

172 FERC ¶ 61,062  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

PacifiCorp	Project Nos.	2082-062 2082-066 14803-000
Klamath River Renewal Corporation		14803-003

ORDER APPROVING PARTIAL TRANSFER OF LICENSE, LIFTING STAY OF  
ORDER AMENDING LICENSE, AND DENYING MOTION FOR CLARIFICATION  
AND MOTION TO DISMISS

(Issued July 16, 2020)

1. On September 23, 2016, and later supplemented, PacifiCorp, licensee for the Klamath Hydroelectric Project No. 2082, together with the Klamath River Renewal Corporation (Renewal Corporation), filed an application to amend the Klamath Project license and to transfer a newly created license for the Lower Klamath Project No. 14803 from PacifiCorp to the Renewal Corporation. On March 15, 2018, the Commission approved the amendment to administratively remove four developments from the Klamath Project and place them into a new license for the Lower Klamath Project.<sup>1</sup> In the March 15 Order, the Commission stated it was deferring action on the transfer application until the Renewal Corporation provided requested additional information.<sup>2</sup> For the reasons discussed below, we approve a partial transfer of the license for the Lower Klamath Project from PacifiCorp (transferor) to the Renewal Corporation (transferee), contingent on PacifiCorp remaining on as a co-licensee.

**I. Background**

2. Prior to our March 15 Order, the 169-megawatt Klamath Project, located primarily on the Klamath River in Klamath County, Oregon, and Siskiyou County, California, included eight developments (from upstream to downstream): East Side, West Side, Keno, J.C. Boyle, Copco No. 1, Copco No. 2, Fall Creek, and Iron Gate. The project

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<sup>1</sup> *PacifiCorp*, 162 FERC ¶ 61,236 (2018) (March 15 Order).

<sup>2</sup> *Id.* PP 71-72.

included federal lands administered by the U.S. Bureau of Reclamation (Reclamation) and U.S. Bureau of Land Management (BLM). The original license for the project was issued on January 28, 1954,<sup>3</sup> and expired on February 28, 2006. The project has been operating under an annual license since that time.<sup>4</sup>

3. PacifiCorp filed an application to relicense the Klamath Project in 2004. In 2007, Commission staff issued a final Environmental Impact Statement (EIS) for the application, analyzing various alternatives, including decommissioning and removing the J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments, but ultimately recommending issuing a new license that included those four developments with staff-recommended mitigation and mandatory conditions from the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (NMFS), and Reclamation.<sup>5</sup> However, PacifiCorp determined that implementing those conditions (specifically, complying with mandatory fishway prescriptions) would mean operating the project at a net loss.<sup>6</sup> Thereafter, PacifiCorp entered into negotiations with a number of resource agencies, tribes, and other entities to evaluate alternatives to relicensing the project.

4. In February 2010, PacifiCorp and 47 other parties, including the States of Oregon and California and the U.S. Department of the Interior (Interior), executed the Klamath Hydroelectric Settlement Agreement (Settlement Agreement), which provided for decommissioning and removing the J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments, contingent on the passage of federal legislation and approval by the Secretary of the Interior. However, the necessary legislation was never passed.

5. Subsequently, in April 2016, the States of Oregon and California, Interior, PacifiCorp, NMFS, the Yurok Tribe, and the Karuk Tribe executed the Amended

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<sup>3</sup> *The California Oregon Power Co.*, 13 FPC 1. On June 16, 1961, the license was transferred to Pacific Power and Light Company (25 FPC 1154) (1961) and then to PacifiCorp on November 23, 1988 (45 FERC ¶ 62,146). The original license order was for the construction and operation of the Big Bend No. 2 development, also known as the J.C. Boyle development. Later orders incorporated the other project developments into the license.

<sup>4</sup> 16 U.S.C. § 808(a)(1) (2018).

<sup>5</sup> The staff alternative recommended issuing a new license for the Fall Creek development, decommissioning the East Side and West Side developments, and removing the Keno development from the project license because it is not necessary for power generation.

<sup>6</sup> See Klamath Hydroelectric Project Agreement in Principle, Nov. 24, 2008, at 5.

Klamath Hydroelectric Settlement Agreement (Amended Settlement Agreement).<sup>7</sup> The Amended Settlement Agreement set forth a process by which PacifiCorp would request Commission approval to transfer the four lower developments (with a total of 163 megawatts) to the Renewal Corporation, which would then seek Commission approval to decommission and remove the developments under the Commission's license surrender procedures.

6. On September 23, 2016, and later supplemented, PacifiCorp and the Renewal Corporation filed an amendment and transfer application with the Commission to: (1) amend the Klamath Project license to administratively remove the four developments to be decommissioned and place those developments into a new license that would become the Lower Klamath Project; and (2) transfer the license for the Lower Klamath Project from PacifiCorp to the Renewal Corporation. On the same day, the Renewal Corporation filed an application to surrender the Lower Klamath Project license and remove the four developments.

7. On May 6, 2016, PacifiCorp requested that the Commission hold the relicensing proceeding for the Klamath Project in abeyance, in accordance with the Amended Settlement Agreement. On June 16, 2016, the Commission granted PacifiCorp's motion.<sup>8</sup>

8. On October 5, 2017, Commission staff issued a public notice of the amendment and transfer application, explaining that the surrender application would be considered in a separate, future proceeding.<sup>9</sup> Also on October 5, 2017, staff requested additional information on the amendment and transfer application regarding the Renewal Corporation's legal, technical, and financial capacity to accept the new license and to decommission and remove the developments, if authorized. Additionally, given the magnitude of the proposed dam removals, the potential for safety issues, and questions

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<sup>7</sup> PacifiCorp and the Renewal Corporation attached the Amended Settlement Agreement to their September 23, 2016 application for amendment and transfer. The parties have provided the Commission with the Amended Settlement Agreement for informational purposes only. The Amended Settlement Agreement itself is not for Commission approval.

<sup>8</sup> *PacifiCorp*, 155 FERC ¶ 61,271 (2016). The abeyance remains in effect until the Commission acts on the surrender application.

<sup>9</sup> The Renewal Corporation requested that the Commission not act on the surrender application until the Renewal Corporation is ready to accept license transfer. In addition, only a licensee, which the Renewal Corporation was not when it filed its surrender application, may file to surrender a license. Accordingly, Commission staff has not issued public notice of the surrender application prior to our approving the transfer.

about the adequacy of funding, cost estimates, insurance, and bonding, Commission staff required the Renewal Corporation and PacifiCorp to convene an independent Board of Consultants (the Board) to review and assess all aspects of the proposed dam removal.<sup>10</sup>

9. On March 15, 2018, the Commission approved the proposed amendment to administratively separate the J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments and create the Lower Klamath Project.<sup>11</sup> At the same time, the Commission deferred consideration of the proposed transfer, stating that it needed more information about the Renewal Corporation's financial capabilities to accept transfer of the license and carry out project decommissioning.<sup>12</sup>

10. PacifiCorp subsequently filed a request to stay the effectiveness of the amendment order until such time as the Commission acts on the transfer application, explaining that implementing the amendment would cost an estimated \$3.1 million. On June 21, 2018, the Commission granted the stay.<sup>13</sup> In that same order, the Commission noted that PacifiCorp could defer its decision on whether to accept the amended licenses until the Commission acts on the transfer application.<sup>14</sup>

## II. Amended Settlement Agreement and Transfer Application

### A. Amended Settlement Agreement

11. As noted above, PacifiCorp and the Renewal Corporation filed the license amendment and transfer application in accordance with the Amended Settlement Agreement, which provides that PacifiCorp will continue to operate and maintain the Lower Klamath Project and will retain the financial and legal liabilities for the developments pending surrender of the transferred license.<sup>15</sup> PacifiCorp and the Renewal

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<sup>10</sup> Letter from David Capka, FERC, to Mark Sturtevant, PacifiCorp, and Michael Carrier, Renewal Corporation (issued October 5, 2017).

<sup>11</sup> March 15 Order, 162 FERC ¶ 61,236. The other four developments remain in the original Klamath Project No. 2082 license.

<sup>12</sup> *Id.* PP 71-72. The March 15 Order included an appendix, which listed all the additional information the Commission would require before acting on the transfer application.

