

3.3.4 Schedule for Secretarial Determination

By March 31, 2012, the Secretary shall use best efforts to (i) determine whether the costs of Facilities Removal as estimated in the Detailed Plan, including the cost of insurance, performance bond, or similar measures, will not exceed the State Cost Cap, and (ii) otherwise complete his determination whether to proceed with Facilities Removal as described in Section 3.3.1, provided that any such determination shall not be made until the following conditions have been satisfied:

A. Federal legislation, which in the judgment of the Secretary is materially consistent with Appendix E, has been enacted;

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B. The Secretary and PacifiCorp have agreed upon acceptable terms of transfer of the Keno facility pursuant to Section 7.5.2;

C. The States of Oregon and California have authorized funding for Facilities Removal as set forth in Section 4 of this Settlement;

D. The Parties have developed a plan to address the excess costs, consistent with Section 4.10 of the Settlement, if the estimate of costs prepared as part of the Detailed Plan (including the cost of insurance, performance bond, or similar measures) shows that there is a reasonable likelihood such costs are likely to exceed the State Cost Cap; and

E. The Secretary has identified a DRE-designate, and, if the DRE designate is a non-federal entity: (i) the Secretary has found that the DRE-designate is qualified; (ii) the States have concurred in such finding; and (iii) the DRE-designate has committed, if so designated, to perform Facilities Removal within the State Cost Cap.

If the above conditions are not satisfied, the Secretary shall not make a determination. Instead, the Secretary shall provide Notice to the Parties, who shall follow the Meet and Confer procedures in Section 8.7 to consider potential modifications to this Settlement. However, if the conditions set forth in Sections 3.3.4.A, B, D, and E are satisfied and, with respect to the condition set forth in Section 3.3.4.C, the Customer Contribution required by Sections 4.1.1 has been established but California Bond Funding required by Section 4.1.2 has not been approved, in whole or part, the Secretary may still make an Affirmative Determination so long as one of the following additional conditions is met:

(1) Based on the Detailed Plan, the Secretary finds that the Customer Contribution and any approved California Bond Funding will be sufficient to accomplish Facilities Removal; or,
(2) If the Secretary finds that the Customer Contribution and any approved California Bond Funding may not be sufficient to accomplish Facilities Removal, the Secretary has received satisfactory assurances from the State of California that the California Bond Funding pursuant to Section 4.1.2.A necessary to effect Facilities Removal will be Timely available.

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3.3.5 Use and Consequences of Secretarial Determination

A. Affirmative Determination

In the event of an Affirmative Determination, California and Oregon each shall provide Notice to the Secretary and other Parties whether the State concurs with the Affirmative Determination. In its Concurrence, each State shall consider, in its discretion and independent judgment, whether:

(i) significant impacts identified in its environmental review can be avoided or mitigated as provided under state law; and

(ii) Facilities Removal will be completed within the State Cost Cap.

- i. Designation of DRE Concurrent with Any Affirmative Determination Any Affirmative Determination shall include designation of a DRE. The Secretary may designate Interior as the DRE, unless the Secretary, in his sole judgment and discretion, designates a non-Federal entity as the DRE consistent with Section 3.3.4.E. The Secretary shall consult with the Parties prior to designating a nonfederal DRE.
- ii. Concurrences By States in Event of Designation of a Federal DRE In the event of the designation of a federal DRE, no Concurrence in such designation is required, and each State's Concurrence decision shall be limited to the Affirmative Determination under Section 3.3.5.A. Each State shall undertake to concur in the Affirmative Determination within 60 days of such determination.
- iii. Concurrence by States in Event of Designation of a Non-Federal DRE If the Secretary designates a non-federal DRE, and each State has concurred in the designation of the DRE as provided in Section 3.3.4.E, each State shall then undertake to concur in the Affirmative Determination within 60 days of Notice of the Determination. If either State proposes to withhold Concurrence with the Affirmative Determination, the Parties shall undertake Dispute Resolution pursuant to Section 8.6 to consider potential modifications to this Settlement.

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B. Negative Determination

If the Secretary determines not to proceed with Facilities Removal, which is removal of all or part of each Facility as necessary to effect a free-flowing condition and volitional fish passage as defined in Section 1.4, this Settlement shall terminate unless the Parties agree to a cure for this potential termination event. Prior to adopting or public release of such a determination, the Secretary shall provide Notice to the Parties of his tentative determination and its basis. The Parties shall consider whether to amend the Settlement, pursuant solely to the provisions of Section 8.11.3.A.i, in a manner that will permit the Secretary to make an Affirmative Determination.