**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**Nos. 05-72739 and 05-74060 (consolidated)**

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**SNOQUALMIE INDIAN TRIBE,**
**PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT,**

**and**

**PUGET SOUND ENERGY, INC.,**
**PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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# BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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**WASHINGTON, D.C. 20426**

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## STATEMENT OF ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in fulfilling its mandate to balance diverse public interests under the

Federal Power Act ("FPA"), 16 U.S.C. §§ 797(e), 803(a) and 808, complied with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"), when it issued a new license to Puget Sound Energy, Inc. ("Puget") for continued operation of the Snoqualmie Falls Hydroelectric Project, conditioned on significantly greater protection and enhancement of environmental resources and values, including increased flows and mists at the Snoqualmie Falls, which are culturally and religiously significant to the Snoqualmie Indian Tribe ("Tribe").

2. Whether the Commission's extensive consultation with the Tribe during the licensing proceeding satisfied the requirements of the National Historical Preservation Act ("NHPA"), 16 U.S.C. § 470, and the Commission's regulations thereunder.

3. Whether the Commission's upward adjustment to the minimum required flows comported with the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and is supported by substantial evidence in the record.

## STATUTES AND REGULATIONS

Pertinent sections of relevant statutes and regulations are set out in the Addendum to this brief.

## COUNTERSTATEMENT OF JURISDICTION

Several of the Tribe's arguments in its brief are jurisdictionally barred because it failed to raise them before the Commission on rehearing. FPA § 313(b),

16 U.S.C. § 825*l*(b). This Court is "required by statute to consider only those issues that Petitioner raised in [its] request for rehearing, or those issues that could not reasonably have been raised at that time." *LaFlamme v. FERC*, 945 F.2d 1124, 1127 (9th Cir. 1991). "No objection to the order of the Commission [denying the application for rehearing] shall be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing unless there is a reasonable ground for failure to do so." *Id*. (quoting FPA § 313(b)). Moreover, the argument must be raised with sufficient specificity so as to put the Commission on notice of the ground on which rehearing was being sought. *See Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 910-911 (9th Cir. 2003) (citing *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.7 (D.C. Cir. 2003).

The arguments now urged an appeal that were not raised on rehearing are as follows:

- The Tribe's argument that the Commission failed to apply the correct legal standard to the Tribe's RFRA claim. Tribe's Brief ("Tr. Br.") 22-24.

- The Tribe's argument that *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), is not relevant to a RFRA inquiry. Tr. Br. 25-37.

- The Tribe's RFRA argument that continued operation of the Snoqualmie Project substantially burdens the Tribe's religion because it deprives the Tribe of access to the Snoqualmie Falls ("Falls") for vision quests and other religious purposes and

because it "alters the ancient sacred cycle of water flowing over the Falls." Tr. Br. 39-46.

- The Tribe's NHPA argument that the Commission failed to comply with National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990) ("Bulletin 38"). Tr. Br. 64-66.

- The Tribe's argument that the Commission violated the NHPA because it failed to solicit information directly from the Tribe concerning the impact of the Project on their religious beliefs in contravention of the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996. Tr. Br. 66-67, n.32.

Contrary to Puget's argument, *see* Puget Brief ("P. Br.") 1-2, 49-59, this Court lacks jurisdiction to consider Puget's appeal. Puget does not have prudential standing to challenge FERC's adjustment to the flow regime in the Rehearing Orders as conflicting with the CWA. As will be explained *infra*, Puget fails to meet the zone of interests test, a prudential standing requirement.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case involves the Commission's careful consideration and balancing of a vast constellation of diverse and often competing interests in a manner consistent with its licensing responsibilities under sections 4(e), 10(a) and 15 of the FPA.[1] At the conclusion of its exhaustive evaluation of all the facts and circumstances, the

[1] 16 U.S.C. §§ 797(e), 803(a) and 808.

Commission issued a new license for the continued operation and maintenance by Puget of the 44.4-megawatt ("MW") Snoqualmie Falls Hydroelectric Project ("Snoqualmie Project" or "Project"), located on the Snoqualmie River, in the City of Snoqualmie, King County Washington. *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 (2004) ("License Order"), *reh'g denied*, 110 FERC ¶ 61,200 (2005) ("Rehearing Order I"), *reh'g denied*, 111 FERC ¶ 61,317 (2005) ("Rehearing Order II"). AR 1294, PER 2143; AR 1337, PER 2227; AR 1359, PER 2262, respectively.[2]

In fulfilling its broad responsibilities under the FPA, the Commission considered and balanced widely diverse interests on a vast array of issues, as evinced by the comprehensive evaluation of the following topics (among others) that were thoroughly explored in the License Order and Final Environmental Impact Statement ("FEIS"): Project Modifications; Water Quality Certification; the Coastal Zone Management Act; FPA Section 18 Fishways; Threatened and Endangered Species; Federal and State Fish and Wildlife Agency Recommendations under FPA Sections 10(a) and 10 (j); Flows at Snoqualmie

[2] "AR" refers to the Amended Certified Index to the Record (Feb. 23, 2006), "PER" refers to Puget's Excerpts of Record and "TER" refers to the Tribe's Excerpts of Record. The Tribe's Excerpts of Record comprise two volumes of materials; Puget's Excerpts of Record comprise nine volumes. Where there is duplication between the two sets, the Commission herein cites to the more comprehensive Excerpts of Record filed by Puget.

Falls; Recreation; Flooding; Cultural Resources; State and Federal Comprehensive Plans; Applicant's Plans and Capabilities; Project Economics; Comprehensive Development; and License Term. *See generally* License Order, PER 2143-2209; FEIS, AR 1074, PER 1675-1974.

All parties were heard in these comprehensive license proceedings. In its evaluation of the license application, the Commission not only analyzed the positions of petitioners, it also carefully evaluated and weighed the views expressed by the Tulalip tribes, the Yakama Nation, local and state governments, environmental groups, the general public, FERC staff, and five other federal government agencies. License Order at PP 2-7, 52-53, PER 2144-46, 2164-65. Over the course of the 13-year licensing process, the Commission carefully considered hundreds of comments, including more than three dozen filings submitted by or for the Tribe (more than any other party intervening in the licensing proceeding).

After thirteen years of reviewing all of the evidence, listening to all of the parties and evaluating all of the comments, only one significant question remained, and the Commission distilled the crux of the dispute as follows:

> The primary issue raised in this proceeding is whether to issue a new license for the continued operation and maintenance of the Snoqualmie Falls Hydroelectric Project, conditioned on significantly greater protection and enhancement of environmental resources and values, or to deny the relicense application and require removal of the project dam and other works, based on a determination that the power

> benefits of the project are outweighed by the cultural and spiritual benefits to the Snoqualmie Tribe of the restoration of pre-project flows over Snoqualmie Falls.

License Order at P 32, PER 2155.

Tasked with resolving these divergent interests consistent with the FPA, the Commission fulfilled its statutory responsibilities and struck an appropriate balance among the range of various public interests. After fully considering the entire record, the Commission concluded that the Snoqualmie Project, with license conditions that increased flow and mist for the benefit of the Tribe, was best adapted to a comprehensive plan for developing a jurisdictional waterway for beneficial public purposes and, therefore, issued Puget a new 40-year license. *See generally* License and Rehearing Orders, PER 2143, 2227, 2262.

While decommissioning of the Project and restoration of pre-project flows (as desired by the Tribe) would provide the Tribe with full spiritual use of the Falls, the power and other public benefits the Project provides would be lost. *Id.* The Commission therefore issued a new license for the Project with conditions that would preserve and *enhance* the Tribe's spiritual use of the Falls. *Id.* While not restoring the pre-project flows, the new license requires augmented flows that more closely mirror natural flows than did the prior license's flow regime. *Id.*; Rehearing Order I at PP 22-23, PER 2234-35; Rehearing Order II at PP 5, 13-17, PER 2264, 2267-70.

In its petition for review, the Tribe raises two principal objections: (1) despite the enhanced flows ordered by the Commission to accommodate the Tribe to the greatest degree possible within the confines of the FPA, the Tribe asserts that the Commission did not go far enough, and instead should have decommissioned the project and restored historic flows – the Tribe asserts that anything less "substantially burdens" its ability to practice its religion and therefore violates RFRA (Tr. Br. 18-56); and (2) despite extensive consultation with the Tribe throughout the licensing process, the Tribe asserts that the Commission failed to comply with the consultation requirements of the NHPA (Tr. Br. 56-66).

Conversely, in its petition for review, Puget claims that the Commission went too far in its efforts to accommodate the Tribe, alleging that the flow augmentation in the Commission's Rehearing Orders conflicts with the CWA's delegation of authority and is not supported by substantial evidence (P. Br. 49-59).

## II. STATEMENT OF FACTS

### A. Puget's Licensing Proposals

In 1991, Puget filed an application for a new license pursuant to FPA §§ 4(e) and 15, 16 U.S.C. §§ 797(e) and 808, for the continued operation and maintenance of the 44.4 MW Snoqualmie Project, located on the Snoqualmie River, in King County, Washington.[3] *See* Application, AR 1, PER 1. The original license for the Snoqualmie Project was issued on May 13, 1975, effective as of March 1, 1956.[4]

[3]The Snoqualmie River is a navigable waterway of the United States. *See Puget Sound Power & Light Co.*, 53 FPC 1657, 1661 (1975); and *Public Utility District No. 1 of Snohomish County*, 18 FPC 737, 740 (1957).