<sup>13</sup> *PacifiCorp*, 163 FERC ¶ 61,208 (2018).

<sup>14</sup> *Id.* n.7.

<sup>15</sup> Amended Settlement Agreement at 7.1.6.

Corporation have entered into an Operation and Maintenance Agreement, which allows PacifiCorp to continue operating the four dams for the benefit of its customers following transfer to the Renewal Corporation.

12. The Amended Settlement Agreement provides that, before the license transfer will become effective, the Renewal Corporation must demonstrate to PacifiCorp and the States of Oregon and California that a number of conditions have been met.<sup>16</sup> These conditions include the following: (a) the Renewal Corporation has provided notice of completion of the Definite Plan;<sup>17</sup> (b) the Renewal Corporation has met the requirements of section 7.1.3 (indemnification of PacifiCorp, Oregon, and California) and Appendix L (contractor qualifications) of the Amended Settlement Agreement; (c) PacifiCorp and the States agree that the Renewal Corporation has made sufficient and timely progress in obtaining necessary permits and approvals to effectuate facilities removal; (d) the Renewal Corporation, the States, and PacifiCorp are assured that sufficient funding is available to carry out facilities removal; (e) the Renewal Corporation, the States, and PacifiCorp are each assured that their respective risks associated with facilities removal have been sufficiently mitigated consistent with Appendix L; (f) the Renewal Corporation, the States, and PacifiCorp agree that no order of a court or the Commission is in effect that would prevent facilities removal; (g) the Renewal Corporation and PacifiCorp have executed documents conveying the property and rights necessary to carry out facilities removal; and (h) the Renewal Corporation accepts license transfer under the conditions specified by the Commission in its order approving transfer.

13. The Amended Settlement Agreement also states that the Renewal Corporation will remove the four developments in accordance with a decommissioning plan and will have three sources of funding for decommissioning and restoration activities: (1) an Oregon PacifiCorp Customer Surcharge; (2) a California PacifiCorp Customer Surcharge; and (3) a California Bond Funding measure.<sup>18</sup> In total, these three sources of funding (collectively referred to as the State Cost Cap) will make \$450 million available to the Renewal Corporation, which the Amended Settlement Agreement provides is the maximum monetary contribution of the States of Oregon and California.<sup>19</sup>

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<sup>16</sup> *Id.* at 7.1.4.

<sup>17</sup> The Definite Plan provides a plan and timetable for the proposed removal of the Lower Klamath Project.

<sup>18</sup> Amended Settlement Agreement at 4.1.

<sup>19</sup> *Id.*

**B. Prior Review of Transfer Application**

14. As noted above, on September 23, 2016, PacifiCorp and the Renewal Corporation filed their amendment and transfer application. On March 1, June 23, December 1, and December 4, 2017, PacifiCorp and the Renewal Corporation supplemented their application with additional information regarding the Renewal Corporation's legal, technical, and financial capacity to fulfill its contractual obligations under the Amended Settlement Agreement.

15. In our March 15 Order, we explained that there was still additional information we needed before we would consider the transfer application.<sup>20</sup> Specifically, we required that the Renewal Corporation file its Definite Plan and additional information regarding its funding for dam operation and removal, contingency reserve, insurance, and risk mitigation.<sup>21</sup> Our order required that the Renewal Corporation provide us the results of an independent review of much of this additional information; we noted that this independent review could be done by the Board.<sup>22</sup>

16. On March 23, 2018, in response to Commission staff's October 5, 2017 directive to convene the Board and our March 15 Order, the Renewal Corporation provided additional information regarding establishment of the Board, including proposed Board members. On May 22, 2018, Commission staff approved the members of the Board and reiterated to the Renewal Corporation what information the Commission would like the Board to review.<sup>23</sup>

17. Subsequently, on June 29, 2018, the Renewal Corporation filed its Definite Plan and its responses to the Commission's additional information requests included in the March 15 Order. In its filing, the Renewal Corporation explained that the Board would review the new information and provide recommendations. On October 22, 2018, Commission staff provided the Renewal Corporation comments on its June 29, 2018 filing, as well as specific items from that filing that the Commission wanted the Board to review.

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<sup>20</sup> March 15 Order, 162 FERC ¶ 61,236 at PP 71-72.

<sup>21</sup> *Id.* PP 54-70 and Appendix.

<sup>22</sup> *Id.* PP 61, 72 and Appendix.

<sup>23</sup> On August 15, 2018, Commission staff approved the replacement of a Board member.

18. On December 12, 2018, the Renewal Corporation filed the Board's Report No. 1, dated December 10, 2018,<sup>24</sup> in which the Board made several recommendations, including that the Renewal Corporation develop a "Plan B" for how it would acquire additional funding should the State Cost Cap be exceeded.<sup>25</sup> Among other things, the Board also recommended that another cost estimate be prepared.<sup>26</sup> In its December 12, 2018 filing, the Renewal Corporation stated that it accepted the Board's recommendations and that its response to the recommendations would be filed with the Commission by the end of April 2019.<sup>27</sup> On January 23, 2019, Commission staff provided the Renewal Corporation further comments and additional information requests based on staff's review of the Board's Report No. 1.

19. On July 29, 2019, the Renewal Corporation filed its response to the Board's recommendations in Report No. 1. In this same filing, the Renewal Corporation provided the Board's Supplemental Report No. 1, in which the Board reviewed the Renewal Corporation's responses.<sup>28</sup> The Board's Supplemental Report No. 1 included five new recommendations, one of which was for the project's cost contingency to be reassessed once the final Guaranteed Maximum Price<sup>29</sup> is identified, the Liability Transfer Corporation terms and conditions and costs are established, and assignment/mitigation

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<sup>24</sup> The December 10, 2018 report supersedes a November 28, 2018 version of Report No. 1. The Board issued its Report No. 1 following a formal meeting held on October 24, 2018. The Board provided an initial Report No.1 to the Renewal Corporation on November 28, 2018, but subsequently revised the report based on a letter requesting clarification from the Renewal Corporation.

<sup>25</sup> Renewal Corporation's December 12, 2018 Filing, Exhibit A at 12.

<sup>26</sup> *Id.*

<sup>27</sup> Renewal Corporation's December 12, 2018 Filing at 2-4. The Renewal Corporation subsequently requested an extension, until the end of July 2019, to file the additional information. Commission staff granted the extension on April 18, 2019.

<sup>28</sup> Renewal Corporation's July 29, 2019 Filing, Attachment A, Supplemental Report No. 1. Following issuance of the Board's Report No. 1 and prior to issuance of its Supplemental Report No. 1, the Renewal Corporation and the Board met informally six times.

<sup>29</sup> The Guaranteed Maximum Price represents the absolute limit of what the Renewal Corporation will pay its contractors to implement the project. Any costs in excess of the Guaranteed Maximum Price are the liability of the contractors.

strategies for the remaining risks are addressed.<sup>30</sup> In its filing, the Renewal Corporation accepted the Board's supplemental recommendations and provided a plan and schedule for providing the additional information to the Commission.<sup>31</sup> The Renewal Corporation indicated that the Guaranteed Maximum Price would be established in February 2020.<sup>32</sup> On February 4, 2020, Commission staff informed the Renewal Corporation that it should also provide the additional information to the Board for its review, as the Commission would need the Board's evaluation of the information to inform its decision on the transfer application.

20. On February 28, 2020, the Renewal Corporation filed its responses to the Board's supplemental recommendations. Subsequently, on March 20, 2020, the Renewal Corporation filed the Board's Report No. 2, in which the Board assessed the Renewal Corporation's supplemental responses.<sup>33</sup> As discussed further below, in its Report No. 2, the Board noted the "significant progress" the Renewal Corporation made in responding to its recommendations.<sup>34</sup>

21. In response to the Board's Report No. 2, on June 10, 2020, the Renewal Corporation filed an updated risk assessment, incorporating its latest cost estimates.

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<sup>30</sup> Renewal Corporation's July 29, 2019 Filing, Exhibit A, Supplemental Report No. 1 at 9-10.

<sup>31</sup> Renewal Corporation's July 29, 2019 Filing, Exhibit A, Response of Renewal Corporation at 1-2.

<sup>32</sup> *Id.* at 1.

