



DAN JOHNSON
DIRECTOR

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
DEVELOPMENT SERVICES BUILDING
150 BEAVERCREEK ROAD OREGON CITY, OR 97045

May 18, 2023

BCC Agenda Date/Item: _____

Board of County Commissioners
Clackamas County

Approval of an Agreement with The Freshwater Trust for the Henry Creek Culvert Fish-Passage Project. Agreement value is not to exceed \$100,000. Funding through County Road Funds. No County General Funds are involved.

Previous Board Action/Review	5/16/23: Discussion item at issues 10/25/22: BCC approval of grant application letter of support and commitment up to \$100,000 in County Road Fund		
Performance Clackamas	Build a strong infrastructure		
Counsel Review	Yes	Procurement Review	No
Contact Person	Devin Patterson	Contact Phone	503-742-4666

EXECUTIVE SUMMARY: The existing 12-foot-diameter culvert that carries Henry Creek under Arlie Mitchell Road in Rhododendron is identified as a barrier to passage for aquatic organisms of all species and life stages. The Freshwater Trust (TFT) proposes to replace the existing culvert with a modular bridge that would meet federal and state fish-passage criteria resulting in a modular bridge that is approximately 40 feet long. With removal of the barrier to fish passage, the project is expected to open up 3 miles of salmon and steelhead habitat.

The agreement with TFT allows the collaboration and commitment to the Henry Creek at Arlie Mitchell Road Culvert Replacement Project. The County’s obligation under the agreement is limited to a County cash contribution of \$24,828 and in-kind services with the combined amount not to exceed \$100,000. The in-kind services are expected to include preconstruction survey, review of plans and specifications, right-of-way acquisition, county permitting assistance, review of construction submittals, landowner outreach, utility coordination, and inspection of the project.

For Filing Use Only

The remaining project costs, estimated to be \$968,704, will be funded by TFT-initiated grant funding requests.

RECOMMENDATION: Staff respectfully recommends the Board of County Commissioners approve this agreement with The Fresh Water Trust for the Henry Creek Culvert Fish-Passage Project.

Respectfully submitted,

Dan Johnson

Dan Johnson
Director of Transportation & Development

HENRY CREEK CULVERT FISH-PASSAGE PROJECT AGREEMENT

THIS AGREEMENT is entered into by and between CLACKAMAS COUNTY, hereinafter referred to as "County," and THE FRESHWATER TRUST, hereinafter referred to as "FRESHWATER," each herein referred to individually as a "Party" and collectively as the "Parties."

RECITALS

1. Henry Creek is a perennial tributary to the Zigzag River in the upper Sandy River watershed. The Henry Creek culvert is located on Arlie Mitchell Road in Clackamas County. The road and culvert are owned and maintained by the County. Arlie Mitchell Road - including the Henry Creek culvert - provides access to Clackamas County residences and to United States Forest Service (USFS) trailheads and USFS recreational cabins. Prior to the construction of the road-stream crossing at river mile 0.3, Henry Creek provided 3 miles of salmon and steelhead habitat. The Henry Creek culvert is a stream-road crossing culvert, 144-inches in diameter, that is a complete barrier for juvenile salmon and steelhead and nearly a complete barrier for adult salmon and steelhead. The existing metal culvert, while still in good condition, was installed in 1965, shortly after the historic 1964 flood event, which washed out several homes, culverts, and portions of roadways in the Mt. Hood area. The location of the Henry Creek culvert is more particularly depicted in the attached Exhibit "A".
2. Sandy River salmon and steelhead are listed as threatened under the Federal Endangered Species Act as a component of the Lower Columbia River Evolutionary Significant Unit. The Zigzag River subwatershed is a high priority area for habitat restoration to benefit salmon and steelhead in the Sandy River basin. A project to replace the Henry Creek culvert has been identified as the number 2 priority project in Oregon Department of Fish and Wildlife's (ODFW) North Willamette Watershed District.
3. Freshwater is prepared to undertake a project to address primary limiting factors for these fish by restoring fish passage in Henry Creek at river mile 0.3. The proposed project will restore access to 2.7 miles of habitat for salmon and steelhead by replacing the road-stream crossing culvert with a bridge. The design of the Project will include replacing the current culvert crossing with a pre-cast, concrete bridge. The bridge and abutments are anticipated to span 1.3-1.5 times the active channel width. The scope of the project is more particularly described in Exhibit "B" attached hereto and incorporated herein (the "Project"). The estimated cost of the Project is \$1,018,460.
4. The County wishes to contribute to the Project and proposes to contribute both funds and staff time. The nature of the County's in-kind contribution would include preconstruction survey work, review of plans and specifications, right-of-way acquisitions, assistance with County permitting, review of construction submittals, landowner outreach, utility coordination, and inspection of Project construction.
5. Except as may be set forth herein, Freshwater will be primarily responsible for delivering the Project, including procurement, design, construction, project management and any necessary Project monitoring. Freshwater has applied for several grants to assist in

