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Appendix G
1996 Memorandum of
Agreement Regarding Skagit River

BK0094 PG4246

MEMORANDUM OF AGREEMENT
REGARDING UTILIZATION OF SKAGIT RIVER BASIN WATER
RESOURCES FOR INSTREAM AND OUT OF STREAM PURPOSES

I. PURPOSE OF AGREEMENT

- A. To ensure the establishment of instream flows to protect fisheries resources, and the mitigation of any interference with such established flows;
- B. To provide a mechanism for the coordinated management of water resources in areas described by the Skagit County Coordinated Water System Plan, Regional Supplement, July 1993 ("CWSP") to meet the out-of-stream needs of the Swinomish Indian Tribal Community, Upper Skagit River Tribe, and Sauk-Suiattle Indian Tribe (collectively "the Tribes"), local governments, and public water purveyors within Skagit County;
- C. To avoid litigation or adjudication of water resources within the Skagit River Basin between the Parties to this Agreement;
- D. To assist in expediting the Department of Ecology's water right decision-making within the CWSP service area;
- E. To modify the CWSP to conform to this Agreement and to incorporate this Agreement into the City of Anacortes' and Public Utility District No. 1 of Skagit County's Joint Operating Agreement.

II. PARTIES TO THIS AGREEMENT ("THE PARTIES")

City of Anacortes ("the City")
Public Utility District No. 1 of Skagit County ("PUD")
Skagit County ("the County")
Upper Skagit Indian Tribe
Swinomish Indian Tribal Community
Sauk-Suiattle Indian Tribe
(collectively "the Tribes")
Washington State
Department of Ecology ("Ecology")
Department of Fish and Wildlife ("WDFW")

III. DEFINITIONS

- A. Instream Flow - The quantity of flow necessary to maintain sufficient water in a stream to support in harvestable numbers the natural production of food and game fish.
- B. Established or establishing instream flows - Instream flows that are established by rule and thus enforceable by law.
- C. Out-of-Stream Use - The quantity of water identified for withdrawal from the Skagit River and its tributaries, or from groundwater in continuity with the Skagit River or its tributaries, for use by the City, PUD, and Tribes.
- D. Effective Date and Term of Agreement - The Effective Date of this Agreement shall be when the last Party has signed the Agreement and shall continue for 50 years from the effective date.
- E. Claims or Adjustments - Existing, recorded, pending, and proposed new water right documents consisting of registered claims, certificates, permits, applications, and proposed changes to such documents related to place of use, point of diversion, and/or authorized instantaneous and annual quantities of water, all of which are specifically identified in Sections IV.B.1.a, IV.B.1.b (1), and IV.C.1.a-d of this MOA.
- F. Skagit River Basin - The water resource basin as generally defined by the State of Washington Water Resource Inventory Areas 3 and 4.
- G. CWSP - Skagit County Coordinated Water System Plan, Regional Supplement (July 1993).
- H. Lower Skagit River Instream Flows - Established instream flows for the segment of the Skagit River below the Skagit River PUD Pipeline Crossing east of Sedro Woolley ("PUD Pipeline Crossing") measured at the existing USGS Station 12200500, near Mt. Vernon.
- I. Future claims or adjustments - any claims or adjustments not specifically identified in this MOA.
- J. Cultus Mountain Streams Instream Flows - Established instream flows for the Salmon, Turner, Mundt, and Gilligan Creeks located in the general Cultus Mountain area.
- K. Ecology Low-Flow Streams: Those streams on Ecology's Surface Water Source Limited (SWSL) list that have been identified to have limitations in available supply as a result of fisheries concerns.

IV. AGREEMENTS

- A. The Tribes agree to the following, conditioned upon the other Parties meeting their obligations as outlined in this Agreement, which includes establishing Lower Skagit River Instream Flows as defined in this Agreement, and as jointly or individually recommended by the parties, within the time period established in subsections IV.B.2.c. and IV.C.2.c., unless such time period is extended in the manner described in such sections.

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1. To not challenge any Skagit River Basin water rights claims or adjustments, made by the City or PUD within 50 years from the effective date of this Agreement, as long as such claims or adjustments are consistent with this Agreement. An inconsistent claim or adjustment would include, but not be limited to, claims or adjustments other than specifically identified in this Agreement as not subject to Lower Skagit River Instream Flows that in any way interfere with established instream flows.
2. That established Lower Skagit River Instream Flows will constitute the full instream flow agreed to by the Parties for 50 years from the effective date of this Agreement;
3. That any challenges made by the Tribes after the 50-year period of this Agreement will be made only against future claims or adjustments by the City or PUD that are additional to those identified in Sections IV.B.1.a, IV.B.1.b(1), and IV.C.1.a, b, c, and d of this Agreement;
4. To collaborate with the Parties to secure adequate flows for instream and out-of-stream uses for areas identified in the CWSP;
5. To work towards establishing satellite systems as defined in the CWSP with the objectives of reducing groundwater or surface water withdrawals that adversely impact Skagit River Basin Instream Flows, improving water use efficiency, and providing public water delivery to existing and planned communities in Skagit County. A primary objective is to reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows that may be occurring as a result of groundwater withdrawal;
6. To seek funding sources to: contribute towards the development and implementation of long-term watershed management programs; develop a coordinated water delivery system throughout the CWSP service area; and achieve the objectives of this Agreement.

