

Relicensing the Skagit: USNPS's Approach

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CRATERS OF THE MOON NATIONAL MONUMENT
Arco, Idaho

Between 1986 and 1991 the USNPS participated in intense legal, technical, and policy negotiations with state and federal agencies, tribes, conservation groups, and a major public utility to formulate a comprehensive mitigation agreement for three large hydropower dams in the Pacific Northwest. The culminating agreement, valued at over \$100 million, signed by all parties, and submitted to the U.S. Federal Energy Regulatory Commission (FERC) in May 1991, was historic and precedent-setting in scope and complexity. It was also the first agreement of many parties to a hydropower licensing. The North Cascades National Park Service Complex's Division of Resource Management had lead responsibility for the negotiations and formulation of the USNPS position. This article attempts to explain USNPS's approach, policy, and negotiation strategy.

HISTORY

The Skagit River Hydroelectric Project consists of the Gorge, Diablo, and Ross dams, reservoirs, powerhouses, and transmission lines. Together with employee residence areas at Newhalem, Diablo, and Hozomeen, these developments are licensed to Seattle City Light by FERC, previously known as the Federal Power Commission. Except for the transmission lines to Seattle, the Skagit project is situated entirely within Ross Lake National Recreation Area, administered by the USNPS within the North Cascades Complex. City Light is a branch of the Seattle city government.

City Light secured the rights to develop the hydroelectric potential of the Upper Skagit in 1918. Acting under permits first from the Secretary of Agriculture that were succeeded by licenses from the Federal Power Commission, City Light completed four hydroelectric developments on the Skagit between 1919 and 1952.

The Gorge, Diablo, and Ross developments are licensed together as the FERC Skagit Project #553. The project license also contains permission from FERC for City Light to increase the height of Ross Dam an additional 125 feet (the "High Ross" proposal). The construction of High Ross is deferred by a 1984 treaty between the United States and Canada that provides City Light with an equivalent amount of power. The treaty has an effective life of eighty years.

RELICENSING PROCESS

For over ten years, City Light has been and is still operating FERC #553 under a less-desirable annual license while preparing an application for a new long-term (most likely thirty-year) FERC license. As the regulations governing the licensing process do not differentiate between a new license and a relicense, this is in effect the same process that would be required if the dams were being built today. The regulations governing the process are found in the Code of Federal Regulations (18 CFR Ch. 1) and require the applicant to supply to FERC a report on existing conditions; a description of the impacts caused by the project; a description of measures, strategies, and facilities recommended by pertinent agencies; and a statement of measures or facilities that will mitigate impacts and an explanation of any rejection of agency recommendations.

The regulations require each of these to be prepared and submitted

for the following categories: water use and quality; fish, wildlife, and botanical resources; historical and archaeological resources; recreational resources; and land management and aesthetics.

FERC may require additional information from the applicant. FERC has taken the position that, for relicensing, the applicant does not have to mitigate for pre-project impacts. Additionally, under the National Environmental Policy Act of 1969, an Environmental Impact Statement is required to review alternatives.

RECOGNIZED IMPACTS OF THE SKAGIT PROJECT

The first step in the process was to determine the effects of the project's existence and continued presence for the next thirty years through a series of studies, funded by City Light. The North Cascades Complex opted to participate in the studies. We assisted City Light in writing the scope of work for the study contracts, served as technical advisors to the contractors, served on the habitat evaluation procedure teams, and, in the case of erosion and archaeology, completed the field work for City Light under several Memoranda of Agreement. This resulted in a distinct advantage in the subsequent negotiations because we were intimately familiar with the studies methodology, shortcomings, and results.

The project occupies approximately 19,226 acres of the 117,000 acres within Ross Lake National Recreation Area. The three lakes inundate 12,400 acres of former river valley within the Recreation Area.

Wildlife and Vegetation. The upper Skagit River valley once contained thirty-four habitats, including riverine, upland, riparian, and wetland. According to City Light studies ("Study of Skagit Dams Original Impacts on Wildlife and Fish Habitat Populations," 1988), all ten

wildlife species studied were significantly affected by the project. These species are indicators of habitat loss and are therefore representative of many other species that were affected by the project.

