

---

# SKAGIT RIVER HYDROELECTRIC PROJECT

**No. 553**

---

## SETTLEMENT AGREEMENT

CONCERNING

**WILDLIFE**

BETWEEN

THE CITY OF SEATTLE

AND THE

WASHINGTON DEPARTMENT OF WILDLIFE;  
U.S. DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE, BUREAU OF INDIAN AFFAIRS,  
AND U.S. FISH AND WILDLIFE SERVICE;  
U.S. DEPARTMENT OF AGRICULTURE;  
U.S. FOREST SERVICE;  
UPPER SKAGIT TRIBE, SAUK-SUIATTLE TRIBE,  
AND SWINOMISH INDIAN TRIBAL COMMUNITY;  
AND THE NORTH CASCADES CONSERVATION COUNCIL

---

APRIL 1991





# TABLE OF CONTENTS

	<u>Page</u>
1.0 PARTIES.....	1
2.0 GENERAL PROVISIONS.....	1
2.1 PURPOSE AND INTENT .....	1
2.1.1 Resolution of Issues.....	1
2.1.2 Stipulation of Adequacy .....	2
2.1.3 Release and Waiver of Claims.....	2
2.1.4 Compliance with Laws and Effect on Rights.....	2
2.1.5 Integrated Agreement .....	2
2.1.6 Assignment .....	3
2.1.7 Authority.....	3
2.2 OBLIGATIONS OF THE PARTIES .....	3
2.2.1 The City's Obligations .....	3
2.2.2 The Intervenors' Obligations .....	3
2.2.3 The Parties' Obligations .....	4
2.3 EFFECTIVE DATE AND DURATION.....	5
2.3.1 Execution and Effective Date .....	5
2.3.2 Duration.....	5
2.4 COORDINATED IMPLEMENTATION .....	5
2.4.1 Across Forum Coordination .....	5
2.4.2 Annual Meeting .....	6
2.5 MONETARY FIGURES .....	6
2.5.1 Adjustments For Inflation/Deflation .....	6
2.5.2 Time Basis For Payments and Obligations .....	6
2.6 FORCE MAJEURE.....	7
2.7 DESIGNATED CONTACTS .....	7
2.7.1 Contact Persons.....	7
2.7.2 Notices .....	9
2.8 REOPENER AND MODIFICATION .....	9
2.8.1 Use of Reopener Clause in License.....	9
2.8.2 Modification .....	9
2.8.3 Burden of Proof .....	10
2.8.4 Effect of Reopener Proceedings .....	10

## TABLE OF CONTENTS (continued)

	<u>Page</u>
2.9 PROJECT MODIFICATIONS (HIGH ROSS).....	10
2.9.1 Project Modifications .....	10
2.9.3 Consultation .....	10
2.9.4 Resolution .....	10
2.9.5 Mitigation Criteria .....	11
2.9.6 Preservation of Rights .....	11
3.0 EXPENDITURES .....	11
3.1 WILDLIFE PLAN EXPENDITURES.....	11
3.2 LAND ACQUISITION AND HABITAT ENHANCEMENT .....	11
3.2.1 Land Acquisition .....	11
3.2.2 Habitat Enhancement.....	12
3.3. CULTURAL RESOURCE EVALUATIONS .....	13
3.4 RESEARCH.....	13
3.4.1 Research Building and Equipment .....	13
3.4.2 Research Study Funding.....	14
3.4.3 Long-term Monitoring in the Ross Lake National Recreation Area .....	14
3.4.4 Bald Eagle Inventory and Planning .....	14
3.5 EDUCATION .....	14
3.6 PLANT PROPAGATION.....	15
3.7 CONTINUATION OF ANNUAL AND PERIODIC PAYMENTS .....	15
4.0 DISPUTE RESOLUTION .....	15
4.1 DISPUTE RESOLUTION PROCEDURE.....	15
4.1.1 Referral of Disputes.....	15
4.1.2 Optional Policy Review.....	15
4.1.3 Referral to the FERC.....	16
4.2 NONCOMPLIANCE .....	16
5.0 PROCEDURES FOR ACQUISITION OF LANDS .....	16
5.1 INITIAL LAND ACQUISITION PROCESS.....	16
5.2 CONSENSUS PROCESS .....	17
5.3 INITIAL LANDS TO BE ACQUIRED.....	17
5.4 SUBSTITUTIONS.....	18
5.4.1 Substitutions during the Initial Acquisition Process .....	18
5.4.2 Replacement Procedure for Wildlife Lands Should Wildlife Values be Adversely Affected Subsequent to Acquisition.....	18

## TABLE OF CONTENTS (continued)

	<u>Page</u>
5.5 OWNERSHIP OF WILDLIFE HABITAT LANDS AND LONG-TERM INTENT .....	18
5.6 LIMITATIONS.....	18
6.0 ISSUES OF GENERAL CONCERN.....	19
6.1 ROSS LAKE OPERATIONS .....	19
6.1.1 Refill After April 15 .....	19
6.1.2 Full Pool Through Labor Day .....	19
6.1.3 Overdraft Years.....	19
6.2 CONTINUING REVIEW OF THE WILDLIFE PLAN AND SETTLEMENT AGREEMENT .....	19
6.2.1 Wildlife Management Review Committee (WMRC).....	19
6.2.2 Composition of the WMRC.....	20
6.2.3 Meetings.....	20
6.3 WILDLIFE PLAN REPORTING AND REVIEW .....	20
6.4 MEMORANDUM OF UNDERSTANDING CONCERNING MANAGEMENT ACTIVITIES ON NON-RESIDENTIAL FEE TITLE LAND; AND GUIDANCE FOR CITY RESPONSE TO WILDLIFE-HUMAN CONFLICTS .....	21
6.5 WILD AND SCENIC RIVER .....	21
7.0 SIGNATURES.....	21

## LIST OF APPENDICES

	<u>Page</u>
APPENDIX Wildlife Habitat Protection and Management Plan.....	33

**UNITED STATES OF AMERICA**

**FEDERAL ENERGY REGULATORY COMMISSION**

**SETTLEMENT AGREEMENT**

**INCORPORATING**

**WILDLIFE HABITAT PROTECTION**

**AND MANAGEMENT PLAN**

**1.0 PARTIES**

This Wildlife Settlement Agreement (Agreement), incorporating the Wildlife Habitat Protection and Management Plan (Wildlife Plan)(see the Appendix to this Agreement), is entered into this 24th day of April, 1991, by and between The City of Seattle, City Light Department (City) and the Washington Department of Wildlife; U.S. Department of the Interior, National Park Service, U.S. Fish and Wildlife Service, and Bureau of Indian Affairs; U.S. Department of Agriculture, U.S. Forest Service; the Upper Skagit Tribe, the Sauk-Suiattle Tribe, and the Swinomish Indian Tribal Community (the Tribes); and North Cascades Conservation Council (collectively referred to as the "Intervenors"). Together the City and the Intervenors are referred to as the "Parties." The Skagit River Hydroelectric Project is referred to as the "Project."

