


STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda J. Bassi, Chief 
Stream and Lake Protection Section

DATE: January 20, 2009

SUBJECT: **Agenda Item 6, January 27-28, 2009 Board Meeting**
Stream and Lake Protection -- Final Settlement Agreement for Tacoma
Power Plant Relicensing

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Introduction

In this agenda item, Staff will present a proposed Final Settlement Agreement that CWCB staff and the AG's Office have negotiated with the Public Service Company of Colorado d/b/a Xcel Energy ("PSCo"), the U.S. Forest Service ("USFS"), the Colorado Department of Natural Resources ("CDNR") and the Colorado Division of Wildlife ("CDOW"), and request Board to authorize the CWCB Director to execute the Final Settlement Agreement if and when, in her discretion, the outstanding issues have been resolved in a manner acceptable to the CWCB.

Upon execution by all parties, the Agreement will be submitted to the Federal Energy Regulatory Commission ("FERC") in connection with the relicensing of the Tacoma Hydroelectric Project. The CWCB's role in implementing this Agreement will be to work with the parties and stakeholders to acquire water, water rights or interests in water to enhance flows in the Dolores River below McPhee Reservoir, using funds provided by PSCo under the Agreement.

Staff Recommendation

Staff recommends that the Board authorize the CWCB Director to execute the Final Settlement Agreement if and when, in her discretion, the outstanding issues have been resolved in a manner acceptable to the CWCB.

Background

PSCo owns and operates the Tacoma Hydroelectric Project, located partially in the San Juan National Forest on Cascade Creek and the Animas River just north of Durango, Colorado. The Tacoma Plant was in service before the creation of the San Juan National Forest and celebrated its 100th anniversary in 2006. PSCo holds decreed water rights to divert the flows of Cascade Creek into a conduit that delivers those flows to the Little Cascade Creek watershed, and then into Electra Lake. From Electra Lake, the water is diverted into a penstock to the Tacoma Powerhouse in the Animas River canyon. As with most non-federal hydroelectric projects, the Tacoma Plant operates under the authorization of a license issued by FERC in accordance with

the power vested in FERC under the Federal Power Act of 1920 ("FPA"), as amended from time to time. Licenses issued by FERC have terms of 30 to 50 years, at which time the projects must be relicensed in accordance with the regulations existing at the time of relicensing. Under Section 4(e) of the FPA, FERC must adopt conditions specified by the USFS on the license if National Forest System lands are occupied by the project, which is the case with the Tacoma Project. Section 10(j) of the FPA requires FERC to solicit recommendations from state fish and wildlife agencies related to the protection, mitigation, and enhancement of fish and wildlife resources impacted by the project.

FERC Relicensing of Tacoma Project

PSCo is in the process of relicensing its Tacoma Hydroelectric Project with FERC, with the process scheduled for completion in February 2010. PSCo is proceeding under the FERC Integrated Licensing Process ("ILP"), which is a relatively new FERC process that is intended to provide a more predictable, efficient, and timely licensing process that ensures adequate resource protections. The process is characterized by early issue identification and the use of studies to fill information gaps, and established time frames to complete process steps for all stakeholders, including FERC.

Instream Flow Study (a/k/a Delphi Study)

As part of the ILP and to assess the availability of fish habitat in Cascade Creek below the diversion dam, fishery biologists from PSCo, the CDOW and the USFS undertook a survey ("the Delphi Study") of the relationship between flows and fish habitat in Cascade and Little Cascade Creeks. The Delphi Study relies on the expertise and judgment of fishery biologists to determine the flows needed to maintain fish habitat at an adequate level. The Delphi team determined that a minimum flow of 7.0 cfs was needed to provide adequate fish habitat in Cascade Creek and 4.5 cfs was needed in Little Cascade Creek. The Delphi team assumed that 2.5 cfs would be available from natural flow in Little Cascade Creek. The Delphi team recommended that when flows at the Cascade Creek diversion dam were less than the 9.0 cfs needed for fish in the two streams: (1) the first 2.0 cfs should be diverted from Cascade Creek so the Tacoma Project's siphon would not freeze in the winter months; and (2) the next 7 cfs should be bypassed to Cascade Creek.

