

# **ATTACHMENT I**



February 12, 2020

## LOCAL IMPACT MITIGATION FUND

In 2010, PacifiCorp, California, and Oregon entered into the Klamath Hydroelectric Settlement Agreement (the “KHSA”), which was further amended in 2016 (as amended, the “AKHSA”). Under the AKHSA, the Klamath River Renewal Corporation (the “KRRC”) will be responsible for removing four dams owned and operated by PacifiCorp (J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate) along the Klamath River, subject to regulatory approval. As part of this process, the KRRC has developed a comprehensive plan for the dam removal project, as reflected in the Definite Plan and now the 60% design specifications. This plan includes a Risk Management Plan (the “RMP”) detailing the various mechanisms used to protect PacifiCorp, California, and Oregon (along with KRRC, the “Indemnified Parties”) from damages arising from the removal of the dams – including claims by third-parties – in a defined, organized, and comprehensive fashion. Below is an overview of the legal and technical analyses used to ensure that one of the component parts of the RMP, the Local Impact Mitigation Fund (the “LIMF”), is adequately capitalized to address the claims it is intended to cover. The Attachments (listed below) provide additional details regarding how the scope and magnitude of key risks were evaluated and accounted for in preparing the overall framework.

### I. Overview of Risk Management Approach

KRRC’s indemnification obligations are set forth in Section 7.1.3 and Appendix L of the AKHSA, provided as Attachments A and B, respectively. Section 7.1.3 requires that KRRC indemnify the principals from and against any monetary or non-monetary harms, claims, or expenses, which may result from the dam removal process. Appendix L further details the required Contractor Qualifications, Insurance, Bonding, and Contractual Indemnifications (as defined therein) that KRRC must put in place in order to effectuate the commitments made in Section 7.1.3. Taken together, these provisions provide a cumulative, integrated, and synergistic approach to insulating and defending the Indemnified Parties from potential liabilities associated with the removal of the dams. KRRC has provided for this liability protection through a series of relationships and agreements including:

#### Kiewit Indemnification

- KRRC’s contract with Kiewit contains an indemnification addressing contractor non-performance and impacts arising from Kiewit’s removal of the dams. Kiewit’s obligations are backstopped by insurance, a performance bond, and a parent guarantee. A summary of this agreement is provided as Attachment C.

#### RES Indemnification

- KRRC’s contract with RES will contain indemnification addressing contractor non-performance and impacts arising from RES’s habitat maintenance and restoration work associated with the dam removal (including certain impacts to natural resources). RES’s obligations will be backstopped by insurance, a performance bond, and a parent guarantee.

#### Consolidated Insurance Program

- Consistent with Aon’s *Revised Risk and Insurance Due Diligence Report* (February 2020), a variety of insurance policies will cover Kiewit’s and RES’s activities. KRRC will either hold the policies or be named as an Additional Insured to provide direct contractual rights of recovery. A summary of the policies and their coverage limits is provided as Attachment D.

#### Performance Bonds

- Bonds will be secured in connection with Kiewit’s and RES’s activities.



## II. Overview of the LIMF

The LIMF will operate in parallel with the other liability protection mechanisms. In consultation with PacifiCorp regarding its experience on prior dam removals, RES (on behalf of KRRC) analyzed potential claims, reviewed available litigation related to prior dam removal projects, and worked with technical advisors to understand (1) the type, scope, and magnitude of risks associated with the dam removal and (2) KRRC's insurance and contractual coverage. Through that process, RES and KRRC identified potential damages and claims that were not covered by insurance or contract. For certain of these risks, KRRC will carry a contingency (e.g., "uncontrollable circumstances" as defined in the Kiewit/RES contracts). For others, RES and KRRC have quantified the potential range of damages, and have determined that the most cost-effective mechanism to address those claims is via the LIMF. In addition, RES believes that resolving certain claims in a transparent manner will contribute to the success of the project.