B. The City of Anacortes agrees to the following:

1. The following certificates presently held, pending water right applications, and future claims or adjustments to water rights will be recognized and put to use by the City in accordance with the relative order of priorities set forth below.
 - a. City Water Rights Not Subject to Lower Skagit River Instream Flows: 85 cubic feet per second (cfs) (54.94 mgd) as comprised in the following:
 - (1) Certificate #C-709 (2/14/1963) which provides 70 cfs (45.24 million gallons per day or mgd) for the "area served by the City of Anacortes Water Supply System".
 - (2) Certificate #C-1161 (7/2/1930) which provides 15 cfs (9.70 mgd) for the "City of Anacortes." This Agreement provides for a change in the point of diversion under this right downstream

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approximately 1,500 feet to coincide with the existing intake for Certificate #C-709.

b. City water rights subject to Lower Skagit River Instream Flows developed as a condition of this Agreement:

(1) Certificate #C-3959 (9/13/1954) which provides 32.30 cfs (20.88 mgd). This Agreement provides for a change in the point of diversion of Certificate #C-3959 from the original "Ranney Well" Skagit River bed subsurface diversion to coincide with the existing intake for Certificate #C-709.

(2) The following may be subject to results of state-of-the-art instream flow studies, regardless of the date of the application: 1) future rights acquired by the City in excess of those specified in Section IV.B.1.b(1) above for service to parties within or outside the service areas as defined in the CWSP; and 2) future claims or adjustments.

2. The City will participate in identifying instream flow needs through an IFIM instream flow study process. The City and PUD, with consultation from the Tribes, will fund and contract for the IFIM studies, which will apply only to the segment of the Skagit River described in subsection III.H.

a. The City, PUD, and any other parties that desire to assist with financing, will fund and contract for the necessary studies to establish Lower Skagit River Instream Flows. The Tribes and WDFW will provide the fisheries and fisheries habitat management criteria for input into the IFIM study and recommended Skagit River Instream Flows.

b. The Parties to this Agreement will jointly develop the recommended instream flows using the Water Resources Forum process (Instream Flow Policy Working Draft, 8th Draft, Revised May 19, 1993) as a guide. The Tribal IFIM study input criteria will be limited to fisheries and fisheries habitat management and will not include other instream objectives. The Parties will utilize all appropriate methods to establish an agreed upon instream flow for managing the Skagit River below the PUD Pipeline Crossing, including mediation.

c. Schedule.

(1) The City agrees that the following events must occur within two years of the effective date of this Agreement: 1) the necessary Lower Skagit River instream flow studies are completed; 2) the City, PUD, and Tribes agree on the recommended instream flows; and 3) the City, PUD, and Tribes submit jointly recommended instream flows to Ecology, or, if these parties cannot agree in writing, submit the differing recommendations for Lower Skagit River Instream Flows to Ecology for its decision as to what to include in the rule proposal. This two-year schedule may only be

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extended by written agreement of the City, PUD, and Tribes. If these parties cannot agree to an extension, the City shall take all necessary actions to ensure that changes to existing water rights documents identified in section IV.B.1. shall not remain or become effective as further described in subsection (3) below. The City may then remove any commitment of water service to the Tribal Reservations identified in subsection IV.B.(3) except as required under a separate contract.

- (2) Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. and IV.C.2.c., Ecology shall immediately file a Preproposal Statement of Inquiry Code Revision (CR) 101, indicating its intention to adopt the Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c(1), with a goal of adopting final rules within two years of its receipt.
 - (3) If Lower Skagit River Instream Flows have not been established by the end of two years following Ecology's receipt of the recommendations described in subsection (1), the City, PUD, and Tribes may extend the deadline only by written agreement. If the City, PUD, and Tribes cannot agree to an extension, the City shall immediately request Ecology to rescind any water right change action submitted to Ecology since the Agreement became effective, even if Ecology has taken final action. The City may immediately reapply for the change. The intent of this provision is to secure the Tribes' right to challenge these changes in the event that Lower Skagit River Instream Flows are not established within the specified schedule.
- d. In the event that Ecology approves the changes referred to in subsection IV.B.2.c(3) above, the City shall ensure that any water rights documents issued by Ecology that purport to effectuate these changes shall be expressly and clearly conditioned to require compliance with this Agreement. Regardless of whether or not Ecology so conditions the document(s), the City shall, by its own authority, enforce the conditions of this Agreement when using these water rights.
 - e. The City may, at its option, negotiate with upstream Skagit River dam operators for release of flows to maintain the agreed upon flow levels downstream from the PUD Pipeline Crossing.
3. To guarantee in perpetuity to the Swinomish Indian Tribal Community for non-discriminatory use by all residents within the Swinomish Indian Reservation a water quantity of 2.8 million gallons per day based on demands identified annually and projected for five and twenty years by the Swinomish Indian Tribal Community and based on amendment to the existing ~~water~~ ^{water} contract with the

Swinomish Tribe. Government-owned and operated uses will be subject to conservation and curtailment programs for both the Reservation and off-Reservation water uses as outlined in Exhibit A, which is incorporated herein. Government-owned and operated economic development on the Reservation, such as the Tribe's marina, gaming facilities, hotels, and similar facilities will be considered services that generate governmental revenue and will receive the second highest priority after residential domestic use. Similar government-owned and operated commercial services within the City's and PUD's service area will receive the same status.