Recreation. The presence of the Skagit Project impoundments has a significant influence on the management of USNPS lands and limits the potential management regimes for adjacent recreational resources (Seattle City Light, "Skagit River Project, Supplemental Environmental Information," 1989). The level of Ross Lake, dictated by power and flood control, directly affects recreational boating and fishing. Lakeshore recreational use has directly affected vegetation by trampling and clearing.

Soil Erosion. In the project area, 1,238 erosion sites were identified within the drawdown of the three impoundments, with another 16 sites outside of the drawdown. This results in 16.2 miles of eroding shoreline and an estimated loss of 1.5 acres per year (City Light, "Skagit River Project, Report on Existing Conditions of Reservoir and Streambank Erosion," 1989).

Visual Quality and Aesthetics. The Skagit Project, including the three dams, town sites, roads, and the power transmission corridors, all have an effect on the aesthetics of the Ross Lake National Recreation Area, with the transmission lines having the greatest visual impacts (City Light, "Skagit River Project, Supplemental Environmental Information," 1989).

Cultural Resources. In the upper Skagit basin, 126 prehistoric sites have been recorded within the drawdown of Ross Lake (City Light, "Summary of Intensive Cultural Resources Survey in the Upper Skagit Basin," 1989). The constant fluctuations of Ross Lake both erodes material from and deposits it to these archaeological sites. In some cases,

the historical integrity of these sites has been or continues to be lost.

Fisheries. The Skagit River flow, as dictated by power production and flood control at the three dams, has an adverse effect on downstream fisheries, particularly in terms of spawning habitat (City Light, "Skagit River Salmon and Steelhead Fry Stranding Studies," 1989). While studies have concentrated primarily on salmon and steelhead species, there are many other resident fish that are affected by stream flows. Lake levels also affect lake fisheries.

THE USNPS NEGOTIATING POSITION

The Skagit project predated the establishment of the North Cascades USNPS Complex, and the enabling legislation for the park units specified that "nothing in this act shall be construed to supersede, repeal, modify, or impair the jurisdiction" of the FERC (Public Law 90-544). In 1988, the Washington Parks Wilderness Act (Public Law 100-668) amended Public Law 90-544 and limited the authority of FERC within Ross Lake National Recreation Area to the existing Skagit Project and specific additional projects operated or proposed by City Light.

The legislation prevented outright USNPS opposition to the projects, so the North Cascades Complex's position was to determine how they could be best integrated, managed and interpreted in the larger North Cascades ecosystem. The policy, as developed by the Complex in this proceeding, is that the Skagit project be operated and the effects of its presence be mitigated so as to have "no significant effect" on the function of the larger ecosystem (USNPS, "North Cascades Complex General Management Plan," 1988). In addition, the recreation potential of the Complex is to be developed only to the point that recreation use has "no significant effect" on the function of

the ecosystem. The Complex's mitigation package considered needs for the expected thirty-year life of the new license; however, the maximum period for which the USNPS can effectively plan is 10-15 years. We realized the effects from the project as well as recreation demand are difficult to predict over such a long period. Therefore, the mitigation package includes specific actions in the first ten years and then periodic evaluation of priorities, with endowments for future mitigation and continued study.

PARTIES TO THE NEGOTIATIONS

FERC formally recognizes certain agencies or parties as being affected by the project and grants them "intervenor" status. The following parties were intervenors to the Skagit project relicensing and therefore the primary parties to the mitigation negotiations (along with FERC and City Light):

- ◆ U.S. National Park Service
- ◆ U.S. Fish and Wildlife Service
- ◆ U.S. Bureau of Indian Affairs
- ◆ U.S. Forest Service
- ◆ U.S. National Marine Fisheries Service
- ◆ Washington Department of Wildlife
- ◆ Washington Department of Fisheries
- ◆ Washington Department of Ecology
- ◆ Upper Skagit Tribe
- ◆ Sauk-Suiattle Tribe
- ◆ Swinomish Indian Tribal Community
- ◆ North Cascades Conservation Council (N3C)

City Light had delegated the responsibility of negotiations to its Environmental Affairs Division. The key to achieving the final settlement was a shared belief that specific mitigation details worked out by all of

the parties with a vested interest and submitted jointly to FERC was vastly preferable to FERC determining the "best" mitigation package gleaned from independent submittals from the intervenors. The intervenors also agreed that the resources at risk and the public would best be served by avoiding a long legal battle. It was this belief, along with a willingness to negotiate and compromise, as well as a deep respect for the resources at risk—attributes shared by all parties, including the utility—that made things work.