Broadly speaking, the LIMF will cover claims related to property damages arising through no fault of RES or Kiewit and, therefore, not covered by their respective contractual indemnification obligations. This includes the potential for increased flooding, issues related to the potential instability of the reservoir rims, and certain impacts to groundwater wells. Separately, KRRC has elected to establish a Facilities Removal Defense Fund (the "Defense Fund") to cover (1) claims that are foreseeable, but where the legal risk associated with such claims is low and/or the Indemnified Parties have agreed that such claims are not compensable (including diminution in property value due to loss of reservoir views or speculative economic impact claims) and (2) unforeseen claims. To effect the above, KRRC will establish two balance sheet reserves, one for the LIMF equal to [redacted] and one for the Defense Fund equal to [redacted].

To administer the LIMF, KRRC will select an independent third-party. That administrator will assist KRRC in finalizing a methodology for each of the covered claims. The methodology will (1) describe the types of claims that are eligible for compensation, (2) the range of compensation available and the criteria for determining that compensation, and (3) the level of proof required by a claimant.

Developing this methodology will involve proactive participation and input from key stakeholders, including the Indemnified Parties. The draft methodology will be made available for public comment through town halls and other meetings. After a limited amount of time, the protocol will become final and, at some point, the fund will be "opened." When the fund is opened, parties impacted by the dam removal will inform the fund administrator that they will like to participate in the fund. The fund administrator will determine if a payment should be made, working within the methodology described above. Importantly, the LIMF will be capped and voluntary. If an impacted party does not sign-up when the fund is open, they will not have access to the fund at a later point and time; such a person might still bring a legal claim, and that claim will be defended by KRRC (unless otherwise agreed by the Indemnified Parties) using resources from the Defense Fund. For potential claimants who have opted into the LIMF, the administrator will determine if they are qualified for compensation and potentially authorize a payment in exchange for a legal release covering all of the Indemnified Parties. As described below, many claims will depend on specific facts and circumstances that are unique (e.g., whether a home is a primary residence, the type of well a landowner has, etc.). The fund administrator will be supported by a technical team but will ultimately have the discretion to determine the legitimacy of covered claims, subject to the methodology and guardrails established by the Indemnified Parties.

The timeline for opening the fund will be determined as the project moves forward. For example, the fund may be opened prior to the dam removal for flooding claims, but after dam removal for long-term impacts to groundwater wells.

KRRC will (1) determine if any damage claim will be defended by the Defense Fund or RES/Kiewit as the contract entities, (2) pay deductibles and other amounts and make any claims, (3) direct the Defense Fund. Upon the latter of the satisfaction of all restoration obligations and the applicable statute of limitations, KRRC will sunset any amounts remaining on KRRC's balance sheet will be dealt with in a manner agreed to by its funders.

In conclusion, and as described in more detail below, the analysis described herein was used to scope the size of the fund as follows:



	Low Amount	High Amount	Recommended Fund Amount
Rim Stability - Damage to property	[redacted]	[redacted]	[redacted]
Rim Stability - Additional Studies	[redacted]	[redacted]	[redacted]
Rim Stability - Monitoring	[redacted]	[redacted]	[redacted]
Rim Stability - Damages to Copco Road	[redacted]	[redacted]	[redacted]
Per Diem	[redacted]	[redacted]	[redacted]
Downstream Flooding - Damage to Property	[redacted]	[redacted]	[redacted]
Groundwater Wells	[redacted]	[redacted]	[redacted]
Emergency Water Supply	[redacted]	[redacted]	[redacted]
Monitoring and Modeling Costs	[redacted]	[redacted]	[redacted]
Administrative Costs	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]
Contingency (15%)			[redacted]
<b>Revised Total</b>			[redacted]

### III. Technical and Legal Analyses Performed

A number of technical and legal analyses have been performed to assess the type, scope, and magnitude of anticipated liabilities associated with the dam removal project, including:

- In January 2019, Perkins Coie completed a memorandum summarizing the claims that may be brought under Federal, California, and Oregon law along with the associated defenses that may be available to these claims. [redacted]
- In May 2019, Stantec performed a full analysis of the technical risks associated with the project. This analysis included review and analysis of the relevant reports, permits, permit applications, studies, and other documents related to the project, which is provided at Attachment F. Based on this analysis, Stantec identified the primary risks associated with the project and the costs associated with the measures used to mitigate those risks. This report has been supplemented and refined by the memoranda described below.
- In January 2020, Cox, Castle, Nicholson completed an expanded analysis focused specifically on the LIMF and the risks identified in the Stantec Report. [redacted] As part of this analysis, Cox, Castle, Nicholson completed an extensive survey of litigation related to other dam removal projects, which informed their analysis. [redacted] Cox, Castle, Nicholson also produced a supplemental analysis focused specifically on the size and scope of the Defense Fund. [redacted]

With the risks of liability identified and extensively assessed by qualified technical and legal experts, the LIMF is expected to be properly capitalized to ensure that it has the resources necessary to satisfy legitimate claims and defend against or otherwise resolve non-meritorious claims.