4. The City, including its Public Works Department, agrees not to provide any water service to users or property located within the Swinomish Indian Reservation without the prior written approval of the Swinomish Indian Tribal Community.
5. To assist Ecology in adopting Lower Skagit River Instream Flow rules within the time period set forth in subsection IV.B.2.c..
6. To actively support and provide input at both a policy and technical level to County officials regarding implementation of Section 63 of the Growth Management Act, such that building permits will only be issued if there is an adequate supply of potable water that can be withdrawn from groundwater without adversely impacting instream flows, other than as agreed herein.
7. To actively seek amendment of the CWSP and adoption of County ordinances that: a) require, in lieu of individual wells, connection of new individual/single family homes to public water systems where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available; and b) limits the use of the 5,000 gallons per day exemption in those areas of the County experiencing inadequate Skagit River Basin Instream Flows that may be occurring as a result of groundwater withdrawals.
8. To seek funding sources to contribute: towards the development and implementation of long-term watershed management programs; towards the development of a coordinated water delivery system throughout the CWSP service area; and towards achieving the objectives of this Agreement. This provision does not supersede or in any way affect the City's financial commitment as set forth in Section IV. B.2.

C. The PUD agrees to the following:

1. The following certificates presently held, pending and new water right applications, and future claims or adjustments to water rights will be recognized and put to use by the PUD in accordance with the relative order of priorities set forth below.

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- a. PUD water rights subject to established Cultus Mountain Instream Flows, but not subject to established Lower Skagit River Instream Flows.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
Claim 9332	Pre-1917	Salmon Creek	1.80	1.16
Certificate 411	10/10/1929	Gilligan Creek	1.50	0.97
Certificate 724	10/30/1963	Gilligan Creek	7.39	4.77
Claim 9333	Pre-1917	Turner Creek	4.30	2.78
Certificate 739	10/30/1963	Turner Creek	6.20	4.01
Certificate 26	9/28/1917	Mundt Creek	2.50	1.62
Certificate 737	10/30/1963	Mundt Creek	8.00	5.17
Certificate 8738	1/16/94	Judy Reservoir	Storage	Storage
Certificate R-673	4/24/1963	Judy Reservoir	Storage	Storage
Subtotal			31.69	20.48

- b. PUD water rights not subject to established Lower Skagit River Instream Flows.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
Certificate 1904	3/26/1953	Sedro Woolley Well	2.00	1.29
Certificate 2107	5/12/1954	Ranney Well	8.90	5.75
Cultus Mountain Water Rights (See Section IV.C. 1 (a))			31.69	20.48
			42.59	27.52

- c. Pending and new PUD Cultus Mountain water right applications subject to Cultus Mountain and Lower Skagit River Instream Flows.

The purpose of these pending and new applications is to make full use of the hydraulic capacity of existing collector lines. When the rights listed below are combined with rights Cultus Mountain streams listed in subsections a and b above, the total diversion will not exceed 35.8 mgd.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
18219 (pending)		Salmon Creek	4.00	2.59
25129 (pending)		Gilligan Creek	13.15	8.50
New		Turner Creek	6.60	4.27
New		Mundt Creek	16.06	10.38

- d. New application partially not subject to Skagit River Instream Flows for proposed Skagit River pumping plant delivering water to Judy Reservoir.

The PUD's combined capacity of the gravity collector lines that presently supply Judy Reservoir is 55.39 cfs/35.80 mgd. The PUD is dependent on the ability to withdraw water from the streams, river, or combination of river and streams in the amount of 55.39 cfs/35.80 mgd when available. A new application for a water right will be filed on the Skagit River in the amount of 12.80 cfs/8.28 mgd. This application for 12.80 cfs/8.28 mgd, when combined with the water rights listed in subsection IV.C.1.a above (31.69 cfs/20.48 mgd) with the new point of diversion on the Skagit River and the existing Sedro-Woolley Well (2.0 cfs/1.29 mgd) and Ranny Well (8.90 cfs/5.75 mgd), both of which are to be transferred to the new pumping station, will result in a total water right of 55.39 cfs/35.80 mgd. Of this amount, 42.59 cfs/27.52 mgd is not subject to Lower Skagit River Instream Flows, and the remainder is subject to such flows.

- e. The instream flows being developed on the Cultus Mountain streams through the completion of an IFIM Study will be recognized as a higher priority than the Cultus Mountain stream: 1) certificates and claims listed in Section IV.C.1.a; 2) pending and new water rights applications listed in Section IV.C.1.c.; and 3) future claims and adjustments.
- f. Based on this Agreement, the PUD:
 - (1) will manage the Cultus Mountain supply to meet the jointly agreed upon Cultus Mountain Instream Flows;
 - (2) may periodically divert up to 35.80 mgd from the Cultus Mountain streams into Judy Reservoir subject to the Cultus Mountain Instream Flows;
 - (3) may provide for an additional point of diversion at the PUD Skagit River Pumping Station on each of the water rights listed in subsection IV.C.1.a above;
 - (4) may transfer the Ranney Well and Sedro Woolley well water right points of diversion to the new PUD Skagit River pumping station; and
 - (5) may periodically divert a maximum of 35.80 mgd from the Skagit River into Judy Reservoir as an alternate source of supply to the Cultus Mountain system as explained above, with 27.52 mgd of this amount not subject to Skagit River Instream Flows and 8.28 mgd subject to Skagit River Instream Flows; and/or.
 - (6) The PUD will continue investigations regarding instream flow needs on Salmon, Mundt, Gilligan, and Turner Creeks. Upon completion of these investigations and establishment of instream flows, the PUD will ensure the retroactive application of the instream flows to existing and pending PUD water rights related to Cultus Mountain streams. As a condition of this subordination of water rights, the PUD may: (1) utilize the full hydraulic

capacity of the existing collector lines to Judy Reservoir when water is available in excess of instream flow needs as outlined in IV.C.1.c above, and (2) provide a substitute and augmented supply from the Skagit River to meet the reductions that occur as a result of curtailment of withdrawals from Cultus Mountain streams due to instream flow needs.