funding the Project and will be solely responsible for administering any such grants for Project work completed, and for completing any necessary Project site restoration and replanting. Freshwater shall also be primarily responsible for coordinating any assistance of other partnering agencies, such as USFS and ODFW, that may be involved in the Project.

6. The Parties desire to define their respective obligations with regards to the Project.

TERMS OF AGREEMENT

NOW, THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

1. **Term.** This Agreement becomes effective as of the last date of signature by a Party indicated below. Unless terminated earlier pursuant to Section 4 of this Agreement, this Agreement will expire upon the completion of the Project by Freshwater and the final payment by the County pursuant to the terms of this Agreement, or by December 31, 2023, whichever is sooner.

2. Freshwater Obligations.

a. Freshwater agrees to deliver the scope of work, as more particularly described in the Recitals and in the attached Exhibit "B". Freshwater agrees to provide final construction plans and specifications to the County and provide a reasonable amount of time for the County to review and approve the materials, consistent with Section 3(e) below.

b. Freshwater will contract for the scope of work set out in the attached Exhibit "B", except for those tasks described below in Section 3(b), which will be performed by the County. Freshwater agrees to manage the Project, and will timely administer any associated engineering, design, and construction work.

c. Subject to the County's reimbursement of Freshwater costs described in Section 3(d), Freshwater shall be exclusively responsible for all costs and expenses related to its performance of work under this Agreement in delivering the Project.

d. Freshwater will invoice the County for the County's portion of costs incurred in delivering the Project ("Eligible Project Costs"). Freshwater may issue an invoice to the County in the amount of Twelve Thousand Four Hundred and Fourteen Dollars (\$12,414) upon completion of mobilization of the Project once the appropriate equipment and infrastructure has been established on the Project site to enable Freshwater to commence execution of the work associated with the Project. Freshwater may issue a second invoice to the County in the amount of Twelve Thousand Four Hundred and Fourteen Dollars (\$12,414) upon substantial completion of the scope of work, as more particularly described in the Recitals and in the attached Exhibit "B". The Parties agree that the County's liability under this Section, related to the County's cash contribution, shall not exceed Twenty-Four Thousand Eight Hundred and Twenty-Eight Dollars (\$24,828).

e. Freshwater shall abide by all terms and conditions contained in any grant

agreement associated with the Project, and Freshwater is solely responsible for ensuring receipt of all grant funds, from any source whatsoever, that will be associated with the Project.