That license expired on December 31, 1993. Subsequently, an annual license was issued authorizing Puget to continue project operations, under the terms of its original license, pending disposition of its relicense application.[5] In its relicense application, Puget initially proposed to increase the Snoqualmie Project's capacity to 73 MW. However, Puget amended its application to request an increase in the authorized capacity to 54.4 MW. License Order at P 2, PER 2144.

The Project's facilities are situated around the scenic 268-foot-high Snoqualmie Falls. The Project, originally built in 1898, operates in a run-of-river mode and diverts Snoqualmie River water around the Falls through two separate power plants, known as Plant 1 and Plant 2. A 217-foot-long, low level concrete dam situated 150 feet upstream of the Falls creates a 4-mile-long backwater area along a river reach especially prone to flooding. Plant 1 power generating facilities are situated in an underground cavity adjacent to the waterfall's left bank. Discharge from Plant 1 is directed into the pool at the base of the Falls. Water diverted to Plant 2 powerhouse facilities on the right bank is discharged 1,550 feet downstream from the Falls. *See* License Order at PP 10-13, PER 2148; Rehearing Order I at PP 5-7, 9, PER 2228-29; FEIS at pp. xix, 1–1, 2–1-4, AR 1074, PER 1690, 1695, 1699-1702.

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[4] *See Puget Sound Power & Light Co.,* 53 FPC 1657 (1975); 54 FPC 157 (1975); and 54 FPC 599 (1975).

[5] *See* FPA § 15(a)(1), 16 U.S.C. § 808(a)(1).

### B. FERC's Comprehensive Environmental Analysis

On November 1994, the Commission staff issued for comment a Draft Environmental Impact Statement ("DEIS") that evaluated the environmental effects of: (1) Puget's original proposal to expand the Project (Major Upgrade); (2) an alternative developed by Commission staff (Minor Upgrade); (3) project removal; and (4) continued operation of the project as it currently exists. *See* License Order at P 6 and notes 14-15, PER 2146; DEIS, AR 374, PER 988.

The Commission considered filed comments on the DEIS from 23 organizations and over 300 individuals. License Order at P 7, PER 2146. Additionally, the Commission held public meetings in the City of Snoqualmie on December 15, 1994, and March 1, 1995, and in Kirkland, Washington on March 2, 1995, to permit oral comments on the DEIS. *Id.*

After Puget dropped its original Major Upgrade proposal (*id*. at P 8, PER 2146), five organizations and numerous individuals filed additional comments in response. License Order at P 9, PER 2147-48. The comments on the DEIS and on Puget's amended application were considered in preparing the FEIS that was issued on October 2, 1996. *Id*. The motions to intervene and all comments and filings were fully considered in determining whether, and under what conditions, to issue the license.

### C. FERC's License and Rehearing Orders

At the conclusion of these comprehensive proceedings, the Commission fulfilled its FPA responsibilities, struck an appropriate balance among the range of

divergent public interests, and concluded that the Snoqualmie Project, with license conditions that, among other things, increased flow and mist for the benefit of the Tribe, was best adapted to a comprehensive plan for developing a jurisdictional waterway for beneficial public purposes. *See generally* License and Rehearing Orders, PER 2143, 2227, 2262. Accordingly, the Commission issued Puget a new 40-year license. *See id.*

The petitions for review followed.

## SUMMARY OF ARGUMENT

### I.

Supported by substantial evidence, the Commission fulfilled its duties under the FPA and properly balanced the developmental and non-developmental values that continued operation of the Project would bring, versus the enhanced quality of religious experience that the Tribe claimed its members could achieve if the Project were decommissioned. The new license was carefully crafted to address all of these public interest issues.

### II.

In issuing a new license for the Project, the Commission did not burden, let alone "substantially burden," the Tribe's religious practices under RFRA. The Commission did not pressure the Tribe members to take actions forbidden by, or prevent them from engaging in conduct mandated by, their religion. To the contrary, the new license conditions substantially enhanced the minimum flows

and resulting mists, which are culturally and religiously important to the Tribe, and provided other protections and enhancements to address the Tribe's concerns.

Moreover, even if the Commission's actions "substantially burdened" the Tribe's religious practices, which they did not, there is still no RFRA violation here because: (1) the Commission's orders advanced compelling government interests in maintaining and increasing an array of public benefits provided by the continued operation of the Project; and (2) the conditions in the new license presented the least restrictive means for achieving those compelling interests, particularly where the only alternative acceptable to the Tribe – decommissioning of the Project – was not a reasonable restriction to achieve those interests under the requirements of the FPA.

**III.**

The Commission fully satisfied the requirements of the NHPA and the Commission's regulations thereunder. The Tribe was an active participant at every stage of the proceeding. Even though the Tribe was not federally recognized until almost two years after the NHPA consultation and development of the Project's Programmatic Agreement were completed, the Commission nevertheless sought, discussed, and considered its views. Moreover, the Tribe was offered the opportunity to sign the Programmatic Agreement as a concurring party, and was made a party to be consulted under the articles of the new license.

**IV.**

Puget lacks prudential standing to challenge the Commission's upward adjustment to the minimum required flows. Assuming jurisdiction, the Commission had authority to make the adjustment under FPA § 10(a), 16 U.S.C. § 803(a), and the adjustment complied with the CWA in that it was consistent with the state water quality certification.

## ARGUMENT

### I. STANDARD OF REVIEW

Judicial review of the Commission's hydroelectric licensing decisions is limited to determining whether the Commission's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (citing Administrative Procedure Act, 5 U.S.C. § 706(2)); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999); *Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985); *see also* FPA § 313(b), 16 U.S.C. § 825*l*(b).

The Court "grants conclusive effect to the Commission's findings of fact if such findings are supported by substantial evidence." *American Rivers*, 201 F.3d at 1194; *see also, e.g.*, *Steamboaters*, 759 F.2d at 1388. "[S]ubstantial evidence constitutes more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC's]

findings." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (citing *Eichler v. SEC.*, 757 F.2d 1066, 1069 (9th Cir. 1985)).

As explained below, the Commission's licensing determinations were well-reasoned, supported by substantial evidence and consistent with applicable law and precedent. Accordingly, the Commission's orders should be upheld.

## II. THE COMMISSION'S DECISION TO ISSUE A NEW LICENSE FOR THE PROJECT, WITH CONDITIONS THAT ENHANCE FLOWS IMPORTANT TO THE TRIBE, WAS REASONABLE, SATISFIED ALL STATUTORY REQUIREMENTS, AND WAS BASED ON SUBSTANTIAL RECORD EVIDENCE

### A. The Commission Complied with Its Federal Power Act Responsibilities in Issuing the New License

Part I of the Federal Power Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). FPA § 4(e), 16 U.S.C. § 797(e), grants FERC authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on waterways that are subject to congressional regulation under the Commerce Clause. *American Rivers*, 201 F.3d at 1191.

Hydropower projects serve many different (and competing) purposes, including power production, recreation, flood protection, and protection and enhancement of fish and wildlife resources. *See Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1482-83 (D.C. Cir. 1990). The Commission must give equal consideration to developmental and non-development values. FPA § 4(e), 16

U.S.C. § 797(e). The FPA provisions recognize the numerous beneficial public uses of the waterways and courts have interpreted them as charging FERC with determining the "public interest" by balancing power and non-power values. *See Udall v. FPC*, 387 U.S. 428, 450 (1967) ("The test is whether the project will be in the public interest."). The Commission must also balance all these competing interests in approving a hydroelectric project that "will be best adapted to a comprehensive plan for improving or developing" the affected waterway. FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). *See American Rivers*, 201 F.3d at 1206-07.

In its licensing orders here, the Commission gave effect to all of the relevant statutes and struck an appropriate balance among competing interests under the FPA, while simultaneously avoiding violation of RFRA and NHPA, as claimed by the Tribe, or of the CWA, as claimed by Puget. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (potentially conflicting federal legislative provisions must be given effect to the extent possible).

### B. The Commission Appropriately Weighed Competing Public Interests Under Its FPA Mandate

#### 1. Operation of the Snoqualmie Project Serves Significant Public Interests

##### a. The Project Provides Needed Power

Since 1889, the Project has been providing clean and economic electricity to help meet the region's increasing need for power while simultaneously reducing the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable energy resources and reducing atmospheric pollution. *See* License

Order at PP 37, 65-68, PER 2157, 2168; FEIS at 1–3-4, 4–106-110, 6–42-44, AR 1074, PER 1697-98, 1897-1901, 1960-62.

### b. The Project Provides Regional Transmission and Reliability Support

Besides its contribution to the region's power needs, as licensed, the Project will help maintain system reliability.