NEGOTIATION PROCESS

City Light's Environmental Affairs Division took the lead and established five forums for negotiation: fisheries, recreation and aesthetics, wildlife, erosion, and cultural resources. The Environmental Affairs Division provided specialists to lead the forums. The intervenors participated in those forums related to resources of their responsibility. The USNPS participated in all five. Each forum met at least every other week, some as frequently as twice a week. The North Cascades Complex's Division of Resource Management attended over 100 negotiation forums in one twelve-month period. Working toward a deadline imposed by FERC, each forum was charged with developing an agreement and a mitigation plan. Because there was overlap between forums and mitigation that could help or hurt one another, coordination was essential. For example, in the fisheries forum, downstream river flow maintenance was a key component in the protection of spawning salmonids. However, lake levels were important in erosion control, recreational lake use (boat launching), aesthetics, and in-lake fish spawning. The fisheries forum discussed the importance of salmonid recruitment and escape to tribal and public fishing, while the wildlife forum discussed salmon

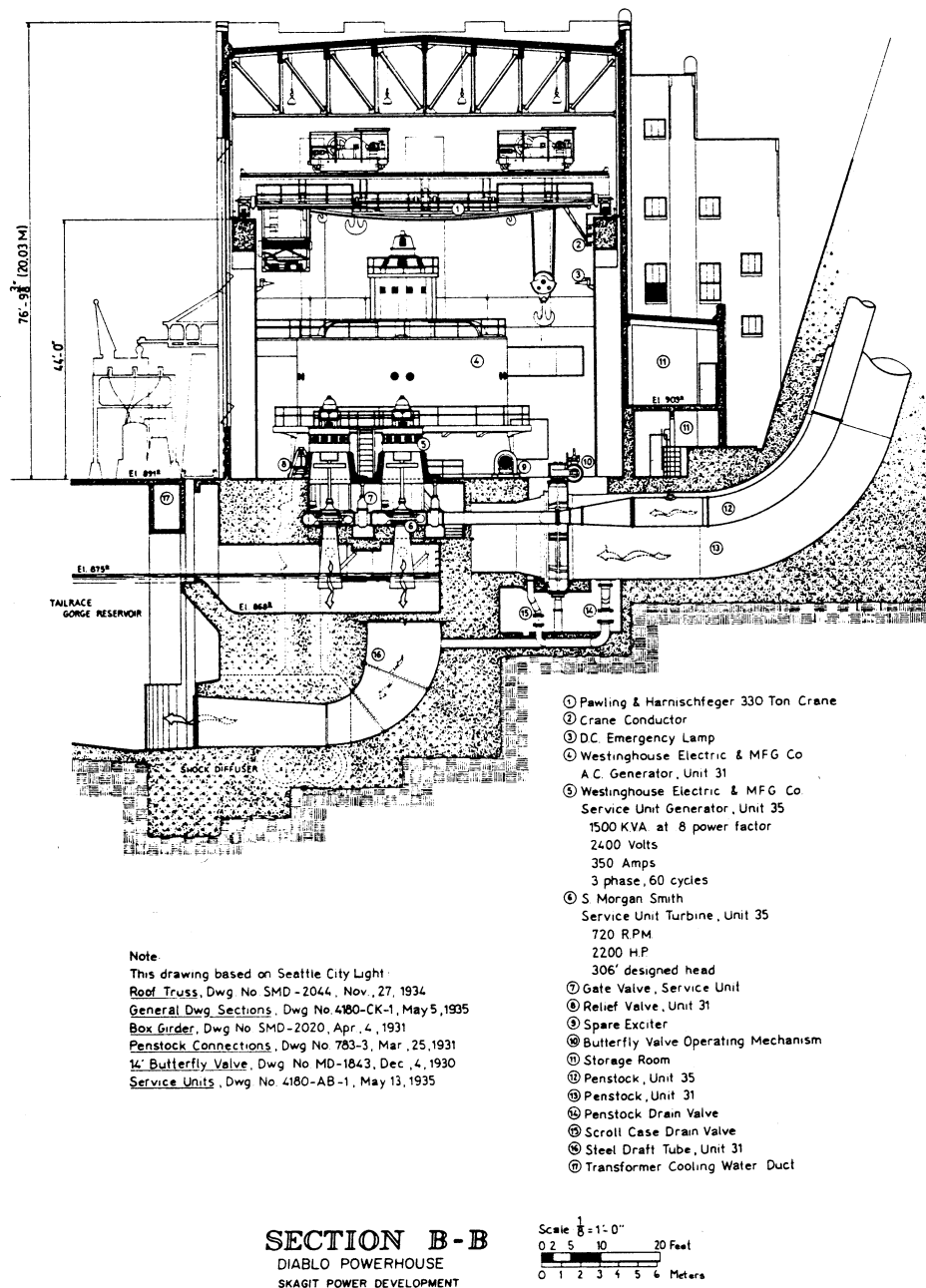


Figure 1. Transverse Section, Diablo Powerhouse, Skagit Hydroelectric Project

carcass importance to winter roosting bald eagles. The negotiation meetings became exceptional opportunities for the various agencies to develop a clear understanding of their points in common and differences in policy and mandate. Coalitions were formed and behind-the-scenes conference calls very common. Few ground rules prevailed and each agency approached the negotiations differently. USNPS chose to "put its cards on the table" early by submitting a comprehensive mitigation package for all five forums. The forum meetings essentially proceeded with detailed proposals offered by the intervenors and affirmative or negative responses from City Light. Where additional information was needed, such as surveys, cost estimates, aerial photography, or reference material, City Light was consistently willing to provide it.

THE USNPS MITIGATION PACKAGE

