

EXPLANATORY STATEMENT

FOR THE SETTLEMENT AGREEMENT
AMONG
PACIFICORP
UNITED STATES FISH AND WILDLIFE SERVICE
UNITED STATES BUREAU OF LAND MANAGEMENT
UNITED STATES NATIONAL PARK SERVICE
USDA FOREST SERVICE
SHOSHONE-BANNOCK TRIBES
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY
IDAHO DEPARTMENT OF FISH AND GAME
IDAHO DEPARTMENT OF PARKS AND RECREATION
TROUT UNLIMITED
IDAHO RIVERS UNITED
GREATER YELLOWSTONE COALITION
AMERICAN WHITEWATER

DATED AUGUST 28, 2002

CONCERNING THE RELICENSING OF THE
BEAR RIVER HYDROELECTRIC PROJECTS
FERC PROJECT NOS. 20, 472, AND 2401
CARIBOU AND FRANKLIN COUNTIES
IDAHO

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for the Bear River Settlement Agreement

I. Introduction

In 1999, PacifiCorp filed with the Federal Energy Regulatory Commission (“FERC”) applications for New Licenses for the Bear River Hydroelectric Projects, the Soda (FERC No. 20), Grace/Cove (FERC No. 2401) and Oneida (FERC No. 472), (hereinafter collectively referred to as the “Bear River Project” or the “Project”).¹ Now, after lengthy discussions between PacifiCorp, state and federal agencies, tribes, and non-governmental organizations, PacifiCorp is submitting an Offer of Settlement describing the terms of the Settlement Agreement (“Agreement”) under which PacifiCorp and these entities will support FERC’s issuance of the New Licenses. Pursuant to FERC’s regulations at 18 C.F.R. § 385.602, PacifiCorp is submitting this separate Explanatory Statement (“Statement”) which provides the rationale behind the protection, mitigation and enhancement (“PM&E”) measures and decision-making provisions contained in the Agreement. Nothing in this Statement is intended to modify the terms of the Agreement. Any conflict between the language in the Agreement and this Statement should be resolved in favor of the Agreement. This Statement should not be used to interpret Agreement terms.

The Agreement was executed on August 28, 2002 (the “Effective Date”) among PacifiCorp, an Oregon corporation (“PacifiCorp” or “Licensee”), United States Fish and Wildlife Service (“USFWS”); United States Bureau of Land Management (“BLM”); United States National Park Service (“NPS”); USDA Forest Service (“USFS”); Shoshone-Bannock Tribes (“Tribes”); Idaho Department of Environmental Quality (“IDEQ”); Idaho Department of Fish and Game (“IDFG”); Idaho Department of Parks and Recreation (“IDPR”); ; Idaho Council of Trout Unlimited (“ITU”); Idaho Rivers United (“IRU”); Greater Yellowstone Coalition (“GYC”); American Whitewater (“AW”), and other intervenors to the FERC relicensing proceedings for the Bear River Project who have executed the Agreement, each referred to individually as a “Party” and collectively as the “Parties.” The Agreement resolves all issues regarding relicensing of the Projects for the purpose of obtaining a FERC order issuing to PacifiCorp a New License for the Project (“New License”).

The Parties submit that the Agreement is fair and reasonable and in the public interest within the meaning of Rule 602, 18 C.F.R. § 385.602(g)(3), for the reasons set forth in this Statement, including the following:

- (1) The Agreement contains specific measures that will substantially improve environmental conditions in the Bear River watershed near the Project;

¹ The license applications refer to the Soda, Grace/Cove and Oneida projects as separate projects for which the FERC would issue three separate new licenses. As stated in Section 6.11 of the Settlement Agreement, the Parties intend that PacifiCorp will request as part of its Offer of Settlement that the three facilities be consolidated under one New license. Therefore, this Statement refers to the three facilities as one Project under one New License.

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- (2) The Agreement provides important resource protection and restoration measures that will benefit fish and wildlife habitat, consistent with regional restoration planning;
- (3) The Agreement provides for various interests and river uses, including irrigation, power production and natural resource values; and
- (4) The Agreement establishes a process for the Parties to collaborate to manage and enhance natural resources in the Bear River watershed throughout the terms of the New License.

The PM&E measures contained in the Agreement represent the Parties' preferred alternative to measures proposed in PacifiCorp's September 27, 1999 license applications. The Parties will file revised recommendations, terms, conditions, and prescriptions consistent with the Agreement, and intend that the Agreement and the revised terms, conditions, prescriptions, and recommendations supersede any inconsistent prior filings by the Parties in this proceeding.

II. Background

A. The Bear River Project

The Bear River Project is located on the Bear River in Caribou and Franklin Counties, Idaho, and is partially located on United States lands administered by BLM. The Project generates approximately 84.5 megawatts of electricity.

The Soda facilities consist of: (1) the 103-foot-high and 433-foot-long concrete gravity Soda dam with a 114-foot-long spillway section; (2) the Soda reservoir with a surface area of 1,100 acres, and active storage capacity of 16,300 acre-feet, and a maximum water surface elevation of 5,720 feet; (3) the Soda powerhouse containing two units with a total installed capacity of 14 megawatts; and (4) other appurtenances.

The Grace/Cove facilities consist of the Grace and Cove developments. The Grace development consists of: (1) a 51-foot-high and 180-foot-long rock filled timber crib dam that creates a 250-acre forebay; (2) a 26,000-foot-long flowline and surge tanks; and (3) a powerhouse with three units with a total installed capacity of 33 megawatts. The Cove development consists of: (1) a 26.5-foot-high and 141-foot-long concrete dam containing a 60-acre forebay; (2) a 6,125-foot-long concrete and wood flume; (3) a 500-foot-long steel penstock; and (4) a powerhouse with a 7.5-megawatt unit.