> Seasonal as well as daily load fluctuations must be considered when evaluating Puget's need for power. . . .
>
> It is during winter peaking periods that system reliability is at risk. During some extreme winter peaking periods, demand levels approach generation supply levels in the Puget Sound region. If one of the main cross-Cascades transmission lines goes down, or if a critical substation goes out, the region could experience severe systematic brown-outs caused by the excessive strain on the system.

FEIS at 1–4, AR 1074, PER 1698; *see also* License Order at PP 69-70, PER 2169.

Additionally, the Northwest Power Planning Council stated that the Project "has important reliability consequences" and "will directly address the Puget Sound area voltage instability concerns currently being studied by the Bonneville Power Administration." NPPC Comments (Sept. 2, 1993), AR 130, PER 944-46.

### c. The Project's Power Is Cost-Effective

The Commission concluded that the project, as authorized and conditioned in the new license, fully develops and uses the hydropower potential of the site. License Order at P 71, PER 2169. Moreover, as licensed, even accounting for the flow augmentation directed in the Rehearing Orders, power from the Project would

provide annual net benefits to the licensee of $10,410,000. *See* Rehearing Order I at P 24, PER 2235-36; *see also* License Order at PP 73-79, PER 2169-71.

#### d. The Project Provides Significant Cultural and Recreational Benefits

The Snoqualmie Project is one of the oldest and most historically significant hydroelectric generation facilities in the Northwest and was listed in the National Register of Historic Places in 1976. The underground Plant 1 powerhouse, completed in 1899, was the first ever successfully constructed underground powerhouse and has been designated a Historic Civil Engineering Landmark by the American Society of Civil Engineers. The public is able to tour the Plant 2 powerhouse, and there are interpretive signs and displays about the Falls and the historic nature of the project's facilities. License Order at P 38, PER 2158; FEIS at 3–70, AR 1074, PER 1790.

Moreover, the Falls, the Snoqualmie Project's major recreational attraction, draws approximately 1.5 million visitors annually and is one of the most popular tourist attractions in the state of Washington. License Order at PP 41-43, PER 2158-59; FEIS at 3–34-43, AR 1074, PER 1754-64.

#### e. The Project Provides Flood Control Benefits

The City of Snoqualmie experiences frequent catastrophic flooding. License Order at PP 49-51, PER 2162-64; FEIS 2–13-15, AR 1074, PER 1711-13. As conditioned in the new license, the Snoqualmie Project will help to relieve the

area's chronic flooding problem. License Order at PP 49-51, PER 2162-64; FEIS 2–13-15, AR 1074, PER 1711-13.

#### f. The Project Provides Fish and Wildlife Enhancements

As conditioned in the new license, the Project will protect fish and wildlife consistent with law and the recommendations of state and federal fish, wildlife and water quality agencies. *See* License Order PP 17-20, 25-29, 46, Ordering PP (E), (F), Articles 401, 403-418, Appendix A, PER 2149-50, 2152-54, 2160, 2175, 2180-93, 2200-09.

### 2. The Falls are Culturally and Religiously Important to the Tribe

#### a. The Significance of the Snoqualmie Falls

On the other side of the balance, Snoqualmie Falls holds significant cultural and religious importance to the Tribe. *See, e.g.*, License Order at P 33, PER 2155; Tr. Br. 3-6; Tribe's Motion to Intervene, AR 75, TER 40-47. The Tribe has explained that the Falls are at the center of the Tribe's creation story and provide a place of "spiritual power" where members come to pray, meditate and worship. *Id.* Further, the Falls is eligible for listing in the National Register of Historic Places as a Traditional Cultural Property. FEIS at 3–67, AR 1074, PER 1787.

#### b. The Importance of Flow and Mist at the Falls

According to the Tribe, the quality of Snoqualmie religious observance correlates to the quantity and quality of the Falls' mist and spray that, in turn, is determined by the quantity of flow over the Falls. *See* License Order at P 33 &

n.33, PER 2155; Rehearing Order I at P 23, PER 2235; Rehearing Order II at P 15, PER 2267-68; Tribe's Motion to Intervene and Request for Preparation of DEIS, AR 991, TER 153-69; FEIS 3–52-56, AR 1074, PER 1772-76.

### C. The New Flow Regime Accommodated the Tribe to the Greatest Extent Possible Under the FPA

Prior to relicensing, Article 13 of the 1975 license required Puget to "[d]ischarge a minimum flow of 100 cfs [cubic feet per second] over Snoqualmie Falls during daylight hours in order to maintain the scenic and aesthetic values of the Falls." 53 FPC at 1667. Since 1991, Puget has also maintained a minimum nighttime flow of 25 cfs over the falls. Application at E4-17, AR 1, PER 60; License Order at P 44, PER 2160. Early in the pre-application consultation, the Tribe indicated a need for flexible timing for spiritual use of the Falls, the importance of continuous flows, and the value of privacy during spiritual activity. *Id.* Additionally, prior to the Tribe's demand for natural flows in this case, it had requested a 200 cfs flow (day and night) because a 200 cfs flow has the potential to produce more spray than the 100 cfs flow since at 200 cfs active plumes strike the surface of the plunge pool. *See* FEIS 3–53, 4–49, AR 1074, PER 1773, 1840.

#### 1. The New License Flow Enhancements

The Commission staff had analyzed a number of minimum flow release scenarios,[6] and determined that public perception of scenic beauty was enhanced

[6] During the course of the licensing proceedings, Puget considered between 100 and 200 different flow regimes. Findings of Fact, Conclusions of Law and

by: (1) higher flows (up to a point), (2) a variety of flows that track seasonal changes, and (3) the coincidence of higher flows with good weather and periods of highest visitation. License Order at PP 47-48, PER 2161-62; FEIS 3–55-56, 6–45, AR 1074, PER 1775-76, 1963. Thus, the Commission concluded that a variety of flows that generally track the seasonal variation in the flow regime of Snoqualmie Falls would best match the Project's need for aesthetic waterfall characteristics important to the Tribe's spiritual and cultural practices at the Falls, as well as characteristics important to recreationists, while also providing generation benefits. License Order at P 47, PER 2161, Rehearing Order I at P 22, PER 2234.

The Commission then determined that, with one exception, the Washington Department of Ecology's ("Ecology's") Water Quality Certification ("WQC") minimum instream flow requirements for the Project met the Commission's criteria. License Order at PP 46, 48, PER 2160-62. Under the conditions of the new license, Puget would be required to provide the following minimum flows (or natural flows if less) consistent with the WQC:

- May 16 through May 31: 200 cfs;
- June: 450 cfs;
- July and August:
    - Weekends and July 4: 200 cfs ;
    - Daytime weekdays: 100 cfs;
    - Nighttime weekdays: 25 cfs
- September through May 15:

- Daytime: 100 cfs
- Nighttime: 25 cfs

*Id.* In the License Order, the Commission then augmented these WQC minimum flows to also require 200 cfs over the Labor Day weekend (day and night). *Id.* at P 48 & n.58. Puget did not object to this adjustment and filed no request for rehearing of the License Order.

### 2. In the Rehearing Orders, the Commission Further Enhanced Flows for the Benefit of the Tribe

In the first Rehearing Order, the Commission re-examined its balancing of interests under FPA § 10(a), 16 U.S.C. § 803(a). Rehearing Order I at PP 21-24, PER 2234-36. Upon further consideration, the Commission decided that the certification flows did not sufficiently take account of the Tribe's concerns and made an upward adjustment to the flow regime (outlined *supra*), requiring flows over the Falls of 1,000 cfs (daytime and nighttime), or inflow, if less, throughout the months of May and June. *Id.* at P 22, PER 2234-35. The Commission then explained this augmentation of the flow regime:

> As previously noted, the Falls are of great religious significance to the Snoqualmie Tribe, and the level of spray and resulting mist produced by water flowing over the Falls is a critical component of their spiritual experience. Typically, May and June are the months during which the level of flows producing the greatest volume of mist naturally occur. While both the flows required by the water quality certification and those recommended in the final EIS track the seasonal variation in flows at the Falls, those recommended in the final EIS would provide a greater threshold for mist during these months. Specifically, while spray is moderately heavy at 450 cfs (the highest flows required by the water quality certification), at 1,000 cfs (the highest flows recommended in the final EIS), heavier spray and

> mist rise from the canyon, and the waterfall is "explosive and powerful."

*Id.* at P 23, PER 2235 (citing FEIS at xix, AR 1074, PER 1690); *see also* FEIS 3–52, AR 1074, PER 1772; Rehearing Order II at PP 4-5, PER 2263-64. The Commission further explained that this augmentation was supported by law (*id.* at n.24), was cost-effective and appropriately balanced competing interests. Rehearing Order I at P 24, PER 2235-36; *see generally* Rehearing Order II at PP 1-18, Ordering PP (A)-(C), PER 2262-71.

### D. The Commission Properly Determined That Project Decommissioning Was Inappropriate Under the FPA

#### 1. The Tribe Insisted on Nothing Less than Decommissioning of the Project

The Tribe has asserted (at least since 1991)[7] that *any* Snoqualmie Project diversion of water compromises the sacred quality of the Falls, that only totally natural (*i.e.*, pre-project) flows can truly support its traditional religious practices, and therefore decommissioning of the Snoqualmie Project is mandated by the FPA. License Order at P 33, PER 2155; Tr. Br. 1-2, 7, 12-13; Tribe's Letter to FERC (Feb. 24, 1992), AR 16, TER 9-14; Tribe's Motion to Intervene at 17, AR 75, TER 45. *See also* NEPA scoping public hearing transcript at 41-42 (Aug. 3, 1993), AR 111, PER 724-25 (reproduced in P. Br. 20-21).

