

Date: July 14, 2016
From: Lawrence Kogan, Esq.
To: KID Board Members, Management & General Counsel
Re: Memorandum: C-Hydro – A KID Project Diverting Considerable Funds Needed For C Canal Flume Replacement (FINAL)

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I. Introduction

1. The Purpose of this Memorandum:

This memorandum is intended to closely examine the very complex and costly C-Drop Hydroelectric Project, which appears to be diverting and withholding from KID access to and use of a considerable amount of the District's liquid funds that otherwise could be employed to support the BOR-directed C Canal Flume Replacement Project, recently estimated to cost from \$10-\$12 million. The KID Board expressed initial interest in this inquiry back in April 2016 when it became apparent from studying the KID's FYE 2012 Financial Statements that \$600,000 of District funds had been loaned to an entity named C-Drop Hydro, LLC and that the District would ultimately be entitled to a 50 percent (%) share in the gross power revenues the C-Drop Hydroelectric Project would earn.¹

2. History of C-Drop Hydroelectric Project:

The C-Drop Hydroelectric Project was initially formally proposed to KID in a March 2008 Feasibility Report prepared by Sorenson Engineering of Idaho Falls, Idaho "to demonstrate the technical and economic basis for the project."² "The site is located on the former Enterprise Hydroelectric Plant which burned and was taken out of service approximately 25 years ago." "This Feasibility Study is for a 900 KW hydroelectric plant project located at the C-Drop at the intersection of the A, B and C Canals."³

Apparently, the March 2008 Feasibility Report had been prompted by a May 2, 2007 email inquiry made by former KID Manager, David Solem with Dennis Daugherty of Riverside, Inc., Parma, Idaho. Tom McCreedy of McCreedy Consulting, Eagle, Idaho had responded to this email on May 10, 2007.⁴ An August 2007 site visit from Tom McCreedy and Ted Sorenson followed,⁵ and on September 11, 2007, Sorenson Engineering submitted a "Stage 1 Feasibility Study for the C-Drop, at a cost of \$2,000 plus expenses."⁶ On or about September 21, 2007, the KID Board of Directors voted to proceed with the "Stage 2" Sorenson Engineering Feasibility Study, estimated to cost \$22,000.⁷ The completed Feasibility Study was subsequently delivered to KID on March 14, 2008.⁸

On October 27, 2008, Sorenson Engineering submitted to KID a follow-up proposal to undertake all activities required to produce and submit a FERC license application to develop the C Drop Hydroelectric Project, at a cost of \$62,000 plus travel expenses, but exclusive of environmental

¹ See MSP Certified Public Accountants, *Klamath Irrigation District Financial Statements December 31, 2012*, at Statement of Net Position Modified Cash Basis, Management's Discussion and Analysis, and Note 4 – Notes Receivable of the Notes to the Financial Statements (attached hereto).

² See Sorenson Engineering, *Feasibility Report for Klamath Irrigation District – C-Drop Hydroelectric Project* (March 2008), at p. 2 (attached hereto).

³ *Id.*

⁴ See Email Correspondence From C.T. McCreedy to David Solem Replying to Solem May 2, 2007 Email to Dennis Daugherty, Riverside, Inc. (May 10, 2007) (attached).

⁵ See Letter Correspondence From David Solem to Tom McCreedy and Ted Sorenson (Aug. 22, 2007) (attached).

⁶ See Letter Correspondence From Sorenson Engineering, P.A. to David Solem (Sept. 11, 2007) (attached).

⁷ See Letter Correspondence From David Solem to Tom McCreedy and Ted Sorenson (Sept. 21, 2007) (attached).

⁸ See Letter Correspondence From Ted Sorenson to David Solem Re C-Drop Hydroelectric Feasibility Report (March 14, 2008) (attached).

subcontractor costs.⁹ Apparently, the KID Board had approved this proposal, because: 1) a November 19, 2008 email from Donald H. Clarke of GKRSE, a Washington, D.C. law firm had referred to KID Manager, Dave Solem as “the client;”¹⁰ and 2) a November 20, 2008 Consultant Agreement entered into between GKRSE and Sorenson Engineering had referred to GKRSE as “the attorneys for the Klamath Irrigation District (“KID”) in regard to obtaining authorization from the Federal Energy Regulatory Commission (“FERC”) for the development of a hydroelectric plant project (“Project”) at C-Drop on the irrigation system maintained and operated by KID.”¹¹

On June 1, 2009, Sorenson Engineering prepared and filed with FERC “an application for a preliminary permit pursuant to Section 4(f) of the Federal Power Act, proposing to study the feasibility of the C Drop Hydroelectric Project (project)...”¹² On August 11, 2009, the FERC dispatched a correspondence to the U.S. Bureau of Reclamation (“BOR” or “Reclamation”)’s Power Resources Office, conveying to the BOR its determination that “Commission staff preliminarily concludes that the Commission has jurisdiction over hydropower development at the site,” and requesting BOR comment within 30 days.¹³ On September 4, 2009, BOR responded by providing documentary evidence of its authority for Klamath Project power development, its written objection “to the proposed hydroelectric power development on the ground that it is reserved for development under Federal Reclamation Law,” and its recommendation that “the Commission withdraw their authority and not issue a permit or license

⁹ See Sorenson Engineering, *Proposal to Prepare FERC License Application for the C Drop Hydroelectric Project*, prepared for Klamath Irrigation District (Oct. 27, 2008) (attached).

¹⁰ See Email Correspondence From Donald H. Clarke to Dave Solem and Ted Sorenson Re Time to Confer (Nov. 19, 2008) (attached).

¹¹ See Consultant Agreement Between GKRSE and Sorenson Engineering (Nov. 20, 2008) (attached).

¹² See U.S. Federal Energy Regulatory Commission, *Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Competing Applications (Project No. 13434-000)* (June 1, 2009) (attached).

¹³ See Ltr. Correspondence From Jeff C. Wright, U.S. Federal Energy Regulatory Commission to Deborah Linke, U.S. Bureau of Reclamation, *Re Preliminary Determination Regarding FERC Jurisdiction Over C-Drop Hydroelectric Project (Project No. 13434-000)* (Aug. 11, 2009) (attached) (This correspondence referenced a 1992 Memorandum of Understanding between FERC and BOR intended “to guide determinations of whether the Commission or Reclamation has authority to license proposed non-federal hydropower development at individual Reclamation projects.”). *Id.* at fn 1, p. 1. See also Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Bureau of Reclamation for Establishment of Processes for the Early Resolution of Issues Related to the Timely Development of Non-Federal Hydroelectric Power at Bureau of Reclamation Facilities (Nov. 6, 1992). The U.S. Departments of Energy, Interior and the Army subsequently entered into an updated memorandum of understanding on March 24, 2010. See Memorandum of Understanding For Hydropower Among the Department of Energy, the Department of the Interior and the Department of Army (March 24, 2010), available at:

<http://energy.gov/sites/prod/files/2015/02/f19/Memorandum%20of%20Understanding%20for%20Hydropower%20March%202010.pdf>.

for this site.”¹⁴ On April 6, 2010, FERC issued an order dismissing KID’s preliminary permit application and directed KID to “request a lease of power privilege from Reclamation.”¹⁵

On December 22, 2009, KID had apparently entered into an Interconnection System Impact Study Agreement with PacifiCorp, for which PacifiCorp subsequently (on May 19, 2010) billed KID \$4,049.99. PacifiCorp issued its “Small Generator Interconnection Tier 4 Facilities Study Report” on July 23, 2010, which focused on hydroelectric generation to the Crystal Springs Feeder out of the Hornet substation located in Klamath County.¹⁶

On or about May 1, 2010, KID had entered into a Business Services Contract with Resources Consultants, Inc. (“RCI”) of Williams, OR to provide a second opinion regarding the feasibility of the C-Drop Hydro Project for a cost of \$4,500. On September 8, 2010, RCI issued a report detailing its review of the Sorenson C-Drop Hydroelectric Project. It concluded that the KID C-Drop Hydro Project “has the potential for being an economic benefit to KID [only] if adequate incentive, grant, and other financial support can be actualized and an appropriate project management plan can be developed.” In addition, it concluded that “(BOR finalizing the lease of power privilege is also a requirement.)”¹⁷ The RCI review, furthermore, recommended that KID secure “a second expert opinion from a P.E. with experience in hydroelectric projects [...] for design and engineering as well as resource assessment and energy production potential.”¹⁸ In particular, it expressed “concerns regarding Klamath River endangered species issues, which is politically charged enough to override established water rights.”¹⁹ RCI also recommended that KID explore [...] the potential for negotiations for diverting water for hydroelectric generation without distribution to water consumers when irrigation bans are in place.”²⁰ Moreover, it concluded that, “[b]ased on assumptions made in the [Sorenson] Feasibility Report, the gross profit margin is 11% [...] which is low, creating a high risk project.”²¹

¹⁴ See Ltr. Correspondence From David Sabo, U.S. Department of Interior Bureau of Reclamation to Kimberly Bose, U.S. Federal Energy Regulatory Commission, *Re Preliminary Determination Regarding FERC Jurisdiction Over C-Drop Hydroelectric Project (FERC Project No. 13434-000)* (Sept. 4, 2009) (attached). See also Memorandum From Elizabeth Molloy, Office of FERC General Counsel *Re C-Drop Project (Project No. 13434-000)* (March 10, 2010) (directing placement into the public record of “Department of Interior Solicitor Opinion M-28725 regarding the use and occupation of a power site on the Klamath reclamation project by the Enterprise Irrigation District”) (attached).

¹⁵ See Federal Energy Regulatory Commission - *Klamath Irrigation District - Order Dismissing Preliminary Permit Application* (Project No. 13434-000), 131 FERC 62,023 (April 6, 2010) (attached) (FERC reasoned that “there is ample evidence that federal hydropower development at the C-Drop location was contemplated in the construction of the federal project and thus has been specifically reserved for federal development. Therefore, the Commission is presumed to lack jurisdiction for the proposed C-Drop Hydroelectric Project on the Klamath Reclamation Project. [...] If Klamath Irrigation District wishes to pursue development of a hydroelectric project at the C-Drop site, it must request a lease of power privilege from Reclamation.”).

¹⁶ See PacifiCorp, *Small Generator Interconnection Tier 4 Facilities Study Report Completed for Klamath Irrigation District Re Proposed Interconnection on PacifiCorp’s Existing 12.0-kV Crystal Springs Feeder, 5LA45, out of Hornet Substation* (July 23, 2010) (attached).

¹⁷ See Resource Consulting, Inc., *Klamath Irrigation District C-Drop Hydroelectric Project – Feasibility Study Review of Sorenson Engineering Report and Overall Project Assessment* (Sept. 8, 2010) at p. 2 (attached). The RCI review also identified the establishment of interconnect and power purchase agreements as key factors to ensure the project’s success. See *Id.* at p. 7.

¹⁸ *Id.*, at p. 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

On November 6, 2010, KID issued its Request for Proposals (“RFP”) related to the C-Drop Hydroelectric Project.²² The RFP indicated that KID would convene a “voluntary proposer’s conference” at KID Headquarters on November 19, 2010, during which proposals for the C-Drop Hydroelectric Project would be submitted and ranked.²³ Only two proposals had been submitted by the December 7, 2010 deadline – one from United Power Corporation and the other from Warm Springs Hydro, LLC.²⁴ Based on the evaluation score sheets completed by KID Board members who had reviewed them on December 7, 2010, Warm Springs received a higher score.²⁵ It is not known whether the proposer’s conference was ever convened.

Apparently, at KID’s December 13, 2010 monthly public meeting, the KID Board accepted the recommendation of its C-Drop Hydro Project Review Committee, and decided, based on such scores, to open negotiations with Warm Springs Hydro, LLC. On December 14, 2010, KID was contacted by United Power Corp. which sought to protest the selection.²⁶ United Power Corporation proceeded to prepare a formal Protest of Award Selection dated, December 17, 2010, seeking the opportunity to present its demonstration of Return to the District which it had anticipated would occur later in the process during contract negotiations. KID received the protest the same day.²⁷ Its protest document, however, did not specify any grounds for protest, and consequently the Board was advised that it failed to meet Oregon statutory requirements.²⁸

On January 3, 2011, KID Manager Stuntebeck advised United Power Corporation by letter correspondence that it would hear its protest during the KID monthly public meeting scheduled for January 13, 2011.²⁹ On January 13, 2011, Mr. O’Keefe presented United Power Corporation’s demonstration of Return to the District.³⁰ On January 31, 2011, KID denied United Power Corporation’s protest.³¹ It reasoned that the protest failed to specify any grounds, effectively requested a change in the District’s proposal evaluation procedure, and failed to include a firm rate of return other compensation formula indicating the District’s share of power revenues.³² On April 4, 2011, United Power Corporation responded to KID’s January 31, 2011 letter, pointing out that, at the January 13, 2011 meeting, **it had “in fact provided a very specific and firm rate of return (30% Royalty) over the (Board evaluation team’s) assumed**

²² See Klamath Irrigation District, *Request For Proposals Related to the C-Drop Hydroelectric Project, Klamath Falls, Oregon* (Nov. 6, 2010) (attached) (accompanied by information about the Project).

²³ *Id.*, at pp. 3-5.

²⁴ *Id.*, at p. 14.

²⁵ The evaluation score sheets had been completed by three KID Board members – Greg Carleton, Ross Fleming and an unidentified KID Board member.

²⁶ See Klamath Irrigation District, *Addendum for the C-Drop Hydroelectric Project Request For Proposals*, signed by United Power Corporation President Bart M. O’Keefe (Dec. 14, 2010) (attached) (The Addendum stated that “[t]he date for Deadline for Protest of award selection in the schedule has been extended to 12/20/10 at 4:30 p.m.”).

²⁷ See Letter Correspondence From Bart O’Keefe, United Power Corporation to Mark Stuntebeck, KID, *Re C-Drop Hydroelectric Project* (Dec. 17, 2010) (attached). (This letter served as UPC’s formal protest of KID’s award selection).

²⁸ KID Counsel W. Ganong had prepared a confidential legal memorandum reaching this conclusion that cannot be disclosed.

²⁹ See Letter Correspondence From Mark Stuntebeck, KID to Bart O’Keefe, United Power Corporation, *Re Protest of Award Selection – C-Drop Hydroelectric Project* (Jan. 3, 2011) (attached).

³⁰ See United Power Corporation, *C-Drop Return to Klamath Irrigation District Proposal Return Comparison*, presented Jan. 13, 2011 (attached).

³¹ See Letter Correspondence From Mark Stuntebeck, KID to Bart O’Keefe, United Power Corporation, *Re Protest of Award Selection – C-Drop Hydroelectric Project* (Jan. 31, 2011) (attached).

³² *Id.*

project life. In addition, [it] gave the project to the District, at no charge, at the end of the term.”³³

Meanwhile, on February 8, 2011, BOR filed in the Federal Register a “Notice of Intent to Accept Proposals, Select One Lessee and Contract for Hydroelectric Power Development at the Klamath Project, C-Drop”³⁴ which had been prepared by BOR Mid-Pacific Region staff on November 10, 2010. The notice required submission of proposals by no later than March 31, 2011 (fewer than 60 days from its Federal Register filing date). **By this point, there were few if any other potential bidders besides Warm Springs Hydro, LLC that could have satisfied this deadline.**³⁵

II. Relevant Provisions of the Following KID-Executed C-Drop Hydroelectric Project-Related Agreements Impairing District Cash Flow and Assets that Otherwise Could Have Been Employed to Support C Canal Flume Financing Arrangement

It should be stated at the outset that, KID counsel William Ganong was involved directly and/or indirectly with KID management in the drafting and amendment of the many agreements KID had executed in connection with the C-Drop Hydroelectric Project. Thus, based on this memorandum’s tentative findings, it is unbelievable that a number of the material (significant) changes the parties had made to these agreements were likely pushed through without KID Board authorization. Such authorization would have been evidenced in related Board resolutions had they been properly adopted *at or before* the time such KID management actions had been undertaken.

1. The KID-Warm Springs Hydro, LLC C-Drop Hydroelectric Project Agreement:

KID entered into the C-Drop Hydroelectric Project Agreement with Warm Springs Hydro, LLC on April 5, 2011.³⁶ This Agreement establishes the framework for the overall relationship between the parties and incorporates references to other agreements the parties have executed. Recital B of such Agreement, for example, anticipated that KID had already begun negotiations

³³ See Letter Correspondence From Bart O’Keefe, United Power Corporation to Mark Stuntebeck, KID *Re C-Drop Hydroelectric Project* (April 4, 2011) (attached).

³⁴ See U.S. Department of the Interior Bureau of Reclamation, *Notice of Intent to Accept Proposals, Select One Lessee and Contract for Hydroelectric Power Development at the Klamath Project, C-Drop*, 76 FR 6820 (Feb 8 2011), available at: <https://www.gpo.gov/fdsys/pkg/FR-2011-02-08/pdf/2011-2675.pdf> (discussing procedures and conditions for entering into a Lease of Power Privilege contract with Reclamation to develop hydroelectric power on the Klamath Irrigation Project).

³⁵ **KID patrons would be wise to further investigate this bidding process to determine whether the District’s interests were best served. It would appear that the previous KID Board and the BOR were so invested in Warm Springs Hydro, LLC that they could not or did not wish to change course. As this memorandum clearly shows, the KID Board’s decision to select Warm Springs Hydro, LLC as its C-Drop Hydroelectric Project “partner” has adversely affected and diverted badly needed District cash flow from other District activities, namely, the C-Canal Flume Replacement Project.**

³⁶ See C-Drop Hydroelectric Project Agreement Between Klamath Irrigation District and Warm Springs Hydro, LLC (April 5, 2011) (attached). April 5, 2011 has been identified as the execution date of this Agreement because it was on this date that KID Board Member David Cacka and Manager Mark Stuntebeck signed it. Warm Springs Members Ted Sorenson and Dennis Daugherty had previously signed the Agreement on April 1, 2011 and March 31, 2011, respectively.

on an interconnect agreement with PacifiCorp, applied with the Oregon Department of Water Resources for a water right to generate hydroelectricity, and had applied with the Oregon Department of Energy for a B.E.T.C. grant “which it agree[d] to waive in favor of Warm Springs.”³⁷

a. *Article 1 – KID Obligations*

Pursuant to Article 1 of this Agreement, KID agreed to provide Warm Springs with “reasonable assistance as requested by Warm Springs” to ensure it “may obtain the rights necessary to develop, build, own and operate the Project.” KID also agreed to “assign its assignable Development Rights to Warm Springs,” including by: 1) “waiving any preference it has to an/or subletting the Lease of Power Privilege with the BOR”; 2) “assigning any necessary or helpful water rights for the Project that it [currently] ha[d] or may receive in the future”; 3) “provid[ing] all documents it has pertaining to the negotiations of an Interconnect Agreement with PacifiCorp;” 4) “granting licenses, permits and other rights as reasonably requested by Warm Springs to enable it to access, construct, own equipment, and maintain the Project;” and 5) “execut[ing...] any other documents or taking such other actions reasonably requested by Warm Springs that are necessary or helpful in the development of the Project.”³⁸

b. *Article 2 – Warm Springs’ Full 24-Year Ownership of Project*

Article 2 provides that Warm Springs would “own and operate the Project at its own cost and expense” [...d]uring the first 24 years the Project is in operations.” At the same time, KID would “use its best efforts to maximize the water flow to the Project throughout the year, to the extent such does not conflict with necessary irrigation obligations from the canals...”³⁹

c. *Article 3 – KID Benefits – A Growing % of Gross Power Receipts During the First 24 Project Years*

Article 3 identifies the primary benefit KID will receive in exchange for having “assign[ed] the Development Rights, [...] provid[ed] necessary permits to use the United States’ own land and rights of way, the use of KID facilities for the development, construction, and operation of the Project, and [fulfilled] KID’s other obligations under this Agreement.” In particular, KID will receive during the course of the first 24 years of the 50-year agreement annual payments from Warm Springs of “a portion of the gross receipts received by Warm Springs from the Power Company for the sale of the power generated by the Project.” **KID’s potential future power revenue share depends on the C-Drop hydroelectric facility generating at least 3,000 MW-hrs of electricity per year during most of the Agreement’s term.**

For Years 1-5 (2012-2016) (with Year 1 commencing “on the date that the Project meets its Commercial Operation Date” which, as set forth in Recital C and Article 1.4 of the Power Purchase Agreement, is April 15, 2012),”⁴⁰ KID shall receive 0% of the gross receipts from

³⁷ See C-Drop Hydroelectric Project Agreement, *supra* at Recital B.

