

On November 17, the Federal Energy Regulatory Commission (FERC) issued an Order Modifying and Approving Surrender of License and Removal of Project Facilities providing for the removal of four dams on the Klamath River in Klamath County, Oregon and Siskiyou County, California (see <https://www.courthousenews.com/wp-content/uploads/2022/11/ferc-order.pdf>). FERC commissioners found “surrender of the Lower Klamath Project license and removal of the project to be in the public interest and grant the [Klamath River] Renewal Corporation’s surrender application, subject to terms and conditions and acceptance of the license transfer.”

“Some people might ask why, in this time of great need for zero-emissions energy, why are we, why is the licensee, agreeing to remove the dams?” FERC Chairman Richard Glick asked. “First, we have to understand this doesn’t happen every day.... A lot of these projects were licensed a number of years back when there wasn’t as much focus on environmental issues, and some of these projects have a significant impact on the environment and a significant impact on fish and other wildlife.” Last April, the Pacific Fisheries Management Council wrote FERC stating, “After decades of engagement on this issue over declining Klamath salmon stocks and near-collapse of Klamath fisheries, the Council is extremely encouraged and expresses strong support for decommissioning and removal of the four lower Klamath dams. (*LA Times*, November 17, 2022)

The order paves the way for enactment of a settlement agreement nearly 15 years in the making by California, Oregon, the Yurok and Karuk Tribes, Berkshire Hathaway Energy-owned utility company PacifiCorp, fishing groups, and other stakeholders to carry out the ambitious plan to remove the dams, and address fish populations, river health and tribal community and culture interests.

FERC approval of the dam removal plan was needed for parties to fully implement the Amended Klamath Hydroelectric Settlement Agreement as signed in 2016. In June 2021, FERC approved allowing dam owner PacifiCorp to be removed from the license for the hydroelectric project and transfer it to the States of California and Oregon and the nonprofit Klamath River Renewal Corporation (KRRRC) as co-licensees to carry out removal of the dams pending final sign-off on the dam removal plan.

Following formal acceptance of the license transfer by the States and the KRRRC, parties led by the KRRRC will take a number of pre-construction steps during 2023 to lay the groundwork to complete removal of the dams at a cost of some \$500 million. The Copco No. 2 dam will be removed as soon as the summer of 2023 under the approved plan, with removal of J.C. Boyle, Copco No. 1 and Iron Gate dams planned during 2024.

“The Klamath salmon are coming home. The people have earned this victory and with it, we carry on our sacred duty to the fish that have sustained our people since the beginning of time,” said Yurok Chairman Joseph James.

California Governor Gavin Newsom stated, “Today’s action culminates more than a decade of work to revitalize the Klamath River and its vital role in the tribal communities, cultures and livelihoods sustained by it. California is grateful for the partnership of Oregon, the Yurok and Karuk Tribes, Berkshire Hathaway and the many other stakeholders who came together to make this transformative effort a reality for the generations to come.”

Oregon Governor Kate Brown declared, “This enormous step forward will make historic progress in revitalizing the Klamath River, which is vital to the sustainability of all communities in the Klamath Basin. Beyond ecological restoration, this is also an act of restorative justice. Since time immemorial, the Indigenous peoples of the Klamath Basin have preserved the lands, waters, fish, and wildlife of this treasured region — and this project will not only improve its water and fish habitat, but also boost our economy. I am grateful for the hard work and perseverance of the region’s tribes, and the partnership of California, who have come together for many years to make this possible.”

“Today’s victory was well earned by the thousands of people who fought for clean water, healthy fisheries, and environmental justice for Klamath River communities. I am grateful to everyone, from the youth to the elders, Governors Newsom and Brown, and the team from PacifiCorp who made this victory possible,” proclaimed Karuk Chairman Russell “Buster” Attebery.

PacifiCorp President and CEO Stefan Bird affirmed, “Today’s ruling is a major achievement for everyone who developed and helped advance this historic agreement over many years. I want to wholeheartedly thank the leadership of Yurok and Karuk tribes, Governors Newsom and Brown and their predecessors, and all of our partners who remained committed to resolving this complex and difficult issue through settlement.”