<sup>33</sup> Renewal Corporation's March 20, 2020 Filing, Report No. 2. Prior to issuing its Report No. 2, the Board and the Renewal Corporation participated in three informal meetings and the Board convened a formal meeting on March 4, 2020.

<sup>34</sup> Renewal Corporation's March 20, 2020 Filing, Report No. 2 at 14. In its Report No. 2, the Board also provided further recommendations for the Renewal Corporation to consider as it moves toward 90% design specification for the project. The Renewal Corporation is advancing to 90% design independently of the transfer proceeding. The Renewal Corporation explains that the 90% design can serve as a basis for the Commission's final decision in the surrender proceeding.

### III. Public Notice, Interventions, and Comments

22. On October 5, 2017, the Commission issued public notice of the license amendment and transfer application, establishing November 6, 2017, as the deadline for filing comments, interventions, and protests.

23. Motions to intervene and comments received prior to issuance of our March 15 Order were all summarized in that order.<sup>35</sup> Since issuance of our March 15 Order, we received late motions to intervene from the Upper Klamath Outfitters Association; the City of Yreka, California; Del Norte County, California; and the Copco Fire Protection District. The Commission granted all four late motions to intervene.<sup>36</sup>

24. We have also continued to receive comments on the amendment and transfer application, both in support of and opposition to the proposal. The bases for commenters' support or opposition are generally the same as those described at length in the March 15 Order.<sup>37</sup>

25. Many of the comments we received in this amendment and transfer proceeding concern impacts associated with decommissioning and removal of the Lower Klamath Project (e.g., impacts to water quality, salmon, tribal communities, recreation, water storage for irrigation and fighting fires, homes and private wells, and electricity costs). Such comments are beyond the scope of this order, which considers only whether the license for the Lower Klamath Project should be transferred to the Renewal Corporation. We acknowledge that these are all important issues, which will be considered in the surrender proceeding. In this order, we review the Renewal Corporation's ability to undertake the proposed decommissioning and removal as part of our review of the license transfer, but we are not yet deciding whether to authorize the proposed surrender and removal. The decision as to whether, and under what conditions, to authorize decommissioning and removal will occur in the surrender proceeding.

26. Since our March 15 Order, we have also received the following motions and procedural requests: (1) Siskiyou County Water Users Association's (Siskiyou Water Users) motion to dismiss the transfer application; (2) County of Siskiyou, California's (Siskiyou County) motion for clarification of the March 15 Order, or in the alternative, petition for declaratory order; and (3) requests from Siskiyou and Del Norte Counties, California to delay action on the transfer application until resolution of the global

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<sup>35</sup> March 15 Order, 162 FERC ¶ 61,236 at PP 20-34.

<sup>36</sup> August 1, 2018, September 6, 2018, October 1, 2019, and July 2, 2020 Notices Granting Late Intervention.

<sup>37</sup> See March 15 Order, 162 FERC ¶ 61,236 at PP 20-34.

pandemic caused by Novel Coronavirus Disease (COVID-19). These motions and requests are discussed below.

#### **IV. Procedural Matters**

##### **A. Siskiyou Water Users' Motion to Dismiss**

27. On April 24, 2018, Siskiyou Water Users filed a motion to dismiss the transfer application.<sup>38</sup> Siskiyou Water Users argue that the Renewal Corporation is not qualified to hold the license because neither Congress nor the Klamath River Compact Commission (Compact Commission) has approved the Amended Settlement Agreement.<sup>39</sup> They infer that, because the original Settlement Agreement required congressional approval, the Amended Settlement Agreement likewise requires congressional approval, which they maintain must be obtained either through direct legislation or approval by the Compact Commission.<sup>40</sup> Accordingly, Siskiyou Water Users contend that, in the absence of Congressional action, the Commission cannot take action in furtherance of the Amended Settlement Agreement until the agreement is authorized by the Compact Commission.<sup>41</sup> As discussed below, we find these arguments unpersuasive.

28. The Klamath River Compact, which became effective with the consent of Congress in 1957,<sup>42</sup> created the Compact Commission, with one representative from Oregon, one from California, and one federal representative (Reclamation has been designated to hold that position), to administer the Compact. The purposes of the Compact are to promote the orderly, integrated, and comprehensive development of the water resources of the Klamath River Basin for domestic and industrial use, irrigation,

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<sup>38</sup> On May 9, 2018, PacifiCorp and the Renewal Corporation filed a joint answer to the motion to dismiss. On May 17, 2018, Siskiyou Water Users filed an answer to the joint answer. Because the Commission's rules do not permit answers to answers, Siskiyou Water Users' answer is rejected. 18 C.F.R. § 385.213(a)(2) (2019).

<sup>39</sup> John and Loy Beardsmore filed comments in support of the Siskiyou Water Users' motion to dismiss. John and Loy Beardsmore's April 26, 2018 Comments at 1.

<sup>40</sup> Siskiyou Water Users' Motion to Dismiss at 1-3.

<sup>41</sup> *Id.* at 5-6.

<sup>42</sup> Pub. L. No. 85-222, 71 Stat. 497 (1957).

fish and wildlife, recreation, hydropower, navigation, and flood protection; and to further intergovernmental cooperation and comity with regard to these resources.<sup>43</sup>

29. The original Settlement Agreement, which called for the transfer of portions of the Klamath Project to Interior, which would then oversee decommissioning (not activities within Interior's statutory authority), required congressional approval in order to be implemented. However, the Amended Settlement Agreement, which does not call for actions that require new legislation, does not. Furthermore, whether the Amended Settlement Agreement might require congressional approval has no bearing on the Renewal Corporation's qualifications as the transferee. As discussed below, we have determined that, in the particular circumstances of this case, the Renewal Corporation is qualified to hold the license as a co-licensee for the Lower Klamath Project and that a partial license transfer is in the public interest.<sup>44</sup> By approving a partial transfer, we are not approving or implementing the Amended Settlement Agreement;<sup>45</sup> we are merely acting on the transfer application, which is fully within our authority under the FPA.<sup>46</sup> The Commission's licensing authority, including its authority to approve license transfers, requires no further federal approval.<sup>47</sup>

30. Nor do we find that, by approving a partial transfer, we are facilitating the evasion of the Compact Commission's jurisdiction, as Siskiyou Water Users claims.<sup>48</sup> The Commission recognizes that the Compact is federal law, but we find nothing in the Compact that would allow the Compact Commission to constrain our authority to approve license transfers. As we have stated previously, a party cannot attempt to assign specific intent to general language in the Compact.<sup>49</sup> The Compact grants the Compact

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<sup>43</sup> See Compact Art. I.

<sup>44</sup> *Infra* PP 66-72.

<sup>45</sup> As noted above, although PacifiCorp and the Renewal Corporation attached the Amended Settlement Agreement to the transfer application, it was not provided for Commission approval. *See supra* note 7.

<sup>46</sup> 16 U.S.C. § 801 (2018).

<sup>47</sup> See *PacifiCorp*, 115 FERC ¶ 61,075, at P 22 (2006)

<sup>48</sup> Siskiyou Water Users' Motion to Dismiss at 5-6.

<sup>49</sup> See *PacifiCorp*, 115 FERC ¶ 61,075 at P 22.

Commission specific decisional authority over several actions—approving hydroelectric license transfers is not one of these actions.<sup>50</sup>

31. In short, we find nothing in the Compact that would require Compact Commission approval of a partial license transfer, the Renewal Corporation as the transferee, or the Amended Settlement Agreement before we could act to approve the license transfer. To the contrary, the Compact’s savings clause specifically preserves this Commission’s authority under the FPA.<sup>51</sup>

32. Moreover, we find nothing in the Compact that would prevent us from approving the proposed surrender application, should we decide to do so, or the Renewal Corporation, as co-licensee, carrying out decommissioning and removal. Siskiyou Water Users seems to suggest that, absent approval from the Compact Commission, these actions would be prohibited pursuant to Compact Article IV, which provides that

[i]t shall be the objective of each state, in the formulation and execution of plans for the distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution and use of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.<sup>52</sup>

We find that this suggestion has no merit. The Compact’s general statement that it should be the objective of the States to make efficient use of whatever power head is available in no way infringes on our hydroelectric licensing authority under the FPA, including our authority to determine when license surrender and decommissioning are in the public interest. Although we find we are not barred from approving the proposed surrender, we again clarify that our approval of the partial transfer does not prejudice any

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<sup>50</sup> For example, the Compact confers specific decisional authority to the Compact Commission when one state seeks to acquire property rights in the other state or when one state files a complaint against the other related to water pollution control. *See, e.g.*, Compact Art. VI.A. Notably, the Compact does not grant the Compact Commission any decisional authority that overlaps with our authority to license hydroelectric projects.