³⁸ See *Id.*, at Article 1.

³⁹ *Id.*, at Article 2.

⁴⁰ The Commercial Operation Date, for purposes of applying power rates to energy generated at the C-Hydro Facility, as determined by **Recital C and Article 1.4 of the C-Drop Hydro, LLC-PacifiCorp Power Purchase**

the first 3,000 MW-hrs generated during said period. For years 6-10 (commencing in 2017-2021), KID shall receive 5% of the first 3,000 MW-hrs generated during that period. For Years 11-15 (2022-2026), KID shall receive 7% of the first 3,000 MW-hrs generated during said period. For Years 16-19 (2027-2030), KID shall receive 12% of the first 3,000 hours generated during said period. For years 20-24 (2031-2035), KID shall receive 20% of the first 3,000 MW-hrs generated during that period.⁴¹

In the event more than 3,000 MW-hrs are generated in a given contract year, KID will receive the following percentages of gross receipts for each MW-hr generated *in excess of* 3,000: For Years 1-2, KID shall receive 5% of gross receipts in excess of 3,000 MW-hrs; For Years 3-10, KID shall receive 15% of gross receipts *in excess of* 3,000 MW-hrs; and For Years 11-24, KID shall receive 20% of gross receipts *in excess of* 3,000 MW-hrs.⁴²

- d. *Article 4 - Warm Springs' Obligation to Inspect, Repair and Rehabilitate Project in Year 24; KID Ownership of 50% of Warm Springs from End of Year 24 Thru Year 50*

Article 4 obligates Warm Springs to thoroughly inspect all of the Project's mechanical and electrical components during the 24th year of operation and to repair and replace all parts or components "as necessary to place the Project in first class working condition to ensure that the Project will continue to operate properly for the following 25 years under normal operating conditions." It also obligates Warm Springs at the end of Year 24 to ensure that KID acquires a direct 50 % interest in Warm Springs, and consequently, an indirect 50% interest in the Project, entitling it to 50% percent of the Project's net profits.⁴³

- e. *Article 5 – KID Waives All Rights to Project Tax Attributes and Government Assistance in Favor of Warm Springs*

Article 5 recognizes Warm Springs' exclusive right as "beneficial owner of the Project for tax and government grant purposes." This beneficial right entitles Warm Springs to "all depreciation expense [...] on its income tax return" and also to "apply [...] for a Section 1603 Grant,"⁴⁴

Agreement is **April 15, 2012**, which is approximately one month prior to the "power generation commencement date" date on which the "switch was flipped at the C-Hydro Facility (**May 3, 2012**), as reported by the media (*See* discussion below at Section II.3.c of this memorandum). **The power generation commencement date which appears in Article 3 of the KID-C-Drop Hydro, LLC Hydroelectric Agreement is used for purposes of applying the period to measure KID's share of gross power receipts from power revenues generated. In other words Years 1-5 during which KID earns 0% of gross receipts from power revenues generated, are likely figured as follows:** Year 1 (May 3, 2012-May 2, 2013); Year 2 (May 3, 2013-May 2, 2014); Year 3 (May 3, 2014-May 2, 2015); Year 4 (May 3, 2015-May 2, 2016); Year 5 (May 3, 2016-May 2, 2017). Compare with Section IV, below. *See PacifiCorp, Energy Purchases From Vendor C-Drop Hydro, LLC Hydro Plant (May 1, 2013 – May 1, 2014), Re Power Purchase Agreement (attached).*

⁴¹ *See* C-Drop Hydroelectric Project Agreement, *supra* at Article 3.

⁴² *Id.*

⁴³ *Id.*, at Article 4.

⁴⁴ *See* U.S. Department of the Treasury, *Recovery Act - 1603 Program: Payments for Specified Energy Property in Lieu of Tax Credits*, available at: <https://www.treasury.gov/initiatives/recovery/Pages/1603.aspx> ("The purpose of the 1603 payment is to reimburse eligible applicants for a portion of the cost of installing specified energy property used in a trade or business or for the production of income. A 1603 payment is made after the energy property is placed in service; a 1603 payment is not made prior to or during construction of the energy property." The Recovery Act reference is to the American Recovery and Reinvestment Act of 2009). *See also* U.S. Department of

Production Tax Credit,⁴⁵ Oregon B.E.T.C. Grant⁴⁶ and/or other federal and/or state grants, assistance, loans, credits and with the like with respect to the Project” (e.g., Energy Trust of Oregon).⁴⁷ **KID agreed to “waive[] any and all rights to Project Tax Attributes and**

the Treasury, *Payments for Specified Energy Property in Lieu of Tax Credits Under the American Recovery and Reinvestment Act of 2009 – Frequently Asked Questions and Answers*, available at: <https://www.treasury.gov/initiatives/recovery/Documents/A%20FAQs0411%20-%20general.pdf>.

⁴⁵ See U.S. Department of Energy, *Renewable Electricity Production Tax Credit (PTC)*, available at: <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> (“The federal renewable electricity production tax credit (PTC) is an inflation-adjusted per-kilowatt-hour (kWh) tax credit for electricity generated by qualified energy resources and sold by the taxpayer to an unrelated person during the taxable year. The duration of the credit is 10 years after the date the facility is placed in service for all facilities placed in service after August 8, 2005. [...] The tax credit amount is \$0.015 per kWh in 1993 dollars for some technologies and half of that amount for others. The amount is adjusted for inflation by multiplying the tax credit amount by the inflation adjustment factor for the calendar year in which the sale occurs, rounded to the nearest 0.1 cents. The Internal Revenue Service (IRS) publishes the inflation adjustment factor no later than April 1 each year in the Federal Registrar. For 2016, the inflation adjustment factor used by the IRS is 1.5556.”) *Id.* See also U.S. Department of the Treasury Internal Revenue Service, *Credit for Renewable Electricity Production and Refined Coal Production, and Publication of Inflation Adjustment Factor and Reference Prices for Calendar Year 2016*, 81 FR 25760 (April 29, 2016), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-04-29/pdf/2016-10065.pdf>.

⁴⁶ See Public Utility Commission of Oregon, *Investigation into the Effectiveness of Solar Programs in Oregon* (July 1, 2014), at pp. 10, 27 (fn. 24), 32, available at: http://www.puc.state.or.us/electric_gas/Investigation%20into%20the%20Effectiveness%20of%20Solar%20Programs%20in%20Oregon%202014.pdf (“Before 2012, businesses that installed solar systems on their property could receive a Business Energy Tax Credit. Through 2006, the credit was 35 percent of eligible project costs. The Legislature increased the credit to 50 percent of eligible costs effective January 1, 2007. The Legislature terminated BETC in 2012 but subsequently adopted a two-year eligibility extension for projects under construction before April 2011. Nearly 1,000 businesses have received a tax credit for installing a solar system. The two year eligibility extension [...] end[ed] on July 1, 2014. [...] No solar project received BETC in 2013. [...] Total business energy tax credits per year averaged approximately \$19 million per year from 2008 to 2012 [...]”)

⁴⁷ See, e.g., ECONorthwest, Report to the Legislative Assembly on Proposed Modifications to the Public Purpose Charge – Final Report (Oct. 6, 2006), at p. 1, available at: https://energytrust.org/About/PDF/061006_PPC_Modifications_Final.pdf (The non-profit Energy Trust was created in 1999 by the Oregon legislature as part of the enactment of Senate Bill 1149 (SB 1149), which “was enacted to introduce competition into Oregon’s electricity markets within the Portland General Electric (PGE) and PacifiCorp service territories. [fn] As part of SB 1149, these utilities were required to reserve 3 percent of their retail electricity sales beginning in March 2002.[fn] This public purpose charge is used [in part,] to fund energy conservation and renewable energy programs [...] Oregon has a 30-year history of using ratepayer funding for conservation and renewable programs prior to SB 1149. [...] With the current system, programs are still funded by ratepayers (through the public purpose charge) but responsibility for running these programs has been removed from the utilities and **given to several different agencies: Energy Trust of Oregon, Inc.** The non-profit Energy Trust began administering funds in March 2002 and seeks to develop and implement programs that promote energy conservation and development of renewable energy resources within Oregon. The Energy Trust receives 73.8 percent of the available public purpose charge funds; 56.7 percent is dedicated to conservation programs and 17.1 percent is dedicated for renewable energy projects.”) *Id.* See also N.C. Clean Energy Technology Center at NC State University, *DSIRE – Energy Trust of Oregon Program Overview*, available at: <http://programs.dsireusa.org/system/program/detail/246> (“The Oregon Public Utility Commission (OPUC) authorized the Energy Trust of Oregon, an independent non-profit organization, to administer these programs beginning in 2002.”); Oregon Public Utility Commission (Home), *Energy Trust of Oregon / Public Purpose Funds*, available at: http://www.puc.state.or.us/pages/electric_restruc/indices/ppindex.aspx (“Energy Trust of Oregon is an independent nonprofit organization dedicated to helping utility customers invest in and benefit from conservation, energy efficiency and generating renewable power. [...] As a steward of funds received through a small percent public purpose charge levied on the bills of ratepayers, Energy Trust keeps costs low and performance high by maintaining an efficient organization and low administrative costs. Energy Trust reports its activities, costs and results to the Commission quarterly and annually, measuring actual performance against annual targets set by the Commission. An independent board of directors oversees Energy Trust operations, provides strategic direction and

Government Assistance in favor of Warm Springs [...to] enable Warm Springs to apply for and/or receive Project Tax Attributes and Government Assistance.”⁴⁸

Since KID is a local government entity/agency, it generally was not eligible to qualify for IRC Section 1603 grant payments in lieu of tax credits.⁴⁹ However, KID would arguably have been eligible to benefit at least somewhat from Section 1603 payments had it demonstrated even minimal negotiation skills⁵⁰ to reach an equitable agreement with Ted Sorenson and Dennis Daugherty that would have provided KID an upfront indirect ownership share of the C-Drop Hydro Facility through a taxable C-corporation.⁵¹ Although such a result would have required creativity from the prior KID Board as well as some sophisticated tax planning advice, a better financial result could have been achieved for the District and its patrons. The Treasury Department’s 1603 program provided KID with a missed opportunity considering that, as a non-taxpaying local government entity, KID was not eligible to benefit from either the investment tax credit⁵² or the production tax credit.⁵³

Nevertheless, since KID did hold a lease of power privilege (“LOPP”) to use BOR-owned District lands for which KID bore O&M responsibilities, the KID could have charged, but did not charge Warm Springs Hydro, LLC// C-Drop Hydro, LLC a market lease rate to compensate the District and its patrons for the considerable expenses they would incur to facilitate the C-Drop Hydroelectric Project – another lost opportunity.

f. *Article 6 - Warm Springs Obligated to Borrow Only from KID; KID’s Offer of an Exclusive \$600,000 Secured Loan to Warm Springs*

approves annual budgets and major expenditures. A Conservation Advisory Council and Renewable Energy Advisory Council comprised of interest groups and stakeholders assist the board with strategic development and provide guidance on plan implementation.”). *Id.*

⁴⁸ See C-Drop Hydroelectric Project Agreement, *supra* at Article 5.

⁴⁹ See U.S. Treasury Department Office of the Fiscal Assistant Secretary, *Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009* (July 2009/ Revised March 2010/ Revised April 2011), at p. 4, available at: <https://www.treasury.gov/initiatives/recovery/Documents/GUIDANCE.pdf> (“Certain persons are not eligible to receive Section 1603 payments. These include: any Federal, state or local government, including any political subdivision, agency or instrumentality thereof.”)

⁵⁰ The prior KID Board needed only to employ minimal negotiation skills to avoid the poor C Canal Flume Replacement Project contract it had reached with the BOR.

⁵¹ See U.S. Treasury Department Office of the Fiscal Assistant Secretary, *Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009* (July 2009/ Revised March 2010/ Revised April 2011), *supra* at p. 4 (“[A]ny [...] entity described above [including...] any Federal, state or local government, including any political subdivision, agency or instrumentality thereof [...] is not eligible to receive Section 1603 payments [...] unless this person only owns an indirect interest in the [entity serving as the 1603] applicant through a taxable C corporation.”).

⁵² See Benjamin Inskeep and Autumn Proudlove, *Commercial Guide to the Federal Investment Tax Credit for Solar PV*, NC Clean Energy Technology Center of NC State University, (March 2015), at p. 4, available at: http://solaroutreach.org/wp-content/uploads/2015/03/CommercialITC_Factsheet_Final.pdf (“If the solar PV system is used by a tax-exempt entity like a school, municipal utility, government agency, or charity, then the ITC may not be claimed.”)

⁵³ See Jenna Goodward and Mariana Gonzalez, *Bottom Line on Renewable Energy Tax Credits*, World Resources Institute (October 2010), available at: <http://www.wri.org/publication/bottom-line-renewable-energy-tax-credits> (“Entities that do not pay taxes, such as publicly owned electric utilities, rural electric cooperatives and government bodies, may not take advantage of the PTC. Investor-owned utilities do qualify for the PTC.”)

Article 6 obligates Warm Springs to secure a construction loan or other form of financing for the Project only from KID, and obligates **KID to provide that loan in an amount not to exceed \$600,000**. The C-Hydro Agreement refers to the loan's terms and conditions as being set forth in a Promissory Note executed by Warm Springs, and to the loan as being secured by a Security Agreement executed by Warm Springs and recorded in the appropriate UCC Financing Statements. Warm Springs also agreed "not [to] grant or allow any other lien against the Project facilities, the Power Sales Agreement or any other attribute or benefit of the Project."⁵⁴

As discussed below in Section III of this memorandum, KID consented to the amendment of Article 6 within the first year of this Agreement to accommodate Warm Springs' need for additional financing of the Project. Arguably, this amendment benefitted Warm Springs and effectively penalized KID.

g. *Article 7 – KID-Warm Springs Hornet Substation Cost-Share*

Article 7 acknowledges that the C-Drop will produce power that is transmitted through PacifiCorp's Hornet Substation. It also anticipates that additional power produced by a solar power facility near the Project that KID was then seeking to install may be transmitted through the Hornet Substation as well. This Article provides that if the Hornet Substation must be upgraded to accommodate power produced from both the Project and the solar facility and the solar facility operator makes the improvements, then Warm Springs would reimburse KID for the hydro Project's portion of the shared cost of such upgrades. It also provides that KID would reimburse Warm Springs for the solar portion of any upgrades Warm Springs makes to the facility.⁵⁵

Article 7 is relevant to this analysis because, as the Minutes of the KID Special Board Meeting of March 29, 2011 reveal, the KID Board had then "been contemplating "solar installations proposed for the District Headquarters and the South Poe Valley pump station," and had at such meeting "agreed to accept the proposal from Sunlight Solar for a tracking sensor solar installation at the South Poe Valley pump station and the proposal from EcoSolar for a fixed sensor solar installation at the District Headquarters." At such meeting, the KID Board also authorized former KID Manager Mark Stuntebeck to "go forward with the projects and pursue a 3rd party agreement **with Ted Sorenson [...] to develop the solar installations and to apply for the tax credits [...]since KID [wa]s not eligible for available tax credits of up to \$36,000 per installation.**"⁵⁶ According to the Board, it was believed that "[t]he potential return to the District [from such installations] may be \$40,000 to \$50,000 profit over a 15 year period."⁵⁷

h. *Article 10 – No Assignment of Interest in Agreement Without Other Party's Consent*

⁵⁴ See C-Drop Hydroelectric Project Agreement, *supra* at Article 6.

⁵⁵ *Id.*, at Article 7.

⁵⁶ See Klamath Irrigation District, *Minutes of a Special Meeting of the Board of Directors (March 29, 2011)* (attached).

⁵⁷ *Id.*

Article 10 prevents either party from assigning their interests in this Agreement and/or the Project to a third party without the consent of the other party. This Article permitted Warm Springs to transfer its interest to another Oregon limited liability company with a different name that was owned by the same two individuals within 1 year of the execution of this Agreement.⁵⁸

2. The KID-Warm Springs Security Agreement:

a. *Recitals A and B; Section 1.4 - Collateral*

KID and Warm Springs executed the Security Agreement on or about April 5, 2011.⁵⁹ The first Recital evidences Warm Springs' "desires to grant [KID] a first security interest in all [Warm Spring's assets]" (emphasis added), including the C Drop Hydroelectric Project and other assets described in Exhibit A of the Security Agreement.⁶⁰ The second Recital expresses Warm Spring's intent that KID "have all the rights and remedies of a security party under the UCC [Uniform Commercial Code]" with respect to said collateral "together with all additional rights and remedies granted under [the Security] Agreement."⁶¹

Section 1.4 describes the collateral with respect to which KID has a first priority lien. These include: a) "The C Drop Hydroelectric Project described on Exhibit A;" b) All of [Warm Springs'] rights in, to and under the Power Purchase Agreement made between [it] and PacifiCorp;" c) "All products, rents, and profits of the C Drop Hydroelectric Project;" and d) "All the foregoing, whether now owned or existing or hereafter acquired or arising or in which [Warm Springs] now has or hereafter acquires any rights."⁶²

b. *Section 2 - Grant of Security Interest*

Section 2 of the Agreement grants to KID "a security interest in the Collateral" described in Section 1.4 "as security for the full and prompt payment in cash and performance of the Obligations"⁶³ owed by Warm Springs "under this Agreement and the Promissory Note dated April 1, 2011."⁶⁴

c. *Sections 3.1 and 5.1 – Warm Springs' Obligation to Perfect, Maintain and Protect KID's Security Interest in the Collateral; Warm Spring's Covenant Not to Permit Any Other Person to Acquire Any Interest in Any of the Collateral*

Section 3.1 of the Agreement obligates Warm Springs to "perform all steps requested by KID to

⁵⁸ See C-Drop Hydroelectric Project Agreement Between Klamath Irrigation District and Warm Springs Hydro, LLC (April 5, 2011) (attached), *supra* at Article 10.

⁵⁹ It is assumed that April 5, 2011 was the actual execution date of the Security Agreement for the same reason this date was assumed to be the execution date of the C-Hydro Agreement. See *supra*.

⁶⁰ See Security Agreement Entered into by Warm Springs Hydro, LLC and Klamath Irrigation District (April 5, 2011) (attached), at Recital A.

⁶¹ See *Id.*, at Recital B.

⁶² *Id.*, at Sections 1.4(a)-(d).

⁶³ *Id.*, at Section 2.