USFS / CDNR Memorandum of Understanding

On April 16, 2004, the USFS and CDNR entered into a Memorandum of Understanding ("MOU") to "establish a framework for the Forest Service and the DNR to work together in a cooperative manner on issues regarding the management of water and water uses on National Forest System lands in Colorado." The MOU provides, among other things, that the USFS and CDNR will "explore creative ways to assure continued operation of water use facilities on NFS lands while protecting aquatic resources . . . ; and that the CWCB and the USFS "will seek ways to achieve instream flow protection in high priority stream reaches through innovative measures consistent with state and federal law" In 2006, to address the possibility of the USFS recommending to FERC that it impose a bypass flow of 7 cfs on Cascade Creek as a condition of the Tacoma Project license, PSCo requested the USFS and the State of Colorado to work together to consider alternatives to a bypass flow as contemplated in the MOU. In response to PSCo's request, the USFS, CDNR, CWCB and CDOW agreed to work with PSCo to explore alternatives to the imposition of a bypass flow on Cascade Creek that would still achieve the USFS's resource protection goals.

Negotiation of Agreement-in-Principle and Final Settlement Agreement

In addition to PSCo, the USFS, the state agencies, representatives of the San Juan Citizens Alliance, Southwestern Water Conservation District, and more recently, the Dolores Water Conservancy District, have participated in lengthy negotiations to develop a mutually acceptable alternative to the imposition of a bypass flow on Cascade Creek. In November 2008, PSCo, the USFS, CWCB, CDNR, CDOW, San Juan Citizens Alliance, and the Southwestern Water Conservation District entered into an Agreement-in-Principle ("AIP") that identified a preferred alternative to a bypass flow at the Tacoma Project and provided a framework for the development of a Final Settlement Agreement between PSCo, USFS, CDNR, CWCB and CDOW. In early November 2008, to allow the parties more time to focus on negotiating a Final Settlement Agreement, PSCo and the other parties to the AIP submitted the AIP to FERC with a request for a 90-day extension of a FERC deadline to file comments, recommendations, and proposed terms and conditions related to the relicensing. FERC denied the request, which in turn resulted in PSCo filing a request for a trial-type hearing on December 4, 2008 to preserve its right to challenge the preliminary conditions filed by the USFS and CDOW. Since that date, the parties have been meeting regularly to negotiate a Final Settlement Agreement, but PSCo, the USFS, and the CDOW also have had to spend significant time and resources on preparing for and submitting documents required for the trial-type hearing. The parties are striving to finalize the Final Settlement Agreement as soon as possible to avoid additional expenditures of time and resources on the hearing.

Terms of Final Settlement Agreement

A copy of the draft Final Settlement Agreement is attached to this memo. However, the parties have not reached agreement on several key provisions of the Agreement as of the date of this memo, and have additional meetings scheduled between the date of this memo and the Board meeting to discuss the issues. Staff has provided this copy to give the Board as much information as possible about the Agreement, and will provide and present an updated version to the Board at the Board meeting. The parties to the Agreement are PSCo, the USFS, CDNR, CDOW and CWCB. The "Interested Stakeholders" referred to in the Agreement include the Dolores Water Conservancy District, Montezuma Valley Irrigation Company, Tribal water users, other local water users, the U.S. Bureau of Reclamation, and participants in the Dolores River Dialogue. The pertinent provisions of the Agreement (paraphrased and condensed from the draft Agreement) are:

1. The preferred alternative to imposing a bypass flow at the Tacoma Project is to provide, during the term of the new FERC license, enhanced flows in the Dolores River below McPhee Dam, especially during dry years and successive dry years, to support the significant aquatic resources that exist in that reach of the Dolores River.
2. Establishment of the Dolores River Water/Habitat Fund ("Fund"), into which PSCo will provide an initial lump sum payment to the Fund of \$225,000 and make additional annual payments to the Fund of \$15,000 each year thereafter. The purpose of the Fund is to pay for the acquisition, by lease, purchase or other form of control over water rights or interests in water to be used for the enhancement of the aquatic resources of the Dolores River below McPhee Dam for the term of the FERC license.
3. Establishment by the Parties, in consultation with the Interested Stakeholders, of a written protocol to guide the use of the Fund for the acquisition of water to enhance coldwater fish populations and aquatic habitat below McPhee Dam.
4. Formation of Dolores River Enhancement Committee by Parties and Interested Stakeholders. The Committee is not a decision-making body, but a forum for discussing

implementation opportunities, particularly the specific use(s) of the Fund, and progress under the Agreement.

