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VIA FACSIMILE TRANSMISSION AND UPS OVERNIGHT TO WUTC
VIA E-MAIL TO UTILITY REPRESENTATIVES

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, Washington 98504-9022
FAX (360) 586-1150

Re: WUTC Docket No. UG-021502: Objection of Yakama Nation

Dear Secretary Washburn:

This letter is being submitted in advance of the Commission's continued hearing in the above-captioned docket. The purpose of this letter is to address some questions and issues that arose during the previous session. Based on the prior discussions, it appears that one of the fundamental issues that should be addressed at the outset is what interests are the Yakamas attempting to protect or advance through their franchise ordinance; that issue is first addressed below.

Background: The Need and Purpose of the Franchise Ordinance

The People who are today referred to as the Confederated Tribes and Bands of the Yakama Nation have lived in central Washington since time immemorial. They walked in its coulees, set camps on its plains, hunted in its timber, and fished in its rivers; fishing was and is a centerpiece of the Yakamas' cultural heritage. The areas the Yakamas historically occupied are set forth in the 1855 Treaty between the United States and the Yakama Nation. (The text of the Treaty can be viewed at http://www.critfc.org/text/yaktreaty.html.) In that Treaty, which attempted to make legitimate the United States' usurpation and occupation of the Yakamas' ancestral lands, the United States promised the Yakamas that they could live peacefully and

without interference on their Reservation, but only if they would cede the vast majority of their ancestral homeland to the United States. (A map of the Ceded Lands is attached as Exhibit 1.) Article 2 of the Treaty provides in part:

> . . . .nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

In return for this and other solemn Treaty promises, the Yakamas agreed to give up their ancestral lands, which is almost all of Central Washington. (See Exhibit 1.) The promise that non-Indians be excluded from the Reservation was broken when, in 1887, Congress passed the Dawes Act, 24 Stat. 388, which threw open Indian reservations for homesteading. No one asked the Yakamas' permission, and the Dawes Act is the reason that the map of the settled part of the Reservation, which is attached as Exhibit 2 to this letter, looks like it is suffering from a bad case of the pox. In the map, Tribal Trust lands (shown in dark green) are interspersed with fee (non-Indian) lands (shown in white), Allotted lands (shown in yellow), and lands repurchased by the tribe (Land Enterprise lands, light green). These differing ownership classifications produced a crazy-quilt patchwork of regulatory authority; for example, Yakama County and the Nation will have zoning authority over adjoining pieces of property. The Dawes Act made Indian self-determination difficult in the extreme; such self-determination, however, remains an overriding goal of the Yakama Nation.

Reservation land remains particularly sacred to the Yakamas, and they have been trying to regain control over it for over a century; indeed, the number of light green parcels on the map – the Enterprise lands – attests to this. The Yakamas realized that not only had vast tracts of the Reservation been transferred out of Indian control, but that non-Indians were making illegal use of significant portions of lands that the Yakamas retained. When suspicions arose regarding the validity of utility rights of way on Indian lands, the Nation commissioned an extensive, expensive study to determine the scope of trespasses on their lands. "Trespass" was defined as non-Indian occupation of Indian lands without proper permit or authorization. This study, which focused initially upon facilities installed by PacifiCorp, led to the conclusion that there were serious continuing trespasses at numerous locations. In almost all circumstances, there were no indications of bad faith, but there were indications of overreaching by individuals, acting beyond the scope of authority by the Bureau of Indian Affairs ("BIA"), negligence or worse by utilities, and many, many trespasses and other violations of a technical nature. For example, although the utilities relied primarily on county road rights of way to place their utility facilities, in some cases there were rights of way (and utility facilities) where there were no roads, in others there were roads but no rights of way, and in still others the utilities "missed" the rights of way. Even greater problems are present in situations in which utilities left the road rights of way; in many

cases, the utilities relied upon consent to install facilities by individuals who had absolutely no authority to grant such consent. In sum, the problems appeared well nigh insurmountable. On the other hand, the Nation is not willing to continue to live with the status quo. Thus the Yakamas' investigation led to the next question:

What is the Remedy?