⁶⁴ *Id.*, at Section 1.8.

perfect, maintain and protect [KID's] security interest in the Collateral.”⁶⁵ Section 5.1 of the Agreement precludes Warm Springs from enabling “any other Person to acquire an interest in any of the Collateral,” and from encumbering the Collateral with Liens, “[...]until all the Obligations have been fully satisfied and paid in cash, [...] unless [KID] otherwise consents in writing.”⁶⁶ **Section 1.4 indicates that the Collateral in which KID allegedly held a perfected security interest includes:** a) the C-Drop Hydroelectric Project described on Exhibit A”; b) “All of Warm Springs Hydro, LLC’s rights in, to, and under” the Warm Springs Hydro, LLC-PacifiCorp “Power Purchase Agreement”; c) “All products, proceeds, rents and profits of the C-Drop Hydroelectric Project”; and d) All the foregoing, whether currently owned or after-acquired.⁶⁷

However, KID did not do much to request that Warm Springs perfect, maintain and protect KID’s security interest in the Collateral or to ensure Warm Springs did not consistent with the requirements of the UCC, as Warm Springs had allegedly intended to do per Recital B and had been required to do by Sections 3.1. This counsel has been unable to locate any KID U.C.C. filing against Warm Springs Hydro, LLC evidencing KID’s perfected security interest in the Collateral identified in Section 1.4 of this Agreement.

d. *Sections 9.2 and 9.5 – Warm Springs’ Ability to Assign KID Collateral to a Third Party and to Amend the Security Agreement*

Section 9.2 of the Security Agreement provides that, “[n]either this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned by any party without the prior written consent of the other parties, which consent will not be unreasonably withheld.”⁶⁸ Section 9.5 of the Security Agreement provides that, “[t]his Agreement may be amended only by an instrument in writing executed by all the parties, which writing must refer to this Agreement.”⁶⁹

As discussed below in Section III.1 of this memorandum, KID subsequently consented to material amendments to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement. Those amendments permitted Warm Springs Hydro, LLC and C-Drop Hydro, LLC, its successor-in-interest, to assign KID’s Collateral under the KID-Warm Springs, LLC Security Agreement and to subordinate KID’s security interest in that Collateral (which was to have been perfected with a U.C.C. filing) to a third party (Northwest FCB). Such amendments to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement effectively invoked Sections 9.2 and 9.5 of the KID-Warm Springs Hydro, LLC Security Agreement. **However, this counsel is unaware of any KID Board resolution authorizing the assignment of KID interests pursuant to the Security Agreement. The KID Consent to Assignment only references the KID-Warm Springs Hydro, LLC (C-Drop Hydroelectric Project).**

Furthermore, KID has failed, to the present day, to request that C-Drop Hydro, LLC ensure the removal of the first security interest still held by Northwest FCB in all of C-

⁶⁵ *Id.*, at Section 3.1.

⁶⁶ *Id.*, at Section 5.1.

⁶⁷ *Id.*, at Section 1.4.

⁶⁸ *Id.*, at Section 9.2.

⁶⁹ *Id.*, at Section 9.5.

Drop Hydro, LLC's interests which had resulted from such amendment of the agreements. This interest is evidenced in a still-valid U.C.C. filing scheduled to lapse on December 15, 2016.⁷⁰

3. The Warm Springs Hydro, LLC Promissory Note:

The Warm Springs Hydro, LLC Promissory Note is secured by the Security Agreement on the Collateral described therein.

a. *The "Promise to Pay" and "Advances" Paragraphs*

Pursuant to the "Promise to Pay" and "Advances" paragraphs of the Promissory Note, Warm Springs promised to repay KID an aggregate principal amount equal to the outstanding advances KID had made to Warm Springs during the first 24 months following the execution of the Promissory Note. In other words, **during said 24-month period, KID had provided to Warm Springs Hydro, LLC with a revolving line of credit. Warm Springs remained able to borrow, repay and re-borrow from KID, as long as the aggregate principal outstanding balance of the credit line advances at any time did not exceed the sum of \$600,000.**

b. *The "Interest Rate" Paragraph*

Pursuant to the "Interest Rate" paragraph of the Promissory Note, in addition to principal, **the Promissory Note provides that Warm Springs shall pay interest on the outstanding principal balance at the rate of 5% per annum payable in one December 31st installment each year during said 24-month period. However, once the C-Drop Hydroelectric Project "has been constructed and starts generating power, the unpaid [aggregate] principal balance and interest shall be amortized and will thereafter be payable in 14 annual installment payments." "[T]he first such payment [was] due and payable one year after the date power generation commence[d], with subsequent payments due on the same day of each year thereafter until the fifteenth anniversary date when all unpaid principal and interest shall be due and payable."** Depending on when the loan advances were taken, the Promissory Note effectively had a 15-to-16 year term to maturity.

Apparently, the 5% interest rate KID charged against the unpaid aggregate balance of both the C-Drop Hydro, LLC credit line drawdowns and the 14-year fixed installment loan was inexplicably below the market rate. More specifically, the 5% interest rate charged was more than .75 below the 5.78% Farm Credit System Bank Interest Rate for 2011, and more than .15 below the 5.15% Farm Credit System Bank Interest Rate for 2012, that had then been charged by the applicable Farm Credit Bank in Oregon⁷¹ (CoBank ACB – Agricultural Credit Bank).⁷²

⁷⁰ See Oregon Secretary of State, Oregon Secretary of State UCC Filing, *Record History – Record No. 1941034/Lien No. 89072662* (12/15/2011) (attached) (identifying C-Drop Hydro, LLC as the Debtor and Northwest Farm Credit Services (FLCA) as the Creditor).

⁷¹ See Internal Revenue Service, *Revenue Rule 2011-17*, Internal Revenue Bulletin: 2011-33 (Aug. 15, 2011), available at: https://www.irs.gov/irb/2011-33_IRB/ar08.html#d0e2419 ("**This revenue ruling contains a list of the average annual effective interest rates on new loans under the Farm Credit System. This revenue ruling also contains a list of the states within each Farm Credit System Bank Chartered Territory.**"). See also Internal Revenue Service, *Revenue Rule 2012-26*, Internal Revenue Bulletin: 2012-39 (Sept. 24, 2012), available at:

In effect, although Ted Sorenson of Warm Springs Hydro, LLC/C-Drop Hydro, LLC was a sophisticated silicon valley renewable energy investor familiar with procuring loans from major commercial banks, the KID Board proceeded to offer him a “farmer loan.” Said loan bears the most liberal of lending terms and conditions – a below-Farm Credit System simple (rather than compounded) interest rate computed only on the unpaid principal balance (rather than on both unpaid principal AND interest), with interest payable only in *single annual* installments rather than in monthly or quarterly installments! In other words, KID offered to Sorenson a farmer loan that he and C-Drop Hydro, LLC would not otherwise be eligible to obtain in the marketplace. It is uncertain whether KID had received any benefit at all in exchange for providing Sorenson this significant benefit and bearing this financial risk.

c. *Completion of Hydroelectric Construction; Commencement of Generating Power*

Clearly, the Promissory Note reflected that the Parties had anticipated the completion of the Hydroelectric Facility’s construction and the commencement of its power generation within 2 years (24 months) following the execution of the Hydroelectric Agreement. It was at this time that the then existing revolving line of credit with December 31 annual payments should have been converted into a fixed installment loan with anniversary date annual payments.

On Friday, May 4, 2012, the Klamath Falls Herald and News reported that “[a] top federal water official flipped the switch Thursday [May 3, 2012] on a hydroelectric facility that will produce up to \$250,000 worth of electricity a year for the Klamath Irrigation District.”⁷³ **This article confirms that the C-Drop Hydroelectric Project’s construction had been completed and the Project had first commenced generating electricity on May 3, 2012. Thus, in accordance**

https://www.irs.gov/irb/2012-39_IRB/ar07.html (The 5% interest rate KID charged C-Drop Hydro, LLC for the \$600,000 loan was also .15 below the average effective interest rates (5.15%) on new CoBank ACB Oregon-based FCB loans for 2012.). Cf. Internal Revenue Service, *Revenue Rule 2013-19*, Internal Revenue Bulletin: 2013-39 (Sept. 23, 2013), available at: https://www.irs.gov/irb/2013-39_IRB/ar08.html (The 5% interest rate KID charged C-Drop Hydro, LLC for the \$600,000 loan was .44 above the average effective interest rates on new CoBank ACB Oregon-based FCB loans for 2013); Internal Revenue Service, *Revenue Rule 2014-21*, Internal Revenue Bulletin: 2014-34 (Aug. 18, 2014), available at: https://www.irs.gov/irb/2014-34_IRB/ar08.html (The 5% interest rate KID charged C-Drop Hydro, LLC for the \$600,000 loan was .69 above the average effective interest rates (4.31%) on new CoBank ACB Oregon-based FCB loans for 2014); Internal Revenue Service, *Revenue Ruling 2015-18*, Internal Revenue Bulletin: 2015-34 (Aug. 24, 2015), available at: https://www.irs.gov/irb/2015-34_IRB/ar07.html (The 5% interest rate KID charged C-Drop Hydro, LLC for the \$600,000 loan was .83 above the average effective interest rates (4.17%) on new CoBank ACB Oregon-based FCB loans for 2015).

⁷² See Farm Credit Administration, *2011 Annual Report on the Farm Credit System* (June 2012) at p. 9, available at: <https://www.fca.gov/Download/AnnualReports/2011AnnualReport.pdf> (“CoBank, one of the four Farm Credit banks, is an Agricultural Credit Bank (ACB), which has a nationwide charter to make loans to agricultural and aquatic cooperatives and rural utilities, as well as to other persons or organizations that have transactions with, or are owned by, these cooperatives. The ACB finances U.S. agricultural exports and imports and provides international banking services for farmer-owned cooperatives. In addition to making loans to cooperatives, the ACB provides loan funds to 29 affiliated ACAs and FLCAs.”). See also Farm Credit Administration, *History of FCA and the FCS*, available at: https://www.fca.gov/about/history/historyFCA_FCS.html.

⁷³ See Joel Aschbrenner, *C Canal Hydro Project Starts Producing Power*, Herald and News (May 4, 2012), available at: http://www.heraldandnews.com/members/news/frontpage/c-canal-hydro-project-starts-producing-power/article_92a87374-95a5-11e1-a316-0019bb2963f4.html.

with the terms of the Promissory Note, as of May 3, 2012, the aggregate outstanding principal balance of the revolving credit line KID had extended to Warm Springs Hydro, LLC//C-Drop Hydro, LLC should have been capped at the then aggregate unpaid balance, at which time the loan should have been converted from a revolving line of credit into a 14-year fixed term loan. In addition, the first payment of principal and interest on the aggregate unpaid loan balance should have been made on May 2, 2013, approximately one year after the date power generation commenced, and all annual installments of principal and interest, thereafter, were due and payable on that anniversary date. As discussed below, in Section III.2 of this memorandum, however, KID neither converted the C-Drop Hydro, LLC revolving credit line to a 14-year fixed installment loan on May 3, 2012, nor collected from C-Drop Hydro, LLC the first loan principal and interest payment on May 2, 2013 and all remaining installments on said anniversary date.

d. *The Warm Springs Hydro, LLC Member Personal Guarantees*

Each of Warm Springs Hydro, LLC's two Members, Ted Sorenson and Dennis Daugherty, executed personal guarantees unconditionally and irrevocably ensuring the full, prompt and timely payment and performance of one-half of the Obligations (including with respect to both the outstanding amount and the Collateral) borne by Warm Springs in the Promissory Notice and Security Agreement executed in favor of KID.⁷⁴

4. BOR Mid-Pacific Region-Issued Permit to KID For Additions or Alterations to Conveyance and Distribution Facilities:

On April 18, 2011 KID applied for, and on October 31, 2011, BOR-Mid-Pacific Regional Office issued a "Permit for Additions or Alterations to Conveyance and Distribution Facilities."⁷⁵ This permit authorized "the District to construct the facilities as requested within the terms and conditions of this permit and the executed LOPP."⁷⁶

5. KID-BOR Lease of Power Privilege Agreement ("LOPP"):

On November 8, 2011, KID and the U.S. Bureau of Reclamation entered into a 40-year Lease of Power Privilege Agreement ("LOPP").⁷⁷

a. *Article 3.1 – KID's Privilege to Use USG Works and C-Drop to Generate and Sell Electricity*

⁷⁴ See Guaranty Agreement of Ted S. Sorenson for the Benefit of the Klamath Irrigation District (April 1, 2011) (attached); Guaranty Agreement of Dennis Daugherty for the Benefit of the Klamath Irrigation District (April 1, 2011) (attached).

⁷⁵ See U.S. Department of the Interior Bureau of Reclamation Mid-Pacific Region, *Permit for Additions or Alterations to Conveyance and Distribution Facilities (Alterations Permit No. O-KLA-2011-08; EA/FONSI No. KBAO-20110006; LOPP No. 11 LC-20-0181/CRA No. 11-LC-20-0180) (Oct. 31, 2011)* (attached).

⁷⁶ *Id.*, at p. 7.

⁷⁷ See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011) (attached). See also *Id.*, at Article 4.1.

Article 3.1 reveals that, subject to conditions, Reclamation “allows the District the right to utilize the “Affected Premises” (interests in lands, roads, dams, outlet works, valve house, tunnel, gate chamber and water ways held by the U.S.)⁷⁸ for the purpose of developing the “New Facility”⁷⁹ for hydroelectric power generation, AND the right to market and sell the power generated by the New Facility, including Renewable Energy attributes and Renewable Energy Credits.⁸⁰

b. *Articles 5.1, 5.2 and 7.1 – KID’s Lease Payment Obligation to BOR*

Article 5.1 obligates KID to make annual LOPP (“lease”) payments to BOR at the following rates: 1) “one (1) mill per kilowatt-hour (kWh) [one-thousandth of a U.S. dollar or one-tenth of a cent] for the first 40 gigawatt-hours of energy the New Facility produces”; 2) “one and a [one] half (1 1/2) mills per kWh for such amounts over 40 and up to and including 80 gigawatt-hours”; and 3) two (2) mills per kWh for such amounts over 80 gigawatt-hours of the energy produced by the New Facility.”⁸¹ Article 5.2 provides that “payments shall be made on or before April 1 of each year of the total generation by the New Facility during the prior calendar year as reported pursuant to Article 10.4.”⁸²

Article 7.1 obligates KID to apply “[a]ll power sale revenues, upon receipt” to “the annual LOPP payments to the United States as specified in Article 5.”⁸³

c. *Articles 5.3, 6.1 and 6.2 – KID’s Obligation to Reimburse Reclamation Expenses*

Article 5.3 provides that KID bears the additional obligation to reimburse BOR for expenses it incurs for services rendered in connection with the New Facility Development, as provided for in Article 6.⁸⁴

Article 6.1 requires KID to reimburse BOR for the costs BOR incurs in rendering certain services to KID during New Facility Development. These services include: 1) reviewing “studies, reports, plans, designs, specifications, drawings, and all other documents submitted by the District;” 2) “conducting the inspection during construction;” 3) “observing testing;” and 4) “any and all activities required during planning, design, construction, and testing of the New Facility to assure the operational integrity and functionality of the C Drop.”⁸⁵

In addition to being held responsible for reimbursing said costs, Article 6.2 obligates KID to reimburse BOR for all costs for rendering “environmental compliance” services. These services

⁷⁸ *Id.*, at Article 2.2.

⁷⁹ *Id.*, at Article 2.1 (“‘New Facility’ means the complete replacement of the existing unit for hydroelectric power development generation connected to the existing C Drop, consisting of, but not limited to, a generating unit of up to, but no exceeding 2000 kW output, a [new] discharge bypass structure with all associated features [...] and corresponding water conduits, valves, transformers, circuit breakers, transmission lines and control and protection devices.”).

⁸⁰ *Id.*, at Article 3.1.

⁸¹ *Id.*, at Article 5.1.

⁸² *Id.*, at Article 5.2.

⁸³ *Id.*, at Article 7.1.

⁸⁴ *Id.*, at Article 5.3.

⁸⁵ *Id.*, at Article 6.1.

include, but are not limited to: 1) “coordination, administration, and approval of any necessary environmental analyses;” 2) “consultation as needed with appropriate Federal, State, Tribal and local officials;” 3) “[d]evelop[ment] and authorization of the Lease;” 4) “monitoring the construction, operation, maintenance, and termination of any resultant authorization;” and 5) “other necessary processing actions consistent with the Lease.”⁸⁶

i. KID’s Trust Account Deposit

Article 6.3 acknowledges KID’s initial deposit of \$45,000 under the BOR-KID Cost Reimbursement Agreement No. 11-LC-20-0180 executed on May 20, 2011,⁸⁷ which “shall continue so long as the LOPP, 11-LC-20-0181 is active.”⁸⁸ The deposit “ha[d] been placed in a reimbursable account managed by Reclamation to cover [] costs as defined in Articles 6.1 and 6.2.”⁸⁹ Apparently, KID had made the \$45,000 deposit via KID Check #2664 on or around May 20, 2011,⁹⁰ which was to be treated as a drawdown of the exclusive \$600,000 loan KID had extended to Warm Springs Hydro, LLC in the same amount. The drawdown treatment was authorized by Warm Springs Hydro, LLC Manager Ted Sorenson,⁹¹ consistent with Article 6 of the C Drop Hydro Agreement.

In addition, Article 6.3 provides that, “[w]hen the projected balance of the account is not sufficient to cover additional estimated costs or expenses expected to be incurred, Reclamation shall request in writing an advance deposit and payment of any deficits,” and “[t]he District shall advance the requested funds within 30 days after receiving the request.”⁹² **According to Attachment 3 of the BOR-KID Cost Reimbursement Agreement referenced above, BOR estimated that these total costs had amounted to \$90,761.⁹³ There is evidence that KID had issued check #2666 in the amount of \$45,000 on May 31, 2011, which was intended to cover the \$45,761 balance owed to BOR for the C-Drop Hydro NEPA review. It is unknown whether this payment was also treated as a drawdown of the \$600,000 line of credit.**

⁸⁶ *Id.*, at Article 6.2.

⁸⁷ See BOR-KID Cost Reimbursement Agreement (Agreement No. 11-LC-20-0180) (May 18, 2011) (attached) (Sections II and III.A of this Agreement provide that its purpose was to “establish[] procedures to reimburse Reclamation for costs incurred due to the involvement with the preparation of the environmental document [i.e., the Environmental Impact Statement (EIS) identified in Section III.C of said Agreement] as well as to process and issue the Lease of Power Privilege (LOPP) Application (11-LC-20-0181) and Alteration Permit (O-KLA-2011-08) to use a Reclamation facility for electric power generation consistent with Reclamation project purposes.”).

⁸⁸ *Id.*, at Section IV.

⁸⁹ See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 6.3.

⁹⁰ See KID Check Dated May 20, 2011, Made Payable to U.S. Bureau of Reclamation in the amount of \$45,000 (attached).

⁹¹ See Ltr. Correspondence From Ted S. Sorenson to KID Manager Mark Stuntebeck Re Bureau of Reclamation Reimbursement for C-Drop Hydroelectric Review/LOPP (May 20, 2011) (attached).

⁹² See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 6.3.

⁹³ See BOR-KID Cost Reimbursement Agreement (Agreement No. 11-LC-20-0180) (May 18, 2011) (attached), *supra* at Attachment 3.

Article 6.3 also obligates Reclamation to provide KID with quarterly statements of the account during New Facility Development, and such statements must accompany any request for additional Advance Deposits.⁹⁴

d. *Article 8 – KID Must Seek BOR Preconstruction Approvals*

Article 8.1 imposes on KID the obligation to secure BOR approvals for the following preconstruction plans before Facility construction commenced: 1) “[p]lans and specifications and schedule(s) for construction and operation, including site restoration plans”; 2) “[a] draft operations plan”; 3) a “Test Plan”; and 4) “[a] draft Emergency Action Plan (EAP)”.⁹⁵ Article 8.2 required KID to submit evidence of insurance and of the irrevocable letter of credit required to secure the construction bond,⁹⁶ while Article 8.3 required KID to refrain from commencement of construction until the District first received written notice from BOR that all preconstruction planning was complete and approved.⁹⁷

e. *Article 9 – KID Obligations During New Facility Construction*

Article 9.1 obligated KID to ensure that construction of the New Facility complied with all approved Plans and Specifications and the approved environmental compliance documents.⁹⁸ Articles 9.5 and 9.6 require KID to ensure that construction activities comply with all necessary Federal, State and local permits and licenses,⁹⁹ as well as, with all applicable codes, ordinances and regulations.¹⁰⁰ Articles 9.4 and 9.8 provide Reclamation with the right at any time to inspect the New Facility construction,¹⁰¹ and to have full access to it to assess the District’s compliance with the terms and conditions of this Agreement.¹⁰² Article 9.14 required KID to complete construction of the New Facility within 2 years of the execution of this Agreement, or risk being held in default under Article 15.¹⁰³ Prior to commencing operations of the New Facility, Articles 9.15 and 9.16 required KID to notify BOR of KID’s plan to conduct and BOR’s opportunity to observe or participate in the New Facility’s operational functionality testing,¹⁰⁴ and to securing a final BOR inspection of said facility.¹⁰⁵

f. *Articles 10 - KID’s Operation and Maintenance Obligations*

Article 10.1 requires KID to operate and maintain the New Facility consistent with the Operations Plan and EAP, as amended, in good condition and repair in accordance with Federal, State and local laws, including environmental laws.¹⁰⁶ Articles 10.1 and 10.2 require KID to

⁹⁴ See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 6.3.