- g. The Agreement provides for changes to the water right documents identified in Section IV.C.1 herein as an element of this Agreement.
 - h. Those future claims or adjustments acquired by the PUD for service to parties within or outside the service areas defined in the CWSP, may be subject to results of state-of-the-art instream flow studies.
2. The PUD will participate in identifying instream flow needs through an IFIM instream flow study process. The City and PUD, with consultation from the Tribes, will fund and contract for the IFIM studies, which will apply only to the segment of the Skagit River described in subsection III.H.
- a. The City, PUD, and any other parties that desire to assist with financing will fund and contract for the necessary studies to establish Lower Skagit River Instream Flows. The Tribe and WDFW will provide the fisheries and fisheries habitat management criteria for input into the IFIM Study and recommended Lower Skagit River Instream Flows.
 - b. The Parties will jointly develop the recommended instream flows using the Water Resources Forum process (Instream Flow Policy Working Draft, 8th Draft, Revised May 19, 1993) as a guide. The Tribal IFIM study input criteria will be limited to fisheries and fisheries habitat management and will not include other instream objectives. The Parties will utilize all appropriate methods to establish an agreed upon instream flow for managing the Skagit River below the PUD Pipeline Crossing, including mediation.
 - c. Schedules.
 - (1) The PUD agrees that the following events must occur within two years of the effective date of this Agreement: 1) the necessary Skagit River instream flow studies are completed; 2) the City, PUD, and Tribes agree on the recommended instream flows; and 3) the City, PUD, and Tribes submit jointly recommended instream flows to Ecology, or, if these parties cannot agree, in writing submit differing recommendations for Lower Skagit River Instream Flows to Ecology for its decision as to what to include in the rule proposal. This two-year schedule may only be extended by written agreement of the City, PUD, and Tribes. If these parties cannot agree to an extension, the PUD shall take all necessary actions to ensure that changes to existing water rights documents identified in section IV.C.1. shall not remain or become effective as further described in subsection (3) below.

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The PUD may then remove any commitment of water service to the Tribal Reservations identified in subsection IV.C.(3) except as required under a separate contract.

- (2) Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. and IV.C.2.c. Ecology shall immediately file a Preproposal Statement of Inquiry (CR 101), indicating its intent to adopt Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c (1), with a goal of adopting final rules within two years of its receipt.
 - (3) If Lower Skagit River Instream Flows have not been established by the end of two years following Ecology's receipt of the recommendations described in subsection (1), the City, PUD, and Tribes may extend the deadline only by written agreement. If the City, PUD, and Tribes cannot agree to an extension, the PUD shall immediately request Ecology to rescind any water right change action that is submitted to Ecology since the Agreement became effective even if Ecology has taken final action. The City may immediately reapply for the change. The intent of this provision is to secure the Tribes' right to challenge these changes in the event that Lower Skagit River instream flows are not established within the specified schedule.
 - d. In the event that Ecology approves the changes referred to in subsection IV.C.2.c(3) above, the PUD shall ensure that any water rights documents issued by Ecology that purport to effectuate these changes shall be expressly and clearly conditioned to require compliance with this Agreement. Regardless of whether Ecology so conditions the document(s), the PUD shall, by its own authority, enforce the conditions of this Agreement when using these water rights.
 - e. The PUD may, at its option, negotiate with upstream Skagit River dam operators for release of flows to maintain the agreed upon flow levels downstream from the PUD Pipeline Crossing.
3. To guarantee in perpetuity to the Upper Skagit Indian Tribal Community for non-discriminatory use by all residents within the Bow Hill Indian lands and the Upper Skagit Indian Reservation a water quantity of 0.75 mgd based on demands identified annually and projected for five and twenty years by the Upper Skagit Indian Tribal Community and based on amendment to the existing wholesale contract with the Upper Skagit Tribal Community. Government-owned and operated uses will be subject to conservation and curtailment programs for both the Reservation and off-Reservation water uses as outlined in Exhibit A, which is incorporated herein. Government-owned and operated economic development on the Reservation, such as the Tribe's gaming facilities, hotels, and similar facilities,

will be considered services that generate governmental revenue and will receive the second highest priority after residential domestic use. Similar government-owned and operated commercial services within the City's and PUD's service area will receive the same status.

4. The PUD agrees not to provide any water service to users or property located within the Swinomish Indian Reservation without prior written approval of the Swinomish Indian Tribal Community. The PUD agrees not to provide any water service to users or property located on Upper Skagit Reservations or other Indian Lands at Bow Hill without the prior written approval of the Upper Skagit Indian Tribe.
5. To assist Ecology in the adoption of instream flow rules for the Lower Skagit River and Cultus Mountain streams within the time period set forth in subsection IV.C.2.c. of this Agreement.
6. To actively support and provide input at both a policy and technical level to County officials regarding implementation of Section 63 of the Growth Management Act, such that building permits will only be issued if there is an adequate potable supply of water that can be withdrawn from groundwater without impacting instream flows;
7. To actively seek amendment of the CWSP and adoption of County ordinances that require, in lieu of individual wells, connection of new individual/single family homes to public water systems where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available. Also, to limit the use of the 5,000 gallons per day exemption in those areas of the County experiencing inadequate Skagit River Basin Instream Flows that may be occurring as a result of groundwater withdrawals.
8. To seek funding sources to contribute: towards the development and implementation of long-term watershed management programs; towards the development of a coordinated water delivery system throughout the CWSP service area; and towards achieving the objectives of this Agreement. This provision does not supersede or in any way affect the PUD's financial commitment as set forth in Section IV.C.2.

