



Oregon Water Resources Department  
Water Right Services Division

Instream Water Right Application  
Number IS-73368

### Final Order Incorporating Settlement Agreement

#### *Application History*

On May 5, 1993, the Oregon Department of Fish and Wildlife submitted an application to the Oregon Water Resources Department ("Department") for an instream water right in the South Fork Rogue River, a tributary to the Rogue River. On March 4, 1997, the Department issued a Superseding Proposed Final Order proposing to issue the certificate with conditions. PacifiCorp filed a protest on April 18, 1997. A settlement agreement resolving the protest was signed on May 19, 2023 ("Settlement Agreement"), and is attached hereto and incorporated as if set forth fully herein.

#### *Findings of Fact and Conclusions of Law*

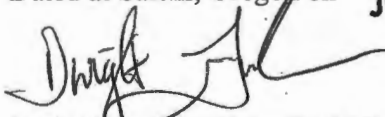
The findings of fact and conclusions of law in the Superseding Proposed Final Order are incorporated into this Final Order Incorporating Settlement Agreement ("Final Order"), except as modified by the Settlement Agreement. To the extent that there are any conflicts between the Settlement Agreement and this Final Order, the terms and conditions of the Settlement Agreement control.

The proposed use would not impair or be detrimental to the public interest.

#### Order

**IT IS HEREBY ORDERED** that Application IS-73368 be approved as provided in the attached Certificate #96967.

Dated at Salem, Oregon on **JUN 01 2023**



Dwight French, Water Right Services Administrator, for  
Douglas E. Woodcock, Acting Director

#### *Appeal Rights*

ORS 183.417(3)(b): "An order that incorporates [an] informal disposition is a final order in a contested case, but is not subject to judicial review. A party may petition the agency to set aside a final order that incorporates the informal disposition on the ground that the informal disposition was obtained by fraud or duress."

6. PacifiCorp's hydroelectric water rights for diversions from the South Fork Rogue River (150 cubic feet per second ("cfs")), Middle Fork Rogue River (150 cfs) and Red Blanket Creek (75 cfs) have a priority date of January 5, 1924. PacifiCorp's hydroelectric water rights for diversions from the North Fork Rogue River are October 8, 1904 (400 cfs), August 24, 1928 (275 cfs) and July 29, 2015 (40 cfs).
7. The priority date for each of ODFW's instream water rights is May 5, 1993, which is the date ODFW filed the Instream Applications with OWRD. PacifiCorp's above-described hydroelectric water rights are senior in priority to the Instream Applications, with the exception of PacifiCorp's seasonal right with a priority date of July 29, 2015, to divert up to an additional 40 cfs from the North Fork Rogue River with equivalent, combined reduction in diversion from the Middle Fork Rogue River and Red Blanket Creek when inflows to the North Fork Reservoir exceed 735 cfs.
8. On or around July 8, 2022, OWRD issued a Notice of Contested Case Rights and Procedures to ODFW and PacifiCorp referring PacifiCorp's Protest to the Office of Administrative Hearings ("OAH") for a contested case hearing.
9. The Parties agree that the Protest involves disputed issues but is resolved solely on the terms set forth in this Agreement.

#### **B. Consent**

1. Each Party to this Agreement certifies that it has read the entire Agreement, including the attached draft final orders ("Draft Final Orders") and corresponding draft water right certificates ("Draft Certificates"), for each of the Instream Applications, and understands and agrees with the contents thereof.
2. Each Party to this Agreement understands and agrees that this Agreement and all documents incorporated by reference herein set forth the entire agreement of the Parties.
3. Each Party to this Agreement understands and agrees that this Agreement, the final orders issued pursuant to this Agreement (each a "Final Order Incorporating Settlement Agreement"), and the final instream water right certificates issued pursuant to this Agreement (each a "Final Certificate") constitute the complete and final resolution of the Protest.
4. Effective upon the Parties' execution of this Agreement, each Party waives any and all right to petition for judicial review of this Agreement, and waives any and all right to request reconsideration, petition for judicial review, or appeal the Final Orders Incorporating Settlement Agreement or the Final Certificates.
5. This Agreement may be signed in counterparts, each of which will be deemed an original, and all of which together will constitute one and the same Agreement.