⁹⁵ *Id.*, at Article 8.1(a)-(c).

⁹⁶ *Id.*, at Article 8.2.

⁹⁷ *Id.*, at Article 8.3.

⁹⁸ *Id.*, at Article 9.1.

⁹⁹ *Id.*, at Article 9.5.

¹⁰⁰ *Id.*, at Article 9.6.

¹⁰¹ *Id.*, at Article 9.4.

¹⁰² *Id.*, at Article 9.8.

¹⁰³ *Id.*, at Article 9.14.

¹⁰⁴ *Id.*, at Article 9.15.

¹⁰⁵ *Id.*, at Article 9.16.

¹⁰⁶ *Id.*, at Article 10.1.

secure Reclamation approval before undertaking any material alterations of the New Facility or extraordinary repairs or replacements of New Facility components. In both cases, all work must be performed at KID expense.¹⁰⁷

Article 10.3 obligates KID to ensure that operation of the New Facility will not interfere or threaten to interfere with water deliveries in the Project. KID must correct any interference immediately at its sole expense. KID must bear the cost of all modifications to the New Facility deemed necessary “to correct any problem identified by Reclamation or the District.”¹⁰⁸ Article 10.3 should be read together with Article 19.1 which provides that, “Klamath Project water for any purpose takes precedence over power uses.”¹⁰⁹

Article 10.4 obligates KID to monitor water discharge flows and energy generation data which it must record and report to Reclamation monthly.¹¹⁰

g. *Article 24.1 – KID and BOR Shall Coordinate Compliance Activities in Connection with Development & Operation of New Facility*

Article 24.1 requires KID and BOR to coordinate their law and regulatory compliance activities, including but not limited to, NEPA, ESA and NHPA during KID’s development and operation of the New Facility. It also requires KID “to abide by any environmental requirements specified in the Environmental Assessment/Finding of No Significant Impacts (KBAO-2011-006) [“BOR’s EA FONSI”¹¹¹] as completed under NEPA for execution of this Agreement.”¹¹²

LOPP Article 24 also would arguably cover the need for KID and BOR coordination with state agencies such as the Oregon Water Resources Department (“OWRD”). During late November 2011 (approximately two months following BOR’s C-Drop FONSI), OWRD had issued a “Notice of Proposed Order on the Potential for Cumulative Impacts of the C-Drop Hydroelectric Project” bearing a 30-day protest response deadline of January 3, 2012.¹¹³

¹⁰⁷ *Id.*; See also Article 10.2.

¹⁰⁸ *Id.*, at Article 10.3.

¹⁰⁹ *Id.*, at Article 19.1.

¹¹⁰ *Id.*, at Article 10.4.

¹¹¹ See U.S. Department of Interior Bureau of Reclamation, *Finding of No Significant Impact & Final Environmental Assessment Klamath Irrigation District – C-Drop Hydroelectric Project* (KBAO-EA-11-006) (Oct. 2011), available at: http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=8448.

¹¹² See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 24.1.

¹¹³ See Oregon Water Resources Department, *Notice of Proposed Order on the Potential for Cumulative Impacts of the C-Drop Hydroelectric Project* (Nov. 29, 2011) (attached) (“Comments and/or protests on this proposed order on the potential for cumulative impacts of the C-Drop Hydroelectric Project are requested from interested citizens, organizations, governmental entities, and other parties. The Department has determined that the impacts of this project are so small in extent, short-term or localized that there is no reasonable likelihood of cumulative impacts with other existing hydroelectric projects in the Klamath River, Lost River, or Swan Lake Basins. A consolidated review with other existing, approved, or proposed projects is NOT required. A contested case hearing on the public interest issues associated with the project shall be conducted in the near future. Any person may file a protest to this order and request a contested case hearing within 30 days of issuance. A protest must be filed in writing and received at the Oregon Water Resources Department no later than 5 p.m. January 3, 2012.”).

Such coordination had been required on December 29, 2011, for example, when the U.S. Bureau of Indian Affairs Northwest Regional Office had filed a surprise eleventh (11th)-hour protest against the proposed final order.¹¹⁴ This unexpected action prompted former KID Manager Mark Stuntebeck to contact KID counsel Bill Ganong,¹¹⁵ OWRD Hydroelectric Coordinator, Mary Graine, former BOR Area Manager for the Klamath Basin Area Office, Jason Phillips,¹¹⁶ U.S. Congressman Greg Walden's Chief of Staff, Nicholas Strader,¹¹⁷ and Klamath Water Users Association ("KWUA") President, Greg Addington¹¹⁸ for direction. On January 3, 2012, Addington responded to Stuntebeck indicating that he had already contacted John Bezdek, Senior Advisor to the Deputy Secretary, U.S. Department of the Interior ("DOI"), and that Bezdek was already "on it."¹¹⁹

During the early morning of January 5, 2012, John Bezdek dispatched an email to federal officials within the U.S. Department of Justice's Environment and Natural Resources Division ("ENRD"), the DOI's Bureau of Indian Affairs ("BIA"), Bureau of Reclamation ("BOR"), and

¹¹⁴ See Email Correspondence From B.J. Howerton, Bureau of Indian Affairs Northwest Regional Office to Mary S. Graine, Hydroelectric Coordinator for Oregon Water Resources Department, *Re C-Drop Hydroelectric Project* (Dec. 29, 2011) (attached) ("Attached for your consideration is DOI, Bureau of Indian Affairs (BIA) response to the proposed final order on the potential for cumulative impacts –C-Drop Hydroelectric Project PC 889, Klamath County, Oregon.").

¹¹⁵ See Email Correspondence From Mark Stuntebeck, KID to Bill Ganong, Esq., KID Counsel, *Re: BIA C-Drop Letter* (Dec. 29, 2011) ("Bill, I've been working late on a response to send to the important people. It's a bit wordy and slightly nasty. Attached promised attachment in letter. Please give me your opinion. Also **Jason emailed me** and he has talked to USFWS and the State [of Oregon], they are on board and **he hopes that with some high level agency folks talking to BIA that they can get them to rescind the letter and comments**, lets' hope [...]"). See also Email Correspondence From Bill Ganong, Esq., KID Counsel to Mark Stuntebeck, KID *Re: BIA* (Dec. 30, 2011) (attached) ("My recommended edits are attached. You need to bite your tongue so as to not put the BIA in a more defensive stance than it is already going to be in. Moronic idiots. Bill").

¹¹⁶ See Email Correspondence From Mark Stuntebeck, KID to Jason Phillips, BOR Klamath Falls Office *Re: BIA C-Drop Letter* (Dec. 29, 2011) (attached) ("Jason [...] So any comments from BOR on up the food chain will be helpful. I will handle our congressional folks and have a chat with the Klamath Tribes. Will also send a letter of concern or contact Ken Salazar if you think appropriate[.] You don't happen to have his email address do you? How about USFW, would be the contact[?]") See also U.S. Department of Interior Bureau of Reclamation, *Reclamation Announces the Selection of Jason Phillips as Deputy Regional Director for the Mid-Pacific Region*, Press Release (Oct. 30, 2013), available at: <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=45005>.

¹¹⁷ See Email Exchange Between Mark Stuntebeck, KID and Nicholas Strader, Office of U.S. Congressman Greg Walden (Dec. 29, 2011 through Jan. 5, 2012) (attached).

¹¹⁸ See Email Correspondence From Mark Stuntebeck, KID to Greg Addington, KWUA (Jan 3, 2012) (attached) ("**Greg, Please get attached info to Mr. Bezdek with the intent to get it to Secretary Salazar.** BIA response attachment is our letter[.] other is supporting documentation. Mark KID").

¹¹⁹ See Email Correspondence from Greg Addington, KWUA to Mark Stuntebeck, KID *Re: BIA* (Jan. 3, 2012) (attached) ("**Mark, FYI, - the response from Bezdek. I also talked to Larry Dunsmoor [of the Klamath Tribes] who is really pissed at BIA and Howerton. He is going to ask the tribal council to send a letter asking BIA to retract...But there are lots of tribal politics at play...We will see.**"). See also Email Correspondence From John Bezdek, DOI-SOL to Greg Addington, KWUA (Jan. 3, 2012) ("#/?!!!!"); Email Correspondence From Greg Addington, KWUA to John Bezdek DOI-SOL (Jan. 3, 2012) (attached) ("**John, I know you are busy, but if you could take a deep breath and read the first attachment here (BIA Response) from Klamath Irrigation District to Secretary Salazar, I would really appreciate it.** BIA has chosen at the 11th hour to protest via the State water right process, Klamath Irrigation District's application for the C-Drop Hydro unit. This [is] totally outrageous and their information is wrong. **Because of all the tax credit issues, any delay in this project threatens its viability.** And to top it off, the Klamath Tribes and Mid-Pacific's BOR office of Indian Trust Assets have all signed off on the project. The Klamath Tribes sent a letter supporting the project [...] Also, where was BIA during the NEPA process? **Who do I talk to?** Greg").

Office of the Solicitor (“SOL”) scheduling a conference call for later that day.¹²⁰ Later that same morning, Mary Grainey, OWRD’s Hydroelectric Program Coordinator, dispatched an email to the same federal officials, KID’s Stuntebeck and C-Drop’s Sorenson. It stated that OWRD would respond to the BIA letter in its next proposed final order by likely **“requir[ing] maintenance of the fish screen at the A-canal as a condition of operation of the hydroelectric project.”**¹²¹ Later that afternoon, Dr. B.J. Howerton of the DOI-BIA dispatched an email correspondence to KID’s Mark Stuntebeck and numerous federal and state officials, beginning with OWRD’s Mary Grainey, DOI-SOL’s John Bezdek and DOI-BOR’s Jason Phillips. The email expressed the DOI-BIA Northwest Regional Office’s consent to the condition that OWRD would impose in its next proposed final order, and BIA’s intent to withdraw its protest letter of December 29, 2011.¹²² Apparently, Stuntebeck’s direct and coordinated contacts with Bezdek, Strader and Grainey worked rather favorably for KID and the C-Drop Hydro Project.¹²³

- h. *Articles 12 and 16 – BOR Retains Title to the C-Drop & Affected Premises; KID Retains Title to New Facility During LOPP Term; KID Retains Title to Power Generated During LOPP Term; BOR Retains Title to Power Generated Thereafter; KID May Agree to Transfer New Facility to BOR Without Compensation*

Article 12.1 reveals that BOR retains title to the C Drop Facility, including the Affect Premises, as identified above in Section II.5.a. of this memorandum.¹²⁴ Article 12.2 shows that KID retains title to the New Facility during the LOPP term, unless KID is in default of said Agreement.¹²⁵

¹²⁰ See Email Correspondence From John Bezdek, DOI SOL to David Harder, DOJ-ENRD; Dale Morris, BIA; B. Howerton, BIA; Jason Phillips, BOR; Barry Mathew, DOI FWS; Laurie Sada, DOI-FWS, John Hicks, DOI-BOR; Kristen Johnson, DOI-SOL, Patricia Rivera, BOR (Jan. 5, 2012) (attached) (“**All: The attached is a letter to the Secretary from the District.** Based on responses to my earlier email, let’s shoot for a 2pm call. Kristen, please sent out a call-in number. Laurie, if you and Matt are unable to join, please give me a call. **Thanks, John.**”)

¹²¹ See Email Correspondence From Mary Grainey, OWRD to Laurie Sada, DOI-FWS, John Bezdek, DOI-SOL, Re: C-Drop Project – Next Steps (Jan. 5, 2012) (attached) (The email was Cc’d to: B. Howerton, DOI-BIA; Dale Morris, DOI-BIA; David Harder, DOJ-ENRD; John Hicks, DOI-BOR; Jason Phillips, DOI-BOR; Mark Stuntebeck, KID; Kristen Johnson, DOI-SOL; Matthew Barry, DOI-FWS; Patricia Rivera, DOI-BOR; Ted Sorenson, C-Drop).

¹²² See Email Correspondence From B.J. Howerton, DOI-BIA to Mary Grainey, OWRD; Mark Stuntebeck, KID; John Bezdek, DOI-SOL; Jason Phillips, DOI-BOR, etc. Re: C-Drop Hydroelectric Project – PC889 (Jan. 5, 2012) (attached) (“Ms. Grainey, Concerning a proposed final order on the potential for cumulative impacts C-Drop Hydroelectric Project PC 889, Klamath County, Oregon, **based upon new information received today, DOI, Bureau of Indian Affairs (BIA), Northwest Regional Office (NWRO) is withdrawing its letter of December 29, 2011. The BIA supports your proposed findings as drafted. Please see the attached letter from the NWRO Regional Director.** A hard copy of this letter will be sent to you via U.S. Mail. [...] Respectfully submitted, Dr. BJ Howerton, MBA [...]”).

¹²³ See Email Correspondence From Mark Stuntebeck, KID to John Bezdek, DOI-SOL (Jan. 5, 2012) (attached) (“Mr. Bezdek, You have gone out of your way to help make our C-Drop project a success. Thank You for your hard work, it is greatly appreciated. Mark Stuntebeck, Manager KID”). See also Email Exchange Between Mark Stuntebeck, KID and Nicholas Strader, Office of U.S. Congressman Greg Walden (Dec. 29, 2011 through Jan. 5, 2012); Office of U.S. Congressman Greg Walden, *Greg Walden Helps Prevent 11th Hour Snag on Klamath Irrigation District Project That Will Create Jobs, Revenue, Clean Power*, Press Release (Jan. 6, 2012), available at: <https://walden.house.gov/media-center/press-releases/greg-walden-helps-prevent-11th-hour-snag-klamath-irrigation-district>.

¹²⁴ See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 12.1.

¹²⁵ *Id.*, at Article 12.2.

Article 12.3 indicates that KID retains title to all power revenues the New Facility generates during the LOPP term, subject to KID's obligation to first apply all power sale revenues to the annual LOPP payments. KID also retains title to all renewable energy attributes and renewable energy credits during the LOPP term.¹²⁶

Articles 12.4 and 12.5 provide that title to the New Facility and to the power it generates will be determined by Article 16 upon the expiration of the 40-year LOPP term.¹²⁷ Article 16.2(a) provides that, upon the LOPP term expiration, BOR has the right to enter into a new agreement with KID or its successors or assigns if the current O&M Agreement (KID's 1954 Operating Contract) is then in effect.¹²⁸ Article 16.2(b) provides that if KID is no longer responsible for the O&M of the Affected Premises upon expiration, BOR has the right to assume possession of the power the New Facility generates for its own use.¹²⁹ Article 16.3(a) states that, upon LOPP term expiration, BOR may direct KID to transfer, and KID shall transfer, to BOR the right to KID's share of the power generated at the New Facility for compensation.¹³⁰ If this Agreement is terminated under Article 15 because KID fails to comply with any of its provisions, BOR may direct KID to transfer, and KID shall transfer, to BOR the right to KID's share of the power generated at the New Facility **without** compensation.¹³¹

Article 16.3(b) provides that, upon termination of this Agreement or expiration of the LOPP term, BOR can determinate in its sole discretion whether the New Facility remains or should be removed in whole or in part from Project lands. If BOR determines the New Facility should be removed, KID will undertake such removal at its sole cost. **Alternatively, if both parties agree, KID may offer BOR title to the New Facility at no cost.**¹³²

i. *Article 26.1 – KID Assignment of Rights Under This Agreement to C-Drop Hydro, LLC*

Article 26.1 acknowledges KID's and C-Drop Hydro, LLC's intent to effectuate an assignment of KID's rights under the LOPP to C-Drop Hydro, LLC, and BOR's advanced approval thereof. This article also refers to an attached document evidencing such assignment.¹³³ **However, Article 26.1 precludes any further assignment or transfer of such rights, in whole or in part, without BOR's written approval.**¹³⁴ Consequently, C-Drop Hydro, LLC's assignment of all of its rights to the LOPP to Northwest Farm Credit without BOR approval, as discussed below in Section III of this memorandum, would arguably have constituted a breach of the LOPP.

¹²⁶ *Id.*, at Article 12.3.

¹²⁷ *Id.*, at Articles 12.4-12.5.

¹²⁸ *Id.*, at Article 16.2(a).

¹²⁹ *Id.*, at Article 16.2(b).

¹³⁰ *Id.*, at Article 16.3(a).

¹³¹ *Id.*

¹³² *Id.*, at Article 16.3(b).

¹³³ See C-Drop Hydroelectric Project Assignment of Lease of Power Privilege to C-Drop, LLC (Dec. 2, 2011) (acknowledging KID's assignment of its rights under the LOPP to C-Drop Hydro, LLC) (attached). One would have assumed that the KID's assignment to Warm Springs Hydro, LLC had occurred contemporaneous with or shortly after the LOPP's execution (Nov. 8, 2011), but the KID Assignment's reference to C-Drop Hydro, LLC suggests that the KID Board had wait until the December 2, 2011 Amendment of the Hydroelectric Agreement.

¹³⁴ See Bureau of Reclamation-Klamath Irrigation District Lease of Power Privilege Agreement for the C Drop Hydroelectric Project, Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011), *supra* at Article 26.1.

6. C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement:

- a. *Recital A – The C-Drop Hydro Facility Has Facility Capacity Rating of 1,100 kW*

C-Drop Hydro, LLC and PacifiCorp entered into their Power Purchase Agreement (“PPA”) on or about October 18, 2011.¹³⁵ Recital A of this Agreement describes the C-Drop Hydro Facility as having a “Facility Capacity Rating of 1,100 kilowatts (kW).”¹³⁶

- b. *Recital B – The C-Drop Hydro Facility is a FERC Qualifying Facility*

Recital C of the Agreement identifies the C-Drop Hydro Facility as a “Qualifying Facility”¹³⁷ (“QF”), which Section 1.32 defines as falling within the meaning provided by Federal Energy Regulatory Commission (“FERC”) regulations¹³⁸ codified at 18 CFR Part 292¹³⁹ in effect on the Effective Date of this Agreement.

- c. *Recital D – Estimating the C-Drop Hydro Facility Would Deliver 4,238 MWhs of Average Net Energy to PacifiCorp Annually; C-Drop Hydro, LLC’s Sections 3.2.6-3.2.7 Warranty that the Facility Would Continue Operations as a QF*

PPA Recital D and Section 4.2 describe C-Drop Hydro, LLC’s estimate that the C-Drop Hydroelectric Facility would deliver to PacifiCorp an estimated 4,238,463 kilowatt-hours (kWh) (4,238 MWh) of average annual Net Energy,¹⁴⁰ commencing on the “Scheduled

¹³⁵ See C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement (Oct. 18, 2011) (attached).

¹³⁶ *Id.*, at Recital A.

¹³⁷ *Id.*, at Recital C.

¹³⁸ *Id.*, at Section 1.32. See also U.S. Department of Energy Federal Energy Regulatory Commission, *What is a Qualifying Facility?*, available at: <http://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp> (A Qualifying Facility is actually referred to as a “qualifying small power production facility [...] of 80 MW or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources.” QFs are part of “a new class of generating facilities which would receive special rate and regulatory treatment.”) See also U.S. Department of Energy Federal Energy Regulatory Commission, *What Are the Benefits of QF Status?*, available at: <https://www.ferc.gov/industries/electric/gen-info/qual-fac/benefits.asp> (“QFs may enjoy certain benefits under Federal, State and local laws. The benefits that are conferred upon QFs by Federal law generally fall into three categories: (1) the right to sell energy or capacity to a utility, (2) the right to purchase certain services from utilities, and (3) relief from certain regulatory burdens.”).

