

# **Exhibit D**

## **Public Correspondence**

**Public correspondence received as of  
December 27, 2013**

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ODFW Hydropower Coordinator  
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December 8, 2013

Subject: Comments for fish passage waiver at Mason Dam

Mason dam was never intended to have a fish ladder. One of the problems, if one was put in, it would only be used during the irrigation period as this was the main purpose of the dam and it still is the main purpose. The irrigation period lasts about five months of the year and what fish would use it is very few indeed; as there are no Adromonus fish runs (Salmon and Steelhead) in the Powder River.

To make Baker County hold to the Oregon Department of Fish and Wildlife (ODFW) proposal to waive fish passage at the dam for placing culverts at McCully Fork and Silver Creek, which are above the Mason Dam is going to cost the tax payers of Baker County thousands of dollars; even though the County proposed using their own equipment for these projects to try and save money.

If ODFW wants these fish passages upstream improved, they should get money through grants or fishing license and not make Baker County tax payers pay for it. Since the fish passage through Mason Dam would be non effective anyway. Also, after all this is done, based on how agencies work, the county would then go through the Environmental Impact Statement (EIS) process, which involves every agency in the country to have a say.

The USFW, ODFW, EPA, DSL, DEQ, USFS, BLM, Environmentalists' and the Tribes and who knows what others will put in their two cents worth; what's going to happen is delay, delay and delay for just a simple little generator in Manson dam that will only run for about five months a year. We do not need any mitigation proposals it is just a form of black mail, and only the tax payers of Baker County will suffer by paying the bill.

We should be saying no to fish passage at Mason Dam as not necessary and no to the ODFW proposal to require mitigating enhancement of streams upstream of the dam instead. We are talking about a dam that does not allow fish passage now. There is no changing of the basic operation of the dam, just the addition of making power during the time of irrigation. (A source of clean energy to be sold to the power grid)

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# MEMORANDUM

Department of Fish and Wildlife  
Intra Departmental

**Date:** December 10<sup>th</sup>, 2013

**To:** Oregon Fish and Wildlife Commission

**From:** Ken Loffink, Assistant Fish Passage Coordinator *KL*

**Subject:** **Fish Passage Task Force Comments on the Proposed Fish Passage Waiver at Mason Dam**

Chair Levy and Commissioners,

Please accept the following comments on behalf of the Fish Passage Task Force. One of the Task Forces's primary roles is to advise the Department, and the Commission, on fish passage issues in the State. Our rules directly call out fish passage waivers as a subject that the Task Force is to provide advice and recommendations to the Department and the Commission. For this waiver request, the Fish Passage Task Force was unable to come to an agreement on a position or a recommendation. Therefore, Task Force Members who chose to do so submitted individual comments and recommendations for your consideration.

The following comments were submitted by Task Force Members for the Commission to consider for this project. If you have any questions, please contact me at 503-947-6256, or at [ken.j.loffink@state.or.us](mailto:ken.j.loffink@state.or.us).

To: Ken Loffink Assistant Fish Passage Coordinator

From: Doug DeHart, Fish Passage Task Force Member Representing Fishing and Conservation

Subject: Comments on Warm Springs and Mason Dam Fish Passage Waivers

Below are my observations on the proposed passage waivers under review for Warm Springs and Mason Dams -

There is a problem with current net benefit analysis in cases like these where connectivity is a primary concern. It is understandably difficult to quantify the magnitude of the benefit of connectivity, but its value in productivity of small semi-isolated populations is scientifically well documented.

The possible conclusion that there is no passage benefit, therefore essentially any off-site enhancement project constitutes a net benefit is basically flawed. If there were truly no possible benefit of passage to any native species we wouldn't even be having the discussion. In order to assess whether one or a series of off-site projects constitute adequate mitigation for foregone passage requires some attempt at quantification.

Mason Dam, in particular, clearly creates discontinuous sub-populations of redband trout which is likely harmful to their productivity. Restoring some degree of connectivity would benefit the populations. Data from alternate sites could be used to estimate the magnitude of the effect lacking data in the Powder Basin.