The Oneida facilities consist of: (1) the 111-foot-high and 456-foot-long concrete gravity Oneida dam; (2) the Oneida reservoir with an active storage of 10,880 acre-feet and a surface area of 480 acres; (3) a 16-foot-diameter, 2,240-foot-long flowline; (4) a surge tank; (5) three 12-foot-diameter, 120-foot-long steel penstocks; (6) the Oneida powerhouse with three units with a total installed capacity of 30 megawatts; and (7) other appurtenances.

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The FERC licenses for these facilities expired on October 1, 2001. Since that time, the facilities have been operating on annual licenses. Since 1996, PacifiCorp has been in the process of seeking New Licenses for these facilities by undertaking studies, consulting with state, federal and tribal resource agencies, preparing license applications, and responding to Additional Information Requests from FERC. Final license applications for these facilities were filed with FERC on September 27, 1999.

B. History of Settlement Discussions

Comments received from public and agency participants on the draft license applications, distributed in November 1998, suggested that significant disagreements existed between PacifiCorp and the stakeholders. A draft offer of settlement was prepared and discussed with stakeholders in June 1999, but no consensus was reached. Based on comments received on the final license applications, and Additional Information Requests issued by the FERC, company representatives began informal communications during 2001 with agency stakeholders regarding issues and priorities in the Bear River basin related to the Project.

Agency stakeholders requested PacifiCorp's presence at a meeting on November 8, 2001, to discuss relicensing of the Bear River Project. Attendees at that meeting concluded that consensus among the parties on actions to resolve outstanding issues would be preferable to license conditions developed by the FERC with information provided in the license applications. The parties agreed to petition the FERC to delay the Ready for Environmental Analysis ("REA") notice to provide the necessary time to reach agreement. At a follow-up meeting on December 8, 2001, PacifiCorp and agency participants discussed potential components of an enhancement package targeted primarily toward restoration of Bonneville cutthroat trout ("BCT").

Subsequent meetings included agency and non-governmental stakeholders, referred to collectively as the Consensus Group. Nine Consensus Group meetings (including one teleconference call and two meetings that involved primarily legal representatives of the parties) were conducted between January 15 and May 23, 2002. An additional public meeting was conducted on February 5 to inform and encourage participation of the public. A final draft Agreement was distributed for a 30-day review to Consensus Group members and all intervenors to the Bear River licensing proceedings. Comments on the draft Agreement were discussed by interested parties during a conference call on July 29, 2002. The final Agreement was signed by the Parties in the State of Idaho Governor's office on August 28, 2002.

C. Mandates and Responsibilities of the Parties

Development of the PM&E measures and decision-making provisions of the Agreement was based on resource agency mandates and mutual agreement of the Parties to employ an ecosystem restoration approach to accomplish resource restoration and enhancement in conjunction with hydropower operations, recreation uses, and other beneficial uses of the Bear River. This section discusses the specific mandates and responsibilities of PacifiCorp; the USFWS, BLM, NPS, USFS, IDEQ, IDFG, IDPR and IDWR (the "Governmental Parties"), the Shoshone-Bannock Tribes (the "Tribes"); and ITU, IRU, GYC and AW (the "Non-governmental Parties" or "NGOs").

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1. The Licensee

PacifiCorp is a public utility incorporated under the laws of Oregon. The immediate goal of PacifiCorp is to obtain a new FERC license for the existing Project at a reasonable transaction cost and with license conditions that will provide safe, economical and reliable electric generation in a responsible and environmentally sensitive manner over the term of the New License. The long-term goal of PacifiCorp is for the Project to continue to be a competitive source of least cost, reliable and flexible hydroelectric generation for meeting customer needs. PacifiCorp is obligated to shareholders and customers for service responsiveness, managed risk, and sound investment, given the ultimate need for the Public Utility Commission's ("PUC") prudence finding, which includes a public interest review. PacifiCorp has determined that the Agreement, if approved by FERC as drafted, will satisfy these goals and obligations.

2. The Governmental and Tribal Parties

a. United States Fish and Wildlife Service

USFWS, a bureau of the Department of the Interior, is the principal federal agency responsible for conserving, protecting, and enhancing fish, wildlife, plants, and their habitats. Pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667(e), USFWS makes recommendations for the conservation of ecosystems upon which such species depend. USFWS also has responsibilities under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, to help federal agencies ensure that their actions do not jeopardize the continued survival and recovery of threatened and endangered species. The only listed species potentially present in the area of the Project is the bald eagle, and the Project is not expected to adversely affect that species; however, BCT, which occurs below the Project, is not listed but is a species of special concern. Although the Agreement can not take the place of consultation under the ESA and therefore should not be considered determinative of USFWS' conclusions under that statute, USFWS believes after careful analysis that the Agreement, if approved unchanged by FERC, will satisfy the requirements of the ESA.

In addition to the above authorities, the Federal Power Act ("FPA"), 16 U.S.C. §§ 791(a) *et seq.*, delegates to the Secretary of the Interior the responsibility to prescribe fish passage requirements in hydroelectric licenses pursuant to Section 18, to provide recommended terms and conditions for the protection, mitigation and enhancement of fish and wildlife and related habitat pursuant to Section 10(j), and to submit recommendations for FERC's consideration pursuant to Section 10(a). Pursuant to these authorities, USFWS intends to submit revised recommendations, terms, conditions and prescriptions consistent with the Agreement.

b. Bureau of Land Management

BLM, a bureau of the Department of the Interior, administers public lands located primarily in 12 Western States for the use and enjoyment of present and future generations. The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701) established the BLM as a multiple use agency and set forth the mandate for the land use planning process and the

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development of Resource Management Plans. The Resource Management Plan directs the BLM in all natural resource management activities and establishes standards and guidelines for that management. The Project is partially located within BLM-administered lands. Section 4(e) of the FPA, 16 U.S.C. § 791(a)) allows BLM, as delegated by the Secretary of the Department of the Interior, to include in licenses for hydroelectric projects such conditions as it deems necessary for the adequate protection and utilization of BLM-administered lands upon which the Project is located. In addition, BLM may provide recommendations for license conditions pursuant to Section 10(a) of the FPA. Pursuant to these authorities, BLM intends to submit revised recommendations, terms and conditions consistent with the Agreement.

