

DRAFT

Agreement between Baker County and the Oregon Fish and Wildlife Commission Concerning Funding of a Fish Entrainment Mitigation Program in Lieu of Fish Screens for the Mason Dam Hydroelectric Project, FERC Number 12686 (Agreement)

1. INTRODUCTION

On April 30, 2013, Baker County filed an application for a hydroelectric license for Mason Dam Hydroelectric Project (FERC No. 12686) with the Federal Energy Regulatory Commission (FERC). Mason Dam impounds the Powder River to form Phillips Reservoir. The dam is located in Baker County, approximately 17 miles southwest of Baker City, Oregon. Baker County proposes to add a 3.4 MW hydroelectric facility with a hydraulic capacity of 300 cfs (Project) to the existing facilities at Mason Dam. The Project will include a 6 foot diameter, 105 foot long steel penstock to convey water from the outlet; a new powerhouse below the dam equipped with a 3.4 MW Francis turbine; 0.8 miles of new 12.47 KV transmission line; and appurtenant facilities.

The Oregon Department of Fish and Wildlife (ODFW) consulted with Baker County 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. ODFW has also cooperated with other state and federal stakeholders through a collaborative process to identify mitigation requirements for the Project. In general, Baker County 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, and Baker County intends to address its obligation, consistent with this Agreement, to mitigate for fish entrainment impacts due to the lack of screening of the Project, as described in its supporting License Application documents filed with FERC.

2. PURPOSE AND EFFECT OF THIS AGREEMENT

Baker County and the Oregon Fish and Wildlife Commission (“Parties”) are entering into this Agreement to resolve fisheries issues related to the entrainment of fish through the Project, consistent with ORS 498.306. This Agreement will establish Baker County’s obligations for fish protection measures in lieu of screening the intake for the Project, as authorized by ORS 498.316. 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.

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 Project as defined above, 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 fish entrainment mitigation measures in a manner that will not conflict with other requirements in the FERC license.

3. PERMITTING

Baker County 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. Baker County 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. The Parties shall cooperate during the permitting, environmental review, and implementation of this Agreement. ODFW shall use all reasonable efforts to support Baker County's applications for any permits, provided that this sentence shall not apply to permits issued by ODFW. Baker County shall not be required to actively support ODFW's 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

Baker County shall provide the following measures:

- A) Provide funding for a Phillips Reservoir Stocking Supplementation Fund to mitigate for the hatchery stocked rainbow trout that may be entrained through the Project during operation.
- B) Install fish screening on the Shaw-Stewart Diversion to mitigate for a portion of the native redband trout and other native fish that may be entrained through the Project during operation.
- C) Provide funding for a Powder River Screening Fund to mitigate for the remaining portion of native redband trout and other native fish that may be entrained through the Project during operation.

Baker County shall not be obligated and ODFW shall not take further action to require Baker County to provide additional funds or mitigation actions in lieu of screening the intake for the Project than is set forth in this section of this Agreement.

4A. Phillips Reservoir Stocking Supplementation Fund. Baker County shall provide \$1,000 for each year of the FERC License for a Phillips Reservoir Stocking Supplementation Fund. The

total amount of this fund will be dependent upon the length of the FERC license. Within thirty (30) days of initiation of Project operation, Baker County shall provide payment to ODFW for \$1,000 for each year of the license term (2013 dollars adjusted as defined in Section 4D). Baker County shall remit payment to “State of Oregon, Department of Fish and Wildlife.” ODFW shall place funds in a State account to be used to administer the Phillips Reservoir Stocking Program as determined appropriate by ODFW.

4B. Shaw-Stewart Diversion Screen. Within ninety (90) days of initiation of Project operation, Baker County shall submit proposed drawings for the Shaw-Stewart Diversion screen (Shaw-Stewart Screen) to ODFW Fish Screening Program for its review and final approval. ODFW will cooperate with Baker County to finalize and approve drawings. Within the in-water work period subsequent to drawing approval, Baker County shall install, or have installed, the approved screening structure at the Shaw-Stewart Diversion. ODFW must approve the constructed Shaw-Stewart Screen before the project is deemed complete. Baker County will be responsible for ensuring the operation and maintenance of the screening structure for the term of the FERC license. Prior to April 1 of the year following completion of the screening structure construction, Baker County shall provide to ODFW written agreements ensuring the operation and maintenance of the screening structure for ODFW’s review and final approval.

