

DRAFT

**ODFW – WARMSPRINGS IRRIGATION DISTRICT
WARMSPRINGS DAM
FISH PASSAGE WAIVER AGREEMENT (W-10-0001)**

This Agreement is entered into on the date of last signature by and between the State of Oregon through its Oregon Fish and Wildlife Commission, hereinafter referred to as "the Commission", and Warm Springs Irrigation District, hereinafter referred to as "the Applicant."

PREAMBLE

The Applicant desires a waiver from fish passage requirements (ORS 509.585) from the Commission for the Applicant's proposed Warm Springs Dam Hydroelectric Project located on the Middle Fork Malheur River in Malheur County Oregon. This Applicant proposes to install a new hydroelectric facility at Warm Springs Dam which presently precludes native fish migration. This action is a fundamental change in permit status and as per ORS 509.585, invokes Oregon Fish Passage Policy. The applicant's Fish Passage Waiver Application # W-10-0001 is attached (Attachment A) and hereby incorporated into this agreement. The Oregon Department of Fish and Wildlife (Department's) benefit analysis is attached (Attachment B) and hereby incorporated into this agreement. This Agreement and the Department's benefit analysis are based on current baseline conditions and no operational changes at the Warm Springs Dam facility.

PROVISIONS OF THE AGREEMENT

1. Pursuant to ORS 509.585 and OAR 635-412-0025(1), (9), and (10)(b), the Commission hereby waives fish passage requirements for Warm Springs Dam, because it determines that the mitigation the Applicant has agreed to results in a net benefit (Attachment B, attached and hereby incorporated into this Agreement) to native migratory fish by providing fish passage improvements at the Dryer Diversion.
2. This agreement to waive fish passage is only valid at Warm Springs Dam and solely for the Applicant's proposed Hydroelectric Project.
3. The Applicant, or your designee, shall provide fish passage mitigation by implementing all of the actions identified in Attachments A and B. The Applicant has arranged for the financing for the required mitigation activities which will cover the cost of construction of the mitigation actions, and the required monitoring, reporting, maintenance, and long-term stewardship of the mitigation sites and activities at the Dryer Diversion site.
4. Attachment A includes specific mitigation design plans for the proposed mitigation at the Dryer Diversion. This Waiver Agreement is contingent on these design plans meeting the Department's fish passage criteria and guidelines and shall be reviewed and approved by the Department prior to installation, pursuant to OAR 635-412-0040(6).
5. The Applicant, your designee, or the Landowner shall be responsible for obtaining all other necessary permissions and permits as appropriate for the implementation of the mitigation.
6. The mitigation 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). Fish passage mitigation authorized by or implemented as a result of this Fish Passage Waiver Agreement does not apply towards future mitigation requirements or other natural resource or habitat related impacts and effects associated with this or any other project.
7. All in-water work associated with the proposed project and the mitigation actions shall be completed during the appropriate Department's in-water work period(s), or as appropriately negotiated by the Department, as required in OAR 635-412-0035(10).
8. Mitigation actions shall be installed per agreed upon design prior to the operation of the hydroelectric project at Warm Springs Dam.
9. The Applicant, your designee, or the Landowner shall monitor and report, as required under OAR 635-412-0040(8), the mitigation sites and provide written status reports to the Department yearly for the first five (5) years after completion of mitigation actions, or as determined by the Department. Reports shall include photographs from established photo-points as part of the monitoring. Monitoring of the mitigation sites shall be conducted annually and during the appropriate times of the year, and unless problems are observed that may require additional analysis, will consist of visual observations, particularly with regards to fish passage function, fish utilization, retention of structural components, and channel stability. Reports shall be submitted to the (1) ODFW Hydropower Program Leader and (2) Fish Passage Program Leader, both in Salem, and (3) ODFW High Desert Region Hydropower Coordinator in Bend by December 31st each year a report is required. Electronic or hard copy submissions are acceptable.
10. Beyond the five year monitoring requirement, monitoring and maintenance of the mitigation are requirements of this Agreement throughout the lifespan of the Warm Springs Hydroelectric Project, or until a new trigger action occurs at Warm Springs Dam pursuant to OAR 635-412-0025 (3).

11. If monitoring by the Applicant, your designee, the Landowner, or the Department indicates that fish passage is not being provided and mitigation sites are not functioning as designed, the Department in consultation with the Applicant or Landowner, shall determine the cause and, during an in-water work period approved by the Department, shall modify the mitigation to rectify problems as necessary.
12. Failure to implement and maintain mitigation, required by ORS 509.610, for the duration of this Agreement shall constitute a violation of this Agreement and applicable fish passage laws (ORS 509.585). Such failure shall invalidate this fish passage waiver for the Warmsprings Dam Hydroelectric Project and shall require the Applicant to provide fish passage at Warmsprings Dam if not remedied in a reasonable amount of time or mitigated with some other projects acceptable to the Department. The Department shall notify the Applicant or the Landowner of such violation and allow a mutually agreed upon reasonable amount of time to rectify such violation.
13. The Department shall be allowed to inspect the mitigation sites at reasonable times for the duration of this Agreement with prior notice, appropriate property owner permission, and with a representative of the Applicant or Landowner present. Unless prompted by emergency or other exigent circumstances, inspection shall be limited to regular and usual business hours, including weekends.
14. The Applicant may employ or contract with other parties to perform work under this Agreement but remains responsible for the mitigation, monitoring, reporting, and maintenance required for implementation of the mitigation actions described in Attachment A and Attachment B.
15. This Agreement is solely for the purpose of fulfilling Oregon fish passage statutory requirements or responsibilities administered by the Commission or the Department and does not satisfy any other Department, federal, state, or local laws, rules, or regulations, including but not limited to State or Federal Endangered Species Acts, any applicable water rights, instream flow requirements, approvals, or certificates administered by Oregon Water Resources Department.
16. This Agreement in no way purports or authorizes take of a federally listed species.
17. This Agreement shall be valid and remain in effect until such time and so long as the Applicant fully implements and continues to provide the agreed-upon mitigation measures identified in Attachments A and B of this Agreement or until future actions or changes in operation at Warmsprings Dam results in a fish passage trigger event (further construction, a fundamental change in permit status, or abandonment), as required in ORS 509.585 (4) and OAR 635-412-0005.
18. This Agreement shall apply to and be binding on the Department and the Applicant and their successors and assigns. The Applicant shall provide in any transaction for a change in ownership of the hydroelectric project or transfer of the hydroelectric project license that such new owner or owners shall be bound by and shall assume the obligations of this Agreement.

Signature: _____

Warmsprings Irrigation District	Date	Oregon Fish and Wildlife Commission	Date
Randy Kinney		Bobby Levy, Chair	

Title: _____

Warmsprings Irrigation District Manager	Commission Chair
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