¹³⁹ See *Id.* (“In order to be considered a qualifying small power production facility, a facility must meet all of the requirements of 18 C.F.R. §§ 292.203(a), 292.203(c) and 292.204 for size and fuel use, and be certified as a QF pursuant to 18 C.F.R. § 292.207.”) See also U.S. Federal Energy Regulatory Commission, *Order No. 671-A; Order on Rehearing - Revised Regulations Governing Small Power Production and Cogeneration Facilities - 18 CFR Part 131 and 292* (Docket No. RM05-36-001) (May 22, 2006), available at: <http://www.ferc.gov/whats-new/comm-meet/051806/E-23.pdf> (explaining how FERC Order 671-A had revised FERC regulations governing small power production and cogeneration facilities to comply with Energy Policy Act of 2005 amendments, “which modified in relevant part section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).” These FERC regulation revisions, in part, “amend[ed] the exemptions available to QFs from the requirements of the Federal Power Act (FPA) and the Public Utility Holding Company Act of 1935 (PUHCA 1935).”).

¹⁴⁰ See C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement (Oct. 18, 2011) (attached), *supra* at Recital D. See also *Id.*, at Article 4.2 (“Average Annual Generation. Seller estimates that the Facility will generate, on average,

Commercial Operation Date” (April 15, 2012). Pursuant to Section 3.2.6, C-Drop Hydro, LLC warranted that the Facility would remain a QF for the entire term of the PPA, and that it would “operate the Facility in a manner consistent with its FERC QF certification.”¹⁴¹ In addition, pursuant to Section 3.2.7, C-Drop Hydro, LLC warranted that it would “not make any changes in its ownership, control or management during the term” of the PPA “that would cause it not to be in compliance with the definition of a [...] Small Power Production Facility provided in PacifiCorp’s Schedule 37 tariff approved by the Commission at the time this Agreement [was] executed.”¹⁴²

d. *Sections 1.1.7 and 2.2.1 – Required C-Drop Hydro, LLC to Secure a Separate Generation Interconnection Agreement*

Section 1.1.7 of the PPA anticipates that the parties would enter into a separate interconnection agreement “providing for the construction, operation, and maintenance of PacifiCorp’s interconnection facilities required to accommodate deliveries of Seller’s Net Output if the Facility is to be interconnected directly with PacifiCorp rather than [via] another electric utility”¹⁴³ through a “wheeling agreement.”¹⁴⁴ Section 2.2.1 required C-Drop Hydro, LLC to provide a copy of an executed Generation Interconnection Agreement (or wheeling agreement) to PacifiCorp by no later than November 30, 2011.¹⁴⁵ **As discussed below in Section II.6 of this memorandum, C-Drop Hydro, LLC had apparently been able to meet this deadline by securing from KID an assignment of all of the District’s rights to the Generation Interconnection Agreement KID had previously executed with PacifiCorp on July 18, 2011.**

e. *Section 3.2.8 (e) – PacifiCorp’s Waiver of Creditworthiness Showing Due to C-Drop Hydro Facility’s 3,000 kW-plus Capacity Rating*

PPA Section 3.2.8(e) waived for C-Drop Hydro, LLC the need to warrant that it meets all PacifiCorp Credit requirements because of C-Drop Hydro, LLC’s representation that the Facility has a Capacity Rating greater than 3,000 kW (“Seller meets the Credit Requirements”).¹⁴⁶

f. *Section 4.3 – PacifiCorp Required Minimum Energy Delivery Output of 2,517,842 kWh*

PPA Section 4.2 obligates C-Drop Hydro, LLC to “make available from the Facility a minimum of 2,517,842 kWh [2,518 MWhs] of Net Output during each Contract Year.” However, Section 4.3 provides that such minimum Net Output shall be reduced on a pro rata basis for the year of “the Commercial Operation Date” (i.e., 2011), and “for any periods during a Contract Year that the Facility was prevented from generating electricity for reasons of Force Majeure (‘Minimum Annual Delivery’).”¹⁴⁷ Section 14.1 defines the term “force majeure” as

4,288,463 kWh per Contract Year (“Average Annual Generation”). Seller may, upon at least six months prior written notice, modify the Average Annual Generation every other Contract Year.”).

¹⁴¹ *Id.*, at Section 3.2.6.

¹⁴² *Id.*, at Section 3.2.7.

¹⁴³ *Id.*, at Section 1.17.

¹⁴⁴ *See Id.*, at Section 2.2.1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, at Section 3.2.8(e).

¹⁴⁷ *Id.*, at Section 4.3.

“any cause beyond the reasonable control of the Seller or of PacifiCorp which, despite the exercise of due diligence, such Party is unable to prevent or overcome. [...] If either Party is rendered wholly or in part unable to perform its obligation under this Agreement because of an event of Force Majeure, that Party shall be excused from whatever performance is affected by the event of Force Majeure, to the extent and for the duration of the event of Force Majeure.”¹⁴⁸ **Section 4.2, in other words, should protect C-Drop Hydro, LLC from failing to meet this minimum Net Output requirement (i.e., breach of contract) due to a drought declaration (Force Majeure event)¹⁴⁹ causing BOR to impose water delivery limitations upon the Klamath Project that result in the Facility generating less electricity during that year (by the pro rata reduction noted above). Section 4.2 would not appear to protect C-Drop Hydro, LLC from breach of contract due to water limitations being imposed as the result of BOR enforcement of the joint BiOp for other than drought conditions – i.e., due to fish suffering bacterial infections or as the result of BOR’s fulfillment of its Indian trust obligations.**

The Minutes of the KID Board meeting of March 13, 2014¹⁵⁰ and April 10, 2014¹⁵¹ clearly reveal that PacifiCorp had initially sought to cancel the PPA because the C-Drop Hydro Facility had been unable to meet the minimum Net Output requirement (i.e., the minimum 2,518 MW-hr power generation benchmark) during 2013 and 2014.¹⁵² Apparently, while C-Drop Hydro, LLC’s failure to meet this minimum requirement during 2014 may have been excused because of the drought declaration then in effect,¹⁵³ its failure in 2013 to meet said requirement would not likely have been excused because it was attributable to the imposition of non-drought-related water restrictions resulting in “less water running through the Hydro Plant” and to Facility maintenance problems.¹⁵⁴ Perhaps, recognizing that the C-Drop Hydro Facility would be unlikely to meet the minimum Net Output requirement during a good portion of the PPA term (thereby raising PacifiCorp’s power distribution costs), the April 10, 2014 KID Board meeting Minutes reveal that, during March 2014, PacifiCorp had approached C-Drop Hydro, LLC with the option of shortening the PPA term so that it may obtain more favorable contract

¹⁴⁸ *Id.*, at Section 14.1.

¹⁴⁹ See, e.g., Damian McNair, *Force Majeure Clauses – Revisited*, DLA Piper Asia Pacific Projects Update (June 2012), available at: <https://www.dlapiper.com/~media/Files/Insights/Publications/2012/06/iForce%20majeurei%20clauses%20%20revisited/Files/forcemajeureclausesrevisited/FileAttachment/forcemajeureclausesrevisited.pdf> (providing examples of Force Majeure operative clauses).

¹⁵⁰ See Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – March 13, 2014* (attached).

¹⁵¹ See Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – April 10, 2014* (attached).

¹⁵² See Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – March 13, 2014* (attached), *supra* at p. 2 (“Stuntebeck informed the Board that he had received a letter from Sorenson, our partner on the Hydro Project, and that our power sales contract may be cancelled if we don’t meet minimum production levels this year [2014].”); Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – April 10, 2014* (attached), *supra* at p. 1 (“PacifiCorp has contacted our partners on the C-Drop Power Sales Contract regarding the possibility of cancelling the contract due to not meeting the contractual minimum last year.”).

¹⁵³ See Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – March 13, 2014* (attached), *supra* at p. 2 (“Greg Addington, KWUA is working with PacifiCorp on our behalf to eliminate this threat. **Greg has received notification that we may not have to meet the current contractual minimum due to the drought declaration**, but nothing is official yet.”).

¹⁵⁴ *Id.*, at p. 2 (“During 2013, we did not meet our required minimum because there was less water running through the Hydro Plant plus there were down times due to maintenance problems with the breaker and the roller gate.”).

rates from the State of Oregon.¹⁵⁵ It was likely for this reason that KID had subsequently proposed the Stukel Spill Project to BOR which it represented could potentially “increase [energy] production 14-15%.”¹⁵⁶

Since the C-Drop Hydro Facility has been proven unable to actually generate the minimum required (guaranteed) amount (2,518 MWh) of energy during 2013 and 2014 (two consecutive years), as previously noted in PPA Recital D and Section 4.3, it is arguable that C-Drop Hydro, LLC breached its performance obligation under Section 11.1.6,¹⁵⁷ which could entitle PacifiCorp to damages under Section 11.4.1.¹⁵⁸ Such performance failure also is inconsistent with Section 3.2.8 to the extent C-Drop Hydro, LLC’s representation that the C-Drop Facility has a Capacity Rating greater than 3,000 kW (as noted in PPA Section 3.2.8(e)) is an inaccurate, if not, false declaration to PacifiCorp that “affirms and adopts all warranties of this Section 3.2.8.”¹⁵⁹ In addition to breaching the creditworthiness warranties of Section 3.2.8, C-Drop Hydro, LLC’s misrepresentations also breached their obligation to provide credit security under PPA Section 10. But for C-Drop Hydro, LLC’s adoption of the creditworthiness warranties, it otherwise would have been required to

¹⁵⁵ See Klamath Irrigation District, *Minutes of the Regular Meeting of the Board of Directors – April 10, 2014* (attached), *supra* at p. 1 (“Greg Addington spoke with PacifiCorp and PacifiCorp responded that there may be options but nothing firm is available. PacifiCorp approached C-Drop [Hydro], LLC with the option to forgive the minimum production requirement for last year [2013] and this year [2014] if the contract were altered by dropping the 20 year contract and going to a 15 year contract. Last year the plant produced a little over 1900 megawatts and the contract minimum was 2640. The failure to meet the minimum was due to less water running through the plant because of drought conditions and maintenance problems with the breaker and roller gate. This year, with low water supplies, it is unlikely we would produce the minimum. The current 20 year contract has rates scheduled for years 1-15. Years 16-20 is based on an index for natural gas prices which is an unknown variable. **Ted Sorenson for C-Drop [Hydro], LLC believes the offer from PacifiCorp is ok and someone will want the power and will be willing to buy it in later years. We could get higher rates in the future or lower with no way to predict. He was however going to request as part of the amended contract a reduction in minimum production to 1512 MWhs.”**).

¹⁵⁶ See *Id.* (“Stuntebeck suggested that the plant could maximize production by approximately 16% if the District could get the Stukel Spill Grant, which would reduce risk of low production. Stuntebeck stated it was not our decision to make as the power sales agreement is between our partner C-Drop [Hydro], LLC and PacifiCorp. C-Drop [Hydro], LLC is keeping the Board informed with any new information that comes in.”). See also Klamath Irrigation District, *WATERSMART Funding Opportunity Announcement No. R15AS00002 Water and Energy Efficiency Grant for FY 2015 – Klamath Irrigation District Stukel Spill Project in Concert with C-Drop Hydro, LLC* (Jan. 9, 2015) (attached), at p. 9. (“Completion of the Stukel Spill Project will allow the increase of average daily flows through the power plant increasing power production as compared to historical operations. KID will increase diversions from UKL and deliver this water to the Stukel spill. This extra flow will pass through the C-Drop hydroelectric plant and essentially be delivered to Lost River for TID and TID diversions from the UKL through Station 48 can be reduced by the same amount in no net increase in total diversion from UKL. KID, C-Drop [Hydro,] LLC and USBR all share in the revenue produced by the C-Drop hydroelectric plant’s renewable clean green energy production. The C-Drop plant uses water delivered for irrigation through KID’s delivery system to produce electricity. We estimate that this project can increase production 14-15%.”).

¹⁵⁷ See C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement (Oct. 18, 2011) (attached), *supra* at Section 11.1.6 (“Underdelivery. If Seller’s Facility has a Facility Capacity Rating of 100 kW or less, Seller’s failure to satisfy minimum delivery obligation of Section 4.3 for two (2) consecutive years” shall constitute an event of default.).

¹⁵⁸ *Id.*, at Section 11.4.1 (“In the event of Seller default under Subsection 11.1.5 or Subsection 11.1.6, then Seller shall pay PacifiCorp the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price for any energy and capacity that Seller was otherwise obligated (under Section 4.3) to provide during the period of default (‘Net Replacement Power Costs’),” but said difference “shall not exceed one Contract Year.”)

¹⁵⁹ *Id.*, at Section 3.2.8.

provide PacifiCorp with a form of credit security.¹⁶⁰ According to PPA Sections 11.1.1¹⁶¹ and 11.2.2,¹⁶² C-Drop Hydro, LLC's breach of such representations and warranties constitutes an unremedied "breach of material terms, and thus, an "event of default" within the meaning of Section 11.1.¹⁶³

Arguably, the C-Drop Hydroelectric Project's performance failure to meet the minimum 2,518 MWh requirement and these warranty breaches could have been prevented had Messieurs Sorenson and Daugherty heeded Resource Consulting Inc.'s (RCI's) concerns expressed in the September 2010 RCI Review of the Sorenson 2008 Feasibility Report. The RCI 2010 review, which is discussed in Section I of this memorandum, warned how politically charged Klamath River endangered species issues could override established water rights and diminish Upper Klamath Lake water flows to the Klamath Project, and ultimately, to the C-Drop hydroelectric facility.¹⁶⁴

Moreover, since KID's double-digit share of potential future power revenues from the C-Drop Hydro Facility during the first 15 years of the KID-C-Drop Hydroelectric Agreement depends on that Facility generating *more than* 3,000 MW-hrs of electricity per year, and the C-Drop Hydro Facility has been proven unable to generate the minimum requirement of 2,518 MWh during 2013 and 2014, it is highly unlikely that KID will realize much if ANY return on investment ("ROI") from this venture.

7. KID-PacifiCorp Interconnection Agreement for Small Generator Facility:

a. *Recitals – Purpose of Agreement and Public Utility Commission Jurisdiction and Article 1.1 – Scope*

KID and PacifiCorp executed the Interconnection Agreement for Small Generator Facility on July 18, 2011.¹⁶⁵ The term of the Agreement is 20 years.¹⁶⁶ The purpose of this Agreement was to enable the interconnection and operation in parallel of the District's C-Drop Hydro (up-to 10 MW) small generator facility with PacifiCorp's transmission and/or distribution system(s) ("T&D system") which is subject to the jurisdiction of the Oregon Public Utility Commission ("PUC").¹⁶⁷

b. *Articles 1.4.2, 1.4.3, 1.5 and 1.7 – The Parties' Respective Responsibilities, O&M Standards and Composite Delivery Requirements*

Articles 1.4.2, 1.4.3 and 1.5 require KID to construct, own, operate and maintain the Facility in accordance with the terms of this Agreement and PUC-required IEEE and National Electric

¹⁶⁰ *Id.*, at Section 10.

¹⁶¹ *Id.*, at Section 11.1.1.

¹⁶² *Id.*, at Section 11.2.2.

¹⁶³ *Id.*, at Section 11.1.

¹⁶⁴ See Resource Consulting, Inc., *Klamath Irrigation District C-Drop Hydroelectric Project – Feasibility Study Review of Sorenson Engineering Report and Overall Project Assessment* (Sept. 8, 2010), *supra* at p. 2 (attached).

¹⁶⁵ See KID-PacifiCorp Interconnection Agreement for Small Generator Facility (July 18, 2011) (attached).

¹⁶⁶ *Id.*, at Article 3.2.

¹⁶⁷ *Id.*, at Recitals 1 and 3.

Code standards, including those identified on Form 7 of the Agreement.¹⁶⁸ Article 1.5 requires each party to be held responsible for the safe installation, maintenance, repair and condition of their respective lines and appurtenances on their respective sides of interconnection, and each party's facilities' must protect the other party's facilities' facilities and personnel from damage and injury.¹⁶⁹ Article 1.7 requires KID's Facility to maintain a composite power delivery at continuous rated power output at the point of interconnection meeting the designated IEEE standard or following the voltage or VAR schedules of comparable generators in the control area.¹⁷⁰

c. *Article 3.4 – Temporary Disconnection of the Interconnection*

Pursuant to Article 3.4, PacifiCorp or KID may temporarily disconnect the facility from PacifiCorp's T&D system.¹⁷¹ This may occur under identified emergency conditions,¹⁷² for routine maintenance,¹⁷³ and/or if disruption or deterioration of service would result to other customers from the same electric system or to the PacifiCorp's T&D system.¹⁷⁴

d. *Article 4 – KID is Responsible for All Costs to Facilitate Interconnection*
¹⁷⁵

Articles 4.1-4.6 hold KID responsible for the costs of building and installing the interconnection facility,¹⁷⁶ all required minor modifications to PacifiCorp's T&D system,¹⁷⁷ all reasonable expenses associating with owning, operating, maintaining, repairing and replacing interconnection equipment,¹⁷⁸ the cost of any PacifiCorp-directed T&D system upgrades,¹⁷⁹ and the actual costs of any actions taken by PacifiCorp to address "adverse system impacts."¹⁸⁰ In addition, KID was responsible for paying to PacifiCorp a deposit to construct and install any required interconnection and/or PacifiCorp T&D system upgrades consistent with the progress payment option described in Attachment 3.¹⁸¹ **Consistent with Article 4.6 and Attachment 3, this option required KID to pay a deposit of \$10,000, by July 31, 2011, and three separate progress payments of \$80,155 by September 30, 2011, December 30, 2011 and February 28, 2012, for a total of \$250,465.**¹⁸² It is not apparent to counsel whether KID sought reimbursement of these expenditures from C-Drop Hydro, LLC or had applied them as an advance against or drawdown of the \$600,000 loan KID had previously extended to C-Drop Hydro, LLC.

¹⁶⁸ *Id.*, at Articles 1.4.2, 1.4.3 and 1.5.

¹⁶⁹ *Id.*, at Article 1.5.

¹⁷⁰ *Id.*, at Article 1.7.

¹⁷¹ *Id.*, at Article 3.4.

¹⁷² *Id.*, at Article 3.4.1.

¹⁷³ *Id.*, at Article 3.4.2.

¹⁷⁴ *Id.*, at Article 3.4.4.

¹⁷⁵ *Id.*, at Article 4.

¹⁷⁶ *Id.*, at Article 4.2.

¹⁷⁷ *Id.*, at Article 4.1.

¹⁷⁸ *Id.*, at Article 4.3.

¹⁷⁹ *Id.*, at Article 4.4.

¹⁸⁰ *Id.*, at Article 4.5.

¹⁸¹ *Id.*, at Article 4.6.

¹⁸² *Id.* See also *Id.*, at Attachment 3.