[7] In an article that appeared in the Seattle Times in 1990, Ron Lauzon, a Snoqualmie sub-chief, stated that "a minimum flow must be maintained at all times. And the Tribal Council says it should be doubled, to 200 cubic feet per second for aesthetic and environmental reasons." Since then, the Tribe has stated that only restoration of natural flows would be acceptable. *See* FEIS 3–53, 4–49, AR 1074, PER 1773, 1840.

### 2. The Commission Properly Rejected Decommissioning as Incompatible with Comprehensive Balancing Under FPA § 10(a)

While restoration of pre-project flows would provide the Tribe with full spiritual use of the Falls, the power (as well as the other public benefits) the Project provides would be lost. License Order at PP 36-40, PER 2156-58; FEIS 4–96-99, 6–1, AR 1074, PER 1887-90, 1919. The new license reflects the Commission's reasoned decision-making in balancing the public interests of providing clean, renewable and economic energy, while simultaneously respecting the Tribe's spiritual interest in the Falls under FPA § 10(a). The Commission understood that "fully resolving [any] one of these issues may compromise the resolution of others." FEIS 6–1, AR 1074, PER 1919. The Tribe, on the other hand, asks that the Project environment be restored to conditions that have not existed since 1898. Such an outcome would destroy the delicate balance struck by the Commission.

Indeed, this Court has recognized that current conditions provide the appropriate baseline for the evaluation of environmental impacts for a relicensing proceeding under NEPA. *See American Rivers*, 201 F.3d at 1195-99. Since its construction and initial operation more than a century ago, the Project has altered the nature of the Falls for purposes of the Tribe's traditional religious practice; nevertheless, the Commission reasonably concluded that the FPA did not require that all past environmental and other effects of a hydroelectric project be mitigated at relicensing. License Order at P 35, PER 2156; *see also* Rehearing Order I at PP

18, 29, PER 2232, 2237. *See American Rivers*, 201 F.3d at 1197 ("It defies common sense and notions of pragmatism to require the Commission or license applicants to 'gather information to recreate a 50-year-old environmental base upon which to make present day development decision.'"). This Court's reasoning is even more compelling when, as here, the Tribe would have the Commission turn the clock back more than 100 years.

### 3. Other License Provisions Designed to Further Protect the Tribe's Interests Would Be Lost Were the Project Decommissioned

Were the Project decommissioned, other tribal protective measures could be jeopardized. The Commission took great care to address the Tribe's concerns:

> Throughout this proceeding, the Commission has considered the effects of the Snoqualmie Project on the resources of importance to the Snoqualmie and, as this order reflects, we have endeavored to accommodate their concerns when framing the requirements of the new project license. To protect the sacred nature of the Falls, and the privacy of Snoqualmie rituals, we will not authorize development of the south side of the river below the Falls, extension of the Preston-Snoqualmie Trail, or the building of a new pedestrian bridge. In addition, any project modifications are to be constructed so as to be invisible and inaudible at the sites where the Snoqualmie conduct their rituals on the south side of the river below the Falls. And while we are not restoring the pre-project flows over the Falls, the new license requires flows that will more closely mirror natural flows than did the prior license's flow regime.

License Order at P 40, PER 2158.

Were Puget's license not renewed, all of these new license provisions would be lost to the Tribe. Moreover, a return to natural flows might attract more

tourism, which could interfere with the Tribe's concerns for privacy – an important element in the Tribe's spiritual use of the Falls. FEIS 6–13, AR 1074, PER 1931.

## III. THE LICENSE ORDERS DO NOT VIOLATE RFRA

Under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq*., the federal government's burdening of the practice of religion is permissible, so long as the burden is not "substantial," *i.e.*, where the action does not pressure the adherent to take action forbidden by, or prevent the adherent from engaging in conduct mandated by, that religion. *Goehring v. Brophy*, 94 F.3d 1292, 1299 (9th Cir. 1996).

The interference with religion must be more than an inconvenience; the burden must be substantial and interfere with a tenet or belief that is central to religious doctrine. *Id.* Thus, to rise to the level of "substantial burden," the government's action: "must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).[8]

Even where the federal government's action is found to have placed a "substantial burden" on religious exercise, the government has not violated RFRA

[8] *San Jose Christian College* defined "substantial burden" in the context of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* RLUIPA substantially tracks the language of RFRA and was enacted by Congress in response to the Supreme Court's partial invalidation of RFRA. *See id.* at 1033-34 (citing *Wyatt v. Terhune*, 315 F.3d 1108, 1115 (9th Cir. 2003)).

if it can demonstrate (i) that compelling government interests are advanced and (ii) that the action represents the least restrictive means of achieving those purposes. 42 U.S.C. § 2000bb-1(b); *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1216 (2006); *Goehring*, 94 F.3d at 1299.

### A. The License Orders Do Not Substantially Burden the Tribe's Practice of Religion

#### 1. The New License Conditions *Enhance* Opportunities for the Tribe to Engage in Its Religious Practices

In this proceeding, the new license did not burden, let alone "substantially burden," the Tribe's religious practices. To the contrary, compared to existing conditions,[9] the new license orders substantially **enhance** the minimum flows and resulting mists that are culturally and religiously important to the Tribe for another forty years. Under the conditions of the new license, "the Snoqualmie will still have spiritual use of the Falls, albeit with somewhat less than the full flows they desire." License Order at P 39, PER 2158.

#### 2. The Commission Applied the Correct Legal Standard

The Tribe criticizes the Commission's orders as suffering from two principal infirmities: (1) the Tribe charges that FERC improperly conflated the First Amendment free exercise standard with the "more rigorous" RFRA standard (T. Br. 22-24); and (2) the Tribe alleges that the Commission solely and improperly

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[9] *See* discussion *supra* regarding *American Rivers*, 201 F.3d at 1195-99 (Commission's environmental baseline for relicensing a project is existing conditions).

relied on *Lyng* because *Lyng* predated RFRA and is inapplicable to a RFRA analysis (*id.* at 25-37). Neither of these arguments was preserved for appeal, *see supra* Counterstatement of Jurisdiction. Assuming jurisdiction, the Tribe nevertheless is incorrect on the merits.

### a. The Commission's Orders Were Based on the Correct Legal Standard

Congress enacted RFRA to counteract the Supreme Court's decision in *Employment Division of Human Resources v. Smith*, 494 U.S. 872 (1990), which had held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. *See Gonzales*, 126 S. Ct. at 1216. RFRA's stated purpose was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

This Court has also applied the test of *Sherbert v. Verner* with respect to RFRA claims (as well as to First Amendment Free Exercise claims). *See Bollard v Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999).

In this case, FERC correctly determined that RFRA applies only:

> to situations in which the Government has either prohibited an individual's religious practice or required an individual to take some action contrary to his or her religion – not to situations in which the Government took some action which incidentally affected the quality of an individual's religious experience. The issuance of a new license will not require the Snoqualmie to violate their religious beliefs. Nor does it prohibit or prevent the Snoqualmies' access to Snoqualmie Falls, their possession and use of religious objects, or the performance of religious ceremonies.

License Order at P 36, PER 2157 (footnotes omitted). To reach this conclusion the Commission relied on *Sherbert v. Verner* and *Wisconsin v. Yoder*, whose compelling interest test RFRA was intended to restore, as well as *Lyng*. *See id*., & nn.38, 41, 42, PER 2156-57. The Commission's analysis is therefore completely consistent with this Court's RFRA standards.

### b. *Lyng* Remains Good Law

A large portion of the Tribe's brief (pp. 25-37) is dedicated to the proposition that *Lyng* is not applicable to a RFRA claim because it preceded the enactment of RFRA. This claim is fundamentally flawed for several reasons.

#### i. The *Lyng* Holding

As the Commission correctly summarized (Rehearing Order I at P 20 & n.20, PER 2233-34), *Lyng* involved a challenge to the Forest Service's construction of a paved road through federal land that included an area used by certain American Indians for religious rituals, and to the Forest Service's adoption of a management plan allowing for timber harvesting in the same area. While noting that the Forest Service had taken some measures to accommodate the American Indians' religious practices, the Court also made it clear that that the government's incidental destruction of the ability to practice one's religion does not violate the Free Exercise Clause of the First Amendment. The Court distinguished between government action that coerces religious practitioners into

acting contrary to their religious beliefs and government action that affects their spiritual development. Relying on *Sherbert v. Verner*, the Court explained:

> [T]he location of the [constitutional] line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. . . .
>
> However much we might wish it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . .
>
> Whatever the rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use, what is, after all, its land.

*Lyng*, 485 U.S. at 451-453.