Fixing all of these problems would be virtually impossible. First, the utilities lacked any specific grants of property when they occupied the county roads; they had to rely on the validity of the county rights of way for road purposes, and if those road rights of way are insufficient (as the Yakamas contend many are), there is nothing that the utilities can do; that is an issue between the county, the United States (through the BIA), and the Yakamas. In this regard, one contention of the Yakamas is that some of the road rights of way were overburdened with utility rights of way. And when specific parcels of land not involving road rights of way were involved, a defect in the right to be present on such parcels often would be realistically impossible to remedy; for example, when Allotted lands are involved, if the grantor of the right to cross the lands did not have the authority to make such a grant (as many did not), today it would be exceedingly difficult to obtain a valid grant, for the property interests in Allotted lands generally become more fractured over time. And even if these problems could be remedied by new conveyances of interests in real property, no such conveyance can be made without Yakama Nation consent thereto.

Accordingly, the Nation soon realized that there was no "quick fix." At the same time, the Nation did not want to continue to suffer trespasses and continuing loss of rights to their Reservation lands, including the right to guide future placement of utility facilities. The solution, which will solve the problems between the utilities and the Yakamas, is the franchise ordinance: In return for the utilities' execution of franchise agreements and payment of franchise fees, the Yakamas (i) will consent to the continued presence of trespassing facilities, and (ii) will assist the utilities in placing future facilities in places acceptable to the Yakamas.

Does the Nation's Franchise Provide Sufficient Rights?

Do Franchises Convey Real Property Interests?

During the hearing, some concern was expressed that a franchise from the Nation would not provide the utilities with sufficient rights; the specific objection was that only the United States, as trustee for Indian lands, could convey real property rights sufficient to authorize the continued existence of trespassing facilities. This objection first miscomprehends what franchises are. When a municipality grants a franchise, it conveys no interest in real property;

there is no real property right that the utility gains from the franchise. Rather, the utility is allowed to piggyback on the municipal rights of way; indeed, the municipality itself often does not own the fee to the underlying land. The Nation's franchise would operate in precisely the same way.

The next question is, assuming that the utilities need real property interests because a road or other right of way is either insufficient or not available, how can the Nation meet such a need through a mere franchise? To rephrase the question:

What Does it Take to Obtain Real Property Interests on Indian Lands?

Related to the concern expressed in the preceding paragraph was the notion that the Yakamas themselves could grant nothing of value in assisting the utilities because the BIA controls the actions of the Yakamas. Again, this is a misconception, but the response is more complex.

As Exhibit 2 indicates, there are three types of Indian lands:

- Tribal Trust lands (the dark green);
- Land Enterprise lands (i.e., repurchased, shown in light green), and
- Allotted lands (yellow).

The BIA has authority over Tribal Trust lands, non-fee Land Enterprise lands, and Allotted lands; it has no trust responsibility with respect to fee lands owned by the Land Enterprise. See 25 CFR § 169.2(a) (Part 169 regulations apply to tribal land and to individually owned land held by individual Indians subject to federal restrictions against alienation or encumbrance). However, it cannot be emphasized too strongly that the BIA's authority to grant rights of way is limited by the desires of the Yakamas. For example, the BIA must obtain Yakama consent in order to convey an interest in Tribal Trust and Allotted lands. Regarding potential steps to remove offending facilities, it again is important to emphasize that the Yakamas can prevent the BIA from initiating a trespass action on those lands. 25 CFR § 169.3. (Indeed, the BIA has delegated its real property functions to the Yakamas, and thus any documents affecting trust lands are prepared and reviewed by the Nation.) Finally, Allotted lands are owned by individual tribal member(s), and are often broken into tens if not hundreds of undivided fractional interests. The BIA must obtain permission to grant rights of way from individual allottees except in limited instances. 25 CFR § 169.3(b). If, however, the Nation possesses a majority interest in an individually allotted piece of land, it may consent to rights of way on behalf of minority shareholders.

To return to the franchise issue, by entering into franchise agreements the utilities obtain a pledge of cooperation from the Nation – which, again, can control the actions of the BIA in matters relating to real property interests. Where the Nation lacks the ability to deal with specific lands, it either can block BIA action (as in the case of Tribal Trust lands), or it can influence the course of administration of those lands through its good offices. The BIA has no authority over Land Enterprise lands not subject to restraints on alienation or encumbrance (i.e., fee lands), and the Nation has plenary authority over those lands. Finally, although the Nation may not have authority to control Allotted lands in which it lacks a majority interest, neither does the BIA. The Nation, however, by entering into the franchise agreements, is pledging to use its good offices to assist the individual utilities in dealing with problems either already present or arising in the future on such Allotted lands.