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, sets forth federal agency decision making procedures which involve cooperation and communication with state and local governments, public and private organizations, and concerned members of the public. The measures included in the Agreement as well as the rationale provided herein will be used by BLM in completing any required NEPA analyses. The Parties have agreed to request that FERC include the Agreement in its NEPA documentation as the preferred alternative.

c. National Park Service

NPS, also a bureau of the Department of the Interior, preserves unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations, and cooperates with partners to extend the benefits of natural and cultural resource conservation and outdoor recreation throughout this country and the world. Pursuant to Section 10(a) of the FPA, the NPS may submit recommendations for the New License for FERC’s consideration. NPS intends to submit revised Section 10(a) recommendations consistent with the Agreement.

d. USDA Forest Service

USFS is an agency of the Department of Agriculture and is responsible for managing public lands in national forests and grasslands. The USFS administers National Forest Lands located outside of the Project boundaries within the Bear River basin. Pursuant to Section 10(a) of the FPA, the USFS may submit recommendations for the New License for FERC’s consideration. USFS intends to submit revised Section 10(a) recommendations consistent with the Agreement.

e. Shoshone-Bannock Tribes

The measures contained in the Agreement are intended to fulfill the United States’ fiduciary duties towards the Tribes and any obligations that PacifiCorp may have in regards to operation of the Project over the term of the New License pursuant to the Fort Bridger Treaty of 1868 (15 Stat. 673) and other federal, state and tribal laws and regulations. The Project is not located within the Tribes’ reservation. The Parties have not determined in the Settlement Agreement whether any portion of the Project land includes unoccupied lands where Tribal hunting and fishing are reserved under Article 4 of the For Bridger Treaty of 1868.

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f. Idaho Department of Environmental Quality

IDEQ is the state agency responsible for implementing environmental protection laws and programs for the state of Idaho. IDEQ manages a broad range of activities, including identification of problem areas; regulation of facilities that generate air, water, and hazardous waste pollution; air and water quality monitoring; cleanup of contaminated sites; and providing education and technical assistance to businesses, local and state government agencies, and interested Idaho citizens. Pursuant to Section 10(a) of the FPA, IDEQ may submit recommendations for the New License for FERC's consideration. IDEQ intends to submit revised Section 10(a) recommendations consistent with the Agreement.

In addition, pursuant to Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, IDEQ is responsible for certifying that the Project, as operated under the New License, will meet water quality standards ("401 Certification"). As of the Effective Date of the Agreement, IDEQ had not yet issued its 401 Certification. The Agreement and its Appendices set forth a process to achieve 401 Certification and IDEQ's intended conditions for the 401 Certification.

g. Idaho Department of Fish And Game

Pursuant to Section 10(j) of the FPA, IDFG is responsible for providing recommended terms and conditions for the protection, mitigation and enhancement of fish and wildlife and related habitat. IDFG may also submit recommendations for the New License for FERC's consideration pursuant to FPA Section 10(a). IDFG intends to submit revised Sections 10(a) and 10(j) recommendations, terms and conditions consistent with the Agreement.

h. Idaho Department of Parks And Recreation

IDPR is the state agency charged with formulating and executing a long range, comprehensive plan and program for the acquisition, planning, protection, operation, maintenance, development and wise use of areas of scenic beauty, recreational utility, historic, archaeological or scientific interest, to the end that the health, happiness, recreational opportunities and wholesome enjoyment of the life of the people may be further encouraged. Pursuant to Section 10(a) of the FPA, IDPR may submit recommendations for the New License for FERC's consideration. IDPR intends to submit revised Section 10(a) recommendations consistent with the Agreement.

i. Idaho Department Of Water Resources

IDWR is the state agency charged with ensuring that water and energy are conserved and available for the sustainability of Idaho's economy, ecosystems, and resulting quality of life. IDWR achieves this mandate through controlled development, wise management, and protection of Idaho's surface and ground water resources, stream channels, and watersheds; and promotion of cost-effective energy conservation and use of renewable energy sources. Pursuant to Section 10(a) of the FPA, IDWR may submit recommendations for the New License for FERC's

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consideration. IDWR intends to submit revised Section 10(a) recommendations consistent with the Agreement.

3. The Non-governmental Parties

a. Idaho Council Trout Unlimited

ITU's mission is to conserve, protect and enhance the watersheds and cold water fisheries of the state of Idaho. ITU intends to submit to FERC revised comments and recommendations for the New License consistent with the Agreement.

b. Idaho Rivers United

IRU's mission is to protect, restore and improve the rivers of Idaho and the communities that depend on them, focusing on issues such as establishment of instream flows, protection of wild rivers, keeping rivers clean and healthy, defending at-risk populations of fish, and minimizing the impacts of dams on Idaho's rivers. IRU intends to submit to FERC revised comments and recommendations for the New License consistent with the Agreement.

c. Greater Yellowstone Coalition

GYC's mission is to protect and conserve the Greater Yellowstone Ecosystem (GYE) and its full range of life, now and for future generations. GYC advocates ecosystem-level sustainability as a guide to the management of the region's public and private lands. GYC works to ensure that a thoughtful and holistic approach is taken to managing the natural resources of the GYE. GYC works to shape a future where wildlife populations maintain their full diversity and vitality, where ecological processes function on public lands with minimal intervention, where exceptional recreational opportunities abound for visitors and residents alike, and where communities can enjoy a healthy and diversified economy. GYC intends to submit to FERC revised comments and recommendations for the New License consistent with the Agreement.

d. American Whitewater

American Whitewater Affiliation (AW) is a national organization with a membership of 8,000 individual whitewater boating enthusiasts and more than 160 local canoe club affiliates, representing approximately 80,000 whitewater paddlers. AW was founded in 1954 to protect and enhance the recreational enjoyment of private whitewater sports in America. AW is dedicated to safety, education, and the conservation of America's whitewater rivers. The mission of the organization is to conserve America's whitewater resources and to enhance opportunities to safely enjoy them. The AW web site is located at www.americanwhitewater.org. A significant percentage of the membership resides in the interior Rocky Mountains and has a direct interest in the outcome of the relicensing of hydropower projects located on the Bear River.

