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December 22, 2004

Honorable Magalie Roman Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington DC, 20426

Reference: Comments on the Notice of Settlement Agreement dated December 3, 2004 for the Baker River Project (P-2150-033)

Dear Ms. Salas:

The Swinomish Indian Tribal Community has rights guaranteed under the Treaty of Point Elliott of 1855, which are effected by the Baker River Project. The Swinomish Indian Tribal Community is, pursuant to federal court order, a co-manager of the fish and wildlife resources of the Baker River Basin along with the Washington Department of Fish and Wildlife (WDFW), the Sauk-Suiattle Indian Tribe and the Upper Skagit Indian Tribe.

The Swinomish Indian Tribal Community has been extensively involved in the collaborative effort to relicense the Baker River Project under the Alternative Licensing Procedures (ALP) ordered by the Commission. The Swinomish Indian Tribal Community supports the comprehensive Baker River Project Settlement Agreement (Settlement) filed with the Commission by Puget Sound Energy (PSE). We believe the Settlement represents the best alternative to a contested license and that it has been a collaborative effort to reach a balance of all interests including those of PSE, state and federal resource agencies, tribes, local governments, non-governmental organizations and interested citizens. Additionally, considerable effort was made by the Baker Legal Workgroup to craft the Settlement and draft license articles to be consistent with our understanding of Commission regulations and policies. The Swinomish Indian Tribal Community respectfully requests that the Commission recognize the Settlement as a comprehensive settlement with all provisions important to its viability, and as such, issue license articles that are consistent with the Settlement and appended draft license articles.

Following the video conference meeting with Commission staff and other project stakeholders on December 8, it became apparent that the Tribe needed to provide additional comments. There was extensive discussion and some disagreement on the intent of Article 107. Our intent in drafting this article matches that expressed during the meeting by PSE, that Article 107 is a placeholder to show the intent of the relicense group to strive to achieve 29,000 acre-feet of flood storage at lower Baker Reservoir through the process established by the US Army Corps of Engineers (ACOE).

Throughout the relicense process the ACOE staff has been consistent in stating that additional flood storage at lower Baker Reservoir would only be considered as part of the Skagit Basin Flood Study. This position was confirmed by Colonel Debra Lewis during government to government meetings between the ACOE, the Swinomish Indian Tribal Community and Sauk-Suiattle Indian Tribe. During the relicense process it became clear, while discussing the issue of flood control, that the timelines for the ACOE process to evaluate new flood control proposals at the Baker River Project did not match the timelines of the Commission ordered ALP for the Baker Project. Throughout the collaborative process, Commission staff stated that while the Commission would make the final decision on a flood control article they would rely heavily on the recommendation of the ACOE. ACOE staff has stated repeatedly that, given the timeline of the relicense, they would not be able to recommend flood control that was different from the existing flood control regime at Upper Baker Reservoir of 16,000 acre-feet lost valley storage and 58,000 acre-feet additional storage established by the ACOE study in 1976. Given the disparity of the two processes, the language of Article 107 that addresses changes to the flood control regime must be read as a placeholder that shows the intent of the relicense participants to strive to achieve 29,000 acre-feet of additional storage at lower Baker Reservoir, but only through the established ACOE process. Agreement to Article 107 by the Swinomish Indian Tribal Community was conditioned on the understanding that Skagit County recognized that additional flood control would have to follow the ACOE process and that Skagit County was committed to the ACOE process. It was our understanding that all relicense participants were agreeable to the ACOE process, which was reflected by their signing the Settlement.

During the December 8 meeting, Skagit County asserted that the Commission must analyze 29,000 acre-feet of storage at lower Baker as part of the NEPA analysis of the new license for the Baker Project. Not only was this not the intent of the article and not required by applicable law, we believe it would represent an unacceptable delay in the relicense process. The necessary information for a NEPA analysis of 29,000 acre-feet of additional flood storage at lower Baker was not scoped or studied as part of the Baker ALP ordered by the Commission. Only one aspect of the analysis was studied as part of the Baker ALP, the effect on the agreed-to downstream flow regime. It was shown that the additional 29,000 acre-feet would not effect the agreed upon flow regime. This did not constitute a complete environmental analysis but would be a major environmental issue in an analysis. For that reason the other relicense participants were willing to support the intent to gain additional flood at lower Baker, subject to further analysis through the ACOE process. Additionally the Settlement does not include any environmental Protection, Mitigation and Enhancement measures for additional flood control. This is because the environmental effects have not been identified. It is our expectation that these measures would be part of the ACOE process. While additional flood control was not scoped or studied, relicense participants were willing to include a place holder license article solely to address the concerns of Skagit County and provide them certainty that there would be support for striving to achieve additional flood control through the ACOE process.

Finally, during the meeting, Commission staff stated that PSE needs to inform the Commission if the Baker Settlement Agreement is a comprehensive settlement and that from the discussion of proposed Article 107 "it did not sound like it". We believe that PSE has shown that the Baker Settlement Agreement is comprehensive and that the language and intent of proposed Article 107 clearly commits analysis of additional flood control to the ACOE process (as has been consistently stated by ACOE staff throughout the Baker ALP). Because of the diligent efforts of all relicense participants to address all parties' interests, including Skagit County's interest in additional flood control, all the participants signed the Settlement. We are concerned by the statements and actions of Skagit County with respect to Article 107 and their effect on the continued efficacy of a comprehensive settlement.

The Swinomish Indian Tribal Community remains committed to the overall settlement and to seeking additional flood control as described in Article 107 consistent with the established ACOE process. The Tribe believes that all parties will have their interests satisfied if they too remain committed to the Settlement.

The Swinomish Indian Tribal Community appreciates the opportunity to comment on the Baker River Project Settlement Agreement.

Sincerely,

Brian Cladoosby  
Chairman,  
Swinomish Indian Tribal Community

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