What is the Appropriate Relationship to Costs of Administration?

During the hearing some suggested that it would be proper to reimburse the Nation only for its costs incurred in administering the franchise program, but that the receipts projected exceed those costs. The suggestion was that the Nation's collections from the utilities under the guise of franchise fees should be limited to its actual administrative costs. This suggestion misunderstands Washington law on the ratemaking treatment of franchise fees.

The basic analytical framework for ratemaking treatment of government exactions on utilities is relatively simple: If the exaction is the result of a consensual or contractual relationship providing the utility with permission to use government rights of way and the exaction is three percent or less of gross revenue, then the exaction is a fee and must be recovered from ratepayers statewide; however, if the exaction is non-consensual or imposed for the mere privilege of operating within the government boundary, or if the exaction exceeds three percent of gross revenue, then the exaction is a tax and should be recovered from local ratepayers. *See* State ex rel. Pacific Tel. & Tel. v. Department of Public Service, 19 Wash. 2d 200, 279 (1943) (contractual franchise payments are fees, not taxes, and must be recovered from statewide ratebase provided the regulatory body finds the amount of the consensual franchise payment is reasonable); WUTC v. Pacific Power & Light Company, WUTC Cause No. U-79-50 (1980) (consensual franchise payment greater than three percent of gross revenue unreasonable and must be considered a tax and recovered from local ratepayers; consensual franchise payment of three percent or less of gross revenue reasonable and properly recovered from statewide ratebase as general operating expense).

An additional wrinkle was added to this analytical framework in 2001, when the Washington Court of Appeals decided City of Lakewood v. Pierce County, 106 Wn. App. 63 (2001). That case, which did not involve regulatory ratemaking, addressed a *non-consensual*

exaction imposed by the City of Lakewood on a sewer utility operated by Pierce County. The Court of Appeals recognized an exception to the principle that a *non-consensual* exaction is a tax; the Court of Appeals held that a non-consensual exaction is a regulatory fee and not a tax if the non-consensual exaction is limited to the administrative costs of the municipality imposing the exaction. This exception relied on the Washington Supreme Court's holding in Covell v. Backus, 127 Wn. 2d 874 (1995), a case that did not involve a utility franchise but which recognized that a non-consensual municipal exaction is not a tax if the amount of the exaction is limited to the administrative costs of the municipality.

In sum, Washington law holds that a consensual or contractual franchise fee of three percent of gross revenue is reasonable and must be treated for ratemaking purposes as a general operating expense and recovered from the statewide ratepayers. Washington law further holds that a non-consensual or imposed exaction is a tax and must be recovered from the local ratepayers unless the non-consensual exaction is narrowly tailored to offset administrative costs, in which case the exaction is a regulatory fee and must be recovered from the statewide ratepayers.[1] In the instant case, the Nation seeks to enter into consensual or contractual franchise relationships with the utilities serving the Reservation. Under Washington law the Nation's three percent franchise fee charged under such consensual franchise relationships is, according to the Commission's own precedents, reasonable, and therefore must be recovered from statewide ratepayers. Washington law simply does not create any linkage between administrative costs and the amount of a consensual or contractual franchise fee; in sum, such linkage is only relevant if a franchise exaction is non-consensual, which does not apply to the instant case because the Nation seeks consensual franchise agreements with utilities serving the Reservation.

Finally, if the Commission believes that it has authority to stray from its precedents regarding the three-percent rule, the Commission may want to consider the value of the privileges that the Nation proposes to confer under the franchise agreements. As noted in State ex rel. Pacific Tel. & Tel. v. Department of Public Service, 19 Wash. 2d 200 (1943), the proper ratemaking standard is:

[1] It should be noted that the WUTC no longer has much occasion to apply this franchise fee analysis because a 1982 amendment to Washington statutes prohibits Washington cities and towns from charging franchise fees in excess of actual administrative expenses. RCW 35.21.860. Nevertheless, the ratemaking analysis set forth above was not altered by the statutory revisions; indeed, the WUTC still has occasion to apply these ratemaking principles to municipal franchise fees that were grandfathered under RCW 35.21.860 (2). In the instant case, RCW 35.21.860 does not prohibit the Nation from imposing a franchise fee because the statute, by it terms, applies only to cities and towns; it cannot, as a matter of law, be applied to the Nation.

