

ATTACHMENT 3 TO SULLIVAN CREEK SETTLEMENT AGREEMENT

FISHERIES MANAGEMENT MEMORANDUM OF AGREEMENT

SULLIVAN CREEK PROJECT
FISHERIES MANAGEMENT MEMORANDUM OF AGREEMENT BETWEEN
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON AND
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

This Sullivan Creek Project Fisheries Management Memorandum Of Agreement (“MOA”) is entered into between the Public Utility District No. 1 of Pend Oreille County, Washington (“PUD”) and Washington Department of Fish and Wildlife (“WDFW”) in connection with the license surrender proceeding for the Sullivan Creek Hydroelectric Project No 2225 (“Project” or “Sullivan Creek Project”) and the application for a Special Use Authorization (“SUA”) to be issued by the US Forest Service (“USFS”) for Sullivan Lake Dam and Reservoir.

RECITALS

WHEREAS,

- A. The Sullivan Creek Project is owned and operated by the PUD, the sole licensee for the Project.
- B. The Project is located on Sullivan Creek, Outlet Creek and Sullivan Lake, which are tributaries of the Pend Oreille River in northeastern Washington. On September 23, 2003 the PUD filed a notice of intent not to file an application for new license for the Project. By orders issued April 21, 2008 and July 18, 2008, the Federal Energy Regulatory Commission (“FERC” or “Commission”) determined that the Project is subject to its mandatory licensing jurisdiction under the Federal Power Act (“FPA”) and that the PUD is required to file an application for surrender of the Project License.
- C. The Project License expired on September 30, 2008.
- D. On September 19, 2008, the FERC issued a notice of authorization of continued Project operation under the FPA pursuant to an annual license, which is renewed automatically until disposition of the Project facilities pursuant to an order accepting surrender of the Project License.
- E. On July 1, 2008 the PUD filed a schedule for filing a License Surrender Application (“LSA”) by December 1, 2010, which was approved by FERC on July 29, 2008. The PUD engaged in pre-filing consultations and collaborated with interested parties through a mediation process. Pursuant to a Joint Motion and an Agreement in Principle filed with FERC September 30, 2009, the PUD agreed to expedite preparation of its LSA based on an assumed filing date of February 1, 2010. Thereafter, FERC granted a request to extend the filing date until March 29, 2010.
- F. The PUD and WDFW are signatories to the Sullivan Creek Hydroelectric Project Settlement Agreement (“Sullivan Creek Settlement Agreement”) executed concurrently with this agreement and made and enter into by and

among the PUD, Seattle City Light (“SCL”), the Bureau of Indian Affairs, US Fish and Wildlife Service (“USFWS”), the US Forest Service (“USFS”), the Kalispel Tribe (“Tribe”), WDFW, the Washington State Department of Ecology (“Ecology”), the Lands Council, American Whitewater, the Selkirk Conservation Alliance (“SCA”), Town of Cusick, Washington, Rick Larson and Al Six (collectively, the “Parties”). This MOA is Attachment 3 to the Sullivan Creek Settlement Agreement, and the MOA will be submitted to FERC with the Sullivan Creek Settlement Agreement for informational purposes only.

- G. In concert with measures taken for the protection of aquatic resources in the Sullivan Creek Settlement Agreement, WDFW asserts that the PUD should provide funding for mitigation of impacts of fish entrainment due to spill and low-level gate releases, and other losses of aquatic productivity due to Sullivan Lake Dam operations; however, the WDFW and the PUD recognize that it is uncertain under FERC’s policy on hydropower settlements whether FERC will require the PUD to provide such funding to WDFW.
- H. The PUD and WDFW are entering into this MOA as part of the overall settlement process leading to issuance by FERC of a License Surrender Order for the removal of certain facilities and issuance of a SUA by the USFS to the PUD for the continued operation of Sullivan Lake Dam and Reservoir. The PUD and WDFW acknowledge that the creation of this MOA is intended as an element of a comprehensive settlement for the Sullivan Creek Project.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. GENERAL PROVISIONS

A. Effective Date

This MOA shall become effective upon the Commission’s issuance of a License Surrender Order that adopts without Material Modification the Proposed License Surrender Conditions set forth in the Sullivan Creek Settlement Agreement.

B. Term of MOA

Unless terminated, the term of the MOA shall commence on the Effective Date and shall continue through the term of the SUA.

2. PURPOSE OF SUPPLEMENTATION AGREEMENT

The Parties agree that the PUD's satisfaction of the obligations in this MOA and in the Sullivan Creek Settlement Agreement will protect and mitigate for impacts of the Project on fish resources and recreational opportunities on those resources. Funds provided in this MOA will be used to address fishery resources managed by WDFW in Sullivan Lake and its associated tributaries, including development of a fisheries management plan and purchasing necessary equipment to carry out WDFW responsibilities. WDFW and the PUD enter into this agreement separately from the Sullivan Creek Settlement Agreement, because although the Parties agree these commitments are appropriate, pursuant to its policy on hydropower settlements FERC has declined to adopt measures requiring the licensee to provide funding to other entities to implement protection and mitigation actions. To ensure that the commitments made in the Sullivan Creek Settlement Agreement are fulfilled and in consideration of WDFW's support for the continued operation of the Sullivan Lake Dam and Reservoir, WDFW and the PUD have entered into this MOA.