#### ii. The Tribe Admits that *Lyng* Remains Good Law

The Tribe can point to no case overturning *Lyng*. In fact, the Tribe acknowledges that *Lyng* remains relevant. In its brief, the Tribe acknowledges that this court continues to apply *Lyng*, citing *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (Tr. Br. 15, 30-31), and cites *Lyng* as controlling in *Navajo Nation v. United States*, 408 F. Supp. 2d 866 (D. Ariz. 2006), *appeal docketed*, No. 06-15371 9th Cir. Mar. 4, 2006) (Tr. Br. 34). The Tribe itself cites to *Lyng* as controlling regarding discrimination against the Native American religion. Tr. Br. 33.

In its rehearing request, while the Tribe went to great lengths to distinguish *Lyng* from this case on its facts, it never claimed that *Lyng* was not good law. *See* Tribe's Rehearing Request 29-32, AR 1303, PER 2213-16; Rehearing Order I at

P 19, PER 2232. In fact, of the six pages addressing the religious protection arguments raised in its request for rehearing, the Tribe's RFRA claim was confined to a single paragraph that simply recited the elements of RFRA. *See* Tribe's Rehearing Request 27-32, AR 1303, TER 2213-16. The Commission addresses issues as they are presented; the Commission discussed *Lyng* at length in its orders because the Tribe had done so in its rehearing request.

### iii. RFRA Was Never Intended to Invalidate *Lyng*

Contrary to the Tribe's claims on appeal, the fact that *Lyng* predates RFRA speaks to its relevance rather than the opposite. RFRA's stated purpose was to restore the compelling interest test that had been applied before *Smith*. In her 1990 concurring opinion in *Smith*, Justice O'Connor (the author of *Lyng* in 1988) specifically expressed her opinion that *Lyng* was no retreat from the compelling interest case:

> Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. . . . In . . . *Lyng* [], for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."

*Smith*, 494 U.S. at 900 (O'Connor, J., concurring) (internal citation omitted).

Furthermore, RFRA's legislative history strongly suggests that pre-*Smith* case-law, including *Lyng*, remains intact:

> The act would not require such a [compelling interest] justification for every governmental action[] that ha[s] an incidental effect on religious institutions. The amendment we will offer today is intended to make it clear that the pre-*Smith* law is applied under the RFRA in determining whether Government action burden under the freedom of religion must meet the [compelling interest] test.

139 Cong. Rec. S 14350, S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy). *See also id.* (statement of Senator Simpson):

> INCIDENTAL IMPACT CASES LYNG CASE
>
> RFRA does not [a]ffect Lyng v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSN., 485 U.S. 439 (1987), a case concerning the use and management of Government resources, because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion. In Lyng, the court ruled that the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise. Thus, the construction of mining or timber roads over Government land, land sacred to native American religion, did not burden their free exercise rights. Unless a burden is demonstrated, there can be no free exercise violation. The statutory language in RFRA was drafted to include protection against laws which impose a burden on religious exercise.

(Capitalization in original); *see also* 139 Cong. Rec. S 14461, S14470 (daily ed. Oct. 27, 1993) (statement of Senator Hatch) (same).

### 3. The Tribe Has Failed to Demonstrate the Orders Prevent the Exercise of Its Religious Practices

Under RFRA, the religious adherent bears the burden of demonstrating that it cannot accomplish the mandates of its religion because of the government's action. *Goehring*, 94 F.3d at 1299. Unlike *Gonzales*, where the government conceded that its action substantially burdened religious practice, 126 S. Ct. at 1218, here, as the Tribe concedes, the Commission has found that the new license

would *not* burden the Tribe's religion. Tr. Br. 35 (citing License Order at P 36, PER 2156-57). Thus, the burden in this case falls to the Tribe to show that its religious practices are substantially burdened by the new license. The Tribe has not met its burden.

**a. The Record Is Bereft of Evidence of Burden**

The Tribe has claimed that the Commission "has authorized the 'continued destruction' of Native American religion by granting the Snoqualmie Falls Hydroelectric project a new license to operate for another forty years." Tr. Br. 1. In support of this claim, the Tribe repeatedly relies upon the following record quote: "The existing Project introduced numerous changes, restricted Native American access to and uses of the immediate area and *may have* compromised some cultural and spiritual values of Indian people." FERC Letter Approving Plans and Final Cultural Resources Mitigation Plan and Programmatic Agreement, Tr. Br. 37, 41, 44, 48 (citing AR 1073, TER 279 (emphasis added)). First, the reference is equivocal, stating only that the Tribe's spiritual values "may have" been compromised. This alone demonstrates the Tribe's failure to meet its burden.

More significantly, this single sentence was taken completely out of context. For the purpose of completeness, more of the passage from which this sentence was culled is reproduced below. As can be seen, when read in context, the reasonable conclusions to be drawn are very different from those suggested by the Tribe (the passage cited by the Tribe is bracketed and bolded):

**Cumulative Impacts**

> No evidence is available to evaluate the effects of the existing Project on prehistoric archaeological sites because none have been reported within the Project Area. **[The existing Project introduced numerous changes, restricted Native American access to and uses of the immediate area and may have compromised some cultural and spiritual values of Indian people.]** However, the Falls continues to play an important role in the culture of the Snoqualmie Indians, as reflected in the eligibility determination of the Falls as a traditional cultural property. Tulalip Tribal members appear not to have been using the Falls in 1988 (Larson 1988), and a representative of The Tulalip Tribes has noted that construction and tourism have compromised the value of the area for such use (Williams 1992). The Snoqualmie Indians asserted that the diversion of additional water called for in the initial relicensing application would have adversely affected the Traditional Cultural Property. The Refurbished Project, however, will not divert additional water flow from the Falls. . . .
>
> The Refurbished Project will not have an adverse cumulative impact on the Snoqualmie Falls Traditional Cultural Property. On the contrary, it will have beneficial impacts on interpretation, education, historic preservation, and other areas. As noted above, the Refurbished Project will enhance existing flow. The Refurbished Project will preserve from development land around the Falls that is located within the Project Boundary. The Refurbished Project is, therefore, expected to make a positive contribution by maintaining and enhancing existing cultural resources.

*Id.* (also cited as AR 1061, PER 1644). Thus, this document demonstrates the very opposite of the Tribe's contention: (1) the Tribe continues to use the Falls for spiritual purposes; (2) the "refurbished" Project, especially in comparison to the "existing" Project, will not have an adverse cumulative impact on the Falls; (3) to the contrary, it will produce several benefits to the Tribe; and (4) not the least of these benefits is increased flows.

### b. There Is Substantial Record Evidence Demonstrating Continuous Religious Use of the Falls

Since 1898, the Tribe has continued to practice its religion at the Falls. The Falls is still held sacred by the Tribe's members and continues to be used for religious purposes. *See, e.g.,* Application, AR 1, PER 247; Tribe's Motion to Intervene, AR 75, PER 682-95; Transcript of Aug. 2, 2003 Scoping Meeting, AR 110, PER 715-16; Transcript of March 2, 1995 Meeting, AR 941, PER 1456-71; Tribe's Motion to Intervene, AR 992, PER 1481; FEIS 6–13, 1074, PER 1931.

As a prime example, Dr. Tollefson, the Tribe's anthropologist in support of its nomination of the Falls to be classified as a Traditional Cultural Property, stated:

> the view [at the Falls] is largely unchanged from a century before, and the majesty of the Falls, the roar of its current, the mist rising from the pool, and the mossy cliffs which rise on three sides still convey the traditional setting of a site which has played a continuous role in the culture of the Snoqualmie people.
>
> Integrity of the condition is also sustained. Some physical characteristics of the Falls were altered with the constructing of a hydroelectric facility at the Falls at the turn of the century. . . . Even so, the Falls continues to maintain a sufficient average volume of flow so that it is recognizably the same site and continues to play an important role in traditional life. In addition, the pool at the base of the Falls and the surrounding vertical cliffs are visually the same as during the historic period and provide a traditional setting for the Falls (Tollefson and Garfield, 1992).

FEIS 4–49, AR 1074, ER 1840. The new license further protects and enhances these conditions.

### B. Even Assuming a Substantial Burden, FERC Nevertheless Satisfied the Remainder of RFRA and Its Actions Must Be Upheld

Even if the Commission's actions "substantially burdened" the Tribe's religious practices, which they did not, there is no RFRA violation because the Commission satisfied the remaining "strict scrutiny" factors.

#### 1. The New License Advances Compelling Government Interests

Even assuming a substantial burden, the orders correctly applied and satisfied the remaining strict scrutiny factors: (i) compelling government interest and (ii) least restrictive means.