One of the hardest parts of the negotiations was determining what to ask for as mitigation. To formulate a package, all of the North Cascades Complex Divisions—Interpretation, Administration, Maintenance, Visitor Protection, and Resource Management—met repeatedly to develop a "wish list" of projects and proposals. A "recreational prospectus" was developed in-house to identify trails, boat ramps, and other compatible recreational facilities. Fortunately, the Complex had just done a General Management Plan which identified some long-range projects. The Complex had also completed a new Resource Management Plan and a new Wilderness Management Plan identifying a list of needs. The Complex staff recognized the relicensing process as an exceptional opportunity to resolve many long-standing problems and to develop programs that might other-

wise never be funded by the USNPS. A project and program list was developed and then refined through consideration of environmental impact, consistency with existing Complex plans, feasibility, opportunity for other sources of funding, and direct relationship to the impacts of the Skagit project. Since City Light had not given a cost ceiling, the Complex included everything the staff felt was necessary to make a comprehensive package. The final package was reviewed by the USNPS Pacific Northwest Regional Office and, upon approval (with fair skepticism that the utility would entertain such a list, I might add), the package was submitted to City Light. This strategy was very effective in that the list provided a focus for the forum negotiations allowing discussions on specific details rather than concepts. By the time of the final negotiations, specific details and cost estimates were well established.

LEGAL ADVICE AND REVIEW

In that the relicensing proceedings and the settlement agreements are a legal process that could resolve outstanding lawsuits and potentially prevent more, legal review became essential in the negotiations. Some discussion was held between the intervenors and City Light as to breaking the forums into separate technical and legal/policy sessions. This was rejected because, in most cases, as with the USNPS, the policy negotiators were the same as the technical negotiators. Additionally, the attorneys needed the technical staff to ensure key mitigation strategies were not lost in legal rhetoric. The Complex involved USNPS attorneys early in the process. This involvement ensured the legal language reflected the technical intent of the negotiators from the USNPS and the U.S. Fish and Wildlife Service. Attorneys were also provided by City Light, who employed at least four, and by

the state of Washington, the U.S. National Marine Fisheries Service, and the Tribes.