Pursuant to Article 4.6, KID also is held responsible for **paying any difference between the deposited amounts and the actual costs of interconnection.**¹⁸³ For example, Attachment 5 of the Agreement reflects that PacifiCorp had provided a best estimate of the additional costs of upgrading the Hornet Substation (through which C-Drop Hydro power would be transmitted) of \$165,801 for which KID and/or its assignee C-Drop Hydro, LLC, was responsible pursuant to Article 7 of the KID-C-Drop Hydroelectric Project Agreement.

e. *Article 5.1 – KID May Assign the Interconnection Agreement*

Article 5.1 provides that either KID or PacifiCorp can assign this Agreement to a third party upon providing prior written notice and receiving prior written consent of the other party.¹⁸⁴ Article 5.1.2 grants KID the right to assign the Agreement without PacifiCorp consent for collateral security purposes to aid in providing financing for the C-Drop Hydro Facility.¹⁸⁵ Article 5.1.3 provides that KID's assignment of the Agreement does not relieve it of its obligations thereunder, while KID's assignee (C-Drop Hydro, LLC, as discussed below in Section III) is held responsible for meeting KID's obligations.¹⁸⁶ The record reflects that KID had previously assigned its interests in the KID-PacifiCorp Interconnection Agreement to C-Drop Hydro, LLC on October 5, 2011. This counsel is unaware of any KID Board resolution authorizing this assignment, which had been executed by KID Board President Dave Cacka.¹⁸⁷ The record also reflects that C-Drop Hydro, LLC had provided PacifiCorp with notice of its assigned KID interests in the Interconnection Agreement on October 11, 2011,¹⁸⁸ and that PacifiCorp had consented to such assignment on November 30, 2011 (barely within the time prescribed by Section 2.2.1 of the C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement).¹⁸⁹

f. *Article 6.1 – KID Must Maintain General Liability Insurance at its Own Expense Sufficient to Indemnify PacifiCorp for Any Loss Caused by C-Drop Hydro's Interconnection Facility*

KID must maintain, at its own expense, general liability insurance sufficient to protect any person, including the PacifiCorp, who may be affected by the C-Drop Hydro Facility and its operation, which shall be sufficient to satisfy KID's indemnification responsibilities under Article 5.3.¹⁹⁰

8. KID-PacifiCorp Facilities Maintenance Agreement Supporting KID-PacifiCorp Interconnection Agreement:

¹⁸³ *Id.*, at Article 4.6.

¹⁸⁴ *Id.*, at Article 5.1.

¹⁸⁵ *Id.*, at Article 5.1.2.

¹⁸⁶ *Id.*, at Article 5.1.3.

¹⁸⁷ See Klamath Irrigation District, *Assignment of Interconnection Agreement for Small Generation Facility* (Oct. 5, 2011) (attached).

¹⁸⁸ See Notice of Assignment From C-Drop Hydro, LLC Member Ted Sorenson to PacifiCorp Account Manager Transmission Services Laura Raypush (Oct. 11, 2011) (attached).

¹⁸⁹ See Ltr. Correspondence From PacifiCorp Director of Transmission Services Nathan Ortega to KID Manager Mark Stuntebeck Re Klamath Irrigation District – Consent to Assignment to C-Drop Hydro, LLC – Q0299 (Nov. 29, 2011) (attached) (reflecting PacifiCorp's execution of consent dated Nov. 30, 2011).

¹⁹⁰ See KID-PacifiCorp Interconnection Agreement for Small Generator Facility (July 18, 2011) (attached), *supra* at Article 6.1.

a. *Recital 2 and Article 1 – Purpose and Duration of Agreement*

The Maintenance Agreement was entered into by KID and PacifiCorp on or about July 18, 2011.

¹⁹¹ In accordance with Article 1, it will continue in force for as long as the Interconnection Agreement for Small Generator Facility executed by these parties remains in effect.¹⁹² Recital 2 of this Agreement provides that PacifiCorp will provide maintenance services with respect to certain PacifiCorp-owned interconnection facilities that were specifically installed for KID’s C-Drop Hydroelectric Project pursuant to the Interconnection Agreement.¹⁹³ These facilities are described in Appendix A.¹⁹⁴

b. *Article 3 – Scope of Maintenance Services PacifiCorp is to Provide*

Articles 3.1 and 3.2 identify various types of maintenance services PacifiCorp will render to ensure the efficient operation of those of its interconnection facilities specially installed to support the C-Drop Hydroelectric Project. More specifically, PacifiCorp shall perform general maintenance, routine vegetation maintenance and emergency repairs and maintenance services.¹⁹⁵

c. *Article 4 – Compensation to PacifiCorp for Performing Maintenance Services*

In exchange for performing these services, Article 4.1 of the Maintenance Agreement establishes that the legal basis for requiring KID to pay compensation to PacifiCorp is Article 4 of the Interconnection Agreement. Said article states that KID “shall be responsible for [PacifiCorp’s] reasonable and necessary cost of all facilities, equipment, modifications and upgrades needed to facilitate the interconnection of the Small Generator Facility to PacifiCorp’s T&D system.”¹⁹⁶

Article 4.1.1 provides that PacifiCorp is entitled to recover the actual costs for such maintenance through billing and invoicing practices required by Section 4.2 reflecting the actual costs PacifiCorp has incurred. These actual costs “includ[e], without limitation, all reasonable costs, charges and taxes incurred” by PacifiCorp “in the design, testing, regulatory approval and inspection of the Facilities.”¹⁹⁷ In addition, they “includ[e], but [are] not limited to reasonable attorney fees, appraisal costs, and all other direct costs; internal costs (including overheads), expenses, and supplies, as determined by” PacifiCorp’s “Enterprise Resource Planning (‘ERP’) system; reasonable costs for the use of its capital and real property interests; and all costs related to obtaining rights-of-way for the Facilities.”¹⁹⁸

¹⁹¹ See OGIA Facilities Maintenance Agreement Between Klamath Irrigation District and PacifiCorp (July 18, 2011) (attached), at Article 1.

¹⁹² *Id.*

¹⁹³ *Id.*, at Recital 2.

¹⁹⁴ *Id.*, at Appendix A.

¹⁹⁵ *Id.*, at Articles 3.1 and 3.2.

¹⁹⁶ *Id.*, at Article 4.1.

¹⁹⁷ *Id.* at Article 4.1.1.

¹⁹⁸ *Id.*

Article 4.1.2 provides that PacifiCorp is entitled to recover its actual labor costs as determined by its ERP system and at the rate established by the State of Oregon. These costs include, but are not limited to “supervision, transportation, equipment, and corporate overheads.”¹⁹⁹

Article 4.1.3 provides that PacifiCorp is entitled to recover its actual material costs for “any equipment or materials purchased or leased by PacifiCorp that are used to maintain or repair the Facilities. These costs “include[e] material costs for overhead relating to equipment and materials, shipping, insurance, and warehouse restocking charges.”²⁰⁰

It is unknown to this counsel how much PacifiCorp has billed and invoiced to KID and/or C-Drop Hydro, LLC for these types of actual maintenance costs since the execution of this Maintenance Agreement and whether KID has remitted any payments for such costs unreimbursed by C-Drop Hydro, LLC.

d. *Article 11.5 – Assignment of this Maintenance Agreement*

Article 11.5 permits either Party “to assign, transfer or subcontract all or any part of [their] rights and obligations under this Agreement, **provided that the party whose rights and/or obligations are assigned, transferred or subcontracted will:** (1) continue to have primary responsibility for all of its obligations set forth in this Agreement unless relieved of its obligations by written consent of the other Party; and (2) **promptly notify the other Party in writing of any assignment or transfer of its rights or obligations under the Interconnection Agreement.**”²⁰¹

III. Amendments, Assignments and Addenda to the Agreements

1. Amendment of the KID-Warm Springs Hydro, LLC C-Drop Hydroelectric Project Agreement; KID Board Resolution Authorizing Amendment of Said Agreement:

On or about January 12, 2012, during the annual and monthly KID Board meeting, **the KID Board passed a resolution “consent[ing] to the Amendment of the Warm Springs Hydroelectric Agreement attached hereto.”**²⁰² Presumably, said Amendment had been executed and was effective *on or after* the date this authorizing KID Board resolution had been passed; however, this is NOT certain.

The KID-C-Drop Hydro, LLC “Amendment to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement”²⁰³ changed the original Agreement in three ways. First, KID consented to Warm Springs Hydro, LLC’s change of name to C-Drop Hydro, LLC.²⁰⁴ Second, KID consented to an amendment of Article 6 of the Hydroelectric Agreement to permit C-Drop

¹⁹⁹ *Id.*, at Article 4.1.2.

²⁰⁰ *Id.*, at Article 4.1.3.

²⁰¹ *Id.*, at Article 11.5.

²⁰² See Klamath Irrigation District, Resolution Consenting to the Amendment of the KID-Warm Springs Hydro, LLC C-Drop Hydroelectric Project Agreement (Jan. 12, 2012) (attached).

²⁰³ See KID-C-Drop Hydro, LLC Amendment to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement (Jan 12, 2012) (attached).

²⁰⁴ *Id.*, at Recitals A-C, Paragraphs 1-2.

Hydro, LLC “to borrow funds, either directly or through a bond sale, from Northwest Farm Credit Services, FCLA (“Northwest FSC”).²⁰⁵ Third, KID consented to C-Drop Hydro, LLC’s use of a domestic water well located near the C-Drop Hydro Project.²⁰⁶

a. *Amendment of Article 6*

The amendment to Article 6 of the original Agreement was subject to the following conditions:

a) “The total amount subject to any Security Agreement or other **lien in favor of Northwest FCS shall not exceed \$1,400,000**”;²⁰⁷

b) “All proceeds or funds received by C-Drop Hydro, LLC under the terms of **the Project Funding Agreement dated effective November 1, 2011 between it and Energy Trust of Oregon, Inc.**,²⁰⁸ any funds or the proceeds or tax savings realized by C-Drop Hydro, LLC under the **Oregon Business Energy Tax Credit Program**, and all payments or tax benefits received by C-Drop Hydro, LLC under **section 1603 of Division B of the Department of Treasury shall be applied in full to repay any debt or bonds held by or issued to Northwest FSC**”;²⁰⁹ *and*

c) “Any security interest or other interest granted to or held by Northwest FSC or arising from or under any agreement with Northwest FSC shall be subordinate to the interests of KID in this Agreement and under any Promissory Note and Security Agreement held by KID and executed by C-Drop. The terms of any Security Agreement or other agreement made by and between Northwest FCS and C-Drop shall specifically incorporate the terms of the Agreement and the Promissory Note, Security Agreement, and other agreements made by KID and C-Drop Hydro, LLC.”²¹⁰

i. The KID-C-Drop Hydro, LLC “Side-Agreement”

The parties had previously discussed the final two conditions noted above by telephone on October 27, 2011, and in what appears to be an October 31, 2011 written “side agreement” between them. For example, on October 31, 2011, KID Manager, Stuntebeck dispatched a letter to Ted Sorenson ensuring the priority of KID’s lien against C-Drop Hydro Project assets. It stated *inter alia* that: “The loan from Farm Credit Services and any associated lien **is secondary to KID’s first lien** against the Project facilities, Power Sales Agreement, or any other attribute or benefit of the Project.”²¹¹

²⁰⁵ *Id.*, at Paragraph 3.

²⁰⁶ *Id.*, at Paragraph 4.

²⁰⁷ *Id.*, at Paragraph 3.a.

²⁰⁸ **This counsel has not located a copy of the executed November 1, 2011 C-Drop Hydro, LLC-Energy Trust of Oregon, Inc. Project Funding Agreement referred to above, which would be helpful in ascertaining how much funding C-Drop Hydro, LLC had actually received from Energy Trust of Oregon, and how much of a grant right KID had waived on behalf of C-Drop Hydro, LLC. Perhaps KID patrons should file a FOIA with the Oregon Department of Energy to secure this information.**

²⁰⁹ See KID-C-Drop Hydro, LLC Amendment to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement (Jan 12, 2012), *supra* at Paragraph 3.b.

²¹⁰ *Id.*, at Paragraph 3.c.

²¹¹ See Klamath Irrigation District, Correspondence From Mark Stuntebeck, Manager KID to Ted Sorenson, C-Drop Hydro, LLC (“Side-Agreement”) (Oct. 31, 2011) (attached), at Paragraph 1.

In addition, the letter imposed a 60-day time limitation on C-Drop Hydro, LLC 's use of Oregon BETC and Energy Trust funds to pay down a preponderance of the \$1,400,000 Northwest FSC loan/bond, and a 1 year limitation on its full payment of that loan/bond.²¹² However, the record shows that “the [Northwest FSC] ARC Bond Security used to finance C-Drop Hydro, LLC ha[d] been paid in full [...] on September 9, 2013,” *more than* 1 year after the start of C-Drop Hydroelectric Facility’s operations.²¹³

The side-agreement also imposed a third condition. It required C-Drop Hydro, LLC to exhaust the \$600,000 KID credit line for construction of the Hydroelectric Project before it assumed the Northwest FSC loan/bond²¹⁴ Perhaps the former KID Board could explain the purpose behind this third condition. Was it to increase interest revenues to the District? To simplify KID’s accounting of principal and interest payments due and owing on the outstanding loan balance?

ii. KID Audit Reports Reveal Internal Control Deficiencies That Likely Impacted C-Drop Accounting

The latter possibility seems extremely remote given the District’s long-time use of a “modified cash basis” of accounting for its financial statements which KID auditors have noted “is a comprehensive basis of accounting **other than accounting principles generally accepted in the United States of America.**” Significantly, the Audit Reports accompanying each of the audited KID financial statements for the fiscal years ended December 31, 2012, December 31, 2013 and December 31, 2014 (dated in June of the year following the audited fiscal year) revealed ongoing KID internal control deficiencies which likely also persisted in prior fiscal years.²¹⁵

Each such MCP Audit Report stated the following: “[W]e identified certain deficiencies²¹⁶ in internal control that we consider to be significant²¹⁷ deficiencies. [...] We consider the following deficiencies to be significant deficiencies in internal control:

²¹² *Id.*, at Paragraph 2 (“The preponderance of the loan through Farm Credit Services will be paid off 60 days from the start of operations of the C-Drop Hydroelectric facility, when C-Drop LLC receives BETC and Energy Trust funds related to the C-Drop Hydroelectric Project, and completely paid in full within one year of the start of operations of the C-Drop Hydroelectric Facility.”).

²¹³ See Letter Correspondence From Northwest FSC to Ted and Gayle Sorenson *Re C-Drop Hydro, LLC Loan Payoff* (Jan. 19, 2016) (attached) (“This letter is to confirm that the ARC Bond Security used to finance C-Drop Hydro, LLC has been paid in full. **The last posted payment which paid the loan in full was on September 9, 2013.** If you have any additional questions on the payoff of C-Drop Hydro, LLC please feel to contact me. Sincerely, Eric Gray, Relationship Manager/AVP”).

²¹⁴ See Klamath Irrigation District, Correspondence From Mark Stuntebeck, Manager KID to Ted Sorenson, C-Drop Hydro, LLC (“Side-Agreement”) (Oct. 31, 2011), *supra* at Paragraph 3.

²¹⁵ See Molatore, Scroggin and Peterson (MSP), *Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2012* (June 14, 2013) (attached); Molatore, Scroggin and Peterson (MSP), *Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2013* (June 24, 2014) (attached); Molatore, Scroggin and Peterson (MSP), *Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2014* (June 24, 2015) (attached).

²¹⁶ See *Id.* (“A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis.”)

²¹⁷ See *Id.* (“A significant deficiency is a control deficiency, or combination of control deficiencies, that adversely affects the entity’s ability to initiate, authorize, record, process, or report financial data reliably in accordance with

- Klamath Irrigation has inadequate documentation of the components of internal control [...]"²¹⁸
- "Klamath Irrigation District has an inadequate design of internal control over the preparation of the financial statements being audited [...]"²¹⁹
- "Klamath Irrigation District had inadequate control over cash transactions because of insufficient segregation of duties due to a limited number of personnel."²²⁰

Although the auditors (MSP) devoted a not insignificant portion of each Audit Report to identifying these deficiencies, they did "not express an opinion on the effectiveness of Klamath Irrigation District's internal control," and concluded each year that "none of the significant deficiencies identified above are material weaknesses."²²¹ It should be noted for the record that, the prior KID Board chose not to periodically rotate/replace District auditors every 5 or so years as is common practice to ensure against accounting anomalies and material misstatements in audited financial statements, especially of public entities.

2. KID Consent to Assignment of C-Drop Hydro, LLC Property Interests in Amended Hydroelectric Agreement to Northwest Farm Credit Services:

On December 2, 2011, more than one full month prior to the Parties' execution of the Amendment to the KID-Warm Springs Hydro, LLC Hydroelectric Agreement, KID executed its "Consent to Assignment" of Warm Springs Hydro, LLC's// C-Drop Hydro, LLC's interests in said Agreement to Northwest Farm Credit Services, FLCA ('Northwest FCS'). This assignment of interests was undertaken for collateral purposes, consistent with the terms of the C-Drop Hydro, LLC-Northwest FCS Security Agreement and Assignment dated, December 2, 2011.²²²

modified cash basis such that there is more than a remote likelihood that a misstatement of the entity's financial statements that is more than inconsequential will not be prevented or detected by the entity's internal control.")

²¹⁸ See *Id.* ("During our audit, we noted that Klamath Irrigation District does not have a current, comprehensive manual of accounting policies and procedures. Although Klamath Irrigation District's management has a good understanding of the policies and procedures for internal control, we suggest that the policies and procedures be written so that compliance with them is easier to assess and monitor. Documentation of the internal control processes and procedures could help to standardize Klamath Irrigation District's accounting processes and be used to inform all employees of desired operating procedures and policies. Such a manual could also greatly minimize the time required to train new staff members with accounting responsibilities. Features of the system of internal controls would also be documented in the manual for future reference.").

²¹⁹ See *Id.* ("During our audit, we noted that Klamath Irrigation District does not have a system in place that would provide for the preparation of financial statements in accordance with the modified cash basis of accounting. Currently, the draft financial statements are prepared for Klamath Irrigation District by the auditors. The auditors may prepare the financial statements as a matter of convenience but Klamath Irrigation District must be in a position to take responsibility for them.").

²²⁰ See *Id.* ("During our audit, we noted that due to Klamath Irrigation District's having a limited number of personnel, there are instances where there is not the opportunity for adequate segregation in duties to prevent the misappropriation of cash received by Klamath Irrigation District.").

²²¹ See *Id.* ("A material weakness is a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the financial statements will not be prevented or detected by the entity's internal control.").

²²² See Klamath Irrigation District, *Consent to Assignment* (Dec. 2, 2011) (attached), at Article 2.

KID subjected its Consent to Assignment to certain conditions, including, most importantly, the following:

1. “Northwest FCS and its designee shall be entitled to independently exercise all rights of C-Drop under the [KID-Warm Springs Hydro, LLC Hydroelectric] Agreement in accordance with the terms thereof [...and shall have the right to pay all amounts due under the Agreement or to perform any other act, duty or obligation required of C-Drop under thereunder at any time to prevent or cure a default under the Agreement [...if] Northwest FCS [has provided KID with...] written notice [...] that **C-Drop has defaulted** under the financing arrangements between Northwest FCS and C-Drop or that **Northwest FCS and its designee intends to act to cure a default by C-Drop** under the Agreement”,²²³
2. “Northwest FCS or its designee shall assume all of C-Drop’s rights, liabilities and obligations **under the [KID-Warm Springs Hydro, LLC Hydroelectric] Agreement** [...if] Northwest FCS or designee with the consent of KID, which consent will not be unreasonably withheld, [...] succeeds to C-Drop’s interests under the Agreement, whether by foreclosure or otherwise.”²²⁴
3. KID also refused to be bound by any agreement executed between such parties;²²⁵ refused to consent to the release of C-Drop Hydro, LLC under the Hydroelectric Agreement or to treat its consent as a novation of that Agreement;²²⁶ and refused to treat its consent as a modification of the notice or payment requirements under the Hydroelectric Agreement.²²⁷

A close review of the Consent Assignment document reveals that KID counsel employed poor language **arguably resulting in KID having consented to the assignment of both Parties’ interests in the Amended KID-C-Drop Hydro, LLC Hydroelectric Agreement, and not merely to the assignment of only C-Drop Hydro, LLC’s interests in said Agreement.** Article 2 states that “C-Drop and [...] Northwest FCS desire that KID consent to **the assignment of the Agreement** to Northwest FCS [...] KID is willing to consent **to this assignment of the Agreement** for collateral purposes [...]” Fortunately, the C-Drop Hydro, LLC-Northwest FCS Security Agreement and Assignment was more artfully drafted and limited KID’s consent of assignment exclusively to C-Drop Hydro, LLC’s interests in said Agreement.