> If the payments called for by a franchise appear excessive or out of proportion to *the privilege accorded to the utility to use city property*, the rate-regulating authority would have the power to fix the proper proportion of the payment to be allocated to operating expense.

Id. at 279 (emphasis added.)

There are a variety of ways to assess the "value" of the privileges accorded. First, beyond the issue of administrative costs, major attention should be given to the very lands that the utilities have been and are occupying without proper authorization. Of course, it would be very difficult to attempt to quantify the value of the benefits that the utilities have enjoyed from the use of those lands, and therefore it might be more appropriate to ask how much it would cost the utilities to comply with strict enforcement of legal rights relating to use of Nation property. From the discussion of the nature of property ownership on the Reservation it should be clear that some problems – like obtaining consent to cross some Allotted lands – are exceedingly difficult to solve, and thus the costs of strict compliance would appear to be enormous. Finally, one might ask what it would cost the trespassing utilities to reconfigure their systems and take other steps necessary to avoid trespassing in the future (overlooking for the moment any claims for past trespasses, notwithstanding that statutes of limitation do not run against sovereigns). Building around problems, moving poles and pipes several feet to avoid encroachment, and taking similar steps to cease trespassing again would be enormously expensive. (In this vein, it is appropriate here to remember that utilities lack the authority to condemn Yakama lands.) For all of these reasons, it seems clear that the privileges afforded – continued use of the lands, a promise not to seek relocation of facilities, a promise to work with the utilities in the securing of rights necessary for the placement of new facilities, and a promise to assist in finding appropriate locations for the placement of such facilities – certainly at least equal the very low franchise fee of three percent of gross revenues.

The Final Question: Why is the Nation Taking this Issue so Seriously?

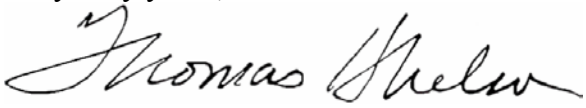
There are a number of reasons for the Nation's interest in how the Commission treats the franchise fee it will impose on Reservation utilities. First, the Nation is interested in using the franchise approach to resolve some very serious historic concerns relating to the use of Indian lands, as well as to provide a basis for future cooperation with and among the various utilities. Second, the Nation does not want to be singled out for treatment different from other franchising authorities; at a minimum, such is demeaning and likely downright illegal. Third, the Nation does not want utility customers residing on the Reservation to bear a burden greater than is justified under Washington law – which is what the Nation believes would happen if the franchise fee were concentrated on the Reservation.

Reflecting upon events to date, the testimony from the utilities and some questions from the Commission seem to inquire whether the Nation would consider a privilege tax instead of a franchise fee. Based on some preliminary discussions, it appears that the Nation would entertain a privilege tax in lieu of the franchise approach. Moreover, it seems that a determination by this Commission that the franchise fees are really privilege taxes in disguise would create a strong incentive to replace the franchise approach with a privilege tax. After all, the privilege tax approach was accepted by the Swinomish and Lummi tribes with no major fallout; indeed, if a privilege tax were involved, there would be no three-percent limitation. The Nation, however, initially took the position that overall the privilege tax approach is less desirable than the franchise approach even though a privilege tax would produce more revenues; this is because the franchise approach seems to be the most direct and simple manner of dealing with serious land problems that have been plaguing the Reservation for the better part of a century – problems that are both well known by the Yakamas and continue to be a source of significant resentment. A franchise approach has the possibility of leading to a new, healthier understanding among the Yakamas, the non-Indian residents on the Reservation, and the utilities that provide their services on the Reservation.

In sum, the Nation is very interested in regaining control over its own future, which necessarily includes reasserting control over lands and interests in lands that have been and are being usurped. The franchise ordinance was a serious step in that direction. It is intended to be a partial solution to some very present and very real problems facing utilities that occupy Nation's lands. The franchise approach would eliminate a sore spot in the relationships between Indians and non-Indians on the Reservation. From the utilities' perspective, the ordinance and resulting agreements would confer some very valuable privileges on the utilities. In light of these considerations, the Nation believes that neither the utilities nor the Commission should second-guess the Nation or its franchise ordinance.

Thank you for this opportunity to participate, and please let me know if you have any questions.