AN AGREEMENT TO AGREE

As negotiations began to focus intently on a package of mitigation in all forums, fear arose among all intervenors, and particularly City Light, that one group might break ranks or come in at the last minute with an unrealistic proposal, thus jeopardizing the agreement. Therefore, in September 1990, after much cross-forum lobbying, all parties signed a preliminary agreement which essentially set the "sideboards" of the final agreement. All parties to the preliminary agreement agreed to adhere to the existing process and the basic mitigation proposals on the table as of that time. In spite of very clear language in the preliminary agreement that made it non-binding (inserted by the attorneys), this was in fact the first formal commitment by the intervenors and City Light to a final settlement.

THE FINAL SETTLEMENT

In May 1991 all of the intervenors signed an offer of settlement and five separate but interrelated settlement agreements that specify over \$100,000,000 (1990 dollars) to be paid by City Light in mitigation over the next thirty years. The license is expected to be issued for thirty years and begin in 1993 or 1994. If FERC deviates substantially from the settlement agreements they become void at the option of any party. All monies are factored to the Consumer Price Index based on 1990 dollars.

The license includes the raising of Ross Dam (the High Ross project) but does not include mitigation of impacts associated with the raising of the dam. The settlement agreements do not constitute any form of support by the parties for High Ross

but define a process for reopening negotiations if High Ross proceeds. Many of the funds will continue through annual licenses after the thirty-year license expires. The North Cascades Complex derives great benefit from these agreements; the components specific to the Complex are outlined in Table 1.

The agreements are substantial and would not have occurred without the commitment to success by the intervenors and City Light, which demonstrated an exceptional willingness to work cooperatively. I believe this is uncharacteristic of most utilities and is a product of the high values at risk in the North Cascades and the large percentage of environmentally aware rate payers in the Northwest.

ADVICE FOR NEGOTIATORS

There are a significant number of FERC-regulated projects scheduled for relicensing in the next ten years. For those individuals chosen to negotiate, I provide the following list of advice.

1. FERC only officially recognizes those with intervenor status, so determine your legal standing. If you do not have standing, contact your solicitor to petition FERC to obtain it.
2. Assign a lead negotiator who understands your organization's policies and, most importantly, has the authority to negotiate. Nothing is more frustrating than meeting with representatives who do not have the authority to negotiate.
3. Obtain good legal counsel, consult with them regularly, and have them attend the negotiations when necessary.
4. Get all intervenors to the same table to determine common ground. Everyone will have their own program and needs but there will be some common

- ground. Find it and use it to form coalitions.
5. Look for relationships between and among mitigation proposals. If one party proposes a mitigation action, look closely at their proposal for slight modifications that can complement your program.
6. Look at the relicensing as an opportunity to complete multi-party agreements that formalize relationships, unspoken promises, cooperation, and joint land management.
7. Push the utility to establish a baseline for the impacts of the project on all resources: cultural, visual, recreational, fishery, wildlife, water quality, etc. The utility should scientifically document the pre-project conditions so a baseline upon which to measure impacts can be provided. While FERC will not impose mitigation to pre-project levels, relicensing is to provide mitigation for the continued "occupation and operation" of the hydro facility for the new license term, usually thirty years. If the utility can occupy those resources for the next thirty years, then they must mitigate impacts in exchange for having the monopoly of those resources.
8. Demand involvement in the preparation of the scope of work of studies of baseline conditions. This way you can ensure your areas of special concern are studied.
9. Where possible, be directly involved in the data collection of the baseline studies. Ideally, have the utility contract directly with your park to conduct the studies. This will ensure you are the most knowledgeable of the results.
10. Tailor the mitigation to the expected term of the license. There is a substantial difference in mitigation for fifteen years as opposed to thirty.
11. Examine your mitigation proposals carefully to ensure they do not make a bad situation worse, are in direct conflict with the other intervenors, or are technically impossible.
12. Obtain the stock portfolio of the utility and have a financial analysis prepared by an independent advisor. Determine how much they can afford in mitigation.
13. Be willing to go the long haul. Negotiations are long, tedious, time-consuming, and often frustrating. Be willing to put in the required time.
14. Design your mitigation package with a realistic application to your agency goals. Don't just dream up some "nice-to-do" proposal.
15. For funds, endowments, or large blocks of money that are mitigation proposals, detail how and when this will be administered: who has control, who provides oversight, who provides accountability, can it be invested, and who manages the portfolio. An oversight committee may be necessary.
16. If the mitigation includes land acquisition, who owns the land?. What is its disposition at the end of the license term? Who manages it during the term? Keep in mind that land bought by the licensee is basically a long-term investment from which it could actually profit. Establish a right of first refusal for acquisition, transfer of title, or basis for the new license application at the end of the term.
17. High-voltage transmission lines are hard to mitigate other than visual screening. Placing the lines underground is approxi-

mately \$1 million per mile with current technology.