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D. Operational Constraints

A critical component underlying the Agreement is the Parties' recognition that PacifiCorp's ability to manipulate reservoir levels and provide flows at the Projects is restricted by and subject to water rights and flood control responsibilities that are memorialized in part in water contracts and agreements, judicial decrees, and interstate compacts. These constraints arise in part out of historic practices that evolved over years of operating to satisfy the vested rights of irrigators and avoid court-imposed flooding liability. The Agreement stipulates that in no event shall PacifiCorp be required to breach or take any action inconsistent with such constraints, each of which are described in further detail below.

1. Sugar Company Contract

The Bear River/Bear Lake system was developed for irrigation. Work began in 1889 on the major irrigation canals near the mouth of the river and in 1902 on the diversion from Bear River into Bear Lake for storage to supply the irrigation canals. The promoter who commenced this work went broke, and the U&I Sugar Company acquired the promoter's position. The Sugar Company developed a small hydro plant near the intake of its canals to supply power to its sugar processing plant. In 1912, U&I Sugar Company conveyed all of its interest in its project, water rights, hydro plant, lands, easements and transmission lines to Utah Power & Light Company, PacifiCorp's predecessor, in return for an absolute guarantee in perpetuity to supply the Sugar Company and its successors with 900 cfs during the irrigation season and 150 cfs during the non-irrigation season. That transaction is called the 1912 Sugar Company Conveyance and Agreement (the "Sugar Company Contract").

The Sugar Company Contract is not a typical water supply contract where water is delivered for a fee. Its basis was a conveyance of real property (including water rights) to PacifiCorp in consideration for water delivery. The Utah Supreme Court held that the Sugar Company Contract is perpetual, and that the Sugar Company's shareholders own not "shares," but "deeds of perpetual water rights" based on the Sugar Company Contract. Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856 (Utah 1978).

PacifiCorp delivers the Sugar Company Contract water to the lower end of the Bear River. The canals are located at the Cutler hydroelectric project dam. In all but flood years, there is insufficient water flowing naturally in the Bear River to make the guaranteed water delivery, even without hydro generation at Cutler. PacifiCorp must pump water it has previously stored in Bear Lake into a canal, which flows into the Bear River above the Projects to make the guaranteed irrigation water deliveries. The contract provides that if any time PacifiCorp fails to release sufficient water to make the 900 cfs or the 150 cfs available to the Sugar Company, "the Power Company and its successors and assigns *on demand* will forthwith release a sufficient quantity of water from *its reservoir or reservoirs, (whether natural or artificial)*," or will allow the Sugar Company to operate its reservoirs to supply the contracted water. (Italics added). The obligation to supply irrigation water attaches to PacifiCorp's Project reservoirs on the Bear River

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if necessary. PacifiCorp must balance operations at each Project with the overriding irrigation water delivery obligation.

2. Last Chance Canal Company Contract

PacifiCorp's contractual arrangement with the Last Chance Canal Company ("Last Chance") is almost as longstanding as its contract with the Sugar Company. Last Chance was the major named defendant in the litigation, Utah Power & Light v. Last Chance Canal Co., (the "Dietrich Decree") to apportion the waters of the Bear River. In the lawsuit, Last Chance filed a counterclaim alleging that PacifiCorp had interrupted the natural flow from the Bear Lake area to the Bear River, which accrued to the benefit of Last Chance's earlier priority natural flow water rights. In 1919, PacifiCorp formalized its Bear Lake relationship with Last Chance by entering into an irrigation contract with Last Chance for supplemental irrigation water stored in and released from Bear Lake. That contract is called the Last Chance Canal Company Contract.

3. Other Irrigation Company Contracts

PacifiCorp has entered into other contracts to supply Bear Lake storage water when the natural flow of the Bear River is insufficient to satisfy the water rights of mainstem irrigators. For example, the Cub River Irrigation Company and the West Cache Irrigation Company contracts were executed in 1916 and 1919, respectively. In 1989 and 1990, PacifiCorp entered into contracts with individual pumpers from the Bear River. These users had been diverting water for many decades, but previously had not been brought under regulation due to their small size. After executing the pumper contracts, PacifiCorp ceased executing new irrigation contracts because PacifiCorp's vested water rights in Bear Lake are fully allocated to the existing irrigation water supply contracts. Not only is there no Bear Lake storage water available for new irrigation contracts, there is no Bear Lake storage water available for relicensing purposes.

4. Judicial Decrees

There are two major court decrees regarding the Bear River between Bear Lake and the Great Salt Lake. The Dietrich Decree established rights in Idaho and, most unusually, recognized the Sugar Company's rights in Utah. Judge Kimball's decree in Utah Power & Light Co. v. Richmond Irrigation Co. (the "Kimball Decree") established rights in Utah while specifically recognizing Judge Dietrich's decree and PacifiCorp's rights to store and release water in Bear Lake.