**2.0 GENERAL PROVISIONS**

This Agreement establishes the City's obligations relating to the wildlife resources affected by the Project, as currently constructed. It also establishes the Intervenors' obligations to support this Agreement, and to submit it to the Federal Energy Regulatory Commission (FERC) as their recommendations relating to said wildlife resources under any applicable provisions of the Federal Power Act (including without limitation Sections 10(a), 10(j), and 4(e) thereof) and the Fish and Wildlife Coordination Act. The U.S. Forest Service agrees that this Agreement constitutes its preferred recommendation under Section 7(a) of the Wild and Scenic Rivers Act.

This Agreement resolves all issues related to the effects on wildlife resources of the Project, as currently constructed, for the period October 28, 1977, through the duration of this Agreement. This includes resolution of the effects on wildlife of the absence of flows in the Gorge bypass reach. It shall be submitted to the FERC for incorporation into the new license for the Project and shall be enforceable as an article thereof. The Parties agree that incorporation and enforcement as a license condition is a material provision of this Agreement.

The Parties stipulate that this Agreement constitutes adequate wildlife resources protection and mitigation for wildlife impacts caused by the Project, as currently constructed, for the period October 28, 1977 through the duration of this Agreement.

For the period October 28, 1977 through the duration of this Agreement, the Intervenors and their successors and assigns, hereby release, waive, and discharge the City, its successors, and assigns, from any and all claims, demands, actions and causes of action of any kind (claims) arising during that period from the effects of the Project as currently constructed on wildlife, so long as the City performs its obligations under this Agreement. This release does not waive claims that may arise from the negligent or intentional misconduct of the City in the operation of the Project.

Nothing in this Agreement precludes the City or the Intervenors from complying with their obligations under the National Environmental Policy Act (NEPA), the Endangered Species Act, the Federal Power Act, the Wild and Scenic Rivers Act, the Fish and Wildlife Coordination Act, or any other laws applicable to the Project. This Agreement shall not affect the rights of any Party except as expressly covered in this Agreement.

Nothing in this Agreement or in the plans, memoranda, procedures or other actions taken to further the purposes of this Agreement shall reduce or otherwise impair access to and exercise of implied or explicit Indian rights, including hunting, fishing and gathering rights; nor shall anything in this Agreement be construed as limiting, waiving or otherwise impairing whatever money damage claims the Tribes may have arising out of the construction and operation of the current Project outside the term of this Agreement.

All previous communications between the Parties, either verbal or written, with reference to the subject matter of this Agreement are superseded by the terms and provisions of this Agreement, and, once executed, this Agreement and its companion documents shall constitute the entire agreement between the Parties.



This Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns.

Each Party to this Agreement represents and acknowledges that it has the full legal authority to execute this Agreement and shall be fully bound by its terms.

By entering into this Agreement, the City agrees to comply with all of the terms of this Agreement, including the payment of monies and the funding of activities specified herein. The City further agrees to submit this Agreement, including the Wildlife Plan, to the FERC as its proposed measures relating to the wildlife resources affected by the Project, as currently constructed, as required by applicable provisions of federal and state law, including without limitation the Federal Power Act.

The City shall assign adequate professional environmental staff to implement this Agreement. This shall include establishment of two new environmental staff positions with expertise in fisheries, wildlife, recreation, visual quality, cultural resources, and erosion control. One staff position shall be dedicated primarily to implementation of the Anadromous Fish Flow Plan and the Anadromous And Resident Fish Non-Flow Plan. The second staff position shall be dedicated primarily to implementation of the wildlife, recreation/aesthetics, erosion control, and cultural resource agreements.

The Intervenors agree to support the expeditious issuance of a new license to the City for the Project, as currently constructed, which is consistent with the provisions of this Agreement, and which includes the Agreement as an article. This support shall include reasonable effort to expedite the NEPA process. The Parties shall file comments on any draft EA or EIS developed by the FERC in the relicensing proceedings for this Project and shall support the measures defined by this Agreement as the preferred action. The Parties, shall exchange drafts of their respective comments prior to submittal to the FERC and consult with each other to ensure that the comments are consistent with this Agreement.

The Intervenors shall submit this Agreement to the FERC as their recommendations related to the wildlife resources affected by the Skagit Project under any applicable provision of the Federal Power Act (including without limitation Sections 10(a), 10(j), and 4(e) thereof) and the Fish and Wildlife Coordination Act. The U.S. Forest Service agrees that this Agreement constitutes its preferred recommendation under Section 7(a) of the Wild and Scenic Rivers Act.

The Intervenors agree that this Agreement obviates any need for flow releases in the Gorge bypass reach for wildlife purposes. The Intervenors shall support all efforts by the City to either retain its existing water quality certificate issued by the State of Washington, Department of Ecology (WDOE) on October 27, 1977, or, in the alternative, to obtain a new water quality certificate consistent with the terms and conditions of this Agreement, including the absence of flows in the Gorge bypass reach. In the event efforts are made to reclassify the Gorge bypass reach from a Class AA water to another Class water under WDOE regulations, the Intervenors shall not oppose this action, and shall, at a minimum, provide written comments not opposing this action to the WDOE. Should the City be required to release flows in the Gorge bypass reach at any time before the issuance of a new FERC license and for any reason, this Agreement shall be voidable at the option of the City. Should the City be required to release flows in the Gorge bypass reach at any time after the issuance of a new FERC license and for any reason, this Agreement shall give rise to an immediate right of the City to petition the FERC to reconsider or reopen applicable license provisions to reconsider all wildlife resources provisions in light of such requirement. Under such circumstances, the City's efforts to initiate a proceeding before the FERC to reconsider or reopen shall not be opposed by the Intervenors; the Parties may, however, differ in their respective positions in such a proceeding.