D. The County agrees to the following:

1. To implement Section 63 of the Growth Management Act, such that building permits will only be issued if the parcel is served by a public water system or if there is an adequate supply of potable water that can be withdrawn from groundwater without adversely impacting Skagit River Basin Instream Flows, other than as agreed herein;
2. To actively work with all parties to address the 5000 gallon permit exemption for all public water systems and for all individual water systems in those portions of Skagit County that are impacted by inadequate Skagit River Instream Flows that may be occurring as a result of surface or groundwater diversions. Skagit County

reserves the right to allow exempt wells for single family systems in the Skagit River Basin above the PUD Pipeline Crossing.

3. To seek amendment of the CWSP and related County implementing ordinances to require connection of new individual/single family homes to public water systems to achieve conservation of resources where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available.
4. To assist Ecology in establishing instream flow rules for the Skagit River below the PUD Sedro Woolley Pipeline Crossing, with the goal of establishment within four years from the effective date of this Agreement.
5. To seek the goals of; (1) providing certainty and stability for water supplies for citizens of Skagit County; (2) to secure adequate streamflow for Ecology designated Low Flow Streams during critical periods to meet fisheries needs; (3) to encourage public water suppliers to provide water from the mainstem of the Skagit River for water users near Ecology Low Flow Streams where withdrawals may have direct impacts on in-stream resources; and (4) to evaluate, jointly with other parties, streams for possible designation by Ecology as Low-Flow Streams.

E. Ecology agrees to the following:

1. To process any City or PUD requests for changes identified in this Agreement, and to expressly and clearly condition any documents effectuating changes to existing rights to require compliance with this Agreement. Ecology agrees to seek to the extent possible, to enact all necessary rule and water right changes necessary to implement this Agreement;
2. Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. (1) and IV.C.2.c.(1), Ecology shall immediately file a Preproposal Statement of Inquiry (CR 101), indicating its intent to adopt Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c (1), with a goal of adopting final rules within two years of its receipt; and
3. Until the adoption of Lower Skagit River and Cultus Mountain Instream Flows provides a framework for determining the availability of water for future appropriations, no final decisions will be made on any water right permit applications within that portion of the Skagit River Basin which lies within WRIA3 which could affect or be affected by those instream flows.
4. In signing this Agreement, Ecology is only obligated to take those actions set forth in this section and is not obligated by or agreeing to any other specific provisions of this Memorandum of Agreement.

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F. The Department of Fish and Wildlife agrees to the following:

1. The Tribe and WDFW will provide the fisheries and fisheries habitat management criteria for input into the IFIM study and recommended Lower Skagit River Instream Flows.
2. WDFW will make a recommendation regarding the adequacy of the jointly developed recommended instream flow for Lower Skagit River Instream Flows to Ecology. WDFW's recommendation decision will be based upon the jointly developed recommendations consistency with the fisheries and fisheries habitat management criteria.
3. In the event that the parties cannot reach an agreement on jointly developed recommended instream flow for Lower Skagit River Instream Flows, WDFW will make a recommendation regarding the differing recommendations for Lower Skagit River Instream Flows to Ecology.
4. WDFW will provide appropriate technical support for developing recommended instream flows for the Cultus Mountain Streams.
5. WDFW is in no way obligated or bound by any other provision of the Memorandum of Agreement, except as outlined in the above four items.

G. All Parties agree to the following:

1. That the long term objective is to develop a comprehensive watershed management plan for the Skagit River Basin designed to manage the use of the water resources to meet both instream and out of stream objectives defined by the City, PUD and Tribes.
 - a. To collaborate in investigating all alternatives so as to secure adequate flows to meet instream needs for portions of the Skagit River upstream from the PUD pipeline crossing at Sedro Woolley and out-of-stream needs within the surface areas defined within the CWSP. The Parties will establish a Skagit River Flow Management Committee (SRFMC) comprised, at a minimum, of representatives of signatories to this Agreement. This Committee will investigate alternatives towards securing adequate flows to meet instream and out-of-stream needs, design a study process for the Skagit River, and develop a management and monitoring plan to this end. The Parties anticipate completion of a management plan over a period of two to five years.
 - b. To actively attempt to establish by rule, within a period beginning on the effective date of this Agreement and extending for five years, instream flows for the entire Skagit River Basin and its tributaries. The Parties agree to develop funding mechanisms to contribute to investigations that will establish these flows.

2. To reach agreement prior to expanding service areas beyond those identified in the CWSP. Such agreement will be based on evaluations of additional needs existing at the time, and after considering additional needs that may exist after the 50-year term of this Agreement. If the Parties cannot agree, then they may not seek or approve any changes relating to water quantity associated with the expansions of service areas for a period of 50 years from the effective date of this Agreement.
3. A work plan and budget for implementing this Agreement will be developed by the City and PUD in draft form within 60 days of the effective date of this Agreement. An adopted work plan and budget will be prepared by the City and PUD within six months of the effective date of this Agreement.
4. The Skagit River Flow Management Committee (SRFMC) shall be responsible for identifying and recommending studies and management responses, and in guiding the development, review, and approval of Skagit River Watershed Management strategies for the signators to this Agreement related to activities that have a measurable impact on the flow in the Skagit River while taking into consideration previously settled hydroelectric agreements. The objective of the instream flow studies is to establish a recommended flow upstream of the Sedro Woolley pipeline crossing for use in the SRFMC Management Plan. The signators to this Agreement agree to establish written response plans based on monthly climatic and flow criteria to help establish an appropriate management response as generally described below.
5. The parties recognize that there is a possibility that the City's 54.94 mgd and the PUD's 27.52 mgd recognized in this agreement as not subject to the Lower Skagit River Instream Flows may reduce Skagit River flows below the established flows. The attached Water Shortage Response Plan is incorporated by reference into this Agreement, and will be implemented in the event that this occurs.
6. No rights, claims, and adjustments identified in this agreement can be confirmed through this Agreement. Confirmation can only be done through an adjudicative process.
7. WDFW is in no way obligated or bound by any other provision of the Memorandum of Agreement, except as outlined in section IV.F.