<sup>51</sup> *See id.* at Art. XI (preserving all rights, powers, and jurisdiction of the United States, its agencies or those acting by or under its authority in, over and to the waters in the Klamath River Basin); *see also* H.R. Rep. No. 85-1130 at 2 (1957) (noting the House Committee’s concerns with hydroelectric power development in the Klamath River Basin and concluding that the Compact, including Article XI, “adequately protects all the interest of the Federal Government”); *see also* S. Rep. No. 85-834 at 2 (1957).

<sup>52</sup> Compact Art. IV.

particular outcome concerning the proposed license surrender and removal of the project. As noted elsewhere in this order, the Commission will address the application to surrender the Lower Klamath Project license and remove the dams in a separate proceeding, in which all parties will have an opportunity to be heard.

**B. Siskiyou County's Motion for Clarification**

33. On May 2, 2018, the Siskiyou County filed a motion for clarification, or in the alternative, petition for declaratory order.<sup>53</sup> Siskiyou County requests that the Commission clarify it will require preparation of an EIS pursuant to the National Environmental Policy Act (NEPA) prior to issuing a decision on the transfer application.<sup>54</sup> As explained more fully below, we will not prepare a NEPA document prior to acting on the transfer; however, we will do so before acting on the surrender application.

34. Siskiyou County notes that our March 15 Order summarized comments received in response to our notice of the application, and that many of those comments concerned environmental impacts associated with the proposed decommissioning and removal of the Lower Klamath Project.<sup>55</sup> Siskiyou County states that, in the order, we went on to say that “[t]hose impacts will be considered when the Commission takes up the applications for transfer and surrender of the Lower Klamath Projects.”<sup>56</sup> Siskiyou County claims this indicates our intent to prepare a NEPA document prior to acting on the transfer.<sup>57</sup> We clarify that it has never been the Commission’s intent to prepare a NEPA document prior to acting on the transfer application.

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<sup>53</sup> On May 9, 2018, PacifiCorp and the Renewal Corporation filed a joint answer to the motion for clarification.

<sup>54</sup> Some commenters similarly requested that we do a NEPA analysis prior to acting on the transfer application. *E.g.*, John and Loy Beardsmore’s November 3, 2017 Motion to Intervene at 3.

<sup>55</sup> Siskiyou County’s Motion for Clarification at 1-2 (citing March 15 Order, 162 FERC ¶ 61,236 at P 34).

<sup>56</sup> *Id.* at 6.

<sup>57</sup> March 15 Order, 162 FERC ¶ 61,236 at PP 20-34.

35. In our October 5, 2017 notice of the application, we made clear that we were not yet requesting comments on the surrender application;<sup>58</sup> however, we received many comments specific to it. Accordingly, the March 15 Order summarized all the comments received but only addressed comments specific to the amendment.<sup>59</sup> Similarly, in this order, we only address comments germane to the transfer proceeding. Before we make a decision on the surrender application, we will consider the environmental impacts associated with the proposed removal and decommissioning, but at this time we are only approving a partial transfer of the license.

36. In addition to referencing the language used in the March 15 Order, Siskiyou County makes four arguments as to why the Commission must prepare an EIS prior to acting on the transfer application.

37. First, Siskiyou County alleges that our decision on the transfer application “constitutes a major federal action significantly affecting the quality of the human environment,” thus triggering the requirement to comply with NEPA.<sup>60</sup> We disagree. In fact, the partial transfer will result in no additional environmental impacts; it is merely an administrative action. As co-licensees, the Renewal Corporation and PacifiCorp are both obligated to ensure the Lower Klamath Project is operated pursuant to its existing license. Accordingly, there are no environmental effects for the Commission to analyze under NEPA related to the transfer application. Nor do we agree with Siskiyou County’s argument that approval of the transfer will “invariably” lead to decommissioning and removal of the Lower Klamath Project.<sup>61</sup> Although Siskiyou County is correct that the Renewal Corporation was created for the purpose of removing the dams, that does not mean that our decision to partially transfer the license to the Renewal Corporation is tantamount to our approval of the proposed surrender.<sup>62</sup>

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<sup>58</sup> Commission staff’s October 5, 2017 Notice of Application for Amendment and Transfer of License and Soliciting Comments, Motions to Intervene, and Protests at 4 (“We are not requesting comments at this time on the surrender application.”).

<sup>59</sup> March 15 Order, 162 FERC ¶ 61,236 at P 34.

<sup>60</sup> Siskiyou County’s Motion for Clarification at 7 (quoting NEPA, 42 U.S.C. § 4332(2)(C) (2018)).

<sup>61</sup> Siskiyou County’s Motion for Clarification at 9.

<sup>62</sup> Indeed, prior to deciding to condition our approval of the transfer on PacifiCorp remaining as a co-licensee, we requested additional information from the Renewal Corporation about how it would operate the Lower Klamath Project in the event surrender is denied. March 15 Order, 162 FERC ¶ 61,236 at Appendix. The Renewal Corporation responded on June 29, 2018, explaining that, should we declined to approve

38. Second, Siskiyou County claims that waiting to commence the NEPA process until the Commission initiates the surrender proceeding constitutes improper segmentation,<sup>63</sup> asserting that “[a]n agency impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”<sup>64</sup> As stated above, there are no environmental impacts associated with the transfer proceeding. Accordingly, there are no impacts that will be excluded from our review by not commencing the NEPA process until we initiate the surrender proceeding.

39. Third, Siskiyou County argues that the Commission is obligated to commence the NEPA process “at the earliest possible time.”<sup>65</sup> Siskiyou County notes that the regulations implementing NEPA state that an EIS must be “prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”<sup>66</sup> Because there are no environmental impacts associated with the transfer and because the Renewal Corporation cannot pursue surrender of a license for which it is not yet a licensee, we appropriately decided to commence the NEPA process upon initiating the surrender proceeding. With regard to the surrender proceeding, the Commission will complete the NEPA process prior to making its decision on the surrender application; accordingly, the Commission’s decision in that proceeding will be fully informed by the NEPA process.

40. And lastly, Siskiyou County argues that the Commission’s categorical exclusions to NEPA are not applicable here given the “extraordinary circumstances” of this proceeding.<sup>67</sup> Although the Commission’s regulations provide that license transfers are

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the surrender application, the parties to the Amended Settlement Agreement would confer regarding potential amendments to the agreement and PacifiCorp would continue to operate the project pursuant to its Operation and Maintenance Agreement with the Renewal Corporation. Renewal Corporation’s June 29, 2018 Response to Information Request, Exhibit A at 6.

<sup>63</sup> Siskiyou County’s Motion for Clarification at 10-11.

<sup>64</sup> *Id.* at 10 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

<sup>65</sup> *Id.* at 11-12 (citing 40 C.F.R. § 1501.2 (2019)).

<sup>66</sup> *Id.* at 12 (quoting 40 C.F.R. § 1502.5).

<sup>67</sup> *Id.* at 14.

categorically excluded from NEPA,<sup>68</sup> Siskiyou County notes that the regulations implementing NEPA state that an agency that adopts categorical exclusions to NEPA must “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”<sup>69</sup> Additionally, Siskiyou County points out that the Commission’s regulations also stipulate that the Commission may require some environmental analysis where the categorically excluded activity may have an effect on wilderness areas, wild and scenic rivers, wetlands, anadromous fish or endangered species, or where environmental effects are uncertain.<sup>70</sup> Here, there will be no environmental effects whatsoever associated with the transfer. The partial transfer of the Lower Klamath Project license is appropriately excluded from NEPA review.

41. In sum, partial transfer of the license will not result in environmental impacts. The Commission will comply with NEPA and fully consider environmental impacts associated with the proposed decommissioning and removal prior to making a decision on the surrender application. Therefore, Siskiyou County’s motion for clarification, and in the alternative petition for declaratory order, is denied.

