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Agreement between Warmsprings Irrigation District and the Oregon Fish and Wildlife Commission Concerning Funding of a Fish Entrainment Mitigation Program in Lieu of Fish Screens for the Warmsprings Dam Hydroelectric Project, FERC Number 13570 (Agreement)

1 INTRODUCTION

On April 15, 2013, Warmsprings Irrigation District (WID) filed an application for a hydroelectric license for Warmsprings Dam Hydroelectric Project (FERC No. 13570) with the Federal Energy Regulatory Commission (FERC). Warmsprings Dam impounds the Malheur River to form Warmsprings Reservoir. The dam is located in Malheur County near the Harney County border, approximately 13 miles southwest of Juntura, Oregon. WID proposes to add a 2.7 MW hydroelectric facility with a hydraulic capacity of 425 cfs to the existing facilities at Warmsprings Dam. The Project will include a new steel liner fitted into one of the outlets; an 8 foot diameter, 190 foot long steel penstock to convey water from the outlet; a new powerhouse below the dam equipped with a single 2.7 MW hydropower turbine; 2.2 miles of new 25 KV transmission line; and appurtenant facilities.

The Oregon Department of Fish and Wildlife (ODFW) consulted with WID on the design of pre-project studies, reviewed the progress of these studies, and made recommendations during the federal licensing consultation process. Environmental studies focused on assessing the resources that could be affected by the Project and determining whether the proposed Project could comply with federal and state hydroelectric development requirements. In general, WID and ODFW concur on fisheries mitigation requirements for the Project. ODFW intends to file Federal Power Act Section 10(j) fish and wildlife recommended terms and conditions that are consistent with this Agreement.

2 PURPOSE AND EFFECT OF THIS AGREEMENT

WID and the Oregon Fish and Wildlife Commission (“Parties”) are entering into this Agreement to resolve fisheries issues related to the entrainment of fish into the penstock, consistent with ORS 498.306. This Agreement will establish WID’s obligations to provide payment to a mitigation fund that is approximately equivalent to funds necessary to support ODFW’s Warmsprings Reservoir Stocking Program. The Parties are bound by this Agreement for the term of the initial FERC license and any annual license or license amendment for the Project issued by FERC for the project as defined above, unless this Agreement is amended, terminated, or a Party withdraws pursuant to the conditions specified by this Agreement. The Agreement does not set forth any requirements of either Party under a FERC license for the Project.

The Parties agree that this Agreement shall not be submitted to FERC as an offer of settlement to be included in license articles and that FERC shall not be asked to enforce the fish entrainment mitigation measures funded pursuant to this Agreement. From the Effective Date of this Agreement through the initial FERC license term, neither of the Parties shall recommend to FERC that fish screening is necessary to prevent entrainment of resident fish into the penstock. While the Parties agree to work together in good faith to cooperatively resolve future

disagreements, this Agreement shall not restrict the Parties' right to advocate for or against measures relating to the construction and operation of the Project other than the specific measures outlined in this Agreement.

This Agreement is only relevant to the specific facts and circumstances of the Warmsprings Dam Hydroelectric Project, and it establishes no precedent with regard to any issue addressed within this Agreement or to either party's participation in the licensing, construction, or operation of other hydroelectric projects. By entering into this Agreement, neither of the Parties shall be deemed to have made any admission or waived any contention of fact or law that it did make or could have made in any FERC proceeding relating to the issuance of a new license for the Project. This Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in any judicial litigation, arbitration or other adjudicative proceeding, except in a proceeding to establish the existence of or to enforce or implement this Agreement. It is the Parties intent to cooperate and implement the funding of fish entrainment mitigation measures in a manner that will not conflict with other requirements in the FERC license.

3 PERMITTING

In the event that ODFW requests, and WID agrees to obtain, necessary state or federal permits to perform any action under this Agreement, including the implementation of fish entrainment mitigation measures outlined in Section 4 of this Agreement, WID shall use reasonable efforts to apply for and obtain in a timely manner all applicable federal, state, regional, and local permits, licenses, authorizations, certifications, and other approvals for the purposes of implementing this Agreement. ODFW shall cooperate during the permitting, environmental review, and implementation of this Agreement. The Parties shall use all reasonable efforts to support each other's applications for any permits, provided that this sentence shall not apply to permits issued by ODFW, and that WID shall not be required to actively support ODFW's permit applications for fish entrainment mitigation measures or studies for which a consensus has not been reached under the following section of this Agreement.

