water quality monitoring report that is annually filed with Ecology and with FERC under the District's Water Quality Monitoring Plan. Annual reports will specifically include information regarding the progress of stream restoration, erosion remediation, and other reasonable and feasible measures listed in Section 5. Draft reports will be submitted to Ecology for review and comment. Any comments received will be addressed, and the final report submitted by May 1 each year.

6.0 REFERENCES

Breithaupt, S.A. and T. Khangaonkar. 2007. Temperature Modeling of the Pend Oreille River, Boundary Hydroelectric Project, CE-QUAL-W2 Model Calibration Report. Battelle, Pacific Northwest Division, Richland, WA. September 2007.

Ecology. 2003. Water Quality Certificate (401), Washington Department of Ecology, Olympia, WA. Amended Order No.02WQER-5121A-01, Certification Conditions for the Box Canyon Hydroelectric Project. Issued February 21, 2003.

Ecology. 2006. Washington Administrative Code, Chapter 173-201A. Water Quality Standards for Surface Waters of the State of Washington. Washington Department of Ecology, Olympia, Washington. 2006.

Ecology. 2011a. Pend Oreille River Temperature Total Maximum Daily Load, Water Quality Improvement Report. Washington State Department of Ecology, Eastern Regional Office Water Quality Program, Spokane, WA 99205. Publication No. 10-10-065. March 2011, revised November 2011.

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FERC. 2004. Final Environmental Impact Statement, for Hydropower Relicensing, FERC/FEIS-0152F, Box Canyon Hydroelectric Project, FERC No. 2042-013, Washington and Idaho. Applicant, Federal Energy Regulatory Commission Office of Energy Projects, Division of Hydropower Licensing, 888 First Street, NE, Washington, DC 20426. September, 2004.

FERC. 2010. Order on Settlement Agreement and Amending License, 130 FERC ¶ 62,148, February 19, 2010, as subsequently amended, most recently by FERC 2017.

FERC. 2017. Order Granting Extension of Time, Dkt. No. P-2042-153, issued Oct. 12, 2017.

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POPUD. 2014a. Agreement By and Between the USDA Forest Service Region 6, Colville National Forest and Public Utility District No.1 of Pend Oreille County For the Box Canyon Hydroelectric Project (No. 2042) Erosion Control, Prevention, and Remediation Plan. July 2014.

POPUD. 2014b. Box Canyon Hydroelectric Project, FERC No. 2042, Watershed Planning Trout Habitat Restoration Program. Public Utility District No.1 of Pend Oreille County. April, 2014.

POPUD. 2011. Box Canyon Hydroelectric Project, FERC No. 2042, Erosion Control Prevention and Remediation Plan. Public Utility District No.1 of Pend Oreille County. September 30, 2011.

POPUD. 2016. Operation Compliance Monitoring for Sullivan Creek 2016 Annual Report. Public Utility District No.1 of Pend Oreille County. November, 2016.

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WDFW et al. 2003. M. Cramer P.E., .K. Bates P.E., D. Miller, K. Boyd, L. Fotherby, Ph.D., P.E., P. Skidmore, T. Hoitsma. Integrated Streambank Protection Guidelines, published by Washington State Aquatic Habitat Guidelines Program, 2002.

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WDFW 2007. Pend Oreille River in the Box Canyon Reservoir Riverbank Stabilization Guidelines, Prepared for WDFW by Mainstream Restoration, Inc. February 15, 2007.

ATTACHMENT H

**TRIBE LETTER OF SUPPORT TO EPA RE: APPROVAL OF PLAN FOR PUMP
OPERATIONS**

[Date]

Dan Opalski, Director
Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

RE: Request for EPA Approval of the Plan for Pumping Operations at the Calispell Creek Pumping Plant

Dear Mr. Opalski:

I am writing to notify the EPA that the Kalispel Tribe of Indians (“Tribe”) and Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”) have entered a settlement agreement to resolve a longstanding dispute related to the Plan for Pumping Operations (“PPO”) at the Calispell Creek Pumping Plant (“CCPP”).

Pursuant to the terms of this agreement, the Tribe will establish two new conservation programs, a principal purpose of which is water quality enhancement, with funding from the PUD; the PUD will make operational changes at the CCPP and Power Lake Dam to help reduce downstream temperatures; and the PUD will dismiss federal court litigation (U.S. District Court for the District of Columbia, No. 1:04cv2224) related to the PPO.

The Tribe anticipates that the conservation outcomes resulting from this collaborative approach to improving water quality in Calispell Creek will be significant enough to address our concerns relative to the attached PPO. Accordingly, we support EPA approval of the PPO.

Please do not hesitate to contact me if you have any questions or concerns.

Regards,

Deane Osterman
Executive Director, Kalispel Natural Resources

ATTACHMENT I

TRIBE LETTER OF SUPPORT TO FERC RE: REVISED PLAN E

[Date]

Ms. Kimberly D. Bose
Secretary, Federal Energy Regulatory Commission
Office of the Secretary
888 First St., NE
Washington, D.C. 20426

RE: Project No. 2042 License Amendment to Incorporate Revised Plan E

Dear Ms. Bose:

On [DATE], Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”), the United States Department of the Interior (“Interior”), the United States Forest Service (“Forest Service”), the Kalispel Tribe of Indians (“Tribe”) and Ponderay Newsprint Company (“PNC”) (collectively, the “Parties”) submitted a Joint Application to amend the Parties’ January 28, 2009 Settlement Agreement for the Box Canyon Hydroelectric Project, No. 2042 (“Project”), which the Commission incorporated into the Project license on February 19, 2010 (130 FERC 62,148). On [DATE], FERC issued an order (CITATION) incorporating without material modification the revised appendices attached to the Parties’ Amended Settlement Agreement into the Project license. This order also rendered effective an Off-License Settlement Agreement (“OLSA”) between the Tribe and PUD.

Pursuant to the terms of the OLSA, the Tribe will establish two new conservation programs, a principal purpose of which is water quality enhancement, with funding from the PUD. The PUD will also make operational changes at the Calispell Creek Pumping Plant (“CCPP”) and Power Lake Dam to help improve downstream water quality in Calispell Creek. The Tribe anticipates that the benefits of these conservation actions will mitigate any adverse water quality impacts resulting from Revised Plan E, which sets forth operational parameters for the CCPP. The Tribe accordingly supports amendment of the License to incorporate Revised Plan E, replacing in its entirety the existing Plan E, Appendix F to the 2005 License Order, 112 FERC ¶ 61,055, 61,488 (2005).

Please do not hesitate to contact me if you have any questions or concerns.

Regards,

Deane Osterman
Executive Director, Kalispel Natural Resources

ATTACHMENT J

KALISPEL TRIBE WAIVER OF SOVEREIGN IMMUNITY