3. County Obligations.

- a. The County agrees to the scope of work as more particularly described in the Recitals and in the attached Exhibit "B".
- b. The County agrees to manage and deliver the following tasks associated with the Project:
 - i. Preconstruction survey work;
 - ii. County review of plans and specifications;
 - iii. Right-of-way acquisition,;
 - iv. Assistance with County permitting;
 - v. Review of construction submittals;
 - vi. Landowner outreach;
 - vii. Utility Coordination; and
 - viii. Inspection of Project construction.
- c. Costs incurred in delivering the work described above in Section 3(b) shall be the responsibility of the County. The County and Freshwater agree that the approximate cost to deliver the work described above in Section 3(b) is Twenty-Four Thousand Eight Hundred and Twenty-Eight Dollars (\$24,828).
- d. In addition to the in-kind contribution described above in Sections 3(b) and 3(c), the County agrees to provide Freshwater the sum of Twenty-Four Thousand Eight Hundred and Twenty-Eight Dollars (\$24,828) as a cash contribution to be used on Eligible Project Costs. As set forth in Section 2(d) above, the County's cash contribution shall not exceed Twenty-Four Thousand Eight Hundred and Twenty-Eight Dollars (\$24,828). In no event shall the combined amount of the County's in-kind contribution and cash contribution towards the Project exceed One Hundred Thousand Dollars (\$100,000). All costs of the Project in excess of One Hundred Thousand Dollars (\$100,000) shall be the responsibility of Freshwater; however, Freshwater shall not be responsible for any costs associated with the County's in-kind contribution described in Sections 3(b) and 3(c).
- e. The County shall review those final construction plans and specifications provided by Freshwater. The County's approval of the final construction plans and specifications is required, and the County shall either accept or reject the final construction plans and specifications within 30 days of the receipt of the materials. The County's approval of the final construction plans and specifications under this section may not be unreasonably withheld.
- f. The County shall pay invoices from Freshwater within 60 days of receipt. The County agrees to notify Freshwater in writing of any objection to costs identified in any invoice within 10 days of receipt
- g. The County will retain ownership of, and be responsible for maintaining, the

new structure upon completion of the Project.

4. **Termination.**

- a. The County and Freshwater, by mutual written agreement, may terminate this Agreement at any time.
- b. Freshwater may terminate this Agreement effective upon delivery of written notice to the County, or at such later date as may be established by Freshwater, if the County fails to perform any of its obligations under this agreement, or so fails to pursue its obligations as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from Freshwater fails to correct such failures within ten (10) days or such longer period as is reasonably necessary to cure such default.
- c. The County may terminate this Agreement effective upon delivery of written notice to Freshwater, or at such later date as may be established by County, if Freshwater fails to perform any of its obligations under this Agreement, or so fails to pursue its obligations as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from County fails to correct such failures within ten (10) days or such longer period as is reasonably necessary to cure such default.
- d. Nothing herein shall prevent the Parties from meeting to mutually discuss the Project or any of the obligations contained in this Agreement. Each Party shall use best efforts to coordinate with the other to minimize conflicts.
- e. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.

5. **Indemnification.**

- a. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, the County agrees to indemnify, save harmless and defend Freshwater, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof (including legal and other professional fees) arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of the County or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which the County has a right to control.
- b. Freshwater agrees to indemnify, save harmless and defend the County, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof (including legal and other professional fees) arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of Freshwater or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which Freshwater has a right to control.

6. **General Provisions**

- a. **Oregon Law and Forum.** This Agreement shall be construed according to the laws of the State of Oregon, without giving effect to the conflict of law provisions thereof.

- b. **Applicable Law.** The Parties hereto agree to comply in all ways with applicable local, state and federal ordinances, statutes, laws and regulations.
- c. **Non-Exclusive Rights and Remedies.** Except as otherwise expressly provided herein, the rights and remedies expressly afforded under the provisions of this Agreement shall not be deemed exclusive, and shall be in addition to and cumulative with any and all rights and remedies otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach, or for any other default or breach, by the other Party.
- d. **Access to Records.** The Parties acknowledge and agree that each Party, the federal government, and their duly authorized representatives shall have access to each Party's books, documents, papers, and records which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of three years after final payment. Copies of applicable records shall be made available upon request. The cost of such inspection shall be borne by the inspecting Party.
- e. **Debt Limitation.** This Agreement is expressly subject to the debt limitation of Oregon counties set forth in Article XI, Section 10, of the Oregon Constitution, and is contingent upon funds being appropriated therefore. Any provisions herein which would conflict with law are deemed inoperative to that extent.
- f. **Severability.** If any provision of this Agreement is found to be unconstitutional, illegal or unenforceable, this Agreement nevertheless shall remain in full force and effect and the offending provision shall be stricken. The Court or other authorized body finding such provision unconstitutional, illegal or unenforceable shall construe this Agreement without such provision to give effect to the maximum extent possible the intentions of the Parties.
- g. **Integration, Amendment and Waiver.** Except as otherwise set forth herein, this Agreement constitutes the entire agreement between the Parties on the matter of the Project. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by such Party of that or any other provision.
- h. **Interpretation.** The titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.
- i. **Independent Contractor.** Each of the Parties hereto shall be deemed an independent contractor for purposes of this Agreement. No representative, agent, employee or contractor of one Party shall be deemed to be a representative, agent, employee or contractor of the other Party for any purpose, except to the extent specifically provided herein. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint

venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.

- j. **No Third-Party Beneficiary.** Neither Party intends that this Agreement benefit, or create any right or cause of action in, or on behalf of, any person or entity other than the County or Freshwater.
- k. **No Assignment.** No Party shall have the right to assign its interest in this Agreement (or any portion thereof) without the prior written consent of the other Party, which consent may be withheld for any reason. The benefits conferred by this Agreement, and the obligations assumed hereunder, shall inure to the benefit of and bind the successors of the Parties.
- l. **Counterparts.** This Agreement may be executed in any number of counterparts (electronic, facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
- m. **Authority.** Each Party represents that it has the authority to enter into this Agreement on its behalf and the individual signatory for a Party represents that it has been authorized by that Party to execute and deliver this Agreement.
- n. **Necessary Acts.** Each Party shall execute and deliver to the others all such further instruments and documents as may be reasonably necessary to carry out this Agreement.
- o. **Attorney Fees.** The Parties shall bear their own costs and attorney fees in the event an action is brought to enforce, modify or interpret the provisions of this Agreement.

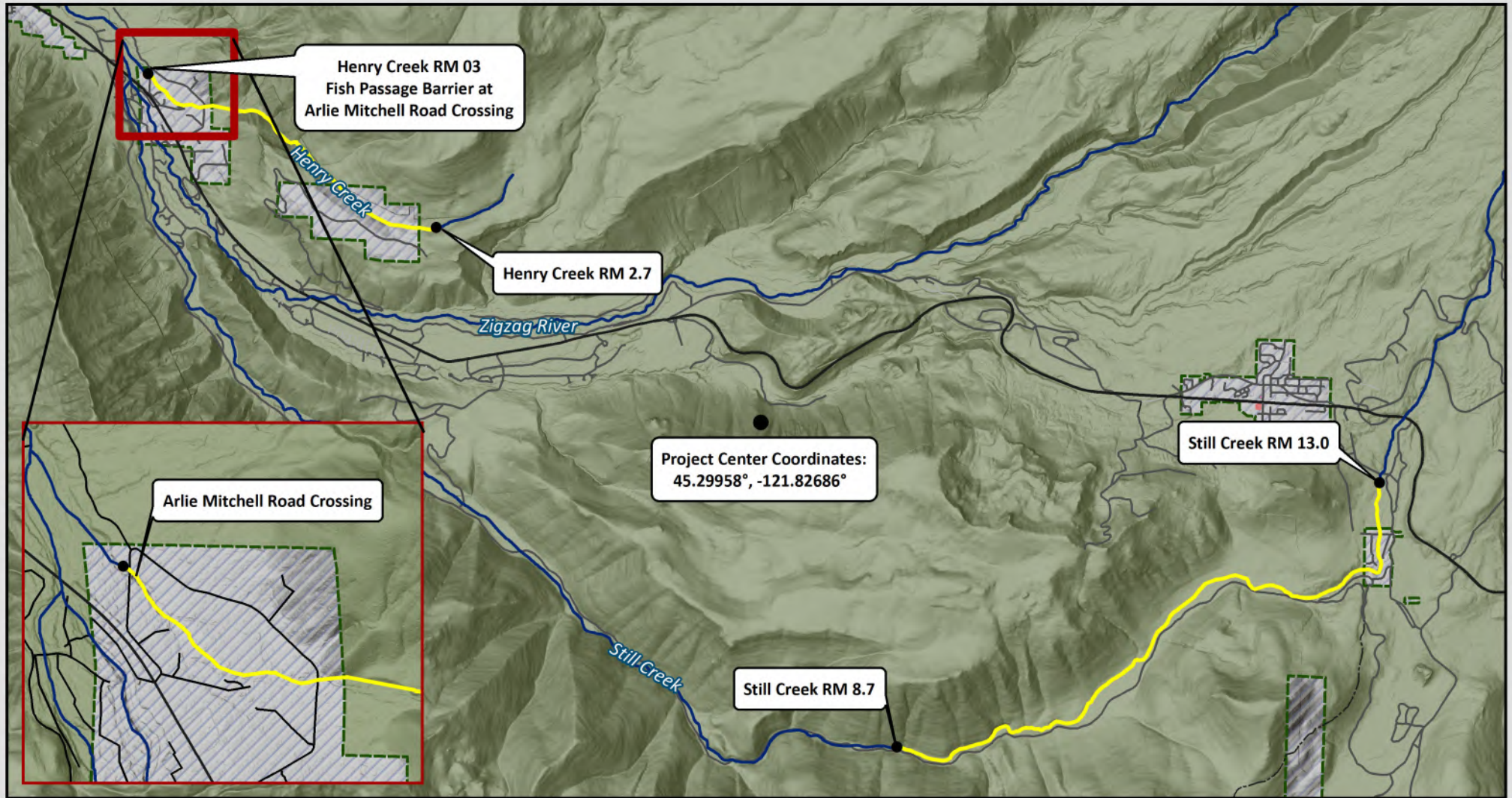
THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