4 FISH ENTRAINMENT MITIGATION MEASURES

WID shall provide a Warmsprings Reservoir Stocking Supplementation Fund to mitigate for the game fish that may be entrained through the Project during operation. WID shall provide \$3,000 annually (U.S. dollars adjusted annually by 3%) for the duration of the initial FERC License. Upon renegotiation of its power purchase agreement, WID, in cooperation with ODFW, will reassess the annual payment amount as an effort to adequately support the Warmsprings Reservoir Stocking Program. The Parties agree that the annual funding amount may, upon mutual agreement, be appropriately increased to fully fund the Warmsprings Reservoir Stocking Program for game fish. Subsequent payments shall be annually adjusted by 3%.

ODFW shall invoice WID by January 31 of each year, to which WID will remit payment, to be made payable to "State of Oregon, Department of Fish and Wildlife," within 30 days of the date of the Invoice. ODFW shall place funds from WID in a State account to be used as defined below for the term of this Agreement. WID shall provide the first year's funding on April 1 or 90 days after the date of the start of commercial operations, whichever is later. All funds not spent in a given year shall be retained in the account and will be available in future years to be spent upon the approval of ODFW, as defined below.

The funds may be used for stocking fish into Warmsprings Reservoir as determined appropriate by ODFW. In the event stocking does not take place, the funds may be used to implement projects that enhance fish habitat in the Middle Fork of the Malheur River watershed as determined by ODFW. Beginning the year following the initiation of this Agreement and the establishment of the account, ODFW will provide WID a written summary of the funded activities that were supported by this Agreement and performed during the previous calendar year. This summary will be due on or before March 31 of each year. WID shall not be obligated and ODFW shall not take further actions to require WID to provide more money to mitigate for the entrainment of fish through Warmsprings Hydroelectric Project except as set forth in this section of this Agreement.

5 PROJECT SELECTION

WID may submit a written request to ODFW to use funding from the account for fish habitat enhancement in the Middle Fork of the Malheur River basin. Copies of the request shall be provided to ODFW's Malheur Watershed District Manager, Malheur Watershed District Fisheries Biologist and Hydropower Coordinator. The written request shall include a detailed description of the fish habitat enhancement project, project location including maps, timeline for project completion, detailed accounting of the funding request, and a description of the anticipated benefits of the project. ODFW shall respond to the request within 60 days of receipt.

6 CONTINGENCIES

This Agreement will terminate if for any reason the Project is not constructed or it does not become operational, or if the Project ceases operations prior to the end of the initial FERC License period. Otherwise this Agreement or any section of this Agreement may be terminated only by written agreement of WID and ODFW. In the event this Agreement is terminated, all remaining funds (accumulated annual deposits minus ODFW approved expenditures) shall be maintained by ODFW in the State account dedicated to administering the Warmsprings Reservoir Stocking Program until the funds are exhausted.

7 AVAILABILITY OF FUNDS

Implementation of this Agreement by ODFW is subject to the availability of, and authorization to use, appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of Oregon. The Parties acknowledge that ODFW shall not be required under this Agreement to expend any appropriated funds unless and until an authorized ODFW official affirmatively acts to commit such expenditures, as evidenced in writing.

8 AMENDMENT OF AGREEMENT

This Agreement may be amended at any time upon written agreement of ODFW and WID.

9 RESPONSIBILITY FOR COSTS

WID shall be solely liable to pay for the cost of actions required of WID by this Agreement. WID shall have no obligation to reimburse or otherwise pay ODFW for its assistance, participation, or cooperation in any activities pursuant to this Agreement, except as required by law.

10 COOPERATION AMONG PARTIES

The Parties shall cooperate in the performance of this Agreement. The Parties shall cooperate in the execution of the Warmsprings Reservoir Stocking Supplementation Fund for the purposes and by the means established in this Agreement.