Unlike *Gonzales*, where the government had failed to demonstrate a compelling interest,[10] here, as detailed *supra*, the Commission identified myriad compelling governmental interests advanced by the issuance of the new license that were based on substantial evidence: (1) the provision of needed generation in the Puget service area (License Order at PP 37, 65-68, PER 2157, 2168; FEIS at 1–3-4, 4–106-110, 6–42-44, AR 1074, PER 1697-98, 1897-1901, 1960-62); (2) the reduction of the use of fossil-fueled, steam-electric generating plants and the conservation of nonrenewable energy resources (*id.*); (3) the reduction of atmospheric pollution (*id.*); (4) the provision of regional transmission and reliability support (FEIS at 1–4, AR 1074, PER 1698; License Order at PP 69-70, PER 2169; NPPC Comments (Sept. 2, 1993), AR 130, PER 944-46); (5) the

[10] In *Gonzales*, the evidence on health risks of *hoasca*, a hallucinogenic tea used in one sect's religious practices, was found to be "in equipoise." 126 S. Ct. at 1218.

provision of economic power (License Order at P 71, PER 2169); (6) the protection of historic properties (License Order at P 38, PER 2158; FEIS at 3–70, AR 1074, PER 1790); (7) the preservation of recreational benefits (License Order at PP 41-43, PER 2158-59; FEIS at 3–42-43, AR 1074, PER 1754, 1762-63); (8) the provision of flood control benefits (License Order at PP 49-51, PER 2162-64; FEIS 2–13-15, AR 1074, PER 1711-13); and (9) the provision of fish and wildlife enhancements (License Order PP 17-20, 25-29, 46, Ordering PP (E), (F), Articles 401, 403-418, Appendix A, PER 2149-50, 2152-54, 2160, 2175, 2180-93, 2200-09).

"Whatever the rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use, what is, after all, its land." *Lyng*, 485 U.S. at 451-453. As this Court has said, "'[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would radically restrict the operating latitude of the legislature.'" *Goehring*, 94 F.3d at 1301 ((quoting *United States v. Lee*, 455 U.S. 252, 259 (1982) (internal quotations and citations omitted)).

Thus, this is not a case like *Gonzales* addressing an individual's or small group's use of a hallucinogenic substance for religious purposes (that could be accommodated with a narrowly crafted exemption to an otherwise applicable rule);

rather, this case involves nothing less than the government's authority and responsibility to regulate the public use of its jurisdictional waterways. This is all the more evident where, as here, nothing less than Project decommissioning would satisfy the Tribe.

The record demonstrates that the Commission carefully balanced the many public interests involved, those advanced by continued operation of the Project against the religious interests of the Tribe. Consistent with its responsibilities under the FPA and other statutory authorities (including RFRA), the Commission exactingly crafted conditions in the new license that advanced these compelling government interests while protecting (and in this case substantially enhancing) the Tribe's opportunities to participate in its religious practices.

### 2. The New License Advances Compelling Government Interests Using the Least Restrictive Means

The Commission rightly instituted a new augmented flow regime that provided more natural flows that preserved generation, respected Tribal interests and struck the appropriate balance under the FPA in the least restrictive manner possible. License Order at PP 36-40, PER 2156-58. The Commission also took great care to address the Tribe's concerns and included tribal protective measures aside from increased flows. License Order at P 40, PER 2158.

Thus, the Commission correctly found that the only alternative acceptable to the Tribe – decommissioning and restoration of flows that have not existed since 1898 – would destroy the delicate balance struck by the Commission and was simply unsupportable, undesirable and infeasible. *See* pp. 1-25 *supra*. The Tribe has not identified any authority that would compel the Commission to make such an irrational and one-sided choice.

## IV. THE COMMISSION COMPLIED WITH THE CONSULTATION REQUIREMENTS OF NHPA

### A. The Tribe Was Adequately Consulted Under NHPA Section 106

The Tribe was fully consulted in compliance with Section 106, and the regulations thereunder, during the relicensing process. Section 106 of the NHPA requires that an agency take into account the effects of its activities and programs on historic properties, including traditional or cultural interests of tribes. 16 U.S.C. § 470f; *see also* 36 C.F.R. § 800.2(c)(2)(ii)(A) (consultation to provide "a reasonable opportunity to identify its concern . . . and participate in the resolution

of adverse effects"). This Court has found that the consultation requirements of the NHPA, like those of NEPA, are procedural in nature:

> Both Acts create obligations that are chiefly procedural in nature; both have the goal of generating information about the impact of federal actions on the environment; and both require that the relevant federal agency carefully consider the information produced. That is, both are designed to insure that the agency 'stop, look, and listen' before moving ahead.

*San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (quoting *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982)). *See also Morris County Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 278-79 (3rd Cir. 1983).

The crux of the Tribe's argument is this: despite its clear communication to the Commission and the other relevant parties of its position in this case, it did not like the end-result; therefore, the consultation process must have been flawed. Tr. Br. 56-67. As the record reflects, however, the Snoqualmie Tribe was consulted to the full extent contemplated by the statute:

> The Snoqualmie Tribe was an active participant at every stage of the proceeding. It participated in discussions at scoping meetings and submitted written comments. Its comments were addressed in both the draft environmental impact statement (EIS) and the final EIS, issued in November 1994 and September 1996, respectively. We have considered both of those sets of comments. Following a determination by Interior that the Snoqualmie Tribal Organization is an Indian tribe within the meaning of federal law, effective October 6, 1999, the Snoqualmie Tribe's comments in the proceeding were considered as recommendations filed by a federally-recognized tribe pursuant to sections 10(a)(2)(B) and 10(a)(3) of the FPA.

Rehearing Order I at P 12, PER 2229-30 (internal citations omitted); *see also* the chronology of consultation outlined in Puget's brief at 14-18.

In its brief, the Tribe admits that it participated significantly in the proceeding. Tr. Br. 10-13. "Despite these risks and hurdles, the Snoqualmie Tribe participated in every stage of the relicensing process. Early on, the Tribe clearly communicated its position . . . ." *Id.* at 12. Indeed, during the course of the proceedings, more than three dozen filings were submitted by or for the Tribe (more than any other party intervening in the licensing proceeding). *See* Amended Certified Index to the Record (Feb. 23, 2006).

The Tribe now compares the Commission's consultation efforts with those found inadequate in *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (Tr. Br. 61-62). However, *Sandia* is inapposite. In *Sandia*, the agency had very limited contact with the tribe, consisting of a single form letter and a one-time request for information from the tribal council. *Id.* at 860-62. By contrast, in this case, the Tribe was consulted on many occasions and, by its own admission, it vigorously participated in all stages of the relicensing proceeding.

### B. The Tribe Was Afforded Full Participation Even Before It Was Federally Recognized

NHPA's implementing regulations do not provide for consultation with non-federally recognized tribes. 36 C.F.R. § 800.16(m) ("Indian tribe" means a tribe "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians").

In this case, the NHPA consultation and development of the project's Programmatic Agreement were completed nearly two years before the Snoqualmie Tribe was formally recognized by the federal government. To preserve the traditional cultural properties identified by the Tribe through the implementation of the Cultural Resources Mitigation and Management Plan and the Historical Resources Mitigation and Management Plan, FERC entered into a Programmatic Agreement with the State Historic Preservation Officer and the Advisory Council for Historic Preservation. The final signature for the Programmatic Agreement was dated January 17, 1997. The Tribe's status as a federally recognized tribe became effective on October 6, 1999. *See* Rehearing Order I at P 13 & n.12, PER 2230.

Nevertheless, the Snoqualmie Tribe was fully consulted; that is, its views were sought, discussed, and considered in the NHPA consultation and in development of the Programmatic Agreement, and it was offered the opportunity to sign the Programmatic Agreement as a concurring party. Rehearing Order I at P

13 & n.12, PER 2230. Moreover, the Tribe was added as a consulting party under Article 420 of the new license. Rehearing Order I at P 16, PER 2231.

### C. Additional Consultation Would Have Been Superfluous or Illegal

By the time the Tribe requested consultation, all aspects of the proceeding (including discussions, meetings, and filings on threatened and endangered species, cultural resources, and development of the DEIS and FEIS) – save receipt of the Clean Water Act's water quality certification issued by Washington State – had been completed. Rehearing Order I at P 14, PER 2231. Here, the Tribe had every opportunity to participate and be heard, and the proceeding was so far advanced that any additional consultation would have caused undue delay, or could have constituted an illegal *ex parte* exchange. *See id.*

#### 1. Direct Contact with Litigants Would Have Violated *Ex Parte* Rules

The Tribe's argument (Tr. Br. 60-63) that the Commission's own regulations compelled direct discussion between the Tribe and the Commission is flawed. While the Commission's regulations provide for government-to-government consultation, they do not allow it to engage in direct contact with tribes during a litigated proceeding. 18 C.F.R. § 2.1c(d), (j); *see also In re Hydroelectric Licensing Under the Federal Power Act*, 102 FERC ¶ 61,185 at P 114 (2003). Since the Tribe was a party to a pending on-the-record proceeding, FERC would have had to violate its own regulations in order to have direct, off-the-record contact with tribal representatives. 18 C.F.R. §§ 385.2201(b), 385.2201(e)(v).

### 2. The Commission Fulfilled Its Trust Responsibility to the Tribe

The Tribe also asserts that the Commission's conduct violated the government's trust responsibility to the Tribe that compels "direct and substantial consultation." Tr. Br. 62. However, in *Skokomish Indian Tribe v. FERC*, 121 F.3d 1301, 1308-09 (9th Cir. 1997), this Court held that the Commission properly discharges its federal trust responsibility to tribes by acting within the context of the FPA. Moreover, the federal agency trust responsibility does not require the Commission to afford tribes greater rights than they otherwise would have under the FPA and FERC's implementing regulations. *See Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990). As described *supra*, the Commission fully discharged its duties under the FPA; thus, it did not violate its trust responsibility to the Tribe.