THE FRESHWATER TRUST Sign <u>Kimberlee Obilana</u> Kimberlee Obilana, VP, People & Operations
The Freshwater Trust – Agency Contact Mark McCollister 700 SW Taylor Street, Suite 200 Portland, OR 97205 (503) 222-9091 Mark@thefreshwatertrust.org

COUNTY OF CLACKAMAS Sign _____
COUNTY OF CLACKAMAS – Agency Contact Devin Patterson 150 Beaver creek Rd. Oregon City, OR 97045 (503) 742-4666 DevinPat@clackamas.us



Exhibit A – Project Location Map

Upper Sandy - Zigzag River Tributaries Restoration Project



— Project Reach
— River Centerline

Land Ownership

 U.S. Forest Service
 Private Non-Industrial Owner



0 0.75 1.5 3 Miles



Exhibit B – OWEB Grant and OWEB Project Application

EXHIBIT B - BUDGET

ODFW USE ONLY	Title: Henry Creek	Project #: P-03-0018
Project Type: P	Activity: Construction	Amount: \$1,018,460.00
		Date received:

Applicant Section	PROJECT BUDGET				
This section describes work that will be completed by the Applicant and their initial outlay of the estimated project cost. The amount of funding provided for this project by all parties is described in the budget summary below.					
PERSONNEL					
Description	Work By	Rate	Quantity	Units	Amount
TFT Project Manager (\$65.56 / hr)	Applicant	\$23,603.00	1.00	Each	\$23,603.00
TFT Monitoring Staff (\$42.29 / hr)	Applicant	\$3,383.00	1.00	Each	\$3,383.00
USGS GS 11 Fisheries Biologist	Applicant	\$450.00	48.00	Day	\$21,600.00
USGS GS 9 Fisheries Biologist	Applicant	\$292.00	96.00	Day	\$28,032.00
Clackamas County Project Staff	Applicant	\$25,000.00	1.00	Each	\$25,000.00
The Freshwater Trust grant admin 23.78% - \$105,663 ODFW, \$75,660 Partner Funds	Applicant	\$181,323.00	1.00	Each	\$181,323.00
Sub-Total1:					\$282,941.00
PROJECT SUPPLIES & MATERIALS					
Description	Work By	Rate	Quantity	Units	Amount
Sub-Total2:					\$0.00
EQUIPMENT					
Description	Work By	Rate	Quantity	Units	Amount
Sub-Total2:					\$0.00
OTHER					
Description	Work By	Rate	Quantity	Units	Amount
Sub-Total3:					\$0.00
CONTRACTED SERVICES					
Description	Contracted By	Rate	Quantity	Units	Amount
Design Engineer - Design, On-site Engineering, Construction Admin	Applicant	\$80,000.00	1.00	Each	\$80,000.00
Heavy Equipment Operator - Equipment Mobilization	Applicant	\$40,000.00	1.00	Each	\$40,000.00
Heavy Equipment Operator - Bridge Deck and Abutments	Applicant	\$215,000.00	1.00	Each	\$215,000.00
Heavy Equipment Operator - Equipment	Applicant	\$300,000.00	1.00	Each	\$300,000.00