18. Talk to the FERC technical staff to ensure their "additional information requests" to the utility reflect your interests as well.
19. Keep in mind that the negotiations are legal processes; if you work for a public agency, you are representing your constituents and must make a public-relations effort to dispel the impression that deals are being cut in a "smoke-filled room." Be aware that mitigation actions will be passed on to the rate payer and the utility may need some public-relations assistance.
20. Look beyond the license term and attempt to negotiate some commitments. These will be difficult but worth the effort.
21. For new recreation facilities, don't forget operation and maintenance funding. Establish a

fund within the mitigation to provide it.

22. License term is over fifteen years are well beyond our ability to plan or predict changing public needs or conditions. Build in some opportunities for periodic re-evaluation.
23. Keep in mind FERC has to do National Environmental Policy Act compliance on the projects. Ideally, your mitigation package will be the preferred alternative within requisite Environmental Impact Statement.
24. Schedule recreational and other developments to occur within the first ten years of the license so that the public can benefit through most of the term.
25. Establish working groups of selected intervenors with specific authority to oversee the mitigation. Don't just leave it to the utility.

Table 1. Outline of the Skagit Project Agreement as it Relates to the North Cascades USNPS Complex

RECREATION AND AESTHETICS

Creation of a North Cascades Environmental Learning Center

Cost: \$9,000,000

- ◆ City Light will purchase the existing concession owned Diablo Lake Resort and construct an Environmental Learning Center
- ◆ Overnight capacity of 60 students and 18 faculty
- ◆ Operated by North Cascades Institute (NCI) under an agreement establishing an Oversight Committee of City Light, the USNPS and NCI
- ◆ Design, construction, maintenance, vehicles, utilities, start-up costs, furnishings provided by City Light in consultation with the Oversight Committee
- ◆ Program support of \$4,150,000 over the license term planned, with \$3,400,000 to be received as an endowment in year ten

Continuing Measures

Cost: \$2,050,000

- ◆ Pay replacement costs of Colonial Creek Electrical Cable
- ◆ Continue Skagit Tours
- ◆ Continue funding Skagit Environmental Endowment Commission

Mitigation Measures

Cost: \$733,000

- ◆ Hozomeen Boat Ramp (\$150,000)
- ◆ Ross Lake Boat Docks (\$308,000)
- ◆ Gorge Lake Boat Ramp (\$150,000)
- ◆ Colonial Creek Boat Ramp (\$125,000)

Other Enhancement Measures

Cost: \$4,117,000

- ◆ Goodell Creek Raft site (\$65,000)
- ◆ Damnation Creek Raft site (\$25,000)
- ◆ Hozomeen water system (\$50,000)
- ◆ Gorge Creek Overlook (\$175,000)
- ◆ Thunder Lake Handicapped fishing (\$200,000)
- ◆ Thunder Knob Trail (\$210,000)
- ◆ Happy Flats/Panther Trail (\$155,000)
- ◆ Desolation/Hozomeen Trail (\$275,000)
- ◆ Ross Lake NRA Interpretive Signs (\$150,000)
- ◆ Bicycle Needs Planning (\$175,000)
- ◆ Recreation Needs Assessments (\$125,000)
- ◆ Future Capital Needs (Ross Lake NRA) (\$312,500)
- ◆ Operation and Maintenance (Ross Lake NRA) (\$2,200,000)