“This is an incredible milestone and key step forward on the path to accomplishing KRRC's core mission to remove the four lower Klamath dams. Today's decision is the culmination of decades of collective work by our many dedicated partners and relentless champions of a restored Klamath River to reconnect a basin that had been cut in half for more than a century,” declared KRRC Board President Brian Johnson. See <https://www.pacificorp.com/about/newsroom/news-releases/ferc-klamath-dam-removal.html>.

The Order was the culmination of a long process with complex economic, environmental and political considerations. The Lower Klamath Project was part of a 169-megawatt hydroelectric development that included eight dams and covered federal lands administered by the U.S. Bureau of Land Management (BLM) and U.S. Bureau of Reclamation. The original 50-year FERC license was issued to the California Oregon Power Company in 1954, transferred to Pacific Power and Light in 1961, and then to PacifiCorp in November 1988. PacifiCorp filed a relicense application in 2004, and has been operating since on annual licenses.

In 2007, FERC staff issued a final Environmental Impact Statement (EIS) after analyzing various alternatives, including 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. Ultimately, staff recommended issuing a new license with mitigation and mandatory conditions from the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and Reclamation.

A licensee may voluntarily decide to surrender a license for a variety of reasons. PacifiCorp concluded that implementing the required modifications (specifically, complying with mandatory fishway prescriptions) would mean operating the Klamath Project at a net loss. FERC regulations require the licensee to file a surrender application that includes a decommissioning plan (18 C.F.R. § 6.1 (2021)). Decommissioning can range from simply shutting down the power operations to removing all parts of the project, including the dam, and restoring the site to its pre-project condition. FERC will only approve a license surrender once the licensee has fulfilled its obligations under the license or as established by the Commission. See Project Decommissioning at Relicensing, FERC Stats. & Regs. ¶ 31,011 (1994) (cross-referenced at 69 FERC ¶ 61,336).

PacifiCorp entered into negotiations with a number of resource agencies, tribes, and other entities to evaluate decommissioning alternatives. 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, which provided for decommissioning and removing the four dams, contingent on the passage of federal legislation and approval by the Secretary of the Interior. However, the necessary legislation was never passed.

Subsequently, in April 2016, the States of Oregon and California, Interior, PacifiCorp, NMFS, the Yurok Tribe, and the Karuk Tribe executed the Amended Klamath Hydroelectric Settlement Agreement, which set forth a process by which PacifiCorp would request FERC approval to transfer the four lower developments to the Renewal Corporation, which would then seek Commission approval to decommission and remove the dams under the FERC's license surrender procedures.

In September 2016, PacifiCorp and the Renewal Corporation filed an amendment and transfer application with the Commission to: (1) amend the Klamath Project license to place the four developments to be decommissioned into a new license that would become the Lower Klamath Project; and (2) transfer the license 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.

In July 2020, FERC approved the partial transfer of the Lower Klamath Project from PacifiCorp to the Renewal Corporation, contingent on PacifiCorp remaining on as a co-licensee. FERC found that if it were to ultimately approve the surrender application, it would not be in the public interest for the entirety of the surrender and decommissioning efforts to rest with the Renewal Corporation given “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.” FERC determined it was appropriate to require PacifiCorp to remain on as a co-licensee, as PacifiCorp could provide legal and technical support, as well as further assurance that there would be sufficient funding to carry out decommissioning.

Following the Transfer Order, PacifiCorp, the Renewal Corporation, the States of Oregon and California, the Karuk Tribe, and the Yurok Tribe began discussions on a mutually agreeable path forward for implementing the Amended Settlement Agreement.<sup>23</sup> These discussions resulted in the parties entering into a Memorandum of Agreement (MOA) on November 16, 2020. Among other things, the MOA provided that PacifiCorp and the Renewal Corporation would not accept their status as co-licensees under the July 16 Partial Transfer Order, and that instead

PacifiCorp, the Renewal Corporation, and the States of Oregon and California would prepare a new license transfer application, whereby PacifiCorp would request to transfer the Lower Klamath Project license to the Renewal Corporation and the States as co-licensees.

Pursuant to the MOA, PacifiCorp and the Renewal Corporation filed an amended surrender application on November 17, 2020, and PacifiCorp, the Renewal Corporation, and the States of Oregon and California filed a new transfer application on January 13, 2021. On June 17, 2021, the Commission approved the transfer application, transferring the Lower Klamath Project from PacifiCorp to the Renewal Corporation and the States of Oregon and California as co-licensees.