11 FAILURE TO PERFORM; ENFORCEMENT

If WID fails to perform obligations required by this Agreement and such failure is not excused by force majeure, ODFW may provide notice to WID of such failure. If such failure is not cured within 30 days, or if such failure is not curable within 30 days and WID has not commenced a cure within that period and diligently pursued completing such cure, ODFW may withdraw from this Agreement. At any time after notice to WID and prior to withdrawal, ODFW may immediately initiate the ADR Procedures in accordance with Section 12 of this Agreement, seek judicial relief, or petition FERC to include certain measure as a required term or condition of WID's FERC License, or enforce such terms or conditions.

Upon withdrawing from this Agreement, ODFW shall be free, to the extent allowed by law, to amend its terms, conditions, and recommendations to FERC in connection with the applicable FERC License; shall no longer be bound by this Agreement; and may exercise any remedy available under applicable laws.

The Parties agree that this Agreement shall be enforceable in state court. Neither Party shall be liable in damages for: any breach of this Agreement, or any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement.

12 ADR PROCEDURES

12.1 General. All disputes between the Parties regarding the obligations of the Parties under this Agreement shall, at the request of either Party, be the subject of nonbinding ADR Procedures. The Parties shall cooperate in good faith to promptly schedule, attend, and participate in ADR Procedures. The Parties agree to devote such time, resources, and attention to ADR Procedures as are needed to attempt to resolve the dispute at the earliest time possible. The Parties shall implement promptly all final agreements reached, consistent with applicable statutory and regulatory responsibilities. Nothing in this Section 13 is intended or shall be construed to affect or limit the authority of an agency with jurisdiction over the Project to resolve a dispute brought before it in accordance with its own procedures and applicable law, or is intended or shall be construed to alter the statute of limitations or other requirements for administration or judicial review of any action. If a Party has filed for judicial review of any action that is inconsistent with this Agreement, and the Parties subsequently agree to modify this Agreement to resolve the inconsistency, the filing Party or Parties shall withdraw the request for review, or recommend such withdrawal, as appropriate.

12.2 Cost. Unless otherwise agreed between the Parties, each Party shall bear its costs for its own participation in ADR Procedures.

12.3 Process.

12.3.1 Notice of Dispute. A Party claiming a dispute shall give notice of the dispute within 30 days of the Party's actual knowledge of the act, event, or omission that gives rise to the dispute. Notification under Section 14.7 of this Agreement, when effective, shall constitute actual knowledge. Service of process on a Party's registered agent shall also constitute actual knowledge.

12.3.2 Meeting of the Parties. In any dispute subject to these ADR Procedures, the Parties shall hold two informal meetings within 30 days after notice, or as soon as practicable thereafter, to attempt to resolve the disputed issue or issues; provided, that with the agreement of both Parties, such meetings may be postponed. A representative from each of the Parties shall attend who has authority to make a decision on the disputed issue and who is superior to the Party's principal representative during the dispute. Within 15 days after the second meeting or any scheduled meeting thereafter, a Party still disputing the issue or issues shall notify the other Party that the informal meetings failed to resolve the dispute and may request mediation (a "Mediation Request"). If a Mediation Request is not so provided, ADR Procedures will be considered complete.

12.3.3 Mediation. Upon a Mediation Request, the Parties may attempt to resolve the dispute using a neutral mediator agreeable to the Parties. If, within 15 days after receiving a Mediation Request, the Parties have not agreed to mediate the dispute, ADR Procedures shall be considered complete. The costs for any mediation shall be shared equally by the Parties. Any Party may withdraw from mediation at any time, at which point mediation shall be considered complete.

13 GENERAL PROVISIONS

13.1 No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to the public and third parties shall remain as imposed under applicable law.

13.2 Successors and Assigns. This Agreement shall apply to and be binding on the Parties and their successors and assigns. In the event WID (or its successor) assigns its rights and obligations hereunder and if the assignment has been approved in writing by ODFW, to which approval shall not be unreasonably withheld, then the assignee shall replace the assigning Party as the responsible party to this Agreement and the assigning party shall no longer be liable for performance under this Agreement. If ODFW does not give written approval for the assignment, then the assigning party shall continue to be secondarily liable for performance under this Agreement. No change in ownership of the Project or transfer of the Project license by WID

shall in any way modify or otherwise affect ODFW's interests, rights, responsibilities, or obligations under this Agreement. Unless prohibited by applicable law, WID shall provide in any transaction for a change in ownership of the Project or transfer of the Project license that such new owner or owners shall be bound by and shall assume the rights and obligations of this Agreement and the FERC License upon completion of the change of ownership and any requisite FERC approval. WID shall provide notice to ODFW at least 60 days prior to completing such transfer or assignment.