The Parties shall cooperate in conducting and participating in studies and other actions provided for in this Agreement and shall provide assistance in obtaining any approvals or permits which may be required for implementation of this Agreement.

The Parties agree to join in the filing of an Offer of Settlement with the FERC based upon this Agreement and to request that the FERC issue appropriate orders approving this Agreement. All Parties shall refrain from seeking judicial review of the FERC's approval of this Agreement. It is expressly agreed by the Parties that this Agreement shall be submitted to the FERC as a unit and that any material modification of its terms, approval of less than the entire Agreement, or addition of material terms by the FERC shall make the Agreement voidable at the option of any Party.

## **2.3 EFFECTIVE DATE AND DURATION**

### **2.3.1 Execution and Effective Date**

This Agreement shall take effect upon the effective date of a license issued by the FERC consistent with this Agreement. If the FERC issues a new license inconsistent with this Agreement, and if a Party appeals, the

Agreement shall not go into effect. The Parties retain the right to appeal the issuance of a license in whole or in part if unacceptable provisions are added, including stay of any provision.

### **2.3.2 Duration**

This Agreement, together with any subsequent modifications, shall remain in effect for the term of the new FERC license period for the Project, which includes the term(s) of any annual license(s) which may be issued after the foregoing new license has expired. This includes ongoing operations and maintenance expenses which shall continue to be funded for the duration of this Agreement.

It is understood and agreed by the Parties that similar settlement agreements are being executed between the City and these Intervenors as well as other Intervenors (not party to this Agreement) in the Project relicensing proceedings concerning other resources affected by continuing Project operations. These other settlement agreements and mitigation and enhancement plans include:

**Fisheries**—Fisheries Settlement Agreement incorporating the Anadromous Fish Flow Plan, and the Anadromous and Resident Fish Non-Flow Plan

**Recreation and Aesthetics**—Settlement Agreement on Recreation and Aesthetics (including the Recreation Plan and Visual Quality Mitigation Plan)

**Erosion**—Settlement Agreement Concerning Erosion Control, incorporating the Erosion Control Plan

**Cultural Resources**—Settlement Agreement Concerning Cultural Resources (Archaeological and Historic Resources), incorporating the Cultural Resources Mitigation and Management Plan, which includes the historic and archaeological resources mitigation and management plans

**Traditional Cultural Resources**—Settlement Agreements Concerning Traditional Cultural Properties.

The City shall host an annual meeting of the Intervenors to facilitate coordination of implementation of the various settlement agreements. The Intervenors agree to cooperate in across forum coordination as necessary and appropriate to further effective program implementation.

All dollar amounts listed in this Agreement are defined as 1990 dollars and shall be adjusted annually for inflation or deflation by using the revised Consumer Price Index (CPI-U) for All Urban Consumers as published by the United States Department of Labor for the Seattle Metropolitan area. The indices used shall be those published for the last half of 1990 and, for subsequent years, the last half of the calendar year preceding that in which a payment or expenditure is to be made. Indexing of items in this Agreement shall continue until the year of actual payment, unless otherwise provided in this Agreement. The percentage of change from the earlier index to the later index shall be multiplied by the amount specified in this Agreement and the result added to or subtracted from that amount to arrive at the total payment or expenditure. Should the CPI-U index not be available, the Parties agree to negotiate another statistical basis for determining annual changes in the City's monetary commitments.

Payments and obligations by the City for this Agreement shall be made and met, unless otherwise noted in the plan, on a license-year basis. License years are based on the date of the FERC order issuing a new license for the Project; however, unless specifically provided otherwise in the plan, the City's monetary obligations do not become payable until the license becomes effective (see Section 2.3). The City shall make Project-specific monies due in license year one available at the time they are needed as soon as possible after the license becomes effective. In subsequent license years, the City shall make payments to the Intervenors for the implementation of specific Wildlife Plan projects at the time that they are needed. Monies required to be paid to or on behalf of the Intervenors for non-project specific purposes shall be paid on the last day of each license year. If the license is issued and accepted during a season which is critical for implementation, it may be impossible to implement a particular program element that year. Therefore, the Parties agree that implementation of such elements may not occur until the license year following its stated schedule in the plan. Agreed upon rescheduling of projects solely as a result of seasonal considerations shall not be considered a license compliance violation.

The City shall not be liable or responsible for failure to perform or for delay in performance due to any cause or event or circumstance of Force Majeure. For purposes of this Agreement, Force Majeure is any cause or event beyond the City's reasonable control. This may include, but is not limited to, fire, flood, mechanical failure or accidents that could not reasonably have been avoided by the City, strike or other labor disruption, act of God, act of any governmental authority or of the Parties, embargo, fuel or energy unavailability (ancillary to, but not including, basic power generation), wrecks or unavoidable delays in transportation, and inability to obtain necessary labor, materials or manufacturing facilities from generally recognized sources in the applicable industry, or communications systems breakdowns, or for any other reason beyond the City's control. The City shall make all reasonable efforts to resume performance promptly once the Force Majeure is eliminated.