3. PUD PAYMENTS TO WDFW FOR FISHERIES MANAGEMENT ON SULLIVAN LAKE AND ITS ASSOCIATED TRIBUTARIES

To mitigate for the fish entrainment that occurs due to spill over Sullivan Lake Dam or use of the unscreened low-level gates, and for the loss of productivity that occurs due to Sullivan Lake Dam and Reservoir operations, the PUD shall make the following payments to WDFW, which shall be used for measures in the Sullivan Creek basin to mitigate for such impacts to fish and other aquatic resources:

A. Initial Payment

Within one year after the Effective Date, the PUD shall provide a one time payment of \$200,000 (2010) to WDFW.

B. Periodic Payments

Commencing on the second year after the Effective Date and for the next sixteen years (seventeen total periodic payments), the District shall provide a payment of \$20,000 to WDFW.

C. General Provisions

The payment in 3.A. above is based on 2010 dollars and shall be adjusted according to a Consumer Price Index most applicable to the rural area of Pend Oreille County or Eastern Washington. The periodic payments made by the PUD pursuant to 3.B. above shall not be adjusted.

4. WDFW RELEASE

WDFW agrees that the PUD's performance of its obligations under the Sullivan Creek Settlement Agreement, the License Surrender Order, the SUA, and this MOA resolves all

issues between the PUD and WDFW and precludes any claims pertaining to impacts to fish and other aquatic resources and recreational opportunities on such resources from the operation and maintenance of the Sullivan Creek Project under the current FERC license, the disposition of Project facilities under the License Surrender Order and the continued operation of Sullivan Lake Dam and Reservoir for the term of the SUA.

5. TERMINATION

This Agreement may be terminated in whole or in part:

A. By either Party in the event that the FERC has issued an order, which order has become final and unappealable, that constitutes a Material Modification of the Boundary Settlement Agreement and/or the Sullivan Creek Settlement Agreement, and based on that order the PUD has withdrawn from the Sullivan Creek Settlement Agreement.

B. By either Party in the event that the Department of Ecology has issued a Clean Water Act Section 401 certification, which certification has become final and unappealable, that constitutes a Material Modification of the Boundary Settlement Agreement and/or the Sullivan Creek Settlement Agreement, and based on that certification the PUD has withdrawn from the Sullivan Creek Settlement Agreement.

C. By either Party in the event that the USFS has not issued a SUA upon termination of the Project License, or has issued a SUA, which has become final and unappealable, that constitutes a Material Modification of the Proposed SUA Conditions and/or the Sullivan Creek Settlement Agreement, and based on that SUA the PUD has withdrawn from the Sullivan Creek Settlement Agreement.

D. By mutual written agreement of the PUD and WDFW.

Within 45 days of the issuance of such order, certification or SUA under 5.A, 5.B or 5.C above, the PUD and WDFW shall meet to discuss and agree upon a temporary adjustment, suspension, or other appropriate action with respect to the annual payments otherwise due pursuant to 3.B above, during the pendency of any appeal and until such order, certification or SUA has become final and unappealable.

6. MISCELLANEOUS

Washington law shall apply to the Parties and this Agreement. In the event that an action is undertaken by a Party against the other Party, to enforce this Agreement, the prevailing Party shall be entitled to all of its costs, including reasonable attorneys' fees, incurred in such action.

7. ACCOUNTING AND AUDITING

A. On or before August 1 of each year, WDFW shall provide an accounting to the PUD showing the expenditures made from the funds provided by the PUD pursuant to this MOA in the prior fiscal year (July 1 through June 30).

B. Within thirty (30) days of the receipt of the accounting provided by WDFW, the PUD, or its representative or agent, may request an audit of the books of WDFW for the purpose of confirming that such expenditures were made for measures in the Sullivan Creek basin to mitigate for Project impacts to fish and other aquatic resources. WDFW shall cooperate with the PUD in performing such audit.

IN WITNESS WHEREOF the Parties hereto have executed this MOA.

Public Utility District No. 1 of
Pend Oreille County

Washington Department of Fish
and Wildlife

By



General Manager

By

Title

7. ACCOUNTING AND AUDITING

A. On or before August 1 of each year, WDFW shall provide an accounting to the PUD showing the expenditures made from the funds provided by the PUD pursuant to this MOA in the prior fiscal year (July 1 through June 30).

B. Within thirty (30) days of the receipt of the accounting provided by WDFW, the PUD, or its representative or agent, may request an audit of the books of WDFW for the purpose of confirming that such expenditures were made for measures in the Sullivan Creek basin to mitigate for Project impacts to fish and other aquatic resources. WDFW shall cooperate with the PUD in performing such audit.

IN WITNESS WHEREOF the Parties hereto have executed this MOA.

Public Utility District No. 1 of
Pend Oreille County

Washington Department of Fish
and Wildlife

By

By

General Manager

Title *Director 3-16-10*

ATTEST

Name _____