### C. Requests to Delay Action

42. On April 8, 2020, Siskiyou County filed a request that the Commission delay action on the transfer proceeding until resolution of the COVID-19 pandemic.<sup>71</sup> Siskiyou County argues that “now is not the time to make a hasty decision,” and that it has concerns about the Commission’s ability to make an informed decision at this time.<sup>72</sup> Similarly, on April 10, 2020, Del Norte County filed a request that the Commission delay action on the transfer application until the COVID-19 crisis has resolved, unless Del Norte County is able to reach an agreement with the Renewal Corporation regarding local

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<sup>68</sup> See 18 C.F.R. § 380.4(a)(8) (2019).

<sup>69</sup> Siskiyou County’s Motion for Clarification at 14 (“quoting 40 C.F.R. § 1508.4 (2019)).

<sup>70</sup> *Id.* (citing 18 C.F.R. § 380.4(b)).

<sup>71</sup> Siskiyou County’s April 8, 2020 Request to Delay Action. Other commenters also noted that the Commission should delay action during the COVID-19 pandemic. *E.g.*, Loy and John Beardsmore’s April 10, 2020 Comments at 3.

<sup>72</sup> *Id.* at 2.

mitigation due to potential damage associated with dam removal.<sup>73</sup> Del Norte County states that it cannot easily “allocate resources to both dam removal and COVID-19.”<sup>74</sup>

43. We note that our decision on this transfer application is far from hasty. The Renewal Corporation and PacifiCorp filed their transfer application in September 2016. The Commission and its staff have spent nearly four years carefully reviewing the application, issuing numerous information requests, and requesting the Board’s review of various items. Moreover, all stakeholders have had ample time to provide us their comments on the proceeding. The Commission has taken the necessary steps to ensure it can continue to carry out its mission and fulfill its statutory obligations during the COVID-19 pandemic. The pandemic has not impeded our ability to make an informed decision on the application.

44. As to Del Norte County’s comments, we reiterate that we are not acting on the surrender application here. In this order, we are approving the partial transfer of the Lower Klamath Project license; however, pending our action on the surrender application, the project will continue to be operated under the terms of its existing license.

## V. Discussion

### A. Co-Licensees

45. We recognize that the intent of the parties to the Amended Settlement Agreement was for PacifiCorp to wholly relinquish its interest in the Lower Klamath Project to the Renewal Corporation, with PacifiCorp continuing to provide management and operations services, but having no responsibility or liability as a licensee. While we have yet to address the surrender application, because of the magnitude of the proposed decommissioning, the uncertainties attendant on final design and project execution, and the potential impacts of dam removal on public safety and the environment, we conclude that, should we ultimately approve a surrender and decommissioning plan, it would not be in the public interest for the entire burden of these efforts to rest with the Renewal Corporation should we approve the surrender application. Although, as we discuss below, the financial and technical arrangements envisioned by the parties might well suffice to carry out the planned activities, there is a significant degree of uncertainty associated with the project. Costs could escalate beyond the level anticipated and unexpected technical issues could arise. Were the Renewal Corporation to be the sole licensee, it might ultimately be faced with matters that it is not equipped to handle. Unlike the Renewal Corporation, which has limited finances and no experience with

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<sup>73</sup> Del Norte County, California’s April 10, 2020 Request to Delay Action at 3.

<sup>74</sup> *Id.* at 12.

hydropower dam operation or dam removal, PacifiCorp has additional resources as well as experience in removing a major project<sup>75</sup> and the experience of operating the facilities associated with the Lower Klamath Project for the last nearly 32 years. Accordingly, we believe that the public interest requires that PacifiCorp remain a co-licensee, and we condition our approval of the transfer upon it doing so. If PacifiCorp and the Renewal Corporation accept their status as co-licensees, we will deem the surrender application to be jointly filed and will process it accordingly.

46. We recognize that this conclusion represents a significant change from what the parties envisioned, although we note that the Amended Settlement Agreement recognizes the possibility of PacifiCorp being a co-licensee.<sup>76</sup> However, it is not necessarily the case that the final results will change from those the parties anticipated. For example, should we approve the proposed decommissioning, it may be that the funding available to the Renewal Corporation will be sufficient to cover the costs of decommissioning and that no substantial unforeseen issues will arise. Further, PacifiCorp and the Renewal Corporation may elect to amend their arrangement in order for the Renewal Corporation to indemnify PacifiCorp for any expenses it bears as result of it being a co-licensee. In the final analysis, however, we do not find it consistent with our obligation to protect the public interest to transfer the Lower Klamath Project to the Renewal Corporation as sole licensee for the purpose of decommissioning the project.

#### **B. March 15 Order Information Requests**

47. As noted above, in our March 15 Order, we stated that we needed additional information before we could consider the transfer application. Specifically, we requested information regarding funding for dam operation and removal, as well as information related to the contingency reserve, insurance, and risk mitigation. Since issuance of March 15 Order, the Renewal Corporation has provided a substantial amount of additional information, which has been thoroughly reviewed by the Board. Based on this more fully developed record, we now consider the transfer application.<sup>77</sup>

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<sup>75</sup> See *PacifiCorp*, 133 FERC ¶ 61,232 (2010) (accepting surrender and authorizing decommissioning of the Condit Hydroelectric Project No. 2342).

<sup>76</sup> See Amended Settlement Agreement at 7.1.7A (“PacifiCorp will provide technical support to [the Renewal Corporation] and to FERC in processing the surrender application, but will not be a co-applicant or co-licensee on the surrender application unless otherwise mutually agreed upon with the [Renewal Corporation].”).

<sup>77</sup> Although not discussed further below, the March 15 Order required that the Renewal Corporation provide a detailed explanation of how PacifiCorp, the Renewal Corporation, and the States of Oregon and California would make their necessary determinations before the license transfer can be effective. March 15 Order, 162 FERC

## 1. Funding for Dam Removal

48. The Amended Settlement Agreement provides that the Renewal Corporation will have three sources of funding for decommissioning, removal, and restoration of the Lower Klamath Project, totaling \$450,000,000: (1) \$184,000,000 from the Oregon Customer Surcharge; (2) \$16,000,000 from the California Customer Surcharge; and (3) \$250,000,000 from the California Bond Measure. The agreement provides that this \$450,000,000 State Cost Cap is the maximum monetary contribution available from the States of Oregon and California.

49. At the time of our March 15 Amendment Order, executed agreements for the Oregon Customer Surcharge and the California Bond Measure had been filed with the Commission,<sup>78</sup> but the Renewal Corporation lacked an executed California Funding Agreement with the California Public Utilities Commission for the disbursement of the California Customer Surcharge. Therefore, we required the filing of this executed agreement prior to our action on the transfer application.<sup>79</sup>

50. The California Funding Agreement, executed on December 14, 2017, was filed on June 29, 2018.<sup>80</sup> Thus, executed agreements for all three funding sources have now been filed with the Commission. These agreements provide for the disbursement of state authorized funds for the various phases of activities associated with implementing the Amended Settlement Agreement, including permitting and regulatory requirements, procurement of contractors, and implementing the Definite Plan.

51. In addition, in our March 15 Order, we noted that, according to the Renewal Corporation, the Customer Surcharges and the Bond Measure had expiration dates in January 2022 and July 2020, respectively.<sup>81</sup> We stated that, although the Renewal Corporation had informed us it would seek extensions from the States if necessary, we

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¶ 61,236 at Appendix; *see also supra* P 12. The Renewal Corporation and PacifiCorp, jointly, provided this information on June 29, 2018. Renewal Corporation and PacifiCorp's June 29, 2018 Response to Information Request.

<sup>78</sup> Renewal Corporation's March 1, 2017 Filing, Attachments F and G.

<sup>79</sup> March 15 Order, 162 FERC ¶ 61,236 at P 58 and Appendix.

<sup>80</sup> Renewal Corporation's June 29, 2018 Response to Information Request, Exhibit B.