In each of the decrees, the "aggregate quantity of water to be simultaneously diverted" by PacifiCorp and the Sugar Company for power generation and irrigation at what is now the Cutler hydroelectric plant, below the Projects, is limited, recognizing the intertwined nature of the two users. Additionally, Judge Dietrich recognized the special status of the Sugar Company contract in his decision rendered in connection with the 1920 decree:

Plaintiff's [PacifiCorp's] earlier rights in Utah were acquired by contract from the Utah-Idaho Sugar Company. In view of the peculiar character of the contract, no attempt will be made to define the several interests of the two companies, but the

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appropriation in its entirety will be decreed without prejudice to any question that may arise between them touching their relative or separate interests. In the discussion which follows all the rights are referred to as those of plaintiff [PacifiCorp], but it will be understood that such rights include also the interest of the Sugar Company.

Dietrich Decree at 1.

5. Amended Bear River Compact

In 1980, Congress approved the Amended Bear River Compact, which had been ratified by the Wyoming, Idaho and Utah state legislatures the preceding year. Once ratified by Congress, the Compact became federal law. The Bear River Compact was created, among other things, “to accomplish an equitable apportionment of the waters of the Bear River among the compacting States.” Amended Compact, Art. I, A. It further states that “the physical and all other conditions peculiar to the Bear River constitute the basis for this Compact.” Amended Compact, Art. I, B.

In other words, the historic regulation of the Bear River system as well as the existing water rights of users in all three states at the time the Compact was ratified served as its foundation. Waters of the Bear River include Bear Lake. The states agreed to the Compact to protect their water rights and remove the cause of present and future controversy over the distribution and use of the waters of the Bear River. They rely on the Compact to ensure the equitable apportionment of their water entitlements. The longstanding historic management regime for Bear River and Bear Lake, which was the basis of the Bear River Compact, creates vested rights on which the states and the water rights holders rely.

One example of the Bear River Compact creating vested rights for irrigation is found in Article VI, D, where the irrigation reserve is established. Although PacifiCorp is the sole owner of the right to store and release water from Bear Lake, it may not release water from the lake except to satisfy the irrigation contracts when the lake is below the irrigation reserve, now calculated at over elevation 5914.70. Through experience with several droughts, PacifiCorp found that the Compact irrigation reserve did not adequately address evaporation on the lake and otherwise protect its ability to supply the irrigation contracts, so it established its own target irrigation reserve at approximately elevation 5918.00.

When Bear Lake falls below elevation 5912.00, storage of Bear River water upstream of Bear Lake is curtailed by the Compact. Extended droughts require greater irrigation releases from Bear Lake due to lower natural flows in the Bear River. During the non-irrigation season in extended droughts, PacifiCorp stores all available water in Bear Lake. Releases of Bear Lake storage water to satisfy instream flows not only would interfere with storage for irrigation, they would violate federal and state law (the Compact) when the lake is below the irrigation reserve and interfere with the vested rights to store water upstream when the lake is at elevation 5912.00 or lower.

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6. Flood Control Liability and Operational Responsibility

In addition to the irrigation contracts, agreements and Compact described above, PacifiCorp's ability to manipulate flows at the Projects is also subject to PacifiCorp's flood control obligations. In Kunz v. Utah Power & Light Co., 526 F.2d 500 (9th Cir. 1975), the Ninth Circuit Court of Appeals imposed a duty of flood control on PacifiCorp. The Court found that, "in its installation and operation of the water storage system, Utah Power established a relationship in which the landowners had to rely on Utah Power to control the spring runoff." Id., at 503-4. The Court reasoned that PacifiCorp's duty of care extended to and required anticipation of extraordinary flood conditions. As a result, PacifiCorp can be held liable for failing to anticipate spring runoff and evacuating Bear Lake to provide room to capture it. In another case, Gossner v. Utah Power & Light Co., 612 P.2d 337 (Utah 1980), the Utah Supreme Court similarly imposed strict flood control liability on PacifiCorp. For these reasons, operation of the Projects is subject to PacifiCorp's flood control obligations.

7. Agreements with Wyoming, Idaho and Utah

As a condition to approval of the ScottishPower-PacifiCorp merger, the three Bear River Compact states required PacifiCorp to formalize its historic Bear River and Bear Lake operational practices. On October 5, 1999, PacifiCorp agreed that its "water rights are constrained by the historic practice of not making a delivery call for hydropower generation; and that Bear Lake is operated, consistent with long-standing historic practice and applicable laws, primarily as a storage reservoir to satisfy contracts for existing irrigation uses and flood control needs in the three States, with the use of water for hydropower generation being incidental to the other purposes for which the water is being released." October 5, 1999 Agreement with Wyoming, Idaho and Utah.

An April 18, 2000 Agreement with Wyoming, Idaho and Utah further described PacifiCorp's operation. A major concern of the states was that PacifiCorp continue to honor natural flow water rights on the Bear River, the majority of which are irrigation rights earlier in priority than PacifiCorp's water rights, and not alter its Project operations in any way to interfere with irrigation. PacifiCorp's historic operations had prioritized irrigation deliveries and flood control operations above hydropower generation where there was a potential for conflict.

PacifiCorp agrees to continue its historic practice of regulating operation at its hydroelectric plants to meet existing downstream demands, some of which have water rights which are earlier in priority than PacifiCorp's hydropower water rights. Such historic operation is consistent with PacifiCorp's FERC licenses.

April 18, 2000 Agreement, ¶ 3.B. Thus, under state law, PacifiCorp may not interfere with earlier priority irrigation water rights by its hydropower operation on the Bear River. Pursuant to the April 18, 2000 Agreement, its historic practice of non-interference with irrigation water rights became a vested right enforceable not only by those holding the irrigation water rights, but by the three Bear River Compact states.