13.3 Failure to Perform Due to Force Majeure. Neither Party shall be liable to the other Party for breach of this Agreement as a result of a failure to perform or for delay in performance of any provision of this Agreement if such performance is delayed or prevented by Force Majeure. The term "Force Majeure" means any cause reasonably beyond the affected Party's control, whether unforeseen, foreseen, foreseeable, or unforeseeable, and without the fault or negligence of the affected Party. Force Majeure may include, but is not limited to, natural events, labor or civil disruption, breakdown or failure of Project works, orders of any court or agency having jurisdiction of the Party's actions, delay in issuance of the FERC License, or delay in issuance of any required Permit. Increased cost for the performance of any obligation required under this Agreement or change in market conditions for the sale of electricity shall not be deemed to constitute Force Majeure. The Party whose performance is affected by Force Majeure shall notify the other Party in writing within 21 days after becoming aware of the Party's inability to perform due to a Force Majeure. Such notice shall identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of delayed obligations. The affected Party shall make all reasonable efforts to promptly resume performance of this Agreement and, when able, to resume performance of its obligations and give the other Party written notice to that effect. If WID's inability to provide funding or perform a habitat mitigation project continues or is reasonably anticipated to continue for more than 180 days due to Force Majeure, ODFW may initiate ADR Procedures, terminate the study or habitat enhancement project, or pursue any other remedy available under applicable law in state court.

13.4 Elected Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.

13.5 No Partnership. Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make either Party the agent for or partner of the other Party.

13.6 Reference to Statutes or Regulations. Any reference in this Agreement to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation or successor statute or regulation in existence as of the date of the action.

13.7 Notice. Any notice required by this Agreement shall be written. Notice shall be sent by first-class mail or comparable method of distribution to the authorized representative of each Party, or a Party's successor or assign if applicable. For the purpose of this Agreement, a notice shall be effective on the date it is postmarked or otherwise distributed. The authorized representative of each Party as of the Effective Date is:

<u>Warm Springs Irrigation District Representative:</u> Warm Springs Irrigation District 344 Main St N Vale, OR 97918 ATTN: Randy Kinney	<u>ODFW Representative:</u> Ken Homolka Hydropower Program Leader Oregon Dept. of Fish and Wildlife 4034 Fairview Industrial Drive SE Salem, Oregon 97302 Tel: (503) 947-6090 Fax: (503) 947-6070 Ken.Homolka@state.or.us
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Each Party is responsible for providing notice to the other Party of any change in its authorized representative. When sending notice pursuant to this Section, each Party shall also send a copy of the notice to the following person or persons:

<u>WID copies:</u> Warm Springs Hydro LLC 5203 S 11th East Idaho Falls, ID 83404 ATTN: Ted Sorenson	<u>ODFW copies:</u> District Biologist Region Hydro Coordinator
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13.8 Section Titles for Convenience Only. The titles of the sections in this Agreement are used only for convenience of reference and organization, and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties. Reference to a given section of this Agreement shall be deemed to include all subsections of that section.

13.9 Entire Agreement. This Agreement sets forth the entire agreement and processes to be followed by the Parties with regard to Matters Addressed.

13.10 Effective Date. As used in this Agreement, Effective Date is the date of the later signature provided under Section 14 of this Agreement.

14 EXECUTION OF THE AGREEMENT

14.1 Signatory Authority. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

14.2 Signing in Counterparts. This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if both the signatory Parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any

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signatures, and may be attached to another counterpart of this Agreement identical in form having attached it to one or more signature pages.

Bobby Levy, Chair
Oregon Fish and Wildlife Commission

Date_____

Randy Kinney, Manager
Warm Springs Irrigation District

Date_____