Heavy Equipment Operator - Labor	Applicant	\$40,519.00	1.00	Each	\$40,519.00
Heavy Equipment Operator - Project Management	Applicant	\$35,000.00	1.00	Each	\$35,000.00
Heavy Equipment Operator - Utilities, Paving	Applicant	\$25,000.00	1.00	Each	\$25,000.00
Sub-Total4:					\$735,519.00
Total Applicant Outlay (adds subtotals 1-4):					\$1,018,460.00

ODFW Section	PROJECT BUDGET				
This section describes work that will be completed by ODFW and their initial outlay of the estimated project cost. The amount of funding provided for this project by all parties is described in the budget summary below.					
PERSONNEL					
Description	Work By	Rate	Quantity	Units	Amount
Sub-Total1:					\$0.00
PROJECT SUPPLIES & MATERIALS					
Description	Work By	Rate	Quantity	Units	Amount

Sub-Total2:						\$0.00
EQUIPMENT						
	Description	Work By	Rate	Quantity	Units	Amount
Sub-Total2:						\$0.00
OTHER						
	Description	Work By	Rate	Quantity	Units	Amount
Sub-Total3:						\$0.00
CONTRACTED SERVICES						
	Description	Contracted By	Rate	Quantity	Units	Amount
Sub-Total4:						\$0.00
Total ODFW Outlay (adds subtotals 1-4):						\$0.00

Budget Summary

This section describes the amount of funding that is expected to be provided for this project by all parties. ODFW is responsible for the ODFW portion of project funding, and the applicant is responsible to provide all remaining funds. Any initial outlay by ODFW that exceeds the ODFW funding amount will be reimbursed to ODFW by the applicant. The project budget sections above describes who will provide the initial outlay of the estimated project cost.

Applicant Funding Sources

Source Type	Description	Is Funding Secured?	Amount
Applicant Inkind	USFS Confirmed/Acquired	Yes	\$49,632.00
Applicant Inkind	Clackamas County Confirmed/Acquired	No	\$24,878.00
Applicant Cash	Clackamas County Confirmed/Acquired	No	\$24,878.00
Applicant Cash	City of Portland Confirmed/Acquired	No	\$200,000.00
Applicant Cash	OWEB Awaiting confirmation	No	\$169,072.00
Total Applicant Share:			\$468,460.00
Requested Amount from ODFW:		Confirmed/Acquired	\$550,000.00

ODFW USE ONLY ODFW Funds

Funding Source	Cost Code	\$ P/S Amount	\$ S/S Amount	\$ Total Amount
Drought Funds	53300-801072-10	\$116,481.00	\$433,519.00	\$550,000.00
Total ODFW Funding:				\$550,000.00
Applicant Share:				\$468,460.00
ODFW Share(54.00):				\$550,000.00
Total Funding:				\$1,018,460.00
Total Project Budget:				\$1,018,460.00