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During drought cycles, the natural flow in the Bear River is very low. It must be supplemented during the irrigation season by Bear Lake storage water releases for the irrigation contracts. After the irrigation season, all water at Stewart Dam is diverted into Bear Lake and stored to recover the lake and provide for the following year's irrigation supply. During high water cycles, natural flow in Bear River is high, and often Bear Lake is at a high elevation and must be evacuated. This makes flows in the river even higher. These conditions, together with the water contracts, agreements, Compact and judicial decrees discussed above, significantly constrain PacifiCorp's operation of the Projects. In developing the Agreement which is the subject of this Statement, the Parties considered these constraints and crafted provisions which maximize the benefits that can be provided to the important resources of the Bear River watershed, without requiring PacifiCorp to breach or otherwise act inconsistently with the constraints described in this section. For these reasons, it is important that FERC incorporate Appendix A of the Agreement without modification into the New Licenses.

III. The Affected Environment

There are six hydroelectric facilities located on the Bear River in Idaho and Utah. Described below is the environment near the Bear River Project involved in this relicensing proceeding.

A. Soda

The Soda facility consists of the Alexander Reservoir, dam, spillway, intake, gatehouse, flow conduit, powerhouse housing two vertical Francis turbines, and an adjacent substation. Approximately 16,300 acre-feet of storage are available in Alexander Reservoir. However, increased recreational use of the reservoir, combined with the coordinated control now required to operate the system, have reduced its usable capacity. The reservoir low water elevation cannot fall below the low-level discharge penstock elevation of 5,670.00. The combined authorized discharge for the Soda Plant is 2,624 cfs. The low-level discharge is capable of passing 900 cfs at a normal operating pool of 5,719.00. The maximum water surface level, due to the Probable Maximum Flood (PMF), is elevation 5,735.80.

The Soda facility is situated in the Basin and Range tectonic province of the Intermountain Seismic Belt, a region that extends from southern Montana, through eastern Idaho, western Wyoming and central Utah. Cover types in the Project area are composed of water, cropland/pastureland and sagebrush steppe. Emergent and scrub-shrub wetlands occur in the area, mostly associated with coves along Soda Reservoir. Kelsey's phlox, a sensitive plant species, occurs in the Soda Springs Natural Scenic Area at the north shore of Soda Reservoir. Sensitive wildlife species observed near the Project include the ESA-listed bald eagle, sharp-tailed grouse and trumpeter swan. Suitable habitat for sharp-tailed grouse is found above the ordinary high water, and the reservoir provides suitable habitat for bald eagles and trumpeter swans. Canada geese and mallard ducks have been observed nesting near Soda Reservoir.

Soda Reservoir is a moderately enriched reservoir, occasionally exceeding IDEQ's criterion of dissolved oxygen for cold water biota. The Soda reach is a 2.2 mile-long section of

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the Bear River that extends from the Soda Dam to the upper end of the pool formed by the Last Chance Diversion Dam. Water quality in the Soda reach meets IDEQ standards with the occasional exception water temperature in summer. Soda Reservoir supports a warm water fish community primarily composed of yellow perch, common carp and Utah sucker. The game fish community downstream of powerhouse is dominated by stocked rainbow and brown trout, and there is no evidence of trout spawning in the river in the Soda reach.

There are three existing recreational facilities within the Soda Project boundary: a small day use area at the downstream end of Soda Reservoir near Soda Dam; a second day use area on the reservoir about 0.5 mile upstream of Soda Dam know locally as Second Bridge site; and the Oregon Trail Park on the reservoir near Soda Springs. PacifiCorp owns and maintains the day use site near the dam. The recreation facilities are weekend destinations to fish, motorboat and water ski. PacifiCorp estimates that current facilities are adequate to meet current and future demand. The river downstream of Soda Dam flows through a narrow rocky canyon for about two miles until it enters the Last Chance Division Dam impoundment. The river supports some limited fishing and conditions suitable for flatwater boating. PacifiCorp's relicensing studies identified eight sites near the Soda facility eligible for inclusion in the National Register of Historical Places (NRHP).

B. Grace-Cove

The Grace/Cove facility consists of two hydroelectric developments (total capacity of 40.5 MW) located on the Bear River in Caribou County near the town of Grace, Idaho. The facility consists of the Grace and Cove diversion dams, forebays, flow lines, and powerhouses.

The Grace forebay covers 38 surface acres and has a total storage capacity of 320 acre-feet. At full pool, the forebay has an average depth of about 14 feet, and the surface elevation varies by about 0.3 foot in any one day and about eight feet over a typical operating year. The Grace bypass is a 6.0-mile long section of the Bear River that extends from the Grace dam to the Grace powerhouse. The Cove forebay covers about 10 surface acres and storage capacity of 60 acre-feet. At full pool, the forebay has an average depth of about seven feet and may vary by about 0.1 foot in any one day and about four feet over a typical operating year. The Cove bypass is a 1.3-mile long section of the Bear River that extends from Cove dam to Cove powerhouse. Currently flows in the bypass reaches are provided by leakage from the dams and natural springs in the lower end of the Grace bypass reach.

Cover types in the area of the Grace/Cove facility consist of cropland/ pastureland, sagebrush steppe, and cliff/rock/tallus. A small amount of emergent and scrub-shrub wetlands occur in the area, mostly associated with the Bear River upstream and downstream of Black Canyon and along the Cove Bypass. No ESA-listed or sensitive plant species are known to be present in the vicinity of the facility. The only sensitive wildlife species observed near the Project is the ferruginous hawk; suitable habitat for ferruginous hawk occurs above the ordinary high water and away from Grace/Cove facilities. Canada geese nest in the vicinity of the Grace and Cove forebays, and mallards have been observed nesting throughout the area. In addition to hydroelectric development, land use in the area includes agriculture crop production and livestock.

