

DRAFT
OREGON DEPARTMENT OF TRANSPORTATION
BAD BANKS CREEK U.S. HIGHWAY 22 MP 36.8 CULVERT
FISH PASSAGE WAIVER AGREEMENT
(W-02-0031)

This Agreement is entered into on the date of last signature by and between the Oregon Department of Fish and Wildlife, hereinafter referred to as "the Department", and the Oregon Department of Transportation, hereinafter referred to as "the Applicant".

PREAMBLE

The Applicant seeks authorization from the Department to waive fish passage requirements (ORS 509.585) for a culvert repair at the existing U.S. Highway 22 culvert at milepost 36.8 (waiver site) located on Bad Banks Creek, a tributary to the North Santiam River in Marion County, Oregon. The culvert repair is scheduled for construction during the in-water work period in 2020. In exchange, the Applicant will fund the replacement of the Linn County-owned barrier culvert over Little Rock Creek on Mad Creek Road (mitigation site) with a new bridge meeting Oregon's fish passage criteria.

The Applicant's Fish Passage Waiver Application # W-02-0031 (Attachment A) and the Department's Net Benefit Analysis (Attachment B) required by ORS 509.585(7)(b) are attached and incorporated into this agreement.

PROVISIONS OF THE AGREEMENT

1. Pursuant to ORS 509.585 and OAR 635-412-0025(1), (9), and (10)(a)(A), the Department waives the fish passage requirements for the artificial obstruction at the waiver location because it determines that the alternative mitigation the Applicant has agreed to results in a net benefit (Attachment B) to native migratory fish.
2. The locations of the artificial obstruction and proposed mitigation site shall only be those specified in Attachments A and B.
3. The Applicant shall provide fish passage mitigation by fully funding and ensuring implementation of the mitigation actions identified in Attachment A.
4. Specific mitigation design plans for the proposed mitigation shall meet Department fish passage criteria and guidelines and shall be approved by the Department prior to installation. The Applicant shall be responsible for obtaining all other necessary permissions and permits as appropriate for implementation of the mitigation.
5. The mitigation identified in Attachments A and B shall not be used to comply with any other legal requirements of the Applicant or others, except as allowed in OAR 635-412-0040(3).
6. Mitigation actions identified in this Agreement shall be completed by the end of 2019.
7. The Applicant shall monitor and evaluate the effectiveness of the mitigation and provide a written status report to the Department by December 31 of each year for the first five (5) years following construction of the mitigation, or as determined by the Department. Reports shall include photo points established as part of the monitoring. Monitoring and evaluation shall be conducted annually and after flood events, unless problems are observed that require additional analysis. Monitoring shall consist of visual observations, particularly with regards to fish passage function, bed and bank stability, potential water surface drops, and consistency of the streambed with the surrounding channel.
8. For the duration of this Agreement, the Applicant shall be responsible for all maintenance required to ensure that the mitigation provides adequate passage for all native migratory fish. If monitoring by the Applicant or Department indicates that volitional fish passage is no longer being adequately provided, the Applicant shall determine the cause, and in consultation with and during a work period approved by the Department, shall modify the mitigation to rectify problems as necessary. Failure to maintain the mitigation for the duration of this Agreement shall constitute a violation of this Agreement and applicable fish passage laws (OAR 635-412-0025(3)). Such failure shall invalidate this fish passage waiver for the culvert at the waiver site and require the Applicant to provide fish passage at the waiver site.
9. The Department shall be allowed to inspect the mitigation at reasonable times for the duration of this Agreement. Unless prompted by emergency or other exigent circumstances, inspection shall be limited to regular and usual business hours, including weekends.
10. The Applicant may employ other parties to perform work under this Agreement, but remains responsible for the mitigation.
11. This Agreement remains in effect until such time as the artificial obstruction triggers fish passage laws again (OAR 635-412-0025(3)).

