



**Office of Legal Counsel**  
**5318 Chief Brown Lane**  
**Darrington, Washington 98241-9420**

**(360) 436-0139**  
**Fax (360) 436-1511**

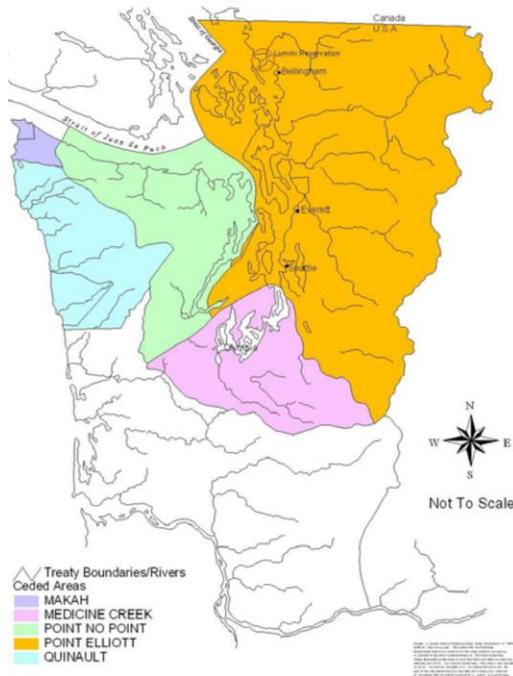
Debbie-Anne Reese, Acting Secretary  
 Federal Energy Regulatory Commission  
 888 First Street, N.E.  
 Washington, DC 20426

Dear Acting Secretary Reese:

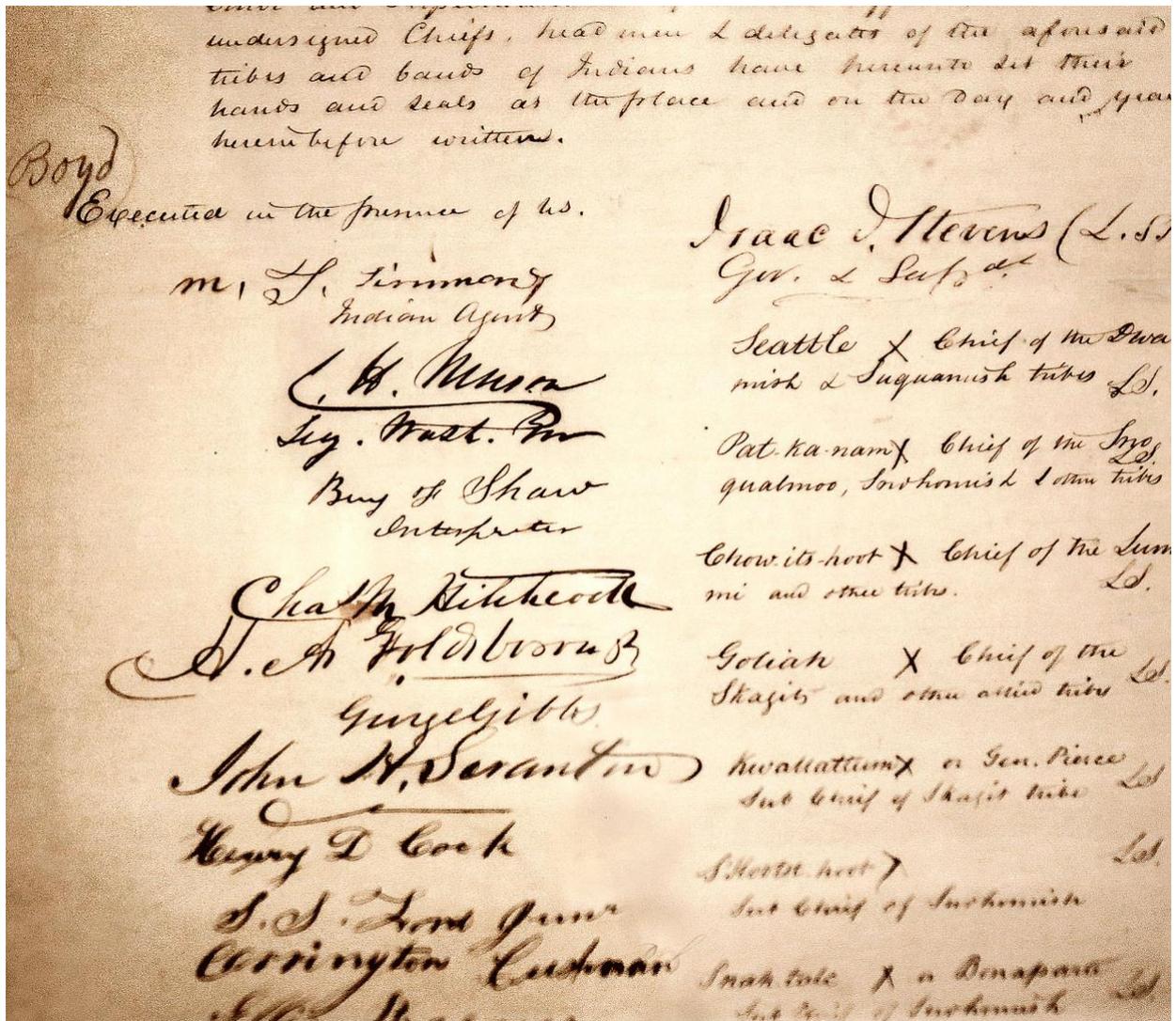
Thank you for the opportunity to provide comments on the Environmental Assessment (EA) of the proposed decommissioning of the Newhalem Creek Hydroelectric Project (FERC No. 2705-037).