V. GENERAL PROVISIONS

- A. **Duration.** The term of this Agreement is 50 years from its effective date. The Agreement may only be amended or modified during the 50-year term by mutual written agreement of all signatories. The Agreement will extend beyond 50 years if all parties agree.
- B. **Severability.** If any provision of this Agreement, or the application thereof to any person or circumstance, is found to be invalid or unenforceable, the remainder of the provisions of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid or unenforceable, as the case may be, shall not be affected thereby.

- C. **Dispute Resolution.** If a dispute arises between two or more parties concerning any provision of this Agreement, or application thereof, any such disputing party may send a written request to the other parties requesting a meeting, to be scheduled within 15 days of the parties' receipt of the request. The parties shall then meet together to discuss the dispute and attempt resolution.
- D. **Enforcement.**
1. **Between the City, PUD, and Tribes:**
 - a) **Notice of Failure.** If any party(ies) ("Notifying Party") believes that another party (ies) is in violation of this Agreement or that a violation is threatened, the Notifying Party shall give written notice ("Notice") to the allegedly violating party (ies) of such violation and demand corrective action sufficient to cure the violation.
 - b) **Failure to Respond.** If the allegedly violating party (ies):
 1. Fails to cure the violation within 30 days after receipt of the Notice; or
 2. Under circumstances where the violation cannot be reasonably cured within the 30-day period, fails to begin curing such violation within the 30-day period; or
 3. Fails to continue diligently curing such violation until it is finally cured; the Notifying Party may bring an action as provided in subsection c. of this Section.
 - c) **Actions.** The Notifying Party may bring an action at law or in equity in a court of competent jurisdiction: to enforce the terms of this Agreement; to enjoin the violation by temporary or permanent injunction; to recover any damages to which it may be entitled for violation of the terms of this Agreement; and to require restoration of resources (which includes, but is not limited to, water and fisheries) to the condition that existed prior to any such injury.
 - d) **Nature of Remedy.** The Notifying Party's rights under this Section apply equally in the event of actual or threatened violations of the terms of this Agreement. The Notifying Party may be entitled to injunctive relief in addition to such other relief, including specific performance of this Agreement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing in law or in equity.
 - e) **Enforcement Discretion.** Enforcement of the terms of this Agreement shall be at the discretion of each Party entitled to performance, and any forbearance by such party to exercise its rights under this Agreement in the event of any breach of any terms of this Agreement by another party

shall not be deemed or construed to be a waiver, laches, or estoppel of such rights. No delay or omission by a party in the exercise of any right or remedy upon breach shall impair such rights or remedy or be construed as waiver, laches, or estoppel.

2. By the City, PUD, and/or Tribes against Ecology.
 - a) The City, PUD, and Tribes agree to together take action to ensure, by all appropriate legal means necessary, that Ecology,
 - 1) Does not take final action on any water rights-related applications, claims, or adjustments, submitted by any person or entity, in or in any way affecting the Skagit River basin, whether or not the person or entity is subject to this Agreement, until after Lower Skagit River and Cultus Mountain Instream Flows are established, other than those applications specifically set forth in Section IV E.1 of this Agreement; and
 - 2) Acts expediently to establish Lower Skagit River and Cultus Mountain Instream Flows in order to meet the schedule established in this Agreement.
- E. Rights Against Non-Parties. As to non-Parties to this Agreement, the Tribes, by signing this Agreement, in no way diminish, relinquish, or waive their respective legal rights, including but not limited to federal reserved water rights and treaty rights, in any administrative or judicial forum at any time.
- F. Successors and Assigns. This Agreement shall be binding on the Parties and on their successors in interest and assigns.
- G. No Third Party Beneficiaries. No third party is intended to, or shall have, any rights under this Agreement. The Parties intend that this Agreement be strictly between themselves, and therefore, only the Parties have any right to enforce this Agreement or any provision of this Agreement.
- H. No Release of Third Parties. This Agreement is not intended by the Parties to act, nor shall it act, to release any third parties not named herein from any claims or liabilities whatsoever.
- I. The parties recognize that there are significant and material considerations not specifically set forth in the Agreement that make the relationship of the parties hereto unique. Because of the unique situation herein, it is the express intent and purpose of the parties that this Agreement not be viewed nor provide precedent beyond the express scope and purpose herein. Therefore, it is agreed between the parties that they will not use this Agreement as precedent outside the Agreement nor should anyone not a party hereto attempt to use the Agreement as precedent against any of the parties.
- J. Headings Not Controlling. The headings in this Agreement are for convenience and reference only, and are not part of this Agreement, and in no way amplify, define, limit, or describe the scope or intent of this Agreement.

