

PPL Montana, 45 Basin Creek Road, Butte, Montana, 59701



PPLM-Mystic-2162

Kimberly D. Bose
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

September 14, 2007

RE: Mystic Lake Project 2301 – CRM Final Programmatic Agreement

Dear Secretary Bose:

PPL Montana has reviewed the FERC Final Programmatic Agreement (PA) for the Mystic Lake Project sent under the August 15, 2007 cover letter from Jennifer Hill. We respectfully decline the opportunity to sign this PA as a Concurring Party. This letter provides the reasons for our decision, addresses a factual inaccuracy in the August 15 FERC letter, and confirms our understanding regarding the effect to PPL Montana or other invited concurring parties of not signing this PA.

PPL Montana recognizes the important role of tribes as potentially interested parties in Cultural Resource Management on the Mystic Lake Project and other FERC-licensed projects. We actively sought the input of potentially interested tribes throughout the Mystic Integrated Licensing Process (ILP). We welcomed tribal participation in identifying and addressing historic properties associated with the Mystic Project to which the tribes might attach religious and cultural significance. In the future, we look forward to working with any tribes who choose to participate in the Archaeological Resources Protection Act (ARPA) permitting process, which will be directed by Custer National Forest.

However, for the reasons stated in our June 22, 2007 letter to the Commission, we continue to believe that FERC's unilateral decision to invite five tribes to concur in this Mystic PA is inappropriate. The PA was developed under a formal consultation

process in which the tribes elected not to participate. More importantly, the invited tribes have not identified any properties in the Mystic Project area to which they attach religious and cultural significance. Inviting the tribes to concur under these circumstances is therefore inconsistent with the National Historic Preservation Act (NHPA), contrary to the intent of the Integrated Licensing Process, and we believe unnecessary.

Inconsistent with NHPA. Inviting tribal concurrence in the PA is inconsistent with the NHPA where, as here, there is no indication of properties of religious and cultural significance to tribes at the Mystic Project. The NHPA, its implementing regulations and FERC guidelines governing Section 106 consultation under the NHPA consistently tie the involvement of tribes in consultation to their attachment of religious and cultural significance to potentially affected properties.¹ Despite a lengthy consultation process with multiple opportunities, neither the tribes nor any other consulting party has identified such properties at the Mystic Project. Rather, as discussed in the Historic

¹ See 16 U.S.C. §470a(d)(6)(B) (consultation under Section 106 to include any tribe that “attaches religious and cultural significance” to potentially affected historic properties); 36 C.F.R. §800.2(c)(2)(ii) (consulting parties to include any tribe that “attaches religious and cultural significance” to potentially affected historic properties); §800.3(f)(2) (agency official to invite tribes that “might attach religious and cultural significance to historic properties in the area of potential effects” to be consulting parties; tribes that request in writing to be consulting parties shall be consulting parties); §800.4(a)(4), (b) and (c)(1) (information gathering to extend to tribes to identify properties that “may be of religious and cultural significance to them,” tribes that “might attach religious and cultural significance to properties” within APE to be consulted on identification of historic properties; and any tribe that “attaches religious and cultural significance to identified properties” to be consulted in evaluating historic significance); §800.5(a) (any tribe that “attaches religious and cultural significance to identified historic properties” to be consulted in evaluating adverse effects); §800.6(c)(2)(ii) (tribe that “attaches religious and cultural significance” to identified historic properties may be invited to be signatory of memorandum of agreement – or programmatic agreement – addressing adverse effects); *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, FERC/ ACHP (May 20, 2002) at 3, 6 and 12 (HPMP should address all historic properties, including “properties of traditional religious and cultural significance to Indian tribes;” consultation during development of HPMP should include tribes that “attach traditional religious or cultural significance to historic properties that may be affected by operation of the project;” and any additional information gathering under HPMP should include consultation with tribes “regarding properties of traditional religious and cultural significance”).

Properties Management Plan, a specific study to identify such properties was sponsored by the Custer National Forest and none were identified in the Project area. Four of the five tribes never requested inclusion as a consulting party, and no tribe requested to be included as a Concurring Party in the PA.

Inconsistent with ILP. Inviting eleventh-hour concurrence in the PA from tribes who have not participated in the licensing process to date is inconsistent with the goals and intent of the ILP. The ILP was developed through extensive efforts of the Commission, other federal and state agencies, Indian tribes, licensees and others. FERC *Hydroelectric Licensing under the Federal Power Act, Final Rule and Tribal Policy Statement*, at ¶1. The purpose of the adopted ILP is “to provide for an efficient and timely licensing process that continues to ensure appropriate resource protections through better coordination” of the licensing participants. 18 C.F.R § 5.1(e). The ILP is an iterative process designed to identify issues up front, then to narrow and resolve these issues. A key feature of the ILP, for purposes of efficiency and timeliness, is the early identification and resolution of issues by all involved parties, including tribes. Four of the five tribes invited to sign the PA as Concurring Parties chose not to take the opportunity to engage in the Mystic ILP, and have expressed no ongoing interest in the Mystic Project. The fifth tribe participated only briefly early in this process. To involve these tribes in ongoing activities under the PA by now inviting them to concur is inconsistent with ILP accountability for active consultation and adherence to process schedule deadlines.