### IV. LIMF Capitalization

Based on these analyses, the LIMF will be capitalized with [redacted] to address potential flooding impacts, rim stability, and groundwater well impacts claims and other issues that may arise. This amount is being updated based on ongoing work by KRRC and its technical advisors. These funds are expected to be paid to landowners and other third parties with legitimate and verifiable claims. In addition, [redacted] will be allocated to legal defense to respond to foreseen claims where the legal risk is low and unforeseen claims. Although these funds are primarily intended to address these claims, the Defense Fund will be used to defend claims across all categories. The technical and legal analyses that underlie these calculations are summarized below.



## **A. Flooding Impacts**

### 1. Technical Analysis

As further detailed in Attachment H, 97 structures, located across 32 parcels, could be impacted by the dam removal. Of these 97 structures, only 36 are habitable structures, with the balance composed of mobile homes, bridges, and miscellaneous small structures (sheds, garages, barns, etc.). The analysis indicates that these structures could be impacted due to the potential increased depth and scope of flooding downstream of the dams after removal. Based on this information, conceptual structural flood mitigation strategies and the associated costs were developed to address the impacts these structures are expected to experience post-dam removal. In addition, based on RES's experience, RES estimated the potential reduction in market value based on increased flooding risk at [redacted] (assuming increased flooding but no loss of habitable structure) and [redacted] (assuming a structure would not be habitable, and the only value for land was as raw land). Market value was calculated using the assessed value of a property increased by [redacted], supported by other sources, including the last sale price (if available).

### 2. Legal Analysis

[redacted] a nuisance, trespass, or negligence claim would be the most likely claims asserted for downstream flood damage.

- Trespass: if there is a physical impact or entry onto the property due to the dam removal (e.g., flooding).
- Nuisance: if there is interference with the landowner's use or enjoyment of their property, regardless of physical impact.
- Negligence: if the impact on the property is the result of improper conduct.

Given the similar elements of these claims, a single set of facts could give rise to multiple claims from the same landowner. Depending on the facts at issue, a negligence claim may be covered by insurance, depending on its nexus to the actions of a contractor.

Of note, there are defenses to the legal claims described above, including a lack of intent and, in California, special immunity for private parties acting pursuant to statute. Therefore, this summary should not be read to suggest that any claim would be successful. However, when viewing flooding claims in connection with KRRC's mandate to prudently address the direct impacts associated with dam removal, the principals have elected to include a reserve within the LIMF to compensate impacted property owners.

### 3. Conclusion

Based on the above, [redacted] is allocated to address downstream flooding impacts. This is based on the technical work done by Stantec to assess properties impacted. These funds are comprised of the lesser of (1) the costs of building a flood improvement to protect the property, or (2) the high reduction in land value (i.e., [redacted] reduction in the value of the land, assuming any property would be essentially uninhabitable). This assumes that all flooding would result in the loss of a habitable structure, which is likely a conservative assumption.

## **B. Rim Stability**

### 1. Technical Analysis

As further detailed in Attachment I, across the entire project area, rim instability is only anticipated along the Copco No. 1 Reservoir. This area includes 3,700 linear feet of slopes along a road adjacent to the reservoir and 2,800 linear feet of slopes adjacent to private property. Localized failures along the road could occur that may require rerouting or abandonment. 579 parcels surround the perimeter of the Copco No. 1 Reservoir, 137 of which contain habitable structures. The analysis indicates that slowing the reservoir drawdown rate would allow saturated soils adequate time to drain, which can help to improve the stability of the materials. Based on this information, certain high-risk properties have been identified along with other properties that would require additional monitoring during the reservoir drawdown. Knight Piesold and Kiewit are in the process of performing a further hazard analysis. That report should be finalized by the end of February – based on initial conversations, the results are similar to those described in Attachment I.