## D. The Commission Properly Delegated Certain Consultation Tasks to Puget

The Tribe cites to National Park Service Bulletin 38 for the proposition that the agency must consult directly with tribes without the use of a consultant or applicant intermediary. Tr. Br. 64-66. First, as explained *supra*, the Tribe did not preserve this argument for appeal. Assuming jurisdiction, the NHPA implementing regulations specifically authorize an agency to "authorize an applicant . . . to initiate consultation with the SHPO [State Historic Preservation Officer]/THPO [Tribal Historic Preservation Officer] and others." 36 C.F.R. § 800.2(c)(4). "Others" as used in this regulation is comparable to the use of

"other consulting parties" in the regulations, which include Indian tribes. *See, e.g.*, 36 C.F.R. § 800.2(c)(2)-(3). Such was the case here.

However, the Commission did not solely rely on Puget's cultural resource evidence in making its ultimate licensing decision. The various consulting parties, including the Tribe and the Advisory Council for Historic Preservation, conveyed their comments on the Cultural Resources Mitigation and Management Plan, the Historical Resources Mitigation and Management Plan and the Programmatic Agreement to the FERC, and these comments were considered along with the rest of the record. *See, e.g.*, ACHP Comments, AR 360, ER 980-84; Tribe's Motion to Intervene and Requesting Preparation of Supplemental DEIS, AR 992, ER 1486-89.

## V. PUGET LACKS PRUDENTIAL STANDING TO CHALLENGE THE ADJUSTMENT TO THE FLOW REGIME IN THE REHEARING ORDERS; ASSUMING JURISDICTION, THIS ADJUSTMENT WAS CONSISTENT WITH THE PROVISIONS OF THE CWA AND WAS WITHIN THE COMMISSION'S FPA AUTHORITY

Under section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1), the Commission may not issue a license for a hydroelectric project unless the State certifying agency has either issued a WQC for the project or has waived certification by failing to act within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA, 33 U.S.C. § 1341(d), provides that the certification shall become a condition on any federal license or permit that is issued.

On September 25, 2003, the Washington Department of Ecology issued its WQC for the Snoqualmie Falls Project, subject to certain conditions. The Snoqualmie Tribe appealed the certification to Washington's Pollution Control Hearings Board, which, on April 7, 2004, amended the certification's interim definition of critical flow. The Commission incorporated the amended certification as a condition of the new license. License Order at Ordering P (E) and Appendix A, PER 2175, 2200-09.

Puget claims that the Commission exceeded its authority under the CWA when, in the Rehearing Orders, it later augmented water flows because (in Puget's opinion) the augmentation "denigrates other beneficial uses and in so doing violates the CWA." P. Br. 49. In support, Puget argues that FERC's augmentation: (1) interferes with Ecology's delegated authority under the CWA (P. Br. 49-50); (2) attempts to depart from state-imposed WQC conditions (P. Br. 51-52); (3) improperly relies on FPA Section 10(a) to "usurp Ecology's authority under the CWA" (P. Br. 52-53); (4) conflicts with Ecology's authority to apply the State's antidegradation policy (P. Br. 54-56); and (5) is not based on substantial evidence (P. Br. 56-59).

### A. Puget Lacks Prudential Standing to Challenge the Commission's Upward Adjustment to the Minimum Required Flows

Where, as here, a petitioner lacks prudential standing, its appeal should be dismissed. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). Prudential standing analysis focuses on whether petitioner's grievance is "within the zone of interests

protected or regulated by the statutory provision" it invokes. *Id.; see also Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005). Congress passed the Clean Water Act to create a comprehensive national system of regulation of water pollution, in which the federal government and the states share responsibilities. *See* 33 U.S.C. §§ 1251-1376; *Great Basin Mine Watch v. Hankins*, No. 04-16125, 2006 U.S. App. LEXIS 19298 (9th Cir. Aug. 1, 2006). Section 401 of the statute "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994) (citing 33 U.S.C. § 1341).

Assuming, *arguendo*, the validity of Puget's claims arising under the CWA, they nevertheless would not be Puget's to make. Instead, it would properly fall to Ecology, the Washington entity responsible for enforcing water quality standards, to express any dissatisfaction with FERC's alleged "usurpation" of Washington's delegated authority under the CWA. Ecology has never so argued. In the wake of the Commission's flow augmentation in the Rehearing Orders, Ecology did not file a request for rehearing, it did not file a petition for review of FERC's orders, nor did it seek to intervene in these court proceedings. To the contrary, Ecology anticipated and accepted the Commission's augmentation over Ecology's minimum flow regime.

Specifically, in a September 11, 1995 letter ("Glynn Letter") to the Commission, John H. Glynn, Ecology's Supervisor, Water Quality Section, Northwest Regional Office, wrote in response to Puget's objection to increasing flows above those specified in Ecology's preliminary minimum flow recommendations:

> On June 28, 1995 Puget Sound Power and Light (Puget Power), applicant for a new license for the Snoqualmie Falls Hydroelectric Project, filed a description of its proposal for a refurbished project. In that filing Puget Power asserted on page three of the Special Information addendum that ". . . any further diminution of water available for hydroelectric power production [beyond that proposed in Ecology's letter of May 13, 1995] would be in violation of the state's antidegradation policy WAC 173-201A-070." *This statement does not represent the position of the Department of Ecology on this matter.*
>
> Ecology, in its May 13th [1995] letter, asserted that the proposed flows would – subject to completion of the 401 process – comply with the state water quality standards. *We recognize that the Federal Energy Regulatory Commission may require supplementary conditions as part of its obligation under the federal license process. We understand that these supplementary conditions could include higher minimum flows.*
>
> I hope this clarification is of help in your deliberations. . . .

AR 1002 (attached hereto, emphases added); *see also* FEIS at 6-33-34, AR 1074, PER 1951-52.

Thus, Ecology, the entity responsible to see that its water quality standards are upheld under the CWA, saw nothing objectionable in FERC's augmentation. Incongruously, while Puget has demonstrated no direct interest in Ecology's water

quality standards (other than in complying with them), it insists on championing a claim that Ecology itself does support.

In truth, Puget's interest in this issue is purely economic. As Puget admits in its brief: "Expressed in terms of the monetary values of lost power, the revised aesthetic flow established by FERC comes at a cost of approximately $18.3 million ($458,000 per year for 40 years)." P. Br. 56.

Additionally, as discussed *supra*, the Commission had previously augmented flows without objection from Puget (or Ecology). In the License Order itself, the Commission augmented the flow regime over and above the minimum flow required by Ecology when the Commission directed increased flows during the Labor Day weekend. License Order at P 48 and Article 421, PER 2162, 2195. As justification for this adjustment, the Commission stated:

> Pursuant to section 10(a)(1) of the FPA, the Commission may impose water quality conditions that are more stringent than those contained in a state's water quality certification. *See, e.g.*, *Carex Hydro*, 52 FERC ¶ 61,216 at 61,769 (1990).

License Order at P 48, n.58, PER 2162.

Puget never objected to this Labor Day weekend flow adjustment or to the Commission's underlying justification for it. In fact, Puget now describes it as "[t]he one minor addition to the WQC flow regime adopted by FERC in the License Order." P. Br. 25, n.13. Puget only became concerned with FERC's alleged usurpation of Ecology's authority under the CWA after the Commission,

relying on the same legal authority,[11] made further adjustments to the flow regime in the Rehearing Orders that were significantly more expensive for Puget. *See* Puget Request for Rehearing, AR 1345, PER 2245-61. This strongly suggests that Puget's interest in this flow adjustment is pecuniary and not environmental, and thus is not an interest contemplated within the CWA.

A petitioner's claim fails if its interests "are so marginally related to or inconsistent with the implicit purposes in the statute 'that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Ashley Creek Phosphate Co.*, 420 F.3d at 940 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). This Court has held that purely economic interests do not fall within the zone of interest of a statute designed to protect the environment. *Ashley Creek Phosphate Co.*, 420 F.3d at 939-45, concerned the zone of interests addressed by section 102(2)(C) of NEPA, 42 U.S.C. § 4332, which this Court described as environmental. There is no valid reason to apply a different analysis to the CWA whose interests are likewise environmental. In the instant circumstances, Puget does not fall within the zone of interests protected by the CWA and, in the absence of backing by the state, presents no claim worthy of protection under the statute.

[11] See Rehearing Order II at P 7 & n.10, PER 2264-65.

### B. The Commission's Augmentation of the Minimum Required Flows Was Consistent with the CWA and Was Authorized by the FPA

Assuming jurisdiction, the Commission had ample authority to make the adjustment under section 10(a) of the FPA, 16 U.S.C. § 803(a), and the adjustment complied with the CWA in that it was consistent with the water quality certification.