Both projects clearly disrupt the connectivity of native non-game fish species and likely result in mortality to some fish attempting to move up and down stream. This is probably less critical than effects to species such as redband trout or bull trout due to healthy status of species such as suckers and cyprinids, compared to the conservation status of the two salmonids. I realize the restricted habitat for bull trout in these basins may well eliminate the value of passage for that species under current conditions.

The Mason Dam project is the more problematic for me for two reasons. The value of connectivity for redband under current conditions seems clear to me. Also, the proposed mitigation projects include a culvert modification which does not meet current design standards for passable culverts. This seem to me poor public policy as well as a bad trade.

With improvements to the discussion and analysis for Warm Springs Dam, I may be able to accept the rationale for a waiver there, though we really do need to get issues such as ownership clarified. At this time, I am opposed to the waiver for Mason Dam unless a new net benefit analysis and altered mitigation proposal satisfactorily dealt with the issues above.

## MEMORANDUM

**TO:** Greg Apke, Fish Passage Coordinator  
**FROM:** Willie Tiffany, Vice-Chair, Fish Passage Task Force  
**DATE:** December 6, 2013  
**SUBJECT:** Mason Dam waiver request.

At the November 15<sup>th</sup> meeting, the Task Force heard a fish passage waiver request at the Mason Dam which prompted much discussion regarding the mitigation standards for waivers and the appropriate party responsible for a trigger. On December 10<sup>th</sup>, the Task Force will reconvene to determine a recommendation on this waiver request. While not formally offering my opinion until the discussion on the 10<sup>th</sup> is complete, my current intention is to abstain from the vote on the Mason Dam waiver request and I want to take this opportunity to articulate my position in writing. I am philosophically opposed to this waiver request due to the precedence it sets for the inappropriate application of the fish passage trigger. However, I am sympathetic to the project proponent who is proposing to create renewable energy at an existing facility while providing benefits for fish passage

I do have practical issues with the application of fish passage requirements for small hydro projects. As an original member of the Rulemaking Advisory Committee that established the fish passage rules, I can attest that the intention of the Committee with the "fundamental change in permit status" trigger as applied to water rights, was a change in water appropriation such as an enlargement, point of diversion change, change in duty, etc. The Committee didn't envision the application of small hydro projects which essentially leave the water right appropriation intact and simply adds small infrastructure to take advantage of current operations to create renewable energy. Having said that, I concede that technically the construction of small hydro by the owner of an existing facility does require a change in the owner's water right to add a new use which could be construed as a "permit change".

In this application, however, the applicant does not currently own any part of the current facility creating the fish passage barrier (Mason Dam). In fact, the owner of the barrier is the Bureau of Reclamation (BOR). The project proponent (Baker County) is not proposing any change in operations at Mason Dam nor is BOR proposing any change in the underlying water right associated with Mason Dam or a change in operations of the Dam. Under ORS 509.580(4) a "Fundamental change in permit status means a change in regulatory approval for the

operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not water right transfers or routine maintenance permits". There is no "change in the operation of an artificial obstruction" proposed here. The County has applied for a new Federal Energy Regulatory Commission (FERC) license associated with an independent project, wholly owned by the County, below the fish passage barrier (Mason Dam). However, the Department has concluded that this wholly independent federal license application triggers a fish passage requirement at a facility owned and operated by a party (BOR) other than the applicant. Further, the Department seeks to exact mitigation for the federally owned and operated barrier from the applicant who is a non-owner of the barrier and has no authority to change operations.

I am also concerned about the analysis of the mitigation package in this application. If passage was required, which is impossible in this case because the applicant doesn't own the facility, the benefits are extremely limited. In the Department's November 15, 2013 presentation before the Task Force the Department admitted that passage at Mason Dam would provide no benefit to bull trout. Additionally, in its November 15, 2013 memorandum to the Fish & Wildlife Commission the Department states, "given available information on the sub populations and current habitat conditions, the Department does not predict that redband trout distribution, productivity or abundance would increase within the upper Powder River if passage is provided at Mason Dam". The memorandum further states, "passage at Mason Dam for native suckers and northern pikeminnow would be limited". The major benefit to passage, as presented by the Department, is the potential "genetic exchange" in redband populations. Since both above and below populations of redbands are healthy, I would support consideration of opportunities to provide "genetic exchange" other than reconstruction of the Dam.