RES worked to assess market value for each property using the methodology described above. The Stantec/AECOM report did not purport to distinguish between risks to specific properties, other than to categorize properties into one of three categories (low risk, medium risk, or high risk). RES assumed that rim instability would result in either minimal damage (a [redacted] reduction in market value) or near total loss (a [redacted] loss in market value). RES also conservatively assumed that all high-risk homes were primary residences, although based on in-field work we understand that many homes are not primary residences, and that every high-risk property would be evacuated for 6 months following drawdown. We used [redacted] per night based on federalpay.org data, for a total of [redacted] to estimate the cost of relocation.

If landowners are unwilling to relocate during drawdown, KRRC will need to work with the county to determine the best path forward.

## 2. Legal Analysis

[redacted] landowners impacted by rim instability could raise nuisance, trespass, and negligence claims similar to the claims associated with flooding impacts in Section IV.A.2. Furthermore, these claims would be subject to defenses similar to those discussed in association with flooding impacts in Section IV.A.2.

## 3. Conclusion

Based on the above, [redacted] is allocated to address rim stability impacts. There is a material difference between the low amount assuming minimal impacts [redacted] and the high amount assuming near total loss for all high-risk properties [redacted]. In addition, there is a risk of an impact to Copco Road which, based on feedback from Kiewit, is not expected to exceed [redacted]. KRRC elected to use the mid-point between the high and low points [redacted] for Copco Road, and [redacted] for additional studies and monitoring for a total of [redacted].

This is based on the technical work done by Stantec to assess properties potentially impacted. These funds will be used to cover (1) purchasing the impacted property for market value, (2) payment of relocation per diem while the property is monitored, or (3) monitoring and additional studies. The precise approach taken will depend on the nature of the impact and may involve a combination of approaches if rim instability is not anticipated but later develops. In addition, the fund administrator will need the flexibility to determine (1) if a home is a primary residence, entitling the owner to a range of compensation between minimal impacts and total loss.

## C. Groundwater Well Impacts

### 1. Technical Analysis

As further detailed in Attachment J, across the entire project area, groundwater well impacts are only anticipated for wells within 1000 feet of the Copco No. 1 Reservoir. There are approximately 70 residences served by approximately 66 wells that meet these criteria, but a smaller subset is expected to experience actual impacts. The groundwater well impacts studied include both well depth and water quality. If wells are impacted, planned mitigation measures include deepening the well, resetting the pump depth, filtration, or well replacement. Based on the attached memorandum as well as discussions with KRRC and their technical advisor, McMillan Jacobs, it was assumed that [redacted] would be materially impacted, [redacted] of which would require a new well to be drilled at [redacted] per well [redacted], [redacted] of which would require deepening or limited work at [redacted] per well [redacted], and [redacted] of which would require minimal work at [redacted] per well [redacted] – for a total of [redacted]. In addition, RES allocated [redacted] to emergency water supply (based on limited research, the average price from various companies appears to be between [redacted] and [redacted] for each delivery of 2,500 gallons with the cost depending on distance).

### 2. Legal Analysis

[redacted] landowners that experience diminished well capacity after dam removal are not expected to have a viable legal claim. To the extent that a reservoir is supporting a specific level of production from a well, the owner of the well has no enforceable legal right to the continued maintenance of that artificial condition. As to water quality, landowners could raise nuisance, trespass, and negligence claims similar to the claims associated with the flooding impacts discussed in Section IV.A.2. Furthermore, these claims would be subject to defenses similar to those discussed in association with flooding impacts in Section IV.A.2.



### 3.Conclusion

Based on the above, [redacted] is allocated to address groundwater well impacts. These funds will be used to cover drilling a new well, deepening a well, installing a storage tank or filtration system, or other work. The precise approach taken will depend on the nature of the impact and may involve a combination of approaches. Of key importance, testing of groundwater wells has determined that arsenic is naturally present in groundwater (i.e., a pre-existing condition), although levels of arsenic may be exacerbated by drawdown. Even levels of arsenic in the groundwater are not exacerbated by drawdown, arsenic levels are a public health issue that will require coordination with various counties and agencies.