5. Pursuant to the protocol, the Parties determine and implement the use of the funds provided by Agreement for the purposes of: 1) acquiring water; 2) enhancing coldwater fish populations; and 3) enhancing aquatic habitat below McPhee Dam.
6. The USFS and the state agencies agree to support PSCo's proposed Tacoma Project operating plan that calls for continuation of the current flow regime in Cascade Creek with no bypass flow requirement.
7. The requirement that PSCo install a gage and monitor fish populations on Cascade Creek.
8. If after a reasonable period of time under the new FERC license, the USFS, in consultation with the CDNR, determines that substantial progress has not been made to obtain water for the Dolores River below McPhee Dam due to the unavailability of water for purchase, lease, or other form of control, PSCo and Committee shall discuss, investigate and evaluate other alternatives to bypass flows with goal of reaching mutually acceptable solution.
9. If a solution is not reached, PSCo will perform an instream flow study in Cascade Creek in consultation with CDOW and USFS and identify how it will meet applicable Forest Plan standards on Cascade Creek. The license could be amended to implement any resulting flow requirement on Cascade Creek by donation, lease, or other method needed to secure such flow by working with the CWCB through its Instream Flow Program. Alternatively, the USFS could recommend the imposition of a bypass flow.
10. The Fund may be used for temporary or permanent acquisitions of water.

Outstanding Issues

In November 2008, PSCo sent the parties a draft Final Settlement Agreement for review and comment. The Parties and Interested Stakeholders have met several times to discuss the Agreement and several have provided comments and proposed revisions to the draft Agreement. However, in early December, the USFS informed the group that the USFS could not provide comments on the Agreement because it was working on developing measures of success for the preferred alternative to enable the USFS to justify supporting off-site mitigation for the Tacoma Project. In early January, the USFS provided the group with some proposed milestones for measuring progress on obtaining additional water for Dolores River flows. The group has been discussing those proposed milestones and has not yet reached agreement on them.

Another outstanding issue is what the role of the Interested Stakeholders should be in implementing the Agreement. The Agreement-in-Principle provided that "the program and process for use of these funds shall be at the discretion of PSCo, USFS, CDNR, and CDOW, acting jointly, with input from affected stakeholders." The CDNR and CWCB have proposed drafting the Agreement to be consistent with the AIP, with the Parties consulting with the Interested Stakeholders on developing the protocol for use of the Fund and discussing decisions to use the Fund with the Interested Stakeholders. The Interested Stakeholders have proposed language that gives them a decision-making role in developing the protocol.

The Parties and Interested Stakeholders will continue to press forward on resolving these issues in an effort to finalize the Agreement as soon as possible.

Staff Recommendation

Staff recommends that the Board authorize the CWCB Director to execute the Final Settlement Agreement if and when, in her discretion, the outstanding issues have been resolved in a manner acceptable to the CWCB.

SETTLEMENT AGREEMENT
Tacoma Hydroelectric Project- FERC Project No. 12589

This final settlement Agreement (“Agreement”) is made pursuant to the Federal Energy Regulatory Commission (“FERC” or “Commission”) Rule 602, 18 C.F.R. §385.602, by and among the following Parties, Public Service Company of Colorado d/b/a Xcel Energy (“PSCo”); United States Department of Agriculture, Forest Service (“USFS”), Colorado Department of Natural Resources (“CDNR”) including its agencies Colorado Division of Wildlife (“CDOW”), and Colorado Water Conservation Board (“CWCB”) (collectively, “Parties”). This Agreement is effective as of the date that the last party identified in this paragraph executes the Agreement (the “Effective Date”).