In its November 15, 2013 presentation, the Department explained the primary beneficiary of the mitigation package is bull trout. I agree that bull trout is a critical species, but given that passage at Mason Dam provides no benefit for bull trout, this species should not have been considered in the benefit analysis. However, in the Department's November 15, 2013 memo, two of the five benefits provided by the proposed mitigation are, "Improving access to 5.3 miles of tributary bull trout habitat" and "Increasing bull trout genetic exchange and interaction within Critical Habitat". I agree that these are important improvements for this critical species but, they should be negotiated as conditions within the FERC conditioning process and are outside the scope of the fish passage authority since bull trout passage at Mason Dam is not an issue.

The Department's own policy is to require passage first and proceed with a waiver only when a net benefit to passage can be provided. In this case, there is no passage question at the applicant's facility (in-conduit hydro turbine below the Dam) rather the passage issue is associated with a facility wholly owned and operated by a third party who is not requesting any regulatory changes. In this case, it would be absurd to require passage as the County has no authority to compel the federal government to reconstruct its facility. So, how can the County be liable to mitigate for passage it can't affect? The fish passage law compels a "project owner or operator" to assume responsibility for passage requirements. ORS 509.585(4) states, "A person owning or operating an artificial obstruction shall, prior to construction, fundamental change in permit...obtain a determination from the department as to whether native migratory fish are or historically have been present in the waters." Again, the County neither owns nor operates Mason Dam. A person fitting this description is the responsible party for a waiver under this same ORS section. If the Department is concerned about passage at Mason Dam it should initiate enforcement proceedings against the project owner (BOR) as proscribed under Oregon Law. Additionally, if the County could somehow be responsible for the passage issues at Mason Dam, its proposed mitigation package primarily benefits a species not impacted by lack of passage at Mason Dam.

I am entering my third year on the Task Force and have been extremely impressed by the careful and thoughtful deliberation of the Task Force members and the quality of work by the Department staff. The Task Force does not take its responsibility lightly in these matters and strives hard to thoughtfully apply the statutes and rules associated with waiver and exemption requests. In my opinion, this request is outside the scope of the appropriate application of the fish passage triggers and neither a waiver nor an exemption is warranted. Additionally, I believe the Department has inappropriately conducted its benefit analysis. However, I am sympathetic to the project proponent's practical approach to just except this requirement, as opposing it on principal and appealing the requirement would be far more costly and far less certain than just agreeing to comply. One of the issues the Task Force continually wrestles with is the appropriate scope of the application of the fish passage requirements. In my opinion, this case magnifies this issue and sets a dangerous precedence while perpetuating the potential public perception that the Department can misuse the fish passage statutes and rules to compel targeted projects that are otherwise outside the Department's jurisdiction. For this reason, I cannot support this request; however, I do not wish to impede the County in this proposed project which provides important benefits to fish so I intend to abstain from voting on the recommendation.

Although I have expressed my concerns verbally with the Task Force, I am submitting this memorandum to merely clarify my potential abstention from the upcoming vote on a recommendation for this waiver

request. I also want to assure you that I will keep an open mind and am prepared to adjust my position after receiving additional information and considering the Task Force's deliberations on December 10<sup>th</sup>.

## MEMORANDUM

**TO:** Greg Apke, Fish Passage Coordinator

**FROM:** Harry Rectenwald Chair, Fish Passage Task Force

**DATE:** December 12, 2013

**SUBJECT** Comments and Recommendation for the Proposed Fish Passage Waiver at Mason Dam on the Powder River

I support the fish passage waiver at Mason Dam on the Powder River finding it to be consistent with existing law and legal interpretations triggering fish passage considerations at dam being retrofit with hydroelectric power.