For purposes of implementing this Agreement, the Parties agree that the following individuals shall be designated by each to be primary contact persons. The initial contact person for the City is:

Superintendent  
Seattle City Light  
1015 Third Avenue  
Seattle, WA 98104-1198

and the initial contact persons for each of the Intervenors are:

National Park Service:

Regional Director  
Pacific Northwest Region  
National Park Service  
83 South King Street, Suite 202  
Seattle, WA 98104

and

Superintendent  
North Cascades National Park  
Service Complex  
2105 Highway 20  
Sedro Woolley, WA 98284  
(206) 856-5700

Fish and Wildlife Service:

Regional Director, Region 1  
U.S. Fish and Wildlife Service  
Eastside Federal Complex  
911 N.E. 11th Avenue  
Portland, OR 97232-4181

and

Field Supervisor, Olympia Field Station  
Fish and Wildlife Enhancement  
U.S. Fish and Wildlife Service  
3704 Griffin Lane, S.E., Suite 102  
Olympia, WA 98501-2192  
(206) 753-9440

Washington Department of Wildlife:

Director  
Washington Department of Wildlife      and  
600 N. Capitol Way  
Mailstop GJ-11  
Olympia, WA 98504  
(206) 753-3318

R. Gary Engman, Mitigation Coordinator  
Washington Department of  
Wildlife, Region 4  
16018 Mill Creek Blvd.  
Mill Creek, WA 98012

North Cascades Conservation Council:

President  
North Cascades Conservation Council  
P.O. Box 95980  
University Station  
Seattle, WA 98145

Upper Skagit Tribe:

Tribal Chairperson  
Upper Skagit Tribe                              and  
2284 Community Plaza  
Sedro Woolley, WA 98284  
(206) 856-5501

Doreen Maloney, Natural  
Resources Manager  
Upper Skagit Tribe  
2284 Community Plaza  
Sedro Woolley, WA 98284

Sauk-Suiattle Tribe:

Tribal Chairperson  
Sauk-Suiattle Tribe                              and  
5318 Chief Brown Lane  
Darrington, WA 98241  
(206) 436-0131

Lawrence Joseph, Natural  
Resources Manager  
Sauk-Suiattle Tribe  
5318 Chief Brown Lane  
Darrington, WA 98241

Swinomish Indian Tribal Community:

Tribal Chairperson  
Swinomish Indian Tribal Community      and  
P.O. Box 817  
LaConner, WA 98504  
(206) 466-4067

Lorraine Loomis, Natural  
Resources Manager  
Swinomish Indian Tribal Community  
P.O. Box 817  
LaConner, WA 98504

U.S. Forest Service:

Forest Supervisor  
Mt. Baker-Snoqualmie National Forest  
21905 – 64th Avenue West  
Mountlake Terrace, WA 98043  
(206) 744-3393

Bureau of Indian Affairs:

Area Director, Portland Area Office  
Bureau of Indian Affairs  
Portland Area Office  
Attention: Land Services  
Eastside Federal Complex  
911 N.E. 11th Avenue  
Portland, OR 97232-4169  
(503) 231-6749

Notification of changes in the contact persons must be made in writing and delivered to all other contact persons.

All written notices to be given pursuant to this Agreement shall be mailed by first class mail or overnight express, service postage prepaid to each Party at the addresses listed above or such subsequent address as a Party shall identify by written notice to all Parties. Notices shall be deemed to be given five (5) working days after the date of mailing.

Notwithstanding any other provision of this Agreement, any Party may at any time invoke or rely upon any reopener clause(s) in the license for the Project in order to request the imposition by the FERC of different or modified measures for wildlife. Any provision of this Agreement that might be read to limit or preclude a Party from raising any relevant material issue of fact or law in reopening or to otherwise conflict with reopening (e.g., Sections 2.1, 2.1.1, 2.1.2, 2.1.3, 2.1.4, and 2.2.2.2) shall be inoperative to the extent of any such limitation, preclusion or conflict.

Before invoking any reopener clause under Section 2.8.1, a Party shall request all other Parties to commence negotiations for a period of up to 90 days to modify the terms and conditions of this Agreement in whole or in part. Any such modification shall be subject to FERC approval, except that the Parties may agree to implement on an interim basis, pending FERC approval, any measure not requiring prior FERC approval.

In any action under this Section 2.8, the petitioning Party shall have the burden of proof.

The Parties shall continue to implement this Agreement pending final resolution of any modification sought from the FERC, or until the relief sought becomes effective by operation of law, or unless otherwise agreed. At the time of petitioning the FERC under Section 2.8.1, nothing shall prevent any Party from requesting the imposition of different or modified measures or from bringing any cause of action in any appropriate forum, or from taking other actions relating to any issue or matter addressed by this Agreement.

This Agreement applies to the Project excluding High Ross or any modified High Ross construction. It does not address mitigation for the effects of raising Ross Dam. In the event the City decides to consider raising Ross Dam, separate provision will be made for additional mitigation. The Parties shall initiate discussions regarding wildlife mitigation according to the following procedures.

### **2.9.2 Notice**

The City shall notify the Intervenor of its decision to consider raising Ross Dam at least 30 months before construction would commence.

At the same time, the City shall commence consultation on necessary wildlife studies and possible mitigation measures using the Wildlife Management Review Committee.

At least 180 days before construction would commence, the City shall either agree with the Intervenor on modifications to this Agreement, or remaining disputes over wildlife measures may proceed to dispute resolution as described in Section 4.0 at the option of any Party.



Mitigation for the effects on the hunting opportunity of the Tribes of raising Ross Dam shall be at least comparable to the mitigation provided-for here for the effects of the current project and shall, at a minimum, replace the resources lost by resources of like kind, quality, and quantity or by mutually agreed arrangements in lieu of such replacement.

Nothing in this Agreement shall preclude any Party from challenging the construction and operation of High Ross or modified High Ross, including disputed mitigation, in any proceeding. The mitigation procedures set out in this Section are not exclusive and need not be commenced or exhausted prior to such challenges.

### **3.0 EXPENDITURES**

The City shall make a total of \$19,940,000 available, to be paid either in lump sum amounts or annual payments as indicated within Section 3.0 for the purpose of funding the measures and programs in the Wildlife Plan (as indicated in the Cost Summary Table 10-1 in the Wildlife Plan). The procedures and schedule for apportionment and disbursement of these monies are specified in the following paragraphs.

The City shall make a total of \$17,000,000 of the \$19,940,000 (see Section 3.1 above; see also Table 3-3 in the Wildlife Plan) available for the purposes of securing and preserving valuable wildlife habitat (“wildlife lands”) in the upper Skagit River and South Fork Nooksack River valleys, and the enhancement and manipulation of wildlife habitat (especially elk forage areas in the South Fork Nooksack River valley). The exact apportionment of monies between land acquisition and habitat enhancement shall be made by consensus of the Parties, as provided in the Wildlife Plan. All of these monies shall be spent. The City shall own and manage the wildlife lands according to the direction provided in this Agreement and in the Wildlife Plan. The monies included within the sum of \$17,000,000 shall be spent as lump sum payments. In no event shall any of the total amount of \$17,000,000 be subject to Section 3.7 including its provision for continuation of annual or periodic payments.