4C. Powder River Screening Fund. Baker County shall provide a Powder River Screening Fund. Baker County shall provide a total of \$90,000 (2013 dollars escalated to the year of payment into the account as defined in Section 4D) for the Powder River Screening Fund. Baker County shall establish a segregated interest-bearing account dedicated to funding the Powder River Screening Fund. Baker County shall bear the cost of all administrative, legal and overhead costs associated with management of the account. In years two (2), four (4), six (6) and eight (8) following initiation of Project operation, Baker County shall deposit \$22,500 (2013 dollars adjusted as defined in Section 4D) into the afore-mentioned account. All funds shall be retained in the account to be available in accordance with the objectives and approvals described in this section of this Agreement.

Funds from the Powder River Screening Fund will be used to finance fish screening mitigation projects on water diversions within the Powder River Basin that are protective of redband trout and other native fish. Screening mitigation project implementation that fully utilizes all funds within the Powder River Screening Fund shall be completed within ten (10) years of the initiation of Project operation unless both Parties agree to an extension of time in which to utilize funds.

Within thirty (30) days following Baker County’s initial payment into the account, Baker County will arrange to meet with ODFW to identify appropriate partners and stakeholders and potential screening mitigation projects. Each successive year Baker County shall meet with ODFW and appropriate partners and stakeholders to review progress of funded projects and identify additional screening mitigation projects until all funds are expended from the Powder River Screening Fund.

The Parties agree to cooperate to identify the most appropriate entity to administer and implement each screening mitigation project. Baker County will be responsible for ensuring any

selected entity administers and implements each screening mitigation project in accordance with this Agreement. Once screening mitigation projects are approved by ODFW for funding, engineering drawings of any proposed screening structures shall be submitted to the ODFW Screening Program for its review and approval. All construction of approved screening structures shall occur during the defined in-water work period. ODFW must approve the constructed screening mitigation projects before such projects are deemed complete. Screening mitigation project development and construction shall be coordinated with land management agencies or landowners, as appropriate. The Parties will work with the entity selected to administer and implement each screening mitigation project whenever possible and appropriate to assist with facilitation of that funded screening mitigation project.

Either Party or partners or stakeholders may propose potential screening mitigation projects for consideration, but ODFW reserves the authority to approve projects and the applicable funding amount. For each screening mitigation project, proposals shall include: (1) the proposing and performing entity; (2) a detailed description of the proposed screening project including waterbody from which water is diverted, location of diversion, owner and operator of diversion, and rate and duty of permitted/certificated diversion; (3) estimated costs for design and installation, including underlying assumptions; (4) identification of fish species present; and (5) identification of parties responsible for operation and maintenance of the screening project.

Upon ODFW's approval of a screening mitigation project, funds shall be disbursed from the mitigation account to the entity administering and implementing that project pursuant to payment arrangements made between Baker County and that entity. Baker County will be responsible for ensuring any such entity expends funds in accordance with this Agreement. Funds provided under this Agreement may be used toward designing and installing or constructing approved screening mitigation projects. Additionally, up to 10 percent of the total screening mitigation project costs may be used to cover administrative costs. Funds provided under this Agreement may also be used to leverage other outside funding sources.

Within twelve (12) months following establishment of the account, Baker County will provide ODFW with a written summary of the status of planned screening mitigation projects to be funded from the account and a financial summary for the account. In subsequent years, this report will be due on or before April 1 and shall include a summary of the status of screening mitigation projects funded from the account in the previous calendar year and a financial summary of the account from the previous calendar year. This annual reporting requirement will continue until all funds are expended from the Powder River Screening Fund.

4D. Fee Inflation Adjustment Equation. The payment amounts set forth in Sections 4A and 4C above shall be adjusted using the following formula:

$$AD = \text{Payable Amount} \times (\text{CPI-U}) / (\text{CPI-U-month and year of signing})$$

Where:

AD = Adjusted dollar amount payable to as defined in Section 4A and 4C

CPI-U = the most current published version of the Consumer Price Index-Urban. The CPI-U is published monthly by the Bureau of Labor Statistics of the U.S. Department of Labor.