<sup>81</sup> March 15 Order, 162 FERC ¶ 61,236 at P 60. The March 15 Order incorrectly stated that the expiration date for the California Bond Measure was June 30, 2021.

had no assurance that the States would be amenable to extensions.<sup>82</sup> Since our March 15 Order, the Renewal Corporation has secured extensions to the expiration dates for all three funding sources. The new expiration date for the Oregon and California Customer Surcharges is December 31, 2024, and the new expiration date for the California Bond Measure is July 1, 2025.<sup>83</sup>

52. In our March 15 Order, we also asked that the Renewal Corporation provide an updated cost estimate for the proposed decommissioning, removal, and restoration of the Lower Klamath Project.<sup>84</sup> Since that time, the Renewal Corporation has updated its cost estimate several times, most recently in its February 28, 2020 filing. Prior to providing its February 2020 cost estimate, the Renewal Corporation entered into a contract with Kiewit Infrastructure West Co. (Kiewit) to perform the dam removal work and identified Resource Environmental Solutions LLC (RES) as the entity that will perform the habitat restoration and mitigation measures.<sup>85</sup> The Renewal Corporation's latest cost estimate reflects a Guaranteed Maximum Price based on 60% design specifications from Kiewit and RES.<sup>86</sup> The updated Guaranteed Maximum Price for dam removal and restoration is \$276,869,497,<sup>87</sup> and the updated total project cost, including contingencies, is estimated at \$445,575,000.<sup>88</sup> This total is below the State Cost Cap and below the Renewal Corporation's updated total budget of \$450,750,000, which now includes accrued interest on funds held by the Renewal Corporation.<sup>89</sup>

53. We recognize that the cost estimate is approaching the State Cost Cap, which is why the Commission and the Board have asked the Renewal Corporation to continue to

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<sup>82</sup> *Id.*

<sup>83</sup> Renewal Corporation's July 29, 2019 Filing at 13 and Attachment L.

<sup>84</sup> March 15 Order, 162 FERC ¶ 61,236 at P 65 and Appendix.

<sup>85</sup> Renewal Corporation's July 29, 2019 Filing at 4; Renewal Corporation's February 28, 2020 Filing at 2.

<sup>86</sup> Renewal Corporation's February 28, 2020 Filing at 2-5.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> Renewal Corporation's February 28, 2020 Filing, Attachment D. The total project cost includes the Guaranteed Maximum Price, permitting fees, insurance, contingency and operating reserves, and all other administrative items. Renewal Corporation's February 28, 2020 Filing at 5.

<sup>89</sup> Renewal Corporation's February 28, 2020 Filing at 5 and Attachment D.

update and refine its Plan B (i.e., how the Renewal Corporation proposes to fund decommissioning and removal if total project costs exceed the state cost cap).<sup>90</sup> As of February 2020, the Renewal Corporation's Plan B consists of the following elements: (1) value engineering to identify opportunities to reduce costs and risks; (2) consideration of scope reduction, including only partial removal of the Lower Klamath Project; and (3) joint effort by parties to the Amended Settlement Agreement to secure third-party funding.<sup>91</sup> The Renewal Corporation states that it "reasonably expects to secure additional funds if necessary, taking into consideration . . . the active support of the States and other [Amendment Settlement Agreement] parties for completion of the Project."<sup>92</sup> This statement is supported by letters filed by the States of Oregon and California in March 2020, reiterating their support for the proposal and their commitments to secure additional funding if necessary.<sup>93</sup>

54. In its Report No. 2, the Board states that:

[t]he Renewal Corporation has realized significant progress in addressing [the Board]'s recommendations presented in our Supplement to Meeting No. 1 Report. The [Guaranteed Maximum Price] costs and contingencies are based on the 60% design, and fall within the state cost cap. [The Board] opines that there will be uncertainty around the 'adequacy' of available funding through completion of the Project. However, the [Board] opines that Renewal Corporation's 'Plan B' appears to be appropriate given the status of the [Guaranteed Maximum Prices] and their contingency at this 60% design stage, and has provided preliminary estimates of cost reductions that could potentially be realized through value engineering and partial removal alternatives.

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<sup>90</sup> March 15 Order, 162 FERC ¶ 61,236 at P 65 and Appendix; Renewal Corporation's December 12, 2018 Filing, Exhibit A at 12.

<sup>91</sup> Renewal Corporation's February 28, 2020 Filing at 8; Renewal Corporation's March 20, 2020 Filing, Report No. 2 at 8-10.

<sup>92</sup> Renewal Corporation's February 28, 2020 Filing at 8.

<sup>93</sup> State of Oregon's March 6, 2020 Letter at 2 ("[I]n the highly unlikely circumstance that costs exceed existing funds, Oregon remains committed to work with other [Amended Settlement Agreement] signatories to ensure necessary resources to complete the project."); State of California's March 9, 2020 Letter at 2 ("[I]n the highly unlikely event that there's insufficient funding, the [California Department of Fish and Wildlife (California DFW)] will work with other [Amended Settlement Agreement] signatories to secure additional funding. The potential of a stranded asset is untenable to [California DFW].").

...

Finally, and most importantly, the States' letters of support indicate that they *'are satisfied that the corporation is on track to meet its obligations under the [Amended Settlement Agreement], as well as meet the Commission's (license transfer) requirements'*, and are committed to *'work with other [Amended Settlement Agreement] signatories to secure additional funding.'*<sup>94</sup>

55. We find that the Renewal Corporation has adequately responded to the information requests in our March 15 Order concerning funding, given our decision that PacifiCorp will remain as a co-licensee.

## 2. Contingency Reserve, Insurance, and Risk Mitigation

56. As we noted in the March 15 Order, separate from the issue of the project's estimated cost is the amount of contingency reserve to address the risks of project delays or additional costs caused by circumstances beyond the Renewal Corporation's control.<sup>95</sup> Accordingly, we required an updated contingency reserve based on the most recent cost estimates, as well as an assessment of its adequacy.<sup>96</sup>

57. Since issuance of the March 15 Order, the Renewal Corporation has updated its contingency reserve a number of times, most recently in its February 28, 2020 filing. In that filing, the Renewal Corporation states that its contingency reserve totals more than \$50 million, which "consists of amounts that Kiewit and RES included in the [Guaranteed Maximum Price], as well as \$35.1 million retained by the Renewal Corporation as owner."<sup>97</sup>

58. In its Report No. 2, the Board notes that

[w]ith the security of the 60% design and the Kiewit and RES [Guaranteed Maximum Prices] and contracts in place or well advanced, there is less uncertainty with the project's cost than at the time of completion of the Definite Plan. Appropriately the contingency amount will continue to be

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<sup>94</sup> Renewal Corporation's March 20, 2020 Filing, Report No. 2 at 14 (emphasis in original).

<sup>95</sup> March 15 Order, 162 FERC ¶ 61,236 at P 66.

<sup>96</sup> *Id.* P 66 and Appendix.

<sup>97</sup> Renewal Corporation's February 28, 2020 Filing at 5.

assessed as value engineering and scope changes are made, as well as agency permit conditions and stipulations become known.<sup>98</sup>

59. The Board opines, however, that the Renewal Corporation may have eliminated the estimate and design contingencies too early.<sup>99</sup> The Board also notes that “a significant change in scope, unforeseen condition, or force majeure event could result in costs well in excess of the \$35 Million contingency[,]” and, accordingly, highlights the importance of the Plan B.<sup>100</sup> As noted above, the Board found the Plan B to be “appropriate” given the current Guaranteed Maximum Prices and their contingencies.<sup>101</sup>

60. Our March 15 Order also required the Renewal Corporation to provide a list of the types and amounts of insurance policies and surety arrangements it anticipates securing.<sup>102</sup> Additionally, we stated we would need to review the Renewal Corporation’s risk register and risk management plan.<sup>103</sup>

61. Like the other elements discussed above, over time, the Renewal Corporation has refined its plan regarding the types and amounts of insurance policies it plans to secure.<sup>104</sup> Since the March 15 Order, the Renewal Corporation engaged Aon as its insurance advisor and broker.<sup>105</sup> Ultimately, based in part on changes in the insurance marketplace and Aon’s recommendation, the Renewal Corporation decided to use the corporate insurance programs of Kiewit and RES.<sup>106</sup> Additionally, the Renewal Corporation will

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<sup>98</sup> Renewal Corporation’s March 20, 2020 Filing, Report No. 2 at 10.

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *See supra* P 54.

<sup>102</sup> March 15 Order, 162 FERC ¶ 61,236 at P 72 and Appendix.

<sup>103</sup> *Id.* P 70 and Appendix.

<sup>104</sup> *See* Renewal Corporation’s March 20, 2020 Filing, Report No. 2 at 6.