ARTICLE I: RECITALS

Section 1.1. PSCo is in the process of obtaining a new license from the Federal Energy Regulatory Commission (“FERC”) for the continued operation of its 8-MW Tacoma Hydroelectric Project (“Project”) originally built in 1906. The Project is located in the Animas River watershed in southwestern Colorado partly on lands within the San Juan National Forest (“SJNF”). The Project diverts water in accordance with its duly authorized water rights at a small diversion dam on Cascade Creek and transports that water to Electra Lake, and then to its powerhouse in the Animas River Canyon. A significant issue related to the relicensing of the Project is the need for, and potentially the quantity of flows in the reach of Cascade Creek below the Cascade Creek diversion dam (“bypass reach”).

Section 1.2. The Parties have undertaken a series of meetings to explore, investigate, and evaluate alternatives to a bypass flow. All of these Parties have a direct interest in the relicensing of the Tacoma Project and/or the water resources of the SJNF. PSCo, as a user of the water resources of the SJNF, is willing to undertake measures that would provide a material benefit to the aquatic resources of the SJNF.

Section 1.3. The Parties ~~developed~~~~created~~ an Agreement-in-Principle (“AIP”) which outlined the nature and technical details of an agreement among the Parties and provided a good-faith framework for the development of this Agreement between PSCo, USFS, and CDNR and/or its agencies. The AIP was signed on November 10, 2008. While the San Juan Citizens Alliance (“SJCA”) and the Southwestern Water Conservation District (“SWCD”) are not Parties to the Agreement, by executing the AIP they signified their support of the concept and terms of this AIP, intending to lead directly to this Agreement.

Section 1.4. All the Parties agree that the preferred alternative, rather than providing a bypass flow at the Tacoma Project, is to provide, during the term of the new FERC license, enhance ~~ment of the~~ flows in the Dolores River below McPhee Dam, especially during dry years and successive dry years, to support the significant aquatic resources that exist in that reach of the Dolores River. Several entities and individuals, including but not limited to the Dolores Water Conservancy District (“DWCD”), Montezuma Valley Irrigation Company (“MVIC”), Tribal water users, other local water users, the U.S. Bureau of Reclamation (“Reclamation”),

participants in the Dolores River Dialogue (“DRD”) and various state and other federal agencies (“Interested Stakeholders”), have been working on the flow enhancement issue for many years.

Section 1.5. The AIP detailed the Parties’ rationale behind the preferred alternative which includes that: (a) the preferred alternative preserves, and does not put at risk, PSCo’s water rights on Cascade Creek and in the Animas River basin (b) the preferred alternative would not reduce Project hydroelectric generation ~~with the consequent impact on Project economies~~; (c) PSCo believes that the record before FERC to date shows that a flow in the bypass reach greater than that which already occurs is unlikely to provide any measurable improvement to aquatic life in the bypass reach; and ~~(d)~~ the CDOW and USFS believe that the record before FERC to date shows that a bypass flow is very likely to have measurable benefit to aquatic life and other ecological functions of Cascade Creek; therefore, the preferred alternative saves resources that would be spent in litigation of this issue.

Section 1.6. It is recognized by all Parties that in all issues related to the authorities of the USFS under Section 4(e) and the CDOW under Section 10(j) of the Federal Power Act (“FPA”), the USFS and CDOW are the entities responsible and authorized to exercise those authorities, and nothing in this Agreement or any other document filed with FERC in relation to the Tacoma Project will, or is intended to, waive or otherwise forfeit these authorities.

Section 1.7 Relevant Statutes

1.7.1. The Parties agree that the measures and actions contained herein are intended to address laws and statutes relevant to the relicensing process, including but not limited to:

- (1) Section 18 of the FPA, 16 U.S.C. § 811 (2000);
- (2) Section 4(e) of the FPA, 16 U.S.C. § 797(e);
- (3) Section 10(j) of the FPA, 16 U.S.C. § 803(j);
- (4) Section 10(a) of the FPA, 16 U.S.C. § 803(a);
- (5) National Forest Management Act, 16 U.S.C. § 1600 *et. seq.*;
- (6) Organic Administration Act of 1897, Pub. L. No. 2 (1897).