There are some factors in this case that make it unusually complicated and very challenging to establish clear accounting for mitigation measures. These factors include among others, Federal Energy Regulatory Commission process, federal ownership of Mason Dam, severely altered stream flow regime below the dam limiting fish survival and production, and funding limitations of the project proponents along with limited economic yield from the hydro project. The proposed mitigation strategy to offset the lack of passage at the dam appears to be a negotiated balance between the need not to unduly disrupt local socio-economic factors, including energy development, while providing an incremental improvement in the remnant fish communities affected by the dam. Restoration opportunities are not feasible because the dam is not operated for fish wildlife production (apparently this is not an authorized purpose of the dam). However, measures in the basin that maintain and improve conditions for remnant fish populations, like those proposed in the waiver, can contribute to rebuilding populations in the future should the owner of the dam change operations to consider fish and wildlife production.

Sincerely,

Harry Rectenwald, Chair, Fish Passage Task Force

## MEMORANDUM

**Date:** December 12, 2013  
**To:** Greg Apke, Fish Passage Coordinator  
**From:** Burke O'Brien, Representative Users,  
Fish Passage Task Force  
**Subject:** Mason Dam Waiver Request for Opinion:

As a newer member of the Task Force I am working hard at learning the rules and the mission of the Task Force. The Mason Dam waiver request which took up the majority of the meeting on November 15<sup>th</sup> seemed to be appropriate. However the ownership of the Structure seems to create a concern as to the need for a second party user (The County of Baker) to even be required to apply for a waiver since the Irrigation water use will not change. The Barrier will not change in design nor in purpose and the Bureau of Reclamation will continue to operate the Dam as an Irrigation structure as stated in the original permit. In my opinion how this issue is addressed in the future by rule or law needs to be reviewed by the Commission. There should be an effort to correct this before we face a similar situation at another time.

With all of this in mind and the fact that Baker County in good faith has offered to improve connectivity for primarily Red Band Trout above the Dam. And further realizing that this is in fact an opportunity for mitigation would otherwise not exist. And realizing that there is in fact a Socio economic impact of a positive nature to Baker County by getting this project up and running I am inclined to be supportive of the Waiver.

## MEMORANDUM

**TO:** Oregon Fish and Wildlife Commission

**FROM:** Dawn J. Nilson, Fish Passage Task Force Member

**DATE:** December 12, 2013

**SUBJECT:** Comments and Recommendation for the Proposed Fish Passage Waiver at Mason Dam on the Powder River

I have reviewed the net benefit analysis prepared by ODFW staff on behalf of the waiver request of providing mitigation in lieu of fish passage at Mason Dam. As shown in the analysis, there would be limited benefit to migratory, native fish by providing fish passage at the existing dam, based on existing environmental conditions. The offsite mitigation measures proposed would provide a net benefit to fish protected under fish passage rules; therefore, the mitigation proposed by the applicant satisfies the standard for approving a waiver. I recommend that the Fish and Wildlife Commission accordingly approve the waiver request.

Though I am in favor of granting a waiver for this project, this is based solely on how regulations have been drafted and interpreted by ODFW and its assistant attorney general. I do not believe that the regulations as applied in these small hydro projects (where no change in water flow or water storage levels would be associated with improvements or modifications) adequately interpret the intent of the law. Please note that this project and a few others that have come before the Fish Passage Task Force raise serious policy issues of the fish passage program. It is not unusual for new laws to be "tested" in the real world and once having been tested to find problems with the technical, political, and/or administrative reasonability of the statute or its regulations.

As a participant in the initial crafting and review of the new fish passage law, it was understood by the water supply community that "triggers" were to be applied as a compromise. The water supply community wanted existing projects grandfathered and ODFW wanted all projects to be applicable to fish passage requirements. It was the understanding of the water supply community that triggers were intended to provide opportunities to consider passage when owners/operators of fish passage obstructions were engaged in major improvements (e.g., dam raise/reservoir expansion; large-scale retrofits) that would alter the water regime and therefore alter fish conditions. The idea was that once venturing into major capital improvement projects involving structural changes and large financial commitments, that fish passage could be more readily factored into the improvements.