The City shall make approximately \$15,262,000–\$16,554,000 of the \$17,000,000 (see Section 3.2 above; see also Table 3-3 in the Wildlife Plan) available for the purpose of securing in fee (or, as necessary, easements or other property interests) and preserving wildlife lands in the upper Skagit River and South Fork Nooksack River basins. The exact amount available for land acquisition (relative to habitat enhancement—see Section 3.2.2), and the specific areas to be acquired, shall be determined through a consensus decision of the Parties, as provided in Section 5.0 below (see also Sections 3.2 and 3.3 in the Wildlife Plan). Payment of the amounts shall be upon the acceptance

of deeds or property agreements by the Seattle City Council. In no event shall any amount set aside for land acquisition be subject to Section 3.7.

The Parties have agreed on an initial list of wildlife lands to be sought for acquisition which is presented in Table 3-1 in the Wildlife Plan. The Parties hereby authorize the City to use best efforts to purchase these lands in fee simple without further approval by the Parties if such lands are available within the costs previously estimated by the City.

The land-acquisition monies shall be split between the Skagit and South Fork Nooksack River basins. The Parties have agreed that the list in Table 3-1 of the Wildlife Plan and the estimates referenced above establish the initial apportionment of land-acquisition monies between the Skagit and South Fork Nooksack River basins (see also Section 5.3 below and Section 3.3.1 in the Wildlife Plan). Should the costs of acquisition of some lands be less than was estimated, the surplus monies shall be placed in a pool for the acquisition of additional wildlife lands, and shall be allocated equally between the Skagit and Nooksack basins. Changes to the allocations shall be made by consensus of the Parties (see Section 5.1).

Notwithstanding Section 2.3.1, the City shall begin to secure some wildlife lands in 1991–92 and continue the process until the new license is accepted by the City. Subject to compliance with the requirements of the consensus process (see Section 5.0; see also Sections 3.2 and 3.3 in the Wildlife Plan), the City shall use its best efforts to acquire or otherwise secure all of the wildlife lands no later than by the end of the second license year.

The City shall make approximately \$446,000–\$1,738,000 of the \$17,000,000 (see Section 3.2 above; see also Tables 3-3 and 5-3 in the Wildlife Plan) available for the purpose of enhancing and manipulating wildlife habitat (especially elk forage areas in the South Fork Nooksack River valley). The exact amount available (relative to land acquisition—see Section 3.2.1) shall be determined through a consensus decision of the Parties, as further provided in Section 5.0 below and the Wildlife Plan. The City shall expend these monies (see Section 3.2.1) according to parcel-specific management plans that shall be developed by the City (with the guidance and direction of the Wildlife Management Review Committee—see Section 6.2.1) after the closing of purchase/easement agreements, as provided in Section 4.8 of the Wildlife Plan.

Monies set aside for habitat enhancement shall not be subject to Section 3.7. In the event the City receives subsequent annual licenses, the City shall provide an additional maximum amount of \$25,000 during each fourth annual license year solely for the purposes of habitat enhancement as described in this Section.

The City shall make \$20,000 of the \$19,940,000 (see Section 3.1 above; see also Table 10-1 and Section 4.2.3 in the Wildlife Plan) available for the purpose of conducting cultural resource reconnaissance surveys as part of the environmental review process for any of the wildlife lands (see Section 3.2.1) on which ground-disturbing activities are proposed. If no such activities occur, the \$20,000 shall not be spent. This is a lump sum payment which is not subject to Section 3.7.

The City shall make a projected \$2,320,000 of the \$19,940,000 (see Section 3.1 above; see also Table 7-1 in the Wildlife Plan) available during the term of the license for the purposes of providing on-going funding and administrative support for research studies and grants, development of new and better management approaches and information, long-term monitoring of wildlife and environmental resources, bald eagle inventory and monitoring efforts, and a research facility and equipment in the Project Area. Disbursement of monies by individual program components is described in Sections 3.4.1 to 3.4.4. Annual payments shall be made for the various components of the research program as described in Table 7-1 of the Wildlife Plan. This amount is subject to Section 3.7.

The City shall make \$130,000 of the \$2,320,000 (*see* Section 3.4 above; see also Table 7-1 in the Wildlife Plan) available for the purpose of renovating and equipping a building in Newhalem as a research facility. Of this \$130,000, the City shall make available up to \$50,000 for the purchase and installation of equipment. The City shall make available \$80,000 of the \$130,000 to refurbish the building structure and utilities to meet current code requirements and to facilitate the research purposes. The City shall consult with the National Park Service in designing the refurbishing and selecting the equipment. The procedures of the Historic Resources Mitigation and Management Plan (which forms a section of the Skagit Project Cultural Resources Mitigation and Management Plan) shall be followed when the alterations are made to the National Register-listed building.

Ownership of the building shall be retained by the City, but the building shall be leased to the National Park Service for the term of the license and any subsequent annual license(s). The City shall bear the costs of the electricity, water use, and lease of the building for the term of the license and any subsequent annual license(s). In consideration of this lease and of the electricity and water use of the building, the National Park Service shall, for the term of the new license, waive any land occupancy fees and costs for the Babcock Creek microwave site (part of the Skagit Microwave Backup System) which is described in the February 15, 1991 Babcock Creek Microwave Tower Environmental Assessment prepared by the National Park Service. The City shall provide upkeep and maintenance to the exterior of the building and grounds, and shall provide repair service for the internal and external electrical wiring and plumbing. The National Park Service shall be responsible for all other internal maintenance and upkeep.

The City shall make available annual payments of \$50,000 for the term of the license and any subsequent annual license(s) available for the purpose of providing funding for wildlife and environmental research, development of new and improved wildlife management and information, and monitoring of wildlife and environmental resources in the Project Area, the Ross Lake National Recreation Area, and the North Cascades National Park Service Complex (for a projected total of \$1,500,000 over a 30-year period; see also Table 7-1 in the Wildlife Plan). These annual payments shall be subject to Section 3.7. The City shall expend these monies with the guidance and direction of the Wildlife Research Advisory Committee, as provided in the Wildlife Plan.