ARTICLE II: AGREEMENT OF THE PARTIES AND EFFECT OF THE AGREEMENT

Section 2.1. AGREEMENT

2.1.1. PSCo, CDNR and its agencies, and USFS hereby agree as follows:

- (a) Within 60 days of the date that a new FERC license issued for the Tacoma Project that is consistent with this Agreement is deemed final and non-appealable (“Final License Date”), the Parties shall establish the Dolores River Water/Habitat Fund (“Fund”), which will be held by _____. Within 30 days of the date of the establishment of the Fund, PSCo will provide a lump sum payment to the Fund of \$225,000. The purpose of the Fund ~~will be~~ is to pay for the acquisition~~re~~, by lease, purchase or other ~~wise obtain form of~~ control over water rights or interests in water ~~in the Dolores River, such water or rights in water so acquired~~ to be used for the

- enhancement of the aquatic resources of the Dolores River below McPhee Dam for the term of the FERC license. Within one year of the Final License date~~the same time period~~, the Parties, in consultation with the Interested Stakeholders, shall establish a written protocol (define) to guide the use of the Fund for the acquisition of water to enhance coldwater fish populations and aquatic habitat below McPhee Dam during the term of the FERC license~~for the exercise of their discretion~~. If the Parties and Interested Stakeholders cannot agree to the terms and conditions of the written protocol within 8 months of the final license date, the Parties will convene to make a final decision on the terms and conditions of the written protocol. Pursuant to the protocol, ~~The Parties shall determine and implement the use of the funds provided by this Agreement for the purposes of: 1) acquiring water; 2) enhancing coldwater fish populations; and 3) enhancing aquatic habitat below McPhee Dam. The Parties and Interested Stakeholders will form the Dolores River Enhancement Committee ("Committee"), which will be convened and informed of the funding decision~~consulted prior to the use of these funds, ~~pursuant to the protocol~~, acting jointly, in consultation with affected stakeholders, with respect to the use of these funds. ~~The Parties shall form and constitute the Dolores River Enhancement Fund Committee ("Committee"). The Parties Committee shall oversee the use of the funds provided by this Agreement for the purposes of 1) acquiring water; 2) enhancing coldwater fish populations and/or 3) aquatic habitat below McPhee Dam. The Committee and~~ shall meet at least once a year, unless otherwise agreed to by the Committee members. It is acknowledged that the Committee is not a decision-making body, but a forum for discussing implementation, opportunities, particularly the specific use(s) of the Fund, and progress under this Agreement
- (b) ~~Within 30 days of the date of the establishment of the Fund, PSCo will provide a lump sum payment to the Fund of \$225,000.~~
- (c) PSCo will make additional annual payments to the Fund of \$15,000 each year thereafter, beginning 12 months after the initial lump sum payment. After the first of these annual payments, subsequent annual payments will be subject to escalation based on the Consumer Price Index. The annual payments shall continue throughout the term of any new FERC license, subject to the terms outlined within item (f) below.
- (d) As part of this Agreement, CDNR and its agencies and the USFS agree to support the future operating plan ~~proposed by PSCo~~ for the Tacoma Project proposed by PSCo that calls for continuation of the current flow regime in Cascade Creek, and no new bypass flow requirement. The USFS may exercise available authority to reopen the license in the future related to issues other than bypass flow when statutory or regulatory mandates require it to do so.
- (e) USFS shall require, and PSCo shall install within 18 months of receiving its new FERC license, a suitable flow or water level monitoring gage in the bypass reach below the Cascade Creek diversion dam to be built and maintained to the current standards of the Colorado Division of Water Resources. The location of such gage

shall be agreed upon by the Colorado Division of Water Resources, USFS and PSCo. PSCo also agrees to continue for the term of the new license its current measurement of diverted flows, to Colorado Division of Water Resources standards, and report any other flows diverted from its water transport system. The USFS shall also require that PSCo monitor fish populations in the bypass reach employing a scope of study and methods substantially in conformance with the fish sampling jointly undertaken during the relicensing process. The monitoring shall occur once every four (4) years, starting in 2012, the third (3) year following issuance of the new FERC license, and shall continue for at least the first fifteen (15) years of the issuance of a new license that is final and non-appealable. These requirements shall be included as conditions in the new FERC license in substantially the form set forth in Appendix A attached hereto.