If that index ceases to be published, any reasonable equivalent index published by the Bureau of Economic Analysis may be substituted upon written agreement between the Parties.

5. 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 Baker County and ODFW. In the event this Agreement is terminated, all remaining funds as defined in Section 4C (accumulated annual deposits minus ODFW approved expenditures) shall be transferred to ODFW, who will maintain funds in a State account dedicated to completing the approved, ongoing or planned projects as described in Section 4C until the funds are exhausted. In the event this Agreement is terminated, all remaining funds as defined in Section 4A shall be maintained by ODFW in the State account dedicated to administering the Phillips Reservoir Stocking Program. The funds will continue to be disbursed as described in Section 4A until all such funds are exhausted.

6. 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.

7. AMENDMENT OF AGREEMENT

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

8. RESPONSIBILITY FOR COSTS

Baker County shall be solely liable to pay for the cost of actions required of Baker County by this Agreement. Baker County 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.

9. COOPERATION AMONG PARTIES

The Parties shall cooperate in the performance of this Agreement. The Parties shall cooperate in the execution of the Fish Entrainment Mitigation Measures defined herein for the purposes and by the means established in this Agreement.

10. FAILURE TO PERFORM; ENFORCEMENT

If Baker County fails to perform obligations required by this Agreement and such failure is not excused by Force Majeure as described in Section 12.3 of this Agreement, ODFW may provide notice to Baker County of such failure. If such failure is not cured within thirty (30) days, or if such failure is not curable within thirty (30) days and Baker County 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 Baker County and prior to withdrawal, ODFW may immediately initiate the ADR Procedures in accordance with Section 11 of this Agreement, seek judicial relief, or petition FERC to include certain measure as a required term or condition of Baker County'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.

11. ADR PROCEDURES

11.1 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 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.

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

11.3 Process.

11.3.1 Notice of Dispute. A Party claiming a dispute shall give notice of the dispute within thirty (30) days of the Party's actual knowledge of the act, event, or omission that gives rise to the dispute. Notification under Section 12.7 of this Agreement, when effective, shall constitute actual knowledge. Service of process on a Party's registered agent shall also constitute actual knowledge.

11.3.2 Meeting of the Parties. In any dispute subject to these ADR Procedures, the Parties shall hold two (2) informal meetings within thirty (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 fifteen (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.

11.3.3 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.

12. GENERAL PROVISIONS

12.1 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.

12.2 Successors and Assigns. This Agreement shall apply to and be binding on the Parties and their successors and assigns. In the event Baker County (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 Baker County shall in any way modify or otherwise affect ODFW's interests, rights, responsibilities, or obligations under this Agreement. Unless prohibited by applicable law, Baker County 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. Baker County shall provide notice to ODFW at least sixty (60) days prior to completing such transfer or assignment.

12.3 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 twenty-one (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 Baker County's inability to provide funding or perform a screening mitigation project continues or is reasonably anticipated to continue for more than 180 days due to Force Majeure, ODFW may initiate ADR Procedures, screening mitigation project, or pursue any other remedy available under applicable law in state court.

12.4 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.

12.5 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.

12.6 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 Effective Date of this Agreement.

12.7 Notice. Any notice required by this Agreement shall be written. Notice shall be sent by first-class U.S. 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 of this Agreement is:

<u>Baker County Representative:</u> Fred Warner, Jr Baker County Commission 1995 Third Street Baker City, OR 97814	<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
--	---

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>Baker County copies:</u> [TBD]	<u>ODFW copies:</u> District Biologist Region Hydro Coordinator
--------------------------------------	---

12.8 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.

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

12.10 Effective Date. As used in this Agreement, Effective Date is the date of the later signature provided under Section 13 of this Agreement.

13. EXECUTION OF THE AGREEMENT

13.1 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.

13.2 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 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

Fred Warner Jr., Chair
Baker County Commission

Date_____

Date_____