The City shall make available annual payments of \$20,000 for the term of the license and for any subsequent annual license(s) to the National Park Service for the purpose of supporting long-term monitoring of wildlife and environmental resources in the Project Area, the Ross Lake National Recreation Area, and the North Cascades

National Park Complex (for a projected total of \$600,000 over a 30-year period; see also Table 7-1 in the Wildlife Plan). These annual payments shall be subject to Section 3.7.

The City shall make available payments for a projected total of \$90,000 to the U.S. Forest Service for the purpose of inventory and monitoring of bald eagle and other wildlife habitat in the Skagit National Recreation River corridor, and the Sauk, Suiattle, and Cascade National Scenic River corridors. The City shall provide these monies according to the following schedule:

- 1) The City shall make payments of \$20,000 in each of license years one and two, to be used for developing the inventory and a plan for monitoring and meeting the needs of bald eagles. These are lump sum payments which are not subject to Section 3.7.
- 2) Beginning in license year seven, the City shall make periodic payments of \$10,000 every five years for the term of the license (thus, such periodic payments shall be made in each of license years 7, 12, 17, 22, and 27), and in any subsequent annual license year which completes the next 5-year period in this progression, to be used for updating the bald eagle plan and monitoring its performance. These periodic payments shall be subject to Section 3.7.

The City shall make annual payments of \$20,000 for the term of the license (for a projected total of \$600,000 over a 30-year period; see Section 3.1 above; see also Table 7-1 in the Wildlife Plan) and any subsequent annual license(s) available to the North Cascades Environmental Learning Center (ELC) (see the Skagit Project Settlement Agreement on Recreation and Aesthetics) for the purpose of providing greater public knowledge and understanding of the values and issues in wildlife and ecosystems management and protection in the Project Area and the North Cascades area. The expenditure of these monies shall be governed by the procedures established for the ELC. These annual payments are subject to Section 3.7.

In Section 6.0 of the Wildlife Plan a plant propagation program is described and developed. The budgeting and scheduling of this program shall be part of the Skagit Project Erosion Control Plan. The Settlement Agreement for Erosion Control shall include the City's commitments for the scheduling and budgeting of this plant propagation program.

In the event the City receives subsequent annual licenses, the annual payments identified in Sections 3.4.2, 3.4.3, and 3.5 in this Agreement shall be continued through any subsequent annual license periods at the same amounts set forth in this Agreement, and the periodic payments identified in Section 3.4.4 in this Agreement shall also be continued through any subsequent annual license periods at the same amounts and time intervals set forth in this Agreement, resulting in an increase in the total expenditures for the particular category.

## **4.0 DISPUTE RESOLUTION**

Any dispute between the Parties solely concerning asserted non-compliance with the terms of this Agreement shall be referred for consideration to the Wildlife Management Review Committee (WMRC) established under Section 6.2.1. The WMRC shall convene as soon as practicable following issuance of a written request by any Party. All decisions of the WMRC relating to asserted non-compliance shall be unanimous. In the event that the WMRC cannot resolve the dispute within thirty (30) days after its first meeting on a dispute, it shall give notice of its failure to resolve the dispute to all Parties.

### **4.1.2 Optional Policy Review**

The Parties may, at their option prior to elevating an issue to the FERC, convene an in-person or telephone conference of policy-level administrators should committee-level dispute resolution fail. Any Party through its designated contact in Section 2.7 may invoke optional policy review by contacting the other Parties' designated contacts and arranging a suitable conference. Decisions by unanimous consent shall bind all Parties. In the event that the policy representatives cannot resolve the dispute within 15 days, the matter may be taken to the next level.

Following failure of resolution of issues solely concerning non-compliance with the terms of this Agreement by the WMRC, and the optional policy review, any Party may request the FERC to refer the dispute to (1) the Chief Administrative Law Judge of the FERC; or (2) the Division of Project Compliance and Administration within the Office of Hydropower Licensing, or its successor, in the order listed above (unless otherwise agreed by the Parties or directed by FERC), for review and resolution pursuant to the FERC's Rules of Practice and Procedure.

Notwithstanding any other provision of this Agreement, any Party may seek relief arising solely from non-compliance with this Agreement by any Party.

## **5.0 PROCEDURES FOR ACQUISITION OF LANDS**

The term "initial acquisition" shall be defined as the use of the land-acquisition portion of the \$17,000,000 (see Section 3.2) to select, secure, and purchase wildlife lands. This initial acquisition process shall end with the

complete disbursement of the portion of the \$17,000,000 that is allocated to land acquisition. Any subsequent alteration to the composition of the wildlife lands, including disposal and new acquisition, shall be handled as provided in Section 5.4.2 below.

Each Party shall designate a representative and alternate representative to represent it for consensus decision-making. These representatives may be collectively referred to as the "Land Acquisition Group." A Party may also designate another Party to represent its interest.

The City shall, as appropriate, convene meetings or communicate with the Parties for the purpose of sharing information, receiving guidance, and arriving at consensus decisions. Decisions may be made at meetings of the Land Acquisition Group, by telephone conference call, polling by telephone, by written authorization, or by any other means as approved by the Land Acquisition Group. The failure of a representative to participate in a decision meeting or call in which the representative had previously agreed to participate shall be considered as that Party's agreement with any consensus reached in the meeting or call.

In the event that the properties listed in Table 3-1 in the Wildlife Plan are substantially reconfigured, the purchase of such properties cannot be made in fee simple (e.g., an easement is all that can be acquired), the cost of securing such lands will exceed initial estimates referenced in Section 3.2.1, fair market value will exceed said initial estimates, or the properties are not available, the City shall inform the other Parties of the difficulties and shall seek guidance (see Section 5.6) from them on how to proceed. The Parties shall approve by consensus the purchase or optioning of: properties which have been substantially reconfigured; the acquisition of interests in properties that are not available in fee simple; properties available only at higher total cost (purchase plus option) than initial estimates; or properties which are substituted for lands identified in Table 3-1 in the Wildlife Plan. Any change in the apportionment of monies between the Skagit River and South Fork Nooksack River basins shall also be made by consensus of the Parties.