- (f) If after a reasonable period of time under the new FERC license (not ~~less~~more than 15 years or before January 1, 2025), it is determined by the USFS, in consultation with the CDNR and/or its agencies ~~and PSCo~~, that substantial progress has not been made to obtain water for the term of the FERC license to be used for the enhancement of the Dolores River aquatic habitat and coldwater fish populations below McPhee Dam due to the unavailability of water for purchase, lease, or other form of control, then the USFS and CDOW shall so notify in writing ~~the PSCo and the~~ other Committee members. Upon such notification, the PSCo and Committee shall undertake further discussion, investigation, and evaluation of other alternatives to a bypass flow at the Tacoma Project, such alternatives to consist of other means to achieve coldwater aquatic habitat improvement below McPhee Dam, or other measures identified by the Committee. These alternatives would be considered by the Committee to a degree and extent necessary to adequately evaluate the benefits and costs of the alternatives. The goal of the Committee shall be to reach a ~~mutually acceptable~~ solution acceptable to all Parties.

If an ~~mutually~~ acceptable solution is not reached within 6 months, PSCo agrees to undertake and complete an instream flow study in the bypass reach using standard PHABSIM methodology, including habitat time series analysis, in full consultation with the USFS and the CDOW. An alternative methodology may be used if agreed to by PSCo, USFS, and the CDOW. A draft study report shall be issued by PSCo for review and comment within 24 months from the date of the written notification by USFS and CDOW to PSCo and the Committee. The study report shall contain PSCo's demonstration of how it would meet the SJNF's relevant Forest Plan standards applicable to the Cascade Creek bypass reach. PSCo may also offer an alternative to a bypass flow at that time. If the USFS and the CDOW concur with PSCo's demonstration of compliance or PSCo's alternative, then ~~it they~~ shall so notify PSCo in writing and PSCo, consistent with any FERC requirements and approvals, shall move to amend the license to implement: (1) any resulting flow requirement in the bypass reach by donation, lease, or other method needed to secure such flow by working with the CWCB through its Instream Flow Program; or (2) the agreed-upon alternative. If applicable, PSCo shall~~would~~ provide to the CWCB such documentation needed to support its application for lease, donation or other means of

providing the required flow to the bypass reach within one year from the date of the ~~USFS~~-written notification. Any flow to the bypass reach implemented under the CWCB's Instream Flow Program would apply for the remaining term of the FERC license.

If the USFS ~~and CDOW~~ ~~does~~ not concur with PSCo's demonstration of compliance, or its alternative, then ~~they~~ shall so notify PSCo in writing. The USFS ~~and CDOW~~ may, after such notification to PSCo, exercise ~~their~~ reservation of authority under Section 4(e) ~~and 10(J)~~ of the FPA. PSCo shall maintain any rights it is afforded under the FPA, including, but not limited to Section 241 of the Energy Policy Act of 2005 and any related provisions.

- (g) PSCo shall only be obligated to make the payments agreed upon herein if the new FERC license contains terms and conditions related to a bypass flow requirement, fish monitoring, and streamflow gaging that are consistent with this Agreement. Annual payments required by this Agreement shall be suspended upon the USFS notifying in writing the Dolores River Enhancement Fund Committee of a lack of substantial progress in acquiring water for use in the Dolores River below McPhee Dam **for the term of the FERC license**. Any unexpended funds previously provided by PSCo in accordance with this Agreement shall be returned to PSCo within three ~~months-years~~ of such notification.

Section 2.2. EFFECT OF THE AGREEMENT

2.2.1. Limitations. This Agreement establishes no principle or precedent with regard to any issue addressed in this Agreement or with regard to any Party's participation in any other pending or future licensing proceeding. Further, no Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any operation, management, valuation, or other principle underlying any of the matters covered by this Agreement, except as expressly provided in this Agreement. By entering into this Agreement, no Party shall be deemed to have made any admission or waived any contention of fact or law that it did make or could have made in the licensing of the Project. This Section 2.2 shall survive any termination of this Agreement.