Not necessary. Inviting the tribes to concur in the Mystic PA is unnecessary. The approved HPMP (pp.48-49) already provides for future tribal consultation in the specific context in which it is appropriate (i.e., in the context of PPL Montana obtaining ARPA permits from the Custer National Forest for proposed archaeological data recovery). Involving the tribes in all of the activities covered by this PA is therefore unnecessary.

Factual correction. The August 15 FERC letter contains a factual inaccuracy regarding tribal involvement in consultation. Specifically, this letter states that the Eastern Shoshone Tribe “provided comments during the development of the HPMP.” However, the first draft of the HPMP was not prepared until approximately a year after the Eastern Shoshone Tribe had stopped participating in consultation, and we have no record of comments from the Eastern Shoshone Tribe or any other tribes on the HPMP.

Of all the tribes identified to PPL Montana by Custer National Forest as being potentially interested in consultations for the Mystic Project, the Eastern Shoshone was the only tribe to indicate an initial interest in participating in consultation. This initial

written request from the Shoshone was provided to the Commission by PPL Montana. However, in a letter dated May 21, 2005, which is the last communication from the Eastern Shoshone of which PPL Montana is aware, they stated that they would not be participating in the on-site resource inventory and that:

(...) after consultation with our Cultural Elders, the Eastern Shoshone Tribe would defer the oversight of this project to the Montana Tribes and Ms. Halcyon LaPoint of the Custer National Forest. From previous association with Ms. LaPoint, the Elders felt confident that Officials of the CNF Offices in that area would honor their Fiduciary oversight responsibilities for this Project and advise us if they felt a situation should arise that would absolutely require our presence.

Although the Eastern Shoshone Tribe and other tribes were provided a copy of the HPMP for review and comment in June, 2006, we are not aware of the Eastern Shoshone Tribe having submitted any comments. Similarly, as noted in the August 15 FERC letter, we are not aware of any comments being provided by any of the other tribes.

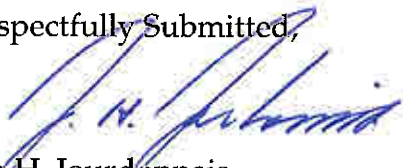
We also respectfully disagree with the August 15 letter assertion that "PPL Montana's and our research indicates that the project area is likely to be an area of interest to the Tribes." The tribes identified to PPL Montana by Custer National Forest, as being potentially interested in consultations, were all invited to participate in consultations during the ILP. PPL Montana reported research of the previous ethnographic studies sponsored by Custer National Forest, which indicated that only three tribes had interests in the entire Beartooth Ranger District, namely the Crow, Shoshone and Arapaho. However, as noted above, the CNF-sponsored study did not identify any properties of traditional cultural and religious significance to tribes in the Mystic Project area nor has any tribe identified such properties. Under these circumstances, and given the decision by the Eastern Shoshone Tribe and other invited tribes not to participate in consultation, we do not agree that the Mystic Project area is likely to be an area of any significant interest to the tribes.

Interpretation of PA. Finally, we wish to confirm our understanding of the effect to PPL Montana, the tribes or any other invited concurring party of not signing the PA. Our understanding is that once the Montana State Historic Preservation Officer signs the PA, it will become effective [36 C.F.R. § 800.6(c)(1) (signatories, as opposed to concurring parties, have sole authority to execute, amend or terminate Agreements)]. A decision not to sign by any or all of the invited concurring parties (PPL Montana, CNF and tribes) does not invalidate the Agreement [*Id.* at § 800.6(c)(3)]. However, as is the case with any agreement, non-signatories to the PA would not be entitled to participate

in any of the activities provided for or otherwise share in any of the benefits provided under the PA. We do understand that, regardless of whether PPL Montana signs the PA, the Commission will require us to implement it and the HPMP as a condition of a new license for the Mystic Project. In that respect, PPL Montana fully intends to implement both documents.

For the reasons above, we remain convinced that it is inappropriate and unnecessary to include non participating tribes in the Mystic PA as concurring parties. We therefore decline the opportunity to sign this PA.

Respectfully Submitted,



Jon H. Jourdonnais
Director Hydro Licensing and Compliance

Cc: Jennifer Hill, FERC
Steve Hocking, FERC
Rollie Wilson, FERC
Posted for viewing by Mystic Project service list at www.mysticlakeproject.com