Attachments: Exhibit A - Water Shortage Response Plan, 7 pages

SIGNED:

Dean Maxwell
Dean Maxwell
Mayor, City of Anacortes

Date: 9-9-96

James P. Kirkpatrick
James P. Kirkpatrick
General Manager
Public Utility District #1 of Skagit County

Date: 9-25-96

Ted W. Anderson, Chair
Skagit County Commissioner

Date: _____

Robert R. Hart
Robert R. Hart
Skagit County Commissioner

Date: 12/23/96

O. Harvey Wolden
O. Harvey Wolden
Skagit County Commissioner

Date: 12/23/96

Floyd Williams
Floyd Williams
Chairman, Upper Skagit Indian Tribe

Date: 9/16/96

Wa Walton
Wa Walton
Robert Joe, Sr., Chairman
Swinomish Indian Tribal Senate

Date: 9-12-96

James Delano Roberts
James Delano Roberts
Chairman, Sauk-Suiattle Indian Tribe

Date: 9-19-96

Mary Riveland
Mary Riveland
Director, Department of Ecology

Date: 9-26-96

Bernard Shanks
Bernard Shanks
Director, Department of Fish & Wildlife

Date: 12/1/96

EXHIBIT A
WATER SHORTAGE RESPONSE PLAN
to the
MEMORANDUM OF AGREEMENT
REGARDING UTILIZATION OF SKAGIT RIVER BASIN
WATER RESOURCES FOR INSTREAM AND OUT OF STREAM PURPOSES

17938

I. PURPOSE OF THIS EXHIBIT

The purpose of this Exhibit is to outline a plan of action by the City, the PUD, and their customers, to reduce the possible impact the City and PUD diversions may have on the recommended Instream Flows for the Lower Skagit River.

II. DEFINITIONS

For the purpose of this Agreement, the following shall mean:

- A. Commercial/Industrial Customers: Includes, but is not limited to, manufacturing, food processing, restaurant, sales, service, farm operations.
- B. Discretionary Water Use: Water use which is not required for business operations or for general health and safety of the user; usually pertains to outside water use during warmer periods of the year (lawn/flower watering, car washing, washing driveways/sidewalks, etc.).
- C. Governmental Customers: Governmental entities, including, but not limited to: Water-related and other City facility operations in the case of the City; water-related facility operations in the case of the PUD; gaming and other fund-raising operations in the case of the Tribes; schools, parks, administrative operations in the case of other governmental agencies.
- D. Irrigation Use: the application of water to promote botanical development, whether at a residence or a commercial business.
- E. Public Service Announcement (PSA): a media advertisement intended to inform the public in general, whether through television, newspaper or radio mediums.
- F. PUD Pipeline Crossing: The location in Sec. 29, Twp. 35N., Rge.5 E.W.M., where the PUD water transmission main crosses the Skagit River. For purposes of determining Skagit River flows at this location, flows measured and recorded at the U.S. Geological Survey Gaging Station No. 12200500 (Skagit River near Mount Vernon) will be utilized.
- G. Residential Customers: Single family or multifamily domestic water users.
- H. Wholesale Customer: A customer who resells the water for commercial/industrial or residential use.

III. ACTION PLAN**17938**

The City and PUD will monitor the flow in the Skagit River at the PUD Pipeline Crossing. If the flow in the Skagit River is projected to fall below the State Department of Ecology Instream Flow Level, the City and PUD will initiate the Response Plan as outlined in the following matrix.

Each Action Level indicated in the matrix outlines specific actions by the City and PUD depending on the anticipated low flow condition in the Skagit River. The durations indicated in the matrix are the anticipated period of the specified flow condition. The duration for an action level will start when the Skagit River flows drop low enough to first meet that Action Level's definition and stop when the flows increase to no longer meet that definition; a higher Action Level can start and stop as needed, and the duration of the lower Action Level will still be calculated based on its original start date.

ACTION LEVEL	DURATION		
	1 to 2 Days	3 to 14 Days	15 Days or More
I Alert Phase	Action I.1	Action I.2	Action I.3
II Management Phase	Action II.1	Action II.2	Action II.3

A. ACTION LEVELS

The Skagit River Flow Management Committee (SRFMC) will meet in May of each year to review the projected stream flows and to identify possible management strategies to meet the collective water needs of the participants. The SRFMC will also outline the proposed Water Response Plan based on the guidelines outlined in this document and for the two Action Levels.

1. Throughout Action Levels I and II as defined below, the City and PUD will coordinate the execution of the following:
 - a) Monitor water supply forecasts provided by State and federal agencies and dam operators. Stream flow projections identified in sections III.4.2 and III.4.3 of this Response Plan shall be based on these forecasts.
 - b) Establish and maintain regular communications with upstream dam operators in the Skagit River Basin to track planned water releases, with the explicit motive of increasing releases to help maintain minimum Lower Skagit River Instream Flows. Monitor the current operating rule curves used for up-ramping and down-ramping for each dam and establish communications and protocol for those

situations when the City and PUD may request additional releases to augment projected deficiencies below the PUD Pipeline Crossing.

The upstream dam operators will be asked to determine the level of flow augmentation they can provide and to document their intent to provide such flow augmentation, or to provide timely notice if they cannot deliver such augmentation.

- c) Establish and maintain regular communications with the Tribes' fisheries manager(s) regarding actual Skagit River flows relative to Lower Skagit River Instream Flows; and seek to coordinate water withdrawal patterns of the City and the PUD with projected fish passage patterns.

- 2. Action Level I, Alert Phase. Applies when flow in the Skagit River is projected to reach the Lower Skagit River Instream Flow level plus 20 percent or at an alternative level defined at the annual SRFMC meeting and as measured at the PUD Pipeline Crossing in Sedro-Wooley.