This counsel is unaware of any KID Board resolution authorizing KID Board consent to the Assignment of C-Drop Hydro, LLC’s interests in the Amended KID-C-Drop Hydro, LLC Hydroelectric Agreement.²²⁸

3. C-Drop Hydro, LLC-Northwest Farm Credit Services Security Agreement and Assignment:

²²³ *Id.*, at Article 2.1.

²²⁴ *Id.*, at Article 2.2.

²²⁵ *Id.*, at Article 2.3.

²²⁶ *Id.*, at Article 2.4.

²²⁷ *Id.*, at Article 2.5.

²²⁸ Perhaps, KID patrons can file a FOIA Request with KID requesting such documentation.

Presumably, contemporaneous with KID's December 2, 2011 execution of the "Consent to Assignment" (and prior to the January 12, 2012 issuance of a KID Board resolution supporting only the Amendment of the C-Drop Hydroelectric Agreement), C-Drop Hydro, LLC and Northwest Farm Credit Services executed the "Security Agreement and Assignment."²²⁹ Recitals A and B of the "Security Agreement and Assignment" indicate that all of C-Drop Hydro, LLC's property interests were assigned to Northwest FCS as security for Northwest FCS' purchase of a \$1.4 million bond (debt instrument) from C-Drop Hydro, LLC.²³⁰ The "Security Agreement and Assignment", thus, effectively amends the KID-Warm Springs Hydro, LLC Security Agreement of April 5, 2011, as discussed above in Section II.2.d of this memorandum. **This counsel is unaware of any KID Board resolution authorizing KID's amendment of this earlier Security Agreement.**

a. *Paragraph 1 – C-Drop Hydro, LLC Property Interests Collateralized*

Paragraph 1 of the Northwest FCB "Security Agreement and Assignment" indicates that the following C-Drop Hydro, LLC property interests were used as security collateral for the \$1.4 million bond:

A) The "C-Drop Hydroelectric Project," including the generator, all currently owned and after-acquired property and goods used in C-Drop Hydro, LLC's operations;²³¹

B) All C-Drop Hydro, LLC's "right, title and interest in and to" the November 8, 2011 KID-Bureau of Reclamation Lease of Power Privilege ("LOPP") Agreement for the C-Drop Hydroelectric Project, Contract No. 11-LC-20-0181, CRA No. 11-LC-20-0180 which lease rights KID had assigned to C-Drop Hydro, LLC²³² **(KID Secretary, Mark Stuntebeck executed an assignment of KID's LOPP rights to C-Drop Hydro, LLC on or about December 2, 2011, allegedly pursuant to LOPP Article 26.1.²³³ This counsel, however, is unaware of any KID Board resolution authorizing KID's assignment of its LOPP rights to C-Drop Hydro, LLC.**

C) All of C-Drop Hydro, LLC's "right, title and interest in and to" the Amended KID-C-Drop "Hydroelectric Agreement;"²³⁴

D) All C-Drop Hydro, LLC's right, title and interest in and to" the October 18, 2011 C-Drop Hydro, LLC-PacifiCorp "Power Purchase Agreement;"²³⁵

²²⁹ See C-Drop Hydro, LLC-Northwest Farm Credit Services, FLCA Security Agreement and Assignment (ARC Bond No. 75102-441) (Dec. 2, 2011) (attached).

²³⁰ *Id.*, at Recitals A and B.

²³¹ *Id.*, at Paragraph 1.A.

²³² *Id.*, at Paragraph 1.B.

²³³ See Klamath Irrigation District, *C-Drop Hydroelectric Project Assignment of Lease of Power Privilege* (Dec. 2, 2012) (attached) (executed by Mark Stuntebeck in his capacity as KID Secretary.) See also Ltr. Correspondence from U.S. Bureau of Reclamation Chief, Resource Management Division to Ted Sorenson, *Re Request for Contractual Information Concerning Lease of Power Privilege Contract Number 11-LC-20-0181* (Sept. 6, 2012) (attached) (wherein BOR had confirmed to Ted Sorenson BOR's authorization of C-Drop Hydro, LLC to operate the C-Drop Hydro Facility pursuant to the LOPP).

²³⁴ See C-Drop Hydro, LLC-Northwest Farm Credit Services, FLCA Security Agreement and Assignment (ARC Bond No. 75102-441) (Dec. 2, 2011) (attached), *supra* at Paragraph 1.C.

E) All of C-Drop Hydro, LLC's "right, title and interest in and to" the KID-PacifiCorp "Interconnection Agreement for Small Generator Facility" **(KID Board President Dave Cacka had executed an assignment of such interest on October 5, 2011. This counsel, however, is unaware of any KID Board resolution authorizing assignment of KID's interest in the Interconnection Agreement);**²³⁶

F) All of C-Drop Hydro, LLC's "right, title and interest in and to" **the November 1, 2011 C-Drop Hydro, LLC-Energy Trust of Oregon "Project Funding Agreement."**²³⁷ **(As discussed above in Section III.1.a. of this memorandum, this counsel has not located a copy of such Agreement.);**²³⁸

G) All of the Business Energy Tax Credits the Oregon Department of Energy granted to C-Drop Hydro, LLC (The Oregon Department of Energy dispatched a letter correspondence dated May 10, 2011 to Dennis Daugherty of Warm Springs Hydro, LLC indicating **ODOE's selection of Warm Springs Hydro, LLC's Tier Two Business Energy Tax Credit (BETC) Application #32845 "to move forward into technical review off of the supplemental list and ODOE's "offering \$440,000 in tax credits instead of the \$957,568 requested in [its] application [...] contingent upon a successful technical review and providing supplemental information [and payment of] the additional review fee [of] \$5,280"** by May 16, 2011.²³⁹ Ted Sorenson responded to this letter by correspondence dated, May 13, 2011 containing an Amendment to BETC Application # 32845.²⁴⁰);²⁴¹ and

H) All payments due or to become due Warm Springs Hydro, LLC under Section 1603 of Division B of the American Recovery and Reinvestments Act ("ARRA") of 2009 issued by the U.S. Treasury.²⁴²

b. *Paragraph 3 - U.C.C. Filing Statement Required*

Pursuant to Paragraph 3 of the Security Agreement and Assignment, C-Drop Hydro, LLC authorized Northwest FCB "to file a financing statement [...] describing the Collateral without

²³⁵ *Id.*, at Paragraph 1.D.

²³⁶ *Id.*, at Paragraph 1.E.

²³⁷ *Id.*, at Paragraph 1.F.

²³⁸ **Perhaps, KID patrons would wish to include this document in any FOIA it may decide to file with KID.**

²³⁹ See Ltr. Correspondence From Jeff Keto, Oregon Department of Energy BETC Manager to Dennis Daugherty, Warm Springs Hydro, LLC, *Re Tier Two, Round 2 Business Energy Tax Credit (BETC) Application #32845* (May 10, 2011) (attached) (This ODOE letter also directed Warm Springs Hydro, LLC to withdraw its most recent BETC Application # 34319. On January 28, 2011, ODOE had apprised KID that its BETC Application #32844 on the C-Drop Hydro Project had not been selected).

²⁴⁰ See Ltr. Correspondence From Ted Sorenson, Warm Springs Hydro, LLC to Jeff Keto Oregon Department of Energy BETC Manager *Re Tier II, Round II Business Energy Tax Credit (BETC) Application No. 32845 – Amendment* (May 13, 2011) (attached).

²⁴¹ See C-Drop Hydro, LLC-Northwest Farm Credit Services, FLCA Security Agreement and Assignment (ARC Bond No. 75102-441) (Dec. 2, 2011) (attached), *supra* at Paragraph 1.G.

²⁴² *Id.*, at Paragraph 1.H.

signature by [C-Drop Hydro, LLC] and to file all amendments and continuations thereof,” enabling Northwest FCB to perfect its security interest in such Collateral.²⁴³

c. *Paragraph 9 – C-Drop Hydro, LLC Warranty of Rights and Power to Transfer Collateral*

Pursuant to Paragraph 9 of the Northwest FCB Security Agreement and Assignment, C-Drop Hydro, LLC warranted and represented that it “has rights in or the power to transfer the Collateral and its title to the Collateral is free of all adverse claims, liens, security interests and restrictions on transfer or pledge except as created by this Security Agreement.”²⁴⁴ **As discussed above in Section II.2.d of this memorandum, this counsel is unaware of any KID Board resolution authorizing the subordination of KID’s security interest to Northwest FCB pursuant to the April 5, 2011 KID-Warm Springs Hydro, LLC Security Agreement. As discussed above in Section III.1.b of this memorandum, the only KID Consent to Assignment executed concerned C-Drop Hydro, LLC interests in the Amended KID-C-Drop Hydro, LLC Hydroelectric Agreement, and it was only in respect of this Amended Hydroelectric Agreement that the KID Board issued a Board resolution.**

4. Addendum to the C-Drop Hydroelectric Project Agreement:

KID and C-Drop Hydro, LLC executed an Addendum to the Amended C-Drop Hydroelectric Agreement on April 1, 2013,²⁴⁵ approximately 2 years (24 months) following the execution of the original Agreement.

Paragraphs 1 and 2 of the Addendum reflect the Parties’ agreement that KID will be compensated for daily inspections of and periodic minor maintenance services performed at the C-Drop Hydroelectric Plant (Facility).²⁴⁶ Paragraph 4 of the Addendum provides that all KID activities at the plant “will be logged on the daily log sheet posted in the plant.”²⁴⁷ It also provides that KID invoices for a given operational year will be issued to C-Drop Hydro, LLC “[w]ithin a reasonable time after the end of each operational year,” and that payment of such invoices shall be due within 30 days of the invoice date, with interest accruing at a rate of 1.333% for late payments.²⁴⁸

a. *Conditional (Partial) Waiver of Lien Rights*

Apparently, the 2013 Addendum to the Hydroelectric Agreement had arisen from a prior disagreement between the parties concerning C-Drop Hydro, LLC’s failure to remit full payment to KID for maintenance work that KID had performed at the C-Drop facility. On January 24,

²⁴³ *Id.*, at Paragraph 3.

²⁴⁴ *Id.*, at Paragraph 9.

²⁴⁵ See Klamath Irrigation District and C-Drop Hydro, LLC, *Addendum to the C-Drop Hydroelectric Agreement*, (April 1, 2013) (attached).

²⁴⁶ *Id.*, at Paragraphs 1 and 2.

²⁴⁷ *Id.*, at Paragraph 4. **KID Patrons may be interested in filing a FOIA with KID to obtain copies of these daily logs.**

²⁴⁸ *Id.* **KID Patrons may be interested in filing a FOIA with KID to obtain copies of all KID invoices to ascertain what \$\$ KID has earned in exchange for providing such maintenance services.**

2012, KID Manager Stuntebeck dispatched a document entitled above.²⁴⁹ The document acknowledged C-Drop Hydro, LLC's prior payment of \$11,078 for Project-related maintenance. It also offered to waive KID's hypothetical right to file a mechanics lien to collect a \$8,678 balance due and owing for additional maintenance work KID had performed during 2011 and through January 17, 2012, provided C-Drop Hydro, LLC tendered full payment in that amount. It is not known whether the full balance claimed to be due and owing was ever paid.²⁵⁰

5. Amendment to KID-Warm Springs Hydro, LLC Promissory Note Line of Credit:

a. *Recap of Original KID-Warm Springs Hydro, LLC Promissory Note*

As discussed above in Section II.3.a of this memorandum, the "Advances" paragraph of the original KID-Warm Springs Hydro, LLC Promissory Note had required KID to ensure, during the first 2 years (24 months) following the execution of the Note, **or until April 5, 2013**, that Warm Springs did not accumulate an **unpaid revolving loan balance of more than \$600,000** (i.e., that the aggregate principal outstanding balance of the revolving credit line advances at any time did not exceed the sum of \$600,000).

As discussed above in Section II.3.b of this memorandum, the "Interest Rate" paragraph of the original Note had required KID to **convert** the unpaid aggregate balance of the C-Drop Hydro, LLC **revolving credit line** (earning interest at the rate of 5% per annum payable in one December 31st installment each year during said 24-month period) **into a 14-year fixed** installment loan **once "the C-Drop Hydroelectric Project [...] has been constructed and starts generating power,"** which occurred on **May 3, 2012**, approximately 13 months after the Note's execution. In addition, as discussed above in Section II.3.c of this memorandum, the "Interest Rate" paragraph of the original Note had required KID to collect from C-Drop Hydro, LLC the **first loan principal and interest payment one year after the date power generation commenced (May 2, 2013)**, and all remaining installments on that "anniversary date." **The record shows, however, that KID did not adhere to ANY these terms and conditions of the original KID-Warm Springs Hydro, LLC Promissory Note Line of Credit. As the result of these KID Management failures to enforce the Note's terms and conditions on KID patrons' behalf, KID Management had effectively amended the original Promissory Note Line of Credit without any KID Board resolution authorizing such amendment.**

b. *Recital 3 – Revision of Payment Schedule of Promissory Note*

On or about September 27, 2013, KID and C-Drop Hydro, LLC executed the Amendment to the KID-Warm Springs, LLC "Promissory Note Line of Credit."²⁵¹ Although the Amended Note was not dated, the attached **"Exhibit A" was dated "9/27/13, 10:48:52 AM."**²⁵² Recital 3 of the Amended Promissory Note indicates that the Amendment was intended "to revise the payment

²⁴⁹ See Klamath Irrigation District, *Conditional (Partial) Waiver of Lien Rights*, presented to C-Drop Hydro, LLC (Jan. 24, 2012) (attached) (accompanied by various statements that do not necessarily add up to the \$8,678 alleged balance).

²⁵⁰ **KID Patrons may be interested in filing a FOIA with KID to confirm whether C-Drop Hydro, LLC ever fully paid this balance.**

²⁵¹ See Klamath Irrigation District and C-Drop Hydro, LLC, *Amendment to Promissory Note Line of Credit*, (Sept. 27, 2013) (attached).

²⁵² *Id.*, at Paragraph 2 and Exhibit A.

schedule of the [original] Promissory Note Line of Credit.”²⁵³ Apparently, Sorenson had previously requested, back on December 18, 2012, that the original Promissory Note “be amended to allow for the first annual payment to be October 1, 2013, with all subsequent annual payments to be on October 1 also.”²⁵⁴

c. *Paragraph 2 – Aggregate Principal Balance Greater than \$600,000*

Paragraph 2 of the Amended Promissory Note identified the payment schedule as comprising “the second full paragraph of the [original] Promissory Note Line of Credit” entitled, “Interest Rate.”²⁵⁵ The Amended “Interest Rate” Paragraph stated that “[t]he parties hereto agree that **as of December 18, 2012**, the balance owed on the Promissory Note Line of Credit was **\$618,935.77** as further set forth in the amortization schedule attached hereto as Exhibit A.”²⁵⁶ This amount was attributable to principal due but not paid on the \$600,000 loan being applied to the aggregate unpaid loan balance.²⁵⁷

d. *Paragraph 3 – Conversion of Revolving Credit Line to Fixed Installments*

Paragraph 3 of the Amended Promissory Note stated, the “**unpaid principal balance** shall be **amortized** over 14 equal annual installments to be paid as follows: \$61,891.06 **on or before October 1, 2013**, and \$61,891.06 on or before the 1st day of each October thereafter until principal and interest are paid in full.”²⁵⁸ Paragraph 3 also stated that, “[a]mounts paid shall first be credited to accrued interest and then to principal due and owing.”²⁵⁹

e. *Conclusions Re Amended Note*

This Amendment to the original Promissory Note Line of Credit was signed by KID Board President Dave Cacka. However, this counsel is unaware of any KID Board resolution authorizing this Amendment.

It may reasonably be concluded that, through this Amendment, KID Management changed (increased) the loan amount beyond the \$600,000 limit of the original Note (by permitting C-Drop Hydro, LLC not to pay the full principal amount then due and owing) without KID Board approval. It also may reasonably be concluded that KID Management changed (extended) the conversion date of the revolving credit line into a fixed installment loan from May 3, 2012 until October 1, 2013, as well as, the anniversary date for payment of fixed installment loan principal and interest from May 2 until October 1 of each year thereafter, also without KID Board approval.

²⁵³ *Id.*, at Recital 3.

²⁵⁴ See Letter Correspondence From Ted Sorenson, C-Drop Hydro, LLC to Mark Stuntbeck, KID *Re Interest Payment on Loan* (Dec. 18, 2012) (attached) (accompanied by C-Drop Hydro, LLC check #1176 in the amount of \$10,000).

²⁵⁵ See Klamath Irrigation District and C-Drop Hydro, LLC, *Amendment to Promissory Note Line of Credit*, (Sept. 27, 2013), *supra* at Paragraph 2.

²⁵⁶ *Id.*, at Exhibit A.

²⁵⁷ *Id.*

²⁵⁸ *Id.*, at Paragraph 3.

²⁵⁹ *Id.*

Furthermore, it may be reasonably concluded that Exhibit A's amortization schedule does not compute. KID Management must provide an updated amortization schedule, current through October 1, 2015. To this end, it is recommended that KID Management provide written verification of all principal and interest payments actually made by C-Drop Hydro, LLC and actually received from KID from October 1, 2013 through October 1, 2015. It also is recommended that KID Management provide written verification of all disbursements from the revolving credit line that KID had made to Warm Springs Hydro, LLC// C-Drop Hydro, LLC from April 5, 2011 through December 18, 2012.

IV. Summary of C-Drop Hydroelectric Project Costs Limiting KID Cash Flows for C Canal Flume Replacement and Related C-Drop Revenues²⁶⁰

1. Pre-C-Drop Hydroelectric Agreement Execution Out-of-Pocket:

- 9/11/07 – Sorenson Engineering Stage 1 C-Drop Feasibility Study – **\$2,000 plus expenses;**
- 9/21/07 – Sorenson Engineering Stage 2 C-Drop Feasibility Study – **\$22,000**
 - Oregon Economic & Community Development Department Grant of **\$6,000** may have reduced the out-of-pocket \$\$ amount to \$16,000-\$17,000 (see below)
- 10/27/08 – Sorenson Engineering Follow-up Proposal to Secure FERC C-Drop License – **\$62,000**
 - 11/20/08 – KID Consultant Agreement Between Sorenson Engineering and GKRSE (Wash., D.C. law firm) – **\$21,897.36 GKRSE legal fees incurred**²⁶¹
- 11/18/08 – W. Ganong Review of Klamath Cty. Land Dev. Code for Permitting of Power Generation Facilities on Federally-owned Land (\$\$??)
- 4/6/09 – **\$6,548**
- 12/22/09 – PacifiCorp Interconnection System Impact Study Agreement –
 - 5/19/10 PacifiCorp Invoice for **\$4,049.99**
- 5/1/10 – Resource Consultants Inc. Business Services Contract for Review of Sorenson C-Drop Feasibility Study – **\$4,500**
- 12/22/10 – W.Ganong Work on Memo – United Power Corp Protest to KID Award of C-Drop Contract to Warm Springs Hydro, LLC (\$\$??)

❖ **Total Cost – \$101,097.99 (minimum estimate)**

2. Post-C-Drop Hydroelectric Agreement Execution Out-of-Pocket:

- 4/5/11 – KID Loan to Warm Springs Hydro, LLC per Hydroelectric Agreement & Promissory Note Line of Credit – **\$600,000**
 - 5/17/11 – drawdown of \$107,580
 - 6/6/11 – drawdown of \$45,000 (BOR environmental costs)
 - 8/8/11 – drawdown of \$50,000 (balance of environmental costs?)

²⁶⁰ KID patrons should secure confirmation of all such figures from KID, recognizing that KID's books and records and audited financial statements are not necessarily reliable. See discussion above, at Section III.1.a.ii of this memorandum.

