



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

February 7, 2011

Dean Brockbank,
Vice President & General Counsel
PacifiCorp Energy
1407 West North Temple, Suite 320
Salt Lake City, Utah 84116

RE: Resolution of PacifiCorp Energy's Dispute Under the Klamath Hydroelectric Settlement Agreement

Dear Mr. Brockbank:

As you are aware, staff from the National Marine Fisheries Service ("NMFS"), Department of the Interior ("DOI"), and PacifiCorp have had several meetings pursuant to Section 8.6.4 of the Klamath Hydropower Settlement Agreement ("KHSA"), to attempt to resolve the dispute that is the subject of your Notice of Initiation of Dispute Resolution by PacifiCorp Energy ("PacifiCorp"), dated January 11, 2011 ("Notice"). It is my understanding that these meetings are leading to a successful resolution, PacifiCorp will withdraw its Notice, and PacifiCorp will take actions requested by the Bureau of Reclamation (Reclamation) to implement flow variability provisions of NMFS' 2010 Biological Opinion (2010 BO) on the Reclamation's operation of the Klamath Irrigation Project. Based on this understanding, NMFS is providing PacifiCorp with the following clarifications of issues.

As you know, NMFS sent a response letter to Reclamation on January 3, 2011, regarding Reclamation's proposed modifications to Iron Gate Dam (IGD) winter flows to implement the Fall and Winter Flow Variability Program (Flow Variability Program) described in Reasonable and Prudent Alternative (RPA) 1 of the 2010 BO, which includes providing up to 18,600 acre-feet of water in the fall and winter period to simulate short-term flow increases from significant precipitation events below IGD. Based on reasons described in that letter, NMFS determined that Reclamation's proposed modifications are consistent with the 2010 BO's Term and Condition 2A. In addition, Reclamation is more recently proposing to implement flows from IGD consistent with the hydrograph flow schedule in Attachment A to this letter. Based on an evaluation that NMFS will provide in a letter to Reclamation, NMFS has determined that this proposed flow schedule is consistent with NMFS' 2010 BO. In turn, PacifiCorp must modify



operations at its hydroelectric facilities on the Klamath River in order for the flows under the Flow Variability Program, including the flow schedule in Attachment A, to result below IGD. Thus, PacifiCorp would be taking action necessary for Reclamation to implement the Flow Variability Program as it is described in the 2010 BO. If PacifiCorp takes actions necessary for Reclamation to implement these and other flows below IGD consistent with the 2010 BO, PacifiCorp will be acting within the scope of coverage of the Incidental Take Statement issued to Reclamation as part of NMFS' 2010 BO, and any incidental take of coho salmon that relates to flows below IGD resulting from such actions will not be considered a prohibited taking under the Endangered Species Act (ESA).

NMFS understands that PacifiCorp will make its best efforts to provide flow variability at IGD after the J.C. Boyle facility is fully operational, within the operational constraints of PacifiCorp's facilities, and without compromising the safety of the facilities, the public, or PacifiCorp personnel. Reclamation proposes to reduce flows from a peak IGD flow of 5000 cfs to 3000 cfs in a manner that is inconsistent with the *Proposed Action* section of the 2010 BO. Ramp-down rates below 3000 cfs are proposed in a manner that are consistent with the *Proposed Action* section of the BO; however, NMFS anticipates some deviation from the proposed ramp-down rates may occur due to PacifiCorp's operational constraints and given the use of the uncontrolled spillway at IGD when flows are greater than 1800 cfs. NMFS anticipates no coho salmon fry are likely to be present in the mainstem Klamath River during the proposed flow event. Coho salmon yearlings and smolts that may be present are less vulnerable to stranding due to their ability to actively flee from risks of dewatering. NMFS anticipates no adverse effects to SONCC coho salmon from the proposed ramp down rates beyond those already described in our 2010 BO. Therefore, NMFS has determined that any incidental take of coho salmon associated with PacifiCorp's implementation of flow variability as described above is authorized under the Incidental Take Statement contained in the 2010 BO.

On another issue, it is my understanding that PacifiCorp intends to file a final application for an Incidental Take Permit under ESA Section 10(a)(1)(B) with NMFS by February 14, 2011. NMFS will, thereafter, use its best efforts to meet the schedule of target dates described below. However, this schedule of target dates is not intended to be an enforceable agreement. If NMFS determines that it will not be able to meet any of these target dates, NMFS will contact PacifiCorp to discuss the reasons for its inability to meet the target date, any actions that NMFS or PacifiCorp can reasonably take to help expedite the permitting process, and any modification to subsequent target dates that may result.

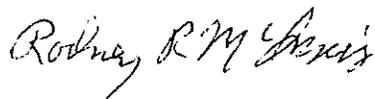
Target Dates:

- a) NMFS will determine and notify PacifiCorp whether PacifiCorp's ESA Section 10(a)(1)(B) permit application package is complete in accordance with the ESA and other applicable laws, regulations and policies within 30 days after the date that NMFS receives PacifiCorp's final application (March 16, 2011 assuming that NMFS receives PacifiCorp's final application on February 14, 2011).