2.2.2. Representation Regarding Consistency and Compliance with Statutory Obligations. By entering into this Agreement, the Parties represent that they believe their statutory and other legal obligations as identified in Section 2.1 are, or can be, met through implementation of this Agreement in addition to those conditions and recommendations submitted by the USFS or any other Party not affected by this Agreement. Nothing in this Agreement shall be construed to limit any government agency with jurisdiction from complying with its obligations under applicable laws and regulations or from considering public comments received in any environmental review or regulatory process related to the Project in accordance with this Agreement. Nothing in this Agreement shall be deemed to constitute a waiver by the Parties of any right, obligation, or cause of action, including claims for injunctive relief or civil penalties, to enforce any laws or regulations not specifically addressed by this Agreement, provided however, that the Parties shall exercise any such right, obligation, or cause of action in

a manner consistent with this Agreement. The Parties shall not be precluded from taking appropriate action to abate an imminent endangerment to human health or the environment should such a situation arise at or in the vicinity of the Project.

2.2.3. The Parties agree that this Agreement is fair and reasonable and in the public interest within the meaning of FERC Rule 602 governing offers of settlement. 18 C.F.R. § 602(g)(3).

2.24. The Parties agree that the Fund may be used to enhance coldwater fishery populations and aquatic habitat below McPhee Dam for: (1) the acquisition of water by lease or other contractual arrangement for the term of the FERC license or a lesser period, or (2) a permanent acquisition of water. The written agreement for the water acquisition shall specify the term and nature of the acquisition.

ARTICLE III: ACTIONS UPON EXECUTION OF THIS AGREEMENT

Section 3.1. FERC Filings. Within 30 days of the effective date of this agreement, PSCO will file with the Commission a fully executed copy of this Agreement in accordance with FERC regulations at 18 C.F.R. § 385.602. Additionally, within 30 days of the effective date of this agreement, USFS will withdraw its preliminary mandatory condition requiring a bypass flow at the Tacoma Project.

Section 3.2. Communications with FERC and Other Government Agencies. To the extent consistent with applicable law, the Parties shall actively support this Agreement and incorporation of consistent terms into the License and any other required permits or certifications. The Parties agree not to propose or otherwise communicate to the FERC or to any other federal, state, or local agency whose approval may be necessary to put this Agreement into effect, any comments, filings, statements, or license conditions not consistent with the terms of this Agreement.

ARTICLE IV: IMPLEMENTATION OF AGREEMENT

Section 4.1. Parties Bound. The Parties shall be bound by this Agreement beginning on the effective date and for the term of the license unless precluded from doing so by an order of FERC or a court of competent jurisdiction.

Section 4.2. Orders of FERC or Court. The following provisions address orders issued by FERC or a court with respect to this Agreement.

4.2.1. Any Party may petition FERC for rehearing of the portion of any FERC order that rejects or modifies any portion of this Agreement (including by amending the License at any time during the term of the license in a manner inconsistent with this Agreement), and seek judicial review with respect thereto. Consistent with Section 3.2, in any such rehearing or review proceeding, whether initiated by a Party or not, no Party shall take a position that is inconsistent with this Agreement.

4.2.2. If FERC materially modifies the preferred alternative or otherwise requires any measure inconsistent with this Agreement, or if, during the term of the license, FERC or a court modifies the License to require operation of the Project in a manner that is inconsistent with the Agreement, then any Party who objects to any such order may give notice to the other Parties, within thirty days of such order, to discuss whether such inconsistency can be resolved by agreement of the Parties. In addition, any Party may seek a rehearing or an appeal of such an order.

Section 4.3. Review of Other Agency Actions. To the extent provided by applicable law, any Party may seek administrative rehearing and judicial review of any action by any other governmental authority inconsistent with this Agreement.

Section 4.4. Availability of Funds. Implementation of this Agreement for a Party that is a federal agency is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury, or the Treasury of the State of Colorado. Implementation of the Agreement by the Parties is subject to the availability of appropriated funds. The Parties acknowledge that USFS and CDOW are federal and state agencies respectively, and shall not be required under this Agreement to expend any government agency appropriated funds unless and until, in the case of USFS, an authorized official of the USFS affirmatively acts to commit such expenditure, and in the case of CDNR, CDOW and CWCB, the Colorado State Controller approves such expenditure, both cases as evidenced in writing.