### C. Terms of the Agreement


1. The Parties agree with the contents of the attached Draft Final Orders and Draft Certificates, which are hereby incorporated by reference. The Parties have agreed to modify each of the original draft certificates as follows:
  - a. Replace condition nos. 6 and 7 with the following condition: "The instream water right will have no effect on and will not be enforceable against senior existing water rights of record authorized by the State of Oregon or any federal agency."
  - b. Add the following new condition, which is identical to the second sentence of ORS 537.334(2): "The establishment of an in-stream water right under the provisions of ORS 537.332 to 537.360 shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any waters vested prior to the date the in-stream water right is established pursuant to the provisions of ORS 537.332 to 537.360."
  - c. Add the following statement: "This instream water right certificate is issued pursuant to a Final Order Incorporating Settlement Agreement, dated \_\_\_\_\_."
2. Within 30 days after all Parties sign this Agreement, OWRD will:
  - a. Withdraw the pending contested case hearing from the OAH (OAH Case Nos. 2022-OWRD-00107, 2022-OWRD-00109, 2022-OWRD-00111 and 2022-OWRD-00113); and
  - b. Issue a Final Order and Certificate for each Instream Application (Applications IS-73368, IS-73369, IS-73370 and IS-73371) consistent with the attached Draft Final Orders and Draft Certificates for each Instream Application.
3. ODFW and OWRD recognize that PacifiCorp disagrees with the instream flow levels described in the Draft Certificates. The Parties have agreed to disagree for purposes of the issuance of the Final Certificates. ODFW and OWRD shall not use the instream flow amounts described in the Draft Certificates or Final Certificates as precedent in any way for or against PacifiCorp, or to argue in any way or as evidence that PacifiCorp has agreed to, adopted, or acquiesced in such instream flow amounts, with regard to any determination of appropriate flow levels in any future state or federal proceeding. Moreover, PacifiCorp shall not be collaterally estopped, barred by *res judicata*, or prohibited or prevented in any way in any future state or federal proceeding from raising such arguments or introducing such evidence as it deems reasonable or appropriate regarding appropriate flow levels. ODFW and OWRD reserve the right to participate in future state and federal proceedings and submit evidence and argument regarding appropriate flow levels, provided the instream flow amounts described in the Draft Certificates or Final Certificates shall not be asserted as precedential. Finally, ODFW and OWRD understand that the representations and



understandings in this section (and other sections of this Agreement) are each a material inducement to PacifiCorp to withdraw its Protest and any other objections to the Instream Applications.

4. The Parties agree that nothing in this Agreement or the Final Orders Incorporating Settlement Agreement establishes factual, legal, or policy precedent.
5. Each Party to this Agreement certifies that it has had a reasonable opportunity to review and request changes to the Agreement, and that it has signed this Agreement of its own free will and accord.
6. Each Party to this Agreement represents, warrants, and agrees that the person who executes this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and bind that Party to the terms of this Agreement.
7. The Parties shall have a right to enforce the terms of this Agreement in Oregon Circuit Court and such rights shall include, but not be limited to, specific enforcement of the Agreement.
8. The laws of the State of Oregon (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Agreement, including without limitation, its validity, interpretation, construction, performance, and enforcement. Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement shall bring the legal action or proceeding in the Circuit Court of the State of Oregon for Marion County (unless Oregon law requires that it be brought and conducted in another county). Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.

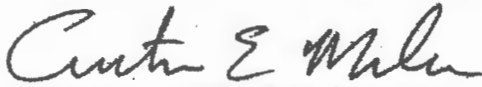
*Signatures on the following page:*



Dwight French, Administrator,  
Water Right Services Division  
for Douglas Woodcock, Acting Director  
Oregon Water Resources Department

Digitally signed by Dwight French  
Date: 2023.04.20 13:54:51 -07'00'

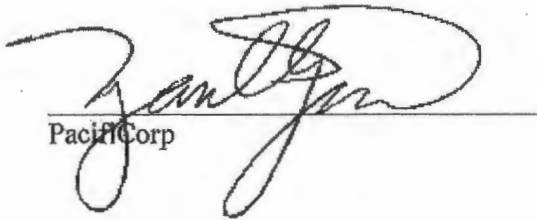
Date



Oregon Department of Fish and Wildlife

5/8/23

Date



PacificCorp

05/19/2023

Date