The small hydropower project proposed at Mason Dam would not alter existing water operations at the dam. This project is only a trigger because it requires a change in the water right (merely to add hydropower as a use) and it requires a FERC license. You will note that the law explicitly does not include water right transfers because transfers do not alter flow rates or storage levels of a water right. I don't think these small hydropower projects, which provide clean energy, offset water distribution costs, and create little to no additional risk to fish or wildlife, were considered when the statute was crafted. Federal and other state agencies are providing financial assistance to these beneficial, small hydropower projects, yet requirements of fish passage or mitigation are rendering more of these projects impractical. Considerable staff time is spent on reviewing waivers and exemptions on a type of project that in all fairness should not be subject to such review. I request that the Commission begin considering alternative policy when addressing small hydropower projects under the fish passage program.

Sincerely,  
Dawn J. Nilson

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**DATE:** December 12, 2013

**TO:** Greg Apke, ODFW Fish Passage Coordinator  
Ken Loffink, ODFW Assistant Fish Passage Coordinator

**FROM:** Stuart Myers, ODFW Fish Passage Task Force

**SUBJECT:** Mason Dam Fish Passage Waiver Request

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The purpose of this memorandum is to provide ODFW and the Fish Passage Task Force my feedback regarding the proposed Mason Dam fish passage waiver request resulting from the proposed addition of a small hydroelectric facility at Mason Dam on the Powder River in Baker County, Oregon. Application of the State's fish passage law for the proposed hydropower project is associated with the "fundamental change in permit status" of the fish passage barrier (i.e., Mason Dam). The proposed project will require a permitting process with the Federal Energy Regulatory Commission and this is considered a fundamental change in permit status.

While I am strong advocate for providing fish passage at passage barriers that prohibit or limit the volitional movement of Native Migratory Fish to carry out critical life histories, I am not totally comfortable with a fish passage trigger being applied to a site and project when a permit is involved for actions that do not affect a water right, the existing way in which water is managed relative to fish passage, and doesn't affect the physical configuration of the barrier. This concern is heightened when a trigger occurs from a proposal to provide hydroelectric power at an existing barrier and within an existing water right. Nonetheless, the trigger determination was made by ODFW and the project proponents have proposed upstream mitigation via the waiver process rather than provide fish passage at Mason Dam.

I feel that the proposed mitigation only marginally compensates for the lack of fish passage at Mason Dam given the scope of the mitigation (culvert retrofit upstream of the dam reservoir), the current location of the dam, and the known fish assemblages upstream and downstream of the dam. Although the Powder River has been significantly degraded in the project area from historic mining activities there are isolated pockets of NMF (both sensitive cool-water species and warm water non-game species) that use the system upstream and downstream of the dam. Much of the justification for not providing fish passage at Mason Dam is based on the degraded habitat conditions upstream and downstream of the dam. It's also perceivable that habitat restoration upstream and downstream of the dam has been viewed as less effective and feasible because of the dam's lack of passage and the degraded conditions of the reservoir. Therefore, what does it take to initiate fish habitat and passage restoration in the upper Powder Basin? From a spatial scale and ecological return of investment point of view, it can be argued that habitat restoration money would not be well-spent if fish passage and fish subpopulation connectivity wasn't improved in the Powder basin via providing fish passage at Mason Dam. I have a hard time accepting a justification for not providing fish passage due to degraded habitat up and

downstream of the an artificial barrier. Often it takes improving habitat connectivity and improving fish passage to justify spending the resources to improve habitat. At Mason Dam, providing fish passage could be the catalyst for significant basin-wide habitat improvements. This notion has been voiced in status reports by resource agencies focused on recovering bull trout and managing redband trout populations.

In summary, the proposed Mason Dam fish passage waiver presents a complex application of the State's fish passage law. This is due to how fish passage triggers are defined and based on the actions proposed to mitigate the lack of passage at the dam. Approval of Mason Dam and the fish passage waivers presents precedents for application of the fish passage waiver process and warrants potential improvements to the waiver net benefit analysis process so that the process is consistently applied from project to project and the intent of the law is carried out.

**I support ODFW's approval of the proposed Mason Dam fish passage waiver** even though I have concerns regarding the passage trigger and the net benefit from the proposed waiver mitigation. My support is largely based on the proposal involving providing hydroelectric capabilities to an existing dam without further restricting fish passage, changing water use patterns, or significantly modifying the dam. My support is contingent on the upstream mitigation (culvert retrofit) being completely compliant with current ODFW fish passage standards.