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Grace forebay is meso-eutrophic, or moderately enriched. Water quality in the forebay meets all water quality standards established by IDEQ to support designated uses for the forebay with the exception of dissolved oxygen for cold water biota. While in summer DO levels in the forebay are occasionally less than the established standard, levels rarely drop below 3.9 milligrams per liter (mg/l). These DO levels would have little impact on the warm-water fish populations (carp, smallmouth bass, yellow perch, Utah sucker and redbreast sunfish) that occur in the forebay since the low levels rarely occur and affect only the deepest portion of the forebay.

Grace Bypass is a 6.0-mile long section of the Bear River that extends from the Grace Dam to the Grace Powerhouse. Currently, flow in Grace Bypass is composed of leakage from Grace Dam (ranging from 1 to 10 cfs depending on the time of year and weather conditions), and contributions from five major springs (ranging from 40 to 70 cfs, depending on the time of year and weather conditions) that enter Grace Bypass about three miles downstream of Grace Dam.

Relicensing studies indicated that water quality in Grace and Cove Bypasses meet all water quality standards established by IDEQ to support designated uses in the bypass with the exception of water temperature to support salmonid spawning and cold water biota. Grace Bypass supports an IDFG-stocked fishery composed of juvenile and adult rainbow trout, primarily in the lower section of the bypass.

C. Oneida

The Oneida facility consists of the Oneida Reservoir, dam, spillway, three 12-foot diameter penstocks, a powerhouse housing three generating units rated at 30 MW, and other appurtenances. Oneida Reservoir is a long and narrow reservoir covering 480 surface acres with a usable storage capacity of 11,500 acre-feet. At full pool, the reservoir has an average depth of about 28 feet, with a maximum depth of about 85 feet.

Most of the cover types in the Oneida facility area are composed of juniper/maple woodland, sagebrush steppe, cropland/pasture, and water. Emergent, scrub-shrub and forested wetlands occur in the area, mostly associated with the upstream end of Oneida Reservoir and the Bear River downstream of Oneida Dam. Established riparian vegetation is composed of species tolerant of frequent watering. No TES plant species were found in the vicinity of the Oneida facility. Sensitive wildlife species observed in the vicinity of the Oneida facility include bald eagle, ferruginous hawk, sharp-tailed grouse, trumpeter swan, leopard frog and rock squirrel.

Relicensing studies indicated that Oneida Reservoir is meso-eutrophic, or moderately enriched. Water quality in the reservoir meets all water quality standards established by IDEQ to support designated beneficial uses with the exception of dissolved oxygen. Oneida Reservoir supports a warm water fish population primarily composed of walleye, carp and yellow perch. The nearest known populations of BCT near the project occur in headwater of tributaries such as Cottonwood Creek and Mink Creek. The Bear River from Oneida Dam to Oneida Powerhouse (Oneida Bypass) supports a naturally-reproducing population of brown trout, and the game fish

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community in the Bear River downstream of powerhouse is dominated by a self-sustaining population of mountain whitefish and stocked brown and rainbow trout.

PacifiCorp studies show that the existing recreational facilities on Oneida Reservoir (Maple Grove Campground and Oneida Day Use Area) facilities are popular weekend destinations for camping, fishing, and boating. The recreational facility on the Bear River downstream of the Oneida facility owned by BLM (Redpoint Campground) also is a popular weekend destination where users camp, fish, wade, tube, and kayak the river. At high flows, the river downstream of the Oneida facility is a Class I or II whitewater boating opportunity suitable for beginners. Relicensing studies indicated that the carrying capacity for these recreational facilities is met or exceeded on about one-half of the weekends in summer. PacifiCorp currently accommodates fishing by limiting releases below the powerhouse to 500 cfs for several hours on weekends in the summer. Boaters/tubers have expressed a desire for higher and more reliable flows on weekends.

IV. Studies and Existing Information

Relicensing studies were conducted between 1996 and 1998 to assess the effects of the presence and operation of the Bear River projects (PacifiCorp 1999a, b, c). Applications submitted to the FERC on September 27, 1999, document the results of these studies, including:

- Water Quality studies
- Bathymetry studies
- Dissolved oxygen studies
- Sediment loading study
- Erosion and bank stability study (reported in Dobrowolski and Allred 1999)
- Fish community studies
- Fish littoral zone and habitat mapping studies
- Benthic macroinvertebrate studies
- Zooplankton studies
- Instream flow studies
- Juvenile fish stranding study
- Trout spawning gravel study
- Threatened and endangered wildlife species studies
- Migratory bird species surveys
- Vegetation cover type mapping
- Riparian zone vegetation studies
- Threatened and endangered botanical species studies
- Cultural resources studies
- Recreation resources studies
- Land use and aesthetics studies

In addition to studies conducted as part of project license preparation, PacifiCorp also conducted a number of studies in response to Additional Information Requests (AIRs) from the FERC, including:

- General investigations to clarify information to the FERC (PacifiCorp 2000, 2001a)

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- Grace whitewater boating (PacifiCorp 2001b)
- Oneida recreation use (PacifiCorp 2001c)
- Wetland and riparian habitat assessment (PacifiCorp 2001d)
- Bonneville cutthroat trout restoration feasibility (PacifiCorp 2001e)
- Cove bypassed reach instream flow study (PacifiCorp 2001f)

Other information referred to in planning for Bonneville cutthroat trout restoration and discussed during settlement meeting included the *Range-wide Conservation Agreement and Strategy for Bonneville Cutthroat Trout* (RCAS 2000) and *Cutthroat Trout Management: A Position Paper, Genetic Considerations associated with Cutthroat trout Management* (CTMAPP 2000).

V. Implementation

A. Timing

A significant benefit provided by the Agreement is increased certainty concerning the timing and implementation of PM&E measures. The Parties have negotiated a comprehensive schedule for implementing such measures to ensure that beneficial measures are implemented in a timely way, recognizing the potential delays often encountered in the relicensing process. Such a schedule likewise enables PacifiCorp to better plan and coordinate its future capital expenditures.