²⁶¹ Patrons should confirm the amount of KID payments to this law firm on C-Drop-related work.

- 10/14/11 – drawdown of 170,000
- 11/18/11 – drawdown of \$227,420
- 5/20/11 – KID-BOR Cost Reimbursement Agreement Re LOPP – **\$90,761** total estimated environmental costs (assumed to be applied above as drawdown to \$600,000 credit line)
- 6/7/11 – Signed C-Drop Hydro, LLC-Adkins Consulting Engineers Inc. contract (\$\$?? impact on KID???)²⁶²
- 7/18/11 – KID-PacifiCorp Interconnection Agreement – **\$250,465**
- 12/27/11 – W. Ganong Revision of Consent to Assignment Provision re C-Drop Hydro, LLC assigning interests in Amended Hydroelectric Agreement to Northwest FCS (\$\$??)
- 12/29/11 – W. Ganong Review of Amendment to Hydroelectric Agreement
- 12/30/11 – W. Ganong Review of Stuntebeck Ltr. to BIA re OWRD Proposed Notice (\$\$??)
- 1/4/12 – W. Ganong Review of Amendment to Hydroelectric Agreement re Pump Well (\$\$??)
- 1/24/12 – KID Maintenance at C-Drop Facility – **\$8,678** (paid for or not?)
- 12/20/12 – W. Ganong Discussion w. Stuntebeck re C-Drop contract Amendment - **\$320**
- 9/9/13 – W/ Gangong Review Board Minutes & Loan Docs for C-Drop & Prepare Second Amendment to Note - **\$280**
- 9/27/13 – Amendment to KID-Warm Springs Hydro, LLC Promissory Note – **\$18,935.77** (added to \$600,000 loan, consisting of unpaid due principal as of 12/18/12)

❖ **Total Cost – \$878,678.77 (minimum estimate)**

TOTAL COST (OUT-OF-POCKET) – \$979,776.76 (min. estimate)

=====

3. KID Interest Revenues Received from C-Drop Hydro, LLC:

- 12/31/12 – \$10,000 (per 12/31/12 KID Financial Statements, Note 4)²⁶³
- 12/31/13 – \$43,269 (per 12/31/13 KID Financial Statements, Note 4)²⁶⁴
- 12/31/14 – \$26,680 (per 12/31/14 KID Financial Statements, Note 4)²⁶⁵
- 12/31/15 –

²⁶² See Email Correspondence From Erik Pedersen, Adkins Consultant Engineers, Inc. to Michael Jarine, Sorenson Engineering, *Re Agreement for Services* (June 6, 2011) (attached); Email Correspondence From Michael Jardine, Sorenson Engineering to Erik Pedersen, Adkins Consultant Engineers, Inc *Re Signed Contract* (June 7, 2011) (accompanied by executed C-Drop Survey Contract) (attached).

²⁶³ See MSP Certified Public Accountants, *Klamath Irrigation District Financial Statements December 31, 2012* (Dec. 31, 2012) *supra* at Note 4 – Notes Receivable of the Notes to the Financial Statements.

²⁶⁴ See MSP Certified Public Accountants, *Klamath Irrigation District Financial Statements December 31, 2013* (Dec. 31, 2013), at Note 4 – Notes Receivable of the Notes to the Financial Statements (attached).

²⁶⁵ See MSP Certified Public Accountants, *Klamath Irrigation District Financial Statements December 31, 2014* (Dec. 31, 2014), at Note 4 – Notes Receivable of the Notes to the Financial Statements (attached).

❖ **Total Revenue \$79,949**

4. KID Share of C-Drop Electricity Generation Gross Receipts:

- 5/1/11-5/1/14
- 5/3/16 – 7/3/16 – **\$23.91** (NOT from % of gross energy receipts)
 - (KID is entitled to 15% of C-Hydro gross energy receipts (\$159.41) **in excess of 3,000 MW-hrs** for Yrs. 3-10) (**before water claims of Hoopa, Yurok & Karuks are adjudicated)
 - (KID is entitled to 0% of C-Hydro gross energy receipts (\$0.00) **up to the first 3,000 MW-hrs** for Yrs. 1-5)²⁶⁶

❖ **Total Revenue \$23.91**

5. KID Share of C-Drop Hydro, LLC Federal, State and Local Tax Credits & Grants:

- Accounting of Section 1603 Grant (\$\$??)
- Accounting of Production Tax Credit (\$\$??)
- Accounting of Oregon B.E.T.C. Grants (\$\$??)
 - **\$440,000** grant (5/10/11)
 - **(\$5,280)** 157,957 kWh review fee
- Accounting of Oregon Trust Grants (\$\$??)
- Accounting of Oregon Economic & Community Development Department
 - **\$6,000** grant (12/22/08)

TOTAL REVENUES EARNED – \$79,972.91

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V. [Appendix](#) – List of C-Drop Hydroelectric Project Documents Referenced in This Memorandum by Document Type

1. Primary C-Drop Agreements:

- The KID-Warm Springs Hydro, LLC C-Drop Hydroelectric Project Agreement (April 5, 2011)
- The KID-Warm Springs Hydro, LLC Security Agreement (April 5, 2011)
- The Warm Springs Hydro, LLC Promissory Note (April 5, 2011)
- Guaranty Agreements of Ted Sorenson and Dennis Daugherty (April 5, 2011)
 - **(These 4 documents are together)**
- KID-BOR Lease of Power Privilege Agreement (“LOPP”) Contract No. 11-LC-20-0181; CRA No. 11-LC-20-0180 (Nov. 8, 2011)
- Klamath Irrigation District, C-Drop Hydroelectric Project Assignment of BOR Lease of Power Privilege to C-Drop Hydro, LLC (Nov. 8, 2011)

²⁶⁶ See PacifiCorp, Energy Purchases From Vendor C-Drop Hydro, LLC Hydro Plant (May 1, 2013 – May 1, 2014), *Re Power Purchase Agreement* (attached).

- BOR-KID Cost Reimbursement Agreement (Agreement No. 11-LC-20-0180) (May 18, 2011)
- C-Drop Hydro, LLC-PacifiCorp Power Purchase Agreement (Oct. 18, 2011)
 - Exhibits to PPA
- KID-PacifiCorp Interconnection Agreement for Small Generator Facility (July 18, 2011)
- Klamath Irrigation District, Assignment of Interconnection Agreement for Small Generation Facility (Oct. 5, 2011)
- PacifiCorp Consent to Assignment of Interconnection Agreement (Nov. 30, 2011)
 - **(These 3 documents are together)**
- KID-PacifiCorp Facilities Maintenance Agreement (OGIA) Supporting KID-PacifiCorp Interconnection Agreement (July 18, 2011)
- Amendment of the KID-Warm Springs Hydro, LLC C-Drop Hydroelectric Project Agreement (Jan. 12, 2012)
- KID Board Resolution Consenting to Amendment of Hydroelectric Agreement (Jan. 12, 2012)
 - **(These 3 documents are together)**
- KID Consent to Assignment of C-Drop Hydro, LLC Property Interests in Amended Hydroelectric Agreement to Northwest Farm Credit Services (Dec. 2, 2011)
- C-Drop Hydro, LLC-Northwest Farm Credit Services Security Agreement and Assignment (Dec. 2, 2011)
- Oregon Secretary of State UCC Filing; UCC Filed Lien No. 89072662 (Dec. 15, 2011) (**have not located)
- KID-C-Drop Hydro, LLC Addendum to the C-Drop Hydroelectric Project Agreement (April 1, 2013)
- KID-C-Drop Hydro, LLC Amendment to KID-Warm Springs Hydro, LLC Promissory Note Line of Credit (Sept. 27, 2013)

2. Secondary C-Drop Agreements:

- GKRSE-Sorenson Engineering Consultant Agreement (Nov. 20, 2008)
- Klamath Irrigation District-Resource Consultants, Inc. Business Services Contract (April 27, 2010)
- C-Drop Hydro, LLC-Energy Trust of Oregon, Inc. Project Funding Agreement (Nov. 1, 2011)

3. Federal & State Agency Permits, Determinations, Agreements:

- BOR Mid-Pacific Region, Permit for Additions or Alterations to Conveyance and Distribution Facilities (Alterations Permit No. O-KLA-2011-08; EA/FONSI No. KBAO-20110006; LOPP No. 11 LC-20-0181/CRA No. 11-LC-20-0180) (Oct. 31, 2011)
- U.S. Department of Interior Bureau of Reclamation, Finding of No Significant Impact & Final Environmental Assessment Klamath Irrigation District – C-Drop Hydroelectric Project (KBAO-EA-11-006) (Oct. 2011)

- Oregon Water Resources Department, Notice of Proposed Order on the Potential for Cumulative Impacts of the C-Drop Hydroelectric Project (Nov. 29, 2011)
- U.S. Federal Energy Regulatory Commission, Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Competing Applications (Project No. 13434-000) (June 1, 2009)
- U.S. Federal Energy Regulatory Commission, Klamath Irrigation District - Order Dismissing Preliminary Permit Application (Project No. 13434-000), 131 FERC 62,023 (April 6, 2010)
- Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Bureau of Reclamation for Establishment of Processes for the Early Resolution of Issues Related to the Timely Development of Non-Federal Hydroelectric Power at Bureau of Reclamation Facilities (Nov. 6, 1992)
- See also Memorandum From Elizabeth Molloy, Office of FERC General Counsel Re C-Drop Project – BOR Authorization (Project No. 13434-000) (March 10, 2010)

4. C-Drop-Related Reports & Studies:

- Sorenson Engineering, Feasibility Report for Klamath Irrigation District – C-Drop Hydroelectric Project (March 2008)
- PacifiCorp, Small Generator Interconnection Tier 4 Facilities Study Report Completed for Klamath Irrigation District Re Proposed Interconnection on PacifiCorp's Existing 12.0-kV Crystal Springs Feeder, 5L45, out of Hornet Substation (July 23, 2010)
- Resource Consulting, Inc., Klamath Irrigation District C-Drop Hydroelectric Project – Feasibility Study Review of Sorenson Engineering Report and Overall Project Assessment (Sept. 8, 2010)
- Klamath Irrigation District, WATERSMART Funding Opportunity Announcement No. R15AS00002 Water and Energy Efficiency Grant for FY 2015 – Klamath Irrigation District Stukel Spill Project in Concert with C-Drop Hydro, LLC (Jan. 9, 2015)

5. KID Board Meeting Minutes, Financial Statements and Audit Reports Re C-Drop:

- Klamath Irrigation District, Minutes of a Special Meeting of the Board of Directors (March 29, 2011)
- Klamath Irrigation District, Minutes of the Regular Meeting of the Board of Directors (March 13, 2014)
- Klamath Irrigation District, Minutes of the Regular Meeting of the Board of Directors (April 10, 2014)
- MSP Certified Public Accountants, Klamath Irrigation District Financial Statements December 31, 2012 (Dec. 31, 2012)
- MSP Certified Public Accountants, Klamath Irrigation District Financial Statements December 31, 2013 (Dec. 31, 2013)
- MSP Certified Public Accountants, Klamath Irrigation District Financial Statements December 31, 2014 (Dec. 31, 2014)

- MSP Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2012 (June 14, 2013)
- MSP Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2013 (June 24, 2014)
- MSP Audit Report Accompanying Klamath Irrigation District Financial Statement For the Fiscal Year Ended December 31, 2014 (June 24, 2015)

6. C-Drop-Related Letter and Email Correspondences, Notices:

- Email Correspondence From C.T. McCreedy to David Solem Replying to Solem May 2, 2007 Email to Dennis Daugherty, Riverside, Inc. (May 10, 2007)
- Ltr. Correspondence From David Solem to Tom McCreedy and Ted Sorenson (Aug. 22, 2007)
- Ltr. Correspondence From Sorenson Engineering, P.A. to David Solem (Sept. 11, 2007)
- Ltr. Correspondence From David Solem to Tom McCreedy and Ted Sorenson (Sept. 21, 2007)
 - **(These 4 documents are together)**
- Ltr. Correspondence From Ted Sorenson to David Solem Re C-Drop Hydroelectric Feasibility Report (March 14, 2008)
- Email Correspondence From Donald H. Clarke to Dave Solem and Ted Sorenson Re Time to Confer (Nov. 19, 2008)
- Ltr. Correspondence From Jackie Ross, Oregon Economic & Community Development Department to David Solemn Re Executed Agreement for Special Public Works Fund, Tech Assistance KID C-Canal Drop Hydro Facility Feasibility Assessment # A08002 (Feb. 25, 2008)
- Ltr. Correspondence From Kaird Bryan, Oregon Economic & Community Development Department to David Solem Re Special Public Works Fund, Renewable Energy Feasibility Fund KID C-Canal Drop Hydro Feasibility Study Project #A08002 (Dec. 22, 2008)
 - **(These 2 documents are together)**
- Ltr. Correspondence From Jeff C. Wright, U.S. Federal Energy Regulatory Commission to Deborah Linke, U.S. Bureau of Reclamation, Re Preliminary Determination Regarding FERC Jurisdiction Over C-Drop Hydroelectric Project (Project No. 13434-000) (Aug. 11, 2009)
- Ltr. Correspondence From David Sabo, U.S. Department of Interior Bureau of Reclamation to Kimberly Bose, U.S. Federal Energy Regulatory Commission, Re Preliminary Determination Regarding FERC Jurisdiction Over C-Drop Hydroelectric Project (FERC Project No. 13434-000) (Sept. 4, 2009)
- Klamath Irrigation District, Request For Proposals Related to the C-Drop Hydroelectric Project, Klamath Falls, Oregon (Nov. 6, 2010)
- Klamath Irrigation District, Addendum for the C-Drop Hydroelectric Project Request For Proposals (Dec. 14, 2010)
- Letter Correspondence From Bart O'Keefe, United Power Corporation to Mark Stuntebeck, KID, Re C-Drop Hydroelectric Project (Dec. 17, 2010)

- Letter Correspondence From Mark Stuntebeck, KID to Bart O’Keefe, United Power Corporation, Re Protect of Award Selection – C-Drop Hydroelectric Project (Jan. 3, 2011)
- United Power Corporation, C-Drop Return to Klamath Irrigation District Proposal Return Comparison (presented Jan. 13, 2011).
- Letter Correspondence From Mark Stuntebeck, KID to Bart O’Keefe, United Power Corporation, Re Protest of Award Selection – C-Drop Hydroelectric Project (Jan. 31, 2011)
- Letter Correspondence From Bart O’Keefe, United Power Corporation to Mark Stuntebeck, KID Re C-Drop Hydroelectric Project (April 4, 2011)
 - **(These 6 documents are together)**
- Ltr. Correspondence From Jeff Keto, Oregon Department of Energy BETC Manager to Dennis Daugherty, Warm Springs Hydro, LLC, Re Tier Two, Round 2 Business Energy Tax Credit (BETC) Application #32845 (May 10, 2011)
- Ltr. Correspondence From Ted Sorenson, Warm Springs Hydro, LLC to Jeff Keto Oregon Department of Energy BETC Manager Re Tier II, Round II Business Energy Tax Credit (BETC) Application No. 32845 – Amendment (May 13, 2011)
- Ltr. Correspondence From Ted S. Sorenson to KID Manager Mark Stuntebeck Re Bureau of Reclamation Reimbursement for C-Drop Hydroelectric Review/LOPP (May 20, 2011)
- Email Correspondence From Erik Pedersen, Adkins Consultant Engineers, Inc. to Michael Jarine, Sorenson Engineering, Re Agreement for Services (June 6, 2011)
- Email Correspondence From Michael Jardine, Sorenson Engineering to Erik Pedersen, Adkins Consultant Engineers, Inc Re Signed Contract (June 7, 2011)
 - **(These 2 documents are together)**
- Notice of Assignment From C-Drop Hydro, LLC Member Ted Sorenson to PacifiCorp Account Manager Transmission Services Laura Raypush (Oct. 11, 2011)
- Ltr. Correspondence From PacifiCorp Director of Transmission Services Nathan Ortega to KID Manager Mark Stuntebeck Re Klamath Irrigation District – Consent to Assignment of Interconnection Agreement to C-Drop Hydro, LLC – Q0299 (Nov. 29, 2011)
 - **(These 2 documents are together)**
- Ltr Correspondence From Mark Stuntebeck, Manager KID to Ted Sorenson, C-Drop Hydro, LLC (“Side-Agreement”) (Oct. 31, 2011)
- Email Correspondence From B.J. Howerton, Bureau of Indian Affairs Northwest Regional Office to Mary S. Graine, Hydroelectric Coordinator for Oregon Water Resources Department, Re C-Drop Hydroelectric Project (Dec. 29, 2011)
- Email Correspondence From Mark Stuntebeck, KID to Jason Phillips, BOR Klamath Falls Office Re: BIA C-Drop Letter (Dec. 29, 2011)
- Email Exchange Between Mark Stuntebeck, KID and Nicholas Strader, Office of U.S. Congressman Greg Walden (Dec. 29, 2011 through Jan. 5, 2012)
- See Email Correspondence From Mark Stuntebeck, KID to Bill Ganong, Esq., KID Counsel, Re: BIA C-Drop Letter (Dec. 29, 2011)
- Email Correspondence From Bill Ganong, Esq., KID Counsel to Mark Stuntebeck, KID Re: BIA (Dec. 30, 2011)

- **(These 2 documents are together)**
- Email Correspondence From Mark Stuntebeck, KID to Greg Addington, KWUA (Jan 3, 2012)
- Email Correspondence from Greg Addington, KWUA to Mark Stuntebeck, KID Re: BIA (Jan. 3, 2012)
- Email Correspondence From Greg Addington, KWUA to John Bezdek, DOI-SOL (Jan. 3, 2012)
- Email Correspondence From John Bezdek, DOI-SOL to Greg Addington, KWUA (Jan. 3, 2012)
 - **(These 3 documents are together)**
- Email Correspondence From John Bezdek, DOI SOL to David Harder, DOJ-ENRD; Dale Morris, BIA; B. Howerton, BIA; Jason Phillips, BOR; Barry Mathew, DOI FWS; Laurie Sada, DOI-FWS, John Hicks, DOI-BOR; Kristen Johnson, DOI-SOL, Patricia Rivera, BOR (Jan. 5, 2012)
- Email Correspondence From Mary Grainey, ORWD to Laurie Sada, DOI-FWS, John Bezdek, DOI-SOL, Re: C-Drop Project – Next Steps (Jan. 5, 2012)
- Email Correspondence From B.J. Howerton, DOI-BIA to Mary Grainey, OWRD; Mark Stuntebeck, KID; John Bezdek, DOI-SOL; Jason Phillips, DOI-BOR, etc. Re: C-Drop Hydroelectric Project – PC889 (Jan. 5, 2012)
- Email Correspondence From Mark Stuntebeck, KID to John Bezdek, DOI-SOL (Jan. 5, 2012)
- Ltr. Correspondence from U.S. Bureau of Reclamation Chief, Resource Management Division to Ted Sorenson, Re Request for Contractual Information Concerning Lease of Power Privilege Contact Number 11-LC-20-0181 (Sept. 6, 2012)
- Klamath Irrigation District, Conditional (Partial) Waiver of Lien Rights, presented to C-Drop Hydro, LLC (Jan. 24, 2012)
- Letter Correspondence From Ted Sorenson, C-Drop Hydro, LLC to Mark Stuntebeck, KID Re Interest Payment on Loan (Dec. 18, 2012)
- Ltr. Correspondence from Gayle Sorenson, C-Drop Hydro, LLC to Mark Stuntebeck, Klamath Irrigation District Re C-Drop Lease Payment to KID – Year 2 (May 1, 2013 to April 30, 2014) (Aug. 27, 2014)
 - **KID Share of C-Drop Electricity Generation Gross Receipts**
- Ltr. Correspondence from Northwest FCS to Ted/Gale Sorenson Re C-Drop Hydro, LLC Loan Payoff (Jan. 19, 2016)

END