<sup>105</sup> Renewal Corporation’s July 29, 2019 Filing at 9.

<sup>106</sup> Renewal Corporation’s February 28, 2020 Filing at 6.

obtain an Owner's Interest Policy<sup>107</sup> to address any events following license transfer and before proposed decommissioning.<sup>108</sup>

62. In its Report No. 2, the Board concludes that the Renewal Corporation's most recent insurance proposal is "the most appropriate and cost effective alternative."<sup>109</sup> Additionally, the Board states that it is "satisfied that both Kiewit and RES possess substantial bonding capacity and relationships with sureties to satisfy the surety requirements set forth in the Kiewit and RES Agreements."<sup>110</sup> The Board recommends that it continue to review future iterations of the project insurance program, and the Renewal Corporation has accepted this recommendation.<sup>111</sup>

63. The Renewal Corporation included its Risk Management Plan as an appendix to its Definite Plan, filed on June 29, 2018.<sup>112</sup> At that time, the Renewal Corporation also provided its first iteration of its risk register, which has been regularly updated since then. In its Report No. 2, the Board noted that the latest iteration of the risk register shows "good progress" and explained that the register is a living document that will continue to be modified throughout the project.<sup>113</sup> The Board recommends that the Renewal Corporation update the risk register on a monthly basis, and the Renewal Corporation has accepted this recommendation.<sup>114</sup>

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<sup>107</sup> The Owner's Interest Policy would protect the Renewal Corporation in the event the Renewal Corporation is held legally liable for a loss that arises out of its sole negligence or willful misconduct. Renewal Corporation's February 28, 2020 Filing, Attachment L at 19.

<sup>108</sup> Renewal Corporation's February 28, 2020 Filing at 6.

<sup>109</sup> Renewal Corporation's March 20, 2020 Filing, Report No. 2 at 6.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 13; Renewal Corporation's March 20, 2020 Filing, Response to Report No. 2 at 2.

<sup>112</sup> Renewal Corporation's June 29, 2018 Response to Information Request, Definite Plan, Exhibit A.

<sup>113</sup> Renewal Corporation's March 20, 2020 Filing, Report No. 2 at 7.

<sup>114</sup> *Id.* at 13; Renewal Corporation's March 20, 2020 Filing, Response to Report No. 2 at 2.

64. On April 27, 2020, the Renewal Corporation provided the Board with an updated risk assessment incorporating the latest cost estimates,<sup>115</sup> as requested by the Board in its Report No. 2.<sup>116</sup> The Board found the latest risk analysis to be “commensurate with the status of the project at 60% design.”<sup>117</sup>

65. We find that the Renewal Corporation has adequately responded to the information requests in our March 15 Order concerning contingency reserve, insurance, and risk mitigation, given our decision that PacifiCorp will remain as a co-licensee.

### C. Review of Transfer Application

66. Section 8 of the FPA,<sup>118</sup> which governs license transfers, does not articulate a standard for approving a transfer application.<sup>119</sup> However, the Commission has held that a transfer may be approved on a showing that the transferee is qualified to hold the license and operate the project, and that a transfer is in the public interest.<sup>120</sup> Section 9.2 of the Commission’s regulations requires applicants to “set forth in appropriate detail the qualifications of the transferee to hold such license and to operate the property under license.”<sup>121</sup>

67. As we explained in our March 15 Order,<sup>122</sup> the Commission has not previously considered an application to transfer a license to a new entity whose sole purpose is to surrender the license and decommission the project, as is the case here.<sup>123</sup> Transferring a

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<sup>115</sup> Renewal Corporation’s June 10, 2020 Filing, Attachment A.

<sup>116</sup> See Renewal Corporation’s March 20, 2020 Filing, Report No. 2 at 13.

<sup>117</sup> Renewal Corporation’s June 10, 2020 Filing, Attachment D.

<sup>118</sup> 16 U.S.C. § 801 (2018); see also 18 C.F.R. §§ 9.1-9.3 (2019).

<sup>119</sup> See *Potosi Generating Station, Inc.*, 100 FERC ¶ 61,115 (2002).

<sup>120</sup> See 18 C.F.R. § 9.3; see also *Kootenai Tribes Energy Keepers, Inc.*, 153 FERC ¶ 61,217 (2015); *Gallia Hydro Partners*, 110 FERC ¶ 61,237 (2005); *Wisconsin v. FERC*, 104 F.3d 462 (D.C. Cir. 1997).

<sup>121</sup> 18 C.F.R. § 9.2 (2019).

<sup>122</sup> March 15 Order, 162 FERC ¶ 61,236 at PP 50-51.

<sup>123</sup> Commission staff, however, has considered this type of application twice before. For a discussion of staff’s handling of these two cases, see March 15 Order, 162 FERC ¶ 61,236 at P 52.

project to a newly formed entity for the sole purpose of decommissioning and dam removal raises unique public interest concerns, specifically whether the transferee will have the legal, technical, and financial capacity to safely remove project facilities and adequately restore project lands. If a project is transferred to an entity that lacks the financial and operational capacity to complete these measures, and if the Commission can no longer hold the former licensee liable, the responsibility to decommission a project or restore project lands may fall to federal or state authorities. To prevent this, Commission staff applies more scrutiny to transfer applications where the transferee intends to surrender and decommission the project.<sup>124</sup>

68. Some commenters assert that the Renewal Corporation is a “shell corporation,” created only to shield PacifiCorp and the States of Oregon and California from liability associated with dam removal.<sup>125</sup> As discussed elsewhere in this order, we are approving the transfer application, contingent on PacifiCorp remaining on as a co-licensee; thus, PacifiCorp will not be shielded from liability associated with dam removal. Further, we note that the Renewal Corporation is a California non-profit corporation in good standing.<sup>126</sup> The Renewal Corporation’s articles of incorporation explicitly provide for implementation of the Amended Settlement Agreement, as well as to maintain and operate, and modify the Lower Klamath Project as needed.<sup>127</sup> The Renewal Corporation’s bylaws describe the day-to-day management responsibilities of the Renewal Corporation, as licensee.<sup>128</sup> The Renewal Corporation has agreed to accept all the terms and conditions of the license and to be bound by the license as if it were the original licensee.<sup>129</sup>

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<sup>124</sup> See Policy Statement on *Project Decommissioning at Relicensing*, 60 Fed. Reg. 339, 346 (Jan. 4, 1995); see also FERC Stats. & Regs. ¶ 31,011, 31,232-33 (1994); *Fraser Papers Inc.*, 87 FERC ¶ 61,177, *order on reh’g*, 89 FERC ¶ 61,286 (1999).

<sup>125</sup> See, e.g., Siskiyou County’s November 6, 2017 Motion to Intervene at 9; see also Rex Cozzalio’s April 22, 2020 Comments at 3-4.

<sup>126</sup> PacifiCorp and Renewal Corporation’s September 23, 2016 Application, Attachment J.

<sup>127</sup> PacifiCorp and Renewal Corporation’s September 23, 2016 Application, Attachment H.

<sup>128</sup> PacifiCorp and Renewal Corporation’s September 23, 2016 Application, Attachment I.

<sup>129</sup> PacifiCorp and Renewal Corporation’s September 23, 2016 Application at 19.

69. According to PacifiCorp and the Renewal Corporation's transfer application, and pursuant to an executed Operation and Maintenance Agreement filed on December 4, 2017,<sup>130</sup> PacifiCorp will operate and maintain the Lower Klamath Project at PacifiCorp's own cost, after transfer of the license, until the Renewal Corporation begins substantial removal of the four dams. The agreement also expressly states that after the transfer, PacifiCorp will perform all of the operation and maintenance functions with respect to the Lower Klamath Project that it would have performed if it were the licensee, including maintaining appropriate records and filing required reports with the Commission.<sup>131</sup> Our decision to require PacifiCorp to remain a co-licensee should not disrupt the agreement between the parties for PacifiCorp to perform all operation and maintenance functions for the Lower Klamath Project, but PacifiCorp will be doing so as a co-licensee as opposed to a non-licensee.

70. Klamath County, Oregon expresses concern regarding the tax status of the Renewal Corporation and whether the county may lose property tax revenues as a result of the transfer.<sup>132</sup> The Renewal Corporation's status and obligations under state law, however, are not germane to this proceeding.