- b) NMFS will file in the Office of the Federal Register a Notice of Receipt of a Permit Application and Notice of Availability of the National Environmental Policy Act (NEPA) Analysis for the application for an Incidental Take Permit within 45 days after the date that NMFS notifies PacifiCorp that the application is complete (May 2, assuming NMFS notifies PacifiCorp that the application is complete on March 16). NMFS anticipates a 30-60 day period after the date of this Notice for the public to comment upon the application and NEPA analysis, in which NMFS anticipates holding a public meeting. In addition, NMFS will continue to consult on a government-to-government basis with affected tribes regarding the incidental take permit application.
- c) NMFS will prepare a draft biological opinion relating to the application for an Incidental Take Permit for review by PacifiCorp within 135 days after the date that NMFS notifies PacifiCorp that the application is complete (July 29, assuming NMFS notifies PacifiCorp that the application is complete on March 16). PacifiCorp may provide comments on the draft biological opinion to NMFS within 14 days from receipt of the document.
- d) NMFS will determine whether to issue a final Incidental Take Permit in accordance with the ESA, NEPA, and applicable implementing regulations and policy, and if NMFS makes a positive determination, it will issue a final Incidental Take Permit to PacifiCorp by October 1, 2011.

I appreciate PacifiCorp's leadership in seeking to improve our mutual understanding of the competing demands for a limited water supply. While I respectfully disagree that NMFS has taken any actions that violate the KHSA, NMFS is committed to improving coordination and communication with PacifiCorp regarding our actions that influence river operations consistent with NMFS' legal requirements and obligations. I appreciate the efforts of you and your staff in these matters and the very positive steps that PacifiCorp is continuing to take to benefit the conservation of salmon in the Klamath River Basin. Please contact Ms. Irma Lagomarsino at (707) 825-5160 if you have any questions regarding the clarifications in this letter.

Sincerely,

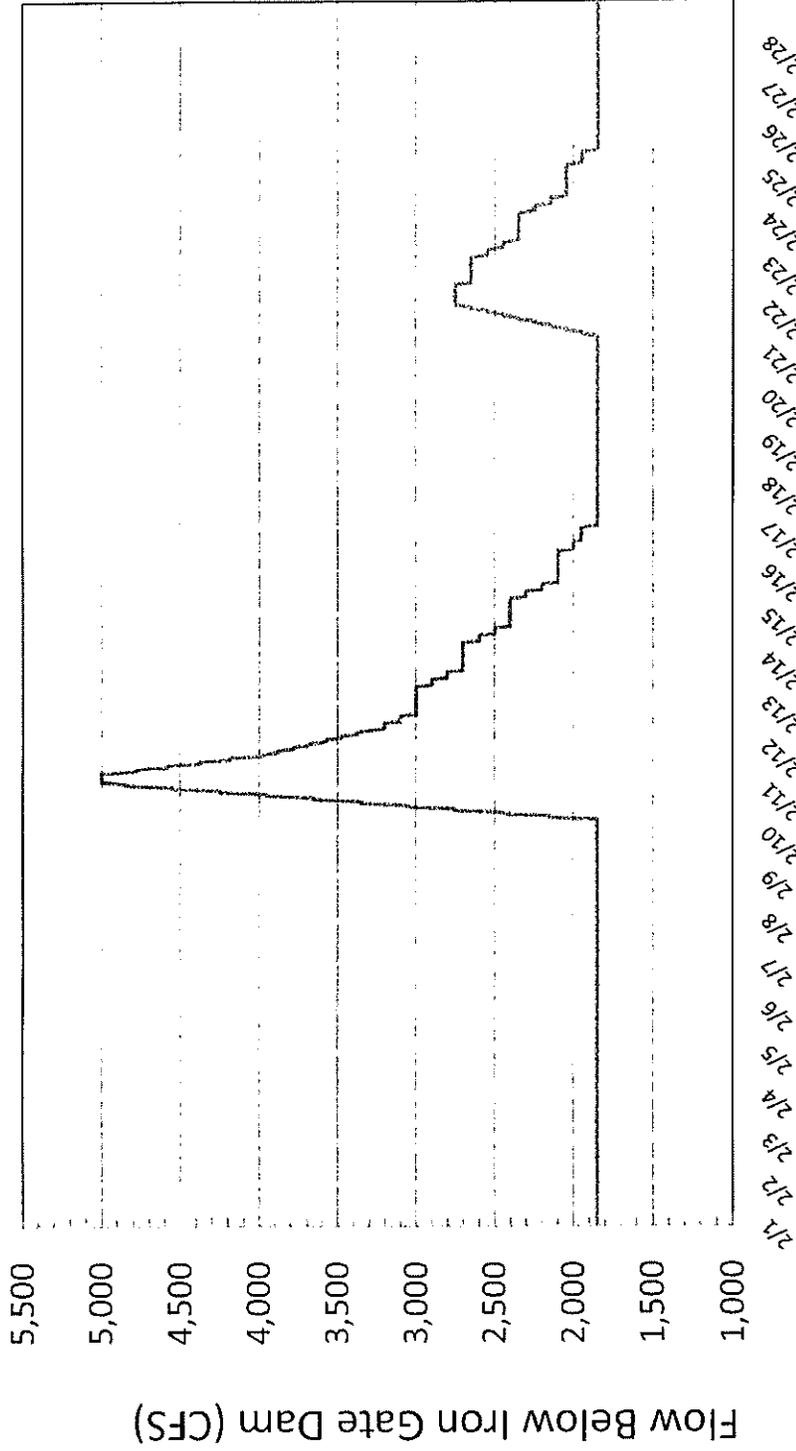


Rodney R. McInnis
Regional Administrator

Enclosure (1)

Attachment A:

Conceptual February 2011 Flow Schedule



Date

Notes: Objective of flow schedule is to release 18,600 acre-feet of water available for flow variability. Pulse flow timing may shift depending on natural flow conditions, operational constraints, or other factors. Hydrograph is conceptual and flows are targets given lack of precision in controlling spill at Iron Gate Dam.