#### 1. The Commission Has Jurisdiction to Consider Water Quality

The Commission does not dispute that, under CWA section 401, the conditions of a state certification are mandatory, and that the Commission does not have authority to reject them. However, it does not follow that the Commission has no jurisdiction to consider the subject of water quality or to adopt license terms related to the subject of water quality. *See* FPA § 10(a)(1), 16 U.S.C. § 803(a)(1) (directing the Commission to consider and balance a wide array of "beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes"). The Commission has historically considered water quality issues. *See Udall v. FPC*, 387 U.S. at 450 (Commission to consider all public interest uses, including aquatic issues); *see also Puget Sound Power & Light Co.*, 54 FPC 157, 159-160 (1975) (listing legitimate public interest concerns, including water quality). Indeed, if the Commission had no subject matter jurisdiction, it could not adopt requirements concerning water quality even where a state waived certification or remained silent as to conditions.

Neither *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006), *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997), nor the language of CWA section 401 suggests that the Commission's mandate under FPA § 10(a) to balance competing interests (including those that may affect flows) is abrogated, except to the extent that the Commission's resulting license conditions may conflict with those of the state water quality certification. *See Noah Corp.*, 57 FERC ¶ 61,170 at 61,601 (1991); *Carex Hydro*, 52 FERC ¶ 61,216, at 61,769 (1990). The Glynn Letter confirms that Ecology agreed with this analysis.

### 2. The Commission's Minimum Flow Adjustment Was Consistent with the WQC

In this case, the state WQC required that the project be operated to ensure that at least 200 cfs or natural flow, whichever is less, passes over the Falls during the period from May 16 through May 31, and that at least 450 cfs or natural flow, whichever is less, passes over the Falls during the period from June 1 through June 30. *See* License Order, Appendix A, PER 2201. Article 421 of the new license essentially adopted the certification's flows. *Id.* at Article 421, PER 2195.[12] On rehearing, the Commission revised Article 421 of the license to require a minimum flow of at least 1,000 cfs or inflow, if less, throughout May and June. Rehearing Order I at P 22, PER 2234-35. A flow that complies with the Commission's minimum will also meet the requirement of the certification's minimum, which is

[12] As previously discussed, Article 421 added a condition that the licensee release a minimum flow of 200 cfs each day of Labor Day weekend.

lower. Thus, the Commission's higher minimum flow does not conflict with Washington Ecology's condition.

### 3. The Commission's Minimum Flow Adjustment Did Not Conflict with Ecology's Authority

Puget's arguments that the Commission encroached upon the state's authority are misplaced. First, Ecology explicitly stated that the Commission's adjustment did not usurp its authority or contradict the state's antidegradation policy. *See* Glynn Letter. Second, *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. at 722-23 (P. Br. 54), is inapposite. There, the Court was dealing with a challenge to Ecology's directed minimum stream flows to protect fish. Here, there is no challenge to Ecology's authority or to its minimum mandated stream flows. The state WQC minimums will continue to be maintained under the Commission's augmentation.

### 4. The Augmentation Is Supported by Substantial Evidence

#### a. Project Economics Supports the Augmentation

In its brief (56-57), Puget implies that the Commission ignored the financial impact of the augmentation. Puget's argument ignores the record:

> The cost of the 1,000 cfs minimum flows (daytime and nighttime) throughout May and June decreases the net annual benefit of the Snoqualmie Project by $458,000 and, together with a separate corrected cost ($85,000) added in this order, reduces the total positive net annual benefit of the project, as relicensed, from $10,953,000 to $10,410,000, a fairly small effect on the total net annual benefit. Given the size of the project (54.4 MW), the relatively small effect on net annual benefit, and the importance of the mist at this site to the Snoqualmie Tribe, raising the flows to ensure 1,000 cfs throughout the months of May and June appropriately balances competing interests.

Rehearing Order I at P 24, PER 2235-36.

### b. The Augmentation Will Not Increase Total Dissolved Gas

Puget next argues (P. Br. 57) that the augmentation is likely to increase Total Dissolved Gas ("TDG") levels in the pool at the base of the Falls, which may degrade water quality. As the Commission explained, this argument is without merit. *See* Rehearing Order II at P 10, PER 2266. In its relicense application, Puget noted that it had monitored gas levels weekly at numerous locations (Plant 1 and 2 tailraces, the top of the Falls, locations upstream of the project, and a USGS gauge downstream of the project), and found the level of gas saturation to be the same, regardless of where the flow was routed. *See* Application, Volume II at E2-27, AR 1 (attached hereto). Ecology's WQC required additional monitoring only at the project powerhouses. The condition states a requirement for sampling for three consecutive months at each powerhouse and, if the standards are met, annually thereafter. License Order, Appendix A, PER 2204. It did not require monitoring in the plunge pool or at other locations below the Falls. *Id.* Furthermore, while Ecology's WQC requires minimum flows over the Falls, it contains no constraints on the maximum flow over the Falls. *See id.*

### c. The Augmentation Will Not Cause Harmful River Level Fluctuations

The new license requires that at the end of April, Puget begin ramping up the flows over the Falls from 200 cfs to the 1,000 cfs minimum flow required in May.

Rehearing Order I at P 22, PER 2234-35. Puget asserts this augmentation will result in ramping over a greater range of flows than does the WQC condition, creating the potential for adverse effects on aquatic species downstream. P. Br. 57. However, it is not the duration of ramping, but the ramping rate that affects aquatic species, and neither the license nor the certification restricts the duration over which ramping can occur. *See* Rehearing Order II at P 13, PER 2267. In this instance, Ecology determined that a ramping rate of 2 inches per hour in the nighttime, with no ramping during the daytime, will adequately protect aquatic species from the effects of ramping during April. License Order, Appendix A, PER 2202. This condition remains undisturbed in the new license. *Id.*

#### d. Substantial Record Evidence Supports the Commission's FPA Balancing on Rehearing

Finally, Puget argues (P. Br. 57-59) that there is no record evidence to support the Commission's finding that its flow augmentation will supply spray and mist sufficient to provide the Tribe with a satisfactory religious and spiritual experience, and that the selection of a 1,000 cfs flow requirement to accomplish that purpose is speculative. These arguments ignore the record in the case. *See* Rehearing Order II at PP 14-17, PER 2267-69; *see also* Rehearing Order I at P 22, PER 2234-35.

The Tribe's need for more mist, along with other competing interests, was weighed as required by section 10(a) of the FPA. Although the Commission had accepted Ecology's WQC flows as an appropriate balancing of those competing

interests in the License Order, the 1,000 cfs flow had also been considered in the proceeding as a part of Flow Option C, which was discussed and recommended in the FEIS. Specifically, the FEIS stated that Flow Option C (with the 1000 cfs daytime flow requirement for May and June) would meet the widest variety of important objectives among the different flow options considered. FEIS 6–46, AR 1074, PER 1964. The FEIS also added that, while Flow Option C would not provide the full natural flows the Tribe requested, it could still enhance the Falls' cultural value. *Id.* Therefore, the record supports the Commission's decision.

Puget also argues that the license application stated, and the FEIS agreed, that there is no constant relationship between flow volume and the Falls' sound and spray; rather, that sound and spray levels may vary with atmospheric conditions, including wind speed and direction, temperature, and humidity. P. Br. 58-59. Puget maintains that since there is no assessment on the record of what level of flows will produce the greatest volume of mist, that there is no basis to support 1,000 cfs to create a specific volume of mist, and that 200 cfs or 450 cfs over the Falls could generate as much mist as 1,000 cfs over the Falls on any given day, depending on the weather.

While the dispersal of the mist may be dependent upon climatic conditions (wind speed and direction, temperature, humidity), the amount of mist generated is a function of the quantity of flow over the Falls. Rehearing Order II at PP 16-17, PER 2268-69. Puget itself has acknowledged this, stating (*see* Application,

Volume II, at E8-27, AR 1, PER 66Q), "the amount of mist generated is therefore a function of the flow over the Falls, such that a flow of 200 cfs should generate twice as much mist (as measured by the number of water particles) as does a flow of 100 cfs." A 1,000 cfs flow produces a greater quantity of mist than a 450-cfs flow, and May and June are the months in which the natural level of flows produces the greatest amount of mist; that is, the greatest number of water particles. Rehearing Order II at PP 16-17, PER 2268-69.

Thus, while it is conceivable that, on a windy day, the mist produced by a 200 cfs flow could be dispersed upward so as to resemble, in volume, a mist cloud derived from a 1,000 cfs flow on a calm day, the 200 cfs mist cloud would be comprised of fewer water particles and therefore would be less dense than the 1,000 cfs mist cloud. As stated in the FEIS, at a flow of 1,000 cfs, five waterfall plumes are active, and the waterfall flow causes heavy spray to rise from the canyon. FEIS 3–53-54, AR 1074, PER 1773-74. The FEIS considered the 1,000 cfs flow along with seven other flow thresholds levels (*id.*) and, as previously noted, recommended this flow on the grounds that it meets the widest variety of important objectives among the different flow options considered.

It was hardly unreasonable for the Commission, in its Rehearing Orders, based on this substantial record evidence and in furtherance of its statutory obligation to respect and balance competing public interests, to increase the minimum flows at the Project.

## CONCLUSION

For the reasons stated, the petitions for review should be dismissed or denied in all respects.

## STATEMENT OF RELATED CASES

Respondent FERC is not aware of any related case pending in this or any court.

Respectfully submitted,

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