#### ***D. Diminution in Property Values (Views)***

##### 1. Technical Analysis

The project area contains 1 designated, scenic overlook, 21 developed recreation sites, and 7 dispersed recreation sites. Additionally, 140 residences are located on Copco No. 1 Reservoir, [redacted] of which are vacation homes.

##### 2. Legal Analysis

[redacted] although landowners may attempt to bring nuisance claims in this context, these claims are not expected to be successful. A change in appearance, unsightly appearance, or interference with views alone does not rise to the level of interference that is actionable as a nuisance. Although not a separate claim, such impacts may be considered as an element of a nuisance claim based on a cognizable physical interference as described above.

##### 3. Conclusion

Based on the above, the Defense Fund would be used to defend claims of diminution in property value. These funds will be used to defend, and if necessary, litigate one case through to judgment to demonstrate there is no viable claim. A successful verdict will then be used to dismiss or otherwise resolve similar claims.

#### ***E. Economic Impacts (Fishing and Recreation)***

##### 1. Technical Analysis

Individual businesses that rely on current fishing and recreation conditions may experience lost profits as a result of the changing conditions. Additionally, construction may produce other short-term profit losses, primarily as a result of increased turbidity.

##### 2. Legal Analysis

[redacted] business owners' solely economic losses are not compensable. Although California and Oregon tort law imposes a general duty to protect others from personal injury or property damage, no such duty exists to protect others from purely economic damage. As such, it is not expected that a business owner, or any other individual, could successfully assert a claim based on economic loss alone.

##### 3. Conclusion

Based on the above, the Defense Fund would be used to defend claims of economic loss. These funds will be used to defend, and if necessary, litigate one case through to judgment to demonstrate there is no viable claim. A successful verdict will then be used to dismiss or otherwise resolve similar claims.

#### ***F. Defense Fund***

In addition, KRRC will establish a Defense Fund to respond to claims that are not otherwise covered by insurance or contract. Analysis of similar projects suggests that a large majority of the legal claims will be addressed through the permitting and approval process or addressed by the LIMF. The remaining foreseen claims with low legal risk and unforeseen claims that are litigated are expected to number in the single digits. Although only a handful of litigious and aggressive claimants can drive up defense costs, an appropriately capitalized and administered Defense Fund can limit these costs. Furthermore, as mentioned above, a single favorable decision can be used to discourage or dismiss future claims. Outside analysis estimates the range of total defense costs to be between [redacted]. This analysis is provided as [redacted].



### **G. Contingency**

In addition to the above, KRRC has reserved a [redacted] contingency. Subject to further work, that contingency may also be used to address sediment issues raised by Del Norte County, dust related impacts, or impacts to downstream water users.

### **V. CONCLUSION**

Based on the analysis of legal and technical advice described herein, there is a range of cost outcomes for the anticipated claims that are compensable and have a specific reserve assigned to them (e.g., flooding impacts, rim stability and groundwater well impacts). The total amount allocated to such impacts is [redacted], [redacted] for administrative costs, and a [redacted] contingency [redacted] for a total of [redacted]. As described above, RES relied on outside counsel to allocate a total of [redacted] to the Defense Fund.

#### **List of Attachments:**

- Attachment A - AKHSA Section 7.1.3
- Attachment B - AKHSA Appendix L
- Attachment C - Klamath Project Agreement Executive Summary
- Attachment D - Aon Insurance Report
- Attachment E - Potential Liability for Damages (redacted)
- Attachment F - Stantec Report
- Attachment G - LIMF Analysis (redacted)
  - Exhibit A - [redacted]
  - Exhibit B - [redacted]
- Attachment H - Flooding Technical Analysis
- Attachment I - Rim Stability Technical Analysis
- Attachment J - Groundwater Well Technical Analysis

***Disclaimer: This document provides a high-level overview of the various mechanisms used to protect the Indemnified Parties from damages arising from removal of the dams. None of the information contained herein should be relied upon as legal or other advice, and no waiver of attorney-client privilege or other confidentiality is intended in the preparation or disclosure of this summary or the attachments. While this memo and certain attachments are being provided to the Board of Consultants, KRRC is redacting confidential attorney-client information from the public record.***