ARTICLE V: FORCE MAJEURE

Section 5.1. An event of “Force Majeure” as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Party, including its contractors and subcontractors (to the extent said contractor was acting under their control or direction), which events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any federal, state, or local government authority, or any regulation, law, or prohibitory or mandatory action of any federal or state governmental authority; acts of God or sudden actions of the elements; acts of war, terrorism, or civil disturbance; and labor stoppages. If a Force Majeure event renders a Party unable to perform any obligation hereunder, that Party shall promptly notify the other Parties, and use best efforts to resume its obligation as soon as possible. For so long as a Force Majeure event renders the performance of any obligation impossible, that obligation is excused.

ARTICLE VI: GENERAL PROVISIONS

Section 6.1. No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any **non-Party to maintain a suit at law or equity** pursuant to this

Agreement. The duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law.

Section 6.2. Successors and Assigns. This Agreement shall apply to and be binding on the Parties and their successors and assigns.

Section 6.3. Modification of the Settlement Agreement. Any modification to the provisions of this Agreement shall be effective only when made in writing and signed by the Parties.

Section 6.4. Elected Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.

Section 6.5. No Partnership. Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make any Party the agent for or partner of any other Party.

Section 6.6. Reference to Statutes or Regulations. Any reference in this Agreement to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation or successor statute or regulation in existence as of the date of the action.

Section 6.7. Notice. Any notice required by this Agreement shall be in writing. It shall be sent by first class mail or comparable method of distribution to the other Party and shall be filed with FERC. For the purpose of notice, the authorized representatives of the Parties as of the effective date are:

PSCo: Public Service Company of Colorado
Attn: Supervisor, Tacoma Hydroelectric Project
240 Electra Lake East
Durango, CO 81301

USFS: Department of Agriculture, Forest Service

CDNR: Colorado Department of Natural Resources

CDOW: Colorado Department of Wildlife
Attn: Director CDOW
6060 Broadway
Denver, CO 80216

CWCB: Colorado Water Conservation Board

ARTICLE VII: EXECUTION OF AGREEMENT

Section 7.1. Signatory Authority. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents,

and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

Section 7.2. Signing in Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached it to one or more signature pages.

This Agreement is executed and effective on the date the last signatory signs and executes the Agreement.

U.S. Forest Service
Date

Colorado Department of Natural Resources
Date

Colorado Division of Wildlife
Date

Colorado Water Conservation Board
Date

APPENDIX A
PROPOSED LICENSE ARTICLES

Article A. The Licensee shall, within one year of the effective date of this license, file with the Commission for approval a Bypass Reach Flow Monitoring Plan that provides for: (a) installation of a flow or water level monitoring gage in the bypass reach below the Cascade Creek diversion dam to be built and maintained to the current standards of the Colorado Division of Water Resources; location of the gage at a location approved by the Colorado Division of Water Resources; (b) continued measurement of diverted flows, consistent with Colorado Division of Water Resource standards, and reporting of any other flows diverted from its water transport system; (c) (d) a schedule that provides for gage operation within eighteen months of the effective date of the license. The Licensee shall provide a minimum of thirty (30) days for review and comment on the draft plan by the U.S. Forest Service and for review and approval on the draft plan by the Colorado Division of Water Resources.

Article B.

The Licensee shall, within one year of the effective date of this license, file with the Commission for approval a Bypass Reach Fish Population Monitoring Plan that provides for: (a) monitoring of fish populations in the bypass reach employing a scope of study and methods substantially in conformance with the fish sampling jointly undertaken during the relicensing process; (b) a schedule that provides for fish population monitoring occurring once every four (4) years, starting three (3) years from the effective date the new FERC license for a period of at least fifteen (15) years. The Licensee shall provide a minimum of thirty (30) days for review and comment on the draft plan by the Colorado Division of Water Resources and for review and approval on the draft plan by the U.S. Forest Service.