If consensus cannot be reached, the decision shall be submitted to the contact persons (see Section 2.7) for resolution. Should consensus still not be reached, the decision shall be referred to the WMRC for final decision. Upon the referral of an initial land acquisition decision, the WMRC shall reach a final decision under the process described in Section 6.2.1. The Parties may establish additional procedures to govern the acquisition process.

"Consensus" shall be defined as collective and unanimous agreement of the Parties on each decision or course of action. Subject to the limitations in Section 5.6 below, all decisions or actions regarding initial land acquisition shall be made by consensus of the Parties. Such decisions include the selection and initial acquisition of lands (see Section 3.2); the apportionment of monies between land acquisition and habitat enhancement; the apportionment of monies or lands between the basins of the Skagit River and South Fork of the Nooksack River; the selection of particular lands or parcels; and all decisions regarding disbursement of the monies apportioned to initial land acquisition. The consensus process of decision-making applies only to the initial acquisition of wildlife habitat lands and shall not be applicable after the completion of the initial land acquisition process and the expenditure of that portion of the \$17,000,000 which is allocated to land acquisition.

Decisions regarding disbursement of monies apportioned to habitat enhancement shall be made by the WMRC; see Section 3.2.2; see Section 6.2.2. See also Section 3.2.2 in the Wildlife Plan.

The City Light Department's Property Management Division will be the City's agent for acquisitions, easements, and any other arrangements regarding real property and interests therein. The Seattle City Council retains the authority to accept the deeds/easements and thus to complete the real property transactions.

The City shall bear the primary responsibility for identifying properties available for purchase. Nothing herein shall restrict another Party from identifying properties for purchase.

The Parties have agreed on a list of lands to be sought for acquisition which is set forth in Table 3-1 in the Wildlife Plan. The Parties have also agreed that the City has authority to purchase these lands as provided in Section 3.2.1 above and in Sections 3.2.1 and 3.3 of the Wildlife Plan. Further, the Parties have agreed that the list and estimates referenced in Section 3.2.1 establish the

initial apportionment of land-acquisition monies between the Skagit and South Fork Nooksack River basins.

In the event that some of the lands referenced in Table 3-1 of the Wildlife Plan are not available for acquisition or are found unsuitable (see Section 5.6), substitute lands shall be selected by consensus of the Parties and be sought for acquisition by the City. An initial list (which is not intended to be exhaustive or to preclude the selection of parcels that are not listed) of substitute lands is included in Table 3-2 of the Wildlife Plan.

During the term of the new license, should the wildlife habitat values of some of the acquired lands be unacceptably harmed or lost (e.g., become isolated or affected by development, or suffer wind or fire damage), and the City and the WMRC (see Section 6.2.1) agree that the interests of the wildlife would be better served by the sale of the affected parcel and the purchase of a substitute parcel, the City may proceed to dispose of the affected area, and select and seek to acquire another area. Acquisition of any such replacement properties shall be approved by the WMRC.

The City shall hold title to, and retain full control (subject to recommendations of the WMRC), of the acquired properties for the term of the new license and any subsequent annual license(s). Furthermore, for the foreseeable future the City intends to own and operate the Project. The City intends that the lands currently being acquired for the Wildlife Plan for the new license also contribute to meeting the needs of wildlife in future license periods. If the City does not renew the license in the future, the City shall offer to the appropriate public agencies a first right of refusal for purchase of the properties at market rates for continued conservation purposes.

The City retains the right to refuse to acquire title or interest in land or property if such acquisition would pose a threat of unacceptable liability (e.g., an old hazardous waste dump is present on site) to the City; if the titles of the lands or easements to be acquired are not clear or capable of being cleared without undue difficulties; if there are unacceptable problems with the title, covenants, or deed restrictions; if the costs would exceed fair market value; if the landowners seek to impose unacceptable conditions; if adverse modifications have occurred which make the lands no longer desirable; or for other such causes. If such problems are identified, the City shall confer with the other Parties to the Settlement Agreement to identify alternative approaches or responses, and/or to select substitute lands.

## **6.0 ISSUES OF GENERAL CONCERN**



The City shall fill Ross Lake as early and as full as possible after April 15 each year, subject to adequate runoff, anadromous fisheries protection flows (specified in the Anadromous Fish Flow Plan), flood protection, minimized spill, and firm power generation needs. Subject to the above constraints and hydrologic conditions permitting, the City shall achieve full pool by July 31 each year.

The City shall hold Ross Lake as close to full pool as possible through Labor Day weekend, subject to adequate runoff, anadromous fisheries protection flows (specified in the Anadromous Fish Flow Plan), flood protection, minimized spill, and firm power generation needs.

In any overdraft year (i.e., in those years in which Ross Lake is drafted below the energy content curve), the City shall bring the Ross Lake level up to the variable energy content curve (VECC) no later than March 31, subject to adequate runoff, anadromous fisheries protection flows (specified in the Anadromous Fish Flow Plan), flood protection, minimized spill, and firm power generation needs.

A Wildlife Management Review Committee (WMRC) shall be convened which shall review the implementation of the Wildlife Plan, assess its progress and the results of management activities and programs, and review and comment on the City's reports on the Wildlife Plan and its components and measures. As provided in Section 5.2 of this Agreement, the WMRC shall make the final decision in questions concerning land acquisition which have been referred to it by the Land Acquisition Group. The decisions of the WMRC concerning land acquisition shall be by majority vote (as provided below).

The WMRC may direct that minor changes be made in the measures and activities of the Wildlife Plan in response to problems or to best meet the needs of the wildlife. Any decisions of the WMRC (except as provided below) shall be by majority vote of the six voting members (i.e., four or more must be in favor).

As provided in Section 4.1.1 of this Agreement, an additional function of the WMRC shall be to serve as the initial step for the review of any dispute between the Parties solely concerning asserted non-compliance with the terms of this Agreement. All decisions of the WMRC relating to asserted non-compliance shall be unanimous.

The WMRC shall consist of six voting members and one non-voting member. The voting members are the City of Seattle, City Light Department (represented by the Environmental Affairs Division), which shall also act as committee chair; Washington Department of Wildlife; National Park Service; U.S. Fish and Wildlife Service; U.S. Forest Service; and a representative of the three Skagit tribes. The non-voting member shall be the North Cascades Conservation Council. Members of the WMRC must have a background in wildlife, ecosystems, or biology.