71. Because the Renewal Corporation intends to decommission and remove the Lower Klamath Project, we have applied more than usual scrutiny to this transfer application, as evidenced by the extensive review the transfer application has undergone. In particular, we have examined whether the Renewal Corporation has the capacity to carry out the proposed decommissioning and removal.<sup>133</sup> We acknowledge that some commenters have questioned the Renewal Corporation's ability, financially and otherwise, to undertake the proposed surrender;<sup>134</sup> however, we find that the Board has thoroughly examined these concerns and found the Renewal Corporation's financing, insurance, and contingencies to be appropriate for what it proposes to do. Although we are generally

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<sup>130</sup> Renewal Corporation's December 4, 2017 Response to Information Request, Attachment A, Exhibit D.

<sup>131</sup> *Id.* at 13, 15.

<sup>132</sup> Klamath County, Oregon's November 6, 2017 Motion to Intervene at 4.

<sup>133</sup> As noted previously, we are not yet acting on the merits of the Renewal Corporation's surrender application; rather, at this time, we are limiting our review to the Renewal Corporation's capacity to carry out the proposal.

<sup>134</sup> *See, e.g.*, Siskiyou County's September 6, 2019 Comments at 2-4 (expressing concern with the cost estimate and the Renewal Corporation's ability to manage risks); Loy and John Beardsmore's September 10, 2019 Comments (arguing the Renewal Corporation has not demonstrated it has the capacity to undertake dam removal).

satisfied that the Renewal Corporation has the capacity to carry out its proposed decommissioning, we find that the public interest would be best served by approving a partial transfer of the license and requiring PacifiCorp to remain on as a co-licensee. Unlike the Renewal Corporation, PacifiCorp has experience operating and decommissioning Commission-licensed hydropower projects. As a co-licensee, PacifiCorp not only can provide legal and technical expertise, as the parties envisioned, but can also provide further assurance that there will be sufficient funding to carry out decommissioning, should we approve the surrender application. Moreover, as a matter of policy, we find that it would be inappropriate for PacifiCorp, which has been the licensee for the Klamath Project since 1988, to relieve itself of all liability associated with the proposed decommissioning should it be approved.

72. Based on the above, we find that the Renewal Corporation is qualified to be a co-licensee for the Lower Klamath Project, and that a partial transfer is in the public interest.<sup>135</sup>

73. Some commenters request that, should we approve the transfer, we include certain mitigation measures as conditions of the transfer.<sup>136</sup> For example, Upper Klamath Outfitters Associated requested that we include “modest common-sense recreation mitigation as a requirement in the license transfer.”<sup>137</sup> The City of Yreka, California requests that any Commission action in this proceeding “expressly ensure that [the City’s] water rights are preserved, and require the applicants to take appropriate action to

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<sup>135</sup> Moreover, we are satisfied that, until the Commission acts on the surrender application, the project will be operated in accordance with its existing license. *See supra* P 69. Additionally, should the Commission decline to approve the surrender application, the Renewal Corporation has explained that the parties to the Amended Settlement Agreement would confer regarding potential amendments to the agreement and PacifiCorp would continue to operate the project pursuant to its Operation and Maintenance Agreement with the Renewal Corporation. Renewal Corporation’s June 29, 2018 Response to Information Request, Exhibit A at 6.

<sup>136</sup> In addition, several commenters request that certain measures or conditions be included in any future order approving the surrender application. *See, e.g.*, American Whitewater’s November 3, 2017 Motion to Intervene and Comments at 3. The Commission will determine whether, and under what conditions, to approve the proposed surrender in the surrender proceeding.

<sup>137</sup> Upper Klamath Outfitters Association’s January 15, 2020 Comments at 1.

mitigate any impacts on the City.”<sup>138</sup> And Bart and Mary Kent request that we put in place conditions regarding compensation for homeowners around Copco Lake.<sup>139</sup>

74. As we have explained above, the mere transfer of the license will not alter the project’s environmental impacts, or the determination of what mitigation measures may be warranted if the surrender is approved. It is therefore unnecessary and premature to include such measures as conditions of this partial transfer. We have previously explained that the imposition of new environmental conditions in a transfer proceeding is inappropriate.<sup>140</sup> To the extent the requested measures are related to the proposed surrender, we will consider them in the surrender proceeding.

#### **D. Administrative Matters**

75. Approval of this partial transfer is contingent on the transfer of title to properties under the license and delivery of all license instruments. The Commission’s practice is to require the transferee to file this information within 60 days of issuance of a transfer order. In order to comply with certain measures in the Amended Settlement Agreement,<sup>141</sup> PacifiCorp and the Renewal Corporation request that we allow them six months to file the instruments of conveyance. We grant this request.

76. On June 21, 2018, we stayed the effectiveness of our March 15 Order until such time as we act on the transfer application. We now lift that stay. In their amendment and transfer application, PacifiCorp and the Renewal Corporation request that we make the amendment effective the date the transfer is effective. We also grant this request. Thus, although we lift the stay of the amendment order, we note that the amendment will be effective on the day the partial transfer is effective after the applicants have complied with ordering paragraph (C). PacifiCorp must file revised Exhibits K and L drawings for the Klamath Project within six months of the date of this order, and PacifiCorp and Renewal Corporation must file revised Exhibits K and L for the Lower Klamath Project within six months of the date of this order.<sup>142</sup>

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<sup>138</sup> City of Yreka, California’s August 14, 2018 Motion to Intervene Out-of-Time and Comments at 5.

<sup>139</sup> Bart and Mary Kent’s March 12, 2020 Comments at 2.

<sup>140</sup> *Pacific Gas and Elec. Co.*, 87 FERC ¶ 61,022 (1999).

<sup>141</sup> *See supra* P 12.

<sup>142</sup> *See* March 15 Order, 162 FERC ¶ 61,236 at ordering paras. (D) and (I).

## VI. Conclusion

77. Because of the pending proposal to surrender and decommission the Lower Klamath Project, we applied particular scrutiny to this transfer application. Although we are generally satisfied that the Renewal Corporation has the capacity to carry out the proposed decommissioning, for the reasons discussed above, we find that the public interest would be best served by approving a partial transfer of the license and requiring PacifiCorp to remain as a co-licensee. We find that the Renewal Corporation is qualified to be a co-licensee for the Lower Klamath Project, and that a partial transfer is in the public interest.

### The Commission orders:

(A) The partial transfer of the license for the Lower Klamath Project No. 14803 from PacifiCorp to PacifiCorp and the Klamath River Renewal Corporation, as co-licensees, is approved as modified by paragraphs (B) and (C) below.

(B) PacifiCorp must pay all annual charges that accrue up to the effective date of the partial transfer. PacifiCorp and the Klamath River Renewal Corporation will be jointly responsible for subsequent annual charges through the remaining term of the license and any extensions.

(C) Approval of the transfer is contingent upon: (1) transfer of title of the properties under the license, transfer of all project files including all dam safety related documents, and delivery of all license instruments to Klamath River Renewal Corporation, which must be subject to the terms and conditions of the license as though it were the original co-licensee; and (2) Klamath River Renewal Corporation as co-licensee acknowledging acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheet. Within six months from the date of this order, PacifiCorp and the Klamath River Renewal Corporation, as co-licensees, must submit certified copies of all instruments of conveyance and the signed acceptance sheet.

(D) Siskiyou County Water Users Association's motion to dismiss the transfer application is denied.

(E) County of Siskiyou, California's motion for clarification, or in the alternative, petition for declaratory order is denied.

(F) The stay of the order Amending License and Deferring Consideration of Transfer Application is lifted. The effective date of the Klamath Project license amendment will be the effective date of the partial transfer of the Lower Klamath Project license.

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(G) PacifiCorp must file revised Exhibits K and L for the Klamath Project within six months of the date of this order. PacifiCorp and the Klamath River Renewal Corporation must file revised Exhibits K and L for the Lower Klamath Project within 6 months of the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, has caused its corporate name to be signed hereto by \_\_\_\_\_, its President, and its corporate seal to be affixed hereto and attested by \_\_\_\_\_ its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, a certified copy of the record of which is attached hereto.

By \_\_\_\_\_

Attest:

\_\_\_\_\_  
Secretary  
(Executed in triplicate)

Document Content(s)

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