Very truly yours,



Thomas H. Nelson

Exhibit 1

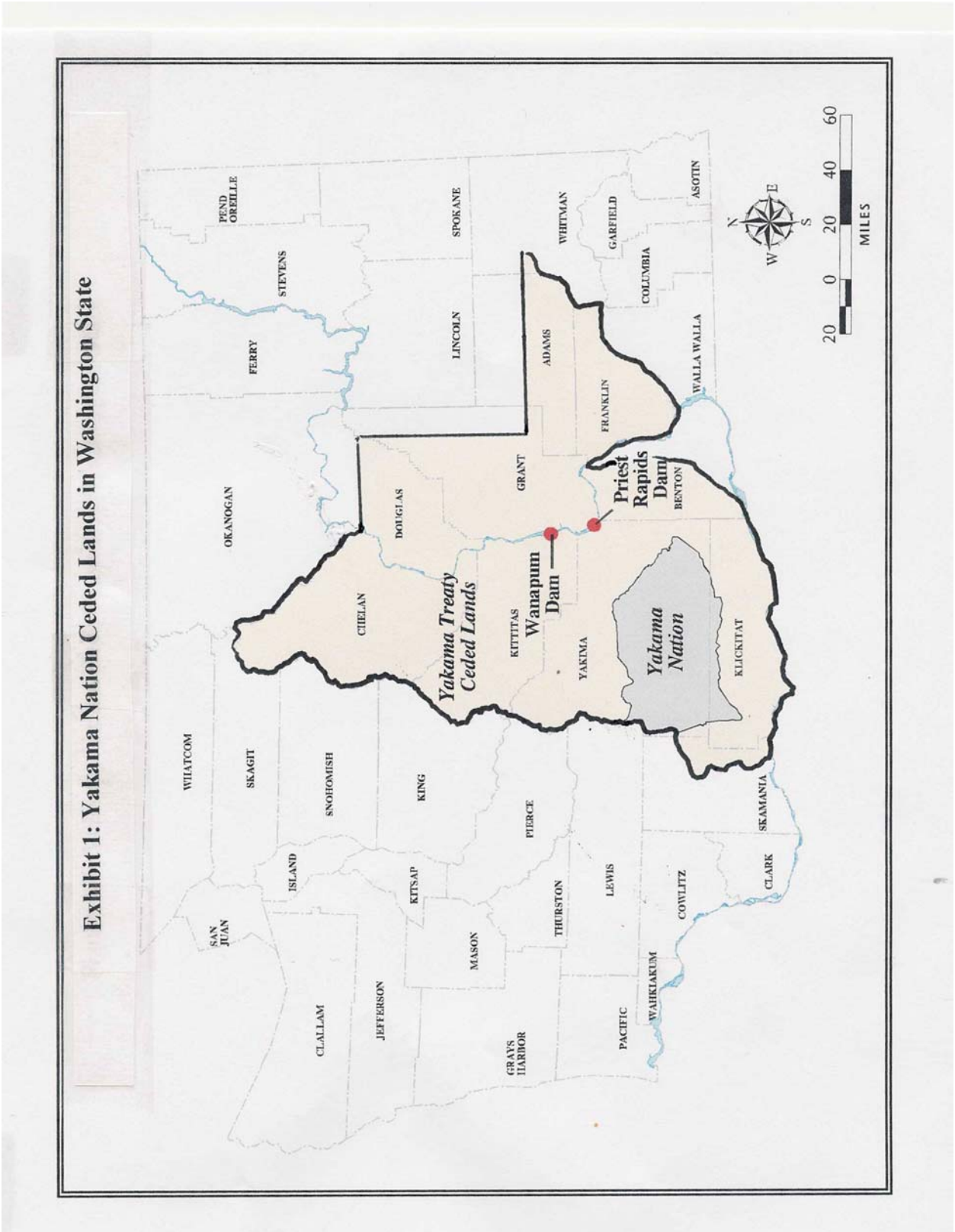
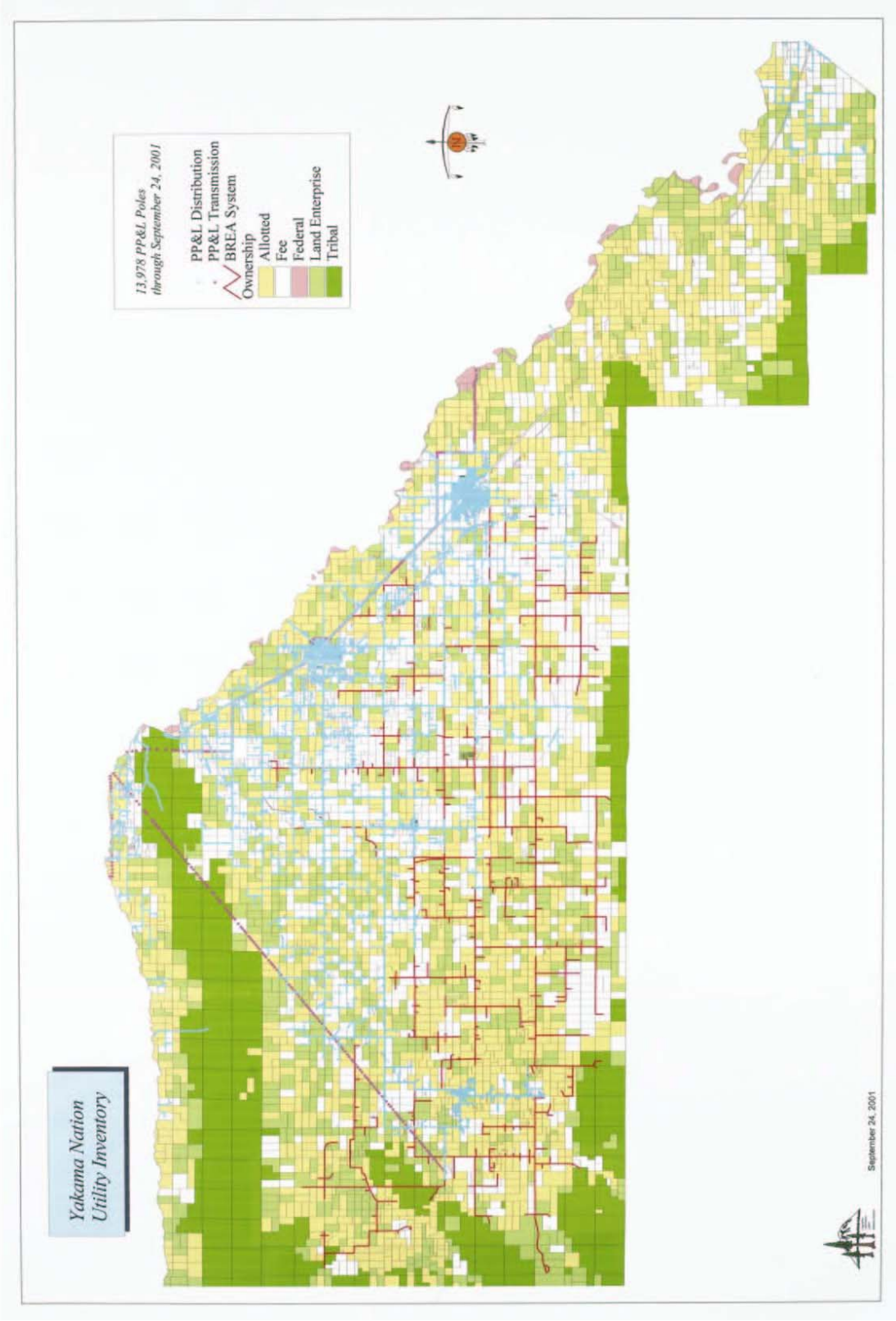


Exhibit 1: Yakama Nation Ceded Lands in Washington State
Yakama Treaty Ceded Lands
Yakama Nation
Wanapum Dam
Priest Rapids Dam
WHATCOM
SKAGIT
SNOHOMISH
KING
PIERCE
SKAMANIA
CLARK
ISLAND
KITSAP
THURSTON
LEWIS
COWLITZ
SAN JUAN
CLALLAM
JEFFERSON
MASON
GRAYS HARBOR
PACIFIC
WAHKIAKUM
OKANOGAN
CHELAN
DOUGLAS
KITTITAS
YAKIMA
KLICKITAT
GRANT
ADAMS
FRANKLIN
BENTON
FERRY
STEVENS
PEND OREILLE
LINCOLN
SPOKANE
WHITMAN
GARFIELD
COLUMBIA
WALLA WALLA
ASOTIN
N
W
E
S
20 0 20 40 60
MILES

Exhibit 2


Yakama Nation
Utility Inventory
13,978 PP&L Poles
through September 24, 2001
PP&L Distribution
PP&L Transmission
BREA System
Ownership
Allotted
Fee
Federal
Land Enterprise
Tribal
September 24, 2001