The Project is located entirely on lands within the area relinquished, or “ceded”, to the United States by the Sauk-Suiattle Indian Tribe and other tribal signatories to the 1855 Treaty of Point Elliot.

**Ceded Areas**  
**Point Elliot Treaty-1855**



In determining what alternative described in the EA to approve, it should be noted that the tribes whose representatives signed the treaty agreed to relinquish their claim to the lands for the purpose of allowing settlers to claim lands therein.



It was never contemplated that the cession was for the purpose of construction of major industrial facilities. Additionally, the Sauk-Suiattle and other tribes retained hunting, fishing, and other usufructuary rights on the land within which this Project is situated. As stated in the Treaty:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

The 1921 construction of the Newhalem Project was undertaken without the consent, nor any consultation, with the tribes who signed the Treaty.

The right to engage in treaty rights is a property right. Consequently, construction of the Project constituted a “taking” of tribal treaty rights without just compensation as required by the Fifth Amendment of the United States Constitution.<sup>1</sup> According the Supremacy Clause of the U.S. Constitution (Article VI, clause 2), treaties are the Supreme Law of the nation:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As stated by the United States Supreme Court, treaties are a grant of rights *from* the tribes—all rights not expressly relinquished were *reserved*:

[T]he treaty was not a grant of rights to the Indians, but a grant of right from them -- a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein.

*United States v. Winans*, 198 U.S. 371 (1905). As such, the only lawful, and moral, alternative to adopt is full removal of all above-ground and submerged structures related to the Project. FERC, like other federal agencies, has a trust responsibility to protect the rights and resources of tribal nations. According to the United States Court of Appeals for the Ninth Circuit:

Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards.<sup>2</sup>

Before the surrender of the license is complete the Project area should be *fully* restored to a state which reflects its condition at the time of the Point Elliott Treaty and capable of being subject to the exercise by Point Elliott Treaty tribes `It is acknowledged that following surrender of the Project license the National Park Service must manage the site in accordance with the National Park Service Organic Act of 1916. However, as per the Constitution, the obligation of the United States to restore the land to its treaty-time state supersedes that—meaning the Project area must be restored to a condition which does not impair treaty rights. The reservation of treaty usufructuary rights sites customarily occupied by tribes operates as an interest in land, i.e. an easement:

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<sup>1</sup> “No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const., Am. V.

<sup>2</sup> *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981), citing *United States v. Mason*, 412 U.S. 391 (1973); and *Seminole Nation v. United States*, 316 U.S. 286 (1942).

They imposed a servitude upon every piece of land as though described therein...and the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.<sup>3</sup>

For the City of Seattle, construction of the Newhalem Project follows its longstanding pattern of appropriating resources from the Skagit river basin for its use that it deemed to be “free in nature.” Contrary to the mosaic mural which adorned the Seattle City Light building for many years entitled “*That Man May Use It Freely as the Air He Breathes*”, Tribal cultural, natural and riverine resources reserved by Treaty are *not* for “free.” Tribes gave up millions of acres in return for the right to them.



For Seattle, the taking of these resources powers its economic development. However, for the tribal people occupying the Skagit River drainage basin who were disposed of their land, whose villages and food harvesting sites were inundated, it was devastating.

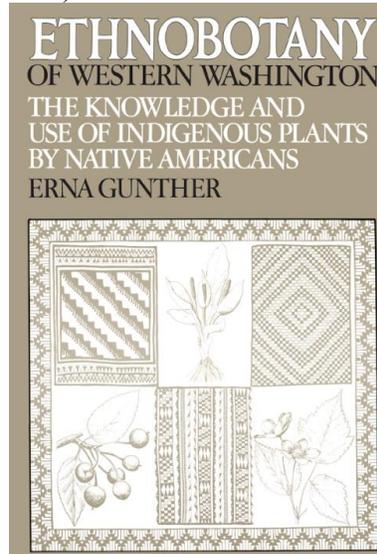
Section 6.3 of the EA states “we discuss the effects of the proposed action and alternatives on environmental resources. For each resource, we first describe the affected environment, which is the existing condition and baseline against which we measure effects.” The “existing condition” should not be the baseline against which effects should be measured. Instead, the “baseline” should be a determination of what measures should be taken to restore the land and waters within the Project boundary to a state which reflects its pre-1921 condition.