The Parties have agreed to implement a suite of PM&E measures before the New Licenses issued by FERC become final. Such measures, which will be implemented upon FERC's issuance and PacifiCorp's acceptance of the New Licenses, include (1) funding for BCT measures such as genetic sampling and analysis, aerial photography, Geographic Information System depictions, and telemetry studies; (2) implementation of minimum flows at the Cove bypass; and (3) designation of representatives to an environmental decision-making committee, discussed in further detail below. Implementation of such measures immediately following issuance and acceptance of the New Licenses will allow the Parties to begin planning restoration and other important PM&E measures as soon as possible in the license terms.

B. Coordination and Decision Making

The Agreement creates an Environmental Coordination Committee ("ECC") whose responsibilities include, among other things, (1) facilitating coordination and consultation among the Parties on implementation of PM&E measures; (2) proposing and approving restoration and flow measures; (3) establishing monitoring criteria to evaluate the effects of PM&E measures; and (4) coordinating and implementing PM&E measures. Another important function of the ECC is to provide a forum for involvement by other interested parties. The ECC will be comprised of one representative from PacifiCorp, the Tribes, each Governmental Party, and each NGO. Each Party that is a member of the ECC will designate a representative to the ECC within sixty days of FERC's issuance and PacifiCorp's acceptance of the New Licenses.

Creation of the ECC will improve the protection of ecological, cultural, aesthetic, and recreational resources by ensuring that there is a high level of communication and coordination

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among resource agencies, PacifiCorp and other members of the ECC prior to implementation of management actions. Creation of the ECC will also ensure a continued collaborative approach among the Parties, thus establishing an atmosphere of cooperation that will speed implementation of the Agreement and ensure its efficacy.

C. Duration

The Parties recommend that FERC adopt 30-year license terms for the New Licenses. This period provides PacifiCorp with sufficient certainty and gives the ECC sufficient time to implement significant resource measures to protect and enhance aquatic habitat.

VI. Rationale for PM&E Measures

A. Aquatic Resources

A history of water diversion for irrigation, hydropower development, and cattle grazing in the Bear River basin in Southeast Idaho has resulted in habitat degradation to native fish populations; impacts to riparian, wetland and other terrestrial habitat; a disruption of geomorphological processes; fragmentation of fish populations; and reduced water quality in the mainstem Bear River near the Project. Remedies to improve upon these conditions is complicated by human demands on the Bear River that are expected to continue through the next license period. Therefore, the Parties agreed that restoration of river processes, water quality, and habitat conditions should be the first step in mitigating effects of the Bear River Project. This, in addition to enhanced instream flows in river reaches affected by Project operations, may be expected to improve conditions in the mainstem Bear River near the Project.

The Parties will collaborate in the preparation of a plan for restoration of native fish and direct the use of mitigation funding. During the first few years of the new license, the Parties will conduct studies that will lead to the development of a BCT restoration plan. The restoration plan will provide a framework for the long-term protection, mitigation, and enhancement of habitats necessary to the persistence of BCT in the Bear River drainage. Implementation of conservation actions that are identified in the restoration plan will address the elimination or reduction of threats to the species' survival. Funding will also be available to conduct actions to restore aquatic habitat, acquire land and water rights from willing landowners in the area, and stock native fish species as habitat improvements are made.

B. Recreation Resources

Recreational boating has been a popular activity in the Bear River near the Project, but available flow in some sections of the river affected by Project operations have not in the past met the needs of some Parties. Inasmuch as water available for whitewater boating and power generation is subject to legally mandated water rights and multi-state agreements, the Parties agreed to increase recreational boating opportunities in the Grace bypass reach consistent with historic water uses and other priorities in the Bear River basin. As water is available, PacifiCorp will re-divert water from the project flowline to the bypass reach for specified time periods during spring and early summer each year, and notify the public when releases will occur. Put-in

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and take-out access points will be improved. Monitoring studies of the effects of these high flows will be conducted during initial years of the new license to assure that recreational boating releases are consistent with native fish habitat restoration in the Grace bypass reach.

Camping and day use will continue to be popular activities during the next license period. The parties agreed that a relatively undeveloped and primitive experience is the desired condition, while maintaining safety for the public. Pursuant to these goals, PacifiCorp will develop a safety plan and provide funding for upgrading facilities near the Oneida development, and provide support to the county for recreation facilities at Soda reservoir.

C. Cultural Resources

PacifiCorp conducted inventories of cultural resources and historic properties during relicensing studies. As part of the Agreement, these resources will be conserved during the next license period. PacifiCorp will prepare an Historic Properties Management Plan to protect cultural resources potentially affected by project operations. The Plan will be developed consistent with the FERC guidelines and in consultation with the Tribes and state and federal agencies.

D. Land Management

PacifiCorp owns relatively little land near the Project. However, a Land Management Plan will be developed to protect resources on company lands due to Project operations. Consistent with identified goals of habitat restoration and improved water quality, PacifiCorp lessees will be required to maintain a buffer zone on parcels near project reservoirs and the Bear River in order to reduce grazing impacts to riparian vegetation. Further, PacifiCorp will fence a buffer zone on its property in the particularly impacted area of the Cove bypass reach.

VII. Conclusion

For the reasons set forth in this Statement and in the Agreement, the Parties believe that the Agreement is fair, reasonable, and in the public interest, and recommend that FERC accept and incorporate without modification the PM&E measures set forth in Appendix A of the Agreement as license articles in the New License.

VIII. Literature Cited

Dobrowolski, J. P. and M. D. Allred. 1999. Potential for bank stability decline due to drastic flow level change in the Bear River. Utah State Univ. final report submitted to PacifiCorp. December 8, 1999.

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PacifiCorp. 2000. Additional Information Request response. Report submitted to the FERC. June 8, 2000.

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