Visual Quality Mitigation

Cost: \$4,782,000, with most retained by City Light for its operations

- ◆ Transmission Lines: Implement ROW Vegetation Management Plan with native species and reduction in pesticide use; paint some key towers, tanks, and bridges to blend with surrounding environment
- ◆ Town sites: Continue maintenance of town sites with shift to native species, with vegetative screening of the switchyards
- ◆ Dams: Remove Broome shed on Ross Dam
- ◆ Refill of Ross Lake as early as possible after April 15 consistent with other constraints

WILDLIFE

Land Acquisition

Cost: \$17,000,000

- ◆ City Light will purchase and hold approximately 5,000 acres of riparian land along the Skagit River and the South Fork of the Nooksack River for the protection of wildlife

Research

Cost: \$2,300,000

- ◆ Research Center in Newhalem operated by USNPS (\$180,000)
- ◆ Research Funding (\$1,500,000, or \$50,000 annually)
- ◆ Long-term Inventory and Monitoring (\$600,000, or \$20,000 annually)

Education

Cost: \$600,000

- ◆ Wildlife Education funding to the NCELC (\$20K Annually)

Plant Propagation

Cost: \$1,470,500

- ◆ City will construct greenhouse and raise 30,000 native plants per year for revegetation of impacted sites in the project area. Facility will hold up to 90,000 plants and be genetically tracked.
- ◆ Nine hundred acres of non-residential fee title lands, owned by City Light within Ross Lake National Recreation Area, will be managed in consultation with the USNPS
- ◆ A Wildlife Management Review Committee consisting of the involved parties, including the USNPS, will oversee the land acquisition and any wildlife enhancement proposals
- ◆ A Wildlife Research Committee consisting of the USNPS, City Light, and Washington Department of Wildlife will oversee the research funding

FISHERIES

Skagit River Flow Mitigation

Cost: \$50,000,000 (estimated)

- ◆ Establishes a specific flow plan for the Skagit River to maximize protection of salmon and steelhead spawning and offspring
- ◆ Establishes a Flow Coordinating Committee, with all parties as members, to oversee and modify the flow plan

Non-Flow Mitigation

Cost: \$6,320,000

- ◆ Includes steelhead production, off channel salmon habitat improvement and enhancement, chinook salmon research
- ◆ Removal of transient barriers to upstream migration on Ross Lake tributaries
- ◆ Ross Lake Resident Trout Program (\$300,000)
- ◆ Establishes the Non-Flow Coordinating Committee, with all parties as members, to oversee the non-flow plan
- ◆ Establishes Ross Lake Resident Trout Working Group to include City Light, USNPS, Washington Department of Wildlife, N3C, and British Columbia in the management of Ross Lake Trout

EROSION

Erosion Control Activities

Cost: \$845,000

- ◆ Implement erosion control at seventy-four sites over ten years
- ◆ Provides option for USNPS to complete the work, contract, or defer it back to City Light
- ◆ Provides funding in 1991 (pre-license) to begin work at the more severe sites

Erosion Control at New Sites and Maintenance

Cost: \$500,000

- ◆ New sites that meet specific criteria may have erosion control activities executed from this fund
- ◆ Maintenance of previously corrected sites, including monitoring of twenty-one sites that may have serious erosion problems in the future due to potential for mass movement of soil

CULTURAL RESOURCES

Archaeological Resources

Cost: \$1,465,000 (estimated)

- ◆ Specific mitigation strategies will be negotiated with the parties and the Washington State Historic Preservation Officer
- ◆ The current memorandum of agreement between City Light and US-NPS will continue for funding the investigations (\$200,000)
- ◆ Publishing of the results (\$25,000)
- ◆ Preparation of archaeological plan (\$40,000)
- ◆ Implementation of archaeological plan (\$1,200,000)

Historic Building and Engineering Resources

Cost: \$352,000

- ◆ Documentation of historic resources, including National Register nominations and comprehensive architectural documentation (\$86,000)
- ◆ Maintenance and protection of historic properties, including training in historic preservation and the preparation of historic landscape reports for Ladder Creek Falls and the town of Newhalem (\$122,000)
- ◆ Interpretation of the historic resources, including a walking tour brochure and displays (\$144,000)
- ◆ A memorandum of agreement has been negotiated with Washington State Historic Preservation Officer concerning the historic resources; an additional agreement will be negotiated concerning the implementation of the archaeological plan