The City and the PUD will execute the following action(s) during the Alert Phase for the duration of the action level indicated:

- a) Action I.1 (1 to 2-day duration):

- (1) No change in water withdrawal/treatment plant operations.
- (2) The PUD will evaluate the flow conditions in their Cultus Mountain project for the period(s) of low flow and will implement a program to maximize storage in Judy Reservoir. The PUD will also use peaking flows from up- and down-ramping at the upstream dams in the Skagit River to keep Judy Reservoir full.
- (3) On behalf of the SRFMC, outline the route of flows from the upstream Skagit River dams downstream to the PUD pipeline crossing using the upstream dam operating rule curves, projected flows from the intervening areas, historical records of streamflows at the upstream gaging stations, and standard routing procedures.
- (4) Prepare PSA #1¹.

- b) Action I.2 (3 to 14 days duration):

¹ Seek voluntary 10 percent water use reduction in peak day use.

- (1) No change in water withdrawal/treatment plant operations.
- (2) The PUD will continue its program to maximize storage in Judy Reservoir.
- (3) Promote a program of voluntary water use reduction by all City and PUD water customers, with a goal of ten percent (10%) reduction in peak day demand.
- (4) Issue PSA #1 to newspaper and radio media requesting voluntary reduction of discretionary use of water.
- (5) In conjunction with the Tribes, monitor and evaluate critical elements of the Lower Skagit River Instream Flows against planned and projected fisheries and habitat management plans for the period(s) of projected low flow. Elements of the Lower Skagit River Instream Flow to be evaluated include: the projected timing of use and passage of fish through the reach of the Skagit River downstream of the PUD river crossing; a comparison of routed flows (provided by the City and PUD) with flows required by the Instream Flow; and the effects of the routed flows on habitat conditions existing or projected to exist during the low flow period(s). Results of the Lower Skagit River Instream Flow critical elements monitoring and evaluation will be provided by the City and PUD.
- (6) The City and PUD will develop/refine a "Contingency Plan of Operation" for the period(s) of low flow using: the routed flows from the upstream reaches of the Skagit River; maximized storage in Judy Reservoir; results from the Instream Flow monitoring and evaluation assessment; estimates of water savings from voluntary water use reduction program(s); and weather and water supply forecasts for the Skagit River Basin. The "Contingency Plan of Operation" will provide for conjunctive use of the PUD's Cultus Mountain Project and the City's and PUD's Skagit River facilities. The "Contingency Plan of Operation" will optimize the PUD's use of water from Judy Reservoir during periods when demands exceed available withdrawals from the City's and PUD's Skagit River facilities and the PUD's Cultus Mountain project due to established instream flows on those water courses.

c) Action I.3 (15 days or more duration):

- (1) No change in water withdrawal/treatment plant operations.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Continue a program of voluntary water use reduction by all City and PUD water customers, with a goal of ten percent (10%) reduction in peak day demand.
 - (4) Continue to refine the "Contingency Plan of Operations" based on additional streamflow information and City and PUD customer demand information.
 - (5) Continue PSA #1 by newspaper and radio media.
3. Action Level II, Management Phase. Applies when flow in the Skagit River falls below the established Lower Skagit River Instream Flow levels, measured at the PUD Pipeline Crossing in Sedro-Wooley and continues until the flows either meet or exceed the regulated instream flow levels.

The City and the PUD will execute the following action(s) during the Management Phase for the duration of the action level indicated:

- a) Action II.1 (1 to 2 day duration):
- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Implement the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
 - (4) Notify the upstream Skagit River dam operators of the downstream flow situation and seek additional releases, if possible, if the situation continues.
 - (5) Continue PSA #1 by newspaper and radio media.
 - (6) Prepare PSA #2² with a program to voluntarily reduce water demand to meet instream flows.

² Mandatory restrictions for discretionary exterior water use to limit diversion to 125.59 cfs/82.46 mgd.

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b) Action II.2 (3 to 14 day duration):

- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows and seek voluntary reduction in demand.
- (2) The PUD will continue its program to maximize storage in Judy Reservoir.
- (3) Continue implementation of the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
- (4) Request the upstream Skagit River dam operators to commence additional releases. Such additional releases should be timed to realize the effect of the release at the PUD Pipeline Crossing at the time of projected deficient streamflow. The City and PUD will base their request(s) on established routing procedures.
- (5) Issue PSA #2 to newspaper and radio media.

c) Action II.3 (15 days or more duration):

- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows and seek voluntary reduction in demand to meet instream flows.
- (2) The PUD will continue its program to maximize storage in Judy Reservoir.
- (3) Continue implementation of the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
- (4) Continue to request the upstream Skagit River dam operator to continue additional releases.
- (5) Continue PSA #2 by newspaper and radio media.

PUBLIC SERVICE ANNOUNCEMENTS
(Subjects Only)

17938

PSA #1 Alert Phase

- Seek voluntary 10 percent water use reduction with a focus on discretionary outside use of water.

PSA #2 Management Phase

- Mandatory restrictions for discretionary exterior water use to limit diversion to 125.59 cfs/82.46 mgd and voluntary reduction in demand to seek to meet the instream flows. The voluntary reduction program may include the following:
 - Restriction on commercial/industrial/residential irrigation.
 - Reduction in peak day water use by all commercial/industrial customers, including restaurants, on the City and PUD systems.
 - Reduction in peak day water use by all residential customers on the City and PUD systems.
- As the City and PUD demand approaches the out of stream diversion limit of 125.59 during low flow conditions, the use reduction program will include:
 - Mandatory restriction of governmental/commercial/industrial/residential irrigation activities from City and PUD systems, including farms.
 - Prohibition of car washing operations at commercial/residential sites.
 - Reduction in peak day water use by all commercial/industrial customers, including restaurants, on the City and PUD systems.

Reduction in peak day water use by all residential customers on the City and PUD systems.