Vegetation is discussed in section 6.3.3.1 (page 25) and only cursorily identifies a few large Douglas fir and western red cedar trees with an understory consists of a variety of shrubs, ferns, other herbaceous perennials, and mosses (common species include sword fern, salal, red huckleberry, and vine maple). What is lacking is a survey of vegetation within the Project Area performed by tribal persons with indigenous knowledge of plants of cultural significance. Pacific

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<sup>3</sup> *United States v. Winans*, 198 U.S. 371 (1905).

Northwest tribal people utilize and consume a wide variety of plant species which might not be of significance to an outside observer or, in the absence of identification, might be erroneously classified as an invasive species. In the absence of such a cultural survey for plants of indigenous significance, at a minimum one should consult Erna Gunther's landmark thesis on the *Ethnobotany of Western Washington; the Knowledge and Use of Indigenous Plants by Native Americans*, University of Washington Press (1973).



It is obvious that the licensee, in order to construct its project, cleared much of the land for its buildings, roads and operational structures, including power lines and transmission towers. Stands of trees, comparable to what was extant prior to 1921 should be planted—including to provide shade for anadromous and nonanadromous fish which inhabit Newhalem Creek. Where possible standing dead trees or “snags” should be left during the demolition processes to provide roosts and nests for bird species.

On page 28 of the Environmental Assessment, it was recommended that the licensee coordinate with the Park Service to tailor a mix of appropriate native plant species for each restoration area. There should also be coordination with the Cultural Resources staffs of the Upper Skagit and Sauk-Suiattle Tribes to insure that they, too, have input into what is a “mix of appropriate native plant species” to be included in revegetation of the restoration area.

Page 53 of the EA states that:

Under the proposed action (partial decommissioning), the powerhouse and penstock remain and provide visitors an easily accessible area to learn and view historical structures in the original context, which may give visitors a better understanding of the continuum of history in the Skagit Valley.

The full removal alternative should be adopted, according to which all above-ground structures would be removed. Retaining these structures does not “give visitors a better understanding” of the “continuum of history in the Skagit Valley. At most, it conveys the message that the continuum of history in the Skagit Valley commenced when “useful” structures were placed on these lands

which the previous tribal inhabitants left vacant and merely wandered over for their subsistence purposes rather than appropriating them for industrial development or cultivation. Leaving these remnants of colonization informs nothing about the history in the Skagit Valley. The Valley's continuum of history did not commence in 1921. Their removal may make way for the establishment and construction of an interpretive or visitor's center which presents more *balanced* information about the Newhalem area which gives presentation of tribal views of the history of the Skagit Valley, a view too often missing. Contrary to information presented in most Pacific Northwest history texts, this region was not "discovered", nor did the region's history start, when British captains George Vancouver, Captain Cook, Peter Puget or Spaniard Juan De Fuca, arrived in the Eighteenth Century.

On Page 56, the EA states that there is no archaeological evidence of an Upper Skagit village near the Newhalem Project. The "evidence" of existence of the village exists in the Oral History of the Lushootseed people, which has been transmitted mouth-to-ear from generation to generation since Time Immemorial. Elders and traditional leaders of the interested tribes should be consulted. After doing so, in all likelihood, the site will be identified and should be provided a perimeter of protection against desecration or vandalism—regardless of whether there are visible remnants or physical "evidence" of where it was.

In fact, following decommissioning, the National Park Service should allow tribal reconstruction of the longhouse. Places listed on the National Register of Historic Places are not the only places worthy of preservation. Tribes have learned from experience that Tribal sacred and cultural sites should not ordinarily be placed upon such lists for identification because doing so usually results in their destruction.

The Sauk-Suiattle Indian Tribe does not support the disposal of concrete or the use of slurry for transporting debris into the vertical portion of the power tunnel and request that all concrete be removed and disposed of offsite.

As stated in Executive Order No. 13985, 86 Fed. Reg. at 7011 (Jan. 20, 2021), Indian tribes and their members "have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, federal policies and programs," as evidenced by the fact that the tribes possessing rights in the Project Area were not consulted prior to its inception. Having been so absolutely excluded from having a say in how the Project was to be constructed, it is only consistent with Environmental Justice that their concerns be given great weight in the Project's decommissioning.

In summary, the only appropriate mitigation for potential effects of decommissioning the Project is the complete removal of the Newhalem Project powerhouse and penstock, including all above-ground and underwater structures.

Thank you for this opportunity to comment on behalf of the Sauk-Suiattle Indian Tribe.

Sincerely,

S/*Jack W. Fiander*, General Counsel  
Sauk-Suiattle Indian Tribe

Document Content(s)

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