The WMRC shall meet as often as is necessary to complete its tasks, but in any case the WMRC shall meet no less than once a year for the first four years of the new license period, no less than once every two years for the next six years, and no less than once every five years for the remainder of the license period. The City (chair) may call a meeting at its own initiative or at the request of any of the members. The City of Seattle, City Light Department, shall provide administrative support for the WMRC (such as providing notice and mailings).

The City shall prepare a report of the implementation of the Wildlife Plan annually during the first five years of the new license and at least every five years thereafter. This report shall summarize land management activities during the period since the last report. A draft of this report shall be submitted by the City to the WMRC for their review and comment (at least 30 days shall be provided for review and comment), and the final report shall be submitted to the WMRC and the FERC.

The City shall enter into a Memorandum of Understanding with the National Park Service as provided in the Wildlife Plan to provide consultation regarding management activities on nonresidential nonproject fee title lands of the City in the Ross Lake National Recreation Area (RLNRA).

Provisions have also been developed to provide guidance to the City in responding to human-wildlife conflicts in the Project Area, and for taking anticipatory action in order to avoid or minimize such conflicts in the future. The provisions are:

- 1) The City shall reduce or eliminate wildlife attractants on nonfederal lands within the RLNRA which result in problem wildlife species habituation, including, but not limited to, the storage of garbage.
- 2) The City shall prohibit wildlife feeding by City residents.
- 3) The City may be authorized to take specific actions to control an animal that presents a threat to human safety. Authorizations determined to be appropriate shall be given on a case-by-case basis and only after prior consultation and approval of the Washington Department of Wildlife (WDW) and the National Park Service (NPS). Authorized actions may include lethal or non-lethal measures.
- 4) Except in cases of immediate threat to public safety, the City shall not take unilateral action in dealing with problem wildlife on non-federal lands without first consulting the NPS and the WDW.

Management of the acquired wildlife lands within the designated corridors of the Skagit Wild and Scenic River System shall be consistent with the maintenance or enhancement of the free-flowing character of each component river, and of the outstandingly remarkable values for which the rivers were placed in the federal Wild and Scenic River System. Such values are wildlife, fish, recreation, and scenic values.

## **7.0 SIGNATURES**

IN WITNESS WHEREOF, the City has caused this Settlement Agreement to be executed by its Superintendent of Light pursuant to Ordinance No. 106741 and the Intervenors have executed same pursuant to applicable legal authority.

Respectfully submitted.

Dated: April \_\_\_\_\_, 1991

**THE CITY OF SEATTLE**

By: \_\_\_\_\_

Randall W. Hardy  
Superintendent of City Light

Address for Notice:

Seattle City Light  
1015 Third Avenue  
Seattle, WA 98104

Dated: April \_\_\_\_\_, 1991

**STATE OF WASHINGTON,  
acting by and through the Washington Department of Wildlife**

By: \_\_\_\_\_

Curt Smith  
Director, Department of Wildlife

Address for Notice:

R. Gary Engman  
Department of Wildlife  
Region 4  
16018 Mill Creek Blvd.  
Mill Creek, WA 98012

William C. Frymire  
Office of Attorney General  
7th Floor  
Highway Licenses Bldg.  
Olympia, WA 98504

Dated: April \_\_\_\_\_, 1991

**U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE**

By: \_\_\_\_\_  
John Earnst  
Superintendent

Address for Notice:

North Cascades Park Service Complex  
Pacific Northwest Region, National Park Service  
U.S. Department of the Interior  
North Cascades National Park Service Complex  
2105 Highway 20  
Sedro Woolley, WA 98284

Dated: April \_\_\_\_\_, 1991

**UPPER SKAGIT TRIBE**

By: \_\_\_\_\_

Floyd Williams  
Tribal Chairperson

Address for Notice:

Upper Skagit Tribe  
2284 Community Plaza  
Sedro Woolley, WA 98284

Dated: April \_\_\_\_\_, 1991

**SAUK-SUIATTLE TRIBE**

By: \_\_\_\_\_

Lawrence Joseph  
Tribal Chairperson

Address for Notice:

Sauk-Suiattle Tribe  
5318 Chief Brown Lane  
Darrington, WA 98241



Dated: April \_\_\_\_\_, 1991

**SWINOMISH INDIAN TRIBAL COMMUNITY**

By: \_\_\_\_\_

Robert Joe  
Tribal Chairperson

Address for Notice:

Swinomish Indian Tribal Community  
P.O. Box 817  
LaConner, WA 98257

Steve Fransen  
Skagit System Cooperative  
P.O. Box 338  
LaConner, WA 98257

Dated: April \_\_\_\_\_, 1991

**U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Marvin L. Plenert  
Regional Director, U.S. Fish and Wildlife Service

Address for Notice:

United States Fish and Wildlife Service  
Eastside Federal Complex  
911 N.E. 11th Avenue  
Portland, OR 97232-4181

Field Supervisor  
U.S. Fish and Wildlife Service  
Fish and Wildlife Enhancement  
3704 Griffin Lane, S.E.  
Suite 102  
Olympia, WA 98501-2192

Dated: April \_\_\_\_\_, 1991

**NORTH CASCADES CONSERVATION COUNCIL**

By: \_\_\_\_\_

David Fluharty  
President

Address for Notice:

NCCC  
P.O. Box 95980  
University Station  
Seattle, WA 98145

Dated: April \_\_\_\_\_, 1991

**U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE**

By: \_\_\_\_\_

John F. Butruille  
Regional Forester, Pacific Northwest Region

Address for Notice:

Sam Nagel  
U. S. Forest Service  
21905 64th Avenue West  
Mountlake Terrace, WA 98043

Dated: April \_\_\_\_\_, 1991

**U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS**

By: \_\_\_\_\_

Stan Speaks  
Area Director

Address for Notice:

U.S. Bureau of Indian Affairs  
Portland Area Office  
Attention: Land Services  
911 N.E. 11th Avenue  
Portland, OR 97232-4169

This page left blank on purpose.

## **APPENDIX**

### **Wildlife Habitat Protection and Management Plan**